



UNITED STATES V. SPERRAZZA: AN APPROPRIATE USE OF FEDERAL ASSET FORFEITURE AS CRIMINAL PUNISHMENT

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The U.S. Court of Appeals for the Eleventh Circuit's decision in *United States v. Sperrazza* is the most recent in a line of federal circuit court decisions to reject the contention that the government must prove the existence of a "cash hoard" to sustain a structuring prosecution.¹ In an opinion authored by D.C. Circuit Judge Douglas H. Ginsburg, who was sitting by designation, *Sperrazza* affirmed the conviction of an anesthesiologist on three counts of tax evasion, in violation of 26 U.S.C. § 7201, and two counts of structuring currency transactions, in violation of 31 U.S.C. § 5324(a)(3).² While this case implicates thorny asset-forfeiture questions, the result reached here should not trouble civil libertarians who are concerned by abuses in other cases.

The Bank Secrecy Act and its implementing regulations require financial institutions to report large currency transactions. Congress concluded these reports—known as Currency Transaction Reports (CTRs)—would be valuable to law enforcement in detecting crimes, including tax evasion.³ To evade the filing of these reports, transactors sometimes "structure" their currency transactions, an activity that is itself a crime.

Precisely what it means to "structure" has proved difficult to define. In *Ratzlaf v. United States*, the U.S. Supreme Court described the crime of "structuring" as the breaking up of a single transaction above the CTR threshold into two or more separate transactions for the purpose of evading a financial institution's reporting requirement.⁴ Guided by *Ratzlaf*, the government often proves a structuring charge by showing the defendant possessed a "cash hoard" in an amount greater than the \$10,000 CTR threshold, and then purposefully broke it down into two or more financial transactions conducted at a domestic financial institution with the purpose of avoiding the filing of a CTR.

Absent proof of the cash hoard above the statutory limit, the government risks mischaracterizing a currency transaction that is perfectly lawful as "structuring." Consider, for example, the small business owner who repeatedly avoids accumulating more than \$10,000 in cash at her business for fear of being robbed. When the business owner makes repeated high-dollar currency deposits the activity may look like

¹ *United States v. Sperrazza*, 804 F.3d 1113 (11th Cir. 2015); see also *United States v. Van Allen*, 524 F.3d 814, 820-21 (7th Cir. 2008); *United States v. Sweeney*, 611 F.3d 459, 471 (8th Cir. 2010).

² *Sperrazza*, 804 F.3d at 1128-29.

³ See *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 26 n.1 (1974).

⁴ See *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

structuring, but that is not in fact the business owner's purpose. Her purpose is to reduce the risk of robbery. That is not a crime; it is good sense.⁵

Dr. Robert B. Sperrazza regularly cashed checks his outside billing firm had received from patients and insurance companies.⁶ The bundle of checks he received from the billing firm usually totaled several thousand dollars and on at least one occasion the checks totaled more than \$10,000.⁷ Approximately every ten days Dr. Sperrazza took the checks to the bank, ordinarily between 20 to 50 checks per visit. In aggregate, the checks often totaled more than \$9,000 but never exceeded \$10,000. His intent was clear. According to one of the partners in his medical practice, Dr. Sperrazza had said he never cashed checks totaling more than \$10,000 at one time because he wanted "to avoid any reports or anything" What Dr. Sperrazza wanted, specifically, was to avoid IRS scrutiny.⁸ As the case illustrates, a person's motive for structuring cash transactions is often linked to tax evasion.

Despite strong evidence of intent and motive, the prosecution lacked evidence of a cash hoard. Except perhaps in one instance where Dr. Sperrazza accumulated more than \$10,000 in checks, he never had a hoard of checks to cash at any one time. Absent evidence of a cash hoard, the government struggled in the trial court to identify the proper unit of prosecution. It ended up defaulting to a calendar year unit of prosecution, charging one structuring count that included sub-\$10,000 transactions in 2007, and a second count that included similar transactions in 2008, totaling \$870,228.99 in structured currency transactions.⁹

On appeal from his conviction, Dr. Sperrazza argued that the indictment failed to charge him with structuring because it did not allege he possessed a "cash hoard." The government answered that it does not need to prove the defendant broke up a cash hoard into sub-\$10,000 amounts. Treasury regulations define structuring to include a "transaction, or series of currency transactions at or below \$10,000."¹⁰ A single cash transaction below \$10,000 cannot constitute structuring.¹¹ But a series or pattern of such transactions can constitute structuring even in the absence of proof that the defendant possessed a cash hoard at any given time. A divided panel of the Eleventh Circuit agreed:

[C]onsider 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 ... with one count of structuring even though he did not have more than \$10,000 in hand at any one time.¹²

The court of appeals also upheld an \$870,228.99 forfeiture order—a sum of money equal to the total amount of money involved in the structuring conduct. Dr. Sperrazza argued that the forfeiture of such a large sum was constitutionally excessive. The argument has some intuitive appeal. In *United States*

⁵ See *Ratzlaf*, 510 U.S. at 155 n.6 (Blackmun, J., dissenting); see also *United States v. Van Allen*, 524 F.3d 814, 821 (7th Cir. 2008) (suggesting that if there was some business reason for conducting a large cash transaction below the CTR threshold, the court would be sympathetic to evidence of such a defense).

⁶ *Id.* at 1117.

⁷ *Ibid.*

⁸ *Id.* at 1118. The government does not need evidence of a bad motive to prove structuring. But evidence of motive supplies the reason to structure, and thus provides powerful indirect evidence of specific intent. See, e.g., *United States v. Davenport*, 929 F.2d 1169, 1173-74 (7th Cir. 1991) (discussing relevance of tax-evasion motive in a structuring prosecution).

⁹ *Sperrazza*, 804 F.3d at 1117.

¹⁰ 31 C.F.R. § 1010.100.

¹¹ *Sperrazza*, 804 F.3d at 1123-24.

¹² *Id.* at 1113.

v. Bajakajian,¹³ the Court held that a forfeiture based on an analogous currency-reporting offense was constitutionally excessive. The *Sperrazza* court distinguished *Bajakajian*. Unlike the defendant in *Bajakajian* whose simple failure to file a Currency Monetary Instrument Report (CMIR) did not implicate the purposes of the CMIR statute, Dr. Sperrazza's conduct fell within the heartland of the CTR statute's purpose.¹⁴ The CTR requirement has existed in some form for years and from its inception has been justified by Congress as a means to identify tax evaders. Dr. Sperrazza was a tax evader. In fact, Dr. Sperrazza's conduct involved so much money over a relatively short time frame that it triggered enhanced statutory penalties for aggravated structuring.¹⁵

Dr. Sperrazza has filed a petition for certiorari from these and other aspects of the Eleventh Circuit's decision, and the government's response to that petition is now on April 29, 2016. Critics of the government's use of the anti-structuring and asset forfeiture laws may point to the case as an example of government overreaching. As the defendant argued before the Eleventh Circuit, the indictment comes close to criminalizing "going to the bank too often."

And, as the dissenting judge pointed out, the majority opinion increases the risk that a person may be wrongly prosecuted based on what appears to be a pattern of structuring transactions when in fact the person had no intent to avoid the CTR. It is also legitimate to raise concerns about the potential excessiveness of the forfeiture. It is a large amount of money to forfeit for a regulatory offense where the underlying funds were derived by lawful means.

But although these are all reasonable arguments to raise, the *Sperrazza* case may be a bad vehicle for raising them. The evidence of the defendant's intent and motive to structure places his conduct at the center of what Congress sought to criminalize when it enacted the anti-structuring statute, § 5324(a)(3). Dr. Sperrazza engaged in a series of transactions just below the \$10,000 CTR threshold with the clear purpose of avoiding the filing of CTRs.

He is not like the hypothetical restaurant owner who avoids accumulating more than \$10,000 in cash to mitigate the risk of robbery. He is not even in a class of people whose activities lie at the outside edge of the structuring statute's purpose, *e.g.*, the person who structures as part of a scheme to avoid a judgment debtor. Instead, Dr. Sperrazza's motives implicate § 5324(a)(3)'s core concerns. He structured not simply to avoid a creditor or reduce the likelihood of a tax audit; he structured as part of a scheme to evade taxes for which he was convicted.¹⁶

On different facts, the central holdings of the *Sperrazza* decision might be more worrisome. Proof of a cash hoard may not be required to sustain a structuring conviction as a legal matter, but it is a sensible guidepost for the government to follow in many structuring cases. If in proving its case the government relies only on a pattern of cash transactions below the \$10,000 CTR threshold, then the risk increases the government may be prosecuting innocent conduct. Similarly, forfeiting all the funds involved in a structuring offense may raise constitutional concerns, particularly where there is evidence the funds derive from a lawful source. But where, as here, the defendant engages in serial structuring, and the government marshals strong evidence of a motive to structure that implicates one of the main purposes for the reporting requirement, these concerns are substantially ameliorated.

¹³ 524 U.S. 321, 334 (1998).

¹⁴ *Sperrazza*, 804 F.3d. at 1127-28.

¹⁵ See 31 U.S.C. § 5324(d)(2).

¹⁶ In *Ratzlaf*, the government attempted to link the structuring activity to other bad conduct, including repeated failures to report gambling income in tax returns. The Court did not give significant weight to the argument because *Ratzlaf* was not prosecuted for these alleged misdeeds. *Ratzlaf*, 510 U.S. at 144 n.11.

In recent years, the government has made aggressive use of asset forfeiture laws in cases involving strong patterns of structuring-like behaviors. Confronted by harsh criticisms (and congressional pressure) the government altered course.¹⁷ Both the Treasury and Justice Departments issued policy statements limiting the circumstances when they will use their asset seizure and forfeiture powers in structuring cases.¹⁸ Moreover, the criticisms that led the government to make these course corrections primarily targeted civil asset seizure and forfeitures. Here, in contrast, the government obtained a criminal conviction by proving its case to a jury beyond a reasonable doubt. This was not a “smash and grab” asset seizure or forfeiture; the forfeiture was properly a part of the punishment for a related criminal offense.

¹⁷ Shaila Dewan, *Law Lets IRS Seize Assets on Suspicion, No Crime Required*, NY TIMES (Oct. 25, 2014), available at <http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html> (last visited Mar. 2, 2016).

¹⁸ See Press Release, *Attorney General Restricts Use of Asset Forfeiture in Structuring Offenses* (Mar. 31, 2015), available at <https://www.justice.gov/opa/pr/attorney-general-restricts-use-asset-forfeiture-structuring-offenses> (last visited on Mar. 2, 2016); see also Thompson Reuters, *IRS Clarifies its Position on Civil Forfeitures in Uncharged Structuring Cases* (Oct. 29, 2014), available at <https://tax.thomsonreuters.com/media-resources/news-media-resources/checkpoint-news/daily-newsstand/irs-clarifies-position-civil-forfeitures-uncharged-structuring-cases/> (last visited Mar. 2, 2016).