No. 19-8151

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL JOHN ALCOCER-ROA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case Nos. 16-16899 and 17-10578

(U.S.D.C. Sd. Fla., Case No. 1:15-CR-20709-PAS-1)

MICHAEL JOHN ALCOCER-ROA

PRO SE

Federal Correctional Complex, Coleman Low / Unit C-2

P.O. Box 1031, Coleman, Florida 33521

QUESTIONS PRESENTED

I. Does an interlocutory appeal is a critical stage? If yes, does a denial of counsel during an interlocutory appeal constitutes a violation of Sixth Amendment under United States v. Cronic, 466 U.S. 648, 659 (1984)?

II. Do pretrial detainees have a constitutional right to get benefit from the prison mailbox rule?

III. Does the wire fraud statute (18 U.S.C. §1343) apply extraterritorially to extraterritorial violations of the Commodity Exchange Act (7 U.S.C. et seq.)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

United States:

(1) U.S.D.C. Wd. Miss., CFTC v. Inovatrade, Inc., Case No. 4:11-CV-00092-NKL.

(2) U.S.D.C. Sd. Fla., CFTC v. Michael Alcocer and Inovatrade, Inc., Case No. 1:12-CV-23459-JAL.

(3) U.S.D.C. Sd. Fla., Michael John Alcocer-Roa v. United States, Case No. 1:20-CV-20298-PAS.

Republic of Panama:

(1) Stock Exchange Superintendence of the Republic of Panama, ("SES"), SES v. Inovatrade, Inc. and Michael John Alcocer-Roa, Case No. CNV-291-11.

(2) General Secretariat of the Attorney's General Office of the Republic of Panama, Third Prosecutor's office, Republic of Panama v. Michael John Alcocer-Roa, Case No. 403-11.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Petitioner Michael John Alcocer-Roa, pro se, hereby files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this petition as far as Petitioner is aware, as required by the Supreme Court rules and Federal Rule of Appellate Procedure 26.1.

Aisenbrey, Margaret P., CFTC Trial Attorney

Alcocer-Roa, Michael John, Petitioner, Pro Se
Baer, Williams, United States Attorney
Caruso, Michael, Federal Public Defender

Cohen, Eric, AFPD

Do Campo, Orlando, Esquire

Eight Circuit, Court of Appeals
Eleventh Circuit, Court of Appeals
Ferrer, Wifredo, United States Attorney

Gonsoulin, John P., AUSA

Greenberg, Benjamin G., United States Attorney

Higgins, Celeste S., AFPD

Hoffman, Andrea, AUSA

In Rem Inovatrade, Inc.

Jimenez, Aimee C., AUSA

Laughrey, Hon. Nanette K., United States District Judge

Lenard, Hon. Joan A., United States District Judge

Marvine, Charles S., CFTC Trial Attorney

O' Sullivan, Hon. John J., United States Magistrate Judge

Otazo-Reyes, Hon. Alicia M., United States Magistrate Judge

Reid, Hon. Lissette M., United States Magistrate Judge

Republic of Panama

Rubio, Lisa Tobin, AUSA

Schwartz, Robert A., CFTC Trial Attorney

Seitz, Hon. Patricia A., United States District Judge

Session, Jeff, United States Attorney

Simonton, Hon. Andrea M., United States Magistrate Judge

Smachetti, Emily M., AUSA - Chief Appellate Division

Snyder, Vannesa S., AUSA

Stock Exchange Superintendence of the Republic of Panama

Stukes, Anne, CFTC Appellate Attorney

Surface, Nathan, FBI Special Agent

United States of America

United States Commodity Futures Trading Commission

United States Department of Justice

Ungaro, Hon. Urusula, United States District Judge

White, Martin B., CFTC Trial Attorney

Willard, Rainbow, AFPD

Respectfully Submitted,

March 19th, 2020

Michael John Alcocer-Roa, Pro Se

Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The date on which the United States Court of Appeals for the Eleventh Circuit decided appeals number 16-16899 and 17-10578 on October 31, 2018. (See Appendix A.)

After the Petitioner Michael John Alcocer-Roa requested to his attorney Esq. Orlando do campo to file a petition for a **certiorari** to the United States Supreme Court, he **pro se** filed the petition. (See Appendix B & C.) See Houston v. Lack, 487 U.S. 266, 270 (1988) (holding that a **pro se** prisoner's notice of appeal shall be deemed filed at the time it is delivered to prison authorities for mailing); **Washington v. United States**, 243 F.3d 1299, 1301 (11th Cir. 2001) (holding that under the **"prison mailbox rule,"** a prisoner's court filings is deemed filed on the date that he delivers the document to prison authorities for mailing); Fed. R. App. 4(c)(A)(C)(ii) (codifying **prison mailbox rule**); **see als** U.S. Const. amends. I & V. However, Mr. Alcocer-Roa's **pro se** petition was **"lost"** and never received by the court, (See Appendix B), and his attorney Esq. do Campo neglected his specific instructions, (see Appendix C). See **Allen v. Culliver**, 471 F.3d 1196, 1198 (11th Cir. 2006) (The mailbox rule may be applied even when a prisoner's pleading is **"lost"** and never received by the court.).

Mr. Alcocer-Roa sent several inquires to the Eleventh Circuit regarding his petitions, and sent an email to Esq. do Campo regarding the petitions. (See Appendix D.) After that, he **pro se** file a motion to recall the mandate and petition for **certiorati** out-of-time under the **prison mailbox rule** and **equitable tolling** doctrine. See **Holland v. Florida**, 560 U.S. 631, 649 (2010). However, the Eleventh Circuit denied any relief on September 27, 2019. (See Appendix E.) In respond, Mr. Alcocer-Roa readdressed his claim to the United States District Court for the Southern District of Florida on October 15, 2019), (see Appendix F), **but** the document was mailed from FCC Coleman Low, in Coleman, Florida on October 31, 2019, (see Appendix F), and filed in the District Court on November 15, 2019. The District Court blocked his petition. After that, Mr. Alcocer-Roa **pro se** filed a petition for **certiorari** in the Supreme Court on January 14, 2020, **but** the Clerk returned back the petition with instructions about the Court's format. (See Appendix G.) And this is the amended petition in compliantes with the format.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional

Cases

Cases Related

United States Code

Federal Rules of Appellate Procedure

Federal Rules of Civil Procedures

Supreme Court Rules

STATEMENT OF THE CASE

After four cases from the **same nucleus of operative facts,**[1] earlier proceedings in which the Federal Government[2] **substancially participated,**[3] in September 2015, the Petitioner Michael John Alcocer-Roa ("Alcocer-Roa") was indicted by a federal grand jury for allegedly operating a **scheme to defraud** through Inovatrade, Inc., (hereinafter "InovaTrade"),[4] a company dedicated to the online foreign-exchange ("forex") off-exchange ("spot") trading services between November 2008 and May 2011 from the Republic of Panama ("Panama").[5] He was charged with five counts of wire fraud, in violation of 18 U.S.C. §1343. (CR-DE:4.) The basis of the Indictment are **extraterritorial** violations of the Commodity Exchange Act ("CEA"), (7 U.S.C. §§1 **et seq.**), provisions regarding forex trading. (**Id.**; CR-DE:63.) The Office of the Public Defender ("FPD") was appointed to represent him on September 15, 2015. (CR-DE:6.)

Since the Arraignment Detention Hearing on September 21, 2015, Mr. Alcocer-Roa established to the United States District Court for the Southern District Court of Florida, ("Southern District Court"), his **affirmative defenses** of Double Jeopardy, Res Judicata, Collateral Estoppel, Privity, Comity, and Lack of Subject-Matter Jurisdiction. (CR-DE:16:13-14.) He raise **pro se** two double jeopardy claims: (1) the preclusive effect from the foreign acquittal judgment obtained **in privity** with the Federal Government, (CR-DE:186); and (2) the $29 million criminal penalty imposed by the Southern District Court under the **extraterritorial** liminations of the CEA in prior civil action,[6] and the **lacked** of jurisdiction over **spot** forex transactions at issue here

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1. **See** (1) U.S.D.C. Wd. Miss., **CFTC v. Inovatrade, Inc.**, Case No. 4:11-CV-00092-NKL, hereinafter "CV-00092"; (2) Stock Exchange Superintendence of the Republic of Panama, ("SES"), **SES v. Inovatrade, Inc. and Michael John Alcocer-Roa**, Case No. CNV-291-11, hereinafter "CNV-291-11"; (3) General Secretariat of the Attorney's General Office of the Republic of Panama, Third Prosecutor's Office, **Republic of Panama v. Michael John Alcocer-Roa**, Case No. 403-11, hereinafter "403-11"; and U.S.D.C. Sd. Fla., **CFTC v. Michael Alcocer and Inovatrade, Inc.**, Case No. 1:12-CV-23459-JAL, hereinafter "CV-23459".

2. For purpose of the instant case the U.S. Commodity Futures Trading Commission ("CFTC") and the U.S. Department of Justice ("DOJ") are the **same party** and will referred to in this motion as "Federal Government". **See United States v. Skelena**, 692 F.3d 175, 732 (7th Cir. 2012) (collecting cases); **see also** 7 U.S.C. §13a-1(a), (f)-(g). (CR:207:3.)

prior of Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1326 (2010) ("Dodd-Frank Act").7 In addition, he brought **pro se** to the Court that the conduct alleged in the Indictment does **not** violate the laws of the United States on March 29, 2016. (CR-DE:34.)

Notably, Mr. Alcocer-Roa was represented at pre-trial and trial stages by court-appointed counsel, AFPD Celeste S. Higgins. (CR-DE:10.) On April 12, 2016, Mr. Alcocer-Roa **specifically instructed** trial counsel to request an **interlocutory appeal** of his motion to dismiss the indictment based on double jeopardy grounds and lack of jurisdiction on the conduct in dispute, (CR-DE:44; CR-DE:63), which counsel stated she would do, but she did **not.** Because he felt confused and was uncomfortable with counsel's response and actions, he filed **pro se** two notice of appeal On April 24, 2016, in a **timely** fashion under the **prison mailbox rule**8 and Federal Rule of Appellate Procedure 4(c) regarding: (1) the denying order of Mr. Alcocer-Roa's motion to dismiss the indictment based on double jeopardy grounds; and (2) the denying order of Mr. Alcocer-Roa's motion to nullify the indictment based on a jurisdictional defect. (CR-DE:117; CR-DE:117:8; CR-DE:256; CR-DE:272.) After an Evidentiary Hearing, the Southern District Court found that Mr. Alcocer-Roa's notice was **deemed** filed on April 24, 2016, and the Federal Government did **not** object that finding. (CR-DE:166:47-48.) After Ms. Higgins **refused** to appeal the denying order (CR-DE:63) to dismiss the indictment and raise Mr. Alcocer-Roa's **affirmative defenses**, and she **denied**9 her assistance in the **interlocutory appeal**, the relationship in between both turned as one clouded by an atmosphere of mistrust, misgiving, and irreconcilable differences.**10** This resulted in multiple claims of conflicting interests, ineffective assistance,

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3. In criminal and civil proceedings, the doctrines of Res Judicata and Collateral Estoppel, provides that **"a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States**, 440 U.S. 147, 153 (1979); **see Taylor v. Sturgell**, 553 U.S. 880, 892 (2008); **see also Hilton v. Guyot**, 159 U.S. 113, 163 (1895); **Ungaro-Benages v. Dresdner Bank AG**, 379 F.3d 1227, 1237-38 (11th Cir. 2004) (District Judge Ungaro). (CR-DE:63.)

4. **"INOVATRADE INC"** was **"a corporation registered at the Public Registry of Panama..., domiciled at 50th and 74th Street, Torre de las Americas Building, Tower A, 9th Floor, Office 904-A...."** (CR-DE:186:2.)

constructive and actual denial of counsel representation, and a breakdown of the client-attorney relationship.

Following the guilt phase of trial, Ms. Higgins moved the Southern District Court to withdrawal as counsel and requested for an appointment of **new** counsel based upon a **"breakdown of communication"** and **"irreconcilable differences"** on May 23, 2016. (**See** CR-DE:95; CR-DE:97; CR-DE:99; CR-DE:102.) The Court granted the motion, and Esq. Orlando do Campo was appointed by the Court to represent Mr. Alcocer-Roa **only** at sentencing and on direct appeal, but **not** for the pending **interlocutory appeal.** (CR-DE:109; CR-DE:166:4; CR-DE:166:42.) In fact, the Court created a **Hobson's** choice for Mr. Alcocer-Roa's defense of deciding between his rights of an **interlocutory** or **direct** appeal.[12] Indeed, Mr. Alcocer-Roa was **not** represented by **any** counsel in his **interlocutory appeal.** (**See** C.O.A. 11th Cir., **United States v. Michael John Alcocer-Roa**, Case No. 16-13623.) (Appendix J.)

Subsequent to Mr. Alcocer-Roa's notice of appeal (CR-DE:117:8) and **later** his convictions, the Southern District Court **without jurisdiction** imposed an **illegal** and **unconstitutional** total sentence of 210 months' imprisonment,[13] and a (second[14]) restitution order in the amount of $7,881,492.83 (CR-DE:193; CR-DE:229.) After that, Mr. Alcocer-Roa **in propria persona** appealed his sentence and restitution, (CR-DE:194; CR-DE:219; CR-DE:230), and raised the jurisdictional defect resulting from his **pro se** notice of appeal of the denying order of Mr. Alcocer-Roa's motion to dismiss the indictment in appeals numbers 16-16899, 17-10578, and 17-15040. (**See** C.O.A. 11th Cir., **United States v. Michael John Alcocer-Roa**, Case Nos. 16-16899,

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5. In May 2011, InovaTrade collapsed. On February 6, 2012, the Panamanian Bankruptcy Court approved InovaTrade's bankruptcy and liquidation. (CR-DE:186:3.)

6. **See** CV-23459-DE:25.

7. The **futures** versus **spot** transaction issue was relevant here becasue of language in the Commodity Exchange Act ("CEA"), (7 U.S.C. §§1 **et seq.**) granting the CFTC jurisdiction over **"contracts of sales of a commodity for future delivery."** **See** 7 U.S.C. §2(a)(1)(A).

8. **See Houston v. Lack**, 487 U.S. 266, 270 (1988) (holding that a pro se prisoner's notice of appeal shall be deemed filed at the time it is delivered to prison officials for mailing); Fed. R. App. P. 4(c)(1)(A)(ii) (codifying **prison mailbox rule**); **see also United States v. Craig**, 368 F.3d 738, 740 (7th Cir. 2004) (**"Today the mailbox rule**

("16-16899"); 17-10578 ("17-10578"), and 17-15040 ("17-15040").) However, the Court stated that appeal number 16-16899 **"[was] an improper proceeding to challenge"** the prior dismissal of the **interlocutory appeal** number 16-13623, (16-16899, 04/17/18), and refused to consider the claim in appeal number 17-15040 **"because the issue [was] no[t] properly"** presented before the Court, (17-15040, 07/03/18). During appealing procees, Esq. do Campo requested to the Eleventh Circuit to withdrawal as an appeal counsel, based upon a **"breakdown of communication"** and **"irreconcilable differences,"** however, the Court denied such petition. In fact, the relationship between Mr. Alcocer-Roa and Esq. do Campo still **"strained"** due to multiple claims of conflicting interests, ineffective assistance, constructive and denial of counsel representation, and a breakdown of the attorney-client relationship. Forcing Mr. Alcocer-Roa into direct appeal with Esq. do Campo with whom he is dissatisfied, with whom he will not cooperate, and with whom he has an irreconcilable confict amounts to constructive and actual denial of the Sixth Amendment right to counsel-because there is evidence that the relationship between Esq. do Campo and Mr. Alcocer-Roa has irretrievably broken down-prevents effective assistance of counsel in appeal.

In October 2018, Mr. Alcocer-Roa **pro se** again raised his jurisdictional claims in appeals numbers 16-16899 and 17-10578. The Court requested the Federal Government to respond Mr. Alcocer-Roa's claims. However, few days later, the Court **unfiled** Mr. Alcocer-Roa's pending motion and, on October 31, 2018, the Eleventh Circuit resolved appeals numbers 16-16899 and 17-10578, and affirmed Mr. Alcocer-Roa's convictions and sentence **without** even considerating

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depends on Rule 4(c)..., [which] applies to 'an inmate confined in an institution'....").

9. **"[A]n attorney who fails to file an appeal on behalf of a client who specifically requests it acts in a professionally unreaspnable manner per se."** Gomez-Diaz v. United States, 433 F.3d 788, 791-92 (11th Cir. 2005) (**citing** Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000)).

10. On April 5, 2016, Mr. Alcocer-Roa filed a **pro se** motion for issuance of subpoena to produce the testimony of Panamanian and American authorities related to the prior actions (CNV-291-11 and 403-11). (CR-DE:46.) However, the Court struck the motion.

11. Currently, Mr. Alcocer-Roa **pro se** raised multiple claims, including but not limited to ineffective assistance of counsel, in habeas petition pursuant to 28 U.S.C. §2255. **See** U.S.D.C. Sd. Fla., **Michael John Alcocer-Roa v. United States**, Case No. 1:20-CV-20298-PAS.

Mr. Alcocer-Roa's **pro se** jurisdictional claims. (**See** 16-16899 and 17-10578, 10/31/18.)

After Mr. Alcocer-Roa requested to his attorney Esq. do Campo to file a petition for rehearing **en panel** or **en banc** to the Eleventh Circuit, and/or, in alternative, a petition for a **certiorari** to the Supreme Court, he **pro se** filed his **"Petition for Rehearing [En Panel or] En Banc [to the United States Court of Appeals for the Eleventh Circuit] and/or, in alternative, Petition for a Certiora[r]i to the Supreme Court [of the United States,]"** based on the **"extraterritorial"** limitations of the CEA-and-wire-fraud-statute, denial of counsel, and denial of access to the courts. After that, Mr. Alcocer-Roa did **not** receive any update about either his attorney[12] or **pro se** petitions, on March 29, 2019, he decided to contact again Esq. do Campo regarding the status of such petitions. But counsel informed him that he **neglected** his petitions, and the Eleventh Circuit may **not** receive his **pro se** petitions.

In August 2019, Mr. Alcocer-Roa filed a **pro se** motion to recall the mandate, and for leave to file a petition for **en panel** and/or **en banc** rehearing out-of-time to the Eleventh Circuit, or, in alternative, file a petition for **certiorari** out-of-time to the Supreme Courts, in appeals number 16-16899, 17-10578 and 17-15040. However, the Court denied **all** petitions in September 2019. On October 15, 2019, Mr. Alcocer-Roa **pro se** re-filed the petitions in the Southern District Court. But the Court after filed, they unfiled, blocked and sent back the petitions on November 15, 2019. On January 6, 2020, Mr. Alcocer-Roa **pro se** readdress his petition to the Supreme Court, however, the Court returned the petitions because the motion did **not** comply with the Court's rules on January 14, 2020.

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12. For a definition of a **"Hobson's Choice," see N.L.R.B. v. CER Inc.**, 762 F.2d 482, 486 n.7 (5th Cir. 1985) (**"The Random House Dictionary of the English Language 675 (unabridge ed. 1969) defines Hobson's choice as 'the choice of taking either that which if offered or nothing; the absence of a real choice or alternative [after Thomas Hobson (1544-1631), of Cambridge, England, who rented horses and have his customers only one choice, that of the horse nearest the stable foor].").**

13. Mr. Alcocer-Roa was sentenced to concurrent terms of 2010 months' imprisonment on each count. (CR-DE:185.)

14. **See** CV-23459, DE:25.

REASONS FOR GRANTING THE PETITION

I. Does an interlocutory appeal is a critical stage? If yes, does a denial of counsel during an interlocutory appeal constitutes a violation of Sixth Amendment under United States v. Cronic, 466 U.S. 648, 659 (1984)?

A. An interlocutory appeal is a "critical stage" under United States v. Wade, 388 U.S. 218, 224 (1967) and Abney v. United States, 431 U.S. 651, 658-62 (1977) based on double jeopardy grounds:

Recently, the Eleventh Circuit in **United States v. Roy** sat **en banc** in a case involving a **Cronic** issue, explaining that refusing to presume prejudice from a constitutional error is **"the rule, not the exception,"** and noting that the Supreme Court has recognized seventeen types of constitutional errors that do not warrant a presumption of prejudice. 855 F.3d 1133, 1144 (11th Cir. 2017). However, a denial of counsel in an interlocutory appeal based on double jeopardy grounds is not one of that seventeen errors. Thus, Mr. Alcocer-Roa submits that is an important federal question of law that is relevant with this Court's decisions in **Wade**, **Abney**, and **Cronic**.

In **Wade**, the Supreme Court held that the Sixth Amendment right to counsel attaches to **"critical stages"** of pretrial proceedings. 388 U.S. at 224. As the Supreme Court has explained, **"[o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence."** Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 212 (2008) (quotation marks omitted). Because **"an unaided layman"** has **"little skill in arguing the law or in coping with an intricate procedural system,"** the Court has long held that the right to counsel extends beyond the trial itself. **United States v. Ash**, 413 U.S. 300, 3007 (1973).

Constitutional protections against double jeopardy clearly precludes the retrial of a defendant who has been acquitted of the offenses with which he was charged. **See Green v. United States**, 355 U.S. 184, 187-88 (1957); **see also Abney**, 431 U.S. at 661-62 (explaining

that the Fifth Amendment protection against double jeopardy embodies a broader, **"deeply ingrained"** principle that **"the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"**) (**citing** Green, 355 U.S. at 187-88)); **Penson v. Ohio**, 488 U.S. 75, 84 (1988) (**"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have."**).

In criminal context,15 courts have only recognized that interlocutory appeals may be had from: (1) orders denying a motion to reduce bail as excessive; (2) orders denying motions to dismiss on double jeopardy grounds; (3) orders denying immunity under the Speech and Debate Clause of the Constitution; and (4) orders directing a defendant to be medicated against his or her will in order to be competent to stand trial. **See Stack v. Boyle**, 342 U.S. 1, 6 (1951); **Abney**, 431 U.S. at 659; **Helstoski v. Meanor**, 442 U.S. 500, 506-07 (1979); **Sell v. United States**, 539 U.S. 166, 176 (2006). Also, the Bail Reform Act provides under certain circumstances for appeals of order relating to bail. 18 U.S.C. §3145.

Here, Mr. Alcocer-Roa fall under one of the recognized circumstances with his double jeopardy claim. Consequently, such appeal would have succeded after Mr. Alcocer-Roa **specifically instructed** Ms. Higgins to request an interlocutory appeal of the denying order (CR-DE:63) of his motion to dismiss (CR-DE:44) the indictment based on double jeopardy grounds. **See Roe v. Flores-Ortega**, 528 U.S. 470, 476-77 (2000); **Abney**, 431 U.S. at 660. Counsel was, therefore, **denied** for failure to pursue Mr. Alcocer-Roa's double jeopardy claim on interlocutory appeal **before** his trial or conviction. (**See** CR-DE:117; CR-DE:117:8; CR-DE:117:9; 16-13623.) **See Wade**, 388 U.S. at 224 (the Supreme Court held that the Sixth Amendment right to counsel attached to **"critical stages"** of pretrial proceedings). The combined force of the Fifth and

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15. Mr. Alcocer-Roa relies on the collateral order doctrine as described in **Cohen v. Beneficial Industrial Loan Corp.**, 337 U.S. 541, 546-47 (1949). The **Cohen** exception is very construed, especially for defendants in criminal manners. **See id.**

Sixth Amendments of the United States Constitution makes extremely important the question of whether an interlocutory appeal is a **"critical stage,"** Wade, 388 U.S. at 224, based on **"double jeopardy,"** Abney, 431 U.S. at 658-62, grounds. **See** Supreme Court Rule 10(c).

B. Sixth Amendment

The Sixth Amendment to the United States Constitution provides that **"[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense."** U.S. Const. amend. VI. An indigent defendant who cannot afford an attorney has an absolute right to have counsel appointed by the court. **Gideon v. Wainwright**, 372 U.S. 335, 342-44 (1963); **see also Johnson v. Zerbest**, 304 U.S. 458, 463 (1983) (6th Amendment requires appointment of counsel for indigent defendants in federal court). Further, federal statutes and rules also provide for the appointment of counsel for indigent defendants. **See** 18 U.S.C. §3006A(a) (federal courts must have procedures to provide counsel to **"any person financially unable to obtain adequate representation"**); Fed. R. Crim. P. 44(a) (indigent defendant entitled to appointed counsel from **"initial appearance through appeal"** unless waived).

The right to counsel includes **"'the right to the effective assistance of counsel.'"** **Strickland v. Washington**, 466 U.S. 668, 686 (1984) (quoting **McMann v. Richardson**, 397 U.S. 759, 771 n.14 (1970). Under **Strickland**, a defendant who claims ineffective assistance of counsel must prove (1) **"that counsel's representation fell below an objective standard of reasonableness,"** 466 U.S. at 687-88, and (2) that any such deficiency was **"prejudicial to the defense,"** **id.** at 692. The same deficient performance and prejudice standards apply to appellate counsel. **See Smith v. Robbins**, 528 U.S. 259, 285-86 (2000); **Evitts v. Lucey**, 469 U.S. 387, 396 (1985); **see also Flores-Ortega**, 528 U.S. at 476-77.

Accordingly, Mr. Alcocer-Roa submits that he was deprived of his Sixth Amendment to counsel when: (1) his trial attorney Ms. Higgins failed to file the appeal of the order denying Mr. Alcocer-Roa's motion to dimiss the indictment based on double jeopardy grounds; and (2) he was deprived of his constitutional right to assistance of counsel for his

interlocutory appeal by trial counsel Ms. Higgins and newly appointed counsel Esq. do Campo.

1.

Normally, **"an attorney who fails to file an appeal on behalf of a client who specifically requests it acts in a professionally unreasonable manner per se."** Gomez-Diaz v. United States, 433 F.3d 288, 791-92 (11th Cir. 2005) (**citing** Flores-Ortega, 528 U.S. at 477)). **"As to the second prong of the** Strickland **test, the** Flores-Ortega **Court held that the failure to file an appeal that the defendant wanted filed denies the defendant his constitutional right to counsel at a critical stage."** Id. at 792 (**citing** Flores-Ortega, 528 U.S. at 483).

On April 12, 2016, Mr. Alcocer-Roa **specifically instructed** trial counsel Ms. Higgins to request an **interlocutory appeal** of his motion to dismiss the indictment based on double jeopardy grounds, (CR-DE:44; CR-DE:63), which counsel stated that she would do, but she did **not**, (**see** CR-DE:117; CR-DE:117:8).**16** Thus, trial counsel AFPD Higgins rendered constitutionally ineffective, and she prejudiced Mr. Alcocer-Roa.

2.

"In certain Sixth Amendment contexts," however, **"prejudice is presumed,"** Strickland, 466 U.S. at 692. For exmaple, no showing of prejudice is necessary **"if the accused is denied counsel at a critical stage of his trial,"** Cronic, 466 U.S. at 659, or left **"entirely without the assistance of counsel on appeal,"** Penson, 488 U.S. at 88. Similarly, prejudice is presumed **"if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."** Cronic, 466 U.S. at 659. And, prejudice is presumed **"when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."** Flores-Ortega, 528 U.S. at 484. Accordingly, Mr. Alcocer-Roa submits that all three limitations accompany the

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16. Mr. Alcocer-Roa submits that the evident suggest that there some communication between the Clerk of the Southern District Court and his trial attorney AFPD Higgins regarding Mr. Alcocer-Roa's notice of appeal from the denying order of the motion to dismiss the the indictment based on double jeopardy grounds. (CR-DE:117:9.) However, counsel did = **not** correct her error, and let the **default** of Mr. Alcocer-Roa's interlocutory appeal.

Cronic rule-each applicable here.

First, Mr. Alcocer-Roa's right to counsel is determined by whether his interlocutory appeal based on double jeopardy grounds constituted a **"critical stage"** in his proceedings. Wade, 388 U.S. at 224. In Wade, the Supreme Court held that the Sixth Amendment right to counsel attaches to **"critical stage"** of pretrial proceedings. Id. Thus, Mr. Alcocer-Roa submits that his interlocutory appeal was a **"critical stage"** in his proceedings, and therefore counsel should have been appointed to assist him with the appeal. **See id.** at 227 (The critical-stage test thus as whether a proceeding threatens **"potential substantial prejudice"** to the defendant's rights that counsel's assistance could help avoid.). Thus, Mr. Alcocer-Roa submits that he was denied of effective representation by counsel at the interlocutory appeal based on double jeopardy grounds as a **"critical stage"** of the initial proceedings because it is at this stage that the constitutional right to equal and meaningful access to the courts for a prisoner, particularly through effective representation by counsel, attaches, and that his substantial rights on direct appeal may be adversely affected.

Second, even when the Cronic exception involves a **"'very heavy' burden"** to the defendant and applies to a **"'very narrow' scope"** of cases, it is **not** insuperable. **United States v. Roy**, 855 F.3d 1133, 144-45 (11th Cir. 2017) (**en banc**) (**citing Stano v. Dugger**, 921 F.2d 1125, 1153 (11th Cir. 1991) (**en banc**)). In Penson, the Supreme Court **"applied Cronic to presume prejudice."** Roy, 855 F.3d at 1144-45; **see Penson**, 488 U.S. at 88 (holding that **"the presumption of prejudice must extend as well to the denial of counsel on appeal"** when the granting of an attorney's motion to withdraw had left the petitioner **"entirely without the assistance of counsel on appeal"**); **see also Harrigton v. Gillis**, 456 F.3d 118, 132 (3d Cir. 2006) (noting than **"an appeal is a critical stage of criminal proceedings"**). Thus, the presumption of prejudice must be extended to Mr. Alcocer-Roa's interlocutory appeal as a critical stage of this criminal proceedings, and the denial of counsel for that appeal.

As the colloquy from Mr. Alcocer-Roa's hearing on pending motion with new-appointed counsel Esq. do Campo, (CR-DE:166), the District Judge Patricia A. Seitz ("Seitz") did not

merely perform a ministerial act of addressing the pending post-conviction motions (from AFPD Higgins and Mr. Alcocer-Roa). Instead, the Court made a finding of fact that Mr. Alcocer-Roa's **pro se** notice of appeal was **deemed** filed on April 24, 2016, (CR-DE:117:8; CR-DE:256; CR-DE:166:34-36), but District Judge Seitz instructed Esq. do Campo to address **all** Mr. Alcocer-Roa's claims in the **direct appeal**, but **not** in the **interlocutory appeal.** (CR-DE:166:4; CR-DE:166:33-34.) That **not** only created a **Hobson's choice** for the defense of deciding between Mr. Alcocer-Roa's rights of an **interlocutory** or **direct** appeal, but also the District Judge Seitz **denied** Mr. Alcocer-Roa of counsel's representation in his **interlocutory appeal** when she left AFPD Higgins withdraw from the case and did **not** let Esq. do Campo represent Mr. Alcocer-Roa in such appeal (or **all** matters pending before the Court). **See** Penson, 488 U.S. at 85 (court erred in denying indigent defendant represenation during appeal as of right after counsel withdrew because defendant lacked representation during decision making process).

Third, **before** Mr. Alcocer-Roa's conviction and sentence, it needed the Court of Appeals for the Eleventh Circuit to exercise discretion, judgment, and skill to determine if the instant prosecution violated the Double Jeopardy Clause. This required inquiry into the status of the prior four proceedings history and to make finding of fact that if the new charges stemmed from the same issue for double jeopardy purpose. Thus, Mr. Alcocer-Roa submits that the adverse and fact-finding nature of this inquiry renders it a **"proceeding[] between an individual and agents of the State...at which counsel would help the accused 'in copying with legal problems or...meeting his adversary.'"** Rothgery, 554 U.S. at 212 n.16 (quoting Ash, 413 U.S. at 312-13).

Accordingly, Mr. Alcocer-Roa submits that the potential for prejudice when counsel is denied during a critical stage is so great that fairness demends an automatic reversal. Considering these factors above-noted, the complete absence of Mr. Alcocer-Roa's attorneys during his **interlocutory appeal** undoubtely constitutes a **structural error.** Thus, the presumption of prejudice must be extend to Mr. Alcocer-Roa's **interlocutory appeal** under Cronic, and reversal is warranting.

II. Do pretrial detainees have a constitutional right to get benefit from the prison mailbox rule?

A. The circuits are currently split on whether the prison mailbox rule applies to pretrial detainees represented by counsel

Mr. Alcocer-Roa submits that there is a circuit split regarding whether the mailbox rule applies to inmates represented by counsel. **Compare** United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994) (prison mailbox rule applies though inmate is represented by counsel), and **United States v. Craig**, 368 F.3d 738, 740 (7th Cir. 2004) (prison mailbox rule applies to inmates represented by counsel), **with** Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) (prison mailbox rule rationale does not apply to prisoners represented by counsel because counsel is capable of controlling fillings of pleadings), Nichols v. Bowersox, 172 F.3d 1068, 1073-75 (8th Cir. 1999) (though prison mailbox rule applied to petitioners because they were proceeding **pro se**, rule does not apply to inmates represented by counsel), **overruled on other grounds by** Riddle v. Kemna, 523 F.3d 850 (8th Cir. 2008), Stillman v. LeMarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (prison mailbox rule inapplicable unless prisoner proceeds **pro se** and delivers legal materials to prison authorities within limitations period), and **Williams v.** Russo, 636 Fed. Appx. 527, 531 n.3 (11th Cir. 2016) (pretrial detainee does not receive the benefit of the prison mailbox rule because he is currently represented by counsel). Thus, Mr. Alcocer-Roa submits that the Court should extend their discretion to grant a writ of **certiorari** to resolve the circuit split regarding on whether the mailbox rule applies to inmates represented by counsel. **See** Supreme Court Rule 10(a).

B. Fifth Amendment

In the Fifth Amendment context: Pursuant to Bounds v. Smith, prisoners (including pretrial detainees) have a constitutionally-protected right of access to the courts. 430 U.S. 817, 820-21, 824 (1977); **see** Love v. Summit County, 776 F.2d 908, 912-13 (10th Cir. 1985) (recognizing pretrial detainees have a constitutional right to adequate, effective, and meaningful

access to the courts); **see also** Chappel **v. Rich**, 340 F.3d 1279, 1282 (11th Cir. 2003) (per curiam) (stating that the access of the courts is a fundamental right grounded in the 5th Amendment).

Alternatively, Mr. Alcocer-Roa submits that even if presuming if, this Court are holding, **Cronic**, does not apply in these circumstances, a new trial order from this Court should still be presumed under the prison mailbox rule and Fed. R. App. P. 4(c). The court of appeals' jurisdiction turned on whether the **"prison mailbox rule"** announced in **Houston v. Lack**, applied to render Mr. Alcocer-Roa's late-filed notice **timely** on April 24, 2016 (before his convictions), (CR-DE:117:8). 487 U.S. 266, 270-71 (1988). If it did, the notice would have been **deeemed** filed on April 24, 2016-the day that Mr. Alcocer-Roa turned it over to FDC-Miami authorities. The record supported this finding. (**See** CR-DE:117:8-9; CR-DE:166:47-48.)

Originally, the prison mailbox rule was first applied to a notice of appeal. **See Houston**, 487 U.S. at 276. The Court held that a **pro se** prisoner's notice of appeal under Fed. R. App. P. 4(a)(1) is **deemed** filed as of the date it is delivered to prison officials for mailing because prisoner seeking to appeal without the aid of counsel is unique. **Id.** at 270. But this case presents a similar situation when Mr. Alcocer-Roa was constructive and actually denied representation in his interlocutory appeal. After AFPD Higgins failed to file his notice of appeal, Mr. Alcocer-Roa should not be deprived of the benefits of the prison mailbox rule. Phrased another way, deprived him from using the prison mailbox rule when he was already deprived of counsel it is **per se** a denial of access to the courts. **See** U.S. Const. amends. V and VI. Thus, Mr. Alcocer-Roa submits that the prison mailbox rule ensures that justice will be properly served and counter-balances the heavy weight that courts procedural rule have stacked against prison litigants. **See Jones v. Bertrand**, 171 F.3d 499, 502 (7th Cir. 1999). Our entire criminal justice was founded on the premise that **"[t]ruth...is best discovered by powerful statements on both sides of the question."** Cronic, 466 U.S. at 655 (internal quotation marks omitted). There is no reson for Mr. Alcocer-Roa to not get benefit

from this rule.

C. The Eleventh Circuit law is wrong

Yet the Eleventh Circuit held that a pretrial detainee does not receive the benefit of the prison mailbox rule because he is currently represented by counsel, **see** Williams v. Russo, 636 Fed. Appx. at 531 n.3, the Court did **not** consider the circumstances when the defendant was constructively or actually denied of counsel representation. Moreover, the Court **wrongly** relies on other circuits law to support its conclusion. Specifically, the Court **misplaced**[17] the Seventh Circuit law about the prison mailbox rule regarding a petitioner represented by counsel. In Craig, the Seventh Circuit stated:

> **"Today the mailbox rule depends on Rule 4(c)..., [which] applies to 'an inmate confined in an institution'...."** 368 F.ed at 740 (quoting Rule 4(c)). Mr. Alcocer-Roa meets that description. **"A court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd."** Id. Thus, Mr. Alcocer-Roa is entitled to use the mailbox rule. **Accord,** Moore, 24 F.3d at 626 n.3. 368 F.ed at 740. Whenever a prisoner attempts to file a notice of appeal from prison he is acting **"without the aid of counsel,"** even if he is **"represented"** in a passive sense. Houston, 487 U.S. at 270-72. The same concerns are present in either case. **18** 19 In fashioning an equitable resolution to the prisoner's filing dilema, in both civil and criminal cases, the courts should be mindful that **"the Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances."** Fallen v. United States, 378 U.S. 139, 142 (1964). Thus, Mr. Alcocer-Roa, a represented prisoner, no less than those proceeding on their own, can use the prison mailbox rule, whose text not draw a distinction between represented and **pro se** litigants. Craig, 368 F.3d at 740.

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17. **See** Williams v. Russo, 636 Fed. Appx. 572, 531 n.3 (11th Cir. 2016); **see e.g.,** Rutledge v. United States, 230 F.3d 1041 (7th Cir. 2000) (holding that the mailbox rule is not available to a prisoner represented by counse). **But see, e.g.,** United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (prison mailbox rule applies to inmates represented by counsel).

18. The Eleventh Circuit extended the prison mailbox rule articulated in Houston "to **pro se prisoners filing complaints in section 1983 cases and claims under the Federal Tort Claims Act."** Garvey v. Vaughn, 993 F.2d 776, 783 (11th Cir. 1993).

19. The Seventh Circuit (taking an even more strict approach to the issue) found that the failure to perfect an appeal at the behest of a client deprives the client not of effective assistance of counsel but of any assistance of counsel on appeal. Castellanos v. United States, 26 F.3d 717, 718 (7th Cir. 1994). The Court went on to hold that abandonment of the client and their wishes is a per se violation of the Sixth Amendment. Id. (citing United States v. Cronic, 466 U.S. 648, 658-59 (1984)).

Accordingly, Mr. Alcocer-Roa's **pro se** notice of appeal (CR-DE:117:8) should be **deemed** filed on April 24, 2016 pursuant to the prison mailbox rule and Fed. R. App. R. 4(c). Thus, the Southern District Court was divested of jurisdiction until the Eleventh Circuit addresses Mr. Alcocer-Roa's interlocutory appeal (16-13623) on the merits,20 and reversal is warranting.

III. Does the wire fraud statute apply extraterritorially to extraterritorial violations of the CEA?

A. The circuits are currently split on whether the wire fraud statute (18 U.S.C. §1343) apply extraterritorally

Mr. Alcocer-Roa submits that there may be a substantial ground for difference of opinion whether the wire fraud statute apply extraterritorially: (1) The circuits are divided as to the extraterritorial application of the wire fraud statute. **Compare European Cmty. v. RJR Nabisco, Inc.**, **("European Community")**, 764 F.3d 129, 139-41 (2d Cir. 2014) (the wire fraud statute **"doe[s] not overcome Morrison's presumption against extraterritoriality")** **rev'd and remanded on other grounds by RJR Nabisco, Inc. v. European Cmty.**, **("RJR Nabisco")**, 136 S. Ct. 2090, 195 L. Ed. 2d 476 (2016), **with United States v. Lyons**, 740 F.3d 702, 718 (1st Cir. 2014) (holding that Wire Act, which prohibits using **"wire communication facility"** to transmit bets or wagers **"in interstate or foreign commerce"** applies extraterritorially because it **"explicitly applies to transmissions between the United States and a foreign country")**; **United States v. Georgiou**, 777 F.3d 125, 137-38 (3d Cir. 2015) (holding that wire fraud statute **"applies extraterritorially")**. And (2) **"the Eleventh Circuit has not opined on the issue"** of whether wire fraud applies extraterritorially, **Absolute Activist Value Master Fund, Ltd. v.**

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20. Ordinarily, in criminal cases, the time limit set forth in Rule 4 is mandatory, but not jurisdictional. **United States v. Martinez**, 496 F.3d 387, 388-89 (5th Cir. 2007) (**citing Bowles v. Russell**, 551 U.S. 205, 207-14 (2007); **United States v. Lopez**, 562 F.3d 1309, 1311-12 (11th Cir. 2009). However, the rule **"assure[s] releif to a party"** that properly raised his or her claim. **Eberhart v. United States**, 546 U.S. 12, 19 (2015) (per curiam). Thus, Mr. Alcocer-Roa submits that the Southern District Court was divested of jurisdiction to take any action (**i.e.** entered a conviction or imposed a sentence) except in the aid of such appeal until the mandate has issued. **Zaklama v. Mount Sinai Med. Ctr.**, 906 F.2d 645, 649 (11th Cir. 1990).

Devine, 233 F. Supp. 3d 1297, *19 (M.D. Fla. 2017), and the Court refused to consider the issue in Mr. Alcocer-Roa's appeal number 16-16899. Thus, Mr. Alcocer-Roa submits that the Court should extend its discretion to grant a writ of **certiorari** to resolve the circuit split regarding on whether the wire fraud statute apply extraterritorially. **See** Supreme Court Rule 10(a).

B. Federal courts are courts of limited jurisdiction and the district court did not have authority to expand the reach of the wire fraud statute.

The obedience to courts and respect for the law does not enact as federal law the Fifth Commandment given to Moses on Sinai.**21** But no human authority can be unlimited, or against God, or the unalienable rights**22** protected in our Constitution. The Constitution vest the **"power of punishment...in the legislative, not in the judicial department."** **Dowling v. United States**, 473 U.S. 207, 214 (1985) (quoting **United States v. Wiltberger**, 18 U.S. 76, 5 Wheat. 76, 95, 5 L. Ed. 37 (1820)). Indeed, it **"is the legislature, not the Court, which is to define a crime, and ordain its punishment."** **Id.**

The parties may not waive a jurisdictional defect.**23** **McCoy v. United States**, 266 F.3d 1245, 1249 (11th Cir. 2001). Because the federal courts are courts of limited jurisdiction, deriving their power from Article III of the Constitution and from the legislative acts of Congress, the parties cannot confer upon the courts a jurisdictional foundation that they

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21. As general rule, the Fifth Commandment is well-educated about the obedience and respect to our superior, including to our civil governments. And commanding us in I Peter 2:13-15:

> **"Submit yourselves to every ordinance of man for the Lord's sake: whether it be to the King, as supreme; [o]r unto governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well."** I Peter 2:13-15, King James Version 1873 ed.

22. **"Without doubt, [the liberty guranteed by the Due Process Clause] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the occupations of life, to acquire unseful knowledge, to marry, establish a home and bring up children, [and] to worship God according to the dictates of his own conscience."** **Meyer v. Nebraska**, 262 U.S. 390, 399 (1929).

23. Mr. Alcocer-Roa's claims challenging the trial court's jurisdiction ans the constitutionally of his statute of conviction are not subject to waiver. **See United States v. Cotton**, 535 U.S. 625, 630 (2002) (holding that subject-matter jurisdiction cannot be waived); **United States v. Saac**, 632 F.3d 1203, 1208 (11th Cir. 2012) (holding that a constitutional challenge to a statute is a jurisdictional issue that is not waivable).

otherwise lack. **Harris v. United States**, 149 F.3d 1304, 1308 (11th Cir. 1998); **see also Kokkonen v. Guardian Life Ins. Co. of America**, 511 U.S. 375, 377 (1994) ("**Federal courts are courts of limited jurisdiction,**" possessing "**only that power authorized by Constitution and statute.**"); **CFTC v. Schor**, 478 U.S. 833, 851 (1956) ("**[T]he parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, §2.**"). Thus, a party's waiver or procedural default would be insufficient to confer subject-matter jurisdiction. **McCoy**, 266 F.3d at 1249; **Harris**, 149 F.3d at 1308. "**A judgment tained by a jurisdictional defect-even one that has been waived-must be reversed.**" **United States v. DiFalco**, 837 F.3d 1207, 1215 (11th Cir. 2015) (quoting **McCoy**, 266 F.3d at 1249). "**Courts have an independent obligation to determine whether subject-matter exists, even when no party challenges it.**" **Hertz v. Friend**, 559 U.S. 77, 94 (2010).

The United States convicted Mr. Alcocer-Roa for allegedly perpetrating a scheme to defraud, which compromised violations of the CEA's provisions regarding forex trading.**24** The Federal Government and the Southern District Court, however, **overlooked** that the application law that was in effect at the relevant time of the alleged offense: (1) the CEA does **not** have "**extraterritorial**" reach to InovaTrade in Panama, **De Atucha v. Commodity Exchange, Inc.**, 608 F. Supp. 510, 523 (S.D.N.Y. 1985); **Morrison v. National Australia Bank Ltd.**, 561 U.S. 287, 255 (2014); (2) the CFTC **lacked** jurisdiction under the CEA to address the preliminary question of forex "**spot**" transactions, **CFTC v. Zelener**, 373 F.3d 861, 869 (7th Cir. 2004); and (3) the wire fraud statute (18 U.S.C. §1343) does **not** apply as an "**extraterritorial predicate**," **Petroleos Mexicanos v. Sk. Eng'g & Constr. Co.**, ("**Petroleos Mexicanos**"), 572 F. App'x 60, 61 (2d Cir. 2013) (summary order). Further, Panama's criminal court and administrative trribunal acquitted Mr. Alcocer-Roa of any wrongdoing in InovaTrade. (CR-DE:186.)

Several principles and rule converge that support the conclusion that the Southern District Court **lacked** subject-matter jurisdiction over the conduct in this case. Especially, when the Federal Government alleged that InovaTrade and Mr. Alcocer-Roa had violated several provisions of the CEA in prior civil actions, and such violations are the basis of Mr. Alcocer-Roa's indictment and convictions. (See 16-16899 and 17-10578, 10/31/18.)

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24. Specifically, the CFTC alleged that InovaTrade and Mr. Alcocer-Roa has violated several statutory provisions, 7 U.S.C. §§6(b)(a)(2)(A)-(C) and 6o(1), as well as multiple regulations, 17 C.F.R. §§4.41, 5.2(b)(1)(3) & 5.16.

Simply put, a federal wire fraud must identify a predicate crime that serve as a **"scheme to defraud."** See **United States v. Bradley**, 644 F.3d 1213, 1240 (11th Cir. 2011); **see also United States v. Takhalov**, 827 F.3d 1307, 1312-13 (11th Cir. 2016). In other words, if the underlying conduct is **not** criminal, then there can be no independently illegal handling of the monies. See **European Community**, 764 F.3d at 140-41 (the Second Circuit held that 18 U.S.C. §1343 does not have extraterritorial application); **United States v. Vilar**, 729 F.3d 62, 72 (2d Cir. 2013) (same); **see also Petroleos Mexicanos**, 572 F. App'x at 61 (**"[W]ire fraud cannot serve as such an extraterritorial predicate."**).

An indictment's failure to charge a crime in violation of the United States law constitutes a jurisdictional defect and therefore may be raised at any time within the same proceedings including after judgment or **certiorari** review. See **United States v. Izurieta**, 710 F.3d 1176, 1179 (11th Cir. 2013). The failure of an indictment to allege a crime in violation of the United States is a jurisdictional defect. **United States v. Brown**, 752 F.3d 1344, 1353 (11th Cir. 2014). As the Eleventh Circuit had indicated that **actual innocence** includes cases in which the prisoner has been convicted of **"an act that the law does not make criminal."** **Spencer v. United States**, 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc) (quoting **Davis v. United States**, 417 U.S. 333, 346 (1974)). **"There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice."** Davis, 417 U.S. at 346.

Accordingly, Mr. Alcocer-Roa submits that a wire fraud indictment predicated upon **non-criminal** conduct is **not** an indictment at all because fails to invoke the district court's statutory authority under 18 U.S.C. §3231 over **"offenses against the laws of the United States."** See **Alikhani v. United States**, 200 F.3d 732, 734-35 (11th Cir. 2000). As such, this indictment defect is jurisdiction and strip the Southern District Court of jurisdiction over this case. See **id.**

C. Application Law

1. CEA

Congress created the CFTC in 1974 to regulate the commodity futures industry. See **CFTC**

Schor, 478 U.S. 833, 836 (1986). Pursuant to a provision of the enabling legislation known as the **"Treasury Amendment,"** transactions involving foreign currency were excluded from the CFTC's oversight, unless they were conducted for **future** delivery and on a board of trade--i.e., an exchange. Id. The purpose of the Amendment **"was to provide a general exception from CFTC regulation for sophisticated off-exchange foreign currency trading, which had previously developed entirely free from supervision under the commodities laws."** Dunn v. CFTC, 519 U.S. 465, 473 (1997). Court were divided, however, as to whether this exempted all off-exchange forex transactions from regulation. **See, e.g.,** id. at 469-70 (rejecting CFTC's position that foreign currency options trading was sibject to regulation); **CFTC v. G7 Advisory Servs., LLC,** 406 F. Supp. 2d 1289, 1294-95 (S.D. Fla. 2005) (noting that a **"majority of courts...concluded that the Treasury Amendment exempted only interbank transactions in foreign currency from CFTC regulation").**

Over time, as off-exchange markets emerged in which retail customers could engage in purely speculative trading, Congress gradually expanded the reach of the CEA **and the CFTC** to cover these markets. Congress enacted the first law affecting retail forex in 2000. Id. at 1295. As the House Report explained, the intent was to afford the CFTC **"jurisdiction over retail foreign currency transactions that are not traded on an organized exchange and that are not regulated by another federal regulator." See** Commodity Futures Modernization Act of 2000, H.R. Rep. 106-711(III), at 54 (Sept. 6, 2000). The legislation provided that forex transactions were exempt from CFTC unless they were **"conducted on an organized, between specified regulated entities and persons who [were] not eligible contract participants ("ECPs")."** Id. One of the goals of this amendment was to help curtain so-called **"bucket shops."** Id.

Despite this effort to define the CFTC's jurisdiction regarding forex transactions, jurisdictional issues persisted. For example, **CFTC v. Zelener,** 373 F.3d 861, 869 (7th Cir. 2004), **reh'g and reh'g en banc denied,** 387 F.4d 624 (2004), the Seventh Circuit held that off-exchange ("spot") forex transactions involving **options** rather than **futures** contracts fell outside the CFTC's purview. The effect of ruling as Zelener was to remove retail forex transactions

that occurred off-exchange ("spot") from CFTC oversight.

Congress then chose to expand the anti-fraud jurisdiction of the CFTC in 2008, in what is something referred to as **"the Zelener fix,"** to give the CFTC jurisdiction over retail forex. 7 U.S.C. §2(c)(2)(C)(iv). In doing so, Congress did not reject the holding in **Zelener** that retail forex transactions are **spot** contracts, not **futures** contracts. Instead, although Congress was specifically aware of the **Zelener** and **[CFTC v.]Erskine**, [512 F.3d 309, 314-15 (6th Cir. 2008), holdings, it chose not to include retail forex in the definition of **"commodity contract"** when it amended the definition in 2005 and 2010, or when it amended the CEA to include forex in the CFTC's anti-fraud jurisdiction in 2008. So, rather than overturning **Zelener**, Congress left intact the court's determination that retail forex transactions are **spot** contracts, not **futures. See United States v. Walsh**, 723 F.3d 802, 811 (7th Cir. 2013) (noting the continuing validity of **Zelener**, stating that **"Zelener held that rollovers of foreign currency sales were not contracts of sale of a commodity for future delivery but were instead spot sales."**).

In 2010, Congress again expanded the CFTC's power, giving it specified authority over off-exchange retail transactions in all commodities, even transactions construed as **spot** or forward contracts. **See** 7 U.S.C. §2(c)(2)(D)(iii). It also amended the definition of **"commodity contract"** again, this time to add a broad array of cleared transactions. 11 U.S.C. §761(4)(F)(ii) (adding, with respect to an FCM or clearing organization, **"any other contract, option, agreement or transaction, in each case, that is cleared by a clearing organization."**) Once again, though, uncleared transactions like retail forex were not included in the definition of **"commodity contract."** Under the age-old rule of statutory construction that **expressio unius est exclusio alterius** (to express one thing implies the exclusion of the other), by choosing to include only cleared transactions, Congress implicity excluded all uncleared transactions not specifically described in other subparagraphs of the definition. **See In re Globe Building Materials, Inc.**, 463 F.3d 631, 635 (7th Cir. 2006). These amendments thus reflect Congressional intent to exclude retail forex from the definition of **"commodity contract"** and therefore from

the protections afforded to individual investors under the CEA.

While the Dodd-Frank Act amended the CEA to expand the CFTC's jurisdiction regarding retail forex transactions, that amendment does not affect the analysis here.

Prior to October 18, 2010, InovaTrade **terminated** all contact within the United States. In compliance with the new regulation of Dodd-Frank Act, InovaTrade **terminated** its representative office leasing agreement on August 31, 2010, and InovaTrade's Subsidiary Corporation was **dissolutionated** on September 24, 2010. (CR-DE:128.)

On January 26, 2011, the CFTC filed its complaint in the Western District of Missouri for permanent injunction, civil monetary penalty ("CMP"), and other equitable relief against InovaTrade.25 The complaint alleged that InovaTrade was been and continued (after October 18, 2010) to unlawfully as an unregistered Foreign Retail Exchange Dealer ("RFED") in the United States, and to solicit or accept orders from non-ECPs in the United States in connection with forex transactions in violation of Section 2(c)(2)(C)(iii)(1)(aa) of the CEA, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the "CRA"), to be codified at 7 U.S.C. §2(c)(2)(C)(iii)(I)(aa), and CFTC regulation 5.3(a)(6)(i), to be codified at 17 C.F.R. §5.3(a)(6)(i), and sought injunctive and other equitable relief and CMP.26 However, the CEA did **not** apply to InovaTrade because the company is a Panamanian corporation with its **"principal place of business...Panama,"** InovaTrade **terminated** its representative office leasing agreement on August 31, 2010, and InovaTrade's Subsidiary Corporation was **dissolutionated** on September 24, 2010.26 Thus, InovaTrade did **not** violated any laws in the United States.

In respond, InovaTrade's attorneys inquired to the Superintendence of Stock Exchange of the Republic of Panama ("SES") about InovaTrade's forex activities and transactions in Panama. **See In re Inovatrade, Inc.**, SES. (CR-DE:34:2.) On March 11, 2011, the Superintendence respond:

"Regarding the subject--matter of Forex, the Commission reinterates that not

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25. **See** CV-00092, DE:1.

26. **Id.** at DE:1:3; CR-DE:128; CR-DE:186.

being considered for now an activity proper of the securities market based on the regulatory framework of Law Decree No.: 1 of 1999, a licensed issued by this Entity is not required to carry out said activity, the broker-dealer houses according to the regulations in force and the opinion that this Commission had issued in the past to engage in the Forex Markets." (CR-DE:34:15, ¶5.)

In May 2011, InovaTrade **collapsed.** The company control passed to the Liquidator Board in the Panamanian Bankruptcy Court, and Mr. Alcocer-Roa was **removed** from the direction of the company.

On July 6, 2011, the Western District of Missouri pursuant to the CEA entered a **default judgment** with a permanent junjunction enjoing InovaTrade from continuing to operates as an RFED with U.S. customers, and imposed a **first** CMP of $280,000-even though the CEA did **not** apply to InovaTrade in Panama.**27**

On August 19, 2011, the SES **in privity** with the CFTC brought an administrative prosecution against InovaTrade and Mr. Alcocer-Roa in Panama.**28** The Complaint alleged that InovaTrade unlawfully offered amount its services, financial brokerage, facilitation of transaction platforms of the Forex Markets, as well as the opening of accounts offering the client the possibility of opening accounts in which financial products as such as forex, CFD (acronym in the English language that usually identifies the Contracts for Difference) and precious metals may be traded. (CR-DE:186; CR-DE:220:18-20.)

Also, the General Secretariat of the Attorney's General Office of the Republic of Panama charged criminally Mr. Alcocer-Roa with **"Crime Against the Economy Order"** in violation of Decree No. 14 of May 18, 2007, for money and property that he obtained from InovaTrade.**29** (CR-DE:188; CR-DE:190; CR-DE:186.)

During the course of these proceedings in Panama,**30** InovaTrade's directors, executives and employees, including but not limited to the former director Mr. Alcocer-Roa, were deposed by Panamanian authorities to provide their testimony with the assistance of the CFTC.

27. CV-00092, DE:17.

28. CNV-291-11.

29. 403-11.

30. CNV-291-11 and 403-11.

On February 6, 2012, the Panamanian Bankruptcy Court approved InovaTrade's bankruptcy and dissolution. (CR-DE:186:3.)

On September 21, 2012, the CFTC filed an injunctive action in the Southern District Court against Mr. Alcocer-Roa and InovaTrade.**31** The Complaint alleged that Mr. Alcocer-Roa and InovaTrade-by and through its agents, employees and principals, including but not limited to Mr. Alcocer-Roa-orchestrated a fraudulent scheme that, between November 2008 and September 2011, induced more than four hundred customers to deposit with or for the benefit of InovaTrade, a purported RFED, more than $10.6 million to off-exchange ("spot") foreign-exchange ("forex"), in violation of: (1) Section 6(b)(2)(A)-(C) of the CEA, 7 U.S.C. §6(b)(a)(2)(A)-(C); (2) Section 4o (1) of the CEA, 7 U.S.C. §4o(1); (3) Regulation 4.41, 17 C.F.R. §4.41; (4) Regulation 5.2(b), 17 C.F.R. §5.2(b); and (5) Regulation 5.16, 17 C.F.R. §5.16.**32** However, the CEA did **not** apply to InovaTrade in Panama, and the CFTC knew or should known that InovaTrade's activities were out of the scope of the agency's jurisdiction. Premature consideration of these matters, vested with the CFTC in the first instance initiate court actions, and would enmesh the district court in a technical thicket which it should avoid, at least until the agency has an opportunity to complete its initial investigatory and adjudicatory functions. But the CFTC already had the opportunity, not only one but on three occassion, to obtained all the relevant facts in this case. Under these circumstances, the CFTC instigated in a bad faith a malicious institution of civil proceedings against InovaTrade and Mr. Alcocer-Roa in the United States.

After the extensive, exhaustive and extraordinary cooperation from Mr. Alcocer-Roa in a six teen months long litigation in Panama, on December 19, 2012, the Superintendence entered an acquittal judgment on the merits in Mr. Alcocer-Roa;s favor. The Superintendence stated on the judgment:

> **"That the documents...[and] information received from the [CFTC]...and the lack of evidence that proves until now the infrigerment" of the law, and "the activities that the company [InovaTrade] offered and [] the transactions carried out were**

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31. CV-23459, DE:1.

32. Id.

promoted and carried out in the Forex Market, the Superintendence considers" that are not illegal, and **"pertinent to conclude"** and **"resolved"** this administrative investigation. (**See** CR-DE:186.)

On February 8, 2013, the CFTC filed a motion for authorizing alternative service on Defendants InovaTrade and Mr. Alcocer-Roa pursuant to the Federal Rule of Civil Procedure 4(f) and h(2) in the second civil enforcement action.**33** The CFTC emphasis to the Court: **"Because defendants are in Panama, Federal Rule of Civil Procedure 4(f) and h(2) set forth the manner by which they may be served."34**

On April 5, 2013, the Southern District Court pursuant to the CEA entered a **default judgment** with a permanent injunction enjoing InovaTrade from continuing to operates as an RFED with U.S. customers, imposed a **second** CMP of $28,830,650.97, a **first** restitution of $9,610,216.99, and ancillary equitable relief against Mr. Alcocer-Roa and InovaTrade.**35 36**

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33. **See** CV-23459, DE:12.

34. **See id.** at DE:12:3.

35. Mr. Alcocer-Roa contends that the civil remedy of almost $29 million dollars jointly with the restitution and permanent injunction are a **"penalty"** in light of **Kokesh v. SEC**, 137 S. Ct. 1635, 198 L. Ed. 2d 86 (2017), because the relevant **"focus"** in the CEA occurred outside the scope of the limitations of the statute, **see De Atucha v. Commodity Exchange, Inc.**, 608 Supp. 510, 523 (S.D.N.Y. 1985); **Morrison v. National Australia Bank Ltd.**, 561 U.S. 247, 255, 261 (2010); **see also CFTC v. Zelener**, 373 F.3d 861, 869 (7th Cir. 2004), **reh'g and reh'g en banc denied**, 387 F.4d 624 (2004); **CFTC v. Erskine**, 512 F.3d 309, 314-15 (6th Cir. 2008).

36. Mr. Alcocer-Roa contends that the Panamanian Acquittal Judgment (CR-DE:186) is recognized, enforced, and given preclusive effect by a court of this country. **Hilton v. Guyot**, 159 U.S. 113, 163-64 (1895); **Ungaro-Benages v. Dresdner Bank AG**, 379 F.3d 1227, 1237-38 (11th Cir. 2006) (District Judge Ungaro) (emphasis added). Especially, when the CEA application to InovaTrade or Mr. Alcocer-Roa in Panama violates ordinary notion of fair play, and no warning or notice given to Mr. Alcocer-Roa that his act could be defined as fraud. In the spirit of **"international comity,"** **Societe Nationale Industrialle Aerospatiate v. United States Dist. Court for Southern Dist. of Iowa**, 482 U.S. 522, 543 (____), a federal court should carefully consider a foreign state's views about the meaning of its own laws. Thus, a final judgment from Panamanian authorities that was tained **in privity** with the CFTC has the same preclusive effect upon the federal courts as it does upon foreign courts. **See Montana v. United States**, 440 U.S. 147, 149, 153 (1979); **Taylor v. Sturgell**, 553 U.S. 880, 892 (2008). The Supreme Court did not defines **"privity"** as to exception to the **dual-soverignty** doctrine nor the Eleventh Circuit had ample opportunity to assess the legal standards for **"privity"** under Due Process Clause. However, Mr. Alcocer-Roa submits that question is warrant.

Accordingly, Mr. Alcocer-Roa submits that the **default judgment** entered by District Judge Joan A. Lenard is the result of an error in which impedes the pursuit of justice, its affects the entire judicial institution. **See** Chambers v. NASCO Inc., 501 U.S. 32, 43-44 (1991); S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897).

B. Wire Fraud

"The law in question here is the wire fraud statute, which makes criminal any 'scheme or artifice to defraud.'" United States v. Rakhalov, 827 F.3d 1307, 1315 (11th Cir. 2016) (quoting 18 U.S.C. §1343). The statute itself, however, does not explain what constitutes such a scheme or artifice. United States v. Bradley, 644 F.3d 1213, 1240 (11th Cir. 2011). Thus, the meaning of the phrase **"scheme to defraud"** has been **"judicially defined."** United States v. Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002). **"[D]espite its breadth,"** however, **"the judicial definition"** of a **"scheme to defraud"** has some limits. Bradley, 644 F.3d at 1240.

"For this reason, the law in the Eleventh Circuit makes clear that a defendant 'scheme to defraud' only if he schemes to 'depriv[e] [someone] of something of value by trick, deceit, chicane, or overreaching.'" Takhalov, 827 F.3d at 1312-13 (quoting Bradley, 644 F.3d at 1240). **"But if a defendant does not intend to harm the victim-'to obtain, by deceptive means, something to which [the defendant] is not entitled'-then he has not intended to defraud the victim."** Id.,

From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transactions has not **"scheme 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 is not intent to harm, there can only be a scheme to deceive, but not one to defraud. Id. Thus, **"even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if...the alleged victims 'received exactly what they paid for.'"** Id. ay 1314 (quoting United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007).

Here, Mr. Alcocer-Roa was indicted and convicted of wire fraud, in violation of 18 U.S.C. §1343. (CR-DE:4; CR-DE:86.) The basis of the Indictment and the convictions is the prior two

civil actions; which involve violations of the CEA's forex provision-the forex fraud need to be a necessary ingredient of the underlying predicate offense. But as it turns out, the CEA is applicable to forex **spot** transactions in Panama-and Mr. Alcocer-Roa was therefore convicted of an existing crime-only if the CEA applies extraterritorial or **spot** transactions. He contends it's not. If the CFTC is right and the CEA aplied to InovaTrade and the Panamanian Interbank Market, Mr. Alcocer-Roa's convictions stand. But if not, this Court should set aside Mr. Alcocer-Roa's convictions.

Thus, Mr. Alcocer-Roa submits that the Federal Government fails to allege a primary CEA violation for the reasons discussed above, so the wire fraud statute did not reach his conduct in Panama. **See European Community**, 764 F.3d at 140-41; **see Vilar**, 729 F.3d at 72; **see also Morrison**, 561 U.S. ____, 130 S. Ct. 2869, 2878 (The Supreme Court reasoned in **Morrison** that even though one of section 10(b)'s terms, **"interstate commerce,"** was defined to include foreign commerce, **see** 15 U.S.C. §78c(a)(17), **"[t]he general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality."** (quotation marks omitted)) (emphasis added). Accordingly, the indictment is incorrect that extraterritorial CEA's violations from forex **spot** transactions was the underlying predicate offense for his §1343 convictions.

In fact, the **"wire fraud statutes do not cover all behavior which strays from the ideal."** **United States v. Weimert**, 819 F.3d 351, 357 (7th Cir. 2016) (internal quotation marks omitted). Unfortunately for the Federal Government, the wire fraud claims based on extraterritorial CEA's violations falls apart on the predicate acts. A scheme to defraud requires a material false statement, misrepresentation or promise, or concealment of a material fact. **Id.** at 355. But the indictment does not identify any materially false statements, misrepresentations, or concealments made in furtherance of the alleged fraudulent scheme. Although the Federal Government's characterization of Mr. Alcocer-Roa's representations that InovaTrade's customers could trade currencies in the company as **"misleadings"** that characterization is simply incorrect. Applying the extraterritorial limits to the CEA to the InovaTrade's forex **spot**

transactions, it is hard to see how Mr. Alcocer-Roa could or would have done these things, and the Panamanian Acquittal Judgment indicates that members of the society where the acts occurred did **not** consider them unfair, dishonest or illegal. Thus, Mr. Alcocer-Roa is **actual innocent**, and he cannot be held criminal liable for InovaTrade's activities and forex **spot** transactions that occurred in Panama.

D. The Morrison Presumption Against Extraterritoriality Applies to the CEA

The Federal Government downplays the **extraterritorial** aspect of this case. (CR-DE:151:233.) But the **extraterritorial** aspect of this case is critical. After all, the **"presumption against extraterritoriality"** is a canon of statutory construction **that assumes** that Congress intends its enactments, whether civil ro criminal, to apply **only** domestically unless it clearly expressess a contrary intention. Morrison, 561 U.S. at 255; De Atucha, 608 F. Supp. at 523; Vilar, 729 F.3d at 72.

"Traditionally, courts have looked to the securities law when called upon to interpret similar provisions of the CEA." Saxe v. E.F. Hutton & Co., 789 F.2d 105, 109 (2d Cir. 1986). Therefore, Morrison's domestic transaction test in effect decides the territorial reach of CEA, and, because Mr. Alcocer-Roa and InovaTrade **"are in Panama,"37** and InovaTrade's forex **spot** transactions occurred in Panama, the fraud claims that Mr. Alcocer-Roa defrauded over 300 victims out of over $7 million by fraudently representing to the victims that they could trade currencies through InovaTrade should be dismissed. **See** Morrison, 561 U.S. at 268 (the Supreme Court held that transactions involving **"securities not registered on domestic exchanges, the exclusive focus [is] on domestic purchases and sales...."**) (emphasis in original).

Morrison established the following framework for deciding questions regarding the **extraterritorial** application of federal statutes. **See** RJR Nabisco, 136 S. Ct. at 2191. First, unless Congress's intention to give a statute **extraterritorial** effect is **"clearly expressed,"** courts **"must presume it is primarily concerned with domestic conditions."** Morrison, 561 U.S. at 255 (citation omitted). In other words, **"[w]hen a statute gives no clear indication of an**

extraterritorial application, it has none." Id. Second, if a statute applies only domestically, a court must determine which domestic conduct it regulates. Id. at 266-67. This is because "it is rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." Id. at 266 (emphasis in original).

Addressing the first Morrison prong, "[t]he CEA as a whole...is silent as to extraterritorial reach," courts must "'presume it is primarily concerned with domestic conditions.'" Loginovskaja v. Batratchenko, 764 F.3d 266, 271-72 (2d Cir. 2014) (quoting Morrison, 561 U.S. at 255). Following Morrison, Mr. Alcocer-Roa submits that the CEA lacked any express statement regarding extraterritorial application at the relevant time of the alleged offense in the instant case. Id.; see e.g., De Atucha, 608 Supp. at 519-24 (performing comprehensive analysis of CEA §4, including statutory language and legislative history, to determine that it does not apply extraterritorially); see also Psimenos v. E.F. Button & Co., Inc., 722 F.2d 1041, 1044 (2d Cir. 1983) (noting that "[i]n contruing the reaches of jurisdiction under the CEA, courts have analogized to similar problems under the securities law which have been more extensively litigated" and making such an analogy with respect to extraterritorial application); Rohrer v. FSI Futures, Inc., 981 F. Supp. 270, 276-77 (S.D.N.Y. 1997) (stating that the CEA is "silent regarding the extraterritorial jurisdictional over cases of alleged fraud"); Societe Nationale d' Exploitation Industrelle des Tabacs et Allumettes v. Salomon Bros. Int'l Ltd., 928 D. Supp. 398, 402-03 (S.D.N.Y. 1996) (same).

Moving to the second step, the Second Circuit explained that, like §10(b) of the SEA, the relevant provision of the CEA has a "clearly transactional" focus. Loginovskaya, 764 F.3d at 272. In Morrison, the Supreme Court ruled that the SEA's "focus" was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." 561 U.S. at 266; see Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 67 (2d Cir. 2012) (A transaction is a "domestic transaction" if "irrevocable liability is incurred or title passes within the United States."); see also Quail Cruise Ship Mgmt. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1310 (11th Cir. 2011) (same). Thus, "if

the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." RJR Nabisco, 136 S. Ct. at 2101; see Morrison, 561 U.S. at 266. The presumption applies "across the board, 'regardless of whether there is a risk of conflict between the American statute and a foreign law.'" RJR Nabisco, 136 S. Ct. at 2100 (quoting Morrison, 561 U.S. at 255). "Rather than guess anew in each case," courts "apply the presumption in all cases, preserving a stable background against which Congress can legislate with predictable effects." Morrison, 561 U.S. at 261 (emphasis added).

Accordingly, Mr. Alcocer-Roa submits that the CEA is focused on domestic forex transactions at the relevant period of the aaleged offense, and thus InovaTrade's forex spot activities and transactions that occurred in and from Panama were out of the CEA scope and CFTC jurisdiction. See Morison, 561 U.S. at 267; RJR Nabisco, 136 S. Ct. at 2100; see also De Atucha, 608 F. Supp. at 523; Zelener, 373 F.3d at 865. Thus, Mr. Alcocer-Roa submits that this Court should limited the territorial scope of the CEA to domestic transactions: "purchase[s] or sale[s]..made in the United States, or invol[ing] a security listed on a domestic exchange," but not to offshore forex spot transactions made by InovaTrade in Panama. See Morison, 561 U.S. at 268.

E. The Morrison Presumption Against Extraterritoriality Applies to the Wire Fraud Statute under CEA's Violations

Application of Morrison and its progeny has been expanded to included criminal cases. See Vilar, F.3d at 1, 5. A defendant facing securities fraud charges may be convicted only if "he has engaged in fraud in connection with (1) a security listed on a United States exchange, or (2) a security purchased or sold in the United States." Vilar, 729 F.3d at 67. If the security is not listed on a United States exchange as is the case here, Morrison's transaction test must be applied to determine if "defendants engaged in fraud with a domestic purchase or sale of securities" in the United States. Vilar, 729 F.3d at 76.37

37. Pre-Morrison case law squarely determined that Section 4 of the CEA does not affirmatively indicate that it applies extraterritorially. E.g. De Atucha, 608 F. Supp. at 519-24.

Thus, Mr. Alcocer-Roa submits that the Federal Government fails to allege a primary CEA violation for the reasons discussed above, so the wire fraud statute did not reach his conduct in Panama. Accordingly, he begins its analysis at the second step.

Hence, Mr. Alcocer-Roa submits that there is some ambiguity found as to the **"focus"** of the wire fraud statute. **See Elsevier, Inc. v. Grossman**, 199 F. Supp. 3d 768, 784 (S.D.N.Y. 2016) (**"It is not entirely clear sort of domestic conduct is 'relevant' to this statutory focus."**) (quotation marks omitted); **United States v. Gasperini**, No. 16-CR-441 (NGG), 2017 U.S. Dist. LEXIS 84116, 2017 WL 2399693, at *7-8 (E.D.N.Y. 2017) (explaining that some courts focus on the **"wires"** while others focus on the **"fraud,"** and ultimately concluding that the wire fraud statute's focus is **"the fraudulent scheme"**); Takhalov, 827 F.3d at 1213-13 (same). Nor is it entirely clear what level of domestic conduct is required. **See Morison**, 561 U.S. at 266 (presumption against extraterritoriality apples even where **"some domestic activity is involved in [a] case"**); European Community, 764 F.3d at 142 n.14 (**"We need not decide whether domestic conduct satisfying fewer that all of the statute's essential elements could constitutes a violation of such a statute."**); **Worldwide Directories, S.A. de C.V. v. Yahoo! Inc.**, No. 14-CV-7349 2016 U.S. Dist. LEXIS 44265, 2016 WL 1298987, at *9-20 (S.D.N.Y.) (**"The Second Circuit has not determined precisely how much domestic conduct neet be alleged to sustain the application of the [wire fraud] statute[]...."**). Neither the Supreme Court nor the Second Circuit has established a definitive test for the domestic reach of the federal wire fraud statute. **See European Community**, 764 F.3d at 141 (**"We need not now decide precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statutes...."**); **RJR Nabisco**, 136 S. Ct. at 2105 (reversing and remanding without providing guidance on the domestic reach of the wire fraud statute). But in **Petroleos Mexicanos**, the Second Circuit provides guideposts in determining the domestic reach of the wire fraud statute.

In **Petroleos Mexicanos**, (a summary order, after its decisions in **European Community**, but prior to the Supreme Court's decision), the Second Circuit considered whether a wire fraud scheme had sufficient connections with the United States to warrant domestic, rather

than extraterritorial, application of RICO. 572 F. App'x at 61. In Petroleos Mexicanos, the foreign defendants had obtained financing in the United States and transmitted seven false invoices for over $159 million to a trust in New York, and payment was made through that New York trust; but "[t]he activities involved in the alleged scheme-falsifying the invoices, the bribes, the approval of the false invoices-took place outside of the United States." See id.; Petroleos Mexicanos v. S.K. Eng'g & Constr. Co., No. 12-CV-9070, 2013 U.S. Dist. LEXIS 107222, 2013 WL 3936191, at *3 (S.D.N.Y. 2013), aff'd 571 F. App'x at 60. The Second Circuit concluded that the domestic contracts were insufficient to support a Rico claim. 572 F. App'x at 61. The domestic conduct at issue here is virtually identical, except for the alleged scheme-purchases and sales of forex spot transactions-through InovaTrade-which took place outside of the United States, in this case, in Panama. (See CR-DE:4:2.)

Thus, "[s]imply alleging that some domestic conduct occurred cannot support a claim of domestic application." Petroleos Mexicanos, 572 F. App'x at 61 (quoting Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 3233 (2d Cir. 2010)). An intent to use the U.S. wires to further a wire fraud is insufficient: "if the comestical conduct alleged its peripheral to the overall shceme, and the scheme is not directed to or from the United States, it does not matter that the defendant intentionally used U.S. wires in furtherance of a fraudulent scheme." Worldwide Directories, 2016 U.S. Dist. LEXIS 44265, 2016 WL 1298987, at *10 (citing Petroleos Mexicanos, 572 F. App'x at 61) (concluding that the alleged domestic conduct, revising and drafting opinions, was "fundamentally minor and peripheral in comparison to the core allegations of the complaint; that the [defendants] bribed, pressured, and intimitated members of the Mexican judiciary in pursuit of a favorable verdict."). Simply put, because the Federal Government relies exclusively on the CEA in pleading predicate acts, it has failed to state a claim sufficient to support extraterritorial application of wire fraud. Petroleos Mexicanos, 572 F. App'x at 61. To extend that the Federal Government relies on several allegations of domestic activity-banking transactions-to support its wire fraud claim, these, too, are insufficient. Id. Thus, the wire fraud allegations in this case in fact exceed the territorial

reach of the statute because the CEA does not provide a cause of action to the federal Government suing foreign or american defendants for alleged misconduct in connection with forex spot transactions at the relevant time of the alleged offense.

Accordingly, Mr. Alcocer-Roa submits that the Indictment is incorrect that extraterritorial CEA's violations was the underlying predicate offense for Mr. Alcocer-Roa's convictions. (CR-DE:4; CR-DE:86.) Thus, Mr. Alcocer-Roa cannot be held criminal liable for InovaTrade's activities and forex spot transactions that occurred in Panama.

F. The Rule of Lenity

The Supreme Court instructs that federal courts must first consider a question of statutory interpretation before addressing a vagueness challenge. Skilling v. United States, 130 S. Ct. 2896, 2929 177 L. Ed. 2d 619 (2010). Thus, Mr. Alcocer-Roa will discuss first his argument regarding the Rule of Lenity before he turning to address the constitutional question of fair notice and vagueness.

Mr. Alcocer-Roa submits that the Rule of Lenity should foreclose prosecution of this case. Especially, when the Federal Government alleged that InovaTrade and Mr. Alcocer-Roa had violated several statutory provisions of the CEA in prior two civil actions, and such violations are the basis of Mr. Alcocer-Roa's indictment and convictions, (16-16899 and 17-10578, 10/31/18), but the Supreme Court limited the securities law to (1) a security listed on a United States exchange, or (2) a security purchased or sold in the United States.

"When ambiguity exist, the ambit of criminal statutes should be resolved in favor of lenity." Izurieta, 710 F.3d at 1192. The rule "remains an important concerns in criminal cases, especially where a regulation giving rise to what would appear to be civil remedies is said to be converted into a criminal law." Id. "The rule of lenity requires ambiguos criminal laws to be interpreted in favor of the defendants subjected to them." United States, v. Santos, 553 U.S. 507, 514 (2009) (plurality opinion). The rule "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose

comand are uncertain, or subjected to punishment that is not clearly prescribed." Id./As the Supreme Court noted, the rule applies if "at the end of the process of construing what Congress has expressed," Callahan v. United States, 364 U.S. 587, 596 (1961), there is "'a griveous ambiguity or uncertainty in the statute,'" Muscarello v. United States, 524 U.S. 125 125, 138-39 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

The rule of lenity holds that a law must speak "in laguage that is clear and definite" if it is to order something crime. United States v. Bass, 404 U.S. 336, 347 (1971) (citation and internal quotation marks omitted). Two principles underlie this rule. First, "a fair warning should be given to the world in laguage that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible, the line should be clear." Id. at 348 (citation and internal quotaion marks omited). And second, the separation-of-powers doctrine requires legislatures, not courts, to define crimes. See id. Under the rule of lenity, when a criminal law is ambiguos, courts resolves doubts in favor of the defendants. Id.

Here, Mr. Alcocer-Roa submits that the lack of referrence in CEA (7 U.S.C. §§1 et seq.) at the relevant time of the alleged offense of extraterritorial jurisdiction does create some ambiguity and such ambiguity should be considered grevious when the text or history of of the regulation creates a strong presumption against extraterritoriality. See Morrison, 561 U.S. at 255. None of the federal statute used by the Federal Government show a clear and definite Congressional intent to impose criminal penalties for allegedly extraterritorial CEA's violations. See United States v. Thompson / Ctr. Arms Co., 504 U.S. 505, 518 (1992) (observing that rule of relinity applies to civil cases when civil law at issue is incorporated into a criminal statute or when a criminal statute is invoked in a civil action). Thus, Mr. Alcocer-Roa submits that the instant indictment is incorrect that extraterritorial CEA's violations was the underlying predicate offense for Mr. Alcocer-Roa's §1343 convictions. For these reasons, the Court should apply the Rule of Lenity in this case, and set aside Mr. Alcocer-Roa's convictions and dismiss the instant indictment with prejudice.

G. Fair Warning and Vagueness

In our constitution order, a vague law is not law at all. When Congress passes a vague law, the rule of courts under our Constitution is not to fashion new, clearer law to take it place, but to treat the law as nullity and invite Congress to try again.

Since the wire fraud statute requires **mens rea**, **see** United States v. Odoni, 782 F.3d 1226, 1232 (11th Cir. 2015) (**mens rea** standard for mail and wire fraud is **"knowingly and intentionally"**), Mr. Alcocer-Roa submits that he lacked knowledge that the CEA apply to InovaTrade at the relevant time of the alleged offense. Thus, Mr. Alcocer-Roa submits that the alleged fraud conduct in the Indictment under the CEA as to the underlying predicate offense to expand the application of the §1343 is unconstitutionally vague. Accordingly, Mr. Alcocer-Roa contends that the Indictment failed to provide him with fair notice that his conduct in InovaTrade in Panama was criminal. **See** United States v. Conner, 752 F.2d 566, 574 (11th Cir. 1985).

Fair notice insures that **"no man shall be held criminally responsible for conduct which he could not reasonably undertsand to be proscribed."** United States v. Lanier, 520 U.S. 259, 265 (1997) (citation omitted). For a fair notice, there are three related principles of statutory construction: First, **"the vagueness doctrine bars enforcement of 'a statute which either forbids or requires the doing og an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"** **Id.** at 266 (citation omitted). Second, strict construction of criminal statutes, **"or the rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."** Id. Third, **"due process bars courts from applying a novel construction of a criminal statyute to conduct that neither the statute, nor any prior judicial decision has fairly disclosed to be within its scope...."** Id.

With respect to Mr. Alcocer-Roa's fair notice challenge, since the wire fraud statute requires **mens rea**-it is well established that the required mental statute for this crime is

knowledge, **"it does relieve the statute of the objection that it punishes without warning an offense of which the accussed was unaware."** Conner, 752 F.2d at 574 (quoting **Screws v. United States**, 325 U.S. 91, 102 (1945). Applying the word knowingly to Mr. Alcocer-Roa's conduct, Mr. Alcocer-Roa must know that the CEA will applies to InovaTrade in Panama. **See Rahaif v. United States**, 139 S. Ct. 2191, 2196 204 L. Ed. 2d 594 (2019) (**"The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legions."**). But because Mr. Alcocer-Roa did not know **any** case law that states otherwise at the relevant time of the alleged offense, therefore, he cannot be held criminal liable for InovaTrade's activitites and forex **spot** transactions that occurred in and from Panama. Thus, Mr. Alcocer-Roa submits that the Court should overturn his convictions and dismiss the instant indictment with prejudice. **See United States v. Carll**, 105 U.S. 611, 612-13 (1982) (overturning a conviction based on the insufficiency of the indictment).

With respect to Mr. Alcocer-Roa's vagueness argument, **"[a] conviction fails to comport with due process if the statute under it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that is authorizes or encourages seriously discriminatory enforcement."** United States v. Williams, 533 U.S. 285, 304 (2008). Because the longstanding historical statutory presumption against **extraterritoriality** is a well settled principle in the American legal system, the **extraterritorial** application of the wire fraud statute based unpon **extraterritorial** CEA's violations as a predicate offense in this case is extremely unreasonable. Especially, when the SES, the Panamanian equivalent of the CFTC, took control of the instant **carbon copy prosecution**, after an investigation, acquitted Mr. Alcocer-Roa.**38** Thus, Mr. Alcocer-Roa submits that the Due Process Clause forecloses Mr. Alcocer-Roa's indictment, and the Court should dismiss the instant case with prejudice.

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38. Mr. Alcocer-Roa submits that one emerging trans-national trend is the phenomen of **"carbon copy prosecutions."** BNA described in 2011 as following: **"When foreign or domestic Jurisdiction A files charges based on a guilty plea or charging document from Jurisdiction B."**

CONCLUSION

The petition for a writ of **certiorari** should be granted.

Respectfully Submitted,

March 19, 2024.

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