No. 15-966

In the Supreme Court of the United States

ROBERT B. SPERRAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the indictment was facially invalid where it alleged that petitioner violated the anti-structuring provision of 31 U.S.C. 5324(a)(3) by engaging in numerous currency transactions over the course of two years, each involving less than $10,000, for the purpose of avoiding the currency-transaction reporting requirement in 31 U.S.C. 5313(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 804 F.3d 1113.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2015. A petition for rehearing was denied on November 2, 2015. The petition for a writ of certiorari was filed on January 28, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on three counts of tax evasion, in violation of 26 U.S.C. 7201, and two counts of structuring currency transactions, in violation of 31 U.S.C. 5324(a)(3). Pet. App. 2a. The district court sentenced petitioner to 36 months of imprisonment and ordered him to forfeit $870,238.99. *Ibid.* The court of appeals

affirmed, *id.* at 2a-27a, with one judge concurring in the judgment, *id.* at 27a-44a.

1. Petitioner and two other doctors owned an anesthesiology practice in Albany, Georgia. Pet. App. 3a. The practice outsourced its billing operations to a medical-billing service, which ordinarily deposited the checks it received from patients and insurance companies into the appropriate doctor's bank account. *Ibid.* Petitioner told the billing service, however, not to deposit the checks for him, and instead to mail him those checks once a week. *Ibid.*[1] About every ten days during 2007 and 2008, petitioner would take a bundle of checks to the bank, *ibid.*, along with handwritten notes of how much he calculated the bundle to be worth, C.A. App. 156-157. Instead of depositing the checks into his account, he would cash them—with the amount often totaling "more than $9,000, but never exceed[ing] $10,000." Pet. App. 3a.

"[B]efore he cashed the checks," petitioner often would first deposit large amounts of cash into his account. Pet. App. 3a; see C.A. App. 283 ("The deposit came first, and then the checks were cashed."); C.A. App. 371 (petitioner's testimony) ("usually first I would make" deposits; "[t]hen I would present [the bank] with the checks that were to be cashed"). "The cash deposits, like the checks, often totaled more than $9,000 without ever exceeding $10,000." Pet. App. 3a; see C.A. App. 33-38 (listing transactions). Petitioner thus often possessed both a bundle of checks and a hoard of cash, with a cumulative value above $10,000, but he designed his conduct to avoid any reportable

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[1] On five occasions, petitioner received packages of checks totaling more than $10,000. Pet. App. 44a n.7.

transaction or other paper trail. Pet. App. 43a (identifying 28 such days).

Petitioner told one of his medical partners that he handled his affairs this way to avoid scrutiny from the Internal Revenue Service (IRS) and, specifically, that he never cashed more than $10,000 in checks at one time because he wanted "to avoid any reports or anything that would involve . . . the regulatory or IRS authorities." Pet. App. 3a. Petitioner failed to report on his tax returns the income from the checks received from his patients. Pet. 8.

2. A grand jury charged petitioner with three counts of tax evasion and two counts of structuring a transaction in violation of 31 U.S.C. 5324(a). Section 5324(a) makes it a crime to "structure * * * any transaction" with a financial institution "for the purpose of evading the reporting requirements" of 31 U.S.C. 5313(a). Section 5313(a) in turn requires domestic financial institutions to report "transaction[s] in currency of more than $10,000" to the Department of the Treasury. 31 U.S.C. 5313(a); 31 C.F.R. 1010.311. The two structuring counts corresponded to the two calendar years at issue, 2007 and 2008. Pet. App. 49a-54a (indictment). The indictment charged that petitioner committed his structuring "as part of a pattern of illegal activity involving more than $100,000 in a twelve-month period." *Id.* at 49a; see 31 U.S.C. 5324(d) (doubling the maximum period of incarceration for structuring as part of such a pattern).

After a jury trial, petitioner was convicted on all counts. Ten months later, petitioner claimed—for the first time, in a motion to set aside the verdict—that the indictment was defective, arguing, as relevant here, that the indictment failed to state an offense

under 31 U.S.C. 5324(a). Pet. App. 5a; Pet. 8. The district court denied petitioner's motion, both on the merits and because it was untimely. Pet. 8; C.A. App. 76-78 (order).

3. The court of appeals affirmed. Pet. App. 1a-27a. The court first assessed the appropriate standard of review, because Rule 12 of the Federal Rules of Criminal Procedure—which sets forth the "motions that must be made before trial" and the consequences for failing to timely make such motions—was amended on December 1, 2014, while petitioner's appeal was pending. *Id.* at 5a-12a. The court of appeals determined that it should review petitioner's claim that the indictment failed to state an offense *de novo*. *Id.* at 12a.

The court of appeals then rejected petitioner's argument on the merits. The court first rejected petitioner's reliance on its decision in *United States* v. *Lang*, 732 F.3d 1246 (11th Cir. 2013), which held that an indictment fails to charge any offense under Section 5324(a) where each structuring count alleges a structured transaction of less than $10,000. Pet. App. 13a-14a. *Lang* reasoned that a "cash transaction involving a single check in an amount below the reporting threshold cannot in itself amount to structuring," the court explained, because in that case there is no reporting requirement to evade—as the court put it, "[w]hen cashed checks come to the structuring dance, it takes at least two to tango." *Id.* at 13a (quoting *Lang*, 732 F.3d at 1249). The court rejected petitioner's reading of *Lang* as additionally requiring an indictment to allege that a defendant "had cash on hand in excess of $10,000." *Ibid.* The court observed that it had "never held all the transactions that make up a single count of structuring must have originated from

a single cash hoard, and [petitioner] has not pointed to any case endorsing that rule." *Id.* at 14a (citing *United States* v. *Sweeney*, 611 F.3d 459, 471 (8th Cir. 2010), and *United States* v. *Van Allen*, 524 F.3d 814, 820-821 (7th Cir. 2008), as rejecting the argument that a defendant must possess more than $10,000 at one time in order to be guilty of structuring). Instead, the court explained, a person "may be convicted of structuring a series of transactions of less than $10,000" where the person "receive[s] small sums of money on an ongoing basis from a fraudulent scheme and engage[s] in * * * separate transactions of slightly less than $10,000 each for the purpose of evading the reporting requirement." *Id.* at 16a.

"To be clear," the court stated, "each count of structuring must include two or more transactions that together exceed $10,000." Pet. App. 16a. But "more than $10,000 in hand at any one time" is not an element of structuring, it explained. *Id.* at 17a. Thus, the court concluded, the statute does not distinguish between "a defendant who has checks totaling $18,000 but decides to cash $9,000 today and $9,000 tomorrow in order to avoid the reporting requirement" and a defendant "who has checks totaling $9,000 and knows he will receive another bundle of checks totaling more than $1,000 tomorrow" and who, "in order to avoid the reporting requirement," determines "to cash the checks totaling $9,000 today." *Ibid.* In both cases, the court noted, defendant structured a financial transaction with the purpose of evading the reporting requirement. *Ibid.*

Applying its reasoning to petitioner's case, the court of appeals concluded that the indictment sufficiently alleged that petitioner had "engaged in a se-

ries of currency transactions under $10,000 for the purpose of evading the reporting requirement." Pet. App. 18a-19a. The court also noted that petitioner did not challenge the sufficiency of the evidence showing that "he had the requisite *mens rea*," which included his statement that he cashed his checks in a manner designed "to avoid any reports" to "the regulatory or IRS authorities." *Id.* at 18a.[2]

Judge Rosenbaum concurred in the judgment. Pet. App. 44a. In her view, the structuring statute "cover[s] only those transactions that originate from a sum that the defendant controls in excess of $10,000." *Id.* at 43a. She still voted to affirm petitioner's convictions, however, because the evidence showed that petitioner *did* control more than $10,000 at any one time: "the government presented evidence that on 15 separate days in 2007 and 13 separate days in 2008, [petitioner] made cash deposits and cashed checks totaling over $10,000." *Ibid.* As Judge Rosenbaum explained, the evidence at trial showed that petitioner "had access to and control over" more than $10,000 "on each of those days[,] but chose to transact in cash amounts under $10,000." *Ibid.* That evidence, she reasoned, established that petitioner structured "at least 28 discrete transactions of distinct sums over

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[2] The court of appeals also noted the government's concession that the two counts of structuring covering 2007 and 2008 respectively should have been charged as a single count covering "a single course of structuring" over that period. Pet. App. 19a. The court did not reach the issue, however, because petitioner never raised it and because any error would have been harmless, as merging the two counts "would affect neither the sentence nor the amount subject to the order of forfeiture." *Id.* at 20a & n.6.

$10,000 in order to avoid the reporting requirements." *Id.* at 44a.

ARGUMENT

Petitioner contends (Pet. 15) that "a necessary element of the crime" of structuring is "a reportable transaction that otherwise would have been entered into in the normal course of dealings." He also claims (Pet. 13) that the court of appeals "has done away with the element of establishing a larger transaction that was altered," and thereby created a split among the courts of appeals. Those claims lack merit. The court of appeals here correctly held that one way of structuring a transaction for the purpose of evading currency-reporting requirements is to engage in a series of cash transactions below $10,000, but with a cumulative value above $10,000, and to do so "for the purpose of evading the reporting requirements." Pet. App. 18a. That holding creates no conflict with any decision of this Court or of another court of appeals. In any event, this case would be a particularly poor vehicle for addressing petitioner's claim because, as the concurring opinion explained, petitioner on dozens of occasions simultaneously controlled more than $10,000 in cash and checks, but deliberately "chose to transact in cash amounts under $10,000" to evade reporting requirements. *Id.* at 43a. Further review is unwarranted.

1. Congress enacted 31 U.S.C. 5313(a) in the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, Tit. II, §§ 221, 222, 84 Stat. 1122. As amended, Section 5313(a) provides that domestic financial institutions must report certain amounts and types of currency transactions to which they are parties, as provided in regulations

promulgated by the Secretary of the Treasury. 31 U.S.C. 5313(a). As this Court explained, "Congress [had] felt that there were situations where the deposit and withdrawal of large amounts of currency or of monetary instruments which were the equivalent of currency should be actually reported to the Government." *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 27 (1974). Specifically, "Congress recognized the importance of reports of large and unusual currency transactions in ferreting out criminal activity and desired to strengthen the statutory basis for requiring such reports." *Id.* at 38. Pursuant to that statutory authorization, the Secretary of the Treasury promulgated regulations requiring domestic financial institutions to report "transaction[s] in currency of more than $10,000." 31 C.F.R. 1010.311.

To prevent bank depositors from engaging in "end runs" around this (and other) reporting requirements, Pet. App. 2a, Congress later amended the Bank Secrecy Act to prohibit an individual from structuring cash transactions for the purpose of evading the reporting requirements. See Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, § 1354(a), 100 Stat. 3207-22 (31 U.S.C. 5324(a)). This new provision, entitled "Structuring Transactions to Evade Reporting Requirement Prohibited," sought to resolve a question that had divided the courts: whether an individual could be prosecuted "for structuring currency transactions to avoid inducing financial institutions to file" the required currency-transaction reports (CTRs). *United States* v. *Mastronardo*, 849 F.2d 799, 802 n.8 & 804 (3d Cir. 1988) (noting existence of "a severe split among the circuits" and that "Congress has since acted to clarify the status of

'structuring'"); see *United States* v. *Phipps*, 81 F.3d 1056, 1060 (11th Cir. 1996) (noting that many courts had held that an individual could not be criminally liable "for structuring transactions to avoid triggering the bank's duty to file a CTR in the first place"). Consistent with that history, the Treasury Department has defined "structuring" as "includ[ing]" (though not being limited to) "the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction[] or series of currency transactions at or below $10,000." 31 C.F.R. 1010.100(xx).[3]

2. Contrary to petitioner's claims of a conflict (Pet. 10-13), every circuit to address the issue has held, consistent with the decision of the court of appeals in this case, that "each count of structuring must include two or more transactions that together exceed $10,000." Pet. App. 16a. The leading case is *United States* v. *Davenport*, 929 F.2d 1169 (7th Cir. 1991), cert. denied, 502 U.S. 1031 (1992), which held that "the structuring itself, and not the individual deposit, is the unit of crime." *Id.* at 1172. Accordingly, when a person breaks up a single $100,000 lump sum into a series of deposits below $10,000, he has committed one act of structuring, not ten. *Id.* at 1171-1172. Every other circuit court to address the issue has reached a similar result. See *United States* v. *Lang*, 732 F.3d 1246, 1249 (11th Cir. 2013) ("A cash transaction involving a single check in an amount below the reporting threshold cannot in itself amount to structuring."); *United States* v. *Handakas*, 286 F.3d 92, 98-99 (2d Cir. 2002)

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[3] Petitioner cites (Pet. 2) this same provision as 31 C.F.R. 103.11(gg) (2010). See 75 Fed. Reg. 65,808 (Oct. 26, 2010) (moving it to 31 C.F.R. 1010.100).

("every structuring offense, by nature, entails multiple transfers of funds in amounts small enough to avoid detection," and an individual structuring offense must include more than one of those "fractional, subliminal transactions made for concealment"), overruled on other grounds, *United States* v. *Rybicki*, 354 F.3d 124 (2d. Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004); *United States* v. *Nall*, 949 F.2d 301, 308 (10th Cir. 1991) (where a defendant breaks $26,000 into three sub-$10,000 cash deposits, he is guilty of one count of structuring, not three).

As the court of appeals noted (Pet. App. 14a), although the most common fact pattern involves possession of a "cash hoard" of more than $10,000 at a single point in time, no court has held that this was required. See *United States* v. *Van Allen*, 524 F.3d 814, 820 (7th Cir. 2008) (rejecting a defendant's attempt to rely on *Davenport* for a requirement that the government must "demonstrate that a defendant held a unitary cash hoard over $10,000 and then broke it up to deposit in amounts under $10,000"). Nor does petitioner claim that such a "cash hoard" requirement exists; indeed, he appears to accept that a defendant need not "actually hold $10,000 at one time to be guilty of structuring." Pet. 11. That is because the crime of structuring occurs when a person arranges, or "structures," his cash transactions "for the purpose of evading the reporting requirements." 31 U.S.C. 5324(a).

Accordingly, the courts of appeals hold—as the court below held—that structuring requires multiple cash transactions which, taken together, exceed $10,000, and where the transactions are structured to evade reporting requirements. Indeed, in *Handakas*, the Second Circuit held that an indictment was multi-

plicitous when it charged the defendant with two structuring counts corresponding to consecutive year-long periods, each involving a series of transactions totaling above $10,000, where the indictment alleged that this was really a single, multi-year "structuring scheme[]." 286 F.3d at 95, 98-99. The indictment here essentially follows the path *Handakas* endorses.[4]

3. Petitioner argues (Pet. 11, 15) that structuring requires "a reportable transaction that otherwise would have been entered into in the normal course of dealings," *i.e.*, that some transaction "would have triggered a CTR, but was altered." But the decision below is not to the contrary. Because structuring requires that a person purposefully arrange a transaction in such a way as to avoid triggering a bank's reporting requirement, petitioner is correct that there must have been—but for the structuring—at least one reportable transaction.

Petitioner instead appears to object to the court of appeal's holding that a person can structure not only a single hypothetical transaction above $10,000 by breaking it into sub-$10,000 components, but also an income stream with a total value above $10,000 by breaking it into sub-$10,000 components. See Pet. App. 16a. But the court of appeals correctly held that both arrangements can constitute structuring. "While breaking up a single cash transaction that exceeds the

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[4] As noted above, see note 2, *supra*, the government here made the same mistake of charging petitioner with two counts of structuring for 2007 and 2008, respectively, when he should have been charged with a single count spanning both years. Petitioner has abandoned any such argument, however, and the court of appeals correctly found that this error was harmless. Pet. App. 20a & n.6.

$10,000 reporting threshold into two or more separate transactions is one way of committing the offense of structuring a transaction, it is not the only way." *United States* v. *Sweeney*, 611 F.3d 459, 471 (8th Cir. 2010); see *Ratzlaf* v. *United States*, 510 U.S. 135, 136 (1994).

In particular, another way to commit illegal structuring is to alter a series of transactions, with a cumulative value above $10,000, to ensure that no single transaction in the series exceeds $10,000, and to do so for the purpose of evading reporting requirements. That interpretation is consistent with the statute's ordinary meaning. See *Webster's Third New International Dictionary* 2267 (1993) (defining the verb "structure" as "to form into an organized structure; build, organize"); XVI *Oxford English Dictionary* 960 (2d ed. 1989) ("to organize the parts or elements of (something) in structural form" or "to establish a hierarchy of relationships or a pattern in (something)"). It is consistent with the Department of Treasury's regulations. 31 C.F.R. 1010.100(xx) (structuring includes "the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction[] *or series of currency transactions* at or below $10,000") (emphasis added). It is consistent with other decisions of the courts of appeals. *E.g.*, *Van Allen*, 524 F.3d at 821 (defendant committed structuring by "mov[ing] over $5 million over the course of a year and a half in amounts almost exclusively under $10,000"); *Handakas*, 286 F.3d at 98-99 (defendant wrote a series of checks over a two-year time period, purportedly to subcontractors, which were instead cashed by the subcontractors and fun-

neled back to defendant). And it is consistent with the statutory purpose: Congress enacted Section 5324(a)(3) in order to prevent people from arranging or organizing their dealings in cash for the purpose of evading reporting requirements. See *Mastronardo*, 849 F.2d at 802 n.8 & 804; *Phipps*, 81 F.3d at 1060.

The court of appeals' decision does not risk imposing criminal liability on a hypothetical innocent businessperson "who makes many small deposits from cash sales." Pet. 14. As the court of appeals explained, Pet. App. 18a, the statute's scienter requirement protects against this concern: a person is guilty of structuring only if she rearranges her transactions "for the purpose of evading the reporting requirement." 31 U.S.C. 5324(a). This *mens rea* requirement protects a person with a cash-income stream of $9000 a day, who goes to the bank every day because she is concerned with being robbed or losing the money (cf. Pet. 14; *Ratzlaf*, 510 U.S. at 145), and a person who receives $18,000 in cash on one occasion and chooses to deposit the money in two different bank accounts because he wants to split the cash with a business partner or spouse. Neither person is guilty of structuring because neither has acted for the purpose of evading the reporting requirement. Here, by contrast, the jury's finding that petitioner acted with the necessary *mens rea* was supported not only by evidence that he engaged in so many cash transactions just below $10,000—yet never above that limit—but also by petitioner's own words: petitioner told his partner that he handled his finances in such an unorthodox manner "to avoid any reports or anything that would involve . . . the regulatory or IRS authorities." Pet. App. 3a.

Petitioner claims prejudice (Pet. 14) on the ground that, if he had been charged with multiple structuring counts—with one count corresponding to each time he would have gone to the bank but for his structuring—then the government "could not have obtained an order of forfeiture for every withdrawal and deposit over a two-year period." (emphasis omitted). But it is far from clear the government would have been unable to make such a showing on the record here. Moreover, on petitioner's approach, petitioner would have been properly convicted of dozens of counts of structuring, rather than one. See Pet. App. 44a. Petitioner thus could have faced a harsher criminal sentence on his approach. See 18 U.S.C. 3584.

Petitioner also does not challenge the forfeiture order before this Court, nor did he challenge the forfeiture order on this ground before the court of appeals. In any event, petitioner's forfeiture argument is independent of his argument about when an indictment sufficiently alleges a structuring offense: "*in personam*, criminal forfeiture[]" is a punishment that constitutes part of a defendant's sentence, see *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998), and is imposed in a separate post-judgment proceeding where the government bears the burden of establishing the amount of money or property subject to forfeiture, see Fed. R. Crim. P. 32.2(b)(1)(A). Petitioner is not challenging the existence of a nexus between his counts of conviction and the forfeiture ordered by the district court; indeed, as noted, petitioner no longer challenges the forfeiture order at all.

4. This case also would be a particularly poor vehicle for resolving the issues petitioner identifies. Petitioner demands that the indictment must charge (and

the jury unanimously must find) a single, "discernable transaction of over $10,000" (Pet. 17) that would have occurred but for the structuring. But petitioner did not object to the indictment until after he was convicted; never suggested such a jury instruction; and has still never challenged the jury instructions that were given. And, as Judge Rosenbaum explained in her separate concurrence, petitioner would be equally guilty of structuring even on his approach: The evidence showed that petitioner "had access to and control over" more than $10,000 on dozens of occasions, "but chose [instead] to transact in cash amounts under $10,000" in order to evade reporting requirements. Pet. App. 43a. Indeed, that was petitioner's *modus operandi*. See *id.* at 43a-44a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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