NO. 18-5391
SUPREME COURT OF THE UNITED STATES

DANIEL SEXTON	)
	)
Petitioner	)
	)
- VS. -	)
	)
UNITED STATES OF AMERICA	)
	)
Respondent.	)

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

REPLY BRIEF OF DANIEL SEXTON IN SUPPORT OF GRANTING THE PETITION

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QUESTION PRESENTED FOR REVIEW

Question I. Does the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017), limiting joint and several forfeiture liability to what a defendant obtained, also apply to this forfeiture order under 18 U.S.C. § 981(a)(1)(C), which held Sexton liable for nearly the entire $2.5 million loss although, as most, he obtained $624,000.

There is a Circuit Split on this Issue as the 3rd and 11th Circuits Held *Honeycutt* applies but the 6th Circuit said it does not; the Respondent agrees that *Honeycutt* applies

Question II – Can costs not permitted by statute and not incurred as part of a victim bank's participation in a government investigation be ordered as restitution, contrary to this Court's holding in *Lagos v. United States,* --- U.S. ---, 138 S. Ct. 1684 (2018)?

This circuit ruling conflicts with recent Supreme Court precedent.

Question III Was the use of a dismissed California charge as a prior conviction and to place Sexton under a criminal justice sentence as to increase his algorithmic Criminal History from a I to a III, and thus increase his algorithmic, rule-based Sentencing Range, a violation of the sentencing guidelines, our principles of individualized justice, and Due Process of Law?

This circuit ruling on increasing criminal history based on a dismissed offense violates Due Process of law under the Fifth Amendment

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REPLY IN SUPPORT OF
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Question I. The Respondent, United States of America, agrees with Petitioner Sexton And the Third Circuit and 11th Circuit Courts of Appeal that the reasoning of *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) applies to this forfeiture order under 18 U.S.C. § 981(a)(1)(C) and the Sixth Circuit Court of Appeals is in error.

But the Respondent is incorrect in arguing that this circuit split should not be resolved as it makes no difference, even lealving defendants in the Sixth Circuit at the mercy of illegal forfeiture penalties it admits would be erroneous, and possibly expand this error to other circuits. And Sexton would continue under an illegal sentence of liability for nearly the entire $2.5 million loss, four times the $624,000 he received.

1 (a) The Respondent, United States of America, agrees that *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) applies to Petitioner Sexton's forfeiture order under 18 U.S.C. § 981(a)(1)(C), and that the Third Circuit and 11th Circuit Courts of Appeal[1] are correct while the Sixth Circuit Court of Appeal's ruling on this is erroneous. (Respondent's brief, page 9, 10-11, 13)

On this ground alone the Petition for Certiorari should be granted, as this represents a strong conflict that will prejudice every criminal defendant involved in alleged monetary benefits wrongfully obtained in the Sixth Circuit[2], perpetuating unfair inconsistency in the administration of justice[3, 4.] Supreme Court Rule 10(a) And the suggestion of the United States that the Sixth

1 See *United States v. Gjeli*, 867 F.3d 418, 427 n.16 (3d Cir. 2017), as amended (Aug. 23, 2017); *United States v. Carlyle*, 712 F. App'x 862, 864 (11th Cir. 2017).
2 See "The Circuit Splits Are Out There – and the Court Should Resolve Them,"Federalist Society Review, volume 16, issue 2, August 13, 2015
3 See Kiran H. Griffith, *Fugitives in Immigration: A Call for Legislative Guidelines on Disentitlement*, 36 Seattle U.L. Rev. 209, 243 n. 12 (2012) (suggesting it is "intolerable" in immigration law for one result to be reached "in one circuit and the opposite result in another").
4 Trevor W. Morrison, *Fair Warning & the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. Cal. L. Rev. 455 (2001) (discussing problems of circuit splits in federal criminal law).

Circuit may revisit this rule conflicts with precedential publication of decisions that bind all later panels. See 6 Cir. R. 32.1; 6 Cir. I.O.P 32.1. Uniformity of the law is essential to the rule of law, and certiorari is key to that[5]. A perpetuated split also has the potential to expand this erroneous ruling into other circuits.

1 (b) But further, the Respondent indicates this is irrelevant as Petitioner Sexton received all of the proceeds in this case; but this is contrary to the evidence that Sexton received only $3000 a week. (R 262, Transcript of Sentencing, Hayworth, PageID 1105) Even over four years th total Petitioner Sexton received only about $624,000, far less than the $2.5 million in total loss. This fraud scheme was developed and carried out by his accountant, who presumably received the bulk of the funds.

And an illegal sentence is always reviewable on appeal as the trial court has exceeded its jurisdiction. Final sentencing as to term within statutory limits is reviewed de *novo* as it is a question of law . See *United States v. Garcia*, 112 F.3d 395, 397 (9th Cir.1997). A sentence imposed in excess of the statutory maximum is plain error. *United States v. Guzman-Bruno*, 27 F.3d 420, 422-23 (9th Cir.) cert. denied, 115 S. Ct. 451 (1994). See also *United States v. Davis*, 656 F.2d 153 (5th Cir. 1981), remanding "Because we find that the trial judge erred in imposing a sentence in excess of that allowed by statute, we vacate Davis's sentencing under Count I of the indictment and remand for resentencing.." A sentence in excess of the statutory maximum can be deemed a "miscarriage of justice." See *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001)

5 See, e.g., Hartnett, Edward, "Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill," 100 Colum. L. Rev. 7, pp 1643-1738 (Nov. 2000) (both questioning and lauding the importance of certiorari0

"When this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc*., 511 U.S. 298, 313, n. 12 (1994)

Here Sexton pled to an illegal sentence, one that implicates the intelligent and voluntary nature of that plea. The illegal forfeiture order is reviewable, and this Court is respectfully asked to grant Mr. Sexton's Petition for a Writ of Certiorari.

Question II – Costs not permitted by statute nor incurred as part of a victim bank's participation in a government investigation may not be ordered as restitution, as affirmed by this Court's holding in *Lagos v. United States,* --- U.S. ---, 138 S. Ct. 1684 (2018)

2. As noted above, an illegal sentence is in excess of the trial court's jurisdiction and is always reviewable on appeal. Sexton, as detailed in his Petition disputed a portion of the documented loss calculation including $50,000 in losses for accrued interest, late fees, legal fees, property taxes, force place insurance, and appraisal fees not permitted by the restitution statute 18 USC § 3663 . This Court held in *Lagos v. United States*, --- U.S. ---, 138 S. Ct. 1684 (2018) that restitution award under § 3663A(B)(4) is "limited to government investigations and criminal proceedings" and cannot include "expenses incurred before the victim's participation in a government's investigation began." Id. at 1688, 1690. Yet the Court of Appeals, over a dissent pointing this out, found Sexton did not dispute the district court's restitution order at sentencing and affirmed. *United States v. Sexton*, 894 F.3d. 787 (6th Cir. 2018)

Yet it is still an illegal sentence. And "The general rule… is that an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of City of Durham,* 393 U.S. 268, 281 (1969). A related concept is that a district court's initially correct determination can become wrong because of a change in law, and this scenario mandates that an

appellate court conclude that the district court plainly erred. *Henderson v. United States*, 568 U.S. 266, 279 (2013); see also *Johnson v. United States*, 520 U.S. 461, 468 (1997)." Judge Moore, dissenting and noting error that required vacation and remand.

Whether the total illegal fees of $50,000 presented or the $12,554.14 in legal fees, ordering restitution was a sentence beyond that legally permitted, as noted by the dissent.

The Petition should be granted and the sentence and order of restitution vacated.

Question III Was the use of a dismissed California charge as a prior conviction and to place Sexton under a criminal justice sentence as to increase his algorithmic Criminal History,and thus increase his algorithmic, rule-based Sentencing Range, a violation of the sentencing guidelines, our principles of individualized justice, and Due Process of Law?

A 2005 nolo contendere plea by Mr. Sexton in California was dismissed in 2008; under California Penal Code §1203.097 , no sentence was imposed in this case. Yet it was counted as to increase Sexton's Criminal History, increasing his Guidelines sentencing range

Due process under the Fifth Amendment requires proof of some type, which simply isn't here. This is a proof issue the burden of which falls on the government, and in this case there was no such proof; Sexton should not have been penalized without such proof as the mere assertion is simply insufficient.

The California matter was dismissed by the California trial court, whose judge was best in a position to determine what it embraced, the California federal appeals court followed that ruling. Here, there is but the dismissal, and our federal courts may respect the judgment of our state courts. This is the foundation of federalism. Second-guessing and speculating about what might have happened is procedurally unreasonable, and substantively unreasonable for unwarranted weight to these factor in violation of Due Process of law under the Fifth Amendment, which requires facts and reason applied to those facts.

It is respectfully requested that this Petition be granted and Sexton's sentence must be vacated and this matter remanded for resentencing without consideration of his California case in setting his Criminal History.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Sexton given the relief he has argued for herein.

Respectfully submitted,

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Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 2175 words and is in compliance with the length rules of Supreme Court Rule 33.

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Certificate of Service

A copy of the foregoing Reply Brief in Support of Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Noel Francisco, Bdrian Benczkowski and Sonja Ralston, Office of the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

This 2nd day of October, 2018

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