No. _____

In The

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent,

v.

SURESH MUNSHANI, a/k/a Sealed Defendant 2,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

B. ALAN SEIDLER
Attorney for Petitioner
305 Broadway, 7th floor
New York, NY 10012
212-334-3131
seidlerlaw@gmail.com

QUESTIONS PRESENTED

1. The following question is presented here. Does the merger of Petitioner's money laundering conspiracy conviction with Petitioner's wire fraud conspiracy conviction require dismissal of the money laundering conviction? The purpose of the wire fraud was to steal money. Petitioner was then charged with money laundering because the two perpetrators divided up the stolen money.

2. Did the Respondent's Reply summation violate Due Process of Law, and deprive Petitioner of a fair trial?

LIST OF PARTIES AND RELATED CASES

1. The names of all parties appear in the case caption.

2. There are no cases in other courts that are directly related to the instant case in this Court.

CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES

SUPREME COURT OF THE

UNITED STATES OF AMERICA

----------x

UNITED STATES OF AMERICA,

Respondent,

-v-

SURESH MUNSHANI,

Petitioner.

----------x

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, Dated October 9, 2024, is submitted herewith as Appendix "A". United States v. Munshani, 23-6520-cr (2d Cir. Oct. 9, 2024).

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Judgment of that Court was entered October 9, 2024.

The statutory provision conferring upon this Court

jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. @ 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

1. Petitioner was denied Due Process of Law pursuant to the Fifth Amendment to the United States Constitution which states in relevant part:

> "No person shall be held to answer ....., 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."

2. The offenses charged in Counts One and Two of the Indictment merged, and Petitioner's conviction on each violated the Fifth Amendment's Double Jeopardy prohibition which reads, No person shall:

> "be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

When Petitioner was arrested on 4-13-2022, the Sealed Indictment charged him with Wire Fraud. After Petitioner rejected 3 different Government plea agreements, the Count Two Money Laundering charge was added on 12-29-2022. As to the events, Petitioner had no control as a signatory or otherwise of the

multiple bank accounts controlled by co-conspirator Suni Munshani under various names and corporations. Petitioner was convicted after a jury trial in the United States District Court for the Southern District of New York of conspiracy to commit wire fraud [18 USC @1349]; and conspiracy to commit money laundering [18 USC @1956(h)]. Respondent's case theory of prosecution as to Petitioner was that these conspiracies were led by Petitioner's brother, Suni Munshani ["Suni"], who became CEO of a company called Protegrity in 2011. According to Count One Petitioner and Suni conspired to defraud Protegrity by causing Protegrity to make payments into bank accounts controlled by the co-conspirators to cover a fictional tax liability. As per Count Two Petitioner and Suni conspired to engage in financial transactions to conceal the wire fraud scheme alleged in Count One and to "engage in a monetary transaction in criminally derived property [from that scheme] of a value greater than $10,000. In other words Petitioner and Suni were convicted of conspiring to defraud Protegrity by wire, and then dividing up the fraudulent proceeds though funds placed in bank accounts.

In the normal course Protegrity banked at JP Morgan Chase. However, as its CEO Suni opened a secondary Protegrity account at Bank of America for which he was the sole authorized user. The Government's case as is relevant to his petition was that in May, 2015, Suni directed the Protegrity finance department to cut a check in the amount of $3.5 million from the JP Morgan Chase Protegrity account, and deposit that $3.5 million in a secondary

Protegrity Bank of America account which Suni controlled as Protegrity CEO. Suni caused Protegrity to release the $3.5 million using the ruse that the money was needed for a Protegrity tax liability. Instead Suni just stole the $3.5 million. Suni then directly transferred on August 24, 2015, $300,000 of said stolen funds from a Protegrity address to a Petitioner's account at TD Bank. Petitioner on August 25, 2015, then wired $274,900 of said $300,000 amount to a Hammershine bank account controlled by Suni as profits for Suni, and Petitioner kept $25,100 as his profit share. Suni subsequently transferred $3 million of fraudulent proceeds from the Suni controlled Protegrity account to a Suni personal account. Petitioner had no role in, or knowledge of said $3 million activity by Suni.

On April 7, August 25, and August 28, 2015, Suni deposited $770,000 Protegrity funds into Petitioner's TD Bank account, and Suni received back $695,000. The Government's theory of prosecution was that Petitioner kept $75,000 as his profit, and $695,000 was returned to Suni as his profit share.

Those transactions are the basis of the Count Two Money Laundering charge in the Indictment against Petitioner.

REASONS FOR GRANTING THE PETITION

REASON ONE: The merger of Petitioner's money laundering conspiracy conviction with Petitioner's wire fraud conspiracy conviction requires dismissal of the money laundering conviction.

The purpose of the wire fraud scheme was to steal money. Petitioner was charged with money laundering because the two conspirators divided up the stolen money.

In Count One of the Indictment Petitioner was charged with Conspiracy to Commit Wire Fraud [18 USC @ 1349]. The elements of Substantive Wire Fraud under Section 1343 parallel those of mail fraud, but require the use of an interstate telephone call or electronic communication made in furtherance of the scheme.

Petitioner was charged in Count Two with conspiracy to commit money laundering [18 USC @ 1956(h)]. Substantive money laundering provides in relevant part:

> (1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (B)knowing that the transaction is designed in whole or in part—
>
> (i)to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii)to avoid a transaction reporting requirement under State or Federal law ....."

The Count One wire fraud had as its sole purpose the stealing money. It is axiomatic the people steal money to obtain stolen proceeds. Here, funds from Suni's fraud scheme were bank

transferred for the sole purpose of dividing the stolen proceeds between co-conspirators.

The Second Circuit Court of Appeals stated at page 9 of its Summary Order dated 10/09/2024:

> ".... Based upon the evidence, Munshani [Petitioner] participated in a money laundering conspiracy, separate from the wire fraud conspiracy, because he '(1) acquired the proceeds of a specified unlawful activity, and then (2) engaged in a financial transaction with those proceeds...."

Petitioner submits the Court of Appeals was wrong in denying Petitioner relief. Merger occurs when a defendant is convicted under two criminal statutes for what is actually a single crime event. United States McDuff. 639 F. App'x 978 (5th Cir. 2016). In United States v. Santos, 553 U.S. 507 (2008) the Supreme Court ruled in a four to one to four decision in an illegal gambling case, that gross receipts were not proceeds to trigger the money laundering statute. Six justices agreed on the point that simply dividing the gross receipts from a fraud among the participants is a merger that bars charging said transfers as money laundering violations. 553 U.S. at 515-17 (plurality opinion) 527 (Stevens, J. Concurring) 529 (Breyer, J. dissenting). However, in May, 2009, Congress amended the money laundering statute to define "proceeds" to include gross receipts in the Fraud Enforcement and Recovery Act of 2009 ["FERA"]. Section 2(f)(1) of FERA now defined "proceeds" to include "gross receipts." FERA did not resolve the issue of

charging the recipient of fraudulently obtained wealth with money laundering when a recipient gives his/her confederates their share. FERA did not resolve Petitioner's issue that by simply committing the underlying wire fraud object of the conspiracy he necessarily commits a money laundering violation which adds potentially 20 years to his sentence. Neither Santos nor FERA resolve the merger problem created when the money laundering transaction is intrinsic to the predicate offense. People do not steal if they cannot benefit from the theft, and split the ill gotten gains. Dividing these proceeds was not an act separate and distinct from the wire fraud that generated those proceeds. Money laundering was triggered only because conspirators split the profits which were the object of the wire fraud. In Santos the result the Court sought was to avoid the unfairness of convicting and sentencing defendants twice for what essentially was one crime. That unfairness has not been reversed. As to Petitioner that unfairness must be corrected. The conspirators committed wire fraud and divided the gains. That should not trigger two separate crimes.

It was succinctly stated in United States v. Kennedy, 707 F.3d 558, 563 (5th Cir. 2013):

> "... in the money laundering context the relevant inquiry is whether the money laundering crime is based upon the same or continuing conduct of the underlying predicate crime, or whether the crimes are separated and based upon separate conduct.

Dividing the instant proceeds was just continuing conduct of

the predicate crime. The wire fraud necessarily required depositing, withdrawing, transferring of funds derived from the offense. The Money laundering conspiracy was merged with the predicate wire fraud conspiracy offense. See, Haague v. Warden. Fed. Corr. Inst. Elkton, 665 F. App'x 390 (6th Cir. 2016).

Reason Two: Respondent's Rebuttal Summation Violated Petitioner's Due Process Rights and Deprived him of a fair trial.

The prosecution/Respondent for the first time made a new, clearly false argument to the jury in its rebuttal summation, and substantiated that claim with false documentation. The prosecutor argued to the jury that in December 2019, acting on Suni's orders, Suresh "cover[ed] bases" by "remov[ing] the dirty name, CBL Associates," as a doing-business-as name from the entity bank account Suresh controlled at TD Bank in Canada.[T 605]. Respondent then argued falsely that two different documents relating to two different named accounts at two different addresses with two different account numbers was probative of the conduct concerning one of the accounts at issue. See, United States v. Rosa, 17 F.3d 1531, 1548-49 (2d Cir. 1994) ("It is clear, of course, that it is *improper* for a prosecutor to mischaracterize the evidence" (emphasis added)); United States v. Tacco,135 F.3d 116, 130 (2d Cir. 1998) ("The prosecution and the defense are generally entitled to wide latitude during closing arguments, so long as they do not misstate the evidence").

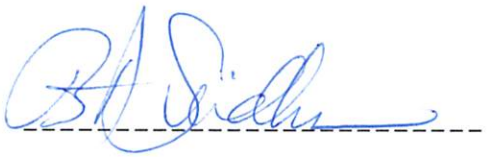
If the Respondent believed the documents were truly ambiguous as it theorized for the first time in its Summation reply, it was the prosecution's trial burden of proof to call a competent witness to explain to the jury that theory rather than presenting a made up view of the evidence to the jury for the first time in a rebuttal summation, and present false documentation in support of that theory. The general topic of Petitioner's response or lack of response to the November 2019 text messages from Suni was already stated to the jury in the prosecution's main summation, [t. 574-76], as well as in Petitioner's summation, [T 592-93]. If there was fresh argument to be made that Petitioner changed the doing-business-name on the entity account in response to that text exchange (rather than just closing the account), the prosecution should have presented the argument in its opening summation. In his closing argument Petitioner stating in his summation that after the text exchange with Suni he did not close that account, does not open the door to permit a new (and false) argument to the jury by the Respondent, and permit Respondent to use a false document slight of hand to prove its point when Petitioner could no longer counter that summation presentation. Respondent sandbagged Petitioner with false interpretations culled from documents related to two different accounts, and not just the account in question. Unfairly, that is what the jury heard last, and it violated Due Process of Law.

CONCLUSION

For the foregoing reason a writ of certiorari should issue to review said judgment of the United States Court of Appeals for the Second Circuit.

DATED: December 17, 2024

Submitted by,



B. ALAN SEIDLER, Esq.
Attorney for Petitioner
305 Broadway, 7th floor
New York, New York 10007
212-34-3131
seidlerlaw@gmail.com

TO: SOLICITOR GENERAL OF THE
UNITED STATES

APPENDIX "A"

23-6520-cr
United States v. Munshani

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of October, two thousand twenty-four.

PRESENT:

JOSEPH F. BIANCO,
STEVEN J. MENASHI,
EUNICE C. LEE,

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 23-6520-cr

SUNI MUNSHANI, a/k/a Sealed Defendant 1,

Defendant,

SURESH MUNSHANI, a/k/a Sealed Defendant 2,

Defendant-Appellant.

FOR APPELLEE: STEVEN J. KOCHEVAR, Assistant United States Attorney (Timothy V. Capozzi and Stephen J. Ritchin, Assistant United States Attorneys, *on the brief*), *for* Damian Williams, United States

Attorney for the Southern District of New York, New York, New York.

FOR DEFENDANT-APPELLANT: JUSTIN S. WEDDLE (Brian Witthuhn, *on the brief*), Weddle Law PLLC, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment, entered on May 15, 2023, is **AFFIRMED**.

Defendant-Appellant Suresh Munshani ("Munshani") appeals from the district court's judgment of conviction entered after a jury trial in which he was found guilty of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). The convictions relate to Munshani's alleged participation in a conspiracy led by his brother, Suni Munshani, to defraud a data security company (the "Victim") and launder the proceeds of that fraud. Munshani was sentenced principally to a term of nine months' imprisonment, followed by one year of supervised release. On appeal, Munshani challenges his convictions, arguing that: (1) the evidence adduced at trial was insufficient to prove the charged conspiracies beyond a reasonable doubt; (2) the district court erred in not allowing Munshani to admit into evidence the portion of his brother's allocution during his guilty plea proceeding where he made no mention of Munshani's involvement in the conspiracy; (3) the district court erred in refusing to give a multiple-conspiracy instruction to the jury; (4) the money laundering charge presented an improper "merger" with the wire fraud charge; and (5) the prosecutor's comments in rebuttal summation deprived him of a fair trial. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

I. Sufficiency of the Evidence

We review a sufficiency of the evidence challenge *de novo*. *United States v. Brock*, 789 F.3d 60, 63 (2d Cir. 2015). In reviewing a sufficiency of the evidence challenge, we will "sustain the jury's verdict if, crediting every inference that could have been drawn in the government's favor and viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Raniere*, 55 F.4th 354, 364 (2d Cir. 2022) (internal quotation marks and citation omitted). The "high degree of deference [this Court] afford[s] to a jury verdict is especially important when reviewing a conviction of conspiracy . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Landesman*, 17 F.4th 298, 320 (2d Cir. 2021) (internal quotation marks and citations omitted).

We conclude that the trial evidence was sufficient to establish that Munshani participated in a conspiracy with his brother to defraud the Victim through a series of financial transactions in 2015 and 2018, from which Munshani kept $150,000 in stolen funds for himself, and transferred approximately $710,000 in stolen funds from his bank account to his brother's account to conceal the funds' criminal origins. To the extent Munshani argues that there was insufficient evidence from which a jury could rationally find that he had the requisite *mens rea*, we disagree. "As with the other elements of a conspiracy, a defendant's knowledge of the conspiracy and his participation in it with criminal intent may be established through circumstantial evidence." *United States v. Atilla,* 966 F.3d 118, 128 (2d Cir. 2020) (internal quotation marks and citation omitted). Here, the circumstantial evidence allowed the jury to reasonably infer that Munshani knew that the funds from the Victim, for whom Munshani had never worked, were obtained by fraud, and that he

knowingly agreed to help his brother steal, and then launder, those funds. That evidence included emails, travel records, cell phone location data, and text messages, which demonstrated, *inter alia*, that Munshani: (1) traveled to Stamford, Connecticut from Canada to meet with his brother near the Victim's headquarters; (2) instructed another person to use their email, phone number, and address to register a fake company used to defraud the Victim; (3) added the fake company's name to a bank account that Munshani controlled; (4) deposited a $400,000 check issued by the Victim to the fake company, wiring $360,000 of it to his brother's personal bank account and keeping $40,000 for himself despite doing no work for the victim; (5) received additional checks obtained by fraud from the Victim, totaling $160,000; (6) lied to his bank by stating that the Victim was his customer; and (7) was warned by his brother to "be private about [his] business." App'x at 118. Although Munshani suggests that "the evidence did not rule out [his brother] actively deceiving [him] in order to induce his actions, just as [the brother] actively deceived the accomplished (and innocent) professionals at [the Victim company] for years," Appellant's Br. at 23, "[t]he possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences," *United States v. MacPherson*, 424 F.3d 183, 190 (2d Cir. 2005) (internal quotation marks and citation omitted); *see also Landesman*, 17 F.4th at 319 ("[T]he Government need not negate every theory of innocence." (internal quotation marks and citation omitted)).

Munshani's related contention, that the government failed to prove that his participation in the transactions in 2015 and 2018 were part of the same conspiracy, is similarly unavailing. As we have emphasized, "[w]here there is sufficient proof of an ongoing connection between transactions, one conspiracy is not transformed into multiple conspiracies simply because it occurs

in more than one stage and at different times." *United States v. Vazquez*, 113 F.3d 383, 387 (2d Cir. 1997). Here, there was sufficient evidence adduced during trial for the jury to rationally find that the transactions in 2015 and 2018, through which Munshani and his brother executed the fraudulent scheme, were part of the same conspiracy because, *inter alia*, the conduct involved the same co-conspirators, victim, bank accounts, and methods. In particular, the methods—involving bank accounts and fake companies—established and utilized to fraudulently obtain the Victim's money in 2015 and then launder the fraud proceeds were designed to be used for multiple transactions and, after utilizing those methods in 2015 to defraud the Victim, Munshani and his brother used those same methods to defraud the same Victim again in 2018. *See United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978) ("Every act in furtherance of the conspiracy is regarded in law as a renewal or continuance of the unlawful agreement, and the conspiracy continues so long as overt acts in furtherance of its purpose are done."). The mere fact that there was a lapse in time between some of the transactions does not undermine the jury's ability to rationally find that all of the transactions were part of the same conspiracy.[1] *See United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000) ("A single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis in its locale of operations." (alteration adopted) (internal quotation marks and citation omitted)).

In sum, the evidence was sufficient to support his convictions for conspiring to commit wire fraud and money laundering.

[1] Contrary to Munshani's suggestion, the evidence was also sufficient to show, as alleged in the indictment, that the conspiracy existed prior to his initial involvement in March 2015, and involved another co-conspirator working with Munshani's brother to defraud the Victim. In any event, the purported lack of any such evidence for this earlier timeframe would not impact the sufficiency of the evidence as to his participation in the charged conspiracy, nor would it constitute a constructive amendment to the indictment.

II. The Brother's Plea Allocution

Munshani argues that the district court erred in denying his request to admit portions of his brother's plea allocution, which Munshani asserts exculpated him because his brother did not mention Munshani's participation in the conspiracy during the allocution. In particular, Munshani argues that his brother's statement was admissible as a statement against penal interest, pursuant to Federal Rule of Evidence 804(b)(3). "We review evidentiary rulings for abuse of discretion and will reverse only if there is manifest error that is harmful and affects substantial rights." *United States v. Dupree*, 870 F.3d 62, 76 (2d Cir. 2017).

Even assuming that the district court should have admitted these statements, the error would not have prejudiced Munshani. The jury had already heard evidence that Munshani's brother participated in multiple schemes to defraud the Victim. In the allocution, his brother stated that he "agreed with others" to defraud the Victim, so his identification of one co-conspirator in one conspiracy did not imply that he did not conspire with Munshani in the charged conspiracy. App'x at 16. Given the evidence supporting Munshani's participation in the charged scheme, his brother's statement identifying one other co-conspirator would not have exculpated Munshani or otherwise altered the weight of the evidence before the jury.

III. Multiple Conspiracy Instruction

Munshani argues that the district court erred by refusing to give the jury a "multiple conspiracy" instruction. We disagree.

This Court will reverse a conviction based upon an erroneous jury trial instruction "if all of the instructions, taken as a whole, caused a defendant prejudice." *United States v. Gershman*, 31 F.4th 80, 99 (2d Cir. 2022) (internal quotation marks and citation omitted). When the defendant's objection is that the "district court decline[d] to deliver a requested instruction," the

conviction will only be overturned if the defendant can show that the "requested instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) (alteration adopted) (internal quotation marks and citation omitted). To achieve a reversal due to the district court's failure to give a multiple conspiracy charge, a defendant must show "both that there was evidence of separate networks operating independently of each other and that [the defendant] suffered substantial prejudice resulting from the failure to give the requested charge." *United States v. Cusimano*, 123 F.3d 83, 89 (2d Cir. 1997) (citation omitted).

Here, as discussed above, there was substantial evidence in the record regarding the existence of a single conspiracy involving Munshani and his brother from 2015 to 2018, and the mere lapse of time between transactions was an insufficient basis to warrant a multiple conspiracy instruction. *See United States v. Dawkins*, 999 F.3d 767, 797 (2d Cir. 2021) (explaining that a multiple conspiracy instruction "is not warranted when the evidence shows that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal" (internal quotation marks and citation omitted)); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (holding that defendant was not entitled to a multiple conspiracy charge "merely by virtue of the fact that [the conspiracy] may involve two or more phases or spheres of operation, so long as there is sufficient proof of mutual dependence and assistance"). In any event, even assuming *arguendo* that Munshani was entitled to a multiple conspiracy instruction, he has not established a substantial prejudice from the instruction's omission, especially because the trial involved only one defendant. *See United States v. Sir Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976) ("Even if two conspiracies had been proved, both conspiracies

could properly have been joined in the same indictment, since there was only one defendant . . . . [The] Defendant thus could in no event have been prejudiced by the failure of the indictment to charge two conspiracies rather than one.").

Accordingly, there is no basis to disturb the convictions based on the failure to give a multiple conspiracy instruction.[2]

IV. "Merger" Challenge to Money Laundering Conviction

Munshani argues that the money laundering conspiracy conviction must be reversed because it is based on the same transfers that are intrinsic to the wire fraud conspiracy charge, and thus suffers from the "merger" problem identified by the Supreme Court in *United States v. Santos*, 553 U.S. 507 (2008). *See United States v. Gushlak*, 495 F. App'x 132, 134 (2d Cir. 2012) (summary order) (explaining that a merger problem arises under *Santos* where "the money laundering count essentially duplicates another charged offense"). We review *de novo* a merger challenge to a money laundering conviction. *United States v. Quinones*, 635 F.3d 590, 597 (2d Cir. 2011). As set forth below, we find Munshani's merger challenge under *Santos* to be unpersuasive.[3]

The evidence at trial established that Munshani received the proceeds of a completed wire transfer from the Victim before participating in a second set of transactions that distributed the

---

[2] We similarly reject any suggestion by Munshani that the district court did not instruct the jury "that the prosecution must prove not only the elements of conspiracy, but also that the conspiracy *was the conspiracy charged* in the indictment, rather than different uncharged conspiracies." Appellant's Br. at 46; *see* Trial Tr. at 632 (instructing the jury that the government must prove, beyond a reasonable doubt, "the existence of the *charged conspiracy*" (emphasis added)); *id.* at 634 (reminding the jury that it was sufficient to find "that the *charged conspiracy* existed" (emphasis added)).

[3] As a threshold matter, the government argues that "Munshani's money laundering conviction presents no merger issue because after *Santos* was decided Congress amended the money laundering statute to eliminate the possibility of the merger issue raised by Munshani." Appellee's Br. at 45. Munshani counters that the "2009 amendment to the money laundering statute to include 'gross receipts' in the definition of 'proceeds' did nothing to eliminate the merger problem at issue in *Santos* and here." Appellant's Br. at 57. However, we need not address this threshold argument because we conclude that, regardless of the 2009 amendment, Munshani's merger claim under *Santos* fails based on the evidence in this case.

remaining fraud proceeds, minus his cut, to his brother. Based upon that evidence, Munshani participated in a money laundering conspiracy, separate from the wire fraud conspiracy, because he "(1) acquire[d] the proceeds of a specified unlawful activity, and then (2) engage[d] in a financial transaction with those proceeds." *United States v. Napoli*, 54 F.3d 63, 67 (2d Cir. 1995), *abrogated on other grounds by United States v. Genao*, 343 F.3d 578, 584 (2d Cir. 2003). In other words, the Victim's funds became "proceeds" under the first prong of *Napoli* when Munshani received such funds in his Canadian bank account via a wire transfer from the Victim because they were "derived from an already completed offense, or a *completed phase* of an ongoing offense." *United States v. Szur*, 289 F.3d 200, 214 (2d Cir. 2002) (internal quotation marks and citation omitted); *see also id.* (explaining that "the funds comprised 'proceeds' at the moment they were in control of the perpetrators, and that moment occurred as soon as [one perpetrator] received them" (internal quotation marks and citation omitted)). Munshani then engaged in a separate financial transaction under the second prong of *Napoli* when he then transferred the tainted fraud proceeds, less his cut, to his brother. In short, the district court properly determined that this evidence was sufficient to support a separate money laundering conspiracy charge under *Santos*.

V. Rebuttal Summation

Lastly, Munshani argues that the prosecutor's rebuttal summation deprived him of a fair trial because the prosecutor (1) misrepresented the facts, (2) shifted the burden of proof, and (3) implicitly commented on the defendant's decision not to testify.

"[A] defendant who seeks to overturn his conviction based on alleged prosecutorial misconduct in summation bears a heavy burden." *United States v. Farhane*, 634 F.3d 127, 167 (2d Cir. 2011) (internal quotation marks and citation omitted). "Inappropriate prosecutorial comments, standing alone, [do] not justify . . . revers[ing] a criminal conviction obtained in an

otherwise fair proceeding." *United States v. Thomas*, 377 F.3d 232, 244 (2d Cir. 2004) (citation omitted). The defendant must show both that the "comment was improper" and "that the comment, when viewed against the entire argument to the jury, and in the context of the entire trial, was so severe and significant as to have substantially prejudiced him, depriving him of a fair trial." *Farhane*, 634 F.3d at 167 (internal quotation marks and citations omitted). Three factors are used to "assess the degree of prejudice": (1) "the severity of the misconduct;" (2) "the measures adopted to cure the misconduct;" and (3) "the certainty of conviction absent the improper statements." *United States v. Russo*, 74 F.3d 1383, 1396 (2d Cir. 1996) (citation omitted). As Munshani failed to object to these alleged errors during trial, we apply the plain error standard and will reverse only if the remarks amounted to "flagrant abuse which seriously affects the fairness, integrity, or public reputation of judicial proceedings, and causes substantial prejudice to the defendant." *United States v. Williams*, 690 F.3d 70, 75 (2d Cir. 2012) (internal quotation marks and citation omitted).

We find no basis to conclude that any of the statements at issue in the prosecutor's rebuttal summation were improper. For example, Munshani contends that the government "made a false argument . . . that [Munshani] had guiltily altered his entity bank account." Appellant's Br. at 59. However, "[t]he Government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Coplan*, 703 F.3d 46, 87 (2d Cir. 2012) (internal quotation marks and citation omitted). Thus, as the district court observed on this claim in denying Munshani's application for bail pending appeal, "[w]hen read in context, this argument [by the prosecutor] was based on evidence that was already in the record, was fairly encompassed within the Government's argument on closing that defendant and his brother had a text conversation about needing to close an account in Canada (i.e., the TD Bank account), and was responsive to the

defense's argument . . . that the TD Bank Account was not closed." Addendum at 13 (citations omitted).

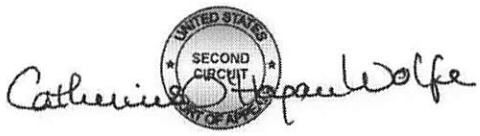
There is similarly no support in the record for Munshani's assertion that the prosecutor improperly shifted the burden to him and "implicitly commented on [his] decision not to testify." Appellant's Br. at 57. It is well settled that the government "may comment on the failure of defendant to refute government evidence or to support his own claims, so long as its remarks could not be construed as a comment on the defendant's failure to testify or as a suggestion that the defendant has any burden to produce evidence." *United States v. Rosa*, 11 F.3d 315, 342 (2d Cir. 1993). As the district court noted, the prosecutor's "[c]omment[s] on a lack of evidence that [the brother] deceived defendant or stating that it was unbelievable that defendant was fooled [by his brother] did not shift any burden to defendant; rather, read in context, these are simply permissible comments on the part of the prosecutor to highlight the weakness of defendant's position." Addendum at 14. Nor did the comment in rebuttal, that the jury should not take the lawyer's word that the defendant was deceived by his brother, implicitly comment on Munshani's failure to testify. Indeed, the prosecutor explicitly told the jury during the rebuttal summation that Munshani had no burden to do anything. Instead, construed in context, the prosecutor's comment was a permissible argument to the jury—namely, that defense counsel's assertion in summation, that Munshani was duped by his brother, lacked support in the record.

In any event, even if improper, these remarks would not constitute a "flagrant abuse" that caused substantial prejudice warranting a new trial. *Williams*, 690 F.3d at 75.

* * *

We have considered Munshani's remaining arguments and conclude that they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



PROOF OF SERVICE

B. ALAN SEIDLER, ESQ., an attorney admitted to practice law in the State of New York certifies as follows:

1. I am not a party to the instant action, and have legal offices at 305 Broadway, New York, New York.

2. On December 17, 2024, the attached Petition for Writ of Certiorai was filed by me by depositing a true copy thereof enclosed in a post paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

Solicitor General of the United States
10th & Constitution Avenue, N.W.
Room 5614
Washington, DC 20530.

DATED: December 17, 2024.

AFFIRMED TO BE TRUE,

B. Alan Seidler
Attorney for Petitioner Munshani