No. 11-249

In the Supreme Court of the United States

KEITH PROST, PETITIONER

v.

CARL ANDERSON, WARDEN

DAVID GEORGE BRACE, PETITIONER

v.

UNITED STATES OF AMERICA AND
CLAUDE CHESTER, WARDEN

EUGENE MATHISON, PETITIONER

v.

RONALD WILEY, WARDEN

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 2255 of Title 28 provides that a federal prisoner who may seek relief under that provision may not apply for federal habeas corpus relief under 28 U.S.C. 2241 unless the remedy by motion under Section 2255 "is inadequate or ineffective to test the legality of his detention," 28 U.S.C. 2255(e). The questions presented are:

1. Whether Section 2255 is "inadequate or ineffective to test the legality of [petitioners'] detention" in light of their argument that their conduct did not constitute money laundering under the test, adopted after their first motions for relief under Section 2255 were completed, in *United States* v. *Santos*, 553 U.S. 507 (2008).

2. Whether *Santos* holds that "proceeds," as used in the prior version of 18 U.S.C. 1956 under which petitioners were convicted, refers to profits rather than gross receipts where the predicate offenses involve illegal drug activity or fraud.

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OPINIONS BELOW

The opinion of the court of appeals in *Prost* v. *Anderson* (Pet. App. 1a-65a) is reported at 636 F.3d 578. The order of the district court (Pet. App. 76a-81a) is not published but is available at 2008 WL 4925667.

The opinion of the court of appeals in *Brace* v. *United States* (Pet. App. 66a-71a) is reported at 634 F.3d 1167. The order of the district court (Pet. App. 82a-89a) is not published.

The opinion of the court of appeals in *Mathison* v. *Wiley* (Pet. App. 72a-75a) is not published in the Federal Reporter but is available at 318 Fed. Appx. 650. The order of the district court (Pet. App. 90a-95a) is not published.

JURISDICTION

The judgment of the court of appeals in *Prost* v. *Anderson* was entered on February 22, 2011. A petition for rehearing was denied on May 26, 2011 (Pet. App. 96a-97a).

The judgment of the court of appeals in *Brace* v. *United States* was entered on March 15, 2011. A petition for rehearing was denied on May 16, 2011 (Pet. App. 98a). On July 29, 2011, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 26, 2011.

The judgment of the court of appeals in *Mathison* v. *Wiley* was entered on March 26, 2009. A petition for rehearing was denied on May 26, 2011 (Pet. App. 99a).

The petition for a writ of certiorari was filed on August 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In separate and unrelated proceedings in the late 1990s, petitioners were convicted of offenses including money laundering, in violation of various provisions of 18 U.S.C. 1956, and conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). Those convictions either were not appealed or were affirmed on di-

rect review. Each petitioner sought and was denied collateral relief under 28 U.S.C. 2255 on grounds not relevant here.

Later, in a fractured decision in *United States* v. *Santos*, 553 U.S. 507 (2008), this Court overturned two defendants' convictions under 18 U.S.C. 1956[1] for laundering the "proceeds" of an illegal gambling business operated in violation of 18 U.S.C. 1955, because the government's case was based on laundering transactions involving the gross receipts, rather than the profits, of the gambling business. After *Santos*, each petitioner here sought habeas corpus relief under 28 U.S.C. 2241 in the district court for his district of confinement (the United States District Court for the District of Colorado for petitioners Prost and Mathison and the United States District Court for the District of Kansas for petitioner Brace). Each petitioner contended, *inter alia*, that *Santos* established he had been convicted of one or more money-laundering offenses based on conduct that the law does not cover, *i.e.*, laundering the gross receipts of underlying specified unlawful activities.

Although federal prisoners ordinarily cannot invoke the Section 2241 remedy (see 28 U.S.C. 2255(e)[2]), each petitioner asserted that Section 2241 was available to him because Section 2255 was "inadequate or ineffective

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[1] Except where noted, all citations to 18 U.S.C. 1956 refer to that section as it appears in the 2006 edition of the United States Code. That version does not differ materially from the versions at issue in *Santos* and in petitioners' cases.

[2] For convenience, all citations to 28 U.S.C. 2255 refer to that section as it appears in Supplement III (2009) to the 2006 edition of the United States Code. The text of Section 2255 is unchanged since 1996, but a 2008 amendment added subsection designations to the existing version of Section 2255.

to test the legality of his detention," 28 U.S.C. 2255(e), as it precluded him from filing a second or successive motion under Section 2255 claiming that he had been convicted of non-existent money-laundering offenses based on *Santos*'s intervening interpretation of the money-laundering statute. See 28 U.S.C. 2255(h)(1)-(2) (permitting second or successive Section 2255 motion only where the claim alleges new, persuasive evidence of actual innocence, or a new rule of constitutional law made retroactive by this Court to cases on collateral review).

The district courts denied petitioners' habeas corpus petitions. Pet. App. 76a-81a, 82a-89a, 90a-95a. Separate panels of the court of appeals affirmed. *Id.* at 1a-65a, 66a-71a, 72a-75a.

1. Before 1948, a federal prisoner could collaterally attack his conviction or sentence by way of a petition for a writ of habeas corpus brought under the general federal habeas corpus statute, which is now codified at 28 U.S.C. 2241. See *United States* v. *Hayman*, 342 U.S. 205, 211-213 (1952). These filings unduly burdened the district courts whose territorial jurisdiction encompassed major penal institutions, because a writ of habeas corpus acts on the prisoner's jailer and must be filed in the district of the prisoner's confinement. See *Rumsfeld* v. *Padilla*, 542 U.S. 426, 447 (2004); *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885). The district of confinement is often located "far from the scene of the facts, the homes of the witnesses and the records of the sentencing court," *Hayman*, 342 U.S. at 213-214, which caused administrative problems for habeas courts attempting to resolve such petitions.

In 1948, Congress responded favorably to a proposal by the Judicial Conference "to alleviate the burden of

habeas corpus petitions filed by federal prisoners in the district of confinement," *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979); see *Hayman*, 342 U.S. at 215-217, by creating a substitute postconviction remedy for federal prisoners. Codified at 28 U.S.C. 2255, this new statutory "motion" procedure diverts federal prisoner collateral attacks away from the inconvenient district of confinement and channels them into "the more convenient jurisdiction of the sentencing court," *Addonizio*, 442 U.S. at 185, while still "afford[ing] federal prisoners a remedy identical in scope to federal habeas corpus," *Davis* v. *United States*, 417 U.S. 333, 343 (1974). The 1948 legislation also generally prevents a prisoner covered by Section 2255 from raising challenges to his conviction or sentence by way of habeas corpus under Section 2241. The statute states that federal district courts "shall not * * * entertain[]" a federal prisoner's application for a writ of habeas corpus unless "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e). This provision is known as the habeas corpus savings clause.

The savings clause was dormant for several decades. During that time, neither Section 2255 nor this Court's decisions generally precluded successive motions for collateral relief. Rather, some cases recognized that intervening decisions authoritatively interpreting a federal criminal statute justified Section 2255 relief, including successive collateral relief under Section 2255, if the interpretation revealed a fundamental miscarriage of justice such as being convicted for "an act that the law does not make criminal." *Davis*, 417 U.S. at 346; see *Sanders* v. *United States*, 373 U.S. 1, 16-17 (1963) (al-

lowing successive Section 2255 motion when necessary to avoid a miscarriage of justice).

In 1996, Congress greatly restricted federal prisoners' ability to seek successive Section 2255 relief in the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220. AEDPA limited the availability of successive Section 2255 relief to cases involving either (1) persuasive new evidence that the prisoner was not guilty of the offense, or (2) a new rule of constitutional law made retroactive by this Court to cases on collateral review. See 28 U.S.C. 2255(h); cf. *Tyler* v. *Cain*, 533 U.S. 656, 661 (2001).

The AEDPA did not, however, provide for successive Section 2255 motions based on intervening statutory decisions, even though such relief had been available under prior law. The significance of this omission became particularly apparent following *Bailey* v. *United States*, 516 U.S. 137 (1995). Before *Bailey*, many courts of appeals held that a defendant's possession of a firearm during and in relation to a drug crime constituted "use" of a firearm within the meaning of 18 U.S.C. 924(c) (1994). This Court rejected that interpretation in *Bailey*, holding that the "use" element required proof that the firearm had been actively employed and that passive possession was not "use." 516 U.S. at 144-146. Some defendants convicted of "using" a firearm under the lower courts' pre-*Bailey* definition of "use" thus had been convicted of conduct that the law did not cover (*i.e.*, "using" a firearm based on evidence of his passive possession). See *Bousley* v. *United States*, 523 U.S. 614, 620 (1998).

A federal prisoner pursuing his first Section 2255 motion was eligible to obtain relief from his pre-*Bailey*

passive-possession conviction under Section 924(c). But a prisoner who had already completed a round of Section 2255 review before *Bailey* was barred by the AEDPA from seeking successive Section 2255 relief because a claim under *Bailey* would not satisfy either of the conditions in 28 U.S.C. 2255(h) for filing a successive Section 2255 motion. Such prisoners instead argued that the categorical unavailability of successive Section 2255 relief based on intervening decisions of statutory interpretation rendered Section 2255 "inadequate or ineffective" and triggered its savings clause, thus allowing them to file a habeas corpus petition under Section 2241.

The courts of appeals to consider that issue generally agreed that Section 2241 relief was available. See *Wofford* v. *Scott*, 177 F.3d 1236, 1241-1244 (11th Cir. 1999) (summarizing decisions from the Second, Third and Seventh Circuits so holding); *Reyes-Requena* v. *United States*, 243 F.3d 893, 902-903 (5th Cir. 2001) (agreeing with these decisions). Although the courts offered varying rationales and adopted slightly different formulations, they generally agreed that the statutory remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [a prisoner's] detention" when three conditions are met: (1) a prisoner who has already completed a first round of review under Section 2255 seeks to raise a claim based on an intervening, retroactive decision of this Court; (2) that decision narrowed the reach of a federal criminal statute in a way that establishes that the prisoner stands convicted of conduct that is not criminal; and (3) controlling circuit precedent had squarely foreclosed the prisoner's claim at the time of the prisoner's trial, appeal, and first motion under Section 2255. See *ibid.*

2. a. Between 1994 and 1997, petitioner Keith Prost was a member of a drug distribution enterprise in Missouri. In 1998, a grand jury in the Eastern District of Missouri charged Prost and others with committing an array of controlled-substance and related offenses. Superseding Indictment, *United States* v. *Hodges*, 4:98-cr-264 (E.D. Mo. July 16, 1998) (Docket entry No. 89).

Prost pleaded guilty in the United States District Court for the Eastern District of Missouri to conspiracy to distribute and possess with intent to distribute methamphetamine and marijuana, in violation of 21 U.S.C. 846 and 841(a)(1) (1994) (Count 1); conspiracy to launder illegal drug proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i) and (h) (Count 9); and conspiracy to launder illegal drug proceeds, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (h) (Count 10). Judgment at 1, *United States* v. *Prost*, 4:98-cr-264 (Jan. 22, 1999) (Docket entry No. 289).

Before accepting Prost's plea, the district court advised him that Count 10 required proof that he laundered illegal "proceeds"; the court did not otherwise define the term "proceeds," and Prost did not ask for a definition, but Prost acknowledged that his conduct "involved drug trafficking proceeds." Tr. at 13, 15, *United States* v. *Prost*, 4:98-cr-264 (E.D. Mo. Oct. 27, 1998). The court accepted Prost's plea. *Id.* at 25. It sentenced Prost to 168 months of imprisonment on each count, to run concurrently. Judgment at 2, *Prost*, 4:98-cr-264 (Jan. 22, 1999) (Docket entry No. 289). Prost did not appeal.

Prost later moved to vacate his sentence (but not his convictions) under 28 U.S.C. 2255, raising grounds not relevant here. The district court denied Prost's motion

and declined to issue a certificate of appealability. *Prost* v. *United States*, 4:00-cv-98, Docket entry Nos. 71, 72 (E.D. Mo. Jan. 12, 2004). The court of appeals declined to issue a certificate of appealability. *Prost* v. *United States*, 04-1394 (8th Cir. July 6, 2004).

b. In 1995, following an undercover investigation, a grand jury in the Western District of Texas charged petitioner David Brace and others with conspiracy to launder illegal drug proceeds, in violation of 18 U.S.C. 1956(h) (Count 1); laundering illegal drug proceeds, in violation of 18 U.S.C. 1956(a)(2)(B)(i) and 2 (Counts 2 and 4); and laundering illegal drug proceeds, in violation of 18 U.S.C. 1956(a)(3)(B) (Count 3). Indictment, *United States* v. *Clarkston*, 5:95-cr-200 (W.D. Tex. June 21, 1995) (Docket entry No. 6).

At trial on the money-laundering charges, the district court instructed the jury that the government was required to prove that the monies at issue "represented the proceeds of some form of unlawful activity." 7 Trial Tr. 226. Brace did not object to this instruction or ask for an instruction defining "proceeds." The jury convicted Brace on all counts, and he was sentenced to concurrent sentences of 175 months of imprisonment on each count. Judgment, *United States* v. *Brace*, 5:95-cr-200 (W.D. Tex. Apr. 30, 1996) (Docket entry No. 120).

The court of appeals initially reversed Brace's convictions on grounds not relevant here, *United States* v. *Knox*, 112 F.3d 802 (5th Cir. 1997), but the court of appeals reheard the case en banc and affirmed Brace's convictions, *United States* v. *Brace*, 145 F.3d 247 (5th Cir. 1998). This Court denied Brace's petition for a writ of certiorari. *Brace* v. *United States*, 525 U.S. 973 (1998).

In 1999, Brace moved to vacate his sentence under 28 U.S.C. 2255, raising grounds not relevant here. The district court denied Brace's motion and declined to issue a certificate of appealability. *United States* v. *Brace*, 5:95-cr-200 Docket entry Nos. 231, 234 (W.D. Tex. Sept. 5, 2000; Sept. 28, 2000). The court of appeals declined to issue a certificate of appealability. *United States* v. *Brace*, 00-50967 (5th Cir. Feb. 8, 2001).[3]

c. In the early 1990s, petitioner Eugene Mathison orchestrated a series of fraudulent Ponzi schemes. In 1996, a grand jury in the District of South Dakota charged Mathison and others with mail fraud, in violation of 18 U.S.C. 1341 (1994) (Counts 1-26 and 39-50); wire fraud, in violation of 18 U.S.C. 1343 (1994) (Counts 27-31); money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i) (Counts 32-37 and 53-61); money laundering, in violation of 18 U.S.C. 1957 (1994) (Counts 51-52); and conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 371 (Count 38). Second Superseding Indictment, *United States* v. *Mathison*, 96-cr-40048 (D.S.D. Dec. 11, 1996) (Docket entry No. 144).

At trial on the money-laundering charges, the district court instructed the jury that the government was required to prove that Mathison "conducted or attempted to conduct the financial transaction with money

[3] In 2005, Brace filed a second motion under 28 U.S.C. 2255, raising grounds not relevant here. The district court dismissed that motion for lack of jurisdiction because it was an unauthorized second or successive Section 2255 motion. *United States* v. *Brace*, 5:95-cr-200 Docket entry 249 (W.D. Tex. June 23, 2005). Brace later filed two petitions for writs of habeas corpus under 28 U.S.C. 2241, both raising grounds not relevant here, and both of which were dismissed for lack of jurisdiction. *Brace* v. *F.C.I. Warden*, 5:05-cv-184 Docket entry No. 7 (E.D. Tex. Oct. 27, 2005); *Brace* v. *United States*, 07-cv-3209 Docket entry No. 3 (D. Kan. Apr. 16, 2008).

that involved the proceeds of mail fraud or wire fraud," Jury Instruction No. 26, at 31, *United States* v. *Mathison*, 96-cr-40048 (D.S.D. June 9, 1997) (Docket entry No. 375), and it defined "proceeds" to mean "any property, or any interest in property, that someone acquires or retains as a result of the commission of the mail fraud or wire fraud," *ibid.* Mathison did not object to these instructions. The jury convicted Mathison on all counts. The district court sentenced Mathison to 246 months of imprisonment, reflecting concurrent 235-month terms of imprisonment on all counts, plus, for each of the offenses charged in Counts 42-44, 49-50, 52, and 57-61—which Mathison had committed while on pretrial release (see 18 U.S.C. 3147)—"an additional term of one (1) month * * * to run consecutively to each other enhancement and consecutively to the two hundred thirty five (235) month term of imprisonment." Judgment at 2, *United States* v. *Mathison*, 96-cr-40048 (D.S.D. Sept. 18, 1997) (Docket entry No. 470). The court of appeals affirmed. *United States* v. *Mathison*, 157 F.3d 541 (8th Cir. 1998). This Court denied Mathison's petition for a writ of certiorari. *Mathison* v. *United States*, 525 U.S. 1089 (1999).

In 2000, Mathison moved to vacate his sentence under 28 U.S.C. 2255, raising grounds not relevant here.[4] The district court denied the motion as barred by the

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[4] Mathison's Section 2255 motion argued, *inter alia*, that the government was required, but failed, to prove that the transactions underlying his money-laundering convictions promoted the underlying offenses and were intended to conceal the source of the laundered funds. See Motion to Vacate at 42-61, *Mathison* v. *United States*, 00-cv-4055 (D.S.D. Apr. 3, 2000) (Docket entry No. 1). But those issues are distinct from the issue Mathison now raises regarding the nature of the funds.

one-year statute of limitations in 28 U.S.C. 2255(f), and it declined to issue a certificate of appealability. *Mathison* v. *United States*, 00-cv-4055 Docket entry Nos. 40, 43 (D.S.D. Dec. 19, 2000; Jan. 4, 2001). The court of appeals declined to issue a certificate of appealability. *Mathison* v. *United States*, 01-1078 Docket entry (8th Cir. Mar. 21, 2001). This Court denied Mathison's petition for a writ of certiorari. *Mathison* v. *United States*, 534 U.S. 860 (2001).[5]

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[5] In the decade following his first motion under Section 2255, Mathison filed numerous papers seeking post-conviction relief on grounds not relevant here; all courts denied relief. See *Mathison* v. *United States*, 01-cv-4143 Docket entry No. 16 (D.S.D. Sept. 12, 2002) (denying relief under Section 2255), vacated with instructions to dismiss, 02-3926 (8th Cir. May 6, 2003), cert. dismissed, 540 U.S. 802 (2003); *Mathison* v. *United States*, 03-cv-4139 Docket entry Nos. 4, 12 (D.S.D. May 30, 2003; Aug. 21, 2003) (dismissing Section 2255 motion and denying certificate of appealability), certificate of appealability denied, No. 03-3202 (8th Cir. Nov. 26, 2003); *Mathison* v. *United States*, 00-cv-4055 Docket entry No. 57 (D.S.D. Jan. 13, 2006) (denying motion under Federal Rule of Civil Procedure 60(b)), certificate of appealability denied, No. 06-1953 (8th Cir. June 9, 2006), cert. denied, 549 U.S. 925 (2006); *Mathison* v. *United States*, 06-1134 Docket entry (8th Cir. Mar. 23, 2006) (denying petition for leave to file a successive motion under Section 2255); *Mathison* v. *Wiley*, No. 08-cv-9, 2008 WL 465294 (D. Colo. Feb. 15, 2008) (denying petition under Section 2241), aff'd, 281 Fed. Appx. 845 (10th Cir. 2008), cert. dismissed, 555 U.S. 805 (2008) (directing the Clerk not to accept further petitions in noncriminal matters from Mathison without payment of the docketing fee required by Supreme Court Rule 38(a) and submission of the petition in compliance with Supreme Court Rule 33.1); *Mathison* v. *United States*, 648 F. Supp. 2d 106 (D.D.C. 2009) (dismissing complaint seeking declaration that 28 U.S.C. 2255(e) is unconstitutional); *Mathison* v. *United States*, 00-cv-4055 Docket entry No. 69 (D.S.D. June 16, 2010) (denying motion under Federal Rule of Civil Procedure 60(b)), aff'd, No. 10-2765 (8th Cir. Nov. 30, 2010), cert. denied, 131 S. Ct. 2472 (2011).

3. In 2008, this Court decided *Santos*, *supra*. The defendants in *Santos* were convicted of money laundering based on payments the operator of an illegal lottery made to his winners and runners using the receipts from his lottery operation, which was run in violation of the federal gambling statute, 18 U.S.C. 1955. The defendants were convicted under 18 U.S.C. 1956(a)(1)(A)(i), the promotional money-laundering statute, which makes it a crime, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] or attempt[] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity * * * with the intent to promote the carrying on of specified unlawful activity [(SUA)]." See 18 U.S.C. 1956(c)(7) (enumerating SUAs to include, *inter alia*, illegal gambling, drug trafficking, and certain fraud offenses). The question presented in *Santos* was whether, with respect to the transactions at issue, "the term 'proceeds' * * * means 'receipts' or 'profits.'" *Santos*, 553 U.S. at 509 (opinion of Scalia, J.). Five Justices concluded that the defendants' convictions should be overturned but divided on the reasoning for that result.

Justice Scalia, writing for a four-Justice plurality, concluded that the word "proceeds" in Section 1956(a)(1) is ambiguous and therefore, in light of the rule of lenity, should be read in all cases as limited to the profits of the SUA. *Santos*, 553 U.S. at 510-514. The plurality emphasized that if "proceeds" meant "receipts," then the government could bring promotional money-laundering charges in "nearly every" case like *Santos* where the putative laundering transaction was a "normal part" of the underlying SUA. *Id.* at 515-517. In such cases, according to the plurality, the money-laundering charge

may be said to "merge" with the crime generating the proceeds, such that a separate conviction for money laundering would be tantamount to a second conviction for the same offense. *Ibid.* In the plurality's view, defining "proceeds" as "profits" eliminates this problem. *Id.* at 517.

Justice Alito, writing for a four-Justice dissent, would have concluded that "proceeds" in the statute always means "the total amount brought in"—*i.e.*, the gross receipts of the SUA. *Santos*, 553 U.S. at 532 (citation omitted).

Justice Stevens concurred in the judgment, concluding that "this Court need not pick a single definition of 'proceeds' applicable to every [SUA]." *Santos*, 553 U.S. at 525. Thus, he concluded based on the legislative history of the money-laundering statute that Congress intended "proceeds" to include "gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 525-526. But as to the case at hand, Justice Stevens concluded that the revenue generated by a gambling business used to pay "the essential expenses" of operating the business, including winnings and salaries, is not "proceeds" within the meaning of the money-laundering statute. *Id.* at 528. Justice Stevens relied on (1) the absence of legislative history bearing on the definition of "proceeds" in the gambling context and (2) the "merger problem" identified in the plurality opinion. *Id.* at 526-527.

4. In 2008, each petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district of his confinement, naming as respondent the warden of his federal prison facility and challenging his detention pursuant to his money-laundering convictions in light of

Santos. The district courts dismissed the habeas petitions.

In Prost's case, the district court, while recognizing that the Tenth Circuit had not yet spoken on what circumstances would render Section 2255 "inadequate or ineffective," agreed with other courts of appeals that a prisoner barred from seeking successive Section 2255 relief would be entitled to seek habeas relief based on an intervening Supreme Court decision narrowing the reach of a federal criminal statute and establishing that he was "actually innocent" of the offense. Pet. App. 79a (following *Reyes-Requena*, 243 F.3d at 903). But the district court expressed doubt that *Santos* established that Prost was in fact "actually innocent" of the money-laundering offense, *id.* at 80a, and it concluded that Prost had failed to show that he could not have raised his claim in a Section 2255 motion in the Eastern District of Missouri, *id.* at 79a, 81a.

In Brace's case, the district court concluded that Brace failed to show that Section 2255 was "inadequate or ineffective" because *Santos*'s holding was limited to "money laundering charges related to illegal gambling," Pet. App. 87a & n.7, and Brace stood convicted of laundering illegal drug proceeds, *id.* at 87a-88a. Accordingly, the court concluded that Brace's "claim of actual innocence fails." *Id.* at 88a.

In Mathison's case, the court summarily concluded —in light of a prior decision dismissing a habeas petition filed by Mathison—that he had "an adequate and effective remedy pursuant to 28 U.S.C. § 2255 in the District of South Dakota" and thus he failed to show that the motion remedy under Section 2255 was "inadequate or ineffective." Pet. App. 95a.

5. Each petitioner appealed to the Tenth Circuit.

a. On March 26, 2009, the Tenth Circuit affirmed the district court's decision in Mathison's case in an unpublished decision, Pet. App. 72a-75a, holding that Mathison "failed to establish that the remedies available to him under [Section] 2255 are inadequate or ineffective," *id.* at 74a-75a. Mathison petitioned for rehearing, and the court of appeals entered an order abating the appeal and rehearing petition pending a decision in Prost's case. *Mathison* v. *Wiley*, 08-1377 (10th Cir. Apr. 22, 2009).

b. On February 22, 2011, the court of appeals affirmed the district court's judgment denying Prost's habeas corpus petition. Pet. App. 1a-65a. The panel did not address (and thus apparently assumed *arguendo*) the validity of Prost's claim that he had been convicted of a money-laundering offense that was invalid under *Santos* (sometimes referred to as a "non-existent" offense). The panel majority and the concurring judge nonetheless concluded, on different reasoning, that Prost could not seek habeas relief because he failed to show that Section 2255 was inadequate or ineffective.

The panel majority and the concurring judge concluded that Prost could have advanced a *Santos*-like statutory-construction argument in his initial Section 2255 motion because, at that time, the Eighth Circuit had not yet addressed the issue. See Pet. App. 2a; *id.* at 45a (opinion of Seymour, J.). The majority further held that Section 2255 would have been adequate and effective even if Prost's argument had been foreclosed by then-controlling Eighth Circuit precedent. *Id.* at 24a-32a. Based on its analysis of the statute, the majority rejected the "erroneous circuit foreclosure test" as a standard for gauging the adequacy of Section 2255. *Ibid.* In the majority's view, Congress "clearly and unequivocally," *id.* at 41a, expressed its intent to preclude

prisoners from seeking habeas relief (or filing a successive Section 2255 motion) based on an intervening decision of statutory construction—even if the intervening decision revealed that the prisoner had been convicted of a non-existent offense and even if the courts that had previously considered the prisoner's claim were bound to summarily reject it based on then-controlling circuit precedent. *Id.* at 24a-32a.[6]

Judge Seymour wrote separately. She agreed with the majority that Prost raised a claim of actual innocence and that Prost could have presented his statutory construction argument in his initial Section 2255 motion because it was not foreclosed by Eighth Circuit law; on that basis, she concluded that Prost had failed to show that Section 2255 was inadequate. Pet. App. 44a-46a. In her view, it was unnecessary to adopt or reject the "erroneous circuit foreclosure test" in Prost's case because Prost's claim would fail even under that test. *Ibid.* She asserted that the majority's narrow reading of Section 2255(e) "creat[ed] an unnecessary circuit split," *id.* at 45a, 47a, and maintained that the majority should have requested supplemental briefing on the constitutional avoidance issue, *id.* at 64a.

c. On March 15, 2011 (before the mandate issued in Prost's appeal), the court of appeals affirmed the dismissal of Brace's habeas petition. Pet. App. 66a-71a. Relying on *Prost*, the court of appeals rejected Brace's

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[6] The panel majority noted that it left open the possibility that a future panel could interpret Section 2255(e) more expansively if it determined that a broader interpretation was necessary "to avoid serious constitutional questions" that might arise from the majority's interpretation of Section 2255(e). Pet. App. 32a-35a. The panel majority declined to reach that issue in Prost's case because in its view Prost had not properly raised the issue. *Id.* at 34a.

argument that his mere inability to file a successive Section 2255 motion rendered Section 2255 inadequate or ineffective. *Id.* at 70a. The court of appeals further held that Brace had not shown that he had been convicted of a non-existent money-laundering offense because in contrast to the defendants in *Santos* (whose laundering transactions related to an illegal gambling business) Brace was convicted of laundering and conspiring to launder the proceeds of an illegal drug operation. *Id.* at 71a n.3. *Santos*, the court of appeals held, "does not apply in the drug context." *Ibid.* (quoting *United States* v. *Spencer*, 592 F.3d 866, 879 (8th Cir. 2010)). The court denied Brace's petition for rehearing. *Id.* at 98a.

d. Prost petitioned for rehearing en banc, and the court of appeals directed the government to file a response. The government responded that the en banc court should rehear the case to reconsider the panel majority's restrictive interpretation of Section 2255(e), which in the government's view was incorrect, would result in the continued incarceration of innocent defendants, was in conflict with other circuits' views, and raised a question of recurring and exceptional importance. Gov't Resp. to Pet. for Reh'g En Banc 8-15 (Prost Reh'g Resp.).

The government emphasized, however, that the court of appeals' judgment affirming the dismissal of Prost's habeas petition was nonetheless correct for two independent reasons. First, the government explained that the court's alternative holding in Brace's appeal—that *Santos* does not control the meaning of "proceeds" in a case charging money-laundering transactions related to illegal drug activity—applied to Prost as well, meaning Prost had not shown that he had been convicted for conduct the law does not make criminal. Prost Reh'g Resp.

5. Second, the government explained, Prost failed to show that Section 2255 was inadequate because he could have raised the argument that "proceeds" is limited to profits in his initial Section 2255 motion. *Ibid.*

The full court of appeals divided evenly over whether to grant Prost's petition, so the petition was denied. Pet. App. 96a-97a; see 28 U.S.C. 46(c). The panel hearing Mathison's appeal then lifted the order abating his appeal and denied his petition for rehearing as well. Pet. App. 99a.

ARGUMENT

Petitioners present two questions for this Court's review: first, whether they may use the general habeas corpus statute, 28 U.S.C. 2241, to pursue claims that they were convicted of money-laundering offenses for conduct the law does not cover in light of *Santos*, *supra* (Pet. 8-26); and second, how *Santos* applies to money-laundering cases based on SUAs other than operating an illegal gambling business (Pet. 27-34). Neither claim merits this Court's review. Although the Tenth Circuit denied petitioners habeas relief for reasons that would not have precluded a habeas petition under the savings clause in other circuits, petitioners would not ultimately be able to secure relief under any other circuit's law, and the Tenth Circuit has not yet completed its review of the savings clause's meaning and scope. As for the proper application of *Santos* to the proceeds of SUAs other than operating an illegal gambling businesses, the Court has repeatedly denied review of that issue, which is of diminishing importance because Congress has amended 18 U.S.C. 1956 to define "proceeds."

1. Petitioners contend (Pet. 8-26) that this Court should resolve a disagreement among the courts of ap-

peals on the circumstances that permit a federal prisoner to resort to Section 2241 because the remedy by motion under Section 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention," 28 U.S.C. 2255(e). Further review of that issue is not warranted at this time.

a. Section 2255 generally provides the exclusive means for a federal prisoner to mount a collateral challenge to the validity of his conviction and sentence. Section 2255(h) permits a second or successive such challenge only based on newly discovered evidence or a new retroactive constitutional ruling. Section 2255(e) bars a prisoner covered by Section 2255's remedy from seeking habeas corpus except when permitted by the savings clause, *i.e.*, when the Section 2255 remedy is "inadequate or ineffective to test the legality of his detention." Consistent with the general view of most of the circuits that have addressed the issue, in the government's view, the savings clause provides a narrow avenue for habeas corpus relief when: (1) a prisoner who has already completed a first round of review under Section 2255 seeks to raise a claim based on an intervening, retroactive decision of this Court; (2) that decision narrowed the reach of a federal criminal statute in a way that establishes that the prisoner was convicted for conduct that the law does not make criminal; and (3) controlling circuit precedent foreclosed the prisoner's claim at the time of the prisoner's trial, appeal, and first motion under Section 2255. Under those circumstances, the statutory remedy provided by Section 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention." 28 U.S.C. 2255(e).

The Tenth Circuit held in Prost's case that if the legality of a prisoner's detention "could have been tested

in an initial Section 2255 motion, * * * then the prisoner may not resort to the savings clause and [Section] 2241." Pet. App. 12a. The court believed that an adequate "test" means an opportunity to raise an argument, whether or not the argument was foreclosed by applicable law. *Id.* at 13a, 24a-32a. Petitioners are correct (Pet. 9-15) that the view articulated by the Tenth Circuit below restricts access to Section 2241 more than does the view adopted by the other circuits to squarely consider the question. See Pet. App. 51a (opinion of Seymour, J.) ("Every other circuit reaching the issue has concluded that the savings clause of [Section] 2255(e) does, in fact, permit claims of actual innocence to be brought pursuant to [Section] 2241 where a defendant was 'foreclosed' by circuit precedent from successfully bringing his claim earlier."); *id.* at 56a-58a (discussing cases).

b. These cases are not, however, suitable vehicles for addressing the proper interpretation of the savings clause. Although *Santos*'s interpretation of Section 1956(a)(1) is a substantive rule retroactive to cases on collateral review (see *Bousley* v. *United States*, 523 U.S. 614, 619-620 (1998)), and 28 U.S.C. 2255(h) bars petitioners from seeking successive Section 2255 relief based on *Santos,* petitioners nonetheless cannot establish the other prerequisites for the limited exception described above and thus would not prevail under the law in any circuit.

First, petitioners have not shown that they have been convicted for conduct *Santos* established is not a crime. As discussed in detail below, pp. 26-30, *infra*, because *Santos* controls only the meaning of "proceeds" in a money-laundering prosecution under 18 U.S.C. 1956(a)(1) where the SUA is operating an illegal gam-

bling business, it does not establish that any of the petitioners—none of whose laundering transactions related to such a business, and one of whom (Brace) was not even convicted under Section 1956(a)(1)—was convicted for conduct that is not criminal.

Second, each of the petitioners could have raised and received a full hearing—on direct review or in his initial Section 2255 motion—on the claim he presses now. In each case, the question whether "proceeds" in Section 1956 should have been interpreted as "profits" was an open one in the petitioner's circuit of conviction.[7] Petitioners cite no case pre-dating their convictions in which the relevant court of appeals (the Fifth Circuit where Brace was prosecuted, or the Eighth Circuit where Prost and Mathison were prosecuted) had interpreted the term "proceeds" in the money-laundering statutes, much less held that "proceeds" means "gross receipts."

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[7] Petitioners suggest (see Pet. 12) that the prisoner's prior opportunities to raise his claim—in particular, the opportunity to raise the claim on direct appeal or in an initial Section 2255 motion without being foreclosed by circuit precedent—are irrelevant to the proper application of the savings clause. But they ultimately identify no circuit (see Pet. 15) as embracing such a permissive view.

The concurring judge in Prost's case suggested that the Ninth Circuit would permit resort to Section 2241 through the savings clause even in some cases where the prisoner's claim was not strictly foreclosed by prior circuit precedent. See Pet. App. 58a n.5 (opinion of Seymour, J.) (describing Ninth Circuit test). But the Ninth Circuit itself understands its test to be in line with "many of [its] sister circuits." *Stephens* v. *Herrera*, 464 F.3d 895, 898 (2006), cert. denied, 549 U.S. 1313 (2008); accord *Ivy* v. *Pontesso*, 328 F.3d 1057, 1060, cert. denied, 540 U.S. 1051 (2003). And the only case in which the Ninth Circuit has granted relief after applying its test was one in which, at the time of the prisoner's conviction and first motion under Section 2255, the court of appeals had already "twice held" against the prisoner's claim. *Alaimalo* v. *United States*, 645 F.3d 1042, 1048 (2011).

Accordingly, petitioners have not demonstrated that they were foreclosed by applicable law from asserting such a claim. See also Pet. App. 54a (opinion of Seymour, J.) (explaining that *United States* v. *Simmons*, 154 F.3d 765 (8th Cir. 1998), offered by Prost as previously foreclosing his claim, "did nothing to address the money-laundering statute, let alone foreclose an interpretation of it that equated proceeds with profits").

Specifically, as to Prost and Brace, no pre-*Santos* decision from either the Fifth or Eighth Circuit appears to address whether the revenues from illegal drug activity are "proceeds" under any part of Section 1956. And as to Mathison, whose direct review and first Section 2255 motion were complete by 2001, the status of revenues from fraud activities as "proceeds" was an open question at least until the Eighth Circuit's 2005 decision in *United States* v. *Huber*, 404 F.3d 1047, 1058-1059.[8] Thus, petitioners' claims differ critically from claims brought by prisoners under Section 2241 in the wake of *Bailey*, *supra*. See pp. 6-7, *supra*. Before *Bailey*, many courts of appeals had squarely considered the meaning of "use" in Section 924(c), and many had concluded that it embraced passive possession of a firearm. As a result, many defendants charged under a passive-possession theory of "use" had in fact been foreclosed by pre-*Bailey* circuit precedent from urging a contrary inter-

[8] The Fifth Circuit recently concluded that a *Santos*-like claim was foreclosed by its pre-*Santos* precedent as applied to fraud proceeds, because that pre-*Santos* precedent defined "proceeds" by reference to whether the product of the SUA had "c[o]me into the [defendant's] possession," not whether the thing in the defendant's possession reflected profits or gross receipts. See *Garland* v. *Roy*, 615 F.3d 391, 397-399 (2010). But that view does not assist Mathison, who was convicted in the Eighth Circuit.

pretation of "use." Petitioners, by contrast, faced no such obstacle from circuit precedent.

c. Even if any of these cases were a suitable vehicle for interpreting the savings clause, this Court's review would be premature.

Despite using somewhat different formulations to describe when Section 2255 is "inadequate or ineffective," all the courts of appeals, except the Tenth Circuit, have articulated a test in keeping with the one described above, p. 20, *supra*. See *Reyes-Requena* v. *United States*, 243 F.3d 893, 903-904 (5th Cir. 2001) (canvassing cases and explaining that "[t]he standards that [circuit] courts have articulated for the savings clause may not be framed in identical terms, but [share certain] basic features").

Although the Tenth Circuit denied rehearing en banc in Prost's case by an evenly divided vote, the panel in Prost's case expressly reserved the option of reinterpreting Section 2255(e) more expansively in a future case upon a showing that such an interpretation was necessary to avoid serious constitutional questions. Pet. App. 32a-35a. The panel did not reach any such issue, holding that Prost did not adequately raise it, *id.* at 34a, and the court has not since addressed that issue. It is true that "the canon of constitutional avoidance has no application in the absence of statutory ambiguity," *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001), and the panel majority's construction of Section 2255(e) seemingly admits of no ambiguity. See Pet. App. 12a ("[The meaning of the savings clause] is clearly indicated by the clause's plain language, its context and history, as well as our own precedent."); but see *Gilbert* v. *United States*, 640 F.3d 1293, 1308 (11th Cir. 2011) (en banc) (describing the savings

clause as "generally worded and ambiguous"), petition for cert. pending, No. 11-6053 (filed Aug. 17, 2011). Nonetheless, the court of appeals' explicit reservation of the issue indicates that a future panel is free to consider the question in an appropriate case. Cf. *Triestman* v. *United States*, 124 F.3d 361, 377-379 (2d Cir. 1997) (indicating that denial of savings clause relief in a post-*Bailey* context "would raise serious constitutional questions"); *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997) ("thorny constitutional issue" would be presented in those circumstances). At least until the Tenth Circuit has completed its analysis of the savings clause by addressing the reserved issue of constitutional avoidance, this Court's review of any disagreement in the interpretation of that clause is not warranted.[9]

2. Petitioners' contention that this Court should clarify *Santos* does not merit this Court's review in general, and these cases in particular would be poor vehicles for addressing the issue.

a. As an initial matter, the meaning of "proceeds" in 18 U.S.C. 1956(a)(1) for SUAs other than operating an illegal gambling business is a question of diminishing importance. On May 20, 2009, the President signed into law the Fraud Enforcement and Recovery Act (FERA),

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[9] Although petitioners assert that the court of appeals' construction of Section 2255(e) raises constitutional difficulties, see Pet. 19-24, because that issue was not addressed below, it should not be addressed in the first instance by this Court, which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioners Brace and Mathison suggest (Pet. 26) that the court of appeals' refusal to consider these issues when they were "explicitly raised" and "extensively discussed" in their appellate briefs shows that the court of appeals will not revisit the avoidance question in a future case. But the Tenth Circuit in Prost's case expressly left the avoidance question for another day, and no published Tenth Circuit decision has addressed it.

Pub. L. No. 111-21, 123 Stat. 1617. Section 2(f)(1)(B) of FERA, 123 Stat. 1618, amended the federal money-laundering statute to define "proceeds" as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. 1956(c)(9) (Supp. IV 2010). That definition resolves prospectively the question whether "proceeds" as used in the money-laundering statute means the "gross receipts" or only the "profits" of the predicate offense.

Accordingly, the meaning of "proceeds" under the version of the statute that this Court construed in *Santos* will be relevant only in prosecutions for conduct occurring before FERA's enactment—a set of cases that will diminish with time. This Court has repeatedly denied review of petitions seeking clarification of *Santos*'s scope that were filed after FERA became law. See *Rashid* v. *United States*, 130 S. Ct. 65 (2009) (No. 08-10075); *Howard* v. *United States*, 130 S. Ct. 62 (2009) (No. 08-9977); *McBirney* v. *United States*, 555 U.S. 831 (2008) (No. 07-10408). The same result is warranted here.

b. Petitioners' central claim—that the lower courts "have struggled" (Pet. 27) to apply this Court's fractured decision in *Santos* and thus this Court's review is warranted to resolve the "division among the circuits on how *Santos* is to be applied," Pet. 29—would not merit this Court's review in any event.

i. In *Santos*, no five Members of the Court agreed on a generally applicable definition of the term "proceeds" in Section 1956(a)(1). The only rule from *Santos*, therefore, is that to establish a violation of 18 U.S.C. 1956(a)(1)(A)(i) when the government alleges that the defendant laundered the "proceeds" of an illegal gam-

bling business operated in violation of 18 U.S.C. 1955, the government must prove that the laundering transactions involved the profits, rather than the gross receipts, of the business. See *Santos*, 553 U.S. at 514 (plurality opinion); *id.* at 528 (Stevens, J., concurring in the judgment). Because of its fractured nature, *Santos* does not resolve the meaning of the term "proceeds" as applied to other SUAs, including the SUAs in petitioners' cases.

This Court's general rule for ascertaining the holding of a case in which there is no majority opinion is that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted). As this Court has recognized, however, the *Marks* test is "more easily stated than applied." *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)). In some cases, there simply is "no lowest common denominator or 'narrowest grounds' that represents the Court's holding." *Nichols*, 511 U.S. at 745-746 (concluding that it was "not useful to pursue the *Marks* inquiry").

The courts of appeals have thus recognized that if no "one opinion can meaningfully be regarded as 'narrower' than another" in the sense that it is a "logical subset of other, broader opinions," then the *Marks* analysis does not apply. See *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003) (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)), cert. denied, 540 U.S. 1103 (2004); see also *United States* v. *Johnson*, 467 F.3d 56, 63-64 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007); *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 169-170 (3d Cir.), cert. denied, 528 U.S.

1003 (1999). In such a case, the courts of appeals have generally concluded that it may be possible to find a legal theory shared by a majority of the Justices by looking to a combination of the plurality or separate concurring opinions and the dissent. See, *e.g.*, *Johnson*, 467 F.3d at 64-66. But where that inquiry also proves unavailing, then "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp.*, 177 F.3d at 170.

That is the situation with *Santos*. Although the *Santos* plurality suggested that Justice Stevens's concurring opinion rests on a narrower ground, 553 U.S. at 523, even that proposition did not command a majority of the Court, and Justice Stevens himself criticized it as "speculat[ion]," *id.* at 528 n.7. Neither Justice Stevens's opinion nor the plurality opinion is a "logical subset" of the other. The plurality opinion rests on the rationale that "proceeds" has a single meaning for all SUAs, and that meaning is "profits." See *id*. at 523-524. Justice Stevens's opinion, by contrast, is organized around the view that "proceeds" has a different meaning for different SUAs. *Id*. at 528. Thus, neither opinion is a logical subset of the other or provides a common denominator because the opinions rest on logically inconsistent premises. Similarly, neither opinion can be combined with the reasoning of the dissenting Justices to generate a controlling legal principle because the dissent concluded that "proceeds" always means "gross receipts." *Id*. at 546 (Alito, J., dissenting). The dissent thus rejects both Justice Stevens's premise (that "proceeds" has different meanings for different SUAs) and the plurality's conclusion (that "proceeds" means "profits."). See *id*. at 531-532. Accordingly, the only binding aspect of the *Santos* decision is its specific result, which does not have any

application to petitioners' cases. See *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("The precedential value of *Santos* is unclear outside the narrow factual setting of that case."), cert. denied, 129 S. Ct. 2812, and 130 S. Ct. 246 (2009).

ii. Petitioners cite decisions of the courts of appeals that have adopted varying views of the breadth of *Santos*'s holding, with some courts limiting their holdings to situations where the SUA is gambling, others applying their holdings whenever an analogous merger problem would arise, and others focusing on the legislative history of Section 1956. See Pet. 29-31. But the consensus view of *Santos* in the circuits would not apply a "profits" definition to most of petitioners' convictions.

In particular, of relevance to Prost's and Brace's convictions, all of the courts of appeals that have considered the issue agree that *Santos* does not apply to the proceeds of illicit drug trafficking. See *Wilson* v. *Roy*, 643 F.3d 433, 436-437 & n.3 (5th Cir. 2011) (so holding and citing decisions of the Second, Sixth, Ninth and Tenth Circuits so holding); *United States* v. *Spencer*, 592 F.3d 866, 879 (8th Cir. 2010). Petitioners identify no court of appeals decision holding otherwise.

Moreover, the only opinion in *Santos* that adopts a uniform "profits" approach expressly does not resolve the meaning of "proceeds" as used outside Section 1956(a)(1). See 553 U.S. at 509 (opinion of Scalia, J.) ("We consider whether the term 'proceeds' in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), means 'receipts' or 'profits.'"). Thus no opinion in *Santos* establishes that petitioners could not be convicted for money laundering under statutes other than 18 U.S.C. 1956(a)(1). See *United States* v. *Aslan*, 644 F.3d 526, 545 (7th Cir. 2011) (on review for plain error, rejecting

application of *Santos* to laundering conviction under Section 1956(a)(2)(B)(i)); but see *United States* v. *Kratt*, 579 F.3d 558, 562-563 (6th Cir. 2009) (applying *Santos* to money-laundering conviction under Section 1957(a)(1)), cert. denied, 130 S. Ct. 2115 (2010).

As for Mathison's money-laundering convictions under Section 1956(a)(1), which related to a fraudulent scheme, there is some disagreement in the circuits. See, *e.g.*, *United States* v. *Hill*, 643 F.3d 807, 856 (11th Cir. 2011) (extending prior precedent holding *Santos* inapplicable to the proceeds of mail and wire fraud and holding *Santos* inapplicable to mortgage fraud); *Garland* v. *Roy*, 615 F.3d 391, 399-404 (5th Cir. 2010) (noting disagreement in the circuits and applying *Santos* to laundering transactions involving payments to defrauded investors in pyramid scheme); *United States* v. *Hall*, 613 F.3d 249, 254-255 (D.C. Cir. 2010) (use of bank fraud revenues to pay expenses of an underlying fraud not money laundering after *Santos*), cert. denied, 131 S. Ct. 1471 (2011); *United States* v. *Van Alstyne*, 584 F.3d 803, 813-816 (9th Cir. 2009) (applying *Santos* to reverse two of three money-laundering convictions related to fraudulent scheme). But that is a narrow issue and it is of diminishing importance.

c. Even if the *Santos* issue merited this Court's attention, which it does not, these cases would not be appropriate vehicles for review.

First, none of the petitioners raised a challenge to the meaning of the word "proceeds" at trial, on direct appeal, or in their first Section 2255 motion. Thus, each petitioner has procedurally defaulted his claims. Petitioners may be able to excuse their defaults by showing "actual innocence" under the demanding standard articulated in *Bousley*, 523 U.S. at 623. But because petition-

ers did not seek below to excuse their defaults, the government has had no opportunity to offer extra-record information to rebut whatever showing petitioners might have made, see *id.* at 623-624, and the lower courts have never passed on the issue. Accordingly, the records in these cases do not conclusively establish that the offenses did not involve laundering of profits.

Second, the procedural posture of these cases as successive collateral attacks creates potential impediments to reaching the merits question petitioners would present. As already discussed (see pp. 21-24, *supra*), petitioners are not entitled to resort to Section 2241 for reasons unrelated to the merits of their claims. Those obstacles to consideration of a *Santos* claim would be fewer or absent in a case arising on direct review or on an initial motion under Section 2255 (as in *Santos* itself). Moreover, since the enactment of the AEDPA it would appear to be unprecedented for this Court to have found it appropriate to break new substantive legal ground on a successive application for post-conviction relief. Thus, as petitioners seem to recognize (*e.g.*, Pet. i, 31), their cases do not present a traditional question of statutory interpretation, but instead present only the issue of the correct approach to interpreting a precedent (*Santos*) that interprets a since-amended statute.

Third, a ruling in Prost's or Brace's favor would have little practical significance because both have been released from prison. Although their convictions may have "collateral consequences adequate to meet Article III's injury-in-fact requirement," *Spencer* v. *Kemna*, 523 U.S. 1, 14 (1998), those consequences are attenuated in Prost's case because he was also convicted of (and does not challenge) a controlled substance felony. As for Brace, he was convicted only of money-laundering of-

fenses. But Brace's claim for relief in light of *Santos* is especially weak because none of his convictions was under a provision of 18 U.S.C. 1956(a)(1), and even the *Santos* plurality, 553 U.S. at 509, limited its consideration to the meaning of "proceeds" in Section 1956(a)(1). See pp. 13-14, *supra*.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner Mathison remains in federal custody, with a projected release date of December 2, 2014. Because the sentencing court ordered partially consecutive terms of imprisonment on some of Mathison's money-laundering convictions, see p. 11, *supra*, it is possible that Mathison would be released from custody sooner upon vacatur of one or more of those money-laundering convictions. But Mathison's multiple post-conviction filings, see note 5, *supra*, may raise additional questions about the appropriateness of recognizing savings clause review for his latest claim.