ORIGINAL

No. 20-767

In the Supreme Court of the United States

JESSICA ARONG O'BRIEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was indicted on one count each of mail and bank fraud, days from the ten-year statute of limitation since selling her real properties in 2007. The indictment duplicitously fused together non-bank and bank transactions, all of which were out-of-statute except for her buyer's home equity line of credit or HELOC. Buyer alone executed his HELOC HUD-1, while the HUD-1 Petitioner and buyer jointly-executed indicated non-bank lender for buyer's two loans. Lower courts disregarded the government's own documentary and testimonial evidence that Petitioner could not have known about her buyer's HELOC lender. Petitioner's convictions instead were affirmed under § 1344(2) citing the *Loughrin v. U.S.*, 353 U.S. 351 (2014) holding and *U.S. v. Bouchard*, 828 F.3d 116 (2d Cir. 2016) *dicta*, imputing purported industry knowledge to conclude Petitioner knew that lender for buyer's HELOC was federally-insured. The Questions Presented are:

1. Whether under *Loughrin*, a real estate seller's knowledge of her buyer's federally-insured lender may be imputed to sustain a conviction under § 1344, thereby omitting proof of actual knowledge.

2. Whether bank and mail fraud are continuing offenses pursuant to *Toussie v. U.S.*, 397 U.S. 112 (1970), that allow the government to circumvent statutes of limitations by aggregating non-bank and bank transactions as a "scheme" involving different parties and transactional purposes.

3. Whether mail fraud or bank fraud is duplicitous, vague and confusing to a jury when it combines four to five un-related non-bank and bank transactions, all of which are outside of the statute of limitations except one, into a single count.

LIST OF PROCEEDINGS

United States Court of Appeals for the Seventh Circuit

No. 19-1004

United States of America, *Plaintiff-Appellee*,
v. Jessica Arong O'Brien, *Defendant-Appellant.*

Opinion: March 13, 2020

Rehearing Denial: September 1, 2020

United States District Court for the Northern District of Illinois Eastern Division

No. 17 CR 239-1

United States of America, *Plaintiff*,
v. Jessica Arong O'Brien, *Defendant.*

Post-Trial Opinion: September 4, 2018

Verdict: February 15, 2018

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The Opinion of the United States Court of Appeals for the Seventh Circuit, dated March 13, 2020, is included below at App.1a. A jury in the Northern District of Illinois convicted Petitioner on two counts on February 15, 2018. (App.67a). Pretrial, the trial court issued opinions on challenges to the statute of limitations, dated January 29, 2018 (App.68a); and on duplicity, dated November 9, 2017 (App.92a). The trial court also denied a post-trial motion to dismiss on September 4, 2018. (App.20a).

JURISDICTION

The Seventh Circuit issued an order denying a timely filed petition for rehearing on September 1, 2020. (App.117a). This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1344.—Bank fraud

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by,

> or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341.—Frauds and swindles

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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 20.—Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. § 662);

(6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) [1] of the Federal Reserve Act; or

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978);

18 U.S.C. § 3293.—Financial institution offenses

No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate—

[. . .]

(2) section 1341 or 1343, if the offense affects a financial institution; or

[. . .]

unless the indictment is returned or the information is filed within 10 years after the commission of the offense.

18 U.S.C. § 3282.—Offenses not capital

a) In General.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

A. Introduction

The issues presented herein provide the Court with the opportunity to resolve clashing decisions between circuits regarding the application of the *Toussie* test and the *Loughrin* decision. This Court's intervention is necessary to stop the growing number of circuits from applying the continuing offense doctrine so loosely that it circumvents the protections afforded by statutes of limitation, the *Ex Post Facto* Clause and federalism principles. As this issue has remained unresolved for decades since *Toussie*, the government has capitalized on the resulting disorder and muddled precedents by openly disregarding Congressional intent, statutory textual limitations and this Court's Opinions on statutes of limitations.

This case highlights the same risk of prosecutorial abuse with this Court's *Loughrin* decision. The government easily blurred the "line at frauds" that required "some real connection to a federally-insured bank" whereby, Petitioner was the seller of her real estate property, with no access and no involvement in the buyer's loans. During the sale, the definition of "financial institution" for mail and bank fraud purposes also did not include mortgage lending companies. Moreover, from 2004 to 2007, these non-federally insured mortgage companies funded their own loans and even surpassed banks in national ranking of mortgage lending. As this Court recognized in *Loughrin*, the element of "by means of" in § 1344(2) is "dependent almost entirely on context," which is fertile grounds for circuit conflicts. Specifically, the Seventh Circuit's Opinion is in direct conflict with the Second Circuit decision. Therefore, this case merits the Court's guidance.

B. Procedural History

On April 11, 2017, just days before the expiration of a ten-year statute of limitations, Petitioner was indicted on one-count each of mail and bank fraud. The indictment alleged that Petitioner and co-defendant Maria Bartko engaged in a scheme to defraud lenders through false pretenses and misrepresentations regarding four disconnected transactions, each separately completed at specific times between 2004 and 2007. The government asked Petitioner to waive the statute of limitations before filing its indictment. She declined.

On May 11, 2007, Petitioner asked the government for *Giglio* and *Brady* materials. None was provided after its key witness Judy Taylor falsely testified.

The trial court denied Petitioner's motions to dismiss on grounds of statute of limitations, duplicity and pre-indictment delay. The trial court ruled that it could use special jury instructions to "mitigate against [t]he overall vice of duplicity" involved with the duplicitous allegations. (App.116a). The district judge however denied Petitioner's request for such special jury instructions. Petitioner preserved for appeal her motions on duplicity, on statute of limitations and for judgment of acquittal.

A jury convicted Petitioner of bank and mail fraud. She was sentenced to a year and a day in prison, two years of supervised release and ordered to pay restitution totaling $660,000. The verdict did not specify which of the two subparagraphs of the bank fraud statute Petitioner was guilty of violating. The Seventh Circuit, however, specifically affirmed Petitioner's bank fraud conviction under § 1344(2), but was silent about any violation under § 1344(1). The Seventh Circuit later denied Petitioner's Rehearing/*En Banc* Petition.

C. Statement of Facts

To convict Petitioner of bank fraud, the government was required to prove that Petitioner <u>knowingly</u> schemed to (1) defraud a financial institution; and (2) obtain any moneys, funds, or other property owned by, or under the custody or control of a financial institution. 18 U.S.C. § 1344. The § 1344 element of "financial institution" was defined as "a [federally-] insured depository institution . . . ," at the time the alleged scheme occurred. 18 U.S.C. § 20.

The applicable statute of limitations for mail fraud pursuant to 18 U.S.C. § 1341 differs depending upon whether a financial institution is involved. Given that the indictment occurred just days before the ten-year statute of limitations, the government needed to prove that Petitioner used the mail to knowingly engage in a scheme to defraud that affected a financial institution. The limitation on mail fraud not involving a financial institution is five years. 18 U.S.C. §§ 3293, 3282.

The government's failure to prove beyond a reasonable doubt a violation of these statutes can be broken down into the following six elements:

1. No Scheme Evidence

Petitioner's conviction resulted from the government's straddling of four, separately completed transactions described to invoke a "continuing offense" that supposedly constituted a scheme in violation of bank and mail fraud statutes. Despite the "financial institution" element for these offenses, the majority of the transactions did not involve a federally-insured financial institution. Moreover, all but the April 16, 2007 transaction were outside of the applicable statute of limitations.

Key portions (App.9a-16a, 24a-34a) of the Seventh Circuit's Opinion are based upon facts that are contrary to the trial record and the government's unsupported arguments. Despite the district court's mandate that the government prove its straw-buyer allegation, it notably did not call one witness with personal knowledge nor anyone who interacted with Petitioner, co-buyer Christopher Kwan or his business partner Bartko that would have given the jury and the courts reliable evidence to base its convictions.

As detailed in Petitioner's Rehearing Petition (Case#19-1004:Doc.#49), the government compensated for this by suborning Taylor's perjured testimony to establish a nexus between Petitioner and a bank and by withholding exculpatory documents that would have changed the case outcome.[1] Taylor, who had no personal knowledge or involvement in Kwan's loans or any part of the 2007 sale transaction, was the <u>only</u> witness the government called to falsely establish the "financial institution" nexus. The following outlines the four transactions:

In 2004, thirteen years before the indictment, Petitioner obtained non-bank mortgages to purchase two properties on 46th and 54th Streets in Chicago (collectively, the "Properties"). Neither Bartko nor Kwan were involved with this transaction.

The government attempted to create a connection between Petitioner and a bank by suborning Taylor's perjured testimony. Taylor falsely testified that Petitioner's 2004 purchase loan, originated by a non-FDIC insured Argent Mortgage, was succeeded by FDIC-insured Citibank. Non-FDIC insured CitiFinancial Mortgage did, not Citibank. (App.134a). CitiFinancial was a primary subsidiary of Citigroup, Inc., another

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[1] Petitioner discovered the government's pattern of deception when she undertook her own representation, and raised the issue in her Petition for Rehearing to the Seventh Circuit. (*See* 19-1004: Doc.#49).

non-FDIC insured entity. (*See* 19-1004:Doc.#49). The government knew Taylor's testimony was perjured because its own exhibit indicates that CitiFinancial, not Citibank, was paid off in 2005, when Petitioner refinanced her 2004 purchase loan. The Seventh Circuit Opinion relied on Taylor's perjured testimony to conclude that Petitioner had prior dealings with Citibank, when she did not. (App.15a).

In 2005, twelve years before the indictment, Petitioner's non-bank purchase loans were fully-paid when non-bank lenders refinanced them. (App.132a-134a). These 2005 non-bank refinance loans were later serviced, but not succeeded, by another non-bank mortgage company. No federally-insured institution bore any risk of loss in the funding or succession in Petitioner's 2004 and 2005 transactions. Petitioner therefore never obtained bank property.

Both the 2004 and 2005 transactions were originated and processed by mortgage companies that have been out-of-business when Petitioner was indicted. Petitioner was foreclosed from retrieving any documents that could have aided in her defense. Notwithstanding, no evidence in the record proved that Petitioner schemed to defraud a bank or schemed to obtain bank property for 2004 and 2005 transactions.

In 2006, eleven years before the indictment, Petitioner obtained a $25,000 commercial line of credit for her small business. The fully and timely paid commercial credit line was open for five years after the sale of the Properties. A federally-insured lender provided this credit line, but Petitioner's company had no ownership interest in the Properties. Neither Bartko nor Kwan were involved with this transaction. There was no evidence showing that this commercial line of credit was opened in furtherance of any kind of scheme, nor is there evidence this loan had any nexus to Petitioner's 2004 and 2005 non-bank lenders, and 2007 Kwan's loans.

In April, 2007, Petitioner sold the Properties to Bartko and Kwan. It is undisputed the April 17, 2007 sale of the 54th Street property did not involve or affect any federally-insured institution. No bank fraud could have been committed in connection with that transaction. Yet, the government included the claimed $345,000 non-bank loss to this transaction in Petitioner's restitution.

2. No Evidence of Intent to Deceive a Federally-Insured Lender

The government argued that the executing transaction is the April 16, 2007 sale of the 46th Street property involving Citibank, a federally-insured entity. Despite the disconnection between this sale and the 2004, 2005, 2006 transactions, the government hitched them to this sale and called it a "scheme," regardless that majority of them did not involve any financial institutions and were all out-of-statute in 2007. Two jury instructions also permitted a conviction based on the non-bank and out-of-statute transactions. (App.118a-119a). Notably, the 2007 loans are not Petitioner's loans. Instead, they are the buyer's loans and there was no evidence proving that Petitioner participated in any scheme with Bartko, Kwan or both, let alone evidence that she participated in defrauding an FDIC-insured lender.

D. No Evidence That Petitioner Knew of Citibank's Involvement

The government argued that Petitioner knowingly deceived Citibank by presenting Kwan as the purchaser of the 46th Street property, when he was only a straw-buyer for Bartko. The government further contended that Kwan received two loans to purchase the 46th Street property: a mortgage from non-federally insured CitiMortgage and a HELOC from federally-insured Citibank. Two key government witnesses, Citibank's Taylor and title company supervisor Patricia Woods, testified that "[Petitioner] wouldn't receive the loan package from the lender" because "it's none of [her] business. The loan package is . . . for the buyer to sign and review" and "[t]he borrower's information is private information."

In FBI 302 reports, Kwan's loan officer confirmed Petitioner's non-involvement with Kwan's loans. Kwan also told the government that he only dealt with Bartko when completing and submitting his loan applications. Despite these reports, the government argued the opposite to the jury and the lower courts, without providing any evidence. The government fabricated this allegation and the Seventh Circuit relied on it in its Opinion. Since the government never called Kwan, Bartko, the loan officer, closer or underwriter for these loans to testify at trial, there was no evidence for the jury to ascertain Petitioner's involvement with Kwan's loans or to support the lower courts' opinions.

There is also uncontroverted documentary trial evidence that Petitioner was <u>only</u> aware that Citi-Mortgage was the lender for Kwan's loans to purchase 46th Street property. Specifically, the only HUD-1 that Petitioner and Kwan signed together indicates that non-federally insured CitiMortgage was the lender for Kwan's first and second loans. (App.135a-137a). Only Kwan signed the HUD-1 for his HELOC, which indicates Citibank. (App.140a-143a). Additionally, Petitioner obtained the only title insurance policy for the property that was issued at closing. The policy specifically only insured CitiMortgage as the lender for Kwan's first and second loans. (App.144a-148a). The Seventh Circuit however incorrectly assumed that the HUD-1 that both Kwan and Petitioner signed indicated that the lender was Citibank. It did not. (App.135a-139a).

Petitioner's lack of knowledge about Kwan's HELOC is also confirmed by the timing of that transaction. The HELOC was collateralized by Kwan's equity in the property. Taylor testified that Kwan would not have been able to pledge the property as security for the HELOC until after he owned it. Consequently, he could not have obtained the HELOC until after Petitioner conveyed the property to him, and after their dealings were completed. When asked at oral argument about evidence that Petitioner knew of Citibank's involvement with the HELOC, the government responded with nothing more than speculation that Petitioner had to have known because she was heavily involved. The Seventh Circuit included that in its Opinion, despite no supporting evidence on the record.

E. No Evidence That the 2007 Loans Affected a Federally-Insured Lender

1. Taylor's Perjured Testimony

The government suborned Taylor's perjured testimony that Citibank was CitiMortgage's "ultimate parent" in a further effort to create a nexus between Petitioner and a federally-insured lender. The government knew that this testimony contradicted Taylor's testimony in another case prosecuted by the same office, *U.S. v. Vani*, 13CR167 (N.D. IL). In *Vani*, Taylor testified that CitiMortgage was a wholly-owned subsidiary of Citigroup in 2007. (*See* Doc.#49Ex.5). This is consistent with paragraph (e) of the *Vani* indictment: ". . . CitiMortgage, a wholly-owned subsidiary of Citigroup [. . .]." (See Doc.#49Ex.6).

Similarly, paragraph 1(c) of the indictment in *U.S. v. Dicosola*, 867 F.3d 793 (2017), also states, "CitiMortgage, a subsidiary of Citigroup, was in the mortgage-lending business." (App.159a). The lead - prosecutor herein knew this because he was also the lead prosecutor in *Dicosola*. (App.160a).

The lead prosecutor nonetheless suborned Taylor's perjured testimony that CitiMortgage was not a lender, but Citibank's 2007 loan-servicing arm. The jury was therefore falsely led to believe that loan funds came from Citibank as CitiMortgage was only a loan servicer, not a lender. Citigroup's 2007 10-K filing with the SEC (accession file#:001-09924) also lists Citibank, CitiMortgage and CitiFinancial, each as principal subsidiaries of Citigroup in 2007. Citibank and CitiMortgage were listed thereon not as parent and subsidiary, but as equal level Citigroup subsidiaries. The lower courts' reliance on *U.S. v. Serpico*, 320 F.3d 691 (7th Cir. 2003) is therefore based on Taylor's suborned perjured testimony.

The government continued to fill in a non-existent link between Petitioner and a federally-insured entity by suborning Taylor's perjured testimony that losses on the 2007 CitiMortgage loan were incurred by Citibank. The government knew this was false because it was contrary to Taylor's testimony in *Vani*. There, Taylor testified that CitiMortgage incurred the losses for its loans. (*See* Doc.#49Ex.5). Moreover, documentary trial evidence reveals that CitiMortgage declared interest income for Kwan's loans, including the HELOC. (App.151a-152a). CitiMortgage's IRS Form 1098 income declaration filing is unrebutted trial evidence that CitiMortgage was the lender for both Kwan's loans and did take the loss. Under Subpoena, Citigroup's representative Tonya Cwach also informed the government on September 25, 2015 that CitiMortgage took the loss for Kwan's loans, including the HELOC. (App.165a-166a). The government nonetheless argued the opposite, without evidence. The Seventh Circuit again relied on this misrepresentation.

2. Non-Bank CMALT Property Funded Kwan's Loans and Was the Entity Affected by the 2007 Loans

Exculpatory documents withheld by the government also show that yet another non-federally insured entity, and not Citibank, bore the ultimate risk of loss for both Kwan's loans in the 2007 sale, including the HELOC. That documentation, discovered by Petitioner when she took over her representation, shows that Kwan's loans were owned by CitiMortgage Alternative Loan Trust, Series 2007-A5 ("CMALT"), a non-federally insured trust. *See also* CMALT 10-K report at www.sec.gov (accession file#000-16107). CitiMortgage was CMALT's sponsor. This is consistent with the government's evidence identifying Kwan's HELOC as "Third-Party HELOC." The CMALT Pooling and Servicing Agreement designated Citibank the nominal administrative roles of paying agent and mortgage/note custodian, where none of its bank property was ever at risk. (*See* Doc.#49Ex.9). Citibank's agreement was to follow the CMALT's payment instructions, for a fee. Citibank's function was also described in a Power of Attorney, stating, "... the Loans may be in [Citibank's] name solely for the purpose of allowing the undersigned to perform its servicing obligations on behalf of such investors." (*See* Doc.#49Ex.14).

The government knew about the CMALT's existence. The Justice Department's 2014 $7-billion settlement with Citigroup specifically included the CMALT as an entity subject to that settlement. (*See* Doc.#49 Ex.12) The settlement document further stated that the government "collected nearly 25 million documents relating to every residential mortgage-backed security issued or underwritten by Citigroup in 2006 and 2007," including the CMALT. The government concealed from Petitioner crucial exculpatory documentation such as the CMALT trust indenture, which was further evidence that Petitioner could not have knowingly schemed to obtain bank property. (*See* Doc.#49Ex.9).

3. No Evidence of Concealment of Bartko by Means of a Straw-Buyer

The government's contention that Petitioner presented Kwan as a straw-buyer and concealed Bartko's involvement with the transaction is contrary to evidence and logic. Petitioner obviously made no effort to conceal Bartko's involvement because Bartko was present at the closing.

Petitioner's open treatment of Kwan and Bartko's co-buyer roles was also disclosed to the lender at the closing through a written acknowledgment prepared by Petitioner. The written acknowledgement was executed by Petitioner, Kwan and Bartko in front of the closing agent representing Kwan's lender, Bonnie Pomrenze, who notarized the document. The title of the acknowledgment identifies Kwan and Bartko as buyers, stating, "ACKNOWLEDGEMENT & AGREEMENTS BETWEEN CHRISTOPHER KWAN/MARIA BARTKO ('Buyers') AND JESSICA O'BRIEN ('Seller')." (App. 149a-150a). The signature line below Bartko's signature on the acknowledgement identifies her as "Maria Bartko, Interested Third Party." The signature line below Kwan's signature identifies him as "Buyer." Uncontroverted documentary evidence shows that the parties presented these acknowledgments to Pomrenze at the closing. The acknowledgments included Pomrenze's signature and notary stamp.

Further, documentary evidence shows that as the closing agent, Pomrenze represented the lender at the closing, not Petitioner or the buyers. (App.153a). Paragraph two therein required Pomrenze to (1) forward any documents presented to her at closing to Kwan's lender; and (2) inform Kwan's lender if she became aware of any previously undisclosed party with an interest in the transactions. (*See also* Defense Ex. 75). Pomrenze's notation that she included "other documents" in the package she sent to CitiMortgage is consistent with these instructions. (App.163a-164a). Pomrenze's supervisor, Woods, who also trained her, testified that Pomrenze should or would have presented these acknowledgements to the lender, as she was instructed. The government's trial evidence shows that the loan package was sent to non-bank <u>CitiMortgage</u> the day after closing. (Doc.#231-2).

The government was able to diminish this exculpatory evidence at trial when Taylor conveniently could not find the acknowledgments in Citibank's files when asked to look for them over ten years later. Just as conveniently, the government never called Pomrenze to testify about them. The trial court granted the government's motion in *limine* to prohibit Petitioner from raising Citigroup and its subsidiaries' misdeeds and mishandling of its mortgage files.

Documentary evidence also shows that Kwan was Bartko's business partner, not her straw-buyer. Kwan and Bartko had purchased two properties together before purchasing Petitioner's Properties. The district court granted another government's motion in *limine* precluding Petitioner from raising Kwan/Bartko prior joint ventures. The government also had documentary evidence that Kwan and Bartko had joint bank accounts (App.161a-162a) and that Kwan assisted Bartko with maintaining their joint properties. (*See also* Doc.#49Ex.10). The government did not call Kwan, Bartko or any witness to support its straw-buyer allegation.

4. No Evidence of Knowledge About Kwan's Ability to Qualify for Loans

Uncontroverted evidence shows that Petitioner had no knowledge of nor involvement with Kwan's loans, including his loan applications. Kwan and his loan officer both confirmed with the government Petitioner's non-involvement. She would therefore have no knowledge regarding Kwan's ability to qualify for those loans.

5. No Evidence of Inflation of the Sales Price for the Property

There is no evidence to prove the government's allegation that Petitioner and Bartko inflated the sales price of the Properties. During its investigation, the government interviewed the lender's appraiser, who assessed the market value of the 46th Street property. The appraiser told the government that his property valuation was based upon comparable properties in the area and the property condition, not based upon buyer and seller agreements. (App.155a-157a). Appraiser did not know Bartko, Kwan and Petitioner. The government never called the appraiser to testify.

6. No Evidence of Kick-Back

There was no evidence at trial showing that payments from Petitioner to Bartko were intended as kick-backs. The government admitted checks that Petitioner made payable to Bartko and Kwan. The government's witness, Woods, testified that this is not uncommon in real estate transactions. Woods also testified that there is no way to amend a HUD-1 to reflect these payments if they are negotiated post-closing, nor were the parties required to do so. Neither Kwan, Bartko nor Pomrenze were called to testify at trial about this or any other matter.

The government instead called a bank representative for Petitioner's checking account. He had no knowledge of Petitioner, Bartko, Kwan or the transactions. He testified about the authenticity of the checks, but not their significance, lacking any knowledge about timing and reasons for the issuance of the checks. There was never any testimony about the checks' purpose. Yet, the Seventh Circuit again parroted the government's unsupported arguments.

Unlike the *Loughrin* fact-pattern, there was no stipulation in this case for the exception of the exculpatory Acknowledgements.

This case presents the Court with the opportunity to reverse a miscarriage of justice, for Petitioner, and anyone whose actions could be scrutinized in perpetuity if the government so chooses.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION EXPANDS THE HOLDING IN *U.S. V. LOUGHRIN* BY PROVIDING ADDITIONAL EXEMPTIONS OF PROOF TO THE GOVERNMENT THAT EFFECTIVELY ENCOMPASS TRANSACTIONS WITHOUT ANY REAL CONNECTION TO A FEDERALLY-INSURED INSTITUTION

The Court in *U.S. v. Loughrin* went to great lengths to restrict the bank fraud statute from federalizing garden-variety fraud cases that should be prosecuted in state courts. The Seventh Circuit's decision ignores both the *Loughrin* limitations and conflicts with the Second Circuit's decision in *Bouchard*, 828 F.3d at 116.

Like Petitioner, the *Loughrin* defendant was convicted of bank fraud in violation of 18 U.S.C. § 1344(2). Unlike *Loughrin*, Petitioner did not stipulate or admit to any crime and has argued throughout that the government failed to prove that she committed mail and bank fraud. Section 1344(2) requires that Petitioner knowingly executed a scheme to obtain property from a financial institution. "Financial institution" was defined from 2004-2007 as a federally-insured financial institution. 18 U.S.C. § 20.[2]

Loughrin held that the government is required to prove intent to defraud for a conviction under subsection (1) of the statute, but not under subsection (2). The Court differentiated the two subsections because the element of fraud in subsection (1) required a showing of intent. Without such language in subsection (2), the Court reasoned that "nothing in the clause additionally demands that a defendant have a specific intent to deceive a bank." *Loughrin*, 573 U.S. at 351.

The Court emphasized that the text of § 1344(2) "limits its scope to deceptions that have some real connection to a federally insured bank, and thus implicate the pertinent federal interest." *Id.* at 366. Seeking to restrict an interpretation that would expand the statute into the role traditionally filled by state prosecutions, this Court further opined that, "we should not construe § 1344(2) as a plenary ban on fraud, contingent only on use of a check (rather than cash)." *Id.* at 362. The Court further held that "[u]nder that clause, it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well includes a relational component: The criminal must acquire (or attempt to acquire) bank property "by means of" the misrepresentation. That phrase typically indicates that the given result (the "end") is achieved, at least in part, through the specified action, instrument, or

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[2] This provision was not amended to include non-federally-insured mortgage lenders until 2009. P.L. 111-21.

method (the "means"), such that the connection between the two is something more than oblique, indirect, and incidental." *Id.* at 362-363. Thus, required proof that a defendant engaged in a scheme to obtain bank assets by means of a false statement which caused the bank to give up those assets.

The Second Circuit construed *Loughrin* to hold that false statements to a non-federally-insured affiliate of a bank did not constitute bank fraud. *U.S. v. Bouchard*, 828 F.3d 116 (2d Cir. 2016). In *Bouchard*, the Second Circuit held that false statements made to a non-federally-insured lending subsidiary of a federally-insured bank did not violate § 1344(2). *Bouchard* emphasized the *Loughrin* requirement that the false statement must go to a federally-insured bank, not its non-federally-insured affiliate, in order to prevent federalization of state level fraud:

> "[W]e are mindful that § 1344(2) should not be read to 'federaliz[e] frauds that are only tangentially related to the banking system,' which is § 1344"s core concern. *Loughrin* [citation omitted] For that reason, and particularly when bank subsidiaries may be engaged in activities far afield of the core functions of our federal banking system, it is important (absent legislative direction to the contrary) to distinguish subsidiaries of banks from the banks themselves." *Bouchard*, 828 F.3d at 126 (emphasis added).

Loughrin did not include an exception for false representations made to a non-federally-insured subsidiary where a defendant knew or should have known the source of the subsidiary's funds. Instead, *Bouchard* stated only in *dicta* that:

> "[T]he Government might have been able to prove that Bouchard knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry. But it failed to make this argument or proffer evidence of Bouchard's extensive knowledge of the real estate and mortgage lending industry as a reason to convict him at trial." *Bouchard*, 828 F.3d at 126.

That *dicta* did not enter into the resolution of the case. It is therefore not binding.

The conviction of Petitioner without proof of a nexus to a federally-insured entity within the ten-year limitation is contrary to *Loughrin* and its emphasis upon the need for federal subject-matter jurisdiction. This is especially true, where the term "financial institution" was defined during the applicable period as a federally-insured institution. There was no evidence showing that Petitioner intended to obtain bank property. Instead, there is uncontroverted evidence that Petitioner was only aware that CitiMortgage was the buyer's lender for both his loans. No evidence shows, or could show, that Petitioner made statements in 2007 directly or indirectly to any federally-insured entity. The court's opinion parroted the government's argument that Petitioner's "intimate involvement in the fraudulent scheme and the 2007 transactions—that O'Brien knew that the funds for the April 2007 loans originated from Citibank." (App.15a). But there is nothing on the record to support these arguments because the government did not call a single witness who was present at the closing, who was remotely involved in the 2007 closings, or who was involved in the loan application. Again, it is undisputed that the only HUD-1 that Kwan and Petitioner signed together identified, CitiMortgage, a non-federally-insured entity for two mortgages that covered the sale price. (App. 135a-139a).

Still, the court insists that "[t]he HUD-1 form O'Brien signed listed Kwan's $73,000 loan, and HUD-1 form for that loan expressly identified Citibank as the lender." As stated, this is simply not true. (App.135a-139a) & (App.140a-143a).

Unlike *Bouchard*, there is uncontroverted documentary evidence in the trial record showing that there was no reason for Petitioner to believe or know that Kwan was obtaining a HELOC after she conveyed the 46th Street property to him.

Additionally, the uncontroverted testimonial evidence of the government's own witnesses was that the "sellers wouldn't receive the loan package from the lenders" because "it's none of [her] business. The loan package is . . . for the buyer to sign and review" and "[t]he borrower's information is private information." Unlike other documentation for the transactions, the HUD-1 for Kwan's HELOC was not signed by Petitioner, demonstrating her non-involvement in that transaction. In fact, it indicates $0.00 funds for the seller. (App.142a). It is also confirmed by the timing of the HELOC transaction. Kwan could not have obtained that line of credit until <u>after</u> Petitioner conveyed the property to him, since his ownership of the property was necessary to secure the HELOC.

Ultimately, the true lender was the non-federally-insured CMALT, the entity that bore all the risk for the 2007 loans or CitiMortgage as the CMALT sponsor, and not Citibank acting in a nominal administrative role. The byzantine structure of these loans included a myriad of small, "moving parts" among numerous entities that allowed the government to hide documents without raising red flags. Consequently, the government was able to hide the CMALT as the true funder of the 2007 loans, even though the government knew of its existence.

The only other evidence linking Petitioner to Citibank was Taylor's suborned perjury. As described above, her testimony was contradicted by her testimony in previous cases, other federal indictments, SEC filings and a Justice Department settlement. Absent Taylor's false testimony, there was no evidence linking Petitioner and a federally-insured entity necessary for her conviction.

The remaining elements of the government's theory of Petitioner's so-called scheme are also contradicted by the record. The acknowledgments executed by Petitioner, Bartko and Kwan and sent to CitiMortgage demonstrate that Kwan was not a straw-buyer because Bartko's interest was open and disclosed. Similarly, the government failed to produce evidence showing that Petitioner's so-called scheme involved a kick-back to Bartko. It produced testimony about the authenticity of certain checks, but nothing about their purpose. The so-called scheme to inflate the purchase price for the Properties was also debunked by the lender's appraiser.

Simply put, there could be no direct federal subject-matter jurisdiction if Petitioner did not know about Citibank's involvement with Kwan. Under *Loughrin* and *Bouchard*, no conviction should have occurred absent that knowledge. The "knowing" element of a financial institution present in *Loughrin* is non-existent in this case. The checks that Loughrin stole bore the name of the financial institution that the checks will be presented, the same financial institution that will provide the property (money). The Seventh Circuit reasoned that the seller-buyer relationship is likened to Loughrin-check facts and circumstances. And yet, the only HUD-1 that Kwan and Petitioner signed indicated CitiMortgage, consistent with the title insurance Petitioner was asked to order insuring CitiMortgage for Kwan's first and second loans. The HELOC HUD-1 was only signed by Kwan.

The Seventh Circuit tracked the government's arguments that Petitioner was involved in the scheme when no evidence supported this conclusion. The government did not call one witness who was present at closing, no witness to testify about Bartko, Kwan and Petitioner's agreements, negotiations or any interactions. The Seventh Circuit based its conclusions and reasonings from the indictment that had prefatory statements stated as if they were facts to be assumed as true. The Seventh Circuit's reasoning tracked the government's brief arguments that were not often supported by the trial record.

The Seventh Circuit ignored key facts and trial evidence, essentially opining that it does not matter whether Petitioner actually knew of Citibank's involvement. It then seized on the *Bouchard dicta* to improperly create federal subject-matter jurisdiction. In so doing, it also exempted the government from proving the remaining elements of 18 U.S.C. § 1344(2). Quoting the *Bouchard dicta*, the Seventh Circuit held that Petitioner's purported real estate experience implied knowledge that the funds for various transactions originated with a federally-insured financial institution, negating the *Loughrin* requirement that the false statement go to that institution, not an affiliate:

> "We conclude that a rational jury could find—based on O"Brien"s experience in the real estate industry and with Citibank in particular, as well as her intimate involvement in the fraudulent scheme and the 2007 transactions—that O"Brien knew that the funds for the April 2007 loans originated from Citibank. In *Bouchard*, . . . [t]he Second Circuit noted that 'the Government might have been able to prove that [the defendant] knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry' but 'failed to make this argument or proffer evidence of [the defendant's] extensive knowledge of the real estate and mortgage lending industry as a reason to convict him at trial.' . . . The government provided precisely such evidence here." *U.S. v. O'Brien*, No. 19-1004, at *14-15 (7th Cir. 2020).

The Seventh Circuit's use of this *dicta* to create an exception to the requirement that a conviction pursuant to § 1344 must include a false statement which is intended to go to a federally-insured financial institution conflicts with both *Loughrin* and *Bouchard*. Concerned with the use of § 1344(2) to federalize garden-variety fraud, *Loughrin* stressed that the statute is limited to acquiring property by means of false statements <u>which are intended to go to a federally-insured financial institution</u>. *Bouchard's* ruling was consistent with *Loughrin's* admonition that "<u>where no false statement will ever go to a financial</u>

institution, the fraud is not the means of obtaining bank property." *Bouchard* construed this holding to preclude a conviction based on false statements to a non-federally-insured affiliate of a bank. The Seventh Circuit's use of *dicta* to convict Petitioner upon her purported knowledge and not upon a direct nexus to a federally-insured lender improperly expands the scope of the statute beyond the holdings in *Loughrin* and *Bouchard.* Notably, the mortgage funding herein came from a non-bank CMALT, proving its knowledge assumption to be false.

This case allows the Court to resolve the conflict between the Seventh and Second Circuits as to the interpretation and application of 18 U.S.C. § 1344(2) in accordance with the *Loughrin* Opinion and provide further guidance before more circuits follow the Seventh Circuit's ruling in this case.

II. THE LOWER COURT'S DECISION TO AFFIRM THE GOVERNMENT'S SCHEME TO DEFRAUD ALLEGATION GIVES THE GOVERNMENT UNCONDITIONAL AUTHORITY TO DISREGARD STATUTES, THIS COURT'S AND LOWER COURTS' OPINIONS, FEDERALISM AND THE CONSTITUTION

The government's indictment alleged a "scheme" to defraud lenders that resurrected ten to thirteen-year old transactions, the majority of which did not involve financial institutions as required by the bank and mail fraud statutes. Because the government needed the ten-year statute of limitation to apply, it was likewise required to prove that the alleged scheme affected a financial institution to prove mail fraud. Despite this element, the lower courts allowed the government to straddle 2004 to 2007 transactions that did not involve or affect federally-insured institutions. As explained below, the lower court's decision disregards applicable statute of limitations, duplicity issues, the *Ex Post Facto* Clause, federal subject-matter jurisdiction and *stare decisis* from its own circuit.

A scheme must involve some planning. It is impossible to plan for something that is unforeseen. There is no evidence that Petitioner knew, intended or foresaw each of the separate transactions which occurred after her purchase of the Properties. Absent this, she could not have done the planning needed to conduct the kind of continuing offense that allowed the government to straddle four distinct transactions.

The Seventh Circuit's decision allowing the government to broaden the use of "schemes" as a vehicle to circumvent statutes of limitation and federal subject-matter jurisdiction will have a widespread deleterious effect. If it is left to stand, a citizen's participation in a twenty-year old transaction could be used to augment a weak government case twenty years later. Lower courts will use this case as precedent to rule that this is acceptable as long as the transactions are not charged separately.

This Court has been blunt about the role that statutes of limitation play in maintaining honest prosecutions:

> "[A] limitations is designed to protect individuals from having to defend . . . against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past . . . For these reasons and others, we have stated

> . . . "the principle that criminal limitations statutes are `to be liberally interpreted in favor of repose'" *Toussie v. U.S.*, 397 U.S. at 114 (1970).

A liberal interpretation of the statute of limitations in favor of repose would never have allowed Petitioner to be indicted for separate transactions that occurred outside of the statute. The government's April 16, 2007 executing transaction occurred nine years and 360 days before the indictment. The other transactions in the scheme occurred eleven to thirteen years before the indictment. The lower courts rationalized the decision to allow this scheme to stand by explaining that the expired transactions were not charged in separate counts anyway. This means that whenever the government alleges a "scheme", it can use time-barred transactions, disregarding duplicity considerations and inevitably confusing a jury. Here, it allowed the government to bolster its weak case focusing on expired transactions and then essentially arguing propensity in its closing. Even more egregious, the government included transactions that had no federal interest as part of its fabricated "scheme," even though the bank and mail fraud statutes required it to show otherwise. Despite the government's acknowledgement that it did not have federal subject-matter jurisdiction over these non-federally-insured lenders, it proceeded with them anyway and the lower courts gave their blessing on the government's deleterious use and abuse of this scheme application.

This is also a violation of the *Ex Post Facto* Clause of the Constitution, retroactively applying the 2009 amendment to the financial institution definition to transactions in prior years. 18 U.S.C. § 3293(b) applies a ten-year limitation to prosecutions for bank and mail fraud involving "financial institutions." At the time that the underlying transactions occurred, the term "financial institution" only included federally-insured institutions. This definition was not expanded to include non-insured mortgage lenders until 2009, after the underlying acts occurred. *See,* Pub. L. 111-21. Consequently, prior to that date, the limitation for prosecuting bank and mail fraud involving non-federally-insured institutions or other garden-variety federal fraud was subject to a five-year period, assuming federal subject-matter jurisdiction exists. 18 U.S.C. § 3282(a). Since mortgage lenders were not within the federal subject-matter jurisdiction during the years at issue, a federal crime could not have been committed. As to mail fraud, the government needed to show that a financial institution was affected for the ten-year statute of limitation to apply.

Each of the underlying transactions occurred outside of the applicable statute of limitation periods. Petitioner was indicted on April 11, 2017. The initial 2004 purchase and the 2005 refinancing involved non-federally-insured institutions. Those transactions were time-barred by both the five-and ten-year limitation for mail fraud count and do not qualify as bank fraud. The 2006 line of credit transaction was also time-barred. The April 16, 2007 conveyance was with a non-federally-insured institution. It was also time-barred.

As discussed above, uncontroverted evidence shows that Petitioner was not involved with the buyer's subsequent HELOC and had no knowledge of this transaction, thereby preventing her from knowingly making false statements to a bank or obtaining bank property. No witness testified that Petitioner was informed of or presented with documents that identified Kwan's HELOC lender. No witness testified that Petitioner knew that Kwan's HELOC or any of the other transactions, which constituted the "scheme" would occur when that "scheme" supposedly started in 2004. The government's glaring failure to show Petitioner's knowledge leaves her without the intent required for her conviction. The Seventh Circuit's misapprehension of the facts shows the harm and confusion that duplicitous counts can cause and how a government can easily manipulate facts to fill evidentiary gaps. If the Seventh Circuit confused the evidence in the record, there is no doubt that the jury too was confused and misled.

The security provided by statutes of limitations is threatened if the government is authorized to straddle unrelated transactions by simply calling it a scheme. The Seventh Circuit's opinion which denies due process protections to Petitioner and future defendants, is a departure from precedential and statutory authority and allows confusion between the circuits to continue.

The aggregation of these distinct transactions does not change this conclusion, nor does it vanquish the elements of the charged crimes. This was precisely the government's intention for straddling out-of-statute transactions: to create the illusion of overwhelming evidence to support its executing 2007 transaction. The lower courts' decisions can only refer to the out-of-statute transactions when it explains factual proofs and only surmise when it comes to the executing transaction. The evidence at trial highlighted the isolated and disconnected aspects of these four separate transactions which lacked the requisite nexus, interrelatedness and continuing characteristics. Each was separated by time; involved different types of transactions including mortgages, financings, and separate revolving lines of commercial and non-commercial credit; and involved eight different lenders. No single borrower was involved in all of the transactions. Both law and policy favoring repose were trampled by artificially linking these transactions with more dissimilarities than similarities to bypass the statute of limitations period.

This forced assimilation is also contrary to law holding that each transaction constituted a completed occurrence, distinct and unrelated to the next, and not a continuing offense. *Toussie* held that a crime cannot be treated as a continuing offense unless Congress has stated that intent in the underlying statute. The bank and mail fraud statutes cannot be treated as continuing offenses because Congress did not include any such intent in those statutes.

Consistent with *Toussie*, the Seventh Circuit in *U.S. v. Anderson*, 188 F.3d 886, 888, 889 (7th Cir. 1999) held that different transactions involving bank fraud are distinct from each other because each terminates when the lender is placed at risk: "[B]ank fraud is complete when the defendant places the bank at risk of financial loss, and not necessarily when the loss itself occurs . . . [The] bank fraud statute is meant to punish each execution of the scheme to defraud, and not each act in furtherance of the scheme to defraud." *See also, U.S. v. Ajayi*, 808 F. 3d 1113, 1120 (7th Cir. 2015). Here, the government alleged that each of the transactions, individually, constituted bank fraud. Pursuant to *Anderson*, each of these transactions was therefore completed and separated from the next when and if each institution was at risk of loss and all of the elements of the crime had occurred. As factually and legally completed, distinct acts, they should not have been straddled to the 2007 transactions to create a "scheme." The Seventh Circuit's disregard of *Anderson* ignored precedent from its own circuit.

Identifying what crimes are continuing offenses has been a chaotic exercise for federal courts, leading to conflicting approaches which result in splits. Scheme to defraud allegations have been abused, misused and overused by prosecutors, with protections afforded by the statutes of limitations being taken away. "Vital to our sense of justice is the notion that we may not subject someone indefinitely to the threat of potential criminal punishment." *U.S. v. Frequency Elecs.*, 862 F.Supp. 834, 843 (E.D.N.Y. 1994).

The Seventh Circuit's brief treatment of this issue is in conflict with contrary holdings by other circuits, necessitating this Court's guidance to address the issue of whether bank and mail fraud are continuing offenses. *See, e.g., U.S. v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984) (a crime is "complete" as soon as every element of the crime has occurred); *U.S. v. Reitmeyer*, 356 F.3d 1313, 1322 (10th Cir. 2004) ("If Congress intended the [crime] to be continuing offense, it could have clearly stated so."); *U.S. v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) (mail and wire fraud not a continuing offense); *U.S. v. Scarano*, 975 F.2d 580, 585 (same); *U.S. v. St. Gelais*, 952 F.2d 90, 97 (5th Cir. 1992) ("It is not the scheme to defraud but the use of the mails or wires that constitutes mail or wire fraud."); *U.S. v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994) (mail fraud is not a continuing offense); *U.S. v.*

Najjor, 255 F.3d 979, 983 (9th Cir. 2001) (bank fraud is a continuing offense); *U.S. v. Otto*, 742 F.2d 104, 107 (3rd Cir. 1984) ("[T]he applicable statute of limitations balances the government interest in prosecution with the need to protect who may lose their means of defense.").

The Seventh Circuit's opinion which denies these protections to Petitioner and future defendants, is a departure from precedential and statutory authority and allows confusion between the circuits to continue. This petition provides the Court with an opportunity to finally resolve these issues.

III. THE AGGREGATION OF DISTINCT, COMPLETED TRANSACTIONS INTO A SINGLE COUNT CONSTITUTED IMPROPER DUPLICITY WHICH DEPRIVED PETITIONER OF HER CONSTITUTIONAL RIGHTS

Federal law is clear. The joining of two or more offenses in the same count (duplicity) is a fatal defect. *See*, Fed. R. Crim. P. 12(b)(3)(B)(i). The government's hitching together of four separate, distinct and completed transactions constituted a duplicitous scenario that was vague and confusing to the jury and deprived Petitioner of constitutional rights.

Duplicity is the joining of two or more offenses in a single count. *U.S. v. Hughes*, 310 F.3d 557, 560 (7th Cir. 2002). When a defendant argues that a charge against him is duplicitous, the issue is whether the indictment alleges in one count the commission of multiple acts in violation of the same statutory provision, or alleges separate and distinct offenses in the same count. The former situation is proper, the latter is not. *U.S. v. Orzechowski*, 547 F.2d 978, 986 (7th Cir. 1976).

The government's assemblage of the transactions herein is rife with duplicity. There was no commonality among them. They took place on different dates over the course on a not unsubstantial three-year period. No one person was involved with all of them. They involved different types of transactions with different types of institutions. There was no common goal or objective. As stated above, they were not ongoing parts of a single continuing transaction. They were considered to each have been a completed transaction. *Anderson,* 188 F.3d at 889. As such, they are exactly what they appear to be: four isolated, distinct and completed transactions. Stringing them into a single count, lumping together non-bank and bank transactions so that otherwise time-barred transactions can be resurrected, is the very definition of duplicity.

Even the district judge recognized this when it stated that it would use special jury instructions to "mitigate against [t]he overall vice of duplicity". (App.116a). Despite this, the district judge denied Petitioner's request for such special jury instructions. Instead, the jury was instructed that:

> "For purposes of Count One, in considering whether the government has proven a scheme to defraud, the government must prove that one or more of the false or fraudulent pretenses, representations, or promises charged in the portion of the indictment describing the scheme be proved beyond a reasonable doubt. The government, however, is not required to prove all of them." (App.118a).
>
> "For purposes of Count Two . . . the government must prove at least one of the false pretenses, representations, promises, or con-

> cealment of material facts charged in the portion of the indictment describing the scheme beyond a reasonable doubt. However, the government is not required to prove all of them . . . " (App.118a-119a).

The result was jury confusion. "The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both." *U.S. v. Buchmeier*, 255 F.3d 415, 425 (7th Cir. 2001) (quotation marks and citation omitted). Put another way, "collapsing separate offenses into a single count . . . prevents the jury from convicting on one offense and acquitting on another." *U. S. v. James*, 749 F. Supp. 2d 705, 708 (S.D. Ohio 2010) (quoting *U. S. v. Campbell*, 279 F.3d 392, 398 (6th Cir. 2002)).

In Petitioner's case, the amalgamation of the separate transactions into a single count deprived her of the constitutional right to a unanimous verdict of the jurors regarding each and all of the transactions. For instance, she could have been convicted with three jurors finding her guilty regarding the 2004 transaction, a different three finding her guilty regarding the 2005 transactions, yet another three finding her guilty regarding the 2006 transactions and still three others finding her guilty regarding the 2007 transactions.

The verdict form perpetuated this confusion by allowing the jury to only find Petitioner innocent or guilty of each count, without specifying any unanimity regarding any particular transaction.

This duplicity also violated Petitioner's Fifth Amendment protection against self-incrimination. It prevented Petitioner from exercising her Fifth Amendment right to remain silent on some transactions and testify about others.

The constitutional and statutory rights of any person do not get to be ignored just because the government is up against the ten-year statute of limitations. The Seventh Circuit's affirmation of Petitioner's conviction never addressed these constitutional infirmities. This case gives the Court the opportunity to do so.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be issued by this Court.

Respectfully submitted,

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