No. 16-964

In the Supreme Court of the United States

SALVADOR MAGLUTA, 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 court of appeals correctly rejected petitioner's challenge to his money laundering convictions in his collateral challenge under 28 U.S.C. 2255 on the ground that the evidence at trial sufficed to support the jury's finding that petitioner acted with a design to conceal the nature, source, or ownership of the drug proceeds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not published in the *Federal Reporter* but is reprinted at 660 Fed. Appx. 803. The orders of the district court (Pet. App. 23a-65a, 111a-175a) are unreported. A prior opinion of the court of appeals is reported at 418 F.3d 1166. Another prior opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted at 313 Fed. Appx. 201.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2016. A petition for rehearing was denied on November 2, 2016 (Pet. App. 217a-218a). The petition for a writ of certiorari was filed on January 31, 2017. 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 Southern District of Florida, petitioner was convicted of, among other things, conspiracy to launder drug proceeds, in violation of 18 U.S.C. 1956(h), and eight substantive counts of transactional money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). Pet. App. 2a. Following an initial appeal in which the court of appeals vacated one of petitioner's other convictions, petitioner was sentenced to 195 years of imprisonment, to be followed by three years of supervised release. The court affirmed petitioner's money laundering convictions and his ultimate sentence. 418 F.3d at 1186; 313 Fed. Appx. at 202, 208.

Petitioner subsequently filed a motion for postconviction relief under 28 U.S.C. 2255. Pet. App. 3a. As relevant here, petitioner challenged his money laundering convictions based on this Court's decision in *Cuellar* v. *United States*, 553 U.S. 550 (2008), which was decided after petitioner's trial concluded. The district court denied the motion for postconviction relief, but granted a certificate of appealability on petitioner's *Cuellar* claims. Pet. App. 23a-65a. The court of appeals affirmed. *Id.* at 1a-22a.

1. For decades, petitioner was one of southern Florida's most prolific and notorious drug traffickers. Gov't C.A. Br. 22. From the late 1970s until October 1991, petitioner and his accomplices trafficked tens of thousands of kilograms of cocaine. *Ibid.* During that time and continuing until December 2001, petitioner also laundered hundreds of millions of dollars in drug proceeds to maintain the operation, sustain his lifestyle, pay legal expenses, and obstruct justice by bribing witnesses, paying hitmen, and aiding himself

and others in evading or escaping capture and hiding from law enforcement. *Id.* at 23-28, 31-37; see 418 F.3d at 1173.

In the fall of 1998, petitioner had an associate deliver $1.2 million in drug proceeds to another associate in Miami. 418 F.3d at 1175. Unbeknownst to petitioner, the associate in Miami had become an FBI informant. *Ibid.* The money was transferred to New York, where the informant gave it to two other members of petitioner's drug ring. *Ibid.* One of those associates then took the money to Israel and "deposited it in an Israeli bank under the fictitious name 'Leonard Friedman.'" *Ibid.* That associate then provided the informant with checks for the Leonard Friedman account, which the informant passed back to the original associate from whom he had received the money. *Ibid.* Petitioner used those checks to make eight payments to several lawyers representing him in various matters. *Ibid.*

2. In 1999, petitioner was indicted on money laundering and obstruction charges. Pet. App. 177a-178a. The case proceeded to a jury trial. As relevant here, the district court instructed the jury that to convict petitioner on the substantive counts of money laundering it must find, among other elements, that petitioner "engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or the control of the proceeds." *Id.* at 21a. The court further instructed that "[t]he statute does not make it an offense merely to conduct financial transactions with the proceeds of narcotics trafficking." *Id.* at 21a-22a (brackets in original). Rather, the court explained, the government needed to prove that petitioner "con-

ducted the charged transaction with the intent to conceal the nature, location, source, ownership or control of the proceeds." *Id.* at 22a. The jury convicted petitioner of, among other offenses, eight counts of transactional money laundering based on each check written from the Israeli account. *Id.* at 2a.

3. On direct appeal, the Eleventh Circuit upheld petitioner's money laundering convictions. 418 F.3d at 1177. The court rejected petitioner's sufficiency-of-the-evidence arguments, concluding, as relevant here, that petitioner "went to great pains to conceal the fact that he was using drug proceeds to pay his lawyers," which "meets the definition of money laundering for purposes of [Section] 1956(a)(1)(B)(i)." *Ibid.* The court observed that petitioner engaged in a "series of unusual financial moves" when he funneled the money into a fictitiously named account in a foreign country by way of another city; that those moves created "an air of 'unusual secrecy'" around the checks; that petitioner used "'third parties to conceal the real owner' of the money in the foreign account" when he relied on four associates to move the money around and when he made use of "the fictitious 'Leonard Freidman'"; and that "[t]he final transaction itself—[petitioner] writing checks on a foreign account held in a false name—is 'highly irregular.'" *Ibid.* (quoting *United States* v. *Majors*, 196 F.3d 1206, 1213 n.18 (11th Cir. 1999), cert. denied, 529 U.S. 1137 (2000)).

4. In April 2010, petitioner moved for postconviction relief under 28 U.S.C. 2255. D. Ct. Doc. 1, at 1 (Apr. 26, 2010). As relevant here, petitioner raised four claims based on this Court's decision in *Cuellar*, *supra*, which held that proof of a design to conceal under the transportation money laundering statute,

18 U.S.C. 1956(a)(2)(B)(i), requires evidence of something more than "merely hiding funds during transportation." 553 U.S. at 563. Petitioner argued that he "used the Leonard Friedman checks only for the purpose of paying his legal fees, not to conceal a listed attribute of the funds." Pet. App. 29a. Based on that assertion, he contended that he was actually innocent of money laundering, that the government's theory of guilt violated due process, that the indictment was defective, and that his counsel provided ineffective assistance by not arguing that petitioner lacked the requisite intent to commit money laundering. *Id.* at 30a, 53a.

The district court assumed without deciding that *Cuellar* applies to transactional concealment money laundering and held that petitioner's *Cuellar* arguments lacked merit. Pet. App. 29a-37a, 53a-54a. Petitioner's claim of actual innocence was unavailing, the court explained, because the jury could have "infer[red] that the purpose for using the 'Leonard Friedman' checks was to conceal a listed attribute of the funds from investigators." *Id.* at 35a. The court observed that "[t]he facts established at trial were damning," involving evidence that "[petitioner's] associates met with each other in Miami to hand off boxes containing a million dollars in drug money, physically moved the money to New York, took the money out of the country, established dummy accounts in foreign banks, obtained temporary and permanent checks in the accounts, and then met with each other to hand-off the checks back in Miami." *Id.* at 32a, 34a-35a. On those facts, the court concluded, "a jury could rightfully assume that how the money was moved had everything to do with why the money was moved," *id.* at

34a, given "the alchemy in which [petitioner] engaged to transform drug money into funds acceptable to his defense team," *id.* at 32a.

The district court concluded that petitioner's remaining *Cuellar* claims likewise failed because the record evidence sufficed to establish a design to conceal under the standard set forth in *Cuellar*. See Pet. App. 36a (observing that petitioner could not establish a due process violation because "any additional burden imposed on the government by *Cuellar*[] was already met by the undisputed record evidence"); *id.* at 36a-37a (concluding that "the indictment sufficiently alleged the 'designed to conceal' element"); *id.* at 53a-54a (rejecting petitioner's claim that his counsel rendered ineffective assistance by not making a *Cuellar* argument because "the government presented enough evidence to sustain the conviction post-*Cuellar*"). The court held in the alternative that petitioner's claims challenging the sufficiency of the indictment and alleging a due process violation were procedurally barred because they were not raised on direct appeal and no valid justification excused that default. *Id.* at 30a; see *id.* at 70a.

5. The court of appeals affirmed the denial of post-conviction relief. Pet. App. 1a-22a. The court assumed without deciding both that *Cuellar* applies to the transactional money laundering statute, *id.* at 6a, and that "freestanding actual innocence claims are cognizable under [Section] 2255," *id.* at 12a. The court found that petitioner had nevertheless "fallen short of establishing his innocence" because, "unlike in *Cuellar*, the facts established at trial in this case permit the inference that the funds were transferred, at least in

part, to conceal the drug proceeds' nature, source, or ownership." *Id.* at 11a-12a.

The court of appeals observed that "[t]he fictitious name on the checks, in addition to the drug proceeds' path from Miami to New York to Israel and then *back to Miami*, would permit the jury to infer that [petitioner's] intent in paying his attorneys was at least in part to cover up the fact that the payments derived from [petitioner's] drug proceeds; that is, to conceal the source or owner of the funds." Pet. App. 11a. Although petitioner argued that "the *sole* purpose of the transactions was to pay his attorneys using an acceptable form of payment," *id.* at 8a-9a, the court noted that petitioner had not "explain[ed] why he could not have paid his attorneys using checks tied to a bank account in the United States or an account in a legitimate name," *id.* at 11a. And "[t]o the extent" that petitioner argued that he was actually innocent in light of 18 U.S.C. 1957(f)(1), which provides that the payment of attorney's fees cannot support a prosecution for engaging in monetary transactions in proceeds obtained from a criminal offense under 18 U.S.C. 1957, the court rejected the claim because "[Section] 1957's special treatment of attorney's fees does not carry over to the [Section] 1956 context." Pet. App. 12a n.6 (citing *United States* v. *Elso*, 422 F.3d 1305, 1309-1310 (11th Cir. 2005)).

The court of appeals further rejected petitioner's remaining *Cuellar*-based claims. Pet. App. 12a-22a. The court found that petitioner's due process argument and challenge to the indictment were procedurally defaulted and in any event meritless. *Id.* at 14a-22a. The court also held that petitioner could not establish ineffective assistance of counsel. *Id.* at 12a-

14a. Counsel had not rendered deficient performance, the court explained, because any argument based on *Cuellar* "would have been futile in light of the evidence adduced at trial." *Id.* at 14a. And the court found that petitioner also could not establish prejudice "because a *Cuellar*-based argument would have failed." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-18) that his money laundering convictions must be set aside in light of *Cuellar* v. *United States*, 553 U.S. 550 (2008), and that review is warranted to avoid undermining protection of the right to counsel. Those arguments lack merit, and further review is not warranted.

1. The court of appeals correctly rejected petitioner's claim that he is entitled to postconviction relief based on *Cuellar*.

a. The issue in *Cuellar* was whether a defendant's attempt to transport unlawful drug proceeds from the United States to Mexico by hiding them in a secret compartment in his car constituted transportation "designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control" of the proceeds within the meaning of the transportation money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i). 553 U.S. at 556-557 (citation omitted); see *id.* at 553-568. The Court held that to prove a violation of that provision the government had to establish that the defendant "transport[ed] something to conceal it," rather than simply "conceal[ed] something to transport it." *Id.* at 566 (citation omitted); see *id.* at 563-564 (concluding that because the word "design" refers to the "purpose" of the transportation and not just to the manner in which it was carried out, "merely hiding funds during transportation is not sufficient to

violate the statute"). The Court recognized that the structuring of transportation to conceal the funds being moved "may be circumstantial evidence that the transportation itself was intended to avoid detection of the funds." *Id.* at 565-566; see *id.* at 567 n.8; see also *id.* at 568-570 (Alito, J., concurring). But "*how* one moves the money is distinct from *why* one moves the money," the Court explained, *id.* at 566 (majority opinion), and secrecy in transportation was not, "standing alone," enough to establish that "the purpose—not merely effect—of the transportation was to conceal or disguise a listed attribute," *id.* at 566, 567. Based on the evidence introduced at trial, the Court concluded that the defendant's "only [proven] purpose" of concealing money to transport it was to compensate leaders of the drug operation, *id.* at 566 n.7, and that the government had not established that the defendant knew or intended the transportation to have the effect of concealing a listed attribute (*e.g.*, the illicit origins) of the transported funds, *id.* at 567.

Assuming that *Cuellar*'s interpretation of the transportation money laundering provision applies equally to the transactional concealment money laundering provision—an open question that the court of appeals did not decide, see Pet. App. 6a—the court correctly recognized that "[t]he facts of this case are materially different from the facts of *Cuellar*." *Id.* at 10a. The evidence established that petitioner directed multiple individuals to move the drug proceeds along a circuitous route from Miami to New York to Israel and then back to Miami after depositing the funds in a foreign bank account in a fictitious name. *Id.* at 10a-11a. Based on that evidence, the court concluded that "a jury could infer * * * that the transactions were

designed in part to conceal some material attribute of the underlying funds"—specifically "to cover up the fact that the payments derived from [petitioner's] drug proceeds." *Id.* at 11a. The court therefore correctly held that, "unlike in *Cuellar*, the facts established at trial in this case permit the inference that the funds were transferred, at least in part, to conceal the drug proceeds' nature, source, or ownership." *Id.* at 11a-12a.

b. Petitioner's arguments to the contrary (Pet. 12-16) lack merit. Petitioner appears (Pet. 12) to read *Cuellar* to stand for the proposition that how money was moved is always irrelevant to why it was moved. But the Court in *Cuellar* acknowledged that "purpose and structure are often related," in that "[o]ne may employ structure to achieve a purpose." 553 U.S. at 565. Nothing in *Cuellar* precludes an inference that secretive transactions, in combination with other evidence of purpose, may show a design to conceal or disguise the illicit origins or ownership of the funds.

Petitioner further contends (Pet. 15-16) that the court of appeals erred in concluding that the evidence sufficed to support the jury's finding that he "engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or the control of the" drug proceeds. Pet. App. 21a (quoting jury instructions). But that factbound argument does not merit this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (stating that the Court does "not grant a certiorari to review evidence and discuss specific facts").

In any event, petitioner's claim lacks merit. Petitioner asserts that, while he may "have had an intent

to conceal his actions, * * * he *transacted* solely for the purpose of paying counsel." Pet. 15; see Pet. 12 (stating that "the sole reason for conducting the transactions was to pay the attorneys' fee"); Pet. 16 (asserting that obtaining legal representation was his "singular purpose").[1] But petitioner identifies no error in the court of appeals' conclusion that the evidence permitted the jury to infer that petitioner's "intent in paying his attorneys was at least in part to cover up the fact that the payments derived from [petitioner's] drug proceeds; that is, to conceal the source or owner of the funds." Pet. App. 11a. And petitioner makes no effort to "explain why he could not have paid his attorneys using checks tied to a bank account in the United States or an account in a legitimate name" if obtaining representation was the sole purpose of the transactions. *Ibid.* As the Eleventh Circuit observed in rejecting petitioner's sufficiency-of-the-evidence challenge on direct appeal, petitioner "went to great pains to conceal the fact that he was using drug proceeds to pay his lawyers," which "meets the definition of money laundering for purposes of [Section] 1956(a)(1)(B)(i)." 418 F.3d at 1177.[2]

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[1] To the extent that petitioner argues that a transaction can only have one purpose as a matter of law, the statute forecloses his claim. See 18 U.S.C. 1956(a)(1)(B) (providing that a transaction must be "designed in whole *or in part* * * * to conceal" a listed attribute) (emphasis added); see also, *e.g.*, *Cuellar*, 553 U.S. at 566 n.7 (noting that "[c]oncealing or disguising a listed attribute need be only one of the purposes" of the challenged conduct).

[2] Petitioner conceded below (Pet. C.A. Br. 14 n.2) that his lawyers requested payment by check "to provide a plausible basis to avoid forfeiture" of the funds. Forfeiture could only be avoided, however, if the lawyers could claim that the checks had come from a legitimate account funded by untainted money. See *Caplin &*

Petitioner also renews his argument (Pet. 8-12) that he is actually innocent of money laundering in violation of Section 1956(a)(1)(B)(i) because Section 1957(f)(1) accords special treatment to the payment of attorney's fees. That argument does not turn on the meaning of *Cuellar* and so arguably falls outside the district court's decision to grant a certificate of appealability as to four claims that the court viewed as "concern[ing] the applicability of the Supreme Court's decision in * * * *Cuellar*." Pet. App. 64a. This Court, moreover, "has 'not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.'" *Id.* at 9a (quoting *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1931 (2013)). But putting those threshold questions to the side, petitioner's claim lacks merit.

Section 1957 criminalizes knowingly engaging in a financial transaction with more than $10,000 in criminally derived proceeds. 18 U.S.C. 1957(a). In contrast to Section 1956, Section 1957 "applies to the most open, above-board transaction" and does not require a showing of a design to conceal. *United States* v. *Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997). Congress enacted a safe harbor from that broad offense, however, by providing that "[a]s used in this section"—that is, Section 1957—"the term 'monetary

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Drysdale, Chartered v. *United States*, 491 U.S. 617, 631-633 (1989) (concluding that drug proceeds are subject to forfeiture even when held by lawyers); see also 21 U.S.C. 853(c) (providing protection from forfeiture for bona fide transactions in which the party was "reasonably without cause to believe that the [assets were] subject to forfeiture"). The jury accordingly could reasonably infer that petitioner engaged in the transactions knowing they were designed at least in part to conceal the source and nature of the drug proceeds.

transaction' * * * does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." 18 U.S.C. 1957(f)(1). By its terms, the Section 1957(f)(1) safe-harbor provision only applies to prosecutions under Section 1957—and not, as here, to a charge of transactional concealment money laundering under Section 1956. Indeed, petitioner does not cite and the government is not aware of any case in which a court has applied the safe-harbor provision to a charge under Section 1956. See *United States* v. *Elso*, 422 F.3d 1305, 1309-1310 (11th Cir. 2005) (rejecting application of the safe harbor to a Section 1956 charge). Petitioner therefore errs in contending that Section 1957(f)(1) immunizes him from prosecution under Section 1956.

2. Petitioner errs in contending (Pet. 8) that this Court's review is warranted to resolve a circuit conflict.

a. Petitioner first asserts (Pet. 8) that a division among the circuits exists "on the reach of 18 U.S.C. § 1957(f)(1)." The cases on which petitioner relies (Pet. 8-10) all involved charges under Section 1957 itself. *United States* v. *Blair*, 661 F.3d 755, 772 (4th Cir. 2011), cert. denied, 132 S. Ct. 2740 (2012); *United States* v. *Velez*, 586 F.3d 875, 877 (11th Cir. 2009); *United States* v. *Hoogenboom*, 209 F.3d 665, 668-670 (7th Cir. 2000); *Rutgard*, 116 F.3d at 1291. Because petitioner was prosecuted under Section 1956, this case does not implicate—and provides a poor vehicle for resolving—any disagreement about the application of Section 1957(f)(1) in prosecutions brought under that section.

b. Petitioner further asserts (Pet. 13) that the court of appeals' application of *Cuellar* conflicts with decisions from other courts that "require[] that for a conviction to be sustained the government must prove that the transaction was undertaken for a concealment purpose, regardless of the manner of the transaction or name used by the person transacting." The court of appeals applied that standard, however, and concluded that it was satisfied. See Pet. App. 10a-12a. The court's finding that the evidence in this case sufficed to establish a concealment purpose does not conflict with other decisions applying *Cuellar* to distinct factual scenarios. And the court's decision accords with decisions from other circuits that have recognized, in line with *Cuellar*, that a transaction's structure may provide probative evidence from which to infer a defendant's intent. See, *e.g.*, *United States* v. *Faulkenberry*, 614 F.3d 573, 586 (6th Cir. 2010) ("[D]epending on context, proof that a transaction was structured to conceal a listed attribute of the funds can yield an inference that concealment was a purpose of the transaction."); *United States* v. *Williams*, 605 F.3d 556, 566 (8th Cir. 2010) (concluding that "structuring, usage of cash, and manufacturing of a fictitious purchaser" showed an intent to conceal); *United States* v. *Brown*, 553 F.3d 768, 787 (5th Cir. 2008) (concluding that cash transactions structured to evade reporting requirements demonstrated an intent to conceal), cert. denied, 557 U.S. 905, and 558 U.S. 897 (2009).

3. Finally, petitioner is incorrect in claiming (Pet. 17) that the court of appeals' decision warrants review because it "impose[s] a restraint on criminal representation." A defendant has no Sixth Amendment right

to procure counsel with tainted funds. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 626 (1989). The money underlying a money laundering conviction will always be tainted because the statute requires that the money "represent[] the proceeds of some form of unlawful activity." 18 U.S.C. 1956(a)(1). A prosecution for paying counsel fees through transactions designed to conceal the tainted origin of the funds therefore does nothing to impair any protected Sixth Amendment interest.

Petitioner's suggestion (Pet. 17-18) that his convictions will chill the market for private defense counsel is likewise unfounded. The money laundering statute requires the government to prove that the defendant knew the money was tainted and acted with an intent to conceal an aspect of its provenance. 18 U.S.C. 1956(a)(1). Those mental-state requirements protect attorneys against exposure to prosecution for good-faith acceptance of fees without knowledge or deliberate ignorance of their tainted source and the calculated use of a method to conceal that source (or other listed attribute). And immunizing attorneys when such payment strategies are used, presumably to avoid either pretrial restraint or forfeiture, serves no legitimate purpose. In any event, petitioner cites no evidence to establish that the market for private defense counsel has been affected over the past 15 years following his convictions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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