No. 06-1005

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EFRAIN SANTOS AND BENEDICTO DIAZ

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 461 F.3d 886. The opinion of the district court granting in part respondent Santos's motion for collateral relief (App., *infra*, 17a-50a) is reported at 342 F. Supp. 2d 781. The opinion of the district court granting in part respondent Diaz's motion for collateral relief (App., *infra*, 51a-79a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2006. On November 13, 2006, Justice

Stevens extended the time within which to file a petition for a writ of certiorari to and including December 23, 2006. On December 14, 2006, Justice Stevens further extended the time within which to file a petition to and including January 22, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 81a-86a.

STATEMENT

This case involves a question about the scope of the principal federal money laundering statute, 18 U.S.C. 1956(a)(1), on which the courts of appeals are divided. After a jury trial in the United States District Court for the Northern District of Indiana, respondent Santos was convicted of conspiring to conduct an illegal gambling business, in violation of 18 U.S.C. 371; conducting an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); and money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i). After a plea of guilty, respondent Diaz was convicted of conspiracy to commit money laundering, in violation of Section 1956(h). The court of appeals affirmed respondents' convictions. *United States* v. *Febus*, 218 F.3d 784 (7th Cir.), cert. denied, 531 U.S. 1021 (2000). Thereafter, respondents filed motions for collateral relief under 28 U.S.C. 2255, and the district court vacated their money laundering convictions. The government appealed, and the court of appeals affirmed the district court's judgments. App., *infra*, 1a-16a.

> 1. Section 1956(a)(1) makes it a crime when anyone, 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 * * *
>
> (B) knowing that the transaction is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1).

Section 1956 defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering crimes enumerated in 18 U.S.C. 1961(1) (Supp. IV 2004). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (Supp. IV 2004).

2. From the 1970s through the 1990s, Santos operated an illegal lottery, known as a bolita, in northwest Indiana. Gamblers placed bets with the bolita's runners, primarily at restaurants and taverns. The runners delivered the wagers to the bolita's collectors, who then gave the money to Santos. Santos paid the runners, the collectors, and the bolita's winners out of the total amount collected. Diaz was a collector in the operation. App., *infra*, 2a.

Based on that conduct, Santos was convicted, after a jury trial, of running an illegal gambling business, in

violation of 18 U.S.C. 1955, conspiracy to commit that offense, in violation of 18 U.S.C. 371, promotional money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i), and conspiracy to commit that offense, in violation of 18 U.S.C. 1956(h). App., *infra*, 2a-3a. Diaz was convicted, after a guilty plea, of conspiracy to commit money laundering, in violation of Section 1956(h). App., *infra*, 3a. The money laundering charges against Santos were premised on his payments to the bolita's couriers and winners. The charge against Diaz was based on his receipt of payment for his collection services. *Id.* at 6a.

Santos was sentenced to concurrent terms of 60 months of imprisonment for the illegal gambling convictions and 210 months of imprisonment for the money laundering convictions. Diaz was sentenced to 108 months of imprisonment. App., *infra*, 3a.

3. On direct appeal, Santos challenged his money laundering convictions. *Febus*, 218 F.3d at 789. He contended that the payments to the couriers and winning bettors did not "promote the carrying on" of the bolita because they were an integral part the operation and thus merely completed the illegal gambling offense. *Ibid.* He argued that the money laundering statute "only punishes the practice of reinvesting the proceeds of an already completed unlawful activity to promote the expansion of that unlawful activity." *Ibid.*

The court of appeals rejected that argument. The court relied on Seventh Circuit precedent holding that "[a] transaction satisfies the promotion provision of the money laundering statute if it constitutes 'the practice of plowing back proceeds of [the illegal activity] to promote that activity.'" *Febus*, 218 F.3d at 789 (quoting *United States* v. *Jackson*, 935 F.2d 832, 842 (7th Cir. 1991)). The court concluded that the government had

proved that type of promotion in this case by establishing that Santos had "reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955." 218 F.3d at 790. The court explained that the "payments to [the] collectors * * * compensated them for collecting the increased revenues and transferring those funds back to [Santos]. And [the] payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Ibid.* The court of appeals noted that the annual receipts of the bolita expanded from approximately $250,000 in 1989 to approximately $410,000 in 1994. *Ibid.*

Diaz, for his part, challenged the district court's refusal to allow him to withdraw his guilty plea. Diaz argued that the government had breached the plea agreement by failing to seek a downward departure for substantial assistance. The court of appeals concluded that Diaz did not provide substantial assistance because he failed to give complete, truthful, and candid testimony at the trial of his co-conspirators. The court of appeals therefore upheld the district court's refusal to allow Diaz to withdraw his plea. *Febus*, 218 F.3d at 790-791.

Accordingly, the court of appeals affirmed respondents' convictions. *Febus*, 218 F.3d at 798. Santos petitioned for a writ of certiorari, and this Court denied the petition. 531 U.S. 1021 (2000).

4. After respondents' convictions became final on direct review, the Seventh Circuit reversed money laundering convictions stemming from acts very similar to those committed by respondents. In *United States* v. *Scialabba*, 282 F.3d 475 (7th Cir.), cert. denied, 537 U.S.

1071 (2002), the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week, the defendants opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to compensate the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *id.* at 476. Based on those expenditures, the *Scialabba* defendants were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions. The court held that funds used to cover the overhead expenses of an illegal activity are not "proceeds" within the meaning of Section 1956(a)(1) because the word "proceeds" means only the "net income" or "profits" of illegal activity. *Scialabba*, 282 F.3d at 478.

The government petitioned for rehearing en banc, arguing that the term "proceeds" in the money laundering statute means gross receipts and is not limited to profits. The petition was denied by an evenly-divided court, with one judge recused. See App., *infra*, 8a n.3. The government then unsuccessfully petitioned for a writ of certiorari on the same issue. *United States* v. *Scialabba*, 537 U.S. 1071 (2002).

5. Following the decision in *Scialabba*, respondents filed motions for collateral relief under 28 U.S.C. 2255. The district court granted the motions in part and vacated respondents' money laundering convictions. App., *infra*, 17a-79a.

The district court concluded that it was not precluded from granting relief by the Seventh Circuit's affirmance of Santos's money laundering convictions in

Febus. The district court reasoned that *Febus* and *Scialabba* addressed different issues: "while the *Scialabba* court concerned itself with the interpretation of the term 'proceeds,' as used in § 1956(a)(1), the *Febus* [c]ourt was not asked to, and therefore did not decide *anything* about the term 'proceeds.'" App., *infra*, 44a, 73a. The district court then held that respondents were entitled to the benefit of *Scialabba*, because, under the Seventh Circuit's narrow interpretation of "proceeds," they stood convicted of conduct that did not violate the money laundering statute. *Id.* at 45a-49a, 73a-78a. The district court explained that *Scialabba* undermined respondents' money laundering convictions because "it clearly appears that the proceeds admittedly used by Santos to pay winners and couriers [including Diaz] *could only have been* gross proceeds." *Id.* at 49a; see *id.* at 77a-78a.

6. The government appealed to the Seventh Circuit with a request for initial en banc consideration. The court of appeals denied the request for initial en banc consideration. App., *infra*, 80a. A panel of the court subsequently reaffirmed *Scialabba* and upheld the judgments of the district court. *Id.* at 1a-16a.

The court of appeals explained that, under the doctrine of *stare decisis*, its decision in *Scialabba* was entitled to "considerable weight." App., *infra*, 9a. Although the court believed that "[t]he government [had] raise[d] several important points in favor of its position," the court concluded the government's arguments were not sufficient to satisfy the heavy standard for overturning circuit precedent. *Id.* at 10a.; see *id.* at 14a-15a.

The court of appeals acknowledged that, since *Scialabba* was decided, several other courts of appeals had addressed the meaning of "proceeds" in Section

1956(a)(1), and "all the other circuits" had "rejected *Scialabba's* approach." App., *infra*, 10a. See *id.* at 10a-12a (discussing *United States* v. *Grasso*, 381 F.3d 160 (3d Cir. 2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (3d Cir. May 20, 2005); *United States* v. *Iacaboni*, 363 F.3d 1 (1st Cir.), cert. denied, 543 U.S. 978 (2004); and *United States* v. *Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005)).

The court of appeals then considered the government's contention that *Scialabba* had eviscerated the promotional subsection of Section 1956(a)(1) by limiting the crime of money laundering to situations in which criminals conceal their proceeds. The court stated that the government was reading the *Scialabba* opinion too broadly. The court explained that, "[w]hile, under *Scialabba*, the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." App., *infra*, 12a.

The court of appeals found more troubling the government's contention that the *Scialabba* rule impedes effective enforcement of the prohibitions against money laundering. The court acknowledged that interpreting "proceeds" to mean net income could cause "evidentiary problems" for the government and complicate the work of judges and juries. App., *infra*, 13a. The court explained that "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given

the likely absence of accounting standards." *Ibid.* Nevertheless, the court did not believe that this "solid policy point" was enough to justify overruling *Scialabba*. *Ibid.*

The court of appeals also observed that the sentencing consequences of *Scialabba* would weaken the government's hand in combating large-scale gambling operations. App., *infra*, 13a-14a. The court explained that, if the government is unable to establish a business's net income, the statutory maximum for a defendant engaged in an illegal gambling operation falls from 240 months of imprisonment under Section 1956(a)(1) to 60 months of imprisonment under Section 1955(a). *Id.* at 13a. The court added that, although the Sentencing Guidelines increase a defendant's base offense level in certain circumstances for the amount of funds laundered, see Sentencing Guidelines § 2S1.1(a)(2) (cross-referencing Sentencing Guidelines § 2B1.1), there is no similar increase under the Guideline for illegal gambling for the amount of funds involved, see Sentencing Guidelines § 2E3.1. App., *infra*, 13a-14a.

The court of appeals concluded that "the government ha[d] demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one." App., *infra*, 14a. The court determined, however, that the government's showing was not enough to meet the compelling-reasons standard for overturning circuit precedent. The court explained that, "[r]ather than vacillate over Congress's intent, it is better for our circuit here, having already considered and duly decided the issue, to stay the course at this juncture, for only Congress or the Supreme Court can definitively resolve the debate over this ambiguous term." *Id.* at 14a-15a (footnote omitted).

REASONS FOR GRANTING THE PETITION

The court of appeals has misconstrued the principal federal money laundering statute in a way that conflicts with decisions of other courts of appeals and significantly impedes effective enforcement of the law. The court's holding that the word "proceeds" in 18 U.S.C. 1956(a)(1) means "net income" or "profits" is contrary to the common understanding of the word. The court's interpretation of "proceeds" also rejects the meaning that Congress gave the same term in related statutes, including one enacted just two years before the money laundering statute.

The court's erroneous holding warrants review. It squarely conflicts with decisions of other courts of appeals and cannot be reconciled with the results and reasoning in numerous other money laundering cases. It removes a large class of routinely-prosecuted money laundering cases from the reach of the statute. And, in other cases, it subjects the government to an unreasonable burden of proof and enmeshes the courts in intractable disputes over the accounting principles that should govern illegal enterprises. Although the government unsuccessfully petitioned for a writ of certiorari on the same issue in *United States* v. *Scialabba*, 537 U.S. 1071 (2002), a clear-cut circuit conflict has now developed, and the Seventh Circuit has announced its intention to adhere to its isolated view. Accordingly, this Court's review is warranted.

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

The principal federal money laundering statute prohibits transactions in unlawfully derived "proceeds"

when those transactions are intended to promote the underlying illegal activity, as well as when they are designed to conceal the proceeds. 18 U.S.C. 1956(a)(1)(A)(i). The Seventh Circuit requires the government to prove that the funds used in those transactions represent the "profits" of illegal activity. That court thus demands that the government establish the profitability of illegal activity, such as drug dealing and gambling, in order to convict defendants for money laundering connected to that activity.

The court of appeals' rule directly precludes money laundering prosecutions based on financial transactions by criminals to pay the expenses of their illegal enterprises. The rule does so even when the payment of expenses promotes the continuation of the illegal business or is done in a manner that conceals the origins of the funds. The rule also creates serious obstacles to effective prosecution in virtually all other money laundering cases, because it imposes an unreasonable burden of proof on the government and entangles the courts in complicated interpretative questions. Unlike legitimate businesses, criminals rarely keep accounting records, much less accurate ones. The Seventh Circuit itself has noted the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits." *United States* v. *Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), aff'd in part and vacated in part, 432 U.S. 137 (1977). Even if documentation can be found, it is not clear what accounting principles should apply to the operations of criminal enterprises, for the accounting industry does not prescribe standards for illegal ventures. Thus, as even the court of appeals acknowledged, App., *infra*, 13a, its rule encumbers the prosecution of money laundering cases with significant complications. If Con-

gress had legislated a "profits" rule, then the government and the courts would have to shoulder that burden. But an examination of the statutory text and background reveals that Congress did no such thing.

1. The court of appeals' definition of "proceeds" as "net income" or "profits" is contrary to the word's most common and "primary meaning." *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). The initial definitions of "proceeds" provided by the *Random House Dictionary of the English Language* (2d ed. 1987), which lists first the most frequently encountered meaning of a word, *id.* at xxxii, are "something that results or accrues" and "the total amount derived from a sale or other transaction." *Id.* at 1542 (emphasis added). The dictionary offers "profits" only as a secondary, less common definition. *Ibid.* Likewise, *Black's Law Dictionary* (8th ed. 2004) defines "proceeds" as "1. The value of land, goods, or investments when converted into money; the amount of money received from a sale. * * * 2. Something received upon selling, exchanging, collecting, or otherwise disposing of collateral." *Id.* at 1242. *Black's Law Dictionary* distinguishes "proceeds" from "net proceeds," which, in a sub-entry under "proceeds," it defines as "[t]he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)." *Ibid.* *Webster's Third New International Dictionary* (2002) (*Webster's*) also leads with the "gross receipts" meaning of "proceeds." *Webster's* provides, as the initial definition, "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue: the total amount brought in." *Id.* at 1807. See also *Webster's New International Dictionary of the English Language* 1972 (2d ed. 1958) ("That which results, proceeds, or accrues

from some possession or transaction; esp., the amount realized from a sale of property.").

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

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

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

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[1] The Seventh Circuit is the lone exception. As with the money laundering statute, the Seventh Circuit has held that "proceeds" in the RICO forfeiture statute means net rather than gross receipts. See *United States* v. *Genova*, 333 F.3d 750, 761 (7th Cir. 2003) (reaffirming *United States* v. *Masters*, 924 F.2d 1362, 1369-1370 (7th Cir.), cert. denied, 500 U.S. 919, 502 U.S. 823 (1991)).

S. Rep. No. 225, 98th Cong., 1st Sess. 199 (1983). Indeed, the Senate Report on the RICO forfeiture provision specifically cited the Seventh Circuit's recognition in *Jeffers* that reliable evidence of "net profits" in criminal conspiracies is hard to adduce. *Id.* at 199 n.24. There is no reason to believe that Congress intended to deviate from its approach in the RICO statute when it enacted the money laundering statute shortly thereafter and used the same term, "proceeds." The concern about the difficulty of proving "net profits" is no less germane to the money laundering statute than to the RICO statute. Rather, it is logical to conclude that Congress intended a consistent meaning for the term "proceeds" in those provisions.

Similarly, courts of appeals have interpreted the term "proceeds" in other related statutes to mean gross receipts rather than profits. See, *e.g.*, *United States* v. *Silvestri*, 409 F.3d 1311, 1333 (11th Cir.) (adopting the above-quoted *Webster's* definition of "proceeds" for purposes of 18 U.S.C. 1957, another money laundering provision), cert. denied, 126 S. Ct. 772 (2005); *United States* v. *McHan*, 101 F.3d 1027, 1041-1042 (4th Cir. 1996) (interpreting "proceeds" as used in 21 U.S.C. 853, the drug forfeiture statute, to mean gross receipts rather than profits), cert. denied, 520 U.S. 1281 (1997).[2]

[2] In the context of civil forfeiture, for cases like this one, involving illegal goods, services, or activities, Congress has explicitly defined "proceeds" to mean all property obtained as a result of the offense and provided that proceeds "is not limited to the net gain or profit realized from the offense." 18 U.S.C. 981(a)(2)(A). That approach confirms the general definition of proceeds that applies in the criminal context. Congress has, however, adopted a different definition of proceeds for certain other civil forfeiture cases. In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the civil forfeiture statute allows the subtraction of "the direct costs incurred

2. The Seventh Circuit's definition of "proceeds" as "profits" or "net income" also presents serious practical problems for money laundering prosecutions. The terms "profits" and "net income" have concrete meaning only after the application of a system of accounting principles. But there are no generally accepted accounting principles for criminal enterprises. Therefore, application of a "profits" approach would require the courts to formulate an accounting theory for illegal businesses. The courts would have to resolve novel and difficult questions, such as whether illicit profit should be measured using accrual or cash accounting methods; whether profit should be measured on an annual, monthly, or other basis; how "capital expenses" should be amortized; and what costs can legitimately be deducted to arrive at the profit figure (*e.g.*, can the operator of an illegal business deduct a "salary" to compensate himself for the time he devotes to the business? can overhead expenses be deducted? how should expenses

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in providing the goods or services," 18 U.S.C. 981(a)(2)(B), but it requires the claimant to carry the burden of proof and excludes overhead or income tax expenses, *ibid.* And "in cases involving fraud in the process of obtaining a loan or extension of credit," the civil forfeiture statute specifies that the claimant is entitled to a "deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim." 18 U.S.C. 981(a)(2)(C). The government has the option of seeking in a criminal case to obtain the forfeiture of any property that it may obtain through the civil provision. See 28 U.S.C. 2461(c). But nothing in the two special definitions of proceeds in that provision suggests that Congress intended generally in the criminal context to vary from the standard definition of "proceeds." Indeed, in the general criminal forfeiture statute, Congress used the words "proceeds," "gross receipts," and "gross proceeds" interchangeably. See, *e.g.*, 18 U.S.C. 982(a)(2), (3)(F), (4) and (5); 18 U.S.C. 982(a)(8)(B) (Supp. IV 2004).

associated with an abandoned "job" be treated?). It is unlikely that Congress would have handed such a difficult task to the courts, especially when there is no ready body of case law or other guidance for them to use to accomplish it.

The "profits" definition of proceeds imposes untenable burdens on the government as well as the courts. Under the "profits" rule, the government is absolutely precluded from prosecuting as money laundering a defendant's use of the receipts of unlawful activity to cover the expenses incurred in conducting that activity. As the district court noted in this case, funds used to cover the expenses of a crime cannot be the net income or profits of that crime. See App., *infra*, 49a, 77a-78a. A prosecution is thus precluded even when the payment of expenses clearly promoted the continued existence and expansion of the illegal business. Indeed, at an earlier stage of this very case, the Seventh Circuit expressly held that Santos's payments to the bolita's winners and employees "promoted" the prosperity and growth of that illegal enterprise. See *Febus*, 218 F.3d at 790 (describing how those payments enabled the bolita to grow from approximately $250,000 in annual revenue in 1989 to approximately $410,000 in annual revenue in 2004). A prosecution is also precluded even when the expense transactions are conducted in nefarious ways to conceal the illegal origin of the funds. That makes little sense because concealing the gross receipts of criminal activity can be just as effective in impeding detection and prosecution of that activity as concealing the profits of the activity. It is not obvious why the actions of concealing and disguising the receipts from a criminal operation are any less nefarious when the underlying operation ran at a loss or merely broke even, instead of being a particu-

larly profitable "job." Either way, the criminal has a need to disguise the receipts.

The "profits" definition also creates substantial burdens on effective prosecution of other money laundering cases. The court of appeals asserted that, under the "profits" rule, "the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i)." App., *infra*, 12a. But, in order to obtain a conviction under the court's rule, the government must prove that the money that was reinvested was "net income" or "profits." As the court itself recognized, that requirement will frequently prove an insurmountable hurdle because "criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky." *Id.* at 13a.

Thus, the "profits" rule dramatic curtails the scope of the money laundering statute as it has traditionally been understood. Prosecutions based on the payment of overhead expenses[3] and prosecutions based on the rein-

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[3] See, *e.g.*, *United States* v. *Alerre*, 430 F.3d 681, 695 (4th Cir. 2005) (distribution of funds obtained through unlawful prescription drug sales and health care fraud to physicians, employees, and owners as "compensation for their efforts"), cert. denied, 126 S. Ct. 1925 (2006); *United States* v. *Caplinger*, 339 F.3d 226, 233 (4th Cir. 2003) (use of fraudulently obtained funds to purchase supplies, make repairs to corporate plane, and pay rent and salaries); *United States* v. *Bolden*, 325 F.3d 471, 479 (4th Cir. 2003) (use of fraudulently obtained funds to compensate accomplice); *United States* v. *Evans*, 272 F.3d 1069, 1082 (8th Cir. 2001) (prostitute's payments to escort agency from proceeds of prostitution), cert. denied, 535 U.S. 1029, 1072, and 1087, 537 U.S. 857 (2002); *United States* v. *Wyly*, 193 F.3d 289, 295-296 (5th Cir. 1999) (kickback to public official for his participation in fraud scheme); *United States* v. *Rudisill*, 187 F.3d 1260, 1267 (11th Cir. 1999) (use of proceeds

vestment of illegally-derived funds[4] have tradition-

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from illegal telemarketing scheme to cover payroll expenses of scheme); *United States* v. *Reed*, 167 F.3d 984, 993 (6th Cir.) (drug proceeds used to pay antecedent drug debt), cert. denied, 528 U.S. 897 (1999); *United States* v. *King*, 169 F.3d 1035, 1039 (6th Cir.) (use of drug proceeds to pay drug couriers for drugs delivered on consignment), cert. denied, 528 U.S. 892 (1999); *United States* v. *France*, 164 F.3d 203, 208-209 (4th Cir. 1998) (drug proceeds used to post bail for confederate in scheme), cert. denied, 527 U.S. 1010 (1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (8th Cir.) (use of proceeds of fraud scheme to pay for office supplies, secretarial services, and staff wages in furtherance of scheme), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Coscarelli*, 105 F.3d 984, 990 (5th Cir.) (proceeds of telemarketing fraud used to pay co-conspirators and cover overhead expenses), vacated, 111 F.3d 376 (5th Cir. 1997), reinstated in relevant part, 149 F.3d 342 (5th Cir. 1998) (en banc); *United States* v. *Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (use of proceeds from fraudulent scheme to compensate individuals for referring victims); *United States* v. *Skinner*, 946 F.2d 176, 177-178 (2d Cir. 1991) (use of drug proceeds to pay supplier).

[4] See, *e.g.*, *United States* v. *Silvestri*, 409 F.3d 1311, 1335 (11th Cir.) (use of proceeds of Ponzi scheme to pay earlier investors in order to continue scheme), cert. denied, 126 S. Ct. 772 (2005); *United States* v. *Williamson*, 339 F.3d 1295, 1302 (11th Cir. 2003) (use of fraudulently obtained proceeds "promoted not only * * * prior unlawful activity, but also * * * ongoing and future unlawful activity"), cert. denied, 540 U.S. 1184 (2004); *United States* v. *Godwin*, 272 F.3d 659, 669 (4th Cir. 2001) (use of proceeds from Ponzi scheme to pay "interest" to investors), cert. denied, 535 U.S. 1069 (2002); *United States* v. *Barragan*, 263 F.3d 919, 924 (9th Cir. 2001) (use of drug proceeds to rent motel rooms for conducting future drug deals); *United States* v. *Dovalina*, 262 F.3d 472, 476 (5th Cir. 2001) (use of drug proceeds "to promote additional marijuana sales"); *United States* v. *Stewart*, 256 F.3d 231, 250 (4th Cir.) ("a portion of the drug proceeds were reinvested into the drug operation"), cert. denied, 534 U.S. 1049 (2001), 535 U.S. 977 (2002); *United States* v. *Burgos*, 254 F.3d 8, 13 (1st Cir.) (use of drug proceeds to buy additional drugs for distribution), cert. denied, 534 U.S. 1010 (2001); *United States* v. *Meshack*, 225 F.3d 556, 572-573 (5th Cir. 2000) (use of drug proceeds to pay for truck used in later drug sales), cert. denied,

ally constituted the vast majority of promotional money laundering cases. The "profits" rule forecloses prosecution of expense cases as a legal matter and severly limits prosecution of reinvestment cases as a practical matter.

The definition of "proceeds" adopted by the court of appeals will also likely impede prosecutions under the concealment subsection of the money laundering statute. Like the promotion subsection, the concealment subsection is violated only if a transaction involves the "proceeds" of specified unlawful activity. See 18 U.S.C. 1956(a)(1)(B)(i). The term "proceeds" that was construed in *Scialabba* and in this case appears in the introductory language of Section 1956(a)(1), which applies to both subsections. See 18 U.S.C. 1956(a)(1). And the court of appeals in this case described *Scialabba* as "holding that the term 'proceeds' in *§ 1956(a)(1)* means net income." App., *infra*, 15a-16a (emphasis added).

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531 U.S. 1100 (2001); *United States* v. *Taylor*, 239 F.3d 994, 998-999 (9th Cir. 2001) (use of proceeds from prostitution to transport minors across state lines for prostitution); *United States* v. *Haun*, 90 F.3d 1096, 1100 (6th Cir. 1996) (use of proceeds of fraud to promote "ongoing and future criminal activity"), cert. denied, 519 U.S. 1059 (1997); *United States* v. *Golb*, 69 F.3d 1417, 1424 (9th Cir. 1995) (use of drug proceeds to facilitate use of planes for drug trafficking); *United States* v. *Thomas*, 12 F.3d 1350, 1360 (5th Cir.) (use of drug proceeds to pay for later drug purchases), cert. denied, 511 U.S. 1095 and 1114 (1994); *United States* v. *Cruz*, 993 F.2d 164, 167 (8th Cir. 1993) (use of drug proceeds to buy vehicle to transport drugs); *United States* v. *Cole*, 988 F.2d 681, 682 (7th Cir. 1993) (use of proceeds from investment scheme to pay "interest" to defrauded investors when "necessary to keep the scheme going"); *United States* v. *Johnson*, 971 F.2d 562, 566 (10th Cir. 1992) (use of proceeds of fraud to pay off home mortgage and buy expensive car in order to impress prospective victims with defendant's business acumen); *United States* v. *Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (use of drug proceeds to buy beeper for use in ongoing drug operation).

Even money laundering violations under 18 U.S.C. 1957—which prohibits engaging in a monetary transaction in criminally derived property of a value greater than $10,000—require the existence of proceeds. See 18 U.S.C. 1957(f)(2) (defining "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense"). Thus, the court of appeals' "profits" rule could ultimately lead to a significant curtailment of all money laundering prosecutions.

3. The court of appeals reasoned that its interpretation of the word "proceeds" is necessary to maintain a distinction between the offense of money laundering and the underlying crime that produces the laundered proceeds. See *Scialabba*, 282 F.3d at 477; App., *infra*, 7a-8a. That is incorrect. As the Seventh Circuit and other courts have elsewhere recognized, the distinction between a money laundering transaction and the underlying crime is maintained by generally requiring that the charged financial transaction "must follow and must be separate from any transaction necessary for the predicate offense to generate proceeds." *United States* v. *Mankarious*, 151 F.3d 694, 706 (7th Cir.), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Heaps*, 39 F.3d 479, 485-486 (4th Cir. 1994); *United States* v. *Conley*, 37 F.3d 970, 980 (3d Cir. 1994).

Thus, robbing a bank or selling illegal drugs cannot simultaneously be prosecuted as a predicate offense and as money laundering, because the money laundering statute requires a transaction using "the proceeds of specified unlawful activity," and there are no proceeds until the bank has been robbed or the drugs have been sold. See *Heaps*, 39 F.3d at 485. In contrast, a bank robber's use of the loot from a robbery to pay his accomplices can constitute money laundering, because the pay-

ment to the accomplices involves the proceeds generated by the robbery. Likewise, a drug trafficker's use of the money obtained from a drug sale to buy a stash house for his enterprise can constitute money laundering, because the house purchase is made with the proceeds generated by the completed drug sale. See *Conley*, 37 F.3d at 980 ("proceeds are derived from an already completed offense, or a completed phase of an ongoing offense").

In this case as well, the conduct constituting the money laundering transaction followed and was distinct from the predicate-offense conduct that produced the proceeds. The illegal gambling operation generated proceeds when the gamblers gave their wagers to the runners. Santos's payments to the runners and the collectors were distinct transactions made with those previously generated proceeds, just like a bank robber's payments to his accomplices. Similarly, the payments to winners were distinct transactions that occurred after the illegal gambling operation had yielded proceeds. Moreover, as the court of appeals recognized in *Febus*, 218 F.3d at 790, in each instance, the money laundering transactions promoted the continuation and expansion of the illegal gambling operation, which could not grow and prosper if it did not compensate its employees and pay winners. See *United States* v. *Iacaboni*, 363 F.3d 1, 5 (1st Cir.) ("nothing makes an illegal gambling operation flourish more than the prompt payment of winners") (quoting B. Frederic Williams & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* 114 (1999)), cert. denied, 543 U.S. 978 (2004)); *United States* v. *Bolden*, 325 F.3d 471, 489 (4th Cir. 2003) (payments from fraudulently obtained funds "com-

pensated Nelson for his part in the scheme, encouraging his continued participation therein").

In short, the Seventh Circuit's cramped definition of "proceeds" is unnecessary to ensure that the underlying criminal act and the money laundering conduct remain distinct. Instead, it unjustifiably excludes from the money laundering statute conduct that goes beyond the underlying crime and entails use of the revenue produced by that crime to promote criminal activity—precisely what the promotion subsection of the statute is designed to prohibit. Moreover, the court's conversion of "proceeds" to "profits" has the effect of eliminating or hampering money laundering prosecutions when the money laundering is entirely distinct from the underlying criminal activity but that activity cannot be proved to have been profitable.

B. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

The decision of the court of appeals is not only incorrect but also conflicts with the construction that the First and Third Circuits have accorded the term "proceeds" in the money laundering statute. Moreover, the decision below is at odds with the reasoning and results in numerous other money laundering decisions.

1. Since the decision in *Scialabba*, the First and Third Circuits have expressly considered and rejected the Seventh Circuit's construction of the word "proceeds" in the money laundering statute.

a. In *Iacaboni*, the defendant pleaded guilty to laundering the proceeds of an illegal gambling operation, in violation of Section 1956(a)(1)(A)(i), by using the proceeds to pay winning bettors. On appeal, the defendant contended that the district court's order forfeiting prop-

erty "involved in" the money laundering offense under 18 U.S.C. 982(a)(1) (Supp. I 2001) was erroneous. Relying on *Scialabba*, the defendant argued that his payments to the bettors did not involve proceeds because they were made with gross receipts rather than profits, and therefore the payments did not constitute money laundering. The First Circuit rejected that argument and held that the word "proceeds" in the money laundering statute is not limited to profits. The court explained that the Seventh Circuit's definition of "proceeds" places an "unreasonable burden on the government of proving net profits." 363 F.3d at 4 (quoting *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996)).

b. Similarly, in *United States* v. *Grasso*, 381 F.3d 160 (2004), vacated and remanded on other grounds, 544 U.S. 945 (2005), reinstated in relevant part, Nos. 03-1441 & 03-1442 (May 20, 2005), the Third Circuit explicitly rejected *Scialabba*'s reasoning and holding. In *Grasso*, the defendant was convicted, under Section 1956(a)(1)(A)(i), of laundering the proceeds of a fraudulent work-at-home scheme by reinvesting the proceeds to purchase advertising, telephone services, printing, envelopes, and other materials in furtherance of the scheme. On appeal, the defendant, relying on *Scialabba*, contended that the evidence failed to support his money laundering conviction because it did not show that the allegedly laundered funds represented "net profits" of the fraudulent scheme rather than "gross receipts or revenue." 381 F.3d at 164. The court of appeals rejected that claim and held that "'proceeds,' as that term is used in § 1956, means simply gross receipts from illegal activity. An individual may engage in money laun-

dering regardless whether his or her criminal endeavor ultimately turns a profit." *Id.* at 169.[5]

2. The Eighth Circuit, relying on *Grasso* but not mentioning *Scialabba*, has also adopted the view that the money laundering statute is not limited to financial transactions involving profits. In *United States* v. *Huber*, 404 F.3d 1047 (8th Cir. 2005), the defendant was convicted of various money laundering offenses involving income from a scheme fraudulently to obtain farm-program payments and federally subsidized crop-insurance benefits. On appeal, he challenged the forfeiture, under 18 U.S.C. 982(a)(1) (Supp. I 2001), of property "involved in" violations of Section 1956(a)(1), as well as other money laundering provisions, on the ground that the forfeited proceeds should have been offset by the expenses that went into producing them. The court rejected that claim and cited *Grasso* for the proposition that "expenses should not be deducted." 404 F.3d at 1058. Although the court in *Huber* did not expressly state that its holding was based on a construction of the term "proceeds" in Section 1956(a)(1), its citation of *Grasso* indicates that was the basis for the holding. Moreover, the court stated that the farm-program payments were "proceeds" within the meaning of the money laundering statute, see *ibid.*—a statement that cannot be reconciled with the Seventh Circuit's definition of "proceeds" as net income.

3. The definition of "proceeds" adopted by the Seventh Circuit is also at odds with the definition accorded the term by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096 (1996), cert. denied, 519 U.S. 1059

[5] Although the Third Circuit reviewed the defendant's claim for plain error, it concluded that there was no error of any kind and stated that it "would affirm even under *de novo* review." *Grasso*, 381 F.3d at 166.

(1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word "proceeds" is unconstitutionally vague. The court held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that means "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Id.* at 1101 (emphasis added) (quoting *Webster's* 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the term "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 and 1077 (2000). The Sixth Circuit's "total revenue" definition directly contradicts the "profits" definition adopted by the Seventh Circuit.

4. The Seventh Circuit's definition also cannot be squared with the results in numerous cases in which courts of appeals have found sufficient evidence to support money laundering convictions based on the use of receipts of illegal activity to pay accomplices or other costs incurred to conduct that activity. See note 3, *supra* (collecting cases). Although the defendants in those cases did not argue that Section 1956(a)(1) prohibits only transactions involving net proceeds, the holdings of the cases reflect the understanding (which was universally accepted until the decision in *Scialabba*) that the statute applies to the payment of overhead expenses.

This Court should grant review to resolve the conflict among the courts of appeals on the meaning of the money laundering statute. A circuit conflict is particu-

larly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute. It is not acceptable for conduct to be money laundering in Boston and Philadelphia but not in Chicago.

C. The Question Presented Is Of Recurring Importance

Review is also warranted because the question presented is important, and the factual scenario that raises the question is a recurring one. Most prosecutions under the promotion subsection of the money laundering statute involve the use of revenue from criminal activity to pay the expenses of that activity or to promote its continuation or expansion. Those money laundering prosecutions are a vital part of the government's efforts to combat organized crime, drug trafficking, illegal gambling, and business fraud. The court of appeals' decision significantly impairs those law enforcement efforts.

The practical burdens on the effective enforcement of the congressional prohibition against money laundering have been described above. See pp. 15-19, *supra*. Equally problematic, the *Scialabba* rule will protect defendants whose illegal businesses are at any particular time unprofitable. It makes little sense to give a money laundering defense to drug dealers, gambling enterprise operators, and racketeers whose expenses over a period of time happen to exceed their revenue.

The burdens on the government and the courts are likely to arise in *all* money laundering cases in the Seventh Circuit because the government must establish that a financial transaction involves "proceeds" of unlawful activity not only in promotion cases but also in concealment cases and in cases involving monetary transactions in criminally derived property. See pp. 19-20, *supra*.

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

D. The Issue Is More Suitable for Review Now Than It Was At The Time Of *Scialabba*

In 2004, this Court denied the government's petition for a writ of certiorari in *Scialabba*, which raised the same issue presented here. Developments since the denial of certiorari in *Scialabba* now clearly make the issue ripe for review.

At the time of the government's petition in *Scialabba*, no other court of appeals had expressly rejected the Seventh Circuit's view that "proceeds" in the money laundering statute means "profits." Since then, two circuits have considered and expressly rejected the Seventh Circuit's view and have held that "proceeds" means gross receipts rather than profits. A third circuit, without expressly stating that it was construing the term "proceeds," has declined to limit the coverage of the money laundering statute to transactions involving profits.

Further, when this Court denied the petition for a writ of certiorari in *Scialabba*, there was reason to believe that the Seventh Circuit might eventually reconsider its decision, because it had denied the government's petition for rehearing en banc by an evenly-divided vote, with one judge recused. In the instant case, however, the government again requested the Seventh Circuit to overrule *Scialabba* in light of the conflicting decisions in other circuits. The Seventh Circuit declined to do so, first denying the government's petition for initial en banc consideration and then reaffirming that it

had determined to "stay the course" set by *Scialabba*. App., *infra*, 14a.

Because of the emergence of a square circuit conflict and the entrenchment of the *Scialabba* holding in the Seventh Circuit, the case for this Court's review is much stronger now than it was in *Scialabba*. As the court below recognized, App., *infra*, 14a-15a, barring congressional action, only this Court can now bring the courts of appeals into alignment on the proper construction of an important federal criminal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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Nos. 04-4221, 05-2316

EFRAIN SANTOS AND BENEDICTO DIAZ,
PETITIONERS-APPELLEES

v.

UNITED STATES, RESPONDENT-APPELLANT

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Decided Aug. 25, 2006

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BEFORE: MANION, KANNE, and ROVNER, Circuit Judges

MANION, Circuit Judge

Efrain Santos and Benedicto Diaz ran an illicit lottery, which landed them in federal prison on money laundering charges. Their money laundering convictions were premised upon the word "proceeds" in 18 U.S.C. § 1956(a)(1) meaning gross income of unlawful activity. This court affirmed the judgments against them in *United States v. Febus*, 218 F.3d 784 (7th Cir. 2000). However, in later proceedings under 28 U.S.C. § 2255, the district court vacated their money laundering convictions on the basis of our decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), which defined "proceeds" to mean net income, as opposed to gross

income.[1] The government appeals, asking us to overturn *Scialabba* and interpret the pivotal term "proceeds" to mean gross income. In the interest of stability in the law, we decline to do so and thus affirm the district court's judgments in favor of Santos and Diaz.

I.

The underlying facts of this case are not in dispute. Efrain Santos operated an illegal lottery, known as a "bolita," in Northwest Indiana from the 1970s until the 1990s. It worked by gamblers placing their bets with the bolita's runners, primarily at local restaurants and taverns. The runners then turned the wagers over to the bolita's collectors, who, in turn, gave the money to Santos. One collector in Santos's employ was Benedicto Diaz. Santos paid, either directly or indirectly, the runners, the collectors, and, of course, the bolita's winners out of the total amount collected. Additional background on Santos, Diaz, and the bolita is detailed in our prior opinion on this matter, *see Febus*, 218 F.3d at 788-91.

A grand jury indicted Santos, Diaz, and eleven others in a ten-count indictment. It named Santos in all ten counts, and Diaz in counts one through four. Count 1 alleged a conspiracy to conduct an illegal gambling business, 18 U.S.C. § 371. Count 2 charged the defen-

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[1] The parties' briefs use the terms gross income, gross receipts, and gross revenue interchangeably to refer to the aggregate amount received into a business operation. In the interest of clarity, this opinion will use "gross income" in this context. Similarly, the parties employ the terms net income, net profits, net gains, net receipts, net revenues, and profits to describe the amount remaining after a business operation's expenses are subtracted from its gross income. This opinion will use "net income" to describe the same.

dants with conducting an illegal gambling business, 18 U.S.C. § 1955. Count 3 alleged a conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of the business, i.e., a conspiracy to launder money, 18 U.S.C. §§ 1956(a)(1)(A)(i) & (h). Count 4 charged the defendants with money laundering by completing a financial transaction with the proceeds of the illegal gambling business with the intent to promote the carrying on of the business, 18 U.S.C. § 1956(a)(1)(A)(i). Counts 5 to 10 were similar money laundering charges under § 1956(a)(1)(A)(i).

A jury convicted Santos on the first five counts and acquitted him of the remainder. The district court sentenced him to 60 months of imprisonment on illegal gambling counts (1-2) and 210 months on the money laundering counts (3-5), all to run concurrently. For his part, Diaz pleaded guilty to count 3, conspiracy to launder money, and the other counts against him were dismissed. The district court sentenced him to 108 months of imprisonment. Thereafter, this court rejected Santos's and Diaz's direct appeals. *See Febus*, 218 F.3d at 789-91.

The two then initiated collateral proceedings with respective motions under 28 U.S.C. § 2255, each raising a number of issues. The district court rejected all but one issue in each case. The district court granted Santos and Diaz relief under § 2255 because—based upon our decision in *Scialabba*, which held that § 1956(a)(1)'s term "proceeds" meant net income, *see* 282 F.3d at 476-78—the district court held that Santos and Diaz were actually innocent of the crime of promotional money laundering and/or conspiracy to commit the same.

When the district court reached that conclusion, and thus vacated Santos's money laundering convictions (counts 3-5), Santos had already completed his concurrent 60-month sentences for his illegal gambling convictions (counts 1-2). Therefore, since the district court invalidated the only convictions keeping Santos in prison, the district court ordered his release upon his posting of a $20,000 unsecured bond. As for Diaz, the district court's § 2255 decision vacated his only count of conviction (count 3), and the district court likewise ordered his release with a $20,000 unsecured bond. The government appeals the grant of the two § 2255 motions.

II.

In challenging the district court's respective decisions to vacate Santos's and Diaz's money laundering convictions, the government raises one argument. It contends that the word "proceeds" in § 1956(a)(1) should be interpreted to mean gross income, not net income. The government's appeal here is thus nothing less than a frontal assault on *Scialabba.* In seeking to revive the vacated convictions, the government does not attempt to outflank or distinguish *Scialabba* in any way. Rather, it frankly concedes that, if the interpretation in *Scialabba* stands, there is insufficient evidence to support Santos's and Diaz's money laundering convictions and, as a result, the district court correctly vacated them. We first review the pertinent statutory section, as well as the holdings in *Febus*, and *Scialabba*, and how they impact the appeal before us.

Section 1956(a)(1)(A)(i) provides as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of

> some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—(A)(i) with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine 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. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

The unlawful activity here was an illegal gambling business, specifically, the bolita. Thus, to convict Santos of money laundering, the government had to prove that he knowingly conducted or attempted to conduct a financial transaction; that the property involved in the financial transaction in fact involved the proceeds of his bolita; that he knew that the property involved in the financial transaction represented illegal proceeds; and that he engaged in the financial transaction with the intent to promote the carrying on of the bolita. *See United States v. Emerson*, 128 F.3d 557, 561 (7th Cir. 1997); Seventh Circuit Pattern Criminal Jury Instructions 18 U.S.C. § 1956(a)(1)(A)(i) (1999). Such elements were also necessary to support Santos's and Diaz's related conspiracy convictions under § 1956(h). *See United States v. Turner*, 400 F.3d 491, 496 (7th Cir. 2005).

The financial transactions at issue in Santos's case were payments to the bolita's collectors and winners. With respect to Diaz, his conspiracy conviction was based upon the receipt of payment for his collection services. When the case arrived here on direct appeal, Santos acknowledged that he used the bolita's proceeds to pay its collectors' salaries and its winners' winnings. *See Febus*, 218 F.3d at 789. The focus in *Febus* was on § 1956(a)(1)(A)(i)'s promotion element: Santos argued that paying salaries and winnings did not promote the carrying on of the bolita. *See id*. at 789-90. As to the important issue in the present appeal, there was no dispute in *Febus* about the meaning of the word proceeds. In contrast to the current situation, Santos—by acknowledging that the salaries and winnings (i.e., operating expenses) came out of its "proceeds"—assumed that the term meant gross income, and *Febus* proceeded accordingly.

In addressing whether the government's case had met the promotion element, *Febus* determined that promotion under § 1956(a)(1)(A)(i) included "transactions that promote the continued prosperity of the underlying offense." *Id*. at 790 (citing *United States v. Conley*, 37 F.3d 970, 979 n. 12 (3d Cir. 1994)); *see also* 218 F.3d at 789 (discussing *United States v. Jackson*, 935 F.2d 832, 841-42 (7th Cir. 1991)). Consequently, *Febus* concluded that Santos's payments of proceeds to the collectors, including Diaz, fell into this category because those transactions "compensated them for collecting the [bolita's] increased revenues and transferring those funds back to [Santos]." 218 F.3d at 790. *Febus* further reasoned that winning payouts from the bolita's proceeds sufficiently promoted the carrying on of the unlawful activity in that the transactions "pro-

moted the bolita's continuing prosperity by maintaining and increasing the players' patronage." *Id*. (citing *United States v. Cole*, 988 F.2d 681, 684 (7th Cir. 1993)).

The gross-versus-net-income dispute then arose in *Scialabba,* which, while not mentioning *Febus* by name, distinguished *Febus* and its default treatment of the term proceeds as gross income by stating "[n]either the Supreme Court nor this circuit has defined the word 'proceeds' [in § 1956(a)(1)], and there is no definition in the statute itself." *Scialabba*, 282 F.3d at 475. The underlying offense in *Scialabba* was also illegal gambling. *See id*. at 475-76. The defendants operated video poker machines in taverns and other establishments. Among other crimes, the defendants were convicted of money laundering under § 1956(a)(1)(A)(i). Strikingly similar to the situation in *Febus*, the financial transactions at issue were the defendants' compensation-related payments to tavern owners who helped facilitate their gambling operation, including its collections, as well as the payouts to winning bettors. *See id*. at 476.

Scialabba, however, ruled that such transactions, which constituted the payment of the enterprise's operating expenses out of its gross income, could not support the defendants' money laundering convictions. *See id*. at 476-78. In reaching that result, *Scialabba* indicated that the term proceeds in § 1956(a)(1) was ambiguous, in that it was unclear if the term meant gross or net income. *See id*. at 477. *Scialabba* then, relying on the rule of lenity[2] and seeking to avoid "con-

[2] When "there is a grievous ambiguity or uncertainty in the language and structure" of a statute, "the rule of lenity instructs that ambiguity in the meaning of a statutory provision should be resolved in favor of the defendant." *United States v. Turcotte*, 405 F.3d 515, 535 (7th Cir.

vict[ing] a person of multiple offenses when the transactions that violate one statute necessarily violate another," interpreted the term to mean net income. *Id.* ("By reading § 1956(a)(1) to cover only transactions involving [net income], we curtail the overlap [between the crime of money laundering and the underlying criminal activity] and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise."). Specifically, *Scialabba* held "that the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture," *id.* at 478, "otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475; *see also id.* at 477-78 (distinguishing *United States v. Mankarious*, 151 F.3d 694, 706 (7th Cir. 1998); *Jackson*, 935 F.2d at 839-42; *Conley*, 37 F.3d 970). As a result, *Scialabba* vacated the defendants' money laundering convictions. *See* 282 F.3d at 478.[3]

The transactions in the present case—compensating the bolita's collectors and paying its winners—are conceptually indistinguishable from the transactions in *Scialabba* which were held to be insufficient under § 1956(a)(1)(A)(i). Such payments of the bolita's operat-

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2005) (quotations omitted).

[3] Upon the government's petition, a vote of the court's then-active members was requested to rehear *Scialabba* en banc, and the petition for rehearing en banc was denied by an equally divided court (5-5). *See United States v. Scialabba*, Nos. 01-1291 & 01-1292, 2002 U.S.App. LEXIS 10014, at *1 (7th Cir. May 22, 2002). The government's petition for a writ of certiorari was also denied. *See United States v. Scialabba*, 537 U.S. 1071, 123 S. Ct. 671, 154 L. Ed. 2d 565 (2002).

ing expenses came out of its gross income. Moreover, the government concedes that there is insufficient evidence in the record to show that the property involved in these transactions involved the bolita's net income, i.e., "proceeds" under *Scialabba*. Since the conduct that led to Santos's and Diaz's convictions only amounted to the disposition of the bolita's gross income, the district court reasoned that the two were convicted of "acts that are not now, nor ever have been, crimes" in this circuit and that the two are entitled to the benefit of *Scialabba* in their § 2255 proceedings. R.46 (Santos) at 27-31; R.38 (Diaz) at 22-25; *see also Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (discussing *Teague v. Lane*, 489 U.S. 288, 305-09, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); citing *Bousley v. United States*, 523 U.S. 614, 620, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)). The government here presents no argument to the contrary, and we need not pursue these issues further in this opinion.

Rather, as indicated above, the only issue the government presents for our review is whether *Scialabba* should be overturned, which would thereby mandate the reversal of the district court's judgments in favor of Santos and Diaz. "We require a compelling reason to overturn circuit precedent." *McClain v. Retail Food Employers Joint Pension Plan*, 413 F.3d 582, 586 (7th Cir. 2005); *see also United States v. Shutic*, 274 F.3d 1123, 1126 (7th Cir. 2001). What is more, "principles of stare decisis require that we 'give considerable weight to prior decisions of this court unless and until they have been overruled or undermined by the decisions of a higher court, or other supervening developments, such as a statutory overruling.'" *Haas v. Abrahamson*, 910 F.2d 384, 393 (7th Cir. 1990) (quoting *Colby v. J.C.*

Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987)); *see also McClain*, 413 F.3d at 586; *Bethesda Lutheran Homes & Servs., Inc. v. Born*, 238 F.3d 853, 858-59 (7th Cir. 2001); *Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1364 (7th Cir. 1996). Here, there has been no such decision by a higher court or a statutory overruling. *Scialabba* is thus entitled to "considerable weight."

The government raises several important points in favor of its position. To start, all the other circuits that have confronted the statutory debate over whether "proceeds" in § 1956(a)(1) means gross or net income have rejected *Scialabba's* approach. *See Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005) (discussing when other circuit opinions might present a compelling reason to overrule circuit precedent). Most prominent is the Third Circuit, which believes that *Scialabba* "reaches an incorrect result" and held that § 1956(a)(1)'s term proceeds "means simply gross receipts from illegal activity." *United States v. Grasso*, 381 F.3d 160, 167, 169 (3d Cir. 2004), *vacated on other grounds*, 544 U.S. 945-46, 125 S. Ct. 1696, 161 L. Ed. 2d 518 (2005). *Grasso* upheld money laundering convictions that were based upon a fraud scheme's advertising, printing, and mailing expenses. 381 F.3d at 162, 169. *Grasso* analyzed several dictionary and legal definitions for the word proceeds and correctly determined that the definitions showed that the word could mean either gross or net income. *Id.* at 167-68. For instance, *Grasso* noted that one dictionary defined proceeds as the "total amount brought in" but also as "net profit" and "the net sum received after deduction of any discount or charges." *Id.* at 167 (citing *Webster's Third New International Dictionary* 1807 (1986)). *Grasso* thus stated: "Given the many

definitions of 'proceeds' and the uncertain value of congressional records in choosing among them, the best approach, we believe, is to examine the statute itself for indications of the intended scope of the term." *Id.* at 168. Then, without discussing the rule of lenity and *Scialabba's* reliance upon it, *Grasso* summarily concluded that, because the statute prohibits the promotion of illegal activity, the use of an unlawful operation's gross income to sustain itself is "clear[ly]" punishable under the statute. *Id.* at 168-69 & n. 13; *but see Scialabba*, 282 F.3d at 477 ("[T]he context [of the statute] does not reveal whether the reference is to gross receipts or net income.").

The only two other circuits to address the gross-versus-net-income issue identified in *Scialabba* are the First and Eighth.[4] The First Circuit, in one brief paragraph in a forfeiture dispute, acknowledged *Scialabba*, but declined to read the § 1956(a)(1)'s term proceeds as net income based upon its prior interpretation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir. 2004) (citing *United States v. Hurley*, 63 F.3d 1, 21 (1st Cir. 1995)); *but see United States v. Genova*, 333 F.3d 750, 761 (7th Cir.

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

2003) (RICO forfeiture case defining proceeds as net income) (citing *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991); comparing *Scialabba*, 282 F.3d 475). Thus, *Iacaboni*, an illegal sports gambling case, ruled that payouts to winning bettors were financial transactions involving proceeds for § 1956(a)(1) purposes. 363 F.3d at 4. For its part, the Eighth Circuit, in another forfeiture situation, followed *Grasso* without discussion. *See United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005). Thus, while there is certainly opposition to *Scialabba*, it is not as entrenched as the government paints it to be.

The government also maintains that *Scialabba* incorrectly limited the crime of money laundering to situations in which criminals conceal their proceeds, thereby eviscerating § 1956(a)(1)'s promotional subsection. *Grasso* mentioned this point as well. 381 F.3d at 168. This is a misreading of *Scialabba*. 282 F.3d at 476. To be sure, the statute criminalizes the concealment of proceeds and also prohibits the use of proceeds to promote the illicit activity. *Compare* 18 U.S.C. § 1956(a)(1)(B) *with* 18 U.S.C. § 1956(a)(1)(A)(i). *Scialabba,* however, did not override the latter. There is a distinct difference between paying expenses and reinvesting net income. While, under *Scialabba,* the act of paying a criminal operation's expenses out of its gross income is not punishable under § 1956(a)(1)(A)(i)—but rather is punishable as part of the underlying crime—the act of reinvesting a criminal operation's net income to promote the carrying on of the operation is still punishable under § 1956(a)(1)(A)(i). Furthermore, in mentioning concealment, *Scialabba* merely pointed out that concealment was not at issue and that the government's case rested solely on the disposition of gross

income and whether such disposition was actionable under § 1956(a)(1)(A)(i). 282 F.3d at 476. *Scialabba* touched upon the lack of concealment simply to show that, to resolve the case, the court had no alternative but to interpret the word proceeds.

Additionally, the government contends that serious evidentiary problems result from interpreting proceeds to mean net income. Sure enough, criminals do not always keep ready records of their dealings, and, when they do, the line between the payment of expenses and reinvestment of net income is, generally speaking, murky, especially given the likely absence of accounting standards. *See Grasso,* 381 F.3d at 169 n. 13. Sorting out an illicit business's net income, therefore, can complicate the government's task of proving promotional money laundering, not to mention courts' and juries' respective roles in defining and determining what is and is not net income. This is a solid policy point (which the government may wish to present to Congress), but it is not enough to overcome the considerable weight afforded to *Scialabba*.

That policy point does tie into a related concern raised at oral argument about the sentencing disparity between money laundering and, in this case, running an illegal gambling business. The elimination of Santos's money laundering convictions, for instance, ended his 210-month sentence, leaving him with only a 60-month sentence, which he had already served. Cf. *Scialabba,* 282 F.3d at 476 (similar differences). More generally, when, as in Santos's case, the government proves a defendant has engaged in an illegal gambling business but is unable to establish the business's net income for purposes of the money laundering statute, the statutory

maximum facing the defendant goes from 240 months to 60 months. *Compare* 18 U.S.C. § 1956(a)(1) *with* 18 U.S.C. § 1955(a). Moreover, in terms of money laundering, the Sentencing Guidelines ratchet up a defendant's base offense level in relation to the value of the laundered funds; however, there is no similar value/amount provision for engaging in an illegal gambling business. *Compare* U.S.S.G. § 2S1.1(a)(2) (2005) (cross-referencing U.S.S.G. § 2B1.1) *with* U.S.S.G. § 2E3.1 (2005). This concern, of course, is not grounds to overturn circuit precedent; we mention it here simply to note the sentencing consequences that can result when, due of a lack of net income evidence, § 1956(a)(1)(A)(i) is unavailable to the government in combating large-scale illegal gambling operations.

Having considered the government's arguments, the most we can say here is that the government has demonstrated that the question of whether Congress intended the term proceeds in § 1956(a)(1)(A)(i) to mean gross or net income is a debatable one. However, simply showing that a point is debatable is not enough to meet the compelling-reasons standard for overturning circuit precedent. *See Russ,* 414 F.3d at 788; *McClain,* 413 F.3d at 586-87; *Bethesda Lutheran,* 238 F.3d at 858-59. Overturning circuit precedent—upsetting the stability and predictability of the law—is not something that should be taken lightly (even when the previous decision was upheld by a 5-5 vote, *see supra* note 3). Rather than vacillate over Congress's intent, it is better for our circuit here, having already considered and duly decided the issue, to stay the course at this juncture, for only

Congress[5] or the Supreme Court can definitively resolve the debate over this ambiguous term. *See Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457 (7th Cir. 2005); *Bethesda Lutheran,* 238 F.3d at 858-59; *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1065 (7th Cir. 2000) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." (quotation omitted)); *Mid-Am. Tablewares,* 100 F.3d at 1364 ("Stare decisis is of fundamental importance to the rule of law." (quotation omitted)); *see also Trompler, Inc. v. NLRB,* 338 F.3d 747, 753 (7th Cir. 2003) (Easterbrook, J., concurring) ("Restless movement from one side of this conflict to another will not make it go away; sooner or later, either Congress or the Supreme Court must bring harmony. Until that happens, judicial resources will be conserved, and predictability increased, if each circuit that has reached a decision sticks with it.").

III.

The government has not presented a compelling reason to overturn *Scialabba* and its holding that the

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[5] We briefly note that, in the closely related context of illegal gambling businesses, Congress has already quelled any debate over the type of funds that triggered criminal liability. One path to proving a § 1955 violation is to show that the illegal gambling business had "*gross* revenue of $2,000 in a single day." 18 U.S.C. § 1955(b)(1)(iii) (emphasis added). By similarly incorporating the word gross or net into § 1956 to define proceeds, Congress could quickly resolve the meaning of this problematic term.

term "proceeds" in § 1956(a)(1) means net income. Accordingly, the district court's respective judgments in favor of Santos and Diaz are AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:01 CV 638

UNITED STATES, PLAINTIFF

v.

EFRAIN SANTOS, DEFENDANT

[Filed: Oct. 20, 2004]

MEMORANDUM AND ORDER

MOODY, District Judge.

Efrain Santos ("Santos" or "defendant") is a prisoner whose incarceration results from a judgment of this court. On November 30, 2001, he initiated this post-conviction proceeding by filing a motion pursuant to 28 U.S.C. § 2255. After reviewing Santos' § 2255 motion, this court determined that additional briefing was necessary. Accordingly, the government filed a response to Santos' motion on June 9, 2003, and Santos tendered his reply on July 7, 2003. After reviewing all of the materials submitted in this matter, the court, for the following reasons, **GRANTS** Santos' § 2255 motion **IN PART**.

I. BACKGROUND

On May 10, 1996, a federal grand jury returned a ten (10) count Indictment against Efrain Santos. (Indictment in Cause No. 2:96 CR 44, at docket # 1 [hereinafter Indictment]). The Indictment charged Santos for several acts committed in connection with his operation of an illegal lottery—known as a "Bolita"-in East Chicago, Indiana. In particular, Count 1 of the Indictment charged Santos with conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 371; Count 2 charged Santos with conducting an illegal lottery business in violation of 18 U.S.C. § 1955; Count 3 charged Santos with conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(h); Counts 4 and 5 charged Santos with money laundering to promote an illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i); and, Counts 6-10 charged Santos with other substantive money laundering offenses. Santos pled not guilty to each of the Counts against him, and went to trial with three other co-defendants.

Santos' trial commenced on September 29, 1997. At trial, it was determined that Santos had begun operating his Bolita in East Chicago, Indiana in the 1970's[1] and continued to do so until approximately 1994. There was a brief period in the late 1970's and early 1980's when

[1] Before he began operating the Bolita in East Chicago, Indiana, Santos worked for Ken Eto, who ran a Bolita spanning both Illinois and Indiana in the late 1960's and early 1970's. (Tr. 1547-48). It appears Santos took over the Indiana portion of Eto's operation sometime in the early 1970's. (Tr. 1547-48).

Santos was absent from the Bolita business, and during that time, one of Santos' co-defendants, Roberto Febus (a.k.a. Bobby Santos), served as the Bolita's interim leader. (Tr. 1548-49). However, Santos returned in 1984.

The winning numbers in Santos' Bolita were based upon the daily Pick Three and Pick Four Illinois lottery games, and upon the Puerto Rican Lottery. (Tr. 733-34). Santos had runners accept bets for his Bolita primarily in bars and restaurants in East Chicago. (Tr. 587, 620-21, 734-35). The runners would take a commission of 15-25% from the bet money, (Tr. 738-39, 909), and then deliver the betting slips and the remaining bet money to "collectors," (Tr. 735-36, 740, 747, 1397-98, 1404, 1414). The collectors would then deliver the slips and bet money to Santos, (Tr. 740-41, 1404-05), but before doing so, they would often take a "salary" out of the collected bet money, (Tr. 755-56, 1399-1400), and on occasion would pay Bolita winners who won $100.00 or less, (Tr. 739, 1426). Santos ultimately paid the Bolita's "big" winners. (Tr. 739, 1427).

The FBI began investigating Santos' Bolita in 1992, (Tr. 138-39), and on March 30, 1993, the FBI executed search warrants for Santos' person, his house, his apartment, and his vehicle, as well as for the persons and vehicles of two of Santos' collectors, (Tr. 209-10, 463). From their search, the FBI found betting slips, ledgers, cash and other evidence of Santos' gambling enterprise. (*See, e.g.,* Tr. 209-14, 464-66, 562, 852-55, 1415). After the FBI's search, Santos closed down his Bolita, but only for a few weeks, (Tr. 747, 1420); operations soon resumed, although the location and collection

method for the Bolita had changed, (Tr. 747-48, 1419-20).

The FBI continued its surveillance of Santos' Bolita and conducted another search on June 22, 1993, (Tr. 221, 466), which returned further evidence of Santos' illegal gambling enterprise, (*see, e.g.,* Tr. 221-23, 466-67, 562, 855-56). This second search did not faze Santos, and the Bolita continued running without interruption. (Tr. 1429). The FBI then executed a third search on October 12, 1993, in which it again found betting sheets, betting slips, cash, and other evidence of Santos' illegal Bolita. (*See, e.g.*, Tr. 576-77).

After hearing all of this evidence at trial, the jury found Santos guilty on Counts 1-5 of the Indictment, and not guilty on Counts 6-10. (Tr. 2142; Minute Entry in Cause No. 2:96 CR 44, at docket # 261). As a result of the guilty verdicts, on April 15, 1998, this court sentenced Santos to 60 months on each of Counts 1 and 2, and to a term of imprisonment of 210 months on each of Counts 3, 4, and 5, all to be served concurrently. (Minute Entry in Cause No. 2:96 CR 44, at docket # 379). After receiving his sentence, Santos promptly filed his Notice of Appeal on April 23, 1998. (Notice of Appeal in Cause No. 2:96 CR 44, at docket # 390).

On appeal, Santos presented only one issue for review: He argued that "the evidence was insufficient to convict him of money laundering because his cash payment to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under" § 1956(a)(1)(A)(i).[2] *United States v. Febus,* 218 F.3d 784,

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[2] Section 1956(a)(1)(A)(i) provides, in pertinent part:

(a)(1) Whoever, knowing that the property involved in a financial

789 (7th Cir. 2000). The Court of Appeals rejected Santos argument and affirmed his conviction. The Court stated:

> In this case, the government established that Santos reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955. Furthermore, [Santos'] own records show that the income to his bolita expanded from approximately $250,000.00 per year for the years 1989 to 1992, to $330,000.00 for 1993, and up to $410,000.00 for 1994. His payments to his collectors, Diaz and Morales, compensated them for collecting the increased revenues and transferring those funds back to him. And his payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage. (citation omitted). Therefore, the government produced sufficient evidence to enable a reasonable jury to find Santos guilty of money laundering beyond a reasonable doubt.

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transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity;

* * * * * *

shall be sentenced to a fine 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.

Id. at 790. Shortly after the Seventh Circuit's decision affirming Santos' conviction, Santos filed a petition for a *Writ of Certiorari.* However, the United States Supreme Court declined review. *Santos v. United States,* 531 U.S. 1021, 121 S. Ct. 587, 148 L. Ed. 2d 503 (2000).

Thus, on November 30, 2001, Santos filed the instant motion requesting that this court vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (Def.'s § 2255 Mot. in Cause No. 2:01 CV 638, at docket # 9 [hereinafter Def.'s § 2255 Mot.]).[3] The undersigned engaged in the prescribed initial consideration, (*see* Rules Governing Section 2255 Proceedings, Rule 4(b)), and subsequently directed the United States Attorney to enter his appearance and file an Answer by January 11, 2002. (Order dated Dec. 10, 2001 in Cause No. 2:01 CV 638, at docket # 2). However, due to a delay caused by several continuances arising out of the Seventh Circuit's decision in *United States v. Scialabba,* 282 F.3d 475 (7th Cir. 2002)—an opinion which the government originally suspected conflicted with the Seventh Circuit's holding in Santos' direct appeal—the govern-

[3] The original § 2255 motion filed by Santos on November 30, 2001, (*see* Cause No. 2:01 CV 638, at docket # 1), failed to comply with Local Rule 47.1 which requires that all § 2255 motions be filed upon the "form contained in the Rules following . . . 28 U.S.C. § 2255." N.D. Ind. L. CR. R. 47.1. Therefore, in an Order dated January 18, 2002, this court directed the Clerk to furnish Santos with a copy of the applicable form, and ordered Santos to comply with the LOCAL RULE no later than March 1, 2002. (Order dated Jan. 18, 2002 in Cause No. 2:01 CV 638, at docket # 7). The January 18 Order also noted that this court would construe Santos' original § 2255 filing as Memorandum of Law. (Order dated Jan. 18, 2002 in Cause No. 2:01 CV 638, at docket # 7). Santos promptly complied with this court's January 18 Order, and thus, his "proper" § 2255 motion appears at docket # 9 in Cause No. 2:01 CV 638.

ment did not tender its response until June 9, 2003. (Gov't Resp. in Cause No. 2:01 CV 638, at docket # 41 [hereinafter Gov't Resp.]). Santos then filed his reply on July 7, 2003. (Def.'s Reply in Cause No. 2:01 CV 638, at docket # 42 [hereinafter Def.'s Reply]). The court shall now address the merits of Santos' motion.

II. STANDARD OF REVIEW

"No prisoner has a constitutional entitlement to further review of the final judgment in a criminal case." *Farmer v. Litscher,* 303 F.3d 840, 844 (7th Cir. 2002) (citing *Freeman v. Page,* 208 F.3d 572, 576 (7th Cir. 2000)). However, with the enactment of 28 U.S.C. § 2255, Congress gave federal prisoners a right to launch a collateral attack against their conviction. Section 2255 ultimately grants the federal courts power "to vacate, set aside or correct the sentence" of a convicted prisoner, 28 U.S.C. § 2255 ¶ 1, but only if the prisoner is able to expose flaws in the conviction "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice," *Boyer v. United States,* 55 F.3d 296, 298 (7th Cir. 1995) (citation omitted). Thus, "relief under 28 U.S.C. § 2255 is reserved for extraordinary situations." *Prewitt v. United States,* 83 F.3d 812, 816 (7th Cir. 1996) (citing *Brecht v. Abrahamson,* 507 U.S. 619, 633-34, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)).[4]

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[4] Emphasizing the social benefit of finality and advancing a jurisprudence of limited post-conviction success, the United States Supreme Court has stated:

> Once the defendant's chance to appeal has been waived or exhausted, . . . [the court is] entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum.

A post-conviction proceeding under § 2255 "is not to be used as a substitute for a direct appeal." *United States v. Barger*, 178 F.3d 844, 848 (7th Cir. 1999) (citing *Theodorou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989)); *accord Coleman v. United States*, 318 F.3d 754, 760 (7th Cir. 2003). Accordingly, the doctrine of procedural default precludes the district court from considering certain claims presented in a § 2255 motion that the defendant could have raised on direct appeal, unless the defendant "can show good cause for failing to raise the issue[s] and actual prejudice." *Galbraith v. United States*, 313 F.3d 1001, 1006 (7th Cir. 2002); *accord Mankarious v. United States*, 282 F.3d 940, 943 (7th Cir. 2002) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for and actual prejudice resulting from the failure to assert it."), *cert. denied*, 537 U.S. 823, 123 S. Ct. 108, 154 L. Ed. 2d 32 (2002). "A showing that a refusal to consider the issue would be a fundamental miscarriage of justice" may also aid a prisoner in attaining review of a procedurally defaulted issue. *Galbraith*, 313 F.3d at 1006 (internal quotation marks and citation omitted).

III. DISCUSSION

Santos presents four (4) arguments for relief in his § 2255 motion. He generally alleges: (1) that he received

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Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, *a final judgment commands respect. United States v. Frady*, 456 U.S. 152, 164-65[, 102 S. Ct. 1584, 71 L. Ed. 2d 816] (1982) (emphasis added).

ineffective assistance of counsel; (2) that the court imposed a sentence in excess of the maximum authorized by law; (3) that his sentence was imposed in violation of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); and, (4) that the opinion expressed by the Seventh Circuit in *Scialabba,* 282 F.3d 475, (a case decided subsequent to Santos' appeal), requires that his convictions for money laundering be set aside and that he be re-sentenced.[5] The court shall now address the merit of each of Santos' contentions.

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[5] Santos' § 2255 motion, which he originally filed *pro se,* is quite jumbled and disorganized, thus, it was somewhat difficult for this court to extricate (from the jumble) the actual issues Santos had presented for review under § 2255. In the end, in an order dated December 10, 2001, this court determined that Santos' motion presented three (3) coherent arguments for relief: (1) that his trial counsel was constitutionally ineffective; (2) that this court imposed upon him a sentence in excess of the maximum authorized by law; and, (3) that the decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), entitles him to collateral relief. (Order dated Dec. 10, 2001 in Cause No. 2:01 CV 638, at docket # 2). Approximately three (3) months after this court issued its December 10, 2001 Order, the United States Attorney's Office brought to this court's attention the decision in *United States v. Scialabba,* 282 F.3d 475 (7th Cir. 2002), which it believed might impact the disposition of Santos' § 2255 request for relief; thus, a fourth issue for review—whether the decision in *Scialabba* requires Santos' money laundering convictions to be set aside-was ostensibly added to the three others presented by Santos in his original § 2255 motion. Both parties have since agreed that there are indeed four (4) questions presented for review in this § 2255 action: (1) whether Santos received ineffective assistance of counsel; (2) whether the court imposed upon Santos a sentence in excess of the maximum authorized by law; (3) whether Santos' sentence was imposed in violation of *Apprendi;* and, (4) whether the opinion expressed by the Seventh Circuit in *Scialabba* requires that Santos' money laundering convictions be set aside and that he be re-sentenced. (*See* Gov't Resp., at 10-11; Def.'s Reply, at 5).

A. *Ineffective Assistance of Counsel Claims*

Santos makes three (3) general claims of ineffective assistance of counsel. He argues: (1) that his trial attorney, Nick Thiros, provided ineffective assistance by failing to object to the Pre-Sentence Investigation Report ("PSI"); (2) that Mr. Thiros provided ineffective assistance by failing to investigate the criminal statutes under which Santos was convicted; and, (3) that Mr. Thiros provided ineffective assistance by failing to object to this court's jurisdiction over Santos' criminal matter.[6] In seeking to prove that his counsel rendered ineffective assistance in these three (3) instances, Santos "bears a heavy burden." *Jones v. Page,* 76 F.3d 831, 840 (7th Cir. 1996) (citation omitted). Santos must show: (1) that his counsel's performance in the specified situation(s) was unreasonably deficient; and, (2) that "the deficient performance prejudiced the defense." *Strick-*

[6] Although Santos has never before, in any court, raised any of these ineffective assistance claims, it matters little in as far as claims of ineffective assistance are not prone to procedural default. *Massaro v. United States,* 538 U.S. 500, 504, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003). Rather, ineffective assistance claims may be properly raised for the first time in a § 2255 proceeding. *Id*. ("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal."); *accord United States v. Woolley,* 123 F.3d 627, 634 (7th Cir. 1997) ("The preferred method for raising a claim of ineffective assistance of counsel is either by bringing a motion for new trial or a request for collateral relief under 28 U.S.C. § 2255.") (internal quotation marks and citation omitted); *Jones v. United States,* 264 F. Supp. 2d 714, 716 (N.D. Ill. 2003) ("The Court in *Massaro* made clear . . . that ineffective assistance of counsel claims are an exception [to the procedural default rules] . . . and may be brought in a collateral proceeding under § 2255."). Therefore, Santos has appropriately raised his ineffective assistance claims for the first time in this § 2255 proceeding.

land v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As the *Strickland* standard is formulated in the conjunctive, Santos must make the requisite showing on both elements; failure to prove either deficient conduct or prejudice invalidates an ineffective assistance claim, *see Rastafari v. Anderson,* 278 F.3d 673, 688 (7th Cir. 2002) ("A failure to establish either [*Strickland*] prong results in a denial of the ineffective assistance of counsel claim.") (citation omitted), *cert. denied sub nomine Rastafari v. Davis,* 537 U.S. 914, 123 S. Ct. 294, 154 L. Ed. 2d 196 (2002).

When considering whether an attorney's conduct was unreasonably deficient under the first prong of the *Strickland* test, a court must operate under a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and treat counsel's performance with high deference. *Strickland,* 466 U.S. at 689, 104 S. Ct. 2052; *accord Williams v. Washington,* 59 F.3d 673, 679 (7th Cir. 1995) (The first prong of *Strickland* "contemplates deference to strategic decision-making."). In order to prevail on the first prong of the *Strickland* test, a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S. Ct. 2052. With regard to the second prong, the court will only disturb a criminal conviction if "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 694, 104 S. Ct. 2052. In other words, "[i]n order to demonstrate that his federal constitutional right to effective assistance of counsel was violated, a defendant must show that effective assistance would have given him a reasonable

shot at acquittal." *Gibbs v. VanNatta,* 329 F.3d 582, 584 (7th Cir. 2003) (noting that this is a "different and lower standard" than proving actual innocence); *accord Kimmelman v. Morrison,* 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

1. *Failing to Object to the PSI*

Santos first contends that Mr. Thiros provided ineffective assistance by failing to object to the PSI report. (Def.'s § 2255 Mem., at 5).[7] Yet, Mr. Thiros *did* make three (3) vigorous objections to the PSI. First, Mr. Thiros argued against the PSI's representation of both the amount of time Santos had been part of the Bolita, (Sent. Tr. 52-53), and the amount of money involved in the gambling operation, (Sent. Tr. 53-54). Second, Mr. Thiros objected to sentence enhancements premised upon (what Santos believed to be) erroneous representations of the time Santos operated the Bolita and the amount of money involved in the Bolita's operation. Finally, Mr. Thiros took issue with "whether or not the money laundering or the gambling operation is the [offense] that the court should take into consideration in determining the appropriate guideline level." (Sent. Tr. 55-58). Not only did Mr. Thiros make these objections generally, he presented both testimonial and documentary evidence in support of his

[7] The citation "Def.'s § 2255 Mem. at ___" references the Memorandum of Law attached to Santos' § 2255 motion in Cause No. 2:01 CV 638, at docket # 9.

objections at Santos' sentencing hearing.[8] Thus, the general claim that Mr. Thiros failed to make objections to the PSI is, in and of itself, false.

However, perhaps Santos' claim is not as general as it appears. Santos' Memorandum in Support of his § 2255 motion does not, in the section entitled "Ineffective Assistance of Counsel," specify to what exactly in the PSI Santos believes Mr. Thiros should have objected. (*See* Def.'s § 2255 Mem., at 5). Yet, in a previous section in his § 2255 motion, Santos argues that the PSI report was improperly prepared and inaccurate. In particular, Santos argues that the PSI inaccurately reported the maximum sentence permitted for his convictions under § 1956(a)(1)(A)(i)[9] and § 1956(h)[10] as twenty (20) years, when according to Santos, the correct maximum sentence is 46 to 57 months. (Def.'s § 2255 Mem., at 2-3). Thus, maybe Santos believes Mr. Thiros should have objected to this alleged inaccuracy.

However, § 1956(a)(1)(A)(i) *clearly* indicates that one who is found guilty of violating the statute "shall be sentenced to . . . *imprisonment for not more than*

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[8] In support of his objections to the PSI, Mr. Thiros first presented the testimony of two witnesses, Angel Morales, (Sent. Tr. 8-16), and Efrain Santos, (Sent. Tr. 34-48), and then submitted, as an exhibit, tax documents allegedly proving the year in which Santos became involved in the Bolita operation, (Sent. Tr. 40).

[9] For the text of § 1956(a)(1)(A)(i), *see supra* note 2.

[10] Section 1956(h) states, in pertinent part:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

twenty years." (emphasis added). The maximum penalty for § 1956(h) is also *clearly* twenty (20) years in this instance. Indeed, § 1956(h) states:

> Any person who conspires to commit any offense defined in [§ 1956] . . . shall be subject to the *same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.*

(emphasis added). Thus, as the "object of the conspiracy" was the offense for which Santos was convicted under § 1956(a)(1)(A)(i), (*see* Indictment, at Count 3), then the appropriate penalty for conviction under § 1956(h) is a maximum of twenty (20) years. Therefore, the inaccuracy within the PSI that Santos suggests existed did not in fact exist, and Mr. Thiros cannot be found ineffective for failing to object to the PSI's correct representation of the penalty for the crimes of which Santos was convicted.

Santos also appears to believe that perhaps Mr. Thiros should have objected to the validity of a prior conviction used to enhance Santos' current sentence. (*See* Def.'s § 2255 Mem., at 4). Santos asserts that his 1966 conviction for "conspiracy to transfer and possess untaxed Marijuana," which was used to enhance his current sentence by three (3) points, is invalid because "courts have since ruled that no one is to be prosecuted for possession of untaxed marijuana." (Def.'s § 2255 Mem., at 4). Accordingly, Santos argues that his sentence should never have been enhanced based upon the invalid 1966 conviction, and presumably, Mr. Thiros should have raised this issue with the court. (Def.'s § 2255 Mem., at 4).

However, "the validity of prior convictions is not open to reexamination at sentencing for a new offense," *Talbott v. Indiana,* 226 F.3d 866, 870 (7th Cir. 2000); such is the case even if those prior convictions are used to enhance the sentence for the new offense, *id*. "This [general] rule is subject to *only one* exception: If an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the right to counsel, the defendant may challenge the validity of his prior conviction during his federal sentencing proceedings. (citation omitted). *No other constitutional challenge to a prior conviction may be raised in the sentencing forum.* (citation omitted)." *Daniels v. United States,* 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001) (emphasis added); *see also Talbott,* 226 F.3d at 870. Santos does not now allege, nor has he ever alleged, and there is no evidence to suggest, that Santos lacked counsel when convicted in 1966. Therefore, Santos fails to meet the one exception to the general rule that "sentencing hearings are not the appropriate forum to examine the validity of prior convictions even though such convictions may be used to enhance a present sentence." *United States v. Mitchell,* 18 F.3d 1355, 1358 (7th Cir. 1994). Consequently, Mr. Thiros did not render ineffective assistance by failing to object to the validity of Santos' 1966 conviction at Santos' latest sentencing; one can hardly be deemed ineffective for following the rules.[11]

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[11] Moving beyond the scope of Santos' ineffective assistance claim for just a moment, it is important to note that federal prisoners are generally *barred* from challenging a current sentence through a motion under § 2255 on the ground that the sentence was inappropriately enhanced by an allegedly invalid prior conviction. *See Daniels v. United States,* 532 U.S. 374, 382, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001);

2. *Failing to Investigate Criminal Statutes*

Second, Santos claims that Mr. Thiros provided ineffective assistance by failing to investigate the criminal statues under which Santos was convicted. (Def.'s § 2255 Mem., at 5). Santos first argues that had Mr. Thiros investigated the criminal statutes listed in the Indictment, Mr. Thiros would have found that 18 U.S.C. § 371 is a "non-promulgated" statute. (Def.'s § 2255 Mem., at 6). Santos never explains what he means when he says § 371 is a "non-promulgated" statute, nor does he explain why or how this issue might be important to or affect his case. However, based upon the context in which the phrase "non-promulgated" appears, it seems Santos uses the phrase to mean that Congress has never "enacted," or rather, "executed" § 371, and therefore § 371 does not have the force of law. *See* Webster's New Int'l Dictionary 1816 (3d ed. 1981) ("Promulgate" is defined as: "b: to issue or give out (a law) by way of

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accord Ryan v. United States, 214 F.3d 877, 879-80 (7th Cir. 2000). Of course, this rule is also subject to the "lack of counsel" exception. *Daniels,* 532 U.S. at 382-83, 121 S. Ct. 1578 (defendant may, in a § 2255 proceeding, challenge a prior conviction used to enhance his current federal sentence if that prior conviction was imposed in violation of defendant's Sixth Amendment right to counsel). However, because "lack of counsel" claims are subject to procedural default rules, a defendant may generally only raise such a claim in his § 2255 motion "if he raised that claim at his federal sentencing proceeding." *Id*. at 382-83, 121 S. Ct. 1578 (citations omitted). In any event, as discussed above, Santos does not now allege, nor has he ever alleged, and the evidence does not suggest, that his 1966 conviction was imposed in violation of his Sixth Amendment right to counsel. As a consequence, Santos may not now appropriately challenge the imposition of the enhancement to his current sentence by collaterally attacking the validity of his 1966 conviction which supported that enhancement.

putting into execution."). If this is in fact what Santos means, then he is wrong. Section 371 was indeed "promulgated," or rather, "enacted" by Congress in 1948, and it does carry the force of law. *See* Act of June 25, 1948, ch. 645, 62 Stat. 701, *amended by* Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 2147. Accordingly, Mr. Thiros was not ineffective for failing to investigate the non-issue of § 371's "promulgation."

Santos next argues that all sections of the Federal Criminal Code are only punishable in Washington, D.C. and the territories of the United States. (Def.'s § 2255 Mem., at 5-6). Therefore, Santos contends, not one of the statutes under which he was convicted was actually enforceable against him, and because Mr. Thiros failed to notice this, Mr. Thiros rendered ineffective assistance. (Def.'s § 2255 Mem., at 5-6). The Seventh Circuit has repeatedly refused to endorse this argument, calling it "frivolous and requir[ing] no further discussion." *United States v. Banks-Giombetti,* 245 F.3d 949, 953 (7th Cir. 2001) (refusing to discuss argument that federal government had no authority to prosecute bank robbery not committed on federal land); *United States v. Jones,* 983 F.2d 1425, 1428 & n. 6 (7th Cir. 1993) (calling "plainly frivolous" the argument that defendant was a citizen of the sovereignty of Texas and thus not subject to the jurisdiction of the United States on federal bond-jumping charges). Accordingly, this court will not endorse such an argument either.

3. *Failing to Object to Jurisdiction*

Lastly, Santos argues that Mr. Thiros was ineffective in failing to object to this court's jurisdiction over his criminal matter. (Def.'s § 2255 Mem., at 5-6). Pursuant

to 18 U.S.C. § 3231, this court has "original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States." In the present case, Santos was charged with and convicted of violating 18 U.S.C. § 371 (conspiracy to conduct an illegal gambling business), 18 U.S.C. § 1955 (conducting an illegal lottery business), 18 U.S.C. § 1956(h) (conspiracy to use proceeds of an illegal gambling business to promote the carrying on of that business), and 18 U.S.C. § 1956(a)(1)(A)(i) (money laundering). Each of these offenses has been defined by Act of Congress as a crime against the laws of the United States. *See Pennsylvania v. Nelson,* 350 U.S. 497, 519, 76 S. Ct. 477, 100 L.Ed. 640 (1956) (Title 18 of the United States Code "codifies the federal criminal laws."). Therefore, this court unquestionably had jurisdiction over Santos' case, and Mr. Thiros was not ineffective in failing to object to a jurisdictional issue that did not exist.

B. *Excessive Sentence Claim*

Santos next contends that the court imposed upon him a sentence in excess of the maximum authorized by law. (Def.'s § 2255 Mot., at 5 ¶ B; Def.'s § 2255 Mem., at 2-3). Santos argues that the PSI inaccurately reported the maximum sentence permitted for his convictions under § 1956(a)(1)(A)(i) and § 1956(h) as twenty (20) years, when according to Santos, the correct maximum sentence is 46 to 57 months. (Def.'s § 2255 Mot., at 5 ¶ B; Def.'s § 2255 Mem., at 2-3). The court has already addressed the merit of this argument in the previous section, although it did so in the context of an ineffective assistance analysis. Nonetheless, no matter what context this argument is analyzed in, it must fail.

As the court explained above, § 1956(a)(1)(A)(i) clearly indicates that those who have engaged in conduct which violates the statute "shall be sentenced to . . . imprisonment for not more than twenty years." Section 1956(h) subjects those convicted under its provisions "to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." Thus, given that the "object of the conspiracy" was the offense for which Santos was convicted under § 1956(a)(1)(A)(i), (*see* Indictment, at Count 3), § 1956(h), in this instance, also carries a maximum penalty of twenty (20) years.

Santos was sentenced to 210 months (17.5 years) for his conviction under § 1956(h), and 210 months for each of the two convictions under § 1956(a)(1)(A)(i) (all to be served concurrently). Accordingly, Santos did not receive a sentence in excess of the maximum authorized by law for the crimes of which he was convicted under § 1956(h) and § 1956(a)(1)(A)(i). Rather, he received two and one-half years less than the maximum. Thus, this court denies Santos' request to vacate his sentence based upon his contention that the penalties he received for his convictions under § 1956(h) and § 1956(a)(1)(A)(i) exceed the maximum prescribed by law; such a contention is simply false.

C. *Apprendi Claim*

Third, Santos argues that this court must vacate his sentence pursuant to *Apprendi,* 530 U.S. 466, 120 S. Ct. 2348. (Def.'s § 2255 Mot., at 6 ¶ 13; Def.'s § 2255 Mem., at 8-9). *Apprendi* ultimately requires that "[o]ther than the fact of a prior conviction, any fact which increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved

beyond a reasonable doubt." 530 U.S. at 490 (emphasis added).[12] Santos specifically asserts that this court violated *Apprendi* by wrongfully determining facts which resulted in a term of imprisonment fifteen (15) years beyond the prescribed statutory maximum of (what Santos argues is) five (5) years for his conviction under § 1956(h). (Def.'s § 2255 Mot., at 6 ¶ 13; Def.'s § 2255 Mem., at 8-9).

As this court has already explained several times over, Santos has simply got it wrong; the statutory maximum under § 1956(h) is NOT only five (5) years. Once again, § 1956(h) prescribes the "same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." The object of the conspiracy in this case was the laundering of monetary instruments, the offense for which Santos was convicted under § 1956(a)(1)(A)(i). (*See* Indictment, at Count 3). As the statutory maximum under § 1956(a)(1)(A)(i) is twenty (20) years, then the statutory maximum under § 1956(h), in this instance, is also twenty (20) years. Thus, this court did not, as Santos contends, sentence Santos fifteen (15) years beyond the maximum number of years of imprisonment listed in § 1956(h). Nevertheless, ignoring for the moment that Santos' *Apprendi* claim is entirely based upon an incorrect understanding of the statutory maximum prescribed by § 1956(h), and

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[12] The rule announced in *Apprendi* is not applicable to sentences that became final *before* June 26, 2000, the date of *Apprendi*'s release. *Curtis v. United States*, 294 F.3d 841, 844 (7th Cir. 2002) (" *Apprendi* [ ] does not disturb sentences that became final before June 26, 2000, the date of its release."). However, as Santos' conviction became final approximately one (1) month *after* the date of *Apprendi's* release, the rule announced in *Apprendi* may be appropriately applied to his case. *See id*.

assuming that Santos simply believes his case generally presents an *Apprendi* issue, the court notes that because Santos raises his *Apprendi* issue for the first time in a collateral attack on his conviction, he must now show *both* cause for failing to raise the issue at trial and on direct appeal, and prejudice resulting from that failure in order to avoid procedural default of the issue. *Galbraith,* 313 F.3d at 1006; *Mankarious,* 282 F.3d at 943.

Santos has not bothered to present any reasons for failing to raise his *Apprendi* issue in previous proceedings. Therefore, Santos has not demonstrated the "cause" necessary to avoid procedural default. Certainly, one might logically ask how it is that Santos could have presented his *Apprendi* claim before the instant proceeding considering that his conviction became final on July 14, 2000, only one (1) month after *Apprendi* was decided. The Court of Appeals has observed, however, that the "foundation for *Apprendi* was laid long before 1992," and that defendants have been "making *Apprendi*-like arguments ever since the Sentencing Guidelines came into being." *United States v. Smith,* 241 F.3d 546, 548 (7th Cir. 2001). In other words, nothing stopped Santos from making an "*Apprendi*-like" argument before this collateral proceeding, and his failure to do so is the forfeiture that leads to a cause and prejudice requirement.

Of course, given that *Apprendi*-like arguments have, apparently, long been in existence, it would seem that perhaps Santos might, or even should be able to raise a claim of ineffective assistance based upon his attorney's failure to raise an *Apprendi*-like argument on Santos' behalf at some point during Santos' criminal pro-

ceedings; an ineffective assistance claim could ultimately serve as "cause" for procedural default purposes, *see Murray v. Carrier,* 477 U.S. 478, 488-89, 106 S. Ct. 2639, 91 L .Ed. 2d 397 (1986) ("Ineffective assistance of counsel . . . is cause for a procedural default."). Yet, the Court of Appeals has noted on more than one occasion that a claim that counsel was ineffective for failing to anticipate *Apprendi* is untenable because "[t]he Sixth Amendment does not require counsel to forecast changes or advances in the law." *Lilly v. Gilmore,* 988 F.2d 783, 786 (7th Cir. 1993); *see also Valenzuela v. United States,* 261 F.3d 694, 700 (7th Cir. 2001); *Smith,* 241 F.3d at 548. The lack of *any* reasonable legal basis for raising a claim can be "cause," *Reed v. Ross,* 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984), but, as noted above, the Court of Appeals has already determined that the foundation for *Apprendi* was apparent well before 1992. *Smith,* 241 F.3d at 548. As a result, Santos cannot establish "cause" excusing the forfeiture of his *Apprendi* claim. *See Bousley v. United States,* 523 U.S. 614, 622-23, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Smith,* 241 F.3d at 548. Thus, Santos' *Apprendi* claim must fail. *See Mankarious,* 282 F.3d at 943 ("An issue not raised on direct appeal is barred from collateral review absent a showing of *both* good cause for and actual prejudice resulting from the failure to assert it.") (emphasis added).[13]

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[13] This court suspects that Santos (and anyone in his shoes) might feel that the precedent discussed above puts him between a rock and a hard place. On the one hand, Santos must show cause for failing to make an *Apprendi*-like argument because *Apprendi's* foundation was apparent. On the other hand, his attorney's apparent failure to notice and build on that foundation is not ineffectiveness constituting "cause" because attorneys are not required to forecast changes in the law. Perhaps this

D. *Scialabba Claim*

Finally, Santos contends that the Seventh Circuit's opinion in *Scialabba,* 282 F.3d 475, decided subsequent to Santos' direct appeal, requires that his money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) be set aside and that he be re-sentenced. (*See generally* Def.'s Reply). The relevant facts of *Scialabba,* as the government notes, are "amazingly similar" to those of Santos' case. (Gov't Resp., at 22). Indeed, like Santos, defendant Scialabba, along with his co-defendant Cechini, ran an illegal gambling business. *Scialabba,* 282 F.3d at 475. Their business ultimately involved providing video poker machines to bars, restaurants, etc. *Id.* Bar/restaurant patrons would play the poker machines, and when they won, patrons could, if they so chose, (lawfully) use their winning video credits to continue playing video poker, or they could (unlawfully) redeem their video credits for cash. *Id.* at 475-76. Scialabba and Cechini used the contents of the video poker coin boxes (filled with the money of video poker players) to compensate bar/restaurant owners for their role in the business and for any payments made to winning customers, and to fix or replace broken or confiscated video poker machines. *Id.* at 476. As a result of Scialabba's and Cechini's activities—in particular, their

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seeming contradiction can be explained by noting that an effective attorney must choose the best issues to pursue on appeal, and is not ineffective for failing to pursue every non-frivolous issue. *Mason v. Hanks,* 97 F.3d 887, 893 (7th Cir. 1996). In this vein, an attorney cannot be expected to argue for reversal of e very negative precedent. Thus, unless an issue looming on the horizon is so obvious that no attorney in his or her right mind would fail to raise it, an attorney's failure to argue for a change or advance in the law should always be deemed a valid strategic choice, whether or not consciously pursued.

act of sharing the contents of the coin boxes with bar/restaurant owners and their use of video poker revenues to lease and fix equipment—they, like Santos, were convicted of money laundering under § 1956(a)(1)(A)(i). *Id.*

The over-arching question presented by *Scialabba* was whether the term "proceeds," as used in § 1956(a)(1),[14] "refers to the gross income from an offense, or only the net income." *Id.* at 475. The Court determined that the money laundering convictions of the *Scialabba* defendants "depend[ed] on the proposition that gross income is proceeds under [§ 1956]." *Id.* at 476. This determination sprang from the government's argument that Scialabba and Cechini violated the plain meaning of § 1956 by sharing the money collected from the gambling machine coin boxes with bar/restaurant owners and by using the coin box monies to meet the expenses of their gambling business (i.e., by leasing video poker machines and/or obtaining amusement licenses). *Id.* The Court equated such an argument with "saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.*

The Court ultimately thought that "[t]reating the word [proceeds] as a synonym for receipts could produce odd outcomes." *Id.* at 477. It reasoned as follows:

> Consider a slot machine in a properly licensed casino. Gamblers insert coins, and the machine itself

[14] For the text of § 1956(a)(1)(A)(i), *see supra* note 2.

> returns some of them as winnings. Later the casino opens the machine and removes the remaining coins. What are the "proceeds" of this one-armed bandit: what's left in the cash box, or the total that entered through the coin slot? At oral argument the prosecutor sensibly replied that the "proceeds" do not exceed what's left after gamblers have received their jackpots; yet the only difference between the slot machine and the video poker machine is that the slot machine is automated and pays gamblers directly. Likewise, one would suppose, the "proceeds" of drug dealing are the *profits* of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers. It would have been easy enough to write "receipts" in lieu of "proceeds" in § 1956(a)(1); the Rule of Lenity counsels against transmuting the latter into the former and catching people by surprise in the process.
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> . . . If [ ] the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. (citations omitted). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Id. (all marks and italics in original). In the end, the *Scialabba* Court held that "at least when the crime

entails voluntary, business-like operations, 'proceeds' must be *net income;* otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id*. at 475 (emphasis added). As a consequence of this holding, the *Scialabba* Court vacated the money laundering convictions of Scialabba and Cechini (after all, as noted above, the convictions of the *Scialabba* defendants had depended upon the proposition that gross income was proceeds under the statute). *Id*. at 476, 478.

It is this decision that has prompted Santos to argue that his money laundering convictions can no longer stand. Santos wonders how it can be that his use of gambling "proceeds" to pay both winning customers and money collectors constituted money laundering, *see Febus,* 218 F.3d at 790, while the remarkably similar acts of Scialabba and Cechini, which involved compensating bar owners for payments to winners and for their compliance in the gambling scheme, did not constitute money laundering, *see Scialabba,* 282 F.3d at 476-78. Santos ultimately argues that the *Scialabba* decision (and its interpretation of § 1956(a)(1)) is now the "law of the circuit." (Def.'s Reply, at 9). Thus, Santos contends, this court must apply that law to his case and set aside his money laundering convictions. (Def.'s Reply, at 9).[15]

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[15] The court thinks it important to note that Santos' reply brief did not clearly set forth Santos' arguments, nor did it provide this court with ANY law supporting his position. Rather, the brief matter-of-factly states that *Scialabba* applies to Santos' case and then goes on to attack the government's brief writing without ever really explaining why the government's position is (presumably) incorrect. Were Santos currently proceeding *pro se,* this court could forgive the deficiencies in his brief, but he is not. The court reminds Santos' attorneys that it is

The government responds rather simply by arguing that the *Scialabba* decision does not impact, or does not control the decision in Santos' case because *Scialabba* did not overrule the holding in *Febus*. (Gov't Resp., at 26-29).[16] The government supports this argument first by noting that in order for the decision of one panel to overrule that of another, the panel deciding the more recent case must, pursuant to Rule 40(e) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit [hereinafter Cir. Rule 40(e)],[17] "recog-

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their job to clearly and concisely present their client's position and to support that position with law.

[16] The government also argues, in the alternative, that the Seventh Circuit simply "got it wrong" in *Scialabba*. The government asserts: (1) that interpreting the term "proceeds" as *net* proceeds "is contrary to the word's most common and primary meaning;" (2) that such an interpretation will severely hamper federal efforts to curtail organized crime, drug trafficking and business fraud; and, (3) that the Court's interpretation of "proceeds" departs from the approach of other Courts of Appeals. (Gov't Resp., at 30-43). The court shall not address these arguments however, as this court cannot "underrule" the Seventh Circuit. *Donohoe v. Consol. Operating & Prod. Corp.* 30 F.3d 907, 910 (7th Cir. 1994) ("Ours is a hierarchical judiciary, and judges of inferior courts *must* carry out decisions they believe mistaken."). Such arguments are better presented to the Court of Appeals itself.

[17] Circuit Rule 40(e) states:

> **Rehearing Sua Sponte Before Decision.** A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when

nize the prior decision which it seeks to overrule, and circulate the new proposed opinion to the full court prior to the issuance of the new opinion." (Gov't Resp., at 26-27). The government then points out that there is no evidence to suggest that the *Scialabba* panel followed the requirements of Cir. Rule 40(e), and therefore, "clearly *Scialabba* was not meant to overrule [Santos' case]." (Gov't Resp., at 28). Thus, the government contends, "Santos' case is still good law;" and accordingly, this court must abide by that law. (Gov't Resp., at 29).

It may be that the *Scialabba* panel did not follow the dictates of Cir. Rule 40(e) in this case,[18] but this court is unsure why that matters considering that *Scialabba* and *Febus* did not decide the same question. Indeed, while the *Scialabba* Court concerned itself with the interpretation of the term "proceeds," as used in § 1956(a)(1), the *Febus* Court was not asked to, and therefore did not decided *anything* about the term "proceeds."[19]

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published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe v. Roe.*)

[18] At least there is not any evidence to suggest that the *Scialabba* Court followed the dictates of Cir. Rule 40(e) in this particular instance.

[19] In *United States v. Febus,* the parties did not argue over the make-up of "proceeds" (as that term is used in § 1956(a)(1)). 218 F.3d 784, 789 (7th Cir. 2000). Rather, both parties appear to have assumed that "proceeds" equal gross receipts. *Id*. Indeed, from this assumption sprang Santos' argument that his use of illegal "proceeds" to pay the Bolita's collectors and winners merely completed the substantive offense of illegal gambling, and thus did not "promote the carrying on" of the

Consequently, there was *nothing* for *Scialabba* to overrule [20] in *Febus.* Therefore, it seems to this court that Cir. Rule 40(e) is irrelevant to the discussion at hand.

Ultimately, this case is not, as the government would like this court to believe, about whether one case "overrules" another, or whether *Febus* remains "good law." Rather, the real question here is whether Santos, as a prisoner collaterally attacking his conviction, is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds," (as used in § 1956(a)(1)), which came after Santos' convictions under § 1956(a)(1) had become final. The answer to this question appears to be "yes," Santos is so entitled.

Courts have long allowed defendants collaterally attacking their conviction the benefit of decisions which give the federal criminal statute under which they were convicted a more narrow reading than had previously been applied at the time of their conviction. *See Schriro v. Summerlin,* 542U.S. 348, 124 S. Ct. 2519, 2522, 159 L. Ed. 2d 442 (2004) ("New *substantive* rules generally apply retroactively [on collateral review]. This includes decisions that narrow the scope of a criminal statute by interpreting its terms.") (citation omitted) (emphasis in original); *Bousley,* 523 U.S. at 619-20, 118 S. Ct. 1604 (new interpretations of criminal statutes made after a

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Bolita in violation of § 1956(a)(1)(A)(i). *Id*.

[20] "A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, *expresses a judgment upon the same question of law* directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent." Black's Law Dictionary 1104 (6th ed. 1990) (emphasis added).

defendant's conviction under that statute are retroactive on collateral review); *Lanier v. United States,* 220 F.3d 833, 838 (7th Cir. 2000) (noting defendant was entitled, even on collateral review, to the benefit of Court's interpretation of a term in 21 U.S.C. § 848 made after defendant's conviction under § 848 had become final); *United States v. Ryan,* 227 F.3d 1058, 1062-63 (8th Cir. 2000) (determining that when the Supreme Court narrows the interpretation of a criminal statute enacted by Congress, that interpretation may be applied retroactively to § 2255 claims for post-conviction relief); *United States v. Barnhardt,* 93 F.3d 706, 708 (10th Cir. 1996) (Supreme Court decision defining substantive reach of criminal statute can be applied retroactively to cases on collateral review). The rationale behind such a policy begins with the idea that "a statute, under our system of separate powers of government, *can have only one meaning.*" *Brough v. United States,* 454 F.2d 370, 372-73 (7th Cir. 1971) (emphasis added); *accord Bousley,* 523 U.S. at 620-21, 118 S. Ct. 1604 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal.") (citation omitted). In other words, when a court interprets the scope of an existing criminal statute, that interpretation effectively serves as a declaration of what the statute has always meant. *Gates v. United States,* 515 F.2d 73, 78 (7th Cir. 1975). Certainly, if it were any other way, if a statute had a new meaning every time a court saw fit to interpret it, the result would ultimately be that acts covered by the statute might be criminal one day but not the next, and persons committing those acts may or may not be subject to prosecution and imprisonment depending on whether they committed the act pre-interpretation, post-interpretation, or somewhere in-between.

In any event, considering that a statute can have only one meaning from the date of its effectiveness onward (unless of course, the language of the statute has actually been changed by Congress), then where a court narrows the scope of a statute under which a federal prisoner was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal. *Bousley,* 523 U.S. at 620, 118 S. Ct. 1604. Thus, as it would be wholly contrary to our notions of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was a crime, defendants collaterally attacking their conviction are therefore entitled to the benefit of decisions which give a federal criminal statute a more narrow reading than had previously been applied to their own conviction under that statute. *Schriro,* 124 S. Ct. at 2522-23; *Bousley,* 523 U.S. at 619-20, 118 S. Ct. 1604; *Lanier,* 220 F.3d at 838; *Ryan,* 227 F.3d at 1062-63; *Barnhardt,* 93 F.3d at 708.[21]

[21] As is obvious, many of the cases cited here discuss the application of a post-conviction statutory interpretation to habeas proceedings in terms of "retroactivity." In using the term "retroactive" or "retroactivity," such cases seem to imply that a court's interpretation of a statute somehow *changes* the law. Yet, this is simply not the case as a statute does not mean one thing pre-interpretation and then something entirely different post-interpretation. *Gates v. United States,* 515 F.2d 73, 78 (7th Cir. 1975). Ultimately, it seems that many courts discuss statutory cases (like the instant action) in terms of "retroactivity" because it is simply the easiest way to describe the situation at hand. However, even those courts that approach statutory cases in such a manner note that the implications for retroactivity analysis are quite different from those cases in which a new rule of criminal procedure is announced. *See, e.g., Woodruff v. United States,* 131 F.3d 1238, 1242 (7th Cir. 1997) ("When the Supreme Court is announcing what an existing statute has meant all along, the implications for retroactivity analysis are quite different from the case in which it is announcing for the first time another

Returning to the case at hand, the fact that the Seventh Circuit only recently interpreted the term "proceeds" in § 1956(a)(1), does not mean that § 1956(a)(1) now means something entirely different than it did before the Court's interpretation. *Gates,* 515 F.2d at 78 ("A statute does not mean one thing prior to . . . interpretation and something entirely different afterwards."). Rather, the *Scialabba* Court's interpretation of "proceeds" as *net* receipts (versus *gross* receipts) was the law of this Circuit, properly interpreted, at the time of Santos' conviction; it is only that *Scialabba* presented the Seventh Circuit with the first opportunity, since the statute became effective, to decide the question of what constitutes "proceeds." Because the Seventh Circuit's determination that the term "proceeds" only refers to *net* proceeds effectively narrows the interpretation previously applied in Santos' case, there exists the distinct possibility that Santos stands convicted of acts that the law does not make criminal. Thus, Santos is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds" (as used § 1956(a)(1)), in this collateral proceeding. *See Bousley,* 523 U.S. at 619-20, 118 S. Ct. 1604; *Lanier,* 220 F.3d at 838; *Ryan,* 227 F.3d at 1062-63; *Barnhardt,* 93 F.3d at 708.

Consequently, in order for Santos to be guilty of money laundering under the *Scialabba* Court's interpretation of "proceeds," the money used by Santos in the financial transactions between himself and his couriers and/or winners for purposes of promoting his gambling business must have derived from the *net* proceeds of his

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implication of the provisions of the Constitution that bear on criminal procedure.").

illegal gambling business. Although Santos did admit that he used *proceeds* (generally) from his gambling business to pay the winners of his Bolita and to pay for the services of his couriers, the constitution of those proceeds (net versus gross) was never determined. *See Febus,* 218 F.3d at 789-90.[22] Nevertheless, after the opinion in *Scialabba*—in which the Seventh Circuit vacated money laundering convictions originally won on facts that, even the government admits, are "indistinguishable" from those presented in Santos' case, (*see* Gov't Resp., at 26)—it clearly appears that the proceeds admittedly used by Santos to pay winners and couriers *could only have been gross* proceeds, *cf. Scialabba,* 282 F.3d at 476 (Court determined that the money laundering convictions of the *Scialabba* defendants, which were based in part upon coin box payments made to bar/restaurant owners, must have depended on "the proposition that gross income is 'proceeds' under the statute."). In using *gross* proceeds from his Bolita to pay couriers and winners, Santos did not, pursuant to the proper interpretation of "proceeds" espoused by the *Scialabba* Court, violate § 1956(a)(1). *See id.* at 478 ("We now hold that the word 'proceeds' in § 1956(a)(1) denotes net rather than gross income of an unlawful venture."). Thus, Santos is currently imprisoned for acts that are not now, nor ever have been crimes. Accordingly, this court hereby **VACATES** Santos' money laundering convictions under § 1956(a)(1)(A)(i) and under § 1956(h).

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[22] The Court did not determine the character of the proceeds used by Santos to pay winners and couriers because it was never asked to do so. Ultimately, all parties participating in Santos' case seemingly proceeded on the theory that "proceeds" equal gross receipts. *Febus,* 218 F.3d at 789; *see also supra* note 19 and accompanying text.

IV. CONCLUSION

For the foregoing reasons, Santos' Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 is hereby **GRANTED IN PART**. Efrain Santos' money laundering convictions under § 1956(a)(1)(A)(i) and under § 1956(h) are **VACATED**. Santo's § 2255 motion is otherwise denied.

This case is hereby set for a status hearing in front of the undersigned on November 4, 2004, at 11:00 a.m. The court **STAYS** the effect of this order until the November 4 hearing.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

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No. 2:01 CV 501
(arising from No. 2:96 CR 44)

UNITED STATES OF AMERICA, PLAINTIFF

v.

BENEDICTO DIAZ,DEFENDANT

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ORDER

This matter is before the court on a Motion for Reconsideration pursuant to FED. R. CIV. P. 59(e) filed by defendant Benedicto Diaz ("Diaz") on September 17, 2001. In his FED. R. CIV. P. 59(e) motion, Diaz requests that this court reconsider its August 24, 2001 Order summarily denying his Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. The government filed its response to Diaz's FED. R. CIV. P. 59(e) motion on June 9, 2003. Diaz then promptly filed a reply on July 15, 2003. After reviewing all of the materials submitted in this matter, the court, for the following reasons, **GRANTS** Diaz's FED. R. CIV. P. 59(e) motion **IN PART**. As a consequence of this court's decision concerning Diaz's FED. R. CIV. P. 59(e) motion, this Order also addresses the merit of Diaz's § 2255

motion, which, for the following reasons, shall also be **GRANTED IN PART**.

I. BACKGROUND

The long story of the instant action filed by defendant Diaz begins in East Chicago, Indiana with a man named Efrain Santos ("Santos") who ran an illegal gambling enterprise known as a "Bolita." Santos began operating his East Chicago Bolita in the 1970's[1] and continued to do so until approximately 1994. There was a brief period in the late 1970's and early 1980's when Santos was absent from the Bolita business, and during that time, Santo's brother, Roberto Febus (a.k.a. Bobby Santos), served as the Bolita's interim leader. (Tr. 1548-49). However, Santos returned in 1984.

The winning numbers in Santos' Bolita were based upon the daily Pick Three and Pick Four Illinois lottery games, and upon the Puerto Rican Lottery. (Tr. 733-34). Santos had runners accept bets for his Bolita primarily in bars and restaurants in East Chicago. (Tr. 587, 620-21, 734-35). The runners would take a commission of 15-25% from the bet money, (Tr. 738-39, 909), and then deliver the betting slips and the remaining bet money to "collectors," (Tr. 735-36, 740, 747, 1397-98, 1404, 1414). This is where defendant Diaz makes his entrance into the story as Diaz began acting as one of Santos' "collectors" in the mid-1980's. (Tr. 733, 735-36). The main thrust of Diaz's job was to deliver the slips and bet money to Santos. (Tr. 740-41). However, before Diaz

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[1] Before he began operating the Bolita in East Chicago, Indiana, Santos worked for Ken Eto, who ran a Bolita spanning both Illinois and Indiana in the late 1960's and early 1970's. (Tr. 1547-48). It appears Santos took over the Indiana portion of Eto's operation sometime in the early 1970's. (Tr. 1547-48).

made his deliveries, he would often take his "salary" out of the collected bet money, (Tr. 755-56), and on occasion would pay Bolita winners who won $100.00 or less, (Tr. 739).[2]

The FBI began investigating Santos' Bolita in 1992, (Tr. 138-39), and on March 30, 1993, the FBI executed search warrants for Santos' person, his house, his apartment and vehicle, as well as for the persons and vehicles of Diaz and another collector, (Tr. 209-10, 463). From their search, the FBI found betting slips, ledgers, cash and other evidence of Santos' gambling enterprise. (*See, e.g.,* Tr. 209-14, 464-66, 562, 852-55, 1415). After the FBI's search, Santos closed down his Bolita, but only for a few weeks, (Tr. 747, 1420); operations soon resumed, although the location and collection method for the Bolita had changed, (Tr. 747-48, 1419-20).

The FBI continued its surveillance of Santos' Bolita and conducted another search on June 22, 1993, (Tr. 221, 466), which returned further evidence of Santos' illegal gambling enterprise, (*see*, *e.g.*, Tr. 221-23, 466-67, 562, 855-56). This second search did not faze Santos, and the Bolita continued running without interruption. (Tr. 1429). The FBI then executed a third search on October 12, 1993, in which it again found betting sheets, betting slips, cash and other evidence of Santos' illegal Bolita. (*See*, *e.g.*, Tr. 576-77).

All of the evidence collected in the many raids on Santos' Bolita resulted in a ten (10) count Indictment against not only Santos, but also against Diaz and several other men all in some way connected to the illegal gambling enterprise. (*See* Indictment in Cause

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[2] Santos reportedly paid the Bolita's "big" winners himself. (Tr. 739, 1427).

No. 2:96 CR 44, at docket # 1 [hereinafter Indictment]). As it relates to the instant action, the Indictment charged defendant Diaz with: (1) conspiracy to conduct an illegal gambling business in violation of 18 U.S.C. § 371; (2) conducting an illegal lottery business in violation of 18 U.S.C. § 1955; (3) conspiracy to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h); and, (4) money laundering to promote an illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i). (Indictment, at Counts 1-4).

Originally pleading "not guilty" to the crimes charged, Diaz later accepted the terms of a Plea Agreement. (*See* Def.'s Pet. to Enter Change of Plea in Cause No. 2:96 CR 44, at docket # 188 [hereinafter Plea Agreement]). In pleading guilty to the crime of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that business in violation of § 1956(a)(1)(A)(i)[3] and § 1956(h)[4], Diaz freely

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[3] Section 1956(a)(1)(A)(i) provides, in pertinent 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;
> >
> > * * *
>
> 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.

[4] Section 1956(h) provides, in pertinent part:

admitted that he received payment for his "collecting" services by taking money directly out of the total collected bets, (Change of Plea Tr. 31-32); it was ultimately the admission of such facts that served as the basis for Diaz's conviction under § 1956(a)(1)(A)(i) and § 1956(h), (Change of Plea Tr. 32).[5] In exchange for Diaz's plea of guilty and for his "complete, truthful and candid information and testimony" at the trial of six of Diaz's co-defendants (who had pled not guilty), the government agreed to file a downward departure motion pursuant to United States Sentencing Guideline ("USSG") § 5K1.1. (Plea Agreement ¶ 9(i)). However, the Plea Agreement noted that should Diaz fail to provide complete, truthful and candid information and testimony, then the government would no longer be obligated to file the departure motion as promised, and Diaz would not be allowed to withdraw his guilty plea. (Plea Agreement ¶ 9(i)).

Before his sentencing, the government informed Diaz that it would not seek the downward departure as promised because it believed Diaz had failed to testify truthfully in accordance with his obligation to do so via his Plea Agreement. Consequently, Diaz moved to withdraw his plea of guilty. (*See* Def.'s Mot. Withdraw Plea of Guilty in Cause No. 2:96 CR 44, at docket # 351).

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

[5] At Diaz's change of plea hearing, the government noted that "the payment of [Diaz's]—basically, his salary, was the use of the specified unlawful activity money to further promote the specified unlawful activity." (Change of Plea Tr. 32).

After a hearing on the issue, this court denied Diaz's request to withdraw his plea of guilty, noting that Diaz's trial testimony was inconsistent with earlier statements made by Diaz under oath. (*See* Order dated June 4, 1998 in Cause No. 2:96 CR 44, at docket # 370). In the end, Diaz was sentenced to 108 months imprisonment and fined $5,000.00. (Minute Entry in Cause No. 2:96 CR 44, at docket # 413).

After receiving his sentence, Diaz promptly filed his Notice of Appeal on June 12, 1998. (*See* Notice of Appeal in Cause No. 2:96 CR 44, at docket # 417). On appeal, Diaz contested only this court's denial of his motion to withdraw his guilty plea. He argued that "since his testimony fulfilled his side of the bargain by assisting the convictions of his co-defendants, the government breached the [plea] agreement by failing to file a downward departure motion for him under § 5K1.1." *United States v. Febus*, 218 F.3d 784, 790 (7th Cir. 2000) (footnote omitted). The Court of Appeals rejected Diaz's argument and affirmed his conviction. *Id.* at 791.

On August 16, 2001, Diaz filed a motion requesting that this court vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (Def.'s § 2255 Mot. in Cause No. 2:01 CV 501, at docket # 1 [hereinafter Def.'s § 2255 Mot.]). The undersigned engaged in the prescribed initial consideration, (*see* RULES GOVERNING SECTION 2255 PROCEEDINGS, RULE 4(b)), and summarily denied Diaz's motion on the basis that Diaz had waived his right to file such a motion through the following language in his Plea Agreement:

> I expressly waive my right to appeal my sentence on any ground, including any appeal right conferred by

> Title 18, United States Code, Section 3742. *I also agree not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding under Title 28, United States Code, Section 2255*. Plea Agreement ¶ 9(m) (emphasis added).

(*See* Order dated Aug. 24, 2001 in Cause No. 2:01 CV 501, at docket # 2).

Unhappy with this court's dismissal of his § 2255 motion, Diaz subsequently filed a motion for reconsideration under FED.R.CIV.P. 59(e). In his motion for reconsideration, Diaz first informs the court that, in (what appeared to be) direct contravention of an express promise in the Plea Agreement not to appeal his case, Diaz nonetheless filed an appeal with the Seventh Circuit. (Def.'s Mot. for Recons. in Cause No. 2:01 CV 501, at docket # 5 ¶ 2 [hereinafter Def.'s Mot. Recons.]). Diaz then argues that because the government failed to invoke the Plea Agreement's waiver as a defense to Diaz's appeal, the government has now forfeited its right to invoke the waiver of collateral attack as a defense to his § 2255 motion. (Def.'s Mot. Recons. ¶ 2).

On November 28, 2001, this court ordered the government to respond to Diaz's FED.R.CIV.P. 59(e) motion. (Order dated Nov. 28, 2001 in Cause No. 2:01 CV 501, at docket # 6). However, due to a long delay caused by several continuances arising out of the Seventh Circuit's decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002)—an opinion which the government originally suspected conflicted with the Seventh

Circuit's holding in *Febus*[6]—the government did not tender its response until June 9, 2003. (*See* Gov't Resp. in Cause No. 2:01 CV 501, at docket # 32 [hereinafter Gov't Resp.]). Diaz then filed his reply on July 15, 2003. (*See* Def.'s Reply in Cause No. 2:01 CV 501, at docket # 33 [hereinafter Def.'s Reply]).

II. DEFENDANT'S FED. R. CIV. P. 59(e) MOTION

A. *Standard of Review*

RULE 59(e) permits parties to file, within ten (10) days of the entry of a judgment, a motion to reconsider that judgment. FED.R.CIV.P. 59(e). Motions filed under this RULE are ultimately designed "to correct manifest errors of law or fact or to present newly discovered evidence." *Publishers Res., Inc. v. Walker-Davis Publications, Inc.,* 762 F.2d 557, 561 (7th Cir. 1985). Therefore, a FED.R.CIV.P. 59(e) motion is not appropriately used for the purpose of rehashing old arguments or for presenting new arguments "that could and should have been presented to the district court prior to the judgment." *Moro v. Shell Oil Co.,* 91 F.3d 872, 876 (7th Cir. 1996). The decision of whether to grant or deny a FED.R.CIV.P. 59(e) motion is entrusted to the "sound judgment" of the district court. *LB Credit Corp. v. Resolution Trust Corp.,* 49 F.3d 1263, 1267 (7th Cir. 1995).

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[6] *United States v. Febus*, 218 F.3d 784 (7th Cir. 2000), is the Seventh Circuit decision dispensing with not only the appeal filed by Diaz, but also the appeals filed by several of his co-defendants including Efrain Santos, the proprietor of the Bolita.

B. *Discussion*

In his FED.R.CIV.P. 59(e) motion, Diaz makes several arguments which he believes clearly demonstrate that this court committed manifest error in summarily denying his § 2255 motion. First, Diaz argues that because he was allowed to appeal his case before the Seventh Circuit, or rather because the government failed to assert that, pursuant to the Plea Agreement, Diaz had waived his right to appeal, the government has now forfeited its right to invoke the Plea Agreement's waiver of collateral attack as a defense to Diaz's § 2255 motion. (Def.'s Mot. Recons. ¶ 2). In other words, Diaz argues that the government cannot pick and choose which waiver in his Plea Agreement it shall uphold and which one it shall not; and therefore, by choosing not to invoke the defense of waiver at Diaz's appeal, the government effectively waived any defense of waiver based upon the Plea Agreement. (*See* Def.'s Mot. Recons. ¶ 2). Accordingly, Diaz contends that this court should not have summarily denied his § 2255 motion based on waiver, but rather must address the merits of his collateral attack. (Def.'s Mot. Recons. ¶ 2).

While a defense of waiver may certainly be waived, *McKnight v. Dean*, 270 F.3d 513, 515 (7th Cir. 2001), the government did not waive any such defense in the instant action. At his appeal, Diaz argued that he should be permitted to withdraw his plea of guilty because the government had breached the Plea Agreement by refusing to file a downward departure motion under USSG § 5K1.1. *Febus*, 218 F.3d at 790. Thus, in essence, Diaz's appeal presented the Seventh Circuit with a question concerning the *validity of his Plea Agreement*. As the waiver within Diaz's Plea Agreement *only*

precludes him from appealing his *sentence,* (*see* Plea Agreement ¶ 9(m)), Diaz was therefore perfectly free to appeal on the grounds he ultimately chose to appeal, *see Blacharski v. United States*, 215 F.3d 792, 793-94 (7th Cir. 2000) (where appellant only waived right to challenge sentence, he was free to appeal validity of plea agreement); *Bridgeman v. United States*, 229 F.3d 589, 591-92 (7th Cir. 2000) (language of plea agreement waiving right to challenge sentence did not preclude defendant from collaterally attacking his underlying conviction). More importantly, the government's decision to forgo asserting the Plea Agreement's waiver of appeal was entirely appropriate, *see Blacharski*, 215 F.3d at 793-94, and certainly does not now harm the government's ability to (properly) raise the defense of waiver against any collateral attack initiated by Diaz. Consequently, Diaz's argument that the government waived its right to assert waiver of collateral attack as a defense to his § 2255 motion must fail.

The rest of Diaz's FED.R.CIV.P. 59(e) motion simply reiterates all the arguments already made in his § 2255 motion. More particularly, defendant argues that: (1) the facts to which he pled guilty do not constitute money laundering, and therefore he is actually innocent of the crime for which he was convicted, (*compare* Def.'s Mot. Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 19-22); (2) since he is not guilty of money laundering, his counsel was ineffective in allowing him to be sentenced in accordance with the Sentencing Guidelines pertaining to money laundering, (*compare* Def.'s Mot. Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 27-30);[7] and, (3) the sentence

[7] In essence, Diaz contends that while the facts to which he pled guilty clearly indicate that he is "guilty of participating in a gambling

enhancement he received for obstruction of justice was improper, (*compare* Def.'s Mot. for Recons. ¶ 4 *with* Def.'s § 2255 Mot., at 33-34). As stated above, a FED.R.CIV.P. 59(e) motion is not the proper vehicle for rehashing old arguments. *Moro*, 91 F.3d at 876. Yet, in this particular instance, Diaz's insistence upon repeating his claims brings to the court's attention an important fact that it inadvertently overlooked when denying Diaz's § 2255 motion based upon the waiver in his Plea Agreement. Indeed, Diaz's claim that the facts admitted in his plea of guilty do not establish the elements of money laundering (and therefore, that he is actually innocent of the crime for which he was convicted) is a challenge to Diaz' s conviction, or rather, a challenge to the factual basis which generated his criminal sentence. Such a challenge is not precluded by the waiver in Diaz's plea agreement which only addresses Diaz's right to contest his *sentence* in a collateral proceeding; the plea agreement remains silent as to whether Diaz may contest his *conviction*, (*see* Plea Agreement ¶ 9(m)).

Accordingly, this court erred in summarily denying Diaz's actual innocence claim based upon the waiver in his Plea Agreement. However, with regard to Diaz's challenge to the obstruction of justice enhancement and his claim of ineffective assistance, the court notes that both of these issues were properly dismissed; such

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enterprise," they do not support his money laundering conviction. (Def.'s § 2255 Mot., at 11). Accordingly, Diaz argues that his attorney should *not* have allowed the court to sentence him under those guidelines which concern the offense of money laundering, but rather should have ensured that he was sentenced under the "gambling guidelines" or, in the alternative, sentenced only for "the proceeds directly attributable to him, $90,000.00 or $180,0000 not $2 million." (Def.'s § 2255 Mot., at 23).

claims ultimately challenge the sentence Diaz received for his plea of guilty, and thus appear to run afoul of the waiver in his Plea Agreement, (*see* Plea Agreement ¶ 9(m)). Therefore, the court hereby **GRANTS** Diaz's FED.R.CIV.P. 59(e) motion **IN PART**, and shall proceed to review the merits of Diaz's actual innocence claim *only*.

III. DEFENDANT'S MOTION PURSUANT TO 28 U.S.C. § 2255

A. *Standard of Review*

"No prisoner has a constitutional entitlement to further review of the final judgment in a criminal case." *Farmer v. Litscher*, 303 F.3d 840, 844 (7th Cir. 2002) (citing *Freeman v. Page*, 208 F.3d 572, 576 (7th Cir. 2000)). However, with the enactment of 28 U.S.C. § 2255, Congress gave federal prisoners a right to launch a collateral attack against their conviction. Section 2255 ultimately grants the federal courts power "to vacate, set aside or correct the sentence" of a convicted prisoner, 28 U.S.C. § 2255 ¶ 1, but only if the prisoner is able to expose flaws in the conviction "which are jurisdictional in nature, constitutional in magnitude, or result in a complete miscarriage of justice," *Boyer v. United States*, 55 F.3d 296, 298 (7th Cir. 1995) (citation omitted). Thus, "relief under 28 U.S.C. § 2255 is reserved for extraordinary situations." *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993)).[8]

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[8] Emphasizing the social benefit of finality and advancing a jurisprudence of limited post conviction success, the United States Supreme Court has stated:

> Once the defendant's chance to appeal has been waived or ex-

A post-conviction proceeding under § 2255 "is not to be used as a substitute for a direct appeal." *United States v. Barger*, 178 F.3d 844, 848 (7th Cir. 1999) (citing *Theodorou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989)); *accord Coleman v. United States*, 318 F.3d 754, 760 (7th Cir. 2003). Accordingly, the doctrine of procedural default precludes the district court from considering certain claims presented in a § 2255 motion that the defendant could have raised on direct appeal, unless the defendant "can show good cause for failing to raise the issue[s] and actual prejudice." *Galbraith v. United States*, 313 F.3d 1001, 1006 (7th Cir. 2002); *accord Mankarious v. United States*, 282 F.3d 940, 943 (7th Cir. 2002) ("An issue not raised on direct appeal is barred from collateral review absent a showing of both good cause for and actual prejudice resulting from the failure to assert it."). "A showing that a refusal to consider the issue would be a fundamental miscarriage of justice" may also aid a prisoner in attaining review of a procedurally defaulted issue. *Galbraith*, 313 F.3d at 1006 (internal quotation marks and citation omitted).

B. *Discussion*

Diaz seeks relief pursuant to § 2255 by claiming that the opinion expressed by the Seventh Circuit in *Scialabba*, 282 F.3d 475, renders him innocent of the crime for which he was convicted, and thus requires that

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hausted . . . [the court is] entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, *a final judgment commands respect*. *United States v. Frady*, 456 U.S. 152, 164-65 (1982) (emphasis added).

his conviction be set aside and that he be re-sentenced. Before the court addresses the merit of Diaz's claim, it is perhaps prudent to note here that Diaz's § 2255 motion does not actually mention the *Scialabba* decision by name in as far as *Scialabba* had not yet been decided when Diaz filed his motion to vacate pursuant to § 2255.[9] Rather, in his § 2255 motion Diaz merely argues that the facts to which he pled guilty did not establish the crime of money laundering, and therefore he was (and is) factually innocent of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of § 1956(a)(1)(A)(i) and § 1956(h). (Def.'s § 2255 Mot., at 19-22).

It was ultimately the government who brought the *Scialabba* opinion to this court's attention and to the forefront of this § 2255 inquiry. Indeed, four (4) months after this court issued its November 28, 2001 Order requiring the government to respond to Diaz's FED.R.CIV.P. 59(e) motion, the government requested an extension of time in which to file its response because it believed the (then-recent) decision in *Scialabba* had the potential to not only impact the disposition of Diaz's FED.R.CIV.P. 59(e) motion, but more importantly, might also affect the claim of actual innocence Diaz had presented in his § 2255 motion. (*See* Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9).[10] In

[9] Diaz filed his § 2255 motion on August 16, 2001, and *Scialabba* was not decided until early 2002.

[10] In its motion for an extension of time, the government argued that the Seventh Circuit's interpretation of money laundering in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), directly contradicted its previous interpretation of money laundering in *Febus*, 218 F.3d 784 (the decision dispensing with the appeals of Diaz and several of his co-

any event, in the intervening time between the government's first request for an extension of time and its eventual response, both parties have agreed that the *Scialabba* decision does indeed directly tie onto the original claim of actual innocence presented by Diaz in his § 2255 motion. Consequently, the court shall address Diaz's claim of actual innocence within the framework of the *Scialabba* decision.

As Diaz's claim of actual innocence centers upon the Seventh Circuit's opinion in *Scialabba,* it is perhaps best to start this discussion by summarizing the facts of that case. Accordingly then, to begin with, the *Scialabba* action, like the case at hand, revolved around an illegal gambling business. *Scialabba*, 282 F.3d at 475. The business, run by two men, Scialabba and Cechini, involved providing video poker machines to bars, restaurants, etc. *Id.* Bar/restaurant patrons would play the poker machines, and when they won patrons could, if they so chose, (lawfully) use their winning video credits to continue playing video poker, or they could (unlawfully) redeem their video credits for cash. *Id.* at 475-76. *Scialabba* and *Cechini* used the contents of the video poker coin boxes (filled with the money of video poker players) to compensate bar/restaurant owners for their role in the business and for any payments made to winning customers, and to fix or replace broken or

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defendants). (Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9). Therefore, the government requested an extension of time to respond to Diaz's FED. R. CIV. P. 59(e) motion so that it might first review the *Scialabba* decision and consider its relationship with *Febus*, and then determine what impact (if any) the *Scialabba* decision had upon Diaz's conviction. (Gov't Mot. for Continuance in Cause No. 2:01 CV 501, at docket # 9).

confiscated video poker machines. *Id.* at 476. As a result of Scialabba's and Cechini's activities—in particular, their act of sharing the contents of the coin boxes with bar/restaurant owners and their use of video poker revenues to lease and fix equipment—they were convicted of money laundering under § 1956(a)(1)(A)(i). *Id.*

The over-arching question presented by *Scialabba* was whether the term "proceeds," as used in § 1956(a)(1),[11] "refers to the gross income from an offense, or only the net income." *Id.* at 475. The Court determined that the money laundering convictions of the *Scialabba* defendants "depend[ed] on the proposition that *gross* income is proceeds under [§ 1956]." *Id.* at 476 (emphasis added). This determination sprang from the government's argument that Scialabba and Cechini violated the plain meaning of § 1956 by sharing the money collected from the gambling machine coin boxes with bar/restaurant owners and by using the coin box monies to meet the expenses of their gambling business (i.e., by leasing video poker machines and/or obtaining amusement licenses). *Id.* The Court equated such an argument with "saying that every drug dealer commits money laundering by using the receipts from sales to purchase more stock in trade, that a bank robber commits money laundering by using part of the loot from one heist to rent a getaway car for the next, and so on." *Id.*

The Court ultimately thought that "[t]reating the word [proceeds] as a synonym for receipts could produce odd outcomes." *Id.* at 477. It reasoned as follows:

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[11] For the text of § 1956(a)(1), *see supra* note 3.

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

. . . If [ ] the word "proceeds" is synonymous with gross income, then we would have to decide whether, as a matter of statutory construction (distinct from double jeopardy), it is appropriate to convict a person of multiple offenses when the transactions that violate one statute necessarily violate another. (citations omitted). By reading § 1956(a)(1) to cover only transactions involving profits, we curtail the overlap and ensure that the statutes may be applied independently to sequential steps in a criminal enterprise.

Id. (all marks and italics in original). In the end, the *Scialabba* Court held that "at least when the crime entails voluntary, business-like operations, 'proceeds' must be *net income*; otherwise the predicate crime merges into money laundering (for no business can be carried on without expenses) and the word 'proceeds' loses operational significance." *Id.* at 475 (emphasis added). As a consequence of this holding, the *Scialabba* Court vacated the money laundering convictions of Scialabba and Cechini. *Id.* at 478.

Returning to the case at hand, Diaz argues that the *Scialabba* decision must "control" the outcome of his actual innocence claim. (Def.'s Reply, at 3). Defendant makes a neat (if somewhat legally superficial) comparison of his actual innocence claim to the claims and facts presented by *Scialabba*, and declares his case to be "indistinguishable" from *Scialabba*. (Def.'s Reply, at 3-5). He ultimately believes that the *Scialabba* decision makes very clear that the conduct which caused him to be convicted under § 1956(a)(1)(A)(i) and § 1956(h)—withdrawing his salary from the total collected bet money[12]—was not in fact criminal, (Def.'s Reply, at 3); after all, the *Scialabba* Court determined that the remarkably similar conduct committed by the *Scialabba* defendants—compensating bar owners from the total collected bet money for payments to winners and for their compliance in the gambling scheme—did not constitute money laundering, *Scialabba*, 282 F.3d at 476-78.

The government quite agrees that "*Scialabba* and Diaz's claim are indistinguishable in their facts . . . ."

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[12] *See supra* note 5.

(Gov't Resp., at 24). More importantly, the government seemingly admits that were this court to apply the *Scialabba* Court's decision (and thus its interpretation of "proceeds") to this § 2255 proceeding, then the act upon which Diaz was convicted would not actually constitute money laundering. (*See* Gov't Resp., at 24). However, the government contends that the *Scialabba* decision does not apply to this case. (Gov't Resp., at 25-27).

Instead, the government directs this court's attention to the Seventh Circuit's earlier decision in *Febus*, 218 F.3d 784, which dispenses with the appeals of Diaz and his co-defendants. (Gov't Resp., at 24). In particular, the government points to the *Febus* Court's discussion concerning the money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) of Efrain Santos.[13] (Gov't Resp., at 24). In rejecting Santos' argument that "the evidence was insufficient to convict him of money laundering because his cash payments to the bolita's collectors and winners were essential transactions of the illegal gambling business, and thus cannot also constitute transactions under" § 1956(a)(1)(A)(i), the *Febus* Court stated:

> In this case, the government established that Santos reinvested the bolita's proceeds to ensure its continued operation for over 5 years, well beyond the 30 days required to complete the substantive offense of illegal gambling under 18 U.S.C. § 1955. Furthermore, [Santos'] own records show that the income to his bolita expanded from approximately $250,000.00

[13] As noted above in Section I, Efrain Santos was the Bolita's proprietor and was indicted along with Diaz and several others.

> per year for the years 1989 to 1992, to $330,000.00 for 1993, and up to $410,000.00 for 1994. His payments to his collectors, Diaz and Morales, compensated them for collecting the increased revenues and transferring those funds back to him. And his payments to the winning players promoted the bolita's continuing prosperity by maintaining and increasing the players' patronage. (citation omitted). Therefore, the government produced sufficient evidence to enable a reasonable jury to find Santos guilty of money laundering beyond a reasonable doubt.

Febus, 218 F.3d at 789-90.

The government sets its focus upon *Febus* because it believes that the reasoning employed by the *Febus* Court in affirming Santos' money laundering convictions under § 1956(a)(1)(A)(i) and § 1956(h) control the fate of Diaz's current claim of actual innocence. (Gov't Resp., at 25-27). Indeed, the government contends that although *Scialabba* was decided after *Febus* (and appears, at least on the surface, to conflict with *Febus* in its interpretation of what constitutes money laundering), *Scialabba* never explicitly overruled *Febus*, and therefore *Febus* remains good law and must govern the outcome of Diaz's current claim of actual innocence. (Gov't Resp., at 25-27).[14] The government supports this

[14] The government also argues that the Seventh Circuit's decision in *Scialabba* "is not well reasoned nor is it a proper interpretation of the promotion prong of the money laundering statute." (Gov't Resp., at 27). The government supports its general belief that the *Scialabba* Court "got it wrong" with several pages of interesting and well-thought-out arguments. However, the court shall not determine the merit of this portion of the government's brief, as this court cannot "underrule" the Seventh Circuit. *Donohoe v. Consol. Operating & Prod. Corp.* 30 F.3d

argument by first noting that in order for the decision of one panel to overrule that of another, the panel deciding the more recent case must, pursuant to RULE 40(e) of the CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT [hereinafter CIR. RULE 40(e)],[15] "recognize the prior decision which it seeks to overrule, and circulate the new proposed opinion to the full court prior to the issuance of the new opinion." (Gov't Resp., at 25). The government then points out that there is no evidence to suggest that the *Scialabba* panel followed the requirements of CIR. RULE

907, 910 (7th Cir. 1994) ("Ours is a hierarchical judiciary, and judges of inferior courts *must* carry out decisions they believe mistaken . . .") (internal quotation marks and citation omitted) (emphasis added)). Such arguments are better presented to the Court of Appeals itself.

[15] CIRCUIT RULE 40 (e) states:

> **Rehearing Sua Sponte Before Decision.** A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing en banc on the question of (e.g., overruling Doe v. Roe.)

40(e), and therefore, "*Scialabba* does not overrule [*Febus*]." (Gov't Resp., at 25).

The court has once before addressed this exact argument in an October 20, 2004 Order which discussed (and ultimately granted in part) the § 2255 claims made by Diaz's co-defendant Santos. As was the case in the instant action, the government initially raised the issue of *Scialabba* during Santos' § 2255 proceeding, and like Diaz does now, Santos argued that the *Scialabba* Court's understanding of the money laundering statute (given its interpretation of the term "proceeds") applied to his case, and therefore the actions for which he was convicted under § 1956(a)(1)(A)(i) and § 1956(h) did not actually constitute money laundering. And, like it does in the instant action, the government argued that *Scialabba* did not overrule *Febus*, and therefore requested that this court apply the *Febus* Court's interpretation of money laundering to Santos' claim of innocence under § 2255. This court disagreed with the government's position in Santos' § 2255 proceeding, and does so again in the instant action.

The reasoning this court employed in Santos' § 2255 proceeding to demonstrate error in the government's position that "*Scialabba* does not overrule [*Febus*]" and thus, "[*Febus*] remains good law," (Gov't Resp., at 25), applies equally to the matter at hand, and thus this court shall repeat it verbatim here:

> It may be that the *Scialabba* panel did not follow the dictates of CIR. RULE 40(e) in this case,[16] but this

[16] At least there is not any evidence to suggest that the *Scialabba* Court followed the dictates of CIR. RULE 40(e) in this particular instance. *See generally Scialabba*, 282 F.3d 475.

> court is unsure why that matters considering that *Scialabba* and *Febus* did not decide the same question. Indeed, while the *Scialabba* Court concerned itself with the interpretation of the term "proceeds," as used in § 1956(a)(1), the *Febus* Court was not asked to, and therefore did not decided *anything* about the term "proceeds."[17] Consequently, there was *nothing* for *Scialabba* to overrule[18] in *Febus*. Therefore, it seems to this court that CIR. RULE 40(e) is irrelevant to the discussion at hand.

Ultimately, the true issue in the instant action, as it was in Santos' case, is whether Diaz, as a prisoner collaterally attacking his conviction, is entitled to the benefit of the *Scialabba* Court's interpretation of the money laundering statute (with respect to the term "proceeds" as used in § 1956(a)(1)), which came after Diaz's conviction under that statute became final. And also as it was in Santos' case, the answer to this question appears to be yes. The court shall once again quote verbatim from its Order discussing Santos' § 2255

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[17] In *Febus,* the parties did not argue over the make-up of "proceeds"(as that term is used in § 1956(a)(1)). 218 F.3d at 789. Rather, both parties appear to have assumed that "proceeds" equal gross receipts. *Id.* Indeed, from this assumption sprang Santos' argument that his use of illegal "proceeds" to pay the Bolita's collectors and winners merely completed the substantive offense of illegal gambling, and thus did not "promote the carrying on" of the Bolita in violation of § 1956(a)(1)(A)(i). *Id.*

[18] "A judicial decision is said to be overruled when a later decision, rendered by the same court or by a superior court in the same system, *expresses a judgment upon the same question of law* directly opposite to that which was before given, thereby depriving the earlier opinion of all authority as a precedent." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990) (emphasis added).

motion because the reasoning employed in applying *Scialabba* to Santos' case also applies here:

> Courts have long allowed defendants collaterally attacking their conviction the benefit of decisions which give the federal criminal statute under which they were convicted a more narrow reading than had previously been applied at the time of their conviction. *See Schriro v. Summerlin*, __ U.S. __, 124 S. Ct. 2519, 2522 (2004) ("New *substantive* rules generally apply retroactively [on collateral review]. This includes decisions that narrow the scope of a criminal statute by interpreting its terms.") (citation omitted) (emphasis in original)); *Bousley v. United States*, 523 U.S. 614, 619-20 (1998) (new interpretations of criminal statutes made after a defendant's conviction under that statute are retroactive on collateral review); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000) (noting defendant was entitled, even on collateral review, to the benefit of Court's interpretation of a term in 21 U.S.C. § 848 made after defendant's conviction under § 848 had become final); *United States v. Ryan*, 227 F.3d 1058, 1062-63 (8th Cir. 2000) (determining that when the Supreme Court narrows the interpretation of a criminal statute enacted by Congress, that interpretation may be applied retroactively to § 2255 claims for post-conviction relief); *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (Supreme Court decision defining substantive reach of criminal statute can be applied retroactively to cases on collateral review). The rationale behind such a policy begins with the idea that "a statute, under our system of separate powers of government, *can have only one*

meaning." *Brough v. United States*, 454 F.2d 370, 372-73 (7th Cir. 1971) (emphasis added); *accord Bousley*, 523 U.S. at 620-21 ("[U]nder our federal system it is only Congress, and not the courts, which can make conduct criminal.") (citation omitted)). In other words, when a court interprets the scope of an existing criminal statute, that interpretation effectively serves as a declaration of what the statute has always meant. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Certainly, if it were any other way, if a statute had a new meaning every time a court saw fit to interpret it, the result would ultimately be that acts covered by the statute might be criminal one day but not the next, and persons committing those acts may or may not be subject to prosecution and imprisonment depending on whether they committed the act pre-interpretation, post-interpretation, or somewhere in-between.

In any event, considering that a statute can have only one meaning from the date of its effectiveness onward (unless, of course, the language of the statute has actually been changed by Congress), then where a court narrows the scope of a statute under which a federal prisoner was previously convicted, there exists the possibility that the prisoner now stands convicted of an act that the law never made criminal. *Bousley*, 523 U.S. at 620. Thus, as it would be wholly contrary to our notions of justice and fairness to allow a defendant to serve a prison term for an act that is not, nor ever was, a crime, defendants collaterally attacking their conviction are therefore entitled to the benefit of decisions which give a federal criminal statute a more narrow reading than

had previously been applied to their own conviction under that statute. *Schriro*, 124 S. Ct. at 2522-23; *Bousley*, 523 U.S. at 619-20; *Lanier*, 220 F.3d at 838; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.[19]

Thus, the fact that the Seventh Circuit only recently interpreted the term "proceeds" in § 1956(a)(1) of the money laundering statute, does not mean that the statute now means something entirely different than it did before the Court's interpretation. *Gates*, 515 F.2d at 78 ("A statute does not mean one thing prior to . . . interpretation and something entirely different afterwards."). Rather, the *Scialabba* Court's interpretation of "proceeds" as *net* receipts (versus *gross* receipts) was the law of this Circuit, properly interpreted, at the time of Diaz's conviction; it is only that

[19] As is obvious, many of the cases cited here discuss the application of a post-conviction statutory interpretation to habeas proceedings in terms of "retroactivity." In using the term "retroactive" or "retroactivity," such cases seem to imply that a court's interpretation of a statute somehow *changes* the law. Yet, this is simply not the case as a statute does not mean one thing pre-interpretation and then something entirely different post-interpretation. *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975). Ultimately, it seems that many courts discuss statutory cases (like the instant action) in terms of "retroactivity" because it is simply the easiest way to describe the situation at hand. However, even those courts that approach statutory cases in such a manner note that the implications for retroactivity analysis are quite different from those cases in which a new rule of criminal procedure is announced. *See, e.g.*, *Woodruff v. United States*, 131 F.3d 1238, 1242 (7th Cir. 1997) ("When the Supreme Court is announcing what an existing statute has meant all along, the implications for retroactivity analysis are quite different from the case in which it is announcing for the first time another implication of the provisions of the Constitution that bear on criminal procedure.").

Scialabba presented the Seventh Circuit with the first opportunity, since the statute became effective, to decide the question of what constitutes "proceeds." Because the Seventh Circuit's determination in *Scialabba* that the term "proceeds" only refers to *net* proceeds effectively narrows the interpretation of money laundering previously applied in Diaz's case, there exists the distinct possibility that Diaz stands convicted of acts that the law does not make criminal. Therefore, Diaz is entitled to the benefit of the *Scialabba* Court's interpretation of "proceeds" in this collateral proceeding. *See Bousley*, 523 U.S. at 619-20; *Lanier*, 220 F.3d at 838; *Ryan*, 227 F.3d at 1062-63; *Barnhardt*, 93 F.3d at 708.

Consequently, in order for Diaz to be guilty of conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and § 1956(h), the money from which Diaz withdrew his salary must have derived from the *net* proceeds of the illegal gambling business run by Santos. *See Scialabba*, 282 F.3d at 475. However, after the opinion in *Scialabba*—in which the Seventh Circuit vacated money laundering convictions originally won on facts that, even the government admits, are "indistinguishable" from those presented by Diaz's actual innocence claim, (*see* Gov't Resp., at 24)—it clearly appears that the total collected bet monies from which Diaz admittedly withdrew his salary *could only have been gross* proceeds, *cf. Scialabba*, 282 F.3d at 476 (Court determined that the money laundering convictions of the *Scialabba* defendants, which were based in part upon payments made to bar/restaurant owners from collected coin box monies, must have depended on

"the proposition that gross income is 'proceeds' under the statute."). In using *gross* proceeds from the Bolita to commit the act for which he was convicted, Diaz could not have, given the proper interpretation of the money laundering statute espoused by the *Scialabba* Court, conspired to commit money laundering. Thus, Diaz is currently imprisoned for an act that is not now, nor ever was a crime. Accordingly, this court hereby **VACATES** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h).

IV. CONCLUSION

For the foregoing reasons, this court hereby **GRANTS** Diaz's Motion pursuant to FED. R. CIV. P. 59(e) **IN PART**, (docket # 5 in Cause No. 2:01 CV 501), reconsidering *only* his claim of actual innocence. This court also **GRANTS** Diaz's Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 **IN PART**, (docket # 1 in Cause No. 2:01 CV 501), and consequently **VACATES** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h).

In accordance with this court's decision to **VACATE** Diaz's conviction for conspiring to use the proceeds of an illegal gambling business to promote the carrying on of that illegal gambling business in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and 18 U.S.C. § 1956(h), this court **ORDERS**:

(1) that the United States Bureau of Prisons release defendant Benedicto Diaz from its custody;

(2) that defendant Benedicto Diaz post a $20,000.00 unsecured bond for his release;

(3) that defendant Benedicto Diaz report to the United States Probation Office in the Northern District of Indiana within 48 hours of his release from the custody of the Bureau of Prisons; and,

(4) that defendant Benedicto Diaz surrender any passport to the United States Probation Office within 48 hours of his release.

SO ORDERED

Enter: February 24, 2005

/s/ JAMES T. MOODY
JUDGE JAMES T. MOODY
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

———————

No. 04-4221

EFRAIN SANTOS, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA

———————

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division

———————

[Filed: Apr. 8, 2005]

———————

The following is before the court: **PETITION FOR INITIAL HEARING EN BANC**, filed on March 14, 2005, by counsel for the appellant.

No judge in active service has requested a vote on the petition. Accordingly,

IT IS ORDERED that the petition is **DENIED**.

APPENDIX E

1. Section 1956(a)(1) of Title 18, United States Code provides:

> 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.

2. Section 1956(c) of Title 18, United States Code, provides in pertinent part:

> (C) As used in this section—
>
> * * * * *
>
> (7) the term "specified unlawful activity" means—
>
> (A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;
>
> * * * * *

3. Section 1961 of Title 18, United States Code, provides in pertinent part:

> As used in this chapter—
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section

1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering

of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importa-

tion, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

4. Section 1955 of Title 18, United States Code, provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of

thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

* * * * *