APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1772

LEVI LAPP STOLTZFOOS,
Appellant

v.

SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ATTORNEY GENERAL OF PENNSYLVANIA; DISTRICT ATTORNEY OF LANCASTER COUNTY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-13-cv-06747)
District Judge: Hon. Legrome D. Davis

Submitted Under Third Circuit LAR 34.1(a)
April 26, 2018

Before: JORDAN, BIBAS, and SCIRICA, *Circuit Judges*

(Filed: April 30, 2018)

OPINION*

---

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

JORDAN, *Circuit Judge*.

Levi Lapp Stoltzfoos was convicted in a Pennsylvania state court of fifty-eight counts of illegally structuring financial transactions to avoid reporting requirements. He has collaterally attacked that conviction in a petition for a writ of habeas corpus, arguing that the Pennsylvania statute under which he was convicted, 18 Pa. Cons. Stat. § 5111(a)(3), is unconstitutionally overbroad on its face and otherwise unconstitutional as applied to him. The District Court denied his petition, and we will affirm.

I. Background[1]

Stoltzfoos had accumulated a life savings of roughly $541,100, which he kept in cash at home in a personal safe. He wanted to deposit that money in a bank, but he did not want anything to do with the paperwork associated with federal bank reporting requirements for financial transactions over $10,000.[2] Thus, between January 6, 2006, and February 11, 2006, Stoltzfoos made fifty-eight cash deposits, all of which were $10,000 or less, at ten different banks. Most deposits ranged from $9000 to $9900.

[1] This factual background is provided in the light most favorable to Stoltzfoos, as our law requires. *See Roman v. DiGuglielmo*, 675 F.3d 204, 208 (3d Cir. 2012) (stating that, when reviewing a petition for writ of habeas corpus, we must "consider all factual allegations in a light most favorable to the petitioner to determine whether he has stated a cognizable claim for habeas relief").

[2] But for certain exceptions inapplicable here, federal law requires financial institutions to file a report on all cash transactions exceeding $10,000. *See* 31 U.S.C. § 5313(a) (listing reporting requirement for transactions "in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation"); 31 C.F.R. § 1010.311 (setting general reporting threshold at transactions "of more than $10,000").

An employee at one of the banks flagged Stoltzfoos's transactions as suspicious, and law enforcement authorities conducted an investigation, obtained and executed search warrants for Stoltzfoos's bank records, and interviewed him. Stoltzfoos admitted that he "knew that when you withdrew $10,000 cash or deposit $10,000 cash, a form has to be filled out." (ECF Doc. No. 1-4 at 92.) He said that he "found this out in [the] fall of 1999 before the new millennium" when he made other deposits and that he "want[ed] no part of [a] government investigation or harassment." (ECF Doc. No. 1-4 at 92.)

The Commonwealth charged Stoltzfoos with fifty-eight counts of dealing in proceeds of unlawful activity, in violation of 18 Pa. Cons. Stat. § 5111(a)(3), which provides that "[a] person commits a felony of the first degree if the person conducts a financial transaction ... [t]o avoid a transaction reporting requirement under State or Federal law."[3] Following a jury trial in the Lancaster County Court of Common Pleas,

---

[3] Section 5111 provides, in relevant part:

> Dealing in proceeds of unlawful activities.
>
> (a) Offense defined.--A person commits a felony of the first degree if the person conducts a financial transaction under any of the following circumstances:
>
> > (1) With knowledge that the property involved, including stolen or illegally obtained property, represents the proceeds of unlawful activity, the person acts with the intent to promote the carrying on of the unlawful activity.
> >
> > (2) With knowledge that the property involved, including stolen or illegally obtained property, represents the proceeds of unlawful activity and that the transaction is designed in whole or in part to conceal or disguise the nature, location,

Stoltzfoos was convicted on all fifty-eight counts. He received a sentence of two to ten years of imprisonment and was assessed a civil penalty of $540,200, nearly the entire amount of the money he had deposited. [4]

> source, ownership or control of the proceeds of unlawful activity.
>
> (3) To avoid a transaction reporting requirement under State or Federal law.

18 Pa. Cons. Stat. § 5111.

[4] Section 5111 prescribes, in relevant part, the following penalties and associated enforcement mechanisms:

> (b) Penalty.--Upon conviction of a violation under subsection (a), a person shall be sentenced to a fine of the greater of $100,000 or twice the value of the property involved in the transaction or to imprisonment for not more than 20 years, or both.
>
> (c) Civil penalty.--A person who conducts or attempts to conduct a transaction described in subsection (a) is liable to the Commonwealth for a civil penalty of the greater of:
>
> (1) the value of the property, funds or monetary instruments involved in the transaction; or
>
> (2) $10,000.
>
> (d) Cumulative remedies.--Any proceedings under this section shall be in addition to any other criminal penalties or forfeitures authorized under the State law.
>
> (e) Enforcement.--(1) The Attorney General shall have the power and duty to institute proceedings to recover the civil penalty provided under subsection (c) against any person liable to the Commonwealth for such a penalty.

18 Pa. Cons. Stat. § 5111.

Stoltzfoos appealed his conviction and sentence, as well as the civil penalty, arguing, among other things, that the statute of conviction, 18 Pa. Cons. Stat. § 5111(a)(3), is void for vagueness and overbreadth, and that the civil penalty was a punitive forfeiture in violation of the Eighth Amendment to the United States Constitution. A divided panel of the Superior Court rejected both the vagueness and overbreadth challenges. It also rejected the Eighth Amendment challenge, having decided the civil penalty was directly proportional to the gravity of Stoltzfoos's offense and the amount was half of the maximum fine that the sentencing court could have imposed.

Stoltzfoos then sought relief in the state courts under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9501 *et seq.* He contended that his trial counsel was ineffective for failing to argue that § 5111(a)(3) violates the "single-subject rule" in Article III, § 3 of the Pennsylvania Constitution.[5] The PCRA court concluded that there was no constitutional violation, and denied his petition for relief. The Superior Court affirmed, and the Pennsylvania Supreme Court summarily denied a petition for allowance of appeal.

Stoltzfoos next filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He alleged that § 5111(a)(3) is unconstitutionally overbroad, that his trial counsel was ineffective for failing to challenge the constitutionality of the statute, and

[5] The "single-subject rule" refers to a provision of the Pennsylvania Constitution that provides that "[n]o bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof." Pa. Const. art. 3, § 3.

that the statute violated Pennsylvania's "single-subject rule." The case was referred to a Magistrate Judge, who recommended dismissing the petition with prejudice because Stoltzfoos's claims lacked merit. The District Court agreed and adopted the Magistrate's report and recommendation, denied the petition for a writ of habeas corpus, and declined to issue a certificate of appealability.

We vacated the Court's order and remanded the case for further consideration, because it appeared that Stoltzfoos had not been given an opportunity to file objections to the Magistrate's report. We expressed "no opinion on the merits" of the petition. (App. at 25.)

On remand, Stoltzfoos was appointed counsel, who filed objections to the report and recommendation. Counsel argued that Stoltzfoos's civil penalty was an excessive fine under the Eighth Amendment to the United States Constitution and that the statute of conviction was both overbroad on its face and unconstitutional as applied to him, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The District Court overruled those objections, and once again adopted the Magistrate Judge's report and recommendation, dismissed the petition, and declined to issue a certificate of appealability.

In its opinion, the Court explained that it was overruling Stoltzfoos's Eighth Amendment objection because he had not included it in the petition for a writ of habeas corpus and, alternatively, because the Pennsylvania Superior Court's analysis of the Eighth Amendment claim was not an objectively unreasonable application of United States Supreme Court precedent. It concluded that Stoltzfoos's overbreadth challenge to

§ 5111(a)(3) also failed. The Court reasoned that the "statute cannot be overbroad because it does not affect constitutionally-protected activity," given that there is no federal right to privacy of banking records. (App. at 49.) It said "that the number of valid applications [of the statute] is likely to be significantly higher than 'conceivably impermissible applications,'" and that the State has an interest in enforcing anti-structuring laws that protect against "money laundering, tax evasion, and other related crimes." (App. at 50-51 (citation omitted).)

Stoltzfoos appealed the District Court's denial of his petition for a writ of habeas corpus. We granted a certification of appealability under 28 U.S.C. § 2253(c)(1), but only with respect to his facial overbreadth challenge and his as-applied challenge.[6]

II. Discussion[7]

We agree with the District Court's thorough analysis and its conclusion that 18 Pa. Cons. Stat. § 5111(a)(3) is not unconstitutionally overbroad on its face or otherwise unconstitutional as applied to Stoltzfoos, and thus that he is not entitled to habeas relief.

---

[6] The Eighth Amendment argument Stoltzfoos made below is therefore outside the scope of the certificate of appealability. We do not address that argument and focus solely on his concern that his statute of conviction is unconstitutionally overbroad on its face and otherwise unconstitutional as applied to him. Although the $540,200 civil penalty imposed on Stoltzfoos – nearly his entire life savings – does appear unusually harsh, our role on habeas review gives us no basis to review it. *See Ex parte Watkins*, 32 U.S. 568, 574 (1833) ("[T]his court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent on the record, reverse the sentence."); *cf. United States v. Thiele*, 314 F.3d 399, 402 (9th Cir. 2002) (rejecting a claim for habeas relief based on the excessiveness of a restitution fine because it did not challenge confinement).

[7] The District Court had jurisdiction under 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 2253.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner must satisfy three statutory requirements to prevail on a federal habeas petition. First, he must show that he has exhausted the available state court remedies, that the state does not provide corrective process, or that "circumstances exist that render such process ineffective to protect the rights of the" prisoner. 28 U.S.C. § 2254(b)(1). Second, he must establish "that he is in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a). Third, if the state appellate court rules on the merits of his claims, he must also show that his detention is the result of a state court decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d). "When a federal claim has been presented to a state court and the state court has denied relief," irrespective of whether the "state court's decision is [accompanied] by an explanation[,]" we must "presume[] that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 98-99 (2011).

Stoltzfoos claims that § 5111(a)(3) is unconstitutionally overbroad on its face and as applied to him, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. That claim was exhausted because it was raised and preserved on direct appeal to the Superior Court of Pennsylvania as well as to Pennsylvania's Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (indicating that AEDPA's exhaustion requirements are satisfied when state prisoners "give the state courts one full

opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"). Although the Superior Court's decision appeared to rest largely on state law grounds, the precedents it cited applied federal constitutional principles and there was no indication that it was not deciding the merits of both Stoltzfoos's federal and state law overbreadth claims. *See Johnson v. Williams*, 568 U.S. 289, 292-93 (2013) (holding that AEDPA deferential review, rather than *de novo* review, applies to a state court decision that expressly addresses some, but not all, of the issues raised by the criminal defendant). Thus, the state court's decision is entitled to deference unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]"[8] 28 U.S.C. § 2254(d).

At least that would be our governing standard if Stoltzfoos had raised a cognizable claim, but he has not. The overbreadth doctrine has only been applied in First Amendment cases. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."); *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 295 (D.C. Cir. 1993) ("In First Amendment cases, and in First Amendment cases only, the Supreme Court has struck down laws [as overbroad.]"); *Lutz v. City of York*, 899 F.2d 255, 270-71 (3d Cir. 1990) ("[T]he overbreadth doctrine has never been recognized outside the

[8] The District Court analyzed Stoltzfoos's federal overbreadth claim under a *de novo* standard of review. That choice did not prejudice Stoltzfoos because that standard is more favorable to him than the AEDPA standard that would ordinarily apply. Nevertheless, we reach the same result that the District Court did.

context of the First Amendment[.]"). Stoltzfoos's overbreadth arguments are misplaced, because he alleges substantive due process violations rooted in the Fifth and Fourteenth Amendments, not a First Amendment claim.[9]

Nor does Stoltzfoos's as-applied challenge fare better. First, although he argues that his statute of conviction "is unconstitutionally overbroad as applied" to him because "he did not possess a criminal intent[,]" (Opening Br. at 17), overbreadth claims are inherently facial; there is no such thing as an as-applied overbreadth claim. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482-83 (1989) (explaining "the difference between an as-applied and an overbreadth challenge," and noting that "the

---

[9] Stoltzfoos stated in his appellate brief that, "[a]lthough Constitutional overbreadth arguments ordinarily pertain to First Amendment free speech concerns, a challenged statute can be held to sweep excessively so broadly as to be beyond the state's legitimate police powers, or be arbitrary and capricious because it leads to the imposition of punishment bearing little relation to any legitimate governmental interest." (Opening Br. at 11-12.) But the cases he cites to support that proposition are inapposite because they either do not involve overbreadth challenges, *see City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) ("While we … conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine."), or they involve First Amendment claims, *see NAACP v. Button*, 371 U.S. 415, 431-38 (1963) (discussing the overbreadth of a statute in light of its impact on First Amendment freedoms, as incorporated to the States through the Fourteenth Amendment).

To the extent Stoltzfoos argues that § 5111(a)(3) is facially invalid because it is missing a *mens rea* element, that argument is outside the scope of our limited review because the certificate of appealability was only granted to address overbreadth challenges. 28 U.S.C. § 2253(c)(3); 3d Cir. L.A.R. 22.1(b); *see also Miller v. Dragovich*, 311 F.3d 574, 577 (3d Cir. 2002) (refusing to address an argument that was outside the scope of the certificate of appealability). Moreover, that argument lacks merit because Pennsylvania law contains a gap-filling provision that provides, "[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto." 18 Pa. Cons. Stat. § 302(c).

principle advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*").

Next, if we construe his claim as otherwise challenging the constitutionality of the statute as applied to him under the Due Process Clause of the Fourteenth Amendment, the statute is clearly constitutional as applied in his case. Section 5111(a)(3) requires a defendant to know (or that he should have known) of his structuring conduct, and likewise know that reporting requirements exist under federal or state law. If the defendant then knowingly (or recklessly) structures his financial transactions to avoid those reporting requirements, he is guilty. All of those elements were satisfied here because Stoltzfoos acted intentionally and knowingly when he made his fifty-eight cash deposits at ten different banks. He said that he "knew that when you withdrew $10,000 cash or deposit $10,000 cash, a form has to be filled out." (ECF Doc. No. 1-4 at 92.) He simply chose not to comply with the law because, as he later said, he "want[ed] no part of [a] government investigation or harassment." (ECF Doc. No. 1-4 at 92.) That is why he split his deposits into fifty-eight separate transactions, all of which were $10,000 or less.

Despite that, Stoltzfoos relies on *Ratzlaf v. United States*, 510 U.S. 135 (1994), to argue that the statute is unconstitutional because it did not require him to know that it was illegal to structure a financial transaction to avoid reporting requirements. Once again, his argument misses the mark. The statute at issue in *Ratzlaf* contained the phrase "willfully violat[ed]," which led the Supreme Court to conclude that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Id.* at 136-37. By contrast, the statute at issue here, § 5111(a)(3), contains no such phrase.

In fact, the Court was careful in *Ratzlaf* to point out that its opinion did nothing to "dishonor the venerable principle that ignorance of the law generally is no defense to a criminal charge." *Id.* at 149; *see also Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law … is no defense to criminal prosecution is deeply rooted in the American legal system."). In addition, *Ratzlaf* is of limited relevance because it involved a question of statutory interpretation rather than one of constitutional dimension.[10]

One might question the civil penalty exacted in this case under Pennsylvania's anti-structuring law, but that does not mean the law is unconstitutional. *See Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910) ("[L]egislation may, in particular instances, be harsh, but we can only say again what we have so often said, that this court cannot set aside legislation because it is harsh."). We cannot say on this record that the decisions of the Pennsylvania courts were contrary to, or constituted an unreasonable application of, clearly established Supreme Court precedent.

III. Conclusion

For the foregoing reasons, we will affirm the District Court's decision to deny Stoltzfoos's habeas petition.

[10] The same is true of the other cases Stoltzfoos cites. *See generally Liparota v. United States*, 471 U.S. 419 (1985); *Morissette v. United States*, 342 U.S. 246 (1952).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEVI LAPP STOLTZFOOS	:	CIVIL ACTION
v.	:	
JOHN E. WETZEL, et al.	:	No. 13-cv-6747

ORDER

AND NOW, this 27th day of February 2017, upon careful and independent consideration of Petitioner Levi Lapp Stoltzfoos's Petition for a Writ of Habeas Corpus (Doc. No. 1), the Report and Recommendation of United States Magistrate Judge Richard A. Lloret (Doc. No. 21), and Petitioner's objections thereto (Doc. No. 42), it is hereby ORDERED as follows:

1. Petitioner's objections to the Report and Recommendation are OVERRULED.
2. The Report and Recommendation is APPROVED and ADOPTED.
3. The Petition for a Writ of Habeas Corpus (Doc. No. 1) is DISMISSED without an evidentiary hearing.
4. A certificate of appealability SHALL NOT issue, in that the Petitioner has not demonstrated that reasonable jurists would find the correctness of the procedural aspects of this ruling debatable. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
5. The Clerk of Court is directed to close this matter for statistical purposes.

I. Background

Over the course of several weeks in January and February 2006, Petitioner made cash deposits totaling $541,100 at ten different Pennsylvania banks. R. & R. (Doc. No. 21), at 2. He deposited the money in fifty-eight separate transactions, almost all of which were between nine and ten thousand dollars. *Id.*, at 2–3. In doing so, Petitioner evaded reporting requirements

imposed on banks by federal law; the regulations require all cash deposits exceeding ten thousand dollars to be reported. *See* 31 C.F.R. § 1010.311.

A jury convicted Petitioner of fifty-eight counts of dealing in proceeds of unlawful activity, in violation of 18 Pa. Cons. Stat. § 5111(a)(3).[1] R. & R., at 4. Petitioner appealed his conviction, which was affirmed by the Pennsylvania Superior Court in 2010; an appeal to the Pennsylvania Supreme Court was summarily denied. *Id.* Petitioner filed a series of collateral challenges under Pennsylvania's Post Conviction Relief Act, but these were rejected. *Id.*, at 4–5.

A petition for a writ of habeas corpus was filed in this Court in November 2013. Pet. (Doc. No. 1). Magistrate Judge Lloret issued a Report and Recommendation that the petition be dismissed, and this Court approved and adopted that report after the appropriate period had passed without the filing of any objections. April 29, 2015 Order (Doc. No. 23). Petitioner then filed two requests for appointment of counsel, which this Court denied. *See* March 14, 2016 Order (Doc. No. 27); March 28, 2016 Order (Doc. No. 31). An appeal followed, and the Third Circuit summarily vacated and remanded for further consideration of Petitioner's filings. *Stoltzfoos v. Sec'y Pa. Dep't of Corr.*, No. 16-1821 (3d. Cir. Aug. 17, 2016). This Court subsequently appointed counsel to represent Petitioner, and counsel filed objections to the report and recommendation in November 2016. Aug. 23, 2016 Order (Doc. No. 35); Objections to R. & R. (Doc. No. 42).

II. Legal Standard

When reviewing a Magistrate Judge's report and recommendation, the district court must make "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). But a federal habeas

[1] 18 Pa. Cons. Stat. § 5111(a)(3) makes it unlawful for a person to "conduct[] a financial transaction . . . [t]o avoid a transaction reporting requirement under State or Federal law."

court's underlying consideration of a state prisoner's habeas petition is "constrain[ed] . . . with respect to claims adjudicated on the merits in state court" by the standards of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts." *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000).

For questions of law, relief may only be granted if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established law if it is "diametrically different" or "mutually opposed" to that law. *Williams*, 529 U.S. at 364. A decision involves an unreasonable application of the law if it either "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," or unreasonably extends or refuses to extend a legal principle from existing Supreme Court precedent. *Williams*, 529 U.S. at 407–08.

Questions of fact also receive highly deferential review. *Lambert v. Blackwell*, 387 F.3d 210, 235–36 (3d Cir. 2004). A state court's factual determinations are presumed to be correct; the petitioner has the burden of rebutting that presumption with clear and convincing evidence. § 2254(e)(1). Relief can only be granted if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2).

These highly deferential standards of review do not apply if the claim was not "adjudicated on the merits in State court proceedings." § 2254(d). If the state court failed to rule

on the merits of a claim, and that claim was properly preserved by the petitioner, then the federal habeas court reviews that matter de novo. *Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001).

III. Discussion

Petitioner objects to the Report and Recommendation on two grounds: that the civil penalty imposed by the trial court violates the Eighth Amendment's prohibition on excessive fines, and that 18 Pa. Cons. Stat. § 5111(a)(3) is unconstitutionally overbroad. Both objections are overruled.

A. Excessive Fines

Petitioner's first objection is that the $540,200 civil penalty is an excessive fine, in violation of the Eighth Amendment to the United States Constitution. This objection fails because the argument was never raised before the magistrate judge. Even if the argument had not been waived, the objection must still fail because the prior state court adjudication was neither "contrary to", nor an "unreasonable application" of, Supreme Court precedent. 28 U.S.C. § 2254.

When a habeas petition is referred to a magistrate judge, Local Rule 72.1(IV)(c) requires the parties to raise "[a]ll issues and evidence" with the magistrate. Arguments that are not presented to the magistrate judge are deemed waived. *See Laborers' Int'l Union of N. Am. v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994); *Stromberg v. Varano*, No. CIV.A. 09-401, 2012 WL 2849266, at *2 n.14 (E.D. Pa. July 11, 2012) (collecting cases). Petitioner first raised the Eighth Amendment excessive fines argument in his Objections to Magistrate Judge's Report and Recommendations (Doc. No. 42). Because this argument was not presented to the Magistrate Judge in the petition for a writ of habeas corpus, Petitioner has waived it. Petitioner suggests that this ground is preserved because his initial petition for a writ of habeas corpus specifically mentioned Eighth Amendment violations, but the petition only

mentions the Eighth Amendment in its list of issues previously raised before the Pennsylvania Superior Court. Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. No. 1-1), at 2. Neither the initial petition nor the Memorandum of Law submitted with it raised Eighth Amendment grounds for habeas relief. *Id.*; Pro Se Memorandum of Law (Doc. No. 1-2).

Even if the Court were to consider Petitioner's Eighth Amendment argument, the objection would still be denied. A fine is any payment to the government required as a punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). The Eight Amendment prohibits the imposition of "excessive fines." U.S. Const. amend. XII. The constitutionality of a fine or forfeiture is a question of proportionality—"[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian*, 524 U.S. at 336–37. Because "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," a court must look to the maximum punishment set forth in statute to determine the gravity of the offense. *Id.*

The Pennsylvania Superior Court found that the penalty ordered by the trial court was not excessive, and Petitioner has not satisfied AEDPA's deferential standard for granting relief from that judgment. The Pennsylvania Superior Court "correctly identifie[d] the governing legal rule," *Williams*, 529 U.S. at 407, conducting the proportionality analysis required by the United States Supreme Court in *Bajakajian*. *See Com. v. Stoltzfoos*, No. 30 MDA 2009, slip op. at 27–30 (Pa. Super. Ct. Oct. 26, 2010) (Doc. No. 1-7). The Superior Court's decision can only be set aside if it was objectively unreasonable in its application of *Bajakajian* to Petitioner's case. *See Williams*, 529 U.S. at 407–08.

The decision was not objectively unreasonable. The Superior Court considered the gravity of the offense, relying on the legislature's judgment that violations of 18 Pa. Cons. Stat. § 5111 can be punished with a maximum penalty of twenty years in prison and a fine of twice the value of the property involved in the transaction. *Stoltzfoos*, No. 30 MDA 2009, slip op. at 29. It then found that the civil penalty of $540,200, the amount of the deposits that formed the basis for the criminal conviction, was proportional to an offense that gravity. *Id.*, slip op. at 30. Petitioner argues this is objectively unreasonable, pointing to the Supreme Court's holding in *Bajakajian* that a forfeiture of the entire amount of a reporting violation was excessive. *Bajakajian*, 524 U.S. at 339–340. But the offense in *Bajakajian* carried a maximum penalty of only five years, not twenty. *Id.*, at 339 n.14. And the amount forfeited in *Bajakajian* was significantly more than the maximum fine allowed under statute, whereas the civil penalty imposed here was only fifty-percent of the maximum. *Id.* Given these significant factual distinctions between the cases, and the Pennsylvania legislature's statutory judgment as to the seriousness of the offense, the Superior Court's conclusion was not objectively unreasonable.

B. Overbreadth

Petitioner also objects to the Magistrate Judge's recommendation that the statute of which Petitioner was convicted, 18 Pa. Cons. Stat. § 5111(a)(3), is not overbroad. As both the Magistrate Judge and Petitioner point out, the question of overbreadth under the federal constitution was never adjudicated in state court, although it was properly raised there by Petitioner. The overbreadth claim is therefore reviewed de novo. *See Appel*, 250 F.3d at 210. Nevertheless, Petitioner's objection fails because the statute does not affect a substantial amount of constitutionally-protected activity.

A law is overbroad if it "sweeps within its prohibitions" constitutionally-protected activity. *Grayned v. City of Rockford*, 408 U.S. 104, 114–15 (1972); *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 226 (3d Cir. 2004). However, only a "substantially overbroad" law can be struck down. *Aiello v. City of Wilmington*, 623 F.2d 845, 860 (3d Cir. 1980). The Third Circuit has a four-factor test to determine whether challenged statute affects a "*substantial* amount of constitutionally protected activity." *Gibson*, 355 F.3d at 226 (emphasis added). The first two factors require a comparison of "the number of valid applications" to the "frequency of conceivably impermissible applications." *Id.* (quoting *Aiello*, 623 F.2d at 860). The other factors to consider are "the nature of the activity or conduct sought to be regulated, and the nature of the state interest underlying the regulation" *Id.* (quoting *Aiello*, 623 F.2d at 860). The party challenging the law bears the burden of showing substantial overbreadth. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)

Section 5111 makes it illegal to conduct a financial transaction "to avoid a transaction reporting requirement under State or Federal law"—a practice known as structuring. 18 Pa. Cons. Stat. § 5111(a)(3). This statute cannot be overbroad because it does not affect constitutionally-protected activity. Petitioner fails to identify any constitutionally-protected conduct impinged by the structuring prohibition. In his pro se Memorandum of Law, Petitioner argues that the statute violates his expectation of privacy in his banking records. Pro Se Memorandum of Law (Doc. No 1-2), at 8. This does not establish constitutionally-protected activity. First, an expectation of privacy in banking *records* does not make the banking activity at issue here constitutionally-protected. And second, even if it did, Petitioner's objection asserts overbreadth in violation of the federal constitution, which unlike Pennsylvania's constitution, does not protect the privacy of banking records. *Compare United States v. Miller*, 425 U.S. 435,

442 (1976) (finding no "legitimate expectation of privacy" in the contents of bank records), *with Com. v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) ("[U]nder Art. I, § 8, of the Pennsylvania Constitution bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank.").

Nor has Petitioner shown, under the *Gibson* factors, that § 5111 affects a substantial amount of alleged constitutionally-protected activity. Comparison of the first two factors suggests that the number of valid applications is likely to be significantly higher than "conceivably impermissible applications." *Gibson*, 355 F.3d at 226. Petitioner argues that avoiding reporting requirement is a facially innocent activity, like arranging one's affairs to minimize taxes. But structuring transactions to avoid triggering a financial institution's reporting requirements is fundamentally different than tax avoidance or other similar kinds of legal structuring of private transactions. Tax avoidance seeks to obtain a legal benefit for the taxpayer, keeping him or her from incurring an obligation to pay higher taxes. But the currency transaction reports at issue here do not impose any obligation on the depositor—only on the financial institution. *See* 31 C.F.R. § 1010.311 ("Each *financial institution* . . . shall file a report of each . . . transaction in currency of more than $10,000." (emphasis added)). Additionally, the benefits a depositor receives from structuring are likely to be unlawful. Individuals engaged in structuring "are not people trying to minimize their taxes by finding such loopholes as the law allows. They are people who are trying to conceal the existence of a large amount of cash from the government." *United States v. Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991). Such efforts to cover up illegal proceeds or deceive taxing authorities are not legitimate reasons to structure. Petitioner has not demonstrated any other legitimate rationale for structuring, and without one,

there are little or no "conceivably impermissible applications" of a law banning the practice. *Gibson*, 355 F.3d at 226.

The remaining two *Gibson* factors also argue against finding substantial overbreadth. Petitioner points to the title of § 5111 to argue that "the nature of the activity or conduct sought to be regulated," *id.*, is "proceeds of unlawful activities." 18 Pa. Cons. Stat. § 5111. He argues that the subsection that prohibits structuring, § 5111(a)(3), is overbroad because it encompasses all funds, not just the proceeds of unlawful activities. Pet.'s Objs., at 13–14. But the scope of the prohibition is consistent with its aims. Requiring financial institutions to report all cash transactions over ten thousand dollars provides the government with information needed to prevent money laundering, tax evasion, and other related crimes. Anti-structuring laws protect this mechanism, preventing anyone from "defeating the goal of the requirement that large cash deposits be reported to the Internal Revenue Service by breaking their cash hoard into enough separate deposits to avoid activating the requirement." *Davenport*, 929 F.2d at 1173. Making it illegal for anyone to structure their transaction to avoid reporting, regardless of the legality of the funds, ensures the viability of this reporting mechanism.

A prohibition on structuring is thus a valuable tool in the government's efforts to combat crimes related to illegal proceeds. This demonstrates that the state's interest in the law—the fourth *Gibson* factor—also weighs against overbreadth.

In sum, Petitioner has failed to show that § 5111 is substantially overbroad. He has been unable to identify any activities impinged upon by the statute that are constitutionally-protected. Even if the Court were, for the sake of argument, to accept banking activity as constitutionally-protected, the *Gibson* factors all weigh against finding that a substantial amount that activity is affected. "The overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last

resort.' *New York State Club Ass'n. v. City of New York*, 487 U.S. 1, 14 (1988) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)). As a result, the burden of demonstrating it should be used falls on Petitioner. *Id.* He has failed to meet it.

IV. Conclusion

For these reasons, Petitioner's objections are overruled. The Court approves and adopts Judge Lloret's Report and Recommendation, and dismisses the petition for a writ of habeas corpus.

BY THE COURT:

/s/ Legrome D. Davis

Legrome D. Davis, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEVI LAPP STOLTZFOOS Plaintiff,	:	Civil Action
v.	:	
JOHN E. WETZEL, et al., Defendants	:	No. 13-6747

REPORT AND RECOMMENDATION

Richard A. Lloret
U.S. Magistrate Judge

March 31, 2015

Before me is a Petition for Writ of Habeas Corpus[1] filed pursuant to 28 U.S.C. §2254. Petitioner Levi Stoltzfoos ("Stoltzfoos") is currently incarcerated at Wernersville Correctional Center, where he is serving an aggregate sentence of two to ten years in a state correctional facility following his conviction of 58 counts of conducting a financial transaction to avoid a reporting requirement under state or federal law in violation of 18 Pa.C.S. § 5111(a)(3). He was also assessed a civil penalty of $540,200.00. Stoltzfoos claims that 18 Pa.C.S. § 5111(a)(3), dealing in proceeds of unlawful activities, is unconstitutional, and argues his trial counsel was ineffective for failing to litigate a constitutional challenge to the statute. I find these claims are meritless and respectfully recommend that his petition for habeas relief be denied.

[1] This case was transferred from the Middle District of Pennsylvania pursuant to an Order from the Honorable William W. Caldwell. *See* Order of November 7, 2013, Doc. No. 1, Exhibit 1, at 2. The Petitioner's initial habeas petition is found at "Attachment 1" on the ECF system. Petitioner's brief in support of his habeas petition is found at "Attachment 2" on the ECF system.

I. FACTUAL AND PROCEDURAL HISTORY

Stoltzfoos is in prison as the result of crimes he committed in Lancaster County between January 6, 2006 and February 11, 2006. The state Superior Court summarized the facts leading to Stoltzfoos convictions as follows:

> Between January 6, 2006 and February 11, 2006 [Appellant] made fifty-eight cash deposits, totaling five-hundred, forty-one thousand, one-hundred dollars ($541,000.00) to ten different banks. Specifically, the following deposits were made on the given days:
>
> January 6 & 7, 2006:
> 1. Bank of Lancaster County $9,900.00
> 2. Sovereign Bank $9,900.00
> 3. Northwest Savings Bank $9,900.00
> 4. National Penn Bank $9,900.00
> 5. Ephrata National Bank $9,900.00
> 6. M&T Bank $9,900.00
>
> January 14, 2006:
> 7. Coatesville Savings Bank $9,900.00
> 8. Bank of Lancaster County $9,900.00
> 9. Sovereign Bank $9,900.00
> 10. Susquehanna Bancshares, Inc. $9,700.00
> 11. Northwest Savings Bank $9,900.00
> 12. National Penn Bank $9,900.00
> 13. Fulton Savings Bank $9,900.00
> 14. Ephrata National Bank $9,900.00
> 15. M&T Bank $9,900.00
> 16. Graystone Bank $9,900.00
>
> January 19, 2006:
> 17. Northwest Savings Bank $9,900.00
> 18. National Penn Bank $9,900.00
> 19. Ephrata National Bank $9,900.00
> 20. M&T Bank $9,900.00
> 21. Graystone Bank $9,900.00
> 22. Susquehanna Bancshares, Inc. $9,900.00
>
> January 20, 2006:
> 23. Bank of Lancaster County $9,900.00
> 24. Sovereign Bank $9,900.00
> 25. Fulton Savings Bank $9,900.00

January 21, 2006:
26. Coatesville Savings Bank $9,500.00
27. Bank of Lancaster County $9,500.00
28. Sovereign Bank $9,000.00
29. Susquehanna Bancshares, Inc. $9,000.00
30. Northwest Savings Bank $9,500.00
31. National Penn Bank $9,000.00
32. Fulton Savings Bank $9,000.00
33. Ephrata National Bank $9,500.00
34. M&T Bank $9,000.00
35. Graystone Bank $9,000.00

January 27, 2006:
36. Bank of Lancaster County $9,000.00

January 28, 2006:
37. Coatesville Savings Bank $9,000.00
38. Sovereign Bank $9,000.00
39. Susquehanna Bancshares, Inc. $9,000.00
40. Northwest Savings Bank $9,000.00
41. National Penn Bank $9,000.00
42. Fulton Savings Bank $9,000.00
43. Ephrata National Bank $9,000.00
44. M&T Bank $9,000.00
45. Graystone Bank $9,000.00

February 4, 2006:
46. Coatesville Savings Bank $9,000.00
47. Bank of Lancaster County $9,000.00
48. Sovereign Bank $9,000.00
49. Northwest Savings Bank $9,000.00
50. National Penn Bank $9,000.00
51. Fulton Savings Bank $6,600.00
52. M&T Bank $9,000.00

February 11, 2006:
53. Coatesville Savings Bank $5,200.00
54. Bank of Lancaster County $9,000.00
55. Susquehanna Bancshares, Inc. $9,000.00
56. National Penn Bank $9,900.00
57. Fulton Savings Bank $9,000.00
58. Graystone Bank $10,000.00

> [Appellant] was charged, under Information 5995-2006, with 58 counts of dealing in proceeds of unlawful activity. Prior to trial, the Commonwealth filed its Motion for Court to Take Notice of Federal Law and Regulation. The [court] granted the Commonwealth's motion [on] June 5, 2007. [Appellant] filed his Omnibus Pretrial Motion on May 14, 2007. In relevant part, [Appellant's] motion included a motion to quash counts 1 through 58 based on 18 Pa.C.S. § 5111(a)(3) not containing a *mens rea* element. The [c]ourt heard argument regarding the pretrial motions prior to trial on May 5, 2008. The [c]ourt denied [Appellant's] motion and referred to 18 Pa.C.S. [§] 302(c), which directs the use of an intentional, knowing, or reckless culpability element when the culpability element sufficient to establish a material element of an offense is not prescribed by law. Following trial, a jury convicted Appellant of all fifty-eight (58) counts of dealing in proceeds of unlawful activities. On July 22, 2008, the court sentenced the Appellant to an aggregate term of two (2) to ten (10) years of imprisonment.

See Commonwealth v. Stoltzfoos, 30 MDA 2009, at 1-4 (Pa. Super. Oct. 26, 2010) (citations omitted).

On direct appeal, Stoltzfoos was represented by the Lancaster County Public Defender's Office. His sentence was upheld by the Pennsylvania Superior Court on October 26, 2010. Judge Ford-Elliot filed a dissenting opinion, where she found that 18 Pa.C.S. § 5111 was unconstitutionally overbroad and argued "the majority disregards the statute's actual purpose." *See id.* at 3 (Ford-Elliot J., dissenting).

Stoltzfoos sought an appeal to the Pennsylvania Supreme Court which was summarily denied on June 16, 2011. *See Commonwealth v. Stoltzfoos*, 854 MAL 2010 (Pa. June 16, 2011). Stolzfoos then filed for PCRA relief. The lower court, finding that the petition presented no material issues of fact, moved to dismiss the PCRA petition by order of February 3, 2012. Court appointed counsel filed a brief on March 9, arguing trial counsel was ineffective for failing to litigate the constitutionality of 18 Pa.C.S. § 5111[2]. *See* Commonwealth's Response to Habeas Corpus Petition, Doc. No. 12, Appendix F, at 4 ["Com. Resp."]. Stoltzfoos claimed that Act 2002-82, which amended the state's

[2] The gist of which centered on 18 Pa.C.S. § 5111 supposed violation of Article III Section 3, also known as the "single subject rule." *See* Com. Resp., at 8 n. 9.

Crimes Code, included a number of different topics which had "nothing to do with dealing in proceeds of unlawful activities. *Id.* at 12. As such, it was in violation of the single subject rule. *Id.* In reviewing the trial court's PCRA finding, the Superior Court held that because the lower court found the single subject rule was not violated, his trial court counsel could not be ineffective.[3] *See Commonwealth v. Stoltzfoos*, 2148 MDA 2011, 4-5 (Pa. Super. June 13, 2012). Petitioner appealed his PCRA ruling to the Supreme Court and was denied review on October 31, 2012. *See Commonwealth v. Stoltzfoos*, 517 MAL 2012 (Pa. Oct. 31, 2012).

This petition followed. Petitioner argues three points: 1) 18 Pa.C.S. § 5111(a)(3) is unconstitutional, 2) his counsel was ineffective for failing to challenge the legality of the statute, and 3) the statute violates the single subject rule. *See* Habeas Petition, Doc. No. 1, Attachment 1, at 6-9 ["Habeas Petition"]; *see also* Com. Resp. at 9-10. Upon review of the Petition and the Commonwealth's response, I ordered supplemental briefing on the overbreadth issue. *See* Order of February 25, 2015, Doc. No. 17. The Commonwealth filed a supplemental brief on March 18, 2015. *See* Commonwealth's Supplemental Brief, Doc. No. 19.

II. STANDARD OF REVIEW

This petition for habeas corpus has been referred to me for a report and recommendation pursuant to 28 U.S.C. § 2254 ("A magistrate judge may perform the duties of a district judge under these rules, as authorized under 28 U.S.C. § 636."). It is a well settled that a state prisoner must exhaust all of his claims by "giv[ing] the state

[3] "The PCRA court opined that the bill amended ten sections of the Crimes Code and did not 'contain topics unrelated to a single subject. Rather, the Court finds that [the bill] serves the single unifying purpose of amending specified sections of the Crimes Code." *See Commonwealth v. Stoltzfoos*, 2148 MDA 2011, 5 (Pa. Super. June 13, 2012) (citing PCRA Court Rule 907 Notice, 9/30/11, at 6).

courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 845 (1999). *See also* 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement is rooted in considerations of comity; the statute is designed to protect the role of the state court in enforcement of federal law and to prevent disruption of the state judicial proceedings. *See Rose v. Lundy*, 102 S.Ct. 1198, 1203 (1982); *Castille*, 109 S.Ct. at 1059 (1989). The burden is on the habeas petitioner to establish that he has fairly presented his federal constitutional claims (both facts and legal theory) to all levels of the state judicial system. See *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002) (*quoting Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231 (3d Cir. 1992), *cert. petition dismissed*, 506 U.S. 1089 (1993)) ("[b]oth the legal theory and the facts underpinning the federal claim must have been presented to the state courts . . . and the same method of legal analysis must be available in the state court as will be employed in the federal court").

In *Coleman v. Thompson*, 501 U.S. 722 (1991), the U.S. Supreme Court held that federal courts should not reach an alleged violation of federal law on habeas review if the state court's decision rests on an independent and adequate state ground.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. "The state-law ground may be a substantive rule dispositive of the case, or a procedural barrier to adjudication of the claim on the merits." *Walker v. Martin*, 131 S.Ct. 1120, 1127 (2011). The doctrine applies whether the default occurred at trial, on appeal, or during collateral proceedings. *Edward v. Carpenter*, 529 U.S. 446, 451

(2000); *Scuba v. Brigano*, 527 F.3d 479, 488 (6th Cir. 2007) (state appellate rule establishing time limits for reopening an appeal); *Cotto v. Herbert*, 331 F.3d 217 (2d Cir. 2003) (examination of state contemporaneous objection rule).

A failure to exhaust claims can lead to procedural default. As the Court of Appeals explained in *Rolan v. Coleman*, 680 F.3d 311, 317 (3d Cir. 2012), *cert. denied*, 133 S.Ct. 669 (2012):

> [p]rocedural default occurs when a claim has not been fairly presented to the state courts (i.e., is unexhausted) and there are no additional state remedies available to pursue, *see Wenger v. Frank*, 266 F.3d 218, 223-24 (3d Cir. 2001); or when an issue is properly asserted in the state system but not addressed on the merits because of an independent and adequate state procedural rule, *see McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999).

Rolan, 680 F.3d at 317. With regard to claims that are not procedurally defaulted, I must determine whether the state court's adjudication of the claims raised was (1) contrary to, or an unreasonable application of, clearly established federal law, or (2) based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d) (2006).

III. DISCUSSION

Here, Stoltzfoos has filed a habeas corpus petition challenging the constitutionality of the statute under which he was convicted, and asserts an ineffective assistance of counsel claim based on an alleged failure to challenge that statute. I will split the first claim into two sections, the first discussing overbreadth allegations and the second dealing with the "single-subject rule."

a. 18 Pa.C.S. § 5111(a)(3) is not overbroad.

With regards to the first argument, the Commonwealth initially wrote that "the state courts were never put on notice that Stoltzfoos was submitting a federal claim."

Com. Resp. at 20. In support of this statement, the Commonwealth argued that "the argument that followed [in Stoltzfoos' brief to the Superior Court] consisted solely of a discussion of state case law and the state constitution." *See id.* (citing Com. Resp. Appendix A.2 at 50-53). This would mean that the Petitioner never put the state courts on notice that he was pursuing a federal claim. *Id.*

This is incorrect. The Superior Court brief cites two United States Supreme Court opinions along with a substantive discussion of privacy rights in a lengthy footnote. *Id.* In one citation, Stoltzfoos argues that Pennsylvania recognizes a privacy right in an individual's financial records. *Id.* at 51; *compare Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (noting that under Article I, Section 8 of the Pennsylvania Constitution, bank customers are entitled to "privacy in records pertaining to their affairs kept at the bank") *with United States v. Miller*, 425 U.S. 435, 440 (1976) (refusing to acknowledge a right to privacy in bank records). The second citation discusses the standards for infringing upon a constitutional right. *See* Comp. Resp. App. A.2 at 52 (citing *Carey v. Pop. Serv.*, 431 U.S. 678, 686 (1977) (holding that where a law infringes upon a constitutional right, the law is "justified only by compelling state interest, and must be narrowly drawn to express those interests")). The Commonwealth recognized in later briefing on the PCRA appeal that "[i]t is a matter of record that trial counsel did not raise [the constitutionality of 18 Pa.C.S. § 5111(a)(3)], but instead raised the claims that the statute violated the *federal constitution* in that it was overbroad and void for vagueness. (These constitutional claims were rejected on direct appeal)." *See* Com. Resp. Appendix G. at 5 (citing *Commonwealth v. Stoltzfoos*, No. 30 MDA 2009 (Pa. Super. Oct. 25, 2010) (Ford-Eliot, J., dissenting)) (emphasis added).

I ordered supplemental briefing on the issue.[4] The Commonwealth filed a brief on the subject on March 18, 2015.

i. The standard of review for the overbreadth claim is *de novo*.

If a state court has adjudicated a raised claim on the merits, no relief can be granted by the federal courts unless that decision resulted in an unreasonable application of "clearly established Federal law." *See* Com. Supp. Br. at 4 (citing 28 U.S.C. § 2254(d)(1)). An adjudication on the merits may occur at any level in the state courts, but that ruling "must fully resolve the claim." *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). This requires the state court's resolution of that claim to have a preclusive effect. *See id.* (citations omitted).

The Court of Appeals for the Third Circuit held in *Chadwick v. Janecka*, 312 F.3d 597 (3d Cir. 2002) that if a claim has not been decided by the state courts, "the restrictive standards of §2254(d) [do] not apply." *See* 312 F.3d at 605 (citations omitted). Thus, I am left to decide the federal overbreadth claim under the *de novo* standard of review. *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (citing *Weeks v. Angelone*, 176 F.3d 249, 258 (4th Cir. 1999) *aff'd*, 528 U.S. 225 (2000) ("When a petitioner has properly presented a claim to the state court but the state court has not adjudicated the claim on the merits, however, our review of questions of law and mixed questions of law and fact is de novo.")).

[4] As the Commonwealth notes in its supplemental brief, "[t]he state court elected not to address the federal constitutional argument, however, and instead dismissed the claim on state grounds." *See* Com. Supp. Br. at 5.

ii. Even under a *de novo* review standard, Stoltzfoos' challenge is meritless.

I see no merit in the argument that 18 Pa.C.S. § 5111(a)(3) is so inadequately tailored that it infringes or prohibits constitutionally protected conduct. 18 Pa.C.S. § 5111(a)(3) prohibits structuring "financial transactions"[5] in order to avoid state and/or federal reporting requirements. Stoltzfoos argues this provision is statutorily overboard because someone seeking to deposit honest, hard-working funds but still trying to avoid transaction reporting requirements would be unfairly punished under this law. *See* Petitioner's Memorandum of Law, at 6-7. As the Commonwealth summarizes, the Petitioner "contends that there is no compelling state interest in punishing a person who knowingly evades the reporting requirements and the statute prohibits constitutionally protected activity." *See* Com. Supp. Br. at 7.

In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the United States Supreme Court elaborated the standards for evaluating overbreadth issues. Any overbreadth claims must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. There are two main concerns in evaluating an overbreadth claim: 1) limitations of language and 2) the measure of deference a court should give elected representatives. *See id.* at 607-08, 613.

Invalidating a statute for overbreadth is a rare action and can only be used as a last resort. *See Broadrick*, 413 U.S. at 613. Nor is it something courts should "casually employ." *See Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 39 (1999). The burden rests squarely on the defendant to demonstrate the presence

[5] A financial transaction, defined by the statute, requires "[a] transaction involving the movement of funds by wire or other means or involving one or more monetary instruments." *See* 18 Pa.C.S. § 5111(f).

of substantial facial overbreadth. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (citing *New York State Club Assn., Inc. v. New York*, 487 U.S. 1, 14 (1988)); *see also Free Speech Coalition, Inc. v. Holder*, 957 F. Supp. 2d 564, 593 (E.D. Pa. 2013).

Our Circuit Court outlines four factors necessary to make a facial overbreadth determination. These include "1) the number of valid applications, 2) the historic or likely frequency of conceivably impermissible applications, 3) the nature of the activity or conduct sought to be regulated, and 4) the nature of the state interest underlying the regulation." See *Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 226 (3d Cir. 2004). The first two *Gibson* factors must be compared to each other. *Id.*

> The Commonwealth examines these first two factors side-by-side, noting that
>
> Evaluating this language against the *Gibson* factors, it is clear that [18 Pa.C.S. §5111(a)(3)] does not reach a substantial amount of constitutionally protected conduct. The statute does not punish someone for making a routine cash deposit. Instead, it was enacted in order to prevent one from evading established banking reporting requirements, which, in this case involved completion of Currency Transaction Reports ("CTRs") for a cash transaction exceeding $10,000.

See Com. Supp. Br. at 9. The aim of enacting these rules was not to punish regular depositors, but individuals seeking to "split up a cash hoard in such a way as to defeat the government's efforts to identify money launderers." *See id.* (citing *United States v. Davenport*, 929 F.2d 1169, 1172-73 (7th Cir. 1991); *cf.* Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring*, 50 SANTA CLARA L. REV. 407, 436-49 (2010) (discussing the purpose and intent of the federal anti-structuring statute). There is no ordinary economic purpose served by breaking up deposits into $9,000 or $9,900 increments. The only common-sense purpose of this activity is to avoid the $10,000 reporting requirement. There is no dispute that avoidance of reporting was what motivated Stoltzfoos here.

Next, the Commonwealth concedes that the title of the statute demonstrates that it was aimed at punishing individuals who conducted financial transactions with money derived from unlawful activities. Com. Supp. Br. at 10. According to the Commonwealth, however, the title of the statute is not dispostive. *See id.* They note that "the statute at 18 Pa. C.S. [§]5111(a)(3) clearly defines the conduct that it seeks to prohibit, namely, engaging in a transaction specifically designed to avoid state or federal reporting requirements. It does not require that the funds at issue be derived from criminal activity." *See id.* at 11. Further, the action of structuring the transaction is the "thrust" of the statute, not the source of the funds themselves. *Id.*

Petitioner argues that *Ratzlaf v. United States*, 510 U.S. 135 (1994) and *United States v. Ismail*, 97 F.3d 50 (4th Cir. 1996) support his position. In *Ratzlaf*, the Supreme Court found that the "willfulness" language in that iteration of the federal structuring statute required proof the defendant knew 1) the bank's duty to report cash transactions of $10,000 or more *and* 2) his duty not to avoid triggering that transaction. *See* 510 U.S. at 146-47. As the Commonwealth notes, this version of the federal transaction reporting requirement was amended by Congress in 1996 to remove any reference to "willfulness." *See* Com. Supp. Br. at 12 (citing Pub. L. No. 103-325 § 411, 108 Stat. 2160, 2253 (1994) *codified at* 31 U.S.C.A. § 5322(a) (1996)). More importantly, *Razlaf* interpreted a federal statute, not the Pennsylvania statute at issue here. It has nothing to do with the question of whether the Pennsylvania statute is overbroad.

Petitioner's reliance on *Ismail* is similarly misplaced. That Fourth Circuit case summarized the changes in *Ratzlaf*, noting that Congress "within months of the *Ratzlaf* opinion, eased the government's burden by enacting legislation that removes the 'willfulness' requirement with respect to the crime of structuring. Thus, in the future,

the Government will not have to prove that defendants knew that structuring is illegal to establish a violation of § 5324." *See* 97 F.3d at 56 (citations omitted). The Petitioner cites to *Ismail* favorably, trying to piece together an argument that the case lends some credence to his position. *See* Habeas Petition, at 9. As this conduct occurred in 2006 and was a violation of Pennsylvania, not federal, law, *Ismail* is of no help to the Petitioner.

The 58 different deposits over a five week period admittedly were designed to circumvent federal and state reporting requirements. Stoltzfoos himself, in correspondence with this court, claims that he was seeking to "avoid" these reporting requirements: "While it is true I avoided the paperwork (in fact [,] I tried to avoid the paperwork), it is also true that I did not know you could not avoid the paperwork." *See* Letter to United States Magistrate Judge Richard A. Lloret, Doc. No. 16, at 1.[6] Even under the *de novo* review afforded to the Petitioner, he is not entitled to relief.

iii. Overbreadth as it applies to Due Process rights is similarly inapplicable.

A law may be overbroad if it "prohibits constitutionally protected conduct." *Grayned v. Rockford*, 408 U.S. 104, 114 (1972). Overbreadth concerns are founded on the possibility that third parties may not exercise constitutionality protected rights due to apprehension over criminal sanctions arising from overbroad statutes. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 629, 634 (1980). The overbreadth doctrine usually applies to First Amendment cases implicating non-commercial speech. *Id.*

Stoltzfoos's habeas petition alleges violations of his privacy rights because Pennsylvania acknowledges "a legitimate expectation of privacy in banking records." *See*

[6] I note that ignorance of the law is usually no defense to criminal charges. *See Cheek v. United States*, 498 U.S. 192, 199 (1991).

Habeas Petition, Exhibit B, at 9 (citing *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979)). In his initial appeal brief to the Pennsylvania Superior Court, Petitioner discussed the overbreadth doctrine in the context of the Fifth and Fourteen Amendments to the United States Constitution. *See* Com. Resp. Appendix A.2 at 50 n. 13. The Supreme Court has acknowledged protected privacy rights in a variety of contexts. *See id.* (citing *H.L. Matheson*, 450 U.S. 398, 434 (1981) (Marshall, Brennan, and Blackmun, JJ., dissenting); *United States v. Caldwell*, 408 U.S. 665, 716-19 (1972) (Douglas, J. dissenting)).

The United States Supreme Court does not acknowledge a privacy right in bank records. *See United States v. Miller*, 425 U.S. 435, 442-43 (1976). "[U]nder Article I, Section 8 of the Pennsylvania Constitution bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank." *See DeJohn*, 403 A.2d at 1291. The court in *DeJohn* was careful to explain that banks "could always be compelled to turn over customer's records when served with a valid search warrant or some other type of valid legal process, such as a lawful subpoena." *Id.* Assuming that Petitioner is arguing that a privacy right acknowledged under Pennsylvania law may generate a federal due process claim – an assumption not addressed by Petitioner - Petitioner's claim collapses because there was no breach of his privacy rights under Pennsylvania law. Search warrants factored into investigating, and later charging, the Petitioner with crimes under 18Pa.C.S. § 5111(a)(3). *See* Com. Resp. Appendix B, at 3 (internal citations omitted) (emphasis added). Regardless of Pennsylvania's recognized privacy interest in bank records, investigating agents secured search warrants of various accounts and executed those warrants in the course of investigating Stoltzfoos' conduct. *See id.* at 3 (noting search warrants executed on

various financial institutions); 5 (noting search warrants executed on Petitioner's residence).

The statute in question does not suffer from overbreadth arising from a federal privacy right, because there is no federal right of privacy in banking records. *See Miller*, 425 U.S. at 443. While privacy rights are recognized in Pennsylvania pursuant to the *Commonwealth v. DeJohn*, 403 A.3d 1283 (Pa. 1979) decision, those rights are not immune from judicially-approved search warrants. *See Commonwealth v. Rekasie*, 778 A.2d 624, 627-28 (Pa. 2001). Petitioner's argument that the statute is overbroad because it potentially impinges on his privacy rights in bank records is without merit.

b. Petitioner's challenge to 18 Pa.C.S. § 5111(a)(3) on single-subject rule grounds is solely grounded in state law considerations.

Found in the Pennsylvania Constitution, the single subject rule states that "[n]o bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or bill codifying or compiling the law or a part thereof." Pa. Const. Art. III § 3. The Commonwealth argues that Stoltzfoos' claim that 18 Pa. C.S. § 5111(a)(3) violates that rule is grounded solely in state law and fails to present a cognizable federal claim. *See* Com. Resp. at 20-21. In *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004) the Court of Appeals held that a court conducting a review of a habeas claim cannot disrupt state court determinations of state law questions.

In *Priester*, the petitioner was charged and convicted of first degree murder following a shooting at a playground. *Id.* 396. One of petitioner's arguments was that the jury instruction regarding accomplice liability was incorrect and this unfairly burdened the petitioner's Due Process right to conviction upon proof beyond a reasonable doubt. *Id.* at 402. The state courts determined that the instructions to the jury during the

murder trial were correct as a matter of state law. *Id.* The Court of Appeals for the Third Circuit held that because the issue of jury instructions had been "squarely addressed" by the Pennsylvania Supreme Court, the Third Circuit could not reexamine those determinations on state law questions. *Id.* (citing *Commonwealth v. Thompson*, 674 A.3d 217, 222-23 (Pa. 1996); *Commonwealth v. Chester*, 587 A.3d 1367, 1384 (Pa. 1991)).

Here, the Superior Court, upon review of Stoltzfoos' PCRA application, sided with the PCRA trial court, holding there was no violation of the single subject rule. Instead, 18 Pa.C.S. § 5111(a)(3) "serve[d] the single unifying purpose of amending specified sections of the Crimes Code." *See Commonwealth v. Stoltzfoos*, 2148 MDA 2011, at 5 (Pa. Super. June 13, 2012) (citations omitted). The Superior Court continued that "the PCRA court held that as a matter of law, the single subject rule was not violated. . . ." *Id.* Given the findings by the state courts on this state law doctrine and the holding in *Priester*, Stoltzfoos' argument is without merit.

c. Petitioner's ineffective assistance of counsel claim is without merit

Stoltzfoos' final claim is that his attorney was ineffective. His argument consumes just a few lines at the end of his memorandum. He argues that "after submitting all of the evidence to counsel of record, and demanding that counsel challenge the constitutionality of the statute that this Petitioner's [sic] was charged under and counsel's failure to do so, denied this Petitioner his constitutional right of Equal Protection of the Law and the right to Due Process." *See* Petition for Writ of Habeas Corpus and Memorandum of Law, Doc. No. 1, Attachment 2, at 9. The Commonwealth argues that this portion of the memorandum is insufficient and that "merely asserting legal conclusions does not fulfill the requirements of Rule 2(c) of the Rules Governing

Section 2254 Cases." *See* Com. Resp. at 22. While I agree with the Commonwealth that these allegations are insufficient to raise a colorable federal claim, and recommend they be dismissed because they are insufficiently pled, I will also provide some explanation why Petitioner's challenge must fail, even if he were to elaborate his pleadings.

The Commonwealth argues that Stoltzfoos' ineffective assistance claim is unexhausted. *See id.* I agree. I have discussed exhaustion requirements earlier in this Report and Recommendation, but recite some of the standards briefly. An application for a writ of habeas corpus cannot be granted unless "the applicant has exhausted the remedies available in the courts of the State." *See* 28 U.S.C. § 2254(b)(1). The burden of demonstrating exhaustion rests on the petitioner. *See Toulson v.* Beyer, 987 F.2d 984, 987 (3d Cir. 1993). Exhaustion requirements are meant to give state courts the first chance to review any federal constitutional challenges to state convictions. *See Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992). These claims must be fairly presented to the state courts to allow the chance for those courts to correct any constitutional violations. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A fair presentation requires a petitioner to present these claims through "one complete round of the State's established appellate review process." *See O'Sullivan v. Boerkel*, 526 U.S. 838, 842 (1999).

Stoltzfoos' ineffective assistance of counsel argument is as unclear as it is brief.[7] Petitioner is incorrect in asserting that his counsel at trial "failed" to challenge the constitutionality of the statute. According to briefing in the Superior Court, his counsel *did* challenge the constitutionality of the statute. *See* Com. Resp., Appendix D, at 5. His

[7] His argument regarding the ineffective assistance claim states, in total, that "after submitting all of the evidence to counsel of record, and demanding that counsel challenge the constitutionality of the state that this Petitioner's [sic] was charged under and counsel's failure to do so, denied his constitutional right of Equal Protection of the Law and right to Due Process." *See* Habeas Br. at 9.

counsel argued during a preliminary hearing at the trial court level that the statute was overbroad in that it "did not criminalize only those who were depositing the proceeds of unlawful activities. . . ." *Id.* (citation omitted). The trial court rejected those arguments. *Id.* at 6. During a review of the Petitioner's PCRA petition, the Superior Court denied Stoltzfoos' ineffectiveness claim. That claim was grounded in his counsel's failure to challenge the constitutionality of the dealing in unlawful proceeds statute on single-subject rule grounds. *See Commonwealth v. Stoltzfoos*, No. 2148 MDA 2011, at 6 (Pa. Super. June 13, 2012). The lone claim argued during the PCRA litigation was that "trial counsel was ineffective for failing to litigate that the enactment of 18 Pa. C.S.A. § 5111 violated [the single subject rule] of the Pennsylvania Constitution." See Com. Resp. Br., Appendix F, at 4. Stoltzfoos' failure to raise an ineffectiveness claim, based on counsel's failure to make an overbreadth argument, in the PCRA petition means the claim is unexhausted, having not been presented to the state court. Of course, such a claim, had it been presented, would have been as meritless then as it would be now, since counsel obviously did make an overbreadth challenge to the statute in the criminal proceeding.

Stoltzfoos' ineffective assistance of counsel claim, if based on the single-subject rule, could only succeed if the statute itself were deemed unconstitutional. *Commonwealth v. Dennis*, 784 A.2d 179, 182 (Pa. Super. 2001). Counsel cannot be deemed ineffective for failing to assert meritless arguments. *Commonwealth v. Gaskins*, 692 A.2d 224, 228 (Pa. Super. 1997). Federal law is the same: "There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." *United States v. Sanders*, 165 F.3d 248, 253 (3d Cir. 1999). In disposing of the single-subject attack, the Superior Court held that because the statute was constitutional, as a matter of state law, there could be no ineffectiveness claim. *See*

Commonwealth v. Stoltzfoos, No. 2148 MDA 2011, at 5-6 (Pa. Super. June 13, 2012). As I have pointed out previously, there can be no review of this state law determination here. Even if the issue were somehow litigable here, the AEDPA requires wide deference to state court conclusions. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The state court's application of the *Strickland* standard must be "unreasonable," not just incorrect, before relief can be granted. *Id.* at 129 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)). The Pennsylvania court's application of *Strickland* was not unreasonable. It was correct. Hence, Stoltzfoos can have no ineffective assistance claim based on the single-subject rule.

In summary (a) an ineffectiveness claim based on overbreadth is both unexhausted and obviously meritless, and (b) an ineffectiveness claim based on the single-subject rule is meritless, both because it would require me to overturn the Pennsylvania court's interpretation of its own law, something I cannot do, and because the denial of Stoltzfoos' ineffectiveness claim was not an unreasonable determination by the Pennsylvania courts.

As I mentioned, I also agree with the Commonwealth's argument that Stoltzfoos' ineffective assistance argument does not even present a federal question. "A passing reference to equal protection and due process, without more, does not constitute a federal question." *See* Com. Resp. at 23.

RECOMMENDATION

I recommend that Stoltzfoos' habeas petition be dismissed with prejudice. I further recommend that no certificate of appealability issue, under 28 U.S.C. § 2253(c)(1)(A), because petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The petitioner may file objections to this

Report and Recommendation within fourteen days after being served with a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See *Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

s/Richard A. Lloret
RICHARD A. LLORET
U.S. MAGISTRATE JUDGE

APPENDIX D

J-S12019-10

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
vs.	:	
LEVI LAPP STOLTZFOOS,	:	
Appellant	:	No. 30 MDA 2009

Appeal from the Judgment of Sentence July 22, 2008
In the Court of Common Pleas of Lancaster County
Criminal, No. CP-36-CR-0005995-2006

BEFORE: FORD ELLIOTT, P.J., GANTMAN, AND COLVILLE*, JJ.

MEMORANDUM: FILED: October 26, 2010

Appellant, Levi Lapp Stoltzfoos, appeals from the judgment of sentence entered in the Lancaster County Court of Common Pleas, following his jury trial convictions for fifty-eight (58) counts of dealing in proceeds of unlawful activities.[1] We affirm.

The relevant facts of this case are as follows:

> Between January 6, 2006 and February 11, 2006, [Appellant] made fifty-eight cash deposits, totaling five-hundred, forty-one thousand, one-hundred dollars ($541,100.00), to ten different banks. Specifically, the following deposits were made on the given days:
>
> January 6 & 7, 2006:

[1] 18 Pa.C.S.A. § 5111(a)(3).

*Retired Senior Judge assigned to the Superior Court.

1. Bank of Lancaster County $9,900.00

2.	Sovereign Bank	$9,900.00
3.	Northwest Savings Bank	$9,900.00
4.	National Penn Bank	$9,900.00
5.	Ephrata National Bank	$9,900.00
6.	M&T Bank	$9,900.00

January 14, 2006:

7.	Coatesville Savings Bank	$9,900.00
8.	Bank of Lancaster County	$9,900.00
9.	Sovereign Bank	$9,900.00
10.	Susquehanna Bancshares, Inc.	$8,700.00
11.	Northwest Savings Bank	$9,900.00
12.	National Penn Bank	$9,900.00
13.	Fulton Savings Bank	$9,900.00
14.	Ephrata National Bank	$9,900.00
15.	M&T Bank	$9,900.00
16.	Graystone Bank	$9,900.00

January 19, 2006:

17.	Northwest Savings Bank	$9,900.00
18.	National Penn Bank	$9,900.00
19.	Ephrata National Bank	$9,900.00
20.	M&T Bank	$9,900.00
21.	Graystone Bank	$9,900.00
22.	Susquehanna Bancshares, Inc.	$9,900.00

January 20, 2006:

23.	Bank of Lancaster County	$9,900.00
24.	Sovereign Bank	$9,900.00
25.	Fulton Savings Bank	$9,900.00

January 21, 2006:

26.	Coatesville Savings Bank	$9,500.00
27.	Bank of Lancaster County	$9,500.00
28.	Sovereign Bank	$9,000.00
29.	Susquehanna Bancshares, Inc.	$9,000.00
30.	Northwest Savings Bank	$9,500.00
31.	National Penn Bank	$9,000.00
32.	Fulton Savings Bank	$9,000.00
33.	Ephrata National Bank	$9,500.00

34.	M&T Bank	$9,000.00
35.	Graystone Bank	$9,000.00

January 27, 2006:

36.	Bank of Lancaster County	$9,000.00

January 28, 2006:

37.	Coatesville Savings Bank	$9,000.00
38.	Sovereign Bank	$9,000.00
39.	Susquehanna Bancshares, Inc.	$9,000.00
40.	Northwest Savings Bank	$9,000.00
41.	National Penn Bank	$9,000.00
42.	Fulton Savings Bank	$9,000.00
43.	Ephrata National Bank	$9,000.00
44.	M&T Bank	$9,000.00
45.	Graystone Bank	$9,000.00

February 4, 2006:

46.	Coatesville Savings Bank	$9,000.00
47.	Bank of Lancaster County	$9,000.00
48.	Sovereign Bank	$9,000.00
49.	Northwest Savings Bank	$9,000.00
50.	National Penn Bank	$9,000.00
51.	Fulton Savings Bank	$6,600.00
52.	M&T Bank	$9,000.00

February 11, 2006:

53.	Coatesville Savings Bank	$5,200.00
54.	Bank of Lancaster County	$9,000.00
55.	Susquehanna Bancshares, Inc.	$9,000.00
56.	National Penn Bank	$9,900.00
57.	Fulton Savings Bank	$9,000.00
58.	Graystone Bank	$10,000.00

[Appellant] was charged, under Information 5995-2006, with 58 counts of dealing in proceeds of unlawful activity.[2] Prior to trial, the Commonwealth filed its Motion

[2] The Commonwealth also charged Appellant with one (1) count of receiving stolen property, 18 Pa.C.S.A. § 3925, for his possession of ninety-three (93)

> for Court to Take Notice of Federal Law and Regulation. The [court] granted the Commonwealth's motion [on] June 5, 2007. [Appellant] filed his Omnibus Pretrial Motion on May 14, 2007. In relevant part, [Appellant's] motion included a motion to quash counts 1 through 58 based on 18 Pa.C.S. § 5111(a)(3) not containing a *mens rea* element. The [c]ourt heard argument regarding the pretrial motions prior to trial on May 5, 2008. The [c]ourt denied [Appellant's] motion and referred to 18 Pa.C.S. 302(c), which directs the use of an intentional, knowing, or reckless culpability element when the culpability element sufficient to establish a material element of an offense is not prescribed by law.

(Trial Court Opinion, filed March 26, 2009, at 1-3) (internal footnote omitted).

Following trial, a jury convicted Appellant of all fifty-eight (58) counts of dealing in proceeds of unlawful activities. On July 22, 2008, the court sentenced Appellant to an aggregate term of two (2) to ten (10) years of imprisonment. The court also imposed a civil penalty of $540,200.00, pursuant to Section 5111(c). On August 1, 2008, Appellant timely filed post-sentence motions. The court denied Appellant's post-sentence motions on September 9, 2008. Appellant did not file a notice of appeal.

On December 5, 2008, Appellant timely filed a counseled petition, pursuant to the Post Conviction Relief Act ("PCRA").[3] In his petition, Appellant requested the restoration of his direct appeal rights *nunc pro tunc*.

Pennsylvania Turnpike toll tickets with a combined value of $8,390.00. Prior to trial, the Commonwealth agreed to the court's entry of *nolle prosequi* for this count.

[3] 42 Pa.C.S.A. §§ 9541-9546.

Also on December 5, 2008, the court granted relief, instructing Appellant to file a notice of appeal within thirty (30) days.

Appellant timely filed the instant notice of appeal on December 31, 2008. On January 5, 2009, the court ordered Appellant to file a concise statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b). Appellant timely filed his Rule 1925(b) statement on January 26, 2009.[4]

Appellant now raises ten issues for our review:

> DID THE TRIAL COURT ERR IN RULING THAT 18 Pa.C.S. § 5111(a)(3) WAS NOT VOID FOR VAGUENESS?
>
> DID THE TRIAL COURT ERR IN RULING THAT 18 Pa.C.S. § 5111(a)(3) WAS NOT VOID FOR OVERBREADTH, WHERE THE STATUTE CRIMINALIZES THE DEPOSITING OF LAWFULLY ACQUIRED CASH INTO FINANCIAL INSTITUTIONS IN A MANNER INTENDED TO MAINTAIN [A] CONSTITUTIONAL RIGHT TO PRIVACY IN...FINANCIAL RECORDS?
>
> DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY THAT THE COMMONWEALTH WAS ALLEGING THAT [APPELLANT] WAS GUILTY OF A FEDERAL CRIME, SET FORTH AT 31 U.S.C. § 5324, WHICH INSTRUCTION WAS IRRELEVANT, IMPROPER, AND HIGHLY PREJUDICIAL?
>
> WAS THE EVIDENCE INSUFFICIENT TO SUSTAIN [APPELLANT'S] CONVICTION FOR 58 COUNTS OF DEALING IN UNLAWFUL PROCEEDS WHERE THE COMMONWEALTH PRESENTED INSUFFICIENT EVIDENCE OF A STATE OR FEDERAL TRANSACTION REPORTING REQUIREMENT,

---

[4] On September 18, 2009, Appellant filed an application for relief with this Court, requesting permission to file a brief exceeding the page limit set forth in Pa.R.A.P. 2135. The decision on the motion was deferred to the merits panel. We now grant the motion. Appellant's brief is accepted as filed.

WHICH [APPELLANT] HAD ALLEGEDLY AVOIDED?

WAS THE $540,200.00 CIVIL PENALTY, IMPOSED PURSUANT TO 18 Pa.C.S. 5111(c), AN EXCESSIVE FINE AND CRUEL AND UNUSUAL PUNISHMENT?

WAS THE ASSIGNMENT OF AN OFFENSE GRAVITY SCORE OF EIGHT TO THE NEWLY CREATED OFFENSE SET FORTH IN 18 Pa.C.S. 5111(a)(3), DESPITE THE SIGNIFICANT DIFFERENCE IN CRIMINAL LIABILITY FROM THAT REQUIRED FOR A CONVICTION UNDER SUBSECTIONS (1) OR (2), A VIOLATION OF [APPELLANT'S] RIGHT TO EQUAL PROTECTION OF THE LAWS?

DID THE TRIAL COURT ERR IN REFUSING TO EXCLUDE THE COMMONWEALTH'S SENTENCING MEMORANDUM, AND IN PERMITTING THE TESTIMONY OF [INVESTIGATORS FROM THE ATTORNEY GENERAL'S OFFICE], WHERE THE PURPOSE OF THE MEMORANDUM AND TESTIMONY WERE TO ATTEMPT TO PROVE THAT THE MONEY [APPELLANT] HAD DEPOSITED WAS THE PROCEEDS OF UNLAWFUL ACTIVITY?

BY REFUSING TO PERMIT DEFENSE COUNSEL FOR [APPELLANT] TO CROSS-EXAMINE THE COMMONWEALTH'S WITNESSES AT SENTENCING, DID THE TRIAL COURT VIOLATE [APPELLANT'S] RIGHT TO THE ASSISTANCE OF COUNSEL, AND HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM?

IN IMPOSING SENTENCE, DID THE TRIAL COURT IMPROPERLY BASE ITS SENTENCE UPON ITS BELIEF, WHICH WAS NEITHER ALLEGED NOR PROVED AT TRIAL, AND EVIDENCE OF WHICH SHOULD NOT HAVE BEEN ADMITTED AT SENTENCING, THAT THE MONEY [APPELLANT] DEPOSITED WAS THE PROCEEDS OF UNLAWFUL ACTIVITIES?

BY DEMANDING THAT [APPELLANT] ANSWER THE TRIAL COURT'S HYPOTHETICAL LEGAL QUESTION ABOUT PROPERTY RIGHTS IN BORROWED MONEY, BY REFUSING TO PERMIT [APPELLANT] TO CONSULT WITH HIS ATTORNEY REGARDING THE COURT'S QUESTION, AND BY REFUSING TO PERMIT DEFENSE COUNSEL TO ADDRESS

> THE COURT ON [APPELLANT'S] BEHALF, DID THE TRIAL COURT VIOLATE [APPELLANT'S] RIGHT TO REMAIN SILENT AT SENTENCING, AND HIS RIGHT TO THE ASSISTANCE OF COUNSEL?

(Appellant's Brief at 7-8).

In his first issue, Appellant asserts Section 5111(a)(3) is defective, because it does not include a *mens rea*. Appellant acknowledges Section 302 provides the *mens rea* of "intentionally, knowingly or recklessly" for statutes which do not otherwise provide a *mens rea*. Appellant also notes Section 5111(a)(1) and (2) require knowing and intentional conduct. Under these circumstances, Appellant maintains "there is no way for an ordinary person to determine whether [Section 5111(a)(3)] is a strict liability offense, whether it requires *mens rea* as set forth in [Section] 302, or whether the requisite *mens rea* is knowing and intentional conduct as is required in subsections one and two of the statute." (Appellant's Brief at 29).

Appellant further argues the title of Section 5111, "Dealing in proceeds of unlawful activities," describes conduct which is not mentioned in Subsection (a)(3). Because the title is not reconcilable with the offense described in Subsection (a)(3), Appellant contends "an ordinary person simply cannot [know] what conduct is prohibited, and the statute encourages arbitrary and discriminatory enforcement." (***Id.*** at 48). Appellant concludes Section 5111(a)(3) is unconstitutionally vague on its face. We disagree.

"When an appellant challenges the constitutionality of a statute, the

appellant presents this Court with a question of law." ***Commonwealth v. Howe***, 842 A.2d 436, 441 (Pa.Super. 2004).

> Our consideration of questions of law is plenary. A statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably, and plainly violates the constitution. Thus, the party challenging the constitutionality of a statute has a heavy burden of persuasion.

Id. (internal citations omitted).

"The void for vagueness doctrine, as extensively developed by the United States Supreme Court, is a due process doctrine incorporating notions of fair notice and warning." ***Commonwealth v. Costa***, 861 A.2d 358, 361 (Pa.Super. 2004), *appeal denied*, 584 Pa. 672, 880 A.2d 1236 (2005) (quoting ***Commonwealth v. Potts***, 460 A.2d 1127, 1133 (Pa.Super. 1983)).

> The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.... A statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Due process is satisfied if the statute provides reasonable standards by which a person may gauge his future conduct.

Costa, supra at 361-62 (quoting ***Commonwealth v. Mayfield***, 574 Pa. 460, 467, 832 A.2d 418, 422 (2003)).

Vagueness challenges can be of two types. ***Commonwealth v. Habay***, 934 A.2d 732 (Pa.Super. 2007), *appeal denied*, 598 Pa. 746, 954 A.2d 575 (2008).

> First, a challenge of facial vagueness asserts that the statute in question is vague when measured against any conduct which the statute arguably embraces. Second, a claim that a statute is vague as applied contends the law is vague with regard to the particular conduct of the individual challenging the statute.
>
> For a court to entertain challenges of facial vagueness, the claims must involve First Amendment issues. When a case does not implicate First Amendment matters, vagueness challenges are to be evaluated in light of the facts at hand—that is, the statute is to be reviewed as applied to the defendant's particular conduct.

Id. (internal citations omitted).

"A facial challenge, in this context, means a claim that the law is invalid *in toto*—and therefore incapable of any valid application." ***Costa, supra*** at 362 (internal quotation marks omitted).

> In cases that do not implicate First Amendment freedoms, facial vagueness challenges may be rejected where an appellant's conduct is clearly prohibited by the statute in question. Additionally, a vagueness challenge fails if a statute has a specific intent requirement, because an appellant cannot complain he did not understand the crime where he has been found to have had the specific intent of doing what is prohibited.

Id. (internal citations omitted).

Section 5111(a) provides as follows:

> **§ 5111. Dealing in proceeds of unlawful activities**

> **(a) Offense defined.**—A person commits a felony of the first degree if the person conducts a financial transaction under any of the following circumstances:
>
> (1) With knowledge that the property involved represents the proceeds of unlawful activity, the person acts with the intent to promote the carrying on of the unlawful activity.
>
> (2) With knowledge that the property involved represents the proceeds of unlawful activity and that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of unlawful activity.
>
> (3) To avoid a transaction reporting requirement under State or Federal law.

18 Pa.C.S.A. § 5111(a).

The Crimes Code also provides the general requirements for culpability when a statute is silent regarding *mens rea*:

> **§ 302. General requirements of culpability**
>
> * * *
>
> **(c) Culpability required unless otherwise provided.**—When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa.C.S.A. § 302(c).

"Whether a given statute is to be construed as requiring criminal intent is to be determined by the court, by considering the subject matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the legislature." ***Mayfield, supra*** at 475, 832 A.2d at 427

(quoting ***Commonwealth v. Black***, 380 A.2d 911, 913 (Pa.Super. 1977)). "The fact that a criminal statute is silent with regard to a culpability requirement does not mean that the Legislature intended to dispense with the same." ***Commonwealth v. Gallagher***, 592 Pa. 262, 267, 924 A.2d 636, 638-39 (2007).

> Instead, there is a long-standing tradition, which is reflected in the plain language of Section 302, that criminal liability is not to be imposed absent some level of culpability. Thi s is because the imposition of absolute liability for a crime is generally disfavored and an offense will not be considered to impose absolute liability absent some indication of a legislative directive to dispense with *mens rea*.

Id. at 267, 924 A.2d at 639.

"A criminal statute that imposes absolute liability typically involves regulation of traffic or liquor laws." ***Costa, supra*** at 363-64 (quoting ***Commonwealth v. Pond***, 846 A.2d 699, 706 (Pa.Super. 2004)).

> Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulation of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt. Along these same lines, an additional factor to consider when determining if the legislature intended to eliminate the *mens rea* requirement from a criminal statute is whether the statute imposes serious penalties. The more serious the penalty, such as a lengthy term of imprisonment, the more likely it is that the legislature did not intend to eliminate the *mens rea* requirement (unless the legislature plainly indicates otherwise in the language of the statute, as for statutory rape).

Costa, supra at 363-64 (quoting ***Pond, supra*** at 706-07). A determination

of whether the legislature intended to impose strict criminal liability also requires examination of the effect of the punishment on the defendant's reputation. ***Id.***

"The title and preamble of a statute may be considered in the construction thereof." 1 Pa.C.S.A. § 1924. "The headings prefixed to titles, parts, articles, chapters, sections and other divisions of a statute **shall not** be considered to control but may be used to aid in the construction thereof." ***Id.*** (emphasis added). The title of a statute "is in no sense conclusive, particularly when there is no ambiguity in the body of the statute or ordinance itself." ***Commonwealth v. Reefer***, 816 A.2d 1136, 1143 n.10 (Pa.Super. 2003), *appeal denied*, 574 Pa. 759, 831 A.2d 599 (2003) (quoting ***Commonwealth v. Campbell***, 758 A.2d 1231, 1237 (Pa.Super. 2000)). "[T]he title cannot control the plain words of the statute and...even in the case of ambiguity it may be considered only to resolve the uncertainty." ***Commonwealth v. Magwood***, 503 Pa. 169, 177, 469 A.2d 115, 119 (1983) (internal quotation marks omitted).

Instantly, Appellant made fifty-eight cash deposits between January 6, 2006 and February 11, 2006. Appellant utilized ten different banks and deposited less than $10,000.00 on each occasion. During the subsequent investigation, Appellant told police: "I knew that when you withdrew $10,000.00 cash or deposit $10,000.00 cash, a form has to be filled out." (***See*** N.T. Trial, 5/6/08, at 92.) Appellant admitted he learned of the bank-

reporting requirements in 1999, and he did not want any part of "government investigation or harassment."[5] (***See id.***)

The Commonwealth also presented witnesses who testified that federal law requires a bank to file a currency transaction report ("CTR") each time a customer makes a deposit in excess of $10,000.00. Further, federal law criminalizes the structuring of financial transactions to avoid the filing of a CTR. This evidence supports the application of Section 5111(a)(3) to Appellant's conduct, as the statute applies to all instances where financial transactions are structured to avoid a reporting requirement under state **or** federal law. ***See*** Pa.C.S.A. § 5111(a)(3).

Additionally, Section 5111(a)(3) does not contain a plain indication that the legislature intended the statute to impose strict criminal liability or operate as an enforcing arm for social regulation of a purely civil nature. A conviction under this statute constitutes a first degree felony; convictions can lead to serious criminal penalties and can significantly harm a

---

[5] The certified record belies Appellant's seemingly innocuous explanation for his conduct. Specifically, the affidavit of probable cause posited the following explanation for the source of Appellant's funds:

> [I]t appears that [Appellant] would purchase an item from one of the merchant's stores, then go to the same or other stores owned by the merchant, and return the same item using a duplicate or bogus receipt. It is believed that, in order for [Appellant] to complete his swindle, he would return an item taken off of the shelves from each of the stores. I believe that [Appellant's] swindle enabled him to receive multiple credits on a single purchase.

(Affidavit of Probable Cause, dated 10/26/06, at 13).

defendant's reputation. Nothing in the plain language of Section 5111(a)(3) shows a legislative directive to dispense with a *mens rea* requirement. Thus, Section 302(c) applies.

Based upon the foregoing, Section 5111(a)(3) is not impermissibly vague on the ground that it contains no specific *mens rea* requirement. ***See Gallagher, supra***; ***Mayfield, supra***; ***Costa, supra***. Moreover, there is no merit to Appellant's argument regarding the title of the statute, because the body of the statute is not ambiguous. ***See Reefer, supra***. Although Appellant suggests the title of the statute, "Dealing in proceeds of unlawful activities," prevents an ordinary person from understanding the prohibited conduct in Section 5111(a)(3), Appellant's own statements demonstrated a keen awareness of exactly what acts the statute prohibited. Therefore, Appellant is not entitled to relief on his first claim.

In his second issue, Appellant relies on ***Commonwealth v. DeJohn***, 486 Pa. 32, 403 A.2d 1283 (1979), for the proposition that Pennsylvanians have a right to privacy in their financial records, even though these records are disclosed to their banks. Despite this privacy right, Appellant asserts Section 5111(a)(3) criminalizes a depositor's decision to structure transactions to avoid reporting requirements, even if the money involved was lawfully acquired. Under these circumstances, Appellant argues Section 5111(a)(3) violates an individual's right to privacy in his financial records "by criminalizing a person's attempts to keep private what the Pennsylvania

Constitution says he has a constitutional right to keep private." (Appellant's Brief at 51-52). Appellant further argues the state does not have a compelling interest to justify the criminalization of such conduct. Appellant concludes Section 5111(a)(3) is unconstitutionally overbroad. We disagree.

"A statute is unconstitutionally overbroad only if it punishes lawful constitutionally protected activity as well as illegal activity." ***Commonwealth v. Davidson***, 595 Pa. 1, 18, 938 A.2d 198, 208 (2007) (internal quotation marks omitted).

> Thus, in determining whether a statute is unconstitutional due to overbreadth, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Consequently, if a statute's overbreadth is substantial, it may not be enforced against anyone until it is narrowed to reach only unprotected activity.
>
> * * *
>
> [The] function of overbreadth adjudication...attenuates as the prohibited behavior moves from pure speech towards conduct, where the conduct falls within the scope of otherwise valid criminal laws that reflect legitimate state interests.... [Further,] while such laws may implicate protected speech, at some point that potential effect does not justify invalidating a statute prohibiting conduct that a state has the power to proscribe.

Id. at 18-19, 938 A.2d at 208 (internal citations and quotation marks omitted).

"The rationale of the overbreadth doctrine is that third parties not presently before the court may refrain from exercising their constitutionally

protected rights for fear of criminal sanctions contained in an overly broad enactment." ***Commonwealth v. Scott***, 878 A.2d 874, 879 (Pa.Super. 2005), *appeal denied*, 586 Pa. 749, 892 A.2d 823 (2005). "The overbreadth doctrine is an exception to the traditional rules of standing and allows a party to assert the First Amendment rights of those not before the court. The overbreadth doctrine applies in First Amendment cases which involve non-commercial speech." ***Id.*** at 879-80 (internal citation omitted).

In ***DeJohn***, the defendant was a suspect in the murder of her husband. During their investigation, the authorities served two "subpoenas" on the defendant's bank, demanding copies of all information pertaining to her accounts with the victim. Pursuant to this request, the authorities obtained a cancelled check. The defendant filed a motion to suppress this evidence, which the court denied. On appeal, the defendant argued the subpoenas were unlawful, and the cancelled check should have been suppressed. The Commonwealth insisted, however, that a depositor lacks standing to challenge the seizure of her bank records.

In response to the Commonwealth's argument, our Supreme Court concluded:

> We are convinced that under...the Pennsylvania Constitution bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank. Since the records seized in the instant case were taken pursuant to an invalid subpoena, and [the defendant] had a legitimate expectation of privacy in those records, [the defendant] has standing to challenge their admissibility.

DeJohn, supra at 1291, 403 A.2d at 49. Nevertheless, the Court stopped short of creating a "banker-customer" privilege:

> The Commonwealth next argues that adopting ***Burrows*** [***v. Superior Court of San Bernardino County***, 13 Cal.3d 238, 118 Cal.Rptr. 166, 529 P.2d 590 (1974)] would amount to this [C]ourt's creation of banker-customer privileges, a task which should be left to the Legislature. We do not believe, however, that our decision in any way creates such a privilege, as the holder of any of the traditionally recognized privileges cannot be compelled to waive said privilege. A bank could always be compelled to turn over customers' records when served with a valid search warrant or some other type of valid legal process, such as a lawful subpoena.

Id. at 1291, 403 A.2d at 48.

Instantly, Section 5111(a)(3) proscribes financial transactions structured to avoid state or federal reporting requirements. This qualification to the term "financial transactions" narrows and limits the reach of the statute. In doing so, the legislature made clear it did not seek to punish individuals for **routine** cash deposits and withdrawals from their bank accounts. Rather, the statute prohibits only those deposits and/or withdrawals which are calculated to evade certain banking reporting regulations.

There is a compelling state interest in punishing those who knowingly evade reporting requirements. CTRs and other bank records must be maintained, because of their usefulness in criminal, tax, and regulatory investigations and proceedings. Contrary to Appellant's assertions, his right

to privacy in these records is not unfettered. ***See DeJohn, supra***. Thus, the prohibitions set forth in Section 5111(a)(3) comport with constitutional principles, and the statute is not overbroad **on the ground alleged**. ***See Davidson, supra***.

In his third issue, Appellant contends the trial court instructed the jury on Section 5324 of the United States Code. Appellant claims Section 5324 does not set forth any transaction reporting requirement that he was alleged to have avoided; instead, Section 5324 sets forth a separate, federal criminal offense. Appellant insists an instruction regarding Section 5324 was completely unrelated to the charges at issue, and the mere mention of this statute left the jury believing Appellant had been charged with a federal crime. Appellant concludes the court provided an erroneous and prejudicial jury charge, and this Court must grant a new trial on this basis. We disagree.

"An appellate court must assess the jury instructions as a whole to determine whether they are fair and impartial." ***Commonwealth v. Collins***, 546 Pa. 616, 620, 687 A.2d 1112, 1113 (1996). A jury charge is erroneous only if the charge as a whole is inadequate, not clear or has a tendency to mislead or confuse, rather than clarify, a material issue. ***Commonwealth v. Baker***, 963 A.2d 495 (Pa.Super. 2008).

> A charge is considered adequate unless the jury was palpably misled by what the trial judge said or there is an omission which is tantamount to fundamental error.

> Consequently, the trial court has wide discretion in fashioning jury instructions.

Id. at 507 (quoting ***Commonwealth v. Brown***, 911 A.2d 576, 583 (Pa.Super. 2006), *appeal denied*, 591 Pa. 722, 920 A.2d 830 (2007)).

"We will not rigidly inspect a jury charge, finding reversible error for every technical inaccuracy...." ***Commonwealth v. Jones, K.***, 858 A.2d 1198, 1200 (Pa.Super. 2004).

> Error cannot be predicated on isolated excerpts of the charge...it is the general effect of the charge that controls. ... The trial court may use its own form of expression to explain difficult legal concepts to the jury, as long as the trial court's instruction accurately conveys the law. A verdict will not be set aside if the instructions of the trial court, taken as a whole, and in context, accurately set forth the applicable law.

Id. at 1201 (internal citations omitted).

Instantly, the court instructed the jury, in pertinent part, as follows:

> In this particular case, [Appellant] is charged under a section which is entitled dealing in proceeds of unlawful activities. To find [Appellant] guilty of this offense, you must find that the following elements have been proven beyond a reasonable doubt. First, [Appellant] conducted a financial transaction.
>
> * * *
>
> Here, the Commonwealth has charged that a financial transaction in which [Appellant] engaged was 58 separate transactions to ten separate banks in Lancaster County. Second, [Appellant] conducted these financial transactions to avoid a transaction reporting requirement under state or federal law.
>
> In this case, the Commonwealth alleges that [the institution] was required to report the transactions under

> the following provision of law: under the...Federal Code of Regulations, Title 31, Part 103.22.... Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange or currency or other payment or transfer, by, through or such other financial institution which involves a transaction of currency of more than $10,000.
>
> Additionally, **the Commonwealth alleges [Appellant] structured each transaction, in violation of 31 U.S.C., which is the United States Code, Section 5324**, structuring transactions to evade reporting requirement prohibited, which states, in relevant part, the 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, reporting or recordkeeping requirements imposed by any order issued under Section 5326 or the recordkeeping requirements imposed by any regulation prescribed under 21—Section 21 of the Federal Deposit Insurance Act, or that the person would cause or attempt to cause a domestic financial institution to fail to file such a report; and thirdly, the value of the property involved in the transaction was $542,000.
>
> Culpability required under this particular act is that to establish a material element of this offense, a person acts either intentionally, knowingly or recklessly with regard to the elements of the offense.

(***See*** N.T. Trial, 5/7/08, at 285-87) (emphasis added). At the conclusion of the charge, but prior to the dismissal of the jury for deliberation, the court asked counsel for any comments about the instructions. Defense counsel objected to the reference to Section 5324, stating: "Your Honor, with regard to the court's instruction on the structuring...I would make a technical objection to that. It's not anywhere in the statutes [the Commonwealth] charged and it's not before the jury, so I want [an objection] placed on the

record." (***See id.*** at 293). The court noted the objection for the record, but declined to alter the charge on this basis.

In support of its instruction, the trial court observed:

> The [c]ourt's mention of [S]ection 5324 was limited to its pertinent part, regarding structuring to avoid reporting requirements. This limited section served to explain the action prohibited under 18 Pa.C.S. § 5111. The remaining elements of [S]ection 5111(a)(3) are distinct from the federal statute and the [c]ourt instructed the jury accordingly. The culpability requirement under the state statute, which differs from the federal statute, was clearly and concisely read into the record to the jury. Specifically, the [c]ourt instructed the jury on three levels of culpability, intentionally, knowingly, and recklessly, pursuant to 18 Pa.C.S. § 302(c) (where no level of culpability is prescribed by law, such element is established if a person acted intentionally, knowingly, or recklessly). A review of the entire charge reveals that the [c]ourt did not instruct the jury on the elements of the federal crime and the [c]ourt's instruction on 31 U.S.C.A. § 5324 was limited to the language on structuring transactions to avoid reporting requirements as this action is clearly contemplated by the Pennsylvania statute.

(Trial Court Opinion at 8-9) (internal citation omitted). We accept this analysis. Here, the court's use of federal law related to the charges at issue. Although the court said what Appellant had done violated federal law, the court used Section 5324 merely to illustrate the type of financial "structuring" contemplated in Section 5111(a)(3). The instruction did not necessarily impart that Appellant had actually been charged with a federal crime. Thus, the charge was not misleading or confusing. ***See Baker, supra***.

In his fourth issue, Appellant avers the Commonwealth had to prove

the existence of a transaction reporting requirement under state or federal law, which Appellant attempted to avoid through the structuring of his financial transactions. Appellant concedes the Commonwealth presented some evidence regarding a bank's obligation to complete a CTR for cash deposits over $10,000.00. Appellant insists, however, the Commonwealth's witnesses did not cite a specific federal regulation which Appellant attempted to evade. Although the court took judicial notice of the applicable federal regulations, Appellant complains the Commonwealth had to present some evidence of these regulations during its case-in-chief. Under these circumstances, Appellant concludes the Commonwealth presented insufficient evidence to support his convictions. We disagree.

When examining a challenge to the sufficiency of evidence, our standard of review is as follows:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually

> received must be considered. Finally, the [finder] of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Jones, B., 874 A.2d 108, 120-21 (Pa.Super. 2005) (quoting ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa.Super. 2003)).

Additionally, decisions on foreign law are governed by statute as follows:

> **§ 5327. Determination of foreign law**
>
> **(a) Notice.**—A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this Commonwealth shall give notice in his pleadings or other reasonable written notice.
>
> **(b) Materials to be considered.**—In determining the law of any jurisdiction or governmental unit thereof outside this Commonwealth, the tribunal may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.
>
> **(c) Court decision and review.**—The court, not jury, shall determine the law of any governmental unit outside this Commonwealth. The determination of the tribunal is subject to review on appeal as a ruling on a question of law.

42 Pa.C.S.A. § 5327.

Instantly, Daniel Licklider, a field investigator from the Pennsylvania Attorney General's office, testified about his investigation of Appellant's financial transactions at issue. The investigation commenced on February 13, 2006, when a Susquehanna Bancshares employee reported that

Appellant appeared to be making structured deposits. Beginning on February 23, 2006, Agent Licklider executed multiple search warrants, seizing Appellant's records from ten different banks. The bank records revealed Appellant had made fifty-eight deposits over a six-week period in January and February of 2006. Fifty-seven of the deposits consisted of cash in amounts slightly less than $10,000.00.

Regarding evidence of federal reporting requirements, the Commonwealth filed a pretrial motion asking the court to take notice of federal law and regulation. In this motion, the Commonwealth alleged Appellant had structured each of his deposits to avoid the filing of a CTR. The Commonwealth cited 31 U.S.C.A. § 5313 and Code of Federal Regulations, Title 31, Part 103.22. These provisions mandate that a CTR must be filed when, *inter alia*, a financial institution handles a cash deposit of $10,000.00 or more. (***See*** Motion for Court to Take Notice of Federal Law and Regulation, filed 6/4/07, at 2.) The Commonwealth also cited 31 U.S.C.A. § 5324, which prohibits the structuring of transactions to avoid reporting requirements. (***Id.***) By order entered June 6, 2007, the court granted the Commonwealth's motion.

At the conclusion of trial, the court formally announced that it had taken judicial notice of the relevant federal provisions. (***See*** N.T. Trial, 5/7/08, at 293-94.) Nevertheless, the Commonwealth's case-in-chief also included evidence about these federal provisions. Specifically, Agent

Licklider summarized the banks' reporting requirements under federal law. (***See*** N.T. Trial, 5/6/08, at 124-26.) The Commonwealth also presented testimony from Lisa Krick, a compliance officer from Susquehanna Bancshares. Ms. Krick explained the process of compiling a CTR as follows:

> [WITNESS]: We are required by federal law to monitor cash activity; various reports are generated and various forms are required under the [Bank Secrecy Act] statute to be reported to the federal government.
>
> [COMMONWEALTH]: Okay. When you say "we," are you referring just to Susquehanna Bancshares or financial institutions such as banks in general?
>
> [WITNESS]: Any financial institution governed by a federal regulator.
>
> [COMMONWEALTH]: And what, if anything, happens with a [CTR] after it's generated by a financial institution?
>
> [WITNESS]: That document is submitted and it is reviewed; and unless there is a problem, a financial institution normally doesn't hear anything regarding that report.
>
> * * *
>
> [COMMONWEALTH]: Now, banks are required to generate a [CTR] on a cash deposit or withdrawal in excess of $10,000.00?
>
> [WITNESS]: That is correct.
>
> [COMMONWEALTH]: Are they required to do so on an amount less than that?
>
> [WITNESS]: We are not required to generate a CTR on an amount less than that, no.
>
> [COMMONWEALTH]: Under the statute, does any financial institution have the discretion to do so?

> [WITNESS]: Absolutely. That is normally utilized, though, with another form. It's not the CTR form.

(***See*** N.T. Trial, 5/7/08, at 219-21.)

Here, Appellant conceded he arranged his deposits to avoid the reporting requirements. Contrary to Appellant's sufficiency argument, the Commonwealth did present evidence of the relevant federal reporting regulations and statutes. Importantly, the Commonwealth filed a pretrial motion for the court to take notice of the relevant federal law. ***See*** 42 Pa.C.S.A. § 5327. The court granted this motion and took judicial notice of the federal statutes and regulations. ***See id.*** Based upon the foregoing, sufficient evidence supported Appellant's convictions for dealing in proceeds of unlawful activities. ***See Jones, B., supra***.

In his fifth issue, Appellant contends his sentence includes a civil penalty of $540,200.00. Relying on ***United States v. Bajakajian***, 524 U.S. 321, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), Appellant asserts a punitive forfeiture violates the Eighth Amendment of the United States Constitution if it is grossly disproportionate to the gravity of the offenses. Appellant alleges the $540,200.00 fine is grossly disproportionate to the instant offenses, where Appellant merely sought to avoid the banks' reporting requirements. Appellant concludes the $540,200.00 civil penalty constitutes cruel and unusual punishment, and this Court must vacate the civil penalty. We disagree.

"The Eighth Amendment to the U.S. Constitution provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." ***Commonwealth v. Real Property and Improvements Commonly Known As 5444 Spruce Street, Philadelphia***, 574 Pa. 423, 427, 832 A.2d 396, 398-99 (2003) (internal quotation marks omitted).

> The Eighth Amendment is made applicable to the states through the Fourteenth Amendment. This Court has held that Article I, Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment. [T]his Court [has previously] reasoned that the excessive fines provision of Article I, Section 13 of the Pennsylvania Constitution is governed by the federal treatment of the Eighth Amendment.
>
> To determine whether the Excessive Fines Clause has been violated, a court must consider whether the statutory provision imposes punishment; and if so, whether the fine is excessive. The first question determines whether the Eighth Amendment applies; the second determines whether the Eighth Amendment is violated.

Id. at 427-28, 832 A.2d at 399 (internal citations, quotation marks and footnote omitted).

"[A] punitive forfeiture would violate the Excessive Fines Clause 'if it is grossly disproportional to the gravity of a defendant's offense.'" ***Commonwealth v. Smothers***, 920 A.2d 922, 925 (Pa.Cmwlth. 2007), *appeal denied*, 594 Pa. 691, 934 A.2d 75 (2007) (quoting ***Bajakajian, supra*** at 334, 118 S.Ct. at 2036, 141 L.Ed.2d at 329). "The [C]ourt [in ***Bajakajian***] also enumerated factors limited to the conduct of the

defendant for measuring the gravity of the offense, including a comparison of the penalty imposed to the maximum penalty available, a determination of whether the violation was isolated or was part of a pattern of misbehavior and an assessment of the harm that resulted from the offense charged." ***Id.*** "***Bajakajian's*** gross disproportionality test applies to all punitive forfeitures regardless of the form of the underlying proceedings." ***5444 Spruce Street, supra*** at 435, 832 A.2d at 403. ***See also In re King Properties***, 535 Pa. 321, 635 A.2d 128 (1993), *overruled on other grounds by* ***5444 Spruce Street, supra*** (holding application of civil forfeiture provision in Controlled Substances Forfeiture Act was punitive in part; therefore, forfeiture under act constituted "fine" subject to review under Excessive Fines Clause).

Further, Section 5111 authorizes the imposition of the following penalties:

> **§ 5111. Dealing in proceeds of unlawful activities**
>
> * * *
>
> **(b) Penalty.**—Upon conviction of a violation under subsection (a), a person shall be sentenced to a fine of the greater of $100,000 or twice the value of the property involved in the transaction or to imprisonment for not more than 20 years, or both.
>
> **(c) Civil penalty.**—A person who conducts or attempts to conduct a transaction described in subsection (a) is liable to the Commonwealth for a civil penalty of the greater of:

> (1) the value of the property, funds or monetary instruments involved in the transaction; or
>
> (2) $10,000.

18 Pa.C.S.A. § 5111(b), (c).

Instantly, the sentencing court acknowledged it could impose a maximum fine of $1,080,400.00, pursuant to Section 5111(b). (***See*** N.T. Sentencing, 7/22/08, at 43.) Nevertheless, the court elected to impose a civil penalty of $540,200.00, pursuant to Section 5111(c). The civil penalty corresponded to the amount Appellant had deposited into his bank accounts during the six-week period in 2006. Under these circumstances, the civil penalty was directly proportional to the gravity of Appellant's offenses. ***See Smothers, supra***. ***See also Commonwealth v. Mitchell***, 833 A.2d 1220 (Pa.Cmwlth. 2003) (holding forfeiture of vehicle was not grossly disproportional to gravity of offenses, especially where fines and forfeiture together were well below maximum fine authorized under statute). Therefore, Appellant is not entitled to relief on his claim of cruel and unusual punishment.

In his sixth issue, Appellant asserts that individuals convicted under Section 5111(a)(3) are subject to the same offense gravity score ("OGS") as individuals convicted under Section 5111(a)(1) and (2), despite substantial differences in the criminal conduct required under each subsection. Appellant submits:

> Persons convicted of violating subsections one or two must

> be conducting financial transactions with knowledge that the money is the proceeds of unlawful activity. 18 Pa.C.S. § 5111(a)(1) and (2). To the contrary, persons convicted of violating subsection three need only have conducted a financial transaction to avoid a transaction reporting requirement—the Commonwealth need not show that the money was the proceeds of unlawful activity or that the transactions were conducted to further any criminal activity, such as tax evasion. Under these circumstances, there is a substantial difference in criminal liability between those persons violating subsections one or two, and those persons violating subsection three, yet all are subjected to the same penalty....

(Appellant's Brief at 68). Appellant complains imposition of the same OGS for each subsection is arbitrary, and not rationally related to a legitimate government interest or substantially related to the object of the statute. Appellant concludes his sentence is illegal, because the court utilized an OGS which violated his equal protection rights. We disagree.

"The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly." ***Commonwealth v. Bullock***, 868 A.2d 516, 524 (Pa.Super. 2005), *cert. denied*, 550 U.S. 941, 127 S.Ct. 2262, 167 L.Ed.2d 1103 (2007).

> However, the principle does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, ... and does not require equal treatment of people having different needs. Indeed, the Commonwealth may create legislative classifications so long as the classifications rest upon some ground of difference which justifies the classification and [have] a fair and substantial relationship to the object of the legislation.

Id. (internal citations and quotation marks omitted).

"Once a classification is challenged, our standard of review depends upon the type of classification at issue." ***Commonwealth v. Bell***, 512 Pa. 334, 344, 516 A.2d 1172, 1177 (1986).

> If the classification implicates a suspect class or fundamental right, we subject the statute to strict scrutiny, and will find it to be valid only if necessary to the achievement of a compelling state interest. If the classification implicates an important though not fundamental right, we must determine whether the classification serves an important governmental interest and [is] substantially related to the achievement of that objective. Finally, the third type of classification, that which implicates neither a suspect class nor a fundamental or important right, will be valid as long as [it is] rationally related to a legitimate governmental interest.

Id. (internal citations and quotation marks omitted).

"As a general matter, economic and social legislation, including legislation creating different categories among criminal offenders, receives rational basis review; however, legislation based on suspect classifications, such as race, national origin, or alienage, as well as classifications that affect fundamental rights are examined under strict scrutiny." ***Doe v. Miller***, 886 A.2d 310, 315 (Pa.Cmwlth. 2005), *affirmed*, 587 Pa. 502, 901 A.2d 495 (2006). "For equal protection purposes, 'fundamental rights' include such constitutional rights as the right to interstate travel, ... the right to vote, ... rights guaranteed by the First Amendment, ... and the right to procreate...." ***Id.*** at 315-16 (internal citations omitted).

Instantly, the classification Appellant has identified—persons convicted under Section 5111—does not implicate a suspect class or a fundamental

right. ***See id.*** ***See also Bell, supra*** (explaining challenge to mandatory minimum sentencing provision did not implicate fundamental right; appellant's fundamental right, *i.e.*, freedom from confinement, had already been forfeited). Further, Section 5111 does **not** distinguish between individuals who commit an offense under Subsection (a)(1), (a)(2), or (a)(3). An individual convicted of any of these subsections commits a first degree felony and receives an OGS of eight; thus, all offenders are similarly situated. Because Section 5111 does not classify individuals for the purpose of receiving disparate punishments, there is no equal protection violation. ***See Bullock, supra***. ***See also Kramer v. W.C.A.B. (Rite Aid Corp.)***, 584 Pa. 309, 883 A.2d 518 (2005) (explaining no equal protection violation existed where statutory provision did not create classification for unequal distribution of benefits or imposition of burdens). Therefore, Appellant is not entitled to relief on his equal protection claim.

In his final four issues, Appellant contends the court imposed an aggregate term of two to ten years' imprisonment based upon its belief that the money Appellant had deposited was the proceeds of unlawful activities. Appellant supports this contention by referencing the court's alleged "negative reaction" to his answer for a hypothetical question the court had posed. Appellant complains the court demanded an answer to this hypothetical, which violated Appellant's right to remain silent at the sentencing proceeding.

Further, Appellant contends the court relied on improper evidence, including the Commonwealth's sentencing memorandum and sentencing hearing testimony from the Commonwealth's investigators. Appellant insists the court compounded its errors by refusing to permit defense counsel to cross-examine the Commonwealth's witnesses at sentencing. Appellant concludes this Court must vacate his sentence and remand the matter for re-sentencing. Appellant's claims challenge the discretionary aspects of his sentence. ***See Commonwealth v. Bromley***, 862 A.2d 598 (Pa.Super. 2004), *cert. denied*, 546 U.S. 1095, 126 S.Ct. 1089, 163 L.Ed.2d 863 (2006) (reiterating claim that sentencing court relied upon impermissible factors constitutes challenge to discretionary aspects of sentence).

Challenges to the discretionary aspects of sentencing do not entitle an appellant to an appeal as of right. ***Commonwealth v. Sierra***, 752 A.2d 910, 912 (Pa.Super. 2000). Prior to reaching the merits of a discretionary sentencing issue:

> [W]e conduct a four part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P.902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 1410 [now Rule 720]; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.A. § 9781(b).

Commonwealth v. Martin, 611 A.2d 731, 735 (Pa.Super. 1992) (most internal citations omitted).

When appealing the discretionary aspects of a sentence, an appellant must invoke the appellate court's jurisdiction by including in his brief a separate concise statement demonstrating that there is a substantial question as to the appropriateness of the sentence under the Sentencing Code. ***Commonwealth v. Mouzon***, 571 Pa. 419, 812 A.2d 617 (2002); Pa.R.A.P. 2119(f). "The requirement that an appellant separately set forth the reasons relied upon for allowance of appeal furthers the purpose evident in the Sentencing Code as a whole of limiting any challenges to the trial court's evaluation of the multitude of factors impinging on the sentencing decision to **exceptional** cases." ***Commonwealth v. Williams***, 562 A.2d 1385, 1387 (Pa.Super. 1989) (*en banc*) (emphasis in original) (internal quotation marks omitted).

The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Anderson***, 830 A.2d 1013 (Pa.Super. 2003). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Sierra, supra*** at 912-13. "[A] claim that the sentencing court relied on impermissible factors in sentencing raises a substantial question." ***Bromley, supra*** at 605.

Here, Appellant's post-sentence motion and Rule 2119(f) statement

properly preserved his claims regarding the court's alleged reliance upon impermissible sentencing factors. As presented, Appellant's claims appear to raise a substantial question as to the discretionary aspects of his sentence. ***See id.***

Our standard of review concerning the discretionary aspects of sentencing is as follows:

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Hyland, 875 A.2d 1175, 1184 (Pa.Super. 2005), *appeal denied*, 586 Pa. 723, 890 A.2d 1057 (2005) (quoting ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa.Super. 1999) (*en banc*)).

"[A] court is required to consider the particular circumstances of the offense and the character of the defendant." ***Commonwealth v. Griffin***, 804 A.2d 1, 10 (Pa.Super. 2002), *cert. denied*, 545 U.S. 1148, 125 S.Ct. 2984, 162 L.Ed.2d 902 (2005). "In particular, the court should refer to the defendant's prior criminal record, his age, personal characteristics and his potential for rehabilitation." ***Id.***

"Precisely because of the wide latitude afforded sentencing courts and because we recognize the court's ability to arrive at a balanced judgment

when possessed of all the facts, it becomes imperative that the facts relied upon by the sentencing court be **accurate**...." ***Commonwealth v. Medley***, 725 A.2d 1225, 1229 (Pa.Super. 1999), *appeal denied*, 561 Pa. 672, 749 A.2d 468 (2000) (quoting ***Commonwealth v. Kerstetter***, 580 A.2d 1134, 1135 (Pa.Super. 1990)) (emphasis in original).

> However, a proceeding held to determine sentence is not a trial, and the court is not bound by the restrictive rules of evidence properly applicable to trials. Rather, the court may receive any relevant information for the purposes of determining the proper penalty.
>
> Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded the entire panoply of criminal trial procedural rights. In fact, the due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure.

Medley, supra (internal citations and quotation marks omitted).

Instantly, the court conducted Appellant's sentencing hearing with the benefit of a pre-sentence investigation ("PSI") report. At the conclusion of the hearing, the court provided the following on-the-record statement:

> The court imposes sentence for the following reasons.
>
> [Appellant] is 39 years of age, which shows he has sufficient maturity to understand the significance of his acts. [Appellant] is intelligent enough to understand the significance of his acts since he did complete the eighth grade of school and has had a consistent work history since that time. He can read, write and understand the English language.
>
> As indicated by counsel, in addition to that which was covered in the [PSI], he has had a consistent work history, predominantly in the cabinet making, woodworking areas,

and the court has noted that. It does indicate that he can follow directions.

[Appellant] does have a prior criminal record, which includes a retail theft in 1992, a retail theft in 1994, criminal mischief in 2002, simple assault in 2002, retail theft in 2002, disorderly intoxication in 2004, resisting an officer in 2004, and defiant trespass in 2004.

I have reviewed the sentencing memorandum relative to the issues that are pertinent to the charges before me. I find that although [Appellant] was clearly a hardworking man, he certainly has failings. Whether it is the distrust of the government or the Y2K matters that he brings to the court's attention, it is not the government that caused these charges or convictions. It was [Appellant's] own greed and avarice which are solely to blame.

On 58 separate times, he made deposits for which he has been found guilty. He knew from the very beginning in almost the first contact with the bank employees that what he was planning on doing was wrong, that there were consequences to that wrong act. Yet over the next two months, [he] continued on 58 separate occasions to violate the laws....

He knew from the very first contact with the bank employee, who explained to him what they were doing and why, that he was planning to subvert the recording requirements, which is what this statute is all about.

[Appellant] purposely used 10 different banks to subvert those reporting requirements and to distribute hundreds of thousands of dollars in January and February of 2006 in an effort to avoid IRS and Pennsylvania reporting requirements.

I note that [Appellant] has never been married and has no children; also that he has no learning disabilities.

Although he was raised Amish, he left the church in the early 1990s and, of course, as counsel indicated, has since been shunned by that church.

> You have used, both at trial and today, the Amish faith, I assume, as an alleged defense. I find that to be a clear slap in the face of the good law-abiding Amish citizens of Lancaster County. You are not Amish and you did not behave like the good, honest Amish people of Lancaster County.
>
> As indicated by the sentencing guidelines, ... the standard range of sentencing here is 12 to 18 months for each individual count.[6] And there is a plus or minus nine months as the mitigated and aggravated range for each count.
>
> * * *
>
> [Y]ou clearly, through all of your statements, have begged the court to understand that you are a simple man and that all of this was earned legitimately.
>
> **I need not make that determination today**...but it is extremely difficult for me to buy that you claim to be a simple man, yet the items found in your house show an extremely different...individual.

(***See*** N.T. Sentencing at 40-43) (emphasis added).

Contrary to Appellant's argument, the court expressly stated it did not need to determine whether the funds in question constituted proceeds of unlawful activities. Admittedly, the court was skeptical of Appellant's portrayal of himself as a "simple man." The court's reaction was justified in light of the evidence adduced at trial, the information contained in the PSI report, as well as the evidence offered at sentencing. The court's expression of doubt about Appellant's self-portrait does not automatically demonstrate

---

[6] With an OGS of eight (8) and a prior record score of one (1), the standard range of the sentencing guidelines provides for a minimum term of twelve (12) to eighteen (18) months' imprisonment.

reliance upon impermissible sentencing factors. In sentencing Appellant, the court properly based its sentence on the particular circumstances of the offenses, emphasizing Appellant's knowledge of the reporting requirements. ***See Griffin, supra***. Thus, we see no reason to disturb the sentence.[7] ***See Hyland, supra***. Accordingly, we affirm.

Judgment of sentence affirmed.

*PRESIDENT JUDGE FORD ELLIOTT FILES A DISSENTING MEMORANDUM.

*JUDGE COLVILLE FILES A CONCURRING STATEMENT.

Judgment Entered.

Deputy Prothonotary

Date: October 26, 2010

[7] Moreover, the court utilized a PSI report and imposed standard range sentences. Therefore, we can presume Appellant's sentence was reasonable. ***See Commonwealth v. Cruz-Centeno***, 668 A.2d 536 (Pa.Super. 1995), *appeal denied*, 544 Pa. 653, 676 A.2d 1195 (1996) (explaining combination of PSI and standard range sentence, absent more, cannot be considered as excessive or unreasonable sentence).

J. S12019/10

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LEVI LAPP STOLTZFOOS,	:	No. 30 Middle District Appeal 2009
Appellant	:	

Appeal from the Judgment of Sentence, July 22, 2008,
in the Court of Common Pleas of Lancaster County
Criminal Division at No. CP-36-CR-0005995-2006

BEFORE: FORD ELLIOTT, P.J., GANTMAN AND COLVILLE,* JJ.

DISSENTING MEMORANDUM BY FORD ELLIOTT, P.J.
FILED: October 26, 2010

I respectfully dissent. I agree with appellant that 18 Pa.C.S.A. § 5111(a)(3) is unconstitutionally overbroad, at least as interpreted by the majority. My concern with the lead opinion is that it seems to divorce Subsection (a)(3) from the title of the statute, "Dealing in proceeds of unlawful activities." In my view, the clear purpose of the statute is to prevent criminals and criminal organizations, including drug dealers and terrorist groups, from hiding their assets. While the majority correctly points out that the title of a statute does not control, "In interpreting any Act of the Assembly, it is important to consider the title of the Act." ***Commonwealth v. Derstine***, 418 Pa. 186, 189, 210 A.2d 266, 268 (1965) (citation omitted). "In ***City Stores Co. v. City of Philadelphia***, 376 Pa.

---

* Retired Senior Judge assigned to the Superior Court.

482, at pages 487-488, 103 A.2d 664, at page 667, the Court said: 'The title is always a part of a statute or ordinance and, as such, must be considered in construing the enactment[.]'" ***Id.*** (additional citations omitted).

There was absolutely no allegation, nor was it ever proved at trial, that appellant's funds were derived from unlawful activities.[1] His allegedly criminal conduct consisted solely of structuring his financial transactions in such a way as to avoid generating a currency transaction report ("CTR"). I note that violation of Section 5111 is a first-degree felony punishable by a maximum of 20 years' imprisonment and a $100,000 fine. Section 5111 also provides for a "civil penalty" of the greater of the funds involved in the transaction or $10,000, which in this case resulted in the Commonwealth seizing over $540,000 of appellant's money. Again, it was never alleged at trial that this money was obtained by illegal means.

Theoretically, an otherwise perfectly law-abiding individual, with no criminal intent other than simply avoiding a CTR, could make a cash deposit of $9,900 of honest money into his savings account at the local bank and spend the next 20 years in a state penitentiary. I refuse to believe that the General Assembly intended such an unconscionable and absurd result when

[1] The majority observes that in the affidavit of probable cause, it was alleged that appellant obtained these funds through some sort of merchandise scheme. (Majority Memorandum at 13 n.5.) However, this was never pursued at trial and appellant was convicted only of violating Section 5111. The Commonwealth withdrew a count of receiving stolen property prior to trial and appellant was not ultimately charged with any theft offenses. (***Id.*** at 3 n.2.)

it enacted Section 5111. By failing to consider the statute's title, "Dealing in proceeds of unlawful activities," I believe the majority disregards the statute's actual purpose.

I am also convinced by appellant's argument that Subsection (a)(3), at least as interpreted by the majority as essentially a strict liability statute, prohibits constitutionally protected activity.

> Strictly speaking, unconstitutional over-breadth only pertains relative to First Amendment free speech concerns. However, the term is sometimes used in non-speech cases to mean that the challenged statute either sweeps excessively broadly so as to be beyond the state's legitimate police powers, and/or by criminalizing a significant amount of constitutionally protected activity, or is arbitrary and capricious because it leads to the imposition of punishment bearing little relation to any legitimate governmental interest.

Commonwealth v. Duda, 592 Pa. 164, 185, 923 A.2d 1138, 1150 (2007) (citations omitted).

I am not as persuaded as the majority that "There is a compelling state interest in punishing those who knowingly evade reporting requirements," at least not as applied in this case, where there is no connection between the funds and any criminal activity. (Majority Memorandum at 17.) As the Fourth Circuit has stated, in applying a similar federal statute:[2]

> [***Ratzlaf v. United States***, 510 U.S. 135, 114 S.Ct. 655 (1994)] expressly rejected the argument "that

[2] 31 U.S.C. § 5324(a)(3).

> § 5324 violators, by their very conduct, exhibit a purpose to do wrong." 510 U.S. at 143, 114 S.Ct. at 660. The ***Ratzlaf*** Court pointed out that structuring a financial transaction is not an"inevitably nefarious" activity. ***Id.*** at 144, 114 S.Ct. at 661. Law abiding citizens frequently structure transactions to avoid a report, regulation, or tax without violating the law. ***Id. See Helvering v. Gregory***, 69 F.2d 809, 810 (2d Cir. 1934) (L.Hand, J.) ("Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes"), ***aff'd***, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596 (1935).

United States v. Ismail, 97 F.3d 50, 57 (4th Cir. 1996). I see nothing inherently wrong with structuring a banking transaction to avoid generating a CTR, in the absence of some underlying criminal purpose.[3] Here, there was no evidence introduced at trial of any evil motive on appellant's part. Indeed, appellant stated simply that he "don't [sic] want no [sic] part of government investigation or harassment." (Appellant's brief at 52 n.14.)

Furthermore, as the majority acknowledges, the Supreme Court of Pennsylvania has recognized a legitimate expectation of privacy in banking records. ***Commonwealth v. DeJohn***, 486 Pa. 32, 49, 403 A.2d 1283, 1291 (1979), ***cert. denied***, 444 U.S. 1032 (1980). ***Cf. Commonwealth v. Duncan***, 572 Pa. 438, 451, 817 A.2d 455, 463 (2003) (holding that there is no right of privacy in a bank customer's name and address, distinguishing

[3] In fact, even if a cash deposit is made in an amount ***less than*** $10,000, the bank retains the discretion to issue a CTR. (Commonwealth's brief at 2); ***Ismail***, 97 F.3d at 53. Therefore, making a deposit of $9,900 versus $10,000 is no guarantee of avoiding a CTR.

"the disclosure of substantive bank records that was the subject of the standing decision in ***DeJohn***"). On its face and without due consideration of the title of the statute, I believe that Subsection 5111(a)(3) applies to a wide range of constitutionally protected activity.

In the absence of any nexus established at trial between the funds deposited by appellant and unlawful activity, and in line with the title of the statute and its purpose in preventing criminal wrongdoers from hiding their criminal activity and the fruits thereof by avoiding reporting requirements, I conclude that Subsection 5111(a)(3) is unconstitutionally overbroad both as applied to appellant in this case, and generally. Therefore, I am compelled to dissent.

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee vs. LEVI LAPP STOLTZFOOS, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 30 MDA 2009

Appeal from the Judgment of Sentence July 22, 2008
In the Court of Common Pleas of Lancaster County
Criminal, No. CP-36-CR-0005995-2006

BEFORE: FORD ELLIOTT, P.J., GANTMAN, AND COLVILLE*, JJ.

CONCURRING STATEMENT BY COLVILLE, J.: FILED: October 26, 2010

At the close of the jury charge, Appellant made an unclear objection to the court's instructions. In my view, the objection did not preserve the challenge to the jury instructions that he now pursues. As such, I would find Appellant is not entitled to relief on that basis.

I observe also that Appellant's purported equal protection argument simply does not constitute such a claim.

In all other respects, I concur Appellant's judgment of sentence should be affirmed.

*Retired Senior Judge assigned to the Superior Court.

APPENDIX E

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 18 Pa.C.S.A. Crimes and Offenses (Refs & Annos)
Part II. Definition of Specific Offenses (Refs & Annos)
Article E. Offenses Against Public Administration (Refs & Annos)
Chapter 51. Obstructing Governmental Operations (Refs & Annos)
Subchapter A. Definition of Offenses Generally (Refs & Annos)

18 Pa.C.S.A. § 5111

§ 5111. Dealing in proceeds of unlawful activities

Effective: December 24, 2012
Currentness

(a) Offense defined.--A person commits a felony of the first degree if the person conducts a financial transaction under any of the following circumstances:

(1) With knowledge that the property involved, including stolen or illegally obtained property, represents the proceeds of unlawful activity, the person acts with the intent to promote the carrying on of the unlawful activity.

(2) With knowledge that the property involved, including stolen or illegally obtained property, represents the proceeds of unlawful activity and that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds of unlawful activity.

(3) To avoid a transaction reporting requirement under State or Federal law.

(b) Penalty.--Upon conviction of a violation under subsection (a), a person shall be sentenced to a fine of the greater of $100,000 or twice the value of the property involved in the transaction or to imprisonment for not more than 20 years, or both.

(c) Civil penalty.--A person who conducts or attempts to conduct a transaction described in subsection (a) is liable to the Commonwealth for a civil penalty of the greater of:

(1) the value of the property, funds or monetary instruments involved in the transaction; or

(2) $10,000.

(d) Cumulative remedies.--Any proceedings under this section shall be in addition to any other criminal penalties or forfeitures authorized under the State law.

(e) Enforcement.--

(1) The Attorney General shall have the power and duty to institute proceedings to recover the civil penalty provided under subsection (c) against any person liable to the Commonwealth for such a penalty.

(2) The district attorneys of the several counties shall have authority to investigate and to institute criminal proceedings for any violation of subsection (a).

(3) In addition to the authority conferred upon the Attorney General by the act of October 15, 1980 (P.L. 950, No. 164), known as the Commonwealth Attorneys Act, [1] the Attorney General shall have the authority to investigate and to institute criminal proceedings for any violation of subsection (a) or any series of related violations involving more than one county of the Commonwealth or involving any county of the Commonwealth and another state. No person charged with a violation of subsection (a) by the Attorney General shall have standing to challenge the authority of the Attorney General to investigate or prosecute the case, and, if any such challenge is made, the challenge shall be dismissed and no relief shall be available in the courts of the Commonwealth to the person making the challenge.

(4) Nothing contained in this subsection shall be construed to limit the regulatory or investigative authority of any department or agency of the Commonwealth whose functions might relate to persons, enterprises or matters falling within the scope of this section.

(e.1) Venue.--An offense under subsection (a) may be deemed to have been committed where any element of unlawful activity or of the offense under subsection (a) occurs.

(f) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Conducts." Includes initiating, concluding or participating in initiating or concluding a transaction.

"Financial institution." Any of the following:

(1) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (64 Stat. 873, 12 U.S.C. § 1813(h)).

(2) A commercial bank or trust company.

(3) A private banker.

(4) An agency or bank of a foreign bank in this Commonwealth.

(5) An insured institution as defined in section 401(a) of the National Housing Act (48 Stat. 1246, 12 U.S.C. § 1724(a)).

(6) A thrift institution.

(7) A broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. § 78a et seq.).

(8) A broker or dealer in securities or commodities.

(9) An investment banker or investment company.

(10) A currency exchange.

(11) An insurer, redeemer or cashier of travelers' checks, checks, money orders or similar instruments.

(12) An operator of a credit card system.

(13) An insurance company.

(14) A dealer in precious metals, stones or jewels.

(15) A pawnbroker.

(16) A loan or finance company.

(17) A travel agency.

(18) A licensed sender of money.

(19) A telegraph company.

(20) An agency of the Federal Government or of a state or local government carrying out a duty or power of a business described in this paragraph.

(21) Another business or agency carrying out a similar, related or substitute duty or power which the United States Secretary of the Treasury prescribes.

"Financial transaction." A transaction involving the movement of funds by wire or other means or involving one or more monetary instruments. The term includes any exchange of stolen or illegally obtained property for financial compensation or personal gain.

"Knowing that the property involved in a financial transaction represents the proceeds of unlawful activity." Knowing that the property involved in the transaction represents proceeds from some form, though not necessarily which form, of unlawful activity, regardless of whether or not the activity is specified in this section.

"Monetary instrument." Coin or currency of the United States or of any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery and negotiable instruments in bearer form or otherwise in such form that title thereto passes upon delivery.

"Transaction." Includes a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition. With respect to a financial institution, the term includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit or other monetary instrument and any other payment, transfer or delivery by, through, or to a financial institution, by whatever means effected.

"Unlawful activity." Any activity graded a misdemeanor of the first degree or higher under Federal or State law.

Credits

1989, Dec. 22, P.L. 770, No. 108, § 1, imd. effective. Amended 2002, June 28, P.L. 481, No. 82, § 4, effective in 60 days; 2012, Oct. 25, P.L. 1645, No. 203, § 1, effective in 60 days [Dec. 24, 2012].

Notes of Decisions (6)

Footnotes

1 71 P.S. § 732-101 et seq.

18 Pa.C.S.A. § 5111, PA ST 18 Pa.C.S.A. § 5111

Current through 2018 Regular Session Act 76

End of Document