IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 18-1092

TERRANCE ROBERTS, Petitioner-Appellant, v. JEFFREY FIKES, Respondent-Appellee.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 16-cv-541-bbc Honorable Barbara B. Crabb Presiding

BRIEF OF RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in Petitioner-Appellant's brief is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), Respondent-Appellee submits the following jurisdictional statement.

I. District Court Jurisdiction

A. This is an appeal from a final order and judgment of the district court for the Western District of Wisconsin, denying Terrance Roberts's petition for a writ of habeas corpus under 28 U.S.C. § 2241 and 28 U.S.C. § 2255(e), in which Roberts collaterally challenged his money laundering convictions in a criminal case prosecuted in the Eastern District of Missouri.

B. The district court had jurisdiction pursuant to 28 U.S.C. § 1331, because Roberts's habeas petition presented a federal question. *See Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004).

II. Appellate Court Jurisdiction

A. This Court's jurisdiction is based on 28 U.S.C. §§ 1291 and 2253(a).

B. On December 12, 2017, the district court docketed both its opinion and order denying habeas relief and its final judgment. R. 23, 24.

C. Roberts filed a timely notice of appeal that he placed in his prison's inmate mail system on January 9, 2018, and that was docketed on January 11, 2018. R. 25.

D. This case is not a direct appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUES

1. Whether to obtain habeas relief under 28 U.S.C. § 2241 Roberts must show he is actually innocent of money laundering under the law of the circuit of conviction, the law of the circuit of confinement, or the law of both circuits.
2. Whether *United States v. Santos*, 553 U.S. 507 (2008), applies to financial transactions designed to conceal the nature, location, source, ownership, or control of the proceeds of an unlawful activity, and if not, whether the Court should affirm the denial of habeas relief in light of the concurrent-sentence doctrine, because, in addition to his conviction and sentence for promotional money laundering, Roberts was separately convicted of conspiring to commit concealment money laundering and is serving a concurrent sentence of equal length for this valid conviction.
3. Whether Roberts can demonstrate that he is actually innocent of promotional money laundering because his predicate offense of transporting individuals in interstate commerce for prostitution "merged" with his money laundering offenses under *Santos* and no reasonable juror would find him guilty beyond a reasonable doubt.

STATEMENT OF THE CASE

I. Introduction

Over the course of 17 years, the Evans family operated a multi-state prostitution ring out of Minneapolis, Minnesota. Roberts and his co-defendants were convicted of transporting individuals in interstate commerce to engage in prostitution, money laundering, and conspiracy to commit those offenses. Roberts now asks the Court to reverse the denial of habeas relief under 28 U.S.C. § 2241 because, he contends, his money laundering convictions "merged" with his predicate offenses, in violation of *Santos*, 553 U.S. 507, and improperly punished him for paying the essential expenses of his prostitution-related crimes.

This case raises a number of difficult legal questions, but can be resolved by answering a simple one: does *Santos* apply to concealment money laundering? It does not, at least under the facts of this case. Because Roberts is serving identical concurrent sentences for promotional and concealment money laundering, the Court can and should deny habeas relief on that basis. If the Court decides to reach the merits of Roberts's promotional money laundering convictions, his petition still fails. His promotional money laundering convictions withstand the Eighth Circuit's interpretation of *Santos* and he has not

demonstrated actual innocence under Seventh Circuit law. Accordingly, the Court should affirm the district court's denial of habeas relief under § 2241.

II. Factual and procedural background

A. Indictment, conviction, sentencing, and direct appeal

From 1982 until the date of the indictment on January 6, 2000, members of the Evans family operated a conspiracy out of Minneapolis that involved the "recruitment, transportation, control, and abuse of prostitutes." *United States v. Evans*, 272 F.3d 1069, 1077 (8th Cir. 2001). Roberts and his father, Monroe Evans, were among the family members who worked as pimps, recruiting females to work as prostitutes for escort services, massage parlors, and on the streets. *See id.*

In January 2000, a federal grand jury in the Eastern District of Missouri returned an indictment charging Roberts with the following offenses:

- Count 1: Conspiracy to transport another person in interstate commerce with the intent to commit prostitution, 18 U.S.C. § 371. R.18-1 at 2.

- Count 19: Money laundering, 18 U.S.C. § 1956(a)(1)(A)(i) and 2. On January 7, 1997, Monroe Evans wired $2,000 from St. Louis to Roberts in Minneapolis. R. 18-1 at 20-21. These funds were the proceeds of a specified unlawful activity, transporting individuals in interstate commerce for prostitution. *Id.* The transfer was made to promote the carrying on of a specified unlawful activity, again transporting individuals in interstate commerce for prostitution. *Id.*

- Count 29: Transporting an individual under the age of 18 with the intent to engage in prostitution, 18 U.S.C. § 2423(a). R. 18-1 at 26. Between October and November 1997, Roberts "knowingly transported an individual under the age of 18 in interstate commerce, from St. Louis, Missouri to Minnesota, with the intent that such individual engage in prostitution." *Id.*

- Count 30: Transporting another person in interstate commerce with the intent to commit prostitution. 18 U.S.C. § 2422(a). Between October and November 1997, Roberts "knowingly persuaded, induced and enticed an individual to travel in interstate commerce from St. Louis, Missouri to Minnesota to engage in prostitution." R. 18-1 at 26.

- Count 44: Conspiracy to commit money laundering, 18 U.S.C. § 1956(h). Beginning in 1982, Roberts and eight co-defendants conspired to conduct "financial transactions affecting interstate commerce, which transactions involved the proceeds of specified unlawful activity, that is, the transportation of individuals in interstate commerce with intent that said individuals engage in prostitution, (1) with the intent to promote the carrying on of such specified unlawful activity and (2) knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity." R. 18-1 at 33-34.

  It was part of the conspiracy that "some escort services accepted credit cards and had bank accounts in a name other than the listed service." *Id.* at 34. That way credit card bills "would not denote the true nature of the service" and would conceal that the escort services were a "front for prostitution activities." *Id.* at 34.

  It was also part of the conspiracy that defendants purchased real estate using "non-qualifying assumable home loans" so that they would not have to identify the "source and nature of their income." *Id.* at 35.

> It was further part of the conspiracy that to take cash proceeds from prostitution and "convert them to cashier's checks to hide the nature and source of the funds." *Id.*

- Count 45: Criminal forfeiture, 18 U.S.C. § 982.

After a two-week trial, a jury convicted Roberts on all counts. With respect to Count 44, the jury returned a special verdict finding that Roberts conspired to launder money with an intent to both promote and conceal. R. 18-4 at 2-3; Respondent's Supplemental Appendix, Supp. App. 2 – Supp. App. 3. The district court sentenced Roberts to 60 months in prison on counts 1 and 30 (two of the three Mann Act counts), to be served consecutively to each other; 192 months on counts 19 and 44 (the money laundering counts), to be served concurrently to each other and consecutively to counts 1 and 30; and 120 months on count 29 (the third Mann Act count involving a minor), to be served consecutively to counts 1, 19, 30 and 44. R. 11-2 at 3; Supp. App. 4 – Supp. App. 11. The total term of imprisonment was 432 months. Supp. App. 6. Roberts's convictions and sentence were affirmed on direct appeal. *Evans*, 272 F.3d 1069, cert. denied *Roberts v. United States*, 535 U.S. 1087 (May 20, 2002).

B. Roberts's § 2255 motion

On June 6, 2003, Roberts filed a counselled motion for collateral relief under 28 U.S.C. § 2255, asserting claims of insufficiency of the evidence and

ineffective assistance of counsel. The district court dismissed the motion as untimely on June 13, 2005, *Roberts v. United States*, No. 03-CV-786 JCH, 2005 WL 1484511 (E.D. Mo. June 13, 2005), and Roberts did not appeal.

C. *Santos* decision

After Roberts's convictions and sentence became final, and following the denial of his § 2255 motion, the Supreme Court decided *Santos*, 553 U.S. 507. The defendants in *Santos* were convicted of money laundering based on payments the operator of an illegal lottery made to his winners and runners using the receipts from his lottery, which was operated in violation of the federal gambling statute, 18 U.S.C. § 1955. The defendants were convicted under 18 U.S.C. § 1956(a)(1)(A)(i), the promotional money laundering statute. The question was whether "the term 'proceeds' . . . means 'receipts' or 'profits'" in these circumstances. *Santos*, 553 U.S. at 509. Five justices concluded that the defendants' convictions should be overturned but disagreed on the reasoning for that result.

Writing for a four-justice plurality, Justice Scalia concluded the word "proceeds" in § 1956(a)(1) is ambiguous and, applying the rule of lenity, should be read in all cases as limited to the profits of the unlawful activity. *Id.* at 510-14. If "proceeds" meant "receipts," the government could bring promotional money

laundering charges in "nearly every" case where the laundering transaction was a "normal part" of the underlying unlawful activity. *Id.* at 515-517. In these instances, the money laundering charge could be said to "merge" with the crime generating the proceeds, so that a separate conviction for money laundering would be tantamount to a second conviction for the same offense. *Id*. In the plurality's view, defining "proceeds" as "profits" solves this problem. *Id.* at 517.

Justice Stevens concurred in the judgment, concluding that "this Court need not pick a single definition of 'proceeds' applicable to every unlawful activity." *Santos*, 553 U.S. at 525, Stevens, J., concurring. Based on the legislative history of the money laundering statute, he concluded 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 before the Court, he 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. He 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 526-27.

Four other justices would have concluded that "proceeds" always means "the total amount brought in"—*i.e.*, the gross receipts of the unlawful activity. *Santos*, 553 U.S. at 532, Alito, J. dissenting (citation omitted).

D. Congressional response to *Santos*

Shortly after *Santos* was decided, Congress amended the money laundering statute to define "proceeds" as gross receipts, *i.e.*, "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. V 2011); Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. However, the amendment is not retroactive and does not apply to the present case. Roberts's convictions are governed by the version of the statute considered in *Santos*.

E. Roberts's § 2241 petition

In 2016, while confined at FCI Oxford, a federal prison in the Western District of Wisconsin, Roberts invoked the saving clause of § 2255(e) and filed a pro se motion for postconviction relief pursuant to § 2241 based on *Santos*. The government conceded that Roberts met two of the three requirements for saving clause relief in this Circuit: (1) *Santos* is a statutory-interpretation case, rather than a constitutional case, which he could not invoke by means of a second or

successive § 2255 motion and is a substantive decision that applies retroactively on collateral review; and (2) Roberts could not have invoked the rule established by the case in an earlier proceeding. R. 21 at 3. The government, however, disputed that Roberts could satisfy the third requirement, because Roberts could not demonstrate that his money laundering convictions were a fundamental miscarriage of justice such that he was actually innocent of a crime. *Id.* at 3-4, 8-10. Specifically, the government argued that Roberts's convictions did not present a merger problem, and even if there were a merger problem, it was limited to his promotional money laundering convictions, leaving intact his separate conviction for conspiracy to commit concealment money laundering for which he was serving a concurrent sentence of equal length. *Id.*

In response to the district court's request for input on whether it should apply Seventh Circuit or Eighth Circuit law to decide the merits of the petition, the government stated that Seventh Circuit law should apply but that Roberts would not prevail under the law of either circuit. *Id.* at 4-6.

On December 12, 2017, the district court entered its opinion and order, finding there was no merger problem and denying relief. R. 23; Appellant's Appendix, SA 35 – SA 36. It concluded that Eighth Circuit law applied and that the money laundering convictions were valid, finding that Roberts's "illegal act

of transporting individuals with the purpose of having them engage in prostitution did not require . . . the types of payments that gave rise to his money laundering charges, and was not limited to those payments." R. 23 at 8; Appellant's Appendix, SA 35. Its judgment denying the petition was docketed the same day. R. 24; Appellant's Appendix, SA 37.

On January 11, 2018, Roberts filed a timely pro se appeal, R. 25, after which this Court appointed counsel and ordered briefing and oral argument. Appellate Docket No. 7, Order docketed June 23, 2021. The Court's order stated that on appeal the parties were not constrained by the district court's framing of the issues. *Id*.

SUMMARY OF ARGUMENT

Starting with choice of law, a prisoner cannot obtain habeas relief based on "a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *In re Davenport*, 147 F.3d 605, 612 (7th Cir. 1998). To obtain relief, Roberts must therefore demonstrate that he is actually innocent of money laundering under the law of both the Seventh and Eighth Circuits. Because Roberts cannot demonstrate actual innocence under the law of either circuit, his petition was properly denied, and this Court should affirm.

Roberts is serving identical concurrent sentences for money laundering under § 1956(a)(1)(A)(i) and conspiring to commit money laundering under §§ 1956(a)(1)(B)(i) and (h). With respect to the conspiracy charge, Roberts was separately convicted of conspiring to launder money for two purposes—to promote an unlawful activity and to conceal the proceeds of an unlawful activity. The acts of concealment that formed the basis for the concealment conviction included obtaining non-qualifying assumable home loans, purchasing cashier's checks from cash proceeds of the prostitution calls, and placing prostitutes with escort services that processed credit card transactions and held bank accounts using a false name. Each of these activities was undertaken to conceal the

proceeds of the unlawful activity, but none of them were necessary to complete it, so there is no merger problem under the law of both the Seventh and Eighth Circuits. Because Roberts is serving identical concurrent sentences for promotional money laundering and conspiracy to commit concealment money laundering, he cannot establish an error grave enough to be a miscarriage of justice. The Court should therefore affirm the denial of habeas relief based on the validity of the concealment conviction alone.

Should the Court choose to review Roberts's conviction for promotional money laundering, his petition still fails. In the Eighth Circuit, "proceeds must mean profits whenever a broader definition would perversely result in a merger problem." *United States v. Rubashkin*, 655 F.3d 849, 865 (8th Cir. 2011).[1] There is no merger problem in this case because a person who transports an individual in interstate commerce for prostitution does not necessarily violate the money laundering statute, 18 U.S.C. § 1956. Roberts violated § 1956 when he received a $2,000 wire transfer of funds derived from prostitution with the requisite intent to promote the carrying on of an illegal activity. What Roberts later did with those funds—purchase a Mercedes that was used on additional prostitution

[1] In *Rubashkin*, as here, the pre-May, 2009 version of the money laundering statute was the applicable one. 655 F.3d at 865 and n.3.

calls—is irrelevant because it was not a necessary expense of his Mann Act offense. As the district court found, the two offenses are separate and Roberts's conviction for promotional money laundering in violation of § 1956(a)(1)(A)(i) is valid under the law of the circuit of conviction.

Although Seventh Circuit law is more favorable to Roberts, he still cannot prevail. Post-*Santos*, this Court on direct appeal twice vacated promotional money laundering convictions based on a prostitution business's payment of rent, utilities, and advertising expenses. *United States v. Lee*, 558 F.3d 638 (7th Cir. 2009); *United States v. Hodge*, 558 F.3d 630, 632 (7th Cir. 2009). However, proceeds used to expand an illegal enterprise or leverage "one criminal activity into the next" still qualify as promotional money laundering. *Santos*, 553 U.S. at 520; *see also Lee*, 558 F.3d at 644. Because Roberts has not demonstrated that the Mercedes was an essential expense of his existing business, as opposed to a purchase that allowed the business to expand and new criminal activity to occur, he is not entitled to habeas relief.

For these reasons, this Court should affirm the district court's denial of habeas relief.

ARGUMENT

I. Standard of review and legal background

This Court reviews the denial of a § 2241 petition de novo. *Camacho v. English*, 872 F.3d 811, 813 (7th Cir. 2017). All of the legal issues discussed below are also reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

Before 1948, federal prisoners could collaterally attack a final judgment by filing a petition for a writ of habeas corpus under 28 U.S.C. § 2241. The petition had to be filed in the judicial district in which the prisoner was confined, creating significant administrative problems. *See United States v. Hayman*, 342 U.S. 205, 211-14 (1952). To alleviate these problems, Congress created a substitute "motion" remedy for federal prisoners, codified at 28 U.S.C. § 2255, which channeled collateral attacks by federal prisoners to the "more convenient forum" of the sentencing court, *id.* at 219, while affording a remedy "identical in scope to federal habeas corpus." *Davis v. United States*, 417 U.S. 333, 343 (1974).

The 1948 legislation also included an exclusivity provision confirming that the new motion remedy was to be used instead of, not in addition to, the § 2241 habeas remedy. The provision states that district courts "shall not . . .entertain[ ]" a federal prisoner's petition for a writ of habeas corpus except in cases where § 2255 was shown to be "inadequate or ineffective to test the legality of [the

prisoner's] detention." 28 U.S.C. § 2255(e). This portion of § 2255 is referred to as the "saving clause," *Boumediene v. Bush*, 553 U.S. 723, 776 (2008), or "savings clause," *Chazen v. Marske*, 938 F.3d 851, 855 (7th Cir. 2019).

In *Davenport,* this Court held that saving-clause relief is available when a prisoner shows that he has been deprived of any opportunity to raise a claim based on a Supreme Court decision of statutory construction that repudiates prior circuit law in effect at the time of the prisoner's earlier proceedings. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998). This Court has condensed *Davenport*'s holding into a three-part test. *See Montana v. Cross*, 829 F.3d 775, 783-84 (7th Cir. 2016). A petitioner who seeks to avoid § 2255's exclusivity provision and pursue relief under § 2241 must establish that:

1. he relies on a statutory-interpretation case that he cannot invoke by means of a second or successive § 2255 motion;

2. "the new rule applies to cases on collateral review and could not have been invoked in his earlier proceeding[s]"; and

3. "the error is grave enough to be deemed a miscarriage of justice."

Id. (cleaned up).

Roberts satisfies the first two requirements. Because *Santos*'s interpretation of "proceeds" in 18 U.S.C. § 1956 was a substantive change in the law defining a criminal offense, the government agrees that the decision applies retroactively on

collateral review. *See Wooten v. Cauley*, 677 F.3d 303, 308-309 (6th Cir. 2012). And because the Eighth Circuit held that gross receipts in a money laundering case could not be offset by expenses in *United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005), a decision issued eight weeks before Roberts's § 2255 motion was decided, the government also agrees that Roberts was foreclosed from raising a *Santos*-based claim. Roberts's petition should be denied, however, because he has not demonstrated a miscarriage of justice.

II. Choice of law

This case presents a choice of law issue. *See Chazen*, 938 F.3d at 860 (noting that it is unclear "whether, in evaluating the merits of [a habeas] petition, we should apply our own precedent or the precedent of the circuit of conviction"). Roberts was convicted in the Eastern District of Missouri, which falls within the jurisdiction of the Eighth Circuit; he filed his § 2241 petition while incarcerated in the Western District of Wisconsin, which is in the Seventh Circuit; and he is currently incarcerated at FCI Sandstone in Minnesota, which is in the Eighth Circuit.[2] Initially, the government and the district court assumed that the law of the circuit of confinement applied to Roberts's petition. R. 23 at 3. The district court later questioned that assumption and directed the government, if it

[2] https://www.bop.gov/inmateloc/, last visited January 12, 2022.

continued to believe that Seventh Circuit rather than Eighth Circuit law controlled, to explain its position. R. 20 at 13. In response, while submitting that the law of the circuit of confinement should control, the government explained that the "resolution of the choice-of-law issue should not affect the outcome" of the case because Roberts's *Santos*-based arguments failed under the law of both circuits. R. 21 at 5.

The government has since reevaluated its position, and asks the Court not to adopt the position it took below. *See Krieger v. United States*, 842 F.3d 490, 499 (7th Cir. 2016) ("we are not bound to accept the government's concession when the point at issue is a question of law"); *see also Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1061 n.4 (7th Cir. 2016) (rejecting plaintiff's concession on choice of law). Roberts argues that *Chazen* and *Guenther v. Marske*, 997 F.3d 735 (7th Cir. 2021), both cases in which this Court held the government to the choice of law position it took below, control. *See* Appellant's Opening Brief at 21-22. But those cases are distinguishable for three reasons.

First, the district court in *Chazen* accepted the government's position on choice of law and granted the prisoner habeas relief based on the law of the circuit of confinement. *Chazen v. Williams*, No. 17-CV-447-JDP, 2018 WL 3575884, at *3 (W.D. Wis. July 25, 2018) (granting relief based on *Van Cannon v. United*

States, 890 F.3d 656 (7th Cir. 2018)). Here, the district court rejected the government's position and applied the law of the circuit of conviction. *Roberts v. Watson*, No. 16-CV-541-BBC, 2017 WL 6375812, at *2 (W.D. Wis. Dec. 12, 2017).[3] When deciding whether to estop a party from changing positions, this distinction matters. The party to be estopped must "have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained." *Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990); *see also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase") (further citation omitted). When, as here, a court rejects the party's earlier position, there is no concern about "creat[ing] the perception that either the first or the second court was misled." *New Hampshire*, 532 U.S. at 750.

Second, there are differences in the law of the Seventh and Eighth Circuits with respect to promotional money laundering convictions. *Compare Chazen*, 938 F.3d at 860 ("with there being no contrary law in the Eighth Circuit," petitioner

[3] The district court in *Guenther* did not reach the issue because it found that *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016), is not retroactive. *Guenther v. Williams*, No. 17-CV-231-BBC, 2017 WL 5054731, at *2 (W.D. Wis. Nov. 2, 2017), rev'd and remanded, *Guenther*, 997 F.3d at 743.

did enough to show that he no longer qualified for the sentencing enhancement); *Guenther*, 997 F.3d at 743 n.4 (Seventh Circuit law provided relief; Eighth Circuit law was "unclear," but district courts within the Eighth Circuit had agreed with the Seventh Circuit's position).

Third, *Chazen* was decided two years after the government responded to the district court's question regarding choice of law in this case. It therefore did not have the benefit of then-Judge Barrett's concurrence, where she observed that "[a]pplying the law of the circuit of confinement risks recreating some of the problems that § 2255 was designed to fix," and stated that applying the law of the circuit of conviction was a "consistent, reasonable rule." *Chazen*, 938 F.3d at 865 (Barrett, J., concurring). Accordingly, the Court should adopt the government's current position that Seventh and Eighth Circuit law must favor Roberts to entitle him to relief.

The proper starting point is the law of the circuit of conviction. A *Davenport* petition most closely resembles a second or successive motion under Section 2255(h)(2), which must be brought in the circuit of conviction. This "suggests that Congress intended collateral review of a conviction or sentence to be made under the same legal standards used by the trial court in the first instance." *Salazar v. Sherrod*, No. 09CV-619-DRH-DGW, 2012 WL 3779075, at *5

(S.D. Ill. Aug. 31, 2012); *see also Chazen*, 938 F.3d at 865 (Barrett, J., concurring) (applying the law of the circuit of conviction is a position that "has force"). However, there is (or should be) an exception to that general rule: if there is a split between the circuit of confinement and the circuit of conviction, the petition must fail.

In *Davenport*, this Court reasoned that "[a] federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." *Davenport*, 147 F.3d at 611. But it added three "qualifications," one of which is that the "change in law" cannot be "a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated." *Id.* at 611-12 (internal citation omitted). *Davenport* explained that "[w]hen there is a circuit split, there is no presumption that the law in the circuit that favors the prisoner is correct, and hence there is no basis for supposing him unjustly convicted merely because he happens to have been convicted in the other circuit." *Id.* at 612. Therefore, a petitioner must demonstrate that he would be entitled to relief in both circuits in order to establish a miscarriage of justice.

If the law of the circuit of conviction is a bar for the petitioner, it would be undesirable for the habeas court to nonetheless grant relief based on the law of the circuit of confinement. *See Cain v. Markley*, 347 F.2d 408, 410 (7th Cir. 1965) (cautioning against one court in a habeas corpus proceeding reviewing another court's adverse determination in a § 2255 proceeding). Defendants convicted in the same jurisdiction could be treated differently based on the "fortuitous placement of a prisoner by the Bureau of Prisons." *Chazen*, 938 F.3d at 865 (Barrett, J., concurring) (quoting *Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001)). This could include "co-defendants convicted of the exact same crimes." *Hernandez*, 242 F. Supp. 2d at 554. That is not an abstract concern in this case—a district court in California dismissed a *Santos*-based § 2241 petition filed by Roberts's co-defendant and co-conspirator, Derry Evans. *See Evans v. Ives*, No. CV 16-04912 FMO (AFM), 2017 WL 74228, at *6 (C.D. Cal. Jan. 4, 2017), report and rec. adopted, 2017 WL 75852 (Jan. 6, 2017).[4] Noting that the Eighth Circuit had interpreted *Santos* narrowly, the court concluded that because Evans's

[4] A district court in Michigan dismissed the § 2241 petition of a second co-defendant, Monroe Evans, who also claimed habeas relief under *Santos*, because he failed to show he had previously filed a § 2255 motion and thus could not establish that the remedy under § 2255 was inadequate or ineffective. *Evans v. Terris*, No. 2:16-CV-12872, 2016 WL 4761807, at *3 (E.D. Mich. Sept. 13, 2016), aff'd, No. 16-2574 (6th Cir. Sept. 5, 2017). The dismissal was without prejudice to any relief Evans may seek in his district of conviction or in the Eighth Circuit.

underlying offenses based on prostitution were distinct from and did not require money laundering, there was no merger problem. 2017 WL 74228, at *3.

If, on the other hand, the law of the circuit of conviction is unfavorable to a *Davenport* petitioner, but the law of the circuit of confinement is favorable, the petition should still fail. To conclude otherwise would produce the problematic result identified in Roberts's brief: "apply[ing] different law to individuals confined in the same correctional facility for violating the same crime in the same manner." Appellant's Opening Brief at 23. In that situation, a habeas court could be placed in the difficult position of granting relief to a *Davenport* petitioner convicted in a different circuit but denying relief with respect to the same claim raised by one of its own defendants.

As discussed below, because Roberts cannot demonstrate actual innocence under the law of either his circuit of conviction or his circuit of confinement, he is not entitled to habeas relief based on *Santos*.

III. Roberts's conviction for concealment money laundering is valid.

The simplest way to resolve this case is to evaluate Roberts's conviction for conspiracy to commit concealment money laundering (Count 44). In *Santos*, five justices were concerned about the government using the money laundering statute to "radically increase" a defendant's sentence based on a financial

transaction that is a "normal part" of another charged offense. *Santos*, 553 U.S. at 517, 527-28. Operating a criminal enterprise requires paying its expenses, and doing so should not also be separately punished as money laundering. *Id.* at 514–15, 528. However, "[n]o such problem of overlap arises where . . . a money-laundering conviction under the concealment prong involves conduct that was entirely *unnecessary* to the completion of the underlying specified unlawful activity." *United States v. Esquenazi*, 752 F.3d 912, 936 (11th Cir. 2014); *see also Buffin v. United States*, 513 F. App'x 441, 447 (6th Cir. 2013); *United States v. Day*, 700 F.3d 713, 727 n.1 (4th Cir. 2012); *United States v. Wilkes*, 662 F.3d 524, 549 (9th Cir. 2011).

Santos did not address concealment money laundering and neither the Seventh nor Eighth Circuit decided whether *Santos* applied to concealment money laundering cases across the board. *See United States v. Aslan*, 644 F.3d 526, 547-48 (7th Cir. 2011) (the meaning of the word "proceeds" in the concealment context is "unsettled"). However, both have analyzed the issue and concluded that no merger problem existed in a particular case.

A. Eighth Circuit law

Starting with the Eighth Circuit, in *Rubashkin*, the defendant was convicted of bank fraud based on actions he took to increase his company's borrowing

ability via its revolving loan. 655 F.3d 849, 853. For example, he paid down the loan balance using customer payments that should have gone into the accounts receivable, which secured the revolving loan. To disguise the nature of these funds, Rubashkin funneled them through a grocery store and school that he also owned. There was no merger problem, the Eighth Circuit held, because Rubashkin's fraud scheme "did not require the types of payments which gave rise to the money laundering charges." *Rubashkin*, 655 F.3d at 867. Rubashkin could have repaid the loan from the company's own accounts "while still creating false invoices and diverting customer payments to inflate the accounts receivable"—the acts that gave rise to his fraud convictions. *Id.* But instead, he "first ma[de] payments to third parties and then ha[d] those third parties make false customer payments to pay down the loan." *Id.* This "additional step"—designed to conceal—was "separately punishable as money laundering." *Id.*

Roberts's observation that *Rubashkin* itself was a concealment case does not help him, since the Eighth Circuit affirmed Rubashkin's money laundering conviction in that case. *See* Appellant's Opening Brief at 67. While the court did not discuss the distinction between promotional and concealment money laundering, it explained—using a merger analysis—why *Santos* does not apply to transactions that are unnecessary to the substantive offense and are instead

undertaken to make the underlying illegal activity harder to detect. *Rubashkin*, 655 F.3d at 866–67 (by funneling loan proceeds through other businesses, Rubashkin concealed the nature of the funds; because these transactions were not a necessary part of the bank fraud, the convictions did not merge).

Mathison v. Berkebile Nos. CIV 12–4156, CR 96–40048, 2014 WL 1871865 (D.S.D. May 8, 2014), reinforces this distinction. *See* Appellant's Opening Brief at 67-68 (citing *Mathison*). There were two sets of money laundering convictions in that case. The first set of convictions was premised on payments to the victims of a Ponzi scheme. The court vacated those convictions, because paying the victims of a Ponzi scheme is a "normal part" of the fraud. *Id.* at *2. The second set of convictions was based on Mathison's wire transfers to an associate "who then wired the money back to Mr. Mathison, or into another account, at his direction." *Id.* (further citation omitted). This associate was not a victim or employee of the Ponzi scheme—he didn't need to be paid to keep the scheme running—so there was no merger problem. *Id.*

Lastly, Roberts's argument that relegating *Santos* to the promotional context would "violate the presumption that identical words used in different parts of the same act are intended to have the same meaning" is unpersuasive. *See* Appellant's Opening Brief at 68 (internal quotation marks and further citation

omitted). A presumption is a starting point, not a "rigid" rule. *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). "It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance." *Id.* Nor is the presumption incapable of yielding to the rule of lenity—which is what five justices believed it had to do in *Santos.* Accordingly, where a concealment money laundering conviction does not create a merger problem, "proceeds" can mean "gross receipts."

B. Seventh Circuit law

This Court has twice employed the same analysis as *Rubashkin.* In *Aslan*, the defendant was part of a scheme to offer items for sale on eBay, collect payment, and then never actually ship the items to the buyers. *United States v. Aslan*, 644 F.3d 526 (7th Cir. 2011). Because the wire fraud statute "punishes the scheme, not its success," the government did not have to prove the defendant actually collected money from a victim to secure a conviction under the wire fraud statute:

> [T]he crime of wire fraud was complete no later than when the victims wired their money to the defendants via Western Union. By that point, [defendant] Fechete had entered into a plan with the Foreign Co-schemers to engage in internet fraud. He had supplied to

> the Foreign Co-schemers, via text message and email, false names to use to lure victims, and the victims, having taken the bait, had wired their money via Western Union to the waiting Fechete. Even if Fechete had been arrested walking into the currency exchange, he would have been guilty of wire fraud by that time, even if the victims had not been deprived of their funds.

Id. at 545–46. Consequently, the defendant's money laundering conviction based on his subsequent transfer of the proceeds of the fraud to his co-conspirators in Romania did not present a merger problem. *Id.* at 545 (there is "no overlap between the wire fraud for which Fechete was convicted and the money laundering scheme that occurred subsequent to the completed wire fraud").

Kelerchian v. United States involved the sale of machineguns that could be imported only "for use by state or federal departments or agencies" or "for use as a sample by a registered importer or registered dealer." 937 F.3d 895, 900 (7th Cir. 2019) (further citation omitted). The deputy chief of a sheriff's department prepared paperwork falsely attesting that various guns were for use by his department. *Id.* at 901. He forwarded this paperwork to a firearms dealer, Kelerchian, who used it to import weapons from a company called H&K. *Id.* After the guns arrived, a patrolman disassembled the guns and sold the parts to Webber. *Id.* at 901-902. This Court rejected Kelerchian's *Santos*-based argument that the fraud was not distinct from the sale of the fraudulently obtained parts to Webber. *Id.* It agreed with the government that "the wire fraud was complete as

soon as the defendants sent the purchase packets with fraudulent statements to H&K, so that the later sale of the parts was a distinct offense." *Id.* The Court ultimately affirmed defendant's conviction of money laundering in violation of 18 U.S.C. § 1957, without needing to decide whether the government had proved concealment money laundering under § 1956(a)(1)(B)(i).

The analysis from *Rubashkin*, *Aslan*, and *Kelerchian* applies with equal force to Roberts's conviction under § 1956(a)(1)(B)(i). Roberts violated the Mann Act by transporting individuals across state lines for prostitution. The additional acts of concealment that formed the basis for conviction in Count 44 were not necessary parts of his Mann Act offenses. For instance, the co-conspirators "obtain[ed] non-qualifying assumable home loans" so that they could "purchase real properties without identifying the source and nature of their income." R. 18-1 at 35. They also took cash proceeds of the prostitution calls and "convert[ed] them to cashier's checks to hide the nature and source of the funds." *Id.* Additionally, they placed prostitutes with escort services that processed credit card transactions and held bank accounts using a false name in order to "conceal that these services were . . . a front for prostitution." *Id.* at 34.[5] A jury could have

[5] Roberts and his co-conspirators also purchased cars with cash down payments, falsely listing their current and past employment. For example, on June 25, 1999, Roberts made

found Roberts guilty of transporting an individual in interstate commerce for prostitution even if none of these transactions took place.

Roberts does not address most of these acts of concealment, focusing instead on the wire transfer he received from his father because that is "the only overt act listed in his concealment charge." Appellant's Opening Brief at 26. But Roberts is not just responsible for the acts of the conspiracy attributed to him in the indictment; he is also "criminally liable for all the acts of his coconspirators undertaken in furtherance of the conspiracy and reasonably foreseeable to [him]." *United States v. Doyle*, 121 F.3d 1078, 1091 (7th Cir. 1997); *see also United States v. Azmat*, 805 F.3d 1018, 1038 (11th Cir. 2015) (to convict a defendant under § 1956(h), the government does not need to prove that he personally laundered money; it is "enough that he knowingly entered an agreement in which his co-conspirators did"). Because Roberts does not dispute his vicarious liability for the acts of his co-conspirators, their acts of concealment provide grounds to affirm the district court's denial of Roberts's petition.

As to the real estate transactions, Roberts acknowledges that defendants' use of non-qualifying assumable mortgages "could *conceivably* be an example of

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a cash down payment to purchase a 1993 Cadillac, listing current employment with "Quick Temp" and past employment with "Evans Garage," both false or sham businesses. R. 11-5 at 153-161.

concealment money laundering." Appellant's Opening Brief at 54, citing R. 18-1 at 35. His argument that there is "no reasonable way" to tell whether the purpose of those transactions was concealment or promotion is incorrect. *Id.* A jury was asked to distinguish between the two and found that the transactions served both purposes. R. 18-4; Respondent's Supplemental Appendix, Supp. App. 2–Supp. App.3. It makes no difference, then, if promotion and concealment are "two modalities" of the "same offense." *See* Appellant's Opening Brief at 26.

C. The benefit of any uncertainty should not go to Roberts.

One additional point bears discussion: the standard of review. In *Aslan*, this Court was reviewing a conviction on direct appeal for plain error. It noted that the "fractured" opinion in *Santos* "addressed only promotional and not concealment money laundering," and it was "not clear how the Court as a whole would rule if the predicate crime was wire fraud that was complete before the money laundering began." *Id.* at 550. Because the law was "unsettled," the Court held that any error could not be plain. *Id.* at 547-48. Similarly in *Hosseini*, this Court rejected a *Santos*-based argument raised for the first time on direct appeal because it was "unclear whether proof of 'proceeds' in a concealment or avoidance money-laundering prosecution required proof that the defendant laundered net profits of the underlying criminal activity." *United States v.*

Hosseini, 679 F.3d 544, 552 (7th Cir. 2012). "[A]s in *Aslan*, the claimed error—if there was one—was not plain." *Id.*

If lingering questions about *Santos*'s application to concealment money laundering preclude a defendant from obtaining relief on plain-error review, then a § 2241 petitioner can't rely on *Santos* to show he is actually innocent of concealment money laundering. On direct appeal, the defendant must show a plain error that "affects substantial rights" and "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." Fed. R. Crim. P. 52(b); *see also United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020). A habeas petitioner, who is proceeding after a final judgment, "must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). Factually, he must demonstrate that "no reasonable juror would find him guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518-19, 538 (2006). Legally, he must show that "controlling law" entitles him to relief. *Chazen*, 938 F.3d at 864 (Barrett, J., concurring); *see also Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007) (declining to grant § 2241 relief because "there is an intercircuit split . . . to be resolved next year by the Supreme Court"). For these reasons, what was a losing argument in *Aslan* and *Hosseini* cannot be a winning argument here.

D. The Court should apply the concurrent-sentence doctrine.

If the Court agrees that Roberts's conviction for conspiracy to commit concealment money laundering is valid, it should affirm the denial of his petition notwithstanding any potential problems with his promotional money laundering convictions, because the concurrent-sentence doctrine obviates the need to consider Roberts's claim.

The concurrent-sentence doctrine "allows appellate courts to decline to review a conviction carrying a concurrent sentence when one 'concurrent' conviction has been found valid." *Ruiz v. United States*, 990 F.3d 1025, 1033 (7th Cir. 2021) (further citation omitted); *see also Ryan v. United States*, 688 F.3d 845, 849 (7th Cir. 2012). Courts have discretion to apply the doctrine when "no prejudice results from foregoing review of the challenged conviction." *Ruiz*, 990 F.3d at 1033. Specifically, courts may decline to review a challenge to a conviction if: (1) the sentence on that conviction runs concurrent to an equal or longer sentence on an unchallenged or affirmed conviction; and (2) there are no adverse collateral consequences to the defendant. *Hill v. Werlinger*, 695 F.3d 644, 649 n.1 (7th Cir. 2012). The Eighth Circuit also recognizes the concurrent-sentence doctrine. *See Eason v. United States*, 912 F.3d 1122, 1123 (8th Cir. 2019).

Both criteria are satisfied here. Roberts is serving concurrent 192-month sentences for promotional money laundering and conspiracy to commit promotional and concealment money laundering. If the Court vacated his promotional convictions, he would not be released any earlier or resentenced on his valid concealment conviction. As to the second part of the inquiry, Roberts has not identified any collateral consequences that he will suffer if his promotional money laundering convictions are not vacated. Concerns about potential exposure to a recidivist sentencing statute for a future offense and being subjected to societal stigma are of no concern here, where Roberts was convicted of three other felonies.[6]

[6] Relatedly, if a jury is instructed on two alternative theories of guilt, a defendant must show actual innocence of both theories to proceed. *United States v. Baxter*, 761 F.3d 17, 28 (D.C. Cir. 2014); *see also Kelerchian*, 937 F.3d at 914. Here, the jury was instructed that it could find Roberts guilty of conspiring to commit money laundering if it found that he conspired to conduct a financial transaction with the intent to promote the carrying on of a specified unlawful activity or to conceal the proceeds of a specified unlawful activity. R. 18-2 at 69. Given the special verdict finding Roberts guilty of both offenses, even if Roberts could establish that he is actually innocent of promotional money laundering, his inability to establish his actual innocence of concealment money laundering provides an additional reason to find that habeas relief is precluded.

IV. Roberts's conviction for promotional money laundering is valid.

If the Court chooses to review Roberts's conviction for promotional money laundering, his petition still fails.

A. Eighth Circuit law

In the Eighth Circuit "proceeds must mean profits whenever a broader definition would perversely result in a merger problem." *Rubashkin*, 655 F.3d at 865 (cleaned up). A merger problem exists when "the mere payment of the expense" of an illegal activity—here, transporting an individual in interstate commerce for prostitution—also serves as the basis for a money laundering offense. *Santos*, 553 U.S. at 527 (Stevens, J., concurring). There was no merger problem in *Rubashkin* because the predicate offense (bank fraud) "did not require the types of payments which gave rise to the money laundering charges." 655 F.3d at 867. Rather, it "was completed every time Rubashkin made a false statement and received a loan disbursement from the Bank." *Id.* at 866. His later "transfer of fraudulent loan proceeds to the grocery store and school was not a necessary result of his obtaining loans through false statements." *Id.*

Other courts have used the same test to evaluate *Santos* claims, asking whether commission of the predicate offense is automatically a violation of the money laundering statute. *Wooten*, 677 F.3d at 310; *United States v. Van Alstyne*,

584 F.3d 803, 815 (9th Cir. 2009) (merger exists when the financial transaction that gives rise to the money laundering conviction is also a "central component" of the predicate offense); *United States v. Brown*, 553 F.3d 768, 783 (5th Cir. 2008) (offenses merge when committing the predicate offense "would almost always support money laundering charges without requiring proof of any distinct laundering activities").

When the predicate offense does not require a financial transaction, applying this test is simple. Take *Wooten*, for example, which involved the interstate transportation of stolen auto parts. The Sixth Circuit explained that no merger problem existed because "[t]he facts and elements of proof necessary to support a conviction for interstate transportation of stolen goods do not include the threshold requirement for proving money laundering, *i.e.*, the existence of a financial transaction." 677 F.3d at 311. This was true even though the petitioner "was also engaged in the buying and selling of stolen goods, which does involve a financial transaction, [because] his crime of transporting stolen goods across state lines in violation of § 2314 did not require it." *Id.*; *see also United States v. Payton*, 437 Fed. Appx. 241, 243 (4th Cir. 2011) (drug possession offense did not present a merger problem because it did not have "an actual financial transaction" as an element); *Rashid v. Warden Philadelphia FDC*, 617 F. App'x 221,

224 (3d Cir. 2015) (no merger problem with mail and wire fraud convictions, which were complete as soon as a communication was sent); *United States v. Reagan*, 725 F.3d 471, 484 (5th Cir. 2013) (no merger problem with respect to bribery conviction, which was complete as soon as defendant solicited payments).

Under the Eighth Circuit test, no merger problem exists with respect to Roberts's convictions. As the district court found, Roberts's "illegal act of transporting individuals with the purpose of having them engage in prostitution did not require . . . the types of payments that gave rise to his money laundering charges." R. 23 at 8. For that matter, Roberts's substantive offenses do not require that prostitution even take place. *United States v. Vargas-Cordon*, 733 F.3d 366, 375 (2d Cir. 2013) (further citation omitted) ("§ 2423(a) is a crime of intent, and a conviction is entirely sustainable even if no underlying criminal sexual act ever occurs"). Because Roberts could have violated the Mann Act without receiving the wire transfer from his father or purchasing the Mercedes, the offenses do not merge.

B. Seventh Circuit law

Before *Santos*, "proceeds" already meant "profits" in this Circuit, at least with respect to promotional money laundering. *United States v. Scialabba*, 282 F.3d

475, 478 (7th Cir. 2002). A year after *Santos*, this Court on direct appeal vacated convictions in two cases, *Hodge* and *Lee*, involving "spas" that were actually fronts for prostitution. In both cases, the government took the position that the only binding aspect of *Santos* was its specific result, which had no application to the cases at hand.[7] In *Hodge*, the Court concluded that the government had "forfeited any benefit that Justice Stevens's approach may offer" and vacated a defendant's money laundering conviction under its pre-*Santos* jurisprudence. *Hodge*, 558 F.3d at 633–34 (accepting the government's concession that "for the purpose of this appeal, *Scialabba* rather than *Santos* controls"). It did not decide whether *Scialabba*'s net-income approach remains controlling. *Id.* at 633-34; *cf. Aslan*, 644 F.3d at 547 ("whether *Scialabba* survives *Santos II* is an open and 'difficult' question") (further citation omitted).

[7] The government's position was (and still is) that neither Justice Stevens' opinion nor Justice Scalia's plurality opinion is a logical subset of the other or provides a common denominator because the opinions rest on inconsistent premises. Justice Scalia's plurality opinion rests on the rationale that "proceeds" has a single meaning for all specified unlawful activities, and that meaning is "profits." *Santos*, 553 U.S. at 523-524. Justice Stevens' concurrence, by contrast, is premised on the view that "proceeds" has a different meaning for different specified unlawful activities. *Id.* at 528. Nor can either opinion 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). Therefore, "the only binding aspect of [the] splintered decision is its specific result." *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999).

Lee provides more insight in that regard. There, the Court observed that charging a defendant with promotional money laundering based on the payment of certain kinds of expenses "may be consistent with Justice Stevens' crime-specific interpretation of § 1956(a)(1)." 558 F.3d at 644. Using the payment of rent as an example, the Court gave the following instances in which "rent might be properly considered paid out of net income": (1) "where rent was paid months in advance as some sort of capital investment"; (2) "where an operation expanded and rented new space"; or (3) "where a business had a month-to-month tenancy with each month the decision being made anew whether to invest their profits into another month of business or to cash out." *Id.* It further explained that the payment of advertising expenses might constitute promotional money laundering, particularly "if a business decides to expand into a new market." *Id.* With both examples, money laundering penalties could be warranted to prevent "the leveraging of one criminal activity into the next." *Santos*, 553 U.S. at 520.

The Court did not decide in *Lee* whether "leveraged" payments could support a promotional money laundering conviction post-*Santos*, but there is no reason to think it would disagree with other courts that have. *See*, *e.g.*, *Brown*, 553 F.3d at 785 (using proceeds of illegal drug sales to buy more drugs was not the "mere payment" of an expense, but was a transaction involving the profits of an

earlier offense to commit a new offense); *United States v. Okun*, No. 3:08–CR–132, 2009 WL 414012, *11 (E.D. Va. Feb. 18, 2009) (assuming *Santos* applies in a non-gambling case, it applies only when transaction defrays an expense of acquiring proceeds from an illegal activity, not when it is an expense of promoting a new crime); *Santana v. United States*, No. C08–1493–JLR, CR06–220–JLR, 2009 WL 1228556, *4 (W.D. Wash. May 4, 2009) (using methamphetamine proceeds to start marijuana business is the promotion of a new crime, not the payment of an essential expense of the crime that generated the proceeds); *United States v. Catapano*, No. CR-05-229 (SJ), 2008 WL 4107177, at *4 (E.D.N.Y. Aug. 12, 2008), report and rec. adopted, 2008 WL 4534010 (E.D.N.Y. Oct. 6, 2008) (*Santos* applies to cases where the transaction relates back to the offense that generated the proceeds, not to cases where defendant was using the proceeds of a completed crime to commit a new one).

Roberts cannot prevail because the nature of the purchase of the Mercedes is unclear. *See Brown v. Rios*, 696 F.3d 638, 641 (7th Cir. 2012) ("actual innocence" is "one of the conditions for allowing a challenge under the habeas corpus statute"). Between October 1996 and November 1996, Monroe Evans transported an individual from Minnesota to Missouri to engage in prostitution. R. 18-1 at 19-20. In January 1997, he wired $2,000 from Missouri to Roberts in Minnesota. R.

18-1 at 20-21. Roberts used that money to purchase a Mercedes. *Evans*, 272 F.3d at 1092; R. 11-4 at 56-61. Perhaps the Mercedes was an ordinary business expense, necessary to maintain the status quo. This would be the case, for example, if it was purchased to replace a different vehicle. However, if the Mercedes were used to expand the conspiracy—geographically, operationally, or otherwise—Roberts is not actually innocent of promotional money laundering. Given this lack of clarity, Roberts has failed to demonstrate his actual innocence.

This Court's decision in *Santos I* is not to the contrary. There, the payments to the lottery's collectors and winners were "conceptually indistinguishable from the transactions in *Scialabba"* and "came out of its gross income." *Santos v. United States*, 461 F.3d 886, 891 (7th Cir. 2006). Conceding that there was insufficient evidence in the record to support the promotional money laundering convictions under *Scialabba*'s net-proceeds approach, the government's only argument was a "frontal assault on *Scialabba*." *Id.* at 889. By contrast here, the nature of the financial transaction is unclear. Roberts could have submitted extra-record evidence to clarify whether the Mercedes was an essential expense or an investment that allowed the business to expand. *See Bousley v. United States*, 523 U.S. 614, 623-24 (1998) (remanding to provide the petitioner with the opportunity to show that he did not "use" a firearm, as that term is defined in *Bailey*); Rule

7(b) of the Rules Governing Habeas Corpus Cases in the United States District Courts (allowing for expansion of the record). He did not, instead relying on a general finding that the Mercedes was used on prostitution calls and a jury instruction that permitted money laundering convictions based on gross proceeds. Appellant's Opening Brief at 48-49. But a "mere legal insufficiency" cannot open the door to habeas relief. *Bousley*, 523 U.S. at 615.

In conclusion, it is Roberts's burden to establish actual innocence. And because the record does not conclusively establish that the Mercedes was an ordinary business expense, he is not entitled to habeas relief based on his conviction of promotional money laundering.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the district court's denial of Roberts's habeas petition be affirmed.

Dated January 12, 2022.

Respectfully submitted,

TIMOTHY M. O'SHEA
United States Attorney

By: s/*Megan R. Stelljes*

MEGAN R. STELLJES
ALICE H. GREEN
Assistant U. S. Attorneys

CERTIFICATE OF COMPLIANCE

I certify that the attached brief complies with the Court's type-volume limits in Fed. R. App. P. 32(a)(7)(B), Fed. R. App. P. 32(g), and Circuit Rule 32(c), and with the Court's typeface and type-style requirements in Fed. R. App. P. 32(a)(5), Fed. R. App. P. 32(a)(6), and Circuit Rule 32(b). This document contains 9,494 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), and was prepared using Microsoft Word 365 in Book Antiqua font size 13 for the body and Book Antiqua font size 12 for footnotes.

s/Megan R. Stelljes
Megan R. Stelljes
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I certify that on January 12, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system, to Petitioner-Appellant's Attorney, Xiao Wang.

/s/
ANNE GASSERE
Legal Assistant

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 4:00 CR 003 JCH
LEVORN EVANS et al.	)	
Defendants.	)	

VERDICT

We, the jury in the above-entitled cause, on the trial of the defendant, TERRENCE ROBERTS, as charged in the Indictment, find as follows:

COUNT I

We find the defendant, TERRENCE ROBERTS guilty (guilty or not guilty)

as charged in Count I of the Indictment.

If you find defendant "guilty," you must answer the following:

Which of the following crimes do you find the defendant conspired to commit?

✓ knowingly transport a minor in interstate commerce in violation of Title 18 U.S.C. § 2423(a).

✓ knowingly transport any individual in interstate commerce for prostitution in violation of Title 18 U.S.C. § 2421.

✓ knowingly persuade, induce, entice or coerce any individual to travel in interstate commerce for prostitution in violation of Title 18, U.S.C. Section 2422(a).

(Check each violation which the jury unanimously agrees defendant committed.)

COUNT XIX

We find the defendant, TERRANCE ROBERTS guilty
(guilty or not guilty)

as charged in Count XIX of the Indictment.

COUNT XXIX

We find the defendant, TERRANCE ROBERTS guilty
(guilty or not guilty)

as charged in Count XXIX of the Indictment.

COUNT XXX

We find the defendant, TERRANCE ROBERTS guilty
(guilty or not guilty)

as charged in Count XXX of the Indictment.

COUNT XXXXIV

We find the defendant, TERRANCE ROBERTS guilty
(guilty or not guilty)

as charged in Count XXXXIV of the Indictment.

If you find the defendant "guilty", you must answer the following question:

Which of the following crimes do you unanimously find that defendant conspired to commit?

✓ conduct and attempt to conduct transactions which involved the proceeds of transportation of individuals in interstate commerce with the intent that said individuals engage in prostitution with the intent to promote the carrying on of such unlawful activity in violation of Title 18, U.S.C. Section 1956(a)(1)(A)(i).

Exhibit D

✓ conduct transactions which involved the proceeds of transportation of individuals in interstate commerce with the intent that said individuals engage in prostitution knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such unlawful activity, in violation of Title 18, U.S.C. Section 1956 (a)(1)(B)(i).

(Check each violation which the jury unanimously agrees defendant conspired to commit)

FOREPERSON

Dated this 28th day of March 2000.

AO 245B (Rev. 8/96) Sheet 1- Judgment in a Criminal Case

United States District Court

Eastern District of Missouri

UNITED STATES OF AMERICA

v

Terrance Roberts

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4:00CR3 JCH

Deborah Van Arink
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1, 19, 29, 30, 44 after a plea of not guilty

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 371	Conspiracy to transport another person in interstate commerce with the intent to commit prostitution.	1982 - 1/6/00	1
18 USC § 1956(a)(1)(A)(i) and 2	Money Laundering.	1982 - 1/6/00	19
18 USC § 2423(a)	Transportation of an individual under the age of 18 with the intent to engage in prostitution.	1982 - 1/6/00	29

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendants Soc. Sec. No.: 429-51-6522
Defendant's Date of Birth: 3/19/73
Defendant's USM No.: 09146-041

Defendant's Residence Address:
2800 Morgan Ave. North
Minneapolis, MN 55411

Defendant's Mailing Address:
SAME AS ABOVE

July 6, 2000
Date of Imposition of Judgment

Jean C Hamilton
Signature of Judicial Officer

Honorable Jean C. Hamilton
United States District Judge
Name & Title of Judicial Officer

July 6, 2000
Date

SA-004

#441

Record No.: 57

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 2422(a)	Transporting another person in interstate commerce with the intent to commit prostitution.	1982 - 1/6/00	30
18 USC § 1956(h)	Conspiracy to Commit money laundering.	1982 - 1/6/00	44

Judgment-Page 3 of 7

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 432 months.

This sentence consists of a term of 60 months on each of counts 1 and 30 to be served consecutively to each other; 192 months on each of counts 19 and 44, to be served concurrently to each other and consecutively to counts 1 and 30; and 120 months on count 29, to consecutively with counts 1, 19, 30, and 44, to the extent necessary to produce a total term of 432 months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./pm on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal
- ☐ as notified by the Probation or Pretrial Services Office

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____ SA-006
Deputy U S Marshal

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall be placed on supervised release for a term of three years on each count to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall refrain from any unlawful use of a controlled substance, and submit to a drug test within 15 days of release on supervised release, and at least two periodic drug tests thereafter for use of a controlled substance.

2. The defendant shall participate, as directed by the probation officer, in a drug or alcohol abuse treatment program which may include substance abuse testing, counseling, residence in a community corrections center, residence in a comprehensive sanctions center, or inpatient treatment in a treatment center or hospital.

3. The defendant shall refrain from the use of alcohol and/or all intoxicants.

4. The defendant shall comply with all federal, state, and local sex offender registration laws.

5. The defendant shall participate in a mental health program as instructed by the U.S. Probation Office.

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Counts 1, 19, 29, 30, 44	$500.00 due immediately		
Totals:	$500.00		

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution, payable through the Clerk of Court, to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	_____	_____	

SA-009

* Findings for the total amount of losses are required under Chapters 1 09A, 1 10, 1 1OA, and 11 3A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: Terrance Roberts

CASE NUMBER: 4:00CR3 JCH

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: _____

Criminal History Category: _____

Imprisonment Range: _____ to _____ months

Supervised Release Range: _____ to _____ years

Fine Range: _____ to _____

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 1 09A, 110, 11OA, and 11 3A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☒ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following specific reason(s):

Upward departure based on 5K2.2 use of physical force and 5K2.8, conduct unusually cruel.

UNITED STATES DISTRICT COURT -- EASTERN MISSOURI
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4:00cr3 USA vs Evans

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Deborah van Arink - 81019	Fax: 314-531-1011

SCANNED & FAXED BY:

JUL 10 2000

J. M. W.