

No. _____

In the
Supreme Court of the United States
OCTOBER TERM, 2021

MONICA RUIZ,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. IS THE INTERSTATE NEXUS REQUIRED IN § 1343 A SUBSTANTIVE ELEMENT OF THE CRIME OF WIRE FRAUD ?**
- II. WAS THE FACTUAL BASIS SUFFICIENT TO SUPPORT MS. RUIZ'S GUILTY PLEA?**
- III. DID THE GOVERNMENT ESTABLISH AN INTERSTATE NEXUS?**

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REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Ruiz*, No. 21-40723 (5th Cir. April 7, 2022)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Eastern District of Texas.

Consequently, Ms. Ruiz files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Texas because Ms. Ruiz was indicted for violations of Federal law by the United States Grand Jury for the Eastern District of Texas.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Article I, Section 8, Clause 3.

The United States Congress shall have power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. Article I, Section 8.

The Congress shall have Power... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

STATEMENT OF THE CASE

1. Procedural History.

On November 19, 2020, a Grand Jury for the Eastern District of Texas, Tyler Division, returned a four-count Indictment against the defendant. Counts 1, 2, 3, and 4 charge the defendant with Wire Fraud, in violation of 18 U.S.C. § 1343. The Counts 1, 2, 3, and 4 offenses occurred on or about December 3, 2015, October 13, 2016, June 10, 2017, and June 24, 2017, respectively. ROA. 1-14.¹ Ms. Ruiz is the only defendant in the case.

Pursuant to a non-binding Plea Agreement, on March 24, 2021, Ms. Ruiz appeared before U.S. Magistrate Judge Love and entered a plea of guilty to Count 1 of the Indictment. ROA. 139. The non-binding Plea Agreement required, among other stipulations, that Ms. Ruiz enter a plea of guilty to Count 1 of the Indictment. In particular, the parties in this case have stipulated to the following:

- Pursuant to U.S.S.G. § 2B1.1(a)(1), the base offense level is seven;
- Because the loss exceeded \$3,500,000 but did not exceed \$9,500,000, an 18-level increase is applicable pursuant to U.S.S.G. § 2B1.1(b)(1)(J);
- Because the offense resulted in substantial hardship to one or more victims,

¹In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

a two-level increase is applicable pursuant to U.S.S.G. § 2B1.1(b)(2)(A)(iii);

- Because the offense involved sophisticated means, and Ms. Ruiz intentionally engaged in and caused the conduct constituting sophisticated means, a two-level increase is applicable pursuant to U.S.S.G. § 2B1.1(b)(10)©;

- Because Ms. Ruiz knew or should have known a victim of the offense was a vulnerable victim, a two-level increase is applicable pursuant to U.S.S.G. § 3A1.1(b)(1);

- A reduction of three levels for acceptance of responsibility under U.S.S.G. § 3E1.1 applies.... The Government's request to decrease the offense level by one level in accordance with U.S.S.G. § 3E1.1(b) is contingent on Ms. Ruiz demonstrating acceptance of responsibility for the offense conduct and cooperating fully in recovering restitution for all relevant conduct;

- The parties stipulate the current unreimbursed losses caused by the Ms. Ruiz's criminal violations are \$4,851,871 and that this is the appropriate amount should the Court order restitution. Ms. Ruiz agreed to pay full restitution to the victims on the count of conviction and all relevant conduct.

Ms. Ruiz understands the amount of restitution owed will be determined at or before sentencing. However, the parties agree said restitution is limited to the value of the funds involved in the relevant offense conduct;

- Ms. Ruiz agrees to forfeit to the United States property noted in the Plea Agreement. ROA.174.

On March 25, 2021, U.S. District Judge Jeremy D. Kernodle accepted and approved the defendant's guilty plea but deferred acceptance of the Plea Agreement pending review of the presentence report. ROA.73. Ms. Ruiz was subsequently sentenced to a term of imprisonment of 97 months. ROA. 163. This sentence is to be followed by a term of supervised release of three years. ROA.165. No fine was imposed, but Ms. Ruiz was ordered to pay a \$100 special assessment and restitution in the amount of \$4,851,971 . ROA.163-164. Thereafter, Ms. Ruiz timely filed a Notice of Appeal. ROA.88-89.

On April 7, 2022, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

2. Statement of Facts.

Ms. Ruiz is a 47 year old lady with four children. She was born to a teen-aged mother in Brownsville, Texas. One of seven children, she has never met her father. As a young child, she was sexually abused by a relative. She dropped out of high school in the tenth grade.

Between 2008 and 2011, Ms. Ruiz was employed at Silverleaf The Villages Resorts on Lake Palestine in Flint, Texas. This is a time-share property where the

employees sell fractional ownerships in the resort property. The victim in this case was referenced as “D.O.” to protect his identity. He was both Senior Vice President and supervisor of Ms. Ruiz at Silverleaf Resorts. He was Ms. Ruiz’s boss. D.O. was a wealthy man from his years of working in the time-share industry. D.O. began dating Ms. Ruiz while they were working together. Ms. Ruiz was eventually fired from Silverleaf because of her relationship with D.O.; he retired shortly thereafter.

D.O. had seven children and four sisters, but his family lives out of state. D.O. financially supported his seven children and assisted his sisters and their children as well. ROA.156. Ms. Ruiz and D.O. lived together for several years in a romantic relationship. This relationship was known to his family. Ms. Ruiz visited his family with him. As one of his daughters testified, “Monica and I were pretty friendly. I, like my father, trusted her. I welcomed -- my husband and I welcomed her into our home in Georgia. She flew out there and visited us”. ROA. 157. Ms. Ruiz’s children sometimes lived with the couple. D.O. died in April 2021.

It is alleged that Ms. Ruiz committed wire fraud. D.O. gave her a substantial amount of money over the years during their romantic relationship. That is the conduct that the Government relied upon to charge Ms. Ruiz with wire fraud, and is the basis of the charge to which Ms. Ruiz entered a plea of guilty. ROA.139.

The Presentence Report established a base offense level of 7 for Count 1 pursuant to U.S.S.G. § 2B1.1. Pursuant to U.S.S.G. § 2B1.1(b)(1)(J), an 18-level upward adjustment was added because the loss was more than \$3,500,000 but less than \$9,500,000. The PSR officer assessed a two-level upward adjustment pursuant to 2B1.1(b)(2)(A)(iii) because the offense involved a substantial financial hardship to one or more victims. A two-level upward adjustment was made pursuant to U.S.S.G. § 2B1.1(b)(10) (c) because the PSR officer found that the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means. The PSR officer also assessed a two-level upward adjustment pursuant to U.S.S.G. 3A1.1(b)(1) because the PSR officer found that the defendant knew or should have known a victim of the offense was a vulnerable victim. The PSR officer made a three-level downward adjustment for acceptance of responsibility.

The total offense level was 28. Ms. Ruiz had a criminal history category of I. The advisory guideline range of imprisonment was 78 to 97 months. Ms. Ruiz was sentenced to a 97-month sentence, followed by a term of supervised release for three (3) years. The notice of appeal was then timely filed. On April 7, 2022, the Fifth Circuit affirmed Ms. Ruiz's conviction and sentence. *See United States v. Ruiz*, No. 21-40723 (5th Cir. 2022)(not published).

REASONS WHY CERTIORARI SHOULD BE GRANTED

- I. THE FACTUAL BASIS WAS INSUFFICIENT TO SUPPORT MS. RUIZ'S GUILTY PLEA.**
- II. NO INTERSTATE NEXUS WAS ESTABLISHED.**
- III. THE INTERSTATE NEXUS REQUIRED IN § 1343 IS A SUBSTANTIVE ELEMENT OF THE CRIME OF WIRE FRAUD**

To establish wire fraud , the government must prove (1) a scheme to defraud; (2) the use of, or causing the use of, wire communications in interstate or foreign commerce in furtherance of the scheme; and (3) a specific intent to defraud. *See* § 1343; *United States v. Sanders*, 952 F.3d 263, 277 (5th Cir. 2020); *United States v. del Carpio Frescas*, 932 F.3d 324, 329 (5th Cir.), *cert. denied*, 140 S. Ct. 620 (2019); *United States v. Simpson*, 741 F.3d 539, 547-48 (5th Cir. 2014).

A conviction under § 1343 “requires that the wire communication cross state lines.” *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988) (explaining that where relevant telephone calls were all intrastate, there was no act that could have constituted wire fraud); *United States v. Izydore*, 167 F.3d 213, 219 (5th Cir. 1999)(“[T]he communication at issue must satisfy the interstate nexus set forth in § 1343; it is an immutable requirement.”)(reversing wire fraud conviction based on intrastate telephone calls and noting that the interstate nexus requirement is not a

substantive element of wire fraud but arises from constitutional limitations on congressional power over intrastate activities); 18 U.S.C. § 1343 (prohibiting transmission of fraudulent communication by wire “in interstate or foreign commerce”). The use of the internet alone is insufficient to establish the required interstate nexus. *See United States v. Kieffer*, 681 F.3d 1143, 1155 (10th Cir. 2012)(“[O]ne individual’s use of the internet, ‘standing alone,’ does not establish an interstate transmission ... because the origin and host servers, whether one and the same or separate, might be located in the same state as the computer used to access the website.”).

In this case, there was insufficient evidence produced that the relevant communications ever crossed state lines. The government failed to prove the interstate nexus necessary for federal jurisdiction. Count One alleged that Ms. Ruiz “knowingly transmitted and caused to be transmitted by means of wire communication in interstate and foreign commerce the writings, signs, signals, pictures, and sounds described below... “. ROA. 11. Count One references a single wire transfer of \$1500 on December 3, 2015. ROA. 11. Ms. Ruiz admitted in the factual basis that she “transmitted or caused to be transmitted by way of wire, radio, or television communications, in interstate or foreign commerce, writings, signs, signals, pictures, or sounds for the purpose of executing the scheme”. ROA. 58.

The Factual Basis references several instances of fraudulent statements and encompasses numerous financial transactions that support the order of restitution. The Factual Basis does not address the specific wire transfer of \$1500 on December 3, 2015 that forms the basis of Count One-a legally discreet offense. It is unclear what bank was used or where the transfer was sent. The Government failed to establish that there was any interstate nexus in Count One. Ms. Ruiz entered a plea of guilty to one count of wire fraud, not a conspiracy to commit wire fraud. Therefore, there is insufficient evidence that the wire transfer referenced in Count One crossed state lines.

The communication at issue must satisfy the interstate nexus set forth in § 1343; it is an immutable requirement. *See United States v. Darby*, 37 F.3d 1059, 1067 (4th Cir. 1994) (noting that the interstate nexus requirement of wire fraud is not a substantive element, but arises from constitutional limitations on congressional power over intrastate activities), *cert. denied*, 514 U.S. 1097, 115 S.Ct. 1826, 131 L.Ed.2d 747 (1995); *see also United States v. Izydore*, 167 F.3d 213, 220 (5th Cir. 1999) (reversing a wire fraud conviction because the government failed to provide sufficient evidence of the interstate nexus element, "an immutable requirement"). The "fact that confers federal jurisdiction," in 18 U.S.C. § 1343 is the interstate nexus : use of an interstate communication "is included in the statute merely as a ground for federal

jurisdiction.... If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied." *United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir.1970). The interstate nexus is necessary, of course, "because Congress's power over intrastate activities is limited by the Commerce Clause." *United States v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir.1996).

Without holding the government to its burden to prove the requisite federal nexus, federal courts risk "turn[ing] almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance." *Fischer v. United States* , 529 U.S. 667, 681 (2000).

Ms. Ruiz maintains that the government did not prove all the elements necessary to sustain a conviction for wire fraud . The evidence presented in this case lacks not establish the requisite interstate nexus. Her conviction should be vacated.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of June 2022, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

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/s/ Amy R. Blalock
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No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2021

MONICA RUIZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
for the Fifth Circuit

No. 21-40723
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

April 7, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MONICA RUIZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:20-CR-92-1

Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:*

Monica Ruiz pleaded guilty, pursuant to a plea agreement, to one count of wire fraud in violation of 18 U.S.C. § 1343, in connection with a scheme involving the use of wire transfers to defraud the victim. As part of her plea agreement, Ruiz generally waived her right to appeal her conviction

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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and sentence, although she reserved the right to challenge a sentence exceeding the statutory maximum or the effectiveness of counsel. She received a sentence of 97 months in prison, to be followed by a three-year term of supervised release, and was ordered to pay \$4,851,971 in restitution.

In her sole ground for relief on appeal, Ruiz asserts that her plea was not supported by a sufficient factual basis. The waiver provision does not bar this argument. *See United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008). However, because Ruiz did not raise this claim in the district court, we review for plain error. *See United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010). To prevail on plain error review, Ruiz must show a forfeited error that is clear or obvious and that affects her substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Even if this showing has been made, this court will exercise its discretion to correct the error only if it “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks and citation omitted). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it.” *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004).

In order to obtain a conviction under § 1343, the Government must establish that a scheme to defraud was “perpetrated by means of wire, radio, or television communication in interstate or foreign commerce.” *United States v. McMillan*, 600 F.3d 434, 447 n.24 (5th Cir. 2010). Ruiz argues the factual basis is insufficient because the record does not include specific facts showing that any of the wire transfers of funds sent in furtherance of the scheme crossed state lines. It is well-established in this circuit that proof of an interstate transmission is required for a wire fraud conspiracy conviction. *See Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988). However, Count One of the indictment, to which Ruiz pleaded guilty, did state that as part of the scheme, a \$1,500 wire transfer was sent “by means of wire communication in interstate and foreign commerce,” and Ruiz admitted to this fact. Thus,

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she has not shown any clear or obvious error. *See Puckett*, 556 U.S. at 135. Even if she had done so, she has not demonstrated that the alleged error affected her substantial rights, as she does not assert that she would not have pleaded guilty but for the error. *See Dominguez Benitez*, 542 U.S. at 83; *see also United States v. Castro-Trevino*, 464 F.3d 536, 540-44 (5th Cir. 2006) (applying *Dominguez Benitez* to a challenge to the factual basis).

Accordingly, the judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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Suite 115
NEW ORLEANS, LA 70130

April 07, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 21-40723 USA v. Ruiz
USDC No. 6:20-CR-92-1

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P.** 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and **5TH CIR. R.** 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P.** 40 and **5TH CIR. R.** 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

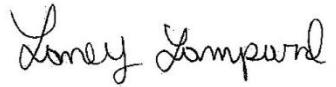
Direct Criminal Appeals. **5TH CIR. R.** 41 provides that a motion for a stay of mandate under **FED. R. APP. P.** 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P.** 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By: Laney L. Lampard, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Bradley Elliot Visosky