UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

UNITED STATES OF AMERICA § **JUDGMENT IN A CRIMINAL CASE**
§
v. §
§ Case Number: **4:20-CR-00318-ALM-KPJ(1)**
KEITH TODD ASHLEY § USM Number: **17619-509**
§ **James P Whalen**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**1-6, 9-16, 18, 19 and 20 of the Fourth Superseding Indictment**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense		**Offense Ended**	**Count**
18:1343(f), 1349	Wire Fraud and Attempted Wire Fraud	05/20/2020	1-6
18: 1343, 1349	Wire Fraud and Attempted Wire Fraud	5/20/2020	9-14, 20
18: 1341, 1349	Mail Fraud and Attempted Mail Fraud	05/20/2020	15, 16
18: 924(c)(1), 924(j)(1)	Carrying or Discharging a Firearm During a Crime of Violence or Possession of a Firearm in Furtherance of a Crime of Violence Causing Death or Murder by Robbery	02/19/2020	18
18:2113(b)(d) and (e)	Attempted Bank Theft and Bank Theft	02/19/2020	19

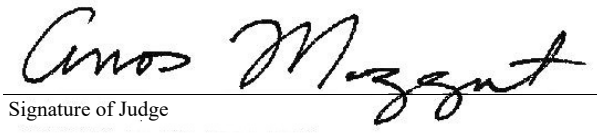
The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ All remaining counts ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 17, 2023
Date of Imposition of Judgment



Signature of Judge

AMOS L. MAZZANT, III
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

August 17, 2023
Date

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: Life. The term consists of 240 months on each of Counts 1, 2, 3, 4, 5, and 6; 240 months on Counts 9, 10, 11, 12, 13, 14, 15, 16, and 20; and terms of life on each of Counts 18 and 19; of the Fourth Superseding Indictment. The Court orders that the sentence imposed on Counts 1, 2, 3, 4, 5, and 6 is to run consecutively to the sentence imposed on Counts 9, 10, 11, 12, 13, 14, 15, 16, 18,and 19, and the sentence on Count 20 is to run consecutively to all the other counts of conviction. This sentence is to run concurrently with any sentence imposed in Docket Number F2100109, 195th District Court of Dallas County, Dallas, Texas.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court recommends that Defendant be designated to a BOP facility in Dallas Fort Worth area, if appropriate. The Court recommends the Defendant receive appropriate mental health treatment while imprisoned. The Court recommends that the Defendant participate in the Inmate Financial Responsibility Program at a rate determined by the Bureau of Prisons staff in accordance with the requirements of the inmate Financial Responsibility Program. The Court recommends the Defendant receive appropriate drug treatment. The Court recommends that Defendant be designated to a BOP facility at Seagoville, Texas if appropriate.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **five (5) years.** This term consists of terms of 5 years on each of Counts 1, 2, 3, 4, 5, 6, 18, and 19, and terms of 3 years on each of Counts 9, 10, 11, 12, 13, 14, 15, 16, and 20, all such terms to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

SPECIAL CONDITIONS OF SUPERVISION

You must provide the probation officer with access to any requested financial information for purposes of monitoring restitution payments and income sources.

You must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless payment of any financial obligation ordered by the Court has been paid in full.

You must not participate in any form of gambling unless payment of any financial obligation ordered by the Court has been paid in full.

You must participate in any combination of psychiatric, psychological, or mental health treatment programs and follow the rules and regulations of that program, until discharged. This includes taking any mental health medication as prescribed by your treating physician. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. You must pay any cost associated with treatment and testing.

You shall not obtain any employment as a financial advisor or obtain employment with any firm that engages in financial brokering.

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$1,700.00	$1,715,249.05	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Restitution of $1,715,249.05 to:

ALICE NEWTON
$102,500.00

BRENDA STEWART
$299,806.00

DENNY WILLMON
$97,328.51

FRED REEVES
$49,365.81

KATHY DIETRICK
$100,000.00

LEONID SHTEYNGART
$124,113.58

ROBERT GREENING
$74,742.19

SAKDIDA SEEGAN
$687,392.96

WILLIAM DRIVER
$180,000.00

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $1,716,949.05 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

It is ordered that the Defendant shall pay to the United States a special assessment of $1,700.00 for Counts 1-6, 9-16, 18, 19, 20, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Any monetary penalty that remains unpaid when the defendant's supervision commences is to be paid on a monthly basis at a rate of at least 10% of the defendant's gross income. The percentage of gross income to be paid with respect to any restitution and/or fine is to be changed during supervision, if needed, based on the defendant's changed circumstances, pursuant to 18 U.S.C. § 3664(k) and/or 18 U.S.C. § 3572(d)(3), respectively. If the defendant receives an inheritance, any settlements (including divorce settlement and personal injury settlement), gifts, tax refunds, bonuses, lawsuit awards, and any other receipt of money (to include, but not be limited to, gambling proceeds, lottery winnings, and money found or discovered), the defendant must, within 5 days of receipt, apply 100% of the value of such resources to any financial penalty ordered. None of the payment terms imposed by this Judgment preclude or prohibit the government from
enforcing the unpaid balance of the restitution or monetary penalties imposed herein.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.
The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA Assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

DEFENDANT: KEITH TODD ASHLEY
CASE NUMBER: 4:20-CR-00318-ALM-KPJ(1)

ADDITIONAL FORFEITED PROPERTY

Real Property: All that lot or parcel of land, together with buildings, improvements, fixtures, attachments, and easements located at **1801 Camo Court, Allen, Texas 75002** being the same property more fully described as Morgan Crossing Phase 4, Blk B, Lot 3.

Cash Proceeds: A sum of money equal to $1,143,000.00 in United States currency, and all interest and proceeds traceable thereto, representing the proceeds of the offense, for which the defendant is personally liable.

United States Court of Appeals for the Fifth Circuit

No. 23-40482

United States Court of Appeals
Fifth Circuit
FILED
December 12, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KEITH TODD ASHLEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:20-CR-318-1

Before ELROD, *Chief Judge*, WIENER, and WILSON, *Circuit Judges*.

JENNIFER WALKER ELROD, *Chief Judge*:

Defendant-Appellant Keith Todd Ashley was charged and convicted on 17 counts of violating federal law, including mail and wire fraud, Hobbs Act robbery, and bank theft for operating a Ponzi scheme and allegedly murdering one of his clients in order to steal funds from the client's bank account and benefit from the client's life insurance proceeds.[1] The district court sentenced Ashley to 240 months' imprisonment to run consecutively

[1] Ashley was also indicted in Dallas County for capital murder of his client. *See Texas v. Ashley*, No. F2100109 (195th Dist. Ct., Dallas Cnty., Tex. Apr. 21, 2021).

for each of 15 counts of wire and mail fraud and imposed life sentences for his convictions of Hobbs Act robbery and bank theft. On appeal, Ashley challenges the sufficiency of the evidence for most of his convictions, claims that his sentence is unreasonable, asks for a new trial based on the district court's denial of his motions for continuance and severance, and claims that the cumulative error doctrine applies.

After obtaining convictions on all counts, the government now concedes on appeal that there was insufficient evidence to convict Ashley of five counts and that the life-sentence enhancement for his conviction of bank theft did not apply. Because we agree that several convictions were not supported by sufficient evidence and that the life-sentence enhancement does not apply, we AFFIRM in part, VACATE in part, and REMAND for resentencing and any other proceedings.

I

Ashley was a licensed financial advisor for the investment firm Parkland Securities.[2] Among other products, Parkland offers unit investment trusts (UITs), which are trusts that hold securities but do not have a guaranteed rate of return. Ashley convinced James Seegan, Robert Greening, and two other clients to invest in UITs offered by Parkland. The clients wrote checks or made wire transfers to Ashley's bank account with Branch Banking & Trust. However, Ashley used those funds to cover personal expenses and other non-investment related expenses, such as expenses at casinos, Ashley's brewery business, legal fees, mortgage expenses, and other personal retail, restaurant, and entertainment bills.

[2] Ashley worked in a variety of fields, often simultaneously. As relevant to this case, Ashley also worked as an investment advisor, insurance broker, nurse, paramedic, and owned a brewery business.

Ashley only occasionally made some payments back to his investors. However, rather than reflecting investment returns, these payments were often merely transfers of funds from one client to another, a characteristic trait of a Ponzi scheme.

Ashley was also an insurance agent for Midland National Life Insurance Company. In 2016, he sold Seegan a $2 million life insurance policy, which identified Seegan's wife as the beneficiary. In 2019, Seegan executed a will and named Ashley the executor and trustee of any trust created by the will. Seegan also created a trust and designated Ashley his successor trustee. With Ashley's assistance, Seegan then changed the beneficiary of his life insurance policy from his wife to the trust, and Ashley executed the change with Midland National.

Shortly after executing this beneficiary designation for Seegan's life insurance policy, Ashley allegedly met Seegan at Seegan's home, purportedly to draw blood for medical testing in relation to the policy, but instead sedated Seegan with a drug, shot and killed him, and staged the scene as a suicide. Ashley subsequently called Midland National to inform the company of Seegan's death and ask about the necessary paperwork for a life insurance claim. Ashley also requested that one of his employees retrieve a copy of Seegan's autopsy. Two days after the alleged murder, Ashley visited Seegan's home again, purportedly to assist Seegan's widow in managing his estate, obtained access to Seegan's phone from his widow and son, and used an app on the phone to transfer $20,000 from Seegan's bank account to himself.

A federal grand jury indicted Ashley on six counts of wire fraud (Counts 1 through 6). The First Superseding Indictment added 11 additional counts: eight counts of wire fraud (Counts 7 through 14), two counts of mail

fraud (Counts 15 and 16), and one count of firearm possession in furtherance of Hobbs Act robbery (Count 17).

A grand jury returned a Second Superseding Indictment with the same charges but amended facts. Ashley filed a motion to dismiss Count 17 for improper venue. The district court denied the motion.

A grand jury then returned a Third Superseding Indictment, which removed two of the wire fraud counts (Counts 7 and 8) and added three counts: carrying or discharging a firearm during a Hobbs Act robbery causing death or murder (Count 18), bank theft (Count 19), and attempted wire fraud (Count 20). Ashley moved to continue trial and all trial-related deadlines. The district court denied the motion.

A grand jury later returned a Fourth Superseding Indictment, which amended Counts 19 and 20.[3] Ashley filed a motion to dismiss Counts 18 and 19, making the same venue argument that he made with respect to Count 17. Ashley also filed a motion to sever Counts 1 through 6 from Counts 9 through 20. The district court denied both motions.

Trial began the following week, and the jury found Ashley guilty on all counts presented.[4] Following trial, the district court denied Ashley's motion for acquittal and sentenced Ashley to 240 months' imprisonment for each of Counts 1 through 6, Counts 9 through 16, and Count 20. The district court imposed life sentences for each of Counts 18 and 19.

---

[3] Count 20 was amended to add a completed wire fraud violation.

[4] Count 17 was dismissed by the government at trial because it was a lesser included offense of Count 18.

Ashley now appeals, seeking reversal of the judgment or a remand for a new trial.[5] On appeal, the government concedes that Counts 2, 4, 5, 6, and 18 were not supported by sufficient evidence. The government also concedes that the life-sentence enhancement did not apply to Count 19.

II

We review preserved challenges to the sufficiency of the evidence *de novo*, viewing the evidence "in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *United States v. Njoku*, 737 F.3d 55, 62 (5th Cir. 2013) (citation omitted). "This standard is 'highly deferential to the verdict.'" *United States v. Harris*, 821 F.3d 589, 598 (5th Cir. 2016) (quoting *United States v. Roetcisoender*, 792 F.3d 547, 550 (5th Cir. 2015)). "In doing so, we ask whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Njoku*, 737 F.3d at 62 (internal quotation marks omitted).

III

Ashley challenges the sufficiency of the evidence for his convictions of Counts 1 through 16, which include wire fraud charges under 18 U.S.C. §§ 1343 and 1347 and mail fraud charges under §§ 1341 and 1349. To sustain a conviction for wire fraud, the government must prove that: "(1) a scheme to defraud exists, (2) the defendant used wire communications in interstate or foreign commerce to further that scheme, and (3) the defendant had specific intent to defraud." *United States v. Davis*, 53 F.4th 833, 842 (5th Cir. 2016) (citation omitted). "A defendant 'acts with the intent to defraud when

[5] Ashley does not challenge Count 20, his conviction of completed and attempted wire fraud based on fraudulently designating himself the beneficiary on another life insurance policy.

he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself.'" *United States v. Swenson*, 25 F.4th 309, 318–19 (5th Cir. 2022) (quoting *United States v. Evans*, 892 F.3d 692, 712 (5th Cir. 2018)).[6] We address the counts in groups based on the relevant underlying conduct.

A

Counts 1 and 3 charge Ashley with wire fraud for soliciting money from his clients—purportedly to manage it on their behalf—but diverting it to cover his personal expenses instead. Specifically, these counts concern Ashley's fraudulent transfer of clients' funds from their accounts to his business account. Count 1 is based on Ashley's transfer of $150,000 from Seegan's account, and Count 3 is based on Ashley's transfer of $75,000 from Greening's account.[7]

Ashley contends that the evidence was insufficient to prove his intent to defraud on Count 1 because the "investment" he received from Seegan was a promissory note that included an amortization schedule upon which he "intended" that Seegan would be repaid. However, the evidence at trial showed that, rather than investing Seegan's assets in securities as promised, Ashley diverted the funds to other uses: paying other "investors," expenses at casinos, expenses at Ashley's brewery business, legal fees, mortgage expenses, and other personal retail, restaurant, and entertainment bills. The jury rationally concluded that Ashley's evidently false promise of investing

---

[6] The elements for mail fraud are the same as those for wire fraud, except that the means by which the fraud is conducted is by mail instead of by wire. *United States v. McMillan*, 600 F.3d 434, 447 n.24 (5th Cir. 2010).

[7] Ashley does not argue that there was insufficient evidence for his intent on Count 3 and so forfeits that issue. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021); *United States v. Shah*, 95 F.4th 328, 363 (5th Cir. 2024).

client funds proved his intent to defraud beyond a reasonable doubt. That Ashley received Seegan's "investment" through a promissory note that allegedly would "eventually return[]" his funds "is of no moment" because "[t]o satisfy the intent requirement, the defendant need only have *intended* that [his] scheme . . . lead [him] to gain something of value." *Swenson*, 25 F.4th at 319. Accordingly, there was sufficient evidence to support the jury's determination that Ashley intended to defraud his clients.[8]

B

Counts 2, 4, 5, and 6 charge Ashley with wire fraud based on Ashley's transferring client funds from his business account to his personal account. Ashley contends that the government failed to establish that these transfers furthered a scheme to defraud, which is the second element of wire fraud. *See Davis*, 53 F.4th at 842. Specifically, Ashley asserts that these transfers, on their own, were immaterial and did not further a scheme to defraud because they were made between accounts that were exclusively within his control. On appeal, the government agrees with Ashley and concedes that these convictions should be vacated.

We agree with the parties. A fraudulent scheme has "reached fruition" when "[t]he person[] intended to receive the money ha[s] received it irrevocably." *Kann v. United States*, 323 U.S. 88, 94 (1944); *see also United States v. Strong*, 371 F.3d 225, 228 (5th Cir. 2004) ("[T]he fraud was complete when the defendants obtained the cash from the . . . bank." (citing *Kann*, 323 U.S. at 94–95)). Ashley "irrevocably" obtained his clients' money for the purposes of the fraud when the funds were wired to a business account

[8] We do not consider Ashley's arguments against the sentencing enhancements for Counts 1 and 3 because the district court did not apply those sentencing enhancements.

that, because it was in his exclusive control, he then used for personal and other expenses.

In its denial of Ashley's motion for acquittal, the district court held otherwise, concluding that the clients' money "only became Ashley's personal funds for his use after it was transferred out of the [business] account." However, the record shows that, once the clients' funds were deposited in Ashley's business account, Ashley withdrew funds from that account as cash and paid credit card debts, gambling debts, legal fees, and expenses at casinos, among other bills. Because Ashley paid for personal and other expenses relevant to the fraud directly from his business account, the money was already available "for his use" before he transferred the money to his personal account.[9] Accordingly, we agree with the parties and conclude that there was insufficient evidence to support Ashley's conviction on these counts.

C

Counts 9, 10, 11, 12, 13, 15, and 16 charge Ashley with defrauding and attempting to defraud Midland National, the company that issued Seegan's life insurance policy. Counts 9 through 13 are wire fraud charges based on Ashley directing Midland National to change the beneficiary of Seegan's life insurance policy to a trust that was under Ashley's control. Counts 15 and 16 are mail fraud charges based on Ashley obtaining Midland National's confirmation of this change in beneficiary designation by mail and Ashley's later efforts to obtain a copy of Seegan's autopsy report, respectively.

---

[9] As an alternative basis for affirming Ashley's conviction, the district court held that his transfer of client funds to his personal account advanced the scheme because it "made the transactions less suspect" to have the clients wire money to his business account. Yet that too is undercut by the fact that Ashley used the business account for personal and other expenses.

Ashley urges that these convictions were not supported by sufficient evidence because Ashley did not make false representations to Midland National or benefit from the insurance proceeds, and that mailing Midland National was immaterial to the scheme. However, we need not reach these arguments because the government did not sufficiently prove that Ashley was engaged in a scheme to defraud Midland National, as the first element of the crime requires. *See Davis*, 53 F.4th at 842.

A "scheme to defraud" requires that the "victims were left without money that they otherwise would have possessed." *United States v. Baker*, 923 F.3d 390, 405 (5th Cir. 2019) (quoting *United States v. McMillan*, 600 F.3d 434, 449 (5th Cir. 2010)). That is not the case here. Under Seegan's life insurance policy, Midland National was contractually obligated to pay out Seegan's life insurance benefits upon Seegan's death regardless of who the beneficiary was. That Seegan changed the beneficiary of the policy to his trust (the named beneficiaries of which, in turn, were Seegan's wife and son), rather than his wife personally, did not change Midland National's obligation. *See United States v. Ratcliff*, 488 F.3d 639, 645 (5th Cir. 2007) (holding that there was no scheme to defraud where the payment would have been made "regardless" of the defendant's actions). Ashley's communications with Midland National to implement this change were thus not a predicate for wire or mail fraud.

Relying on Fourth Circuit precedent, the government asserts that a person defrauds an insurer when he "create[s] the circumstances giving rise to a claim and then ma[kes] a claim for benefits under the policy." *United States v. Gray*, 405 F.3d 227, 235 n.2 (4th Cir. 2005). However, because Ashley was neither a beneficiary of Seegan's life insurance policy nor a beneficiary of the trust, he could not make a claim for benefits under the policy. The government acknowledges this fact but presses that Ashley still "stood to gain" from the payout of life insurance proceeds to the trust

because, as trustee, Ashley had "broad authority" over the trust. Yet that does not make Midland National the victim, as the government contends. At most, the evidence proffered at trial supported that Ashley intended to defraud Seegan's widow and son, the trust's beneficiaries, from the life insurance benefits paid to the trust. However, the government's theory for these counts was that Midland National was defrauded. Because the change in the beneficiaries of Seegan's trust did not defraud Midland National, the jury lacked sufficient evidence to convict Ashley of Counts 9, 10, 11, 12, 13, 15, and 16.

D

Count 14 is an additional wire fraud conviction based on Ashley's use of Seegan's cell phone—two days after Seegan was allegedly murdered—to transfer $20,000 from Seegan's bank account to his own. Grouping his arguments against Count 14 with his arguments against the Midland National wire fraud counts, Ashley contends that he did not make any false or fraudulent misrepresentation to Midland National. However, Count 14 is predicated on Ashley's deception of Seegan's widow and son, not Midland National. Thus, Ashley's challenge to Count 14 fails.

In wire fraud cases, "[w]e have described a scheme to defraud[] as including 'any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the [entity] to be deceived.'" *United States v. Greenlaw*, 84 F.4th 325, 339 (5th Cir. 2023) (third alteration in original) (quoting *United States v. Evans*, 892 F.3d 692, 711–12 (5th Cir. 2018)). "[S]howing a scheme to defraud requires proof that [Ashley] made some kind of a false or fraudulent material misrepresentation." *United States v. Spalding*, 894 F.3d 173, 181 (5th Cir. 2018) (internal quotation marks omitted). In particular, the misrepresentation must have "a natural tendency to influence, or be capable

of influencing, the decision of the [person] to which it was addressed." *Evans*, 892 F.3d at 712 (alteration adopted) (citation omitted).

The record provides more than sufficient support for the jury's conclusion that Ashley falsely represented himself to Seegan's widow and son in order to gain access to Seegan's cell phone and use it to wire funds from Seegan's bank account to his own. The jury heard from Seegan's widow that: the day after Seegan was allegedly murdered, Ashley came to Seegan's house to "help with cleaning" the house and "look[ing] through all the paperwork"; Ashley came back the following day and told her that he needed to "go through" Seegan's cell phone; to access the phone, Ashley had Seegan's son unlock it because Seegan's son's fingerprint was programmed into the device in case of emergencies; Ashley asked if Seegan's widow had seen text messages between him and Seegan, and when she confirmed that she had, Ashley "accidentally" deleted all the text messages between the two; and Seegan's widow did not give permission to Ashley to transfer $20,000 from Seegan's bank account to his own or know that this was why Ashley sought access to the phone.

The jury also heard testimony from Arthur Hilson, a technology engineering manager at Texas Capital Bank, the bank that maintained Seegan's account. Hilson testified that on the day Ashley accessed Seegan's cell phone, Seegan's account was accessed through the bank's online banking platform after multiple attempts from an outside IP address, and about eight minutes after Seegan's bank account was accessed, a wire for $20,000 was transmitted from Seegan's bank account to Ashley's business account.

The jury rationally found that, to procure something of value—in this case, $20,000 from Seegan's bank account—Ashley engaged in a scheme to defraud beyond a reasonable doubt. Ashley misled the Seegans by giving them the false impression that he was lending a helping hand. That false

pretense influenced Seegan's widow and son to allow Ashley to access Seegan's cell phone and bank account. Once he had access, Ashley then took Seegan's money without his widow's knowledge or permission. A rational jury could have found that, instead of helping a widow and her son as he had represented, Ashley deceived the vulnerable for his financial gain. That was sufficient evidence to convict Ashley of Count 14.

IV

Ashley next challenges the sufficiency of the evidence for his conviction of Count 18, using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1), (j). The predicate crime of violence was Hobbs Act robbery, 18 U.S.C. § 1951(a). Count 18 was based on 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. Ashley claims that the government failed to prove the predicate crime (Hobbs Act robbery) and that venue was improper in the Eastern District of Texas.

To sustain a conviction for Hobbs Act robbery, the government must prove: (1) the unlawful taking or obtaining of personal property from a person or in the presence of another person, against his will; (2) by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, to property in his custody or possession, or anyone in his company at the time of the taking or obtaining, and (3) the offense in any way or degree obstructed, delayed or affected commerce or the movement of any article or commodity in commerce. *See* 18 U.S.C. § 1951(a); Fifth Cir. Pattern Jury Instruction No. 2.73B (Criminal 2019).

Ashley contends that there was no completed robbery because Ashley's taking of Seegan's money occurred two days after the alleged murder. On appeal, the government concedes that there was insufficient

evidence, however on the different basis that Ashley's taking of Seegan's money did not occur "in the presence" of Seegan. The government explains that because Ashley accessed Seegan's phone and transferred $20,000 to himself two days after Seegan's murder, Ashley was not in Seegan's "presence" when he stole the money, as the first element requires. The government avers that the Hobbs Act's requirement that the property must be taken "from the person or in the presence of another" refers to a person's physical presence, not legal personhood or estate.

We agree with the government that, for these reasons, Ashley's subsequent taking of Seegan's funds did not occur in his physical presence and thus was not Hobbs Act robbery. Ashley's argument that venue was improper for Count 18 is, therefore, moot.

V

Ashley challenges the sufficiency of the evidence for Count 19, his conviction of bank theft under 18 U.S.C. § 2113(b) based on his transferring $20,000 of Seegan's funds to his business account—the same conduct that formed the basis for Count 14. Ashley also challenges the district court's application of the life-sentence enhancement under § 2113(e) and venue in the Eastern District of Texas as to this count. We review each argument in turn.

A

To sustain a conviction for bank theft, the government must prove that the defendant took and carried 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 the bank. 18 U.S.C. § 2113(b); *see also Carter v. United States*, 530 U.S. 255, 262 (2000).

Ashley contends that there was insufficient evidence to sustain his conviction because he did not physically enter Texas Capital Bank or take money from it. The government responds that § 2113(b) does not require the physical carrying away of money from a bank. We agree with the government.

We have previously said that the "taking and carrying" element of bank theft can be "accomplished simply by 'withdrawing funds from a bank pursuant to a scheme to defraud.'" *United States v. Godfrey*, No. 94-20424, 1995 WL 581915, at *3 (5th Cir. 1995) (unpublished) (quoting *United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir. 1987)); *see also United States v. Johnson*, 706 F.2d 143, 144–145 (5th Cir. 1983) (sustaining a bank theft conviction where the defendant instructed a bank teller over the phone to wire transfer funds from the account of the person he was impersonating). Several of our sister circuits have also concluded that § 2113(b) does not require the physical taking away of money. *See United States v. Sayan*, 968 F.2d 55, 62 (D.C. Cir. 1992); *United States v. Kucik*, 844 F.2d 493, 499–500 (7th Cir. 1988); *United States v. Bradley*, 812 F.2d 774, 779 n.3 (2d Cir. 1987); *United States v. Politano*, No. 86-5686, 1987 WL 38624, at *4 (4th Cir. 1987) (unpublished) (declaring that the defendant's "argument that he did not 'take and carry away' the funds of the bank because he used wire transfers is patently frivolous"); *United States v. Morgan*, 805 F.2d 1372, 1377 (9th Cir. 1986).

Moreover, as the government contends, Ashley's implied "physical" taking construction of § 2113(b) makes little sense in the statute's context. The preceding subsection, § 2113(a), which also punishes bank theft, expressly requires physical entry or attempted entry into a bank. *Id.* § 2113(a) (punishing "[w]hoever enters or attempts to enter any bank . . . or any building used in whole or in part as a bank . . . with intent to commit . . . larceny"). By contrast, § 2113(b) lacks any such requirement.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (citation omitted); *see also Rodriguez-Avalos v. Holder*, 788 F.3d 444, 451 (5th Cir. 2015) (quoting *Brown*, 513 U.S. at 120); *Martinez v. Caldwell*, 644 F.3d 238, 242 (5th Cir. 2011) (quoting *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 338 (1994)). Accordingly, neither physical entry into a bank nor the physical taking of money from a bank is a requirement for bank theft under § 2113(b).

Ashley next urges us to read into § 2113(b) a requirement that, when the government alleges theft by false pretenses, the defendant must have made a misrepresentation directed at the bank. *See United States v. Howerter*, 248 F.3d 198, 204–05 (3d Cir. 2001) (concluding that "because there was no falsity or false pretenses directed at the bank . . . , [the defendant's] conduct was not fraudulent vis-a-vis the bank"). On this account, Ashley then could not be convicted because, while he deceived Seegan's widow and son in accessing Seegan's phone to withdraw funds, he did not mislead the bank by the mere act of electronically withdrawing funds from Seegan's account. *Cf. United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991) ("The mere act of ordering or causing to be ordered a wire transfer does not of itself necessarily constitute a misrepresentation in all circumstances.").

However, Ashley's argument falters out of the gate because, while § 2113(b) covers theft committed by false pretenses, it is not confined to the common-law elements of theft by false pretenses. *See Carter*, 530 U.S. at 264–67 (rejecting importing the "common-law meaning" of the terms "robbery" and "larceny" into § 2113(b) because "neither term appears in the text"). By contrast, in *Briggs*, an affirmative representation was required because the relevant bank theft statute there, 18 U.S.C. § 1344, requires "false or fraudulent pretenses, representations, or promises." *Briggs*, 939

F.2d at 226–27. Section 2113(b) lacks such an express requirement. Instead, we have said that § 2113(b) "embraces all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *United States v. Bell*, 678 F.2d 547, 548 (5th Cir. Unit B 1982) (en banc) (alterations adopted and internal quotations omitted), *aff'd*, 462 U.S. 356 (1983); *see also Godfrey*, 1995 WL 581915, at *3. Ashley does not contest that he intended to steal Seegan's funds held at Texas Capital Bank by causing them to be wired to his account. Ashley's withdrawal of Seegan's funds after deceiving Seegan's widow and son was a fraudulent taking and thus sufficient to support Ashley's conviction of bank theft under § 2113(b).

B

Ashley challenges the district court's application of the sentencing enhancement for Count 19 established by 18 U.S.C. § 2113(e), which provides for a life-sentence maximum when the offense involves the killing of another person. On appeal, the government concedes that the enhancement should not have been applied because the evidence was insufficient to support that Ashley killed Seegan "in committing" the bank theft. We agree with the government for the same reason that we agree with the government's concession of insufficient evidence for Hobbs Act robbery in Count 18. Section 2113, in language identical to the Hobbs Act, covers robbery "from the person or presence of another." *Compare* 18 U.S.C. § 2113(a), *with id.* § 1951(b)(1). Ashley's alleged murder of Seegan, though a prerequisite to his committing bank theft, did not occur directly "in committing" the theft. We therefore vacate the life-sentencing enhancement on Ashley's conviction of Count 19.

C

Finally, Ashley challenges the jury's determination that venue was proper in the Eastern District of Texas. Seegan's house, where Ashley both allegedly committed the murder and used Seegan's phone to wire funds, is located outside the district. Ashley contends that venue was improper because the bank from which Ashley wired Seegan's funds, Texas Capital Bank, does not have any branch locations in the district and any preparatory steps that Ashley took within the district are not alone sufficient to establish venue. In its denial of Ashley's motion for acquittal, the district court held that Ashley's murder of Seegan was a prerequisite to the theft, and that Ashley's preparatory steps in the district toward the murder—leaving his home, which was located in the district, with a firearm and driving to Seegan's home—were sufficient to establish venue.

Because Ashley's venue challenge is "properly preserved by a motion for judgment of acquittal, we review the district court's ruling de novo." *United States v. Romans*, 823 F.3d 299, 309 (5th Cir. 2016). We will affirm if "a rational jury could conclude that the government established venue by a preponderance of the evidence." *Id.* (internal quotation marks and citation omitted).

We affirm the jury's conclusion of proper venue. Venue is appropriate in a district in which the offense was committed. Fed. R. Crim. P. 18. We need not reach the question of whether Ashley's preparatory steps are alone sufficient because an essential part of the theft—the wire transfer of funds to Ashley's bank account—occurred in the district. As the government identifies, the account to which Ashley wired the funds was established and maintained in the district and was associated with Ashley's business entity located in the district. Thus, the wire transfer was completed in the district. Ashley contends that holding a "destination" bank account

sufficient to establish venue would improperly equate bank theft with wire fraud, but that is merely a function of the fact that, here, Ashley's act of "tak[ing] and carr[ying] away" funds under the bank theft statute was accomplished by a wire transfer. 18 U.S.C. § 2113(b).

Moreover, venue was appropriate for the independent reason that Ashley first undertook to commit the theft within the district. The jury was presented with evidence showing that, after Seegan's murder, Ashley first attempted to access Seegan's bank account to commit the theft remotely from Ashley's residence within the district, only traveling to Seegan's house after he could not log in to Seegan's account because he did not have the required temporary access code. Thus, the jury properly determined that venue lies in the Eastern District of Texas.

VI

Ashley next contends that the district court erred by denying his motions for continuance and severance. We review for abuse of discretion. *See United States v. Sheperd*, 27 F.4th 1075, 1085 (5th Cir. 2022) (continuance); *SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 475 (5th Cir. 2022); *United States v. Singh*, 261 F.3d 530, 533 (5th Cir. 2001) (severance). To reverse, we must determine that the denial of the relevant motion resulted in "specific and compelling" or "serious" prejudice. *Sheperd*, 27 F.4th at 1085; *Singh*, 261 F.3d at 533. We address each motion in turn.

A

Ashley challenges the district court's denial of his motion to continue the trial in order for him to prepare his defense to the Third Superseding Indictment, which added Counts 18, 19, and 20 to the case less than three weeks before trial.

A district court may grant a continuance to advance the "ends of justice" when the government brings a superseding indictment that operates to prejudice the defendant. 18 U.S.C. § 3161(h)(7)(A), (B)(iv); *United States v. Jackson*, 50 F.3d 1335, 1339 (5th Cir. 1995). We have identified several factors to weigh:

> (1) the amount of time available to prepare for trial; (2) the defendant's role in shortening the time available; (3) the likelihood of prejudice from denial; (4) the availability of discovery from the prosecution; (5) the complexity of the case; (6) the adequacy of the defense actually provided at trial; (7) the experience of the attorney with the accused; and (8) timeliness of the motion.

United States v. Boukamp, 105 F.4th 717, 746 (5th Cir. 2024) (quoting *Sheperd*, 27 F.4th at 1085) (alterations adopted).

Ashley insists that the court's denial of his continuance motion prejudiced him because he was required to prepare a defense for two counts carrying life sentences on short notice, and because the factual bases for the added counts were unclear. However, the relevant charges added by the Third Superseding Indictment—Count 18 (possession of a firearm in furtherance of a crime of violence causing death/murder by robbery) and Count 19 (bank theft)—were based on the same operative facts as Count 17 (possession of a firearm in furtherance of a crime of violence), which was included in the Second Superseding Indictment filed well over a year earlier.

Ashley contends that these added counts "shifted the focus of the entire case" to the alleged murder, but the government had already alleged facts concerning the murder in connection with the Second Superseding Indictment. While the addition of Counts 18 and 19 did represent the first time that the government sought a life sentence in this case, Ashley does not

articulate how the additional counts prejudiced his defense, such as, for example, by explaining what evidence he would have tried to obtain with more time. In any event, because the government has conceded the insufficiency of the evidence for Count 18 and the life-sentence enhancement for Count 19, and we agree, any prejudice Ashley suffered as a result from the denial of his continuance motion is now moot. Accordingly, the district court did not reversibly err in denying Ashley's continuance motion.

B

Ashley next challenges the district court's denial of his motion to sever Counts 9 through 20, each of which involved evidence concerning Seegan's alleged murder, from Counts 1 through 6, his wire fraud charges for operating a Ponzi scheme.

A district court has the discretion to join multiple charges in the same trial where the offenses "are connected with or constitute parts of a common scheme of plan." Fed. R. Crim. P. 8(a). If a district court joins charges under Rule 8(a), severance is proper only where "there is clear, specific and compelling prejudice" to the defendant. *United States v. Huntsberry*, 956 F.3d 270, 287 (5th Cir. 2020) (quoting *Singh*, 261 F.3d at 533). Such prejudice can occur, for example, when "the government added [some] counts solely to buttress its case on the other counts" in an "attempt[] to shore [up] its thin evidence" on those counts. *United States v. McCarter*, 316 F.3d 536, 540 (5th Cir. 2002) (alteration adopted and citation omitted). Finally, the district court must "balance" any "possible prejudice to the defendant" with the "economy of judicial administration." *United States v. Harrelson*, 754 F.2d 1153, 1176 (5th Cir. 1985).

Ashley contends that he was prejudiced because his wire fraud charges based on his diverting client funds to personal and other expenses (Counts 1 through 6) were joined with charges based on his alleged murder of Seegan.

The government's concession on appeal that the jury lacked sufficient evidence to convict Ashley of four of those wire fraud counts adds additional force to Ashley's argument. However, because we vacate Ashley's convictions of those charges that the government conceded, the effect of any such prejudice is limited. *See United States v. McRae*, 702 F.3d 806, 820 (5th Cir. 2012) ("[W]e may affirm if we find that misjoinder occurred but that the error was harmless."). In any event, Ashley fails to articulate the "specific" prejudice he faced that is necessary to overcome the "usual presumption in favor of joinder." *Huntsberry*, 956 F.3d at 287 (citation omitted). The government's evidence for convicting Ashley of the remaining charges, Counts 1 and 3, was "not thin." *Id.* at 289. As explained above, the jury was presented with voluminous evidence documenting Ashley's use of client funds for personal and other expenses. Ashley does not explain how the allegations concerning Seegan's murder, though dramatic, were necessary for the government to "shore" up the evidence for his wire fraud charges. *McCarter*, 316 F.3d at 540. Accordingly, the district court did not reversibly err in denying Ashley's severance motion.

VII

Ashley next challenges the procedural and substantive reasonableness of his sentence. Ashley contends that his sentence was procedurally unreasonable because the district court calculated the amount of loss he was responsible for based on intended loss rather than actual loss and did not account for funds that Ashley returned to his victims. Ashley contends that his sentence was substantively unreasonable because the district court was biased against him and imposed a sentence that was greater than necessary.

In light of the government's stark reversal in its position on appeal and our decision to vacate several of Ashley's convictions, we remand for resentencing on all remaining counts. We leave any issues regarding the

recalculation of loss, the effect of any returned funds, and the procedural and substantive reasonableness of the new sentence for the district court to consider on remand.

VIII

Last, Ashley asserts that the cumulative error doctrine warrants reversal. "[T]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Delgado*, 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc) (citation omitted). However, cumulative error "justifies reversal only when errors 'so fatally infect the trial that they violated the trial's fundamental fairness.'" *Id.* at 344 (quoting *United States v. Fields*, 483 F.3d 313, 362 (5th Cir. 2022)). "[T]he possibility of cumulative error is often acknowledged but practically never found persuasive." *Id.* (citation omitted).

Though the government's conduct in this case was unusual, we ultimately decline to apply the cumulative error doctrine here. The government's concession of numerous convictions on appeal certainly raises the prospect that serious error existed in the trial. The government obtained convictions from the jury on all counts, but on appeal conceded that the jury lacked sufficient evidence to convict Ashley of two charges resulting in life sentences and several wire fraud charges. Moreover, the government offers only threadbare explanations of its change in positions. However, Ashley does not articulate how these errors resulted in a fundamentally unfair trial, instead arguing that they evidenced government "overreach." While the government may have overreached, that alone is insufficient to conclude that such errors were "fatal[]" to the whole trial's fairness. *Id.* (citation omitted). The government presented "substantial evidence of guilt" for the remaining

counts. *Id.* Accordingly, we decline to apply the cumulative error doctrine here.

* * *

For the reasons stated above, we AFFIRM Ashley's convictions of Counts 1, 3, 14, and 19, VACATE his convictions of Counts 2, 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, and 18, and REMAND to the district court for resentencing and any other proceedings consistent with this opinion.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

December 12, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 23-40482 USA v. Ashley
USDC No. 4:20-CR-318-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 39, 40, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

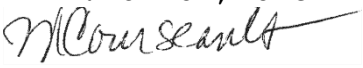
Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Melissa B. Courseault, Deputy Clerk

Enclosure(s)

Mr. Sean Christopher Day
Ms. Heather Harris Rattan
Mr. Bradley Elliot Visosky
Mr. James Patrick Whalen

REVISED

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 12, 2024
Lyle W. Cayce
Clerk

No. 23-40482

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KEITH TODD ASHLEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:20-CR-318-1

Before ELROD, *Chief Judge*, and WIENER and WILSON, *Circuit Judges*.

JENNIFER WALKER ELROD, *Chief Judge*:

IT IS ORDERED that the Appellant's petition for panel rehearing and the Appellee's petition for panel rehearing are both DENIED. However, we withdraw the opinion previously filed in this case on December 12, 2024, and substitute it with the following opinion.

Defendant-Appellant Keith Todd Ashley was charged and convicted on 17 counts of violating federal law, including mail and wire fraud, Hobbs Act robbery, and bank theft for operating a Ponzi scheme and allegedly murdering one of his clients in order to steal funds from the client's bank

account and benefit from the client's life insurance proceeds.[1] The district court sentenced Ashley to 240 months' imprisonment to run consecutively for each of 15 counts of wire and mail fraud and imposed life sentences for his convictions of Hobbs Act robbery and bank theft. On appeal, Ashley challenges the sufficiency of the evidence for most of his convictions, claims that his sentence is unreasonable, asks for a new trial based on the district court's denial of his motions for continuance and severance, and claims that the cumulative error doctrine applies.

After obtaining convictions on all counts, the government now concedes on appeal that there was insufficient evidence to convict Ashley of five counts and that the life-sentence enhancement for his conviction of bank theft did not apply. Because we agree that several convictions were not supported by sufficient evidence and that the life-sentence enhancement does not apply, we AFFIRM in part, VACATE in part, and REMAND for resentencing and any other proceedings.

I

Ashley was a licensed financial advisor for the investment firm Parkland Securities.[2] Among other products, Parkland offers unit investment trusts (UITs), which are trusts that hold securities but do not have a guaranteed rate of return. Ashley convinced James Seegan, Robert Greening, and two other clients to invest in UITs offered by Parkland. The clients wrote checks or made wire transfers to Ashley's bank account with Branch Banking & Trust. However, Ashley used those funds to cover

---

[1] Ashley was also indicted in Dallas County for capital murder of his client. *See Texas v. Ashley*, No. F2100109 (195th Dist. Ct., Dallas Cnty., Tex. Apr. 21, 2021).

[2] Ashley worked in a variety of fields, often simultaneously. As relevant to this case, Ashley also worked as an investment advisor, insurance broker, nurse, paramedic, and owned a brewery business.

personal expenses and other non-investment related expenses, such as expenses at casinos, Ashley's brewery business, legal fees, mortgage expenses, and other personal retail, restaurant, and entertainment bills. Ashley only occasionally made some payments back to his investors. However, rather than reflecting investment returns, these payments were often merely transfers of funds from one client to another, a characteristic trait of a Ponzi scheme.

Ashley was also an insurance agent for Midland National Life Insurance Company. In 2016, he sold Seegan a $2 million life insurance policy, which identified Seegan's wife as the beneficiary. In 2019, Seegan executed a will and named Ashley the executor and trustee of any trust created by the will. Seegan also created a trust and designated Ashley his successor trustee. With Ashley's assistance, Seegan then changed the beneficiary of his life insurance policy from his wife to the trust, and Ashley executed the change with Midland National.

Shortly after executing this beneficiary designation for Seegan's life insurance policy, Ashley allegedly met Seegan at Seegan's home, purportedly to draw blood for medical testing in relation to the policy, but instead sedated Seegan with a drug, shot and killed him, and staged the scene as a suicide. Ashley subsequently called Midland National to inform the company of Seegan's death and ask about the necessary paperwork for a life insurance claim. Ashley also requested that one of his employees retrieve a copy of Seegan's autopsy. Two days after the alleged murder, Ashley visited Seegan's home again, purportedly to assist Seegan's widow in managing his estate, obtained access to Seegan's phone from his widow and son, and used an app on the phone to transfer $20,000 from Seegan's bank account to himself.

A federal grand jury indicted Ashley on six counts of wire fraud (Counts 1 through 6). The First Superseding Indictment added 11 additional counts: eight counts of wire fraud (Counts 7 through 14), two counts of mail fraud (Counts 15 and 16), and one count of firearm possession in furtherance of Hobbs Act robbery (Count 17).

A grand jury returned a Second Superseding Indictment with the same charges but amended facts. Ashley filed a motion to dismiss Count 17 for improper venue. The district court denied the motion.

A grand jury then returned a Third Superseding Indictment, which removed two of the wire fraud counts (Counts 7 and 8) and added three counts: carrying or discharging a firearm during a Hobbs Act robbery causing death or murder (Count 18), bank theft (Count 19), and attempted wire fraud (Count 20). Ashley moved to continue trial and all trial-related deadlines. The district court denied the motion.

A grand jury later returned a Fourth Superseding Indictment, which amended Counts 19 and 20.[3] Ashley filed a motion to dismiss Counts 18 and 19, making the same venue argument that he made with respect to Count 17. Ashley also filed a motion to sever Counts 1 through 6 from Counts 9 through 20. The district court denied both motions.

Trial began the following week, and the jury found Ashley guilty on all counts presented.[4] Following trial, the district court denied Ashley's motion for acquittal and sentenced Ashley to 240 months' imprisonment for each of

---

[3] Count 20 was amended to add a completed wire fraud violation.

[4] Count 17 was dismissed by the government at trial because it was a lesser included offense of Count 18.

Counts 1 through 6, Counts 9 through 16, and Count 20. The district court imposed life sentences for each of Counts 18 and 19.

Ashley now appeals, seeking reversal of the judgment or a remand for a new trial.[5] On appeal, the government concedes that Counts 2, 4, 5, 6, and 18 were not supported by sufficient evidence. The government also concedes that the life-sentence enhancement did not apply to Count 19.

II

We review preserved challenges to the sufficiency of the evidence *de novo*, viewing the evidence "in the light most favorable to the government, with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *United States v. Njoku*, 737 F.3d 55, 62 (5th Cir. 2013) (citation omitted). "This standard is 'highly deferential to the verdict.'" *United States v. Harris*, 821 F.3d 589, 598 (5th Cir. 2016) (quoting *United States v. Roetcisoender*, 792 F.3d 547, 550 (5th Cir. 2015)). "In doing so, we ask whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Njoku*, 737 F.3d at 62 (internal quotation marks omitted).

III

Ashley challenges the sufficiency of the evidence for his convictions of Counts 1 through 16, which include wire fraud charges under 18 U.S.C. §§ 1343 and 1347 and mail fraud charges under §§ 1341 and 1349. To sustain a conviction for wire fraud, the government must prove that: "(1) a scheme to defraud exists, (2) the defendant used wire communications in interstate or foreign commerce to further that scheme, and (3) the defendant had

[5] Ashley does not challenge Count 20, his conviction of completed and attempted wire fraud based on fraudulently designating himself the beneficiary on another life insurance policy.

specific intent to defraud." *United States v. Davis*, 53 F.4th 833, 842 (5th Cir. 2016) (citation omitted). "A defendant 'acts with the intent to defraud when he acts knowingly with the specific intent to deceive for the purpose of causing pecuniary loss to another or bringing about some financial gain to himself.'" *United States v. Swenson*, 25 F.4th 309, 318–19 (5th Cir. 2022) (quoting *United States v. Evans*, 892 F.3d 692, 712 (5th Cir. 2018)).[6] We address the counts in groups based on the relevant underlying conduct.

A

Counts 1 and 3 charge Ashley with wire fraud for soliciting money from his clients—purportedly to manage it on their behalf—but diverting it to cover his personal expenses instead. Specifically, these counts concern Ashley's fraudulent transfer of clients' funds from their accounts to his business account. Count 1 is based on Ashley's transfer of $150,000 from Seegan's account, and Count 3 is based on Ashley's transfer of $75,000 from Greening's account.[7]

Ashley contends that the evidence was insufficient to prove his intent to defraud on Count 1 because the "investment" he received from Seegan was a promissory note that included an amortization schedule upon which he "intended" that Seegan would be repaid. However, the evidence at trial showed that, rather than investing Seegan's assets in securities as promised, Ashley diverted the funds to other uses: paying other "investors," expenses at casinos, expenses at Ashley's brewery business, legal fees, mortgage

---

[6] The elements for mail fraud are the same as those for wire fraud, except that the means by which the fraud is conducted is by mail instead of by wire. *United States v. McMillan*, 600 F.3d 434, 447 n.24 (5th Cir. 2010).

[7] Ashley does not argue that there was insufficient evidence for his intent on Count 3 and so forfeits that issue. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021); *United States v. Shah*, 95 F.4th 328, 363 (5th Cir. 2024).

expenses, and other personal retail, restaurant, and entertainment bills. The jury rationally concluded that Ashley's evidently false promise of investing client funds proved his intent to defraud beyond a reasonable doubt. That Ashley received Seegan's "investment" through a promissory note that allegedly would "eventually return[]" his funds "is of no moment" because "[t]o satisfy the intent requirement, the defendant need only have *intended* that [his] scheme . . . lead [him] to gain something of value." *Swenson*, 25 F.4th at 319. Accordingly, there was sufficient evidence to support the jury's determination that Ashley intended to defraud his clients.[8]

B

Counts 2, 4, 5, and 6 charge Ashley with wire fraud based on Ashley's transferring client funds from his business account to his personal account. Ashley contends that the government failed to establish that these transfers furthered a scheme to defraud, which is the second element of wire fraud. *See Davis*, 53 F.4th at 842. Specifically, Ashley asserts that these transfers, on their own, were immaterial and did not further a scheme to defraud because they were made between accounts that were exclusively within his control. On appeal, the government agrees with Ashley and concedes that these convictions should be vacated.

We agree with the parties. A fraudulent scheme has "reached fruition" when "[t]he person[] intended to receive the money ha[s] received it irrevocably." *Kann v. United States*, 323 U.S. 88, 94 (1944); *see also United States v. Strong*, 371 F.3d 225, 228 (5th Cir. 2004) ("[T]he fraud was complete when the defendants obtained the cash from the . . . bank." (citing *Kann*, 323 U.S. at 94–95)). Ashley "irrevocably" obtained his clients' money

[8] We do not consider Ashley's arguments against the sentencing enhancements for Counts 1 and 3 because the district court did not apply those sentencing enhancements.

for the purposes of the fraud when the funds were wired to a business account that, because it was in his exclusive control, he then used for personal and other expenses.

In its denial of Ashley's motion for acquittal, the district court held otherwise, concluding that the clients' money "only became Ashley's personal funds for his use after it was transferred out of the [business] account." However, the record shows that, once the clients' funds were deposited in Ashley's business account, Ashley withdrew funds from that account as cash and paid credit card debts, gambling debts, legal fees, and expenses at casinos, among other bills. Because Ashley paid for personal and other expenses relevant to the fraud directly from his business account, the money was already available "for his use" before he transferred the money to his personal account.[9] Accordingly, we agree with the parties and conclude that there was insufficient evidence to support Ashley's conviction on these counts.

C

Counts 9, 10, 11, 12, 13, 15, and 16 charge Ashley with defrauding and attempting to defraud Midland National, the company that issued Seegan's life insurance policy. Counts 9 through 13 are wire fraud charges based on Ashley directing Midland National to change the beneficiary of Seegan's life insurance policy to a trust that was under Ashley's control. Counts 15 and 16 are mail fraud charges based on Ashley obtaining Midland National's

[9] As an alternative basis for affirming Ashley's conviction, the district court held that his transfer of client funds to his personal account advanced the scheme because it "made the transactions less suspect" to have the clients wire money to his business account. Yet that too is undercut by the fact that Ashley used the business account for personal and other expenses.

confirmation of this change in beneficiary designation by mail and Ashley's later efforts to obtain a copy of Seegan's autopsy report, respectively.

Ashley urges that these convictions were not supported by sufficient evidence because Ashley did not make false representations to Midland National or benefit from the insurance proceeds, and that mailing Midland National was immaterial to the scheme. However, we need not reach these arguments because the government did not sufficiently prove that Ashley was engaged in a scheme to defraud Midland National, as the first element of the crime requires. *See Davis*, 53 F.4th at 842.

A scheme to defraud of the sort charged against Ashley, "if successful, must wrong the victim's property rights in some way." *United States v. Ratcliff*, 488 F.3d 639, 648 (5th Cir. 2007). That is not the case here. Under Seegan's life insurance policy, Midland National was contractually obligated to pay out Seegan's life insurance benefits upon Seegan's death regardless of who the beneficiary was. That Seegan changed the beneficiary of the policy to his trust (the named beneficiaries of which, in turn, were Seegan's wife and son), rather than his wife personally, did not change Midland National's obligation. *See id.* at 645–46 (holding that there was no scheme to defraud where the payment would have been made "regardless" of the defendant's actions). Ashley's communications with Midland National to implement this change were thus not a predicate for wire or mail fraud.

Relying on Fourth Circuit precedent, the government asserts that a person defrauds an insurer when he "create[s] the circumstances giving rise to a claim and then ma[kes] a claim for benefits under the policy." *United States v. Gray*, 405 F.3d 227, 235 n.2 (4th Cir. 2005). However, because Ashley was neither a beneficiary of Seegan's life insurance policy nor a beneficiary of the trust, he could not make a claim for benefits under the policy. The government acknowledges this fact but presses that Ashley still

"stood to gain" from the payout of life insurance proceeds to the trust because, as trustee, Ashley had "broad authority" over the trust. Yet that does not make Midland National the victim, as the government contends. At most, the evidence proffered at trial supported that Ashley intended to defraud Seegan's widow and son, the trust's beneficiaries, from the life insurance benefits paid to the trust. However, the government's theory for these counts was that Midland National was defrauded. Because the change in the beneficiaries of Seegan's trust did not defraud Midland National, the jury lacked sufficient evidence to convict Ashley of Counts 9, 10, 11, 12, 13, 15, and 16.

D

Count 14 is an additional wire fraud conviction based on Ashley's use of Seegan's cell phone—two days after Seegan was allegedly murdered—to transfer $20,000 from Seegan's bank account to his own. Grouping his arguments against Count 14 with his arguments against the Midland National wire fraud counts, Ashley contends that he did not make any false or fraudulent misrepresentation to Midland National. However, Count 14 is predicated on Ashley's deception of Seegan's widow and son, not Midland National. Thus, Ashley's challenge to Count 14 fails.

In wire fraud cases, "[w]e have described a scheme to defraud[] as including 'any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the [entity] to be deceived.'" *United States v. Greenlaw*, 84 F.4th 325, 339 (5th Cir. 2023) (third alteration in original) (quoting *United States v. Evans*, 892 F.3d 692, 711–12 (5th Cir. 2018)). "[S]howing a scheme to defraud requires proof that [Ashley] made some kind of a false or fraudulent material misrepresentation." *United States v. Spalding*, 894 F.3d 173, 181 (5th Cir. 2018) (internal quotation marks omitted). In particular, the

misrepresentation must have "a natural tendency to influence, or be capable of influencing, the decision of the [person] to which it was addressed." *Evans*, 892 F.3d at 712 (alteration adopted) (citation omitted).

The record provides more than sufficient support for the jury's conclusion that Ashley falsely represented himself to Seegan's widow and son in order to gain access to Seegan's cell phone and use it to wire funds from Seegan's bank account to his own. The jury heard from Seegan's widow that: the day after Seegan was allegedly murdered, Ashley came to Seegan's house to "help with cleaning" the house and "look[ing] through all the paperwork"; Ashley came back the following day and told her that he needed to "go through" Seegan's cell phone; to access the phone, Ashley had Seegan's son unlock it because Seegan's son's fingerprint was programmed into the device in case of emergencies; Ashley asked if Seegan's widow had seen text messages between him and Seegan, and when she confirmed that she had, Ashley "accidentally" deleted all the text messages between the two; and Seegan's widow did not give permission to Ashley to transfer $20,000 from Seegan's bank account to his own or know that this was why Ashley sought access to the phone.

The jury also heard testimony from Arthur Hilson, a technology engineering manager at Texas Capital Bank, the bank that maintained Seegan's account. Hilson testified that on the day Ashley accessed Seegan's cell phone, Seegan's account was accessed through the bank's online banking platform after multiple attempts from an outside IP address, and about eight minutes after Seegan's bank account was accessed, a wire for $20,000 was transmitted from Seegan's bank account to Ashley's business account.

The jury rationally found that, to procure something of value—in this case, $20,000 from Seegan's bank account—Ashley engaged in a scheme to defraud beyond a reasonable doubt. Ashley misled the Seegans by giving

them the false impression that he was lending a helping hand. That false pretense influenced Seegan's widow and son to allow Ashley to access Seegan's cell phone and bank account. Once he had access, Ashley then took Seegan's money without his widow's knowledge or permission. A rational jury could have found that, instead of helping a widow and her son as he had represented, Ashley deceived the vulnerable for his financial gain. That was sufficient evidence to convict Ashley of Count 14.

IV

Ashley next challenges the sufficiency of the evidence for his conviction of Count 18, using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c)(1), (j). The predicate crime of violence was Hobbs Act robbery, 18 U.S.C. § 1951(a). Count 18 was based on 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. Ashley claims that the government failed to prove the predicate crime (Hobbs Act robbery) and that venue was improper in the Eastern District of Texas.

To sustain a conviction for Hobbs Act robbery, the government must prove: (1) the unlawful taking or obtaining of personal property from a person or in the presence of another person, against his will; (2) by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, to property in his custody or possession, or anyone in his company at the time of the taking or obtaining, and (3) the offense in any way or degree obstructed, delayed or affected commerce or the movement of any article or commodity in commerce. *See* 18 U.S.C. § 1951(a); Fifth Cir. Pattern Jury Instruction No. 2.73B (Criminal 2019).

Ashley contends that there was no completed robbery because Ashley's taking of Seegan's money occurred two days after the alleged

murder. On appeal, the government concedes that there was insufficient evidence, however on the different basis that Ashley's taking of Seegan's money did not occur "in the presence" of Seegan. The government explains that because Ashley accessed Seegan's phone and transferred $20,000 to himself two days after Seegan's murder, Ashley was not in Seegan's "presence" when he stole the money, as the first element requires. The government avers that the Hobbs Act's requirement that the property must be taken "from the person or in the presence of another" refers to a person's physical presence, not legal personhood or estate.

We agree with the government that, for these reasons, Ashley's subsequent taking of Seegan's funds did not occur in his physical presence and thus was not Hobbs Act robbery. Ashley's argument that venue was improper for Count 18 is, therefore, moot.

V

Ashley challenges the sufficiency of the evidence for Count 19, his conviction of bank theft under 18 U.S.C. § 2113(b) based on his transferring $20,000 of Seegan's funds to his business account—the same conduct that formed the basis for Count 14. Ashley also challenges the district court's application of the life-sentence enhancement under § 2113(e) and venue in the Eastern District of Texas as to this count. We review each argument in turn.

A

To sustain a conviction for bank theft, the government must prove that the defendant took and carried 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 the bank. 18 U.S.C. § 2113(b); *see also Carter v. United States*, 530 U.S. 255, 262 (2000).

Ashley contends that there was insufficient evidence to sustain his conviction because he did not physically enter Texas Capital Bank or take money from it. The government responds that § 2113(b) does not require the physical carrying away of money from a bank. We agree with the government.

We have previously said that the "taking and carrying" element of bank theft can be "accomplished simply by 'withdrawing funds from a bank pursuant to a scheme to defraud.'" *United States v. Godfrey*, No. 94-20424, 1995 WL 581915, at *3 (5th Cir. 1995) (unpublished) (quoting *United States v. Goldblatt*, 813 F.2d 619, 625 (3d Cir. 1987)); *see also United States v. Johnson*, 706 F.2d 143, 144–145 (5th Cir. 1983) (sustaining a bank theft conviction where the defendant instructed a bank teller over the phone to wire transfer funds from the account of the person he was impersonating). Several of our sister circuits have also concluded that § 2113(b) does not require the physical taking away of money. *See United States v. Sayan*, 968 F.2d 55, 62 (D.C. Cir. 1992); *United States v. Kucik*, 844 F.2d 493, 499–500 (7th Cir. 1988); *United States v. Bradley*, 812 F.2d 774, 779 n.3 (2d Cir. 1987); *United States v. Politano*, No. 86-5686, 1987 WL 38624, at *4 (4th Cir. 1987) (unpublished) (declaring that the defendant's "argument that he did not 'take and carry away' the funds of the bank because he used wire transfers is patently frivolous"); *United States v. Morgan*, 805 F.2d 1372, 1377 (9th Cir. 1986).

Moreover, as the government contends, Ashley's implied "physical" taking construction of § 2113(b) makes little sense in the statute's context. The preceding subsection, § 2113(a), which also punishes bank theft, expressly requires physical entry or attempted entry into a bank. *Id.* § 2113(a) (punishing "[w]hoever enters or attempts to enter any bank . . . or any building used in whole or in part as a bank . . . with intent to commit . . . larceny"). By contrast, § 2113(b) lacks any such requirement.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, . . . Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (citation omitted); *see also Rodriguez-Avalos v. Holder*, 788 F.3d 444, 451 (5th Cir. 2015) (quoting *Brown*, 513 U.S. at 120); *Martinez v. Caldwell*, 644 F.3d 238, 242 (5th Cir. 2011) (quoting *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 338 (1994)). Accordingly, neither physical entry into a bank nor the physical taking of money from a bank is a requirement for bank theft under § 2113(b).

Ashley next urges us to read into § 2113(b) a requirement that, when the government alleges theft by false pretenses, the defendant must have made a misrepresentation directed at the bank. *See United States v. Howerter*, 248 F.3d 198, 204–05 (3d Cir. 2001) (concluding that "because there was no falsity or false pretenses directed at the bank . . . , [the defendant's] conduct was not fraudulent vis-a-vis the bank"). On this account, Ashley then could not be convicted because, while he deceived Seegan's widow and son in accessing Seegan's phone to withdraw funds, he did not mislead the bank by the mere act of electronically withdrawing funds from Seegan's account. *Cf. United States v. Briggs*, 939 F.2d 222, 227 (5th Cir. 1991) ("The mere act of ordering or causing to be ordered a wire transfer does not of itself necessarily constitute a misrepresentation in all circumstances.").

However, Ashley's argument falters out of the gate because, while § 2113(b) covers theft committed by false pretenses, it is not confined to the common-law elements of theft by false pretenses. *See Carter*, 530 U.S. at 264–67 (rejecting importing the "common-law meaning" of the terms "robbery" and "larceny" into § 2113(b) because "neither term appears in the text"). By contrast, in *Briggs*, an affirmative representation was required because the relevant bank theft statute there, 18 U.S.C. § 1344, requires "false or fraudulent pretenses, representations, or promises." *Briggs*, 939

F.2d at 226–27. Section 2113(b) lacks such an express requirement. Instead, we have said that § 2113(b) "embraces all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *United States v. Bell*, 678 F.2d 547, 548 (5th Cir. Unit B 1982) (en banc) (alterations adopted and internal quotations omitted), *aff'd*, 462 U.S. 356 (1983); *see also Godfrey*, 1995 WL 581915, at *3. Ashley does not contest that he intended to steal Seegan's funds held at Texas Capital Bank by causing them to be wired to his account. Ashley's withdrawal of Seegan's funds after deceiving Seegan's widow and son was a fraudulent taking and thus sufficient to support Ashley's conviction of bank theft under § 2113(b).

B

Ashley challenges the district court's application of the sentencing enhancement for Count 19 established by 18 U.S.C. § 2113(e), which provides for a life-sentence maximum when the offense involves the killing of another person. On appeal, the government concedes that the enhancement should not have been applied because the evidence was insufficient to support that Ashley killed Seegan "in committing" the bank theft. We agree with the government for the same reason that we agree with the government's concession of insufficient evidence for Hobbs Act robbery in Count 18. Section 2113, in language identical to the Hobbs Act, covers robbery "from the person or presence of another." *Compare* 18 U.S.C. § 2113(a), *with id.* § 1951(b)(1). Ashley's alleged murder of Seegan, though a prerequisite to his committing bank theft, did not occur directly "in committing" the theft. We therefore vacate the life-sentencing enhancement on Ashley's conviction of Count 19.

C

Finally, Ashley challenges the jury's determination that venue was proper in the Eastern District of Texas. Seegan's house, where Ashley both allegedly committed the murder and used Seegan's phone to wire funds, is located outside the district. Ashley contends that venue was improper because the bank from which Ashley wired Seegan's funds, Texas Capital Bank, does not have any branch locations in the district and any preparatory steps that Ashley took within the district are not alone sufficient to establish venue. In its denial of Ashley's motion for acquittal, the district court held that Ashley's murder of Seegan was a prerequisite to the theft, and that Ashley's preparatory steps in the district toward the murder—leaving his home, which was located in the district, with a firearm and driving to Seegan's home—were sufficient to establish venue.

Because Ashley's venue challenge is "properly preserved by a motion for judgment of acquittal, we review the district court's ruling de novo." *United States v. Romans*, 823 F.3d 299, 309 (5th Cir. 2016). We will affirm if "a rational jury could conclude that the government established venue by a preponderance of the evidence." *Id.* (internal quotation marks and citation omitted).

We affirm the jury's conclusion of proper venue. Venue is appropriate in a district in which the offense was committed. Fed. R. Crim. P. 18. We need not reach the question of whether Ashley's preparatory steps are alone sufficient because an essential part of the theft—the wire transfer of funds to Ashley's bank account—occurred in the district. As the government identifies, the account to which Ashley wired the funds was established and maintained in the district and was associated with Ashley's business entity located in the district. Thus, the wire transfer was completed in the district. Ashley contends that holding a "destination" bank account

sufficient to establish venue would improperly equate bank theft with wire fraud, but that is merely a function of the fact that, here, Ashley's act of "tak[ing] and carr[ying] away" funds under the bank theft statute was accomplished by a wire transfer. 18 U.S.C. § 2113(b).

Moreover, venue was appropriate for the independent reason that Ashley first undertook to commit the theft within the district. The jury was presented with evidence showing that, after Seegan's murder, Ashley first attempted to access Seegan's bank account to commit the theft remotely from Ashley's residence within the district, only traveling to Seegan's house after he could not log in to Seegan's account because he did not have the required temporary access code. Thus, the jury properly determined that venue lies in the Eastern District of Texas.

VI

Ashley next contends that the district court erred by denying his motions for continuance and severance. We review for abuse of discretion. *See United States v. Sheperd*, 27 F.4th 1075, 1085 (5th Cir. 2022) (continuance); *SCF Waxler Marine, L.L.C. v. Aris T M/V*, 24 F.4th 458, 475 (5th Cir. 2022); *United States v. Singh*, 261 F.3d 530, 533 (5th Cir. 2001) (severance). To reverse, we must determine that the denial of the relevant motion resulted in "specific and compelling" or "serious" prejudice. *Sheperd*, 27 F.4th at 1085; *Singh*, 261 F.3d at 533. We address each motion in turn.

A

Ashley challenges the district court's denial of his motion to continue the trial in order for him to prepare his defense to the Third Superseding Indictment, which added Counts 18, 19, and 20 to the case less than three weeks before trial.

A district court may grant a continuance to advance the "ends of justice" when the government brings a superseding indictment that operates to prejudice the defendant. 18 U.S.C. § 3161(h)(7)(A), (B)(iv); *United States v. Jackson*, 50 F.3d 1335, 1339 (5th Cir. 1995). We have identified several factors to weigh:

> (1) the amount of time available to prepare for trial; (2) the defendant's role in shortening the time available; (3) the likelihood of prejudice from denial; (4) the availability of discovery from the prosecution; (5) the complexity of the case; (6) the adequacy of the defense actually provided at trial; (7) the experience of the attorney with the accused; and (8) timeliness of the motion.

United States v. Boukamp, 105 F.4th 717, 746 (5th Cir. 2024) (quoting *Sheperd*, 27 F.4th at 1085) (alterations adopted).

Ashley insists that the court's denial of his continuance motion prejudiced him because he was required to prepare a defense for two counts carrying life sentences on short notice, and because the factual bases for the added counts were unclear. However, the relevant charges added by the Third Superseding Indictment—Count 18 (possession of a firearm in furtherance of a crime of violence causing death/murder by robbery) and Count 19 (bank theft)—were based on the same operative facts as Count 17 (possession of a firearm in furtherance of a crime of violence), which was included in the Second Superseding Indictment filed well over a year earlier.

Ashley contends that these added counts "shifted the focus of the entire case" to the alleged murder, but the government had already alleged facts concerning the murder in connection with the Second Superseding Indictment. While the addition of Counts 18 and 19 did represent the first time that the government sought a life sentence in this case, Ashley does not

articulate how the additional counts prejudiced his defense, such as, for example, by explaining what evidence he would have tried to obtain with more time. In any event, because the government has conceded the insufficiency of the evidence for Count 18 and the life-sentence enhancement for Count 19, and we agree, any prejudice Ashley suffered as a result from the denial of his continuance motion is now moot. Accordingly, the district court did not reversibly err in denying Ashley's continuance motion.

B

Ashley next challenges the district court's denial of his motion to sever Counts 9 through 20, each of which involved evidence concerning Seegan's alleged murder, from Counts 1 through 6, his wire fraud charges for operating a Ponzi scheme.

A district court has the discretion to join multiple charges in the same trial where the offenses "are connected with or constitute parts of a common scheme of plan." Fed. R. Crim. P. 8(a). If a district court joins charges under Rule 8(a), severance is proper only where "there is clear, specific and compelling prejudice" to the defendant. *United States v. Huntsberry*, 956 F.3d 270, 287 (5th Cir. 2020) (quoting *Singh*, 261 F.3d at 533). Such prejudice can occur, for example, when "the government added [some] counts solely to buttress its case on the other counts" in an "attempt[] to shore [up] its thin evidence" on those counts. *United States v. McCarter*, 316 F.3d 536, 540 (5th Cir. 2002) (alteration adopted and citation omitted). Finally, the district court must "balance" any "possible prejudice to the defendant" with the "economy of judicial administration." *United States v. Harrelson*, 754 F.2d 1153, 1176 (5th Cir. 1985).

Ashley contends that he was prejudiced because his wire fraud charges based on his diverting client funds to personal and other expenses (Counts 1 through 6) were joined with charges based on his alleged murder of Seegan.

The government's concession on appeal that the jury lacked sufficient evidence to convict Ashley of four of those wire fraud counts adds additional force to Ashley's argument. However, because we vacate Ashley's convictions of those charges that the government conceded, the effect of any such prejudice is limited. *See United States v. McRae*, 702 F.3d 806, 820 (5th Cir. 2012) ("[W]e may affirm if we find that misjoinder occurred but that the error was harmless."). In any event, Ashley fails to articulate the "specific" prejudice he faced that is necessary to overcome the "usual presumption in favor of joinder." *Huntsberry*, 956 F.3d at 287 (citation omitted). The government's evidence for convicting Ashley of the remaining charges, Counts 1 and 3, was "not thin." *Id.* at 289. As explained above, the jury was presented with voluminous evidence documenting Ashley's use of client funds for personal and other expenses. Ashley does not explain how the allegations concerning Seegan's murder, though dramatic, were necessary for the government to "shore" up the evidence for his wire fraud charges. *McCarter*, 316 F.3d at 540. Accordingly, the district court did not reversibly err in denying Ashley's severance motion.

VII

Ashley next challenges the procedural and substantive reasonableness of his sentence. Ashley contends that his sentence was procedurally unreasonable because the district court calculated the amount of loss he was responsible for based on intended loss rather than actual loss and did not account for funds that Ashley returned to his victims. Ashley contends that his sentence was substantively unreasonable because the district court was biased against him and imposed a sentence that was greater than necessary.

In light of the government's stark reversal in its position on appeal and our decision to vacate several of Ashley's convictions, we remand for resentencing on all remaining counts. We leave any issues regarding the

recalculation of loss, the effect of any returned funds, and the procedural and substantive reasonableness of the new sentence for the district court to consider on remand.

VIII

Last, Ashley asserts that the cumulative error doctrine warrants reversal. "[T]he cumulative error doctrine . . . provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Delgado*, 672 F.3d 320, 343–44 (5th Cir. 2012) (en banc) (citation omitted). However, cumulative error "justifies reversal only when errors 'so fatally infect the trial that they violated the trial's fundamental fairness.'" *Id.* at 344 (quoting *United States v. Fields*, 483 F.3d 313, 362 (5th Cir. 2022)). "[T]he possibility of cumulative error is often acknowledged but practically never found persuasive." *Id.* (citation omitted).

Though the government's conduct in this case was unusual, we ultimately decline to apply the cumulative error doctrine here. The government's concession of numerous convictions on appeal certainly raises the prospect that serious error existed in the trial. The government obtained convictions from the jury on all counts, but on appeal conceded that the jury lacked sufficient evidence to convict Ashley of two charges resulting in life sentences and several wire fraud charges. Moreover, the government offers only threadbare explanations of its change in positions. However, Ashley does not articulate how these errors resulted in a fundamentally unfair trial, instead arguing that they evidenced government "overreach." While the government may have overreached, that alone is insufficient to conclude that such errors were "fatal[]" to the whole trial's fairness. *Id.* (citation omitted). The government presented "substantial evidence of guilt" for the remaining

counts. *Id.* Accordingly, we decline to apply the cumulative error doctrine here.

* * *

For the reasons stated above, we AFFIRM Ashley's convictions of Counts 1, 3, 14, and 19, VACATE his convictions of Counts 2, 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, and 18, and REMAND to the district court for resentencing and any other proceedings consistent with this opinion.

United States Court of Appeals for the Fifth Circuit

No. 23-40482

United States Court of Appeals
Fifth Circuit
FILED
December 12, 2024
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

KEITH TODD ASHLEY,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:20-CR-318-1

Before ELROD, *Chief Judge,* WIENER, and WILSON, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART and VACATED IN PART, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

Certified as a true copy and issued as the mandate on Feb 18, 2025

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 18, 2025

Mr. David O'Toole
Eastern District of Texas, Sherman
101 E. Pecan Street
Federal Building
Room 216
Sherman, TX 75090-0000

No. 23-40482 USA v. Ashley
USDC No. 4:20-CR-318-1

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Roeshawn Johnson

By: _____
Roeshawn Johnson, Deputy Clerk
504-310-7998

cc: Mr. Sean Christopher Day
Ms. Heather Harris Rattan
Mr. Bradley Elliot Visosky
Mr. James Patrick Whalen

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	§	
	§	Case No. 4:20-CR-318
v.	§	Judge Mazzant
KEITH TODD ASHLEY	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendant's Motion to Sever (Dkt. #106) and Defendant's First Amended Motion to Sever (Dkt. #135). Having considered the motions, the responses, and the relevant pleadings, the Court finds both motions should be **DENIED**.

BACKGROUND

From 2013 to 2020, the Government alleges that Defendant Keith Todd Ashley ("Ashley") used his resources as a financial investor to run a Ponzi scheme (Dkt. #127). Ashley would earn the trust of certain clients and promise them he would invest their money with guaranteed returns of 3 to 9% per year (Dkt. #127 at p. 4). However, he would shift the money given to him throughout three bank accounts in his name, occasionally depositing portions of one client's money into another client's bank account. While some money was returned to the investors, Ashley kept approximately $1.3 million for personal use. The Government has charged Ashley for the above-mentioned actions with Wire Fraud and Attempted Wire Fraud under 18 U.S.C. §§ 1343, 1349 ("Counts 1–6") (Dkt. #127).

From 2016 to 2020, the Government alleges that one of Ashley's investors, J.S., entered into additional agreements with Ashley that involved Midland National and Texas Capital Bank, ultimately resulting in J.S.'s death at the hand of Ashley (Dkt. #127). Ashley sold J.S. two life

insurance policies. On April 8, 2019, J.S. made Ashley the executor of his will, and eight days later, Ashley was named the trustee of J.S.'s trust upon J.S.'s death. Ashley then communicated with Midland National to have the beneficiary of J.S.'s life insurance policies changed to J.S.'s trust. On February 19, 2020, J.S. died in his home with a firearm in his hand. It is the Government's position that Ashley murdered J.S. and staged it as a suicide (Dkt. #143). In the days following J.S.'s death, Ashley contacted J.S.'s bank to transfer J.S.'s money to Ashley's personal accounts. The Government has charged Ashley with the following based on the above-mentioned actions: Wire Fraud; Attempted Wire Fraud; Mail Fraud; Attempted Mail Fraud, Carrying or Discharging a Firearm During a Crime of Violence or Possession of a Firearm in Furtherance of a Crime of Violence; Carrying or Discharging a Firearm During a Crime of Violence or Possession of a Firearm in Furtherance of a Crime of Violence causing Death/Murder by Robbery; Bank Theft; and Attempted Bank Theft under 18 U.S.C. §§ 924, 1341, 1343, 1349, and 2113 ("Counts 9–20").

On August 8, 2022, Ashley filed a Motion to Sever (Dkt. #106). At the time the motion was filed, the Second Superseding Indictment was the most recent indictment and it only included Counts 1–6 and 7–17. On September 6, 2022, the Government filed its response, notifying the Court that it also intended to file a Third Superseding Indictment and that Ashley's counsel had been notified of the new charges "surrounding the murder of J.S." (Dkt. #111 at p. 2). On September 7, 2022, the Government filed a Third Superseding Indictment, which removed Counts 7 and 8, and added Counts 18, 19, and 20 (Dkt. #116). On September 15, 2022, the Government filed a Fourth Superseding Indictment (Dkt. #127).[1] On September 16, 2022, Ashley filed this

[1] Although a Fourth Indictment was filed, it does not change any of the arguments of the parties, as Counts 1–6 were not changed and no additional counts were added. The Fourth Superseding Indictment changed two things. First, for Count 19 it added "attempt" language and subsection (d) of 18 U.S.C. § 2113 for Bank Theft, when just subsections (b) and (e) were listed on the previous indictment. Second, the Government added 18 U.S.C. § 1343 Wire Fraud to

present First Amended Motion to Sever (Dkt. 135), which the Government responded to on September 19, 2022 (Dkt. #143).

LEGAL STANDARD

Federal Rule of Criminal Procedure 8(a) and Rule 14(a) both address joinder of offenses in an indictment. Rule 8(a) establishes that:

> The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

FED. R. CRIM. P. 8(a). "Joinder of charges is the rule rather than the exception," and "Rule 8 is construed liberally in favor of initial joinder." *United States v. Bullock*, 71 F.3d 171, 174 (5th Cir. 1995) (citing *United States v. Park*, 531 F.2d 754, 761 (5th Cir. 1976)). Whether joinder is proper under Rule 8(a) is "determined by the initial allegations of the indictment, which are accepted as true absent arguments of prosecutorial misconduct." *United States v. Harrelson*, 754 F.2d 1153, 1176 (5th Cir. 1985) (citations omitted). Once the Court determines that joinder is proper under Rule 8, the Court must decide whether joinder causes sufficient prejudice to require severance under Rule 14(a). *United States v. Rice*, 607 F.3d 133, 142 (5th Cir. 2010).

Rule 14(a) may be used to provide relief from prejudicial joinder:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

FED. R. CRIM. P. 14(a). "Severance is required only in cases of compelling prejudice." *Rice*, 607 F.3d at 142 (citation and quotation omitted). Severance under Rule 14(a) is "drastic relief" that is

---

Count 20, when only 18 U.S.C. § 1349 Attempted Wire Fraud was included in the previous indictment (Dkt. #139 at pp. 2–3).

appropriate where the defendant convinces that Court that "without such drastic relief [he] will be unable to obtain a fair trial." *United States v. Perez*, 489 F.2d 51, 65 (5th Cir. 1973).

ANALYSIS

Ashley asks this Court to sever Counts 1–6 from Counts 9–20 for two main reasons.[2] First, Ashley contests that Rule 8(a) is violated by consolidating Counts 1–6 and Counts 9–20. Second, Ashley argues that severance should be granted under Rule 14 because without it, Ashley will suffer "compelling prejudice" as to Counts 1–6 because a jury will not be able to objectively analyze the alleged Ponzi scheme if they hear facts surrounding J.S.'s alleged murder (Dkt. #135 at p. 2). The Court addresses each argument in turn.

Under Rule 8(a), two offenses may be consolidated that are "connected with or constitute parts of a common scheme or plan." FED. R. CRIM. P. 8(A). In deciding whether offenses are part of a common scheme or plan, courts should analyze how the facts of each underlying offense are related. *See United States v. Osuagwu*, No. 3:16-CR-343, 2018 WL 1014176, at *2 (N.D. Tex. Feb. 22, 2018). Counts 1–6 and Counts 9–20 are a direct result of Ashley gaining the trust of individuals and convincing them that he should handle their money. J.S. was a victim twice, as he was one of the investors from Counts 1–6 and owned the life insurance policies that are at the center of Counts 9–20. Additionally, Ashley used bank accounts to complete his transfer of funds, which led to Ashley being charged with Wire Fraud and Attempted Wire Fraud on both sets of counts. In both schemes, Ashley allegedly used his own Branch Banking & Trust Company business account under the name KBKK, LLC (Dkt. #127 at pp. 3–4, 18). Recognizing that Rule

[2] The Court recognizes that Ashley also alleges that joinder in this case violates the Due Process Clause of the Fifth Amendment to the United States Constitution (Dkt. #106 at p. 2; Dkt. #135 at p. 2). However, Ashley's only basis for this violation is mentioned in conjunction with his severance argument stating that the "compelling prejudice will deny the Defendant his right to a fair trial" (Dkt. #135 at p. 3). Under that argument, if there is no compelling prejudice, there is no denial of a right to a fair trial. Therefore, the Court consolidates this Due Process argument together with the severance argument and will handle them together under a Rule 14 analysis.

8(a) is "construed liberally," this Court finds that these factual similarities are sufficiently related to find the consolidation of Counts 1–6 and Counts 9–20 proper in this case. *Bullock*, 71 F.3d 171 at 174.

Although joinder is proper, this Court now looks to whether inclusion of Counts 9–20 brings "compelling prejudice" against Ashley and warrants severance under Rule 14(a). *Rice*, 607 F.3d at 142. The Fifth Circuit provided the applicable test for severance, asking "can the jury keep separate the evidence that is relevant . . . and render a fair and impartial verdict to him. If so, though the task be difficult, severance should not be granted." *United States v. Welch*, 656 F.2d 1039, 1054 (5th Cir. 1981) (citing *Peterson v. United States*, 344 F.2d 419, 422 (5th Cir. 1965)). An analysis into the possible prejudice requires a "balance in economy of judicial administration with the possible prejudice to the defendant. *Harrelson*, 754 F.2d at 1176. Ashley argues that a jury will not be able to be fair and impartial as to Counts 1–6 given the facts surrounding J.S.'s alleged murder by Ashley in Counts 9–20 (Dkt. #127).

In *United States v. Smith*, the defendant argued that evidence of his drug charges was prejudiced by having a murder-for-hire charge tried at the same time. 281 F. App'x 303, 304 (5th Cir. 2008) (unpublished). The Fifth Circuit rejected this argument, noting that although it is true that evidence of continuous drug dealing would have likely been inadmissible in a trial that dealt with only his drug charges, it did not meet the threshold of showing he was denied a fair trial. *Id.* at 305. The Fifth Circuit focused on the fact that the evidence at trial was sufficient to prove guilt on the drug charges and that a jury instruction was given that limited the relevance of the testimony. *Id.* Similarly, in *United States v. Erwin*, the defendants argued that severance was warranted when the majority of trial consisted of "evidence of the two kidnappings, two beatings, and one killing," when the relevant charges were drug related and crimes of dishonesty. 793 F.2d 656, 666 (5th Cir.

1986). The Fifth Circuit found that all but one of the appellants "failed to demonstrate the compelling prejudice" required because again, the evidence was sufficient to prove the actual charges at issue and that the court cautioned the jury about the proper use of the evidence. *Id.*

Here, the Court recognizes that Ashley will suffer some prejudice because of Counts 1–6 and Counts 9–20 being tried together. The jury will hear facts of an alleged murder staged as a suicide when Counts 1–6 merely deal with the transferring of funds to Ashley's personal bank accounts. However, this does not mean Ashley will suffer compelling prejudice. Granting a severance requires this Court to order two trials against Ashley. When weighing the factor of judicial economy against the potential prejudice that can be remedied with certain instructions to the jury, this Court finds that the high standard for severance is not satisfied.

Ashley makes an argument that he will suffer harm if this Court grants a Rule 29 motion at trial for the counts related to J.S.'s alleged murder (Dkt. #135 at p. 2). This argument is a non-starter, as it relies on multiple counts being dismissed on legal insufficiency grounds after the evidence has been elicited but before the jury is asked to make a determination of guilt. The Court declines to hold that the high threshold for severance is met based on the possibility that future motions will be granted in Ashley's favor.

In sum, although the facts surrounding J.S.'s murder would likely be inadmissible in a trial for Counts 1–6 alone, evidence of J.S.'s murder does not satisfy the standard of "compelling prejudice" required for severance. A jury instruction limiting the relevance of evidence related to J.S.'s death should be enough to counteract any prejudice against Ashley as to the jury making a fair and impartial decision for Counts 1–6.

CONCLUSION

It is therefore **ORDERED** that Defendant's Motion to Sever (Dkt. #106) and Defendant's First Amended Motion to Sever (Dkt. #135) are **DENIED**.

IT IS SO ORDERED.

SIGNED this 22nd day of September, 2022.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

UNITED STATES MAGISTRATE COURT
EASTERN MAGISTRATE OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	DOCKET 4:20-CR-318
VS.	SEPTEMBER 9, 2022
KEITH TODD ASHLEY	11:41 A.M.
	PLANO, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 18

REPORTER'S TRANSCRIPT OF ARRAIGNMENT AND MOTION HEARING

BEFORE THE HONORABLE KIMBERLY C. PRIEST JOHNSON,
UNITED STATES MAGISTRATE JUDGE

FOR THE GOVERNMENT:	HEATHER HARRIS RATTAN U.S. ATTORNEY'S OFFICE - PLANO 101 E. PARK BOULEVARD, SUITE 500 PLANO, TX 75074
FOR THE DEFENDANT:	JAMES P. WHALEN RYNE THOMAS SANDEL WHALEN LAW OFFICE 9300 JOHN HICKMAN PKWY, SUITE 501 FRISCO, TX 75035
COURT REPORTER:	CHRISTINA L. BICKHAM, CRR, RDR FEDERAL OFFICIAL REPORTER 101 EAST PECAN SHERMAN, TX 75090

PROCEEDINGS RECORDED USING DIGITAL RECORDING;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

(Open court, defendant present.)

THE COURT: All right. The Court calls Case Number 4:20-cr-318, *United States versus Keith Todd Ashley*.

MS. RATTAN: Heather Rattan for the United States, your Honor.

MR. WHALEN: James Whalen and Ryne Sandel for Mr. Ashley, your Honor. Good morning.

THE COURT: Good morning.

We need to do -- in addition to the suppression motion that was filed, which is the purpose of this hearing, it's my understanding we also need to do an arraignment now -- is that correct --

MR. WHALEN: That's correct, your Honor.

THE COURT: -- on the Third Superseding Indictment?

All right. Why don't we do that first.

Ms. Amerson.

Mr. Ashley, can you raise your right hand to be sworn, please.

(The oath is administered to the defendant.)

THE COURT: All right. We are here for your arraignment. You've been charged with violations of federal criminal law now in the Third Superseding Indictment.

Have you received a copy of this Indictment?

MR. WHALEN: Your Honor, he has not received a physical copy of it. We did discuss it over the phone yesterday, what's contained in the new --

THE COURT: So is he aware of the new charges?

MR. WHALEN: He is, your Honor.

THE COURT: Okay.

All right. Mr. Ashley, you have the right to have this Indictment read aloud at this time; or you may waive that right. What would you like to do?

MR. WHALEN: We'd waive, your Honor.

THE COURT: Okay. Ms. Rattan, would you please advise Mr. Ashley. I think for -- it would be sufficient just of the new charges.

MS. RATTAN: Yes, your Honor.

The charges -- the new charges would be Counts 18, 19, and 20.

Count 18 charges a violation of Title 18 United States Code, Section 924(j), which is essentially enhanced punishment off of a 924(c)(1). And the penalty is death or imprisonment for a term of years or imprisonment for life; a fine not to exceed $250,000, or both; a term of supervised release of not more than five years; and a special assessment of $100.

Count 19 charges a violation of Title 18 United States Code, Section 2113(b) and (e), which is bank theft.

The penalty is not less than ten years or, if death results, death, imprisonment for life; a fine not to exceed $250,000, or both; a term of supervised release of not more than five years; and a special assessment of $100.

And then Count 20 -- Count 20 charges a violation of Title 18 United States Code, Section 1343 and 1349, which is wire fraud and attempted wire fraud. The penalty is imprisonment for a term not to exceed 20 years; a fine not to exceed $250,000 or if any person derived pecuniary gain from the offense or if the offense results in pecuniary loss to a person other than the defendant, then a fine of not more than the greater of twice the gross gain to the defendant or twice the gross loss to individuals other than the defendant, or both such imprisonment and a fine; and a term of supervised release of not more than three years. If the violation affects a financial institution, such person shall be imprisoned not more than 30 years and fined not more than $1 million or not more than twice the gross pecuniary gain or twice the gross loss of the offense, or both; and a term of supervised release of not more than five years with a special assessment of $100.

Those are the new counts, your Honor.

THE COURT: All right. Thank you.

Mr. Ashley, please state your -- well, let me ask

you. Do you understand the nature of the new charges that have been alleged against you?

THE DEFENDANT: Yes.

THE COURT: All right. Please state your full name and age for the record.

THE DEFENDANT: Keith Todd Ashley, 50.

THE COURT: What is the last grade of school that you've completed?

THE DEFENDANT: Associate's degree.

THE COURT: Have you ever been diagnosed with any mental illness or problem?

THE DEFENDANT: No, ma'am.

THE COURT: Are you currently under the influence of any drug or alcohol?

THE DEFENDANT: No, ma'am.

THE COURT: Mr. Whalen, do you believe your client is competent to proceed here today?

MR. WHALEN: Yes, your Honor.

THE COURT: Mr. Ashley, at this time I'll ask how you plead to Counts 1 through 20 in the Third Superseding Indictment. Guilty or not guilty?

THE DEFENDANT: Not guilty, your Honor.

THE COURT: We'll accept your plea of not guilty to Counts 1 through 20 of the Third Superseding Indictment.

And what's the -- I know that you're specially set

for trial at this time on September --

MR. WHALEN: 26th, your Honor.

THE COURT: 26th?

Is that -- are we going to move for continuances or no?

MR. WHALEN: Your Honor, we intend to move for a continuance in light of the new charges.

THE COURT: What's the government's position?

MS. RATTAN: We're going to oppose it.

THE COURT: Okay. All right. Well, then, let's go ahead and talk about the motion.

I -- it's a pretty clear issue. I don't need oral argument. But while you're here, I want to give you the opportunity to make any statements for the record if you would like to do that.

I do have a couple of questions for the government and so I'm going to start just by asking those questions and then I'll -- again, I'll allow each of you to make any statements that you want to make on the record.

So my first question is with respect to the -- I believe it was three warrants that were subsequently issued after the assets -- that being the car and then the two cell phones -- were seized. The response from the government says that those warrants were attached, but they were not and I'd like to see them.

MS. RATTAN: Yes, your Honor.

THE COURT: So if we could get an attachment that -- it looks like it was just supposed to be attached and it wasn't, as Exhibit A.

MS. RATTAN: And, your Honor, we may be able to email that to Ms. Amerson right now.

THE COURT: Okay. That would be great.

And, Mr. Whalen, have you -- do you have a copy of those warrants at this time? Have you seen them?

MR. WHALEN: I've seen the warrants, and I --

THE COURT: Okay.

MR. WHALEN: -- agree that there were warrants obtained --

THE COURT: Okay.

MR. WHALEN: -- subsequent to the initial seizure of those items.

THE COURT: No -- yeah, so -- yes. Okay. I just wanted to make sure you'd also seen them because I don't have a copy.

So my primary question, Ms. Rattan, is when the government obtained warrants for Mr. Ashley's residence and home, did you not have probable cause at that time to also obtain warrants for his cell phone -- the cell phone that you knew about and his vehicle?

MS. RATTAN: I think the same probable cause

certainly would apply, but I don't think that "could you have gotten a warrant" is really the question before the Court. I think the question before the Court is very narrow, and that question is -- because you're always going to have the "could you have gotten the warrant" question.

THE COURT: Well, but the reason why I think it is a pertinent question is for the government to argue exigent circumstances, there's plenty of case law saying, well, you, the government, can't create the exigent circumstances and then say you had exigent circumstances.

And so it seemed to me, from reading the government's response, that the exigent circumstances were you had the information but then you had this interview. I don't -- but I don't have any information in terms of the substance of the interview.

Certainly by -- if a decision was made then to take Mr. Ashley into custody at that time, then seizing the vehicle -- other question while I'm on it is I don't think the actual location of the vehicle was noted. I'm assuming that's the vehicle that Mr. Ashley drove to the interview. Is that correct?

MR. WHALEN: That's correct.

THE COURT: Okay.

MS. RATTAN: Yes.

THE COURT: So then seizing on the interview upon

arrest and -- and the cell phone that was on his person, I think, is fully supported by case law. So that was my only question because the substance of the interview was not necessarily addressed.

Is that -- is that the government's position in terms of the creation of exigent circumstances?

MS. RATTAN: Well, I don't think the government created the exigent circumstances. I do think that they existed, but I don't think they were created by the Carrollton Police Department or by the government.

We've cited a couple of cases -- *Mata* and *Babcock* -- that talk about when the defendant becomes aware that the cat's out of the bag and they are the subject or target of the investigation, that's a dangerous moment. That can be an exigent circumstance.

And that's what happened at the interview because the investigation, of course, as the Court knows -- the Court's been involved in this and heard the detention hearing evidence -- the crime scene was staged to appear like a suicide. The medical examiner fell for the staging, and the medical examiner had issued a report that determined that the death was a suicide.

So the investigation is arguably kind of a cat-and-mouse game; and the law enforcement, the Carrollton Police Department, had not come out and done anything to

indicate to the defendant that he might be a focus of the investigation. In fact, when they called him and asked him to come in for the interview, the way they presented it to him was "This was opened as a financial investigation. It's been transferred to me, Detective Bonner. The papers -- I've just got to cross my T's and dot my I's. You know it's been ruled a suicide. Would you mind coming on in?"

So the whole time, they've never done anything to focus on or let the defendant know that he might be a target of the investigation so that they can conduct interviews and collect evidence. And really, I mean, the ME has ruled that it's a suicide; so they are open. All they know is that the defendant was the last person known to be seen with the victim. That's what they know; so they're conducting investigation.

They bring him in. Toward the end of the interview, they start asking Mr. Ashley questions and he starts acting cagey. They say, "Do you work in a hospital?" They know that he does. And he's cagey about, "Well, let's see, what year was that?" Doesn't want to answer that question.

He is not being direct and not answering their questions. So it's at the end of the interview that the detective believes -- and it becomes apparent -- that

Ashley, the defendant, thinks that he now is a target of the investigation; and that is the exigent circumstance.

The detective knows the defendant is former law enforcement. He knows that the victim's wife has said that in her presence the defendant deleted text messages and said to her that he deletes messages off his phone as well. So these are the circumstances that the detective was aware of when he said, "I need your phone."

THE COURT: And the warrants that were obtained prior to the interview -- that for Mr. Ashley's residence and business -- am I correct that those were being executed while Mr. Ashley was in the interview with the government? Is that accurate?

MS. RATTAN: I'm not sure if it was exactly simultaneous, but they definitely were the same day.

THE COURT: Okay.

MR. WHALEN: And, your Honor, also, to focus on the other warrants, is as we put in our brief, there was a warrant to install a tracking device on his vehicle several days earlier; and what they alleged in that warrant -- and we can provide it to the Court -- in the affidavit was "We're concerned about him destroying evidence."

So they had enough probable cause to get a tracking device put on his vehicle, and so nothing -- what changed? And the only thing that changed was that they did

create the exigency. They reached out to say, "Come back in for another interview"; and they made the choice to then say, near the end of the interview, "You're a suspect in this case." Okay? They made that choice.

And then now they're saying, well, there is the exigency because now he is a suspect. Well, they told him that.

THE COURT: Well, but --

MR. WHALEN: So they created --

THE COURT: -- I think what Ms. Rattan said is yes, I mean, telling him, "You're" -- actually saying, "You're a subject." But she also talked about questions that were being asked -- where she describes Mr. Ashley's answers as being cagey -- that weren't necessarily created by the government.

I also think something that Ms. Rattan pointed out as important is that Mr. Ashley did not know at that point in time that he was a suspect, at least for the murder of the victim. And it is one thing to get a warrant for a business and a residence that you have a planned execution date. The vehicle that Mr. Ashley's driving to the interview as a -- and the cell phone on his person -- I don't think it can be disputed that certainly the government probably did have sufficient probable cause to also obtain warrants for the cell phone and the vehicle

prior -- well, at the same time they obtained the other warrants.

But I agree with Ms. Rattan. That is -- that's not the test. It's a question that I have because I do think that, you know, the -- being able to articulate how and why the government did not create the exigent circumstances is important, and so that's -- that was the purpose of my question.

Other than that, I don't have any other questions other than just needing a copy of the warrants. But I told you I'd give you a response [*sic*] to make any other statements, if you'd like to, on the record with regards to this issue, Mr. Whalen. Is there anything else you'd like to note?

MR. WHALEN: No. I think -- I don't know if they submitted the video of the interview.

THE COURT: I haven't seen it.

MS. RATTAN: We haven't submitted it.

MR. WHALEN: But I think it would be helpful for the Court to review that because I think that would put this whole scenario into context for the Court to review it and -- and we -- we believe -- and I think it's important the Court looks at time frame here, too. I mean, the time that the death occurred until the time they interview him is seven months later. I think there is a lot of

information the Court should look at as far as whether or not, at this particular time when they seize that, there is an exigent circumstance that they created.

I think -- looking at the video, I think, would help that. And we'll either submit it or the government can, but I think the Court needs to review that.

THE COURT: Okay. I'm willing to do that. Who wants to submit it?

MS. RATTAN: Oh, we'll submit it, your Honor.

THE COURT: Okay.

MS. RATTAN: And we just emailed to Ms. Amerson the warrants the Court was asking about.

THE COURT: Okay. Thank you.

MR. WHALEN: And is the tracking warrant -- tracker warrant in that, too?

MS. RATTAN: No. It's just the warrant for the truck and two phones.

THE COURT: Yes.

MS. RATTAN: The warrant for the --

THE COURT: I'm aware of the tracker warrant --

MR. WHALEN: Okay.

THE COURT: -- that was obtained prior to the seizure of the assets we're talking about.

All right. Anything else, Mr. Whalen?

MR. WHALEN: No, your Honor.

THE COURT: Ms. Rattan?

MS. RATTAN: Well, and I know the Court's going to see the video. But what we'd highlight in the video is toward the end of the interview of the defendant, the law enforcement asks the defendant why he thinks there would have been a loud noise at the victim's house; and that's when he starts getting cagey. He starts saying, "Well, there was a microscope. Maybe it fell off the table." He starts speculating on why a loud noise would have been created.

They asked him "Why did you go back to the house the second time"; and he comes up with a "Well, I was very concerned that he might harm himself; so I had to go back a second time."

And then, of course, as I mentioned earlier, the question about "Do you work at a hospital?" And he acts vague and doesn't want to answer that question.

So it's at the end of the interview that they realize that he's going to lie, not going to be cooperative. And he's got the phone; and they know from what the victim's wife, Dida Seegan, has told them that he's an eraser. He's going to destroy that evidence if they don't seize it right then.

They seized it and very conservatively and very quickly got warrants. Nobody looked at it. Nobody did

anything with it until they had warrants to go into it, both the phone and the truck.

THE COURT: All right.

Yes? I know you have a different position but --

MR. WHALEN: Well, but I think it's important to admit they -- you know, they knew this issue about the text messages for months, okay? So I think -- and they invite him down, to come down for another interview; and then we're going to tell him he's a suspect.

They created the exigency, and they knew all this information before he even stepped in the door. And so I think -- I just ask you to look at it holistically, not through the lens of what the government thinks the evidence shows. I think if you look at it objectively, it's a reasonable conclusion that they created the exigency.

THE COURT: Well, and I guess the one -- you're correct that they knew what they knew before he came down. I think probably the one -- maybe an unknown was whether he would answer, you know, in a way that comported with their evidence; and, you know, that was an unknown. I mean, was that the basis of the arrest at that time? I don't know.

MR. WHALEN: And it -- just so it's clear, they did not arrest him at that time.

THE COURT: Okay.

MR. WHALEN: Okay. He did not get arrested. They

did not get an arrest warrant until November, after he was indicted here in federal court.

And he was in that interview with counsel. They contacted his counsel and led him to believe that this was an interview just to clear up some items, okay? So they -- I know they are allowed to do it. But they give this misleading information, "Oh, yeah, come on down"; and then they go through this interview and then tell him at the end he's a suspect.

They created it. It's clear. And they can't then say, "Oh, no, because he's cagey." You can't create it and then say, "Well, because he did this." That is the exigency.

They -- it's pretty obvious and they knew everything and they could have had a warrant waiting for him when he drove down with his truck that they had a tracker on. They knew where it was. They knew the identity of the truck, the VIN number, the owner to get a tracking warrant. They certainly had enough to get a warrant right then. The same with the phone.

MS. RATTAN: Okay. The question is not did they have probable cause to do the warrant. It is at the moment when they took the phone, were the circumstances exigent.

And in terms of the interview, they don't know what he's going to say at the interview. They interview

him. He starts acting cagey on these certainly three issues that I've pointed out. And that's when they say, "We need your phone and you're not taking your truck" but very quickly get warrants.

THE COURT: Okay. All right.

We talked about this before because I wanted to make sure everybody was on notice of the timing issue. So I'm going to issue an opinion as quickly as I can, and then we'll see what that allows for the objection time period. I'll give you as much time as I can, okay?

MS. RATTAN: Okay. And then we'll send -- I don't know if the interview will email, but we'll get it to the Court quickly.

THE COURT: Okay. All right. Thank you.

MR. WHALEN: Thank you, your Honor.

MS. RATTAN: Thank you, your Honor.

THE COURT: We stand adjourned.

(Proceedings concluded, 12:01 p.m.)

COURT REPORTER'S CERTIFICATION

I, court-approved transcriber, hereby certify on this date, September 5, 2023, that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/
CHRISTINA L. BICKHAM, CRR, RDR

18 U.S. Code § 2113 - Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

(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.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value which has been taken or stolen from a bank, credit union, or savings and loan association in violation of subsection (b), knowing the same to be property which has been stolen shall be subject to the punishment provided in subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, including a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), and any institution the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the National Credit Union Administration Board, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(h) As used in this section, the term "savings and loan association" means—

> **(1)** a Federal savings association or State savings association (as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b))) having accounts insured by the Federal Deposit Insurance Corporation; and

(2) a corporation described in section 3(b)(1)(C) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)(C)) that is operating under the laws of the United States.