No. 21 –

In The Supreme Court Of The United States

OLUFOLAJIMI ABEGUNDE, PETITIONER,

V.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

OLUFOLAJIMI ABEGUNDE (MBA)

#71343-019 (PRO-SE)

REEVES COUNTY DETENTION CENTER III
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QUESTION PRESENTED

In determining the propriety of Joinder of offenses and/or defendants under Rule 8 Federal Rules of Criminal Procedure, there is a profound circuit split in a crucially consequential area. The Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have held that the propriety of Joinder – Under Rule 8 – must be judged solely by the allegations on the face of the indictment. On the other hand, the Third, Fourth, Tenth, Eleventh, and D.C. Circuits to varying extents, consider factors beyond the indictment. The later Circuits consider factors that include the allegations on the indictment, pretrial evidence, trial evidence, and appellate arguments in determining the propriety of Joinder Under Rule 8.

The question presented is should the propriety of Joinder – under Rule 8 – be judged strictly by the allegations on the indictment (as the Fifth, Sixth, Seventh, Eight, and Ninth Circuits have held)? Or should factors beyond the indictment be considered (as the Third, Fourth, Tenth, Eleventh, and D.C. Circuits have held)?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1 (b) (iii):

- *United States V. Abegunde, No. 17-cr-20238-5HL, U.S.* District Court for the Western District of Tennessee. Judgment entered October 23, 2019.

- *United States V. Abegunde, No. 19-6229, U.S.* Court of Appeals for the Sixth Circuit. Judgement entered January 14, 2021; rehearing denied April 6, 2021.

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JURISDICTION

The Court of Appeals entered judgment on January 14, 2021 (Appendix A). The Court of Appeals also denied a timely Petition for rehearing en banc on April 6, 2021 (Appendix B). This Court has jurisdiction under 28 U.S.C. 1254 (1).

Constitutional Provisions, Statutes, And Rules

1. Federal Rules of Criminal Procedure.

Rule 8. Joinder of Offenses or Defendants

(a) Joinder of Offenses. The indictment or information may change a defendant in separate counts with 2 or more offenses if the offenses charged – whether felonies or misdemeanors or both – are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

2. Federal Rules of Criminal Procedure.

Rule 18. Place of Prosecution and Trial

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The Court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

3. Constitution of the United States

Article III, Section 2, Clause 3 of the United States Constitution provides: “The trial of crimes, except in cases of impeachment, shall be by Jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any state, the “Trial shall be at such place or places as the congress may by law have directed.”

4. **Article Amendment VI of the United States Constitution** provides" *"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.*

5. **Amendment V of the United States Constitution** provides*: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

6. **Amendment XIV Section 1 of the United States Constitution** provides: "*All persons born or naturalized in the United States and subject the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."*

7. Statutes

Title 18, Section 1349 of the U.S. Code, entitled *"Attempts and Conspiracy,"* provides:

"Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was object of the attempt or conspiracy.

8. Title 18, section 1343 of the U.S. Code, entitled ***"Fraud by wire, radio, or television"*** provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sound for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

9. **Title 18, section 1344 of the U.S. Code, entitled "*Bank Fraud" 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.

10. Title 18, Section 1956(h) of the U.S. Code provides:

Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

11. Title 18, Section 1956(a)91) B(i) provides:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –

(a) (1) (B) (i): to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

12. Title 18, Section 371 of the United State Code, entitled:

"Conspiracy to commit offense or to defraud United States" provides.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

13. Title 8, Section 1325 (C) of the United State Code, entitled "Marriage fraud" provides:

Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years or fined not more than $250,000 or both.

14. Title 18, Section 3237 (a) of the U.S. Code, entitled

"Offenses begun in one district and completed in another" provides:

Except as otherwise expressly provided by enactment of congress, an offense against the United States begun in one district and completed in another, or committed in more than

one district, may be inquired of and prosecuted in any district in which such offenses was begun, continued, or completed.

Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

INTRODUCTION

This case presents an important and recurring question concerning a key criteria for determining the propriety of Joinder of Offenses, and/or Defendants, pursuant to Rule 8, Federal Rules of Criminal Procedure.

The rule has been inconsistently applied across Circuit Courts, leading to ambiguities, disparities, different sets of precedents, and Circuit splits – with regards the interpretation and proper application of Rule 8 in consequential areas. However, the focus of this petition is with respect to the Circuit split on the critically vital issue of whether the determination of the propriety of Joinder under Rule 8 should depend solely on the allegations as contained in the indictment, or whether Courts should consider factors beyond the indictment.

While the Third, Fourth, Tenth, Eleventh, and D.C. Circuits to varying extents – have correctly interpreted Rule 8 as not limiting the determination of the propriety of Joinder to only the allegations on the indictment; the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits limit the determination of the propriety of Joinder to only the allegations on the indictment. The latter precedent of considering only the allegations on the indictment likely permitted the judicial travesties identified below.

First, in the proceedings below, the government capitalized on the Sixth Circuit precedent – that the propriety of Joinder be determined by the contents of the indictment alone – by willfully and knowingly including numerous egregious misrepresentations of material facts on the superseding indictment. The government included these falsehoods on the superseding indictment without any considerations for the sanctity, integrity, and public reputation of judicial proceedings. At trial however, the government's misrepresentations were not only proven to be inaccurate; the government's misrepresentations were proven to be unsupported by the evidence on the record. Furthermore, the flagrant misrepresentations by the government were proven to be contrary to the evidence on the record.

As such, a combination of the Sixth Circuit's precedent – regarding considering only the allegations on the indictment – and the government's gross misrepresentations on the superseding indictment significantly prejudiced Petitioner.

The second travesty is with regards the government, guilefully including a phantom charge of bank fraud conspiracy – in an obscure manner – on the superseding indictment. The inclusion of this phantom charge thus led to the decision below where the Sixth Circuit inaccurately asserted that Petitioner had been convicted of bank fraud conspiracy. Nothing could be further from the truth! This is as a result of the fact that the government did not present any scintilla of evidence to the jury to substantiate the supposed bank fraud conspiracy charge. Furthermore, the jury instructions did not contain any directive to the jury to consider and determine whether Petitioner was actually involved in the alleged bank fraud conspiracy. As a matter of fact, after returning the superseding indictment, the government went silent on anything related to the alleged bank fraud conspiracy charge. At trial, the bank fraud conspiracy charge was completely eschewed. When the jury eventually returned its verdict; there was absolutely no mention of a bank fraud conspiracy charge. Additionally, the

verdict form does not list bank fraud conspiracy as an offense that Petitioner was convicted of. Of significance is the fact that on appeal, in the government's "Brief for appellee United States of America", the government did not list bank fraud conspiracy as one of the offenses that Petitioner had been convicted of.

Yet, in its decision below, the Sixth Circuit did not only wrongly conclude that Petitioner had been convicted of bank fraud conspiracy; the Sixth Circuit utilized the bank fraud conspiracy count – that was not presented to the jury and was completely eschewed at trial – as justification for its ruling below that the Joinder of Offenses was proper, just because the bank fraud conspiracy charge was obscurely included on the superseding indictment.

Thirdly, even though the Sixth Circuit has not taken a definite position regarding which particular rule applies – Rule 8(a) or Rule 8 (b) in cases where a defendant's claim that multiple offenses have been improperly joined in a multiple defendant case; the Sixth Circuit has consistently held that Joinder of multiple offenses in a multiple defendant case is proper where there is a logical relationship, and there is a large area of overlapping proof with regards to the joined offenses. In the proceedings below, the Sixth Circuit ignored this standard while asserting that it followed the standard.

Had the Sixth Circuit truly followed this standard by meticulously examining the contents of the superseding indictment, it would have gained cognizance of the fact that it is absolutely impossible to establish a logical relationship with respect to the joined offenses. This is simply because the allegations on the superseding indictment show that – based on the sequence of events alleged on the superseding indictment – there could not possibly have been any over-lapping evidence regarding the joined offenses.

Yet, rather than elucidate the logical inter-relatedness and overlapping evidence regarding the joined offenses – based on the allegations on the indictment – as Sixth Circuit extant standards require; in its decision below, the Sixth Circuit specifically cherry-picked inconsistent and unfounded allegations on the superseding indictment that are inconsistent with logic and common sense.

Furthermore, the Sixth Circuit ignored the substantiated and logically credible allegations on the superseding indictment; thereby prejudicing Petitioner.

Fourthly, besides its decision regarding the issue of Joinder, the Sixth Circuit – rather than analyze the evidence on the record – mostly ignored the evidence and granted unsupported allegations oracular status. In addition to the foregoing identified issues, the Sixth Circuit elevated false and unsubstantiated allegations to the stature of undisputed fact. This manifested in all the other issues – besides Joinder – presented for review. Hence, prejudicing Petitioner severely.

These interlaid travesties ultimately precipitated the outrageous error below where the Sixth Circuit affirmed the propriety of the Joinder of an alleged marriage fraud conspiracy count, regarding a marriage that was entered into in the Eastern District of North Carolina, and not the Western District of Tennessee where Petitioner was prosecuted. Joining this

alleged marriage fraud conspiracy count violates the provisions of the United States Constitution, and the Federal Rules of Criminal Procedure regarding proper venue in criminal cases. In any case, the Sixth Circuit affirmed the propriety of the Joinder of the said marriage fraud conspiracy count to the alleged underlying wire fraud conspiracy count, and a money laundering conspiracy count. The underlying wire fraud conspiracy count is regarding fraudulently obtained funds, unconnected to Petitioner, that did not originate, terminate, or move through the Western District of Tennessee. Hence, based on Sixth Circuit precedent regarding venue in wire fraud cases, venue was also improper for the underlying wire fraud conspiracy in the West District of Tennessee.

In the decision below, rather than review the record to determine the propriety of venue for the underlying wire fraud conspiracy count, the Sixth Circuit inductively relied on unsubstantiated assertions. As such, the Sixth Circuit's decision thus violates its current precedent regarding venue in wire fraud cases. This error can be easily attributed to the impact of relying solely on the allegations on the indictment in Joinder related offences, as the Sixth Circuit may have been inadvertently incentivized to rely on allegations – rather than the evidence on the record. In the proceedings below, the Sixth Circuit inductively applied the Joinder precedent – of relying solely on allegations with regards to other issues presented for review, thereby prejudicing Petitioner.

The travesties below reinforce the untenable nature of the Sixth, and other Circuit precedents of considering only the allegations on the face of the indictment in determining the propriety of Joinder under Rule 8. These travesties also reinforce the key fact that the Sixth Circuit mostly ignored the evidence on the record in general. Had the Sixth Circuit examined the evidence on the record, it would not have affirmed the propriety of joining the totally unrelated offenses as it did below. Furthermore, had the Sixth Circuit examined the record, it would have easily deciphered the irregularities employed by the government and its general misconduct.

As such, the need for this Court's intervention – via the exercise of its supervisory power – in correcting this anomalous departure from the accepted and usual course of judicial proceedings is urgent.

The decision below does not only violate Petitioner's guaranteed right to not be deprived of liberty without due process of law; the decision below also violates Petitioners right to a fair trial. Furthermore, the decision below seriously impacts – in a deleterious manner – the fairness, integrity, and public reputation of judicial proceedings.

A clear guidance regarding the proper application of Rule 8 – vis-à-vis a resolution in line with precedents in the Third, Fourth, Tenth, Eleventh, and D.C. Circuits, that the propriety of Joinder should not be determined solely by the allegations on the face of the indictment – will minimize the chances of a reoccurrence of the travesties below.

Finally, a resolution that does not limit the determination of the propriety of Joinder to the indictment will diminish the propensity for overzealous advocacy by the government, where the government might knowingly join unrelated charges that would prejudice a defendant at trial, thereby making conviction more likely, in the hopes that neither the

defense attorney, the District Court, nor the Appellate Court will notice the misjoinder of counts. This is what occurred below.

STATEMENT

Proceedings Below

Petitioner, Olufolajimi Abegunde earned a Master of Business Administration (MBA) degree from Mays Business School, Texas A & M University, College Station, Texas, graduating with the class of 2016. Subsequently after, in an attempt to ameliorate the devastating economic crisis in Nigeria (Petitioner's country of origin) that led to a shortage of the world's reserve currency for international trade and international commerce – the United States Dollar (USD) – Petitioner founded a Money Service Business (MSB) and a Financial Technology start-up with a focus on brokering international money remittances and currency exchanges.

Petitioner's business – FJ Williams Inc. DBA TranzAlert – was duly licensed and registered with all the extant industry regulatory bodies that include the Financial Crimes Enforcement Network (FINCEN), U.S. Department of the Treasury; the Georgia Department of Banking and Finance; and the Central Bank of Nigeria, inter alia. In other words, Petitioner's business went through, and successfully navigated the exact same rigorous regulatory vetting process as MSB's such as Western Union and MoneyGram.

In August 2016, a long-time friend of Petitioner, Mr. Ayodeji Ojo, visited the U.S. from Nigeria with a pregnant wife and infant daughter, and was hosted by petitioner at his home in Atlanta, Georgia. At the time Ojo possessed a wholly legitimate check that he needed to cash to enable him take care of expenses related to his family's trip, as well as the health expenses associated with his pregnant wife. On encountering failure to cash the check due to its size, it was recommended by a banker that Ojo open a new bank account, deposit the check into the bank account, and wait for the check to clear.

Ojo chose Wells Fargo Bank. Since Ojo was staying at Petitioner's home, and since Ojo did not have a U.S. telephone number – a mailing address and phone number are requirements to open the bank account – Ojo sought, and Petitioner granted Ojo permission to use Petitioner address and phone number to open the account.

Around October 11, 2016; two months after Ojo had departed the U.S., Petitioner received a phone call from a certain Brian Ancona, a supposed investigator at Wells Fargo Bank, who stated that a certain Ramos Alonso was in the bank and was seeking the reversal of $9000 that Alonso had inadvertently deposited into Ojo's bank account. Petitioner told Ancona to hold while Petitioner attempted a three-way call connecting Ojo—the account holder—and Ancona.

The three-way call was unsuccessful. Ojo subsequently called Petitioner back, and Petitioner conveyed the issue, and advised Ojo to immediately authorize the reversal of the $9000. Petitioner also told Ojo that he did not want to be in the middle of any issues. When

Ancona called back, Petitioner communicated that Ojo had authorized the reversal and Ancona expressed gratitude.

Around March 15, 2017; FBI agents visited Petitioner's home and asked for Ojo. In wide ranging "convivial" interactions that digressed to discussions about fraud; Petitioner vociferously condemned all kinds of fraud. Petitioner offered the FBI agents full cooperation by providing them with Ojo's contact information and ensuring that Ojo contacted them less than one hour after the agents departed Petitioner's home.

Around February 7, 2018; while Petitioner was at the airport in Atlanta, Georgia to alter a scheduled flight; Petitioner was arrested and eventually presented with an indictment that charged Petitioner with Wire Fraud Conspiracy, Money laundering Conspiracy and Aggravated Identity Theft in the Western District of Tennessee – a location that Petitioner had absolutely no known connection with. It is worthy of note that the Indictment did not contain any allegations that Petitioner engaged in any form of criminal activity. The only instance Petitioner camp up, had to do with an accurate assertion that Petitioner granted Ojo permission to utilize Petitioner's address for the purpose of Ojo opening a bank account since Ojo did not reside in the U.S. and thus did not have a U.S. address.

Abegunde indicated that he would proceed to trial. Hence a trial date was set for October 8, 2018. However, on August 29, 2018; two months after a trial date was set, (AUSA Ireland, one of the prosecutors indicated that the government would not return a Superseding Indictment) the government returned a superseding indictment that substituted the Aggravated identity Theft charge for a Marriage Fraud Conspiracy charge – regarding a marriage that was entered in the eastern District of North Carolina for which there is absolutely no connection to the Western District of Tennessee. The government also added a Witness Tampering count on the superseding indictment.

Prior to trial, Petitioner filed a Rule 8 – Federal Rules of Criminal procedure – Motion Challenging the Joinder of the marriage fraud conspiracy count to the wire fraud and money laundering conspiracy counts. However, the District Court ruled that the joinder was proper.

Petitioner then proceeded to trial and was found guilty on all charges. Petitioner appealed the convictions, challenging the sufficiency of the government's evidence, venue, the propriety of the joinder of the unrelated offences, and whether wholly innocuous actions by Petitioner rise to the level of criminality. The U.S. Court of Appeals for the Sixth Circuit affirmed petitioner's conviction and sentence. Regarding the issue of joinder, the Sixth Circuit, utilized unsubstantiated and actual misrepresentations of material fact on the superseding indictment, to reach its decision that joinder was proper. In a petition for rehearing, Petitioner pointed out that based on the facts of the case, and according to extant U.S. law, joinder was improper. However, the Sixth Circuit denied Petitioner's request for rehearing.

REASONS FOR GRANTING THE PETITION

A. The decision Below Draws Attention to the Profound Circuit Split over the Appropriate Criteria for Determining the Propriety of Joinder – under Rule 8 – in Relation to whether Courts should consider only the Contents of the Indictment or whether Courts should Consider Factors Beyond the Indictment.

The Sixth Circuit's precedent of considering only the allegations on the face of the indictment in determining the propriety of Joinder under Rule 8 is far from the standard across the Circuit Courts. Five Circuit Courts – to varying extents – now hold that the propriety of Joinder under Rule 8, should not be determined by relying solely on the allegations on the indictment. A similar number of Circuits – the Sixth Circuit, ad four other Circuits – hold that propriety of Joinder under Rule 8 should be determined based solely on the contents of the indictment.

The decision below draws attention to this equipoise and profound Circuit split. As things currently stand, there is not a uniform set of rules regarding this pertinent and critically vital issue, such that outcomes for criminal defendants vary based on the geographical location where the prosecution occurs. Furthermore, criminal defendants in certain districts receive benefits that defendants in other districts/jurisdictions miss out on. Hence, this Court's review is necessary to resolve this deep division.

1. At least five Circuits hold that Joinder under Rule 8 should not be determined solely by the allegations on the Indictment.

To varying extents, five Circuit Courts allow District Courts to consider factors beyond the allegations on the indictment in determining the propriety of Joinder under Rule 8. *See 1A Federal Practice and Procedure §143 n. 30 (4th ed., Apr., 2016 update).* For example, the D.C. Circuit allows District Courts to review the indictment and pretrial evidence offered by the government. *See United States V. Carson, 455 F.3d 336, 372 U.S. App. D.C. 251 (D.C. Cir. 2006).* The Eleventh Circuit allows District Courts to review the "the face of the indictment" and "the government's representations before trial, with the caveat that relied-upon representations must be "borne out in evidence presented during trail". *United States V. Hersh, 297 F. 3d 1233, 1241 n.10 (11th Cir. 2002).* In other words, the correctness of the District Court's Joinder ruling can turn on developments that postdate the Joinder ruling.

The Fourth Circuit similarly reviews the District Court's Joinder decision "by examining the indictment and evidence presented at trial" *United States V. Cardwell, 433 F. 3d 378, 385 n.1 (4th Cir. 2005).*

The Tenth Circuit's opinion on analyzing Joinder shows that the Tenth Circuit does not limit District Courts to the face of the indictment. For example, in *United States V. Valentine, 706 F. 2d 282 (10th Cir 1983),* the Court accepted the governments arguments apparently made for the first time on appeal, that the close proximity between guns found during a search was "sufficient to indicate a common scheme or plan". Id. at 289 and n.5. Also, in *United States V. Price, 265 F.3d 1097 (10th Cir. 2001),* the Court upheld the Joinder

of drug and gun offenses based on "testimony at the pretrial hearing concerning how defendant's possession of firearms was related to his drug trafficking." Id at 1105.

The Third Circuit has held that trial judges may look beyond the face of the indictment to determine proper joinder in limited circumstances. Where representations made in pretrial documents other than the indictment clarify factual connections between the counts, reference to those documents is permitted." *United States V. Mc Gill, 964 F. 2d 222, 242 (3rd Cir. 1992).*

The Fourth Circuit acknowledged the "tension" – its decision to look beyond the indictment – creates with other Circuits, but its own rule "has the benefit of a built-in harmless error review; if … the evidence at trial reveals that (a sufficient) relationship exists (between charged offenses), it is difficult to see how the defendant could ever be prejudiced by the technical misjoinder" *Cardwell, 433 F.3d at 385.*

2. The Sixth Circuit and four other Circuit Courts have held that the propriety of Joinder should be determined solely by the allegations on the indictment.

Around five Circuit Courts currently hold that the propriety of Joinder must be judged by the indictment alone. See 1A Federal Practice and Procedure, supra; *United States V. Mc Rae, 702 F.3d 806, 820 (5th Cir 2012)* ("whether joinder is proper is normally determined from the allegations in the indictment.") (quoting *United States V. Posada – Rios, 158 F.3d 832, 862 (5th Cir. 1998)); United States V. Massa, 740 F.2d 629, 644 (8th Cir. 1985)* ("The propriety of joinder… is determined from the face of the indictment"); *United States V. Locklear, 631 F. 3d 364, 368 (6th Cir. 2011)* ("[W]hether joinder was proper under Rule 8 (a) is determined by the allegations on the indictment.") (quoting *United States V. Chavis, 296 F. 3d 450, 456 – 57 (6th Cir. 2002); United States V. Lanas, 324 F. 3d 894, 899 (7th Cir. 2003)* ("[I]n assessing the propriety of joinder under this rule (Rule 8), we look solely to the face of the governments indictment and not to any evidence ultimately presented at the defendant's trial."); *United States V. Coleman, 22 F.3d 126, 132 (7th Cir 1994) (quoting United States V. Quintanilla, 2 F.3d 1469, 1482 (7th Cir. 1993) (*"The test of misjoinder is what the indictment charges, not what the proof at trial shows."); *United States V. Jawara, 474 F.3d 565, 572 – 73 (9th Cir 2007)* ("[T]he validity of joinder is determined solely by the allegations in the indictment."), *United States V. Fiorillo, 186 F.3d 1136, 1145 (9th cir. 1999)* ("In making an assessment whether joinder was proper, this Court examines only the allegations in the indictment.").

The Seventh Circuit justified these precedents by stating that "the initial decision to join is made (and properly reviewed) without real insight into the actual mutual relevance of the individual offenses and their surrounding circumstances which only crystallizes with the presentation of evidence at trial. An uncomplicated inquiry and review of initial joinder is the natural product of Rule 8, and the practicalities of litigation, and makes sense so long as authority remains for monitoring the continued appropriateness of a joint trial as proceedings go forward, further developments unfold, and evidentiary and other sources of prejudice can be better observed and analyzed." Coleman, 22 F.3d at 134.

However, the Seventh Circuit's argument must be viewed in the proper context. In COLEMAN, the Seventh Circuit was making a dual argument. The first argument that served as the basis for a separate Seventh Circuit precedent – regarding the interpretation of Rule 8 – is when the Seventh Circuit held that if offenses "are of like class, although not connected temporally or evidentially, the requisites of proper joinder should be satisfied so far as Rule 8 (a) is concerned." Coleman, 22 F.3d at 133.

The Seventh Circuit also held that Rule 8 (a) "[I]s a rather clear directive to compare the offenses charged for categorical, not evidentiary similarities." Id. Thus with this holding in COLEMAN, the Seventh Circuit set a new precedent regarding the interpretation of Rule 8. At present, this precedent is unique to the Seventh and Eleventh Circuits.

It must be pointed out that the categorical approach involves "looking only to the statutory definitions of… [the] offenses, and not the particular facts underlying [the offenses]. "Taylor V. *United States, 495 U.S. 575,600, 110 S.Ct. 2143, 109 L.Fd. 2d 607 (1990).* While the application of the categorical approach – with respect to Rule 8 – is limited to the Seventh and Eleventh Circuits; the Sixth Circuit and many other Circuits apply totally different standards that take evidentiary considerations into account in determining the propriety of Joinder under Rule 8.

Hence, the Seventh Circuit's justification for determining the propriety of Joinder solely based on the allegations on the indictment does not apply in other Circuits.

3. This Court's Review is Necessary to Resolve the Circuit Split

The division between the opposing Circuits regarding this issue is deeply entrenched and is unlikely to be resolved without this Court's intervention.

Furthermore, the division raises constitutional issues. As has been shown, on the side of the proponents of relying solely on the contents of the indictment in determining the propriety of Joinder, there is a crucially significant difference in the way Rule 8 is interpreted and applied in another area. That is, with regards whether the categorical approach applies or whether evidentiary similarities should be considered in analyzing the propriety of Joinder.

A combination of the application of the categorical approach – that applies only in the Seventh and Eleventh Circuits – with the precedent of considering only the allegations on the indictment seems fair on its face, since joinder would be proper, only if the Joinder offenses are of like class and are statutorily similar.

However, combining the face of the indictment doctrine with the precedent of considering evidentiary similarities – that applies in Circuit Courts other than the Seventh and Eleventh Circuits – raises crucially consequential legal and constitutional questions. The most significant of which is, do mere allegations brought by an adverse party (the government), in an adversarial proceeding (the U.S. judicial system) rise to the level of factual evidence? In other words, is it fair when mere unsubstantiated allegations (on an indictment) brought by an adversary (the government) in a supposedly objective, unbiased, fair, just, and balanced process (the U.S. judicial system) be considered to be "evidentiary" considerations? "it is well settled that disputed facts are not evidence upon which the district Court can rely." *United States V. Hamidullah, 768 Fed. Appx. 914, 918 (11th Cir. 2019).* See

also *United States V. Rodriguez, 732 F.3d 1299, 1305 (11th Cir. 2013).* Additionally, this Court has held that facts are not evidence, in the sense that "evidence means the statements of witnesses or documents produced in Court for inspection". *United States V. Pugh, 25 L.Ed 322, 99 U.S. 265, 270 (1879).*

Furthermore, besides the prosecutorial honour system – that does not accommodate any guardrails, control measures, or accountability – what guarantees the veracity and integrity of the government's allegations of fact on the indictment?

Upon examining these questions, it becomes increasingly and abundantly clear that a process that allows for the elevation of mere allegations of fact to the level of absolute certainty is antithetical to the concept of "presumption of innocence" – a fundamental American principle, and the bedrock of more than 200 years of American jurisprudence – especially when Courts consider only allegations of fact that have not been examined by the triers of fact for the establishment or refutation of these alleged facts.

A system in one country that provides criminal defendants the advantage of the consideration of substantiated allegations by virtue of geographic location (District Courts under Circuits that look beyond the allegations on the indictment) on the one hand; and a system that offers the disadvantage of the consideration of only unsubstantiated allegations of fact, also by virtue of geographic location (District Courts that look solely at the indictment) on the other – is inherently unfair, unjust, un-American, and likely unconstitutional. At this point, only this Court can provide uniformity – via a firm guidance – on this crucially consequential and recurring issue.

B. The Decision Below Is Not In Compliance With The Requirements Of Rule 8 Thereby Making The Decision Wrong

This Court "has long recognized that joint trials conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crimes to trial." *United States V. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 88 L.Ed. 2d 814 (1986) (quoting Bruton V. United States, 391 U.S. 123, 134, 88 S. Ct. 1620, 20 L.Ed 2d 476 (1968).* However, the requirements of Rule 8 "are not infinitely elastic," *United States V. Mackins, 315 F.3d 399, 412 (4th Cir. 2003)* (quoting *United States V. Randazzo, 80 F.3d 623, 627 (1st Cir. 1996),* "and so cannot be stretched to cover offenses… which are discrete and dissimilar." Id, at 412 (quoting *United States V. Richardson, 161 F.3d 728, 733, 33 U.S. App. D.C. 118 CD.C Cir. 1998).*

Joinder of unrelated charges "create[s] the possibility that a defendant will be convicted based on considerations other than the facts of the charged offenses." *United States V. Carduell, 433 F.3d 378, 385 (4th Cir. 2005); see also Bruton, 391 U.S. 123, 131 n.6* ("An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.").

While Courts may "construe the Rule [Rule 8] to promote the goals of trial convenience and judicial efficiency" *United States V. Graham, 275 F.3d 490, 512 (6th Cir. 2001)* (Internal quotation marks omitted), but "where multiple defendants are charged with

offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief." Ingram V. *United State, 272 F.2d 567, 570 (4th Cir. 1959).* See also Schaffer V. *United States, 362 U.S. 511, 80 S.Ct. 945, 4 L.Ed. 2d 921 (1960).*

"It is also true that failure to meet the requirements of this rule constitutes misjoinder as a matter of law." *United States V. Chavis, 296 F.3d 450, 456 (6th Cir. 2002)* (citation omitted). If joinder of multiple defendants or multiple offenses does not comply with the requirements of Rule 8, the District Court has no discretion on the question of severance." Id.; see also Charles Alan Wright, 1A Federal Practice and Procedure: Criminal §145, at 89 – 90 (3d ed. 1999) ("Misjoinder of offenses or defendants… raises only a question of law. If there has been misjoinder, the trial Court has no discretion to deny the motion (to sever").

1. According to Extant U.S. Law, there were no Legal Justifications for the Joinder Below

Based on the Federal Rules of Criminal Procedure, extant statutory provisions, and the U.S. Constitution, the ruling below – that joinder was proper is wrong.

This is a result of the facts that:

a) Marriage Fraud Conspiracy is not a continuing offense.

Most Circuit Courts rarely adjudicate cases related to marriage fraud because the United States Customs and Immigration Service (USCIS) has a parallel process for detecting and punishing such offenses. Rarer among Circuit Courts are cases adjudicating whether marriage fraud – and by extension marriage fraud conspiracy – is a continuing offense. However, the Fifth and Eleventh Circuits have recently ruled that marriage fraud conspiracy is not a continuing offense.

This Court has ruled that an offense should not be characterized as continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that congress must assuredly have intended that it be treated as a continuing one." Toussie V. *United States, 397 U.S. 112, 115, 90 S.Ct. 858, 25 L.Ed 2d 156 (1970).*

The starting point for statutory interpretations purpose "is the language of the statute itself." *United States V. Zuniga – Artega, 681 F.3d 1220, 1223 (11th Cir. 20212)* (internal quotation marks omitted). The statute criminalizing marriage fraud reads "Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both." [8 U.S.C §] 1325 (c).

This Court has distinguished the "instantaneous" from the "continuing" offense in that the commission of an act of the former type, the illegal aim is attained as soon as every element of the crime has occurred, whereas in the commission of an act of the latter type, "the unlawful course of conduct is 'set on foot by a single impulse and operated by an unintermittent force, until the ultimate illegal objective is finally obtained." Toussie, supra at

136 (White J. dissenting) (citing *United States C. Mid-state 10., 306 U.S. 161, 166, 831 L.Ed. 563, 59 S.Ct. 412 (1939).*

"In the typical case, an offense is complete as soon as every element in the crime occurs… But in the case of a continuing offense, the crime is not exhausted… as long as the prescribed conduct continues." United States V. Cores, 365 U.S. 405, 409, 2 L.Ed. 2d. 873, 877, 78 S. Ct. 875 (1958); United States V. Kissel, 218 U.S. 601, 607, 54 L.Ed. 1168, 1178, 31 S.Ct 124 (1910); see *Model Penal Code* §*1.07, comment (tent. Draft No. 5, 1956).*

Returning to the statute criminalizing marriage fraud. "The elements of marriage fraud require only that the defendant (1) knowingly enter into a marriage, (2) for the purpose of evading any provision of the immigration laws." *United States V. Ongaga, 820 F.3d 152, 159 – 161 (5th Cir. 2016).* "Actions occurring after the marriage do not constitute elements of the offense under [8 U.S.C. §] 1325(c). Instead, all elements of marriage fraud are satisfied when the defendant enters into the marriage." Id. at 160. "As first-year law students (presumably) learn, a criminal offense is typically completed as soon as each element of the crime has occurred." *United States V. Mc Gofl, 831 F. 2d 1071, 1078, 265 U.S. App. D.C. 312 (D. C. Cir. 1987).*

In *United States V. Rojas, 713 F.3d 1317 (11th Cir. 2013),* the Eleventh Circuit held that *"congress's use of the phrase 'enters into' in the explicit language of the [marriage fraud] statute – an act that can only occur on the singular date that a marriage takes place – upends the district Court's conclusion that marriage fraud is a continuing offense"* Rojas, 7118 F.3d at 1320.

"In sum, the plain language of the [marriage fraud] statute does not compel the conclusion that marriage fraud is a continuing offense." Ongaga, 820 F.3d at 160.

In ONGAGA, the Fifth Circuit further held that "Neither is the nature of the crime such that Congress would have intended it to be treated as a continuing offense. Typically, such crimes are those which involve 'ongoing threat of harm' or those 'offenses that prohibit on individual from remaining in an unlawful condition or status.' There is no ongoing threat of harm from having entered into a marriage to evade the immigration laws unless those laws are actually violated. In that case, fraudulently obtaining immigration benefits or lying to federal agents, [or other unlawful actions after the marriage was entered into] are themselves crimes. Furthermore, being married – even for the purpose of evading immigration laws – is not itself an unlawful condition or status" Id.

In the proceedings below, a marriage that was "entered into" – for the alleged purpose of evading the provisions of immigration laws – in the Eastern District of North Carolina around May 6, 2016, could not have continued into the Western District of Tennessee in July 2016. Furthermore, the alleged marriage fraud offense could not have continued into the Western District of Washington State in October 2016, when the respective underlying wire fraud conspiracies – that were joined with the marriage fraud conspiracy – occurred.

Therefore, the justification for the Joinder in the proceedings below – on the grounds that the alleged marriage fraud offense continued into the Western District of Tennessee have been completely dispelled, and annulled.

b) Venue was Improper for the Marriage Fraud Conspiracy Count in the Western District of Tennessee.

Proper venue in a criminal case is an "essential part [ ] of a free and good government." *United States V. Petlechkov, 922 F.3d 762, 766 (6th Cir. 2019)* (quoting The Federal Farmer, in 2 THE COMPLETE ANTI-FEDERALIST 230 (Herbert J. Storing ed. 1981). The U.S. constitution and the Federal Rules of Criminal Procedure require that a crime be prosecuted and tried in the district where the crime was committed. See *U.S. Const. art III §2; U.S Const. amend. VI; Fed. R. Crim. P.18.*

Regarding the impact of venue on the issue of Joinder, Courts have held that "Rule 8 of the Federal Rules of Criminal Procedure does not permit joinder of offenses committed in different districts." *United States V. Palomba, 31 F.3d 1456, 1461 (9th Cir. 1994);* see also *United States V. Hirschfeld, 964 F.2d 318, 321 (4th Cir. 1992), cert. denied, 122 l.Ed. 2d 371, 113 S.Ct. 1067 (1993); 24 Moore's Federal Practice § 608. 02 [1]* (Matthew Bender, 3d. ed.)" Offenses committed in different districts are not joinable even if the requirements of Rule 8… are otherwise met, since "prosecution shall be had in a district in which the offense was committed." (Citing Moore's Federal Practice § 618. 01 [1]); BENDERS FEDERAL PRACTICE FORMS, COMMENT ON RULE 8 ("Regardless of whether justification for joinder would otherwise exist, offenses committed in different districts may not be joined because, as a general rule, venue for a prosecution is to be 'in a district where the offense was committed'") (Citing Fed. R. Crim. P.18).

As stated, the language of the statute criminalizing marriage fraud explicitly contains the phrase "enters into" which implies an act that can only occur in one single location, and on the singular date that the marriage takes place. See Rojas, 718 F. 3d at 1320.

In the proceedings below, it is an undisputed fact that the allegedly fraudulent marriage was "entered into" in the Eastern District of North Carolina. Therefore, based on the provisions of the U.S. Constitution, the Federal Rules of Criminal Procedure, extant Supreme Court, and Circuit Courts' precedents, any prosecution for the alleged marriage fraud conspiracy should have occurred in the Eastern District of North Carolina where the marriage was "entered into". As such, it was improper to prosecute the alleged marriage fraud conspiracy count – via a joinder of the alleged marriage fraud conspiracy count with the underlying wire fraud conspiracy count – in the Western District of Tennessee.

This is as a result of the fact that there was absolutely no nexus between the alleged marriage fraud conspiracy and the Western District of Tennessee. Also – as will be established shortly – there was absolutely no nexus between Petitioner and the alleged wire fraud that occurred in the Western District of Tennessee.

c) Venue was Improper For The Underlying Wire Fraud Conspiracy Offense, Making Joinder Improper

Regarding the issue of venue with respect to wire fraud cases, Courts have consistently applied 18 U.S.C §3237(a) as the criminal statute that provides the specific statutory venue provision. In the proceedings below, while reviewing a challenge to the propriety of venue, the Sixth Circuit supposedly applied 18 U.S.C. §3237(a) albeit without referencing the actual evidence on the record.

There are two prongs under §3237(a). The first prong provides that: "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." See 18 U.S.C. 3237(a).

In the proceedings below, the underlying offense was an alleged conspiracy to commit wire fraud. However, the government, in one single count, charged two separate offenses that were completed in two different districts three months apart.

It must be pointed out that in such prosecutions, it is settled that each mailing or wire transmission in furtherance of the fraud scheme constitutes a separate offense, and it may be separately punished. See Badders V. *United States, 240 U.S. 391, 394, 36 S.Ct. 367, 60 L.Ed 706 (1916)* (recognizing that "there is no doubt that the law may make each putting of a letter into the post office a separate offense" when multiple mailings relate to the same scheme); *United States V. Williams, 527 F.3d 1235, 1241 (11th Cir. 2008)* (Determining that, "where one scheme or artifice to defraud involves multiple wire transmissions, each wire transmission may form the basis for a separate count because section 1343 targets not defendant's creation of a scheme to defraud, but the defendant's execution of a scheme to defraud").

The first offense – an alleged wire fraud conspiracy – was completed on or around July 25, 2016, in the Western District of Tennessee. With regards this particular offense, the government neither alleged that Petitioner was in any way connected to this offense; nor does the evidence on the record purport any nexus between Petitioner and this offense. Hence, there is absolutely no justification for punishing Petitioner for this unique offense, since there is no allegation or evidence that Petitioner was part of the scheme.

The second offense – another alleged wire fraud conspiracy – involved the unlawful use of a wire transmission to defraud a real estate firm based in the Western District of Washington State on or around October 3, 2016. With respect to this particular offense, the nexus between Petitioner and this offense is dubious at best.

A conspiracy is "an agreement by two or more persons to commit an unlawful act, coupled with intent to achieve the agreements objective, and (in most states) action or conduct that furthers the agreement; [a conspiracy] is a combination for an unlawful purpose." Blacks Law Dictionary, 375 (10th ed. 2014) (citing 18 U.S.C. 371). "A conspiracy is a separate offense from the crime that is the object of the conspiracy. A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been

abandoned. A conspiracy does not automatically end if the conspiracy's object is defeated". Blacks Law Dictionary at 375 (citing United States V. *Jimenez Recio, 537 U.S. 270, 123 S.Ct. 819 (2003).*

Returning to the first prong of 18. U. S. C. §3237(a); this prong is abundantly clear regarding its description of a distinct offense, not separate offenses. The separate offenses below have already been detailed such that there is no nexus between Petitioner and the first offense. As has been pointed out, the U. S. Constitution, the Federal Rules of Criminal Procedure, and extant Supreme, and Circuit Court precedents require that an offense be prosecuted in the district where the offence was committed. See U. S. *Const. art III §2; U.S. Const. amend. VI; Fed. R. Crim. P. 18*. As such, the first prong of 18 U.S.C. § 3237(a) has no application pertaining to the prosecuting Petitioner in the Western District of Tennessee.

The second prong of 18 U.S.C. § 3237 (a) is specifically targeted to offenses involving mails and by extension, wires. This prong provides that: "Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves." Id. Based on the plain language of this prong, as well as Circuit Court precedents, the second prong of 18 U.S.C. § 3237(a) is the applicable section to the proceedings below, and the Sixth Circuit supposedly applied it albeit inaccurately below.

Courts – including the Sixth Circuit – have explained that a "plain reading of the text" of 18 U.S.C. § 3237(a) shows "that venue in a wire fraud case is limited to districts where the wire transmission is deposited, received, or moves through." *United States V. Petlechkov, 922 F. 3d 762, 769* (attraction in original) (citing 18 U.S.C. § 3237(a); see also *United States V. Jamal, 246 Fed. Appx. 351, 364 (6th Cir. 2007); United States V. Grenoble, 413 F.3d 568, 573 (6th cir. 2005); United States V. Wood, 365 F.3d 704, 713 (6th Cir. 2004).*

Since it has been established that there is no allegation by the government, or any evidence that Petitioner was connected to the $154,000 fraud on a Memphis company in July 2016; the second prong has no application with respect to Petitioner regarding the wire transmission connected to this fraud in the Western District of Tennessee.

Regarding the second offense that occurred in the Western District of Washington on or around October 3, 2016; a totally separate company – Whattcom Land Title Company with no known connection to the Western District of Tennessee – was defrauded of around $60,000. The proceeds of this fraud, that was executed via an unlawful wire transmission, was transferred – by a yet to be identified individual – to a "mule" in California, Javier Luis Ramos Alonso, Petitioner's Co-defendant who has absolutely no known prior connection or interaction with Petitioner. According to the Superseding Indictment, Alonso then deposited $9,000 of the fraudulent proceeds into an account "controlled by Ojo and bearing ABEGUNDE's address and contact information." R. 165: Superseding Indictment, at PageId 666, Paragraph 31(g).

In other words, according to the allegations on the Superseding Indictment, Petitioner had no control over the account that received the $9,000 being proceeds of the fraud in the Western District of Washington State.

In any case, the $9,000 was deposited into a bank account domiciled in Atlanta, Georgia – in the Northern District of Georgia. The only thing that remotely connects Petitioner to the said bank account is that – according to the allegations on the indictment – "on or about August 2016, Ojo opened a new account… at Wells Fargo and, with permission, used ABEGUNDE'S address and phone number to register the account." Because "ABEGUNDE knew that Ojo needed a United States address to associate because Ojo was a resident of Nigeria and did not reside in the United States." R. 165: Superseding Indictment, at pageId 665, Paragraph 31(b).

Of the highest significance regarding the issue of venue, is the fact that the government neither made any allegation on the indictment or elsewhere; nor did the government present any scintilla of evidence – direct or circumstantial – that the wire transmission associated with the defrauding of the firm based in the Western District of Washington State either originated, terminated, or moved through the Western District of Tennessee.

To prove that venue was proper in the Western District of Tennessee, the government needed to show that the wire transmission diminutively associated with Petitioner originated, terminated, or moved through the Western District of Tennessee. To do that, the government was obliged to present enough evidence to allow a rational trier of fact to find venue by a preponderance of the evidence. Petlechkov, 922 F.3d at 770; Wood, 364 F.3d at 713 – 14; *United States V. Greene, 995 F.2d 793, 801 – 02 (8th Cir. 1993).*

In the proceedings below, there is simply no evidence, direct or circumstantial, that the fraudulent wire transmission – that was remotely immaterially, diminutively, inconsequentially, and one for which there was an insufficient legal basis for establishing a nexus to Petitioner – originated, terminated, or moved through the Western District of Tennessee. Cf. Johnson V. Coyle, 200 F.3d 987, 994 – 95 (6th Cir. 2000). (Holding that no rational juror could have fund the defendant guilty of kidnapping when the government did not present any evidence of kidnapping as defined by state law).

Accordingly, venue was improper for the underlying wire fraud conspiracy offense in the Western District of Tennessee. Hence, if venue was improper, then by extension, joinder in the proceedings below was also improper.

2. According To Extant Circuit Court Precedents Regarding The Interpretation of Rule 8, There Were No Factual, Logical, Or Commonsense Justifications For The Decision Below That Joinder Was Proper.

"Traditionally, Courts have held that Rule 8(a) applies to a prosecution of a single defendant, and that Rule 8(b) applies exclusively whenever multiple defendants are involved, even if the defendant is contesting only the joinder of counts against himself." *United States V. Frost, 125 F.3d 346, 389 (6th Cir. 1997)* (citations omitted). See also Charles A. Wright,

Federal Practice and Procedure §144 *(2d ed. 1982 and supp. 1993).* Although the Sixth Circuit has not made a definite decision on what rule applies – Rule 8(a) or Rule 8(b) – when a defendant claims that multiple offenses were improperly joined in a multiple defendant case; many Courts have held that Rule 8(b) applies. See Zirker V. *United States, 253 Fed. Appx. 573, 576 n.3 (6th Cir. 2007)* (while "the Sixth Circuit has yet to decide whether it will follow the majority rule, … the weight of authority from outside [the Sixth Circuit] suggests that Rule 8(b) applies in most cases involving more than one defendant").

In the proceedings below, even though the government argued for the application of Rule 8(a), the Sixth Circuit applied Rule 8(b). "The Primary difference between the two sections [of Rule 8] is that it is easier to justify joinder under Rule 8(a) because unlike Rule 8(b), it also permits joinder of offenses which are merely of the same and similar character." Frost, 125 F.3d at 389. That is, under Rule 8(a) "At least one of Rule 8(a)'s three conditions must be satisfied for proper joinder [.]" Jawara, 474 F.3d at 573. On the other hand, only two conditions need to be satisfied for joinder to be proper under Rule 8(b). Pursuant to Rule 8(b), Joinder is proper if the defendants are "alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting the same offense or offenses." See Rule 8(b) Fed. R. Crim. P. *"Under Rule 8(b) multiple defendants may be joined only if a sufficient nexus exists between the defendants and the single or multiple acts or transactions charged as offenses."* United States V. Johnson, 763 F.2d 773, 775 (6th Cir. 1985).

Nevertheless, besides the Seventh and Eleventh Circuits that apply the categorical approach in determining the propriety of Joinder; as already stated, the majority of Circuit Courts take into account temporal and evidentiary similarities in determining the propriety of Joinder under Rule 8. For example, the First Circuit has held that A Court… takes *"into account factors such as whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct[s] occurred."* United States V. Sabean, 885 F.3d 27, 42 (1st Cir. 2018) (Citation and Internal quotation marks omitted).

The Third Circuit has interpreted Rule 8 as allowing joinder of offenses when there is a "transactional nexus' between the items … being joined." *United States V. McGill, 964 F. 2d 222, 241 (3d Cir. 1992)* (quoting United *States V. Eufrasio, 935 F.2d 553, 570 n.20 (3d Cir. 1991).* This transactional nexus can be based on physical, temporal, or logical connection between offenses, such as an Interrelation of facts or evidence. See e.g. *United States V. Gorecki, 8/3 F.2d 40, 42 (3d Cir. 1987).*

The Sixth Circuit's Precedent regarding the propriety of Joinder under Rule 8 is that "when the Joined Counts are logically related, and there is a large area of overlapping proof, joinder is appropriate. Graham, 275 F.3d at 512."

In short, for joinder to have been proper under Rule 8(a), the joined offenses should be of the same or similar character. That is, the joined offenses must be "[N]early corresponding; resembling in many respects; somewhat alike; having a general likeness." *United States V. Tyndall, 263 F. 3d 848, 850 (8th Cir. 2001)* (alteration in original); Roper V. *United States, 564 A. 2d 726, 729 (D.C. 1989)* ("Offenses are of same and similar character

when the joined counts allege the same general kind of crimes"). On the other hand, the propriety of joinder under Rule 8(b) is determined by the logical interrelatedness of the offenses as well as the evidentiary overlap with regards the joined offenses. That is, Joinder is proper only where each count arises out of the "same act or transaction" or "same series of acts or transactions." *United States V. Hatcher, 680 F.2d 438, 441 (6th Cir. 1982).* Acts or transactions constitute a series "if they are logically interrelated" or "Part of a common scheme or plan." Johnson, 763 F.2d at 776.

It must be pointed out that a marriage fraud conspiracy and a wire fraud conspiracy cannot be said to be of the same or similar character under any circumstance because the two offenses are "entirely distinct offense[s]" such that the counts must be "established on proof of elements unique to [these offense [s]." *United States V. Chavis, 296 F.3d 450, 458, (6th cir. 2002) (Internal quotation marks omitted).*

Hence, the inquiry regarding the propriety of the joinder below turns on whether the joined counts are logically interrelated, and/or whether there is a large area of overlapping proof regarding the joined offenses. That is, the inquiry turns on the provisions of Rule 8(b).

a) According To The Allegations On The Superseding Indictment, There Was No Logical Relationship Or Any Areas Of Overlapping Proof Regarding The Joined Offences, Making Joinder Improper

The Superseding Indictment alleges that between May 13, 2016, and May 24, 2016, there were four transactions – two deposits, one cash withdrawal, and the writing of a cashier's check from the account – on Petitioner, and Petitioners wife's joint bank account. See R. 165: Superseding Indictment, at PageId 673, paragraphs 46(j) – (m). It must be pointed out emphatically that there is absolutely no allegation on the indictment that these transactions were in anyway, manner, shape, or form associated with any kind of fraudulent activity.

The Superseding Indictment goes on to state that "on or about June 9, 2016, Caffey texted ABEGUNDE in relation to the closed Bank of America accounts…" Id. at PageID 672, paragraph 46(h). This statement on the Superseding Indictment logically implies that Petitioner and Petitioner's wife's joint bank account was closed on or before June 9, 2016.

Meanwhile, the same Superseding Indictment states that the alleged fraud that occurred in the Western District of Tennessee took place "on or about July 25, 2016…" Id. at PageID 665, Paragraph 31(d). The Superseding Indictment further states that the alleged fraud that occurred in the Western District or Washington took place "On or about October 3, 2016…" Id. At PageId 666, Paragraph 31(f)

As has been established, there are absolutely no allegations on the Superseding Indictment or elsewhere, there is also no scintilla of evidence on the record that Petitioner was in any way connected to the wire fraud that occurred in the Western District of Tennessee around July 25, 2016. Regarding the fraud that occurred in the Western District of Washington state on or about October 3, 2016, the superseding indictment states that "…

approximately $61,000… was transferred to a Wells Fargo bank account… that was controlled by RAMOS ALONSO…" Id. at PageID 666, paragraph 31 (f).

The Superseding Indictment then states that "On or about October 4 through 6, 2016, RAMOS ALONSO conducted approximately seven (7) wire transfers… sent to bank accounts around the country, including to one controlled by Ojo and bearing ABEGUNDE's address and contact information." Id. at PageID 666, paragraph 31(g).

Based on the sequence of the events alleged on the superseding indictment that have been highlighted herein, it is logically impossible for Petitioner and Petitioner's wife's joint bank account – that had been closed on or before June 9, 2016 – to have received the proceeds of a fraud that occurred around six weeks after June 9, 2016. That is, the fraud that occurred on or about July 25, 2016, in the Western District of Tennessee.

Furthermore, logic and common sense dictate that it is indisputably impossible for Petitioner and Petitioner's wife's joint bank account – that was closed on or before June 9, 2016 – to have received the proceeds of fraud that occurred five months after, on or about October 3, 2016.

Of crucially consequential significance is the fact that based on the allegations on the indictment, Petitioner did not control any bank account whatsoever that received the alleged fraudulently obtained funds.

Ergo, based on the allegations on the Superseding Indictment, there is no possible logical relationship between the joined offenses. Furthermore, the Superseding Indictment does not state any areas of overlapping evidence with regards the joined offenses. This is simply because of the fact that since the joined offenses are absolutely unrelated, there cannot possibly be any overlapping evidence regarding the joined offenses.

Of the highest significance is the fact that the Sixth Circuit's conclusion – that "Abegunde used his marriage to Caffey to facilitate the transfer and receipt of funds obtained through the alleged conspiracies, in which Ramos – Alonso was participant," See Sixth Circuit's Ruling in United States V. Abegunde, No. 19 – 6229, Page 9 (Opinion by Circuit Judge JANE B. STRANCH) (6th Cir., Jan 14, 2021) – is neither supported by the government's allegations of fact on the Superseding Indictment; nor is the Sixth Circuit's conclusion supported by evidence on the record.

Lastly, there were no legal, factual, logical, or common-sense justifications for the joinder below.

C. The Decision Below Overwhelmingly Demonstrates The Dangers Of Limiting The Determination Of The Propriety Of Joinder To The Allegations On The Indictment

In the proceedings below, the government exploited the Sixth Circuit's precedent-of determining the propriety of joinder by assessing only the content of the indictment-by willfully and knowingly including false misrepresentations of material fact on the Superseding Indictment. The government carried out this abhorrent act knowing fully well

that it did not have the evidence, and therefore could not substantiate its allegations-with evidence beyond a reasonable doubt-before the triers of fact at Petitioner's trial.

By putting together a hodgepodge of confounding sweeping statements, and incongruous allegations of facts, the government created a situation where the alleged underlying wire fraud conspiracies – that occurred on or about July 25, 2016; and on or about October 3, 2016, respectively – were ignored or relegated to tertiary status. Rather than placing the respective wire fraud conspiracies at the center of the proceedings and elucidating the nexus between Petitioner and the fraudulent activities surrounding these particular conspiracies; the government deliberately included ad hominem allegations – that are immaterial and unrelated to the fraudulent activities – on the superseding indictment in a sensational manner. Hence, rather than focusing specifically on the alleged wire fraud conspiracy, the District Court, the finders of fact, and the Sixth Circuit where captivated by the sensational allegations. Additionally, the Courts placed a premium on the ad hominem allegations while ignoring the actual evidence on the record.

Even though most of the allegations on the indictment turned out to be unsubstantiated at trial; according to the precedent in the Sixth Circuit, and four other Circuits, the government's allegations did not need to be substantiated at trial. With this precedent, the government was at liberty to include conjecture, speculation, and phantom misrepresentations of material facts on the Superseding Indictment with impunity.

The ultimate master stroke by the government in the proceedings below was the utilization of ad hominem allegations to justify an action that is ordinarily indefensible based on fact and law. The government audaciously succeeded in the joinder of offense that cannot be said to be same or similar under any circumstance. Furthermore, as has been demonstrated, the joined offenses neither had a logical relationship; nor did the joined offenses have any area of overlapping evidence. Hence, the requirements for joinder of offenses either under Rule 8(a) or Rule 8 (b) were not met in the proceedings below. In another guileful act, the government evasively included a phantom bank fraud conspiracy count on the Superseding Indictment. However, in all the proceedings after the Superseding Indictment was returned – including at trial, sentencing, and on appellate briefs – the government eschewed the alleged bank fraud conspiracy charge. In other words, the bank fraud conspiracy charge was not proven beyond a reasonable doubt – to the finders of fact – at trial. But because of the precedent of not looking beyond the indictment, the Sixth Circuit actually utilized its phantom bank fraud conspiracy charge as the basis for its ruling below that Joinder was proper.

Of consequential significance is the fact that in the proceedings below, the Sixth Circuit's precedent likely led to a situation where all the government's allegations on the Superseding Indictment were elevated to oracular status, despite the allegations not being substantiated. Consequently, regarding the challenge to the propriety of the joinder below, the Sixth Circuit was likely incentivized to not meticulously review the allegations on the Superseding Indictment for their logical interrelatedness and areas of overlapping evidence regarding the joined offenses. As has been demonstrated, if the Sixth Circuit had actually

reviewed the allegations on the indictment; based on the sequence of events alleged on the indictment, it would have been logically impossible for the requirements of Rule 8 to have been met.

Worst still, is the fact that regarding all the other issues presented for review, the Sixth Circuit also elevated unsubstantiated allegations to sacrosanct fact, without any regard for the evidence on the record. Additionally, a recurring theme throughout the Sixth Circuit's review of Petitioner's case was the surgical precision with which the Sixth Circuit cherry picked immaterial, unrelated, or unsubstantiated allegations, while ignoring impervious evidence on the record.

At trial, the evidence on the record betrayed most of the government's false allegations on the indictment. Furthermore, the evidence on the record turned out to be contrary to and did not support the government's allegations regarding other issues presented to the Sixth Circuit for review.

There is little doubt that a proximate cause of the Sixth Circuit affirming Petitioner's convictions – on all counts below – is attributable to the precedent of considering only the allegations on the indictment in determining the propriety of Joinder under Rule 8. This is simply because the Sixth Circuit did not evaluate the evidence on the record regarding other issues presented for review. Also, when evidence on the record was pointed out to the Sixth Circuit, the Sixth Circuit dismissed the evidence on the record in favour of allegations that were immaterial to and had no nexus to the separate and respective offenses that occurred on or about July 25, 2016; and on or about October 3, 2016.

Of the highest significance is the fact that the improper Joinder below violated Petitioner's due process rights, as well as Petitioner's right to a fair trial, as the joinder caused Petitioner to be "convicted based on considerations other than the facts of the charged [underlying wire fraud conspiracy] offenses." *Cardwell, 433 F.3d at 385*; see also *Bruton, 391 U.S. 123, 131 n.6* (*"An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence."*). In the proceeding below, the improper joinder caused the jury to listen to evidence related to a marriage fraud conspiracy that was totally unrelated and had no bearing on the underlying wire fraud conspiracies.

1. The Government Capitalized On Sixth Circuit Precedent – Of looking solely At The Allegations On The Indictment – By Willfully And Knowingly Including a Phantom Charge As Well As Misrepresentations Of Material Fact On The Superseding Indictment.

In the proceedings below, the government made many unsupported sweeping statements and multiple allegations – that amounted to misrepresentations of material fact – on the Superseding Indictment. However, the focus here, is on the misrepresentations that were utilized by the Sixth Circuit below.

(a) The Inclusion Of The Phantom Bank Fraud Conspiracy Count On The Superseding Indictment That Led To The Wrong And Highly Prejudicial Conclusion That Petitioner Was Convicted of Bank Fraud Conspiracy

While the government evasively included a bank fraud conspiracy charge on the superseding indictment, the bank fraud conspiracy charge was included in a confounding and questionable manner. Count one of the superseding indictment is captioned ***"Wire Fraud Conspiracy"*** *– 18 U.S.C § 1349.* After re-alleging and referencing certain paragraphs under count one, the government went on to evasively state that **"ABEGUNDE… knowingly and willfully conspired and agreed… to commit the offences of wire fraud and bank… fraud…"**

However, with regards the allegations under the object; manner and means; and acts in furtherance of Count One, there is absolutely no allegation that Petitioner was involved in a bank fraud conspiracy in any way, shape, manner, or form.

Notwithstanding, the only area of the Superseding Indictment under count, where the words ***"bank"*** and ***"fraud"*** appear in the same sentence were when the government stated that ***"When bank accounts were closed due to suspicion of fraudulent activity, coconspirators lied to bank investigators…"*** *R. 165:* Superseding Indictment, at page ID 664, paragraph 29. A similar statement was made under Count four – conspiracy – 18 U.S.C. § 371. The government stated that ***"ABEGUNDE opened accounts… with Bank of America… the accounts… were closed due to suspicion of fraudulent activity."*** *See Id at PageId 672, Paragraph 46(g).*

While the first allegation under Count one is vague and is not specifically targeted at any individual; the second allegation is more specific, in that it points at the particular bank account that was closed as belonging to Petitioner and Petitioner's wife. This is significant because the phantom bank fraud charge was supposedly brought under Count One and not Count Four. Hence, the allegations under Count One ought to be utilized in making any determinations regarding Count One. The particular allegation does not in any way correspond to the elements of bank fraud conspiracy. As such, the allegation under Count One could not possibly serve as a basis for the conclusion that Petitioner was convicted of bank fraud conspiracy.

In any case, these allegations should have been discarded because the evidence on the record at trial exposed the allegations as false misrepresentations of material fact.

On cross-examination, when the FBI agents that investigated the case were repeatedly pressed regarding the exact reason why Petitioner's bank accounts were closed; they consistently stated on the record that they did not know for sure the reason why Petitioner's bank accounts were closed. *See R. 346: Marcus Vance Testimony, at PageID 81-85.*

Hence, the allegation on the indictment that Petitioner's bank accounts were closed due to suspicion of fraud, amounts to a prejudicial misrepresentation of material fact, since it

appears to have been utilized by the Sixth Circuit in reaching its conclusion that Petitioner was convicted of bank fraud conspiracy.

Additionally, as has already been pointed out, after the government returned the Superseding Indictment, the government went completely silent regarding the alleged bank fraud conspiracy charge. The charge was not mentioned in all the pretrial proceedings below. Furthermore, at trial, the charge was completely eschewed. During trial summation when the government made around two dozen false misrepresentation of material fact, the government made no mention of the bank fraud conspiracy charge. Additionally, the jury instructions did not contain any directive to the jury to evaluate whether there was sufficient evidence to convict Petitioner of bank fraud conspiracy; neither was the bank fraud conspiracy charge mentioned to the jury in any manner, way, shape, or form. *See R. 252: Final Jury Instructions PageID 796-1045.*

Of the highest significance regarding this point, when the jury eventually returned its verdict, there was absolutely no mention of a bank fraud conspiracy charge; neither did the verdict form contain any bank fraud conspiracy charge. *See R.259: Verdict Form, PageID 1052-53.*

In the government's response to Petitioner's Rule 29 motion challenging the sufficiency of the evidence used to convict Petitioner, the government refrained from mentioning the bank fraud conspiracy charge. *See R. 266: United States Response To Defendants Motion For Judgment Of Acquittal And/Or Motion For New Trial, PageID 1070-1089.* Also, on appeal, on the governments Brief of Appellee United States of America, while listing the charges that Petitioner was convicted of, the government never mentioned that Petitioner had been convicted of bank fraud conspiracy. *See case: 19-6229, R. 36: Brief for Appellee United States of America, at PageID 11.*

Yet, in its decision below, the Sixth Circuit did not only wrongly conclude that Petitioner had been convicted of bank fraud conspiracy; the Sixth Circuit actually utilized this phantom bank fraud conspiracy charge – that was completely eschewed after the government returned the superseding indictment – as justification for its ruling below that the Joinder of offenses was proper. *See Abegunde, No. 19-6229, at Page 8-9.*

This preposterous outcome was precipitated by the Sixth Circuit's precedent of considering only the allegations on the Indictment in determining the propriety of Joinder under Rule 8. Had Petitioner's case fallen under the Third, Fourth, Tenth, Eleventh, or D.C. Circuits, with such good fortune, Petitioner would not have suffered such a prejudicial outcome. It is not just unfair, unjust, and inequitable when the outcome of a Defendant's case depends on the location where the Defendant is charged, it is also un-American and likely unconstitutional.

This singular act by the government – of including a phantom charge on the Superseding Indictment, that it did not prove beyond a reasonable doubt – reflects the prodigious dangers of limiting the determination of the propriety of Joinder to the contents of the indictment.

(b) Other false Allegations – Misrepresentations of Material facts – That were utilized by the Sixth Circuit.

i) In its ruling below, the Sixth Circuit stated that: *"In the indictment, the government made several allegations supporting the logical interrelatedness of the conspiracy counts (to commit wire fraud, bank fraud, and money laundering) to the conspiracy to commit marriage fraud". See United States V. Abegunde, No. 19-6229, page 8 (Opinion by Circuit Judge Jane B. Stranch (6th Cir. 2021).* Nothing could be further from the truth.

With regards to Count One, the underlying wire fraud conspiracy count on the Superseding Indictment; and by extension Count Three (Since the allegations for Count One were realleged for Count Three); under the acts committed in furtherance of Count One and by extension Count Three, the government did not make any allegations that are related to or rise to the level of the elements of those counts in any way, manner, shape, or form. *See R. 165: Superseding Indictment, at PageID 665 – 667, Paragraphs 31(a) – (m).* Furthermore, the only controversial allegation regarding Count One, and by extension Count Three is that "following the interview with FBI agents, ABEGUNDE contacted Ojo via WhatsApp messenger and told Ojo 'Your name is in FJ Williams. I lied about that.'" However, the alleged statement is immaterial to the respective acts of fraud that occurred on or about July 25, 2016, in the Western District of Tennessee; and on or about October 3, 2016, in the Western District of Washington. This is because there is no evidence of any nexus between the statement on the one hand, and the said acts of fraud on the other. Also, the statement concerning Petitioner's business – FJ Williams Inc. – was made in March 2017, eight months after the July fraud; and five months after the October fraud. The statement was also taken out of context.

Then again, as has already been established, a close examination of the Superseding Indictment makes clear that there is no basis for the Sixth Circuit's conclusion regarding the interrelatedness of the conspiracy counts. It has been demonstrated that it is logically impossible to establish a relationship with regards the joined offenses. Lastly regarding this point, it has also been established that Petitioner was not convicted of bank fraud conspiracy.

ii) In its ruling below, the Sixth Circuit – citing two misrepresentations of material fact merged the misrepresentations and stated that: "'*Abegunde would use the access provided by his fraudulently obtained immigration status to open multiple financial accounts' used to facilitate the conspiracy."* Id at Abegunde, No. 19-6229 at page 8.

The sources of the Sixth Circuits statements are: *"…ABEGUNDE would use the access provided by his fraudulently obtained immigration status to open multiple accounts for business and personal use."* R. 165: Superseding Indictment, at page ID 671, paragraph 44. And *"ABEGUNDE would use his fraudulently obtained immigration status in the United States to open bank accounts, or cause bank accounts to be opened, to facilitate the receipt and transfer of funds obtained through fraudulent activities"* Id at Paragraph 45.

These two statements from the Superseding Indictment, and by extension the statement by the Sixth Circuit amount to misrepresentations of material facts. Regarding the conclusion reached by the Sixth Circuit that bank account opened as a result of Petitioner's marriage facilitated the conspiracy; it has already been demonstrated that based on the sequence of events alleged on the Superseding Indictment, it is logically impossible, and commonsense dictates that bank accounts that were closed six weeks before the first wire fraud that occurred in July 2016; and four months before the second wire fraud, in October 2016 could not have received the proceeds of the alleged conspiracies.

Additionally, while the record at trial reflects the fact that Petitioner had multiple business and personal bank accounts prior to Petitioner's marriage, and therefore did not need to get married in order to open bank accounts; there is absolutely nothing illegal in opening business and personal accounts after a marriage as long as the bank accounts are not used to further illegal activity. There is no evidence that this was the case based on the allegations on the Superseding Indictment as well as the record at trial.

Furthermore, as has been established, the elements of the marriage fraud conspiracy count were satisfied on the day the marriage was "entered into". That is, on May 6, 2016. It has also been established that Courts have held that marriage fraud conspiracy is not a continuing offense. Therefore, opening bank accounts for business and personal use is not only immaterial to the proceedings below (especially because there is no evidence on the Superseding Indictment or elsewhere that accounts associated with Petitioner's marriage facilitated the conspiracy); opening business and personal accounts for personal use could not have served as a basis for the joinder below.

To conclude on this point, the only bank account that received funds connected to the October 2016 fraud, was a bank account that was diminutively connected to Petitioner, in that the Superseding Indictment alleged that the account was not controlled by Petitioner. Also, the only connection between Petitioner and the bank account is that Petitioner's mailing address and phone number was used to open the bank account for justifiable reasons. See Id. at PageID 666, paragraph 31(g); paragraph 31(b). Based on the allegations on the indictment, this bank account that received $9,000 –being proceeds of the October fraud – was in no way connected to Petitioner's marriage. Hence, this $9,000 transaction – that occurred four months after petitioner and petitioner's wife's bank accounts were closed – could not have served as a basis for the joinder below.

2. In Reviewing Issues Other Than Joinder, The Sixth Circuit – Rather Than Assess The Evidence On The Record – Inductively Utilized Immaterial Allegations And Misrepresentations With Regards Other Issues Presented For Review.

In evaluating other issues presented for review, the Sixth Circuit relegated, and ignored the actual evidence on the record while elevating and utilizing unsubstantiated misrepresentations, as well as immaterial allegations. The Sixth Circuit also cherry picked –

with surgical precision – the most ad hominem allegations that had no relevance in the proceedings below and utilized them in affirming Petitioner's convictions.

To identify the impacts of immaterial allegations, as well as the false misrepresentations of material facts; the key is to isolate these sensational ad hominem allegations, and then establish whether a nexus exists between the allegations on the hand; and the respective underlying wire fraud conspiracy offenses that occurred on or around July 25, 2016; and the one that occurred on or about October 3, 2016, on the other.

(a) Misrepresentations Utilized By The Sixth Circuit In Reviewing The Sufficiency Of The Evidence

To support a conviction for a conspiracy to commit wire fraud, the evidence must show that "*the defendant 'knowingly and willfully joined an agreement with at least one other person to commit an act of [wire] fraud and that there was at least one overact in furtherance of the agreement." United State V. Cunningham, 619 F.3d 355, 313 (6th Cir. 20120 (quoting United States V. Jamieson, 427 F.3d 394, 402 (6th Cir. 2005).* Additionally, to support a conviction for Money laundering conspiracy, the government had to prove that *"two or more persons conspired or agreed to commit the crime of money laundering; and the defendant knowingly and voluntarily joined the conspiracy". See United States V. Hynes, 467 F. 3d 951, 964 (6th Cir. 2006)).*

This Court has held that *"**a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt**." Jackson V. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).* This Court has also held that a Rule 29 motion – challenging the sufficiency of the evidence utilized to convict – calls on Courts to distinguish between reasonable inferences and speculation. In such an inquiry, each step in the inferential chain must be supported by evidence that allows the jury to *"draw reasonable inferences from basic facts to ultimate facts." Colman V. Johnson, 566 U.S.___, ___, 132 S.Ct. 2060, 2064, 182 L. Ed. 2d 978 (2012).* ***"Although a jury may infer facts from other facts that are established by inference, each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation."*** *Piaskowski V. Belt, 256 F.3d 687, 693 (7th Cir. 2001).*

In assessing whether evidence permits an inference beyond a reasonable doubt, special care must be taken to guard against the possibility that a defendant might be found guilty by either speculation or mere association. Circumstantial evidence that leads only to a strong suspicion that someone is involved in criminal activity is no substitute for guilt beyond a reasonable doubt. *Id at 692.*

In proceeding, Petitioner must make the following clarifications: Firstly, as alleged on the Superseding Indictment, Petitioner was indicted for participating in two underlying wire fraud and money laundering conspiracy offenses that occurred in July and October 2016 respectively. Hence, the focus or any inquiry must be on these offenses. Secondly, for Petitioner to have participated in these offences, there must be evidence of a nexus between

petitioner and these offenses. Furthermore, the government's evidence must explicitly pin-point the exact nexus between petitioner and these offences. Thirdly, an element of each of the offences is that there must be an agreement with at least one other person to join the respective conspiracy offenses. Furthermore, the evidence must show who exactly, that is, the particular individual or individuals that Petitioner agreed with to commit the offenses. Fourth, the evidence presented must have a bearing on Petitioner's guilt or innocence with regards the offences that occurred in July and October 2016. Finally, the evidence must be analyzed and interpreted in line with the context of the particular evidence.

i) In its ruling below, the Sixth Circuit falsely asserted, without citing any basis or justification on the record, that *"A Wells Fargo financial crimes consultant, Brain Ancona testified that proceeds received from fraudulent schemes were sent to Ramos Alonso, Abegunde's co-defendant who then distributed the money into accounts opened by Abegunde or under his control". Abegunde, No. 19 -6229, at page 12.* This assertion served as the basis for the conclusion of petitioner's agreement to join the conspiracy. Id.

The above conclusion by the Sixth Circuit is false as it relates to Petitioner. The conclusion is contrary to, and unsupported by the evidence on the record. Furthermore, the Sixth Circuit did not cite Brain Ancona's testimony, via the exact location on the record, that it extracted the testimony from. This is simply because such evidence does not exist. Furthermore, as has already been established, the Superseding Indictment is abundantly clear that Petitioner was not in control of the bank account that received the fraudulently obtained funds. *See R. 165;* Superseding Indictment at PageID 666, Paragraph 31(g). The Superseding Indictment is also clear regarding the diminutive nexus between Petitioner and the said bank account that received $9,000 from the October 2016 fraud. That is, Petitioner granted a long-time friend permission to utilize petitioner's mailing address, and phone number to open a bank account for justifiably valid reasons two months before the October fraud. See Id, at PageID 665, paragraph 31(b).

Based on the allegations of fact on the Superseding Indictment, the reason why Petitioner was indicted, and convicted is because Petitioner came to a friend's aid. Ordinarily, thunderous alarm bells ought to be going off in the U.S. judicial system in particular, and in the country in general when the basis for convictions on fraud related charges is a legal and charitable act.

Returning to the Sixth Circuits misrepresentation, the inquiry turns on the pertinent question: how did the Sixth Circuit reach its conclusion when Brian Ancona's testimony, other evidence on the record, and the allegations of fact on the Superseding Indictment do not corroborate the Sixth Circuit's conclusion? The answer lies in the contents of the contents of the government's *"Brief of Appellee United States of America."* The Sixth Circuit utilized a false misrepresentation of material fact by the government in reaching its conclusion, and literally copied this unsubstantiated misrepresentation in its ruling below. *See. R.36: Brief of Appellee United States of America, case no. 19 – 6229 at PageID 14.* The false misrepresentation by the government and by extension the Sixth Circuit is contrary to, and unsupported by the evidence on the record. Of the highest significance is the fact that the

misrepresentation amounts to a prejudicial variance from the Superseding Indictment. This particular misrepresentation further establishes and reinforces the Sixth Circuit's pattern of relying on unsubstantiated allegations rather than the actual evidence on the record.

ii) In further concluding that Petitioner had knowledge of, and agreed to participate in the conspiracies, the Sixth Circuit made the unsubstantiated sweeping statement that "*On the date of one of the BECs, Abegunde directed an individual to transfer money into an account linked to his phone number and address."*

This supposed statement – of proven fact – is not only blatantly false, but the statement is also very troubling. First, the Sixth Circuit did not cite the source – via the evidence on the record – for its conclusion. Hence the basis for its conclusion is unknown, as there is no citation or quoting any testimony on the record that corroborates the Sixth Circuit's conclusion.

In the proceedings below, it is an undisputed fact that the only thing that creates only a diminutive nexus between petitioner and the alleged conspiracies is a $9,000 transaction that occurred in October 2016. This is corroborated by the testimony of the FBI agents that investigated the case, as they admittedly could not pinpoint the original source of the funds associated with Petitioner's business, other than one $9,000 transfer that occurred in October 2016. *See R. 346: David Palmer Testimony, at PageID 231 – 232; Abegunde, No. 19 – 6229, at page 19.*

Furthermore, there is absolutely no allegation by the government that Petitioner directed Petitioner's co-defendant, Alonso, or anyone else to make the $9,000 deposit into the said bank account. Therefore, the Sixth Circuit's conclusion logically implies that it was referring to the July 25, 2016, BEC. That is the date when the first wire fraud occurred. Hence, the inquiry regarding the validity of the Sixth Circuit's conclusion turns on events related to Petitioner that occurred on July 25, 2016.

The trial record reveals the fact that Petitioner ran a Money Service Business (MSB) that was registered and licensed with the extant regulatory bodies including the Georgia Department of Banking and Finance; and the Financial Crimes Enforcement Network (FINCEN), of the United States department of Treasury. Furthermore, testimony at trial revealed that Petitioner ran a blemish-free business that was in compliance with its regulatory obligations. *See R.332: Theodore Vlahkis Testimony, at PageID 100-103.*

The day–to–day operations and activities of Petitioner's business involved the brokerage of foreign currency exchanges, and international remittances. It therefore should not be surprising that Petitioner conducted such transactions every single day of the month of July, 2016; including on July 25, 2016, the day of the first BEC.

In any case, Petitioner's business activities on July 25, 2016, are irrelevant to this inquiry. This is as a result of the crucially consequential fact that the bank account that was "linked to his [Petitioner's] phone number and address" was opened in August 2016

according to the government's allegations of fact on the Superseding Indictment. *See. R. 165: Superseding Indictment, at PageID 665, Paragraph 31(b).*

Logic and commonsense therefore dictate that is absolutely impossible for Petitioner – on July 25, 2016 – to have *"directed an individual to transfer money into an account linked to his phone number and address,"* When the only account allegedly linked to petitioner's phone number and address had not been opened on July 25, 2016.

Yet, the Sixth Circuit utilized this absolutely impossible scenario as a basis for its ruling below that Petitioner participated in the alleged conspiracy. This particular conclusion by the Sixth Circuit typifies the hodgepodge of confounding conjecture that was utilized by the Sixth Circuit in contravention of not only the evidence on the record; but in contravention of logic and commonsense. The Sixth Circuit's conclusions are not only unreasonable, they are also impermissible. Simply put, the U.S. judicial system *"does not tolerate the conviction and imprisonment of people based on suspicion, speculation or conjecture. The government must present direct or circumstantial evidence of each element of each charged offense." United States V. Jones, 713 F.3d 336, 352 (7th Cir. 2013).* Furthermore, *"the meager circumstantial evidence is simply too innocuous to convict… particularly since much of it is conjecture camouflaged as evidence." Piaskowski, 256 F.3d at 693.*

To conclude on this point, the utilization of conjecture camouflaged as evidence by the Sixth Circuit below establishes the fact that the Sixth Circuit perfunctorily handled Petitioner's case, thereby violating Petitioner's due process rights.

iii) Another basis for the Sixth Circuit's conclusion that Petitioner participated in the conspiracy is the Sixth Circuit asserting that: *"In a conversation with a colleague over WhatsApp, Abegunde admitted that he does not know the men coordinating the scheme, but said that, they put money into his accounts, and his exchanges 'clean the cash and eliminate risk.'".*

Validating the Sixth Circuit's conclusion based on the above assertion turns on analyzing the impact of the assertion on the inferential chain. That is, analyzing the strength of the logical relationship between the conclusion reached by the Sixth Circuit, on the one hand; and the assertion utilized to reach the conclusion, on the other. Such an analysis will find that the assertion creates an extremely weak inferential chain. Additionally, a reliance on such *"evidence"* in reaching the conclusion is not only unreasonable, such *"evidence"* is impermissibly speculative.

It has been established that the entire *"scheme"* described in the Superseding Indictment was centered around two Business Email Compromises (BECs) one occurring on or about July 25, 2016; and the other occurring on or about October 3, 2016. *See R. 165: Superseding indictment, PageID 665 – 66, Paragraphs 31(d) and 31(f).* As has also been established regarding these two BEC's, the only incident that diminutively links Petitioner is that Petitioner granted a long-time friend permission to open a bank account utilizing petitioner's address and phone number, for perfectly justifiable reasons. *See. Id at PageID 665, Paragraph 31(b).* This bank account that Petitioner had no control over, received $9,000

in proceeds of the October BEC two months after Petitioner granted his friend permission to utilize petitioner's address and phone number to open the bank account. *See. Id at PageID 666, paragraph 31(g).* Furthermore, based on all the evidence on the record below, this benevolent act by Petitioner – of permitting a friend to utilize his address and phone number to open a bank account – is the only action that links Petitioner to the bank account that received the $9,000. Additionally, the evidence on the record manifests the fact that among all the numerous transactions involved in petitioner's day-to-day business activities, no single transaction can be linked to fraud. *See. R.346: David Palmer Testimony, at PageID 231-232.*

In other words, the transaction that was linked to fraud – the $9,000 transaction – was not connected to Petitioner in any way, manner, shape, or form according to the evidence on the record. That is, Petitioner did not communicate with Alonso, or anyone else regarding this $9,000 transaction. As a matter of fact, the evidence on the record establishes the fact that regarding the $9,000 transaction, Petitioner actually admonished his friend Ojo, for being careless in handing out his bank account information to an untrustworthy individual. *See. R. 334: Olufolajimi Abegunde Testimony, PageID 66.*

The act of admonishing Ojo regarding the $9,000 transaction further reinforces the fact that Petitioner had no connection to the $9,000 transaction.

Returning to Petitioner's conversation with Petitioner's colleague; the context of the conversation was regarding two associates in the currency exchange and remittances industry, discussing the challenges of the industry in general; as well as preventive measures against unintended fraudulent wire transfers (such as the fraudulent wire transfer into Alonso's bank account). Hence petitioner's insistence on cash deposits in the course of Petitioner's day-to-day business operations. *See. R. 334: Olufolajimi Abegunde Testimony, PageID 66.*

Of crucially consequential significance is that the alleged conversation occurred around one year after the BECs had been completed.

So therefore, the logical implication of all these established facts is that there is absolutely no scintilla of evidence on the record that in any way suggests the possibility that Petitioner's conversation with his colleague was regarding the frauds that occurred in July and October 2016.

Also of significance is the Sixth Circuit's choice of words. The Sixth Circuit asserted that Petitioner *"admitted that he does not know the men co-coordinating the scheme…".* This sweeping statement raises significant and serious questions, because an admission is *"an acknowledgement that facts are true." Black's Law Dictionary, at 56 (10th ed. 2014).* Furthermore, a related term to an admission is a confession. Without any evidentiary or logical basis, the Sixth Circuit concluded that Petitioner confessed to participating in the BEC Schemes; based on the fact that Petitioner was merely having a harmless conversation with a colleague one year after the conclusion of the BEC Schemes. Additionally, the Sixth Circuit completely disregarded the exculpatory nature of the context of Petitioner's conversation, in that Petitioner was actually communicating about fraud prevention and not

its perpetuation. The Sixth Circuit also failed to acknowledge the key fact that the actual meaning of Petitioner's conversations would greatly depend on the context in which the conversations occurred. As a matter of fact, the Sixth Circuit unilaterally chose the context through which to interpret a conversation between Petitioner and Petitioner's colleague by assuming that Petitioner actually knew of and agreed to join the conspiracy.

In the proceedings below, if one starts with the assumption that Petitioner indeed knew of and agreed to join the conspiracy, then the conclusion reached by the Sixth Circuit probably makes sense. But if one starts with the presumption of innocence, *"that bedrock 'axiomatic and elementary principle' whose enforcement lies at the foundation of our criminal law"; In re Winship, 397 U.S. 358, 365, 90 S.Ct. 1068, 25 L.Ed. 2d 368' (1970) (quoting Coffin V. United States, 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895), "then some further corroboration of actual criminal conduct is needed to prove guilt beyond a reasonable doubt." United States V. Garcia, 919 F. 3d at 489, 495 (7th Cir. 2019).*

Petitioner's conversation regarding situations totally unrelated to the underlying case, and without any corroboration that Petitioner engaged in criminal activities is not enough to support a criminal conviction. *See Piaskowski, 256 F. 3d at 693 (reversing verdict based on "conjecture camouflaged as evidence").* The evidence utilized by the Sixth Circuit simply cannot support a reasonable finding of guilt because it does not satisfy the *"state of near certitude"* required by Jackson V. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1970). In reviewing the sufficiency of the evidence in the proceedings below, the Sixth Circuit could only have concluded that Petitioner engaged in the conspiracies by crossing *"the line between what inferences the evidence supports, and what is more in the realm of speculation." United States V. Jones, 713 F.3d 336, 349 (7th Cir. 2013).*

iv) The final basis for the Sixth Circuit's conclusion that Petitioner participated in the wire fraud and money laundering conspiracies and that the evidence was sufficient, is the Sixth Circuit asserting that *"When FBI agents questioned him about his knowledge regarding fraud occurring on the account, Abegunde's whatsapp messages indicate he lied about his involvement and then contacted a co-conspirator to joke about his concealment."*

The evidence on the record indicates that the FBI agents did not question Petitioner about any fraud in particular. The basis of their visit was to make inquiries about Ojo. In the process, Petitioner and the agents had convivial discussions.

Of crucial significance is the fact that the agent that visited Petitioner, while testifying under direct and cross examination did not corroborate the above assertion and was unaware that Petitioner lied about Petitioner's involvement.

Furthermore, the alleged lie told by Petitioner had no bearing on the underlying offences. In other words, the alleged lie was immaterial, in that Petitioner told Ojo on WhatsApp that *"Your name is in FJ Williams. I lied about that." See. R.165: Superseding Indictment at PageID 667, Paragraph 31 (L).* FJ Williams is Petitioner's business name, and the contents of Petitioner's articles of incorporation have no bearing on the underlying offenses. Additionally, the conversation with the FBI agents occurred eight months after the

completion of the first BEC, and five months after the conclusion of the second BEC. *See Id.* Petitioner must also point out that *a "material fact is one that might affect the outcome of the action under governing law". Anderson V. Liberty Lobby, Inc, 477 U.S. 317, 248, 106 S.Ct. 2458, 2510, 91 L. Ed. 2d 265 (1986).* While a material misrepresentation is *"a misrepresentation that could influence the decision of a person [ ] of ordinary prudence and comprehension", Petlechkov, 922 F. 3dat 766 (Internal quotation marks omitted).* The Statement by Petitioner has no nexus whatsoever to the BEC's that occurred several months prior. Finally, regarding the Sixth Circuit's assertions, Petitioner's alleged joke was taken out of context. Ojo stated that *"there is nothing wrong with seeing an opportunity and taking advantage of it."* and petitioner responded with *"lol"* meaning laugh out loud. In reality, there is actually nothing wrong with capitalizing on legal opportunities. There is also nothing wrong with laughing out loud. As already stated, the meaning of Petitioner's conversations depends on the context of the conversations. Since there is no further evidence to corroborate the actual context of Petitioner's conversations; divining the actual context of Petitioner's conversation amounts to speculation, which is impermissible.

b) Misrepresentations Utilized by the Sixth Circuit in Reviewing the Issue of Venue.

The Sixth Circuit has consistently held *"that venue in a wire fraud case is limited to districts where the wire transmission is deposited received or moves through."* Petlechkov, 922 F.3d at 769 (alteration in original) (internal quotation marks omitted).

In the proceedings below, the only transaction that remotely links Petitioner to the instant prosecution is a $9,000 transaction being proceeds of a $61,000 fraud that occurred in the Western District of Washington State in October 2016. *See. R.165: Superseding Indictment, at PageID 666, Paragraph 31(f) – (g).* furthermore, throughout the proceedings below, there were no deviations from this allegation on the superseding indictment. On the government's *"Brief for Appellee United States of America"* the government reinforced the fact that the $9,000 transaction resulted from the $60,000 or so fraud on Whatcom land Title Company in Bellingham; located in the Western District of Washington State in October 2016. *See case: 19-6229, R. 36: Brief for Appellee United States of America, at PageID 13-14.*

These facts are undisputed by the evidence on the record. As such, in determining the propriety of venue below, the government needed to show that the wire transmission related to the fraudulently obtained $9,000, moved through the Western District of Tennessee. *Wood, 364 F. 3d at 713*. That is, the government had to show that the $9,000 originated, terminated, or moved through the Western District of Tennessee. All the evidence on the record indicates that the $9,000 originated from Whatcom Land Title Company in the Western District of Washington State that was defrauded of around $60,000 in October 2016. The funds were then transferred to Alonso's account in California. From there, Alonso deposited $9,000 to an account domiciled in the Northern District of Georgia, more specifically, in Atlanta, Georgia. *See. Case: 19-6229, R. 36: Brief for Appellee United States of America, at PageID 13-14; see also R. 165: Superseding Indictment, at PageID 666, paragraph 31(f)-(g).*

There is absolutely no evidence that indicates that the $9,000 originated from any location other than the Western District of Washington State. Furthermore, there is absolutely no evidence that the $9,000 terminated, or moved through the Western District of Tennessee. Yet, in its decision below, the Sixth Circuit inaccurately concluded that *"the Government's evidence linked him [Abegunde] to an account that received $9,000 of $154,000, in fraudulent funds from a company in the Western District of Tennessee." See Abegunde, No. 19-6299, at page 15.*

Rather relying on the evidence on the record below – that clearly indicates that the $9,000 originated from the $60,000 fraud that occurred in the Western District of Washington State and not the $154,000 fraud that occurred in the Western District of Tennessee – the Sixth Circuit relied on an unfounded, uncorroborated, damaging, and highly prejudicial assertion by Petitioner's appellate Counsel. The Sixth Circuit utilized the fact that *"Abegunde's counsel acknowledged that those proceeds related to the Western District of Tennessee"Id.* Petitioner, concludes according to the basis of the Sixth Circuit's adjudication regarding the issue of venue – that a reliance on mere allegations of fact in determining the property of joinder likely led to the Sixth Circuit considering allegations, and not the evidence on the record, in reviewing the issue of venue, thereby prejudicing Petitioner.

c) Misrepresentations Utilized by the Sixth Circuit in Reviewing the Issue of Loss Chart.

In the proceeding below, while under cross-examination, the F.B.I agent that investigated the case, consistently stated on the record that the only funds on the loss chart that can be linked to fraud is the $9,000 transaction, and that he could not pinpoint the exact sources of funds other than the $9,000 transaction. *See. R. 346: David Palmer testimony, at PageID 231 – 232.* Furthermore, the F.B.I agent established on the record that he could not ascertain a nexus between Petitioner and the fraudulently obtained $9,000. *See. Id at PageID 240.* So therefore, the government agent that investigated the case confirmed that there was absolutely no connection between Petitioner and any fraudulently obtained funds.

Yet, in adjudicating the issue of Loss Chart, while acknowledging that *"The Government's witness [the F.B.I. agent that investigated the case] admittedly could not pinpoint the original source of the funds [on the loss chart], other than one $9,000 transfer that occurred in October 2016" see Abegunde, No. 19-6229, at Page 19.* Sixth Circuit went on to ignore this crucially consequential piece of evidence on the record; and then utilized events that were unrelated, immaterial to and had no nexus to the fraudulent BEC's. Furthermore, the Sixth Circuit utilized wholly legitimate activities involved in the day-to-day operations of petitioner's licensed money service Business (MSB), as the basis for its adjudication that the loss chart was admissible.

Two things are clear by this adjudication. The first is that evidence on the record was relegated, while speculative assumptions were elevated. Second, the Sixth Circuit cherry picked the utilization of substantiated facts in the proceedings below. For example, in reviewing the loss chart, the Sixth Circuit acknowledged that the $9,000 transfer… occurred in October 2016." Id. yet in reviewing the issue of venue, the Sixth Circuit stated that the

$9,000 originated from a $154,000 fraud that occurred in July 2016. Had the Sixth Circuit focused on, and utilized the evidence on the record, in reviewing other issues presented for review, the Sixth Circuit would not have affirmed Petitioner's conviction. However, by commencing the review process by analyzing the propriety of joinder solely according to mere allegations; the Sixth Circuit was incentivized, to, and actually utilized unsubstantiated allegations of facts in assessing all the other issues presented for review.

D. This Case Presents An Ideal Vehicle For Resolving The Circuit Split As Well As The Potential Constitutional Issues Associated With The Precedent Of Considering Only Allegations On The Indictment In Determining The Propriety Of Joinder Under Rule 8

In the concluding stages of its ruling regarding the propriety of joinder – under Rule 8 – below, the Sixth Circuit asserted that: "*As alleged in the indictment, it is reasonable to infer that Abegunde used his marriage to Caffey to facilitate the transfer and receipt of funds obtained through the alleged conspiracies, in which Ramos – Alonso was participant".* Abegunde, No. 19 – 6229 at Page 8. The Sixth Circuit further asserted that *"The evidence of Abegunde's transfers in his joint accounts with Caffey serve as 'overlapping proof of conspiracy to commit bank fraud and his conspiracy to commit marriage fraud."* Id at Page 8 – 9. The Sixth Circuit then concluded by asserting that *"Evidence that Abegunde used the joint bank accounts from the marriage to transfer money obtained from the BEC schemes, moreover, was also proof of the fraud charges because it demonstrated how Abegunde laundered the money at issue."* With these conclusions, the Sixth Circuit ruled that the joinder below was proper.

It must be pointed out, and reinforced that it has already been demonstrated – via the actual allegations of facts on the Superseding Indictment – that it is logically impossible for an inference to be drawn that there was a nexus between Petitioner's joint bank accounts, and the alleged conspiracies since the said joint bank accounts had been closed prior to the commencement of the conspiracies. Furthermore, the triers of fact below found that Alonso was not guilty of participating in the conspiracies. *See. R. 259.: Verdict Form, at PageID 1.* Yet the Sixth Circuit concluded that Alonso was a participant in the conspiracies. Therefore, the conclusions utilized by the Sixth Circuit – in its ruling that joinder was proper – are not only problematic; the conclusions are arbitrary and unjustifiable.

Furthermore, the conclusions utilized by the Sixth Circuit in its decision below are composed of incongruous and out of place legal terminology; such that the conclusions raise very serious constitutional issues, that call into question the constitutionality of the decision below in particular; and the constitutionality of the precedent of relying solely on the allegations on the indictment in determining the propriety of joinder in general.

In its ruling below, the Sixth Circuit blurred the lines regarding the plain and legal meanings of the terms inferences, evidence, proof, allegations of fact, and speculation. Furthermore, the blurring of these lines by the Sixth Circuit was precipitated by the impossibility of drawing inferences by adhering to the precedent of relying solely on the allegations on the indictment in determining the propriety of joinder under Rule 8.

This is simply because – on the one hand – *"An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist."* Siewe V. Ganzalez, 480 F. 3d 160, 168 (2d Cir. 2007) (alterations omitted) (quoting Bickerstaff V. Vassar Coll., 196. F. 3d 435, 448 (2d Cir. 1999)). Also, *"Evidence means the statements of witnesses or documents produced in court for inspection." United States V. Pugh, 25 L.Ed. 322, 99 U. S. 265, 270 (1879);* Black's Law Dictionary, at 673 (10th ed. 2014) (Evidence is *"Something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact.").* Proof is *"the establishment or refutation of an alleged fact by evidence." Id. at 1409.*

"Speculation on the other hand is a complete absence of probative facts to support the conclusion reach." Lavender V. Kurn, 327 U. S. 645, 653, 66 S. Ct.740, 90 L. Ed. 916 (1946). An allegation of fact is *"a declaration that something is true' especially, a statement not yet proved, that someone has done something wrong or illegal." Black's Law Dictionary, at 90 (10th ed. 2014).*

It must be pointed out that *"an allegation of fact is not evidence."* Duncan Foundry and Machine Works, Inc. V. NLRB, 458 F. 2d 933, 936 n7 (7th Cir. 1972). Furthermore, *"It is well established that disputed [allegations of] facts are not evidence upon which the district court can rely." United States V. Hamidullah, 768 Fed. Appx. 914, 918 (11th Cir. 2019); see also United States V. Rodriguez, 732 F. 3d 1299, 1305 (11th Cir. 2013).*

The line between permissible inferences and speculation *"is drawn by the laws of logic"* and not *"judicial idiosyncrasies." Tose V. First Pa. Bank, N. A., 648 F. 2d 879, 895 (3d Cir. 1981). Abrogated on other grounds by Griggs V. Provident Consumer Discount Co., 459 U. S. 56, 103 S. Ct. 400, 74 L.Ed. 2d 225 (1982).* As this court has instructed, *"the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway V. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 87 L.Ed. 1458 (1943).*

At times, it may be difficult to distinguish between inference and speculation, as some speculation may indeed be reasonable. Reasonable speculation occurs when a conclusion is reached that a *"disputed fact exists that is within the realm of possibility",* but the conclusion reached is nevertheless unreasonable because it is not logically based on another fact known to exist. *See Langston V. Smith, 630 F. 3d 310, 314 (2d Cir. 2011)* (noting the distinction between *"reasonable speculation and sufficient evidence")' Leonard B. Sand et al., Modern Jury Instructions §* 6.01 (2011)*)"The process of drawing inferences from facts in evidence is not a matter of guess work or speculation. An inference is a deduction or conclusion which ... [is] ... to [be] draw[n] ... from facts which have been established by direct or circumstantial evidence."); see also O' Laughlin V. O'Brien, 568 F. 3d 287, 301 – 02 (1st Cir. 2009); Newman V. Metrish, 543 F. 3d 793, 796 – 97 (6th Cir. 2008).* Indeed, the court *"may not credit inferences within the realm of possibility when those inferences are unreasonable." United States V. Quattrone, 441 F. 3d 153, 169 (2d Cir. 2006).*

As the proceedings below have demonstrated, the precedent of relying solely on the allegations on the indictment in determining the propriety of joinder, necessarily and definitively requires courts to elevate disputed allegations of facts to the level of sufficient evidence of wrongdoing.

The precedent also assuredly requires courts to rely on speculation in drawing inferences while determining the propriety of joinder under Rule 8. Of consequential significance is the fact that – without anything at all to corroborate allegations of fact the precedent leaves courts with no choice, but to fill the evidentiary void by automatically endorsing the veracity of disputed allegations of facts that have not been proven.

In ruling that joinder was proper below, the Sixth Circuit acknowledged that it drew *"reasonably inferences from mere allegations of facts on the superseding indictment. See Abegunde, No. 19 – 6229 at page 8."* Furthermore, the Sixth Circuit equated allegations of facts to evidence of wrongdoing. The Sixth Circuit then utilized these phantom evidence of proof of wrongdoing.

Since the allegations of fact utilized by the Sixth Circuit – in reaching its decision below – were not proven; relying on such allegations in determining the propriety of joinder under rule 8 amounts to speculation at best. At worst, a reliance on such allegations amounts to conjecture. Either of which are impermissible.

This court has held that *"a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty." United States V. Davis, 139 S.Ct. 2319, 2 335, 204 L. Ed 2d. 757, 777 (2019).*

Every year, there are innumerable prosecutions that involve joinders under Rule 8. The precedent followed by the Sixth, and four other Circuits – of relying solely on the allegations on the indictment in determining the propriety of joinder – uniquely positions prosecutors to capitalize on the anomalous faith these Courts place in them, by deliberately prejudicing criminal defendants via improper joinders under Rule 8.

Astonishingly, prior to the decision below, in an astute ruling, the Sixth Circuit recognized the potential for such outcomes in United States V. Soto, 794 F. 3d 635 (6th Cir. 2015). In SOTO, the Sixth Circuit acknowledged the benefits of plain error review with regards claims of misjoinder under Rule 8. The Sixth Circuit held that *"Plain error review discourages overzealous advocacy by the government. For example, the government might knowingly join charges that would prejudice a defendant at trial, thereby making conviction more likely, and hope that neither the defense attorney nor the district court would notice the misjoinder of counts." Id at 656.* The Sixth Circuit further held that *"in such a case, plain error review would permit an appellate court to correct the error and thereby discourage the government from taking advantage of a known prejudicial error." Id.*

More astonishing is the fact that in the proceedings below, the same Sixth Circuit reviewed Petitioner's challenge – to the propriety of the joinder of offenses below – de novo, and not plain error. Yet, while reviewing de novo, the Sixth Circuit neither detected, nor corrected the governments acts of taking advantage of known prejudicial errors.

This particular inconsistency by the Sixth Circuit amplifies and reinforces the urgent need for this court's intervention in resolving the conflicting interpretations of Rule 8. Additionally, as has been demonstrated, the wrongfulness of the combination of the precedent of considering only allegation on the indictment, on the one hand; and the carte blanche that prosecutors have in joining offenses, on the other, further magnifies the importance of this courts intervention.

It must be pointed out that the five Circuit Courts that look beyond the indictment are better positioned to determine the propriety of joinder under Rule 8, since they would not have to speculate in order to draw inferences regarding the propriety of joinder under Rule 8. Rather, they are positioned to rely on established facts and not alleged facts in determining the property of joinder.

A situation where outcomes for criminal defendants – regarding joinder under Rule 8 – are determined by the geographical location, such that defendants in districts under the Third, Fourth, Tenth, Eleventh, and D. C. Circuits receive benefits that defendants under the Fifth, Sixth, Seventh, eight, and Ninth Circuits do not receive in generally untenable.

This court has consistently held that *"ambiguity concerning the ambit of criminal statutes should be resolved in favour of lenity." Yates V. United Stated, 574 U. S. 528, 547 – 48, 135 S.Ct. 1074, 191 L. Ed 2d 64 (2015). (Quoting Cleveland V. United Stated, 531, U.S. 12, 25, 121 S.Ct. 365, 148 L.Ed 2d 2 221 (2000); see also Davis, 139, S.Ct. at 2333. (*lenity reflects *"the tenderness of the law for the rights of individuals" (quoting United States V. Wiltberger, 18 U. S. (5 Wheat) 76, 95 (Marshall, C. J.)) (1820); United States V. Santos, 553 U. S. 507, 515, 128 S. Ct. 2020, 170 L. Ed 2d 912 (2008) ("[p]robability is not a guide which a court, in construing a penal statute, can safely take.").*

As has been established, the primary justification for Joinder under Rule 8 is that it promotes the goals of trial convenience and Judicial economy. However, as the Circuits that look beyond the indictment – in determining the propriety of joinder – has established overtime; looking beyond the indictment has not had any damaging effects on these factors. If looking beyond the indictment had led to negative outcomes in judicial proceedings in general, the five Circuits that look beyond the indictment would have changed course and reverted to the precedent of looking solely at the indictment.

Furthermore, as the decision below demonstrates, looking solely at the indictment potentially affects the due process right, as well as the rights of criminal defendants to a fair trial. As the evidence on the record confirms, in the proceedings below, Petitioner was convicted – on the underlying wire fraud conspiracy and money laundry conspiracy counts – based on mere unsubstantiated allegations that were not proven beyond a reasonable doubt, as due process requires. The only inculpatory evidence throughout Petitioner's trial was with regards the joined marriage fraud conspiracy count. However, as has been demonstrated, there was no legal, logical, factual, or common-sense justification for the joinder below, thereby making the joinder improper.

Thus, the joinder led to a prejudice so great, that it denied Petitioner his right to fair trial. In the proceedings below, Petitioner was convicted based on the assured innuendo

concomitant with the improperly joined marriage fraud conspiracy count. As the Joinder caused the jury to listen to evidence regarding a marriage fraud conspiracy that was totally unrelated to and had no bearing on the underlying wire fraud conspiracy, and the money laundry conspiracy counts.

However, as this Court has held, "An important element of a fair trial is that the Jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." Bruton, 391 U.S. 123, 131 n.6. The joinder below ensured the opposite.

The precedent of looking solely at the indictment assuredly led to Petitioner's prejudice below.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectively submitted,

_____

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APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

CERTIFICATE OF SERVICE

The undersigned hereby certifies he deposited a copy of the Petition for a Writ of Certiorari in the prison mailbox system at the Reeves County Detention Center III on the 2nd day of September 2021, for onward transmission to the:

Office of the Clerk,
Supreme Court of the United States
1, First Street, NE
Washington, DC 20543

_____
Olufolajimi Abegunde (MBA) #71343-019