SUPREME COURT OF THE UNITED STATES

No. 06–1005

UNITED STATES, PETITIONER *v.* EFRAIN SANTOS AND BENEDICTO DIAZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 2, 2008]

JUSTICE BREYER, dissenting.

I join JUSTICE ALITO's dissent while adding the following observations about what has been referred to as the "'merger problem.'" *Ante*, at 8 (plurality opinion). Like the plurality, I doubt that Congress intended the money laundering statute automatically to cover financial transactions that constitute an essential part of a different underlying crime. Operating an illegal gambling business, for example, inevitably involves investment in overhead as well as payments to employees and winning customers; a drug offense normally involves payment for drugs; and bank robbery may well require the distribution of stolen cash to confederates. If the money laundering statute applies to this kind of transaction (*i.e.*, if the transaction is automatically a "financial transaction" that "involves the proceeds of specified unlawful activity" made "with the intent to promote the carrying on of specified unlawful activity"), then the Government can seek a heavier money laundering penalty (say, 20 years), even though the only conduct at issue is conduct that warranted a lighter penalty (say, 5 years for illegal gambling). 18 U. S. C. §1956(a)(1).

It is difficult to understand why Congress would have intended the Government to possess this punishment-transforming power. Perhaps for this reason, the Tenth

Circuit has written that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.'" *United States* v. *Edgmon*, 952 F. 2d 1206, 1214 (1991). And, in 1997, the United States Sentencing Commission told Congress that it agreed with the Department of Justice that "money laundering cannot properly be charged for 'merged' transactions that are part of the underlying crime." Report to Congress: Sentencing Policy for Money Laundering Offenses, including Comments on a Dept. of Justice Report, p. 16 (Sept. 1997), online at http://www.ussc.gov/r_congress/launder.pdf (as visited May 20, 2008, and available in Clerk of Court's case file).

Thus, like the plurality, I see a "merger" problem. But, unlike the plurality, I do not believe that we should look to the word "proceeds" for a solution. For one thing, the plurality's interpretation of that word creates the serious logical and practical difficulties that JUSTICE ALITO describes. See *post*, at 7–12 (dissenting opinion) (describing difficulties associated with proof and accounting). For another thing, there are other, more legally felicitous places to look for a solution. The Tenth Circuit, for example, has simply held that the money laundering offense and the underlying offense that generated the money to be laundered must be distinct in order to be separately punishable. *Edgmon, supra*, at 1214. Alternatively the money laundering statute's phrase "with the intent *to promote* the carrying on of specified unlawful activity" may not apply where, for example, only one instance of that underlying activity is at issue. (The Seventh Circuit on a prior appeal in this case rejected that argument, and thus we do not consider it here. See *United States* v. *Febus*, 218 F. 3d 784, 789 (2000).)

Finally, if the "merger" problem is essentially a problem of fairness in sentencing, the Sentencing Commission has

adequate authority to address it. Congress has instructed the Commission to "avoi[d] unwarranted sentencing disparities" among those "found guilty of *similar criminal conduct*." 28 U. S. C. §991(b)(1)(B) (emphasis added); see also §994(f) (instructing the Commission to pay particular attention to those disparities). The current money laundering Guideline, United States Sentencing Commission, Guidelines Manual §2S1.1 (Nov. 2007) (USSG), by making no exception for a situation where *nothing but a single instance of the underlying crime has taken place,* would seem to create a serious and unwarranted disparity among defendants who have engaged in identical conduct. My hope is that the Commission's past efforts to tie more closely the offense level for money laundering to the offense level of the underlying crime, see *id.,* Supp. to App. C, Amdt. 634 (Nov. 2001), suggest a willingness to consider directly this kind of disparity. Such an approach could solve the "merger" problem without resort to creating complex interpretations of the statute's language. And any such solution could be applied retroactively. See 28 U. S. C. §994(u).

In light of these alternative possibilities, I dissent.