No. 06-

IN THE

Supreme Court of the United States

SAMUEL NESS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

VIVIAN SHEVITZ
ATTORNEY AT LAW
46 Truesdale Lake Drive
South Salem, New York 10590
(914) 763-2122

WALTER DELLINGER
(Counsel of Record)
MARK S. DAVIES
SCOTT M. EDSON
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Petitioner

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QUESTION PRESENTED

The federal courts of appeals are divided over the meaning of "designed to conceal or disguise" in the principal federal money laundering statute, 18 U.S.C. § 1956 ("Laundering of Monetary Instruments"). Section 1956 criminalizes using illegal proceeds in financial transactions "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B). Similarly, the statute criminalizes using illegal proceeds in an international transportation "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(b)(2)(B)(ii).

The question presented is whether, as the Sixth, Seventh and Tenth Circuits have held, the money laundering statute reaches conduct "designed to conceal or disguise" illegal proceeds by making illegitimate funds appear legitimate or whether, as the Second, Third, Fifth and Eleventh Circuits have held, the "designed to conceal or disguise" requirement is met by any conduct that hides money regardless of whether or not the conduct was designed to create the appearance of legitimate wealth.

PARTIES TO THE PROCEEDING

Petitioner is Samuel Ness, defendant-appellant below.

Respondent is the United States of America, appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Ness respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's decision is reported at 466 F.3d 79 and reprinted in the Appendix to this Petition ("App.") at 1a-6a. The district court's decision denying petitioner's motion for judgment of acquittal is unpublished, but is available electronically at 2003 WL 21804973 or 2003 U.S. Dist. LEXIS 13561 and reprinted at App. 7a-24a.

JURISDICTION

The court of appeals issued its decision on October 10, 2006, App. 1a, and denied petitioner's timely petition for rehearing en banc on January 10, 2007, App. 25a. On March 29, 2007, Justice Ginsburg extended the time to file a petition for writ of certiorari to and including May 2, 2007, and, on April 13, 2007, Justice Ginsburg further extended the time to file to and including June 1, 2007. *See* No. 06A930. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The principal federal money laundering statute, 18 U.S.C. § 1956, has separate transaction and transportation paragraphs. The transaction money laundering provision, § 1956(a)(1), makes it a crime to, among other things, engage in "a financial transaction" with "the proceeds of some form of unlawful activity" "knowing that the transaction is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B). Similarly, the trasportation money laundering provision, Section 1956(a)(2), makes it a crime to transport "from a place in the United States to or through a place

outside the United States" "the proceeds of some form of unlawful activity" "knowing that such transportation" "is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds."

These and other relevant provisions are reproduced at App. 26a-40a.

STATEMENT OF THE CASE

The decision below deepens an acknowledged circuit split concerning the definition of "conceal or disguise" in the principal federal money laundering statute, 18 U.S.C. § 1956. Petitioner engages in the lawful business of transporting large amounts of United States currency, "the currency of choice for many people in many countries all over the world." Although some of petitioner's customers turned out to be drug dealers, there is no suggestion that petitioner is guilty of any drug crime. Petitioner's company is fully licensed, insured, and it complied with all federal reporting requirements. Petitioner took no steps to "launder" any money, *i.e.*, to create the appearance of legitimate wealth. Nevertheless, the Second Circuit affirmed petitioner's money laundering conviction on the theory that his routine and lawful steps to hide cash during transfer satisfies the "conceal or disguise" element of the money laundering statute. App 3a-4a. In so holding, however, the court below acknowledged that at least two other circuits would find this evidence insufficient to support a money laundering conviction. Review by this Court is warranted.

1. The international transportation of U.S. currency is a lawful and vital part of the world economy. For historical, cultural and other reasons, certain legitimate businesses rely on large, secure, international cash transfers rather than wire or other electronic means of transferring funds. For example, high-value-good industries where small family owned business participate – such as the diamond industry in New

York – make extensive use of large cash deliveries to foreign countries. As the government's first witness at trial observed, the American dollar is "the currency of choice for many people in many countries all over the world." Tr. 51 (testimony of government witness Daniel Craig Jack). "People need it or want it for a lot of different reasons." *Id.*

Under federal law, large international cash deliveries are entirely legal so long as properly declared to customs officials. As U.S. Customs and Border Enforcement explains, "[i]t is legal to transport any amount of currency . . . into or out of the United States. However, if you transport . . . an aggregate amount [of currency] exceeding $10,000 (or its foreign equivalent) . . . you must file a report with U.S. Customs and Border Protection." *See* U.S. Customs and Border Enforcement, *Currency Reporting*, CBP Publication No. 0000-0503 (2006)[1]; *see also* 31 U.S.C. § 5316 (must report if more than $10,000 being transported); Financial Crimes Enforcement Network ("FinCEN") FORM 105 (formerly Customs Form 4790) (reporting form for international transportations of currency exceeding $10,000).[2] As this Court has noted, it is "permissible to transport [hundreds of thousands of dollars in] currency out of the country so long as" it is properly reported. *United States v. Bajakajian*, 524 U.S. 321, 337 (1998).[3]

Obviously, those whose legitimate business involves the international transportation of large amounts of cash take steps to assure that the public is not aware of the transporta-

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[1] http://cbp.gov/xp/cgov/toolbox/publications/travel/ (follow "Currency Reporting Flyer - English Version" hyperlink).

[2] http://www.fincen.gov/fin105_cmir.pdf.

[3] In 2001, Congress enacted a statute criminalizing the international transportation of cash without submitting the required customs declaration forms. *See* 31 U.S.C. § 5332 ("Bulk cash smuggling into or out of the United States"); USA PATRIOT Act of 2001, Pub. L. No. 107–56, Title III, Subtitle C, § 371(c), 115 Stat. 337 (2001), *amended by* Pub. L. No. 108–458, Title VI, Subtitle C, § 6203(h), 118 Stat. 3747 (2004).

tion. Bulk cash attracts criminals who may not hesitate to use violence.[4] Thus, the lawful international transportation of bulk cash and other valuables is usually accompanied by a range of secretive measures. *See, e.g.*, Karotek AS Armored Cash & Bullion Transport Page (advertising "a range of active security measures" employed by secure transport vehicles, and explaining that "[w]e are unable to publicly discuss these measures but will provide full information to bona fide prospective clients")[5]; Rob Bates, *Cutting Your Shipping Losses*, Jewelers' Circular Keystone, Sept. 1999 (suggesting such tactics as avoiding shipping to or from zip codes associated with diamond business, changing routes and procedures frequently "just as you would to avoid other types of crime," handwriting labels so that it appears that the sender does not frequently use express shipping, and avoiding "things that could draw attention to your box")[6]; Southeastern Gems, Gold & Diamonds Wholesale Distributors Policies Page ("When addressing your return package, it is recommended that you address the package to Southeastern or to Southeastern GG & D. Please do not label or address the package to Southeastern Gems. Addressing it to Southeastern Gems will increase the chances of theft by about 500%.")[7]; Yosepha Designs Frequently Asked Questions Page, ("Please do not write any words on the package shipping label that in any way allude to the contents of the pack-

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[4] *See, e.g.*, George Chidi, *Gang Crimes May Be On Rise In Lilburn*, Atlanta J. Const., May 21, 2007, at J1 ("On April 4, a robber shot an armored car driver at Atlanta Check Cashing . . . . The robber escaped with an unknown amount of money . . . ."); *Robbers Nab More Than $1M In Truck Heist*, Chicago Tribune, May 3, 2007, at 10 (describing armored-car heist, during which "[a]t least two shots were fired"); Ferdie De Vega, *Gunmen Rob Armored Truck*, Tallahassee Democrat, Apr. 24, 2007, at 1A; *Armored - Car Driver Shoots Man Trying to Rob Him in Cheltenham*, Philadelphia Inquirer, March 11, 2007, at B08.

[5] http://www.karotek.com/security_cash_bullion_transport.php.

[6] http://jck.polygon.net/archives/1999/09/jc09-143.html.

[7] http://www.southeasterngems.com/policies.php.

age such as gems or jewelry, in order to deter potential theft of an item while in transit.").[8] Indeed, such secretive measures are a necessary feature of the legitimate business of meeting the world-wide demand for U.S. currency.

2.a. Petitioner Samuel Ness owned and operated a company called Protective Logistics Corporation of New York ("PLC"). Ness once worked for Republic Bank (now HSBC) securely delivering millions of dollars to other financial institutions. "His job there was essentially to carry cash for HSBC Bank on airplanes for delivery to other banks in foreign countries." Tr. 23 (government's opening statement). A typical cash shipment for that Bank "can vary from 2 or $300,000 to over $50 million." Tr. 59 (testimony of government witness Mr. Jack).

After leaving HSBC, Ness started his own company transporting cash, gold, and jewelry for individuals and small businesses, rather than banks. Ness owned and operated PLC, an armored car company in New York City's diamond district. PLC was licensed by New York State[9] and insured by Lloyds of London. Court of Appeals Appendix ("C.A. App.") at 71a (New York armored car license); C.A. App. 72a (New York certificate of incorporation); C.A. App. 75a (Airport Customs Security Bond); C.A. App. 76a (Port Authority Identification Badge Application); C.A. App. 78a-82a (insurance certificates).

Most of PLC's clients were orthodox Jewish diamond merchants who often conducted business on a handshake. PLC kept detailed internal records of the huge amounts of

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[8] http://www.yosephadesigns.com/1057898.html.

[9] New York General Business Law § 89bbb(c) states "Armored car services means engaging in the business of providing secured transportation, protection and safeguarding of valuable cargo from one place or point to another, including the provision of cash services for automated teller machines, by means of specially designed and constructed bullet-resistant armored vehicles and armored car guards."

cash and diamonds it transported out of the United States. PLC filed the required customs forms declaring the transported cash. *See* Ness Court of Appeals Br. ("Ness C.A. Br.") at 56. Fund deliveries were conducted at PLC's place of business in the diamond district on Fifth Avenue, though sometimes deliveries were made at off-site locations more convenient for customers. *See id.* at 9. PLC had written delivery and transportation procedures, making clear that all PLC personnel were to file the requisite declaration forms and answer truthfully any questions from law enforcement agents acting within the scope of their authority. App. 41a-43a. Among others, Mr. Ness employed two off-duty Sabena employees, one a flight attendant, to courier funds for PLC. *See* Ness. C.A. Br. at 11 n.1. Like Ness and all other PLC employees, they always filed the required customs forms. *See id.*; App. 41a-43a.

b. In July 2001, Mr. Ness was arrested in Belgium. He was thereafter extradited to the United States. The government originally charged Ness with obtaining cash from narcotics traffickers, transporting the cash out of the country without filing Currency and Monetary Instrument Report forms CF 4790 ("CMIRs") and then using "a variety of bank accounts – including a Swiss account – to transfer and/or exchange the money." C.A. App. 62a (original indictment); C.A. App. 99a (Assistant U.S. Attorney Christopher J. Morvillo's Sept. 4, 2001 Affidavit In Support Of Request For Extradition). The government, however, could not substantiate these charges and they were dropped. Ness was not charged with any narcotics offense. Indeed, at trial the testimony was uniform that Ness was never told that any of these transportations were for drug dealers. *See* Tr. 202, 700-02, 831-32.

Undaunted by the collapse of its theory of the case and the obvious inapplicability of other criminal statutes, the government amended the indictment and charged Ness with

one substantive count of transaction money laundering (18 U.S.C. § 1956(a)(1)(B)(i)). The government also charged Ness with one count of conspiring to commit three money laundering offenses: monetary transactions in unlawful funds for a "financial institution" (18 U.S.C. § 1957(a)), financial transaction money laundering (18 U.S.C. § 1956(a)(1)(B)(i)) and international transportation money laundering (18 U.S.C. § 1956(a)(2)(B)(i)).

At trial, the government did not argue that Ness took any steps to launder money as that term is commonly understood, *i.e.*, taking steps to make illegally obtained funds appear legitimate. Instead, the government attempted to satisfy the statutory requirement of showing a "design[] . . . to conceal or disguise" with evidence that he used secretive means when transporting funds. *See* Gov't Court of Appeals Br. at 41 (emphasizing testimony that Ness told an associate to maintain confidentiality and to disguise money during shipping); *accord id.* at 40-41.[10]

Acting under a "financial institution" jury instruction that everyone (including the government and the court of appeals below) now essentially acknowledges was "faulty," *see* App. 6a, the jury convicted Ness.[11] Apparently, the jury accepted

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[10] Similarly, the government notes that clients delivering currency to petitioner did not always obtain a receipt. *See* App. 4a (noting "avoidance of a paper trail"). A receipt, of course, is for the benefit of the person delivering the money to a transport company, not for the transport company's benefit. The fact that petitioner did not give a receipt directly to a courier who dropped off currency does not mean that he avoided a paper trail. To the contrary, by filing the required customs declaration forms when transporting cash abroad, petitioner not only created a paper trail, but placed it directly in the hands of federal authorities.

[11] At the government's urging, the jury was instructed that a "financial institution" includes "any person or business that physically transports . . . currency in an aggregate amount exceeding $10,000 at one time from the United States to anyplace outside the United States." The government later conceded that that instruction was overly "broad" as it ef-

the government's expansive theory that Ness "consciously avoided," Tr. 1145-1149, learning that some of his customers were transferring currency as part of a narcotics conspiracy. *See* C.A. App. 67a (indictment). The district court denied Ness's motion for judgment of acquittal, and specifically rejected Ness's contention that the government failed to prove the conceal or disguise element. *See* App. 23a (concluding evidence of concealment was sufficient and noting that Ness treated cash deliveries as "confidential"). He was sentenced to fifteen years' imprisonment with three years supervised release. C.A. App. 16a (Judgment In A Criminal Case).[12]

3. The Second Circuit (Winter, Calabresi, Pooler) affirmed. The panel relied exclusively on the substantive count of transaction money laundering. The court of appeals noted Ness's argument that his armored car company is not a financial institution, and also noted that the "'financial institution' jury charge proposed by the prosecution and adopted by the court was inaccurate, as the government now all but admits." App. 6a. Nonetheless, the court found Ness's conviction "could be sustained" based solely on the "substantive count of transaction money laundering." *Id.*

In affirming the substantive money laundering conviction, the Second Circuit acknowledged that accepting the government's understanding of "conceal or disguise" under the transaction money laundering statute would deepen an existing circuit split. As the court of appeals noted, Ness

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fectively turned every person into a "financial institution," gutting Congress's carefully chosen statutory term.

[12] In a post-trial motion, new counsel for Ness elaborated on the errors, concessions, and omissions made by his original trial counsel. For example, trial counsel made clear his own belief that Ness was engaged in drug dealing by comparing Mr. Ness to "normal drug defendants," Tr. 1234, even though, as explained above, Mr. Ness was engaged in the lawful business of bulk cash transportation and the government's witnesses uniformly testified that Ness was never told that any of these transportations were for drug dealers.

"argues that the concealment element is satisfied only when the transaction or transportation at issue was designed to give the appearance of legitimate wealth," and that "the government showed only that he accepted cash from drug transactions for shipment from one place to another, *e.g.*, from drug seller to their suppliers." App. 3a. The Second Circuit observed that "[s]ome other circuits that have decided money laundering appeals would find this evidence legally insufficient because they have essentially adopted Ness's reasoning." *Id.* (citing *United States v. Cuellar* ("*Cuellar I*"), 441 F.3d 329 (5th Cir. 2006) and *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), but comparing *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994)).[13]

After noting the circuit split, the court below concluded that it was bound by circuit precedent to follow the circuits that have adopted at an expansive reading of the money laundering statute. The panel upheld petitioner's money laundering conviction based solely on the fact that his international transportation of the cash was (as the transportation of cash always is) accompanied by secretive measures. App. 3a. Specifically, the panel stated it was bound by *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006). In *Gotti*, the Second Circuit affirmed a concealment money laundering conviction arising out of the payment of tributes up the hierarchy of an organized crime family because "the process by which the cash tributes were transmitted was highly complex and surreptitious." *See* 459 F.3d at 337. Relying on *Gotti*, the court of appeals below ruled that the "conceal or disguise" element was satisfied in this case by "the level of secrecy that attended Ness's" transportation of currency for customers that turned out to be drug traffickers. App. 4a. In reaching its

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[13] After the decision below issued, the Fifth Circuit reheard *Cuellar* en banc. *See United States v. Cuellar* ("*Cuellar II*"), 478 F.3d 282 (5th Cir. 2007) (en banc). A petition for certiorari was filed on May 3, 2007. *See* No. 06-1456. If the Court grants the *Cuellar* petition, this petition should be held pending decision in *Cuellar*.

conclusion, the court noted that its understanding of "conceal or disguise" would apply to both financial transaction money laundering and international transportation money laundering. *Id.* at 4a n.1.

REASONS FOR GRANTING THE PETITION

As expressly recognized by the Second Circuit below, App. 3a, the circuits are divided over whether the "conceal or disguise" element of the money laundering statute requires proof of a design to create the appearance of legitimate wealth. The Sixth, Seventh and Tenth Circuits limit the international transportation money laundering crime to those who transport funds with a design to create the appearance of legitimate wealth. The Second Circuit, as well as the Third, Fifth and Eleventh Circuits, hold that the "conceal or disguise" element is satisfied whenever the transportation of money is accompanied by some measures of secrecy. Of course, all transportation of cash is accompanied by secretive measures, and thus these circuits have adopted an expansive view of the money laundering crime, one that implausibly does not require any design to launder money.

I. THE SECOND CIRCUIT'S DECISION IS WRONG BECAUSE MONEY LAUNDERING INVOLVES CREATING THE APPEARANCE OF LEGITIMATE WEALTH

The federal money laundering statute reaches conduct that is designed to create the appearance of legitimate wealth. The text, structure and history of the money laundering statute all support this common sense understanding of the prohibition. The Second Circuit's expansive reading of the statute to reach the "hiding" of cash independent of any effort to create the appearance of legitimate wealth is wrong. Indeed, the court of appeal's suggestion that judges can draw arbitrary lines based on an atextual "sufficiently elaborate and secretive measures" test confirms the panel's misguided statutory reading.

A. The "Conceal Or Disguise" Element Requires Proof Of A Design To Create The Appearance Of Legitimate Wealth

The federal money laundering statute reaches only those transactions or transportations "designed to conceal or disguise" specified attributes of illegal proceeds. Although a criminal might attempt to "launder" illegal proceeds in any number of ways, the unifying goal remains the same: making "dirty" money look "clean," and thus enabling the criminal to amass useable wealth from the illegal acts. In achieving that goal, the criminal might, for example, move drug money through a legitimate business by doctoring the books to inflate revenues, allowing the ill-gotten gains to make up the shortfall. But whatever method a criminal may invent for making illegally obtained money appear legitimate, the methods are all nicely captured by the statutory prohibition against transactions and international transportations "designed" "to conceal or disguise" the attributes that betray the illegal character of the proceeds: their "nature," "location," "source," "ownership," or "control." *See* § 1956(a)(1)(B)(i) & (a)(2)(B)(i).

Indeed, the statute is expressly aimed at "money laundering," as reflected in its title: "Laundering of Monetary Instruments." *See* 18 U.S.C. § 1956. As a matter of plain English, to "launder" money "is to disguise illegally-obtained money by making it appear legitimate." *United States v. Cuellar* ("*Cuellar II*"), 478 F.3d 282, 297 n.4 (5th Cir. 2007) (Jerry E. Smith, J., dissenting), *citing* 8 *Oxford English Dictionary* 702 (2d ed. 1989) (to launder money is "to transfer funds of dubious or illegal origin, usually to a foreign country, and then later to recover them from what seem to be 'clean' sources"); *The American Heritage Dictionary of the English Language* 992 (4th ed. Houghton Mifflin Co. 2006) (to launder money is "to disguise the source or nature of (illegal funds, for example) by channeling through an in-

termediate agent"); *and The New Oxford American Dictionary* 958 (2d ed. Oxford Univ. Press 2005) (to launder money is to "conceal the origins of (money obtained illegally) by transfers involving foreign banks or legitimate businesses"). *See also Bajakajian*, 524 U.S. at 351 (Kennedy, J., dissenting) ("By its very nature, money laundering is difficult to prove; for if the money launderers have done their job, the money appears to be clean."); *Black's Law Dictionary* 1027 (8th ed. 2004) (to launder money is "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced").

Law enforcement agencies also define money laundering as creating the appearance of legitimate wealth. The influential President's Commission on Organized Crime – which spearheaded the legislative effort to enact the current money laundering statute – defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, *and then disguises that income* to make it appear legitimate." President's Comm'n On Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, And Money Laundering* 7 (Books for Bus. 2001) (1985) (emphasis added).[14] In fact, the section of

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[14] As explained by Judge Smith's *Cuellar II* dissent, the Report gave examples of the type of activity that a money laundering statute should reach:

> [P]ayments to the Gambino family that were transferred through three bank accounts, including one in Switzerland, then withdrawn and placed into a safe deposit box; secretion into Swiss bank accounts, by the head of the New Orleans family of La Cosa Nostra, of $1.8 million that had been extorted from the Teamsters; a drug trafficker's practice of making numerous small deposits, totaling over $500,000, into a casino account, gambling a small amount, and then withdrawing the balance from the account in the form of checks made out to third parties, which were deposited in a securities firm before withdrawal; and the Hell's Angels' use

the Commission's report entitled "What is Money Laundering" begins with the proposition that "[l]aundering money is to switch the black money or the dirty money to clean money." *Id.* (internal quotation marks and alterations omitted). Similarly, the General Accounting Office defines money laundering as "the process of disguising or concealing illicit funds to make them appear legitimate." General Accounting Office, *Investigating Money Laundering and Terrorist Financing: Testimony Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources* (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) (May 11, 2004), *available at* http://www.gao.gov/new.items/ d04710t.pdf.[15]

The legislative history confirms that Congress intended the money laundering statute to apply to money laundering as generally understood: converting unlawful proceeds to create the appearance of legitimate wealth. For example, the House Report accompanying the money laundering bill cites the President's Commission definition, *supra*, at 8. Comprehensive Money Laundering Prevention Act, H.R. Rep. No. 99-746 at 16 (1986). The House Report goes on to explain: "In other words, laundering involves the hiding of the paper trail that connects income or money with a person in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or

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> of drug proceeds to purchase, through front men, failing businesses and real estate to legitimize the cash.

See Cuellar II, 478 F.3d at 298-99.

[15] Law enforcement officials in other countries also define money laundering as creating the appearance of legitimate wealth. For example, the Interpol General Assembly's working definition of money laundering is "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources." See Interpol, *Money Laundering: Funds derived from criminal activities* (Jan. 17, 2006), *available at* http://www.interpol.int/Public/ FinancialCrime/MoneyLaundering/default.asp.

assets." *Id.*; *see also United States v. Esterman*, 324 F.3d 565, 565 (7th Cir. 2003) (recognizing that the Money Laundering Control Act of 1986 was "meant to target the transformation of funds derived from illegal activities into a clean or useable form.").

In addition to text and context, two other standard interpretive tools establish that "money laundering" means creating the appearance of legitimate wealth. When construing a criminal statute, this Court avoids interpreting distinct statutes to reach the same conduct because of the potential for cumulative punishment unintended by Congress. *See, e.g., Simpson v. United States*, 435 U.S. 6 (1978). Furthermore, in determining Congressional intent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 14, *quoting United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). Here, interpreting "designed to conceal or disguise" in the money laundering statute as requiring a design to create the appearance of legitimate wealth prevents the statute from further criminalizing acts which are already illegal (*e.g.*, illegal drug sales), and does not unfairly punish conduct that the plain language of the statute does not reach.

B. The Second Circuit's "Level of Secrecy" Test Is Not Supported By The Statutory Text And Is Unworkable

In upholding petitioner's money laundering conviction in the absence of any design to create the appearance of legitimate wealth, the Second Circuit has untethered the money laundering statute from the evil it was written to proscribe. Congress plainly could have defined money laundering as any transportation involving illicit funds. It chose instead to craft a precise definition of the conduct that constitutes "money laundering." The definition of "designed to conceal or disguise" adopted by the court below causes the money laundering statute to expand beyond its well defined

channels. Almost all transportations of funds (whether involving unlawful funds or not) will involve some level secrecy. The court of appeals disregarded the specific prohibition on money laundering enacted by Congress, instead rendering almost all international transportation or transactions involving unlawful funds money laundering.

The broad understanding of money laundering of the court below turns almost any movement of criminal proceeds into money laundering, rendering superfluous numerous specific criminal statutes. For example, in §§ 1956(a)(1)(A)(i) and 1956(a)(2)(A), Congress proscribed transactions and transportations involving unlawful proceeds when "designed . . . to promote specified unlawful activity." Under the Second Circuit's reading, however, unless the criminal takes no steps to hide the large amounts of cash – a highly unusual criminal method – conduct proscribed by these provisions is already concealment money laundering. *Cf.* 18 U.S.C. § 1960 (providing five-year sentence for operating "unlicensed money transmitting business" by either failing to obtain requisite federal or state licensing, or transporting or transmitting "funds that are known to the defendant to be derived from a criminal offense or are intended to be used to promote or support unlawful activity").

Moreover, under the Second Circuit's analysis, a car dealer is engaged in money laundering if he sells a Porsche (or, for that matter, a beat-up 1982 Yugo) to someone "known" to be a drug trafficker who pays in cash, so long as the cash is physically hidden upon delivery. Under the Second Circuit's analysis, the money laundering statute permits the car dealer to make the sale, so long as the cash exchange occurs in the show room, and not in a back office. Similarly, someone in the secure transportation business might need to hide from potential bandits the fact that he is collecting a large sum of cash from a restaurant, pawn shop, or jewelry store. By so doing, however, he has satisfied the money

laundering statute's "conceal or disguise" element under the Second Circuit's decision. If, on the other hand, the transporter wishes to avoid the heavy consequences attendant to a money laundering conviction, he must risk his immediate safety, as well as that of the cash he was hired to securely transport, by announcing to the world that he is collecting a large sum of bulk cash.[16] Congress plainly did not intend such nonsensical results.

Perhaps perceiving the illogical consequences of its reading, the court below sought to cabin its expansive definition of "designed to conceal or disguise." Relying on an earlier Second Circuit case, the court of appeals noted "that not every disposition of unlawful funds qualifies as a money laundering offense." App. 4a (citing *United States v. Stephenson*, 183 F.3d 110 (2d Cir. 1999)). Nevertheless, the court ruled that the evidence of concealment was sufficient to support Ness's convictions because of "the level of secrecy" that attended Ness's receipt of the funds. *See id.*

In purporting to draw a line between "minimal" and "sufficient" secrecy for purposes of the "conceal or disguise" element, the court suggested no standard, no set of factors and no guideposts, but merely declared that the elaborateness of the conduct in this case was enough. No statutory basis exists, however, for creating a sliding scale between ordinary and extraordinary secrecy; the statute trains on the binary inquiry into whether there was a "design . . . to conceal or disguise" the listed attributes. Rather than judicially amending the criminal statute to include a vague "sufficient" concealment requirement, the court should simply have inter-

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[16] *See also* John K. Villa, *A Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes*, 37 Cath. U. L. Rev. 489, 500-01 (1988) (discussing social costs of businesses refusing to service "suspicious" persons who, having been identified as "suspect," are powerless to clear their names).

preted the money laundering statute to require proof of money laundering.

II. THE CIRCUITS ARE DIVIDED ON THE PROPER TEST FOR "CONCEAL OR DISGUISE" UNDER THE FEDERAL MONEY LAUNDERING STATUTE

A. The Sixth, Seventh and Tenth Circuits Properly Require A Design To Create The Appearance Of Legitimate Wealth

Three circuits have squarely held that money laundering requires a design to create the appearance of legitimate wealth.

In *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (Ebel, J.), the Tenth Circuit reversed the conviction of a defendant who was involved in the transportation of known drug proceeds through elaborate and covert means. Dimeck was to collect drug funds in Detroit and deliver them to another driver in Detroit, who would then deliver them to California. *Id.* at 1243. The government relied upon evidence of secrecy – reminiscent of the evidence of secrecy relied upon by the Second Circuit below – to satisfy the "conceal or disguise" element of § 1956(a)(1)(B)(i): Dimeck used a van marked with his company's logo to clandestinely deliver what he knew to be $60,0000 in cash drug proceeds to a transporter, who was waiting in a motel room. *Id.* When Dimeck arrived at the motel, he delivered the cash in an unsealed box, also bearing his company's logo. *Id.* Before departing, he told the transporter to make sure he physically disguised the money during transit. *Id.* The Tenth Circuit, however, vacated the conviction, concluding the evidence was insufficient because it failed to establish that "the transaction [was] motivated significantly by a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of the funds so that they might enter the economy as legitimate funds." *Dimeck*, 24 F.3d at 1245.

Pointing to the statutory text, the Tenth Circuit explained that § 1956(a)(1)(B)(i) "only prohibits financial transactions designed to conceal or disguise certain *listed attributes* of the proceeds: 'the nature, the location, the source, the ownership, or the control of the proceeds.'" *Id.* at 1246. The evidence against Dimeck was thus insufficient because, although the government showed Dimeck had taken elaborate steps to hide the money, it failed to suggest a design to "confuse or mislead anyone as to the characteristics" of the funds. *Id.* As the court observed, "it is not necessary for those involved" in the drug trade "to conceal or disguise the attributes of the money as it passes from one set of hands to another because the people expected to handle the money know it is illegal drug money." *Id.* at 1247. Dimeck merely facilitated the delivery of drug proceeds "as illegal funds," and the Tenth Circuit thus vacated the conviction because "the government failed to show that the transaction was designed to disguise or conceal the attributes of the illegal proceeds." *Id.* at 1246-47.[17]

Similarly, the Seventh Circuit has concluded that "conceal or disguise" as used in the money laundering statute means making "ill-gotten" money appear "innocent." In *Esterman*, the defendant was convicted for transferring money from a joint account he shared with a Russian business partner into a series of personal accounts in the United States.

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[17] The First Circuit recently approved of *Dimeck*. In *United States v. Morales-Rodriguez*, 467 F.3d 1 (1st Cir. 2006), the court reiterated *Dimeck*'s rule that "mere transportation of concealed drug money [does] not constitute money laundering because the money laundering statute 'was designed to punish those . . . who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.'" *Id.* at 13; *cf. United States v. Cruzado-Laureano*, 404 F.3d 470, 483 (1st Cir. 2005) (concluding that concealment element was met where mayor deposited public funds in account of "Onaden," his wife's former dental practice, which everyone in town assumed was legitimate public account).

324 F.3d at 570. The Seventh Circuit vacated that conviction due to the "absence of efforts to transform ill-gotten funds into apparently innocent assets or funds that the criminal can use later with impunity." *Id.* at 572; *see also United States v. Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996) ("this offense focuses on the conversion of the fruits of the earlier crimes into other, presumably less detectable, forms"); *United States v. Jackson*, 935 F.2d 832, 839-40 (7th Cir. 1991) ("the government must prove that the transaction was designed to conceal one or another of the enumerated attributes of the proceeds involved").

Like the Seventh and Tenth Circuits, the Sixth Circuit requires proof of a design to create the appearance of legitimate wealth. In *United States v. McGahee*, 257 F.3d 520 (6th Cir. 2001), the court reversed a concealment money laundering conviction premised on payments made from a bank account containing illegal proceeds. In so doing, it held that "[t]he checks drawn on the account were not intended to conceal how he got the funds, but merely to convert them to liquid assets." *Id.* at 528. Without evidence that the transactions were designed "to create the appearance of legitimate wealth," the court ruled, the conviction could not stand. *Id.*[18]

The definition of "designed to conceal or disguise" applied by the Sixth, Seventh and Tenth Circuits properly limits § 1956 to those transportations that amount to a distinct criminal act: cleansing "dirty" money so that it may enter the stream of commerce under the guise of legitimate wealth.

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[18] The Second Circuit below cited a different Sixth Circuit decision, *United States v. Prince*, 214 F.3d 740, 752 (6th Cir. 2000). In *Prince*, unlike the instance case, the defendants participated in a scheme designed to hide the illegal qualities of the funds involved. *See Prince*, 214 F.3d at 752 (describing scheme by which defendants would have fraud victims employ "trusted" third parties, who would effectuate the transfer to defendants, thereby breaking monetary link between victim and perpetrator).

Under this reading, the legality of the transportation turns not on whether the transportation was accomplished through secret codes or by hiding cash in a container with a false bottom, but on its ultimate "design[]." With the scope of the statute thus defined, the broad category of listed attributes allows the statute to capture any of the infinite ways a criminal might seek to convert dirty money to clean.

B. The Second, Third, Fifth And Eleventh Circuits Do Not Require A Design To Create The Appearance Of Legitimate Wealth

Three circuits have agreed with the Second Circuit that secrecy during transit satisfies § 1956(a)'s "conceal or disguise" element.

The Fifth Circuit has given extensive consideration to the meaning of "conceal or disguise" in the money laundering statute. In the decision below, the court cited to a now-vacated panel opinion, *United States v. Cuellar* ("*Cuellar I*"), 441 F.3d 329 (5th Cir. 2006). There, the defendant had been arrested in Texas driving toward the Mexican border with $83,000 in cash hidden in a secret compartment of his vehicle. *Id.* at 331. After a jury trial, he was convicted of international money laundering in violation of § 1956(a)(2)(B)(i). *Id.* According to the panel opinion, the government's evidence was insufficient because it failed to show that the defendant was "trying to create the appearance of legitimate wealth by smuggling drug money across the border." *Id.* at 334 (internal quotation marks omitted).

Relying in part on the decision below, the Fifth Circuit ruled en banc that hiding drug proceeds during international transportation satisfies the "conceal or disguise" element. *See United States v. Cuellar* ("*Cuellar II*"), 478 F.3d 282 (2007). The en banc court rejected the panel's view that "if all the government's proof shows is that the money was hidden to allow it to be transported to Mexico, that is not enough to sustain a conviction." *Id.* at 289. Rather, accord-

ing to the en banc majority, the "conceal or disguise" element was met because "concealment of the funds during the U.S. leg of the trip [was] a vital part of the transportation design or plan to get the funds out of this country." *Id.*; *see also id.* at 290 (citing decision at issue here and stating that Second Circuit "expressly rejected [Cuellar's] argument and the [*Cuellar I*] panel's position" that "conceal or disguise" element requires design to create appearance of legitimacy).[19] In dissent, Judge Smith noted that the en banc "majority ignores the overwhelming caselaw, in both this court and our sister circuits, to the effect that the statute requires a design to create the appearance of legitimate wealth." *See Cuellar II*, 478 F.3d at 303.[20]

The decision below also relied on the Third Circuit's decision in *United States v. Carr*, 25 F.3d 1194, 1199-1200, 1205 (3d Cir. 1994). There, the defendant hid illegal drug proceeds in a bag, intending to fly internationally. His cash

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[19] The en banc majority attempted to distinguish the facts before it from those at issue in *Dimeck* by explaining that the delivery in *Dimeck* involved only "a minimal attempt at concealment," whereas the delivery it addressed was accomplished through somewhat more elaborate attempts at concealment. *See Cuellar II*, 478 F.3d at 291. Like the Second Circuit, the Fifth Circuit purported to draw a line between the delivery of unlawful funds with a "minimal" amount of concealment and the delivery of unlawful funds with a "sufficient" level of secrecy and complexity, a test which suffers from the same deficiencies as the decision below.

[20] Judge Smith also argued that the Fifth Circuit's majority opinion lacked judicial precedent. In so doing, he sought to distinguish the Second Circuit decision at issue here by stating that Ness's conviction involved "[t]he scrupulous avoidance of a paper trail and the use of numerous couriers, small bills, clandestine meetings to funnel millions of dollars in drug proceeds overseas is classic money laundering." *See Cuellar II*, 478 F.3d at 303. That distinction misunderstands the decision below. As the Second Circuit acknowledged, Ness's conviction was upheld solely because he used secretive means to transport cash. *See* App. 3a-4a. The Second Circuit did not (and could not on the record presented) hold that Ness's transportation was "classic money laundering," but instead held that the methods used were sufficiently secretive to themselves satisfy the concealment element. *Id.*

was seized and he was arrested for money laundering. *Id.* at 1200. In upholding his conviction, the Third Circuit explained that the government was required to prove the defendant "knew the transportation was undertaken to disguise or conceal the money in some material fashion." *Id.* at 1206. The court concluded that the "conceal or disguise" element was established – absent evidence of a design to create the appearance of legitimate wealth – because the defendant had taken pains to physically conceal the money in order to secure its safe passage. *See id.*; *see also Cuellar II*, 478 F.3d at 290-91 (relying on *Carr*).

Moreover, the Eleventh Circuit is in accord with the Second Circuit. In *United States v. Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001), the Eleventh Circuit stated that "the text of the statute is not [so] restrictive" as to require proof of concealment to create the appearance of legitimate wealth. Most recently, the Eleventh Circuit, following both *Carr* and the en banc Fifth Circuit in *Cuellar II*, reiterated its position that money laundering does not require a design to create the appearance of legitimate wealth, holding instead that money laundering includes "hid[ing] [drug] money in . . . cars to prevent the authorities from finding it." *United States v. Garcia-Jaimes*, __ F.3d __, 2007 U.S. App. LEXIS 8963, at *21-23 (11th Cir. Apr. 19, 2007) (discussing *Cuellar II*, *Carr* and *United States v. Johnson*, 440 F.3d 1286 (11th Cir. 2006)).

In sum, three circuits (the Sixth, Seventh and Tenth), properly interpret the money laundering statute to require the concealment of funds to create the appearance of legitimate wealth. In direct and express conflict with these decisions, four circuits (the Second, Third, Fifth and Eleventh) hold that merely hiding illegal proceeds is sufficient to satisfy the "conceal or disguise" element of the money laundering statute.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO RESOLVE THE MEANING OF "CONCEAL OR DISGUISE" IN THE MONEY LAUNDERING STATUTE

This case presents an excellent vehicle for this Court to resolve the meaning of the "conceal or disguise" element of § 1956.

First, the decision below turns solely on the meaning of conceal in the federal money laundering statute. Although initially a multifaceted prosecution, the government's theory of the case collapsed, in part because petitioner has always reported his international transportations to U.S. Customs officials. Thus, his conviction was affirmed solely on the basis of the Second Circuit's expansive definition of "conceal." Indeed, the court below expressly acknowledged that other circuits would reverse this conviction. The single question presented by this petition is dispositive as to the outcome here.

Second, there are no material factual disputes. There is no dispute that Ness transported large amounts of funds in a hidden fashion for customers who were drug dealers. App. 2a ("Ness does not dispute that such evidence was presented."). Similarly, there is no dispute that petitioner never tried to make the funds he transported look like profits from legitimate businesses. Although the transfers included secretive measures, the transfers were designed to move cash from point A to point B. *See* App 3a-4a.

Third, granting this petition will permit the Court to consider the meaning of the money laundering statute at the same time that it is considering a distinct but closely related question. In *United States v. Santos*, No. 06-1005 (cert. granted April 23, 2007), this Court has agreed to resolve a circuit split as to whether "proceeds" as used in § 1956 means "gross receipts" or "profits." In urging this Court to grant review, the Solicitor General of the United States

wrote:

> This Court should grant review to resolve the conflict among the courts of appeals on the meaning of the money laundering statute. A circuit conflict is particularly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute. It is not acceptable for conduct to be money laundering in Boston and Philadelphia but not in Chicago.

United States v. Santos Gov't Pet. for Cert. in No. 06-1005, at 25-26. Just as the circuit split on the meaning of "proceeds" warrants review, so too the circuit split on the meaning of "designed . . . to conceal or disguise" *in the same subparagraph* warrants this Court's review. Judicial economy is advanced by this Court considering together the statutory questions involving the money laundering statute that have divided the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIVIAN SHEVITZ
ATTORNEY AT LAW
46 Truesdale Lake Drive
South Salem, New York 10590
(914) 763-2122

WALTER DELLINGER
(*Counsel of Record*)
MARK S. DAVIES
SCOTT M. EDSON
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300