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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in case 06-1005, United States versus Santos.

5 Mr. Roberts.

6 ORAL ARGUMENT OF MATTHEW D. ROBERTS

7 ON BEHALF OF THE PETITIONER

8 MR. ROBERTS: Mr. Chief Justice, and may it
9 please the Court:

10 The Seventh Circuit misconstrued the Federal
11 money laundering statute by interpreting the term
12 "proceeds" to mean profits. The statute prohibits the
13 laundering of all the gross receipts of a crime, not
14 just its profits. The primary meaning of "proceeds" is
15 gross receipts, and the statutory context makes clear
16 that's the meaning Congress intended here. The statute
17 is structured to prevent criminals from using the fruits
18 of their crimes to promote or to conceal their illegal
19 activities. But a profits definition of proceeds would
20 constrict the statute in ways that can't be squared with
21 that statutory objective.

22 Because the word "proceeds" appears in
23 the introductory section of the statute, those kinds of
24 restrictions would apply to both concealment and
25 promotion cases.

1 For example, the statute wouldn't cover
2 expense payments that are structured to conceal the
3 unlawful nature and source of the funds involved. That
4 means that if an illegal gambling operator recorded the
5 compensation that he paid his collectors as salary
6 payments by a legitimate business that he owned, that
7 that would not be covered under the statute.

8 JUSTICE SCALIA: Where -- so what?

9 MR. ROBERTS: Well, Congress was trying --

10 JUSTICE SCALIA: Is there some rule up there
11 that says every criminal statute has to cover as much as
12 possible?

13 MR. ROBERTS: No, Your Honor. That's not
14 what we're arguing. What we're arguing is that there is
15 no reason that Congress wouldn't have covered these
16 transactions and that they implicate the objectives of
17 the statute as revealed by its text, just as much as the
18 transactions that are clearly covered.

19 JUSTICE SCALIA: I think it -- I think it
20 much more remarkable than that, more extraordinary than
21 that, that Congress would want to make all -- all
22 betting operations like this a violation automatically
23 of two criminal statutes.

24 MR. ROBERTS: Well, Your Honor --

25 JUSTICE SCALIA: I find that sort of, you

1 know, very strange.

2 MR. ROBERTS: -- it is certainly true that
3 illegal gambling and money laundering are going to occur
4 together, but that isn't a cause for concern. It just
5 reflects the fact that certain businesses, illegal
6 businesses like gambling operations, like drug dealing,
7 frequently generate large amounts of cash and they need
8 to launder that cash in order to survive and to prosper.

9 JUSTICE GINSBURG: It is hard to see this --
10 that, just in the sense of laundering, nothing is being
11 concealed. They're not -- the money that's being paid
12 to the runners and the collectors, it is an ordinary and
13 necessary expense of the illegal business.

14 So I think Justice Scalia was emphasizing
15 that this is, for the very same conduct two discrete
16 statutes, one with much heavier penalties. That makes
17 it odd, too, that the basic gambling statute has a lower
18 penalty than this money laundering statute, and yet it's
19 the same conduct that's violating both.

20 MR. ROBERTS: Well, it's not the same
21 conduct in that the conduct here, the paying the winners
22 and paying the collectors is not a required element of
23 the gambling offense.

24 JUSTICE SCALIA: Oh well, I mean -- come on.
25 Nobody -- nobody runs a gambling operation without

1 paying off the winners. It's not going to last very
2 long.

3 MR. ROBERTS: And, true --

4 JUSTICE SCALIA: To make the paying off of
5 the winners a separate crime from running the gambling
6 operation seems to me quite extraordinary.

7 MR. ROBERTS: It -- it -- it's true, Your
8 Honor, that they're not going to last very long.
9 They're not going to survive. They're not going to
10 grow. That's because they need to commit money
11 laundering in different ways to do that.

12 JUSTICE SCALIA: But even if --

13 JUSTICE KENNEDY: Can you tell me what
14 happens if there's a -- two bank robbers, the one's with
15 the get-away car; the other one going into the bank
16 teller, and the robber that goes into the bank gets
17 \$1,000 and comes out and gives 500 to the get-away guy.
18 Is that a violation of the statute?

19 MR. ROBERTS: That is, if the -- if the
20 payment would promote the continuing -- if they've got a
21 continuing robbery operation and by paying him he's
22 going to say, he's saying, you know, keep on continuing
23 in the operation and let's expand it further.

24 JUSTICE SOUTER: Then under your theory the
25 employee who gets paid shows up for work the next

1 morning; and so, of course, under your theory it would
2 be promotion.

3 MR. ROBERTS: Your Honor, your question and
4 a lot of the questions I'm getting, I think express
5 concern about treating these transactions as promotion
6 under the statute. But the question --

7 JUSTICE SOUTER: I would have the same
8 concern if we were dealing with concealment.

9 MR. ROBERTS: What I don't --

10 JUSTICE SOUTER: If the robbery takes place
11 in a dark alley, is that automatically concealment?

12 MR. ROBERTS: No, because what needs to be
13 concealed, what there needs to be is a financial
14 transaction that's designed, the transaction itself, to
15 conceal the nature and source of the proceeds.

16 JUSTICE SOUTER: That's going into the alley
17 instead of doing it out on the --

18 MR. ROBERTS: I don't think that doing a
19 robbery in the alley would be a financial transaction --
20 would be designing a financial transaction to conceal
21 the unlawful nature and source of the proceeds.

22 But if I can give you an example of --

23 JUSTICE ALITO: Mr. Roberts, isn't it true
24 that the problems that are being highlighted are
25 problems that result from expansive interpretations of

1 other concepts that are not before us here, expansive
2 interpretation of promotion, expansive interpretation of
3 concealment?

4 The Seventh Circuit in the first appeal in
5 this case interpreted promotion very broadly. And then,
6 I guess it felt that it had boxed itself in and that's
7 what led to this interpretation of proceeds. But if you
8 interpret those other concepts more narrowly, you don't
9 have the same kind of overlap.

10 MR. ROBERTS: I agree with that, Your Honor.
11 I was going to try to say to Justice Souter's question
12 before that if you have concerns that these kind of
13 expense payments should not be treated as promotional
14 money laundering, the way to address those is not by
15 adopting a profit construction of proceeds, because that
16 would do tremendous violence to the statute in other
17 ways.

18 And I do think that there are --

19 JUSTICE GINSBURG: What about the
20 qualification that Judge Easterbrook made when he said,
21 at least where the crime is a business-like operation?
22 He gave the example of gambling, he gave the example of
23 selling contraband.

24 And it seems to me that he was narrowing his
25 definition of proceeds to cases where the crime is not

1 robbery or a one-time event, but a business-like
2 operation.

3 MR. ROBERTS: Well, I think it's difficult
4 to interpret the proceeds, the term "proceeds," to mean
5 something different for business operations than for
6 other crimes because it's the same word. But even so,
7 Your Honor, there are other ways --

8 CHIEF JUSTICE ROBERTS: Why don't you
9 continue. I'm sorry. I didn't know you weren't done.

10 MR. ROBERTS: Okay. I'm sorry.

11 Even so, there are other ways in which a
12 profits definition just makes no sense under this
13 statute, besides the numerous concealment transactions
14 that would be excluded that Congress would have no
15 reason not to cover. It also would make no sense as
16 applied to professional money launderers. Those are
17 people who are hiding money for criminals as a matter of
18 their business. Because they wouldn't be guilty of
19 money laundering, even if they knew that they were
20 concealing money that was generated by a Federal felony,
21 unless they also knew that the money was profits.

22 CHIEF JUSTICE ROBERTS: I thought your
23 answer to the line of questioning that we were having
24 was that the problem would still be there, even if you
25 limited this statute to profits. You take the two bank

1 robbers in Justice Kennedy's hypothetical, the one that
2 robs the bank, the other in the get-away car. If before
3 the robber gave the money to the person in the get-away
4 car, he said, now, you know, I'm keeping \$100 because I
5 had to buy the gun and that was \$100, so you only get
6 400, so it's only the profits that they're splitting,
7 you'd have the same problem, wouldn't you?

8 MR. ROBERTS: That's right. That's another
9 point, Your Honor, that a profits definition itself
10 isn't going to solve the problem of where the underlying
11 crime and the money laundering --

12 JUSTICE SCALIA: It will solve a lot them.
13 And unless you're willing to come in and say, yes, do it
14 to us, give us a narrower definition of concealment and
15 a narrower definition of what's a transaction, but
16 you're not willing to do that. You're going to stretch
17 that as broadly as you can.

18 MR. ROBERTS: It's not going to -- it's
19 not -- first of all, this case doesn't present the
20 interpretation of promotion and the Court would be free
21 to address that in --

22 JUSTICE STEVENS: Maybe the question
23 presented doesn't present it -- -

24 MR. ROBERTS: Yes.

25 JUSTICE STEVENS: But I think the facts of

1 the case do present it. I mean, it's theoretically
2 possible we could agree with you on the profits issue,
3 but nevertheless say this doesn't fit the promotion.

4 MR. ROBERTS: You certainly could, Your
5 Honor. But that would not be an alternative ground that
6 would be appropriate for you to rule on in this case,
7 because that issue was raised on direct appeal. It was
8 decided against Respondents by the --

9 JUSTICE STEVENS: I understand all that, but
10 we can still do it if it's perfectly obvious that that's
11 the right way to dispose of the case.

12 MR. ROBERTS: You can obviously address any
13 issue that you want to, Your Honor. But the ordinary
14 rule is that issues that have been decided on direct
15 review shouldn't be relitigated on collateral attack.
16 The issue wasn't addressed by either of the courts below
17 in these collateral proceedings.

18 JUSTICE GINSBURG: Wouldn't it be --

19 MR. ROBERTS: We do submit that it was
20 resolved correctly in this case, because, as the Seventh
21 Circuit held and as all the other courts of appeals have
22 held about promotion, the payments to the winners and
23 the payments to the collectors encourage the continued
24 participation of the collectors and encourage the
25 increased participation by gamblers.

1 JUSTICE GINSBURG: Mr. Roberts, the Seventh
2 Circuit in this case was following a precedent in
3 another case and it thought that the defendant was would
4 prevail under its theory.

5 If this Court should say that that theory,
6 that it's profits and not proceeds that matter, wouldn't
7 it be appropriate for us, if we don't decide the
8 question ourselves, to remand and say, Seventh Circuit,
9 your precedent was wrong; but you could consider a
10 question that was not necessary for you to reach because
11 you had your precedent on the profits issue?

12 MR. ROBERTS: You could do that, but the
13 question that I think that is concerning the Court was
14 resolved by the Seventh Circuit in this very case on
15 direct appeal. So on direct appeal, the argument was
16 made by Mr. Santos that these transactions can't count
17 as promotional money laundering because they're
18 essential transactions of the business and that they
19 don't promote the carrying on of the business, and the
20 court of appeals rejected those arguments.

21 JUSTICE SCALIA: You might well reject it if
22 you're going to have a narrow definition of proceeds. I
23 mean, that rejection was connected with its acceptance
24 of a narrow definition of proceeds. And if you're
25 asking us to obliterate the latter, I don't know why it

1 isn't reasonable to send it back to the Seventh Circuit
2 and say, well, you still said the same thing if you came
3 out differently on the proceeds question.

4 MR. ROBERTS: Well, we certainly would
5 prefer that you did that than that you interpreted
6 proceeds to mean profits because of the violence that it
7 would do to the remainder of the statute, Your Honor.

8 I was talking about professional money
9 launderers before and how they wouldn't be guilty of
10 money laundering if they were concealing money that they
11 knew that was generated by a crime. And Congress --
12 there's no reason that Congress would have considered
13 those professional money launderers to be less culpable
14 merely because they might be laundering only illicit
15 receipts.

16 And It would be very difficult for the
17 government to prove that professional money launderers
18 knew that they were laundering profits because they
19 haven't participated in the predicate crime.

20 JUSTICE BREYER: I've got that point, but
21 what is your suggestion as to how to deal with what is
22 underlying disturbing me and it seems like a lot of
23 others, if prima facie Congress did not intend that you
24 launder money where the activity is an essential part of
25 the underlying crime itself? And there are three ways

1 of dealing with that:

2 One is this gross receipts method, which has
3 the defects you mentioned.

4 The second is a definition of "promotion"
5 which says when you promote a crime that's different
6 from engaging in the crime.

7 And the third is sentencing; because it's a
8 real offense sentencing method and where what you've
9 done is nothing more than the underlying crime, the
10 sentence should be nothing more than the underlying
11 crime. I see three ways to get to the same problem, and
12 you're asking us to decide them piecemeal, yet they're
13 related. What do I do?

14 MR. ROBERTS: Well, I think you decide the
15 question presented here and you decide that proceeds
16 means that -- that proceeds means gross receipts,
17 because that's the only meaning that makes sense with
18 the statute.

19 But the sentencing point you make is a very,
20 very good one, Your Honor. And the fact is that the
21 Sentencing Guidelines were changed in 2001 to align the
22 punishment for money laundering when people participate
23 in the underlying crime much more with the punishment
24 level for the underlying crime.

25 And -- you know, in addition, as we know,

1 the Sentencing Guidelines are advisory, and so courts
2 could certainly take into account concern about
3 overlap --

4 JUSTICE BREYER: But still your answer
5 leaves me -- and I have no answer to this; I want yours.
6 I want you to see that I'm in -- at risk here as a judge
7 of getting whipsawed, that I first decide this case for
8 you; and the next case, all kinds of arguments appear
9 that I hadn't thought of; and then the third case,
10 again. But if I could have them somehow together, I
11 could look at the least evil way or the most efficient
12 way of achieving the congressional objective.

13 MR. ROBERTS: Well, I think that you can't
14 have all of them together, Your Honor, unfortunately.
15 But I do think that we would say that out of the three
16 that you raised, the best way to deal with concerns
17 about this would be in the sentencing context.

18 JUSTICE SCALIA: I find that extraordinary.
19 You really come in and say yeah, two crimes, assume
20 Congress meant ordinary gambling crime to carry with it
21 this other extraordinarily high penalty for the same
22 activity that involves the gambling, but don't worry
23 about it, we'll even it out in the sentencing.

24 I mean -- that's no way to run a railroad.

25 MR. ROBERTS: It's not -- Your Honor, it's

1 just not exactly the same activity, because people can
2 commit gambling without commit money laundering. They
3 can be guilt of illegal gambling without being guilty of
4 money laundering --

5 JUSTICE SCALIA: Straighten that out in the
6 definition of the crime, rather than in the --

7 MR. ROBERTS: But they can be -- even under
8 this definition, Your Honor. In this very case there
9 were restaurant and tavern owners that permitted the
10 gambling bets to be taken on their premises because it
11 increased their -- the patronage of their businesses.
12 And they were convicted of participating in illegal
13 gambling operations. They didn't commit money
14 laundering, because they didn't engage in a financial
15 transaction that's not an element of the gambling
16 offense, that involves the proceeds of the offense, and
17 that's intended either to conceal the proceeds --

18 JUSTICE STEVENS: -- Mr. Roberts -- that the
19 gambling offense is conducting a gambling business, so
20 it makes it -- it is not just the gambling itself --

21 MR. ROBERTS: It is -- but the statute
22 defines what the three -- the statute defines what the
23 three elements of the gambling business are, Your Honor.
24 That it's illegal gambling that's illegal under State
25 law, that involves 5 or more persons, that it has --

1 continues for more than 30 days or has more than \$2,000
2 in gross revenues in a day.

3 JUSTICE SCALIA: What continues? The
4 business has to continue. You are not engaging in a
5 gambling business if you're not paying off the winners.
6 That's all. That's not a good decent honest gambling
7 business.

8 (Laughter.)

9 MR. ROBERTS: The gambling business -- it
10 might be gambling and fraud, Your Honor. But the
11 gambling business can continue for more than 30 days
12 without having paid the winners if they had a lottery
13 every month, and it was at the end of the month -- they
14 hadn't paid the winners yet, it would have gone for the
15 30 days, in a 31-day month without -- without having
16 paid the winners.

17 JUSTICE KENNEDY: And -- if your definition
18 of proceeds is problematic, it is something like an
19 abstract question you're asking us to answer. If this
20 -- if we say well, we're not sure this is proceeds but
21 if it is proceeds, it is defined as gross receipts.

22 That's an artificial context in which to
23 address the issue.

24 MR. ROBERTS: Yes. I think that what
25 they're asking you to do is to interpret -- and what the

1 Seventh Circuit has done, is to interpret proceeds in a
2 way that makes no sense for the statute in order to deal
3 with these concerns about promotion cases that can be
4 dealt with in the other ways that Justice Breyer raised.
5 And there are really four --

6 JUSTICE GINSBURG: Mr. Robert, may I go back
7 to something you said about -- of the options that
8 Justice Breyer mentioned.

9 You said the way to handle it is in
10 sentencing.

11 Santos was sentenced to 60 months on the
12 gambling counts and 210 months on the laundering. You
13 said the statute has been changed. So what would be the
14 sentence under the statute as it now exists? And this
15 is vastly disproportionate. 60 months for gambling, and
16 210 for money laundering.

17 MR. ROBERTS: I'm sorry, Your Honor. I
18 probably should know the answer to what the precise
19 range would be under the guidelines. Now, I don't. But
20 what I do know is before, the way the guidelines worked
21 was that the base offense level for a money laundering
22 crime was not tied to the offense level for the
23 underlying offense. So it was set I think starting at
24 23 for promotional money laundering.

25 But what happened in 2001 is that the

1 commission changed the rules so that when you -- when
2 the money laundering involves the person who
3 participated in the underlying offense and has also done
4 the money laundering, you start with the offense level
5 for the underlying offense and then you make some minor
6 increases depending upon the type and the --

7 JUSTICE BREYER: I have it in front of me
8 actually. I was looking at it. And it seems to me what
9 it assumes is that the underlying offense is different
10 from the money laundering. And do you have any
11 rationale at all as to why this individual, if it's true
12 that he did nothing more than engage in the underlying
13 offense, why should he receive one day more than 60
14 months?

15 MR. ROBERTS: Well, because he does engage
16 in something more than what he needs to do to be
17 punished for the underlying offense, and that conduct is
18 -- and that conduct is -- promotes ongoing crime or can
19 conceal ongoing crime in ways that are just what
20 Congress was getting at in the statute. And --

21 JUSTICE SCALIA: Because gambling under the
22 definition has the three elements that do not include
23 paying off the winners. That's what it all represents
24 --

25 MR. ROBERTS: Because -- well, that's one

1 thing, but the other thing is, Your Honor, if I could
2 talk about the ways that the proceeds definition just
3 doesn't make sense here. If these expense payments --
4 the expense payments for instance, the payment of the
5 salary that Mr. Santos made to Mr. Diaz -- it happens in
6 this very case, although we didn't prosecute it as
7 concealment money laundering -- that he recorded those
8 payments as salary payments by a printing business that
9 he owned.

10 And he's doing that to conceal the activity,
11 to enable it to keep going. And that's just what
12 Congress was trying to get in the statute. Wouldn't be
13 covered under a profits definition. If criminals
14 concealed the gross receipts temporarily until they pay
15 the expenses -- for instance, if a gambling operator
16 takes the money that -- his illicit receipts from the
17 gambling, and he puts it in the bank account of the
18 printing business. And then later he uses it to pay the
19 winning betters, he's doing that to hide it so the
20 gambling operation can keep going. That's what Congress
21 was trying to get at here. That wouldn't be covered.

22 That -- that evades detection just as much
23 as transactions that hide profit.

24 JUSTICE STEVENS: You are saying it would
25 not be covered as money laundering, but nevertheless it

1 would be illegal and be punished as gambling.

2 MR. ROBERTS: Yes, it would, Your Honor.

3 But the conduct, the concealment conduct --

4 JUSTICE STEVENS: And everything they've
5 done here would be punished as gambling --

6 MR. ROBERTS: -- the concealment conduct is
7 additional conduct, and it is what Congress wanted to
8 get at here, and a profits definition would mean that it
9 is excluded from the statute.

10 And it would exclude the --

11 JUSTICE KENNEDY: Well, you see the problem
12 we have is we're not sure that it is within the statute.
13 So then you're asking us to say how to make the statute
14 work when we don't think the statute's applicable at
15 all.

16 MR. ROBERTS: Well, I guess if you don't
17 think that concealing expense payments should be
18 covered, if you don't think concealing money that is --

19 JUSTICE STEVENS: Can you imagine running a
20 illegal gambling business and advertising your expenses?
21 I mean, you have got to conceal these --

22 MR. ROBERTS: It's not a question of
23 advertising them, Your Honor. It's not a question of
24 advertising them, but it is a question of taking
25 additional conduct to conceal them.

1 JUSTICE STEVENS: But it's not additional
2 conduct. That's the point.

3 MR. ROBERTS: It is additional conduct. He
4 didn't need to record it on the books of the -- on the
5 books of his printing business.

6 JUSTICE SOUTER: What if he puts it in a tin
7 can and buries it in the garden? Is that additional
8 conduct?

9 JUSTICE SCALIA: Of course it is.

10 MR. ROBERTS: It's additional conduct, but
11 it's not designed to conceal the unlawful nature --

12 JUSTICE SOUTER: Why isn't it? Do you put
13 your salary in tin cans in the garden?

14 MR. ROBERTS: I might like to keep my money
15 in the cookie jar -- and it's perfectly legitimate
16 money, Your Honor -- because I don't want when someone
17 comes into my house that -- for them to steal the cash.

18 JUSTICE SOUTER: I just don't see how you
19 can make the distinction you're making, and therefore I
20 don't see how you can avoid Justice Stevens's problem.

21 MR. ROBERTS: If he takes the money, Your
22 Honor, and he structures his payments to his employees
23 by making them -- or to his suppliers, by making them in
24 \$9,000 increments in order to evade transaction
25 reporting requirements, that wouldn't be covered either

1 under this interpretation of the statute.

2 JUSTICE ALITO: Mr. Roberts, isn't it true
3 that the Seventh Circuit's interpretation of proceeds
4 doesn't really solve these problems except in the case
5 of an unprofitable business? In the case of a
6 profitable illegal enterprise, all of the same problems
7 exist.

8 MR. ROBERTS: I think there are many
9 situations, as the Chief Justice pointed out, in which a
10 profits definition isn't going to be enough to solve it.
11 For instance, just a drug dealer accepts payment for the
12 drugs. If that money exceeds the cost of the business,
13 it would presumably be profit and without some other
14 requirement in the statute, it would count as money
15 laundering. And for instance, when street-level dealers
16 that are employed by a drug kingpin turn the receipts
17 over to the kingpin even after they've take out their
18 share, let's say -- under a profits definition if those
19 receipts exceeded the costs of the business that would
20 also be covered as money laundering. So I think it's
21 very true that the profits definition isn't going to
22 solve all the problems as well.

23 That's a -- you know -- another point about
24 it.

25 It also means that what we have to prove

1 profits that that's going to be very difficult for us to
2 do even in cases that don't involve these expense
3 payments because criminals often don't keep accounting
4 records. They certainly don't keep records that are
5 accurate and complete and decipherable by law
6 enforcement. And Congress recognized the lack of hard
7 evidence of criminal profits, and for that reason
8 Congress provided for the forfeiture of proceeds rather
9 than profits in the RICO and drug forfeiture statutes.
10 And there's no reason to think Congress took a different
11 approach here in the money laundering statute, two years
12 later, when it used the same term "proceeds."

13 There's also -- there's the issue of the
14 uncertainty that would be created by a profits
15 definition, because it would raise all these questions,
16 and there are no accounting rules to resolve them.

17 And even the court below acknowledged that
18 it's difficult to determine what is and isn't net
19 income, and that the line between paying expenses and
20 reinvesting that income is murky.

21 And I don't think the Court should lightly
22 assume that Congress intended a definition of an element
23 of the offense that's going to raise these numerous
24 issues about the scope of that essential element of the
25 offense. And the Court is going to have to resolve them

1 all without any guidance from Congress.

2 So if I could reserve the reminder of my
3 time.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. ROBERTS: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Vare.

7 ORAL ARGUMENT OF TODD G. VARE

8 ON BEHALF OF RESPONDENTS

9 MR. VARE: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 Justice Ginsburg, you have suggested
12 correctly that the only conduct in this case was the
13 payment of ordinary and necessary expenses of the
14 business.

15 Justice Scalia, you correctly suggested that
16 paying off winners is necessary to every gambling
17 operation.

18 Justice Breyer, you have correctly suggested
19 and stated that the money laundering statute is intended
20 to punish different conduct, different criminal activity
21 than the underlying criminal activity.

22 CHIEF JUSTICE ROBERTS: Didn't Justice Alito
23 correctly suggest that these merger problems would still
24 persist even under your definition of "proceeds"?

25 MR. VARE: I think that that is not

1 necessarily true. The merger problems would -- would
2 exist except for the "profits definition," certainly on
3 the facts of these cases -- on this case.

4 On this case the only facts that were
5 presented by the Government -- and they have conceded
6 that they did not present any evidence of profits.

7 CHIEF JUSTICE ROBERTS: No, but I mean if
8 you have a "profits" definition and the enterprise has
9 profits, all of these problems we've been talking about
10 in terms of the merger, as I call it, between the money
11 laundering and the underlying offense would still be
12 there, right?

13 MR. VARE: Yes, Your Honor. There would.
14 There would. And, in fact, Justice Alito also correctly
15 suggested that the reason why the Scialabba panel
16 decided the "proceeds" definition is profits was because
17 of the expansive interpretation and application of the
18 other aspects of the statute, and that they were left
19 with essentially no choice.

20 JUSTICE SCALIA: So why are you urging us to
21 create two problems, to drag along all of the problems
22 that you object to with -- with interpreting proceeds to
23 include simply covering your expenses? You acknowledge
24 that the problems you point out would continue to exist
25 if we accept your definition.

1 On the other hand, I think you have to
2 acknowledge that accepting your definition creates other
3 problems of its own, such as the difficulty in every
4 case of showing that an illegal operation made a profit,
5 such as the difficulty of deciding what kind of criteria
6 you use for determining what are the -- what are the
7 ordinary and necessary expenses of a criminal
8 enterprise.

9 Why should we -- why should we choose to get
10 the worst of both worlds? And why isn't the proper way
11 to attack the difficulty to focus in on what constitutes
12 a transaction and what constitutes concealment --
13 something other than the "proceeds" definition?

14 MR. VARE: I think you're absolutely
15 correct, Justice Scalia. And, in fact, in our
16 opposition to the petition for cert in this case, we
17 made this very point as to why this was not the right
18 case to determine all of these issues, and particularly
19 the burdens that have been presented by the government.

20 JUSTICE KENNEDY: Did you argue at any point
21 that these were not proceeds?

22 MR. VARE: Yes, Your Honor, we did.
23 Justice Kennedy, in the briefing in the opposition to
24 cert and in our response brief, we have set forth
25 distinct arguments that there are not separate

1 transactions distinct and different from the underlying
2 criminal activity.

3 JUSTICE KENNEDY: Did you argue that in the
4 court of appeals?

5 MR. VARE: That was presented as -- that was
6 presented as part of the Febus decision as an argument
7 that those transactions did not constitute distinct and
8 separate transactions from gambling. That was presented
9 in the pro se petition and acknowledged by the
10 government in responding to the pro se petition below.

11 The government acknowledged that the
12 question in Febus, the question in Scialabba, the
13 question in this case on habeas are legally and
14 factually indistinguishable. And I think Justice
15 Stevens has suggested that all of this is inherent in
16 the question presented.

17 A fair -- it is fairly included because to
18 look at the statutory context of the word "proceeds" is
19 necessary for an intelligent resolution of the meaning
20 of that word as well as how it plays throughout the rest
21 of the statute.

22 JUSTICE BREYER: The question is can you
23 violate the statute by financial transactions which --
24 have you promoted the crime, when those transactions are
25 no more than part of the crime itself?

1 That's basically the question. And I think
2 Justice Kennedy is asking if, in fact, we wanted to
3 reach that question, is this a case in which we could do
4 it, through reargument or in some other way?

5 MR. VARE: I think that that is a question
6 that this Court could resolve on the facts of this case,
7 or --

8 JUSTICE BREYER: And was it raised in the
9 court below?

10 MR. VARE: It was -- it was raised in the
11 court below as -- as inherent -- well, it was certainly
12 raised in the Febus, in the direct appeal.

13 It is inherent in the 2255 petition filed
14 pro se by my client, Mr. Santos. It was acknowledged by
15 the government that these issues are not legally or
16 factually distinguishable.

17 And again, it is inherent in the question
18 that's presented. The money laundering statute requires
19 conducting a financial transaction involving the
20 proceeds of the specified unlawful activity with the
21 intent to promote the --

22 JUSTICE KENNEDY: Well, I think it is a
23 stretch so far as the question presented. The question
24 presented is very clear whether or not it is gross
25 receipts or net profits. That's what we're asked to

1 resolve.

2 JUSTICE GINSBURG: That's not your question
3 presented.

4 MR. VARE: Absolutely not, Justice Ginsburg.
5 It is not our question presented, but we do feel that,
6 even in answering that question, whether or not it is
7 net or gross does require looking at the term in
8 context. And -- and the context, we're not looking at a
9 different statute.

10 CHIEF JUSTICE ROBERTS: I didn't see that
11 you presented -- a separate question presented in your
12 opposition.

13 MR. VARE: We did , Your Honor.

14 CHIEF JUSTICE ROBERTS: Where is that?

15 MR. VARE: In the -- Mr. Chief Justice --

16 CHIEF JUSTICE ROBERTS: Not at page (ii).

17 MR. VARE: In Mr. Santos' brief. And the
18 question presented there was --

19 JUSTICE KENNEDY: Brief in opposition --

20 MR. VARE: The brief in opposition on the
21 very first page.

22 CHIEF JUSTICE ROBERTS: Oh, but I am looking
23 at the orange one, not the red one. The orange one is
24 what we have before us when we decide whether or not to
25 grant certiorari. And there you don't have a different

1 question presented.

2 MR. VARE: No, we did not -- in the
3 opposition to the cert petition we did not present a
4 different question presented as a question presented.

5 But we did present the argument --
6 Mr. Santos did and Mr. Diaz did -- that there were no
7 separate transactions that promoted the carrying on of
8 the specified unlawful activity. Rather, all that the
9 government had presented in this case was merely
10 conducting the illegal gambling business.

11 CHIEF JUSTICE ROBERTS: If we adopt your
12 position, we will have to decide a question like, for
13 example, if the argument is I didn't have any profits
14 because I had to pay \$10,000 for a hit man to kill
15 somebody, we would have to have a judicial decision
16 that, yes, paying hit men is the ordinary and necessary
17 business expense in carrying out illegal gambling
18 operations, right?

19 MR. VARE: I think, Mr. Chief Justice, in
20 any case you're going to have to look at what the
21 specified unlawful activity is in the context of a money
22 laundering prosecution, because that is part of the
23 context.

24 And so in this case you have to look at what
25 is the ordinary conduct of an illegal gambling business.

1 And I would suggest that paying off a hit man most
2 likely would not fall into that category. But,
3 certainly, as many of the Justices, including Justice
4 Scalia and Justice Stevens and others have suggested,
5 that when a gambling business pays off its winners, that
6 is inherent -- that is integral -- to conducting a
7 gambling business. It is not --

8 CHIEF JUSTICE ROBERTS: Let's take two
9 illegal gambling operations that are identical in every
10 way except that the one pays the runners, you know, \$200
11 a week. The other pays the runners \$500 a week. And
12 the one that pays \$500 doesn't make any profits because
13 he's paying too much to the runners.

14 The first one, the more successful
15 operation, you say, can be prosecuted for money
16 laundering because its has profits. The other one
17 doesn't. So incompetence is rewarded.

18 MR. VARE: No, Mr. Chief Justice. I would
19 say that neither one could be prosecuted for money
20 laundering because in both situations --

21 CHIEF JUSTICE ROBERTS: But the --

22 MR. VARE: -- when in both situations the
23 gambling operator is simply paying off ordinary business
24 expenses. Just the collectors who are part and parcel
25 of running the illegal gambling business, they're one of

1 the participants. And that's part of the illegal
2 gambling statute, is that you have to have five or more
3 participants.

4 CHIEF JUSTICE ROBERTS: No, I'm focusing on
5 the question presented -- that was the only question
6 presented when we considered whether to grant certiorari
7 by either of the parties, and that focuses solely on the
8 question of whether "proceeds" is considered gross
9 revenues or profits.

10 MR. VARE: Well, Mr. Chief Justice, what I
11 -- what I believe is the answer to your question is --
12 is you cannot look at the term "proceeds" in isolation.
13 And Justice Breyer, you know, suggested that the reason
14 why we're even here today, arguing about what I believe
15 is just absurd and unwarranted results on the facts of
16 this case, is because the courts below -- and the
17 government has proposed expansive interpretations -- the
18 courts below have adopted, in some cases and not others,
19 these expansive interpretations.

20 JUSTICE ALITO: But this doesn't --
21 "proceeds" must mean the same thing in every money
22 laundering case, doesn't it? And every money laundering
23 case is not based on a gambling business. There are
24 drug businesses and all sorts of other predicates.

25 MR. VARE: Well --

1 JUSTICE ALITO: Can it mean something
2 different in -- depending on the underlying illegal
3 activity?

4 MR. VARE: I think there is certainly a
5 suggestion, but that this Court itself has made recently
6 in the Duke Energy case, that a term can have multiple
7 meanings, multiple shades of meanings, and that will
8 depend upon the context. So you have to look at the
9 context and the specified unlawful activity is context.

10 Now, I'm not suggesting that we adopt a
11 definition of proceeds as net profits in one case for
12 one unlawful activity or gross profits for another
13 unlawful activity or gross receipts for another one.

14 But the problem that we have presented to us
15 today is due to the piecemeal construction and
16 application of this statute and --

17 JUSTICE SCALIA: Mr. Vare, you know, I'm --
18 I'm unwilling to decide the definition of transaction
19 question in the present case because, frankly, I think
20 that's a -- in itself, a very difficult question which
21 we haven't had adequately argued. For example, while I
22 believe, as I've indicated earlier, that paying off the
23 winners is -- is an essential part of a gambling
24 operation, I don't believe that paying off runners
25 necessarily is. You can have a gambling operation

1 without runners, can't you? You can --

2 MR. VARE: You could have --

3 JUSTICE SCALIA: You can -- you can view
4 that as something beyond the mere -- the mere gambling
5 crime. I don't -- I don't think you can view that
6 paying off the winners is beyond the gambling crime, but
7 I do think having a bunch of runners and paying off each
8 of them is not necessarily part of gambling.

9 MR. VARE: Well, you can have a gambling
10 business without runners per se.

11 JUSTICE SCALIA: Exactly.

12 MR. VARE: But you do need, Justice Scalia,
13 you do need five or more participants. And the courts
14 below have defined participants as -- as owners or
15 partners, bartenders, cocktail waitresses, doormen,
16 employees of the business.

17 And if those are qualifying participants to
18 even establish the -- the predicate for an illegal
19 gambling business, then those participants are most
20 likely going to get paid, and if they get paid, then
21 that is simply part of conducting an illegal gambling
22 business.

23 I think the fact -- I mean, the fact that
24 the runner in this case, the bet collector, Mr. Diaz, is
25 probably -- you know, illustrates best the unwarranted

1 result in this case. Mr. Diaz did nothing more in this
2 case than collect wages of about \$150 a month or a week,
3 something along those lines, for simply collecting
4 debts, and he was convicted of money laundering and
5 sentenced to 9 years in jail.

6 Mr. Santos, my client, all he did was pay
7 winners and pay those bet collectors to collect debts,
8 and he -- his sentence was nearly quadrupled.

9 CHIEF JUSTICE ROBERTS: So someone who
10 simply paid off whoever it is that ships in, you know, a
11 ton of heroin, you'd say is not guilty then? Same
12 thing. I mean, you're just paying off the people who
13 engage in the activities that are necessary for the
14 continuation and promotion of the illegal enterprise.

15 MR. VARE: Well, I -- I think in that case,
16 Mr. Chief Justice, I would -- I would suggest it might
17 be an incomplete hypothetical, because simply paying the
18 expenses of a crime or simply buying more drugs is not
19 in and of itself -- and I think the government has
20 conceded that in their opening -- that's not in and of
21 itself money laundering. There has to be a transaction
22 that is conducted with the intent to promote the
23 carrying on or separately a transaction that is designed
24 to conceal the legitimate or the illegitimate source of
25 -- of the funds received.

1 So simply receiving proceeds from an
2 unlawful activity is not enough. And that's clear on
3 the statutory language. You either have to have some
4 promotion element or some concealment element.

5 JUSTICE ALITO: Let me go back to the
6 question of the definition of "proceeds."

7 Isn't it very unlikely that Congress would
8 have wanted -- wanted to adopt the net income definition
9 in light of the legal issues and the problems of proof
10 that that would involve?

11 Let's take the example of an international
12 drug ring that has assets in a foreign country. They
13 may have crops. They may have processing plants,
14 warehouses, trucks, airplanes, et cetera. They ship
15 millions of dollars of drugs into the United States.
16 They get millions of dollars in gross revenue here every
17 year. They hire a professional money launderer to
18 launder the money here. Now, the Government wants to
19 prosecute the money -- the person they hired plus
20 members of the organization.

21 The person they hired may not know and may
22 not care whether the money that was being laundered was
23 profits or not. And how are you going to prove what --
24 whether this enterprise was a profitable enterprise or
25 not? They may have -- and they may have enormous gross

1 revenue, but they may have -- they may have enormous
2 expenses overseas. They may have bought a lot of
3 warehouses and equipment. They may have lost a lot of
4 things because they were raided by the government,
5 destroyed the factory, killed the plants.

6 It becomes as impossible situation, and why
7 would Congress ever have adopted a definition like that?

8 MR. VARE: Well, Justice Alito, I don't
9 think it's an impossible situation, number one, and I'll
10 get to that in a second. To address your first
11 question, could Congress have intended this to mean
12 profits knowing that the burdens were so difficult?

13 To answer that question, then you must look
14 at what else Congress intended, and there's no question
15 that Congress intended to punish different conduct than
16 the underlying criminal activity.

17 And then you have to look at what Congress
18 intended to get at when they wanted to fill the gap in
19 criminal law, when they want wanted to punish crimes
20 that were not previously punished.

21 They focused on getting at ill-gotten gains
22 of criminal enterprises. They focused -- and our
23 briefs, you know, set forth the statements that are
24 replete through the debates on the floor, that the
25 Congress was focused on profits of criminal enterprises.

1 Congress was not focused on the unprofitable
2 criminal enterprise because --

3 JUSTICE ALITO: I'm sure that's true. They
4 wouldn't be that worried about the unprofitable criminal
5 enterprises because they wouldn't last very long. But
6 there's the -- there still is the problem of proof --

7 MR. VARE: Absolutely, Justice Alito.

8 JUSTICE ALITO: -- proving that it's
9 profitable.

10 MR. VARE: And the proof problem --

11 JUSTICE SCALIA: Not just proving that it's
12 profitable; proving that the person laundering it knew
13 that it was profits because that's part of the
14 definition of the crime, that scienter. And how can you
15 prove that the fellow knew that it was profits? He
16 would very rarely know whether it was or wasn't. So he
17 skips off scot-free free of the laundering crime.

18 MR. VARE: Well, Justice Scalia, the intent
19 or the knowledge or the scienter requirement is going to
20 be present. It's going to be a burden on the government
21 to prove, no matter what definition of proceeds is.

22 But in terms of proving profits, the
23 government is able to prove profits in other criminal
24 financial transaction-type cases in a number of ways.
25 They're not limited to a particular accounting method.

1 They can choose the accounting method that they want.
2 They're not limited to looking at day after day after
3 day, week after week after week of financial records.
4 They can aggregate records that are selected from
5 particular points in time. And even in --

6 CHIEF JUSTICE ROBERTS: Well, how do they
7 know even what the fiscal year of these enterprises is?
8 I mean let's suppose you have some costs. They have to
9 buy the poppy field or wherever, but, you know, over 3
10 years, they're going to make a lot of money. You're
11 saying you can't prosecute them in year 2?

12 MR. VARE: No, I'm not saying that at all,
13 Mr. Chief Justice, and I think my point would be the
14 government would not even need to look at a fiscal year
15 to prove profits. They would be able to look at a
16 period of time and through their extensive search and
17 seizure efforts --

18 CHIEF JUSTICE ROBERTS: My point is the
19 profits may not come in immediately, even though the
20 underlying activity is exactly the same.

21 MR. VARE: That may be the case. They may
22 have a difficult burden of proving profits in the early
23 stages, but most of these prosecutions practically occur
24 after a period of time.

25 JUSTICE SCALIA: I mean what -- what's the

1 total stage you look at? Suppose it's profitable 1
2 month and not the next month, and the loss the second
3 month more than undoes the profits of the first month.
4 Can you still prosecute them for the profits in the
5 first month?

6 MR. VARE: Certainly, based upon the profits
7 in the first month. They're not limited to that. I
8 mean --

9 JUSTICE SCALIA: One day they could pick
10 then, they have one good day. And they could --

11 MR. VARE: And they could profit on that one
12 good day if there are other transactions involved in the
13 profits.

14 JUSTICE KENNEDY: What about the bank robber
15 -- there's just one bank robbery. They spend \$500 to
16 each, to people for their airfare and car rental. They
17 rob the bank. They only get \$800. They lost \$200.
18 They then give the \$800 to the attorney to please -- or
19 to somebody to please launder the money. No profits?

20 MR. VARE: I don't think that that --

21 JUSTICE KENNEDY: That would be a very silly
22 result.

23 MR. VARE: Well, I -- I don't think that,
24 under that hypothetical, even the government would
25 charge those criminals with money laundering.

1 JUSTICE KENNEDY: No. They gave it to a
2 third person to conceal it, \$800.

3 MR. VARE: Well, if there's --

4 JUSTICE KENNEDY: 8,000, 8 million.

5 MR. VARE: Simply giving money to somebody
6 else does not meet the concealment and disguise
7 element. I mean, there has to be an effort made to
8 disguise the source of the income as being illegitimate.

9 JUSTICE KENNEDY: Assume that it's proceeds.
10 Assume that they have a money launderer. Under your
11 definition there's still no violation?

12 MR. VARE: I suppose I would say no. And
13 I'm going to explain why I have to say no, and I'm going
14 to give you a medical word. The profits construction is
15 not perfect. There's no question about that.

16 But we're here today because it's the only
17 way to resolve the case that came up to this Court based
18 upon the expansive interpretations of the rest of the
19 money laundering cases.

20 CHIEF JUSTICE ROBERTS: Well that's -- but
21 we don't try to solve every case. We look at particular
22 questions presented. And maybe there's going to be
23 another case coming up in which the issue of how broadly
24 you should construe promotion is, or whether you should
25 have a different definition when the offenses are merged

1 or not. And we'll confront that when it gets here.

2 It seems to me that your argument is --
3 maybe your best argument, but your argument, anyway, is
4 let's avoid this question because of these other
5 mistakes that have been made, mistakes which are not
6 presented to us on the question on which we granted
7 cert.

8 MR. VARE: I think, Mr. Chief Justice, I'm
9 not asking this Court to avoid any question. What I am
10 saying is that there is a profits construction that if
11 you apply the traditional rules of statutory
12 construction, if you look at the text -- the word
13 itself, "proceeds," does not have a single plain meaning
14 as gross receipts. It is ambiguous. And it has
15 multiple shades of meaning depending upon the context.

16 If you look at the term "proceeds" in
17 context then, then it will depend upon how one is using
18 it. If I were selling a house, and I asked somebody on
19 the street what would be my proceeds from the sale of my
20 house, in that -- and only in that context, some would
21 say it is the gross. Some would say it is the net.
22 Some would say it depends.

23 Well, it depends upon what? It depends upon
24 context. That is included in the question presented.

25 JUSTICE GINSBURG: Well, let's take this

1 context.

2 There is, if you are going to go with
3 profit, a question of what expenses? That's one of the
4 difficulties of working with a net proceeds, because we
5 don't know what the expenses that you would deduct, and
6 the hit man was given as one example. You said no, not
7 that one. But salaries to the runners, yes.

8 To figure out what would count to come up
9 with a net figure is the least difficult, is it not?

10 MR. VARE: Justice Ginsburg, I think that it
11 is slightly more difficult in the case the government
12 has now, which is really no difficulty at all. I think
13 that it would depend upon the unlawful activity, the
14 specified unlawful activity, what would be the ordinary
15 expenses associated with doing that crime.

16 And lower courts are well equipped and
17 juries are well equipped to hear evidence, direct and
18 circumstantial, and make inferences and decide those
19 issues.

20 JUSTICE SCALIA: Why does it have to be the
21 ordinary expense of that? I mean, let's assume the
22 charge is murder, and I happen to use a hit man for the
23 murder. That's proven and whatnot.

24 Why -- you mean, that isn't part of the
25 murder conviction, simply because I could have done it

1 without a hit man, I could have done it myself?

2 MR. VARE: No, I don't think so at all,
3 Justice Scalia.

4 JUSTICE SCALIA: You think paying the hit
5 man would be part of the murder transaction?

6 MR. VARE: Absolutely.

7 JUSTICE SCALIA: Uh-huh.

8 MR. VARE: But I don't think that that
9 necessarily parlays into whether or not it is money
10 laundering or not.

11 JUSTICE SCALIA: No, I understand.

12 MR. VARE: If, for example, the murderer
13 paid the hit man with money to kill somebody and then
14 paid -- you know, used proceeds from the insurance
15 premium that somebody might have been his wife or her
16 husband, and used the proceeds to pay off the money --
17 the hit man for the next crime or to reward him or
18 something else, to carry on the business or used the
19 insurance proceeds to conceal where they came from, then
20 I think you could create a hypothetical situation of
21 money laundering.

22 CHIEF JUSTICE ROBERTS: I thought it would
23 depend on whether or not the insurance proceeds exceeded
24 how much he had to pay the hit man, right? Let's say
25 he's not doing it to get the insurance money. It just

1 so happens he had a \$50,000 policy on the victim --

2 JUSTICE SCALIA: He wanted to kill his wife,
3 right?

4 CHIEF JUSTICE ROBERTS: Yes. He just wanted
5 to commit the murder, not get the money. And so he pays
6 the hit man \$100,000, he gets the \$50,000, and then uses
7 it for all these other activities, you'd say no money
8 laundering, because no profits?

9 MR. VARE: If we assume the expansive
10 interpretations of a transaction promoting the
11 underlying crime that have been presented in this case
12 and then we apply the profits definition, that might not
13 be money laundering. But, the money laundering statute
14 is not designed to cure that evil. That evil is
15 punished and punished severely by the murder statute.
16 It is punished as the underlying crime.

17 And so in this case, Mr. Santos and
18 Mr. Diaz -- or Mr. Santos was punished up to the maximum
19 of five years for running an illegal gambling business.
20 He didn't do anything else other than run a gambling
21 business.

22 And so I think the point is at the end of
23 the day, there are certainly a lot of hypothetical
24 situations that suggest a profits construction might
25 pose some burdens, might not make sense. But if you're

1 going to look at the burdens on the government in terms
2 of construing the term "proceeds," then you also must
3 look at the consequences of accepting the gross receipts
4 construction. And I think at the outset, nearly every
5 justice up here suggested -- well, that turns every
6 illegal gambling business into a money laundering
7 violation.

8 The government has no answer to that. Under
9 their interpretation as applied today, then every
10 illegal gambling operator will be guilty of money
11 laundering.

12 CHIEF JUSTICE ROBERTS: I thought their
13 answer was the money laundering statute covers a whole
14 waterfront of activities besides illegal gambling. And
15 the question is, what did Congress intend when they
16 passed the money laundering statute.

17 This is kind of the tail wagging the dog.
18 The tail is, well, it presents these problems when
19 you're talking about gambling operations, but there's a
20 whole rest of the dog area where it doesn't present a
21 problem.

22 MR. VARE: Well, I think what the money
23 laundering statute was intended to do was punish
24 different conduct, separate and distinct from the
25 underlying crime. And that different conduct is

1 inherent in conducting a financial transaction with the
2 intent to promote the carrying on of the unlawful
3 activity.

4 I do not think that you can parse the
5 statutory language and only address the term "proceeds"
6 irrespective of its consequences.

7 In fact, I think the questions directed to
8 me as to the harsh consequences on the government
9 approving profits shows that you have to look at the
10 term "proceeds" in its context. In its context includes
11 not only the burdens on the one hand, but it certainly
12 includes the situation we have here, that every illegal
13 gambling business is automatic money laundering. And
14 that is not what money laundering statute was enacted,
15 it's not what it was written or intended to address.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Vare.

18 Mr. Roberts, you have four minutes
19 remaining.

20 REBUTTAL ARGUMENT OF MATTHEW D. ROBERTS

21 ON BEHALF OF THE PETITIONER

22 MR. ROBERTS: Thank you.

23 If I could first address the reasons why
24 this Court should not decide the separate transaction
25 issue itself in this case.

1 First of all, it's not the question
2 presented here which is limited to the meaning of the
3 statutory term "proceeds." Respondents didn't present
4 any alternative question in their briefs in opposition.
5 And, in fact, they don't present an alternative question
6 presented even in their briefs on the merits. They're
7 just using the concern about merger as a reason to
8 decide that proceeds means profit.

9 The separate transaction issue was decided
10 against Respondents adversely on direct appeal in the
11 Febus case, as my brother on the other side
12 acknowledged. And those kinds of issues that are
13 decided adversely on direct appeal shouldn't be
14 relitigated.

15 The issue wasn't raised in the separate
16 transaction issue, it wasn't raised in the Section 2255
17 issues, and wasn't addressed by the courts below in
18 these collateral proceedings.

19 At most, we say it should be left open for
20 another case that presents -- that presents the issue.
21 Beyond that, if this Court thought that something should
22 be left open for the court below to address, the court
23 below could address a range of possible ways to deal
24 with ensuring a separation, for example, Justice
25 Stevens's suggestion that an illegal gambling business

1 under the statute itself entails the payment of winners
2 and the payment of employees, although we don't think
3 that it does.

4 But a profits definition is not the way to
5 address concerns about overlap for the underlying
6 offense, because it makes no sense in the broader
7 context of the statute.

8 It would create significant uncertainty
9 about the scope of the statute because of the absence of
10 accounting rules. It would make proof very difficult as
11 a general matter because of the absence of those rules
12 and because criminals often don't keep accounting
13 records. It would exclude numerous concealment
14 transactions that Congress had no reason not to cover,
15 and it would cripple the government's ability to
16 prosecute professional money launderers, which are
17 really a significant part of the problem that Congress
18 was addressing.

19 If the Court has no further questions, we
20 would ask that the judgments of the court of appeals be
21 reversed.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 The case is submitted.

24 (Whereupon at 12:00 noon, the case in the
25 above-entitled matter was submitted.)

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