

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SEAN GRAHAM

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. By denying relief, did the Ninth Circuit Court of Appeals err in holding that the masking of trial witnesses was not a violation of defendant's Fifth Amendment right to due process and his Sixth Amendment right to confront the government's witnesses, but, rather, was a permissible and non-prejudicial measure to advance an important public interest, to wit: to prevent the spread of the SARS-COV-2 virus among trial participants?
2. Does the decision in the instant case conflict with the decision of another Circuit Court of Appeals' decision on an important matter, to wit: whether, in a wire fraud case, the government must prove that the wired funds must necessarily have been sourced, at least in part, from the tainted portion of a specific pool of funds containing both tainted and untainted funds?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner, Michael Sean Graham (“Graham”), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner’s positions asserted herein.

OPINIONS BELOW

The Court of Appeals denied relief in its Memorandum Decision dated February 26, 2024 (Appendix B). The Court of Appeals denied Petitioner’s Petition for Rehearing/En Banc Hearing on April 9, 2024 (Appendix C). The district court’s minutes and Order are unreported.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit denying relief was entered on February 24, 2024, and its Order denying Petitioner’s Petition for Panel Rehearing/En Banc Hearing was entered on April 9, 2024. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Wire Fraud (18 U.S.C. § 1343)

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment to the United States Constitution reads as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On October 25, 2016, an indictment was filed in the United States District Court, District of Arizona, charging Graham with 20 counts of Wire Fraud (Counts 1 – 20) in violation of 18 U.S.C. § 1343, four counts of Mail Fraud (Counts 21-24), in violation 18 U.S.C. § 1341, and forfeiture allegations, pursuant to 18 U.S.C. § 981(a)(1)(c) and 28 U.S.C. § 2461(c). (7-ER-1469-1478)¹

The government alleged that Graham operated a business, Strat X, LLC, a.k.a., StratFX (“Strat X”), that purported to own proprietary software with algorithms designed to hedge foreign currency transactions in the foreign currency exchange market (“FOREX”). Between 2013 and 2016, Strat X allegedly received \$2,135,770 from investors believing that Graham would use his software and trading algorithms to make the investors money trading on the FOREX market. The government alleged that Graham returned \$393,224 to the investors, and the remaining \$1,742,545 was diverted by

¹ The abbreviation “Doc.” refers to the docket entries in the Clerk’s record, and will be followed by the docket number designated in the Clerk’s file. The abbreviation “ER” refers to the Excerpts of the Record, and will be preceded by the volume number, and followed by the relevant page number referenced in Appellant’s Excerpts of the Record.

Graham for uses other than investing in the FOREX market. The government described Graham's operation as a "Ponzi" scheme because Graham allegedly used money received from some of the investors to pay other investors, rather than depositing the money in segregated investors' accounts and paying investors from their own accounts. The case went to trial.

Petition, Michael Sean Graham, is challenging his September 21, 2021 convictions on Counts, 2, 5, 6, 7, 8, 9, 10, 12, 14, 15, 18, 19, 20, 22, and 24 of the indictment. The remaining counts were dismissed.

CASE HISTORY

The case went to trial on April 19, 2021². Just prior to the start of the trial, the trial judge informed the parties that all witnesses would be masked to protect trial participants from contracting the COVID-19 virus. The judge declared that each witness would testify without a mask for the first fifteen minutes, or so, of his/her testimony, after which a mask (over the nose) would be worn. (1-ER-108-109) Neither party objected to this procedure. District Court, District of Arizona, General Order 21-05 containing all COVID-19 court protocols controlled the April 19, 2021 trial in this case. Notably, that directive did not require trial witness masking, and, in fact, the trial judge in the instant case allowed witnesses to testify unmasked for the first fifteen

² Before the jury was empaneled, the government moved to dismiss Counts 13, 16, 17 and 21 of the Indictment. During the trial, the government moved the Court to reinstate Count 21 and, instead, dismiss Count 23. The court granted that motion.

minutes or so of their testimony. Additionally, all cloth masks were deemed acceptable, with no minimum filtering requirements. Trial participants were allowed to bring their own versions of masks to court. The jurors, themselves, were all masked, and were positioned some distance from one another, and from the witnesses, as they testified. (1-ER-108-109) (7-ER-1363-1367) The witnesses all testified from behind a large plexiglass shield. Graham did not object to these procedures.

At the close of the government's case-in-chief, Graham moved for a directed verdict under Rule 29, Fed.R.Crim.Proc. He argued that because of the fungible nature of money, and the comingling of alleged investor funds with funds from other sources, the government failed to prove that the wire transfers alleged in Counts 2, 5, 6, 9, 10, 14, 15, 18, 19 and 20 were from funds that had any connection to the alleged scheme. The district court denied the motion.

At the conclusion of the evidence, the jury found Graham guilty on Counts 2, 5-10, 12, 14-15, 18-20, 22 and 24.

On September 21, 2021, the district court imposed concurrent prison terms of 72 months on Counts 2, 5, 6, 7, 8, 9, 10, 12, 14, 15, 18, 19, 20, 22 and 24 of the indictment, with all prison terms to be followed by consecutive 36-month terms of supervised release, to be run concurrently with one another. A special assessment was imposed in the amount of \$1,500. Restitution in the

amount of \$1,318,814 was ordered based on the district court's findings at the September 21, 2021 sentencing proceeding. (1-ER-45)

On October 29, 2021, following a stipulation between the parties regarding restitution, the district court filed an Amended Judgment in a Criminal Case, amending (only) the restitution figure upward to \$1,389,739. (1-ER-2-7) (See Appendix A, hereto)

Graham appealed from those convictions and sentences, and a three-judge panel of this Court denied relief. (See Appendix B, hereto)

On appeal, Graham argued, *inter alia*, that he was denied his Fifth Amendment right to due process, and his Sixth Amendment right to confront the government's witnesses, due to the court-ordered masking of trial witnesses. He argued the Confrontation Clause assures the defendant the presence of the government's witnesses upon whom the defendant and the jury can look while they testify, and the Due Process Clause demands that the *defendant's* witnesses also be seen by the jury while testifying. This did not happen. He posited that even under the plain error standard of review, the judgments of guilt and corresponding sentences on all counts of conviction should be vacated, and the case remanded for further proceedings. (Graham Opening Brief, pp. 6-14)

Given the plethora of publicly available scientific studies demonstrating that masking was/is ineffectual in preventing the spread of the COVID-19 virus, the Panel had the option of remanding the case for an evidentiary

hearing to determine whether the masking of witnesses, in retrospect, was necessary to further an important public policy, i.e., to protect the trial participants from contracting the COVID-19 virus. Instead, the Panel held, in pertinent part, as follows:

Graham next alleges that the district court violated his confrontation clause and due process rights by requiring witnesses to testify while masked during some, but not all, of their testimony. Because Graham did not object to the masking policy at trial, we review for plain error. *United States v. Olano*, 507 U.S. 725, 732 (1993).

The district court did not plainly err. Considering that the trial took place during the COVID-19 pandemic, the masking requirement was “necessary to further an important state interest,” namely, the health of trial participants. *United States v. De Jesus-Casteneda*, 705 F.3d 1117, 1120 (9th Cir. 2013). And the “reliability of the [witnesses’] testimony was otherwise assured” because they were present in the courtroom, testified under oath, were subject to cross-examination, unmasked during some of their testimony, and their demeanor and body language were visible. *Id.* at 1121. Nor did the masking requirement infringe upon Graham’s due process rights. *Id.*

(See Appendix B, hereto)

Graham also argued that the government failed to establish that the wire transfers alleged in Counts 2, 5, 6, 9, 10, 14, 15, 18, 19 and 20 of the indictment were sourced from the tainted portion of a specific pool of funds containing both tainted and untainted funds, and for that reason, the district court erred in denying Graham’s motion for acquittal on those counts.

The Panel responded as follows:

Graham also challenges the sufficiency of the evidence underlying his convictions. Because he did not renew his

motion for acquittal at the close of evidence, we review his challenge for plain error or to prevent a miscarriage of justice. *United States v. Barragan*, 263 F.3d 919, 922 (9th Cir. 2001). We conclude that, considering the evidence in the light most favorable to the prosecution, a rational trier of fact could find the essential elements of the crimes were proven beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc).

Counts 2, 5, 6, 9, 10, 14, 15, 18, 19 and 20 concern the transfer of funds from Graham's business account to a personal bank account. The government was not required to prove that all the funds in the business account could be "traced back to a particular unlawful activity." *United States v. Lazarenko*, 564 F.3d 1026, 1036 (9th Cir. 2009). Because at least some of the funds in the business account were deposited by individuals who testified as to false statements by Graham that induced them to invest, and who later received falsified statements misrepresenting their earnings, a reasonable juror could conclude that transfers out of that account were "in furtherance" of the fraud. *Id.*

(See Appendix B, hereto)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court, or has decided an important federal question in a way that conflicts with relevant decisions of the United States Supreme Court.

Ordering the masking of both government and defense trial witnesses, absent a science-based reason for doing so did *not* serve an important public interest, and, therefore, constituted a violation of Graham's rights under the

Due Process and Confrontation Clauses, and was plain, if not structural, error under *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

Additionally, the Ninth Circuit Court of Appeals decision in this case (relying on *Lazarenko, supra*) regarding the government's burden to trace funds in wire fraud counts to tainted funds conflicts with the Fifth Circuit's decision in *United States v. Poole*, 557 F.2d 531, 536 (5th Cir. 1977).

ARGUMENT

In denying relief, the Panel failed to address, or even acknowledge, Graham's argument that the masking of trial witnesses was unnecessary to protect the health of trial participants. Rather, the Panel appears to have accepted, uncritically, the notion that masking was, in fact, protective, and, therefore, advanced an important public policy, despite the large number of scientific studies to the contrary cited in Graham's appellate brief, and available to the trial court at the time of the trial.

Graham posits that the masking of trial witnesses violated his rights under the Confrontation and Due Process Clauses of the United States Constitution.

The Confrontation Clause assures the defendant the presence of witnesses "upon whom [defendant] can look while being tried. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988). The Supreme Court has stated that the central value of the Confrontation Clause is having the witness "stand face to face with the jury in order that they may look at him, and judge by his demeanor

upon the stand and the manner in which he gives his testimony whether his is worthy of belief.” *California v. Green*, 399 U.S. 149, 158 (1970).

The witnesses in the instant case were unmasked for the first fifteen minutes, or so, of their testimony, but each was masked during the majority of their testimony. Moreover, the over-the-nose masks in the instant case revealed little of the witness’ facial expressions. The rationale for masking all of the witnesses in the instant case – to protect those present in the courtroom from contracting the COVID-19 virus – is/was not supported by science, and was likely ineffectual and unnecessary to advance an important public policy.

There is no evidence in the record that any of the witnesses were ill, or otherwise experiencing COVID-19-like symptoms, and, by the time the trial took place, the idea that masking prevents the spread of the disease had been largely debunked. *See, e.g.*, Paul Elias Alexander, PhD., *More than 150 Comparative Studies and Articles on Mask Ineffectiveness and Harms* (Dec. 20, 2021)³, <https://centerforneurologyandspine.com/do-masks-work-see-the-review-of-over-150-studies-below/> (the body of evidence indicates that face masks are largely ineffective in controlling the transmission of the Covid-19-Virus); Prof. Carl Heneghan & Tom Jefferson, *Landmark Danish study shows face masks have no significant effect*, <https://physiciansqualitycare.com> (“Danmask-19” trial in Denmark revealed

³ A number of those study results were available prior to the trial in this case.

that any effect masks have on preventing the spread of COVID-19 is small); Joel Zinberg/Inside Sources, *Point: There's No Evidence That Masks Work* (May 6, 2022), https://recordnet.com/story/opinion/2022/05/06_point-there's-no-evidence-masks-work/9677658002/ (Two recent randomized controlled clinical trials of the effectiveness of masking in preventing the spread of COVID-19 revealed little or no benefit from mask wearing).

The important public policy purportedly advanced by the district court was the protection of the health of the trial participants. However, that interest was not science-based, particularly when considering that the witnesses were situated away from the jury and behind a large plexiglass shield, and the jury members were masked and separated from one another in the courtroom. There was simply no science-based reason to require the masking of witnesses, and it is little consolation that the witnesses were unmasked for the first fifteen minutes or so of their often lengthy testimony. Nor is it any consolation that the decision to mask the witnesses was well intentioned, and/or based on (then-controversial) information emanating from the Center for Disease Control, or some other government entity. The fact remains that Graham was deprived of certain of his constitutional rights for reasons that were specious.

Due process also arguably requires that a defendant have a full opportunity to present *defense* witnesses who are fully visible to the jury, and whose demeanor and facial expressions are on full display. See, e.g.,

Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (“The right to offer the testimony of witnesses...is in plain terms the right to present a defense, the right to present the defendant’s version of the facts...[the accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law”). That did not occur here. Graham’s expert witness, Michael Haugen, was masked throughout most of his testimony.

Finally, it is notable that the trial judge offered the parties no alternatives to masking, such as the examination of witnesses using live video feed.

While plain error review likely applies here, the error was plain under *Coy, supra*, and *California v. Green*, 399 U.S. 149, 158 (1970), given the absence of a genuine public policy reason for masking the trial witnesses. **Before taking it upon himself to order the masking of trial witnesses, the trial judge had a duty, *sua sponte*, to create a better (science-based) record than that provided through a controversial health advisory from a government agency to justify the stripping away of Graham’s Fifth and Sixth Amendment rights.**

Admittedly, *Coy*, *Green* and *Chambers* are not factually similar to the instant case, but the principles advanced in those cases have clear application here. The error affected Graham’s substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial

proceedings.

The Supreme Court has opined that *the right to confront, face to face, one's accusers at trial is fundamental to a fair trial*. While exceptions might exist, “they would surely be allowed only when necessary to further an important public policy”. *Coy* at 1021. *This Court then made clear that exceptions merely rooted in generalized public policy, not deemed specifically applicable to the testifying witness, would not be allowed. Id.* In *Coy* (screen placed between defendant and sexual abuse victim/witnesses during trial), the Court found reversible error, and through its citation to *Pointer*, suggested a Sixth Amendment violation *could* rise to the level of structural error.

Here, the jury was not allowed an unobstructed view of the witness' faces while they testified, *including the defendant's expert*. Absent a science-based reason for the masking of witnesses, this was a clear violation of Graham's confrontation and due process rights under the Constitution.

On these facts, Graham was arguably entitled to at least have the case remanded to the trial court for an evidentiary hearing to determine whether, in retrospect, the masking of witnesses in the courtroom was truly necessary to further an important public policy, particularly in light of the plethora of scientific studies published both before and after the trial debunking the notion that masking is/was effective in preventing the spread

of the COVID-19 virus.⁴

Regarding the district court's denial of Graham's motion for acquittal on Counts 2, 5, 6, 9, 10, 14, 15, 18, 19 and 20, those counts all pertain to monies transferred, by wire, from a bank account (Strat X) controlled by Graham to a Cecilia Cordova and/or a Cecilia Valenzuela. (7-ER-1475-1476) However, for these transfers to constitute wire fraud, the government had to prove, beyond a reasonable doubt, that the funds described in those accounts were from "investors" in Graham's alleged scheme. However, as government's trial exhibit 101 (9-ER-1706) clearly shows, \$201,000 was deposited into the Strat X account between 9/05/14 and 10/16/14 by people/entities that the government failed to prove were "investors" in the alleged scheme. The following is a chart (from trial exhibit 101) (9-ER-1706) of people/entities who transferred funds to Graham's Strat X account about

⁴ The lack of clarity on this issue has invited a wide range of disparate approaches by district courts to address the problem – some affording adequate due process, and some arguably not. See, e.g., *United States v. James*, No. CR-19-0801-001-PTC-DLR, 2020 WL 6081501 (D.Ariz. October 15, 2020) (masking of trial witnesses required); *United States v. Tagliaferro*, 531 F.Supp.3d 844 (S.D.N.Y. 2021) (defendant masked, but trial witnesses unmasked); *United States v. Crittendon*, No. 4: 20-CR-7 (CDL), 2020 WL 4917733, at *5 (M.D.Ga. August 21, 2020) (witness required to wear face shields *or* testify behind plexiglass shield, rather than wearing face masks, to alleviate any Confrontation Clause concerns); *United States v. Petit*, 496 F.Supp.3d 825 (S.D.N.Y. 2020) (Confrontation Clause issue addressed by having witnesses testify from behind a plexiglass encasement rather than being masked); *United States v. Thompson*, 543 F.Supp.3d 1156 (D.N.M. 2021) (vaccinated trial participants not required to wear face masks. Trial witnesses required to replace face masks, if any, with clear face shields while testifying); *United States v. McClellon*, No. 2:22-CR-00073-LK (W.D.Wash. December 15, 2023) (trial witnesses directed not to wear face masks unless there is a medical reason requiring such protection); *United States v. O'Sullivan*, 20-CR-272 (PKC) (E.D.N.Y. Oct. 27, 2023) (witnesses allowed to testify unmasked, behind plexiglass shield with clear face shield); *United States v. Bhogireddy*, 19-CR-00769 (N.D.Ill. March 1, 2024) (trial witnesses not required to wear masks); and *United States v. Chen*, 17-CR-00603-BLF-1 (N.D.Cal. June 29, 2021) (vaccinated witnesses not required to wear masks. Unvaccinated witnesses required to wear masks.).

which little, if any, evidence was produced at trial connecting them to Graham's alleged scheme:

<u>Source</u>	<u>Date</u>	<u>Amount</u>
Till Dark Investments/Marc Jacobs	9/05/14	\$20,000
Christopher York	9/08/14	\$50,000
Till Dark Investments/Mark Jacobs	9/19/14	\$30,000
H. Dan Hill/Mach One Air Charters, Inc.	9/25/14	\$50,000
Kenneth C. Ward and Emily Ward	10/01/14	\$ 1,000
H. Dan Hill/Mach One Air Charters, Inc.	10/16/14	\$50,000
Harrison Andrews	2/06/15	\$30,000
Harrison Andrews	2/19/15	\$25,000
KP Investments II LLC/David Erickson	2/17/15	\$ 5,000

On 10/28/14, Till Dark Investments/Mark Jacobs received back \$50,000. On 11/03/14, Kenneth C. Ward and Emily Ward received back \$975. On 3/05/15, Harrison Andrews received back \$23,489, and on 3/16/15, Andrews received back another \$28,611. Reducing the aforementioned transfers (\$261,000) by the \$103,100 returned to those people/entities, a net \$157,900 was received during that time frame from people/entities not alleged in the indictment to be victims of the alleged scheme, with the exception of Dan Hill, who is mentioned in the scheme section of the indictment, but not in any of the counts. Neither Hill nor the others testified at trial. And while they all were characterized as "investors" on some of the

government's summary exhibits, virtually no evidence, beyond the tracing of funds from their accounts to the Strat X account, was presented at trial establishing that they were in fact, investors in the alleged scheme. (3-ER-412-422) In fact, the government's expert, Russell Tarabour, was unable to explain why the above-named sources were characterized as "investors". (3-ER-412-422)

Counts 2, 5, 6, 9, 10, 14, 15, 18, 19 and 20 of the indictment involved the following transfers:

Count 2: \$30,000 from Strat X to Cecilia Valenzuela on October 3, 2014;

Count 5: \$20,000 from Strat X to Cecilia Cordova on November 3, 2014;

Count 6: \$25,000 from Strat X to Cecilia Cordova on November 24, 2014;

Count 9: \$25,000 from Strat X to Cecilia Cordova on December 12, 2014;

Count 10: \$10,000 from Strat X to Cecilia Cordova on December 23, 2014;

Count 14: \$12,000 from Strat X to Cecilia Cordova on February 9, 2015;

Count 15: \$38,000 from Strat X to Cecilia Cordova on February 12, 2015;

Count 18: \$25,000 from Strat X to Cecilia Cordova on March 16, 2015;

Count 19: \$5,000 from Strat X to Cecilia Cordova on June 15, 2015;

and

Count 20: \$4,000 from Strat X to Cecilia Cordova on July 13, 2015.

(7-ER-1475-1476)

While the \$194,000 transferred to Cordova/Valenzuela in the above-described counts slightly exceeds the \$157,900 that came in from the aforementioned people/entities not conclusively tied to the scheme alleged in the indictment, the government failed, at trial, to rule out other non-investor deposits to the Strat X accounts being the sources of those transfers. The government's trial exhibits describing Strat X account activity shows a \$33,975 deposit on 7/13/15 that was not attributed to a specific alleged investor (8-ER-1558-1559), and Strat X account activity for April and May, 2015 is not included among the government's trial exhibits. (8-ER-1554-1559)

As Graham's expert witness, Michael Haugen, correctly pointed out during his trial testimony, once the alleged investor funds were commingled with the non-investor funds, it was not possible to determine whether certain transfers from Strat X were from alleged investors, or were from sources unrelated to the alleged scheme.

It was not enough for the government to simply characterize certain people/entities as "investors" on the summary charts/exhibits. The

government had the burden to prove, beyond a reasonable doubt, that each alleged investor was, in fact, a victim of Graham's alleged scheme, and the government clearly failed to do so with respect to the above-named people/entities, who, collectively, transferred a net \$157,900 to Strat X. That failure, and the failure to connect to "investors" other monies that were (or may have been) deposited to the Strat X account during the relevant time period, deprived the jury of any basis upon which to conclude, beyond a reasonable doubt, that the wire transfers alleged in Counts 2, 5, 6, 9, 10, 14, 15, 18, 19, and 20 were from funds that had any connection to the alleged scheme.

Relying on *United States v. Lazarenko, supra*, the Panel held because at least some of the funds in the pooled account were tainted, a reasonable juror could have concluded, without tracing the wire transfers to tainted money, that *all* of the aforementioned transfers of funds out of that account were "in furtherance" of the fraud. Presumably, this decision would allow a guilty verdict to stand where a single tainted dollar is deposited to a multimillion-dollar bank account, and a single dollar is later wired to the account owner's wife.

In *United States v. Poole, supra*, the Fifth Circuit Court of Appeals reversed a conviction for interstate transportation of a security taken by fraud where the transfer of moneys from an account containing both tainted

and untainted money was less than the untainted portion of the account. *Id.* at 535-36.

Thus, the Panel's decision in the instant case appears to conflict with Fifth Circuit's decision in *Poole*.

CONCLUSION

By denying relief, the Ninth Circuit Court of Appeals erred in holding that the masking of trial witnesses was not a violation of defendant's Fifth Amendment right to due process and his Sixth Amendment right to confront the government's witnesses, but, rather, was a permissible and non-prejudicial measure to advance an important public interest, to wit: to prevent the spread of the SARS-COV-2 virus among trial participants.

Moreover, the decision in the instant case conflicts with the decision of another Circuit Court of Appeals' decision on an important matter, to wit: whether, in a wire fraud case, the government must prove the wired funds must necessarily have been sourced, at least in part, from the tainted portion of a specific pool of funds containing both tainted and untainted funds.

For the foregoing reasons, this Court should grant this petition for writ of certiorari, reverse the decision of the Ninth Circuit Court of Appeals, and remand the case with instructions.

RESPECTFULLY SUBMITTED this 19th day of June, 2024, by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
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