No. 23-6069

IN THE SUPREME COURT OF THE UNITED STATES

JEREMIE SAINTVIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether subsections (1) and (2) of the federal bank-fraud statute, 18 U.S.C. 1344, describe separate crimes rather than separate means of committing a single crime.

2. Whether the district court abused its discretion in declining to strike, as prejudicial surplusage, language in petitioner's indictment describing his bank-fraud scheme.

3. Whether petitioner was entitled to challenge venue for the first time after trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20)* is not published in the Federal Reporter but is available at 2023 WL 3644976.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2023. A petition for rehearing was denied on June 26, 2023 (Pet.

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* The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated, beginning with page 1 following the cover page.

App. 21-23). On September 8, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 26, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344 and 2; making a false statement to a federally insured institution, in violation of 18 U.S.C. 1014; aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1); and making a false statement to a department or agency of the United States, in violation of 18 U.S.C. 1001(a). Judgment 1. The court sentenced petitioner to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-20.

1. Petitioner applied for nine loans from federally insured banks and one loan from the Small Business Administration. See Presentence Investigation Report (PSR) ¶ 47. In applying for seven of the ten loans, petitioner used the identities of individuals in senior living facilities in Florida. See Gov't C.A. Br. 5. Petitioner created fictitious businesses under the victims' names, forged the victims' signatures on the loan applications, and used

the victims' personal identifying information to open bank accounts to receive and transfer loan proceeds. See id. at 5-6.

Petitioner applied for the remaining three loans on behalf of businesses that he or his mother owned. See Gov't C.A. Br. 6. The applications for those loans contained false information about the businesses' status, employees, and expenses, and they were accompanied by falsified documentation. See ibid.

Eight of petitioner's ten loan applications were approved. See PSR ¶ 47. The federally insured banks disbursed $961,777, and the Small Business Administration disbursed $159,900. See ibid.

2. A federal grand jury indicted petitioner for bank fraud, in violation of 18 U.S.C. 1344 and 2; making a false statement to a federally insured institution, in violation of 18 U.S.C. 1014; aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1); and making a false statement to a federal agency, in violation of 18 U.S.C. 1001(a). Indictment 1-22.

a. The bank-fraud statute, 18 U.S.C. 1344, prohibits knowingly executing a scheme or artifice "(1) to defraud a financial institution; or (2) to obtain any of the moneys * * * owned by * * * a financial institution, by means of false or fraudulent pretenses." 18 U.S.C. 1344. And the bank-fraud count in petitioner's indictment charged that he "did knowingly and willfully execute * * * a scheme and artifice to defraud a

federally insured financial institution * * * and to obtain moneys owned by * * * [such an institution] by means of materially false and fraudulent pretenses." Indictment 10.

In sections of the bank-fraud count labeled "Introduction" and "The Fraudulent Scheme," the indictment described petitioner's scheme to defraud multiple financial institutions. Indictment 1, 11 (capitalization altered; emphasis omitted); see id. at 1-14. Then, in a section labeled "Execution of the Scheme," the indictment alleged a single execution of the scheme: petitioner's submission of an application to the Florida Credit Union. Id. at 14 (capitalization altered; emphasis omitted); see ibid. ("Between on or about May 4, 2020, and on or about May 21, 2020, for the purpose of executing and attempting to execute this fraudulent scheme, [petitioner] did knowingly and willfully submit false and fraudulent representations to [Florida Credit Union] in [a Small Business Loan Paycheck Protection Program] loan application, and in supporting loan documents and emails.").

Before trial, petitioner filed a motion to dismiss the bank-fraud count as duplicitous (i.e., charged multiple crimes in a single count), or alternatively to strike asserted surplusage from it, which the district court denied. See D. Ct. Doc. 40, at 1-4 (July 6, 2021). The court rejected petitioner's contention that that subsections (1) and (2) of the bank-fraud statute (and thus

the bank-fraud count in his indictment) set forth "two separate offenses," explaining that the statute instead describes "two different ways" to commit a single crime. Id. at 2; see id. at 1-3. The court also rejected petitioner's request to "strike as surplusage the allegations in [the bank-fraud count] which are not directly connected with the [Florida Credit Union] application," D. Ct. Doc. 35, at 9 (June 14, 2021), explaining that "[a] motion to strike surplusage from an indictment should not be granted unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial," and finding that petitioner had not satisfied that standard, id. at 4 (citation omitted).

Although the district court denied petitioner's motion "without prejudice to raising the issue at trial," petitioner did not renew the motion at trial. D. Ct. Doc. 40, at 4. And following a jury trial, he was found guilty on all counts. See Judgment 1.

b. After the trial ended, petitioner filed a motion in which he argued, for the first time, that the Northern District of Florida was an improper venue for the trial. See D. Ct. Doc. 202, at 1-2 (Dec. 20, 2021). He asserted that the offenses occurred entirely in the Southern District of Florida, and that venue was proper only there. See D. Ct. Doc. 202, at 1, 5 (Dec. 20, 2021).

The district court denied the motion as "untimely." Sent. Tr. 96. It also found, in the alternative, that the evidence at trial supported venue in the Northern District of Florida. Ibid.

The district court sentenced petitioner to 204 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. See Pet. App. 1-20.

The court of appeals first rejected petitioner's contention that the indictment's bank-fraud count was duplicitous. See Pet. App. 11-13. The court explained that subsections (1) and (2) of the bank-fraud statute "are merely two ways to prove the same offense -- bank fraud." Id. at 13.

The court of appeals also determined that the district court did not abuse its discretion in declining to strike information from the indictment as surplusage. See Pet. App. 14-15. The court of appeals observed that the bank-fraud statute "requires the government to prove the existence of a scheme, and the scheme-related evidence is exactly the information that [petitioner] argues is surplusage." Ibid.

Finally, the court of appeals determined that petitioner was not entitled to relief on his contention that the Northern District of Florida was an improper venue. See Pet. App. 15-17. The court explained that, "at the latest, [petitioner] should have

challenged venue during trial." Id. at 17. And it observed that petitioner "did not challenge venue before or at trial, but rather waited [until] a week prior to sentencing." Id. at 16.

ARGUMENT

Petitioner contends that the indictment's bank-fraud count was duplicitous (Pet. 9-17), that the bank-fraud count contained improper surplusage (Pet. 17-26), and that his venue challenge was timely (Pet. 26-35). The court of appeals correctly rejected those contentions; its decision does not conflict with any decision of this Court; and there is no circuit conflict that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner's contention (Pet. 9-17) that the indictment's bank-fraud count was duplicitous does not warrant further review.

a. An indictment is "duplicit[ous]" if it "join[s] two or more offenses in the same count." Fed. R. Crim. P. 12(b)(3)(B)(i). Duplicitous counts are prohibited principally because they create a danger that the jury will find the defendant guilty without unanimously agreeing on a single offense that the defendant committed. See Pet. App. 11 n.12. At the same time, "[a] count may allege * * * that the defendant committed [a single offense] by one or more specified means." Fed. R. Crim. P. 7(c)(1); see

Sanabria v. United States, 437 U.S. 54, 66 n.20 (1978) ("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged.").

Whether a statute sets forth different crimes or different means of committing a single offense is a "question of statutory construction." Schad v. Arizona, 501 U.S. 624, 636 (1991) (opinion of Souter, J.); see Mathis v. United States, 579 U.S. 500, 518 (2016). Here, the bank-fraud statute provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice --
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. 1344. Sections 1344(1) and (2) describe two different ways of committing a single crime, not two different crimes.

Both subsections form part of a single sentence. Both are preceded, and yoked together, by the phrase "Whoever knowingly executes, or attempts to execute, a scheme or artifice." 18 U.S.C. 1344. Each subsection then simply describes a different type of scheme or artifice that the statute covers. And the statute

prescribes the same penalty -- "fined not more than $1,000,000 or imprisoned not more than 30 years, or both" -- for either type of scheme. Ibid.

Contrary to petitioner's contention (Pet. 14), Congress's use of the word "or" to separate subsections (1) and (2) does not establish that each subsection sets forth a separate crime. When the word "or" links two "self-contained units," each of which "describes a complete offense," it may be natural to read the word as linking two distinct offenses. United States v. Loniello, 610 F.3d 488, 493 (7th Cir. 2010), cert. denied, 563 U.S. 929 (2011). But when, as here, a phrase "does not specify all elements of any offense, * * * the word 'or' is [generally] best read * * * to identify different ways of committing one element of the offense." Ibid.

Petitioner also errs in contending (Pet. 14) that the court of appeals' decision conflicts with this Court's decision in Loughrin v. United States, 573 U.S. 351 (2014). In Loughrin, this Court determined that Section 1344(2) does not require proof that the defendant intended to defraud a financial institution. See id. at 353. The Court did not consider whether Sections 1344(1) and (2) set forth distinct offenses. See id. at 356 ("The single question presented is whether the Government must prove * * * that the defendant intended to defraud a bank."); Gov't Br. at 17

n.4, Loughrin, supra (No. 13-316) (observing that the case did not present the question "whether the statute contains two offenses for purposes of * * * multiplicity analysis"). And the Court's recognition that the two clauses have "independent meaning," Loughrin, 573 U.S. at 359, is equally consistent with interpreting them as elements of separate offenses or means of committing a single offense.

b. Multiple courts of appeals have recognized that Section 1344 sets forth a single offense. See, e.g., United States v. Crisci, 273 F.3d 235, 239 (2d Cir. 2001) (per curiam); United States v. Schwartz, 899 F.2d 243, 246 (3d Cir.), cert. denied, 498 U.S. 901 (1990); United States v. Celesia, 945 F.2d 756, 758-759 (4th Cir. 1991); United States v. Harvard, 103 F.3d 412, 420 (5th Cir.), cert. denied, 522 U.S. 824 (1997); United States v. LeDonne, 21 F.3d 1418, 1426 (7th Cir.), cert. denied, 573 U.S. 1020 (1994). And contrary to petitioners' contention (Pet. 15-17), the Third, Fifth, and Ninth Circuits have not held otherwise. While the decision below is in tension with some statements made by the Tenth Circuit, that tension does not amount to a square circuit conflict that warrants this Court's review.

The Third Circuit has recognized that Section 1344 sets forth only a single offense. See Schwartz, 899 F.2d at 246. The Third Circuit decision that petitioner cites (Pet. 16), Schwartz v.

Warden Fort Dix FCI, 841 Fed. Appx. 481 (2021) (per curiam), is non-precedential and does not contain the language that petitioner attributes to it. Compare Pet. 16 (describing Schwartz as stating that "Loughrin abrogated our decision in Thomas, that the bank fraud statute created 'only one offense'") (emphases added), with Schwartz, 841 Fed. Appx. at 484 ("Loughrin * * * abrogated our holding in Thomas, which, as discussed above, required the government to establish a specific intent to defraud a financial institution in order to obtain a conviction under § 1344(2).").

In the Fifth Circuit decision that petitioner cites (Pet. 15), the court observed in a footnote that the Tenth Circuit had stated that Section 1344 "sets forth two distinct crimes." United States v. Medeles, 916 F.2d 195, 198 n.4 (5th Cir. 1990) (quoting United States v. Bonnett, 877 F.2d 1450, 1453 (10th Cir. 1989)). But the Fifth Circuit did not itself adopt that interpretation, and it has since recognized that Section 1344 sets forth a single offense. See Harvard, 103 F.3d at 420; United States v. Barakett, 994 F.2d 1107, 1110 n.10 (1993), cert. denied, 510 U.S. 1049 (1994).

The Ninth Circuit decision that petitioner cites (Pet. 15) addressed only the question whether Section 1344(1) requires proof that a bank was "the intended financial victim of the fraud," not the question whether Sections 1344(1) and (2) set forth different

offenses. United States v. Shaw, 781 F.3d 1130, 1132 (2015), vacated, 580 U.S. 63 (2016). In any event, because this Court vacated the Ninth Circuit's judgment, see Shaw v. United States, 580 U.S. 63, 72 (2016), its opinion "has no precedential effect," United States v. Carrillo-Lopez, 68 F.4th 1133, 1142 n.4 (9th Cir. 2023), cert. denied, No. 23-6221 (Jan. 22, 2024).

Finally, the Tenth Circuit decision that petitioner cites (Pet. 15-17) involved the mail-fraud statute, 18 U.S.C. 1341, not the bank-fraud statute, 18 U.S.C. 1344. See United States v. Cronic, 900 F.2d 1511, 1513 (1990). The Tenth Circuit has stated, in two other decisions that petitioner does not cite, that Section 1344 "sets forth two distinct crimes." Bonnett, 877 F.3d at 1453; see United States v. Swanson, 360 F.3d 1155, 1162 (10th Cir. 2004). But the Tenth Circuit did not make either statement in the course of analyzing a claim that an indictment was duplicitous. See Swanson, 360 F.3d at 1162; Bonnett, 877 F.3d at 1453. Indeed, in one of those decisions, the Tenth Circuit (albeit without expressly considering the divisibility issue) sustained an indictment that "charged the defendant with violations of * * * subsections (1) and (2) * * * as a single crime." Bonnett, 877 F.2d at 1457.

Any inconsistency or lack of clarity in the Tenth Circuit's decisions is best resolved by the en banc Tenth Circuit, not by this Court. See Wisniewski v. United States, 353 U.S. 901, 902

(1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Its isolated statements, which did not lead to any outcome that directly conflicts with the outcome here, do not provide a sound basis for certiorari in this case.

c. Furthermore, this case would be an unsuitable vehicle for addressing the divisibility question, because any error in the indictment was harmless. Petitioner argues (Pet. 12) that the indictment prejudiced him by allowing the jury to find him guilty of bank fraud without unanimously agreeing on whether he violated subsection (1) or subsection (2). But there can be no meaningful dispute that the scheme in this case -- in which petitioner sought to use falsified applications to obtain money from financial institutions -- was covered by both subsections. The scheme sought both to "defraud a financial institution," 18 U.S.C. 1344(1), and to obtain money from a financial institution "by means of false or fraudulent pretenses," 18 U.S.C. 1344(2). See Loughrin, 573 U.S. at 358 n.4 ("[T]he overlap between the two clauses is substantial.").

The district court also instructed the jury that, where the indictment charged that an offense was committed in alternative ways, the jury could find the defendant guilty only if "one of the alternatives [wa]s proved beyond a reasonable doubt" and the jury

"agree[d] unanimously as to that alternative." D. Ct. Doc. 97, at 8-9 (Sept. 24, 2021). Although such an instruction was unnecessary for a count setting forth only a single offense, it avoided any risk that the jury might have found petitioner guilty "without unanimously agreeing on the same offense." Pet. App. 11 n.12 (citation omitted); see, e.g., United States v. Trammell, 133 F.3d 1343, 1354-1355 (10th Cir. 1998) ("One cure for an otherwise duplicitous indictment is to give an augmented instruction requiring unanimity on one or the other of the acts charged within a count.").

2. Petitioner alternatively contends (Pet. 17-26) that the district court should have struck as surplusage the allegations in the indictment's bank-fraud count that concerned institutions apart from the Florida Credit Union. That fact-bound contention does not warrant this Court's review.

Under the Federal Rules of Criminal Procedure, a district court "may strike surplusage from the indictment." Fed. R. Crim. P. 7(d). A court should strike an allegation as surplusage only if it is "irrelevant" and "prejudicial." Fed. R. Crim. P. 7 advisory committee note (1994); see Pet. App. 14. The court of appeals correctly determined that the allegations at issue here were not irrelevant. See id. at 15.

To obtain a conviction under the bank-fraud statute, the government must prove both that a fraudulent "scheme or artifice" existed and that the defendant "knowingly execute[d], or attempt[ed] to execute," that scheme. 18 U.S.C. 1344. Petitioner's "extravagant and multi-faceted" scheme involved multiple financial institutions, multiple businesses, and multiple forms of fraud. Pet. App. 15. Although the government charged only a single execution of the scheme -- the submission of an application to the Florida Credit Union -- the allegations about other financial institutions, businesses, and acts were relevant to the existence of the scheme. See id. at 14-15 ("[A]n allegation of bank fraud requires the government to prove the existence of a scheme, and the scheme-related evidence is exactly the information that [petitioner] argues is surplusage.").

In addition, a district court "may strike surplusage from the indictment"; it generally is not required to do so. Fed. R. Crim. P. 7(d) (emphasis added). "A part of the indictment unnecessary to and independent of the * * * offense proved may normally be treated as 'a useless averment' that 'may be ignored.'" United States v. Miller, 471 U.S. 130, 136 (1985) (citation omitted). Petitioner has not shown that the additional allegations in the indictment were so inflammatory and prejudicial that the district court abused its discretion by refusing to strike them. See Pet.

App. 15 n.14 (finding it unnecessary to consider whether the additional allegations were inflammatory or prejudicial, but stating that petitioner's arguments on those points "lack[ed] persuasive force"). Petitioner asserts (Pet. 24) that the indictment could have inflamed the jury, but the district court specifically instructed the jury that the allegations in the indictment are not evidence. See D. Ct. Doc. 97, at 1. In addition, the court allowed petitioner to renew his motion to strike at trial, but petitioner did not to do so. See D. Ct. Doc. 40, at 4.

In any event, petitioner does not appear to challenge the legal standard that the court of appeals applied in determining whether district courts should strike allegations as surplusage. See Pet. App. 14 ("A motion to strike surplusage from an indictment should not be granted unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial.") (citation omitted). Petitioner instead argues (Pet. 19-22) that the court misapplied that standard in this case. That fact-bound contention does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

3. Finally, petitioner contends (Pet. 26-35) that the court of appeals erred in determining that he could not challenge venue for the first time after trial. This Court has previously denied a petition for a writ of certiorari presenting the same question. See De Jesumaria v. United States, 583 U.S. 831 (2017) (No. 16-8764). The Court should follow the same course here.

a. Article III's Venue Clause provides that the "Trial of all Crimes * * * shall held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, Cl. 3. And the Sixth Amendment's Vicinage Clause guarantees the accused the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI.

Venue is not an element of the offense. See Smith v. United States, 599 U.S. 236, 253 (2023). As a result, the propriety of venue becomes a jury question only if the defendant puts it "in issue." United States v. Perez, 280 F.3d 318, 333 (3d Cir.), cert. denied, 537 U.S. 859 (2002). To put venue "in issue," a defendant must, at a minimum, object to venue before the jury's verdict and make a timely request for a jury instruction on the question. See, e.g., United States v. Cordero, 668 F.2d 32, 44 (1st Cir. 1981)

(Breyer, J.); United States v. Grammatikos, 633 F.2d 1013, 1022 (2d Cir. 1980); United States v. Auernheimer, 748 F.3d 525, 532 (3d Cir. 2014); United States v. Carbajal, 290 F.3d 277, 288-289 (5th Cir.), cert. denied, 537 U.S. 934 (2002); United States v. Nwoye, 663 F.3d 460, 466 (D.C. Cir. 2011); 2 Charles Alan Wright et al., Federal Practice and Procedure § 306 (4th ed. 2009).

A defendant who fails to put venue in issue during the trial may not challenge venue for the first time after trial or on appeal. See, e.g., Perez, 280 F.3d at 335-336; United States v. Greer, 440 F.3d 1267, 1271 (11th Cir. 2006); Cordero, 668 F.2d at 44; Nwoye, 663 F.3d at 466; Grammatikos, 633 F.2d at 1022. Allowing a defendant to lie in wait during the trial and then insist after conviction that the evidence on venue was insufficient would sandbag the government and waste judicial resources.

Petitioner errs in arguing (Pet. 29-34) that a defendant who fails to put venue in issue forfeits rather than waives the defense, enabling him to obtain plain-error relief on appeal. See United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing waiver from forfeiture). In Musacchio v. United States, 577 U.S. 237 (2016), this Court rejected a similar contention in the context of a statute-of-limitations defense, which, like venue, "becomes part of a case only if the defendant puts [it] in issue." Id. at 248. And as with the statute-of-limitations defense, even a

forfeiture-based approach to an improper-venue claim would result in no relief, as it is not error, let alone plain error, for a matter not "in issue" to have been unaddressed at trial. See id. at 248 & n.3.

b. Contrary to petitioner's suggestion (Pet. 28), the decision below does not conflict with the D.C. Circuit's decision in United States v. Wilson, 26 F.3d 142 (1994), cert. denied, 514 U.S. 1051 (1995). Petitioner states that Wilson "held that the defendant had not waived his venue rights even though he did not challenge venue until after trial." Pet. 28 (emphasis added). In fact, the court there determined that all of the defendants had waived their venue rights where one of them had successfully moved for transfer. See, e.g., Wilson, 26 F.3d at 151 ("[B]y initiating the move to transfer to D.C. [the defendant] waived any subsequent objections based on improper venue.").

c. This case, in all events, would be a poor vehicle for reviewing petitioner's contention, because the district court correctly recognized -- when petitioner raised the issue after trial -- that sufficient evidence supported venue in the Northern District of Florida.

Venue depends on the location of the conduct constituting the offense. See United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999). And "where a crime consists of distinct parts which have

different localities the whole may be tried where any part can be proved to have been done." Id. at 281 (citation omitted). Consistent with those principles, "the general rule of venue under the various false statement and false claim statutes" permits the prosecution to be brought "either in the district where the false statement is prepared and mailed, or where the statement is received." United States v. Wuagneux, 683 F.2d 1343, 1356 (11th Cir. 1982). Here, although petitioner mailed the fraudulent documents from the Southern District of Florida, the documents at issue were received in the Northern District of Florida. See Gov't C.A. Br. 43-46. Venue accordingly would have been proper in either district.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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