NO. 21-_____

In the Supreme Court of the United States

JOSEPH JOHN PLANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over Mr. Plany's case?

2. Whether Mr. Plany received ineffective assistance of counsel?

4. Whether Mr. Plany was denied due process when a severance was not granted?

4. Whether high caseloads for district court judges constitute a violation of 28 U.S.C. § 636 and Article III of the United States Constitution?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page. There is no corporate disclosure statement required in this case under Rule 29.6.

LIST OF PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

No. 20-16689

United States of America, *Plaintiff-Appellee, v.*
Joseph John Plany, *Defendant-Appellant*

Date of Final Order: February 9, 2021

United States District Court for the District of Arizona

No. CV-19-00370-PHX-SRB

Joseph John Plany, *Petitioner, v.*
United States of America, *Respondent*

Date of Final Judgment: July 30, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joseph John Plany ("Plany"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

A copy of the Order of the United States Court of Appeals for the Ninth Circuit denying Plany a Certificate of Appealability is annexed at App.1a. A copy of the Judgment of the United States District Court adopting the Report and Recommendation and denying Plany's Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside or Correct a Sentence is annexed at App.2a. A copy of the Report and Recommendation of the Magistrate Judge of the District of Arizona is annexed as App.4a.

JURISDICTION

The date on which the United States Court of Appeals, Ninth Circuit issued its Order denying the request for a certificate of appealability was February 9, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution

§ 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before

mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all 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.

§ 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

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.

U.S. Const. amend. V

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 offence 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.

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. § 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;

(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); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

12 U.S.C. § 1813(c)(2)
Definitions relating to depository institutions

(2) Insured depository institution

The term "insured depository institution" means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter.

28 U.S.C. § 636
Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a

judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a

special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there

is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court

in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt Authority.—

(1) In general.—

A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.—

A magistrate judge shall have the power to punish summarily by fine or imprisonment,

or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.—

In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.—

In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge

to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.—

The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.—Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties ex-

ceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.—

The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United

States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the

judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.

STATEMENT OF THE CASE

Petitioner, Joseph John Plany, ("Plany") and Co-defendant, Paxton Anderson ("Anderson"), were indicted in the District Court of Arizona on September 11, 2012 on (31) counts of Bank Fraud in violation of 18 U.S.C. § 1344, and one (1) count of Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 1349. The charges were based on fraudulent construction loans for homes to be built in the State of Arizona between December 30, 2004 and June of 2009 by Anderson's construction companies, primarily Dynamite Custom Homes L.L.C. (Exhibit "A" of Plany's 28 U.S.C § 2255 Motion: Indictment). Plany was office manager of Anderson's companies.

Plany and Anderson were tried together. The joint trial started on May 8, 2014 and ended on June 4, 2014 when the jury returned verdicts against Plany and Anderson. After trial the Government dismissed Counts 7, 15, 28, & 29. Plany was found not guilty on Counts 1, 2, 3, and 8, and guilty on Counts 4-6, 9-14, 16-27, and 30-32. On May 18, 2015 Plany was sentenced to 48 months incarceration and 5 years supervised probation on each count to run concurrently. Dynamite Custom Homes was dissolved in June 2009, along with other Anderson Construction Companies.

A conspiracy was formed between Anderson, loan brokers, loan officers, and people who could prepare convincing false employment documents and income statements. Anderson and the co-conspirators would prepare false loan applications and other documents in the conspiracy. They would also recruit

'straw buyers', (Ones who could not qualify for a loan), to get construction loans. Once the loans were approved Anderson would use false 'Draw Consent' forms and 'Affidavit of Contractor' forms to obtain money from the loans.

When the conspiracy was proceeding another crime was committed. Anderson started taking money out of construction loan accounts to finance an extravagant lifestyle, such as buying racehorses. The conspiracy and thefts were exposed when legitimate buyers ended up owing substantial sums of money on construction loans without their home being built.

Plany discovered construction loans for homes were being falsified. When he questioned Anderson, he told him the buyers knew about false statements in loans, and after the house was built the construction loan would be paid off by the buyer.

Plany prepared documents and did other things involved in the conspiracy. He was not a conspirator. He did not participate in the planning, organizing, or profits from the conspiracy or money Anderson stole from buyers.

At Plany's Sentencing hearing the Court stated, " . . . But Mr. Plany didn't benefit, . . . he didn't get any of this money for himself or for any company over which he had any . . . for which he had any interest. He was a mere employee . . . There's no evidence that he was an owner or participant in profits or in any way from Dynamite Custom Homes or the other entities that might have existed." (RT 5/18/15 at pg. 6, Para. 2&3). The Court further stated, "I don't know what it was about Mr. Anderson that caused Mr. Plany to basically commit fraud, commit fraud for $2200 every

other week," (Plany's salary), and, "There was nothing in the evidence at trial that indicated that Mr. Plany was ever going to have an opportunity to participate in these hoped-for huge profits that they were going to make as a result of the speculation in custom homes." (RT 5/18/15 at pg. 64, para. 3).

At Co-Defendant Anderson's Sentencing hearing the Court stated, " . . . And based on the evidence at trial, Mr. Anderson used these loan proceeds, clearly exceeding a million dollars, for things that not only included buying and supporting and racing horses, but also indirectly to continue to prop up Dynamite Custom Homes by paying for things with construction draws that shouldn't have been paid for, like to make mortgage payments, by falsifying construction draws, taking construction draws on trumped-up invoices for nonexistent entities." (RT 5/18/15 at pg. 7 para 3). The Court went on to stated, "For Mr. Anderson, however, having heard all the evidence at trial and having reviewed the objections, the response and addendum, I agree that there is no question but that Mr. Anderson was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive. He was also the person that directed his employees to commit the various frauds that were committed after the loans were obtained, including obtaining draws based on fraudulent invoices forged signatures, cut-and-pasted signatures and so this . . . his activities as an organizer or leader went way beyond . . . well beyond the frauds that were involved simply on the loan application, but proceeded beyond that involved numerous other individuals . . . ." (RT 5/18/15 at pg. 9, para. 1).

Federal jurisdiction in the case was based on FDIC (Federal Deposit Insurance Corporation) insurance of a lender. The lender in the loans was a wholly owned subsidiary of M&I Bank, M&I Mortgage Company. The Government based jurisdiction on the FDIC insurance of M&I Bank. At the time the crimes were committed a subsidiary of a bank was not covered by the bank's FDIC insurance. The issue was raised in Plany's 28 U.S.C. § 2255 Motion ("§ 2255 Motion" or "Motion"). In the Direct Appeal the Ninth Circuit considered evidence on lack of FDIC insurance and concluded there was 'insufficient evidence' presented on the issue. Exhibits in Plany's Motion show M&I Mortgage Company as the lender. (One buyer listed obtained their own financing). The exhibits are Spreadsheets, Draw Consent forms, and Affidavit of Contractor forms.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL COURT DID NOT HAVE JURISDICTION OVER PLANY'S CASE BECAUSE HE WAS CONVICTED ON CHARGES INVOLVING A MORTGAGE COMPANY THAT WAS NOT FDIC INSURED.

"Federal courts are under a continuing duty to confirm their jurisdictional power and are obliged to inquire *sus sponte* whenever a doubt arises as to [its] existence." *Acosta v. Direct Merchs. Bank*, 207 F.Supp.2d 1129, 1130 (S.D. Cal. 2002), *quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977).

The Government elected to prove jurisdiction in Plany's case on the FDIC insurance of M&I Bank. However, documents provided the defense and used at trial, and set out in Plany's exhibits, only named M&I Mortgage Corporation as the lender of the construction loans. In the Government's Response to the Motion, they did not dispute the authenticity of the documents in Plany's exhibits. The evidence the government presented at trial was the same evidence the Ninth Circuit found "insufficient". The Government ignored the new evidence in Plany's exhibits and argued the Court of Appeals finding of insufficiency of evidence outweighed the evidence in Plany's exhibits. The documents in Plany's exhibits consisted of Spreadsheets that show all the loans were made by M&I Mortgage Company except one, (where the buyer obtained their own financing), and executed 'Draw Consent' forms and 'Affidavit of Contractor' forms

that show the transfer of money from the loans to one of Anderson's bank accounts.

The District Court rejected the documents in Plany's exhibits in favor of a Report and Recommendation (R&R) prepared by a Magistrate Judge. The District Court adopted the Magistrate Judge's R&R, that recommended denial of Plany's Motion, and denial of a Certificate of Appealability. The Ninth Circuit Court of Appeals denied a Certificate of Appealability.

It is a federal crime to knowingly execute, or attempt 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." 18 U.S.C. § 1344. "Financial entity" is defined, as relevant to this case, as any bank or savings association the deposits of which are insured by the Federal Deposit Insurance Corporation ("FDIC"). *See* 18 U.S.C. § 20(1) (emphasis added); 12 U.S.C. § 1813(c)(2); *United States v. Bennett*, 621 F.3d 1131, 1133 (9th Cir. 2010). Thus, under § 1344, the defrauded financial institution's federally-insured status is a jurisdictional prerequisite and necessary for the establishment of federal jurisdiction. *See United States v. Sanders*, 343 F.3d 511, 516 (5th Cir. 2003); *See also United States v. Ayewoh*, 627 F.3d 914, 917 (1st Cir. 2010) and *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996).

In May 2009, Congress amended the definition of "financial institution" to include mortgage lending businesses. *See* 18 U.S.C.S. § 20(10). However, the Bank Fraud charges in Plany's Indictment ran from

12/10/2004 to 04/03/2007. The conspiracy charge in Plany's case incorporates the bank fraud charges as Overt Acts, that ran from 12/03/2004 to 12/15/2007. Therefore, the amendment does not apply to Plany's case.

In *United States v. Bennett*, 621 F.3d 1131, 1133 (9th Cir. 2010), the important facts are the same as in Plany's case. In *Bennett* the defendant was convicted of three (3) counts of bank fraud arising from mortgages the defendant fraudulently procured from Equicredit Corporation, a wholly owned subsidiary of Bank of America. The evidence against the defendant was that he fraudulently procured funds from Equicredit; Equicredit was not FDIC-insured; Equicredit was a wholly owned subsidiary of Bank of America; and Bank of America was FDIC-insured. Based on these facts, the Court concluded that no rational trier of fact could have found the defendant guilty under 18 U.S.C. § 1344 because defendant did not defraud a "financial institution" or procure assets "owned by" a "financial institution." *Bennett*, 621 F.3d at 1138. The Court based its holding in *Bennett* on the reasoning that, "a parent corporation does not own the assets of its wholly-owned subsidiary by virtue of that relationship alone." *Id.* As a result, the Ninth Circuit found that the defendant's convictions for bank fraud could not stand. *Id.* In Plany's case, the Government did not dispute M&I Mortgage Corporation was a subsidiary of M&I Bank, and that M&I Mortgage Corporation did not have FDIC Insurance.

In *United States v. Banyan*, 933 F.3d 548, 551 (6th Cir. 2019), the Sixth Circuit reversed the defendant's convictions for Bank Fraud (18 U.S.C. § 1344) and Conspiracy to Commit Bank Fraud (18 U.S.C.

§ 1349) because the fraud was not perpetrated against the banks, but instead against subsidiaries of the banks', mortgage companies, that were not FDIC insured. In *Banyan* the record demonstrated that the fraudulent loans (obtained in 2006-2007) were funded by SunTrust Mortgage Company and Fifth Third Mortgage Company, subsidiaries of SunTrust Bank and Fifth Third Bank, both banks were FDIC insured. On that basis, the defendants challenged the sufficiency of the evidence for their convictions.

In *Banyan* the problem with the government's case was that neither of the mortgage companies from which the defendants obtained funds were "financial institutions" as defined by 18 U.S.C. § 20, because neither of those companies had deposits that were federally insured. The Court rejected the government's argument that the mortgage companies should be regarded as "financial institutions" because they were subsidiaries of the banks. The Court found that argument to be "nearly frivolous." The government offered no evidence that either of the parent banks funded the loans at issue. Even though there was evidence that one of the defendants made mortgage payments with checks made out to "SunTrust Bank" rather than to "SunTrust Mortgage Company", the Court found that those checks were not enough for a jury to find beyond a reasonable doubt that, when the defendants submitted fraudulent loan applications to the mortgage companies, they actually intended to obtain funding from the banks. The Court stated, "'The government did not even try to prove that the defendants schemed to obtain bank property. Instead, the government argue the parent banks "owned" the funds that the mortgage companies provided to the defendants.'" The Sixth

Circuit noted this argument had already been rejected by the Ninth Circuit in *United States v. Bennett*, 621 F. 3d 1131 (9th Cir. 2010).

In Plany's case the pivotal facts are the same as in *Banyan*: 1. The charges against Plany were Bank Fraud, and Conspiracy to Commit Bank Fraud. 2. M&I Mortgage Corporation was a wholly owned subsidiary of M&I Bank. 3. M&I Bank was FDIC insured. 4. M&I Mortgage Corporation was not FDIC insured, and 5. M&I Bank's FDIC insurance did not extend to its subsidiary M&I Mortgage Corporation.

In the *Banyan* opinion, at pg. 4, the court stated, "'As used in these provisions, the term "financial institution" means, as relevant here, a "federally insured depository institution." . . . . That subsection "requires that a defendant "knowingly executed, or attempted to execute, a scheme or artifice with at least two elements." The first element is that defendant must inten[d] to obtain bank property. The second element is that "the envisioned result—*i.e.*, the obtaining of bank property-[must] occur 'by means of false or fraudulent pretense, representations, or promises." "That second element is met when "the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control.'" . . . The opinion further states, (at pg. 4, 2nd column), "'The government proved neither element here. The basic problem with the government's case is that neither of the mortgage companies from which the defendant obtained funds were "financial institutions" as defined by § 20, because neither of those companies had deposits that were federally insured. That statutory determination is straight forward as they come." . . . "And Congress has

precisely defined the term "financial institution," as relevant here, to apply to institutions that hold federally insured deposits—which the defrauded mortgage companies undisputedly did not.'"

In *Banyan* the court rejected various arguments made by the government, to try and shift the loans made by the mortgage companies to the parent banks. Rejected arguments consisted of: The bank 'owned' the funds the mortgage company provided to defendant; The bank had 'custody or control' of the mortgage company funds; The bank had a 'duty to protect' the funds of its subsidiary; The bank had the power or authority to guide or manage the mortgage company's funds; The jury could reasonably infer the funds obtained from the mortgage company belonged to the bank, because the losses incurred by the mortgage company would flow directly up to the bank, which would diminish the value of the bank.

In *Banyan*, the court made it clear: In a charge of Bank Fraud or Conspiracy to Commit Bank Fraud, the 'intent' of the perpetrator, and resulting 'act' of the perpetrator, has to be to obtain money, or other things of value, held by a bank.

Plany did not have the 'intent' to obtain money from M&I Bank. (*See* the Court's statements at sentencing set out in 'Summary of Case'), which shows Plany did not have the required intent to steal from M&I Bank.

Numerous times during trial the prosecutor referred to the construction loans as being financed by M&I Bank. Plany's exhibits contradicted the assertion and the testimony of co-defendants who had cooperating witness agreements or were given immu-

nity. The exhibits in Plany's Motion are authentic and transactional. They are 'Spreadsheets' that set out the loans and show the lender as M&I Mortgage Company, (Exhibit "I"). They are documents that show the transfer of money from the loans to Anderson's bank accounts: Samples of executed 'Draw Consent forms', (Exhibit "G"), and executed 'Affidavit of Contractor' forms, (Exhibit "H"). The Consent and Affidavit forms show the M&I Mortgage Corporation insignia at the top of the page; The loan number under which it states M&I Mortgage Corp.; Signed approval, and where the money was to be deposited, in one of Anderson's company bank accounts. The documents are undeniable evidence of the lack of federal jurisdiction in Plany's case.

28 U.S.C. § 2255 explicitly authorize motions to vacate based upon allegations "that the court was without jurisdiction to impose such sentence." 28 U.S.C. § 2255(a). Proof of FDIC insurance is not only an essential element of bank fraud, it is necessary for the establishment of federal jurisdiction. *United States v. Sanders*, 343 F.3d 511, 516 (5th Cir. 2003). A federal court may not entertain an action over which it has no jurisdiction. *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000) (emphasis added). A federal prisoner who wishes to challenge the validity or constitutionality of his conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. *Tripati v. Henman*, 843 F.2d 1160, 1162 (9th Cir.1988). Without FDIC insurance the District Court did not have jurisdiction in Plany's case. For this reason, this Court should grant certiorari and reverse Plany's convictions and vacate his sentence.

II. PLANY WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT WHEN A SEVERANCE WAS NOT GRANTED.

A district court should grant a severance under Rule 14 if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 938 (1993). The defendant seeking severance bears the burden of showing undue prejudice of such a magnitude that, without severance, he will be denied a fair trial. *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011). Prejudice may arise where: (a) the jury could confuse and cumulate the evidence of one charge to another; (b) the defendant could be confounded in presenting his defenses; and (c) the jury could erroneously conclude the defendant is guilty on one charge and therefore convict him on another based on his criminal disposition. *United States v. Johnson*, 820 F.2d 1065, 1070 (9th Cir. 1987).

Plany and Anderson were tried together. Plany was the only defendant besides Anderson who had not received a cooperating witness agreement. Plany's counsel and Anderson's counsel agreed to a "Joint Defense," and that Anderson's counsel would be the lead attorney. The agreements effectively prevented Plany from presenting a defense because his testimony would undermine Anderson's defense.

Almost all the substantive evidence presented at trial went against Anderson, the mastermind of the conspiracy, who stole millions from people who hired him to build them a home. Plany was not a co-conspirator. He was a low-level employee who did

not make money from the conspiracy or from Anderson's thefts. Plany was threated and intimidated by Anderson to cooperate in the conspiracy. (*See* the Court's statements in "Summary of Case"), where the court could not understand why Plany participated in the conspiracy. The court was unaware of the threats and intimidation.

At trial the prosecutor tried to connect Plany to all the misconduct of Anderson, to make it appear he was as guilty as Anderson. At trial the prosecutor argued Plany was as guilty as Anderson because he was a CPA (Certified Public Accountant). Plany was not a CPA. Throughout the trial the prosecutor tried to show Plany received money from the conspiracy and from the money Anderson stole from buyers. Plany did not receive money from the conspiracy or from money Anderson stole from buyers. (*See* statements made by the court at Plany's sentencing hearing, pgs. 10&11 *supra*, (RT 5/18/15, at pg. 6, para. 2&3 and RT 5/18/15 at pg. 64, para. 3).

The joint defense agreement and Anderson's attorney being the lead attorney, gave Anderson control of the trial which prevented Plany from testifying in his own behalf and offering evidence to support his testimony. Plany was not allowed to testify because his testimony would have been damaging to Anderson's defense.

If Plany had been able to testify, in a separate trial, he would have been able to separate himself from Anderson and respond to the prosecutor's allegations; tell the jury he was not a part of the conspiracy; not a CPA; did not receive money from the conspiracy or money Anderson stole; did not steal money from

Anderson's businesses; and did not have the intent to steal money from M&I Bank.

III. PLANY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

A. Ineffective Assistance of Counsel for Failure to Pursue a Cooperation Agreement.

The benchmark for assessing a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Defendant must demonstrate (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000), quoting *Strickland*, 466 U.S. at 688, 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Wiggins v. Smith*, 539 U.S. 510, 525 (2003).

It has long been held that criminal defendants are entitled to effective assistance of counsel during all critical stages of the criminal process. *Powell v. Alabama*, 287 U.S. 45, 57 (1932); *Brewer v. Williams*, 430 U.S. 387 (1977). During all critical stages of a prosecution, it is counsel's "duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. Those obligations ensure that the ultimate authority remains with the defendant "to make certain

fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

In the early stage of Plany's case his counsel was devoid of representation. He did not make himself aware of facts in potential charges, he did not interview Plany to find facts that supported a defense, and he did not counsel Plany to pursue a cooperating witness agreement. Counsel waited three years before approaching the prosecutor for a cooperating witness agreement. It was too late.

Counsel was a seasoned defense attorney, with 30 years of experience. (*See* Exhibit "D" of Plany's § 2255 Motion). Based on the circumstances of Plany's case and the prosecutor's willingness to negotiate an agreement, there is no excuse for counsel's conduct.

The prosecutor was interested in Plany's cooperation. He stated, "We were absolutely interested in cooperation of Plany . . . . Indeed, many of the witnesses during trial prep have expressed surprise that he did not come in to help himself . . . . Given Plany's inside role he should have cooperated but didn't." (*See* Exhibit "E" of Plany's Motion). The prosecutor told counsel, "It isn't until nearly three years later that he (Plany) has decided to cooperate in some last ditch effort." (*See* Exhibit "E" of Plany's Motion). By that time co-conspirators and others involved in the case had made favorable cooperating witness agreements and Plany's testimony was not needed. This left Plany in a position where he had to go to trial with Anderson, the person who orchestrated the conspiracy and stole millions from buyers.

One of the cooperating witnesses, a co-worker of Plany's who had stolen thousands of dollars from Anderson's businesses, was given immunity for her testimony. She had the same job and did the same things as Plany. Had counsel not ignored the case for three years Plany could have received immunity for his testimony, as his co-worker did, and not end up with multiple felony convictions and a sentence of four years in prison. (*See* exhibit "E" of Plany's Motion), where the prosecutor stated, "I am certain that we would have accepted his (Plany's) cooperation short after arrest." If counsel had been diligent in pursuing a resolution in Plany's case, there is more than a reasonable probability the outcome in Plany's case would have been different.

B. Ineffective Assistance of Trial Counsel for Agreeing to a Joint Defense.

Plany was tried with Anderson. Plany's counsel agreed to a joint defense and to let Anderson's attorney be the lead attorney at trial. Plany's attorney was an experienced criminal defense attorney so he had to know a joint defense would not be in the best interest of his client. The agreements effectively stopped Plany from presenting a defense. Anderson's attorney would not let Plany testify because his testimony would be damaging to Anderson's defense.

If Plany had a separate trial, he would have been able to testify and offer evidence on his own behalf. At Plany's Sentencing hearing the Court confirmed Plany's defense would be substantially different than Anderson's. At the hearing the court stated, " . . . But Mr. Plany didn't benefit, . . . he didn't get any of this money for himself or for any company over which he

had any . . . for which he had any interest. He was a mere employee . . . There's no evidence that he was an owner or participant in profits or in any way from Dynamite Custom Homes or the other entities that might have existed." (RT 5/18/15 at pg. 6, Para. 2&3). Despite the court's acknowledgment Plany made no money from the conspiracy or from the money Anderson stole, Plany was ordered to pay $2,888,399.00 in restitution. (*See* Judgment & Commitment filed in District Court on 5/21/2015). There is more than a reasonable probability the outcome in Plany's case would have been different, but for the ineffective assistance of trial counsel.

IV. EXCESSIVE CASELOADS FOR DISTRICT COURT JUDGES CONSTITUTE A VIOLATION OF 28 U.S.C. § 636 AND ARTICLE III OF THE UNITED STATES CONSTITUTION.

Overwhelming caseloads have forced District Court Judges ("District Judges") to 'assign' Magistrate Judges the duty to evaluate, write an opinion, and make a decision in § 2255 Motions. The Magistrate Judge prepares a document called a "Report and Recommendation" ("R&R"). In an Order, the District Judge can adopt the R&R and it becomes the opinion and decision on the Motion.

A District Judge is required to do a *de novo* review of the research, opinion, and decision in the R&R, and the evidence and law in the Motion before it can become law. Because of excessive caseloads a District Judge does not have the time to do a bona fide *de novo* review of the Motion and has to rely on the R&R being the right reasoning and decision in the Motion. A Magistrate Judge does not have authority to make the dispositive decision in a Motion.

The authority of Magistrate Judges is limited by 28 U.S.C. § 636, under which a Magistrate Judge is only allowed to decide non-dispositive matters, but not dispositive ones. *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015). In dispositive matters, the Magistrate Judge can go no further than issuing a Report and Recommendation to a District Court Judge, who must then undertake *de novo* review. *Id.* If a Magistrate Judge is allowed to enter a final order in a § 2255 Motion proceeding, that order is not reviewable by the district court. *United States v. Johnston*, 258 F.3d 361, 371 (5th Cir. 2001). Magistrate Judge authority over such proceedings would turn the concept of reviewability on its head. *Id.* (consensual delegation of § 2255 motions to Magistrate Judges violates Article III of the Constitution).

There are risks in a District Judge not having sufficient time to do a bona fide *de novo* review of the Motion and rely on a Magistrate Judge's R&R as the resolution of the Motion. The Motion challenges previous decisions in the case. Congress appoints a District Judge for life, so they can be protected when making controversial decisions. A Magistrate Judge does not have that protection. A Magistrate Judge is an employee, so they may have an incentive to prepare an R&R that is not offensive to the people who could affect their future.

The incentives create a risk of an R&R being the wrong analysis and decision in a Motion. If a District Judge had time to do a genuine *de novo* review of an R&R and the evidence and law in the Motion, they would be able to determine if the R&R is accurate and the right decision.

The House Judiciary Committee held a hearing on February 24, 2021 about the need to expand the federal bench. Dominguez, Maritza, *Gaggle Podcast: Why Legal Experts And Federal Judges Call For A Judiciary Expansion In Arizona*, www.azcentral.com, 6/2/2021 (App.36a). The Federal District Court in Arizona "has been struggling to keep pace with a staggering caseload" as reported by U.S. District Judge Diane Humetewa. Knappenberger, Ryan, *Judge Tells Lawmakers Arizona Federal Courts Are Overloaded, Overworked*, Cronkite News, 2/24/2021 (App.32a). Judge Humetewa testified about the longstanding, unmet need for more federal judges in Arizona, where there is a legal backlog. "In Arizona, the status quo simply cannot meet the constitutional mandate to administer meaningful justice to all." (App.33a). In fiscal year 2020 in the Arizona district, there was an average of 663 cases per judge. *Id.* Both Democrats and Republicans agreed at the hearing the nation is "overdue" for more federal judges. (App.34a).

In Plany's Motion the R&R is deceptive and wrong. It avoids addressing violations of Supreme Court law and the evidence in Plany's Motion. The exhibits in Plany's Motion show undeniable evidence the construction loans were made by M&I Mortgage Company. Nowhere in the R&R did the Magistrate Judge challenge the accuracy of facts in the exhibits of Plany's Motion. The exhibits consist of Spreadsheets from M&I Mortgage Company that show all the construction loans were made by them except one, where the buyer obtained their own financing; Executed Consent and Affidavit of Contractor forms that show the actual transfer of money from M&I Mortgage Company to Anderson's bank accounts; Copies of emails from the

prosecutor that show he would have liked Plany to be a Government witness, and that Plany's attorney waited three years before approaching him for a cooperating witness agreement, which was too late; and excerpts from transcripts where the District Judge stated Plany was not a conspirator and did not receive money from the conspiracy or from the money Anderson stole from buyers.

The R&R in Plany's Motion was wrong when considering the irrefutable evidence in the Motion. It appears the Magistrate Judge either made up their mind before preparing the R&R or was influenced by factors that caused them to ignore the evidence in Plany's exhibits and rely on extraneous evidence to support denying the Motion.

The R&R in Plany's Motion is defective. It was not an objective evaluation of the evidence and law in Plany's Motion, and there was not a bona fide *de novo* review of the Motion. Therefore, the R&R in Plany's Motion should be set aside, and the case dismissed.

CONCLUSION

Plany's case involves Constitutional violations of jurisdiction, the right to effective assistance of counsel, and the right to a severance. Therefore, Plany requests the Court grant certiorari and dismiss the case because the errors cannot be corrected.

Respectfully submitted,

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