No. 06-1604

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

REPLY BRIEF FOR PETITIONER

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The Solicitor General cannot deny that six federal appellate judges have expressly recognized a circuit split concerning whether merely hiding illegally obtained funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. Nor can the government disavow its claim earlier this term that circuit court division regarding the statute in question – 18 U.S.C. § 1956(a) – merits this Court's attention. Recognizing the pressing need for clarity under the basic federal money laundering statute, the Solicitor General promises a clear interpretation of the "concealment" element based on § 1956(a)'s plain text, one that is also consistent with the views of all circuit courts. But the government fails to deliver, offering instead an interpretation that amends the statute and that does not reconcile the divergent circuit court decisions. Indeed, the government is forced to concede that the precise conduct petitioner was convicted of here – transporting drug proceeds up the supply chain – would not support a money laundering conviction in the Tenth Circuit. A well-defined circuit split is significantly undermining the uniform enforcement of a much-used criminal statute. Certiorari is warranted.

I. The Decision Below Deepens An Existing Circuit Split

The Solicitor General's sole reason for opposing certiorari is that the circuit courts are not in conflict. (U.S. Br. 10-17.) The government's own brief, however, shows the circuit court disarray over whether the concealment money laundering provisions of § 1956(a) require the government to show that the transaction or transportation at issue was undertaken for the purpose of creating the appearance of legitimate wealth.

1.a. There should be no dispute that the decision below conflicts with the Tenth Circuit's decision in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (Ebel, J.). To begin with, the court below so stated, noting that the Tenth Circuit had "essentially adopted [petitioner's] reasoning," and would therefore have vacated his convictions. (*See* Pet. App. 3a.) The court of appeals, however, affirmed the convictions, concluding that it was bound by the circuit precedent of *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), *cert. denied*, *Ciccione v. United States*, 127 S. Ct. 3001 (2007). (*Id.*) In *Gotti*, the court upheld concealment money laundering convictions for defendants who did no more than use "highly complex and surreptitious" means to transmit cash "tributes" up a criminal organization's hierarchy, absent evidence that the defendants attempted to legitimize the funds. *See* 459 F.3d at 337-38. Recognizing that *Gotti* is inconsistent with *Dimeck*, the court below affirmed petitioner's convictions, but noted that the Tenth Circuit would not have done so. (Pet. App. 3a.)

Similarly, the "circuit split" was explicitly noted by Judge Smith, who wrote the en banc dissent in *United States v. Cuellar*, 478 F.3d 282 (5th Cir. 2007) (en banc), *petition for cert. pending*, No. 06-1456 (filed May 3, 2007), and who called for the Attorney General to confess error in that case. *See Cuellar*, 478 F.3d at 304-05, 307 (Smith, J., dissenting, joined by DeMoss, Dennis, JJ.). Although acknowledging that the en banc *Cuellar* dissent recognized the circuit split, the Solicitor General suggests that this Court should ignore Judge Smith's opinion because he was writing in dissent. (U.S. Br. 13 n.7.) But that Judge Smith was in dissent does nothing to undermine the concrete evidence of a split cited in his decision. As Judge Smith explained (and as more fully set forth below) the *Cuellar* majority's attempt to distinguish *Dimeck* as a case involving "minimal," as opposed to "elaborate," concealment, finds no basis in the *Dimeck* decision. *See Cuellar*, 478 F.3d at 302 (Smith, J., dissenting).

b. *Dimeck* cannot be squared with the decision below. In that case, Dimeck used his company van and a company box to deliver drug proceeds secretly to another driver, Moore, in a hotel room. 24 F.3d at 1242-43. He suggested that Moore conceal the money in a suitcase or taped box. *Id.* at 1243. Dimeck was arrested and charged with conspiracy to violate 18 U.S.C. § 1956(a)(1)(B)(i) . *Id*. at 1241. At trial, the United States urged, and the jury found, that the "conceal or disguise" element was met by "Dimeck's actions in telling Moore to tape up the box and inquiring . . . about any markings on the box that would tie the money to him after it was seized by police." *Id*. at 1243.

The Tenth Circuit reversed the conviction because the concealment surrounding the transportation was not designed to "confuse or mislead anyone as to the characteristics of those proceeds, or to assist in allowing these proceeds to enter into legitimate commerce." 24 F.3d at 1246. The illegal funds, though transported secretly, were to be *received* "as illegal funds" (*i.e.*, with no disguise of their illegal attributes), and Dimeck's admitted concealment fell outside the statute. *Id.* The court thus held that Dimeck's hiding of the money would not sustain a conviction under § 1956(a) because the government had not shown that the defendant took "the *additional step* of attempting to legitimize" the funds. *Id*. at 1247 (emphasis added); *see also United States v. Morales-Rodriguez*, 467 F.3d 1, 13 (1st Cir. 2006) ("In *Dimeck*, the court found that the mere transportation of concealed drug money did 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.'" (alteration omitted)).

According to the Solicitor General, in this case petitioner was convicted of money laundering and conspiracy to commit money laundering for "transport[ing] large amounts of

illicit cash from drug traffickers to their foreign associates in such a way as to avoid detection of the cash or its link to the traffickers." (U.S. Br. 7.) The government can point to no evidence that petitioner did anything other than deliver cash drug proceeds as such, or knew of any scheme to disguise the proceeds' illicit nature or otherwise dispose of them after delivery. Yet, as the government admits, the *Dimeck* court held that "[w]here a courier in a drug distribution scheme simply transports cash to a distributor from a middleman, . . . 'the underlying drug transaction has not yet been completed and the money laundering activity has not yet begun.'" (*Id.* at 11 (quoting *Dimeck*, 24 F.3d at 1246) (alterations omitted).) *See also Dimeck*, 24 F.3d at 1247 (hiding money "in a box, suitcase, or other container does not convert . . . mere transportation . . . into money laundering"). The conduct petitioner was convicted of – transporting cash up the supply chain of a narcotics enterprise – is thus categorically *not* money laundering in the Tenth Circuit. Petitioner's convictions therefore could not have been affirmed under Tenth Circuit precedent.[1]

The Solicitor General responds by asserting that the Tenth Circuit did not mean what it said. (*See* U.S. Br. 12.) In the government's view, the Tenth Circuit was really adopting (*sub silentio*) an "elaborate concealment" standard that dis-

[1] As the Solicitor General points out, petitioner's conspiracy conviction had one object – violating 18 U.S.C. § 1957(a) – that contained no concealment element. (U.S. Br. 6 n.3.) In affirming petitioner's conspiracy conviction, the court below relied exclusively on the objects that do have a concealment element. The court declined to consider whether the evidence was sufficient to show that petitioner operated a "financial institution," as required under § 1957(a), and similarly concluded that the admittedly defective jury instruction regarding the "financial institution" element did not affect petitioner's substantial rights because, in the court's view, the conspiracy count could be affirmed through its two other objects – each of which has a concealment element. (*See* Pet. App. 4a-5a.) The decision below thus depends on the court's reading of § 1956(a)'s concealment provisions.

tinguishes between "elaborate concealment," which is money laundering, and "'a minimal attempt at concealment,'" which is not. (U.S. Br. 12-13.) To the contrary: Under *Dimeck*, *all* secrecy during transportation fails to show the required knowledge of a design to conceal, absent evidence of the necessary "additional step." *Dimeck*, 24 F.3d at 1246.[2]

c. In view of the acknowledged and evident circuit court disagreement between the Second and Fifth Circuits on one hand and the Tenth Circuit on the other, review is warranted. Just this spring, the Solicitor General successfully urged this Court to grant certiorari where the Seventh Circuit created a conflict with two other circuits' interpretation of "proceeds" under § 1956(a). *United States v. Santos*, *cert. granted*, No. 06-1005 (Apr. 23, 2007) (oral argument scheduled for October 3, 2007). In so doing, the Solicitor General explained that *any* split over the "substantive meaning" of § 1956(a) is "particularly problematic." *Santos* Gov't Pet. at 26. So too here: The conflict over the substantive meaning of a key money laundering provision is "particularly problematic" and warrants this Court's immediate attention.

2. Furthermore, as the petition explains (at 17-22), the circuit court conflict over the meaning of "designed" "to

---

[2] The Tenth Circuit's decision in *United States v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994), does not support the government's argument that the Tenth Circuit is aligned with the court below. The *Garcia-Emanuel* court refused to affirm concealment money laundering convictions absent evidence that the defendant "design[ed] a paper trail that would lead an investigator to believe that the money . . . came from sources other than the defendant" or his criminal activity. *See* 14 F.3d at 1477. The *Garcia-Emanuel* court (like the *Dimeck* court) thus obliged the government to show a design to create the appearance of lawful wealth. *See id.* ("While it is true that this misrepresentation [telling salesman that money came from restaurant profits] brings an element of concealment into the transaction, we do not believe . . . this single misrepresentation can amount to substantial evidence that the transaction was designed to conceal illegal funds.").

conceal" extends well beyond *Dimeck*. Decisions from the First, Sixth and Seventh Circuits also directly conflict with the decision here, a decision that accords with the views of the Fifth and Eleventh Circuits.[3]

As noted in the petition, the First Circuit recently adopted *Dimeck*'s rule. *See United States v. Morales-Rodriguez*, 467 F.3d 1, 13 (1st Cir. 2006). In that case, the court applied the *Dimeck* test and affirmed a money laundering conspiracy conviction because the defendant made repeated transfers among three bank accounts that were "intended to create the appearance of legitimate income." *Id.* The Solicitor General asserts that the First Circuit did not adopt the *Dimeck* test because it affirmed the conviction. (U.S. Br. 13 n.8.) But the *Morales-Rodriguez* court expressly applied the *Dimeck* rule, and never mentioned any other standard.

The conflict is also clear with the Sixth and Seventh Circuits. (*See* Pet. at 18-19 (discussing *United States v. McGahee*, 257 F.3d 520 (6th Cir. 2001), and *United States v. Esterman*, 324 F.3d 565 (7th Cir. 2003). The Solicitor General points out that both *Esterman* and *McGahee* are applications of the holding in *United States v. Sanders*, 929 F.2d 1466 (10th Cir. 1991). (U.S. Br. 14.) The *Sanders* court held that the transactions at issue there were not money laundering because there was no evidence they were "'intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase used to make the purchase were obtained through illegal activities.'" *Id.* The *Sanders* court thus rejected the government's argument that the defendant

---

[3] With respect to the Eleventh Circuit, see *United States v. Garcia-Jaimes*, 484 F.3d 1311 (11th Cir. 2007) (concluding that hiding drug money in secret compartments of cars during transit to Mexico constituted concealment money laundering), petition for cert. pending *sub nom. Nunez-Virraizabal v. United States*, No. 06-11863 (filed June 11, 2007).

had committed money laundering by titling a car in her daughter's name and signing her daughter's name to the purchase agreement. *See* 929 F.2d at 1472-73. As we explain in our petition, both *Esterman* and *McGahee* oblige the government to show that the defendant intended to conceal the relevant attributes of unlawful funds by taking an extra step intended to hide the illicit nature of the funds. (*See* Pet. 18-19.)[4]

II. The Decision Below Incorrectly Expands The Scope Of The Federal Money Laundering Statute

1. As explained in our opening petition, § 1956(a)'s concealment provisions require proof of a design to conceal the unlawful nature of the funds. (*See* Pet. at 10-13.) That requirement is derived from § 1956's text, structure and history, and may be easily applied by the lower courts. (*See also* Amicus Curiae Brief of National Association of Criminal Defense Lawyers 2-14.)

In an effort to demonstrate the need for a more expansive understanding of the statute, the Solicitor General includes a list of conduct that should constitute money laundering. (U.S. Br. 9.) The evident point is to suggest some money laundering is not designed to create the appearance of legitimate wealth, and thereby expose petitioner's statutory reading as too narrow. But, as the Solicitor General promptly admits, the "*ultimate*" goal of every activity the government mentions is "to convert illicit funds into usable (apparently

[4] *United States v. Prince*, 214 F.3d 740 (6th Cir. 2000), does not support the Solicitor General's view that the Sixth Circuit is in accord with the court below. The defendant in *Prince* directed others to structure transactions through a third party in order to break the link between the victims (unwitting investors in a scam) and the money. *See* 214 F.3d at 752 ("The government elicited testimony that Prince, on at least two occasions, stated that due to the structure of the transactions it could not be proven that he received money."). The defendant in *Prince* thus did more than merely move money; he moved it in order to conceal its nature.

legitimate) funds." (*Id.*) In fact, the zinger – that "a criminal may engage in such conduct in an effort to create the appearance of having no wealth at all" – actually proves petitioner's point: The criminal who endeavors to create the temporary appearance of no wealth does so in order to permit the money to resurface later as lawful wealth. The Solicitor General's list thus confirms that interpreting the statute as we suggest captures all of the conduct Congress targeted.

2. The government also rewrites § 1956(a). The statute requires proof that the defendant conducted a specific transaction or international transportation, knowing that it was undertaken (at least in part) for the purpose of concealing the listed attributes (that is, it was "designed . . . to conceal"). The government, however, would read each statutory element in apparent isolation, interpreting § 1956(a) to require only proof of some concealment and some transaction or transportation (and presumably some undefined connection between the two). Having unmoored the elements from their statutory context, the government is able to assert confidently that the mens rea element (knowing of a design to conceal) can be satisfied – and not merely evidenced – by the physical act of concealing money. (*See* U.S. Br. 7 ("conduct *constitutes* [knowledge of] a 'design,' at least 'in part,' to 'conceal or disguise'" (emphasis added) (alteration omitted)).) By its plain text, § 1956(a) prohibits the act of transacting or transporting internationally with knowledge of a design to conceal, and not simply the act of concealing if it happens to be related to a transaction or international shipment.[5]

[5] Unless the government is assuming the novel proposition that receiving money (but not jewelry or other freight) for transport itself constitutes a "financial transaction," its splintered reading of § 1956(a) permits it to avoid identifying any transaction or international transportation that petitioner conducted secretly, let alone one that he knew was "designed . . . to conceal." Instead, the government discusses only how "traffickers" brought money to petitioner for transport. (*See* U.S. Br. 3.) In

3. The Solicitor General would expand the money laundering statute to include mere transportation of illegal funds. Because almost every transaction or transportation involving illicit (or even lawful) funds carries with it some modicum of secrecy, money laundering would almost always flow from the underlying crime under the Solicitor General's reading. *Cf. Grunewald v. United States*, 353 U.S. 391, 402 (1957) (defendants could not be convicted of conspiracy to conceal a conspiracy because "every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world").[6]

Apparently seeking to cabin that definition, the Solicitor General asserts that the concealment element is satisfied only by "elaborate concealment," a standard with no basis in the statute's text, structure or history. (*Id.* at 12-13.) Moreover, that standard is wholly arbitrary and lacks any discernable benchmarks. This case so illustrates. If the government is correct, Ness committed money laundering by transporting cash that he received in a gift-wrapped package, but Dimeck

---

fact, the one "hidden" shipment discussed in the government's brief, a shipment of cash that was packaged with jewelry (U.S. Br. at 2-3), was a *domestic* shipment from California to New York (see Pet. App. 12a-13a), and thus outside § 1956(a)'s ambit.

[6] As this Court has observed, transporting bulk cash internationally – even if physically hidden – is entirely legal, so long as the required declaration forms are submitted. *See United States v. Bajakajian*, 524 U.S. 321, 337 (1998). In fact, the United States Postal Service instructs shippers to conceal from the outside world the contents of any package worth $400 or more. *See* PS Form 2976 (Jan. 2004) ("If you do not wish to list the contents on the wrapper or in any case if the value of the contents is $400 or over, affix only the upper portion of the label [which does not disclose the contents]. . . ."). The Solicitor General cannot (and does not) deny that Ness completed all of the required declarations form, thereby telling federal authorities about every international shipment in excess of $10,000. (*See* Pet. 6, 7 n.10). The "concealment" discussed by the government is thus consistent with shipping methods prescribed by the Postal Service.

did not commit money laundering by transporting drug money in a cardboard box with a legitimate company's logo on the side. (*See* U.S. Br. 3, 12-13.) Section 1956(a)'s concealment provisions are not so opaque; they require the government to show that the defendant undertook a transaction or transpiration involving illegal funds, knowing that it was designed to create the appearance of legitimate wealth.

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

September 25, 2007