No:

In The
Supreme Court of the United States

OCTOBER TERM 2022

KATRINA BROWN *Petitioner*,
v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE DISTRICT COURT COMMITTED ERROR BY ORDERING THE DEFENDANT TO GO FORWARD WITH CLOSING ARGUMENT WITHOUT STANDBY COUNSEL LANDES BEING PRESENT IN THE COURTROOM AND AVAILABLE TO ASSIST THE DEFENDANT DURING HER CLOSING ARGUMENT AND THE GOVERNMENT'S CLOSING ARGUMENT AND MR. BROWN'S CLOSING ARGUMENT?

II.

WHETHER THE DISTRICT COURT COMMITTED ERROR BY FAILING TO GRANT THE DEFENSE'S MOTION FOR SEVERANCE, RENEWED MOTION FOR SEVERANCE DURING THE TRIAL SINCE JOINDER OF DEFENDANTS WAS PREJUDICIAL TO THE SUBSTANTIAL RIGHT OF THE DEFENDANT TO A FAIR TRIAL?

III.

WHETHER THE DISTRICT COURT COMMITTED ERROR WHEN IT DID NOT SUA SPONTE OBJECT TO THE GOVERNMENT'S CLOSING ARGUMENT THAT TAXPAYER'S FUNDS WERE BEING SPENT ON THE FRAUDULENT ACTIVITY BY THE DEFENDANT?

LIST OF PARTIES

The parties to this Writ of Certiorari appear in the caption of the cause on the title page. (Reginald Brown was a co-defendant in the District Court case. Mr. Reginald Brown is an appellant in 20-14254. Both parties Katrina Brown and Reginald Brown filed separate briefs to the Eleventh Circuit. The Eleventh Circuit Court of Appeals issued a consolidated opinion addressing Katrina Brown and Reginald Brown's arguments see Appendix (A).)

PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS DIRECTLY RELATED TO THIS CASE

United States District Court (M.D. Fla:

United States v. Katrina Brown, No 3:18-cr-00089-MMH-JRK (November 3, 2019)

United States Court of Appeals (11th Cir.);

United States v. Katrina Brown No. 20-14254 (November 19, 2021)

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Katrina Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on November 19, 2021.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not published. The Eleventh Circuit's opinion dated November 19, 2021 is contained within the appendix (A).

JURISDICTION

The Eleventh Circuit issued its decision on November 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254. Ms. Brown timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (May 9, 2022) and Rule 29. Rule 13 (3) states "...But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." The February 8, 2022 Order from the Eleventh Circuit denying the appellants' Petition(s) for Rehearing is located at appendix (D).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

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."

STATEMENT OF THE CASE

A. The Indictment

A grand jury returned a thirty-seven count indictment, charging Katrina Brown with Count one violation of 18 U.S.C. section 1349 Conspiracy to Commit Mail and Wire Fraud, Counts 2 through 14 violation of 18 U.S.C. sections 1341 and 2 Mail Fraud, Counts 15 to 27 violation of 18 U.S.C. sections 1343 and 2, Wire Fraud, Counts 28 to 33 violation of 18 U.S.C. sections 1957 and 2, Illegal Monetary Transactions, Counts 34 and 35 violation of 18 U.S.C. sections 1349 and 1344, Attempted Bank Fraud, Counts 36 and 37, violation of 18 U.S.C. 1014, False Statement to a Federally Insured Institution. (appendix (C))

B. Dates of Trial

Ms. Brown went to a jury trial (with the co-defendant Reginald Brown) during the time period of September 23, 2019 to October 2, 2019.

C. Verdict of the Jury

The jury found Ms. Brown guilty of all thirty-seven counts contained in the Indictment.

D. Sentence of the Appellant

The petitioner sentence was imprisonment for 33 months consisting of 33 months as to Counts 1 to 37, all such terms to concurrently; Supervised Release: 60 months, consisting of 36 months as to Counts 1-33 and 60 months Counts 34 to 37 all such terms to run concurrently; Special Assessment: $3700.00 and Restitution: of $210,540.99 to the City of Jacksonville and $214,785.69. (appendix (B))

REASONS FOR GRANTING THE PETITION

The Sixth Amendment to the United States Constitution provides that:

"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."

I

The District Court committed error by permitting the defendant to go forward with closing argument without Standby Counsel Landes being present in the courtroom and available to assist the defendant during her closing argument and the government's closing argument and Mr. Brown's closing argument.

The petitioner would argue that standby counsel is constitutional required to be present during crucial parts of the trial if the defendant has not invited error for the absence of standby counsel. An order from the district court pursuant to *Faretta v. California*, 422 U.S. 806 (1975) appointed Mr. Landes and Mr. Leombruno as appellant's standby counsel. The district court entered an order defining the role of standby counsel Landes and Leombruno and quoted *McKaskie v. Wiggins*, 465 U.S. 168, 176 (1984) and stated in said order:

> . . . However, standby counsel serves an important role, is "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary..."

During the first day of trial, standby counsel Mr. Landes was experiencing a medical condition and had a swelling in his eyes. Mr. Landes requested that a day of trial end at 4:00 p.m. or earlier so he could go to his doctor for a cut to relieve the swelling above his eye. The Court

allowed Mr. Landes to leave at 3:50 p.m. the next day, 10 minutes before termination of the day, after first consulting with the Defendant for her input. [Doc 339-Pg 14-15]. The Assistant U.S. Attorney attempted to have the trial go forward to 5:00 p.m. to 5:30 p.m. The district court admonished the prosecutor that the parties had agreed the day before that Mr. Landes would be leaving 5 to 10 minutes early to make his doctor's appointment and the Court would not go forward to 5:00 to 5:30 with trial without Mr. Landes. The Court obviously was conscious of its order describing the duties as standby counsel having an important role and did not desire to go forward f without standby counsel Mr. Landes present. (Mr. Leombruno, had been relieved of all counsel duties on August 30, 2019.)

The district court's order denying the Motion for New Trial stated ". . .Ms. Brown consulted with and received assistance from standby counsel on countless occasions throughout the trial. . ."

In *McKaskie v. Wiggins,* 465 U.S. 168, 183 (1984) (noting "*Faretta* does not require a trial judge to permit 'hybrid' representation.") The appellant would agree *Faretta* stands for the proposition that no court is bound to permit a 'hybrid' representation of the defendant being a co-counsel with counsel of record and dividing the duties of a defense before

the jury. However, there was still a question of the constitutionality for the assistance of standby counsel with Justice Blackmun and Chief Justice Rehnquist in the dissent in *Faretta v. California*, 422 U.S. 806 at 852 (1975) when the justices proposed this question:

> ...If a defendant has elected to exercise his right to proceed pro se, does he still have a constitutional right to assistance of standby counsel? . . .

The petitioner would also argue that *McKaskie* at 183 states:

> *Faretta* does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much their force. A defendant does not have a constitutional right to choreograph special appearances by counsel...

Ms. Brown was not desiring a "hybrid' representation nor was she attempting to choregraph special appearances by counsel. The petitioner simply wanted standby counsel to be present during her closing arguments, Mr. Brown's closing argument, and the Government's closing arguments.

In *McKaskie v. Wiggins*, 465 U.S. 168, 176 (1984) the Supreme Court stated:

> . . . However, standby counsel serves an important role, is "to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary..."

Ms. Brown's standby counsel Mr. Landes was absent from the courtroom on October 1, 2019 during closing arguments. The District Court informed the parties that Mr. Landes had called and spoke to the deputy clerk that he was sick and unable to appear in court. An exchange took place between the Court and the appellant about her preference and what she wanted done. Ms. Brown's preference and request was not to go forward with closing arguments without her standby counsel's presence in the courtroom. The government expressed a preference to go forward. Mr. Brown's counsel deferred to the District Court's ruling. The District Court made a ruling that Ms. Brown was required to go forward without standby counsel.

During the *Faretta* hearing on August 1, 2019 the magistrate judge went into one of the duties of standby counsel which was to take over the case if the defendant decided not to continue with representation. In the District Court's order defining the duties of standby counsel the Court states in paragraph (1) "Standby Counsel is expected to be fully prepared for trial and shall remain so, in order to be able to take over the defense of the case if requested by the Defendant or order by the Court."

One of the reasons the petitioner gave for not wanting to go forward with the closing arguments unless her standby counsel was present in Court was as follows:

> . . . The reason why I always like to have my standby counsel in place is because when I decided to go pro se, when I was appointed a standby counsel, I know that the Court stated to me at any point during the case if I had any reservations about proceeding that he would be able to take over and present my case for me. . .

The defendant was told by the magistrate judge that there would be a standby counsel present and available to take over the defense of the case if she chooses not to continue with pro se representation. The defendant was informed by the written order of the District Court there would be a standby counsel present to take over if the defendant decided not to continue pro se representation. The petitioner started with two standby counsel on August 2, 2019. On the morning of October 1, 2019, the petitioner had no standby counsel present in the courtroom to assist her.

The petitioner did not "invite error" with the absence of her standby counsel. Indeed, the petitioner was not even aware why her standby counsel was absent until the Court informed her. The factual pattern in the petitioner's case is different than *United States v. Wilson*, 2020 U.S. App.

LEXIS 33748, 979 F. 3d 889 (11th Cir 2020) when the defendant "invited error" contributing to the absence of standby counsel. The undersigned counsel will be requesting this court revisit and limit *Wilson* to only a defendant who has "invited error". The petitioner would argue that the constitutional requirement of standby counsel was questioned by the dissent in *Faretta* because this question was never answered by the majority in *Faretta*. The petitioner would argue that *McKaskie* did not answer the question posed by the dissent in *Faretta*. In *Wilson* at 49 this Court stated:

> Alternatively, even assuming arguendo that the district court erred in proceeding with the trial without standby counsel present, any error was harmless. See *United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir 1997) (explaining that, if an appellant cannot demonstrate that he was prejudiced by the district court's erroneous ruling regarding counsel, the error was harmless), modified on other grounds by *United States v. Toler*, 144 F.3d 1423 (11th Cir 1998). To demonstrate prejudice, Wilson must show that but for standby counsel's absence the results of his trial would have been different. See id.

The petitioner would argue that prejudice occurred that puts the verdict in doubt because during the government's closing argument "golden rule" violations occurred. During the government's closing argument, the appellant did not have standby counsel to consult with for possible objections during said argument. The petitioner will further argue that she

was prejudiced during her closing argument when Mr. Bell (Mr. Brown's counsel) objected to her closing argument. Ms. Brown did not have standby counsel to counsel with pertaining to Mr. Bell's objection. The government objected twice during Ms. Brown's closing argument. Ms. Brown did not have the opportunity to consult with standby counsel concerning the government's objections. Even if the petitioner was a trained trial lawyer, unexpectedly taking away a member of the trial team that the petitioner had consulted with and received assistance from on countless occasions throughout the trial would prejudice the presentation of closing argument for the defense that would put the outcome of the trial into question.

II

The District Court committed error by failing to grant the defendant's motion for severance and renewed motion for severance during the trial, since joinder of defendants was prejudicial to the substantial right of the defendant to a fair trial.

The second claim of petitioner is that her motion for severance was denied and joinder of the defendants was prejudicial to the substantial right of the defendant to a fair trial. The district court denied the Defendant's motion for severance by the order published on April 3, 2019.

The district court erred by failing to grant the Defense's renewed

Motion for Severance during the trial. The petitioner's original motion for severance alerted the district court the Defendants would have mutual antagonistic defenses. The co-defendant's, Reginald Brown, motion for severance of defendants also alerted the district court that Mr. Brown's theory of defense was to blame the petitioner for lying to the lenders and Mr. Brown simply relied on Ms. Brown's business acumen. The motion further alerts the district court that Mr. Brown's defense is completely antagonistic to Ms. Brown's position. Defendants who are indicted together are usually tried together," especially in conspiracy cases. *United States v. Browne*, 505 F.3d 1229, 1268 (11th Cir. 2007). "The exceptional circumstances justifying a deviation from [this] rule...are few and far between." *United States v. Lopez*, 649 F. 3d 1222, 1234 (11th Cir. 2011).

There's "a two-step test for determining whether a defendant is entitled to a new trial due to district court's refusal to sever prior to trial or to grant a mistrial once trial has commenced." *United States v. Blankenship,* 382 F.3d 1110,1122 (11th Cir. 2004). A defendant must demonstrate that (1) the joint trial prejudiced her and (2) severance was the proper remedy for the prejudice. *Zafiro v. United States,* 506 U.S. 534, 539(1993);

Blankenship, 382 F.3d at 1122. Even if prejudice is appropriately demonstrated, "less drastic measures, such as a limiting instruction, often will suffice to cure any risk of prejudice." *Zafiro,* 506 U.S. at 539. The only two circumstances in which severance is the only permissible remedy are "if there is a serious risk that a joint trial would [1] comprise a specific [constitutional] trial right of the defendants or [2] prevent the jury from making a reliable judgment about guilty or innocence." *Blankenship*, 382 F. 3d at 1122-23.

Reginal Brown's attorney stated his client would take the stand in his opening when he stated:

"Now, as we gather here over the course of the next seven to ten days for you to decide whether the United States can convince all of you beyond a reasonable doubt that Mr. Brown committed the crimes charged in this indictment, as you probably figured by now, Mr. Brown will give up that valuable important right to remain silent and take the stand in his own defense to these serious conspiracy charges of mail, wire fraud, and money laundering."

Unfortunately, Mr. Brown never took the stand in this case after the below arguments by Mr. Brown's counsel were made.

Reginald Brown's attorney made these arguments and demonstrated his defense strategy in opening statement:

". . . Virtually all the evidence, ladies and gentlemen, that you will hear this case will concern whether Katrina Brown fraudulently induced the lender, BizCapital, to disburse funds from a loan agreement to her family's business made with the bank, and related to this question is the evidence of whether those false representations that she made were material to the bank's decision to issue the check for the money...."

"...It is after he learns that he might be implicated in this allegation that he confronts Ms. Brown directly about those allegations"

"It is at this meeting he asked her, he tells: The FBI is investigating me. What's going on?"

"It's at this meeting Katrina Brown admits tearfully that she did it. She prepared the false invoices. She e-mailed the lender. She often times picked up the deliveries from his home."

"Reginald Brown had no knowledge of the- –that she submitted false invoices to the lender. . ."

Through his attorney, Reginald Brown made these arguments and further demonstrated his defense strategy in closing statement:

". . .I leave for you to consider whether the United States has proven its case against Katrina Brown beyond a reasonable doubt with this cautionary note."

"Judge Howard has advised you, instructed you, the law is that you must consider the evidence against each person individually, each citizen independently. In short, if you find one guilty, that does not mean, compel that you require Reginald Brown guilty. . ."

". . .Now, where was that found? In the search warrant of Katrina Brown's warehouse."

"It wasn't found anywhere connected— - and it's the kind of evidence that got—that really come out through the defense case, that shows kind of the minimal or lack of evidence for Reginald Brown; it may actually be somewhat incriminating for Katrina Brown..."

". . .So, keep in mind, you can't have a conspiracy charge, ladies and gentlemen. You've got to have another player, because otherwise, it's just a number of individual crimes as to Katrina Brown..."

". . .And it may help you for your purposes when you compare the whatever that mountain of evidence may be against Katrina Brown preparing and mailing falsified invoices to BizCapital—there is simply no evidence that Reginald Brown knew of it and helped knowingly, willfully furthering it in any way. . ."

". . .If Mr. Brown did not know that Katrina Brown was sending false invoices to BizCapital, . . ."

". . .As for the conflicts, I quite frankly— - I don't see this as a real conflict of the evidence case as to Mr. Brown. Most of the evidence points directly to Katrina Brown... "

". . .Is it in any way connected to Mr. Brown. No. Only indirectly, only through Katrina. It may be incriminating evidence as to Katrina Brown. It is lack of evidence or evidence of reasonable doubt as to Reginald Brown. . ."

". . .One of the other business I want to touch on in terms of evidence and the form of the testimony. You heard over the course of the trial Tommie Hogan and Vandaren Gantt speak. Now, neither knew Reginald Brown directly or had any contact with him. And, ladies and gentlemen, I would suggest, much like Mr. Brown, however, both of these people may have been used by Ms. Katrina Brown.

Mr. Gantt, it appears may have been a bit of a test case. He appeared to have a business relationship with Ms. Brown. . .

After this statement by Mr. Brown's counsel, appellant, who is pro se, objects in a speaking objection. The Defense would argue this speaking objection was also a renewal of her original motion for severance. Ms. Brown's speaking objection was as follows:

Katrina Brown: Your Honor, I have an objection. Can we do a sidebar please?

The Court: You can come to sidebar.

(at sidebar, out of the hearing of the jury:)

The Court: What's your objection, Ms. Brown?

Katrina Brown: My Objection go that he's in – first of all, he's insinuating that I committed a crime; number two, he's insinuating that I use other people and he's acting like the prosecutor.

And, I mean, you know, I can understand if he's saying what his client didn't do, but for him to insinuate I committed the crime, he is saying I committed crimes.

The Court: Is that legally impermissible with co-defendant, Ms. Brown?

Katrina Brown: Well, typically if a co-defendant is going to suggest that a –

-that another co-defendant committed the crime, then that should have been said at a different trial, not in the same trial. I don't believe it's permissible in the same trial.

The Court: Mr. Duva, do you want to respond?

Mr. Duva: Your Honor, Ms. Brown position is incorrect. Mr. Bell is free, in the closing argument, to argue what the evidence shows. He's taking a strategic position that the evidence shows that Ms. Brown is guilty and that his client is not, and he's certainly free to do that.

The Court: I think that's correct, and I think it's consistent with his opening statement and I think he's permitted to do that, Ms. Brown, so your objection is overruled.

After the exchange with the Court at side bar, Mr. Bell continued in his closing argument to take his strategic position that the evidence shows that

Appellant was guilty and that Mr. Brown was not guilty as follows:

". . .Now, let me turn back to one other issue that I suggested to you in opening statement which was essentially that virtually all of the evidence that you would hear in this case would concern Katrina Brown, her father's

excellent barbecue sauce and the family's efforts to navigate the manufacturing and the distribution of the sauce..."

An excerpt from the government counsel's closing argument demonstrates how Katrina Brown was not only being prosecuted by the government counsel but by Reginald Brown's counsel when the government counsel repeated part of Reginald Brown's counsel closing argument.

". . .There's one thing that Reginald Brown's camp and the Government agrees on, there is a literal- - and I'll use Mr. Bell's words, mountain of evidence here against Katrina Brown. . . "

Denial of motions for severance of defendants is common before federal trial courts. That is novel is the standard espoused in *Blankenship* has been met by the appellant. The first prong of Blankenship was satisfied when co-defendant's counsel, in opening statement, stated that the Katrina Brown tearfully confessed to Reginald Brown that she had prepared false invoices and submitted them to the lender this was a clear indication that Mr. Brown would be testifying. Mr. Brown choose not to

testify. The petitioner was denied confrontation because after Reginald Brown's opening statement, Mr. Brown became one of Ms. Brown's accusers. Ms. Brown was also denied her right to a fair trial under the Sixth Amendment of the United States Constitution thus satisfying the prongs set out in *Blankenship* because the lack of an impartial jury after Mr. Bell opening statement. The undersigned counsel is aware the right to confrontation only applies to confronting witnesses against a defendant. But had the government counsel promised a confession in opening and then choose not to put on the witness that the confession was made to for confrontation then this case would be ripe for mistrial. Mr. Bell's opening stating Ms. Brown confessed then choosing not to put on the witness who heard the confession is what makes this severance of defendants issue novel. (What is perplexing is the affidavit of Co-Defendant Reginald Brown attached to Ms. Brown's Supplemental Motion for New Trial where Mr. Brown swears Ms. Brown did not make a confession to him.) The second prong of *Blankenship* was also satisfied after Mr. Bell's statement of the appellant's tearful confession because no matter what instruction was given by the court on counsel's opening not being evidence, the fact that the jury

heard that Ms. Brown had tearfully confessed was a bell that could not be un-rung. The *Blankenship* standard only requires one of the prongs to be satisfied for severance of defendants.

The appellant would further argue that when the prosecutor incorporates the words of the co-defendant's counsel into his closing argument (i.e., mountain of evidence against Ms. Brown) then the second prong of *Blankenship* has also been satisfied.

This issue has recently been addressed in the order in *United States v. Shkreli, and Greebel*, EDNY Case no. 15-CR-637. The Court addressed the deprivation of constitutional rights when one counsel for defendant intends to act as a "second prosecutor" against the other defendant. In this case, Greebel's attorney intended to inform the jury the prosecution theory against Shkeli was true. So important was that topic, the Court devoted an entire section to its order entitled: "Constitutional Right to a Fair Trial." The following quotes are from that section, and most certainly apply to the situation Ms. Brown found herself in:

> A joint trial would place on Shkreli an unfair and heavy burden in defending himself against both the government and Greebel. Severance is granted because of the stated intention of Greebel's counsel, in his declaration (ECF No. 159) and at oral

argument, that Greebel's defense team will act as a second prosecutor against Shkreli, by arguing that Shkreli is guilty and that Greebel is, himself, just another victim of Shkreli's fraud.

Greebel's counsel intends to assert a defense that will be an "echo chamber" for the prosecution by presenting evidence of multiple instances of Shkreli's purported lies, deceptions, and misrepresentations.

The court recognizes that counsel's arguments are not evidence, and the jury will be so instructed, however, the underlying theme of Greebel's defense, that Shkreli lied, committed fraud, and is guilty, will permeate a joint trial to the substantial prejudice of Shkreli. Through such double prosecution of Shkreli by the government and Greebel, there is a serious risk that the jury would be prevented from making a reliable judgment about guilt or innocence even with limiting instructions by the court.

Order at 19-20

III

The District Court committed error when it did not sua sponte object to the government's closing argument that taxpayers' funds were being spent on the fraudulent activity of by the defendant.

The petitioner's third claim is that the prosecutor violated the "Golden Rule" in his closing argument of the government.

The Court must look on the basis of the entire record. A case that is counter to the following argument of the petitioner in which the appellant will attempt to distinguish is *United States v. Harmas,* 974 F.2d 1262, 1269 (11th Cir. 1992). In *Harmes,* when this Court found it was not error, in a case where the defendant was charged with conspiracy to defraud the government, for the prosecutor to argue that false claims made against federal loan guarantee agencies ware actually made against taxpayers.

On the basis of the entire record, the comments were not designed to inflame the jury or to ask the jurors to put themselves in the position of the litigant.

This case is distinguished because the prosecutor used the term "taxpayer" or "taxpayer money or dollars" eight times during his closing argument to inflame the jurors.

This Court must first look at the testimony of the government's first

witness the lead FBI agent explained the relationship between BizCapital (lender) and the Small Business Administration and Basic Products and Co-Wealth (borrowers):

"Sure. So BizCapital is a lender that's actually—that actually lent money to Basic Products and Wealth in this case, but they partner with the Small Business Administration because the SBA is going to back this loan. They guaranteed this loan by 75 percent."

So, SBA doesn't actually lend the funds to this borrower. They guarantee the funds to the lender; in this case, BizCapital."

The government repeatedly told the jury the funds for the 12 disbursements constituted "taxpayer" money, stating in closing argument:

"Well, where does an SBA loan come from? Comes from the Government. The United States of America has no money. The only reason they have money – I mean, in and of itself, it has no money. The reason they have money? Taxpayers, taxpayer money, otherwise they have no money."

"So, this taxpayer money going to the Brown family, going to Katrina Brown, that facilitates her ability – she didn't do it right."

"The lender that's doling out the taxpayer money [SBA money], you can't lie to that entity with false invoices and that's okay. That's materiality."

"Because the City of Jacksonville, despite maybe how it acts at times, it has no money either. That's all-taxpayer money. It's the same as the SBA."

"These are taxpayer dollars, the loan and the grant that go to KJB Specialties and Basic Products is the taxpayer's money."

"That's Count Twenty-six, $210,549.99. That's taxpayer money going to the lender. That's not okay."

"1T is the 12 checks with the endorsements on the back, over a quarter of a million dollars in funds from the City of Jacksonville grant and from the BizCapital loan that was guaranteed by the U.S. taxpayers. . .

"BizCapital's loan is guaranteed by the SBA, and by extension, it's guaranteed by taxpayers across the country."

The remarks were improper by the government since these remarks were "Golden Rule" violations and inaccurate since the monies loaned were not taxpayer monies but monies of the BizCapital, the lender when the disbursement of funds were made.

Case law, for the proposition it is improper to appeal to the pecuniary interests of the jury, are many – and demonstrate the conduct here warrants a reversal. In *United States v. Smyth*, 556 F.2d 1179, 1185 (5th Cir. 1977) (it is improper for a prosecutor to invoke the individual pecuniary interests of the jury as taxpayers); *United States v. Guinn*, 460 Fed. Appx 888 (11th Cir. 2012) (prosecutor' comments appealing to the jurors' pecuniary interests as taxpayers during opening and closing argument were improper).

What is troubling is that the Small Business Administration is not listed as a victim in the Judgement and Sentence for restitution purposes. The PSR list that funds were disbursed from a BizCapital controlled account. The BizCapital funds may have been guaranteed by the SBA but they were BizCapital funds and not taxpayer funds at the time of the offense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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