

No. 19-6229

**United States Court of Appeals
For the Sixth Circuit**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OLUFOLAJIMI ABEGUNDE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE,
No. 2:17-cr-20238-7

BRIEF OF DEFENDANT-APPELLANT OLUFOLAJIMI ABEGUNDE

ORAL ARGUMENT REQUESTED

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34, Appellant Olufolajimi Abegunde respectfully requests oral argument as it will aid the Court in its decisional process. The issue in this appeal involves the following: (1) whether Mr. Abegunde was prejudiced by the District Court's failure to sever the unrelated counts in the indictment; (2) whether the Government provided sufficient evidence at trial to prove consent for purposes of a conspiracy; and (3) whether there was a direct link between Mr. Abegunde to the Western District of Tennessee for the purpose of prosecution. Because this is a complex case with intricate details and evidence, the Appellant believes that oral argument is necessary if the Court has questions and to ensure sufficient discussion of the applicable law and guidelines. The weight of the court's resentencing rested on the type of factors that were stricken from Sentencing Guidelines. Therefore, this case deserves face time since this is a special case of particular importance.

STATEMENT OF JURISDICTION

The jurisdiction of this Court may be invoked pursuant to 28 U.S.C. § 1291 as appeal from a final judgment entered by the United States District Court for the Western District of Tennessee, Western Division. Final Judgment, RE 323, Page ID # 1576-1583. Furthermore, jurisdiction to review the sentence imposed in this case may be invoked pursuant to 18 U.S.C. § 3742(a) as an appeal of a sentence imposed under the Sentence Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rule of Appellate Procedure.

STATEMENT OF ISSUES

- I. Whether the District Court's denial of Olufolajimi Abegunde's *Motion to Sever Counts* resulted in misjoinder and prejudice to his jury trial rights.
- II. Whether the Government failed to establish a conspiracy to commit wire fraud and conspiracy to commit money laundering without proof of consent or an agreement between Olufolajimi Abegunde and other conspirators.
- III. Whether improper venue resulted because there was no proof of a direct link of Olufolajimi Abegunde and the Western District of Tennessee.
- IV. Whether the District Court abused its discretion when it failed to provide the necessary jury instruction and clear demarcation for dual witness roles.
- V. Whether the District Court erred in granting the use of "the loss chart" as relevant conduct in its determination of Olufolajimi Abegunde's proper sentencing range.

STATEMENT OF THE CASE

The defendant Olufolajimi Abegunde (“Mr. Abegunde”) appeals the convictions imposed in this criminal case. On August 24, 2017, the grand jury returned a multi-count indictment charging multiple coconspirators, including Mr. Abegunde and others, with various counts in connection with widespread cybercrime activities. Indictment, RE 3, Page ID # 3-28. Mr. Abegunde was subsequently arrested in February 20, 2018 and transported to the Western District of Tennessee. Arrest Warrant, RE 82, Page ID # 223. On April 13, 2018, the United States District Court for the Western District of Tennessee (“District Court”), in recognition of the intricate issues at play, designated the case as complex. First Report Date, RE 92, Page ID # 232. On August 24, 2018, defense counsel moved for – and the District Court granted – a severance of Mr. Abegunde’s case from the larger conspiracy charged in the August 24, 2017 indictment. Order Granting Motion to Sever Defendant, RE 161, Page ID # 635. The District Court subsequently scheduled Mr. Abegunde for trial with co-defendant Javier Luis Ramos-Alonso (“Mr. Ramos-Alonso”). Order Granting Motion to Sever Defendant, RE 161, Page ID # 635.

The grand jury returned a superseding indictment against Mr. Abegunde and Mr. Ramos-Alonso on August 29, 2018. Superseding Indictment, RE 164, Page ID # 638-656. The Superseding Indictment charged Mr. Abegunde and Mr. Ramos-

Alonso with one count of wire fraud conspiracy, in violation of 18 U.S.C. § 1349, and one count of conspiracy to launder money by conducting a financial transaction involving property that represented the proceeds of a specified unlawful activity, in violation of 18 U.S.C. §§ 1956(a)(1)(B) and 1956(h). Mr. Abegunde was also charged with one count of conspiracy to enter into a marriage for the purpose of evading immigration laws, in violation of 18 U.S.C. § 371, and one count of witness tampering, in violation of 18 U.S.C. § 1512(b). The District Court scheduled the trial for March 11, 2019. Revised Criminal Scheduling Order, RE 217, Page ID # 803-804. On March 6, 2019, Mr. Abegunde moved to sever the marriage-fraud conspiracy count from the remaining counts in the superseding indictment based on the notion that the counts were so unrelated as to warrant joinder and would result in prejudice to Mr. Abegunde. Motion to Sever Counts, RE 238, Page ID 935-938.

On March 11, 2019, the District Court denied Mr. Abegunde's motion. Transcript, RE 345, Page ID # 2614-2653. Throughout the seven-day trial proceedings, defense counsel established various factual contradictions in the accusations against Mr. Abegunde on cross examination of the Government's key witnesses, Agent Marcus Vance and Agent David Palmer¹. Trial Transcript, RE 346 & RE 353. In particular, Agent Vance agreed that the only transaction that related to

¹ Special Agent Marcus Vance and Special Agent David Palmer were assigned to this case since the outset of investigations on Mr. Abegunde; hence, the Government's use of them as expert and lay witnesses for trial.

the Western District of Tennessee was the \$9,000.00 that transferred from Mr. Ramos-Alonso's account to Ayodeji Ojo's ("Mr. Ojo") account. Trial Transcript, RE 353, Page ID # 3129. Furthermore, Agent Vance admitted that he did not know the true source of all the funds in which Mr. Abegunde was accused of fraudulent activity, except for the \$9,000.00, triggered from the Business Email Compromise ("BEC")², that was deposited into Mr. Ojo's account³ and that it was the only transaction that could have logically brought Mr. Abegunde before the District Court. Trial Transcript, RE 346, Page ID # 2693-2694; Page ID # 2753. Agent Vance also stated that there was no criminal enterprise agreement for purposes of establishing a conspiracy between Mr. Abegunde and Mr. Ramos-Alonso, nor did they have any knowledge of each other prior to the charges against them; however, the agreement and all communications were between Mr. Ramos-Alonso and "Tammy Dolan"⁴, whom Agent Vance and others assigned to the case have yet to place a true identification. Trial Transcript, RE 346, Page ID # 2754-2757. Even further, Agent Palmer testified that Mr. Abegunde was not involved in any of the

² "BEC" is a type of computer intrusion that occurs when an employee of a company is fooled into interacting with an email message that appears to be, but is not legitimate. Indictment, RE 3, Page ID # 3.

³ The only connection of Mr. Ojo's account as to Mr. Abegunde is that Mr. Ojo used his address and phone number on the application for the initial opening of the account; however, Mr. Ojo is the "sole owner" of the account.

⁴ "Tammy Dolan" is the unidentified co-conspirator that directed Mr. Ramos-Alonso through email communications to deposit/withdraw funds through a "romance scam".

BEC schemes and that he was not the BEC component of the investigation. Trial Transcript, RE 346, Page ID # 2878-2879. At the conclusion of trial, the jury returned guilty verdicts against Mr. Abegunde on all counts in which he had been charged. Order on Jury Verdict, RE 256, Page ID # 1048-1049. However, Mr. Ramos-Alonso was acquitted of the two conspiracy counts and only charged with aiding and abetting the July 25, 2016 BEC wire fraud of a Memphis real estate company. Order on Jury Verdict, RE 256, Page ID # 1048-1049.

On April 2, 2019, Mr. Abegunde sought a judgment of acquittal and/or a new trial because the verdict of guilty was against the overwhelming weight of evidence in the case. Motion for Judgment of Acquittal, RE 264, Page ID # 1066-1067. Additionally, Mr. Abegunde sought to relitigate his March 2019 motion to sever, asserting the District Court should have severed the charges in his case in that they were not in any way interrelated.

On July 24th, 2019, the District Court held Mr. Abegunde's initial sentencing hearing. RE 294. The Government offered a chart prepared by Agent Vance for the District Court to use in its computation of loss for purposes of determining the sentencing range for Mr. Abegunde. RE 308, Page ID # 1459-1463. Subsequently, defense counsel objected to the Government's loss calculation chart and the District Court heard argument from the parties. The District Court directed the parties to identify factors and circumstances in which it could determine that the

preponderance of the evidence would show that the loss chart should be considered as relevant conduct. On August 15, 2016, Mr. Abegunde filed his Memorandum asking the District Court to exclude any amount from the loss chart in its loss calculations. RE 296, Page ID # 1255-1258. The District Court held a continuation of Mr. Abegunde's sentencing hearing on September 6, 2019. RE 296. Additionally, the District Court heard argument from the parties and decided to postpone the proceedings to October 22, 2019. On September 18, 2019, the District Court denied Mr. Abegunde's motion for judgment of acquittal. Order Denying Motion for Acquittal, RE 310, Page ID # 1465-1474.

On October 23, 2019, Mr. Abegunde was sentenced to 78 months of incarceration with three years of supervised release based upon a total offense level of 28 and a criminal history category of I. Redacted Judgment, RE 323, Page ID 1576-1583. Subsequently, Mr. Abegunde timely filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit on October 25, 2019. Notice of Appeal, RE 324, Page ID 1604.

SUMMARY OF THE ARGUMENT

The District Court's failure to sever Mr. Abegunde's marriage fraud counts from the other counts resulted in the cumulation of prejudice during trial and a substantial and injurious influence on the jury's ability to deliver a reliable verdict. The Government failed to provide sufficient evidence that Mr. Abegunde's charge of conspiracy to enter into a marriage for the purpose of evading immigration laws was committed for the purpose of advancing the alleged conspiracy to commit wire fraud and launder money or to engage in witness tampering.

Although the Government was successful in procuring a guilty verdict, the proof at trial supported the following: (1) Mr. Abegunde had no knowledge of Mr. Ramos-Alonso prior to the charges brought against them nor did they have a readily ascertainable scheme to defraud in place; (2) the Government never explained how the funds acquired from the BEC or romance scam was in any way cleaned or "laundered" by Mr. Abegunde and returned to the parties actually responsible for the BEC. The verdict of guilty was against the overwhelming weight of evidence in this case.

Mr. Abegunde's rights were substantially infringed upon from the outset when he was arrested and haled into the Western District of Tennessee for prosecution because there was no direct link or connection with illegal activity on the part of Mr. Abegunde to the Western District. The prejudicial effect on Mr. Abegunde's rights

ever-flowed when there was no clear demarcation of the lay testimony and an express decline of the District Court to give a clear demarcation on objection by the Government to do so at the time between the fact and expert opinion testimony. Moreover, the District Court merely gave a “general instruction” regarding the dual testimony of Agent Palmer and Agent Vance; which is the exact conduct this Court advised against in *United States v. Lopez-Medina*. This plain error coupled with other prejudicial effect issues raised in the foregoing argument resulted in an infringement on Mr. Abegunde’s substantial rights thus amounting to reversible error.

ARGUMENT

I. THE DISTRICT COURT’S FAILURE TO SEVER THE MARRIAGE FRAUD COUNT FROM THE OTHER ALLEGED OFFENSES RESULTED IN MISJOINER AND OVERWHELMING PREJUDICE TO MR. ABEGUNDE’S JURY TRIAL RIGHTS.

Standard of Review

A defendant’s claim that charges were improperly joined is primarily one of law, in which the Court of Appeals reviews *de novo*. *United States v. Deitz*, 577 F.3d 672, 692 (6th Cir. 2009). “Whether joinder was proper under Rule 8(a) is determined by the allegations on the face of the indictment.” *United States v. Chavis*, 296 F.3d 450, 456 (6th Cir. 2002). The remedy for the misjoinder of counts in an indictment or information is not dismissal, but rather an order for election or for a separate trial of the counts. *Id.* Furthermore, if misjoinder affects substantial rights, reversal is only required if the misjoinder resulted in actual prejudice because it had “substantial and injurious effect or influence in determining the jury’s verdict.” *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.ED.2d 814 (1986).

Traditionally, the majority of federal circuits have held that Rule 8(a) applies only to a prosecution of a single defendant, and that Rule 8(b) applies exclusively whenever multiple defendants are involved, even if a defendant is contesting only the joinder of counts against himself. *See* 1 Charles Alan Wright, Federal Practice and Procedure: Federal Rules of Criminal Procedure § 143 p. 479, § 144 p. 494 (2d ed.1982). The Sixth Circuit, however, has not decided whether Rule 8(a) should

apply to multiple-defendant prosecutions. *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.ED.2d 814 (1986).

The key difference between the two sections is that it is easier to justify joinder under Rule 8(a) because it permits joinder of offenses which are merely of “the same or similar character.” *Frost*, 125 F.3d at 389. However, if joinder fails to meet the requirements of Rule 8 it constitutes misjoinder as a matter of law and as a result, the district court has no discretion on the question of severance. *Chavis*, 296 F.3d at 456. If joinder does comply with Rule 8 requirements, then a defendant may also move for severance pursuant to Rule 14 which provides:

“if the joinder of offenses or defendants in an indictment... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants’ trials, or provide any other relief that justice requires.” Fed. R. Crim. P. 14(a).

Mr. Abegunde asserts that his convictions were due to overwhelming prejudice as a result of the District Court not severing the count related to marriage fraud from the other counts. The counts were so unrelated as to be combined in a single indictment against multiple defendants which resulted in the cumulation of prejudice during trial, as well as a substantial and injurious influence on the jury’s verdict against Mr. Abegunde.

A. The Government's Application of Rule 8(a) to Mr. Abegunde's Alleged Offenses Resulted in a Cumulation of Prejudice at the Trial Proceedings.

The majority of federal circuits do not apply Rule 8(a) to multiple-defendant prosecutions because of the risk of “cumulation of prejudice”. See 1A Charles Alan Wright et al., *Federal Practice & Procedure* 144 (4th ed. 2008). There will be cumulation of prejudice against a defendant “from the spillover or accumulation of evidence,” *United States v. Sw. Bus Sales, Inc.*, 20 F.3d 1449, 1453 (8th Cir 1994), if evidence is allowed not only against co-defendants but also regarding offenses committed by those co-defendants that are merely of “the same or similar character” as an offense committed by those co-defendants.

The Government argued in its response to Mr. Abegunde's *Motion to Sever Counts* that the motion should be denied because the offenses were interrelated, and Rule 8(a) should be construed in favor of joinder. *United States v. Deitz*, 577 F.3d 672, 692 (6th Cir 2011). However, the Government's analysis and use of Rule 8(a) in the present case, is misplaced and should not have been permitted to justify the use of Rule 8(a) for joinder of Mr. Abegunde's counts. This is largely in part due to the fact this Court has not decided whether Rule 8(a) should be applied in a multiple-defendant prosecution. Furthermore, the use of Rule 8(a) as a means of justification for joinder of the unrelated counts caused cumulation of prejudice in Mr. Abegunde's case.

“When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense or related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the rules do not permit cumulation of prejudice by charging several defendants with similar but unrelated offenses.” *United States v. Chalmers*, 474 F. Supp. 2d 555, 576 (S.D.N.Y. 2007) quoting *Cupo v. United States*, 359 F.2d 990, 993 (D.C. Cir. 1966). The counts of marriage fraud in comparison to the other counts are so unrelated that joinder caused cumulation of prejudice in Mr. Abegunde’s case.

It is the Government’s contention that the marriage fraud count exemplifies the perpetuation of fraud on the United States by Mr. Abegunde and his wife. However, the Government lacked the necessary evidentiary support to bolster such an argument. Mr. Abegunde and Mr. Ramos-Alonso were both charged with the conspiracy to commit wire fraud and launder money. However, the charge of conspiracy to enter into a marriage for the purpose of evading immigration laws was only charged to Mr. Abegunde and his wife who sponsored him for lawful permanent residency. Mr. Abegunde was the only overlapping defendant; therefore, when the District Court granted the *Motion to Sever Defendants*, it should have equally severed the marriage fraud count that was of no relation to the counts in which Mr. Abegunde and Mr. Ramos-Alonso were jointly charged with for trial.

B. Even if This Court Finds Rule 8(a) was Properly Applied, the Counts Should have been Severed under Rule 14, Based on the Serious Risk of Prejudice to Mr. Abegunde.

Even if joinder does comply with Rule 8, a defendant may also move for severance pursuant to Rule 14. “A district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Ross*, 703 F.3d 856, 884 (6th Cir. 2012).

In the present case, regardless if joinder of the offenses did comply with Rule 8, severance was still necessary because failure to sever resulted in a prejudicial effect on Mr. Abegunde’s jury trial and ultimately a guilty conviction. This case was designated as a complex case due to the intricate nature of the offenses and the voluminous amounts of evidence to be presented. Based on that notion alone, the marriage fraud count should have been severed because of the risk of jury confusion of the issues in an already complex trial proceeding.

Mr. Abegunde faced insurmountable prejudice at trial based on counts that were not interrelated being tried simultaneously. Therefore, because the jury was prevented at the outset from making a reliable judgment about guilt or innocence and the cumulation of prejudice during trial, Mr. Abegunde’s counts should have been severed and tried separately.

II. WITHOUT PROOF BEYOND A REASONABLE DOUBT OF CONSENT OR AN AGREEMENT BETWEEN MR. ABEGUNDE AND ALLEGED CONSPIRATORS, THE GOVERNMENT FAILED TO ESTABLISH A CONSPIRACY TO COMMIT WIRE FRAUD AND CONSPIRACY TO COMMIT MONEY LAUNDERING.

Standard of Review

The Sixth Circuit reviews *de novo* the denial of a motion for judgment of acquittal, pursuant to Rule 29. Fed. R. Crim. P. 29. *United States v. Ramirez*, 635 F.3d 249, 255 (6th Cir. 2011). Pursuant to Rule 29(a), a “court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” *United States v. Rogers*, 769 F.3d 372, 377 (6th Cir. 2014).

The wire fraud provision of 18 U.S.C. § 1343 consists of three elements. The prosecution must establish “that the defendant devised or willfully participated in a scheme to defraud, that he used or caused to be used an interstate wire communication in furtherance of the scheme, and that he intended to deprive a victim of money or property.” *United States v. Faulkenberry*, 614 F.3d 573, 581 (6th Cir. 2010). A conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, requires the Government to establish beyond a reasonable doubt that “two or more persons conspired, or agreed, to commit the crime of wire fraud” and “that the defendant knowingly and voluntarily joined the conspiracy. *Rogers*, 769 F.3d at 377.

To procure a conviction under 18 U.S.C. 1956(h), the Government must prove that two or more persons conspired, or agreed, to commit the crime of money laundering and that the Defendant knowingly and voluntarily joined the conspiracy. *United States v. Hynes*, 467 F.3d 951, 964 (6th Cir. 2006) (explaining that the Government must prove that the defendant “agreed with another person to violate the substantive provisions of the money-laundering statute during the period alleged in the indictment”).

In the two counts for conspiracy, the government failed to present direct evidence of an agreement or consent on the part of Mr. Abegunde to commit the crime of wire fraud or money laundering. Furthermore, the Government concedes in its response to Mr. Abegunde’s *Motion for Judgment of Acquittal* that Mr. Abegunde neither knew every member of the conspiracy nor undertook all of the conspiracy’s activities. In the *Superseding Indictment*, Mr. Abegunde was accused of being a critical part of the business email compromise (“BEC”) scheme; however, at trial Agent Palmer testified that Mr. Abegunde was not involved with the BEC component of the case. RE 346.

During trial, the Court received proof of the BEC that took place on July 25, 2016. The money from this BEC was traced to “Tammy” whom romantically lured Mr. Ramos-Alonso into receiving monies and sending portions back to “Tammy.” Money from this transaction went into the account of Mr. Ojo, who opened the

account with a bank in Atlanta, Georgia while visiting Mr. Abegunde. The Government showed proof at trial that Mr. Abegunde answered a call from a bank official related to a deposit in the amount of \$9,000.00 transferred into the account of Mr. Ojo. For convenience and as a friend, Mr. Abegunde portrayed to be Mr. Ojo and told bank officials that if money was in the account that should not be, he absolutely approved reversal of the transaction to its rightful owner. This same \$9,000.00, is the only amount that the government provided any proof that was deposited into an account that was remotely related to Mr. Abegunde. At trial, Agent Vance even testified on cross that this was the only deposit that he and other agents were able to identify the exact source of funds. RE 346.

It is the Government's contention that Mr. Abegunde's startup businesses were shell companies used to further the alleged criminal enterprise of money laundering; however, evidence from defense counsel at trial proved to the contrary. Mr. Abegunde's businesses were legitimate and licensed with the necessary authorities in Georgia. The financial transactions that were conducted through Mr. Abegunde's "F.J. Williams" accounts were legitimate and legal transactions and the Government provided no direct evidence to dispute this fact. The Government secured Mr. Abegunde's conviction without direct evidence of stolen identification related to Mr. Abegunde or direct proof of any illegally obtained proceeds that necessitated laundering being in any way directly linked to Mr. Abegunde.

Pursuant to *United States v. Rogers*, because there was not proof beyond a reasonable doubt offered to support or establish that Mr. Abegunde “consented or agreed” to a conspiracy to commit wire fraud or the financial transactions of his financial business were illegal, this Court should reverse the District Court’s denial of Mr. Abegunde’s motion for judgment of acquittal.

III. BECAUSE THERE WAS NOT PROOF OF A DIRECT LINK TO THE WESTERN DISTRICT OF TENNESSEE, PROSECUTION OF MR. ABEGUNDE RESULTED IN IMPROPER VENUE.

Standard of Review

On appeal, questions of jurisdiction and venue are questions of law that are reviewed *de novo*. “We review *de novo* the district court's interpretation of the venue statutes and its determination of whether a case is filed in an improper venue.” *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir.1998).

Because the wire fraud statute makes no reference to the venue of the offense, the provisions of 18 U.S.C. § 3237(a) apply, which provides in pertinent part that wire fraud prosecutions may be instituted in “any district in which an interstate or foreign wire transmission began, continued, or was completed.”

“[W]ire fraud statutes do not punish fraudulent schemes--only the illegal use of the mails or wire facilities in furtherance of such schemes. As a result, federal courts should focus only on the specific geographic characteristics of

the charged mailing or wire transmission--meaning where did it originate, terminate, or pass through? Jack E. Robinson, The Fed. Mail & Wire Fraud Statutes: Correct Standards for Determining Jurisdiction & Venue, 44 Willamette L. Rev. 479, 532 (2008).

In the present case, the only transaction that haled Mr. Abegunde into the Western District of Tennessee was the \$9,000.00 transaction taken from a real estate company in Memphis, Tennessee. As explained in previous sections of this brief, the only relation to Mr. Ojo's account was that Mr. Abegunde spoke on Mr. Ojo's behalf to the bank representative regarding the deposit and return of the \$9,000.00 and Mr. Ojo used his address to open the account while Mr. Ojo was staying with him in Atlanta. Mr. Ojo is the sole owner of the account, which means he is the only one that has authority over the account. RE 346.

Therefore, his connection to the account and the alleged illegal funds that were deposited therein are in no way a direct link to Mr. Abegunde that would warrant him being haled into the Western District of Tennessee for purposes of prosecution. At best, his connection can be characterized as minimal and indirect in the grand scheme of this entire case; thus, venue was improper and unconstitutional as to Mr. Abegunde.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROVIDE A CAUTIONARY JURY INSTRUCTION REGARDING AGENT PALMER AND AGENT VANCE’S DUAL WITNESS ROLES AND A CLEAR DEMARCATION BETWEEN THEIR FACT TESTIMONY AND EXPERT OPINION TESTIMONY.

Standard of Review

This Court reviews a district court’s decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Baldwin*, 418 F.3d 575, 579 (6th Cir. 2005). The district court’s decision regarding evidence admissibility is only reversed if this Court finds that the district court abused its discretion and if the mistake affected substantial rights that amounts to more than harmless error. *Pressman v. Franklin*, 384 F.3d 182, 187 (6th Cir. 2004). An abuse of discretion occurs when the district court “relies on clearly erroneous findings of fact... improperly applies the law, or...employs an erroneous legal standard.” *United States v. Cline*, 362 F.3d 343, 348 (6th Cir. 2004). The standard of review imposed for jury instruction issues is also abuse of discretion; however, if the defendant failed to object to the instructions during trial then this Court shall review for plain error. *Johnson v. United States*, 520 U.S. 461, 466-467 (1997).

In *United States v. Tocco*, this Court held there was no abuse of discretion in permitting an agent to testify in a dual capacity if the district court “instructed the jury, both before [an agent] gave his opinion and again in the jury charge, that it should consider [the agent’s] dual roles in determining what weight, if any, to give

[his] expert testimony.” 200 F.3d 401, 419 (6th Cir. 2000). “A general instruction on weighing officer testimony does not guard against a jury mistakenly weighing opinion testimony as if the opinion were fact, nor does it instruct the jury that they are free to reject the opinions given. Nor does such a general instruction regarding possible law enforcement bias address the additional risk of bias in forming expert conclusions regarding one's own investigation.” *United States v. Lopez-Medina*, 461 F.3d 724, 744 (6th Cir. 2006).

In *Lopez-Medina*, there was no cautionary jury instruction regarding the agents' dual witness roles nor a clear demarcation between their fact testimony and expert opinion testimony, thus this Court concluded that the district court committed an error that was plain or obvious in permitting the dual role testimony. 461 F.3d at 745. Moreover, this Court also held that because the error at issue “seriously impacted the fairness, integrity, or public reputation of judicial proceedings” (in conjunction with the other evidentiary issues), it may have affected the outcome of the defendant’s trial and a reversal of his conviction was warranted. *Id.*

At Mr. Abegunde’s trial, Agent Vance and Agent Palmer both testified as experts and fact witnesses. RE 353; RE 355. Agent Vance gave testimony as an expert first and then a lay witness; however, at the time of transition to lay testimony, the Government asked the District Court to give a demarcation or “jury instruction”. The District Court declined to give the demarcation, stating in pertinent part, “I

typically don't give that instruction during the trial...I don't think it means that much to the jury...and, it is hard to draw the line...it doesn't come out in segment form because one bleeds over into the next." RE 353, Page ID # 3132. Likewise, in Agent Palmer's testimony, there was no clear demarcation to assist the jury in understanding the dual roles or to signal the transition between the two. RE 332. During jury instructions, the District Court gave a general instruction regarding Agent Palmer and Agent Vance's dual role testimony. RE 355, Page ID # 3335.

Pursuant to *Lopez-Medina*, because there was no jury instruction regarding Agent Vance and Agent Palmer's dual witness roles nor a clear demarcation between their expert opinion and fact testimony, the District Court committed an error that was plain and obvious in permitting the dual-role testimony. This issue coupled with the foregoing issues in this argument, substantially impinged on the jury trial rights of Mr. Abegunde and amounts to more than mere harmless error.

Therefore, this Court should find that Mr. Abegunde's rights were seriously impacted and reverse the decision of the District Court.

V. THE DISTRICT COURT ERRED IN GRANTING THE USE OF "THE LOSS CHART" AS RELEVANT CONDUCT IN ITS DETERMINATION OF A PROPER SENTENCING RANGE FOR MR. ABEGUNDE.

Standard of Review

This Court reviews a defendant's sentence for reasonableness, using an abuse of discretion standard. *United States v. Jeross*, 521 F.3d 562, 569 (6th Cir. 2008).

“Reasonableness review has both substantive and procedural components.” *United States v. Keller*, 498 F.3d 316, 322 (6th Cir. 2007). The evaluation of the procedural reasonableness of a defendant’s sentence is two-fold. The district court’s findings of fact are reviewed for clear error and its legal conclusions are reviewed *de novo*. *United States v. Angel*, 576 F.3d 318, 320 (6th Cir. 2009). Therefore, whether conduct constitutes “relevant conduct” under the Sentencing Guideline § 1B1.3(a)(1)(B) is reviewed *de novo*, while the underlying factual findings regarding whether that conduct is “within the scope” of, “in furtherance” of, and “reasonably foreseeable” in connection with jointly undertaken criminal activity are reviewed for clear error. *United States v. Tocco*, 306 F.3d 279, 284 (6th Cir. 2002).

When a defendant is convicted of conspiracy, the district court must determine the relevant conduct pursuant to Section 1B1.3(a)(1)(B) of the Sentencing Guidelines (“Guidelines”), which provides that, “in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy),” the defendant will be held responsible for “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” USSG § 1B1.3(a)(1)(B). Additionally, relevant conduct includes “all [criminal] acts

and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.” USSG § 1B1.3(a)(1)(A). According to *United States v. Donadeo*, Sections 1B1.3(a)(1)(A) and (B) provide that “the amount of loss attributable to a defendant may include any loss that resulted from his/her own criminal conduct, as well as any loss that resulted from certain conduct of others.” 910 F.3d 886, 894 (6th Cir. 2018).

Throughout the months of August and September, the District Court began the process of sentencing Mr. Abegunde. During those hearings, various strenuous objections were made to the Government’s assertion that the calculations presented on its proffered demonstrative chart should be considered as loss in connection to the conspiracy counts for which Mr. Abegunde was convicted. RE 293, Page ID # 1248-1252. The District Court erred in allowing the loss chart to ascertain loss because there were no allegations made that established that the transactions were in any way illegal. This is based on the fact that the Government’s witness Agent Vance indicated that he could only identify one illegal source out of more than eighty deposits on the loss chart that he created. Further, Agent Vance testified there was no way for the District Court to make the determination that the deposits on the loss chart were actual offenses. The chart failed to comply with the requirements of USSG § 1B1.3(a)(2) which provides that the transactions may be included in Mr.

Abegunde's offense level as "relevant conduct" only if it is "part of the same course of conduct or common scheme or plan as the offense of conviction."

To qualify as a part of a "common scheme or plan" under the "relevant conduct" guideline, the offenses "must be *substantially connected* to each other by at least one common factor, such as common victims, common accomplices, common purposes, or similar modus operandi." USSG § 1B1.3, application note 9(A) (emphasis added). As mentioned in the foregoing argument, there were not common accomplices because Mr. Abegunde did not even have knowledge of his co-defendant, Mr. Ramos-Alonso. There was no modus operandi because in review of the conversations between Mr. Abegunde and other individuals, it is abundantly clear his intent was to merely buy and sell Naira⁵. RE 318, Page ID # 1538-1560. The Government failed to provide evidence that Mr. Abegunde knew or should have known that any of the transactions were from funds illegally obtained. It is a grueling dichotomy to overcome that if Mr. Abegunde posed questions regarding the source of funds, he exhibited signs he believed or knew the funds were procured illegally; however, if he failed to pose a question then he acted deliberately indifferent. If the Government was in actual pursuit of the truth instead of stretching the facts and doggedly pursuing a conviction, Mr. Abegunde's intent and the lack of criminal conduct would have been utterly obvious.

⁵ Naira is the currency of Nigeria.

Based on the District Court's error in considering the loss chart in its computation of Mr. Abegunde's sentencing range, he was sentenced to 78 months of incarceration with three years of supervised release. Redacted Judgment, RE 323, Page ID 1576-1583. Therefore, Mr. Abegunde respectfully asks this Court to find that he should be resentenced without consideration of the loss chart as proof of relevant conduct.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand to the District Court for a new trial. Mr. Abegunde further prays for such other relief to which he may be entitled to either at law or equity.

Respectfully submitted,

/s/ John Keith Perry, Jr.

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CERTIFICATE OF COMPLIANCE

I, John Keith Perry, Jr. this 19th day of March, 2020, do hereby certify, as the undersigned counsel of record for the Defendant-Appellant, Olufolajimi Abegunde, certify pursuant to Fed. R. App. P. 32(g) that the Brief of Defendant-Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 5,787 words and 587 lines including footnotes excluding the parts of the Brief exempted by Fed. R. App. P. 32(f). In addition, this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, Times New Roman font in 14 point size, with footnotes in Times New Roman font 14 point size.

/s/ John Keith Perry, Jr.
Signature

3/19/2020
Date

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has electronically filed the foregoing Brief of Defendant-Appellant, Olufolajimi Abegunde, with the Clerk of Court using the CM/ECF system, which will send notification of the filing to the following attorneys of record,

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This the 19th day of March, 2020.

/s/ John Keith Perry, Jr.
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(c) and 30(b), Counsel for Defendant-Appellant, hereby designates the following filings in the District Court’s record as entries that are relevant to this appeal:

Document	R.E. #	Page ID #
Superseding Indictment	164	638-656
Motion to Sever Counts	238	935-938
Motion for Judgment of Acquittal	188	295-296
Judgment	323	1576-1583
Notice of Appeal	324	1605-1606

This the 19th day of March, 2020.

/s/ John Keith Perry, Jr.
John Keith Perry, Jr.