

# 10-288

*To Be Argued By:*  
GEOFFREY M. STONE

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## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 10-288**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

SAMUEL CARTER, JR.,  
*Defendant,*

JASON SHOLA AKANDE,  
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Statement of Jurisdiction

The district court (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution pursuant to 18 U.S.C. § 3231. The district court entered its judgment on January 26, 2010. *See* Government's Supplemental Appendix ("GA") 35.<sup>1</sup> The defendant filed a timely notice of appeal on January 15, 2010, *see id.*, and this Court has jurisdiction to consider this appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291.

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<sup>1</sup> The government is submitting a proposed supplemental appendix with transcripts of the trial and exhibits introduced at trial.

## **Issues Presented for Review**

- I. Whether the district court erred in denying the defendant's motion to sever for improper joinder under Rule 8(a) of the Federal Rules of Criminal Procedure, or abused its discretion in denying the defendant's motion to sever under Rule 14 where the offenses were part of a common scheme, the charges were similar in character and significant evidence in support of each charge was interconnected and would have been admissible at separate trials.
  
- II. When viewed in the context of an otherwise fair trial, did three isolated, allegedly improper comments during the government's closing and rebuttal summation cause the defendant substantial prejudice, or amount to reversible plain error, when those comments did not affect the defendant's substantial rights or the outcome of the trial?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

The defendant was convicted by a jury of conspiracy to make a false statement in a passport application, in violation of 18 U.S.C. §§ 371 and 1542, making a false statement in a passport application, in violation of 18 U.S.C. § 1542, and making a false statement to a government agency, in violation of 18 U.S.C. § 1001.

The defendant now appeals the district court's decision not to sever the passport fraud charges from the charge of making a false statement to a government agency. The district court did not abuse its discretion in declining to sever because the charges were properly joined, were similar in nature, and were part of a common scheme or plan.

The defendant further argues that three parts of the government's closing and rebuttal summation – to which he did not object at the time – were improper because they misstated the evidence. The statements in the rebuttal summation were based on the record at trial. Further, none of the prosecutors' remarks caused the defendant substantial prejudice, much less rose to the level of reversible plain error. The "misconduct" was not severe in the context of an otherwise fair trial, the district court expressly instructed the jury that it should decide the facts based on the evidence, and there is every reason to believe that the defendant would have been convicted even without the prosecutors' comments.

The judgment should be affirmed.

## Statement of the Case

On December 21, 2005, a federal grand jury in Connecticut returned a superseding indictment charging the defendant in Count One with conspiracy to make a false statement in a passport application, in violation of 18 U.S.C. §§ 371 and 1542, in Count Two with making a false statement in a passport application, in violation of 18 U.S.C. § 1542, and in Count Three with making a false statement to a government agency, in violation of 18 U.S.C. § 1001. *See* Joint Appendix (“JA”) 39-43. On October 22, 2009, a jury returned guilty verdicts on all three counts of the superseding indictment. *See* GA881.

On January 15, 2010, the district court sentenced the defendant to concurrent sentences of 41 months of imprisonment on each count of conviction, to be followed by a three-year term of supervised release. JA216. The district court entered judgment on January 26, 2010. *See* GA35.

The defendant filed a timely notice of appeal on January 15, 2010. *See id.* The defendant completed his sentence of imprisonment and currently is serving his three year term of supervised release. The defendant is in federal custody, pending his appeal to the Board of Immigration Appeals of an order requiring him to be removed from the United States.

## **Statement of Facts and Proceedings Relevant to this Appeal**

The evidence adduced at trial established the following:

The defendant is a Nigerian national. GA100. Sometime in 1997, the defendant entered the United States illegally, allegedly through Canada. GA84. As an illegal alien, the defendant was not a lawful resident of the United States and was not eligible to apply for, or to obtain legally, a United States Passport. GA371.

On October 8, 1997, the defendant married Chastidy Williams, a United States citizen, in Atlanta, Georgia. GA100. At the time, the defendant was renting an apartment in Atlanta and Williams was living with a roommate in Atlanta. GA182, 213. The defendant provided Williams with gifts and spending money. GA214-215. Williams was twenty-one years old at the time. GA151. No family members or friends were present at the wedding. GA213.

Immediately after the wedding ceremony, Williams said she did not want to be married and she left the defendant's apartment after a few days. GA213. While Williams stayed at the defendant's apartment on occasion after their marriage, she said that she never lived with the defendant. GA142. Williams said that they never shared the same bed and they never consummated their marriage or had intimate relations. GA174. Williams said that on numerous occasions the defendant gave her money and

gifts. GA213-214. Williams said that shortly after their marriage ceremony, she moved back to her parents' home in Tallahassee, Florida. GA213. On several occasions, Williams traveled back to Atlanta and briefly stayed at the defendant's apartment, but she never moved in with, or lived with, the defendant. GA142, 213-214. Williams did not tell her family about the marriage. GA213.

On October 13, 1997, the defendant executed an application to obtain United States Permanent Residency based on his marriage to Williams. GA84-85. The defendant submitted the application and numerous other documents to the Immigration and Naturalization Service ("INS") for the purpose of obtaining lawful permanent residency in the United States. GA83-108. In addition, in October 1997, the defendant requested advance permission to travel abroad and re-enter the United States after temporary foreign travel. GA88-89. The INS denied the defendant's request for permission to travel abroad and then legally re-enter the United States. GA89. The INS informed the defendant that because he was illegally present in the United States for more than 180 days before filing his application, he would be barred from re-entry into the United States for three to ten years if he traveled abroad. *See* GA91.

On August 22, 2001, the defendant and Williams were interviewed by an INS immigration officer in Atlanta, Georgia in connection with the defendant's application to obtain United States Permanent Residency. GA92-93. The primary purpose of the interview was to determine whether the defendant and Williams were in a bona fide

marriage. GA93. Prior to the interview, the defendant submitted documents, including an employment reference letter, showing that Williams was employed by Advent Capitol Partners Ltd. (“Advent”) and that Williams earned a salary of \$35,000 per year. GA95-96. The defendant also submitted, *inter alia*, a document purporting to show Williams’s addresses over the past five years and financial records, utility bills and other documents purporting to show that the defendant and Williams were commingling their assets and living together. GA97, 160.

Williams testified that the defendant and his attorney handled everything and she just showed up and signed some documents. GA153-154. Williams testified she never worked at Advent and she did not know anything about Advent. GA157. Williams also testified that she had never lived with the defendant and she had never lived at certain of the residences listed on the paperwork that the defendant submitted to the immigration authorities.<sup>2</sup> GA154-156.

The immigration interview did not result in United States Permanent Residency for the defendant. GA100-101. In the Fall of 2001, soon after the INS denied his application for Permanent Resident status, the defendant sent letters to the INS in Atlanta and in Hartford, stating that he was moving to New Britain, Connecticut and

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<sup>2</sup> INS was subsequently replaced in relevant part by a successor agency, Citizen and Immigration Services. For ease of reference, this brief will refer to INS or “immigration authorities.”

requesting that his immigration file be transferred to Connecticut. GA101-102.

Between at least 2001 and the date of the trial, the defendant and Williams lived completely separate lives. Williams lived in New Jersey from 2001 through 2002, when she moved back to Tallahassee, Florida to care for her mother. GA143-145. Williams lived at her mother's residence in Tallahassee between 2002 and February 2003. GA143-145, 239-241. In February 2003, Williams moved into her own apartment on Lee Avenue in Tallahassee and lived there until December 2006. GA237-245. While living in Tallahassee, Williams attended Keiser University and then worked in the medical field. GA145-147, 218-234. In approximately December 2006, Williams moved to New Jersey for approximately two years, before moving back to Tallahassee. GA148-149. The defendant never lived with Williams in either New Jersey or Florida. GA149. Williams considered herself to be single. GA146-149. Williams identified her marital status as "single," both on school documents and documents relating to the apartment that she rented on Lee Avenue in Tallahassee. GA223, 240.

While there are many inconsistencies in the defendant's representations regarding where he lived and when he lived at a particular residence, there are numerous records and other evidence that reveal that between 2000 and 2005, the defendant first lived in California and then moved to Connecticut. For example, according to DMV and vehicle registration records, the defendant was living in Beverly Hills, California from at least October 2000

through June 2003. GA676-678. According to the defendant's rental application for 429 Farmington Avenue, the defendant lived in Marina Del Rey, California from July 1998 through September 2001. GA817-819. As noted above, the defendant advised the INS that he moved to New Britain, Connecticut in the Fall of 2001. GA101-102. The defendant submitted numerous documents to the INS, showing that he was living at various addresses in New Britain in 2002 and 2003, and then at 429 Farmington Avenue in 2003. GA101-107. Williams, on the other hand, has never lived in either California or Connecticut. GA174, 211.

In January 2002, as he had done in October 1997, the defendant requested permission to legally re-enter the United States after temporary foreign travel. GA103-104. As in 1997, the defendant's request was denied. GA104.

In early 2003, the defendant met Samuel Carter, Jr. on Main Street in Hartford in front of the Hartford library. GA424. At the time, Carter was homeless and did not have a job. GA428-429.

In the Summer of 2003, the defendant offered Carter an opportunity to make some money. On July 21, 2003, the defendant drove Carter to the Newington post office, instructed Carter to open up a P.O. Box and provided Carter with funds to open up the P.O. Box. GA434-449. The defendant also instructed Carter to get an application for a United States Passport. GA435. On or about July 23, 2003, the defendant drove Carter back to the Newington post office and instructed Carter to fill out the passport

application with Carter's information. GA434-449. The defendant instructed Carter to write "engineer" in the occupation box. GA449. The defendant provided Carter with two passport-sized photographs of himself (*i.e.*, of the defendant). GA450-451. The defendant instructed Carter to apply for a United States passport using Carter's name and other identifying information, but using the photographs of the defendant. GA434-451. In exchange, the defendant agreed to pay Carter \$1,000. GA435. As they agreed, Carter submitted the fraudulent Passport application to a postal clerk at the Newington post office. GA447.

In 2003, the defendant persuaded Williams to come to Connecticut to help him get a United States Lawful Permanent Resident card. GA162-163. The defendant told Williams that he needed to become a lawful permanent resident for his business. GA150, 162-163. The defendant convinced Williams to come to Connecticut for a few days at the end of August and beginning of September in 2003 and a few days in March 2004, by making Williams feel guilty that she owed him. GA162-163. The defendant told Williams that it was her fault that he did not get lawful permanent residency in 2001, because she did not "cooperate" at the August 22, 2001 immigration interview in Atlanta. GA162-163.

At the end of August 2003, the defendant paid for round-trip airline tickets for Williams to travel to Connecticut. GA163-165. Williams stayed with the defendant for a few days before returning to Florida. GA163-165. While in Connecticut, the defendant filled out

paperwork for Williams to get a Connecticut identification card and Williams signed the paperwork. GA164-165. The Connecticut identification card identified Williams's last name as Williams-Akande and her address as 429 Farmington Avenue, Hartford, CT. GA108, 164-165, 673-674. In addition, Williams signed an application that identified her as the defendant's roommate at his apartment at 429 Farmington Avenue, Apartment 101 in Hartford. GA817-824.

The information on the identification card application was false. Williams testified that she has never used the name Williams-Akande. GA164-165. Williams also testified that she has never lived in Connecticut, at 429 Farmington Avenue or any other Connecticut residence. GA160-161, 174, 217.

In March 2004, the defendant again paid for Williams to travel to Connecticut. GA175. Once again the defendant paid for round trip tickets so that Williams could return to Florida after the interview. GA175.

On March 25, 2004, the defendant and Williams were interviewed by an immigration officer in Hartford. GA105. The primary purpose of the interview, like the August 2002 interview, was to determine whether the defendant and Williams were in a bona fide marriage. GA93. During the interview, the defendant and Williams falsely lead the immigration officer to conclude that they were living together in a bona fide marriage. GA106-108, 319-338. They falsely represented, for example, that Williams lived with the defendant at 429 Farmington

Avenue, Apartment 101, in Hartford. GA106-108. In addition, the defendant provided the immigration officer with numerous documents that falsely showed that the defendant and Williams were commingling their assets and living together at 429 Farmington Avenue. GA106-108. Based on the false representations made during the interview and the false representations made in the numerous documents submitted by the defendant to the immigration authorities, the defendant obtained a United States Permanent Resident Card issued under the authority of the United States. GA338.

In 2005, after federal law enforcement officers started investigating this matter, the defendant sent two handwritten letters to Williams telling her not to cooperate with law enforcement and “reminding” her about certain events in their past. GA872-874. The defendant told Williams not to talk to investigators. *Id.* The defendant told Williams to contact his brother and explained that his brother’s name is Michael. *Id.*

In or about October 2005, the defendant sent a second handwritten letter to Williams. The defendant sent a five page handwritten letter addressed to Williams and a one page cover letter addressed to his brother Michael Akande. GA875-881. In the cover letter, the defendant asked his brother to immediately send to Williams the five page letter and extra divorce forms. *Id.* Further, the defendant told his brother that Williams must get the five page letter before the “olopar,” which, according to Williams, means “police.” *Id.* In the five page letter, the defendant told Williams that he obtained his green card and she should

fill out the divorce papers. *Id.* The defendant said, in part, “I want to summarize things that I want to tell you, and they are as follows: Me and you are still legally married, but we are currently separated and going through a divorce. . . . Marriage is a personal and private thing, you don’t owe anybody any explanation about your marriage.” *Id.* The defendant proceeded to tell Williams that she was an employee at Advent Capital Partners in Atlanta in 2001 and further explained what he had been doing and where he was living during the past five years. *Id.*

### **Summary of Argument**

I. The district court properly denied the defendant’s severance motion because joinder was proper under Rule 8. Each charge was part of the defendant’s scheme to obtain documents issued under the authority of the United States that would enable him to re-enter the United States after traveling abroad and remain in the United States indefinitely. In addition, joinder was proper because the passport fraud charges and the false statement charge were similar in character, and important evidence in support of each charge was interconnected and would have been admissible at separate trials on each offense.

Further, even assuming *arguendo* that the offenses were misjoined, the defendant did not suffer any actual prejudice because the district court properly instructed the jury to treat each charge separately, the evidence of guilt was overwhelming as to each count and this was not the type of case that would confuse a jury, thereby impeding its ability to examine each charge separately.

Moreover, for the same reasons, the district court acted well within its discretion in denying the defendant's motion for severance under Rule 14.

II. The challenged remarks in the rebuttal summation were supported by the trial record. Further, none of the challenged remarks caused the defendant substantial prejudice, much less rose to the level of reversible plain error. The "misconduct" was not severe in the context of an otherwise fair trial, the district court expressly instructed the jury that it should decide the facts based on the evidence, and there is every reason to believe that the defendant would have been convicted even without the prosecutors' comments.

### **Argument**

#### **I. The district court did not commit error or abuse its discretion in denying the defendant's severance motion.**

##### **A. Relevant facts**

On January 3, 2006, the defendant filed a motion to sever the passport fraud charges from the false statement charge. JA44-45. The defendant argued that the charges were not properly joined under Rule 8 and also requested that the district court exercise its discretion and sever the counts under Rule 14. JA46-56. The government opposed this motion, arguing that the joinder was proper because each charge was part of a common scheme, the charges are of a similar character and certain evidence would be

admissible in separate trials on each charge. JA57-81. The government further argued that joinder would not unduly prejudice the defendant. *Id.*

During a status conference, the district court orally stated that it was denying the defendant's motion to sever. GA47-48. At a later proceeding, the district court mistakenly stated that it had granted the motion to sever. At the final pretrial conference, the district court denied the motion to sever "for substantially the reasons stated by the Government." GA51-52.

### **B. Governing law and standard of review**

Rule 8 of the Federal Rules of Criminal Procedure allows for joinder of charges if any one of three conditions is met. Separate charges can be joined if they "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). This Court has previously defined "similar" as "(n)early corresponding; resembling in many respects; somewhat alike; having a general likeness." *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980) (citing *Webster's New International Dictionary* (2d ed.)). It has also interpreted Rule 8 to imply that "[j]oinder is proper where the same evidence may be used to prove each count." *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991). Rule 8(a) allows for joinder of claims as long as they "have sufficient logical connection." *United States v. Ruiz*, 894 F.2d 501, 505 (2d Cir. 1990).

An appeal claiming error based on the denial of a motion for improper joinder under Rule 8(a) must satisfy a two-pronged test. First, the defendant must show that the joinder was improper. Second, he must show that the misjoinder was prejudicial to him. *Id.*; *United States v. Rivera*, 546 F.3d 245, 253 (2d Cir. 2008). This Court reviews “the propriety of joinder *de novo* as a question of law.” *United States v. Tubol*, 191 F.3d 88, 94 (2d Cir. 1999).

Under Rule 14 of the Federal Rules of Criminal Procedure, a defendant may move for separate trials of counts charged in the same indictment if he believes the joinder prejudicial. “A motion for severance under Rule 14 is addressed to the discretion of the trial court . . . and the sound exercise of that discretion is virtually unreviewable.” *United States v. Arocena*, 778 F.2d 943, 949 (2d Cir. 1985) (internal quotations and citations omitted); *Rivera*, 546 F.3d at 253. A trial court’s denial of a motion to sever “will not be overturned unless the defendant demonstrates that the failure to sever caused him substantial prejudice in the form of a miscarriage of justice.” *Blakney*, 941 F.2d at 116 (interior quotations and citations omitted). “Given the balance struck by Rule 8, which authorizes some prejudice against the defendant, a defendant who seeks separate trials under Rule 14 carries a heavy burden of showing that joinder will result in substantial prejudice.” *United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994) (internal quotations and citations omitted). Indeed, a defendant seeking severance must show that unfair prejudice resulted from the joinder, not merely that the defendant “might have had a better chance

for acquittal at a separate trial.” *United States v. Rucker*, 586 F.2d 899, 902 (2d Cir. 1978).

### **C. Discussion**

#### **1. The district court properly considered proffered evidence.**

The district court properly considered proffered evidence in deciding whether to sever the charges. While this Court has not yet addressed this issue, at least four Circuit Courts of Appeal have held that courts may consider post-indictment proffers in addressing a motion to sever under Rule 8. *See United States v. Dominguez*, 226 F.3d 1235, 1241 (11th Cir. 2000); *United States v. McGill*, 964 F.2d 222, 242 (3rd Cir. 1992); *United States v. Halliman*, 923 F.2d 873, 883 (D.C. Cir. 1991); *United States v. Talavera*, 668 F.2d 625, 629 (1st Cir. 1982); *see also United States v. Cardwell*, 433 F.3d 378, 385 & n.1 (4th Cir. 2005) (considering indictment and evidence presented at trial).<sup>3</sup>

In *Dominguez*, for example, the Eleventh Circuit explained that the “rationale behind the indictment only

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<sup>3</sup> While other Circuit Courts have stated that the basis for joinder must appear on the face of the indictment, these courts largely were not confronted with a post-indictment proffer. *See United States v. De Yian*, 1995 WL 368445 at \*9 (S.D.N.Y. June 21, 1995). Rather, these courts were assessing whether the validity of joinder should be based on the indictment or on evidence offered at trial. *See id.*

rule makes sense when the indictment evidences the requisite connection between the charges, but the evidence at trial takes an unexpected turn that vitiates the basis for joinder.” 226 F.3d at 1241. The Eleventh Circuit explained the rationale behind the rule as follows: “[t]he difficulty . . . in allowing a court to analyze a Rule 8 claim based on the evidence adduced at trial is that it permits a reviewing court to conclude that initial joinder was improper based on information that was not and could not have been known to the prosecutor at the time the indictment was brought.” *Id.* (internal quotation and citation omitted). The Eleventh Circuit stated that this rationale “shows not just why the indictment only rule exists, but also why that rule is not applicable to situations when the evidence proffered by the government before trial or adduced during trial shows that initial joinder was *proper* even though the indictment may not have explicitly stated the connection between the charges.” *Id.* Accordingly, the Eleventh Circuit held that “[i]t is enough that when faced with a Rule 8 motion, the prosecutor proffers evidence which will show the connection between the charges.” *Id.*

Likewise, the D.C. Circuit has held that “the government need not demonstrate the propriety of its joinder decisions on the face of the indictment . . . Rather, the government need only present evidence before trial” sufficient to establish that joinder is proper. *Halliman*, 923 F.2d at 883 (internal quotation and citation omitted); *see also United States v. Spriggs*, 102 F.3d 1245, 1255 (D.C. Cir. 1997) (stating that court may consider pretrial proffer when ruling on propriety of joinder of multiple defendants).

Similarly, the First Circuit has held that the “possibility of benefit [from joinder] should explicitly appear from the indictment or from other representations by the government before trial.” *Talavera*, 668 F.2d at 629 (internal quotation and citation omitted). And the Third Circuit has held that “[t]rial judges may look beyond the face of the indictment to determine proper joinder in limited circumstances.” *McGill*, 964 F.2d at 242 (affirming joinder where “trial judge permitted the Government to ‘proffer’ the evidence it would adduce at trial to connect the tax and non-tax charges”).

An additional justification for permitting the government to proffer evidence is that in many cases, like the instant case, the relationship between the joined counts is not an element of the offenses. *See De Yian*, 1995 WL 368445 at \*10. Requiring the government to establish the relationship between the counts in the indictment “would require that the Government reconstitute a grand jury for the purpose of making findings of fact that are not necessary to sustain the charges included in the indictment. Neither the Constitution nor the language of the Rules at issue require such an outcome.” *Id.* (citing *United States v. Lane*, 474 U.S. 438, 448 (1986) (noting that “the specific joinder standards of Rule 8 are not themselves of constitutional magnitude”)).

Rule 13 of the Rules of Criminal Procedure also “appears to support the position that the basis for joinder may come from outside the indictment.” *Id.* at 10. Rule 13 permits a district court to join indictments for trial “if all offenses . . . could have been joined in a single

indictment” pursuant to Rule 8. Fed. R. Crim. P. 13. “At a minimum[,] the existence of Rule 13 obviates any requirement that a Grand Jury consider whether to join multiple offenses in a single indictment.” *Id.*

Furthermore, this Court’s decision in *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981) supports the government’s proffer of evidence to support joinder of offenses. The district court in *Gordon* held that two indictments should be joined for trial. *United States v. Gordon*, 493 F. Supp. 814, 821 (N.D.N.Y. 1980). The district court reached this conclusion based on a supporting affidavit provided by the government that “outline[d] in detail” the background facts necessary to show that “the alleged transactions upon which the charges in the second indictment are based do intertwine and connect together with transactions in several counts of the first so as to constitute part of a common scheme to obtain moneys by fraud” and, as such, the counts could “have been charged in a single indictment” pursuant to Rule 8(a). *Id.*

This Court affirmed the joinder of the two indictments for trial. *Gordon*, 655 F.2d at 485. While the Court did not specifically address the post-indictment proffer issue, it expressly approved the district court’s analysis. *Id.* Specifically, the Court stated: “[o]ur examination of the record satisfies us that [the district court judge] was correct in finding that ‘the alleged transactions upon which the charges in the second indictment are based do intertwine and connect together with transactions in several counts of the first so as to constitute part of a

common scheme to obtain moneys by fraud.” *Id.* (quoting *Gordon*, 493 F. Supp. at 821); *see also Pacelli v. United States*, 588 F.2d 360, 367 n.20 (2d Cir. 1978) (in evaluating Rule 8(b) joinder, “necessary linkage” between coconspirators may be “established by the evidence presented at trial” if absent from face of indictment).

In sum, as the Eleventh Circuit recognized, the rationale behind the indictment-only rule actually *supports* consideration of proffered evidence when the defendant attacks joinder as improper based on the indictment before trial. In addition, in the instant case, the relationship between the passport fraud charges and the false statement charge are not elements of the offenses. Inclusion of their relationship in the indictment would be unwieldy, would unnecessarily convolute the charges and, as one district court recognized, “would require that the Government reconstitute a grand jury for the purpose of making findings of fact that are not necessary to sustain the charges included in the indictment.” *De Yian*, 1995 WL 368445 at \*10 (internal quotation omitted).<sup>4</sup> Accordingly, the district court properly considered proffered evidence in deciding the defendant’s motion to sever.

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<sup>4</sup> Indeed, in many cases, the indictment will not identify the overlap of evidence in support of the separate charges. As discussed in Part I.C.2.c., *infra*, this is an important factor in support of joinder. *See Blakney*, 941 F.2d at 116 (“Joinder is proper where the same evidence may be used to prove each count.”).

## **2. The charges were properly joined.**

The district court correctly determined that the passport fraud charges and the false statement charge were properly joined in a single indictment. Joinder was appropriate for several independent reasons. First, each charge was part of the defendant's scheme to obtain documents issued under the authority of the United States that would enable him to re-enter the United States after traveling abroad and remain in the United States indefinitely. Second, the passport fraud charges and the false statement charge were similar in character. Third, significant evidence in support of each charge is interconnected and would have been admissible at separate trials on each offense.

### **a. The offenses were part of a common scheme.**

The passport fraud counts and the false statement count were part of a common plan or scheme; as such, they were properly joined in a single indictment. *See Ruiz*, 894 F.2d at 505 (affirming joinder of false statement and perjury counts as part of common scheme); *United States v. Golomb*, 754 F.2d 86, 88 (2d Cir. 1985) (affirming joinder of mail fraud charge relating to application for unemployment benefits and charges involving stolen property as part of common scheme because of “evidence that [defendant] assisted in fraud in return for his confederates’ agreement to continue supplying stolen property”); *Gordon*, 655 F.2d at 485 (affirming joinder of mail fraud, interstate transportation of stolen property and false statement charges because transactions upon which

charges are based intertwined “so as to constitute part of a common scheme to obtain moneys by fraud”).

The defendant argues that the passport fraud counts and the false statement count were not connected and were not part of a common scheme or plan. Def. Br. 23-24. The defendant argues that “there was no connection between the two sets of charges,” *id.* 24, and that “[t]his case stands in stark contrast to cases where the Court has found that joined offenses are interconnected.” Def. Br. 23. The defendant further argues that “the evidence concerning the passport fraud would not have been admissible in a trial of the false statement count, and evidence concerning the false statements to INS would not have been admissible at trial of the passport fraud.” Def. Br. 22.

The defendant’s arguments are unavailing. This Court’s precedent and the facts of this case reveal that the counts were part of a common plan or scheme. In *Ruiz*, for example, the defendant was a state senator who founded a nonprofit corporation named Alliance for Progress, Inc. (“Alliance”) that sponsored construction projects. 894 F.2d at 502. The indictment charged the senator with two counts of making a false statement in a loan application on behalf of Alliance to procure financial support for the proposed development of a shopping mall. *See id.* at 504. In addition, the senator was charged with making misrepresentations to a federal grand jury regarding his attempts to secure Senate Ethics Committee approval of his consulting fees from the Alliance projects. *See id.* at 503-04.

This Court affirmed joinder of the charges, holding that the activities underlying the false statement and perjury counts all related to the defendant's extra-senatorial activities through Alliance and thus were part of a common scheme or plan. *See id.* at 505; *see also Gordon*, 655 F.2d at 484-85 (finding a common scheme because the defendant misused his position as a financial adviser to obtain money by fraud in each charge).

In this case, the defendant schemed to obtain documents issued under the authority of the United States that would enable him to re-enter the United States after foreign travel and to remain in the United States. Each charge directly relates to this scheme. Indeed, the defendant's efforts to obtain a United States Passport and to obtain a Permanent Resident Card are the two means by which he executed this fraudulent scheme.

Between 1997 and 2004, the defendant fraudulently attempted to obtain a Permanent Resident Card. *See* Statement of Facts, *supra*; JA58-61. A Permanent Resident Card would enable the defendant to remain indefinitely in the United States and to re-enter the United States after foreign travel. Similarly, a United States Passport issued in the name of Carter but with the defendant's photograph, would enable the defendant to re-enter the United States after foreign travel. In addition, to the extent that the defendant was misrepresenting himself as Carter, the defendant could stay in the United States indefinitely.

Likewise, the defendant's argument that evidence concerning the passport fraud and the false statement count would not have been admissible at separate trials is similarly unavailing. Attempting to support this argument, the defendant argues that his defense to the passport fraud counts was that Carter was untrustworthy and set up the defendant and his defense to the false statement charge was that the marriage was bona fide. Def. Br. 22. The defendant argues that the "alleged lies to INS about the marriage and living arrangements would not be relevant to Carter's credibility, nor would the switched photo passport allegation be relevant to the legitimacy of Defendant's marriage." Def. Br. 22.

This argument, however, disregards the government's theory of the case and significant evidence in this case. The government argued that the defendant's unsuccessful efforts to obtain lawful permanent residency in the United States provided extremely strong motive for the defendant's conspiracy with Carter to submit a fraudulent application for a United States Passport. *See* JA58-61.

The defendant's submissions to the INS make clear that the ability to re-enter the United States after foreign travel was an important motive behind his scheme to obtain a Permanent Resident Card. Indeed, at the very same time that the defendant applied for a Permanent Resident Card, he requested permission (on the basis of his pending application for a Permanent Resident Card) to re-enter the United States after foreign travel. GA88-89. The INS denied this request. GA89. The INS informed the defendant that because he was present in the United States

for at least 180 days before he filed his application for a Permanent Resident Card, he would not be readmitted into the United States if he traveled abroad. GA91. In January 2002, the defendant again requested advance permission to re-enter the United States after foreign travel. GA103-104. Once again, the INS did not grant his request. GA104.

This put the defendant in a difficult position. If he left the United States without advance permission from the INS, his application for permanent residency would be rejected. The INS made clear, however, that it would not grant the defendant such advance permission. Thus, the defendant needed a Permanent Resident Card to re-enter the United States lawfully after foreign travel. But the defendant had been attempting, without any success, to obtain a Permanent Resident Card for more than five and a half years.

Accordingly, as of the Summer of 2003, it was increasingly clear that the defendant would not secure documents (*i.e.*, a Permanent Resident Card or advance permission from the INS based on his pending application for permanent residency) authorizing his re-entrance into the United States using his own identity. The defendant needed to use someone else's identity. As a result, the defendant conspired with Carter to obtain a United States Passport in Carter's name, but with the defendant's photograph. *See* JA58-61.

In sum, the defendant devised a fraudulent scheme to obtain documents issued under the authority of the United

States that would enable him to re-enter after foreign travel, and remain in, the United States. This scheme consisted of two parts: the defendant's efforts to obtain by fraud a Permanent Resident Card and the defendant's efforts to obtain by fraud a United States Passport. As such, the passport fraud charges and the false statement charge were part of the same scheme. Thus, the charges were properly joined in the same indictment. *See Ruiz*, 894 F.2d at 505; *Golomb*, 754 F.2d at 88.

**b. The charges were similar in character.**

Offenses are properly joined in a single indictment when they are "of the same or similar character." *See* Fed. R. Crim. P. 8(a). As this Court has stated, Rule 8(a) "covers [crimes] of 'similar' character, which means nearly corresponding; resembling in many respects; somewhat alike; having a general likeness." *Werner*, 620 F.2d at 926 (internal quotations omitted) (finding that conspiracy, Hobbs Act and theft of foreign currency offenses arose out of similar scheme to use position as a company insider to obtain money or property carried by company to airport); *see also Ruiz*, 894 F.2d at 505 (finding that false statement counts concerning senator's attempt to procure financial support from bank for proposed development of mall and perjury count concerning senator's misrepresentations to grand jury about his attempts to secure Senate Ethics Committee approval of his consulting fees "surely were of the same or similar character") (internal quotation and citation omitted).

Here, there was ample evidence that the passport fraud charges and the false statement charge were of a similar character. First, in both the passport fraud charges and the false statement charge, the defendant and a co-conspirator submitted a fraudulent application to a United States agency. *See* JA39-42, 58-61. Second, in both instances, the application was submitted for the purpose of obtaining a document issued under the authority of the United States. Third, the document in both instances related to the defendant's right to freely travel into, and remain in, the United States. Fourth, in both instances, the defendant induced a United States citizen (in part, by money) to assist him in making false representations to a United States agency. GA214-215, 435. Fifth, both the passport fraud charges and the false statement charge were necessitated by the fact that the defendant was an illegal alien residing in the United States. Sixth, the defendant had the same motive for both offenses – he wanted to obtain documents issued under the authority of the United States that would enable him to freely enter into and remain in the United States.

In response to these arguments, the defendant points to *United States v. Jawara*, 474 F.3d 565 (9th Cir. 2007). Aside from the fact that this is not controlling precedent, this case is distinguishable for several reasons. First, the validity of the joinder in that case was decided solely by the allegations in the indictment. *See id.* at 572. Second, the *Jawara* court found a “lack of any temporal connection” in the charges, *see id.* at 578; whereas, in the instant case, the defendant's scheme to defraud immigration authorities was on-going at the time that he

submitted the fraudulent passport application. Third, there was no “potential evidentiary overlap” in that case. *See id.* at 579. In contrast, in this case, there is significant interconnected evidence. *See Part I.C.2.c., infra.* Fourth, the court in *Jawara* found that there was “no similar mode of operation with respect to the two crimes.” *See* 474 F.3d at 579. Here, by contrast, in both instances, the defendant induced a United States citizen to assist him in making false representations to a United States agency so that the defendant could freely enter into, and remain in, the United States. Fifth, the counts in *Jawara* did not involve related geographic locations. *Id.* at 579. In this case, however, the conspiracy to submit a fraudulent passport application and the fraudulent representations to the immigration officer both were perpetrated in the Hartford area.

In sum, both the passport fraud charges and the false statement charge were substantially similar in character. Because of their similarity in character, the offenses were properly joined in a single indictment. *See, e.g., Ruiz*, 894 F.2d at 505; *Gordon*, 655 F.2d at 484-85; *Werner*, 620 F.2d at 926.

**c. Significant evidence in support of the charges was interconnected and would have been admissible at separate trials.**

This Court has repeatedly held that joinder of two counts is proper where there is an overlap of evidence that may be used to prove each count. *See Amato*, 15 F.3d at 236 (joinder proper where evidence was “interconnected

and overlapping”); *Blakney*, 941 F.2d at 116 (“[j]oinder is proper where the same evidence may be used to prove each count”); *United States v. Turoff*, 853 F.2d 1037, 1044 (2d Cir. 1988) (joinder of mail fraud and tax fraud charges proper where proof of one scheme is necessary to fully understand other scheme).

In *Blakney*, for example, this Court upheld the joinder of narcotics and firearms charges because the defendant “was selling both commodities to the same customers.” 941 F.2d at 116. Accordingly, the Court noted that “[t]he evidence in support of the two counts was thus interconnected, and the interests of judicial efficiency were served by having the counts tried together.” *Id.*

Here, evidence in support of the passport fraud charges and the false statement charge was interconnected and would have been admissible at separate trials on each offense. Evidence regarding the false statement charge, for example, would have been admissible in a trial on the passport fraud charges pursuant to Rule 404(b) of the Federal Rules of Evidence to establish the defendant’s motive. *See, e.g., Werner*, 620 F.2d at 929 n.7 (stating that evidence from 1976 theft would be admissible in trial of 1978 theft – and vice versa – to show motive, opportunity and knowledge); *United States v. Romero*, 54 F.3d 56, 60 (2d Cir. 1995) (affirming denial of severance “because much of the evidence of [defendant’s] involvement with violent narcotics operations . . . would have been admissible in a separate trial as evidence of his motive for ordering [victim’s] death”).

Evidence regarding the defendant's representations to the INS established his motive for the passport fraud charges. This evidence showed that, *inter alia*, as of July 2003: (a) the defendant was an illegal alien, who had been residing in the United States since 1997; (b) the defendant wanted to travel outside the United States for business and personal reasons; (c) in October 1997 and in January 2002, the defendant requested advance permission to re-enter the United States after foreign travel and the INS denied both requests; (d) the INS informed the defendant that any applicant for Permanent Resident status, who is illegally present in the United States for more than 180 days before filing his application and who leaves the United States while the application is pending, will not be readmitted into the United States; (e) the INS further informed the defendant that because he was present illegally in the United States for at least 180 days before filing his application, he would not be readmitted into the United States after foreign travel; (f) without United States Permanent Residency, the defendant would not be able to re-enter the United States lawfully after foreign travel; (g) the defendant had been trying, without success for more than five and a half years, to obtain a United States Permanent Resident Card; and (h) if the INS learned that the defendant left the country without advance permission, his application for United States Permanent Residency would be rejected. This evidence was directly relevant to the defendant's intent and motive to fraudulently obtain a United States Passport in the name of a United States citizen – namely, Samuel Carter, Jr.

Likewise, evidence regarding the passport fraud arguably would have been admissible in a trial on the false statement charge. Evidence regarding the defendant's unsuccessful efforts to obtain a United States Passport established a strong motive for the defendant's fraudulent scheme to obtain a United States Permanent Resident Card.<sup>5</sup> Like the United States Passport that the defendant attempted to secure, a Permanent Resident Card would enable the defendant to re-enter the United States after traveling abroad. In addition, to the extent that the defendant was misrepresenting himself as Samuel Carter, Jr., the defendant could stay in the United States indefinitely. Similarly, a Permanent Resident Card would enable the defendant to stay in the United States indefinitely.

Because evidence in support of each charge established strong evidence of motive and intent as to the other charge, substantial testimony and documentary evidence was relevant to all of the charges. Even setting aside the Rule 404(b) evidence, however, there was additional overlapping evidence in support of each of the charges. For example, Special Agent Sullivan testified in depth

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<sup>5</sup> The fact that the passport fraud was committed after the defendant's initial attempts to secure a Permanent Resident Card does not undermine the admissibility of the passport fraud evidence in a trial on the false statement charge. *See Werner*, 620 F.2d at 929, n.7 (stating that evidence of 1978 robbery would be admissible in trial on the 1976 theft) (citing decisions establishing that subsequent similar acts, including other crimes, are admissible).

regarding the defendant's false statements to immigration authorities. She also testified regarding the defendant's applications to travel abroad. GA102-104. Special Agent Sullivan testified, for example, that the defendant submitted documents stating that he planned to travel abroad for approximately one month and that he intended to travel abroad more than once. GA103. Similarly, Wayne Segrave, the immigration officer who interviewed the defendant and Williams, also provided testimony regarding the defendant's travel restrictions as someone who "entered without inspection." GA269. Segrave further testified that if the defendant could not get a green card and a passport, then he could not travel abroad without advance permission from immigration authorities. GA338-339. Further, evidence regarding the passport fraud also supported a finding that the defendant was living in Connecticut in the Summer of 2003, while other evidence showed that Williams was living in Florida. For example, Carter provided testimony regarding the passport conspiracy and testimony corroborating that the defendant was living in Hartford in 2003 (*i.e.*, not with Williams in Florida or elsewhere). Carter also testified that the defendant said he was from West Africa and California, and that he had a wife and son in California. GA434. In addition, Postal Inspector Hinman, who investigated the fraudulent passport application, testified regarding the circumstances of his interview of Williams and where she was living. GA689-690.

Given the overlapping evidence in support of the passport fraud charges and the false statement charge,

joinder of the charges in a single indictment was proper. *See Amato*, 15 F.3d at 236; *Blakney*, 941 F.2d at 116.

**3. The defendant has not shown prejudice from the joinder.**

Even if joinder of charges was improper, this Court will affirm a denial of a motion to sever if the misjoinder was not prejudicial to the defendant. *See Rivera*, 546 F.3d at 253.

Here, joinder of the offenses did not prejudice the defendant. As discussed above, important evidence regarding each offense was intertwined with, and would have been admissible in a separate trial regarding, the other offenses. Indeed, they both were part of a common scheme or plan. Accordingly, the defendant was not prejudiced by joinder. *See Werner*, 620 F.2d at 926 n.5 (“a frequent basis used by the Government to show that improper joinder under Rule 8 was harmless error is that all or substantially all the evidence admitted at the joint trial would have been admissible in separate trials”); *see also Romero*, 54 F.3d at 60 (“the prejudice, if any, was not great because much of the evidence [of narcotics charge] . . . would have been admissible in a separate trial as evidence of his motive for ordering [murder]”).

In *Jawara* – the case relied upon by the defendant – the Ninth Circuit held that the defendant did not suffer any actual prejudice from the misjoinder. *See* 474 F.3d at 581. The court found that the following factors supported its conclusion “that misjoinder did not have a ‘substantial and

injurious' effect on the verdict." *Id.* at 580. First, the district court "instructed the jury to treat the charges separately . . . ." *Id.* Second, "the evidence of guilt was overwhelming as to both counts." *Id.* Third, the court held that "the issues in this . . . trial were relatively simple" and the evidence regarding the two counts distinct and, thus, "evidence related to one crime did not likely taint the jury's consideration of the other crime." *Id.* at 581 (internal quotations omitted).

Here, as in *Jawara*, the district court properly instructed the jury to treat the charges separately. Indeed, if anything, the charge in this case emphasized more thoroughly the need to treat the counts separately than the charge in *Jawara*. Specifically, in this case, the district court instructed the jury:

The charges against the defendant are contained in three separate counts. Counts One, Two and Three, each charge the defendant with a different crime. You must consider each count separately and return a separate verdict of guilty or not guilty for each.

To prove that the defendant is guilty of the offense charged in a given count, the government must prove each of the elements of that offense beyond a reasonable doubt. Unless the government proves each and every element of the offense beyond a reasonable doubt, you must find the defendant not guilty of that offense. You may find the defendant not guilty of one or more of the

offenses and guilty of one or more of the other offenses.

JA175-176. In addition, with respect to each count, the district court properly instructed the jury regarding the elements that the government must prove and further instructed the jury that if they found that the government had failed to prove one or more of these elements beyond a reasonable doubt, then the jury must return a not guilty verdict as to that count. *See* JA186, 192.

Further, during its charge, the district court provided each juror with a copy of the verdict form, which required the jurors to make separate findings as to each count. *See* JA170.

In short, as the court ruled in *Jawara*, the jury instructions more than adequately “militate[d] against a finding of prejudice.” 474 F.3d at 580. *See also Romero*, 54 F.3d at 60 (“Absent evidence to the contrary, juries are presumed to follow proper instructions designed to minimize the risk of prejudice from joinder.”).

In addition, as the court found in *Jawara*, “the evidence of guilt was overwhelming” as to each count. 474 F.3d at 580. As described in the Statement of Facts and discussed in detail in Part II.C.1., *infra*, the evidence was extremely strong as to each count. As the court in *Jawara* stated, “we do not confront a situation where prejudice might stem from a disparity of evidence— i.e., a weak case joined with a strong case.” *Id.* Accordingly, this factor strongly militates against a finding of prejudice.

Further, as in *Jawara*, the issues in this trial were relatively simple. Even if certain evidence might not have been admissible at separate trials of the passport fraud and false statement crimes, the evidence was straightforward and would not result in prejudice. *See* 474 F.3d at 581. Simply put, this is not the type of case that would confuse the jury, thereby impeding its ability to examine the defendant's conduct on the different charges separately. *See Werner*, 620 F.2d at 929 (stating that jury could readily examine defendant's conduct on two different occasions separately).

Accordingly, even assuming *arguendo* that joinder was improper, the joinder caused minimal, if any, prejudice to the defendant.

**4. The district court did not abuse its discretion by denying severance under Rule 14.**

As discussed above, *supra*, joinder of the passport fraud charges and the false statement charge caused little, if any, prejudice to the defendant. Indeed, the evidence of guilt was overwhelming as to each count, there was no disparity of evidence between the counts, the evidence was relatively simple and straight forward as to each of the counts, the district court properly instructed the jury to consider each count separately and this is not the type of case that would confuse the jury. Further, significant evidence in support of the passport fraud charges and the false statement charge would have been admissible at separate trials on each offense. In short, the defendant

cannot show, as he must, that “the failure to sever caused him substantial prejudice in the form of a miscarriage of justice.” *Blakney*, 941 F.2d at 116 (interior quotations and citations omitted).

**II. Isolated statements in the prosecutors’ closing and rebuttal summation did not cause the defendant substantial prejudice in an otherwise fair trial, much less rise to the level of reversible plain error.**

**A. Relevant facts**

**1. The district court’s preliminary instructions**

Prior to the start of evidence, the court gave preliminary instructions. The court instructed the jury that they were the sole judges of the facts, and the evidence from which they would find the facts consisted of (1) the testimony of witnesses on the witness stand, (2) documents and other tangible things that are received into the record as exhibits and (3) any facts that the parties stipulate to. GA63-64. The court emphasized, “Nothing else is evidence. In particular, statements and arguments that are made by counsel for the government are not evidence, statements and arguments made by Mr. Akande in his capacity as his own counsel are not evidence.” GA64.

## **2. The closing arguments**

### **a. The government's opening summation**

During its opening summation, the government argued that Williams and Carter both were vulnerable when they met the defendant and that there was significant corroboration for their testimony. JA96-98.

The government argued that it had proven the five elements of Count Three. The prosecutor reviewed the testimony of Williams and Segrave, the immigration officer who interviewed Williams and the defendant, and the documents that the defendant and Williams had submitted to INS. JA99-102. The prosecutor argued that Williams testified that representations and documents that were submitted to the INS were a "lie." JA105. The prosecutor argued that there was significant corroboration for Williams's testimony, including the testimony of Janet Del Signore, who was the Dean of Academic Affairs at Keiser University in Tallahassee, Florida, and Keiser University's records regarding Williams. JA104. The prosecutor further argued that while Williams was living in Florida, the defendant was living a completely separate life in California and Connecticut. JA105. This was shown by the testimony of Carter, Melissa Wright and Connecticut DMV records. JA105. The prosecutor argued that the defendant's misrepresentations to INS were material and this was supported by the testimony of Special Agents Sullivan and Segrave. JA106. The prosecutor discussed examples of fraudulent records submitted to INS and also discussed the letters that the

defendant sent to Williams coaching her about their marriage and where she worked. JA106-108.

The government also argued that it had proven the elements of Counts One and Two. The prosecutor reviewed Carter's testimony regarding Carter's and the defendant's conspiracy to submit a fraudulent application for a U.S. Passport. JA111-113. The prosecutor reviewed the testimony regarding the application process, the fraud indicators on the application and the subsequent criminal investigation, during which investigators interviewed Carter. JA111-112. The prosecutor asked the jury to use their common sense, and asked them why would Carter submit a passport application with the defendant's picture? JA112-115. The prosecutor argued that Carter had a simple motive – "a thousand dollars." JA115. The prosecutor further argued that the defendant had a strong motive. JA115-116. The defendant had wanted to travel abroad for a long time. JA115. The defendant had submitted applications for permission to travel abroad in 1997 and 2002, and both applications were denied. JA115-116. Moreover, INS told the defendant that if he left the country and he would not be allowed to come back. JA116.

**b. The defense summation**

The defendant argued that his marriage to Williams was not a fraud and the government was overreaching. JA122. He argued that it was not an arranged marriage, JA122-123, 127-128, and that it was impossible for them to have a joint bank account without the bank having

Williams's information. JA124. He contended that it was their intent to live together when they got married, JA125, and he pointed to his letters to Williams as evidence that he still communicated with her and he still had feelings for her, JA125-126. According to the defendant, these letters showed problems with their marriage, not fraud. JA132. He acknowledged that their marriage had problems, but he denied asking Williams to marry him for a green card. JA126-127. He argued that they filed tax returns together and these tax returns were submitted to immigration authorities. JA128-129. He also argued that bank records show that they were married. JA123-124, 135.

The defendant further argued that there was a period of time when Williams maybe thought that she was single, but the divorce was not really filed. JA132. He argued that Williams checked "single" on certain documents because there was a misunderstanding. JA133. He contended that a married couple can live in separate states and still have a bona fide marriage, JA129, 133, and thus, there was no motive for them to lie about living together. JA133-135. The defendant argued that their joint accounts, their automobile insurance coverage and his rental application proved that their marriage was bona fide. JA135, 143. Finally, he argued that marriage fraud requires two people to commit the fraud and Williams was never charged. JA136-137.

On the passport fraud counts, the defendant argued that Carter was not credible, JA138, and that Carter committed the passport crime on his own, JA152. He noted that the passport application was in Carter's own handwriting, that

Carter used his own credit card to open the P.O. Box, and that Carter signed the application. JA150-152. He argued that the government could not show that any of the handwriting on the application was the defendant's; nor did it have any phone records linking the defendant to Carter. JA152. The defendant argued that Carter was a paid government informant, that he set up the defendant and that he cannot be trusted. JA152. He argued that the government needed to prove that there was an agreement between Carter and the defendant, but had failed to produce any evidence beyond Carter's testimony. JA152-153. He pointed to inconsistencies between the testimony of Carter and other witnesses, and argued that Carter was not credible. JA153-154.

**c. The government's rebuttal summation**

In its rebuttal summation, the government asked the jury whether the defendant's argument – that the defendant and Williams were living together in a bona fide marriage, but they were just having difficulties – was consistent with the evidence. JA155. The prosecutor argued that since at least 2001, and likely much earlier, the defendant and Williams were living completely separate lives. JA155-159. The prosecutor discussed the testimony of Williams, who testified that she lived in New Jersey from 2001 to 2002, she lived at her mother's house in Tallahassee from 2002 to February 2003 and she lived at an apartment on Lee Avenue in Tallahassee from February 2003 through 2006. JA156. The prosecutor argued that Williams's testimony was corroborated by, *inter alia*, the testimony of Janet Del Signore, Keiser University's detailed attendance

records, employment records, the testimony of Kent Strauss and rental records. JA156-157. The prosecutor argued that there was significant evidence – including Carter’s testimony, DMV records, the defendant’s rental application at 429 Farmington Avenue and Melissa Wright’s testimony – that the defendant lived in California by 2000-2001 and then moved to Connecticut by 2002. JA157-159.

The prosecutor argued that Williams testified that she never lived in California, she never lived in Connecticut and, most importantly, she never lived with the defendant at 429 Farmington Avenue in Hartford, as represented to immigration authorities. JA159. The prosecutor argued that Williams came to Connecticut twice, in September 2003 and March 2004, because she thought there was an immigration interview and the defendant told her that it was her fault the other interview with immigration did not work out. JA162-163. With respect to the bank records that the defendant argued were proof that his marriage to Williams was bona fide, the prosecutor argued that Williams testified that she had never seen those documents before, she had no knowledge that she was a joint account holder of his accounts and she certainly never used any of the accounts. JA160. The prosecutor also asked the jury to consider whether the defendant’s handwritten letters to Williams were “letters between a couple that are in a bona fide marriage” or letters from a person “who’s trying to urge someone not to cooperate with authorities and trying to coach that person as to who he is [and] what he’s been doing the last several years.” JA161.

In addition, the prosecutor addressed the defendant's arguments that Carter was not credible. The prosecutor asked the jury whether Carter answered questions, from both the government and the defendant, honestly and directly and whether he tried to hide or minimize his own involvement in the conspiracy. JA162. The prosecutor also asked the jury to consider several simple, common-sense questions. The prosecutor asked the jury why Carter would need a P.O. Box and where Carter, who was homeless and without a job, would get money for a P.O. Box and an expedited passport application. JA162-163. The prosecutor asked the jury to consider why Carter would need a passport (let alone an expedited passport) given the evidence that Carter had never traveled outside the United States, he had no plans to travel outside the United States and, even if he did have such plans, he could not afford to travel outside the United States. JA163. Further, the prosecutor asked the jury to consider how would Carter obtain two passport-sized photographs of the defendant and, more importantly, what would Carter do with a passport with the defendant's photograph. JA163. The prosecutor asked how the passport would have any use to Carter and argued that there was only one person who would have any use for such a passport – the defendant. JA163-164.

Last, the prosecutor addressed the defendant's arguments regarding motive. JA166-167. The prosecutor argued that Carter was motivated by "a thousand dollars." JA166. The prosecutor further argued that the defendant had an extremely strong motive. JA166. The prosecutor argued, in part as follows:

[T]he evidence shows in this case that the defendant entered the United States unlawfully in 1997 and since 1997 he had been trying unsuccessfully to obtain lawful permanent residency here in the United States. Moreover, you know from the evidence that the defendant wanted to travel abroad and be able to reenter the United States.

In fact, in October of 1997, within days of his marriage ceremony, the defendant executed an application for travel document requesting authorization to be able to travel abroad. In addition in 2002, he requested authorization to be able to travel abroad and what happened? The INS declined his application. They told him because he had been unlawfully present in the United States for more than 100 days, if he traveled abroad, he would be barred from reentry into the United States for either three to ten years. He certainly wouldn't be able to attain lawful permanent residency. Simply put, the defendant could not travel abroad and reenter the United States without jeopardizing his ongoing efforts to obtain lawful permanent residency. He could not do this using his own identity, so what did he need to do? He needed someone else's identity. He needed the identity of a United States citizen. He needed a United States passport with his own photograph but a United States citizen's information. And that is exactly what Jason Shola Akande conspired to do with Samuel Carter.

JA166-167.

### **3. The final charge**

At the conclusion of closing arguments, the court charged the jury. The court again instructed the jury that they “are the sole judges of the facts of the case.” JA174. The court further instructed, in relevant part:

The evidence from which you are to decide what the facts are comes in one of three forms:

First, there is the sworn testimony of witnesses both on direct and cross-examination;

Second, there are the exhibits that have been received into the record; and

Third, there are facts to which the parties have agreed or stipulated. . . .

Arguments or statements made by counsel for the government and by Mr. Akande acting in his capacity as his own counsel are not evidence. Questions to witnesses by counsel for the government and Mr. Akande are not evidence. Objections to questions and arguments by counsel for the government and Mr. Akande are not evidence. . . .

JA199.

Later in the charge, the court instructed, “[y]our verdict must be based solely on the evidence presented during the trial or the lack of evidence.” JA209. Near the end of its charge, the court again instructed:

Remember again that your verdict must be based solely on the evidence in the case and the law as I have given it to you, not on anything else. Opening statements, closing arguments or statements or arguments by counsel for the government and Mr. Akande are not evidence. If your recollection of the evidence differs from the way counsel or Mr. Akande has stated the evidence, your recollection controls.

JA211.

### **B. Governing law**

A prosecutor enjoys wide latitude in giving a closing argument so long as he or she does not misstate the evidence, or offer comments calculated solely to inflame the passions of the jury. *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998); *United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994); *United States v. Shareef*, 190 F.3d 71, 79 (2d Cir. 1999); *United States v. Modica*, 663 F.2d 1173, 1180 (2d Cir. 1981). The prosecutor is also given broad range regarding the inferences that he or she may suggest to the jury during her summation. *Edwards*, 342 F.3d at 181; *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987). In addition, a prosecutor is

“ordinarily entitled to respond to the evidence, issues, and hypotheses propounded by the defense.” *United States v. Marrale*, 695 F.2d 658, 667 (2d Cir. 1982).

“Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.” *United States v. Young*, 470 U.S. 1, 11 (1985); *accord Modica*, 663 F.2d at 1184 (“Reversal is an ill-suited remedy for prosecutorial misconduct . . .”); *United States v. Burden*, 600 F.3d 204, 221 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 251 (2010) and *cert. denied*, 131 S. Ct. 953 (2011). To warrant reversal, prosecutorial misconduct must “‘cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.’” *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *Shareef*, 190 F.3d at 78); *see also Shareef*, 190 F.3d at 78 (“Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute ‘egregious misconduct.’”) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

This Court looks at three factors when considering whether an improper comment caused substantial prejudice: “1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements.” *Burden*, 600 F.3d at 222. “The ‘severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.’” *United States v.*

*Thomas*, 377 F.3d 232, 245 (2d Cir. 2004) (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

Moreover, where, as here, a defendant does not object to allegedly improper comments during a summation, this Court reviews for plain error. *United States v. Caracappa*, 614 F.3d 30, 41 (2d Cir.), *cert. denied*, 131 S. Ct. 675 (2010). Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

### **C. Discussion**

#### **1. The prosecutor’s statements in rebuttal summation were based on the evidence.**

The defendant argues that the government made improper statements in its rebuttal summation. Specifically, the defendant challenges the following statements:

We know Chastidy Williams had a driver's license back in Florida, but on that trip to Connecticut where she thought there was an immigration interview, the defendant took her to the Department of Motor Vehicle, like the immigration paperwork, the defendant filled it out, she signed whatever he told her to sign, she signed the rental application work [stet].

JA160. The defendant claims that these statements have "no evidentiary support." Def. Br. 31. According to the defendant, "[t]here was no evidence that Defendant instructed Williams to sign any driver's license application, rental application, or any other form." *Id.*

The defendant's argument is misplaced. Indeed, the statements that Williams came to Connecticut at the defendant's request, that the defendant filled out the paperwork for a Connecticut identification card for Williams and that Williams, at the defendant's request, signed the paperwork, is supported by the record.

Williams testified that she came to Connecticut for a few days in September 2003 because she thought there was an immigration interview. GA161-165. Williams said that the defendant paid for her round trip plane tickets and she stayed in Connecticut for a few days before returning to Florida. GA163-165. When Williams was asked how the defendant got her to come to Connecticut, Williams testified, in part, that the defendant "told me that we were still married and the previous interview was my fault because I wouldn't cooperate." GA162. Williams further

testified, “I felt pressured, obligated, because he said I had – it was my fault, you know, that these this other interview didn’t work because I didn’t cooperate.” GA163.

Williams acknowledged that she obtained a Connecticut identification card on September 2, 2003. GA165. The Connecticut identification card, which was signed by Williams, identified her last name as Williams-Akande. GA165. Williams further testified:

Question: Did you fill out the paperwork to have that name (*i.e.*, Williams-Akande) on there?

Answer: No.

Question: Have you used the name Williams-Akande or Akande-Williams?

Answer: No.

Question: How have you always referred to your last name?

Answer: Williams.

Question: Do you know who filled out the paperwork for you to get this identification card?

Answer: Mr. Akande.

GA165.

During redirect, Williams again testified that the defendant filled out the paperwork for the Connecticut identification card. GA217. Williams testified that she obtained the Connecticut identification card because she thought that the defendant had an immigration interview. GA216. Williams was asked about the address on the identification card, which identifies her address as 429 Farmington Avenue, Hartford, Connecticut, and testified as follows:

Question: Now, this Connecticut identification card – what was the address? Do you remember or do you want me to show you?

Answer: You can show me. I think its Farmington something.

Question: Can you see that?

Answer: Yes.

Question: And what's that address?

Answer: 429 Farmington Avenue.

Question: And if this was submitted to the immigration department for them to believe that you were living there, would that be a lie or would that be the truth?

Answer: That would be a lie.

Question: And why is that?

Answer: I didn't live there.

GA217.

In short, the statements in the rebuttal summation were based on the trial record.

**2. The prosecutor's statements in closing argument and rebuttal summation did not cause the defendant substantial prejudice in an otherwise fair trial.**

As noted above, the defendant challenges the prosecutor's statements in the rebuttal summation that the defendant took Williams to the Department of Motor Vehicle and the defendant filled out the paperwork for a Connecticut identification card and told Williams to sign it. Def. Br. 30-31. The defendant also claims that the prosecutor made the following two improper statements during its opening summation: (1) that Williams had just left Tallahassee, moved to Atlanta and did not have any particular contacts or career set up; and (2) that Williams called the defendant when she either had a flat tire or some sort of repairs needed on her automobile.<sup>6</sup> Def. Br. 29.

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<sup>6</sup> The government acknowledges that Williams did not testify about these matters at trial. The prosecutor apparently mistakenly confused Williams's trial testimony with other

Even if these statements were improper, they did not cause the defendant substantial prejudice.

The Supreme Court has instructed that “[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding.” *Young*, 470 U.S. at 11. Accordingly, even if this Court were to find any of the prosecutor’s comments improper, it should not reverse the defendant’s conviction unless those comments resulted in substantial prejudice to the defendant, when considered in the context of the trial as a whole. *See Burden*, 600 F.3d at 221. When evaluating whether an error resulted in substantial prejudice, this Court considers “1) the severity of the misconduct; 2) the measures the district court adopted to cure the misconduct; and 3) the certainty of conviction absent the improper statements.” *Id.* at 222.

Here, there is no basis for finding that the prosecutor’s comments caused the defendant substantial prejudice. *First*, the allegedly improper statements did not amount to severe misconduct, especially when considered in the context of the whole trial. While Williams did not testify at trial regarding how long she had been in Atlanta when she met the defendant, whether she had a job at the time that she met the defendant or whether she called the defendant regarding a vehicle problem after she met the defendant, the prosecutor’s statements on these topics were rather innocuous.

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statements she had made.

Moreover, even if Williams did not testify at trial to the precise statements identified by the prosecutor, she testified to other facts that highlighted her vulnerability to the defendant's scheme. Specifically, Williams testified concerning, *inter alia*, the following: she moved back and forth between Tallahassee and Atlanta; she met the defendant at a convenience store/gas station, GA181; she lived with a roommate and the defendant lived alone in Atlanta, GA182; while she stayed with the defendant for a few days, she never lived with the defendant, GA142; she got married to the defendant on October 8, 1997 in Atlanta, GA153; no family members or friends were at the wedding ceremony, GA213; Williams did not tell her family about the marriage, GA213; immediately after the marriage, she was not comfortable with the marriage; she stayed at the defendant's apartment for a few days, but she never lived with him, GA213; she never shared a bedroom with the defendant and she never had intimate relations with the defendant, GA174; shortly after their marriage ceremony, she moved back to her parent's home in Tallahassee, GA213; and on several occasions, she traveled back to Atlanta and stayed at the defendant's apartment, but she never lived with the defendant, GA142, 213-214.

Further, Williams testified that she never lived with the defendant in California or Connecticut, GA211, that she came to Connecticut twice for what she believed were immigration interviews, GA161-165, that she "felt pressured, obligated, because he said I had – it was my fault, you know, that these this other interview didn't work because I didn't cooperate," GA163, and that the

representations to the immigration officer that they were living together as a married couple at 429 Farmington Avenue in Hartford were a “lie,” GA217.

Moreover, the defendant has identified no other errors, much less any alleged prosecutorial misconduct, in the rest of the trial. Thus, at most, the prosecutor’s comments, if improper, were “an aberration in an otherwise fair proceeding.” *Thomas*, 377 F.3d at 245 (quoting *Elias*, 285 F.3d at 191).

*Second*, the district court adopted appropriate measures to mitigate the impact of any improper comments. Because the defendant did not object to any of the challenged statements in the prosecutors’ closing argument and rebuttal summation, the court had no opportunity to respond directly to the arguments now raised by counsel. Nevertheless, the court instructed the jury to base its decision solely on the evidence in the record, and specifically told the jury, on multiple occasions, that the arguments or statements made by counsel for the government are not evidence and are to be disregarded in deciding what the facts are. GA1165, 1177. *See Elias*, 285 F.3d at 192. There is no reason to believe that the jury could not follow these basic instructions, and thus they mitigate the impact of any alleged improper comments.

*Finally*, even absent the prosecutors’ challenged remarks, the defendant would almost certainly still have been convicted of all three offenses. As an initial matter, the challenged remarks were not relevant to the defendant’s conspiracy to make a false statement in a

passport application or the defendant's making a false statement in a passport application. Moreover, with respect to the defendant making a false statement to the immigration authorities, the evidence against the defendant was extremely strong and there is every reason to believe that he would have been convicted even without the prosecutors' comments.

The evidence at trial established that between at least 2001 (if not much earlier) and the date of the trial – and specifically, at the time of the immigration interview in March 2004 – the defendant and Williams lived completely separate lives. *See supra* at 7-8. Williams testified that between 2001 and 2006, she lived in Tallahassee, Florida and New Jersey. *See id.* The defendant never lived with Williams in either New Jersey or Tallahassee. GA149. During much of this time, Williams had no contact with the defendant. Indeed, Williams considered herself to be single. GA 146-149, 223, 240.

Williams's testimony was corroborated by significant evidence, including: the testimony of Janet Del Signore, who was the Dean of Academic Affairs at Keiser University in Tallahassee, GA218-234; Keiser University's academic records regarding Williams, including detailed attendance records, *see id.*; William's Florida identification card; the testimony of Kent Strauss, who managed the apartment where Williams lived on Lee Avenue in Tallahassee between February 2003 and December 2006, GA237-245; Strauss Management rental records regarding Williams, *see id.*; the testimony of

Melissa Wright, who was the defendant's girlfriend in Connecticut in 2003 and 2004, GA248-259; the testimony of Samuel Carter, who was an acquaintance of the defendant in Hartford in 2003, GA424-432; and the testimony of Paul Hinman, who was a retired Postal Inspector who investigated the defendant's illegal activities, GA681-690. Indeed, Williams identified her marital status as "single" on her Keyser University paperwork and her rental paperwork for her apartment at Lee Avenue in Tallahassee in 2002. GA223, 240.

Further, while there are many inconsistencies in the defendant's representations regarding where he lived and when he lived at a particular address, there was substantial evidence establishing that the defendant moved to California by at least 2000 and then moved to Connecticut, where he was living in March 2004. This evidence included the following:

- Connecticut Department of Motor Vehicle records and vehicle registration records showing that the defendant was living in Beverly Hills, California from at least October 2000 through June 2003. GA676-678.
- The defendant's rental application for 429 Farmington Avenue, stating that he lived in Marina Del Rey, California from July 1998 through September 2001. GA817-819.
- Correspondence the defendant sent to immigration authorities in the Fall of 2001 indicating that he had moved to New Britain. GA101-102.

- Numerous documents the defendant submitted to immigration authorities showing that he was living at various addresses in New Britain in 2002 and 2003, and then at 429 Farmington Avenue in 2003. GA101-102.
- Melissa Wright's testimony that she was dating the defendant in 2003 and, on occasion, she would stay overnight at the defendant's apartment at 429 Farmington Avenue, and that there were no signs that any other woman was living there. GA249-251.
- Samuel Carter's testimony that he met the defendant in the Summer of 2003 in Hartford. GA424-432.

Moreover, Williams testified that the defendant and Williams falsely represented to the immigration officer at the March 2004 interview that they were living together at 429 Farmington Avenue in a bona fide marriage. Williams testified that she never lived in Connecticut, let alone at 429 Farmington Avenue, with the defendant. GA174, 217. Williams further testified that she was not aware of the paperwork, such as the bank statements, that were submitted to the immigration officer, which purported to show that Williams and the defendant were in a bona fide marriage. *See* GA211-212. Likewise, Williams testified that the paperwork that was submitted to the INS in connection with the immigration interview in Atlanta in 2001 – which paperwork was part of the defendant's immigration file, which the immigration officer relied on in determining whether the defendant and Williams were

living together in a bona fide marriage – was false. GA153-157.

In short, there is every reason to believe that even without the challenged remarks, the defendant would have been convicted of all three charges.

**3. The isolated statements identified by the defendant do not constitute reversible plain error.**

Because the defendant did not object to the prosecutors' statements, this Court reviews those statements for plain error. *Caracappa*, 614 F.3d at 41. The inquiry into plain error overlaps to some extent with the questions already considered. As discussed in detail above, even if there was error, there was no impact on the defendant's substantial rights because the trial was otherwise fair, and the defendant cannot show that the prosecutors' remarks affected the outcome, *see* Section B.2, *supra*. To the contrary, even without the challenged remarks, there is every reason to believe that the defendant would have been convicted of all three offenses.

**Conclusion**

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 7, 2011

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

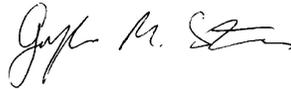
A handwritten signature in black ink, appearing to read "Geoffrey M. Stone". The signature is written in a cursive style with a large initial "G" and a long horizontal stroke at the end.

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**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,955 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in cursive script, appearing to read "Geoffrey M. Stone".

GEOFFREY M. STONE  
ASSISTANT U.S. ATTORNEY

## **ADDENDUM**

## **Rule 8. Joinder of Offenses or Defendants**

### **(a) Joinder of Offenses.**

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.

### **(b) Joinder of Defendants.**

The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

## **Rule 14. Relief from Prejudicial Joinder**

### **(a) Relief.**

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.

### **(b) Defendant's Statements.**

Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.