No. 23-6069

IN THE SUPREME COURT OF THE UNITED STATES

JEREMIE SAINTVIL, et al.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

Jeremie Saintvil, Pro Se
#36269-509
FCI-Butner Low
P O Box 999
Butner, NC 27509

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REPLY BRIEF OF PETITIONER

In its opposition, the Government relies on caselaw that directly contradicts its own argument regarding duplicity. It overlooks crucial aspects of this Court's established jurisprudence on statutory interpretation, while downplaying the significant circuit split and the cumulative prejudicial effects arising from a duplicitous Count tainted with unlawful surplusage. Additionally, it fails to address surplusage that encroaches upon Congress's exclusive authority. Notably, there is an absence of any discussion regarding the venue waiver's good cause defense. These deficiencies underscore the compelling need for this Court to grant the petition for a writ of certiorari, as further elaborated below.

I. THE GOVERNMENT'S DUPLICITY ARGUMENT ERRED IN IT'S FLAWED ANALYSIS OF THE STATUTORY DISTINCTION OF THE BANK FRAUD SUBSECTIONS.

Further review by this Court is warranted, as the Government erroneously contends that Sections 18 USC § 1344(1) and (2) of the bank fraud statute describe two different ways of committing a single crime, not two different crimes. Gov't. Opp. Brief at 8 The Government's position rests on the following fundamental misunderstanding of alleged single-sentence statutes and how complete offenses are defined.

1. The Government Failed To Acknowledge The Significant Textual Distinctions Within The Bank Fraud Statute, Which Set It Apart From Other Single-Sentence Statutes Conjoined By A Common Phrase.

The Government asserted, "Both subsections form part of a *single sentence*. Both are preceded, and *yoked together*, by the phrase 'Whoever knowingly executes, or attempts to execute, a scheme or artifice'. 18 U.S.C. § 1344." Gov't. Opp. Brief at 8. (emphasis added). Relying on this statutory construction the Government claimed that "Each subsection then

simply describes a different type of scheme or artifice that the statute covers. And the statute prescribes the same penalty – 'fined not more than $1,000,000 or imprisoned not more than 30 years, or both' – for either type of scheme." Gov't. Opp. Brief at 8. This attempt at statutory gymnastics fails to recognize the palpable textual disparities between the bank fraud statute and others, such as the mail fraud statute.

Analogous to the present case, in Loughrin v. United States 573 U.S. 351 (2014), Loughrin previously advanced a comparable argument before this Court. Contrary to Loughrin's plea, this Court discerns palpable textual disparities between the mail fraud statute and the bank fraud statute. This Court stated, "the two statutes have notable textual differences. The mail fraud law contains two phrases strung together in a single, *unbroken sentence*. (emphasis added). By contrast, § 1344's two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation—thus placing the clauses visually on an equal footing and indicating that they have separate meanings. The legislative structure thus reinforces the usual understanding of the word "or" as meaning ... well, "or"—rather than, as Loughrin would have it, "including." Loughrin at 359.

This structural demarcation underscores the disparate meanings of the clauses, debunking any notion that a single-sentence statute conjoined by a common phrase but separated by the term "or" implies inclusion rather than distinction.

2. The Government's Error Is Most Evident In Claiming The Bank Fraud Subsections Are Not Complete Offenses That Is Directly Contradicted By The Case It Cited For Support.

The Government claimed that "Congress's use of the word "or" to separate subsections (1) and (2) does not establish that each subsection sets forth a separate crime. When the word "or" links two "self-contained units," each of which "describes a complete offense," it may be natural to read the word as linking two distinct offenses. United States v. Loniello, 610 F.3d 488, 493 (7th Cir. 2010), cert. denied, 563 U.S. 929 (2011). But when, as here, a phrase "does not specify all elements of any offense, the word 'or' is [generally]

best read to identify different ways of committing one element of the offense." Ibid. Gov't. Opp. Brief at 10. The Government improperly relied upon this Seventh Circuit case to advance the perplexing argument that the two bank fraud subsections are not complete offenses but mere "phrases" in a self contained unit. This Seventh Circuit case directly contradicts the Government's claim.

First, in United States v. Loniello, the Seventh Circuit directly addressed whether the federal bank-robbery statute, 18 U.S.C. § 2113(a), first subsection creates one crime or two. Loniello at 490. The prosecutor contended that the first two paragraphs of § 2113(a) create distinct offenses. But the district court held that § 2113(a) creates *only one offense.* Loniello at 499. The Seventh Circuit agreed with the prosecutor's argument that Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), holds that the statutory elements define how many distinct crimes have been created. *If each statute contains an element that the other does not, then the offenses are different.* Loniello at 491.(emphasis added).

Applying the Blockburger elements test, the Seventh Circuit unequivocally held that not only does the two paragraphs of subsection (b) state separate crimes but concluded that the two paragraphs of subsection (a) likewise create distinct offenses. Loniello at 492.

Critically, the Seventh Circuit, in line with other circuits, reaffirmed the enduring validity of the Blockburger elements test, which has been relied upon for over 90 years by this Court. This foundational test remains indispensable for determining whether distinct and completed crimes have been created within statutory provisions. The Seventh Circuit emphasized how the Blockburger test is "much superior to making everything turn on how the subheadings of the United States Code are arranged." Id.

Since the passage of this historic precedent, this Court has steadfastly declined to replace the Blockburger test. In Loughrin, this Court illustrated how each subsection of the bank fraud statute necessitates proof of distinct elements, the other does not. A distinction acknowledged by the Government. Gov't Opp. Brief at 11. ("the Court [in Loughrin] determined that Section 1344(2) does not require proof that the defendant intended to defraud a financial institution"). Settling the question of whether the bank fraud statute subsections comprise of two distinct and complete offenses.

Second, the defendants in Loniello also emphasized the significance of the word "or" between the first two paragraphs of § 2113(a), suggesting that the two paragraphs denote alternative means to commit a single crime. The Seventh Circuit recognized that drafters commonly use "or" to distinguish different offenses in a sequence. The Seventh Circuit's interpretation of the function of "or" in statutory language underscores the critical importance of contextual analysis. The Court aptly distinguished between the use of "or" within *phrases* like "by force and violence, or by intimidation," and its function as a conjunction between *self-contained units* within statutes such as 18 USC § 2113(a) and 15 USC § 1644. In the latter context, "or" serves to group multiple offenses under a single statutory provision to indicate uniform punishment, rather than indicating a singular offense. Each set of enumerated elements within these provisions represents a distinct and complete offense, subject to equivalent penalties. As the Seventh Circuit stated, "Whoever does x [comprising elements 1, 2, 3, and 4] or y [comprising elements 3, 4, 5, and 6] shall be imprisoned not more than z years," where each set of 4 elements describes *a complete offense.* Loniello at 493 (emphasis added).

Similarly, in § 1344(1), the language "Whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution" stands as a self-contained unit, embodying ***all*** elements necessary for a complete offense. Section 1344(2) delineates the phrase "to obtain any of the moneys, funds, credits, assets, securities, or other property," constituting a single element of the offense. Contrary to the Government's interpretation, the use of 'or' in this context merely signifies different methods of fulfilling one element of the overarching complete offense.

Despite it's best efforts, the Government's argument is contradicted by both Loughrin and Loniello, which underscore that each bank fraud subsection constitutes a distinct and complete offense.

3. The Government Relies On Pre-Loughrin Case Law And Dismisses The Weight Of The Clear Circuit Split.

The Government's reliance on five pre-Loughrin cases to assert that Section 1344 sets forth a single offense is misplaced. None of the cases cited hold any authority post-Loughrin. Therefore, their relevance in interpreting the current understanding of the bank fraud statute is obsolete. As such, these precedents fail to provide compelling support for the Government's argument and should not be considered conclusive in this matter before this Court. Ultimately, it is the rulings of this Court that hold significance in interpreting the law.

The Government's reliance on the Third Circuit's decision in Schwartz to assert that Section 1344 defines a single offense overlooks the broader context. While Schwartz v. Warden Fort Dix FCI (2021) may be non-precedential, it still reflects the Third Circuit's understanding that Loughrin altered prior interpretations of the distinctness of the bank fraud statute subsections.

In contrast to the Government's claim, the Fifth Circuit's decision in Harvard does not explicitly recognize Section 1344 subsections as delineating a single offense. A notable difference between Harvard and the present case is the government's decision, made prior to jury instructions, to pursue charges *exclusively* under Section 1344(1). Harvard at 420. No such decision was made in this case.

The Ninth Circuit's decision in United States v. Shaw, while vacated by this Court, still holds persuasive value in illuminating the Ninth Circuit's interpretation of Section 1344. The vacatur does not diminish the Ninth Circuit's analysis of the statute, which focused on specific elements of Section 1344(1) rather than addressing the distinctiveness of Sections 1344(1) and (2).

Of most importance, while the Tenth Circuit's decisions in U.S. v. Bonnett, 877 F.2d 1450 (10th Cir. 1989) and United States v. Swanson, 360 F.3d 1155, 1162 (10th Cir. 2004), may not have explicitly addressed the issue of duplicity, they nevertheless underscore the Tenth Circuit's recognition that "the plain language of 18 U.S.C. § 1344 sets forth two distinct crimes concerning federally insured financial institutions." Bonnett, 877 F.2d at

1453. The Government overlooked an additional Tenth Circuit case that more directly addresses this distinction, namely United States v. Loughrin, 710 F.3d 1111 (10th Cir. 2013), the very case this Court granted certiorari and affirmed.

In stark contrast to the Government's suggestion, there is no contention within the Tenth Circuit warranting an en banc resolution of any inconsistency or lack of clarity regarding its decision that the bank fraud subsections constitute two distinct crimes. What does exist, however, is a clear circuit split with the Eleventh Circuit on this matter. Supreme Court Rule 10(a) states that a circuit split occurs when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals. Instead, the resolution of such critical legal questions, which affect not only individual litigants but also the administration of justice nationwide, is best suited for this Court, the ultimate arbiter of federal law.

4. The Government's Contention Of Harmless Error Ignores The Substantial Cumulative Prejudicial Effects, Including Lack Of Notice, Jury Confusion, And Lack Of Unanimity .

The Government's claim "this case would be an unsuitable vehicle for addressing the divisibility question, because any error in the indictment was harmless", Gov't Opp. Brief at 14, overlooks the substantial cumulative prejudicial effects resulting from a duplicitous Count One of the indictment and ineffective jury instructions to remedy this defect. As forewarned at the district court, this duplicitous Count was not an isolated issue but rather exacerbated by the additional surplusage, as further discussed below. D.Ct. Doc. 35 at 6-11.

As admonished by this Court, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt". Chapmen v. California, 386 U.S. 18, 24, 87 S. CT. 824, 17 L. Ed. 2d 705 (1967). The Eleventh Circuit refused to address whether the district Court's jury instructions remedied the duplicity in Count One, as it erroneously concluded that Count

One was not duplicitous. The pivotal issue remains whether the jury unanimously agreed on the specific offense attributed to the Petitioner, beyond a reasonable doubt.

For a verdict to be unanimous, the jury must reach "more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the *principal factual elements* underlying a specified offense." McKoy v. North Carolina, 494 U.S. 433, 450 n.5 (1990) (emphasis added). In other words, a "jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved *each element*." Richardson v. United States, 526 U.S. 813, 817 (1999) (emphasis added).

The Government's contention "that there can be no meaningful dispute that the scheme in this case – in which Petitioner sought to use falsified applications to obtain money from financial institutions – was covered by both subsections" is beside the point in the duplicity context. Gov't Opp. Brief at 14. The key point lies in the detrimental repercussions of an unaddressed constitutional transgression. When there is a "genuine possibility" that "different jurors voted to convict on the basis of different facts establishing different offenses," the "failure to give a specific unanimity instruction [is] plain error violating [the defendant's] 'substantial right to a unanimous jury verdict as granted by Article III, § 2, and the Sixth Amendment of the United States Constitution. See United States v. Romero-Coriche, No. 19-50372 (9th Cir. 2020)

The district court's jury instruction lacked specific unanimity, neglecting to mitigate the adverse effects of a duplicitous Count One. Instead, it invited each juror to render their verdict based on a wide spectrum of options, some of which fell outside the statutory definition of bank fraud. The jury instructions under Count One stated: "The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme *substantially similar* to the one alleged in the indictment" . D. Ct. Doc 97. 5, (emphasis added).

This instruction opened the door for various interpretations among jurors, potentially resulting in divergent conclusions regarding the principal factual elements underlying the bank fraud statute when extrapolated.

For instance, crucial to a bank fraud conviction is the essential element of "a financial institution," as defined by 18 U.S.C. § 20. Jurors 1 through 4 could have concluded that the defendant's guilt of *only* a scheme to defraud Florida Credit Union, as no funds were obtained, thus violating § 1344(1). In contrast, Jurors 5, 6, and 7 may have dissented, contending that guilt lay in a inflammatory separate scheme allegedly involving the Petitioner's defrauding his own mother and actual dispersal of funds from the United States Treasury, a violation of only § 1344(2). Meanwhile, jurors 8 through 12 might have anchored their conviction on yet another distinct offense, defrauding credit card companies such as American Express, Capital One, and Discover to obtain funds, in violation of both subsections. However, a critical divergence arises, as none of these entities were federally insured (FDIC), a pivotal jurisdictional element also required for conviction. D. Ct. Doc. 102 AT 32-33. See United States v. Rackley, 986 F.2d 1357, 1360–61 (10th Cir.1993)("In order to convict the defendant of bank fraud under 18 U.S.C. § 1344, the government was required to prove ... that the financial institution was then insured by the [FDIC]." Indeed, there is no reasonable doubt that the likely divergence among jurors on the principal factual elements of the bank fraud statute occurred. This would be concealed within a general verdict of guilt, underscoring the constitutional harm resulting from non-unanimous verdict on either of the bank fraud statute subsections.

Additionally, the district court's instruction referenced by the Government, which stated that "Where the indictment charged that an offense was committed in alternative ways, the jury could find the defendant guilty only if 'one of the alternatives [wa]s proved beyond a reasonable doubt' and the jury 'agree[d] unanimously as to that alternative,'" was strategically placed after Court Four, not Count One. D. Ct. Doc. 97, at 8-9.

In light of these considerations, it becomes evident that the question of divisibility in the indictment is far from trivial; rather, it strikes at the heart of ensuring a fair and just trial for defendants nationwide. The glaring discord among circuits underscores the

paramount need for clarity to safeguard the integrity of statutory interpretation and uphold fidelity to the directives of this Court.

II. THE GOVERNMENT'S SURPLUSAGE ARGUMENT ENDORSES THE BROADENING OF A CRIMINAL STATUE, CONTRARY TO CONGRESSIONAL INTENT.

The Government claimed that the contention regarding the district court's failure to strike as surplusage the allegations in the indictment's bank-fraud count, which concerned institutions apart from the Florida Credit Union, is a fact-bound contention and does not warrant this Court's review. The Government's claim fails to recognize the fundamental constitutional principles at stake. The impermissible broadening of a criminal statute is of a magnitude eminently deserving of this Court's attention for the following reasons:

1. The Government's Stance Implies That Achieving Relevance Necessitates An Expansion Of The Criminal Statute.

The Government lays forth the Eleventh Circuit correctly determined that the surplusage of allegations at issue here were not irrelevant, and although the government charged only a single execution of the scheme – the submission of an application to the Florida Credit Union – the allegations about other financial institutions, businesses, and acts were *relevant to the existence of the scheme.* Gov't Opp. Brief at 15 (emphasis added). While quoting the Eleventh Circuit's affirming opinion that "[A]n allegation of bank fraud requires the government to prove the existence of a scheme, and *the scheme-related evidence* is exactly the information that [Petitioner] argues is surplusage." Id. (emphasis added).

In response, though the claim of relevance was vehemently contested, it is essential to emphasize that the issue of surplusage extends beyond mere relevance to prove the existence of a scheme. The crux of the matter lies in the inclusion of extraneous allegations within the charge itself. By doing so, broadened the essential elements of the bank fraud statute to encompass offenses not directly charged in the indictment.

This is evident by the multiple locations of surplusage within the indictment. Notably, their placement in the charging paragraph. D. Ct. Doc. 1 at 10, Part B, The Charge. A charging paragraph outlines the core of the offense as charged by the grand jury and must precisely delineate the basis upon which the accusations against the defendants were formulated. Conversely, the means paragraph pertains to the evidence required to *sustain the charges.* United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978). Contrary to the Government's implications, it is not necessary to impermissibly broaden a criminal statute in order to prove the existence of a scheme.

2. The Government's Silence On The Constitutional Implications Of Broadening A Criminal Statute Under The Vice Of Relevance.

As the Government's response was silent on the constitutional implications of broadening charges, its reliance on United States v. Miller, 471 U.S. 130, 136 (1985), to justify treating surplusage of this type as 'a useless averment' independent of the offense proved, is unsubstantiated. While Miller provides guidance on disregarding surplusage, it does so in the context of elements unnecessary to and independent of the offense proved. However, the surplusage in this case, embedded within the charge itself, cannot be deemed independent.

In Miller, the Court distinguished the case from its decision in Stirone v. United States, 361 U.S. 212 (1960). The Court of Appeals leaned on Stirone to assert that a conviction narrower than, but fully included within, the indictment's plan violated the Fifth Amendment's grand jury right. However, Stirone actually stands for a different proposition. In Stirone, the offense proven at trial exceeded the indictment's scope, as trial evidence 'amended' the indictment by broadening the possible bases for conviction. As noted by the Stirone Court, the crucial issue was 'whether [Stirone] was convicted of an offense *not charged in the indictment'* 361 U.S., at 213, (emphasis added).

Stirone, was indicted for unlawfully interfering with interstate commerce under the Hobbs Act, specifically alleging extortion obstructing sand shipments into Pennsylvania for a steel mill's construction. However, trial evidence extended beyond sand shipments to

include obstruction of steel exports, *constituting an offense not initially charged.* Consequently, this unanimous Court found the indictment unconstitutionally 'broadened.' Id.(emphasis added)

In this instance, the offense alleged transcended the boundaries of the criminal statute from the very initiation of the indictment's drafting. Compounding this error, trial evidence further fortified the 'amended' statute, thereby expanding the potential grounds for conviction beyond the purview of the criminal statute. As referenced earlier in the duplicitous reply, the district court's jury instructions never remedied the duplicitous nor prejudicial surplusage because it invited a conviction for allegations "substantially similar" to what was in the indictment and not in the purview of the bank fraud statute. This Court in McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), found that the jury instructions on the mail fraud count permitted a conviction for conduct not within the purview of the mail fraud statute, this Court reversed the convictions. McNally, at ___, 107 S.Ct. at 2882, 97 L.Ed.2d at 303.

3. The Government Trivializes The Constitutional Magnitude Of Surplusage Of This Type On The Outcome Of Criminal Cases And Assault On Congressional Authority.

The Government claims any risk of an inflamed jury, was remedied by the district court specifically instructing the jury that the allegations in the indictment are not evidence. See D. Ct. Doc. 97, at 1. Gov't Opp. Brief at 16.

The mere instruction to disregard the allegations in the indictment that the district court also instructed to use during it's deliberations, does not negate the prejudicial impact of including surplusage within the charge itself. Doc. 168 at 37. Despite the Petitioner's pretrial efforts to alert the district court to the inflammatory harm of the particular allegation involving his own mother and having further attempted to raise such objections during opening arguments, the court disregarded the Petitioner's objections and permitted the jury to hear these claims, accompanied by images of alleged victims, which included the Petitioner's own mother. See, e.g. D. Ct. Doc. 63 at 5; Doc. 154 at 22, 27-28, 31; Doc. 242 at

40-42. This is in stark contrast to the approach taken in United States v. Awan, 966 F.2d 1415 (11th Cir. 1992), a case cited in the Eleventh Circuit's response, where the district court meticulously shielded the jury from potential prejudice by providing them with only a summarized version of the indictment *that omitted references to the challenged allegations.* Awan, 966 F.2d at 1426.

Given this context, the court's decision to entertain a renewed motion to strike surplusage during trial was rendered moot, as the irreparable and cumulative prejudicial effects had already taken their inflammatory toll.

Also, the Government claims the Petitioner did not appear to challenge the legal standard that the court of appeals applied in determining whether district courts should strike allegations as surplusage but instead, the court's misapplication of that standard in this case. That fact-bound contention does not warrant this Court's review. Gov't Opp Brief at 15.

First, the Petitioner's contention isn't merely about a minor misapplication of this standard; rather, it concerns the egregious misapplication of the standard, significantly impacting the outcome of the criminal case. The prosecutor urged the jury to convict based on surplusage, directing them to "follow the money" during closing arguments. D. Ct. 237 at 1. However, Florida Credit Union never disbursed, wired, or transferred any funds whatsoever. Consequently, there existed no monetary trail for the jury to "follow" . D. Ct. 237 at 1 & 68-69. There is no meaningful doubt that this surplusage likely served as the sole basis for the jury's guilty verdict—an injurious fact that not only determined the trial's outcome but also impinges upon the Petitioner's constitutional rights, seriously affecting the fairness, integrity of this judicial proceeding. The Eleventh Circuit failed to adequately assess the inflammatory and prejudicial nature of this surplusage and its prejudicial use at trial, thereby irreparably infecting the Jury's deliberative process.

Second, this is not merely a fact-bound contention but goes to the heart of Petitioner's constitutional right to a fair trial and calls for the exercise of this Court's Supervisory Powers to uphold the integrity of the legislative process and safeguard against any encroachment on the authority of the United States Congress to define the scope and application of criminal laws. Supreme Court Rule 10(a).

A decline to grant review by this Honorable Court, would send a message to Federal prosecutors nationwide that encroachments against the sacred authority of the United States Congress will go unchecked, emboldening further government overreach in broadening criminal statutes under the guise of relevance. This will inevitably lead to further unjust prosecutions, erosion of civil liberties, undermine the fundamental balance of power between branches of government, and weaken the protections afforded by the United States Constitution.

III. THE GOVERNMENT WAS NOTABLY SILENT ON THE GOOD CAUSE DEFENSE FOR VENUE.

The Government claimed that the contention regarding the district court's failure to strike as surplusage the allegations in the indictment's bank-fraud count, which concerned institutions apart from the Florida Credit Union, is a fact-bound contention and does not warrant this Court's review. The Government's claim fails to recognize the fundamental constitutional principles at stake.

1. **The Government's "In Issue" Argument Lacks Substantive Relevance to This Court's Consideration.**

The Government contends that the Petitioner's challenge to the venue was raised for the first time after trial, citing De Jesumaria v. United States, 583 U.S. 831 (2017) (No. 168764), a previous denial by this Court of a petition for a writ of certiorari presenting the same question. Gov't Opp. Brief at 17-18.

First, De Jesumaria raised his venue objection for the first time in his Motion for Bond Pending Appeal, nearly five months after the verdict, without any good cause for his delay. Here, the important question before this Court is "Whether a finding of waiver of a fundamental constitutional right is valid *without determining whether the good cause defense, apparent in the trial record,* excused the untimely objection? Pet. Brief at i

(emphasis added). It is this good cause defense that the Government strikingly remained silent about in its reply.

Any subsequent arguments regarding the absence of venue being placed "in issue" during the trial, along with its accompanying nine supporting cases, holds no substantive relevance to this Court's deliberation on the question initially presented.

2. The Government Ignored Federal Law In It's Silence Of The Good Cause Defense To A Delayed Venue Objection.

The Government offers that, "A defendant who fails to put venue in issue during the trial may not challenge venue for the first time after trial or on appeal.". However, under Federal Rule of Criminal Procedure 12(b)(3), venue challenges must be raised by the time of trial; under a 2014 amendment to that rule, "a court" is allowed to consider an untimely venue challenge for "good cause." Fed. R. Crim. P. 12(c)(3). See United States v. Moody, 664 F. App'x 367 (5th Cir. 2016); United States v. Soto, 794 F.3d 635 (6th Cir. 2015). Federal Law permits post-trial venue challenges for good cause, a pivotal fact conspicuously absent from the Government's response.

Hence, the Government's assertion that "Allowing a defendant to lie in wait during the trial and then insist after conviction that the evidence on venue was insufficient would sandbag the government and waste judicial resources" diverts attention from the fundamental issue of whether the Eleventh Circuit's relaxed standard for venue waiver is constitutionally acceptable without any regard for the good cause defense, apparent in the district court record.

The district court record unveils that the Government acknowledged a discovery breach, entailing the egregiously delayed disclosure of substantial evidence crucial to the Petitioner's timely venue objection. D. Ct. Doc. 202 at 1-10, Doc. 243 at 3-4 (Government admitting the discovery violation was "a genuine mistake"). This newfound evidence, among other factors, underscores why the venue objection surfaced post-trial. It constitutes a factor that the Eleventh Circuit should have taken into account before adjudicating the waiver of the fundamental constitutional right to venue, as directed by this Court.

The Government contends that this Court rejected the notion that failing to raise venue in issue results in forfeiture rather than waiver, thus enabling plain-error relief on appeal, is flawed. Citing United States v. Olano, 507 U.S. 725, 733 (1993) (distinguishing waiver from forfeiture) and Musacchio v. United States, 577 U.S. 237 (2016), According to the Government, this Court dismissed a similar argument concerning a statute-of-limitations defense, which, akin to venue, 'becomes part of a case only if the defendant puts [it] in issue.' Id. at 248." Gov't Opp. Brief at 19-20.

The Government missed the central issue of the Eleventh Circuit's improper waiver determination, which was decided *without any evidence* as to the Petitioner's *intent*. The Government contends waiver is not afforded plain error review. Whether failure to put venue in issue equates to waiver or forfeiture depends on the particular facts and circumstances surrounding each, namely whether there is evidence of intentional relinquishment of the known right in question. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Absent this intent, untimely notions are forfeited. As noted in United States v. Bowers, 811 F.3d 412, 421 (11th Cir. 2016), "untimely motions are forfeited rather than waived."

As discussed extensively by the Sixth Circuit in a case involving a defendant's untimely motion to server counts. The Sixth Circuit held, "Under the current version of Rule 12 of the Federal Rules of Criminal Procedure, effective December 1, 2014, "we do not treat the failure to file a motion as a waiver unless the circumstances of the case indicate that the defendant intentionally relinquished a known right, ...Given that the *record does not establish that Santana intentionally relinquished a known right*, we treat Santana's failure to file a motion to sever the counts before trial as a forfeiture: "the failure to make the timely assertion of a right." Quoting United States v. Olano, 507 U.S. 725, 733 (1993) . Because Santana did not raise this issue in the district court, we review the joinder of counts for *plain error*." United States v. Soto, 794 F.3d 635 (6th Cir. 2015) (emphasis added).

The Eleventh Circuit holding in the present case does conflict with practices of "lower court's", despite the Petitioner's citation error the Government points out. The

intended lower court citation was United States v. Matthews, Criminal No. 5:17-118-KKC (E.D. Ky. Oct. 1, 2020) from a district court in the Sixth Circuit. Not in the D.C. Circuit's decision in United States v. Wilson, 26 F.3d 142 (1994), cert. denied, 514 U.S. 1051 (1995). There, the district court concluded after the Government failed to produce evidence for venue at trial the defendant *properly* raised the objection to venue "after trial". Id (emphasis added).

In any event, the court records clearly demonstrate that this case presents an exceptional opportunity for this Court to review the Petitioner's contention. Along with giving no regard to Federal Law permitted good cause for a delay challenge, the district court erroneously asserted, without providing any supporting facts, that sufficient evidence existed to support venue in the Northern District of Florida,

3. Contrary To The Sixth Amendment, The Government Attempts To Add An Additional Element To Justify Proper Venue.

The Government affirmed "Venue depends on the location of the conduct constituting the offense. See United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999). And "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." Id. At 281 (citation omitted)." Gov't Opp. Brief at 20-21. To support it's position , the Government claimed that "consistent with those principles, "the general rule of venue under the various false statement and false claim statutes" *permits* the prosecution to be brought "either in the district where the false statement is prepared and mailed, or where the statement is received." United States v. Wuagneux, 683 F.2d 1343, 1356 (11th Cir. 1982)(emphasis added). Here, although Petitioner mailed the fraudulent documents from the Southern District of Florida, the documents at issue were received in the Northern District of Florida. See Gov't C.A. Br. 43-46. Venue accordingly would have been *proper* in either district" Gov't Opp Brief at 20-21. (emphasis added).

This conclusion errs for three reasons. First, in United States v. Smith, 740 F.2d 734 (9th Cir. 1984), the Ninth Circuit addressed whether a federal agency must receive a false

statement in order to trigger the statute of limitations for a violation of 18 U.S.C. § 1001. The government cites cases in which venue was deemed proper in districts where the false statements were received. However, the Ninth Circuit found the Government's effort to redefine the essential elements of the substantive offense by resorting to venue cases is unpersuasive. The Ninth Circuit held the theory goes against the weight of authority holding that a section 1001 violation can be complete without actual receipt of the statement by the relevant federal agency. Citing United States v. Balk, 706 F.2d at 1059; United States v. Hooper, 596 F.2d 219, 223 (7th Cir. 1979); United States v. Herberman, 583 F.2d 222, 227 (5th Cir. 1978). Second, even the case law allowing venue in districts where the statements were received indicates that the perpetrator's actions constitute a complete and indictable offense upon preparation of the false statement and its application to a matter within the jurisdiction of a federal agency. The cases do not suggest that actual receipt by the relevant agency is an essential element of the offense. Citing the same case the Government uses to argue otherwise, United States v. Wuagneux, 683 F.2d 1343, 1356 (11th Cir. 1982),

The second reason and of most significance is this Court's ruling in United States v. Cabrales, 524 U.S. 1, 5, 118 S. Ct. 1772, 141 L.Ed.2d 1 (1998), made clear that both Rule 18 of the Federal Rules of Criminal Procedure and the Constitution require that a person be tried for an offense where that offense is committed." If the crime constitutes a "continuing offense" — that is, if it was "begun in one district and completed in another" — it may be "prosecuted in any district in which [the] offense was begun, continued, or completed." 18 U.S.C. § 3237(a). If, however, the crime "began, continued, and w[as] completed" in *only* one district, Cabrales, 524 U.S. at 8, 118 S.Ct. 1772, it must be prosecuted in that district. Id. See also U.S. v. Smith, 641 F.3d 1200 (10th Cir. 2011).

Third, according to the government's prosecution theory at trial and in accordance with the law, the bank fraud was deemed *complete* upon the act of hitting the send button, with receipt by the bank not being an essential conduct element for Count One. Despite the eventual receipt of fraudulent statements and documents by FCU employees in Gainesville, the government failed to establish where these false statements and documents were *initially received*. While the SBA had recruited applicants in the Southern District of

Florida, there was no testimony pinpointing the server to which the application was submitted. D. Ct. Doc. 243 at 88-89. FCU, headquartered in the Northern District but with branches in the Middle District, utilized an outside vendor, Smartsheet, and another company called MeridianLink, to process online applications, which were then routed to FCU's commercial department in Gainesville. D. Ct. Doc. 242 at 113, 115, 116, 117 and 123. However, all actions by FCU occurred after the scheme had been executed in the Southern District, with no evidence whatsoever linking the events to Gainesville. This Court has emphasized that the focus of inquiry should be on the essential conduct elements of the crime as committed by the alleged defendant.

The Eleventh Circuit's decision to affirm the district court's judgment despite the clear venue error and delay in the timely venue objection caused by the Government's discovery violations is a significant miscarriage of justice. This Court should grant certiorari to correct this error and establish a clear and consistent standard for the waiver of venue rights nationally.

CONCLUSION

For the above stated reasons, the Petitioner respectfully request that this Court grant review and reverse the decisions of the Eleventh Circuit Court Of Appeals.

Respectfully submitted this 28th day of February, 2024.

Jeremie Saintvil, Pro Se

#36269-509

FCI-Butner Low

P O Box 999

Butner, NC 27509