No. 18-_____

In the Supreme Court of the United States

CINDY OMIDI,

Petitioner,

–v–

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROJER JON DIAMOND
LAW OFFICE OF ROGER JON DIAMOND
1717 4TH STREET, FLOOR 3
SANTA MONICA, CA 90401
(310) 452-6643
ROGDIAMOND@AOL.COM

RYAN DANIEL KASHFIAN
ROBERT ADAM KASHFIAN
COUNSEL OF RECORD
KASHFIAN & KASHFIAN LLP
1875 CENTURY PARK EAST,
SUITE 1340
CENTURY CITY, CA 90067
(310) 751-7578
RYAN@KASHFIANLAW.COM
ROBERT@KASHFIANLAW.COM

SEPTEMBER 27, 2018 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Does 31 U.S.C. § 5317 give a district court authority to enter a personal money judgment against a person who has violated only 31 U.S.C. § 5324(a)(3) (structuring), even though: (a) the person did not engage in any criminal conduct other than structuring; (b) the structured funds are neither available nor traceable; and (c) section 5317 does not expressly confer the court with authority to impose a personal money judgment, in the absence of traceable funds.

2. Is an indictment constructively amendment, warranting reversal of a conviction, when the indictment relies on one specific statutory basis for jurisdiction (31 U.S.C. § 5312(a)(2)(V)), but the (objected to) jury instructions and evidence allows for a conviction on two alternative statutory basis for jurisdiction (31 U.S.C. § 5312(a)(2)(V) and § 5312(a)(2)(K))?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

This important appeal involves critical issues of statutory interpretation and constitutional rights.

Cindy Omidi ("Omidi") was charged and convicted, after a jury trial, of one count of structuring (31 U.S.C. § 5324(a)(3)). Omidi did not engage in any collateral criminal conduct other than the structuring itself. When Omidi was indicted, the structured funds were neither available nor traceable; nevertheless, the district court entered a $290,800 money judgment against her. This petition should be granted, because her conviction and the forfeiture judgment are unwarranted, for the reasons she argued below: (1) the jury instructions constructively amended the indictment's statutory jurisdictional basis; and (2) Congress has not authorized money judgments for structuring in lieu of non-traceable funds (*see* 31 U.S.C. § 5317).

The district court and the Ninth Circuit disagreed with Omidi's contentions:

1. The Ninth Circuit opined that, "[r]elying on [21 U.S.C.] § 853(p), the district court properly entered the money judgment against Omidi as a substitute for the money orders involved in her offense," because "[s]ection 5317 of Title 31, the forfeiture statute for structuring convictions, incorporates the procedures established in 21 U.S.C. § 853," and "[s]ection 853(p) provides a procedure for the forfeiture of substitute property." (App.3a, MEMORANDUM OF DISPOSITION). However, the Ninth Circuit's decision conflicts with well-established canons of statutory construction. Specifically, in an adjacent statute, 31 U.S.C. § 5332(b),

involving a similar crime, Congress explicitly allowed for "personal money judgment" and specifically referenced section 853(p); however, neither section 853(p) nor "personal money judgments" are specifically specified in section 5317, but section 853(p) was nevertheless relied upon in the Ninth Circuit's memorandum.

2. The Ninth Circuit also opined that, the indictment was not constructively amended. (App.1a, MEMORANDUM OF DISPOSITION). However, instead of focusing on whether the jury instructions altered the indictment's statutory jurisdictional basis, the Ninth Circuit focused on whether the government proved "the specific transactions Omidi was charged with structuring," in the indictment. *Id.* (emphasis added). However, by not focusing on the indictment's statutory jurisdictional allegations, the Ninth Circuit's decision conflicts with (a) this Court's precedent, *United States v. Stirone*, 361 U.S. 212 (1960), (b) Fifth Circuit precedent, *United States v. Mize*, 756 F.2d 353 (5th Cir. 1985), and (c) Fourth Circuit en banc precedent, *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc).

Stirone, *Mize*, and *Cruz* stand for the proposition that the "critical" issue for a constructive amendment is identifying what "the Federal Government's jurisdiction of this crime rests" on in the indictment and whether the "conviction . . . rest on that charge and not another . . . ." *Stirone*, 361 U.S. at 257-58 (emphasis added). The Ninth Circuit's memorandum does not follow Supreme Court precedent and conflicts with *Stirone*'s progeny. *See*, *Mize*, 756 F.2d at 356 ("if a federal offense may be predicated upon alternative bases of jurisdiction, a defendant's conviction cannot

rest upon a basis of jurisdiction different from that charged in the indictment").

Therefore, this Court should grant the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the court of appeals (App.1a, MEMORANDUM OF DISPOSITION) is not reported but is available at 714 F. App'x 808. The opinions of the district court (App.5a, ORDER RE MONEY JUDGMENT; App.21a, ORDER DENYING MOTION FOR NEW TRIAL) are not reported.

JURISDICTION

The court of appeals entered its judgment on March 14, 2018 and denied a petition for rehearing on April 24, 2018. (App.47a, NINTH CIRCUIT DENIAL OF REHEARING). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Following statutory provisions are included in the appendix to this petition (App.49a):

- 21 U.S.C. § 853
- 31 U.S.C. § 5312
- 31 U.S.C. § 5317
- 31 U.S.C. § 5324

STATEMENT OF THE CASE

I. The Indictment, the Evidence, and the Jury Instructions

Omidi was convicted of one count of structuring, under 31 U.S.C. § 5324(a)(3), and subsequently a $290,800 personal money judgment was entered against her.

Section 5324(a)(3) is part of the Bank Secrecy Act ("BSA") and makes it a crime to "structure . . . any transaction with one or more domestic financial institutions." 31 U.S.C. § 5324(a)(3) (emphasis added). The financial institution element is critical, because it provides the basis for federal jurisdiction, and the BSA has 26 definitions of "financial institution," including:

> (K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

* * *

(V) the United States Postal Service [(the "USPS")];

31 U.S.C. § 5312(a)(2)(V) and (a)(2)(K).

Despite the availability of 26 different statutory basis for jurisdiction, the indictment limited the jurisdictional basis to one statutory subsection (a)(2)(V) (*i.e.*, the USPS), specifically alleging Omidi structured transactions "with a domestic financial institution, namely, the USPS." (App.85a, INDICTMENT, ¶ 7) (emphasis added). Also, the indictment alleged Omidi structured transactions at four locations, including the Wilshire Business Center, and that "[t]he USPS operated" the Wilshire Business Center. (App.84a, INDICTMENT, ¶ 5).

Nevertheless, at trial, the evidence proved the allegations were wrong; the USPS did not operate the Wilshire Business Center. Instead, the evidence proved the Wilshire Business Center was a contract postal unit. (App.23a & fn. 2, ORDER DENYING MOTION FOR NEW TRIAL).

Over the defense's objection, the district court instructed the jury that it had to find "the structured transaction with one or more domestic financial institutions," and it defined "[a] financial institution [as] the United States Postal Service or an issuer, redeemer, or cashier of money orders." (App.23a, ORDER DENYING MOTION FOR NEW TRIAL); (App.75a, 81a, ORAL INSTRUCTION); (App.71a-72a, WRITTEN INSTRUCTION, Nos. 18, 26).

II. The $290,800 Money Judgment Against Omidi

The district court found that Omidi did not engage in any criminal conduct other than structuring:

> [T]he government has not produced clear evidence that the funds were used in other illegal activity. This is not a case where the government has tied Omidi to a "complicated larger scheme," produced evidence that Omidi "enabled" others to commit crimes or shown that Omidi was "connected to" a criminal enterprise.

(App.14a, ORDER RE MONEY JUDGMENT).

Also, when Omidi was indicted, the structured funds were neither available nor traceable. (App.10a, ORDER RE MONEY JUDGMENT). After a guilty verdict, the district court entered a $290,800 personal money judgment against Omidi. (App.5a, ORDER RE MONEY JUDGMENT).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Ninth Circuit: (a) decided an important question of federal law that has not been, but should be, settled by this Court, (Supreme Court Rule 10(c)); and (b) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. (Supreme Court Rule 10(a).) Specifically, the district court imposed a money judgment against Omidi, personally, for $290,800.00,

as a forfeiture, which the Ninth Circuit affirmed. However, when Omidi was indicted, the structured funds were neither available nor traceable, and Congress has not authorized forfeiture for non-traceable property for violations of 31 U.S.C. § 5324(a)(3).

2. The Ninth Circuit: (a) decided an important question of federal law that has not been, but should be, settled by this Court, and has entered a decision in conflict with the decision of another United States court of appeals on the same important matter (Supreme Court Rule 10(c)); and (b) has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. (Supreme Court Rule 10(a).). The jury instructions and evidence at trial constructively amended the indictment's statutory and jurisdictional basis in conflict with *United States v. Stirone*, 361 U.S. 212 (1960) which prohibit the alterations to the indictment's jurisdictional basis. The Ninth Circuit's decision permitting the alterations of the jurisdictional and statutory basis of the indictment is also in conflict with *United States v. Mize*, 756 F.2d 535 (5th Cir. 1985) and *United States v. Fitzpatrick*, 581 F.2d 1221 (5th Cir. 1978), and *United States v. Floresca*, 28 F.3d 706 (4th Cir. 1995), thereby creating a conflict in the decisions between the Circuit Courts of Appeal.

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT LACKED AUTHORITY TO ENTER A PERSONAL MONEY JUDGMENT AGAINST OMIDI FOR VIOLATING 31 U.S.C. § 5324

The district court imposed a money judgment against Omidi, personally, for $290,800.00, as a forfeiture. (App.5a, ORDER RE MONEY JUDGMENT). However, when Omidi was indicted, the structured funds were neither available nor traceable, (App.10a, ORDER RE MONEY JUDGMENT), and Congress has not authorized forfeiture for non-traceable property for violations of 31 U.S.C. § 5324(a)(3). Therefore, this Petition should be granted.

A. 31 U.S.C. § 5317(c)(1) Is Limited to Traceable Assets

Federal Rules of Criminal Procedure 32.2 specifically requires that "the court must determine what property is subject to forfeiture under the applicable statute." Fed. R. Crim. P. 32.2(b)(1)(A)). The applicable forfeiture statute for structuring is 31 U.S.C. § 5317. Section 5317 does not expressly confer the court authority to impose a personal money judgment, when the structured funds are not available. Instead, section 5317(c) states:

> (c) Forfeiture.—
>
> (1) Criminal forfeiture.—
>
> (A) In general.—The court in imposing sentence for any violation of [31 U.S.C.

> § 5324], or any conspiracy to commit such violation, shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto.
>
> (B) Procedure.—Forfeitures under this paragraph shall be governed by the procedures established in [21 U.S.C. § 853].

31 U.S.C. § 5317(c) (emphasis added).

While the Ninth Circuit recognized that section 5317 is the principle forfeiture statute for structuring convictions, the Ninth Circuit held that "[r]elying on [21 U.S.C.] § 853(p), the district court properly entered the money judgment against Omidi as a substitute for the money orders involved in her offense," because section 5317(c)(1)(B) incorporates the provisions of section 853. (App.3a-4a*,* MEMORANDUM OF DISPOSITION).

The Ninth Circuit reasoning was erroneous, as section 853(p)—which is a substantive provision and not a "procedure"—is not incorporated by section 5317 (c)(1)(B), and, hence, the district court could not rely on section 853(p), to enter a personal money judgment.

1. Availability of Property Subject to Forfeiture Under Section 5317(c)(1)(A)

First, the specific language of section 5317(c)(1)(A) does not provide for forfeiture of any assets other than those "involved in the offense" and "traceable thereto." The plain language simply does not permit forfeiture of non-traceable assets, and this Court must give the Congressional mandate effect. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-292 (1988) ("If the statute is clear

and unambiguous that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress." (internal quotations and citations omitted)). Here, because the structured money orders have since been dissipated, (App.3a-4a, MEMORANDUM OF DISPOSITION), and there are no assets "traceable" to this offense, the district court's order of a money judgment must be reversed.

2. Forfeiture of Substitute Assets Under Section 853(p) is Unavailable

Second, section 853(p) does not apply in structured transaction cases, *i.e.*, forfeiture under section 5317. This necessarily follows from the language of two statutes used by Congress to refer to section 853 as the mechanism through which the government may seize property subject to forfeiture.

Section 5317 does not set forth the "procedure" for forfeiture involving a violation of section 5324(a)(3). Instead, section 5317(c)(1)(B) incorporates by reference the "procedures" of 21 U.S.C. § 853,

> Forfeitures under this paragraph shall be governed by the procedures established in [21 U.S.C. § 853].

(Emphasis added).

Conspicuously, section 5317(c)(1)(B) uses the word "procedures" and not "provisions". The choice of words is dispositive. By using the word "procedures" and not "provisions," Congress intentionally chose to avoid incorporation by reference of the non-procedural provisions of section 853, including section 853(p) (the substituted assets provision).

This follows from basic canons of construction. "It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning." *White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) *overruled on other grounds by Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc); *Legacy Emanuel Hosp. and Health Ctr. v. Shalala*, 97 F.3d 1261, 1265 (9th Cir. 1996). As such, "[t]he use of different terms within related statutes generally implies that different meanings were intended." *Cunningham v. Scibana*, 259 F.3d 303, 308 (4th Cir. 2001) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46.06, at 194 (6th ed. 2000)).

Here, in a related statute, 18 U.S.C. § 982, *i.e.*, the money laundering forfeiture statute (18 U.S.C. § 1956)[1], Congress incorporated by reference of the "provisions"

---

[1] The money laundering forfeiture statute (18 U.S.C. § 1956), and the structuring statute (31 U.S.C. § 5324) are related. Congress created 31 U.S.C. § 5324 in the Money Laundering Control Act of 1986. *See* Pub. L. No. 99-570, 100 Stat. 3207-18 (1986). And, in 1994, Congress amended 31 U.S.C. § 5324 in the Money Laundering Suppression Act. *See* Pub. L. No. 103-325, 108 Stat. 2160 (1994). Moreover, courts and commentators frequently use the terms "structuring" and "money laundering" interchangeably. *See, e.g.*, *Rippetoe v. Roy*, 2011 WL 2652131, at *1 (E.D. Tex. June 9, 2011) (including section 5324 when describing an indictment for conspiring to launder money); C. Doyle, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, Congressional Research Service, at 1 n.7 (Feb. 8, 2012) *available at* https://www.fas.org/sgp/crs/misc/RL33315.pdf (defining money laundering as including "structuring financial transactions" in violation of 31 U.S.C. § 5324); S. Welling, *Smurfs, Money Laundering, and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 Fla. L. Rev. 287, 314 (1989) (arguing that "[s]murfing"—another term for structuring—"cannot be isolated from the laundering process").

of section 853, including section 853(p) (the substituted assets provision), as opposed to just the procedures established in section 853:

> The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

18 U.S.C. § 982(b)(1) (emphasis added).

In sum, section 982(b)(1) incorporates the "provisions" of section 853, while section 5317(c)(1)(B) incorporates the "procedures" of section 853. Congress's use of the word, "provision" in section 982(b)(1) reflects its intention to incorporate all of section 853, while Congress' use of the word "procedures" in section 5317(c)(1)(B) reflect its intention to incorporate only the procedural elements of section 853. Accordingly, Congress' purposeful use of the term "procedures" in section 5317(c)(1)(B) was intended to restrict incorporation of the provisions of section 853 to only those that provide a procedure for seizing assets subject to forfeiture in 31 U.S.C. § 5317(c)(1)(A). *See, e.g., White*, 370 F.3d at 1011; *Legacy Emanuel Hosp. and Health Ctr.*, 97 F.3d at 1265; *Cunningham*, 259 F.3d at 308.

3. Section 853(p) is Substantive, not a Procedural

Moreover, section 853(p) is a substantive provision, not a procedural provision, because it alters or defines

a defendant's rights in an applicable forfeiture proceeding. A rule of "procedure" is a rule that sets forth a particular manner of proceeding or way of doing something. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 80 (1995). A procedural rule regulates "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965). A substantive rule of law creates and defines the rights, duties, and obligations that are subsequently administered by procedural rules of law. *Id.* at 464. While a procedural rule may affect a substantive right, any such effect must be incidental and may not materially modify a right granted by the substantive rule of law. *Id.*

Section 853(p) authorizes the government to seize from a defendant against whom forfeiture has been ordered any property of an equivalent value to the property originally subject to forfeiture, if, as a result of that defendant's behavior, the original property subject to forfeiture is unavailable. The provision clearly defines a defendant's rights, duties, and obligations after conviction of a crime for which forfeiture is an available penalty. In doing so, the provision goes beyond simply setting forth a manner of proceeding or a simple way of doing something. Rather, section 853(p) allows the government access to assets wholly unrelated to the crime for which a defendant has been convicted and authorizes the government to seize those "innocent" assets to satisfy an order of forfeiture. Such a broad entitlement fundamentally alters the property rights granted a defendant elsewhere in our law and transcends the proper boundaries of any procedural rule. By its terms, section 5317(c)(1)(A) defines the extent of the

property subject to forfeiture in structured transaction cases. To effect forfeiture of any assets other than those "involved in" an offense, the government must demonstrate that such assets are "traceable thereto." *Id.* The government may only seize a substitute asset "that qualifies for forfeiture under an applicable statute." Fed. R. Crim. P. 32.2(e)(1)(B). Thus, section 5317(c)(1)(B) incorporates only the procedural elements of section 853, and further, the substitute assets provision codified in section 853(p) is a substantive provision.[2]

B. Interpreting Section 5317(c)(1)(B) to Include Substituted Assets Is Absurd

Conclusively proving that section 5317(c)(1)(B) was not meant to include the substitute asset provisions of section 853(p) is the absurdity results that follow form such a construction, when the unlimited forfeiture of substituted assets for structuring is juxtaposed with the limited forfeiture of substituted assets for money laundering—a far more egregious crime. Specifically, in money laundering cases, its forfeiture statute (18 U.S.C. § 982(b)(2)) limits the government's the right

---

[2] The list of direct assets forfeitable under 31 U.S.C. § 5317(c)(1)(A) versus those forfeitable under 21 U.S.C. § 853(a) differ. *Compare*, 31 U.S.C. § 5317(c)(1)(A) ("all property, real or personal, involved in the offense and any property traceable thereto") *with*, 21 U.S.C. § 853(a) ("(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation") Thus, even if the Court were to find that 21 U.S.C. § 853(p) applies, because 21 U.S.C. § 853(p) substitute assets points to 21 U.S.C. § 853(a), which conflicts with 31 U.S.C. § 5317(c)(1)(A), it is unclear what assets can be obtained.

to seize under "[t]he substitution of assets provisions of subsection [21 U.S.C. § 853](p)" to instances "where [the] defendant" did not "act[] merely as an intermediary who handled but did not retain the property in the course of the money laundering offense". In structuring cases, which is a far less egregious crime, section 5317(c)(1)(B) contains no similar limitation on forfeiture of substituted assets.

Thus, absurdly, forfeiture would be limitless for structuring, whereas forfeiture for money laundering is limited. For instance, the substituted assets of an intermediary, who launders money for a drug dealer, are not forfeitable under section 982(b)(2); however, if this Court were to include substituted assets for structuring, under section 5317(c)(1)(B), then, the substituted assets of an intermediary, who like Omidi structures money orders but was not "complicated larger scheme," had not "enabled" others to commit crimes, and not was "connected to" a criminal enterprise, (App. 14a-15a, ORDER RE MONEY JUDGMENT), are forfeitable. This Court "cannot adopt" such "a construction" because it "leads to absurd results." *Kui Rong Ma v. Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004).[3]

---

[3] Indeed, structuring does not inherently involve moral turpitude or any associated criminal activity. 31 U.S.C. § 5324; *Goldeshtein v. INS*, 8 F.3d 645, 646 (9th Cir. 1993). Money laundering, on the other hand, is inherently nefarious and does involve moral turpitude, because its essential element includes the involvement of "proceeds of some form of unlawful activity." 18 U.S.C. § 1956; *Smalley v. Ashcroft*, 354 F.3d 332, 338-39 (5th Cir. 2003). Accordingly, it is absurd to hold that, in structuring cases, the government is entitled to unlimited forfeiture of substitute assets under section 853(p).

C. 31 U.S.C. § 5332(b) Explicitly Allows for "[P]ersonal Money Judgment"

Moreover, in an "adjacent statute," 31 U.S.C. § 5332(b), involving a similar crime, evading the currency reporting requirements of traveling in and out of the United States, Congress explicitly allowed for "[p]ersonal money judgment":

> (b) Penalty.—
>
> * * *
>
> (2) Forfeiture.—In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property.
>
> (3) Procedure.—The seizure, restraint, and forfeiture of property under this section shall be governed by section 413 of the Controlled Substances Act [21 U.S.C. § 853].
>
> (4) Personal money judgment. —If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act [21 U.S.C. § 853(p)], the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

31 U.S.C. § 5332(b).

Both section 5317(c)(1) and section 5332(b) allow for forfeiture of any or all property, real or personal,

"involved in the offense," and "any property traceable" thereto. *Compare*, 31 U.S.C. § 5317(c)(1)(A) ("[t]he court . . . shall order the defendant to forfeit all property, real or personal, involved in the offense and any property traceable thereto"), *with*, 31 U.S.C. § 5532(b)(2) ("the court . . . shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property"). However, section 5332(b) additionally and expressly allows for personal money judgments. 31 U.S.C. § 5332(b)(4). Such difference in the two statutes is dispositive. Had the Congress intended to allow personal money judgment, it would have additionally and expressly provided for such option in section 5317 (c)(1) as it did in section 5332(b). As such, this Court must recognize the difference in sections 5317(c)(1) and 5332(b) and must, therefore, give Congress' word choice judicial effect. *See, e.g., White*, 370 F.3d at 1011; *Legacy Emanuel Hosp. and Health Ctr.*, 97 F.3d at 1265; *Cunningham*, 259 F.3d at 308.

D. Forfeiture Statutes Must Be Strictly Construed

Further, to the extent this Court finds any ambiguous, it should grant this petition, as forfeitures are disfavored, *see United States v. One Ford Coach*, 307 U.S. 219, 226 (1939), and, therefore, "forfeiture laws . . . are 'strictly construed . . . against the government.'" *United States v. Ritchie*, 342 F.3d 903, 910 (9th Cir. 2003) (citation omitted).

II. THE JURY INSTRUCTIONS CONSTRUCTIVELY AMENDED THE INDICTMENT'S STATUTORY AND JURISDICTIONAL BASIS

As noted above, the district court's jury instructions expanded the indictment's jurisdictional basis under section 5312(a)(2)(V) of the BSA from "a domestic financial institution, namely, the USPS," a (App.85a, INDICTMENT, ¶ 7) (emphasis added), to instructing the jury that it could convict Omidi if she structured at "one or more domestic financial institutions" (App.23a) (emphasis added), including the uncharged statutory basis for jurisdiction, section 5312(a)(2)(K), stating

> A "financial institution" is the United States Postal Service or an issuer, redeemer, or cashier of money orders.

(App.23a, 75a, 81a, 71a-72a) (emphasis added).

Accordingly, the indictment's jurisdictional basis and the conviction's jurisdictional basis do not match, because the jury instructions constructively amended the indictment's basis for federal statutory jurisdiction, thereby warranting reversal.

A. *United States v. Stirone*, 361 U.S. 212 (1960)

United States v. Stirone, 361 U.S. 212 (1960) is directly on point. There, this Court unanimously held that the district court's jury instructions constructively amended an indictment, under 15 U.S.C. § 1951 (Hobbs Act), where the jury instructions expanded the indictment's interference with commerce allegations under the Hobbs Act, reasoning that "[t]he charge [in the indictment] that interstate commerce is affected is critical since the Federal Government's jurisdiction of

this crime rests only on that interference," and, *a fortiori*, "[i]t follows that when only one particular kind of commerce is charged to have been burdened a conviction must rest on that charge and not another, ..." *Stirone*, 361 U.S. at 257-58 (emphasis added).

B. *United States v. Mize*, 756 F.2d 353 (5th Cir. 1985) and *United States v. Fitzpatrick*, 581 F.2d 1221 (5th Cir. 1978) (*per curiam*)

Relying on what *Stirone* held was "critical" and mandatory, the Fifth Circuit has held

> [I]f a federal offense may be predicated upon alternative bases of jurisdiction, a defendant's conviction cannot rest upon a basis of jurisdiction different from that charged in the indictment.

United States v. Young, 730 F.2d 221, 224 (5th Cir. 1984).

Thus, reversal of Omidi's conviction is mandatory, because the statutory jurisdictional basis of the conviction as stated in the jury instructions, (App.23a, 75a, 81a, 71a-72a) does not match the statutory jurisdictional basis of the conviction (as stated in the indictment, (App.85a)). Indeed, this Court's use of the word "must" regarding synchronization between the indictment and conviction's jurisdiction basis in *Stirone*, 361 U.S. at 257-58 is "mandatory" language,[4] and the conviction must be reversed.

---

[4] *See, e.g., Forbes v. Twp. of Lower Merion*, 76 F. App'x 475, 477 (3d Cir. 2003) ("In light of [the Supreme Court's] use of the word 'must,' [in *Wilson v. Layne*, 526 U.S. 603, 609 (1999),] we held in *Sutton v. Rasheed*, 323 F.3d 236, 250 n. 27 (3d Cir. 2003), that the initial constitutional inquiry is a 'mandatory' prerequisite to a

Moreover, the Fifth Circuit has reversed many convictions for lack of harmony between the indictment and the jury instructions' jurisdictional basis. For example, in *Mize*, 756 F.2d 353, the Fifth Circuit reversed embezzlement, misapplication of bank funds, and making false bank entries convictions, because the indictment relied on one specific statutory basis for jurisdiction (a "member bank") but the jury instructions allowed the defendant to be convicted on an alternative statutory basis for jurisdiction (an "insured bank"). In *United States v. Fitzpatrick*, 581 F.2d 1221 (5th Cir. 1978) (*per curiam*), the Fifth Circuit reversed an armed bank robbery conviction, because the indictment relied on one specific statutory basis for jurisdiction (a "federally insured institution") but the jury instructions allowed the defendant to be convicted on an alternative statutory basis for jurisdiction (a "federally charted institution").

Likewise, here, the indictment was constructively amended, because the indictment relied on one specific statutory basis for jurisdiction ("a domestic financial institution, namely, the USPS"), but the jury instructions allowed Omidi to be convict on an alternative statutory basis for jurisdiction (the "[USPS]" or an "issuer, redeemer, or cashier of money orders"), thereby warranting reversal of the conviction. However, the Ninth Circuit held the indictment was not constructively amended, reasoning

> The indictment listed the specific transactions Omidi was charged with structuring, and the government's evidence at trial established that

---

qualified-immunity analysis and not an aspiration 'describing what the courts ordinarily should do.'").

> Omidi had structured those, and only those, transactions.

(App.2a, MEMORANDUM OF DISPOSITION).

Thus, the Ninth Circuit's decision conflicts with this Court's precedent (*Stirone*) and the Fifth Circuit's decisions (*Mize* and *Fitzpatrick*), which held that the critical issue is not whether the transactions in the indictment match the evidence at trial; rather, the "critical" issue is identifying what "the Federal Government's jurisdiction of this crime rests" on in the indictment and whether the "conviction . . . rest on that charge and not another . . . ." *Stirone*, 361 U.S. at 257-58 (emphasis added).

C. *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994)

Additionally, in *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994), an en banc panel of the Fourth Circuit expressly overturned *Moore v. United States*, 512 F.2d 1255 (4th Cir. 1975) a case in which statutory charging term of the indictment was incorrect, just as in Omidi's case, even though the transactional matters in the indictment were sufficiently pled and matched evidence, reasoning:

> In *Moore*, the defendant was convicted of possessing a prohibited firearm in violation of 26 U.S.C. § 5861. The indictment charged that Moore possessed a sawed-off 12-gauge shotgun, as prohibited by 26 U.S.C. § 5845(d), but the evidence proved instead that he possessed a flare gun that was modified to fire 12-gauge shells, a weapon prohibited under 26 U.S.C. § 5845(e). The jury was charged

> under § 5845(e). The panel held that the misdescription in the indictment was surplusage and affirmed the conviction. But *Moore* is indistinguishable from this case: Floresca was indicted under section 1512(b)(1) but the jury was charged under and he was convicted under section 1512(b)(3). Because both of these departures from the offense as indicted constitute clear examples of constructive amendment, we reject the rule of *Moore* and overrule that case.

Analogous to *Moore* who was indicted on a single count of 26 U.S.C. § 5861 (the transactions at issue), Omidi was indicated on a single count of section 5324 which corresponded to specific financial transactions. Further, just as *Moore* was specifically indicted by the grand jury under the statutory subsection 26 U.S.C. § 5845(d) but the jury instructions corresponded to a violation of 26 U.S.C. § 5845(e), Omidi was specifically indicted only under the statutory subsection section 5312(a)(2)(V) defining "USPS" as the financial institution, (App.85a, INDICTMENT, ¶ 7), but the jury instructions corresponded to a violation of 31 U.S.C. § 5312 (a)(2)(V) and § 5312(a)(2)(K) defining "[USPS]" or an "issuer, redeemer, or cashier of money orders" as the financial institution, (App.23a, 75a, 81a, 71a-72a)), constituting clear constructive amendment. As the *Floresca* stated, "[w]e stress that it is the broadening itself that is important—nothing more." 38 F.3d at 711.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

ROJER JON DIAMOND
LAW OFFICE OF
ROGER JON DIAMOND
1717 4TH STREET, FLOOR 3
SANTA MONICA, CA 90401
(310) 452-6643
ROGDIAMOND@AOL.COM

RYAN DANIEL KASHFIAN
ROBERT ADAM KASHFIAN
COUNSEL OF RECORD
KASHFIAN & KASHFIAN LLP
1875 CENTURY PARK EAST,
SUITE 1340
CENTURY CITY, CA 90067
(310) 751-7578
RYAN@KASHFIANLAW.COM
ROBERT@KASHFIANLAW.COM

COUNSEL FOR PETITIONER

SEPTEMBER 27, 2018