RESTRUCTURE THE STRUCTURING LAW: THE NEED FOR A RESTRICTIVE INTERPRETATION OF THE MINIMUM CASH REQUIREMENT UNDER THE STRUCTURING STATUTE

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I. INTRODUCTION

Structuring? What is that anyway? Well one might consider the structuring scandal behind Dennis Hastert, former speaker of the United States House of Representatives.[2] Mr. Hastert's former student accused him of sexual harassment during Mr. Hastert's tenure at the accuser's high school.[3] Mr. Hastert, the longest-serving Republican speaker of the House of Representatives was charged with making cash withdrawals in a manner intended to avoid detection by bank officials, a crime known as structuring.[4] The evidence against the former speaker indicated that he withdrew cash in $50,000 increments from several accounts to pay off the former student every six weeks for years.[5]

After bank officials questioned Mr. Hastert about his actions, he then structured his withdrawals to amounts less than $10,000 in attempt to remain undetected.[6] Mr. Hastert made 106 smaller withdrawals all under $10,000 and totaling $952,000 over the years he paid off his accuser.[7] Though federal prosecutors never charged Mr. Hastert with the underlying offense of sexual abuse, prosecutors charged Mr. Hastert with structuring

[2] Conor Friedersdorf, *Why Is It a Crime to Evade Government Scrutiny?*, ATLANTIC (Jun. 2. 2015), https://www.theatlantic.com/politics/archive/2015/06/when-evading-government-spying-is-a-crime/394640/

[3] *Id.*

[4] Julie Bosman, *Details About the Indictment of Dennis Hastert*, N.Y. TIMES (June 9. 2015), https://www.nytimes.com/2015/06/10/us/the-case-against-dennis-hastert.html

[5] *Id.*

[6] *Id.*

[7] *Id.*

his funds to evade detection.[8]

The anti-structuring provisions under 31 U.S.C. § 5324 are a product of the Money Laundering Control Act of 1986 ("MLCA"), an amendment to the Banking Secrecy Act.[9] The MLCA resolved the disputes amongst circuit courts including between the Eleventh Circuit Court of Appeals which held that a defendant who purchased several cashier's checks totaling over $100,000 in cash to conceal the true origins of the funds was guilty of structing, but the First Circuit Court of Appeals failed to find a defendant who purchased twelve checks, all of which aggregated to more than $100,000 but none of which exceeded $10,000 guilty. [10] The MLCA statute—primarily aimed at curbing money laundering—mandated financial institutions to file currency transaction reports ("CTRS") for transactions over $10,000.[11] After the MLCA passed in 1986, there were a number of successful enforcement actions.[12] Additionally, there were several amendments made to the statute, but most were technical and non-substantive.[13] For example, in 1992 Congress amended the statute adding sub-section 5324(b) which criminalized a failure to file currency and monetary instruments reports ("CMIR").[14]

Technical issues in the MLCA's enactment and issues pertaining to the criminality a defendant must possess both plagued the money laundering statute.[15] Among the issues that led to the 1994 amendment was the meaning of the word "willfully" within § 5324.[16] *Ratzlaf v. United States*[17] was the case that squarely placed this issue before the Supreme Court.

At issue in that case was whether a heightened proof of knowledge was required to charge defendants.[18] Specifically, whether the defendant

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[8] David Post, *Anti-Structuring in the news!*, WASH. POST. June 10. 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/10/anti-structuring-in-the-news/?utm_term=.7c04bf19cb80.

[9] Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Transaction Reporting and the Crime of Structuring*, 50 SANTA CLARA L. REV. 407, 440 (2010).

[10] *Compare* United States v. Tobon-Builes, 706 F.2d 1092, 1099 (11th Cir. 1983) *with* United States v. Anzalone, 766 F.2d 676, 678-681 (1st Cir. 1985).

[11] Money Laundering Control Act, 18 U.S.C. § 1956 (1986).

[12] COMPTROLLER GEN., U.S. GEN ACCOUNTING OFFICE, REPORT TO CONGRESS: BANK SECRECY ACT REPORTING REQUIREMENTS HAVE NOT YET MET EXPECTATIONS, SUGGESTING NEED FOR AMENDMENT 23-25 (1981).

[13] Linn, *supra* note 9, at 440.

[14] *See* United States v. One 1985 Mercedes-Benz, 14 F.3d 465, 467 & n.4 (9th Cir. 1994) (discussing the legislative changes to the Money Laundering Control Act).

[15] Linn, *supra* note 9, at 444.

[16] Linn, *supra* note 9, at 444.

[17] Ratzlaf v. United States, 510 U.S. 135 (1994).

[18] Linn, supra note 9, at 443.

knew their conduct brought them within the purview of the statute and whether the defendant also knew their conduct is criminal.[19] The *Tobon-Builes* and *Anzalone* circuit split was the catalyst for the 1994 *Ratzlaf* decision.[20] The Supreme Court in *Ratzlaf* held that "willfully" meant that the defendant needed knowledge of both the wrongful conduct and knowledge that the conduct was criminal to violate the structuring provision.[21] In repudiating the Court's holding, Congress immediately amended the statute by deleting the statute's use of the phrase "willfully" for all criminal prosecutions asserted under the statute, thereby eliminating the requirement that the defendant know the conduct was a crime.[22]

The *Ratzlaf* decision and Congress' willingness to amend the statute ties in with another potential issue with the current statute. Specifically, there is a trend in some cases whereby prosecutors are charging defendants even though they do not have the requisite minimum cash requirement. In the specific context of money laundering, defense attorneys sometimes assert the "cash hoard defense," arguing that the defendant lacked the requisite minimum funds.[23] This defense, commonly used by tax crime attorneys, argues that the defendant at no point had the minimum cash requirement on hand during the commission of the crime, therefore the defendant cannot be guilty as charged.[24] In *Ratzlaf*, the defendant did have a cash hoard of $160,000 dollars which he broke into smaller chunks, but in subsequent decisions from circuit courts the defendants did not.[25]

Some circuit courts have had defendant assert the cash hoard defense unsuccessfully. For example, years after *Ratzlaf*, defendants from the Seventh and Eighth Circuits argued they were not guilty of the structuring statute because they never had the relevant "cash hoard" necessary. In *United States v. Van Allen*[26] and *United States v. Sweeney*[27] the Seventh and Eighth Circuits respectively rejected the defendant's cash hoard defense. These cases are important because they provide key context on

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19 Linn, supra note 9, at 443.

20 *Id.* at 445.

21 *Ratzlaf*, 510 U.S. at 142.

22 *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, Sec. 411, 108 Stat. 2160, 2253 (amending Section 5324 to include its own criminal penalty provision, now codified at 31 U.S.C. § 5324(c)).

23 Blanch Law Firm, *Cash Hoard Defense*, (2012), http://taxcrimefirm.com/defenses-to-tax-evasion/cash-hoard-defense/

24 *Id.*

25 *Ratzlaf*, 510 U.S. at 137 (discussing that defendant Ratzlaf had $160,000 in debt from playing blackjack at a casino that Ratzlaf "purchased cashier's checks, each for less than $10,000" from different banks that Ratzlaf used to pay the casino and evade the bank's obligation to report cash transactions exceeding $10,000).

26 *See* United States v. Van Allen, 524 F.3d 814, 820 (7th Cir. 2008).

27 *See* United States v. Sweeney, 611 F.3d 459, 472 (8th Cir. 2010).

what the cash hoard defense is and why its uses were unsuccessful in the cases that follow.

A few years after the Seventh and Eighth Circuit decisions, the defendant in *United States v. Sperrazza* from the Eleventh Circuit made a more persuasive cash hoard defense argument which was ultimately rejected.[28] In *Sperrazza*, the court held that the "government may properly charge a defendant with structuring a transaction" even though the defendant did not have the requisite $10,000 in hand at any time.[29] Arguably more important is the dissenting opinion, which argues a defendant needs to have the minimum cash requirement before they can be charged and prosecuted under the structuring law because the dissent is consistent with principles of statutory interpretation and the legislative intent.[30]

An implication of *Sperrazza* and other subsequent courts' decisions plays out in a few ways. First, take for example a restaurant owner who goes to the bank every week to deposit approximately $9,000 dollars to avoid carrying copious amounts of cash and avoid robbers.[31] Are they guilty of a crime? How about a bartender who makes about $2,000-$2,500 a week in tips but never over $10,000 in a month? The bartender deposits roughly $9,500 every month into a bank account, with no knowledge a crime is being committed.[32] Are they guilty of crime? If we accept the *Sperrazza* decision, both of these individuals could be guilty of a crime based on their pattern of conduct, though neither possessed greater than the requisite $10,000.[33] The *United States v. Sperrazza* interpretation of section 5324—which disregards a fundamental requirement of the minimum cash of $10,000 a defendant must possess—could lead to a host of innocent people being prosecuted. In other words, prosecutors should not solely rely on a pattern of transactions to charge and prosecute

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28 United States v. Sperrazza, 804 F.3d 1113 (11th Cir. 2015).

29 *Id.* at 1125.

30 *Id.* at 1129.

31 *Id.* at 1124 (discussing two hypothetical defendants with the first most likely guilty of structuring and the second innocent. "First, consider 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; there can be no question the defendant may be charged with one count of structuring in violation. Second, consider the defendant who has checks totaling $9,000 and knows he will receive another bundle of checks totaling more than $1,000 tomorrow; in order to avoid the reporting requirement, he decides to cash the checks totaling $9,000 today.").

32 Radley Balko, *The federal 'structuring' laws are smurfin' ridiculous*, THE WASHINGTON POST (March. 24, 2014), https://www.washingtonpost.com/news/the-watch/wp/2014/03/24/the-federal-structuring-laws-are-smurfin-ridiculous/?noredirect=on&utm_term=.2d005c0b33f3

33 *Id.*

individuals under the structuring absent the minimum cash requirement.

Part II of this comment provides a brief overview of what money laundering is and examines the current state of the structuring laws under the Bank Secrecy Act. This section also examines how the enactment of the 1986 Money Laundering Control Act, the 1994 *United States v. Ratzlaf* decision, and how Congress reacted to *Ratzlaf* shaped the current structuring provisions. Part III discusses the cash hoard defense in broad terms, its failed uses in the *Van Allen* and *Sweeney*, and how these cases set the stage for the *United States v. Sperrazza* decision. Part III provides an in-depth explanation of the *Sperrazza* majority and dissenting opinions. Part IV argues why the *Sperrazza* dissent accurately addresses the cash hoard issue. This section also highlights how the *Sperrazza* decision implicates the rule of lenity, the decision's policy implications, argues for legislative action in addressing the cash hoard issue, and recommends how the statute should be amended. Part V concludes by re-introducing the issue, summarizing the argument, and re-highlighting the propose fix to the current structuring statute.

II. BRIEF OVERVIEW OF MONEY LAUNDERING

Money Laundering is the process of legitimizing money that comes from illegitimate sources.[34] Money laundering has three different phases: (1) placement, which refers to the introduction of the "dirty money" into financial institutions, (2) layering, which refers to concealing the source of that money through complex transactions, and (3) integration, which refers to placing the money back into the market as if it were from legitimate sources.[35] Typically, but not always, the money comes from criminal activity.[36] Individuals who intend to evade taxes and conceal the source of their funds could be guilty of money laundering.[37]

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[34] Investopedia, *Money Laundering*, https://www.investopedia.com/terms/m/moneylaundering.asp(last visited Nov. 16, 2018); *see also* INTERNATIONAL COMPLIANCE ASSOCIATION, https://www.int-comp.org/careers/a-career-in-aml/what-is-money-laundering/ (last visited Feb. 8, 2019) (Money laundering is the generic term used to describe the process by which criminals disguise the original ownership and control of the proceeds of criminal conduct by making such proceeds appear to have derived from a legitimate source." . . . "There are two key elements to a money laundering offence: [t]he necessary act of laundering itself" and "a requisite degree of knowledge or suspicion (either subjective or objective) relating to the source of the funds or the conduct of a client.).

[35] Investopedia, *Money Laundering*, https://www.investopedia.com/terms/m/moneylaundering.asp (last visited Nov. 16, 2018).

[36] *Id.*

[37] Anthony Verni, *Money Laundering Is Tax Evasion*, VERNI TAX LAW. (Feb. 25, 2016), https://www.vernitaxlaw.com/money-laundering-is-tax-evasion/.

A. The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act of 1970 ("Bank Secrecy Act" or "BSA")

The Financial Recordkeeping and Reporting of Currency and Foreign Transactions Act is commonly known as the BSA.[38] The BSA requires United States' financial institutions to maintain records and file reports on currency transactions and financial institutions' customer relationships.[39] Another purpose of the BSA is to use the reporting and recordkeeping requirements to investigate and uncover criminal, tax, and regulatory violations.[40] The reporting and recordkeeping requirements were also used to conduct intelligence and counterintelligence measures and to fight against international terrorism.[41] Congressional findings also suggests the global war on terrorism and stopping terrorist financing was a policy priority.[42] Another purpose was to combat criminal, tax, and regulatory violations.[43] Using the reports to prosecute money laundering and other financial crimes was another goal of the BSA.[44]

The BSA also requires individuals, banks, and other financial institutions to file currency transaction reports ("CTRs") and Suspicious Activity Reports ("SARs") with the United States Department of Treasury.[45] These reports are used to identify individuals who may be subject to the criminal, tax, and terrorism enforcement actions.[46] The main use of the CTRs has been to help track large amounts of cash generated by individuals and entities used for illegal purposes.[47] The SARs are used by financial institutions to report identified or potentially illegal activities.[48] In sum while CTRs are used to identify individuals, SARs have been used to identify the activities in which these individuals engage.[49]

The BSA consists of two main parts: Title I which requires financial recordkeeping and Title II which requires reports of currency and foreign

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38 Financial Recordkeeping and Reporting of Currency and Foreign Transactions of 1970, 31 U.S.C. § 5311 (1970).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, BANKING SECRECY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL (2014).

44 *Id.*

45 *Id.*

46 *Id.*

47 FEDERAL DEPOSIT INSURANCE CORPORATION, BANK SECRECY ACT, ANTI-MONEY LAUNDERING, AND OFFICE OF FOREIGN ASSETS CONTROL SAFETY MANUAL, (2004).

48 *Id.*

49 *Id.*

transactions.[50] The BSA regulations clarified that financial institutions, banks, and other individuals were only obligated to file CTRs if the "currency or other monetary instruments in an aggregate amount exceed[ed] $10,000 at one time."[51] The BSA generally defines financial institutions as banks, credit unions, private bankers, and investment companies.[52] Though the BSA does not provide a specific definitional section for individuals within reporting requirements, these individuals are grouped as financial agencies.[53] A financial agent means exactly what one might think, a person acting as an agent of any one of the financial institutions listed within the BSA.[54] The reporting and recordkeeping requirements applies to both transactions involving United States currencies[55] and foreign currencies.[56]

Over the years, the BSA has been amended several times through different acts including: (1) the Money Laundering Control Act of 1986; (2) Annuzio-Wylie Anti-Money Laundering Act of 1992; (3) Money Laundering Suppression Act of 1994; (4) Money Laundering and Financial Crimes Strategy Act of 1998; and (5) the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act better known as the USA PATRIOT Act of 2001.[57] Of relevance is the Money Laundering Control Act, which produced the current anti-structuring provisions that this comment examines.

B. The Birth of the Money Laundering Control Act ("MLCA") of 1986

Following the enactment of the BSA, there was a prolonged period with minimal enforcement actions for BSA violators.[58] Things changed after the Bank of Boston was fined $500,000 for violations of the BSA's

50 *Id.*

51 31 C.F.R. § 103.22 (1987).

52 31 U.S.C. § 5312 (1970).

53 *Id.*

54 *Id.*

55 31 U.S.C. § 5313 (1970).

56 31 U.S.C. § 5314 (1970).

57 FEDERAL DEPOSIT INSURANCE CORPORATION, BANK SECRECY ACT, ANTI-MONEY LAUNDERING, AND OFFICE OF FOREIGN ASSETS CONTROL SAFETY MANUAL, (2004); *see also* Linn, *supra* note 9, at 441-44 ("In 1992 Congress amended § 5324(a) to make it a crime to structure financial transactions to evade the reporting and recordkeeping requirement relating to the cash purchase of cashier's checks and similar instruments in amounts of $ 3000 or greater. In 2001, Congress expanded the reach of § 5324(a) again by prohibiting structuring to evade the recordkeeping requirement relating to wire transfers in amounts of $ 3000 and greater.").

58 Linn, *supra* note 9, at 407 ("After a prolonged period of inaction that lasted well into the 1980s, financial institutions complied with the BSA's requirements by sending ever-increasing numbers of reports to the government.").

reporting requirements.[59] In *United States v. Bank of New England*,[60] the Bank of Boston was fined because it exempted a known criminal organization from CTR filing requirements. In the case, the First Circuit Court of Appeals upheld the trial court's jury instructions, which allowed the jury to find the bank criminally liable.[61] The jury concluded because some bank employees had sufficient knowledge of the reporting requirements vis-à-vis the theory of respondent superior, the bank could also be criminally liable.[62]

In *Bank of New England*, a customer visited a branch of the Bank of New England several times a month to withdraw large sums of cash from various corporate accounts.[63] During thirty one independent visits, the customer requested blank checks from the cashier and then made those checks payable as cash in amounts between $5,000 and $9,000, all less than the BSA's $10,000 requirement.[64] The bank did not file currency transaction reports on any of these transactions until it received a grand jury subpoena.[65]

On appeal, the bank argued lack of notice, alleging the statute did not specify that there would be criminal culpability for failure to file CTRs, especially for customers who used checks.[66] The bank also argued lack of intent, alleging it did not willfully fail to file CTRs.[67] The court rejected the notice argument, holding the language of the regulation gave the bank "adequate warning that a single, lump-sum transfer of cashing exceeding $10,000 was reportable" and that the customer's recurring practice should have given the "bank fair warning that [defendant's] transactions were reportable."[68] The court ultimately held the bank willfully failed to file CTRs because the aggregate knowledge of the particular operation was sufficient, thereby rejecting the bank's lack of intent argument.[69]

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59 United States v. Bank of New England, 821 F.2d 844 (1st Cir. 1987).

60 *Id.*

61 *Id.* at 857.

62 *Id.*

63 *Id.* at 848.

64 *Id.* ("[Defendant] withdrew from the Prudential Branch of the Bank more than $ 10,000 in cash by using multiple checks—each one individually under $ 10,000—presented simultaneously to a single bank teller.").

65 United States v. Bank of New England, 821 F.2d 844, 848 (1st Cir. 1987).

66 *Id.*

67 *Id.* at 847.

68 *Id.* at 848-49.

69 *Id.* at 856.

1. The catalyst of the Money Laundering Control Act of 1986.

The decision led to a new widespread compliance with the BSA by financial institutions helping achieve the BSA's goal of prosecuting money launderers, tax evaders, and other individuals who intended to keep their criminal, financial dealings a secret.[70] In the 1980s, as a result of the increased compliance and enforcement actions, individuals "structure[d]" their transactions as a way around the BSA's recordkeeping and reporting requirements.[71] While the *Bank of New England* case put banks on notice of banks' reporting requirements, two other cases ultimately led to the enactment of the Money Laundering Control Act of 1986.[72]

In the 1983 *Tobon-Builes* case, the Eleventh Circuit Court of Appeals held a defendant who purchased several cashier's checks totaling $185,2000 in cash to conceal the true origin of the funds was guilty under 18 U.S.C. § 1001.[73] In its holding the court stated "the government charged and proved that [defendant] willfully and knowingly caused financial institutions not to report currency transactions that they had a duty to report."[74] The defendant in *Tobon-Builes* went to several banks in Florida and purchased cashier's checks in amounts less than $10,000 while using a variety of aliases to conceal his transactions.[75] The defendant argued he was under no legal duty to report any of his cash transactions.[76] The court rejected this argument finding it inapplicable and reasoned that the statute does apply to individuals as well as financial institutions.[77] The fact that the defendant used false names and "his structuring of single $18,000 transactions" all showed a scheme to prevent the financial institutions from "fulfilling [its] legal duty."[78]

Contrary to the *Tobon-Builes* decision, the *Anzalone* decision held a defendant who purchased a total of twelve checks all of which aggregated to more than $100,000, but no single check exceeding $10,000 individually, was not criminally liable under 18 U.S.C. section 2.[79] The court held the defendant did not have fair warning or a duty to disclose.[80]

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70 Linn, *supra* note 9, at 444.

71 *Id.*

72 Money Laundering Control Act, 18 U.S.C. § 1956 (1986); *see* United States v. Tobon-Builes, 706 F.2d 1092, 1099 (11th Cir. 1983); United States v. Anzalone, 766 F.2d 676, 678-681 (1st Cir. 1985).

73 United States v. Tobon-Builes, 706 F.2d at 1096-99 (11th Cir. 1983).

74 *Id.*

75 *Id.* at 1095.

76 *Id.* at 1096.

77 *Id.* at 1098.

78 *Id.*

79 United States v. Anzalone, 766 F.2d 676, 678-681 (1st Cir. 1985).

80 *Id.*

The court further stated "nothing on the face of either the Reporting Act . . . or . . . legislative history support[ed] the proposition that a 'structured' transaction by a customer constitute[ed] an [act]."[81] In *Anzalone*, the defendant purchased several checks together totaling over $10,000 but never individually exceeding $10,000 on two separate occasions.[82] The defendant argued the statute was constitutionally vague and it failed to give him proper notice.[83]

In accepting the defendant's vagueness argument, the court held § 5313(a) of the statute was indeed vague because its provision relating to "any other participant in the transaction" does not specify whether it applies to individuals as well as to financial institutions.[84] In siding with the defendant's notice argument, the court also held the statute "imposed no duty on the defendant to inform the Bank of his 'structured' funds."[85] Prior to *Anzalone* and *Tobon-Builes*, it does not seem that there was a united legislative voice to address the issue of structuring, but with the Money Laundering Control Act of 1986[86] there was a voice. Further, Congress' desire to expressly reject the *Anzalone* holding led to the enactment of the Money Laundering Control Act where Congress found those who structured criminally liable.[87]

C. The Arrival of the Money Laundering Control Act of 1986 and How it Augmented and Amended the Bank Secrecy Act

The Money Laundering Control Act of 1986 was amended by the Anti-Drug Abuse Act in subtitle H.[88] The MLCA was vital because it substantially augmented the BSA to combat money laundering.[89] One augmentation was that the MLCA imposed and increased criminal penalties for violations of the Bank Secrecy Act.[90] Specifically, criminal culpability

81 *Id.*

82 *Id.* at 679.

83 *Id.* at 680.

84 *Id.* at 681.

85 United States v. Anzalone, 766 F.2d 676, 682 (1st Cir. 1985).

86 18 U.S.C. § 1956 (1986).

87 Linn, *supra* note 9, at 440.

88 *Id.*

89 John K. Villa, *A Critical View of Bank and the Money Laundering Statutes*, 37 CATH. U. L. REV. 489, 495 (1988) (explaining that the Money Laundering Control Act of 1986 made amendments to the BSA and added two new money laundering provisions itself).

90 House Bill 5077; *see also* Villa, *supra* note 89 at 495 (The MLCA also added a new section to the BSA, which is known as the 'anti-structuring statute.' Section 5324(1) and (2) of the anti-structuring statute prohibit an individual from causing a financial institution either to fail to file a required report or to file a false report. Congress presumably intended these provisions to address the growing body of cases which have held that because the

was imposed on those individuals who knowingly assisted in money laundering or in structuring transactions to evade BSA's requirements.[91] The MLCA also enhanced the BSA by increasing the maximum civil penalties for each violation.[92] Penalties for knowingly violating the statute are either $25,000 or the amount of the transaction not exceeding $100,000.[93] In addition, the penalty for negligently violating the statute is $500.[94] The MLCA also required financial institutions, especially banks, to maintain comprehensive compliance programs.[95]

The MLCA amended the BSA with the addition of section 5324 or the anti-structuring provision.[96] Section 5324 applies primarily to financial institutions.[97] On a macro scale, section 5324 deals with actions by individuals that adversely affect the reporting and recordkeeping requirements of financial institutions under the BSA.[98] The intent of the MLCA was simple; make money laundering a crime and close the structuring loophole used to evade the BSA's recording and recordkeeping requirements.[99] The legislation was also enacted to address the perceived non-enforcement by banking regulatory agencies and the absence of banks' compliance programs.[100]

> To better examine the prohibited actions, the current version of Section 5324(a) is:
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> "Domestic Coin and Currency Transactions Involving Financial Institutions.—No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping

regulations promulgated under the BSA do not impose a duty on individuals to inform the bank of a reportable transaction, such a duty cannot be imposed in a criminal prosecution without violating the fair warning requirements of the due process clause of the fifth amendment.).

91 FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, BANKING SECRECY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL (2014).

92 31 U.S.C. § 5321(a)(1) (West Supp. 1987).

93 *Id.*

94 *Id.*

95 FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, BANKING SECRECY ACT ANTI-MONEY LAUNDERING EXAMINATION MANUAL (2014).

96 Villa, *supra* note 89, at 495.

97 31 U.S.C. § 5324

98 *Id.*

99 House Bill 5484; *see also* Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform, American Bankers Association (Sept. 11, 2001) (on file with author).

100 Recommendations for Bank Secrecy Act/Anti-Money Laundering Reform, American Bankers Association (Sept. 11, 2001) (on file with author).

> requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508—
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> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326, or to maintain a record required under any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508;
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> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326, or to maintain a record required under any regulation prescribed under section 5326, or to maintain a record required under any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91–508, that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions."[101]

At the time of the enactment of section 5324, structuring was never formally defined nor was there a criminal penalty provision.[102] Further, the prior version of section 5324 attached a "willful" requirement to a defendant's mental culpability.[103] After the enactment of section 5324 in 1986, there were several amendments made to the statute but none more significant than the one following the *Ratzlaf* case.[104]

D. The Influence of Ratzlaf v. United States on the Current Version of 31 U.S.C. § 5324

In *Ratzlaf*, the Court was faced with the question of whether "a defendant's purpose to circumvent a bank's reporting obligation suffice[s] to sustain a conviction for 'willfully violating' the anti-structuring provision?"[105] In a five-four decision, the Court in *Ratzlaf* held that "to

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101 31 U.S.C. § 5324(a)(1)-(4).

102 Villa, *supra* note 89, at 496; *see also* Linn, *supra* note 9, at 444.

103 Linn, *supra* note 9 at 440.

104 Linn, *supra* note 9, at 440-41.

105 Ratzlaf, 510 U.S. at 137.

give effect to the statutory 'willfulness' specification [in 31 U.S.C. § 5322], the Government [must] prove [that the defendant] knew that the structuring he undertook was unlawful."[106] Another interpretation of the Court's holding was that the government must prove both that the defendant knew of the bank's duty to report cash transactions exceeding $10,000 and that failure to do so was a crime.[107]

In *Ratzlaf*, the defendant attempted to evade the bank's reporting requirements by purchasing individual cashier's checks, each less than $10,000, from his total poker earnings of $100,000.[108] As a result, the defendant was charged with structuring in violation of the reporting provisions under 31 U.S.C. §§ 5322(a) and 5324(3).[109] On appeal to the Court, the defendant argued that he could not be convicted under the law's "willful" requirement because he was unaware that structuring was a crime.[110] The Court held even though the defendant admitted to structuring his cash transactions, congressional intent of "willfulness" mandated that the defendant's knew of the bank's reporting requirements and knew that structuring was a crime.[111] In concluding, the Court stated its decision does not "dishonor the venerable principle that ignorance of the law generally is no defense,"[112] but echoed that "had congress wished to dispense of the [willfulness] requirement" it would have done so.[113]

Congress reacted to the *Ratzlaf* decision quickly and within ten months Congress superseded the ruling by statute.[114] Congress amended section 5324 by deleting the statutory requirement of "willfulness" for all criminal prosecutions asserted under 31 U.S.C. § 5324.[115] Under what became known as the "Ratzlaf fix," prosecutors only have to prove that persons accused of structuring acted with the intent to evade the reporting requirements not that the person knew such requirements were a crime.[116]

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106 *Id.* at 138.

107 *Id.* at 142.

108 *Id.* at 137.

109 *Id.*

110 *Id.* at 138.

111 *Ratzlaf v. United States*, 510 U.S. 135, 146-47 (1994).

112 *Id.* at 149.

113 *Id.* at 146.

114 Linn, *supra* note 9, at 447.

115 *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, Sec. 411, 108 Stat. 2160, 2253 (amending Section 5324 to include its own criminal penalty provision, now codified at 31 U.S.C. § 5324(c)).

116 U.S. DEP'T. OF JUSTICE, CRIMINAL RESOURCE MANUAL 2001-2009 (2018); *see also* Linn, *supra* note 9, at 447 (First, Congress amended 31 U.S.C. § 5322 to add a clause exempting violations of § 5324 from that statute's reach. Second, Congress wrote a criminal penalty provision directly into § 5324 that omitted the willfulness requirement. Taken together, these amendments eliminated the basis on which the Supreme Court in Ratzlaf had

This helped clarified the intent question and we now turn to the issue of necessitating the minimum cash requirement in prosecutorial decision-making.

III. THE "CASH HOARD" DEFENSE AND ITS FAILED USES IN THE *SPERRAZZA* PREDECESSORS: *VAN ALLEN* AND *SWEENEY*

One way a prosecutor proves a defendant has structured funds is to show that the defendant had a cash hoard exceeding $10,000.[117] Typically in a case where the government prosecutes an individual who lacks the requisite $10,000 amount, the government usually proves intent based on either the pattern of deposits or with other evidence.[118] The "cash hoard" issue comes into play because the defendant usually argues that because they lack the minimum cash, the prosecution should be barred from pursuing a case against them.[119] In the structuring context, the rejection of the cash-hoard defense in *United States v. Van Allen* and *United States v. Sweeney* set the stage for a troubling rejection of the cash hoard defense in *United States v. Sperrazza*.

A. The Predecessors: United States v. Van Allen and United States v. Sweeney

In 2008, the Seventh Circuit Court of Appeals in *United States v. Van Allen* held there was sufficient evidence to find a defendant criminally liable for structuring under 31 U.S.C. § 5324 based on a pattern of deposits.[120] In *Van Allen*, the defendant was an auto-parts businessman who in a span of two years deposited more than 3,000 checks totaling over $5.8 million with none of the checks exceeding $10,000.[121] When questioned by the FBI, the defendant explained that his patterns of transactions were "to 'avoid the aggravation' of filing extra paperwork".[122] At some point prior to his indictment, the defendant filed for bankruptcy and failed to disclose many of his financial assets as well as the money earned by his auto-parts business during the two years he made the check

read the statute to require proof that a defendant knew structuring was a crime.).

117 Linn, *supra* note 9 at 462-63. *See, e.g.*, United States v. Davenport, 929 F. 2d 1169 (7th Cir. 1991).

118 *Id.* at 465-47; *see also* Courtney J. Linn, *United States v. Sperrazza: An Appropriate Use of Federal Asset Forfeiture as Criminal Punishment*, (March 18, 2016), https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/legalstudies/legalbackgrounder/031816LB_Linn.pdf

119 Blanch Law Firm, *supra* note 23.

120 United States v. Van Allen, 524 F.3d 814, 820 (7th Cir. 2008).

121 *Id.* at 818.

122 *Id.* at 817.

deposits.[123] The defendant was eventually indicted on several counts including violations of the anti-structuring provision under 31 U.S.C. § 5324(a)(3).[124]

The defendant made two arguments in his defense: lack of evidence by the government[125] and failure by the government to meet its burden of proof.[126] The defendant argued "the only method of proving structuring is to demonstrate[] that [he] held a unitary cash hoard [of] over $10,000."[127] In rejecting the defendant's argument, the court held that the regulations intended for any transaction seeking to evade CTRs would be a violation of the law regardless of whether it involved amounts over $10,000.[128] Though the court recognized its decision could punish small businesses dealing primarily in small amounts of cash under $10,000, the court fell short of accepting those repercussions.[129]

In 2010, two years after the *Van Allen* decision, the Eighth Circuit Court of Appeals considered a similar "cash hoard" argument by defendants in *United States v. Sweeney*.[130] In *Sweeney*, the Eighth Circuit held the defendants were criminally liable for structuring under 31 U.S.C. § 5324 because the defendants knew about the reporting requirements and acted in a way to evade those reporting requirements.[131] The indictment in *Sweeney* alleged that, in order to purchase a car, the defendant illegally structured $22,263.22 in cash by breaking up into varying amounts of $9,900 and other amounts less than the $10,000.[132] The car dealer and bank tellers testified at trial that the defendants knew of the reporting requirements.[133] The defendants were subsequently found guilty of structuring offenses relating to the car purchases.[134]

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123 *Id.* at 818.

124 *Id.*

125 *Id.* at 819.

126 United States v. Van Allen, 524 F.3d 814, 820 (7th Cir. 2008).

127 *Id.* ("Primarily relying on United States v. Davenport, 929 F.2d 1169 (7th Cir. 1991), [defendant] argues that the only method of proving structuring is to demonstrate that a defendant held a unitary cash hoard over $ 10,000 and then broke it up to deposit in amounts under $ 10,000.).

128 *Id.* at 821.

129 *Id.* (finding that because the defendant moved over $5 million in the two years which he could not prove a legitimate business purpose for, "the fear raised" by the defendant did not apply.).

130 United States v. Sweeney, 611 F.3d 459, 472 (8th Cir. 2010).

131 *Sweeney*, 611 F.3d at 472.

132 *Id.* at 464-65.

133 *Id.*at 465.

134 *Id.*

The defendants made two structuring related defenses.[135] First, the defendants argued the car purchase and bank withdrawal were not transactions recognized under the 31 U.S.C. § 5324(c)(3).[136] Second, the defendants argued "break[ing] up a single cash transaction" above the $10,000 reporting requirement "into two or more separate transactions" was the only way to charge defendants with a structuring violation.[137] Relying on *Van Allen*, defendants argued prosecutors failed to show that a single transaction that exceeded $10,000 was broken up into smaller amounts.[138] The Eight Circuit like *Van Allen* rejected the defendants' argument, holding that the cash hoard theory was a sufficient but not necessary ground for prosecution.[139] The court refused to narrowly interpret the statute citing the regulations' expansive interpretation just as *Van Allen* did.[140] The *Sweeney* court's rejection of the cash hoard argument seemingly set the stage for *United States v. Sperrazza* five years later in 2015.

B. United States v. Sperrazza: The Majority

In 2015, the Eleventh Circuit Court of Appeals affirmed a conviction on tax evasion and structuring and held the "government may properly charge a defendant with structuring a transaction" under 31 U.S.C. § 5324(a)(3) even if the defendant does not have more than $10,000."[141] In *Sperrazza*, the defendant as part of his practice outsourced his billing operations to a management firm.[142] In return, the firm collected payments from Dr. Sperrazza's patients and mailed Dr. Sperrazza checks every week.[143] Approximately every ten days Dr. Sperrazza cashed about twenty to fifty of these checks per visit.[144] The checks the defendant cashed often totaled more than $9,000 dollars but none ever exceeded $10,000.[145] After law enforcement searched defendant's home on an unrelated criminal investigation, an envelope labeled "clean" with about $24,000 in cash was

135 *Id.* 470-71.

136 United States v. Sweeney, 611 F.3d 459, 470-71 (8th Cir. 2010).

137 *Id.*

138 *Id.* at 471.

139 *Id.*

140 *Id.* ("The regulations explain that '[i]n any manner' includes, but is not limited to, the breaking down of a single sum of currency exceeding $ 10,000 into smaller sums . . . or the conduct of a transaction, or series of currency transactions, including transactions at or below $ 10,000.'").

141 United States v. Sperrazza, 804 F.3d 1113, 1125 (11th Cir. 2015).

142 *Sperrazza*, 804 F.3d at 1117.

143 *Id.*

144 *Id.*

145 *Id.*

discovered.[146] One of Dr. Sperrazza's partners also admitted that Dr. Sperrazza told them he never cashed checks more than $10,000 because he wanted to avoid reports and IRS authorities.[147] As a result, Dr. Sperrazza was convicted on five counts of tax evasion and structuring under 31 U.S.C. § 5324(a)(3).[148]

On appeal, the defendant made several arguments including that the structuring charges failed to state an offense and was therefore factually inaccurate.[149] Sperrazza, like the defendants in *Van Allen* and *Sweeney*, argued there was no violation of the statute because it does not "allege he has a 'cash hoard' in excess of $10,000."[150] The court rejected this argument and cited both *Van Allen* and *Sweeney,* reasoning that the cash-hoard requirement was not necessary to uphold a structuring conviction and that Dr. Sperrazza presented no contrary authority.[151]

Dr. Sperrazza's arguments were based on the *Ratzlaf* decision where the defendant there argued the need for a sum of money larger than $10,000 to be convicted of structuring.[152] Like *Sperrazza*, the *Ratzlaf* Court also rejected this argument.[153] The court also dismissed the dissent's argument, that there needs to be at least $10,000 for a structuring charge, and highlighted two hypotheticals to support their argument. The hypotheticals are as follows:

> First, consider 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; there can be no question the defendant may be charged with one count of structuring in violation of § 5324(a)(3). Second, consider the defendant who has checks totaling $9,000 and knows he will receive another bundle of checks totaling more than $1,000 tomorrow; in order to avoid the reporting requirement, he decides to cash the checks totaling $9,000 today. We think the Government may charge the defendant in the second example with one count

146 *Id.*

147 United States v. Sperrazza, 804 F.3d 1113, 1117 (11th Cir. 2015).

148 *Id.*

149 *Id.* at 1118.

150 *Id.* at 1121.

151 *Id.* at 1122 (citing United States v. Sweeney, 611 F.3d 459, 470 (8th Cir. 2010); United States v. Van Allen, 524 F.3d 814, 821 (7th Cir. 2008) the court noted "We have never held all the transactions that make up a single count of structuring must have originated from a single cash hoard, and Sperrazza has not pointed to any case endorsing that rule. To the contrary, two circuits have expressly rejected the contention.")).

152 *Id.* at 1123.

153 United States v. Sperrazza, 804 F.3d 1113, 1123 (11th Cir. 2015).

> of structuring even though he did not have more than $10,000 in hand at any one time.[154]

In the end, the majority dismissed the dissent's argument and held Dr. Sperrazza was still guilty of structuring.

C. United States v. Sperrazza: The Dissent

In *Sperrazza*, Judge Rosenbaum's dissent could be summed into one statement: the defendant needs to have control of at least $10,000 before a structuring charge can be brought under 31 U.S.C. § 5324(a)(3).[155] Though the dissenting opinion does ultimately agree with the majority's outcome, it does not agree with its reasoning.[156] The dissent argues the majority's decision punishes someone who "goes to the bank too often."[157] Judge Rosenbaum further states the implications of the majority's decision punishes someone for structuring no matter how small an amount of money that was controlled and this is not in line with congressional intent.[158] In the dissent, Judge Rosenbaum cites that neither congressional intent nor the regulations support the majority's opinion.[159] Judge Rosenbaum also declared that the *Van Allen* and *Sweeney* cases were unpersuasive.[160]

In arguing that the majority's decision deviates from congressional intent, Judge Rosenbaum concluded that the statutory language of the structuring statute warrants transactions greater than $10,000.[161] Using the Senate Report accompanying the Money Laundering Control Act of 1986, Judge Rosenbaum maintained that there was no intention to include transactions not totaling $10,000.[162] Ultimately Judge Rosenbaum completed her congressional intent analysis by highlighting that the commentary surrounding the statute clearly does not aim to punish

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154 *Id.* at 1124 (explaining that the dissent's argument that the defendant needs "control" of at least $10,000 was errant).

155 *Id.*

156 *Id.* at 1136 (Though I respectfully disagree with the Court's broad construction of § 5324(a)(3), I agree with the Court that the government nonetheless presented sufficient evidence to sustain a structuring conviction in this case under the definition of "structuring" that Congress intended. In fact, I would uphold conviction on two counts of structuring.).

157 *Id.* at 1129.

158 *Id.* (As a result of today's ruling, in this Circuit, no matter how small a sum of money a person may possess or otherwise enjoy a right to control—even if only a few dollars—he may find himself facing structuring charges if he goes to the bank often enough to create the appearance to the government of engaging in a pattern of financial transactions of $10,000 or less. I suppose that we will discover in the coming years how frequent a bank visitor one must be to imperil himself, but, in any case, it is clear today that § 5324(a)(3) has taken on a far broader reach than Congress ever intended.).

159 United States v. Sperrazza, 804 F.3d 1113, 1129-32 (11th Cir. 2015).

160 *Id.* at 1134.

161 *Id.* at 1130.

162 *Id.* at 1131 (citing S. REP. NO. 99-433, at 22 (1986)).

someone who does not control at least $10,000.[163]

In examining whether the regulations supported the majority, Judge Rosenbaum echoed the commentary of the Department of Treasury regulation.[164] The dissent noted the statute was intended to address two issues: (1) financial institutions must report transactions involving at least $10,000 and (2) there to be a reportable sum of money.[165] Judge Rosenbaum's critique here characterizes the majority's interpretation as overly broad and explains that the majority's reading of the statute conflicts with congressional intent.[166] In assessing *Van Allen* and *Sweeney*, Judge Rosenbaum expresses that neither of those decisions engaged in a deep analysis of statutory language or congressional intent but merely predicated their decisions on a statutory interpretation those courts developed themselves.[167]

IV. ANALYSIS AND RECOMMENDATIONS

This section of the comment explains why the *Sperrazza* dissent accurately addresses the cash-hoard issue and analyzes the majority's errant conclusion. This section also highlights how the Sperrazza decision implicates the rule of lenity, the decision's policy implications, the need for legislative action in addressing the issue, and recommendations for change.

A. The Plain Language, Congressional Intent, and Rule of Lenity

The majority's decision in *Sperrazza* was in error because the statutory language is ambiguous. Accepting that the language is ambiguous, congressional intent necessitates a finding that a defendant be in control of the requisite $10,000 minimum.

1. The Statutory Language is Ambiguous

The majority deviates from the plain language of the statute and regulations because both sources consistently have the $10,000 requirement within its text. The plain language rule allows consultation with extratextual sources only after a court has determined the statutory language is ambiguous.[168] If the meaning of the text is plain, then no

163 *Id.*

164 *Id.* at 1133.

165 United States v. Sperrazza, 804 F.3d 1113, 1133 (11th Cir. 2015).

166 *Id.* at 1134.

167 *Id.*

168 Matthew J. Hertko, *Statutory Interpretation in Illinois: Abandoning the Plain Meaning Rule for an Extratextual Approach*, 2005 U. ILL. L. REV. 377, 379 (2005).

outside information is allowed.[169] Even the Court in *Tennessee Valley Authority v. Hill,* has stated "when confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history to guide its meaning."[170] Often the rule is invoked when courts want to prohibit reliance on a specific type of outside source.[171] These outside sources include legislative history, policy considerations, practice, and other substantive cannons.[172] The plain language rule does not categorically aim to excuse the use of outside sources, but rather to make these sources irrelevant because the statute's language is plain.[173]

Using the principles from statutory interpretation, the structuring statute will be analyzed. The pertinent part the structuring provision under the regulation states structuring involves but is not 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. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution any single day in order to constitute structuring within the meaning of this definition.[174]

The $10,000 requirement is seen four times in the short provision of the regulations discussing what structuring means.[175] The statutory provision under 31 U.S.C. section 5324 does not specify a dollar amount needed to structure.[176] The language of the statute under subsection (a)(3) states it is a crime to "structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions," providing no guidance of whether the individual must possess the $10,000 requirement. [177]

The definitional provision under 31 U.S.C. section 5312 also does not provide guidance as to whether an individual needs to have control of at least $10,000 as a condition for structuring, thereby making the language of the statute even more ambiguous.[178] The only mention of any dollar

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169 William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 540 (2017).

170 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 n. 29 (1978).

171 Baude, *supra* note 169, at 543.

172 Baude, *supra* note 169 at 543–46.

173 Baude, *supra* note 169 at 545.

174 31 C.F.R. § 1010.100 (2018); *see also* 31. U.S.C. § 5324(a).

175 *See Id.* 31 C.F.R. § 1010.100 (2018).

176 31 U.S.C. § 53249(a).

177 *Id.*

178 31 U.S.C. § 5312.

amount under the definitional section pertains to requiring casinos with a revenue of more than $1,000,000 to file transaction reports.[179] A further analysis of the statute shows it is subject to differing interpretations.[180] On one hand, the consistent mention of $10,000 throughout the language of the regulation strongly suggests it is a requirement, especially considering the "exceeding $10,000" language.[181] On the other hand, the words "but is not limited to" also suggest that the individual may not necessarily be required to have at least $10,000 in hand when structuring.[182] The prefatory term "but is not limited to" typically means a list of non-exhaustive examples[183] so it is entirely possible that the $10,000 requirement is not mandatory. These two possible interpretations strongly suggest that the statute may be ambiguous, and though the dissent never expressly says so, it can be inferred from that opinion.[184]

The dissent argues the breaking down or "split[ing] up" requirements of the statute mean the individual must possess an amount greater than or at least $10,000.[185] The dissent used the dictionary definition of "splitting up" to argue that the person needs to have control of more than $10,000 before one can structure the transaction in the legal sense.[186] The dissent notes the minimum $10,000 cash requirement is embedded in the statute as the statute also requires that there is at least $10,000.01 before a bank must file a transaction report.[187] Though the dissent's conclusion and reasoning are sound, the dissent at times over-relies on congressional intent without clearly expressing what that intent is.[188]

2. Congressional Intent is Needed

The dissent expressed that Congress did not intend for the anti-structuring statute to cover transactions where the person did not control at least $10,000.[189] In examining congressional intent, the dissent highlighted

179 *Id.*

180 31 C.F.R. § 101.100 (2018).

181 *Id.*

182 *Id.*

183 Ken Adams, *An Update on "Including But Not Limited To"*, Adams on Contract Drafting, (Sep. 14. 2015), https://www.adamsdrafting.com/an-update-on-including-but-not-limited-to/.

184 United States v. Sperrazza, 804 F.3d 1113, 1130 (11th Cir. 2015).

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.* at 1131 (dissent notes "[E]ven to the extent that § 5324(c)(3) may be viewed as ambiguous . . . the legislative intent is perfectly clear.").

189 *Sperrazza*, 804 F.3d at 1130 ("I respectfully disagree with the Majority's approach. This interpretation does not account for the phrase splitting up an amount of currency that would not be reportable if the full amount were involved in a single transaction[.] . . . The

an example discussed by the Senate report discussing that a person who converted $18,000 into smaller amounts will be guilty of structuring, suggesting that the person needs possession of more than $10,000.[190] The dissent also notes the example in the Senate report where a person who breaks down $2,000 into four transactions of $500 was not subject to liability under the law, thereby bolstering the $10,000 possession argument.[191] Primarily, the dissent here argues the $10,000 requirement is needed at the outset of the conduct not at the endpoint as the majority errantly held.[192]

The commentary from the Senate report also strongly suggests that Congress intended that before a person be charged with structuring, the person must have control of at least $10,000.[193] Remarks from Mr. Keating II, then Assistant Secretary of Enforcement at the Department of Treasury notes that "this bill would prohibit structuring of currency transactions to avoid the $10,000 currency transactions reporting requirement."[194] The Assistant Secretary even reported that he would not favor lowering the $10,000 limit for filing CTRs.[195] The commentary alone seems insufficient to reach the conclusion that an individual needs control of the $10,000 minimum requirement. However, when coupled with the Senate Report cited in *Sperrazza's* dissent, it can be reasonably inferred that without the $10,000 requirement there is no prosecution possible.[196]

phrase lays bare congressional intent that a person necessarily controls a hoard of more than $10,000 before she can structure transactions. To "split" means "[t]o separate . . .; disunite." . . . A person cannot disunite something that does not yet exist. Instead, as the two examples in the commentary illustrate—one involving the splitting up of $18,000 into two transactions of $9,000 each and the other involving the splitting up of $2,000 into four transactions of $500 each—a united whole must first exist before it can be disunited. We are not at liberty to construe the statute more broadly than it was written and then we know Congress intended. But that is what the Court's opinion does today in holding that a person may violate , even if he lacks control over more than $10,000."). Judge Rosenbaum in her dissent argued that Congress did not intend for the anti-structuring statute to cover transactions where the person did not have control of at least $10,000.

190 United States v. Sperrazza, 804 F.3d 1113, 1131 (11th Cir. 2015).

191 *Id.* (citing S. Rep. No. 99-433, 22 (1986).

192 *Id.*

193 *Id.*

194 Assistant Secretary Keating II commented that the bill would specifically prohibit structuring transactions to avoid the $10,000 reporting requirement, *The Drug Money Seizure Act and The Bank Secrecy Act Amendments: Hearing Before The Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 2d Sess. 17 (1986).

195 *Id.* (noting that Assistant Treasury Secretary John K. Walker, Jr. and Assistant Secretary Francis A. Keating II reported to Congress that they would not favor lowering the $10,000 but rather would urge compliance with existing laws and regulations to encourage coordination between the government and financial institutions).

196 *Sperrazza*, 804 F.3d at 1132.

3. Rule of Lenity Favors the $10,000 Requirement

The rule of lenity allows an ambiguous criminal statute to be read in favor of the defendant.[197] The rule rests on various assumptions: (1) only Congress may legitimately define crime; (2) there is a fair warning requirement of legal or illegal behavior an accused must know before the accused may be criminally punished; and, (3) criminal statutes should be construed narrowly to counter risks of prosecutorial overreach.[198] The late Justice Scalia described the rule of lenity arising when there is a tie in the interpretation of an ambiguous criminal statute, the defendant must win that tie.[199] Justice Scalia argued Due Process would prohibit holding citizens accountable for violating a statute "whose commands are uncertain or subjected to punishment that is not clearly prescribed."[200]

i. Brief History on Lenity

The rule of lenity originates in old English criminal law which shielded clergy members from criminal liability.[201] During the middle ages, it was known as the "benefit of clergy" rule, because clergymen were afforded certain benefits.[202] For example, it allowed clergymen to avoid the death penalty.[203] By the end of the thirteenth century the rule applied to all major crimes not only felonies.[204] Over the next two centuries, the rule not only benefitted clergy but also benefited any individual who could read.[205] Given the severity of the death penalty for petty crimes and its effect on

197 Bouvier Law Dictionary Lenity (Rule of Lenity).

198 Sanford Greenberg, *Who Says It's a Crime?: Chevron Deference to Agency Interpretations of Regulatory Statutes that Creates Criminal Liability*, 58 U. PITT. L. REV. 1, 3; 15 (1996) ("The lenity doctrine has a three-part rationale: legislative supremacy, the idea that only Congress has the authority to define behavior subject to criminal sanction; fair warning; and separation of powers.").

199 This case, now overturned by statute, presented to the Court about whether the word "proceeds" in the Money Laundering Control Act or 18 U.S.C. § 1956 should be interpreted broadly to mean "receipts". While the plurality opinion by Justice Scalia stated it did, Congress shortly amended the statute in 2009 to define proceeds as "gross receipts". The Santos case will be used solely to highlight Justice Scalia's definition and discussion of the rule of lenity not to discuss the majority's decision; United States v. Santos, 553 U.S. 507, 514 (2008).

200 *Id.*

201 Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 514-15 (2002).

202 *Id.* at 514.

203 *Id.* at 515 (discussing that all felonies in the Middle Ages were punishable by death.).

204 *Id.*

205 *Id.*

petty criminals, judges narrowly construed criminal statutes.[206] It is worth noting that the rule's past application in earlier British time was limited to sentencing, but its application in American tradition was much broader.[207]

In America, the rule was first invoked in *United States v. Sheldon* where the Court refused to apply a statute criminalizing the transportation of articles of provision from United States to Canada to a defendant who herded oxen.[208] The Court in *Sheldon* warned against interpreting criminal law by equity so as to extend it to cases that are not within the statute's ordinary meaning.[209] Three years later the Court invoked the lenity rule in concluding that a federal manslaughter statute for killing on the high seas does not apply to a defendant who killed someone while on a river.[210] Even though the Court invoked the rule in these cases, there was no clear evidence demanding the rule's application in sentencing case as there was in ancient England.[211] However, things changed following the 1950s when the Court started to invoke the rule in a sentencing context.[212] One of these cases involved the Fair Labor Standards Act where the Court interpreted this statute to impose penalties for individuals' entire conduct not just penalties for each violation of the statute.[213] The most vibrant invocation of the rule to sentencing cases was the *United States v. R.L.C.* case where the Court needed to determine whether a juvenile should be sentenced under the statutory maximum or under the sentencing guidelines maximum.[214] In holding that the sentencing guidelines penalty applies, the Court held that the "rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing."[215]

ii. Recent SCOTUS take on Lenity

Even in recent years the Supreme Court continues to apply rule of lenity, indicating the rule's continued significance and acceptance as a tool for interpretation. For example, the rule of lenity has been invoked under the Armed Career Criminal Act which states that a defendant convicted of being a felon in possession of a firearm will face a minimum fifteen year term if they have three or more previous state or federal convictions for a

206 *Id.* at 518.
207 Spector *supra* note 201, at 518.
208 United States v. Sheldon, 15 U.S. 119, 121 (1817).
209 *Id.*
210 United States v. Wiltberger, 18 U.S. 76, 93 (1820).
211 Spector, *supra* note 201, at 526.
212 *Id.* at 527.
213 United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).
214 United States v. R. L. C., 503 U.S. 291, 294-96 (1992).
215 *Id.* at 309.

violent felony or serious drug offense.[216] In 2007 and 2008, the Court invoked the rule of lenity to eliminate a possible statutory construction of the "residual clause" of the Armed Career Criminal Act's sentencing enhancement for certain gun crimes.[217] In *James v. United States*, the Court held that attempted burglary as defined under Florida law was a violent felony for purposes of the ACCA.[218] In *Begay v. United States*, the Court held that driving under the influence was a not a "violent felony" for purposes of the ACCA.[219]

Even a few terms ago, the Court considered statutory interpretation questions where they did not expressly mention the rule of lenity, but it discussed the implications of lenity raising concerns about prosecutorial overreach as well examining whether the statutes had legislative support.[220] In *McDonnell v. United States*,[221] the Court unanimously held that a governor does commit an "official act" for purposes of a federal bribery statute even though the governor accepted loans and gifts, attended meetings, hosted events, arranged meetings, and contacted officials. These recent lines of cases show at the very least the Court invokes the rule of lenity, examines its effects on ambiguous statutes, and is concerned about the lenity implications.

iii. The Rule of Lenity in Sperrazza

In *Sperrazza*, the dissent argued that the rule of lenity does not tolerate the majority's interpretation of section 5324(a)(3) of the Bank Secrecy Act.[222] The dissent argued the rule of lenity should apply favoring the defendant.[223] The dissent notes in the presence of two interpretations, one harsh and the other lenient, the rule of lenity should govern unless Congress is clear.[224] Ultimately, the dissent concluded the statute covers only those transactions that originate from the defendant's control of funds exceeding $10,000.[225] Since the language of the statute is ambiguous, application of the rule of lenity warrants reading the statute with leniency

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216 Armed Career Criminal Act, 18 U.S.C § 924(e) (1984).

217 These two decisions have now been overturned but their lenity analysis remains intact. *See*, James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008).

218 *James*, 550 U.S. at 214.

219 *Begay*, 553 U.S. at 154.

220 Zachary Price, *The Court after Scalia: The Rule of Lenity*, SCOTUSblog, (Sept. 2, 2016), https://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/

221 McDonnell v. United States, 136 S. Ct. 2355 (2016).

222 *Sperrazza*, 804 F. 3d at 1136.

223 *Id*.

224 *Id.*

225 *Id*.

in favor of defendants.[226]

iv. Lenity Implications?

In *Sperrazza*, the rule of lenity may not have been helpful because there was other evidence sufficient to find Dr. Sperrazza guilty of structuring as the dissent rightfully concludes.[227] However, if one were dealing with a defendant in a case where there was significantly less evidence of structuring, the doctrine of lenity brings several concerns to the forefront.[228] For example, there is the possibility prosecutors unfairly elect to enforce criminal laws with an ambiguous statute such as section 5324.[229] Invoking the rule also helps ensure accountability for prosecutor's charging decisions.[230] Invoking the rule could allow charging decisions to be reviewed more easily based on the specific definition as opposed to an ambiguous one.[231] Another way lenity will affect charging decisions is it will make the true nature of the crime facially apparent rather than burying some details in the conviction or plea agreement.[232] Lenity also helps ensure there is a general support for a criminal statute that is being enforced.[233] The rule ensures lawmakers will be held accountable by exposing them to either ridicule, critic, or resistance from the law they enact; they cannot hide from public pressure by constructing a vague statute.[234]

B. The Policy Implications of the Sperrazza Majority's Not so Plain Meaning Interpretation

One of the major policy implications of the *Sperrazza* decision is prosecutorial overreach.[235] Structuring charges are usually criticized as opening the door to prosecutorial overreach.[236] In cases where the

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226 *Id.*

227 *Id*.

228 Greenberg, *supra* note 198, at 19.

229 Greenberg, *supra* note 198, at 19; *see* 31 U.S.C. § 5324.

230 Zachary Price, *The Rule of Lenity As A Rule of Structure*, 72 FORDHAM L. REV. 885, 940 (2004).

231 Price, *supra* note 230, at 940.

232 Zachary Price, *The Court after Scalia: The Rule of Lenity*, SCOTUSblog, (Sept. 2, 2016), https://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/

233 *Id.*

234 Price, *supra* note 230, at 911.

235 Stewart Bishop, *High Court Passes on Fla. Doc's Deposit Structuring Appeal*, LAW360, (June 13, 2016), https://www.law360.com/articles/806449/high-court-passes-on-fla-doc-s-deposit-structuring-appeal.

236 Post, *supra* note 8.

defendant does not have the requisite cash hoard, two issues arise.[237] First, the government must primarily rely on a pattern of deposits which is not always reliable to show criminal intent.[238] In other words, if the government solely relies on a pattern of transaction, this could capture individuals who structure but lack the criminal intent.[239] For cases involving actors with a pattern of transactions resembling structuring, a thin line between determining innocuous or felonious activity develops.[240]

Even though the *Sperrazza* majority highlighted the "innocent actor" implication, the court in error suggested an innocent actor would not be subject to criminal liability under its ruling.[241] The court on this point reasoned an innocent actor lacks the criminal intent needed, but does not explain how that relieves them from being implicated within the statute.[242] The court's conclusion is not entirely true because to determine intent, the government may need to show either direct evidence such there was in *Sperrazza* or circumstantial evidence, which could be a pattern of deposits. If the government uses solely a pattern of circumstantial evidence, then the innocent actors described in *Sperrazza* could be implicated as well.

C. Why the Legislature is More Apt at Addressing the Cash Hoard Defense

The legislature may be more apt at addressing the cash hoard defense issue in *Sperrazza* as the Supreme Court has denied certiorari of *Sperrazza's* appeal.[243] In an opposition brief by the United States Government, then Solicitor General Donald Verrilli argued that based on precedent from other appellate courts addressing the cash hoard defense, the *Sperrazza* decision was in line.[244] In other words, the government

237 Linn, *supra* note 9, at 465.

238 *Id.*

239 *Id.*

240 Balko, *supra* note 32.

241 *Sperrazza*, 804 F.3d at 1124.

242 *Id.*

243 Bishop, *supra* note 235.

244 Brief for the United States in Opposition at 12, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, United States v. Sperrazza, 804 F. 3d 1113 (2016) (No. 15-966). Then Solicitor General Donald Verrilli made several arguments including that this case and appeal were a 1) "particularly poor vehicle for addressing petitioner's claim because, . . . [the] 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'" 2) That "petitioner [did not] claim that such a "cash hoard" requirement exist[ed]" and 3) "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

argued because there was no circuit split on the issue, the Court did not need to address it and thereby should deny Sperrazza's petition for certiorari.[245]

Based on the Court's decision to deny certiorari, it seems the Court has no interest at least for now to address whether an individual who never possesses more than $10,000 could be charged with structuring under 31 U.S.C. 5324 absent direct evidence of intent.[246] Therefore, the legislature is the next logical actor for the issue. A few years ago Senators Feinstein and Grassley proposed a bill titled: Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017.[247] Though the bill does not address the cash hoard defense, it addresses other structuring provisions within the BSA.[248] The attempt by these Senators suggests that there could be bi-partisan efforts to address money laundering issues including the minimum cash requirement issue. Therefore, the Court's denial of certiorari implicitly shows the Court's unwillingness to address the cash hoard issue while the bi-partisan efforts in Congress shows Congress' willingness to make some substantive changes.

D. Recommendations

The ambiguity currently within the statute could be fixed by defining key statutory provisions and rewriting or rephrasing some wording within the statute. Unfortunately, similar state statutes provide no help. Below, the necessary recommendations to the statute will be expressed including how the statute should look given all of the concerns highlighted in previous sections of this comment.

1. Possession Defined

First, the word possess must be defined. The statute in its current form does not define possession or control. Therefore, dictionary definitions and other criminal statutory provisions will inform on how to define these terms. Possession means:

> Detention and control, or the manual or ideal custody, of any- thing which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place

regulatory or IRS authorities.'" (citing Pet. App. 3a.).

245 *Id.*

246 *Id.*

247 Combating Money Laundering, Terrorist Financing, and Counterfeiting Act of 2017, S. 1241, 115th Cong. (2017).

248 *Id.*

and name.[249]

In the context of criminal law, possession can be either actual or constructive possession.[250] Actual possession means that an individual has immediate and direct physical control over the item or property.[251] With the revised suggestion, in the context of the structuring provision, the individual would need to be in either physical possession of the required $10,000 or have at least $10,000 in that individual's bank account which is then withdrawn and broken up into smaller amounts to structure. Constructive possession involves a situation where the individual does not have direct possession of the item or property but has the intent and ability to control such item.[252]

Applying the structuring provision, the individual will need to have the intent and ability to control the required $10,000, though direct possession of the funds is not necessary. For example, if the individual orders an agent, be it a lawyer or financial advisor, to take the required $10,000 and break it into smaller chunks, then the individual will also be culpable. The issue of whether the $10,000 must be cash or securities will not be addressed because the definitional section of the statute provides what is a monetary instrument.[253]

2. The Fixer

Second, we must addressed which branch of government is in the best position to amend the statute or at least provide immediate clarity. Typically Congress makes necessary amendments to statutes.[254] However, the Court and government agencies can also provide guidance in interpretations which may be useful while congressional action awaits.[255] A key solution is to amend the statute to read that one could only be charged

[249] *Possession*, Black's Law Dictionary (5th ed. 2016).

[250] Umansky Law Firm, *Court Upholds Questionable Interpretation of Constructive Possession*, https://www.thelawman.net/Press-Room/Court-Upholds-Questionable-Interpretation-of-Constructive-Possession/ (last visited Mar. 8, 2019).

[251] *Id.*

[252] *Id.*

[253] *See* 31 U.S.C. § 5312 (defining monetary instruments as "(A)United States coins and currency; (B)as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; and (C)as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form.")

[254] The White House, *The Legislative Branch*, https://www.whitehouse.gov/about-the-white-house/the-legislative-branch/ (last visited Apr. 5, 2019) (discussing the role of Congress in American law).

[255] Supreme Court of the United States, *The Court and Constitutional Interpretation*, https://www.supremecourt.gov/about/constitutional.aspx (last visited Apr. 5, 2019).

with structuring if he or she possesses the required $10,000. Since legislative enactment is usually a process that is not immediate, in the interim the Department of Justice could release an opinion letter or advisory opinion. Assuming the first two solutions fail, bringing a test case to a lower court may also be a potential avenue to address the issue.[256]

3. The Old and Improved

The statutory provision relating to the $10,000 requirement in its present form reads—

> 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. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution any single day in order to constitute structuring within the meaning of this definition.[257]

The statute in its ideal form will read—

> An individual is guilty of structuring if the individual possesses and splits up the requisite $10,000 in monetary instruments as defined by 31 U.S.C. § 5312 of this chapter, into smaller amounts at the onset, with the intent to cause or attempt to cause a financial institution to fail to file a currency transaction report, though the individual does not need to know the consequences of the financial institution's failure. The transaction need not exceed the $10,000 reporting threshold at any single financial institution any single day in order to constitute structuring within the meaning of this definition. In a case where the individual does not have the requisite $10,000, direct evidence must be provided to show the individual acted with the intent to cause or attempt to cause the financial institution to fail to file the currency transaction report.

Therefore, the revised statute would ensure prosecutors will not solely

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[256] Govtrack, *Statistics and Historical Comparison*, https://www.govtrack.us/congress/bills/statistics (last visited Apr. 5, 2019) (highlighting statistics of congressional legislation introduced versus those enacted dating back to 1974).

[257] 31 U.S.C. § 5234.

rely on a pattern of transactions to prosecute cases where the defendant does not have the minimum cash requirement.

4. No Help from the States

Examining current state structuring statutes as a model for the federal statute is not helpful because the state structuring laws are a replica of federal law. For example, in New Jersey the structuring statute makes no mention of a monetary amount or whether an individual need to have control of at least $10,000.[258] A reading of the New Jersey law shows that it is almost a verbatim adoption of the federal language, so it seems that looking to states, at least New Jersey will not be of much help.[259]

5. New Law to Sperrazza Facts

Would Dr. Sperrazza have been guilty under the suggested statute? Based on the new law, Dr. Sperrazza would be still be guilty for several reasons. First, Dr. Sperrazza has immediate physical control over the requisite $10,000 with the intent to structure the checks to evade taxes. Even if Dr. Sperrazza's argues he did not have direct possession because an outside firm handled the funds, Dr. Sperrazza still had the requisite constructive possession.[260] Further, checks are monetary instruments by the statute's definitional section so any argument to the contrary would be errant.[261] Applying to suggested statute to the Sperrazza facts though there is no evidence Mr. Sperrazza's transaction exceeded the requisite $10,000 at any single time, there will be sufficient direct evidence to find Dr. Sperrazza culpable under the new statute. One piece of evidence was the envelope in his home found by law enforcement labeled "clean" cash totaling $24,000. Another piece of evidence was the testimony of Sperrazza's partner expressing that the doctor structured to avoid reports and IRS authorities. Therefore, even under the revised statute Dr. Sperrazza would be guilty.

V. CONCLUSION

Although the current language of the statute is ambiguous, congressional intent and rules of statutory interpretation suggests that an individual need to be in control of at least $10,000 to be charged with structuring. The Eleventh Circuit's decision in *Sperrazza*, rejecting this proposition, sweeps innocent individuals who neither intend to violate the statute nor attempt to hide any underlying criminal conduct. The Court's

258 N.J. STAT. ANN. Section 2C:21-25.
259 *Id.*
260 *Sperrazza*, 804 F.3d at 1117.
261 31 U.S.C. § 5312.

decision to errantly deny certiorari does not help answer this pending question of whether an individual could be charged for structuring solely based on a pattern of transactions when they lack the requisite $10,000 statutory requirement. Since there is judicial silence on this issue, the burden should now fall on Congress to attempt to provide an answer. While not every individual who structures money and possesses less than the $10,000 requirement is innocent, the chances of innocent individuals being punished are too great. There soon needs to clear action from either the legislative or judicial branch. If not, a restaurant owner who goes to the bank every week to deposit $9,000 dollars to avoid carrying copious amounts of cash and to avoid robbers could be guilty of a crime absent greater evidence of intent. Even a bartender who makes about $2,000-$2,500 a week in tip but never over $10,000 a month could also be guilty of a crime. Our system of criminal justice hopefully cares enough to prevent such charges and convictions.