No. 15-1166

In the Supreme Court of the United States

RICHARD OLIVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
JAMES I. PEARCE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, under a now-superseded version of 18 U.S.C. 1957, the district court's definition of "proceeds" for purposes of a money laundering conviction constitutes reversible plain error in light of this Court's decision in *United States* v. *Santos*, 553 U.S. 507 (2008).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 15-1166

RICHARD OLIVE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2015. A petition for rehearing was denied on November 17, 2015 (Pet. App. 39a). On February 8, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 16, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 (2006); four counts of wire

fraud, in violation of 18 U.S.C. 1343 (2006); and two counts of money laundering, in violation of 18 U.S.C. 1957 (2006). Pet. App. 1a. He was sentenced to 372 months of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 1a-22a.

1. In 2006 and 2007, petitioner served as the president and executive director of the National Foundation of America (NFOA), a Tennessee corporation that purported to be a charitable organization providing humanitarian aid. Pet. App. 1a, 4a-5a. Shortly after founding NFOA, petitioner applied to the Internal Revenue Service to recognize NFOA as a tax-exempt Section 501(c)(3) organization. *Id.* at 4a. NFOA never obtained Section 501(c)(3) status. See *id.* at 4a-6a; Gov't C.A. Br. 9.

Acting through NFOA, petitioner offered "charitable gift annuities." Presentence Investigation Report ¶ 8. Under a charitable gift annuity, an individual contributes cash, securities, or other assets to a charity; in return, that individual receives a fixed payment stream over time from the charity and can claim a charitable deduction. *Ibid.* Individuals who entered into contractual installment plans with NFOA exchanged their existing (noncharitable) annuities for an NFOA charitable gift annuity, which (according to NFOA) promised higher returns and offered a tax deduction. Pet. App. 5a. Notwithstanding that NFOA had never received status as a tax-exempt Section 501(c)(3) organization, petitioner had his employees falsely describe NFOA as such an organization. *Id.* at 5a-6a. In addition, petitioner offered financial advisors an above-market commission to promote NFOA's supposedly-charitable annuities to their clients. *Ibid.*

Once a customer entered a contract with NFOA, petitioner typically surrendered that customer's annuity for cash. Pet. App. 5a. Annuities have two values: an accumulated value, which is the policy's total value including bonuses and interest that grow over time, and a surrender value, which is the immediate cash value if surrendered and is substantially lower than the accumulated value. *Ibid.* After receiving approximately $19.3 million in client annuities, NFOA surrendered them early for $16.5 million. *Ibid.*

Petitioner improperly diverted NFOA funds for his personal use, including approximately $690,000 for a vacation home in Las Vegas and $154,000 for personal expenses and a trip to New Orleans. Pet. App. 6a; Gov't C.A. Br. 13-14. Petitioner also used NFOA funds to pay over $2.6 million in commissions to financial advisors, including a single payment of $30,028.33 in May 2007. Gov't C.A. Br. 13.

2. A federal grand jury charged petitioner with three counts of mail fraud in violation of 18 U.S.C. 1341 (2006), four counts of wire fraud in violation of 18 U.S.C. 1343 (2006), and two counts of money laundering in violation of 18 U.S.C. 1957 (2006). Pet. App. 1a-4a. Section 1957 makes it unlawful to "engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity." 18 U.S.C. 1957(a). "[S]pecified unlawful activity" (SUA) is defined as certain enumerated offenses, including illegal gambling, drug trafficking, wire fraud, and mail fraud. 18 U.S.C. 1956(c)(7)(A), 1957(f)(1); see 18 U.S.C. 1961(1). "[C]riminally derived property" is defined to mean "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. 1957(f)(2).

Under the version of the statute at the time of the offense, the term "proceeds" in Section 1957(f)(2) was not defined. See 18 U.S.C. 1956, 1957 (2006).

The money laundering counts charged a withdrawal of $641,051.17 in connection with petitioner's purchase of property in Las Vegas (Count 8) and a withdrawal of $30,028.33 to pay a commission to a financial advisor (Count 9). Pet. App. 4a. The jury convicted petitioner on all counts. *Id.* at 1a. The district court sentenced petitioner to 372 months of incarceration to be followed by three years of supervised release, and ordered him to pay $5,992,181.24 in restitution. *Ibid.* The 372-month prison term consisted of seven consecutive terms of 36 months for the mail and wire fraud counts, and two consecutive 60-month terms for the two money laundering counts. Judgment 2.

3. The court of appeals affirmed. Pet. App. 1a-22a. On appeal, petitioner argued for the first time that this Court's decision in *United States* v. *Santos*, 553 U.S. 507 (2008), barred his conviction for money laundering in Count 9. Pet. App. 15a-16a. In *Santos*, the defendants were convicted of money laundering based on payments that 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 of promotion money laundering under 18 U.S.C. 1956(a)(1)(A)(i), 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 a

SUA. *Ibid.* The question presented in *Santos* was whether, with respect to the transactions at issue, the term "proceeds" in Section 1956(a)(1) "mean[t] '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 to refer to profits. *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. *Ibid.* Observing that a violation of the illegal lottery offense subjected defendants to five years of imprisonment but that the money laundering count potentially added an additional 20 years, the plurality could discern no reason why Congress "would have wanted * * * to radically increase the sentence" for the illegal lottery offense." *Id.* at 517. In the plurality's view, defining "proceeds" as "profits" eliminates this problem. *Ibid.*

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.*, gross receipts. *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. Such an interpretation also avoided the "particularly unfair" result of "increas[ing] the statutory maximum from 5 to 20 years." *Id.* at 527.

The court of appeals concluded that petitioner's *Santos* claim lacked merit. Pet. App. 15a-19a. Following circuit precedent, the court analyzed petitioner's challenge to his Section 1957 conviction under the same framework the circuit uses for claims based on *Santos*, which considered the definition of "proceeds" under Section 1956(a)(1). *Id.* at 16a n.3. Under that framework, the court assessed (1) whether a merger problem as described in *Santos* would exist; (2) if so, whether that merger problem resulted in a "radical increase" to the statutory maximum sentence; and (3) whether the legislative history failed to indicate that Congress intended such an increase. *Id.* at 17a

(quoting *Jamieson* v. *United States*, 692 F.3d 435, 440 (6th Cir. 2012) (per curiam)); see *United States* v. *Kratt*, 579 F.3d 558 (6th Cir. 2009), cert. denied, 559 U.S. 1070 (2010). The court agreed with petitioner that a "merger problem" existed because the mail fraud counts charged in the indictment included compensation of financial advisors, which was also the basis for the money laundering offense charged in Count 9. Pet. App. 18a. But petitioner's *Santos* claim failed, the court reasoned, because the statutory maximum sentence for his money laundering conviction (10 years) was shorter (not radically longer) than the statutory maximum for his mail fraud convictions (20 years). *Ibid.* The district court's decision to impose consecutive terms of imprisonment did not alter that analysis, the court added, because it made "little sense to hinge the meaning of 'proceeds' on a discretionary post-conviction sentencing decision." *Id.* at 19a. Because the court of appeals denied petitioner's claim on the second step, it did not address the relevant legislative history.

Judge Moore concurred in the judgment. Pet. App. 23a-38a. She agreed that Count 9 "did not merge" with petitioner's mail and wire fraud convictions under the circuit's *Kratt* framework, but believed that *Kratt* incorrectly interpreted *Santos*. *Id.* at 23a. In Judge Moore's view, *Kratt* "inaccurately described Justice Stevens's concurrence and announced an unwise method of statutory interpretation." *Id.* at 29a. Judge Moore reasoned that "proceeds" under both Sections 1956 and 1957 should be interpreted to mean "profits" whenever the government charged the defendant with money laundering based on payment of the essential expenses of the predicate crime. *Id.*

at 35a-36a. Applying that test, she would have vacated Count 9 because petitioner's compensation of financial advisors who referred their clients to NFOA constituted an "essential expense" of the scheme. *Id.* at 36a-37a.

ARGUMENT

Petitioner contends (Pet. 10-19) that one of his money laundering convictions must be set aside in light of *United States* v. *Santos*, 553 U.S. 507 (2008), and that the Court should grant review to clarify that, under *Santos*, the term "proceeds" in the money laundering statute means "profits" rather than "gross receipts," for all predicate offenses. Pet. i. That claim does not warrant this Court's review. The application of *Santos* to predicate offenses other than illegal gambling is not an issue of continuing importance because Congress has since amended the money laundering statute to define "proceeds" to mean "gross receipts." 8 U.S.C. 1956(c)(9), 1957(f)(3). This Court in turn has often denied petitions raising *Santos* claims, and it should do the same here. In any event, petitioner's case would not be an appropriate vehicle for review. Petitioner's *Santos* claim is reviewable only for plain error, and the court of appeals committed no error, much less an error that is obvious in light of this Court's splintered decision in *Santos*.

1. As an initial matter, the meaning of "proceeds" under the version of the money laundering statute interpreted in *Santos* has no significance for crimes committed after mid-2009. On May 20, 2009, the President signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. Section 2(f)(1)(B) of FERA, 123 Stat. 1618, amended Section 1956 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. III 2009). And Section 2(f)(2) of FERA, 123 Stat. 1618, amended Section 1957 to define "proceeds" the same way. 18 U.S.C. 1956(f)(3) (Supp. III 2009). Those definitions resolve prospectively the question whether "proceeds" as used in the money laundering statutes 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 closed set of cases that will diminish with time. Indeed, the statute of limitations for money laundering offenses is five years, 18 U.S.C. 3282(a), which has elapsed. Petitioner contends (Pet. 14) that "long after 2009, indictments continue to charge defendants with illicit schemes that include pre-2009 conduct." But the number of indictments charging pre-2009 conduct cannot be very large and will inevitably shrink and disappear with the passage of time. For example, the indictment in the sole case petitioner cites for this proposition, *United States* v. *Lonich*, No. 3:14-CR-00139, 2016 WL 324039 (N.D. Cal. Jan. 27, 2016), mentioned acts in 2008, but only charged the defendants in that case with devising and executing a fraud scheme from March 2009 until September 2012. *Id.* at *1-*2.

This Court in turn has denied review of many petitions seeking clarification of *Santos*'s scope, both before and after FERA became law. *E.g.*, *Esquenazi* v. *United States*, 135 S. Ct. 293 (2014) (No. 14-189); *Buffin* v. *United States*, 134 S. Ct. 422 (2013) (No. 13-

53); *King* v. *United States*, 132 S. Ct. 1128 (2012) (No. 11-764); *Prost* v. *Anderson*, 132 S. Ct. 1001 (2012) (No. 11-249); *Quinones* v. *United States*, 132 S. Ct. 830 (2011) (No. 11-563); *Webster* v. *United States*, 563 U.S. 918 (2011) (No. 10-1095); *Kratt* v. *United States*, 559 U.S. 1070 (2010) (No. 09-1084); *Bueno* v. *United States*, 559 U.S. 1049 (2010) (No. 09-1072); *Musick* v. *United States*, 558 U.S. 990 (2009) (No. 08-10827); *Demarest* v. *United States*, 558 U.S. 948 (2009) (No. 09-281); *Rashid* v. *United States*, 558 U.S. 831 (2009) (No. 08-10075); *Howard* v. *United States*, 558 U.S. 830 (2009) (No. 08-9977); *Combs* v. *United States*, 557 U.S. 905 (2009) (No. 08-1405); *McBirney* v. *United States*, 555 U.S. 831 (2008) (No. 07-10408). The same result is warranted here.

2. Even if this Court's review were warranted to clarify the scope of *Santos* as applied to the now-superseded version of the money laundering statute, this case would not provide a suitable vehicle to provide that clarification. Petitioner's *Santos* claim is reviewable only for plain error because he did not raise such an objection in the district court. Pet. App. 15a. Petitioner therefore would be entitled to relief only if he could show, among other things, that the district court made an "obvious" error. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Petitioner cannot make that showing.

a. 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 gambling 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 (opinion of Scalia, J.); *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 petitioner's case.

This Court's general rule for ascertaining the holding of a case lacking a 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; see *id.* 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. *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 *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 *Santos* is its specific result, which does not have any application to petitioner's case. See *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("[t]he precedential value of *Santos* is unclear outside of the narrow factual setting of that case"), cert. denied, 557 U.S. 905, and 558 U.S. 897 (2009).

b. Petitioner's money laundering conviction in turn does not constitute a plain error in light of *Santos*. In *Santos*, after the jury found the defendant guilty of two gambling counts and three money laundering counts, the district court sentenced him to 60 months of imprisonment on the gambling counts and 210 months on the money laundering counts. 553 U.S. at 509-510. Although Congress "evidently decided that lottery operators ordinarily deserve up to 5 years of imprisonment," the merger of the gambling counts with the money laundering counts subjected the defendant to "an additional 20 years" under Section 1956(a)(1). *Id.* at 516; cf. 18 U.S.C. 1955(a) (five-year statutory maximum for illegal gambling offense) with 18 U.S.C. 1956(a)(1) (20-year statutory maximum for money laundering offense).[1]

Though disagreeing on how to interpret "proceeds" in Section 1956, the plurality and Justice Stevens agreed that a core flaw with the dissent's interpretation of "proceeds" as "gross receipts" for the illegal gambling statute was how it affected the statutory maximum Santos faced. Justice Scalia's plurality

[1] The "merger problem" does not refer to a double jeopardy violation, as no such violation occurs where each offense requires proof of a fact that the other does not. See *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Money laundering, wire fraud, and mail fraud each contain elements that the others do not.

opinion could discern no reason why "Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime." *Santos*, 553 U.S. at 517 (opinion of Scalia, J.). Similarly, Justice Stevens concluded that such an increase in Santos's case was "particularly unfair" and that the dissent's interpretation "eviscerated" the "important limitations" built into the "statutory cap of five years" for the illegal gambling offense. *Id.* at 527 (Stevens, J., concurring). Petitioner's assertion (Pet. 18-19) that none of the opinions in *Santos* "spoke in terms of 'statutory maximum sentences'" is accordingly incorrect.

The court of appeals correctly applied *Santos*, therefore, when it concluded that the fairness problem that troubled five members of the Court in *Santos* does not arise here. Unlike in *Santos* where the penalty for money laundering was far higher than the penalty for the SUA, the statutory maximum sentence for petitioner's money laundering conviction (10 years) is far shorter than the maximum penalty for his SUA (20 years). See Pet. App. 18a. Indeed, Justice Scalia was particularly concerned that prosecutors "would acquire the discretion to charge the lesser lottery offense, the greater money laundering offense, or both—which would predictably be used to induce a plea bargain to the lesser charge." *Santos*, 553 U.S. at 516. But where the money laundering offense is the lesser offense, as here, that concern (whether or not well-founded) is significantly ameliorated.[2]

---

[2] The concern about using money laundering charges to induce a plea bargain is particularly inapposite here. Petitioner faced far

c. In any event, even if an error occurred here, the meaning of this Court's splintered decision in *Santos* would be too uncertain for that error to be "clear" or "obvious." *Olano*, 507 U.S. at 734. Indeed, although courts of appeals have found plain error in light of controlling circuit precedent definitively interpreting *Santos*, see *United States* v. *Cosgrove*, 637 F.3d 646, 656-657 (6th Cir. 2011); *United States* v. *Moreland*, 622 F.3d 1147, 1165-1167 (9th Cir. 2010), no court of appeals has ever found that a district court's failure to instruct the jury that "proceeds" means "profits" for predicate offenses other than illegal gambling constitutes plain error in light of *Santos* itself. See *United States* v. *Foley*, 783 F.3d 7, 15-16 (1st Cir. 2015) ("[G]iven the ambiguity of *Santos*'s holding and the lack of clear guidance in our cases, we doubt that any misapplication of *Santos* by the district court rises to the level of plain error"); *United States* v. *Thornburgh*, 645 F.3d 1197, 1209 (10th Cir.) (the "error cannot be *plain*, in view of the widely differing interpretations of *Santos*"), cert. denied, 132 S. Ct. 214 (2011); *United States* v. *Aslan*, 644 F.3d 526, 547-548 (7th Cir. 2011) ("The law remains unsettled and the error is therefore not plain."); *United States* v. *Smith*, 601 F.3d 530, 545 (6th Cir. 2010) (no plain error because "the meaning of *Santos* as applied to this case is uncertain") (citation omitted); *United States* v. *Demarest*, 570 F.3d 1232, 1241-1242 (11th Cir.), cert. denied, 558 U.S. 948 (2009); *United States* v. *Nguyen*, 565 F.3d 668, 682 (9th Cir. 2009); *United States* v.

---

greater exposure on the underlying fraud charges (Counts 1 through 7); he does not challenge one of his money laundering convictions (Count 8); he went to trial; and petitioner was ultimately convicted on all counts. See Pet. App. 1a.

Fernandez, 559 F.3d 303, 316 (5th Cir.) ("the uncertainty renders any error here not 'plain'"), cert. denied, 556 U.S. 1283, and 558 U.S. 824 (2009); *Brown*, 553 F.3d at 785.[3] Furthermore, petitioner was convicted under Section 1957, but Justice Scalia's opinion in *Santos* adopting the uniform "profits" approach (that petitioner urges) only considered the meaning of "profits" in Section 1956(a)(1). See 553 U.S. at 509 (opinion of Scalia, J.). Even if there were an error here, therefore, it would not qualify as a plain error.

3. Petitioner's claim (Pet. 10) of "widespread confusion" among the circuits on how to apply *Santos* does not merit this Court's review, and in any event this case would not be an appropriate vehicle for resolving that disagreement.

Petitioner cites (Pet. 10-13) 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 (such as the court of appeals in petitioner's case) focusing on the effect on the statutory maximum of any merger problem. With respect to money laundering convictions for which the predicate SUA is a fraudulent scheme, the courts of appeals have taken differ-

---

[3] In the course of finding that no plain error occurred, the Third Circuit stated in dicta that the plain-error analysis "does not depend upon whether the current state of the law surrounding 'proceeds' under § 1956 is confused and the Supreme Court's decision in *Santos* is confusing." *United States* v. *Bansal*, 663 F.3d 634, 645 (2011). In articulating the plain-error standard, however, *Bansal* overlooked *Olano*'s second requirement that the error be "clear" or "obvious," and only quoted the third "substantial rights" prong. See *ibid.*

ent approaches. 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), cert. denied, 132 S. Ct. 1988 (2012); *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, 253-255 (D.C. Cir. 2010) (use of bank fraud revenues to pay expenses of an underlying fraud not money laundering after *Santos*), cert. denied, 562 U.S. 1223 (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 as discussed above, that is an issue of no prospective significance and diminishing retrospective importance because Congress has since amended the money laundering statutes to resolve the dispute. This Court has often denied petitions seeking to clarify the confusion about *Santos*'s meaning. Moreover, this case would be a particularly poor vehicle for resolving any disagreement among the circuits because it arises on a plain-error posture. And as the confusion among the circuit courts itself illustrates, any error here in interpreting *Santos* would not be plain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
JAMES I. PEARCE
Attorney

MAY 2016