Santos and Cuellar: The U.S. Supreme Court Limits the Government's Ability to Prosecute Transnational Crime Under the Money Laundering Statutes

Stefan D Cassella

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Stefan D. Cassella
Special Assistant U.S. Attorney
Eastern District of Virginia

INTRODUCTION

The theme of this Symposium – year after year – is the globalization of crime and the challenges that it presents to law enforcement. We say that if criminals are not going to respect international borders then we must find better ways to cooperate with each other, not only by assisting each other with individual cases, but by adopting more uniform statutes and procedures, and in particular by enforcing the laws that criminalize the act of transporting criminal proceeds across frontiers. In short, we say, “if crime crosses borders, so must law enforcement.”

Usually when I come here, I like to report some success in the effort to globalize our law enforcement capabilities to keep step with the criminals who have no respect for international borders. I like to recognize progress, but not so this time. We have had a major setback in the U.S. that is making it much more difficult for us to use the money laundering statutes to prosecute persons who transfer money from one place to another, both domestically and internationally.

The problem arose in June of this year when our Supreme Court issued two decisions taking a narrow view of the law defining money laundering. I thought it would be interesting to talk about those two cases as examples of what can go wrong if, in the course of drafting legislation, we aren’t absolutely clear about the intent of the law and how it is intended to fit into the overall plan for dealing with the globalization of crime.

The U.N. Convention

As background, recall that in 2000 the U.N. adopted a Convention Against Transnational Organized Crime (“Convention”) that called upon all States to enact money laundering laws. Among other things, the Convention said that States should make it a criminal offense to transfer the proceeds of crime from one place
to another for the purpose of concealing or disguising the property. Convention, Art. 6, Sec. 1(a). This would include transfers across international borders, as this is, after all, the Convention Against Transnational Organized Crime.

The U.S. has such an anti-money laundering statute, and we have used it hundreds of times since it was first enacted more than 20 years ago. See 18 U.S.C. § 1956-57. It has resulted in significant jail sentences and the forfeiture of millions of dollars in criminal proceeds. That is all to the good, and we felt confident that we were doing our part as signatories to the Convention. Now, however, we have this case.

The Cuellar case

In Cuellar v. United States, 128 S. Ct. 1994 (2008), we have a Mexican national who was stopped in South Texas for driving erratically. When he was stopped, he was 114 miles (180 km) away from the border near the town of Eldorado. He had traveled from the border to San Antonio the day before, and was on his way back via Big Spring the day he was stopped.

The defendant was driving a VW Beetle, the back seat of which was covered with goat hair. He claimed he had been transporting goats in the vehicle but the police thought the goat hair might have been put there to disguise the scent of narcotics and thus to throw the drug dogs off his trail. So the police brought in a dog, the dog alerted to the smell of marijuana, and during a search of the vehicle the police found a secret compartment containing $81,000 (USD) in cash, bundled in plastic bags and duct tape. The defendant was arrested, but he protested that he had to have the car in Mexico by midnight or else his family would be “floating down the river.”

Taking all of these things together, the police and the prosecutors concluded that Cuellar was a courier who had come up from Mexico to pick up a carload of drug money and was driving back to Mexico with the cash concealed in the vehicle. This is a very common scenario in South Texas where marijuana from Mexico is transported across the border and sold in the United States, and couriers then pick up the proceeds in big cities like San Antonio (one of the ten largest cities in the United States) and transport it back to Mexico.

Now, I think we could all agree that this is the type of case the Convention on Transnational Organized Crime was directed at — international drug trafficking followed by international money laundering. The money was clearly destined to be taken across the border, it was drug proceeds, and it was obviously concealed.
or disguised.

Does the U.S. money laundering statute make this an offense? We thought it did; the particular statute in question makes it an offense to transport criminal proceeds from the United States to a foreign country knowing that the transportation was designed . . . to conceal and disguise the nature, location, source, ownership or control of the funds. 18 U.S.C. § 1956(a)(2)(B)(i). We thought these facts fit that statute, so did a jury that convicted the defendant, and so did the intermediate court of appeals; but the Supreme Court disagreed.

Here is what the Court said: The statute makes it a crime to transport money for the purpose of concealing it. What we want to know is why the defendant was transporting the money. But all of the Government’s evidence – the strange itinerary, the concealed compartment, the goat hair, etc. – spoke only to the manner in which the defendant transported the money; it spoke to how he transported it, not why he did so. Maybe he was just concerned that if he didn’t hide the money in his car, it would be stolen from him by robbers. There was no evidence that the defendant was transporting the money for the purpose of concealing it once he got to where he was going.

It is not a crime, in other words, simply to conceal criminal proceeds in your vehicle while driving across the border into Mexico. We do have bulk cash smuggling statutes in the United States – essentially Customs violations – but they did not apply here because the defendant was still 114 miles from the border when he was arrested, and there was no proof that he was aware of the Customs requirements. See 31 U.S.C. § 5332 (making bulk cash smuggling an offense). So despite these facts, there was no criminal offense; the conviction was reversed.

It is true that the Supreme Court is the highest court in the U.S. and that its decisions are therefore unreviewable by any other court. This could, however, be fixed with legislation. A legislative fix might involve simply making it a crime to transport criminal proceeds anywhere in the United States with the intention of taking them out of the country, but there has not yet been any movement toward a legislative fix. In the meantime, we are faced with a huge loophole in our international money laundering law.

The Santos Case

That was the Cuellar case, one of the two unfortunate decisions handed
down on June 2, 2008. That was bad, but not nearly as bad as the second decision.

In *United States v. Santos*, 128 S. Ct. 2020 (2008), the defendant ran a lottery – an illegal gambling business or a “numbers racket” – in the State of Indiana. He took in a lot of money each week from gamblers in bars and restaurants, kept a portion of the money for himself, and used the rest to pay his employees, the winning bettors, and his other expenses to keep the scheme going. He had been doing this for 20 years; it was definitely not a one-time operation but a continuing scheme.

Now, the money laundering statute in the United States not only makes it a crime to conceal or disguise the proceeds of a crime – what we call concealment money laundering — but also makes it a crime to use criminal proceeds to conduct a financial transaction for the purpose of promoting a criminal offense, including the continuation of an on-going scheme. We call that promotion money laundering. See 18 U.S.C. § 1956(a)(1)(A)(i). The important point is that both kinds of money laundering require proof that the defendant was using the *proceeds of a crime* – that’s the key ingredient, the proceeds of a crime — to commit the offense.

The facts of this case seemed to constitute promotion money laundering: the defendant took the money he got from gamblers – the *proceeds* of a crime – and used it, after taking out his share, to pay the expenses necessary to keep the scheme going. A jury agreed and found the defendant guilty. But once again we ran into trouble in the Supreme Court.

The case turned on the meaning of the term “proceeds.” The U.N. Convention, which called on States to enact money laundering legislation, defined proceeds to mean “any property derived from or obtained, directly or indirectly, through the commission of an offence.” Convention, Art.2(e). This seems straightforward enough, so straightforward that the U.S. Congress did not think it necessary to include the definition in the money laundering statute. Instead, for over 20 years, courts have assumed that a definition much like the definition in the Convention applied in money laundering cases. Proceeds meant “any property derived from or obtained through the commission of an offense,” and if you’re running an illegal gambling business, the money you’re getting from your customers is such property.

In *Santos*, however, the defendant said, “proceeds does not mean just any money derived from a crime, it means the *profits* of the crime.” Crime is
committed for profit, he said, so until there are profits, there are no proceeds to launder. This seemed like an argument designed only to appeal to an economist, not to a prosecutor or a judge, but unfortunately there were evidently a number of “economists” on the Court.

We have a 9-justice Supreme Court. In Santos, four of them, led by Justice Scalia, agreed with the defendant’s economic argument. Money laundering, they said, cannot be committed unless the defendant is laundering the net profits of his crime. Another four justices, led by Justice Alito, said this was absurd. We can’t expect the prosecutor to prove that every drug dealer, terrorist fundraiser, child pornographer, con artist or gambler has turned a profit before he can prove a money laundering offense. Are we going to call in PriceWaterhouse, examine the books, and apply Generally Accepted Accounting Principles to the Mafia? And how would a proceeds-means-profits definition square with the definition of proceeds in the U.N. Convention? This cannot be right, they concluded; proceeds has to mean “gross receipts.”

That left the ninth Justice, Justice Stevens, who said he wasn’t sure who was right but agreed with the first group that this conviction should be overturned. Because the so-called money laundering transactions were merely the payment of the essential expenses of the gambling business, he said, convicting the defendant of money laundering in these circumstances would be tantamount to double jeopardy. Thus, he agreed with Justice Scalia’s plurality that proceeds must mean profits in this situation so that there could be no conviction for money laundering.

Thus, we are left with a 4-4-1 split, arguably holding that in every money laundering case, we have to prove that the defendant was laundering net profits.

Impact of Santos

So what does this do to the ability of the United States to use its money laundering statutes to attack transnational crime? It leaves us with a huge problem. Remember, the word “proceeds” appears in all of our money laundering statutes without being defined, and a four-justice plurality has now defined it to mean “net profits” not just in promotion money laundering cases, and not just in domestic money laundering cases involving gamblers in Indiana, but in all money laundering cases.

Suppose someone decides to run a criminal operation involving child pornography or Internet fraud or human trafficking, and suppose to start up his
operation he invests $100,000 from an unknown source and uses it to buy computers, pay bribes, rent office space, acquire inventory and so forth. And suppose after his first weeks of operation he takes in $75,000 in receipts and sends it to a foreign bank where he’s opened an account in his wife’s maiden name. This, I submit, would be what all of us, and certainly the drafters and signatories of the U.N. Convention, would consider international money laundering – a classic example of transnational crime. This is precisely what we have all vowed to work together to prevent, to detect, and to punish. But is this any longer a crime in the United States? Arguably not: depending on what precedential value a 4-justice plurality opinion has, it appears that in my scenario there could be no money laundering offense because the defendant had not made a profit when he sent the $75,000 to the foreign bank.

We are trying to get this fixed legislatively as well, by codifying the definition of “proceeds” in the Convention, but once again, there has not yet been any movement in that direction.

Conclusion

What is the lesson from all of this? The road toward the implementation of effective tools against transnational crime, including money laundering, is not a smooth one. Despite our best efforts there are going to be setbacks, not only for the usual reasons – the difficulties in obtaining evidence, the challenges imposed by concepts of national sovereignty, the myriad ways in which criminal proceeds can be hidden in a global economy — but because drafting legislation is an imprecise art, and judges are sometimes reluctant to construe legislation liberally simply to accommodate the goals of law enforcement professionals who attend conferences on transnational crime. As Justice Scalia said in Santos, “we interpret ambiguous criminal statutes in favor of defendants, not prosecutors,” slip op. at 12.

So what we all must do is to strive to make our legislation as precise as possible, so that as we go forward, as we craft the tools necessary to work with each other across international borders to deal with the challenges of globalization, we are not frustrated by ambiguity. That’s not always easy: imprecision is often the lubricant that allows the machinery of the legislative process to run at all. But as this experience shows, it is necessary.

— and I think we can get it done.