No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARK GELAZELA,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

TIMOTHY A. SCOTT
Scott Trial Lawyers, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone: (619) 794-0451
Facsimile: (619) 652-9964

Attorney for Mark Gelazela

QUESTION PRESENTED FOR REVIEW

Whether after-the-fact "lulling" allegations extend the statute of limitations for wire fraud beyond the five-year period authorized by 18 U.S.C. § 3282(a).

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IN THE SUPREME COURT OF THE UNITED STATES

MARK GELAZELA,

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UNITED STATES OF AMERICA,

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

Petitioner Mark Gelazela respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed petitioner's convictions, finding, *inter alia*, that the district court did not err in failing to dismiss the indictment as time-barred because "'the indictment alleged that part of the scheme to defraud was lulling the victims, and...the indictment was filed within the five-year statute of limitations based on lulling communications to the victims that were part of the scheme to defraud." *United States v. Gelazela*, 777 Fed. Appx. 898, 899 (9th Cir. 2019) (unpublished) (attached as Appendix A).

JURISDICTION

On September 20, 2019, the Ninth Circuit affirmed petitioner's convictions via memorandum disposition. *See* Appendix A. After requesting an extension of time, Petitioner filed a timely petition for rehearing en banc on November 4, 2019, which was denied on December 5, 2019. *See* Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 3282(a) states: "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

STATEMENT OF THE CASE

On July 29, 2015, the grand jury indicted Gelazela and three co-defendants with nine counts of wire fraud, in violation of 18 U.S.C. § 1344. Clerk's Record ("CR") 1, Appellant's Excerpts of Record ("ER") 1690. The indictment alleged that Gelazela—along with codefendants Francis Wilde, Steven Woods, and Bruce Haglund—participated in a scheme to defraud investors involving short-term, high-yield financial products known as "bank guarantees." ER 1691-1692. The government claimed that the defendants convinced investors to wire money into a trust account, split the money up amongst themselves, and later made up excuses when the promised returns did not materialize. ER 1691-1692.

The indictment identified four alleged victims in its substantive counts. *See* ER 1693-1694. And the last date that any alleged victim parted with money was March of 2010:[1]

Investor	Respective Count in Indictment	Day of Last Wire Transfer
K.M.	1, 4, 5	03/15/2010
D.G.	2, 7	02/04/2010

1 *See* CR 69-3 to 69-6; ER 1680-1688.

C.V.	3, 6, 8	10/26/2009
R. K.	9	10/30/2009

Faced with this obvious statute-of-limitations problem, the government tried to draft its way around its case being time-barred. It alleged instead in counts 1-9 that the defendants—after the alleged fraud had occurred—made representations about possibly returning the funds. *See* ER 1693-1694 (describing alleged efforts by defendants to placate investors).

Gelazela moved to dismiss. *See* CR 69, ER 1663. He argued that a five-year statute of limitations applied under 18 U.S.C. § 3282 and that all elements of the offenses alleged in the indictment had been completed at the latest by March 2010—the date when the last funds were invested into the program.[2] ER 1667. Gelazela reasoned that because wire fraud was not a continuing offense according to this Court's authority, the statute of limitations began to run on the date that each alleged

2 To be clear, Mr. Gelazela maintained at trial, and maintains today, that he did not commit any fraud of any kind. Investor funds were managed co-defendant Frank Wilde, who repeatedly and persuasively assured Mr. Gelazela that the investment program was legitimate. Indeed, at his sentencing, Mr. Wilde exculpated Mr. Gelazela entirely, advising the Court that Mr. Gelazela was not at fault in any way, and had relied on Wilde in good faith. *See* 2017.10.23 Sentencing at 39-40.

crime was complete. ER 1669. Because the government returned the indictment in July 2015, he argued, the case against him was time-barred.

The government opposed Gelazela's motion. CR 71. It argued that because Gelazela had sent emails to investors in August 2010 allegedly "in furtherance of the fraudulent scheme and to help conceal it and lull victims," the statute of limitations had not expired. *Id.*

The district court embraced these arguments, and denied the motion to dismiss. *See* ER 33-34. It claimed: "I don't think that the law supports a finding by the Court that you fall, um -- with the five-year statute of limitations applying when there's lulling. The wirings [sic] occurred after the receipt of the money, carried on for a significant period of time. They to do appear and are arguably designed to lull the victims into a false sense of security, and to postpone the ultimate complaint." ER 33-34. The district court continued: "the wirings [sic],[3] in a sense, are part of an ongoing or evolving plan that are within the wire fraud statute and would bring this offense within the statute of limitations." ER 34.[4] Finally, the district court observed

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3 By "wirings," the district court apparently meant emails, as all wire funds transfers had already long been completed.

4 As discussed *infra*, wire fraud is simply not a continuing offense under this Court's precedent. Therefore, any conjecture about an alleged "ongoing plan" is inapposite to this statute-of-limitations issue.

that "[t]he emails qualify under, I think -- or the numerous emails to the victims claimed that the money would be returned even when allegedly the defendant and defendants knew that there was no money left to be returned.[5] And such emails could surely be seen as designed to lull the victims into a false sense of security." *Id.* It continued: "I don't think the statute of limitations provides a defense under this factual circumstance. I'm going to deny your request to find that there was a violation of the statute of limitations." *Id.* The matter proceeded to trial.

The government returned a superseding indictment shortly before trial.[6] CR 110, ER 1639. It alleged the same scheme as the original indictment but charged Gelazela with only two substantive counts of wire fraud, both occurring on August 12, 2010. ER 1643. The charges claimed that Gelazela had sent emails to alleged victims K.M. and D.G. "claiming funds would be returned to clients" if they executed and returned certain notarized paperwork. *Id.* The government alleged that Gelazela sent the emails "for the purpose of executing and attempting to execute the above-described scheme to defraud..." ER 1642.

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5 As demonstrated at trial, and later corroborated by his co-defendants, Mr. Gelazela had no knowledge regarding the balance in the bank accounts that were controlled by Wilde and Haglund alone.

6 The other three codefendants—Wilde, Woods, and Haglund—had pleaded guilty in the interim.

At trial, the government claimed that Gelazela misled investors. It asserted that Gelazela had promised investors extraordinary returns on their investments, had taken undisclosed upfront fees from their funds, and then later "lulled" investors by stating that money would be returned to them. ER 1441-1442.

Gelazela vigorously denied the allegations and stated that the prosecution had grossly misstated the facts. His defense was that investors sought to participate in an investment program set up and controlled by co-defendant Wilde. The program lasted for a few months only. Gelazela produced evidence and testimony that he had always acted in good faith, and in reliance on co-defendant Wilde's successful public business background and assurances that the program was viable and legitimate. After the S.E.C. raised concerns about the program, Gelazela immediately stopped his role in facilitating any new investments. Instead, he attempted, through co-defendant Wilde, to return money to the investors, as Wilde repeatedly assured him, in writing, that the money was "going to be returned with interest." *See* ER 1447-1462.

The jury ultimately returned guilty verdicts against Gelazela on both counts. The district court sentenced Gelazela to 41 months' custody and imposed more than $5,000,000 in restitution. *See* CR 316, ER 37-38.

On appeal, Gelazela argued, *inter alia*, that the district court had erred in failing to dismiss the indictment as time-barred. He argued that even taking all of the government's evidence as true, no offense occurred within the applicable statute of limitations. He noted that there was no dispute that the last wire transaction in this case happened in March 2010, and the government did not return the indictment until July 2015, months beyond the applicable five-year statute of limitations. Gelazela reasoned that because wire fraud is simply not a continuing offense under this Court's precedent, the government could not rely on dubiously alleged after-the-fact "lulling" activities to bring time-barred charges within the limitations period.

But the Ninth Circuit affirmed Gelazela's convictions. The Court found that "the district court correctly denied Gelazela's motion to dismiss the indictment as time-barred because the indictment alleged that part of the scheme to defraud was lulling the victims, and held that the indictment was filed within the five-year statute of limitations based on lulling communications to the victims that were part of the scheme to defraud." *Gelazela*, 777 Fed. Appx. at 899.

This petition follows.

REASON FOR GRANTING THE PETITION

I. Review is warranted to address the question of whether the statute of limitations on a continuing offense such as wire fraud may be extended by allegations of after-the-fact "lulling."

A. The original indictment was time-barred because more than five years elapsed between the completion of the alleged offenses and the indictment being filed.

A five-year statute of limitations governs the charged offenses. *See* 18 U.S.C. § 3282. This five-year period begins to run when "the crime is complete." *Toussie v. United States*, 397 U.S. 112, 115 (1970). And the crime is complete "as soon as every element in the crime occurs." *United States v. Musacchio*, 968 F.2d 782, 790 (9th Cir. 1992). *See also United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984) (same).

So, in accordance with this Court's precedent, under Ninth Circuit law a fraud offense is complete (and thus the statute begins to run) when the following elements are met:

• First, the defendant knowingly [participated in] [devised] [intended to devise] a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

• Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

• Third, the defendant acted with the intent to defraud, that is, the intent to deceive or cheat; and

• Fourth, the defendant used, or caused to be used, a wire communication to carry out or attempt to carry out an essential part of the scheme.

See Ninth Cir. Model Crim. Jury Instr. 8.124 (2014).

Taking the government's case at face value, each of those elements had long since been fulfilled for each investor before July 29, 2010. The government alleged that the defendants participated in a scheme to defraud investors by selling them bank-guarantee opportunities. It claimed that the defendants made various misrepresentations and omissions in convincing investors to part with their money, with an intent to defraud. These representations were all by wire, either by telephone or email. At the very latest, once the investors parted with their money in reliance on the representations (or more likely, once the defendants used a wire to pitch investors in the first place) the crimes were already complete. No amount of communication after the fact makes the crime any more "complete" any later. The uncontroverted evidence showed that the latest date that an investor parted with

money was March 15, 2010. The indictment was returned on July 29, 2015—five years and four months later. The charges were accordingly time-barred absent some exception to the statute-of-limitations rule.

B. Because wire fraud is not a continuing offense, after-the-fact "lulling" allegations cannot bring time-barred charges within the limitations period.

The government persuaded the district court and the Ninth Circuit that the charges were not time-barred because the indictment alleged "lulling" activity that would somehow extend the limitations period. *See* ER 33-34. That was error.

This Court's authority is clear that wire fraud does not qualify as a "continuing offense" that extends the limitations period once the crime is complete. The seminal case on continuing offenses is *United States v. Toussie*, 397 U.S. 112 (1970). In *Toussie*, this Court held that failing to register for the draft was not a continuing offense for statute of limitations purposes, even though the defendant repeated his failure to register every successive day. The Court explained that "the doctrine of continuing offenses should be applied in only limited circumstances" and further relied on "the principle that criminal limitations statutes are to be liberally interpreted in favor of repose." *Id.* at 115.

Relying on *Toussie*, the Ninth Circuit summarized the "continuing offense" doctrine as follows: "A continuing offense 'involves (1) an ongoing course of

conduct that causes (2) a harm that lasts as long as that course of conduct persists.' Unlike most crimes, it is only after this ongoing course of conduct is complete that the 'crime is complete' for statute of limitations purposes. Thus, a continuing offense punishes 'each execution of a fraudulent scheme rather than each act in furtherance of such a scheme....' The Supreme Court has held an offense is 'continuing' when either: (1) 'the explicit language of the substantive criminal statute compels such a conclusion'; or (2) 'the nature of the crime involved is such that Congress must assuredly have intended that it be treated as continuing one.'" *United States v. Holden*, 806 F.3d 1227, 1231 (9th Cir. 2015) (internal citations omitted).

In accordance with these principles, the Ninth Circuit has held that mail and wire fraud simply do not qualify as continuing offenses. As the Court held in *United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991) "the offenses at issue—18 U.S.C. §§ 1341 and 1343—criminalize each specific use of the mail or wire. Each offense is complete when the fraudulent matter is placed in the mail or transmitted by wire, respectively. Thus, the offenses . . . are not continuing offenses." *Id.* (emphasis provided). *See also United States v. Scarano*, 975 F.2d 580, 585 (9th Cir. 1992) ("[defendant] argues that his mail fraud was a 'continuing offense' that was not completed until after the November 1, 1987 effective date of

the guidelines. . . . This court has already concluded, however, that mail and wire fraud are not continuing offenses.") (emphasis provided).[7]

Thus, the law is clear that the statute of limitations begins running when all the elements of a crime are present—here, March of 2010 at the latest. The law is equally clear that the government cannot extend the limitations period by drafting around it in the indictment. In *Bridges v. United States*, 346 U.S. 209 (1953), for example, this Court stated: "The embellishment of the indictment does not lengthen the time for prosecution. It is the statutory definition of the offense that determines whether or not the statute of limitations" has been violated. *Id.* at 222-23. There, the Court applied a "categorical approach," examining the elements of the offense and not the factual predicate for the conduct alleged.[8] Indeed, if the statute of limitations hinged on the prosecutor's drafting pen, then "[v]irtually any

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7 *Niven* and *Scarano* both analyzed whether wire fraud was a continuing offense that would trigger different sentencing guidelines, rather than statutes of limitations. But there is no principled reason to call wire fraud a non-continuing offense in that context but not in this one, especially considering that "criminal limitations statutes are to be liberally interpreted in favor of repose." *Toussie* at 115. Furthermore, courts have cited *Niven* and *Scarano*'s holdings favorably when analyzing statute-of-limitations issues. *See e.g. United States v. Winn*, 58 F. Supp. 3d 1119, 1122 (D. Nev. 2014).

8 This is consistent with the way the categorical approach has been applied to other, more recent statutory questions. *See, e.g., Descamps v. United States*, 133 S. Ct. 2276 (2013) (categorical approach is an "elements-based inquiry" and not an "evidence-based" one).

criminal actions that extend over time could fall within this expansive definition depending upon how a prosecutor chose to charge a case. . . . *With this approach, the limitations period would be virtually unbounded.*" *United States v. Yashar*, 166 F.3d 873,878-89 (7th Cir. 1999). As *Yashar* held, "*for offenses that are not continuing offenses under Toussie, the offense is committed and the limitations period begins to run once all elements of the offense are established, regardless of whether the defendant continues to engage in criminal conduct.*" *Id.* at 879-80 (emphasis provided).

So it was here. The fact that the indictment alleged "communications" with investors afterwards does not change the fact that the alleged substantive offenses were already legally "complete" beforehand. Even if the August 10 emails allegedly tried to placate investors after the fact, the crime—defrauding the investors out of their money—had already occurred. Additional alleged statements afterwards do not make the earlier crimes any less complete and do not extend the statute of limitations period for those earlier instances of alleged fraud.

And the "lulling" allegations in the original indictment did not bring the charges within the limitations period. *See* CR 71. There is no authority to support the proposition that a defendant's alleged after-the-fact "lulling" can extend the limitations period for earlier substantive violations of the statute, or that these

"lulling" activities can even themselves constitute a substantive instance of wire fraud. The cases relied upon by the Ninth Circuit and government—*United States v. Lane*, 474 U.S. 438 (1986); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988); *United States v. Andrews*, 803 F.3d 823 (6th Cir. 2015); and *United States v. Fishman*, 645 F.3d 1175 (10th Cir. 2011)—either discuss the issue in the context of "sufficiency of the evidence" to support a wire fraud conviction (*Lane*), or involved conspiracy allegations in which the "lulling" formed an integral part of the agreement.[9] None of these cases hold that "lulling" allegations can rescue time-barred charged from the statute of limitations, nor would such an interpretation make sense in light of *Toussie* and *Niven*.

For example, in *Andrews*, the Court found no violation of the statute of limitations because the defendant had executed one of the fraudulently-obtained loans *within* the limitations period. *See Andrews*, 803 F.3d at 825 ("Andrews also was indicted within the five-year statute of limitations... As the record confirms and as Andrews concedes, the final loan occurred on September 25, 2008. That is fewer than five years before the government indicted Andrews—on September 18,

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9 Importantly, all these cases agree that "the existence of scheme to defraud and its duration are fact questions for the jury." *Andrews*, 803 F.3d at 824. As discussed below, the district court's failure to give jury instructions on these issues compounded its error in denying Gelazela's statute-of-limitations claim.

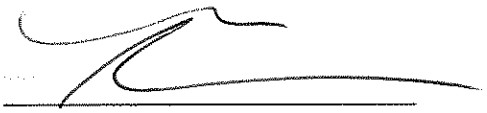
2013.") And in *Fishman*, the defendant was charged, *inter alia*, with *conspiracy* to commit mail and wire fraud under 18 U.S.C. § 1349. *See Fishman*, 645 F.3d at 1184. In those circumstances, the Tenth Circuit rejected the statute-of-limitations challenge, finding that because "conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period." *Id.* at 1191.

But here, the original indictment did not charge a conspiracy. It charged after-the-fact "lulling." Tellingly, the government did not charge the specific allegedly-fraudulent wire transactions, likely because it knew that the limitations period for those charges had expired. The government instead relied on after-the-fact communications to bootstrap its way into the limitations period. That was plainly contrary to *Toussie* and this Court's precedent. In these circumstances, and as required by *Toussie*, the trial court and Ninth Circuit should have liberally interpreted the limitations statute in favor of repose and dismissed the indictment. Certiorari should be granted accordingly.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,



Dated: March 2, 2020

TIMOTHY A. SCOTT
Scott Trial Lawyers, APC
1350 Columbia Street, Suite 600
San Diego, CA 92101
(619) 794-0451

APPENDIX

A

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ALAN GELAZELA, Defendant-Appellant.	No. 17-50366 D.C. No. 8:15-cr-00080-DOC-3 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK GELAZELA, AKA Mark Alan Galezela, AKA Mark Gelazel, AKA Mark A. Gelazela, AKA Mark Alan Gelazela, Defendant-Appellant.	No. 18-50006 D.C. No. 8:15-cr-00080-DOC-3

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted September 11, 2019
Pasadena, California

Before: RAWLINSON, IKUTA, and BENNETT, Circuit Judges.

Appellant Mark Gelazela (Gelazela) appeals his convictions for wire fraud premised on a scheme to defraud investors in bank guarantees.

The district court correctly denied Gelazela's motion to dismiss the indictment as time-barred because the indictment alleged that part of the scheme to defraud was lulling the victims, and held that the indictment was filed within the five-year statute of limitations based on lulling communications to the victims that were part of the scheme to defraud. *See United States v. Lane*, 474 U.S. 438, 451-52 (1986) (explaining that "[m]ailings occurring after receipt of the goods obtained by fraud are within the statute if they were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place") (citations and internal quotation marks omitted); *see also United States v. Tanke*, 743 F.3d 1296, 1305 (9th Cir. 2014) (articulating that "[a]llowance must be made for the reality that embezzlements and other schemes to defraud are often open-ended, opportunistic enterprises. They may evolve over time, contemplate no fixed end date or adapt to changed circumstances.") (citations, alterations, and

internal quotation marks omitted). Because the lulling communications were wires in furtherance of the scheme, the continuing offense doctrine was not applicable. *See United States v. Niven*, 952 F.2d 289, 293 (9th Cir. 1991), *overruled on other grounds by United States v. Scarano*, 76 F.3d 1471, 1477 (9th Cir. 1996).

The district court properly instructed the jury concerning the requisite elements for wire fraud, and that the jury was required to determine that the lulling communications were part of the scheme to defraud. *See Tanke*, 743 F.3d at 1305 (holding that "mailings designed to avoid detection or responsibility for a fraudulent scheme fall within the mail fraud statute when they are sent before the scheme is completed. To determine when a scheme ends, we look to the scope of the scheme as devised by the perpetrator").[1] The district court also adequately responded to the jury's question regarding the materiality of the lulling communications because the instruction on materiality was not ambiguous. *See id.*

AFFIRMED.

[1] "It is well settled that cases construing the mail fraud and wire fraud statutes are applicable to either." *Tanke*, 743 F.3d at 1303 n.3 (citation omitted).

APPENDIX

B

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ALAN GELAZELA, Defendant-Appellant.	No. 17-50366 and 18-50006 D.C. No. 8:15-cr-00080-DOC-3 Central District of California, Santa Ana ORDER

Before: RAWLINSON, IKUTA, and BENNETT, Circuit Judges.

The panel has voted to deny the Petition for Rehearing and to reject the Suggestion for Rehearing En Banc.

The full court has been advised of the Suggestion for Rehearing En Banc and no judge of the court has requested a vote.

The Petition for Rehearing filed on November 5, 2019, is DENIED, and the Suggestion for Rehearing En Banc is REJECTED.