

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH TODD ASHLEY,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court’s precedent, and due process, prohibit a federal appellate court from upholding a conviction on a theory of guilt that was never charged in the indictment, presented by the prosecution, or submitted to the jury?
2. Whether a wire transfer, initiated without any misrepresentation to a financial institution, constitutes “theft by false pretense” from a bank under 18 U.S.C. § 2113(b), despite contrary rulings from the Third and Seventh Circuits?
3. Whether a defendant is denied fundamental due process when multiple trial errors — culminating in the reversal of most convictions on appeal — are deemed harmless in isolation, but collectively render the trial fundamentally unfair and the remaining verdicts unreliable?

STATEMENT REGARDING PARTIES TO THE CASE

The names of all parties to the case are contained in the caption of the case.

RELATED PROCEEDINGS

U.S. District Court:

On August 18, 2023, judgment was entered against Petitioner Keith Todd Ashley in *United States v. Ashley*, No. 4:20-CR-00318. (Appendix A).

U.S. Court of Appeals:

On December 12, 2024, the Fifth Circuit published its opinion in the Appeal for Ashley's matter, *United States v. Ashley*, No. 23-40482 (5th Cir. 2024). Wherein the court affirmed the Petitioner's convictions of Counts 1, 3, 14, 19 and 20, vacated the convictions for counts 2, 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, and 18, and remanded to the District Court for resentencing. (Appendix B).

On February 18, 2025, the Fifth Circuit denied the Petitioner's and the United States' petition for panel rehearing and issued its mandate. It also withdrew its December 12, 2024, opinion and issued its Opinion with Technical Revisions. (Appendix C).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Todd Ashley (hereinafter “Ashley”) respectfully petitions for a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On August 17, 2023, the United States District Court for the Eastern District of Texas, Sherman Division (District Court) sentenced Ashley to a term of Life of imprisonment. (Appendix A). The Fifth Circuit Court of Appeals (Fifth Circuit) affirmed in part, vacated in part, and remanded for resentencing on December 12, 2024. (Appendix B). On February 18, 2025, the Fifth Circuit withdrew its December 12, 2024, opinion and issued its Opinion with Technical Revisions. (Appendix C).

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Texas had jurisdiction in this criminal action pursuant to 18 U.S.C. § 3231. The Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and entered judgment on December 12, 2024. (Appendix B). The Fifth Circuit further denied the Petitioner’s and the United States’ petition for panel rehearing (and made technical revisions to its Opinion) on February 18, 2025. (Appendix C). This petition is being

brought within ninety (90) days of the denial for panel rehearing and thus has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

U.S. CONST. AMEND. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provisions:

18 U.S.C. § 2113(b):

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan

association, shall be fined under this title or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

INTRODUCTION

This case presents a rare and compelling record of constitutional violations in a federal criminal prosecution — errors of a kind and magnitude that merit this Court’s attention, followed by appellate rulings that created circuit splits and depart from this Court’s precedent. Petitioner Keith Todd Ashley was convicted on seventeen counts and eight sentencing enhancements, resulting in sentence of Life; many of which the Government later conceded were legally or factually unsupported. Its concessions reached across both schemes charged in the indictment and implicated nearly every legal theory and factual basis underlying the case. The Fifth Circuit vacated a majority of Ashley’s convictions and all sentencing enhancements. It upheld five of the seventeen convictions. In doing so, the Fifth Circuit departed from decisions of this Court and other courts of appeals on fundamental questions of due process, scope of federal statute, and the role of appellate courts in criminal cases.

This case raises urgent and unsettled questions concerning due process, the limits of appellate review, the scope of federal criminal statutes, and the cumulative impact of errors originating from the Government’s own conduct. This case is an ideal vehicle for review: the record is fully developed, the legal issues have been fully presented with published orders and opinions from the district and appellate courts, and the resolution of each question presented is outcome dispositive. Certiorari is warranted to resolve entrenched circuit conflicts, correct a decision that contravenes this Court’s precedent, and reaffirm essential constitutional protections in federal criminal trials.

STATEMENT OF THE CASE

On September 16, 2022, the Appellant, Keith Todd Ashley (hereinafter “Ashley”), was indicted by a Grand Jury in the Eastern District of Texas, in a Fourth Superseding Indictment. The indictment charged Ashley with thirteen counts of wire fraud (Counts 1–6, 9–14, and 20) in violation of 18 U.S.C. §§ 1343 and 1349; two counts of mail fraud (Counts 15–16) in violation of 18 U.S.C. § 1341; one Count of Hobbs Act Robbery causing death (Count 18) in violation of 18 U.S.C. § 924(c)(1) and (j); and one Count of Bank Theft causing death (Count 19) in violation of 18 U.S.C. § 2113(b), (d) and (e).

Ashely was tried and convicted on two separate, unrelated schemes. Counts One through Six involved a Ponzi scheme in which Ashley encouraged clients to

invest in unit investment trusts (“UIT”) and used those funds for personal use. Counts Nine through Twenty concerned a murder-for-profit scheme involving the death of a friend (“Seegan”) and a scheme to defraud a life insurance company (“Midland National”).

Ashley persisted in his plea of not guilty and proceeded to trial. On September 26, 2022, a jury trial commenced before United States District Judge Amos L. Mazzant. On October 5, 2022, the jury returned a verdict of guilty on all submitted counts, including: Wire Fraud Affecting a Financial Institution¹ (Counts 1–6); Wire Fraud (Counts 9–14, 20); Mail Fraud (Counts 15–16); Possession or Carrying of a Firearm During the Commission of a Crime of Violence Causing the Murder of a Person Through the Use of a Firearm (Count 18)²; and Bank Theft Killing A Person in Commission of the Violation (Count 19). ROA.1003-18.

On August 17, 2023, Ashley appeared before United States District Judge Amos L. Mazzant, III for sentencing. The Government, despite previously requesting an upward departure, recommended a downward variance of 240 months on Counts 1 through 6 by abandoning the “affecting a financial institution” enhancement. After adopting the original Final PSR and hearing arguments from both parties, the court sentenced Ashley to a sentence of 240 months on Counts 1 –

¹ Increasing the maximum sentence from 20 years to 30 years.

² Carrying a Mandatory Sentencing Minimum of Life.

6, 240 months on Counts 9 – 16, life imprisonment on Counts 18 and 19, and 240 months on Count 20. Judge Mazzant ordered Counts 1 – 6 to run consecutively to Counts 9 – 16, 18 and 19, and Count 20 to run consecutively to all other counts.

Ashley appealed to the U.S. Court of Appeals for the Fifth Circuit, filing his Appellant's brief on February 12, 2024. Ashley challenged the sufficiency of the evidence on Counts One through Six, Counts Nine through Sixteen, Count Eighteen, and Count Nineteen. He also challenged: (1) improper venue for Counts 18 and 19; (2) lack of federal jurisdiction for Count 18, (3) the denial of a motion to continue and to sever, and (4) the procedural and substantive unreasonableness of his sentence. Finally, Ashley argued that the aggregation of errors resulted in the denial of a constitutional right to a fair trial and that the Cumulative Error Doctrine applies.

For the first time on appeal, the Government conceded that multiple convictions lacked evidentiary support. It admitted insufficient evidence for Counts 2, 4, 5, and 6; for Count 18 in its entirety; and for the life-sentence enhancement for Count 19.

The Government agreed with Ashley's contention that insufficient evidence existed to support wire fraud on Counts Two, Four, Five, and Six given the wire transfers were between Ashley's own accounts, so the scheme had reached fruition. The Fifth Circuit accepted this analysis and vacated these counts. However, it affirmed Counts 1 and 3, concluding that the transfer of funds from clients' accounts

to Ashley’s account supported convictions for wire fraud. At oral argument, the Government further conceded it could not pursue the “affecting a financial institution” enhancement for Counts 1 and 3 on remand – which the Fifth Circuit warranted Ashley’s argument on this enhancement moot.

The lower court vacated Counts 9 – 13 (Ashley’s communications with Midland National regarding a change in beneficiary designation) and Counts 15 – 16 (mail fraud pertaining to the mailing of Seegan’s change in beneficiary form and autopsy) for insufficient evidence showing a scheme to defraud Midland National Life Insurance. The Government sought convictions under a guise of a scheme to defraud Midland National, and the Fifth Circuit held that Midland National was obligated to pay out the death benefits regardless — so no property rights were wronged.

The Fifth Circuit affirmed Count Fourteen, wire fraud in connection with Ashley’s scheme to defraud Midland National. The Government theory for Count 14, Ashley’s use of Seegan’s cell phone, post-mortem, to make a wire transfer for \$20,000 to himself, was that it furthered the scheme to defraud Midland National. The Fifth Circuit instead asserted that the victims in this Count were Seegan’s widow and son, not Midland National.

The Government also conceded Count Eighteen (using or carrying a firearm during a Hobbs Act robbery resulting in death) for insufficient evidence. The Fifth

Circuit vacated Count 18, Ashley’s use of a firearm when he allegedly killed Seegan and two days later, used Seegan’s phone to transfer \$20,000 from Seegan’s bank account to his own, concluding the taking of funds did not occur in Seegan’s presence so the elements of a Hobbs Act robbery were not met.

Count Nineteen, predicated on the same \$20,000 wire transfer as Count 14 and Count 18, alleged a violation of 18 U.S.C. § 2113(b) (bank theft). The Fifth Circuit affirmed this as bank theft by false pretenses since Ashley deceived Seegan’s widow. However, the court vacated the life-sentence enhancement under § 2113(e), agreeing with the Government that the elements of a killing during the commission of the offense was not met.

After hearing oral argument and requesting supplemental briefing, the Fifth Circuit agreed with the Government’s concessions and vacated Counts 2, 4, 5, 6, and 18, and the sentencing enhancements on Counts 1 – 6, 18, and 19. The Fifth Circuit also vacated Counts 9 – 13 and 15 – 16, although the Government did not concede these counts. Counts One, Three, Fourteen, Nineteen, and Twenty were affirmed and remanded to the district court for resentencing. The Fifth Circuit deemed Ashley’s challenge to the denial of a continuance moot in light of the vacated convictions. It rejected Ashley’s argument for the denial of severance, finding no reversible error. It did not consider Ashley’s procedural and substantive unreasonable sentence claim given the remand for resentencing. Despite the Government’s “unusual” and

“numerous” concessions, which the court acknowledged raised “the prospect that serious error existed in the trial,” the Fifth Circuit declined to apply the cumulative error doctrine.

I. The Fifth Circuit Affirmed Count 14 on a Theory Never Presented to the Jury, in Direct Violation of This Court’s Precedent.

This Court has consistently held that a conviction cannot be upheld on a basis neither charged in the indictment nor presented to the jury. *Dunn v. United States*, 442 U.S. 100, 106 (1979). Ashley was indicted and tried on the theory that Count 14 constituted part of a scheme to defraud Midland National Life Insurance Company. The Fifth Circuit acknowledged that the evidence failed to support this theory with respect to related counts (Counts 9–13 and 15–16). Yet, the Fifth Circuit affirmed Count 14 on a wholly distinct theory: Ashley defrauded Seegan’s widow and son. This alternate theory, never charged, never argued, and never submitted to the jury, cannot constitutionally sustain a conviction.

The threshold inquiry raised by this error is: whether an appellate court may serve the function of a court of first view and uphold a conviction on a theory not presented by the Government at the district court level, despite clear precedent from this Court indicating otherwise.

II. The Fifth Circuit Created a Circuit Split by Affirming Bank Theft Based on a False Pretense Directed at a Private Individual — Not the Bank Itself.

Ashley presents a question that has yet to be before this Court. Count 19 charged Ashley with bank theft under 18 U.S.C. § 2113(b) for initiating a wire transfer from Seegan's personal account. But the alleged misrepresentation was not directed at the bank, and no bank property was taken. The Fifth Circuit nevertheless affirmed the conviction, holding that any fraud involving funds held in a federally insured account constitutes theft under § 2113(b) — even where the bank was a passive intermediary. That interpretation contradicts decisions from the Third and Seventh Circuits, which require that misrepresentation be directed toward the financial institution.

The threshold question is whether § 2113(b) can be stretched to reach wire transfers between personal accounts, absent any misrepresentation to the financial institution itself.

III. The Denial of Severance and a Timely Continuance Compromised Ashley's Right to a Fair Trial and Severely Prejudiced Ashley.

This Court has long recognized that adequate time to prepare a defense and the fair presentation of charges are fundamental to due process. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Zedner v. United States*, 547 U.S. 489, 498–99 (2006). Nineteen days before trial, the Government filed a superseding indictment adding complex, high-penalty charges. The district court denied Ashley's motion to

continue and refused to sever unrelated fraud and murder-for-profit schemes, forcing trial on both before a single jury. The resulting prejudice was evident: the jury convicted on all 17 counts and 8 sentencing enhancements, despite 12 counts and all enhancements being vacated on appeal.

The threshold question is whether the district court arbitrarily denied Ashley's pre-trial motions when late-arising charges and improperly joined offenses deprive the defendant of a meaningful opportunity to prepare and prepare a defense.

IV. In Connection with his Fundamental Right to a Fair Trial, the Cumulative Error Throughout Ashley's Trial Contravenes Due Process and Warrants Reversal.

This Court has held that multiple trial errors, even if individually harmless, may collectively violate due process when their combined effect renders the trial fundamentally unfair. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The Fifth Circuit acknowledged that the Government engaged in "unusual" conduct, offered "threadbare explanations," and conceded insufficient evidence on the majority of charges and enhancements, yet declined to apply the cumulative error doctrine.

The threshold question is whether a conviction may stand when the Government's conduct, evidentiary failures, and procedural violations collectively compromised the fairness of the entire proceeding, even if no single error alone mandates reversal.

REASONS FOR GRANTING THE WRIT

I. This Case Presents an Ideal Vehicle to Reaffirm the Constitutional Boundaries of Appellate Review in Criminal Cases.

With respect to Count 14, this Court should grant this petition, vacate the underlying judgment, and remand to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit directly contradicted the Supreme Court of the United States precedent when it found sufficient evidence for Count 14, a conviction of 18 U.S.C. § 1343, based upon a theory never presented to the trier of fact.

Appellate courts cannot “assume . . . the function of a court of first view . . . [or] of a jury” by affirming convictions on “any theory they please simply because the facts necessary to support the theory were presented to the jury”. *Ciminelli v. United States*, 598 U.S. 306, 317, 143 S. Ct. 1121, 1129 (2023); *McCormick v. United States*, 500 U. S. 257, 270-271, n. 8, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). The Government charged Ashley with a scheme to defraud Midland National Life Insurance. It never sought a conviction for Count 14 on the theory that Ashley’s scheme to defraud was against the decedent’s family. And, as established by the court of appeals, the Government failed to meet its burden of proof in establishing any scheme to defraud Midland National so Count 14 must be vacated.

a. The Government Consistently Prosecuted Count 14 as a Scheme to Defraud Midland National.

Ashley was convicted of Counts 9 through 16 as part of a unified scheme to defraud Midland National Life Insurance Company. The Government indicted all

eight fraud counts under “The Scheme” that “Ashley, knowingly devised and intended to devise a scheme and artifice to defraud Midland National.” ROA.563-64. Grouping Counts 9 through 14 together, the Indictment alleges that Ashley, acting as a Registered Representative for Midland National, sold two life insurance policies to his friend, Seegan. Seegan subsequently changed the beneficiary of the policies to a trust and named Ashley as trustee. Ashley then communicated with Midland National to confirm and verify the change in beneficiary designation (Counts 9–12) and later contacted the company to report Seegan’s death (Count 13).

Count 14 was charged as part of the same scheme but relied only on limited factual allegations set out in a summary chart. Specifically, it stated that Ashley used a telephone to initiate and complete a \$20,000 wire transfer from Seegan’s account at Texas Capital Bank to Ashley’s business account via Branch Banking and Trust Company. ROA.567. While the chart described the “how,” the elements of wire fraud require more and the indictment itself charged a single, overarching scheme to defraud Midland National. No distinct or alternative theory was presented for Count 14.

The Government’s theory at trial remained consistent with the indictment: Ashley intended to defraud Midland National and Midland National was the intended victim of Count 14. At every stage — indictment, opening statements, case-

in-chief, and closing argument — the Government identified Midland National as the intended victim.

During opening statements, the Government made this theory explicit:

The victims of the robbery were, of course, James Seegan who lost his life, his family who lost a husband and a father, but also Midland life insurance company. Midland life insurance company really was the intended victim here for the defendant because just like when you walk into a 7-Eleven as a robber, if I am the robber and I shoot and kill the person behind the counter, I'm not getting one penny of their money. I'm taking Southland Corporation's money. I'm taking 7-Eleven's money.

ROA.1669. In closing, the Government reiterated, “[Counts] 9 through 14 []relates to the fraudulent things that [Ashley] did in relation to Midland Life, trying to get the beneficiary changed”. ROA.2909. Throughout trial, Ashley repeatedly put the Government and the Court on notice that Count 14 could not be sustained under this theory. ROA.2940. In response, during rebuttal, the Government made a fleeting attempt to shift the narrative, acknowledging:

There was talk from the defense that that -- you have to acquit on that because it has no relation to Midland, okay? That's true/ It has no relation to Midland. It's Texas Capital Bank. That's the bank account that we're dealing with here.

And you're going to have the Indictment. If you read the Indictment, it's very clear. We're dealing with the Texas Capital Bank; we're not dealing with Midland . . .

ROA.2976. While the Government's passing reference to Texas Capital is nothing more than a red herring, this distraction still could not provide support for the Fifth

Circuit's new theory that the scheme to defraud for Count 14 was against Seegan's widow.

The Government's post-trial briefing confirmed its continued reliance on the theory that Midland National was the intended victim of Count 14. In its response to Ashley's motion for judgment of acquittal, the Government stated:

With respect to the Wire and Mail Fraud charges, the United States presented sufficient evidence that Ashley orchestrated a fraudulent scheme and had the specific intent to defraud four individuals [the victims of Counts One through Six]. . . as well as Midland National Insurance Company" and "[C]ounts 9 through 16 . . . [are] charges in which the United States alleges that the victim of the fraud was Midland.

ROA.1035;1081. Facing Ashley's consistent challenge that Count 14 could not be sustained under this theory (*see* ROA.1035), the Government responded:

The Fourth Superseding Indictment, read as a whole, makes it absolutely clear what schemes Ashley conducted. Count 14 unambiguously states that the wire transfer went from Seegan's account to Ashley's account. The fact that Seegan's bank and his family were the victims, not Midland Life, does not render the evidence insufficient.

ROA.1084. But that assertion only confirmed the issue. Consequently, the indictment, read as a whole, grouped Counts 9 through 14 as part of a single scheme to defraud Midland National. While the government, rightfully, alleged independent theories of the wire fraud for Counts 1 – 6 and Counts 9 – 14, it did not charge a separate scheme targeting Seegan's family, nor did the Government argue such a theory at trial. Count 14, like the others in the group, was presented as part of the

overarching Midland National scheme; and the Fifth Circuit held that theory to be legally insufficient. The Government's reliance on the indictment "as a whole" does not salvage Count 14. To the contrary, it underscores that all eight counts, Counts 9 – 16, were prosecuted under a unified theory.

The district court's Order on Defendant's Motion for Acquittal echoed that both Ashley and the Government understood Count 14 to be part of a single scheme targeting Midland National. Notably,

Counts Nine through Fourteen all are [] Wire Fraud concerning Seegan's Life Insurance policy and his bank accounts. The Government alleges that the victim of this fraud was Midland National, the bank with which Seegan and Ashley both contacted regarding Seegan's life insurance policy.

ROA.1164. Most critically, the district court affirmed that Counts 13 and 14 concerned Ashley's use of telecommunications to execute that plan,

Counts Thirteen and Fourteen concern Ashley's use of phones toward Midland National and Texas Capital Bank regarding part three of Ashley's plan, as they took place after he murdered Seegan at his home, and concern Ashley's taking of money from Seegan's account.

ROA.1165. Although the court acknowledged that Count 14 did not directly involve the life insurance proceeds, it nevertheless tied the transaction to the same overarching scheme:

Although Count Fourteen does not relate specifically to the life insurance proceeds, the Court does note that the taking of Seegan's money was the ultimate plan from the beginning, to obtain money to deal with Ashley's financial troubles. See *Waddell*, 840 F. App'x at 442. The Court finds that the evidence supports a finding that a reasonable

juror could find that a scheme to defraud existed, Ashley used wire communications in interstate or foreign commerce to further that scheme, and Ashley had specific intent to defraud for each of the Life Insurance Counts.

ROA.1165-66. The record consistently reflects that Count 14 was prosecuted as part of a scheme to defraud Midland National.

The Government steadfastly grouped Counts 9 – 16 together, alleging a single scheme to defraud Midland National Life Insurance Company. At no point did the Government present a distinct theory for Count 14. The conviction rested on the claim that Ashley used Seegan's bank account to transfer \$20,000 to himself as part of a scheme to defraud Midland National. The appellate court injected itself as the trier of fact and affirmed Count 14 based “[o]n Ashley's deception of Seegan's widow and son, not Midland National,” despite finding the government did not sufficiently prove that Ashley was engaged in a scheme to defraud Midland National for Counts 9 – 13 and 15 – 16. *Ashley*, 128 F.4th at 650. Once that theory collapsed, so too must Count 14.

b. Appellate Courts May Not Uphold a Conviction by Assuming the Role of the Jury.

The United States Constitution, and due process, require a person be given the right to be tried by a jury of their peers, and does not permit a criminal conviction unless beyond a reasonable doubt. Noted by the Honorable Justice Frankfurter, the Government's duty to establish guilt beyond a reasonable doubt is “a requirement

and a safeguard of due process of law in the historic, procedural content of ‘due process.’” *Leland v. Oregon*, 343 U.S. 790, 802, 72 S. Ct. 1002, 1009 (1952) (dissenting opinion). When an appellate court upholds a conviction on a theory not alleged in an indictment or presented to a jury, it “[o]ffends the most basic notions of due process.” *Dunn v. United States*, 442 U.S. 100, 106, 99 S. Ct. 2190, 2194 (1979). Appellate courts may not affirm convictions on “any theory they please simply because the facts necessary to support the theory were presented to the jury”. *McCormick v. United States*, 500 U. S. 257, 270-271, n. 8, 111 S. Ct. 1807, 114 L. Ed. 2d 307 (1991). To cherry picks facts presented to the jury and apply them to a new theory, “asks [an appellate court] to assume not only the function of a court of first view, but also of a jury. That is not [its] role.” *Ciminelli v. United States*, 598 U.S. 306, 317, 143 S. Ct. 1121, 1129 (2023). A defendant, in a criminal case, is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance and an appellate court may not retry a case on appeal under different instructions and on a different theory than presented to the jury. *McCormick*, 500 U. S. at 270-271, n. 8.

The legal issue presented is straightforward, and the factual record is fully developed. Ashley does not ask this Court to revisit the contours of “a scheme to defraud”, given the lower circuit provided that necessary clarity. Rather, Ashley asks

this Court to reaffirm long-standing constitutional precedent that bars appellate courts from affirming convictions on uncharged and untried theories.

The Government failed to meet its burden of proof on Count 14 under the only theory it alleged: that Ashley defrauded Midland National. As the Fifth Circuit found, Midland National was not “wronged” of any property rights because it remained contractually obligated to pay the insurance proceeds. Therefore, a scheme to defraud Midland National does not exist. *Ashley*, 128 F.4th at 649. By that reasoning, Count 14, premised on the same theory, must also fail.

Instead, the Fifth Circuit engaged in impermissible fact-finding. It affirmed Count 14 by substituting a new theory: that Ashley defrauded Seegan’s widow and son. That theory was never alleged, argued, or submitted to the jury. Whatever rationale the Government had for charging Count 14 as fraud against Midland National, due process prohibits appellate courts from rescuing the conviction by inventing alternative theories — even if the jury might have reached the same verdict on this new theory. *See Dunn v. United States*, 442 U.S. 100, 107, 99 S. Ct. 2190, 2194 (1979). Nor can the Government avoid its burden to establish each element by appealing to a broad, “overarching” theory of the case. A connection between the wire transfer in Count 14 and Midland National is unclear, at best. However, Ashley bore no burden to fill that evidentiary gap, nor did the Fifth Circuit have license to do so on the Government’s behalf.

The Fifth Circuit’s handling of Count 16 underscores the error. That count, too, appeared to have little relevance to Midland National. The appellate court rightly reversed it for insufficient evidence, without crafting a new theory to save the conviction. Yet for Count 14, the court did precisely that, violating the very constitutional protections this Court has long enforced.

II. The Fifth Circuit’s Interpretation of 18 U.S.C. § 2113(b) Conflicts with Circuit Precedent

With respect to Count 19, this Court should grant this petition, vacate the judgment, and remand. While this Court has interpreted 18 U.S.C. § 2113(b) in key decisions, it has not yet addressed the specific requirements for a conviction based on theft by false pretenses under that statute. The Fifth Circuit affirmed a conviction under 18 U.S.C. § 2113(b) based on misrepresentations directed at an individual, rather than a bank. That decision conflicts with the rulings of the Third and Seventh Circuits and presents a question of exceptional federal importance that merits resolution.

Bank theft, under 18 U.S.C. § 2113(b), criminalizes the “tak[ing] and carr[ying] away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association.” Considering congress’s intent in protecting banks “from those who wish to steal [its] assets — even if they used no force in doing so”, this Court

expanded 18 U.S.C. § 2113 beyond common law larceny to include the crime of taking under false pretenses. *Bell v. United States*, 462 U.S. 356, 76 L. Ed. 2d 638, 103 S. Ct. 2398 (1983).

The Fifth Circuit held that a wire transfer from an individual's personal bank account, even when induced by fraud directed at that individual, constitutes a "taking" from a bank. *United States v. Ashley*, 128 F.4th at 653. Specifically, the Fifth Circuit held that while *Bell* expanded § 2113(b) to include theft by false pretenses, § 2113(b) is not confined to theft by false pretenses and therefore does not require an affirmative representation. *Id.* The Fifth Circuit has stretched the federal bank theft statute far beyond its intended reach and transforms virtually any fraud involving bank-held funds into a federal bank theft crime; regardless of whether a bank is deceived, victimized, deprived of, or ever had knowledge of the theft.

This analysis is in direct contrast to the Third and Seventh Circuit. Considering the congressional purpose of § 2113(b) being to protect banks, the falsity, embezzlement, or fraudulent scheme must have been directed at, or implicated, the bank in some way, and not merely a third party. *United States v. Howerter*, 248 F.3d 198 (3rd Cir. 2001); *United States v. Kucik*, 844 F.2d 493 (7th Cir. 1988). In *Howerter*, the defendant, as the treasurer, held the signature card of an organization's bank account. He was indicted for bank theft by writing checks from the organization's FDIC-insured bank account to himself. The Third Circuit,

considering the congressional policy to protect banks, held “that the falsity, embezzlement, or fraudulent scheme must have been directed at, or implicated, the bank in some way, and not merely a third party.” *Howerter*, 248 F.3d at 205 (emphasis added). The defendant’s conduct did not “take or carry away with the intent to steal” since defendant, as the signature card holder, had the authority to withdraw funds and the absence of fraudulent conduct directed at the bank, by the way of a scheme to deprive it of funds. *Id.*

Similarly, in *United States v. Kucik*, 844 F.2d 493 (7th Cir. 1988), the defendant, operating a check-kiting scheme involving an FDIC-insured bank and a non-insured credit union, was indicted for theft of cashier’s checks (given that the scheme resulted in loss of money from the non-FDIC insured credit union). Although he misrepresented having funds in his credit union account to the bank, he did not intend to permanently deprive the bank of its money. While the taking of a cashier’s check from an FDIC insured bank constituted as a thing of value, the false pretense relied on was directed toward a non-FDIC insured entity. *United States v. Kucik*, 844 F.2d 493 (7th Cir. 1988).³

³ Ultimately, the convictions were reversed due to an error in not providing a *Williams* instruction for a charge under 18 U.S.C. § 2113(b). See *Williams v. United States*, 458 U.S. 279, 284-85, 73 L. Ed. 2d 767, 102 S. Ct. 3088 (1982) (a check is not a statement that the drawer has funds in his account sufficient to pay it).

The wire transfer at issue in Count 19 involved Ashley's movement of \$20,000 from Seegan's account at Texas Capital Bank to Ashley's account. But a wire transfer order, by itself, is not a false pretense or misrepresentation. As the Fifth Circuit has recognized, a transfer instruction is "an instruction to a bank, unaccompanied by a promise of any kind." *United States v. Briggs*, 939 F.2d 222, 226 (5th Cir. 1991). *Briggs*, relying on *Williams v. United States*, 458 U.S. 279 (1982), held that wire transfer orders are not statements that can constitute fraud under federal statutes. Ashley's conviction cannot be sustained on the bare act of instructing a bank to transfer funds. No false pretense was directed at the bank and no evidence was presented that Ashley misrepresented anything to Texas Capital Bank. Under *Kucik* and *Briggs*, that alone forecloses liability under § 2113(b).

By allowing convictions under § 2113(b) where the only deception is aimed at a private individual, and not the bank, the Fifth Circuit's ruling improperly transforms private disputes over electronically transferred funds into federal bank theft crimes.

III. The Denial of Continuance and Severance Violated Due Process and Created Substantial Prejudice.

With respect to the denial of a continuance and severance, this Court should grant certiorari, vacate the judgment, and remand. The district court's refusal to grant additional time to prepare following a last-minute superseding indictment, along with its decision to join two unrelated schemes in a single trial, violated Ashley's

due process rights and deprived him of a fair trial. The Fifth Circuit improperly dismissed these constitutional violations as “moot” or “limited” in light of the Government’s post-trial concessions and the vacatur of 12 counts. But the prejudice from these errors resulted in reversible error.

a. The Government’s Late Superseding Indictment Undermined Ashley’s Due Process Right

Adequate time to prepare a defense is a core component of due process. Congress codified this right in the Speedy Trial Act, which allows for an “ends of justice” continuance when necessary to avoid prejudice — especially where the Government files a superseding indictment shortly before trial. See 18 U.S.C. § 3161(h)(7)(A), (B); *Bloate v. United States*, 559 U.S. 196, 197, 130 S. Ct. 1345, 1348 (2010); *see also United States v. Rojas-Contreras*, 474 U.S. 231, 236, 106 S. Ct. 555, 88 L. Ed. 2d 537 (1985); 18 U.S.C. § 3161(h)(7)(A), (B)(iv).

While trial courts have broad discretion in deciding continuance requests, an arbitrary or unreasoning denial may constitute a violation of the right to counsel. *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983); *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In reviewing such decisions for abuse of discretion, courts must consider the complexity of the case, the timing of the indictment, and the time needed for effective preparation. *Zedner v. United States*, 547 U.S. 489, 498–99 (2006); *Goldsby v. United States*, 160 U.S. 70, 72, 16 S. Ct. 216, 217 (1895). A denial constitutes reversible error where the defendant shows (1) actual prejudice and (2)

that the denial offends fundamental conceptions of justice. *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986); *United States v. Sheperd*, 27 F.4th 1075, 1085 (5th Cir. 2022).

Nineteen days before trial, the Government filed a Third Superseding Indictment, adding two new counts, Count 18 and Count 19, each carrying a mandatory life sentence. Eight days later, it filed a Fourth Superseding Indictment – adding Attempted Bank Theft on Count 19 and wire fraud on Count 20 based on facts not supported by any other count. These complex, high-penalty charges significantly altered the scope of the case, leaving Ashley with inadequate time to investigate, prepare expert testimony, or mount an effective defense. The magnitude of these changes, combined with the legal and factual complexity of the case demonstrated by the Government’s extensive concessions, made continuance essential.

The Government conceded that Count 18 and the sentencing enhancement for Count 19 lacked sufficient evidence. The Fifth Circuit, in turn, deemed the continuance issue “moot.” *United States v. Ashley*, 128 F.4th 641, 655 (5th Cir. 2025). But that determination was erroneous. *See Sibron v. New York*, 302 U.S. 40, 57 (1968)(a criminal case is moot only when there is no possibility that “any collateral legal consequences will be imposed upon the basis of the challenged conviction.”). The harm caused by a denial of adequate preparation time is not

rendered harmless by later vacatur of some charges. Count 19 remains, and so does Count 20. Ashley's liberty remains at stake, and the prejudice from being forced to trial without adequate preparation time persists.

b. The District Court's Denial of Severance Created Incurable Prejudice

A district court may join separate offenses in the same indictment if the offenses are of the same or similar character, based on the same act or transaction, or connected with or parts of a common scheme or plan. Fed. R. Crim. P. 8(a). Likewise, Federal Rule of Criminal Procedure 14(a) permits a district court to sever charges if the defendant "may be prejudiced" by joinder. *United States v. Ballis*, 28 F.3d 1399, 1408 (5th Cir. 1994). The general test is whether "it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly . . . keep separate the evidence that is relevant and render a fair and impartial verdict." *United States v. Welch*, 656 F.2d 1039, 1053-54 (5th Cir. 1981).

Ashley was tried on two distinct and unrelated schemes: a financial fraud and a murder-for-profit. Despite his repeated objections, the district court denied severance, forcing a single jury to consider both sets of charges together. The appellate record clearly shows the jury could not render a fair verdict. The jury convicted on all 17 counts and imposed all eight sentencing enhancements. But on appeal, the Government, despite having previously defended the sufficiency of the evidence, conceded that multiple counts related to both schemes were legally and

factually unsupported. The Fifth Circuit agreed and vacated 12 counts and all eight enhancements. That reversal starkly underscores the prejudice caused by trying unrelated charges together.

The grave error in the district court's refusal to sever was demonstrated in its own bias. It allowed substantial weight to be given to its personal judgment of Ashley at sentencing when it crafted its sentence so that, regardless of the legal merits of various objections and arguments, a specific sentence could be reached:

And just so you know, even if I'm wrong on these objections, for all the reasons I stated -- those were all grounds -- I would give you the same sentence. So even if you go get me reversed on these objections, I would give you the same sentence I'm giving you today. So whichever way I have to do it to figure it to get there, I would do that because if I can't make it very clear for what you've done in all of this case -- I've said it before, and I'll say it again -- you should never be out in the public ever again.

ROA.3095.

The Fifth Circuit acknowledged the potential for prejudice but held that "the effect... is limited" by the fact that most counts were vacated. *Ashley*, 128 F.4th at 656. To suggest, as the Fifth Circuit did, that the prejudice from joinder was "limited" because some counts were later vacated, misses the point. Ashley was convicted by a jury that improperly relied on inadmissible or improperly joined evidence. Five counts remain, and two of those should have been severed from the rest. The integrity of the jury's verdict is therefore irreparably compromised.

The denial of Ashley’s motions to continue and sever materially impaired his constitutional right to a fair trial. The mass concessions and vacations reiterate the necessity for severance and continuance, and the prejudice Ashley faced given this error.

IV. The Fifth Circuit’s Refusal to Apply the Cumulative Error Doctrine Sanctioned a Fundamentally Unfair Trial that Riddled with Error.

With respect to cumulative error, this Court should grant certiorari and vacate the entirety of the remaining judgment. Ashley was forced to stand trial on charges the Government later conceded were legally unsupported. On its face, these severe concessions, alone, conclude the trial was so infected with error to render it unfair. The Fifth Circuit acknowledged this fundamental due process concern. However, it ultimately declined to invoke the cumulative error doctrine despite the Government’s “unusual” conduct and “numerous” concessions with “threadbare explanations” raising the “prospect that serious error existed in the trial”. *Ashley*, 128 F.4th at 656.

“A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). When multiple errors create a combined effect resulting in a fundamentally unfair trial, due process is violated — even if no single error alone would justify reversal. *Chambers v. Mississippi*, 410 U.S. 284, 298, 93 S. Ct. 1038, 1047 (1973); *see also Glossip v. Oklahoma*, 145 S. Ct. 612, 629 (2025) (“A prejudice analysis requires a ‘cumulative

evaluation; of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief.”). Summarized by the Ninth Circuit, clearly established federal due process requires that “the combined effect of the trial court’s multiple errors rendered a defendant’s defense ‘far less persuasive than it might have been,’ *Chambers*, 410 U.S. at 294, resulting in a ‘substantial and injurious effect or influence’ on the jury’s verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1721 (1993), which ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ *DONNELLY v. DeCHRISTOFORO*, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871 (1974).” *Parle v. Runnels*, 505 F.3d 922, 934 (9th Cir. 2007).

Federal courts uniformly recognize that the aggregate of individual errors, harmless in isolation, may have a debilitating effect and render a trial fundamentally unfair. The practical application of this due process protection is known as the cumulative error doctrine. *See United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993); *United States v. Fell*, 531 F.3d 197, 233 (2d Cir. 2008); *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019); *United States v. Runyon*, 707 F.3d 475, 520 (4th Cir. 2013); *United States v. Delgado*, 672 F.3d 320, 343-44 (5th Cir. 2012); *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000); *United States v. Adams*, 628 F.3d 407, 419 (7th Cir. 2010); *United States v. Hardy*, 224 F.3d 752,

757 (8th Cir. 2000); *United States v. Lopez-Medina*, 596 F.3d 716, 740-41 (10th Cir. 2010); *United States v. Lopez*, 590 F.3d 1238, 1258 (11th Cir. 2009).

It is not the requirement that one single error result in cognizable harm, the cumulative-error doctrine “requires the vacation of a defendant’s conviction even though the same compendium of errors, considered one by one, would not justify such relief.” *United States v. Baptiste*, 8 F.4th 30, 39 (1st Cir. 2021). The rubric of cumulative error demands that trial errors be weighed against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy--or lack of efficacy--of any remedial efforts); and the strength of the government's case. *United States v. Sanabria*, 645 F.3d 505, 507 (1st Cir. 2011). Likewise, “[e]rrors can accumulate either by virtue of their relatedness, such that they ‘amplify each other in relation to a key contested issue in the case’ or by virtue of their combined magnitude such that, when aggregated, ‘unrelated errors sufficiently undermine[] confidence in the outcome of the trial.’” *United States v. Greenspan*, 923 F.3d 138, 154 (3d Cir. 2019) (quotation omitted).

A cumulative error claim is “*sui generis*,” and only in rare instances do errors “so fatally infect the trial that they violated the trial’s fundamental fairness. *United States v. Valencia*, 600 F.3d 389, 429 (5th Cir. 2010); *United States v. Delgado*, 672

F.3d 320, 344 (5th Cir. 2012) (en banc). Reversal is justified when synergistic effect of the errors as a whole severely prejudice the defendant’s constitutional right to a fair trial. *United States v. Riddle*, 103 F.3d 423, 425 (5th Cir. 1997). Simply, cumulative error exists when contrary rulings “would have produced a very different trial.” *United States v. Boyce*, 759 F. App’x 259, 265 (5th Cir. 2019) (citing *Riddle*, 103 F.3d 423, 434); *see also Greenspan*, 923 F.3d at 154.

a. Ashley’s Trial was Infested with Error.

This case is precisely the “*sui generis*” scenario that the cumulative error doctrine was designed to protect. The Fifth Circuit itself acknowledged that the unusual number of government concessions “certainly raises the prospect that serious error existed in the trial.” *Ashley*, 128 F.4th at 656. Yet it refused to acknowledge the synergistic effect of these acknowledged deficiencies.

Ashley was tried on 17 counts in a joint prosecution involving two unrelated schemes. The jury convicted him on every count and imposed all available enhancements. The Fifth Circuit vacated 12 of those convictions, along with all sentencing enhancements. The remaining convictions — Counts 1, 3, 14, 19, and 20 — were reached by a jury that had been exposed to inadmissible and improperly joined evidence. While Ashley agrees with the Panel’s decision to vacate thirteen counts and eight enhancements (two with mandatory life sentences), this does not lessen his right to a fair trial on the remaining convictions.

The remaining convictions cannot be quarantined from the errors infecting the broader trial. The Government’s shifting theories, the untimely filing of a superseding indictment, the denial of severance, the refusal to grant a continuance, and repeated instances of prosecutorial overreach created a cascade of procedural and substantive violations that stripped Ashley of a fundamentally fair proceeding. Ashley consistently objected at every stage, preserving each issue and grounding his challenges in well-established law. While Ashley restricted his argument in this Petition to two specific pre-trial errors, he steadfastly complained of fundamental errors at the district court level as permitted by the posture of the case as the case evolved.⁴ Given the unique nature and significant error, Ashley’s appellate argument necessitated a focus on the clearly erroneous convictions he faced. Yet the scope and sequence of errors, combined with the Government’s mass post-trial concessions, suggest that even more trial-level flaws may have escaped scrutiny due to the constrained procedural posture of Ashley’s case at the time each trial error occurred. In such a case, where the record reflects systemic breakdowns, the only appropriate remedy is full vacatur. Ashley’s trial, viewed in its entirety, was fundamentally unfair.

⁴ In addition to the aforementioned pre-trial motions, Ashley filed the following substantive pre-trial motions: Motion to Dismiss for Improper Venue; Motion to Dismiss for Lack of Jurisdiction; Motion to Dismiss for Prosecutorial Vindictiveness; Motion to Dismiss for Duplicitous Pleadings; Motion to Dismiss for Multiplicity; Motion for Bill of Particulars; Motion to Suppress. However, he received little relief from the district court.

The record reveals not only a single reversible error — but a pattern of compounding procedural and constitutional violations that warrant vacatur of the entire judgment. This Court should enforce the cumulative error doctrine to preserve the integrity of due process and the criminal justice system.

* * *

CONCLUSION

For the forgoing reasons, the Court should grant the Petition for Writ of Certiorari, vacate the underlying judgment, and remand for further proceedings consistent with this Court’s resolution of the constitutional and statutory questions presented.

Respectfully submitted this 19th day of May 2025.

Respectfully submitted,

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**CJA COUNSEL OF RECORD FOR
KEITH TODD ASHLEY**

CERTIFICATE OF SERVICE BY MAILING

I hereby certify that, on the 19th day of May 2025, the original Petition and its Appendix, **as well as the Motion to Proceed in Forma Pauperis**, were sent to the Court by FedEx Express mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Keith Todd Ashley, at:

Fannin County Jail
2389 Silo Road
Bonham, TX 75418

Lastly, I hereby certify that, on the same day, a true and correct copy of this Petition and Appendix was sent by FedEx Express mail to:

Solicitor General of the United States
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001

/s/ James P. Whalen
JAMES P. WHALEN

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 8,122 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 19th DAY OF MAY 2025.

/s/ James P. Whalen
JAMES P. WHALEN
