No. _____

In the
Supreme Court of the United States

ALPHONSO WATERS, JR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether petitioner's due process rights were violated by his wire fraud convictions for conduct that did not fall within the ambit of the wire fraud statute as the government acknowledged lacking sufficient evidence to prove petitioner intended to harm the target of his alleged deception, an essential element of the criminal statute.

2.

Whether the denial of petitioner's requested jury charge that wire fraud requires an intent to harm violated petitioner's due process rights by not requiring the government to prove an essential element of the criminal statute.

STATEMENT OF RELATED PROCEEDINGS

- United States v. Alphonso Waters, Jr.; Eleventh Circuit Court of Appeals - No. 18-11333-W (September 10, 2019);
- USA v. Alphonso Waters; United States District Court Northern District of Georgia Atlanta Division, Criminal Case # 1:16-cr-00407-TCB (March 26, 2018).

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INTRODUCTION

This case arises from petitioner's alleged deceptive acts in connection with the efforts of a LLC owned by he and his wife to obtain a $6 million loan to complete the buildout of the LLC's new medical office building. The building's appraised value, while under construction, was $8.4 million. The government charged petitioner with violating the wire fraud statute, (18 U.S.C. § 1343), which requires an intent to harm.

This case involves a sharp and marked departure from the law governing wire fraud. Petitioner's convictions constituted an extreme expansion of wire fraud far beyond its historical and permissible boundary.

The government's theory of the case undeniably was that deception alone constitutes fraud. Contrary to the government's deception only theory, wire fraud requires an intent to harm.

The government's sentencing memorandum, however, acknowledged that the desired loan was over collateralized by $2.4 million. Thus, the government acknowledged being unable to prove petitioner intended to harm the potential lender, whose loss, actual or intended, was zero.

The government failed to prove that the alleged deceptive conduct was intended to harm the target of the deception. The government, in fact, did not attempt to do so.

The government's failure to prove that petitioner acted with an intent to harm requires the reversal of petitioner's convictions. Petitioner's due process rights were violated by his wire fraud convictions for conduct that did not constitute wire fraud.

This Court has restricted the government's efforts to expand wire fraud beyond its statutory boundary. But the Eleventh Circuit's decision impermissibly does so by allowing the government to prosecute, under the wire fraud statute, without proving an essential element - an intent to harm.

Without the intent to harm requirement, the wire fraud statute would be expanded into a morality and ethics code. But that was not Congress' purpose when enacting the statute. Therefore, the requested writ should be issued to reaffirm this Court's rulings prohibiting the wrongful expansion of the wire fraud statute.

In addition, this Court has few opportunities to review a clear legal dispute about a jury charge's constitutionality. And those opportunities typically come several years after the wrongful convictions, resulting from an unconstitutional jury charge, have shattered lives and ruined reputations.

A defendant is entitled to a properly instructed jury charge so that the jury considers all of the essential elements of the charged crimes. "[V]ital . . . in our criminal procedure" is "the requirement of proof beyond a reasonable doubt" of each element of the charged crime. In re Winship, 397 U.S. 358, 363 (1970).

But the trial court, after rejecting petitioner's requested jury charge that wire fraud requires an intent to harm, gave two alternative fraud definitions. The first alternative defined "scheme to defraud" as not requiring intent to harm.

The first alternative unconstitutionally removed the government's burden to prove beyond a reasonable doubt an essential element of the charged crimes. A reasonable jury, from the charge, could have concluded that wire fraud does not require an intent to harm. The flawed jury charge, thereby, deprived petitioner of his Fifth Amendment due process rights by not requiring the government to prove each element of wire fraud.

The due process requirement for proper jury charges presents an important constitutional question. A jury charge cannot take an essential element of a charged crime from the jury for its decision. See Sandstrom v. Montana, 442 U.S. 510 (1979), (jury charge presuming intent based on ordinary and necessary consequences of defendant's acts invaded the jury's fact finding function and was contrary to the overriding presumption of innocence afforded to the accused); United States v. United States Gypsum, 438 U.S. 422 (1978), (in a pricing fix conspiracy case, a jury charge presuming the requisite intent to fix prices if defendant's conduct actually had the effect of fixing prices invaded the jury's fact finding function by impermissibly removing the issue from the jury's consideration); Morissette v. United States, 342 U.S. 246 (1952), (a jury charge presuming intent to steal where defendant took property without permission knowing it to belong to another, despite defendant's

defense that he thought property was abandoned, unconstitutionally withdrew a material issue of fact from the jury and conflicted with overriding presumption of innocence afforded to the accused.)

The jury charge here, although in a different manner, had an equivalent unconstitutional effect. The jury charge, like the jury charges above, withdrew an essential element of the charged crimes from the jury and did not require the government to prove that element. In the above cited cases the wrongful withdrawal of an issue from the jury was by unconstitutional presumptions here by not requiring the jury's determination of an essential element. Therefore, this is another reason that the requested writ should be issued and petitioner's convictions reversed.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 937 F.3d 1344 (11th Cir. 2019). That opinion affirmed Petitioner's conviction in the trial court United States v. Alphonso Waters, Jr., United States District Court, Northern District of Georgia, Atlanta Division, Criminal Case # 1:16 cr 00407-TCB. No opinion of the District Court is reported.

JURISDICTION

The Court of Appeals' judgment was entered September 10, 2019. Petitioner, October 10, 2019, filed a timely petition for rehearing, which was denied November 19, 2019. The petition for a Writ of Certiorari was filed February 14, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. 3, Sec. 2, in pertinent part, provides: "The Trail of all Crimes, expect in Cases of Impeachment, shall be by Jury...."

The Fifth Amendment to the U.S. Const., provides: "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

The Sixth Amendment to the U.S. Const., in pertinent part, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . and to have Assistance of Counsel for his defense."

The following statutory provisions involved are in the appendix: 18 U.S.C. § 1341, 18 U.S.C. § 1343, 18 U.S.C. § 1344. App. 95-97.

STATEMENT OF THE CASE

A limited liability company ("LLC"), owned by petitioner and his wife, sought a $6 million loan, from an investment firm, to buildout a new medical office building. The construction was between two-thirds and three-fourths completed. The medical office building, at that time, had an appraised value of $8.4 million. (App. 80-81.)

In addition to the $2.4 million over collateralization, the LLC's projected rental cash flow would have been sufficient to repay the requested loan. Id. 82-83. The chief executive of a real estate services and investment banking company, who did "all the market research

[and] . . . market analysis" for the requested loan (App. 81), concluded that the medical office building's projected rent would have been sufficient to cover the loan's debt service.

> We found that the office rents that Al projected were accurate. We found out that the demographics and the market supported an medical office building in this location. . . . [T]he location was a good location, and that the only thing lacking was capital really to get this project moving and successful.

Id. 82

Moreover, pursuant to the loan's terms sheet, the lender, under a "lockbox" arrangement, would have controlled the LLC's rental income. The tenants would have paid their rent into an account the lender controlled. (App. 98) The rental income would have been distributed in the following order: tax escrow, insurance escrow and the LLC's debt service to the lender before any money would be distributed to the LLC. (App. 78-80.) Thus, the potential lender was virtually assured of not losing money on the desired loan.

But during the loan's due diligence process, the lender found two federal tax liens against petitioner and his wife. (App. 71-74.) The tax liens were not against the LLC.

The lender was upset about the non-disclosure of the tax liens. Therefore, the lender was unwilling to proceed with the loan until the tax liens were resolved

either by payment or a payment plan acceptable to the IRS. (App. 75.)

Petitioner, while attempting to resolve the tax liens, sent a letter, purportedly from the IRS, to his lawyer to send to the lender. (App. 76.) The purported IRS letter stated that the IRS had accepted petitioner's proposed payment plan for resolving the tax liens.

The lender, suspicious of the purported IRS letter's authenticity, contacted the IRS, who found the letter bogus. (App. 77.) During the questioning of the letter's authenticity, petitioner sent a followup letter to the lender stating that the purported IRS letter was legitimate. (App. 83-86.)

Petitioner was charged, under 18 U.S.C. § 1343, with two counts of wire fraud. (App. 57.) Petitioner denied writing the alleged IRS letter but acknowledged writing the followup letter. Petitioner pleaded not guilty and proceeded to trial.

There was no evidence, at trial, that petitioner had acted with intent to harm the potential lender. The government's sentencing memorandum acknowledged that "the loss amount, actual or intended, [of petitioner's alleged deception] [was] zero." (App. 45.) And the government, also, acknowledged, because of the loan's $2.4 million over collateralization, lacking sufficient evidence to prove petitioner had an intent to harm the lender. Id.

The government focused solely on petitioner's alleged deception, involving the bogus IRS letter and his financial statement that failed to disclose the tax liens. The government neither alleged nor attempted

to prove petitioner had any intent to harm the lender. (App. 57.)

Therefore, petitioner requested a jury charge that, under the wire fraud statute, deception, without intent to harm, does not constitute a "scheme to defraud". (App. 90-92.) Petitioner's Request to Charge Nine lifted language from United States v. Takhalov, 827 F.3d 1307 (11th Cir. 2016), which restated the principle that deception without an intent to harm does not constitute fraud.

Petitioner's requested jury charge stated:

> [T]here is a difference between deceiving and defrauding; to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all. . .. [O]ne who defrauds always deceives, but one can deceive without defrauding. A Defendant 'schemes to defraud' only if he schemes to deprive someone of something of value by trick, deceit, chicane or overreaching. But if a Defendant does not intend to harm the victim . . . then he has not intended to defraud the victim. Furthermore, . . . a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. For if there is no

> intent to harm, there can only be a scheme to deceive, but not one to defraud.

(App. 55-56.) (Internal quotation marks omitted.) (Emphasis supplied.)

The government objected to petitioner's requested charge without additional language being added that stated: "The 'scheme to defraud,' as that phrase is used in the wire fraud statute, reference only to those schemes in which a defendant lies about the nature of the bargain itself." (App. 90.) Petitioner did not consent to the government's proposed added language.

The trial court sustained the government's objection:

> I think that is overly confusing, and the subject is adequately covered by the charge as given now.

(App. 92.) (Emphasis supplied.)

The trial court charged the jury that intent to defraud could be shown alternatively by either deception for personal gain or deception with intent to harm:

> The intent to defraud is the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

(App. 93.) (Emphasis supplied.)

The either/or disjunctive jury charge's first prong focused solely on deception without any requirement for intent to harm. And the government, throughout the case, proceeded under the theory that deception by itself was sufficient to establish fraud.

For instance, the government's closing argument, in describing intent to defraud, did not mention intent to harm and focused solely on deception.

> Let's go to the third element [of wire fraud]. We have to prove that the defendant acted with the intent to defraud. We know this was all intentional. We know that he was aware of his tax liens, but he knowingly failed to disclose them. We know that when the tax liens were found by Colony, he then created a fake letter intentionally to deceive Colony that he was creditworthy of receiving a $6 million loan. When questioned about whether the letter was legit, he sent Chesterfield and the congressman's office fraudulent emails to deceive, to make it appear that the letter was legit. Ladies and gentleman, element three is satisfied.

(App. 92-93.) (Emphasis supplied.)

The jury found petitioner guilty on both wire fraud counts. (App. 33.) The United States Court of Appeals for the Eleventh Circuit affirmed petitioner's convictions finding that petitioner's deception went to the benefit of the parties' bargain and therefore was harmful to the lender. (App. 1.)

The Eleventh Circuit, in affirming the denial of petitioner's requested jury charge, focused on his

refusal of the government proposed "nature of the bargain" language that "would have defined for [the jury] what 'harm' means." (App. 88-89.) The Eleventh Circuit held that, because petitioner failed to define the term "harm," petitioner's requested charge was properly denied. (App. 1.)

REASONS TO GRANT THE WRIT

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY HIS WIRE FRAUD CONVICTIONS AS THE GOVERNMENT HAS ACKNOWLEDGED LACKING SUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL STATUTORY ELEMENT THAT PETITIONER INTENDED TO HARM THE TARGET OF HIS ALLEGED DECEPTION

The Wire Fraud Statute Replicates The Mail Fraud Statute Except For Method Of Perpetuating The Prohibited Fraud

The wire fraud statute, enacted during 1952, was modeled after the mail fraud statute (18 U.S.C. § 1341) originally enacted during 1872. The wire fraud statute has little legislative history. See United States v. Giovengo, 637 F.2d 941, 943 (3d Cir. 1981), cert. denied, 450 U.S. 1032 (1981) (scant legislative history of §1343); United States v. Louderman, 576 F.2d 1383, 1387 n.3 (9th Cir. 1978) (sparse legislative history of §1343), cert. denied, 439 U.S. 896 (1978).

The two fraud statutes, which in relevant parts are identical, make it illegal to use the mail or interstate wire "for the purpose of furthering" any "scheme or artifice to defraud." The crimes prohibited by these two

statutes have two elements: a scheme to defraud (which contemplates an intent to harm the target of the deception) and a mailing or wiring. The only real difference, in the statutes, is the means used to perpetuate the prohibited fraud: mail in one and interstate wire in the other.

The mail and wire fraud statutes, because of similar language, are in parimeteria and given parallel interpretations as cases construing one statute can be used to interpret the other. See Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); United States v. Von Barta, 635 F.2d 999 at 1005 n.11 (2d Cir. 1980) ("scheme to defraud" uniformly given same construction in mail and wire fraud cases); and United States v. Morelli, 169 F.3d 798, 806 n. 9 (3d Cir. 1999) ("[T]he wire fraud and mail fraud statutes differ only in form, not in substance, and cases... interpreting one govern the other as well.")

Congress, In Enacting The Two Fraud Statutes, Adopted The Common Law Definition Of Fraud

"The starting point in every case involving construction of a statute is the [statute's] language itself." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976). (Citation omitted.) The wire fraud statute does not define the term "scheme or artifice to fraud."

Although the wire fraud statute's legislative history is not illuminating, Congress modeled the statute after the mail fraud statute. Congress' use of the term

"scheme or artifice to defraud" in the mail fraud statute, which Congress adopted in the wire fraud statute, is extremely significant and clearly a deliberate choice of words. The term "fraud" had a well known common law meaning and Congress was aware of that meaning.

Congress, when enacting the mail fraud statute, adopted the common law definition of "fraud." When Congress uses a common law term, absent evidence to the contrary, it is assumed Congress intended the term to have its common law meaning. See United States v. Turley, 352 U.S. 407 (1957); United States v. Carll, 105 U.S. 611 (1882).

There is a complete absence of evidence that Congress, when adopting the two fraud statutes, was not incorporating the common law definition of "fraud." Not one word in the mail fraud statute, replicated in the wire fraud statute, suggests Congress intended the term "scheme to defraud" to be different from its common law definition.

Therefore, the common law "fraud" definition applies to the fraud statutes' "scheme or artifice to defraud" language. Thus, the common law fraud definition is where the analysis begins.

The Wire Fraud Statute Requires An Intent To Harm

The common law meaning of "fraud" required deception coupled with injury. This Court, in another context, has stated unambiguously that the common law term fraud required harm to the victim.

> Injury is an essential element of remediable fraud. 'Deceit and injury must concur.'

Montana-Dakota Utilities v. Northwestern Public Service Co., 341 U.S. 246, 254 (1951)(Citations omitted.) (Emphasis supplied.)

Indeed, courts of equity, during the nineteenth century, recognized fraud as "all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another. . . ." Moore v. Crawford, 130 U.S. 122, 128 (1889). (Emphasis supplied.)

The treatises, also, interpreted "fraud" as requiring harm to the victim. See M. Bigelow, Law of Torts 101 (8th ed. 1907) (damage "must already have been suffered before the bringing of the suit.") and T. Cooley, Law of Torts,348, p551 (4th ed. 1932) (plaintiff must establish that he "suffered damages" and that the "damages followed proximately after the deception.")

Decisions and treatises, during the time period Congress enacted the mail fraud statute, referred to the common law action for misrepresentation not as "fraud" but as "deceit." See e.g. J. Bishop Commentaries on the Non-Contract Law 132-144 (1889). T. Cooley, A Treatise on the Law of Torts 555-556 (1878) E Jaggard, Hand-Book of the Law of Torts 558-602 (1895). F. Pollock, A Treatise on the Law of Torts 348-388 (1894).

By using the scheme to defraud language, Congress intended to forbid "pecuniary or property injury inflicted by a scheme to use the mails for the purpose." Hammerschmidt v. United States, 265 U.S. 182, 189

(1924). The "intent to defraud in such a statute was satisfied by the wrongful purpose of injuring one in his property rights." Id. 188.

Thus, the mail and wire fraud statutes, in addition to deception, require an intent to harm the deception's target. Intent to harm is the two fraud statutes' critical limiting element.

Otherwise, those statutes would be amorphous, infinitely malleable and virtually unlimited with regard to the scope of deceptive acts to which they could be applied. Almost any deceptive conduct, by or in connection with mail or interstate wire, in any context would fall within the ambit of the statutes. Thus, the decision below gives the government unbridled discretion to apply the fraud statutes to all deceptive conduct, done by mail or wire, without any intent to harm.

Such a broad open-ended and standardless interpretation of the fraud statutes would make them unconstitutionally vague and, for all practical purposes, would give the government a blank check to expand the scope of the fraud statutes without limit. Thus, the fraud statutes could be applied arbitrarily and capriciously to acts that reasonably could have been perceived as lawful.

The Constitution, however, requires "fair notice of what sort of conduct may give rise to punishment." McNally v. United States, 483 U.S. 350, 375 (1987). See United States v. Lanier, 520 U.S. 259, 266 (1997) (statutes cannot be construed to cover conduct that people of "common intelligence must necessarily guess

at its meaning," any ambiguity must be construed to apply "only to conduct clearly covered" and "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."

And such a boundless scope of the fraud statutes would trigger the rule of lenity, which "serves as an aid for resolving [a statute's] ambiguity." Callanan v. United States, 364 U.S. 587, 596 (1961). "[T]he rule of lenity . . . holds that the harsher of two possible readings of a criminal statute will be enforced only when Congress has spoken clearly." United States v. Boots, 80 F.3d 580, 588 (1st Cir. 1995). (Citations omitted.)

Moreover, Congress did not intend for the two fraud statutes to be all encompassing morality and ethic codes. The fraud statutes were not designed to address all deceptive, dishonest, ethically questionable, immoral, unappealing or brazenly bad conduct.

This Court has recognized that Congress, in enacting the mail fraud statute, did not outlaw every "bad" act "if use of the mails was part of it . . . ." Hammerschmidt, 188. Furthermore, there is no "common-law crime of unethical conduct" and the fraud statutes should not be applied to establish one. Sorich v. United States, 555 U.S. 1204, 1207 (2009) (Scalia J. dissenting.)

Therefore, this Court repeatedly has rejected efforts to expand the mail fraud statute's scope. See Fasulo v. United States, 272 U.S. 620 (1926); Parr v. United

States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974). For example, this Court has found unacceptable a lower court interpreting the mail fraud statute expansively to cover blackmailing. This Court stated, "the decision. . . should be confined to pecuniary or property injury inflicted by a scheme to use the mails for the purpose." Hammerschmidt at 188-89.

Several court of appeals have applied similar reasoning in holding that the two fraud statutes require an intent to harm. The Eleventh Circuit's decision cannot be reconciled with the prior judicial decisions interpreting the wire fraud statute.

There has been no shortage of decisions regarding this issue. The following cases are illustrative and not meant to be exhaustive.

For instance, in United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), the United States Court of Appeals for the Second Circuit, in construing the statutes' "scheme to defraud" language stressed that although the government does not have to prove harm occurred, it must prove harm was contemplated.

The issue is not whether the deception's target was injured. Rather, a "scheme to defraud'[s]" critical element is "fraudulent intent." Id. 1180. (quoting Durland v. United States, 161 U.S. 306 (1896). "[B]ecause the critical element in a 'scheme to defraud' is 'fraudulent intent,' ... the accused need not have succeeded in his scheme to be guilty of the crime. But the purpose of the scheme 'must be to injure. . . .'" Id. 1180-81. (Emphasis supplied.)

The Second Circuit, in United States v. Starr, 816 F.2d 94 (2d Cir. 1987), restated that wire fraud requires an intent to harm and not merely deception. In Starr, the Second Circuit reversed mail and wire fraud convictions in a situation involving deceptive mail rates. The Second Circuit unequivocally held that, deceptive conduct, without an intent to harm, does not constitute wire fraud.

The defendants, in Starr, charged their clients amounts equal to the regular postage rate to deliver their packages. But without the clients' knowledge, the defendants, in connection with delivering their client's mail in bulk, received a reduced rate and kept the difference.

Although Starr presented abundant use of the mails and abundant deception, the government failed to establish that the defendants intended to harm their clients. The defendants' profits, from their deception, were irrelevant for the wire and mail fraud analysis, and did not convert their deception into a "scheme to defraud."

The Second Circuit held:

> Only a showing of intended harm will satisfy the element of fraudulent intent. XXX
>
> Misrepresentations amounting only to a deceit are insufficient to maintain a ... wire fraud prosecution. Instead, the deceit must be coupled with contemplated harm to the victim.

Id. 98. (Emphasis supplied.)

Likewise, in United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994), the Second Circuit reversed the mail fraud conviction of a lobbyist, who concealed that he was lobbying a relative. The Second Circuit stated that a scheme to defraud required deceit "coupled with a contemplated harm to the victim." Id. 1257 (Citation omitted.) The Second Circuit, in reversing the conviction, held that the defendant could not have intended to harm the corporation or its shareholders, if the defendant had followed the instructions of an unconflicted corporate agent acting in good faith.

Similarly, the United States Court of Appeals for the Sixth Circuit has held that wire fraud does not punish mere deceit that induces another person to enter into a transaction - there must be more and the more is an intent to harm. "To be guilty of fraud, an offender's 'purpose must be to injure'. . . a common-law root of the federal fraud statutes." United States v. Sadler, 750 F.3d 585, 590 (6th Cir. 2014).(Citations omitted.) (Emphasis supplied.)

The United States Court of Appeals for the Eighth Circuit, also, has held that the mail fraud statute is inapplicable without an intent to harm the victim. United States v. McNeive, 536 F.2d 1245, 1250-1251 (8th Cir. 1976).

And in United States v. Takhalov, 827 F.3d 1307 (11th Cir. 2016), as revised (Oct. 3), modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016), the Eleventh Circuit held that a "scheme to defraud" under the mail and wire fraud statutes requires an intent to harm. In Takhalov, wealthy men tourists, in Miami, were lured into bars to spend exorbitant sums of money for drinks

and caviar to entertain attractive women who presented themselves as friendly fellow tourists. But the women, in fact, were bar employees.

The government's proof focused solely on the women tricking the men into entering the bars. The government argued that, regardless of what occurred after the men entered into the bars,[1] the defendants acted fraudulently based solely on the women's misrepresentations about themselves that lured the men into the bars. If they had known the women were bar employees paid to recruit them into the bars, rather than friendly tourists, the men probably would not have gone into the bars.[2] Therefore, the government contended that the deceived mens' purchases in the bars were made under false pretenses and that constituted fraud.[3]

The Eleventh Circuit, however, found that the men were merely deceived not defrauded.[4] Although the women failed to disclose their relationship with the bars, the men, after going into the bars, ordered bottles of alcohol, and drank them in the pleasant company of their new female friends, and were charged prices that they agreed to pay.[5]

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[1] Id. 1311.

[2] Id.

[3] Id.

[4] Id.

[5] Id.

The men were not "victims."[6] Rather, the tricked men simply "got what they paid for - nothing more, nothing less."[7] Therefore, the Eleventh Circuit reversed their convictions holding that, under the mail and wire fraud statutes, deception, by itself, does not constitute fraud.

Yet another example is United States v. Lemire, 720 F.2d 1327 (D.C. Cir. 1983) cert. denied, 467 U.S. 1226 (1984), where the United States Court of Appeals for the D.C. Circuit, also, ruled that wire fraud requires a subjective contemplation of harm. The D.C. Circuit held:

> . . . [A]n intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute. There must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk the employer.

Id. 1337. (Emphasis supplied.)

Petitioner's Due Process Rights Were Violated By His Convictions For Conduct That Did Not Fall Within The Ambit Of The Wire Fraud Statute

The government did not allege or attempt to prove that petitioner intended to harm the potential lender.

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[6] Id.

[7] Id.

(App. 57.) In Takhalov, 827 F.3d 1307, the Eleventh Circuit, however, categorically held, consistent with well-established law, that wire fraud requires an intent to harm.

But the government, here, tried the case as if oblivious to Takhalov and the well-established law that it reflected. The government, at the charge conference, argued that Takhalov was inapplicable. (App. 89-91.)

The government, in objecting to petitioner's request to charge, cited only to Shaw v. United States, ___ U.S. ___, 137 S. Ct. 462 (2016), where this Court held that the bank fraud statute 18 U.S.C. 1344 does not require an intent to harm.

But Shaw did not involve either the mail or wire fraud statutes. Therefore, Shaw is inapplicable.

The government here had to prove each element of the charged crimes one of which was intent to harm the target of the deception. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

But the government failed to prove that petitioner acted with an intent to harm. The government, in fact, did not attempt to do so.

Not a single witness provided evidence that petitioner acted with an intent to harm. The government, in fact, never asked any witness if petitioner acted with an intent to harm.

The only testimony about petitioner's conduct being harmful to the potential lender was based on a undeniable misstatement of Georgia law. The erroneous testimony was that the tax liens harmed the LLC, because they made the IRS a super creditor of the LLC, which would have jeopardized the requested loan's repayment. (App. 68-69.)

But that testimony was 180 degrees contrary to Georgia law. And testimony undeniably contrary to the law cannot support a conviction.

The lower courts mistakenly viewed the tax liens as being against both petitioner and the LLC, treating petitioner and the LLC as legally one and the same. But under Georgia law, a limited liability company is an entity separate and distinct from its members, with each having separate and distinct rights and liabilities. Old Nat. Villages, LLC v. Lenox Pines, LLC, 659 S.E. 2d 891 (Ga. App. 2008). See United States v. Rogan, 639 F.3d 1106 (7th Cir. 2011), (the United States Court of Appeals for the Seventh Circuit, applying Georgia's limited liability law, held that the IRS could execute its tax lien only against the individual tax payer and not against the LLC that he had organized).

Thus, the IRS, if it had enforced the tax liens, only could have seized petitioner's interest in the LLC not the LLC's underlying assets such as the medical office building and the rental income it generated. Therefore, the tax liens would not have harmed the lender or placed the lender at risk in connection with a loan to the LLC.

Moreover, the Eleventh Circuit's conclusion that the removal of the tax liens constituted part of the bargain was not merely wrong but was profoundly wrong. The representation, about the tax liens being resolved, may have been made in an unsuccessful effort to induce the potential lender to make the desired loan. But the deceptive conduct, by itself, did not make the misrepresentation part of the bargain.

Not a single witness testified that the removal of the tax liens was part of the parties' bargain. And the term sheet did not indicate that the tax liens removal was part of the parties' bargain. (App. 98.)

Petitioner's due process rights were violated by his convictions without evidence that he acted with an intent to harm, an essential element of wire fraud. The government's sentencing memorandum establishes that fact.

The government, in its sentencing memorandum, acknowledged that the government, because of the loan's substantial $2.4 million over collateralization, lacked sufficient evidence to prove petitioner acted with an intent to harm. The government, also, acknowledged that the target of petitioner's alleged deception did not suffer any harm.

The scheme, for which petitioner was found guilty, may have been appalling, deceitful and ill-advised, but it was not wire fraud. And the fact that the deception was particularly egregious, by the use of a bogus IRS letter, does not remove wire fraud's required element of intent to harm.

Accordingly, reviewed under the correct standard, petitioner's convictions should be reversed because no reasonable juror could have found beyond a reasonable doubt that petitioner acted with an intent to harm. Thus, petitioner was unconstitutionally convicted for conduct not constituting a crime.

THE DENIAL OF PETITIONER'S REQUESTED JURY CHARGE, THAT WIRE FRAUD REQUIRES AN INTENT TO HARM, VIOLATED PETITIONER'S DUE PROCESS RIGHTS BY NOT REQUIRING THE GOVERNMENT TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED CRIME

The Jury Charge Violated Petitioner's Due Process Rights Articulated In Winship By Allowing The Jury To Convict Him Without Finding An Essential Element Of The Charged Crime

The trial court's jury charge here had two alternative definitions of "intent to defraud." The jury charge, because given in the disjunctive, must be interpreted as providing two different ways of establishing intent to defraud.

The first alternative definition did not require an intent to harm. Rather, the first alternative definition focused solely on deception without an intent to harm.

The jury reasonably could have focused on the unconstitutional first alternative fraud definition, and interpreted the jury charge as not requiring the government to prove an essential element of the

charged crime: intent to harm. And that possibility violated petitioner's due process rights.

The jury issued a general verdict. Therefore, we do not know which alternative fraud definition the jury used.

This Court should not assume that the jury used the correct second alternative definition. This is particularly so because the government, throughout the trial, focused solely on deception unconnected to any intent to harm.

Therefore, the most reasonable assumption is that the jury, also, focused on the first alternative charge that fraud only requires deception. Because the government focused its case solely on deception, there is simply too high a likelihood that the jury, in convicting petitioner, relied upon the unconstitutional first alternative charge.

When a jury, returns a general verdict, after being given two alternative charges, on an issue, one of which was constitutional and the other one unconstitutional, any guilty verdict must be reversed. This Court in Sandstrom v. Montana, 442 U.S. 510 (1979), stated:

> It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See. e.q. Stromberg v. California, 283 U.S. 359 (1931); Leary v. United States, 395 U.S. 6 (1969).

Id. 526.

The Sandstrom holding was based on the fear that juries may have construed an ambiguous jury charge unconstitutionally despite the fact a constitutional interpretation, also, was possible. Because at trial, here, the government focused solely on deception without attempting to prove an intent to harm, the jury most likely focused on the first alternative' s unconstitutional fraud definition, Accordingly, the first alternative's unconstitutionality requires petitioner's convictions to be reversed.

A Properly Instructed Jury Is Constitutionally Mandated

The right to a properly functioning jury, which requires a properly instructed jury, is a cornerstone of our criminal justice system. The United States Constitution, in two separate provisions, guarantees the right to a jury trial on criminal charges. (Art. 3, Sec. 2 states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury....") (The Sixth Amendment, in pertinent part, states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.")

As Alexander Hamilton observed, there was complete unanimity, during the debates to ratify the Constitution, about the jury's vital role:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists, in thus. The former regard it as a

> valuable safeguard to liberty; the latter as the very palladium of free government.

The Federalist No. 83, at 614 (Alexander Hamilton) (C. John Hamilton, 1864.)

Therefore, the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." Blakely v. Washington, 542 U.S. 296, 305-06 (2004). The jury is "the great bulwark of our civil and political liberties," Apprendi v. New Jersey, 530 U.S. 466, 477 (2000), and is the mechanism that "prevent[s] oppression by the Government." Duncan v. Louisiana, 391 U.S. 145, 154 (1968). Thus, "[t]his Court has repeatedly sought to protect the historical role of the jury" in our criminal justice system. United States v. Haymond, 588 U.S. ___, 139 S. Ct. 2369, 2384 (2019).

To ensure that a defendant's Constitutional right in a criminal case to a jury trial is meaningful, the jury must find beyond a reasonable doubt that the defendant committed every element of the charged crime. Jackson v. Virginia, 443 U.S. 307, 319 (1979). This Court has stressed that a defendant is entitled to no less.

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 364. (Emphasis supplied.)

The government must prove each element of a charged crime, because of a conviction's serious consequences. The Constitution's due process provision requires something as momentous as a criminal conviction be done in a fundamentally fair way.

"The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and the certainty that he would be stigmatized by the conviction." Id. 363. Therefore, "[t]he function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions." Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 13 (1979).

This Court, in Ivan v. City of New York, 407 U.S. 203, 205 (1972) (per curiam), recognized that:

> [T]he major purpose of the constitutional standard of proof beyond a reasonable doubt announced in Winship was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function.

A correct jury charge is a primary mechanism to minimize erroneous jury decisions. Accordingly, a jury charge is not a mere formality. A jury, without a proper jury charge, cannot fairly and adequately ensure a defendant's right to a fair trial.

When the jury is not charged about an essential element of the charged crime, the trial dynamics are unfair. And all criminal defendants have the right to a

fair trial. Engle v. Isaac, 456 U.S. 107, 134 (1982); Ponzi v. Fessenden, 258 U.S. 254, 260 (1922).

Therefore, the trial court must ensure that the applicable law is stated accurately and correctly to the jury. Sparf v. United States, 156 U.S. 51 (1895). When an element of the charged crime is omitted from the jury charge, the omission deprives the jury of its fact finding duty and violates the defendant's due process rights. United States v. Gaudin, 515 U.S. 506 (1995); and Osborne v. Ohio, 495 U.S. 103 (1990).

In Connecticut v. Johnson, 460 U.S. 73, 85 (1983), this Court held that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence." (Citation omitted.) Here the jury undoubtedly relied upon the unconstitutional first alternative definition of fraud because there was no evidence to support the second alternative definition.

The Court, when reviewing a challenged jury charge, reviews the entire jury charge. Francis v. Franklin, 471 U.S. 307 (1985). The Court determines whether the charge as a whole was sufficient to ensure the jury understood the issues involved and was not misled. The analysis "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom, 514.

Here, the entire jury charge failed to inform the jury that deception, without an intent to "harm," does not constitute wire fraud. Accordingly, the denial of petitioner's request to charge violated his due process rights.

Needless to say, a defendant should not be shortchanged nor his jury trial truncated by an improper jury charge. And that is what unconstitutionally occurred here. Therefore, petitioner's convictions should be reversed.

The Eleventh Circuit Wrongfully Upheld The Denial Of Petitioner's Requested Jury Charge Because It Did Not Define "Harm"

The Eleventh Circuit wrongfully affirmed the jury charge, because petitioner's requested charge did not define the word "harm." The Eleventh Circuit, thereby, concluded that the requested charge failed to provide guidance about how to determine the difference between a scheme to deceive and a scheme to defraud. (App. 1.) "Without those tools the jury could hardly have been expected to apply our Takhalov decision correctly." Id.

The Eleventh Circuit's analysis is simply wrong. The term "harm" in petitioner's requested jury charge was a self-explanatory concept, to be given its plain and ordinary meaning. Thus, there was no need for petitioner's requested charge to define "harm."

The Eleventh Circuit's conclusion that the common and well-established word "harm" needed to be defined is baffling and untenable. Petitioner's requested charge made it crystal clear that wire fraud requires an intent

to harm and that deception, by itself, does not constitute a scheme to defraud.

Contrary to the Eleventh Circuit, the government's proposed additional "nature of the bargain" language ironically would have added needless complexity and confusion to petitioner's requested charge when none existed. To put this point a different way, the government's proposed "nature of the bargain" language would have made the charge more difficult, not easier, for the jury to understand.

The average juror, without the government's proposed added language or any definition of "harm," would have known what "harm" meant. The reason for petitioner not defining "harm," in his requested charge, is that there was no need to, and there was no better way of explaining the concept.

The jury did not need additional instruction to determine if petitioner intended to "harm" the potential lender. Whether petitioner intended to do so was a decision that a fair minded and reasonable jury could have made without additional judicial guidance.

The Eleventh Circuit, throughout its Takhalov opinion, which applied the well-established law that wire fraud requires an intent to "harm" the target of the deception, used "harm" in its plain and ordinary meaning.

The Eleventh Circuit stated that "there is a difference between deceiving and defrauding: to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all." Id. 1312. Thus, "if a defendant does not

intend to harm the victim . . . then he has not intended to defraud the victim." Id. 1313 (brackets and quotation marks omitted.) "From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." Id. "[T]his is so even if the transaction would not have occurred but for the trick. For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud." Id. (Emphasis supplied throughout this paragraph.)

Accordingly, there was no reason for petitioner's requested jury charge to define "harm." A reasonable juror would have understood the word "harm" and easily could have applied "harm" correctly without any need for a definition.

"Harm" is neither a new word nor a difficult word to define or a word whose meaning is changing. Likewise, "harm" is neither a legal term of art nor an archaic word.

Black's Law Dictionary defines "harm" as "[I]njury, loss, damage; material or tangible detriment," which is consistent with the common usage of "harm." Funk & Wagnalls New Comprehensive International Dictionary of the English Language defines "harm" nearly identically as "[t]hat which inflicts injury or loss."

Simply stated, the word "harm" is neither incomprehensible nor confusing to a modern juror. "Harm" has a self-evident meaning easily comprehendible to a lay juror.

Just as the jury easily could have understood the word "harm," without any definition, the jury just as easily could have applied the concept "harm" without judicial guidance. The jury did not need judicial guidance to apply the wire fraud statute's intent to "harm" requirement correctly.

If the Eleventh Circuit's decision governs, the implications would be astounding with dire consequences. The failure to define any common and well-established word (hardly any word is more common and well-established than the word "harm") would be grounds, at either the trial or appellate levels, for denying a requested jury charge.

The Eleventh Circuit's ruling would result often in requested jury charges being denied arbitrarily and capriciously. This is particularly so because the Eleventh Circuit gives no guidance when a common and well-established word needs to be defined.

Further, the Eleventh Circuit ignored the repeatedly stated presumption that juries understand and follow jury instructions. The presumption that juries faithfully follow jury charges is a core part of our legal doctrine. See, e.g., Francis, 105 S. Ct. at 1976 n.9 ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") See e.g. Richardson v. Marsh, 481 U.S. 200, 211 (1987). ("Juries are presumed to follow their instructions.") Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion) ("A crucial assumption underlying [the jury] system is that

juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed."); Id. 75 n.7 ("The 'rule'- indeed, the premise upon which the system of jury trials functions under the American judicial system- is that juries can be trusted to follow the trial court's instructions.") Jackson v. Denno, 378 U.S. 368, 382 n.10 (1964) and Opper v. United States, 348 U.S. 84, 95 (1954).

Petitioner's Due Process Rights And Right To Counsel Were Violated By Not Being Allowed To Adopt A New Defense At The Charge Conference

The Eleventh Circuit, in denying petitioner's requested charge, mistakenly focused on petitioner's two defenses made prior to the charge conference.

> Waters' proposed jury instruction on the difference between fraud and deceit did not propose either of his two defense theories. As a result, the rejection of his jury instruction did not impair his presentation of a defense theory.

(App. 1.) (Citation omitted.) (Emphasis supplied.)

Petitioner, however, at the charge conference, was entitled to adopt a new defense theory to present during closing argument. A defendant, any time during the trial, has a constitutional right to add a new defense provided the new defense theory has evidentiary support. Therefore, a new defense can be raised from the first trial day to the charge conference.

A rule that a defendant is not entitled to a jury charge on a defense theory, to be first presented to the jury during closing argument, would violate the defendant's due process rights by depriving the defendant of a fair trial. The defendant, until the end of the evidentiary portion of the trial, may not know what theory of defense that ultimately will be presented to the jury during closing argument. See, e.g., Brooks v. Tennessee, 406 U.S. 605 (1972).

A defendant and his counsel, regardless of how intelligent and well prepared, are not clairvoyant and do not know for certain how the trial evidence will develop.

As Justice Black has explained:

> Any lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about.

Williams v. Florida, 399 U.S. 78, 109 (1970).

Strategy often evolves during a trial. A defendant may not recognize a defense theory until closing argument, when the defendant first perceives an insufficiency or inconsistency in the government's evidence.

It would be a due process violation, to limit jury charges to the defendant's defense theory prior to the charge conference. The defense theory may evolve and change during the trial and by the end may be quite eclectic.

And that is what petitioner's requested charge represented, petitioner's new defense theory. Petitioner adopted his new defense theory prior to and for use during the closing argument.

The restriction here of the ability of petitioner's counsel to argue his new desired defense of no intent to harm, violated petitioner's Fifth Amendment due process rights. The denial of "basic protections" of due process "necessarily render[s]" a trial "fundamentally unfair" preventing it from "reliably serv[ing] its function as a vehicle for determination of guilt or innocence." Rose v. Clark, 478 U.S. 570, 577-78 (1986).

Moreover, to limit the defense theories to the defenses made prior to the close of evidence and the charge conference would shackle "Counsel's guiding hand." This would violate a defendant's Sixth Amendment right, in a criminal case, to be represented by counsel. The right to counsel would be impaired greatly, if counsel was restricted or forbidden to change the defense, at the charge conference, after seeing the trial evidence.

If a defendant's counsel is prevented from presenting a defendant's best defense, even if first articulated at the charge conference, the defendant has been denied representation by counsel. And a denial of representation by counsel "makes the adversary process itself presumptively unreliable." United States v. Cronic, 466 U.S. 648, 659 (1984).

If petitioner's requested jury instruction had been given, his new defense theory could have been pounded home to the jury, during closing argument, powerfully

and persuasively. But because of the trial court's refusal to give petitioner's requested charge, petitioner was not in a position to argue effectively that the government's failure to prove an essential element of wire fraud (an intent to harm), meant that there was no wire fraud.

"[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988). And this is so even if the supporting evidence is "weak, insufficient, inconsistent, or of doubtful credibility." United States v. Opdahl, 930 F.2d 1530, 1535 (11th Cir. 1991), or "dubivous." United States v. Fowler, 735 F2d 823, 829 (5th Cir. 1984). "A defendant cannot be shortchanged nor his jury trial truncated by a failure to charge." Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967).

Here, the government's failure to introduce any intent to harm evidence provided the evidentiary foundation for petitioner's requested charge. (App. 43.) Accordingly, the denial of petitioner's requested jury charge violated his Constitutional rights and denied him a fair trial, which requires the reversal of petitioner's convictions.

The Eleventh Circuit's Jury Charge Standard Is Inconsistent With And Is A More Stringent Standard Than This Court Has Required

In Buchanan v. Angelone, 522 U.S. 269 (1998), a jury sentenced a mentally disturbed young man to death for killing several family members. The

defendant, in a habeas petition, argued that Virginia's capital jury charge failed to properly inform the jury to consider mitigating evidence.

The charge failed to mention "mitigation" or any of its morphological permutations. Nonetheless, this Court ruled that the charge correctly and comprehensibly informed the jury that even if the jurors found sufficient aggravating factors sufficient to warrant a death penalty, they still were suppose to consider any mitigating evidence and reach a reasonable moral decision on the death issue.

Shortly thereafter, Weeks v. Angelone, 528 U.S. 225 (2000), presented exactly the same issue. The only difference between the cases was that in Weeks the jury, during its deliberation, asked the trial court to clarify the jury charge. The trial court refused to do so, referring the jury back to the original jury charge. This Court again affirmed the conviction.

The requested charge here was a more complete and accurate charge than the approved Buchanan and Weeks charges. Accordingly, the Eleventh Circuit's denial of petitioner's requested charge is inconsistent with and a more stringent standard than this Court's approved charges in Buchanan and Weeks.

The Unconstitutional Jury Charge Was Not Harmless

The remaining issue is whether the Constitutional error, involving the denial of petitioner's requested jury charge, was harmless beyond a reasonable doubt, under the Court's standard set forth in Chapman v. California, 386 U.S. 18 (1967). Petitioner respectfully

submits that the error, here, allowing the jury to find him guilty without the government proving an essential element of the charged crimes was not harmless.

In Chapman, this Court recognized that violations of Constitutional rights "basic to a fair trial" can "never be treated as harmless error." Id. 23. The harmless error analysis only may be used with respect to "unimportant and insignificant" constitutional violations. Id. 22.

Thus, when the Constitutional error directly relates to a trial's truth-finding function, which occurred here, the very core of a fair trial has been affected. The charge's failure to require the jury to find an essential element of the charged crime impaired the jury's truth-finding function.

The Constitutional error may have caused the jury to review the facts differently, and therefore to have reached a different conclusion than if it had been charged properly. Therefore, under Chapman, the error was not harmless.

There was no evidence on which a jury reasonably could have found beyond a reasonable doubt that petitioner acted with an intent to harm. Accordingly, the jury charge's unconstitutionality can not be presumed harmless. The erroneous charge may have dictated the jury's verdict without the jury finding an essential element of the charged crimes whether petitioner intended to harm the potential lender.

CONCLUSION

For the foregoing reasons, petitioner requests the Court to issue a Writ of Certiorari to the Eleventh Circuit.

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