No. 06-1604

In the Supreme Court of the United States

SAMUEL NESS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether proof that petitioner transported large amounts of illicit cash from drug traffickers to their foreign associates in such a way as to avoid detection of the cash or its link to the traffickers was sufficient to establish that he conducted a financial transaction with, and transported, money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of 18 U.S.C. 1956(a)(1)(B)(i) and (2)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 466 F.3d 79. The opinion of the district court (Pet. App. 7a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. A petition for rehearing was denied on January 10, 2007 (Pet. App. 25a). On March 27, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including May 2, 2007. On April 13, 2007, Justice Ginsburg further extended the time to June 1, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h), and one count of substantive money laundering, in violation of 18 U.S.C. 2 and 1956(a)(1)(B)(i). He was sentenced to 180 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-6a.

1. From mid-2000 through at least July 2001, petitioner ran a bulk-cash export business, Protective Logistics. On multiple occasions during that time frame, petitioner received large bundles of cash—ranging from $12,000 to almost $900,000, and totaling millions of dollars—from illegal narcotics traffickers and arranged for the cash to be shipped from the United States to Belgium, Israel, or Canada. The traffickers used aliases or only first names when delivering cash to petitioner, and the traffickers knew petitioner only as "Samuel," "Shmuel," "Shmulik," or "David." Petitioner did not ask the traffickers for identification or have them complete paperwork, and petitioner did not provide them with receipts. Petitioner provided the traffickers with code names or passwords to use to claim their cash abroad. One trafficker testified that he delivered most of his cash deliveries to petitioner at a McDonald's restaurant, and that the trafficker would instruct petitioner to drive him through the McDonald's parking lot and drop him off up the block to avoid attracting attention. Pet. App. 7a-13a, 22a-24a; Tr. 115-116, 118, 206, 220-221, 228, 317, 333-334, 338-339, 695, 702, 722-723, 826-832, 835, 841-843.

Petitioner directed his business partner to ship illegal cash inside parcels containing legitimate jewelry

shipments and to indicate on the airbill only the jewelry being shipped. Petitioner also instructed his partner to "never give receipts." Petitioner explained to his partner that his business was to "sell[] confidentiality." In addition, the traffickers disguised the cash when delivering it to petitioner. One trafficker delivered approximately $85,000 in a gift-wrapped package, and another delivered approximately $191,000 in a taped-up fax machine box placed in a shopping bag. Pet. App. 8a-13a; Tr. 112-115, 422, 431, 439-440, 445, 691-692.

2. The money laundering conspiracy count against petitioner alleged three objects—to engage in monetary transactions in property in an amount greater than $10,000 that was derived from narcotics trafficking, in violation of 18 U.S.C. 1957(a); to conduct financial transactions involving the proceeds of narcotics trafficking, knowing that the transactions were designed in whole or in part to conceal the nature, ownership, and control of the proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (transaction money laundering);[1] and to transport funds from a place inside the United States to a place outside

[1] 18 U.S.C. 1956(a)(1) provides in relevant part:

> 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—
>
> * * * * *
>
> (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
>
> is subject to imprisonment for not more than twenty years.

the United States, knowing that the funds represented the proceeds of narcotics trafficking, and knowing that the transportation was designed to conceal the nature, ownership, and control of the proceeds, in violation of 18 U.S.C. 1956(a)(2)(B)(i) (international transportation money laundering).[2] Count 1. The substantive money laundering count alleged a discrete violation of 18 U.S.C. 1956(a)(1)(B)(i) involving petitioner's receipt, in February 2001, of $50,000 in narcotics proceeds for shipment abroad. Count 2.

The jury returned guilty verdicts on both counts. On a special verdict form, it found that petitioner had conspired to achieve all three objects of the conspiracy. Pet. App. 2a, 5a. The district court denied petitioner's motion for judgment of acquittal. *Id.* at 7a-24a.

3. The court of appeals affirmed. Pet. App. 1a-6a. The court rejected petitioner's contention that the concealment element of 18 U.S.C. 1956(a)(1)(B)(i) and

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[2] 18 U.S.C. 1956(a)(2) makes it a crime, punishable by up to twenty years of imprisonment, to:

> * * * transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> * * * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

(2)(B)(i) is satisfied only when the transaction or transportation at issue is designed to give unlawful proceeds the appearance of legitimate wealth. Pet. App. 2a-4a. In so doing, the court noted, without analysis of the decisions, that the Tenth Circuit, and a since-vacated Fifth Circuit panel, had "essentially adopted [petitioner's] reasoning." Pet. App. 3a (citing *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), and *United States* v. *Cuellar*, 441 F.3d 329 (5th Cir. 2006), vacated, 478 F.3d 282 (5th Cir. 2007) (en banc), petition for cert. pending, No. 06-1456 (filed May 3, 2007)). Relying on its earlier decision in *United States* v. *Gotti*, 459 F.3d 296 (2d Cir. 2006), cert. denied, 127 S. Ct. 3001 (2007), however, the court of appeals concluded that the evidence was sufficient to establish a design to conceal or disguise within the meaning of Section 1956(a)(1)(B)(i) and (2)(B)(i). Pet. App. 4a.

In *Gotti*, the court upheld transaction money laundering convictions against a claim of evidentiary insufficiency based on the "highly complex and surreptitious" process through which the illicitly obtained proceeds were transferred from lower to higher figures in an organized crime hierarchy. Pet. App. 3a (quoting *Gotti*, 459 F.3d at 337). Here, the court concluded that the "level of secrecy" that attended petitioner's dealings with the traffickers, including "clandestine meetings to transfer large sums of concealed cash, the use of coded language, and the scrupulous avoidance of a paper trail," was comparable to that in *Gotti*. *Id*. at 4a. The court expressed no view "as to sufficiency issues that might arise when the remittance of unlawful funds is sur-

rounded by less elaborate stratagems or a lesser measure of secrecy." *Ibid.*[3]

ARGUMENT

Petitioner contends (Pet. 10-22) that the court of appeals erred in concluding that the evidence was sufficient to support the jury's finding that petitioner's transactions with, and transportation of, the illicit drug proceeds were designed to "conceal or disguise" the nature, location, source, ownership, or control of the proceeds under 18 U.S.C. 1956(a)(1)(B)(i) and (2)(B)(i). Specifically, petitioner asserts that the statute requires proof of a design to create the appearance of legitimate wealth, and that the ruling in this case deepens an alleged conflict among the circuits on this issue. The court of appeals' interpretation of the statute is correct, and there is no conflict in the courts of appeals on this issue. Further review is not warranted.[4]

1. The court of appeals correctly held that the concealment prongs of the transaction money laundering

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[3] The court declined to consider petitioner's claim that the evidence failed to establish that his business met the statutory definition of a "financial institution," because that claim applied only to the Section 1957(a) object of the conspiracy and could not affect the validity of the jury's guilty verdicts on the two other objects. Pet. App. 5a. In addition, although the court agreed with petitioner's claim that the jury instruction on the "financial institution" element was erroneous, it concluded that the error, which petitioner failed to preserve at trial, did not rise to the level of plain error. *Id.* at 6a. Petitioner does not renew those arguments in this Court.

[4] A similar issue is presented in *Cuellar* v. *United States*, petition for cert. pending, No. 06-1456 (filed May 3, 2007), and *Nunez-Virraizabal* v. *United States*, petition for cert. pending, No. 06-11863 (filed June 11, 2007). The government has filed an opposition to the petition in *Cuellar*.

statute, 18 U.S.C. 1956(a)(1)(B)(i), and of the international transportation money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i), do not require proof of a design to create the appearance of legitimate wealth. These statutes make it a crime for anyone to conduct a financial transaction with funds, or transport funds from a place in the United States to a place outside the United States, knowing that the transaction or transportation "is designed in whole or in part * * * 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)(B)(i) and (2)(B)(i).

Petitioner, who ran an ostensibly legitimate export business, transported large amounts of illicit cash from drug traffickers to their foreign associates in such a way as to avoid detection of the cash or its link to the traffickers. To achieve this objective, petitioner avoided learning the identities of the traffickers; eschewed receipts in connection with the transactions; used code names and passwords in conducting transfers; and transported cash in parcels containing legitimate jewelry shipments. That conduct constitutes a "design[]," at least "in part," to "conceal or disguise" the "nature" of the proceeds (*i.e.*, their association with an illegal enterprise), the "location" of the proceeds (*i.e.*, their physical presence in the parcels), and the "source," "ownership" and "control" of the proceeds (*i.e.*, their connection to the true owner). Pet. App. 4a, 22a-24a; see *United States* v. *Cuellar*, 478 F.3d 282, 289-292 (5th Cir. 2007) (en banc) (affirming international money laundering conviction where defendant transported wrapped bundles of large sums of cash derived from drug dealing concealed in a hidden compartment in his car that was covered with animal hair to hinder its discovery), peti-

tion for cert. pending, No. 06-1456 (filed May 3, 2007); *United States* v. *Garcia-Jaimes*, 484 F.3d 1311, 1322 (11th Cir. 2007) (affirming international money laundering convictions based on evidence that the defendants entered into a transportation scheme using car haulers to secretly transport illicit drug proceeds from the United States to Mexico), petition for cert. pending *sub nom. Nunez-Virraizabal* v. *United States*, No. 06-11863 (filed June 11, 2007).

Petitioner nonetheless contends that the "conceal or disguise" element of these statutory provisions should be construed to require proof that the design to conceal the proceeds was devised for the purpose of creating "the appearance of legitimate wealth," Pet. 10—*i.e.*, "making 'dirty' money look 'clean.'" Pet. 11. But "the text of the statute is not [so] restrictive." *United States* v. *Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002). The statutory prohibitions make it an offense to engage in a financial transaction with, or to transport, money for the purpose of concealing or disguising certain of its attributes. See 18 U.S.C. 1956(a)(1)(B)(i) and (2)(B)(i). As the Fifth Circuit explained in *Cuellar*, in choosing "the broad, unqualified word 'conceal,'" Congress did not intend to prohibit only "concealment that is accomplished in a certain way." 478 F.3d at 290. Accordingly, *how* the funds are concealed or disguised—whether by creating the appearance of legitimate wealth, putting the money in the name of a third party, converting the property to another form, or commingling the money with other property—is irrelevant, except to the extent that the particular means chosen is probative of a design (*e.g.*, the more convoluted the transaction, the easier it is to infer a design to conceal or disguise).

Similarly, the statute does not require the government to prove *why* the nature, location, source, or ownership of the proceeds was concealed or disguised. Nothing in the text compels the government to prove that the nature, location, source, ownership, or control of the property was concealed or disguised in order to create the appearance of legitimate wealth. To the contrary, a criminal may seek to conceal the illicit funds for reasons entirely unrelated to a design to create the appearance of legitimate wealth, such as to evade paying taxes, to prevent seizure and forfeiture of the funds under the asset forfeiture laws, to avoid connecting himself with unlawful conduct or with a criminal confederate, or to forestall a court from ordering him to use the funds to pay restitution to his victims. While the criminal's *ultimate* goal may be to convert illicit funds into usable (apparently legitimate) funds, that process may take several steps. Indeed, rather than concealing or disguising the nature, location, source, ownership, or control of funds to create the appearance of legitimate wealth, a criminal may engage in such conduct in an effort to create the appearance of having no wealth at all. The statutory text reaches all of that conduct.

Thus, while disguising funds for the purpose of creating the appearance of legitimate wealth would establish the concealment element of the statute—and may, as petitioner asserts (Pet. 11-13), be a common understanding of what it means to "launder" money—that is hardly the exclusive way to violate the statute. Accordingly, the court of appeals correctly refused to engraft such a requirement onto the statute. See, *e.g.*, *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("Where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its

terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).[5]

2. Petitioner contends (Pet. 17-22) that the circuits are divided on the question whether Section 1956(a)(1)(B)(i) and (2)(B)(i) "require[] a design to create the appearance of legitimate wealth." Pet. 17. He contends that decisions from the Sixth, Seventh, and Tenth Circuits require proof of such a design, while three other circuits (the Third, Fifth, and Eleventh) reject the need for such proof. There is no conflict on this issue warranting this Court's review.

a. Contrary to petitioner's assertion (Pet. 17-18), the decision in this case does not conflict with *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994). In *Dimeck*, the defendant was convicted of a conspiracy to commit transaction money laundering based on evidence that he transported drug proceeds in a box and gave them to a

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[5] Petitioner errs in relying (Pet. 13-14) on the title of the statute, various secondary-source definitions of money laundering, and the legislative history as a basis for reading an element into the statute that its text does not contain. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (title of a statute cannot limit the plain meaning of the text); *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994) (legislative history). Moreover, the legislative history cited by petitioner (Pet. 13-14) for his create-an-appearance-of-legitimate-wealth requirement goes on to indicate that money laundering breaks the chain of evidence (the "paper trail") between a person and certain funds "in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets." *Ibid.* (quoting H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986)). None of those purposes requires more than was done here—attempting to conceal illicitly obtained cash in order to transport it out of the country. More importantly, none of those purposes (or the creation of the appearance of legitimate wealth) need be proved to violate the statute; instead, the statute reaches conduct that Congress thought would facilitate attainment of those purposes.

co-conspirator, who was then to transport them out of state to give to a drug supplier. *Id.* at 1241, 1242-1243. In reversing, the Tenth Circuit concluded that this evidence was insufficient to prove an effort to conceal or disguise the money being transported. See *id*. at 1247 ("The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering."). The *Dimeck* court was driven by a desire to draw a line between the underlying drug transaction that generated the illicit funds, on the one hand, and the money laundering, on the other. Where a courier in a drug distribution scheme simply transports cash to a distributor from a middleman, the court believed that "the underlying drug transaction ha[s] not yet been completed and the money laundering activity ha[s] not yet begun." *Id.* at 1246. That fact pattern differs from the highly sophisticated efforts to move funds abroad that took place in this case. The *Dimeck* court did state that the "money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises," and that it was that step that was missing in *Dimeck*. *Id.* at 1247. But the court did not hold that such proof was the only additional proof that could have satisfied the statute. Nor is it clear that the *Dimeck* court would regard the post-crime concealed movement of funds that petitioner carried out to be part of the underlying drug transaction.[6]

[6] In addition, in describing the Tenth Circuit's earlier decision in *United States* v. *Garcia-Emanuel*, 14 F.3d 1469 (1994), the *Dimeck* court stated that *Garcia-Emanuel* had observed that the statute requires proof of a "desire to create the appearance of legitimate wealth

The court of appeals in this case did state, without analysis of the facts of *Dimeck*, that that case would preclude a money laundering prosecution when a defendant merely shipped cash from one place to another, because the court below read *Dimeck* to require a showing that "the transaction or transportation at issue was designed to give unlawful proceeds the appearance of legitimate wealth." Pet. App. 3a. But the court of appeals did not endorse the view that unadorned transportation of illicit cash from one drug dealer to another amounts to proof of a design to conceal. Rather, as the court explained, proof of the design-to-conceal element turns on the "level of secrecy" involved, and it upheld the conviction in this case based on the use of clandestine meetings, coded language, and avoidance of a paper trail. *Id.* at 4a. The court reserved cases where the transfer of funds "is surrounded by less elaborate strategems or a lesser measure of secrecy." *Ibid.*

The result in this case thus does not conflict with *Dimeck*. As the Fifth Circuit noted in distinguishing *Dimeck*, the defendant in *Dimeck* made only "a minimal attempt at concealment," see *Cuellar*, 478 F.3d at 291,

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or otherwise to conceal the nature of the funds so that they might enter the economy as legitimate funds." *Dimeck*, 24 F.3d at 1245. But *Garcia-Emanuel* indicated that there were multiple ways the government could prove a design to conceal. See *Garcia-Emanuel*, 14 F.3d at 1475-1476 ("[A] variety of types of evidence have been cited by this and other circuits as supportive of evidence of intent to disguise or conceal. They include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction; or expert testimony on practices of criminals.") (footnotes omitted).

in contrast to the elaborate concealment of the "nature, the location, the source, the ownership, or the control" of the funds established here. See Pet. App. 4a.[7] The degree of concealment is significant because, as the Tenth Circuit itself noted in *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1475 (1994), "actions that are merely suspicious and do not provide substantial evidence of a design to conceal will not alone support a conviction." Thus, although some *language* in *Dimeck* could be read to preclude prosecutions absent a specific showing that the defendant has "attempt[ed] to legitimize [the] proceeds," 24 F.3d at 1247, the decision itself would not bar prosecutions where, as here, the defendant's actions reveal a design to frustrate discovery of the cash. And, to the extent petitioner takes issue (Pet. 16) with the court's reliance here on the extent of the secrecy involved in finding a violation, that creates no conflict warranting review, as it is consistent with the Tenth Circuit's understanding of the "design" requirement in the statute. *Garcia-Emanuel*, 14 F.3d at 1474-1478.[8]

b. The Sixth and Seventh Circuit decisions cited by petitioner address a different issue and do not conflict

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[7] As petitioner notes (Pet. 21) the *dissent* in *Cuellar* claimed that the majority's opinion ignored the law from other circuits. 478 F.3d at 304-305 (Smith, J., dissenting). But the *Cuellar* majority expressly distinguished *Dimeck* "on several bases." *Id.* at 291-292.

[8] Although petitioner asserts in a footnote that the First Circuit "recently approved of *Dimeck*," Pet. 18 n. 17, the case petitioner cites merely quoted from *Dimeck* before "find[ing] the facts of *Dimeck* to be easily distinguishable" and rejecting the defendant's reliance on *Dimeck*. *United States* v. *Morales-Rodriguez*, 467 F.3d 1, 13 (1st Cir.), cert. denied, 127 S. Ct. 696 (2006). That decision does not conflict with the decision below.

with the decision below. See Pet. 18-19 (discussing *United States* v. *Esterman*, 324 F.3d 565 (7th Cir. 2003), and *United States* v. *McGahee*, 257 F.3d 520 (6th Cir. 2001)). Both *Esterman* and *McGahee* involve applications of the holding in *United States* v. *Sanders*, 929 F.2d 1466 (10th Cir.), cert. denied, 502 U.S. 846 (1991), that evidence that a person merely spent his own money in an open or notorious way, or deposited it into an account in his own name, is insufficient to satisfy the concealment element of the money laundering statute. *Id.* at 1472. In *Sanders,* the defendant was convicted of money laundering under 18 U.S.C. 1956(a)(1)(B)(i) based on her purchase of two vehicles with drug proceeds. 929 F.2d at 1471. In reversing her conviction, the court of appeals observed that the money laundering statute is not a mere "money spending statute"; rather, its purpose is to reach commercial transactions "intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities." *Id.* at 1472.

The issue in cases like *Sanders* is whether the defendant merely spent or invested his money, in contrast to engaging in transactions in order to conceal or disguise the nature, source, or ownership of the funds. *Esterman* and *McGahee* rely on that distinction and not on a principle that concealment must aim at generating an appearance of legitimate wealth. In *Esterman*, the Seventh Circuit concluded that proof that a defendant transferred fraud proceeds to a personal bank account in his own name, and used the money for retail purchases, was not sufficient to show intent to conceal. 324 F.3d at 571. The court reasoned that, to ensure that every movement of illicit proceeds does not become a

money laundering offense, there must be "concrete evidence of intent to disguise or conceal" such as statements by the defendant, unusual secrecy, careful structuring, use of legitimate businesses or third parties, or unusual financial moves. *Id.* at 573.

In *Esterman*, the court did not hold that creating the appearance of legitimate wealth is necessary to prove a design to disguise or conceal. To the contrary, the court listed several examples of circumstances that would constitute money laundering (as opposed to mere money spending), and only one of those examples would necessarily create such an appearance. See 324 F.3d at 573 (listing "unusual secrecy surrounding transactions, careful structuring of transactions to avoid attention, folding or otherwise depositing illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction").

In *McGahee*, the defendant used a business account to disburse fraudulently obtained proceeds by writing checks to himself, to "cash," and to his mortgage company. 257 F.3d at 526-527. The Sixth Circuit concluded that such conduct was "not intended to conceal how he got the funds, but merely to convert them to liquid assets," *id.* at 528, and further observed that the transactions were not "designed to create the appearance of legitimate wealth." *Ibid.* Rather, the court observed, "the funds were transmitted in a direct, ordinary, and open manner." *Ibid.* The court thus concluded that the defendant's conduct "did not evidence a design to conceal the proceeds of illegal activity." *Ibid.* While the Sixth Circuit did note that evidence of an intent to create the appearance of legitimate wealth would be one

way of establishing an intent to conceal, *ibid.*, the court did not suggest such proof is the only way to do so.

Indeed, *United States* v. *Prince*, 214 F.3d 740 (6th Cir.), cert. denied, 531 U.S. 974 (2000), cited by the decision below (Pet. App. 3a), belies petitioner's contention that the Sixth Circuit requires an intent to create the appearance of legitimate wealth as well as his claim of a conflict between the Sixth Circuit and the court below. In *Prince*, the Sixth Circuit upheld a conviction based on evidence that the defendants "aided in a scheme in which there was an attempt to conceal the true owner and controller of funds," without any suggestion or discussion of any requirement of an intent to create the appearance of legitimate wealth. 214 F.3d at 752. Although petitioner attempts to distinguish *Prince* on the ground that the defendants there purportedly "participated in a scheme designed to hide the illegal qualities of the funds involved," Pet. 19 n.18, the facts of that scheme are not different in any material respect from those here. Just as the defendants in *Prince* attempted to conceal the true owner and controller of funds, here petitioner took steps (including the use of code names and passwords) to conceal the true owners of the funds.

Even assuming, as petitioner's argument suggests, that *Esterman* and *McGahee* are specific applications of his appearance-of-legitimate-wealth requirement, those cases would not warrant review of the decision below. As the decision below makes clear (Pet. App. 4a), the Second Circuit would reach the same conclusion as the Sixth and Seventh Circuits on the facts of *McGahee* and *Esterman*. In *United States* v. *Stephenson*, 183 F.3d 110, cert. denied, 528 U.S. 1013 (1999), the Second Circuit relied on *Sanders* to hold that "the defendant's use of unlawful funds to purchase a car was insufficient as a

matter of law to support a conviction under 18 U.S.C. § 1956(a)(1)(B)(i)," and the court below reaffirmed that holding. Pet. App. 4a; see *Stephenson*, 183 F.3d at 120 ("Joining a number of other circuits, we hold that Subsection (i) of the money laundering statute does not criminalize the mere spending of proceeds of specified unlawful activity."); *id.* at 121 ("Thus, absent proof of intent to conceal, an ordinary purchase made with ill-gotten gains does not violate the money laundering statute.").

3. There is no connection between the legal issue before the Court in *United States* v. *Santos*, cert. granted, No. 06-1005 (Apr. 23, 2007), and the issue raised by petitioner. As petitioner notes (Pet. 23), the issue in *Santos* concerns the meaning of the word "proceeds," as used in the money laundering statutes, a discrete question of statutory interpretation not presented here. Petitioner did not contend in the lower courts that the funds were not proceeds, and he does not do so now. Insofar as petitioner suggests (Pet. 23-24) that review of this case should be undertaken along with *Santos*, that suggestion is misguided: unlike *Santos*, where there is a clear, explicit, and intractable conflict among the courts of appeals concerning the meaning of the statutory term "proceeds," here the cases cited by petitioner involve holdings on whether particular facts established a design to conceal or disguise, which is the type of issue on which courts necessarily draw distinctions based on varying circumstances. Despite pointing to language in some opinions linking money laundering to the creation of "the appearance of legitimate wealth," petitioner can identify no inconsistent results or inevitable disagreements on outcomes on the issue he raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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