RECORD NO. _____

IN THE
Supreme Court of the United States

GBENGA BENSON OGUNDELE
a/k/a Benson Ogundele,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

> Whether voluminous amounts of substantive evidence containing prejudicial opinions of government agents held to be erroneously admitted under Federal Rule of Evidence 1006 by the Fourth Circuit violated Petitioner's right to a fair trial, or alternatively the confrontation clause, under the Sixth Amendment, thus triggering the *Chapman* standard of review, placing the burden on the Government to show the error was harmless beyond a reasonable doubt.

PARTIES TO THE PROCEEDINGS

Petitioner Gbenga Benson Ogundele was a Defendant and Appellant below. Mojisola Tinuola Popoola and Babatunde Emmanuel Popoola were also Defendants and Appellants below but are not parties to this petition. They are concurrently filing their own cert petition as they each have issues specific to their case. In each of their petitions, they may also be addressing the issue addressed by Ogundele as it is an issue that affected each of the three parties. Victor Oloyede, who was also a Defendant and Appellant below, is not filing a petition. The United States was the Plaintiff and Appellee below.

RELATED CASES

United States Court of Appeals for the Fourth Circuit:

No. 17-4102, USA v. Victor Oyewumi Oloyede

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No. 17-4186, USA v. Babatunde Emmanuel Popoola, a/k/a Emmanuel Popoola, a/k/a Tunde Popoola

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No. 17-4191, USA v. Mojisola Tinuola Popoola, a/k/a Mojisola Oluwakemi Tin Popoola, a/k/a Moji T. Popoola

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The Petitioner, Gbenga Benson Ogundele, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's published opinion, (*United States v. Oloyede* et. al, No(s) 17-4102, 4186, 4191, and 4207 (4th Cir. July 31, 2019), finding that the trial court's error in admitting Rule 1006 substantive evidence charts was harmless is attached as Appendix A. The order denying rehearing and rehearing *en banc* is attached as Appendix B. Petitioner's motion to exclude the 1006 charts, that was joined by the other Defendants, along with the relevant trial transcript extract, is attached as Appendix C. Appendix D is the objected-to admitted charts.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions was entered on July 31, 2019. A timely petition for rehearing and rehearing *en banc* was filed on September 9, 2019. The motion for rehearing was

denied on October 1, 2019. (App. A33). This petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Issue I: Harmless Error and Rule 1006

U.S. Const. amend. VI.

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 favor, and to have the assistance of counsel for his defense.

Federal Rules of Criminal Procedure 52. Harmless and Plain Error.

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Rule of Evidence 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

STATEMENT OF THE CASE

1. **The Trial.**

On May 18, 2015, the Petitioner was indicted, along with others, and charged with Conspiracy to Commit Wire Fraud 18 U.S.C. § 1349 and Conspiracy to Commit Money Laundering, 18 U.S.C. § 1956(h). (Docket 1). Petitioner also faced charges of Aggravated Identity Theft in violation of 18 U.S.C. § 1028A. *Id.*

The general theory behind the Government's case was that the co-defendants offered to make their US bank accounts available to fraudulent deposits. Concurrently, unindicted coconspirators overseas would join matchmaking websites, create online relationships, and then convince their new love interests, through various make-believe stories, to deposit money into these accounts. The money would then be sent overseas or laundered through used car sales.

In advance of the trial, the Government produced multiple "draft" charts for each of the Defendant's bank records. The charts were a composite of curated entries which reflected what the Government believed were fraudulent transactions. Some, but not all of them, were mirrored at trial by actual victim-witness testimony. There were many

alleged victims who did not testify but who were named transactions in the charts. Finally, there were cash transactions that were selectively placed into the chart. The government, without providing underlying discovery related to those cash transactions, or presenting evidence at trial that justified such a claim, argued that those cash deposits were proceeds of fraud as well. At trial, the Government moved to introduce the charts as substantive evidence under Federal Rule of Evidence 1006.

Petitioners argued that the methodology for the creation of the charts was not sound, that their use was not in accordance with Rule 1006, that the particular agent was not the appropriate proponent of the charts as he did not create them, and finally that the admission of the charts denied the Defendants of their right to a fair trial under the Sixth Amendment. The trial Court overruled the motion and allowed all charts to be introduced.

On November 21, 2016, the jury found the Petitioner guilty of each of the charges against him. (Docket 363). Petitioner was sentenced on March 22, 2017, to a total term of 234 months. (Docket 528) Petitioner timely appealed.

2. **Direct Appeal**

The United States Court of Appeals for the Fourth Circuit affirmed on July 31, 2019. The Court rejected Petitioner's argument which is at issue on this petition for certiorari.

First, the court rejected Appellants' argument that admission of the substantive evidence charts violated their right to a fair trial under the Sixth Amendment. Although the court found that the admission of the charts was error, the court found the error was harmless. (App. 12).

Petitioner, along with other Defendants at trial, maintained that many of the charts' entries, including those reflecting many of the cash deposits, were never proven to be related to fraudulent activity, and that admitting the charts into evidence implied that every entry was fraudulent. The Fourth Circuit agreed that introduction of the charts, as they were created, was error:

> We agree with Ogundele and Oloyede that the charts relating to their accounts failed to comport with Rule of Evidence 1006 because of their selectivity. They did not fully represent the accounts that they were purportedly summarizing.

(App. 11).

The Fourth Circuit opined further about the inappropriateness of the charts:

the government in this case was not using the charts as surrogate evidence offered in lieu of voluminous underlying bank records, but rather was seeking to help the jury understand how various related records demonstrated a pattern of suspicious activity engaged in by the defendants.

(App. 12).

In coming to its harmless error conclusion, the court held that Petitioner's argument "ignores the role of a trial, where each side selects evidence to be presented to the jury." *Id.*

Second, as to the argument of Petitioner's that admission of the charts violated Rule 1006, the Court held that the evidence's admission "did not affect the defendant's substantial rights, particularly as the same information in the same form could have been shown to the jury under Rule 611(a)." *Id.*

REASONS FOR GRANTING THE PETITION

a) Abuse of Rule 1006, meant for merely easing the burden of voluminous document production at trial, makes a fair defense impossible, and this Court should apply the higher *Chapman* standard to safeguard against strategic abuse of the rules of evidence.

Harmless Error.

The federal harmless-error statute, 28 U.S.C. § 2111, and Federal Rule of Criminal Procedure 52(a) each direct federal courts of appeals to

correct only those errors that "affect substantial rights." This Court long ago established the standard for determining whether a trial error had the requisite effect under these provisions. The standard is met if the error "had substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and requires the appellate court to ask "'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963)). When the error is constitutional in nature, the appellate court "must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. Non-constitutional errors require a "fair assurance" of the absence of any possible effect. *Kotteakos*, 328 U.S. at 765. In other words, if the reviewing court is left in "grave doubt"— meaning that the court is in "equipoise" as to whether the error influenced the verdict—then it must find that the error was not harmless. *O'Neal v. McAninch*, 513 U.S. 432, 435, 437-38 (1995). In both instances, the Court has insisted that the burden of persuasion must lie with the government. *See Kotteakos*, 328 U.S. at 765; *Chapman*, 386 U.S. at 24.

Over the years, the Court has phrased the *Kotteakos* and *Chapman* formulations in various ways. But the consistent and indispensable feature of the traditional harmless-error analysis is its focus on the error's potential effect on the jury's verdict, in view of the entire record. And that inquiry "is entirely distinct from a sufficiency-of-the-evidence inquiry." *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986).

Other Courts, in the context of Sixth Amendment violations under Crawford, have held that the higher *Chapman/Kotteakos* standard harmless error review of standard where it is required to show that the "constitutional error was harmless beyond a reasonable doubt. *United States v. Williams*, 632 F.3d 129 (4th Cir. 2011)(citing *Chapman* at 24)(*See also Mitchell v. Esparza*, U.S. 12, 17-18 (2003)).

Right to a Complete Defense.

The trial court's error was not merely evidentiary, it was constitutional. The heightened *Chapman* standard should have been applied to the trial court's error. The Fourth Circuit's assertion that the same evidence when have been shown to the jury completely disregards the critical differences between Rule 611(a) and Rule 1006. Rule 611(a)

charts may be shown to the jury but may not go back to the jury for deliberations.

For these charts to have been appropriate to publish to the jury under 611(a), the underlying evidence would have had to have been previously introduced at trial. *See United States v. Kaley* (11th Cir., 2019). In many respects, these charts included names of witnesses that defense counsel had no information about, and they also included cash transactions of which the Government never disclosed the supporting evidence to believe they were fraudulent.

Further, the agent who discussed the charts was not qualified as an expert witness nor should his opinions have been allowed, as they were by the District Court, as lay opinion under 701. F.R.E. 701. (App. 56). Lay opinion testimony was inappropriate because Rule 701 only allows such an opinion if it is "rationally based on the witness's perception." *Id.*

Since the agent in this case did not prepare the chart, decide on its methodology, or act as anything other than a device for displaying the charts, he was not an appropriate witness to introduce (or publish) these charts in any manner. To put it simply: the government could not

have discussed the charts with the jury under 611(a) because they did not have a competent witness to do complete such a task. The agent did not just simply discuss the charts, he gave his opinions on what that information meant. In summary the error is two-fold: The Government did not have the appropriate proponent for a 611(a) chart and, even if they had, 611(a) charts are not evidence to be considered by a jury.

The federal Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense,' " *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984). In various types of cases, This Court has held that this right was violated by the exclusion of defense evidence under a state rule of evidence. *See Holmes v. South Carolina*, 547 U.S. 319 (2006)(rule did not rationally serve any discernible purpose); *Rock v. Arkansas*, 483 U.S. 44, 61 (1987) (rule arbitrary); *Chambers v. Mississippi*, 410 U.S. 284, 302–303, (1973) (State did not even attempt to explain the reason for its rule); *Washington v. Texas*, 388 U.S. 14, 22, (1967) (rule could not be rationally defended). *Nevada v. Jackson*, 569 U.S. 505 (2013).

This case is an appropriate opportunity for this Court to extend its own line of cases protecting the right to a fair defense and trial. If this Court does not intervene, Government attorneys across the country will be enabled to further erode trial rights of the accused. Failure of this Court to act will cause continued confusion across the country as to the appropriate application of rules 611(a) and 1006.

b) The admission of the Rule 1006 Charts was in violation of the Confrontation Clause as the summary exhibits included testimonial statements.

From the initial motion, throughout litigation, counsel for Petitioner argued that the admission of the Rule 1006 charts violated his client's right to a fair trial. Counsel did not specifically mention *Crawford*, but certainly the core of Petitioner's Sixth Amendment argument goes to his right to confront witnesses against him. *Crawford v. Washington*, 541 U.S. 36 (2004). The charts introduced came in through a witness that was incompetent to opine on the charts. As a result, these charts, found by the Fourth Circuit to be erroneously curated, kept Petitioner from his right to confrontation against testimonial evidence. These charts, in their own respect, were statements themselves.

Despite the codification of the Best Evidence Rule, Rule 1006 acts as a hearsay exception. Karim Basaria, *Summary Exhibits and the Confrontation Clause: Looking Beyond the Hearsay Rule For Evidentiary Implications of Crawford's Progeny*, 102 J. Crim. L. & Criminology 851 (2013)[1]. These rule 1006 charts, and their underlying documents, are prepared out of court and their admission is more consequential because, unlike demonstrative aides under Rule 611(a), they may reflect evidence not admitted at trial. *United States v. Pelullo*, 964 F.2d 193, 205 (3d Cir. 1992). The question posed by Basaria's article gets right to the heart of the argument counsel made to the trial court, and the error made by the Fourth Circuit:

> *Crawford*'s focus on separating hearsay from the Confrontation Clause does not preclude the possibility that other types of evidence, such as testimonial summary exhibits, could implicate confrontation concerns when the defendant is *afforded no opportunity to cross-examine the preparer of the summary*.

Basaria at 868. (emphasis added).

When received as substantive evidence, a summary is more than just a mere recapitulation of voluminous information, depending upon

[1] This part of Petitioner's argument takes much of the content from Mr. Basaria's article. Counsel for Petitioner wishes to thank Mr. Basaria for his scholarship.

the presentation, it is a statement in and of itself. *Id*. The agent in this case, through his testimony, indicated that the chart was, in fact, a statement itself:

I didn't include all of the wires. I only included wires that had names that were included on a victim list that was provided by the case agent.

Id. at 192 (fix cite)

Although the judge did strike the portion of testimony referring to the list as a "victim list" the damage was already done, and it did not change the fact that these charts were statements of the type that triggers Confrontation Clause protection.

As the article points out, this Court has yet to address whether *Crawford* protection applies to Rule 1006 charts where the charts are statements themselves. The answer should be in the affirmative when, in cases such as this one, the circuit court agrees that it was error to admit the charts, and where the charts were clearly statements themselves. Again, the circuit court's opinion acknowledges that they that the Government was "seeking to help the jury understand how various related records demonstrated a pattern of suspicious activity engaged in by the defendants." (App 12). The charts went beyond the

purpose of Rule 1006 of making voluminous records "available to the jury." 4 Wigmore §1230.

As Basaria argues, whether a document should be flagged as a statement would largely depend on whether the investigation was objective or included subjective reasoning. Some forensic accountant determinations may be objective, for example "whether documents are signed, whether the dollar amounts total correctly, or whether a transaction was approved before a particular date." *Basaria* at 869. That type of analysis is different than that of "fraud examiners" which, by necessity, requires subjective analysis when included whatever documents are included in the summary. *Id*. This type of subjective gathering is exactly the type that those who created the chart in this case engaged in. Part of Petitioner's argument below acknowledged this distinction between appropriate methods of putting information into charts:

> The government did not disclose in their proffer that the names in the chart were included because they were suspected victims. The inclusion of a victim list, or any other type of *subjective list like this*, is not the type of chart summary evidence that is allowed under Rule 1006.

(App. 34).

To the extend trial counsel persevered a Sixth Amendment argument, but not *Crawford* explicitly, plain error review is appropriate. A plain error is one that affects substantial rights even though it was not brought to the court's attention. Fed. R. Crim. Pro 52(b). This rule is a codification of the plain error review standard set for in *United States v. Atkinson*. *United States v. Young*, 470 U.S. 1, 7 (1985). The current application has shifted. Now the there is a "focusing on the effect of the error on the public's faith in the judicial system, the standard now narrowly centers on the outcome of the particular case." *Young*, 470 U.S. at 19-20.

If this Court believes plain error review is appropriate, Petitioner has four requirements to meet. *See United States v. Olano*, 507 U.S. 725, 732 (1993). Petitioner must show that 1) an error was made; 2) the error is plain; 3) the error affects substantial rights and 4) the decision to correct is necessary because the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 732.

The district court's error here was both evidentiary and constitutional. Because of the confrontation clause violation, the standard of review for this violation should be whether the error was

"harmless beyond a reasonable doubt." *See Chapman v. California*, 386 U.S. 18, 24 (1967).

The error here is plain for two reasons. First, it was clear from the testimony of the sponsoring agent, and plain review of the charts themselves, that these charts were statements in and of themselves. The subjective nature of the charts, selecting very particular transactions based on theories of prosecution, puts these charts into the category of testimonial under *Crawford*. Second, review of the trial record reflects the significant reliance of the government on these charts to buttress their theory of the case. They used them for many witnesses, they used them in closing argument, and they used them to subvert Petitioner's right to a fair trial by introducing theory of the prosecution evidence without having to provide the appropriate underlying evidence. Here, there is more than a "nontrivial possibility" that the references might have determined the outcome of the case. *Olano* at 641.

As to the substantial rights inquiry, there is ample evidence that this evidence affected Petitioner's substantial rights. These charts were used with "intensity and "frequency throughout the trial." *Id.* Counsel

objected numerous times throughout the trial along with filing a written motion that was argued during the trial.

The Government may argue that there was substantial evidence presented through the trial. However, the evidence appeared substantial in the context of the presentation of the charts. Some arguable innocent transactions were tainted by the presentation of cash transactions in these charts which made the presentation of a defense nearly impossible.

This error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings" because it was a manifest abuse by the government of evidentiary rules to circumvent the rigors of the Sixth Amendment and the rules of evidence. If this error is held harmless, prosecutors around the country will enabled to abuse Rule 1006 and bring doubt to the fairness of our judicial system.

The Fourth Circuit was legally erroneous when it claimed that the jury would have heard the evidence through rule 611(a) anyway. Allowing 611(a) charts to be considered as evidence is prohibited for good reason: it would be unfairly prejudicial.

> Demonstrative exhibits that are not admitted into evidence should not go to the jury during deliberation, at least not without

> consent of all parties. We would not allow a lawyer to accompany the jury into the deliberation room to help the jurors best view and understand the evidence in the light most favorable to her client. The same goes for objects or documents used only as demonstrative exhibits during trial.

Baugh v. Cuprum S.A. De C.V., 730 F.3d 701 (7th Cir. 2013).

The petitioners preserved both an evidentiary objection under Rule 1006, and a Constitutional objection under the Sixth Amendment. The heightened standard should apply, and the Fourth Circuit failed to review the error to determine if it was clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

CONCLUSION

The petition for a writ of certiorari should be granted.

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