No. _____

In the

# Supreme Court of the United States

**MATTHEW GATREL,** Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

On Petition for a 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. Whether petitioner Matthew Gatrel's convictions should be reversed because the government presented insufficient evidence to support his convictions. He was convicted of causing or attempting to cause damage to protected computers, but after six years of investigation the government was unable to produce evidence of damage to even one single computer. The reason is simple: no computers were damaged because the Websites were incapable of causing damage.

2. Whether Gatrel's convictions should be reversed due to the district court's erroneous jury instruction. To obtain a felony conviction, the government was required to prove that Gatrel damaged ten protected computers within a one-year period. Since there was no evidence of damage, Gatrel requested that the jury be required to return a unanimous verdict on which ten computers were damaged during the one-year period. The district court's refusal to require unanimity violates the Supreme Court's and this Court's principles; *see, e.g.*, *Richardson v. United States*, 526 U.S. 813, 815 (1999), *Erlinger v. United States*, 2024 U.S. LEXIS 2715, 2024 WL 3074427 (2024).

3. Whether the indictment must be dismissed for lack of venue. Gatrel resided in Illinois. The government filed the indictment in the Central District of California, relying upon the purported presence of codefendant Juan Martinez in the Central District. However, at the eleventh hour the government elected not to call Martinez to testify at trial, and therefore did not introduce any evidence to establish venue in the Central District.

4. Whether Gatrel's sentence should be reversed because the district court erred in calculating the Sentencing Guidelines range, by imposing duplicative enhancements for sophistication of the offense.

## RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit

*United States v. Gatrel*, No. 22-50138

Unpublished Memorandum disposition affirming Gatrel's convictions and sentence filed on December 22, 2023 (App. 2)

Order denying petition for rehearing and rehearing en banc filed on April 1, 2024 (App. 1)

United States District Court for the Central District of California

*United States v. Gatrel,* No. 19-cr-36-JAK

Judgment and Commitment Order filed on June 13, 2022 (App. 9)

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## PETITION FOR WRIT OF CERTIORARI

Matthew Gatrel petitions for a writ of certiorari to review the judgment and Memorandum decision of the United States Court of Appeals for the Ninth Circuit in his case.

## OPINIONS BELOW

The Ninth Circuit's Memorandum decision in *United States v. Gatrel*, No. 22-50138, was not published. (App. 2) The district court's Order in *United States v. Gatrel*, Central District of California Case No. 19-36-JAK, also was not published. (App. 9)

## JURISDICTION

The Ninth Circuit issued its Memorandum decision affirming the district court judgment on December 22, 2023. (App. 2) The Ninth Circuit issued its order denying rehearing and rehearing en banc on April 1, 2024. (App. 1) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Const. Art. III, §2, cl. 3

U.S. Const. Amend. VI

18 U.S.C. §1030

U.S.S.G. §2B1.1

These provisions are included in Appendix D (App. 15)

## STATEMENT OF THE CASE

### A. Indictment

The government filed an indictment against Gatrel and codefendant Juan Martinez on January 24, 2019. Count 1 of the indictment alleged a conspiracy between Gatrel and Martinez to cause damage to protected computers in violation of 18 U.S.C. §1030, and specifically to cause such damage affecting ten or more protected computers during a one-year period, in violation of 18 U.S.C. §1030(a)(5)(A), (c)(4)(B)(i), (c)(4)(A)(i)(VI).

According to the indictment, Gatrel, using a computer in Illinois, offered services via the website downthem.org ("DownThem") that would allow his subscribers to cause internet traffic to victim computers, an online attack technique known as Distributed Denial of Service ("DDoS"), for the purpose of degrading or disrupting the victim computers' access to the internet. The indictment alleged that the DDoS attacks used "amplification," meaning that brief commands sent to third-party computers would cause much longer strings of data to be sent back in response. The indictment also alleged that the attacks used the practice of "spoofing," in which the attacks

disguised the origin of the electronic queries so that the queries were perceived to be coming from the victim computers. (11-ER-2579-80)

The indictment alleged that codefendant Martinez, using a computer in California, communicated with and assisted Gatrel in the operation of DownThem. (11-ER-2580)

According to the indictment, Gatrel, Martinez, and other unindicted coconspirators would maintain and improve the website and respond to requests for attacks, scripts, or assistance from potential or current customers. (11-ER-2580)

The indictment alleged that Gatrel also offered a server subscription service in the website ampnode.com ("AmpNode") that allowed subscribers to obtain servers for operating their own DDoS attacks. (11-ER-2580)

Count 3 claimed that Gatrel and Martinez caused and attempted to cause damage to protected computers in violation of §1030. (11-ER-2589)

### B. Martinez' Plea Agreement

Martinez signed a plea agreement prior to trial, in which he agreed to plead guilty to count 3. At the government's request, the court conducted a change of plea hearing before trial, because Martinez was expected to testify at Gatrel's trial. (10-ER-2440)

### C. Gatrel's Trial

At trial, the government introduced the testimony of two expert witnesses (Damon McCoy, Associate Professor in the NYU Department of Computer Science and Engineering; and Krassimir Tzvetanov, a dual degree student at Purdue University, focusing on cyber forensics in his doctorate and homeland security in his masters), and the case agent, FBI SA Elliott Peterson. The government did not present any testimony from individuals who allegedly coadministered the Websites, customers of the Websites, or anyone associated with the IP addresses purportedly targeted by the Website.

Tzvetanov testified that he gave trainings on booter services. In those trainings, he taught that the low-end of booter services was at least 5-10 Gbps, and the high end was up to 40 Gbps. (9-ER-2045-46)

To determine the capacity of the DownThem website, Tzvetanov reviewed the packet capture (PCAP) data produced by the FBI's testing of DownThem on July 19-20, 2018. (13-ER-3265) PCAP data provides a record of all incoming and outgoing network data. (10-ER-2368)

Tzvetanov testified that the highest file size identified from the FBI tests of DownThem was 37.3 Mbps, based upon the inaccurate methodology of averaging over five minutes. (9-ER-2062-63) Tzvetanov admitted that he was not aware of any instance where any of his colleagues identified a 37.3 Mbps attack as arising to a DDoS attack. (9-ER-2071)

Tzvetanov testified about customer service tickets between AmpNode administrators and customers. (10-ER-2366-67) Tzvetanov acknowledged that none of the PCAP data he reviewed showed attacks of the strength referenced in the tickets. The representations made by AmpNode administrators did not correspond to any data available to Tzvetanov (to wit, the PCAP data produced by the FBI's own testing). (9-ER-2084-89)

McCoy testified that he purchased subscriptions and conducted dozens of tests using various services, including DownThem. Sometimes the DownThem tests failed, but at least some of the DownThem tests were executed. (8-ER-1746-52, 8-ER-1774, 8-ER-1789-91, 15-ER-3896)

McCoy also testified regarding customer service communications between DownThem, AmpNode and their customers. McCoy admitted that he did not independently verify any of the claims made in the tickets that he testified to. (7-ER-1618-19) McCoy did not verify with any subscriber of any IP address that they had in fact been attacked through DownThem. (7-ER-1628) McCoy was not aware that the case agent Peterson ever contacted a single person who was supposedly the target of an attack. (7-ER-1632)

Peterson testified that he tried to identify who was running the Websites. (6-ER-1388-1467) He researched email addresses and public records, and found a reference to Gatrel. (6-ER-1467) Peterson obtained a search warrant to search an address that Peterson incorrectly believed to be

Gatrel's residence. On November 19, 2018, Peterson executed the search warrant at an address that was not Gatrel's residence. (7-ER-1532, 5-ER-1222)

Peterson and three other agents then went to another address which was Gatrel's. (ER-1532-33) They arrived at Gatrel's apartment a little before 7:00 a.m. The FBI did not have a search warrant for Gatrel's address, so Gatrel did not have to let them in. Gatrel was told he didn't have to talk with the FBI, he could talk with a lawyer, anything he said could be used against him, and he could stop talking when he wanted. (7-ER-1535-36, 5-ER-1221-25)

Gatrel allowed the FBI agents to enter his apartment and agreed to speak with them. They talked for hours. Gatrel copied the Websites on a hard drive and gave them to the FBI. Gatrel even let the FBI take his computer to image. (7-ER-1544-45) The agents took Gatrel to breakfast at Panera and talked to him more. (5-ER-1230) Since Gatrel had no phone, the FBI purchased a cellphone for Gatrel to facilitate his continued cooperation. Over the course of the next month, Peterson had two or three follow-on conversations with Gatrel and exchanged text messages with him. (5-ER-1232-34)

Peterson testified that Gatrel said that he had assistance in multiple points in the operation of DownThem, and there was currently a

coadminstrator or partner (Martinez) who Gatrel thought was located in Hawaii. (7-ER-1540-41)

Peterson testified that there were persons and groups in the Website databases with administrative privileges. For example, he saw Vynide, Durham, Nachos and Martinez engaged in customer communications and customer service in the databases. Others also expressed interest in providing customer service. (5-ER-1038-44, 5-ER-1116)

Peterson testified that he looked for codefendant Martinez and believed that he was in the Central District of California. Peterson went to the place that he believed was Martinez' residence. They had a conversation and then Martinez provided Peterson a copy of the Website database. (5-ER-1130)

The government introduced exhibits reflecting communications between the Websites and their customers. For customer service, customers would write tickets to the Websites, or email ampnodehosting@gmail.com or tankshu04@gmail.com. According to the government's own evidence, the Websites' responses to the customer tickets and emails were handled by various administrators, including Gatrel, Vynide, Durham, Nachos and Martinez.

Peterson testified that the tickets admitted into evidence were not the entirety of the tickets but only tickets selected by Peterson from about 3,000 tickets. (5-ER-1129) Several of the tickets selected by the government

indicated that DownThem was not working. (4-ER-851-57) Peterson could have identified the DownThem customers but chose not to. (4-ER-857-70) Peterson testified that he attempted to find cases where Website attacks might have had some likelihood of logs, but was not successful. (5-ER-1045-52, 15-ER-3715)

The jury returned a verdict that venue was proper in the Central District and that Gatrel was guilty on all counts. (3-ER-592-97)

### D. Gatrel's Rule 29 Motions for Judgment of Acquittal

Gatrel submitted oral and written Rule 29 motions for judgment of acquittal for lack of venue. The court denied the motions. The court held that Peterson testified that he went to the place that he believed was Martinez' residence in the Central District of California and found Martinez there. Martinez gave him a copy of the database. In addition, in a customer service ticket dated September 8, 2018. Martinez wrote: "Right now my time its 10 pm, pacific time, im from LA, so you let me know what time tomorrow okay." (1-ER-90)

### E. Gatrel's Sentencing

The Revised Presentence Report claimed that Gatrel managed and directed at least four others to help run or provide customer support for the Websites. Codefendant Martinez helped administer DownThem for a period of time by fixing the Website and handling customer support. Three other

individuals known by the monikers Nachos, Vynide and Durham provided customer support. (RPSR21) (Notably, the government never presented testimony from Martinez, Nachos, Vynide or Durham.)

The RPSR assessed a four-level role enhancement under §3B1.1(a). The RPSR stated that the "offense involved at least five criminal participants: the two codefendants, 'Nachos,' 'Vynide,' and 'Durham….'" (RPSR48) (However, the government never presented testimony from any of the alleged participants.)

In calculating the Sentencing Guidelines range, the court rejected the requested loss enhancement because the government had not met its burden of proof, and the government agreed that the victim enhancement did not apply. (1-ER-73-79, 2-ER-394) The court imposed a four-level role enhancement. Based upon a Sentencing Guidelines range of 21-27 months, the court sentenced Gatrel to 24 months in custody. (1-ER-80)

### F. Gatrel's Arguments on Appeal

Gatrel contended on appeal that his convictions must be reversed because the government presented insufficient evidence. Gatrel was convicted of conspiring and causing or attempting to cause damage to protected computers, but after six years of investigation the government was unable to produce evidence of damage to even one single computer out of the all the IP addresses allegedly targeted by the Website. No computers were

damaged because the Websites were proven by the government's own evidence to be incapable of causing damage. The government's own expert witness Tzvetanov testified that the low-end of a booter/stresser service is at least 5-10 Gbps. Over the six years prior to trial, the FBI repeatedly tested the capability of DownThem. In 2015, only ¼ of the FBI tests conducted had any effect, and the FBI was unable to produce any data from those tests. In June 2018, the FBI again tried to test DownThem, but the website was not working. FBI tests were purportedly conducted on July 20, 2018, but the FBI could not produce any data from that testing. (AOB-31-32)

The only data produced at trial was from tests on July 18, 2018, and that data conclusively established that DownThem did not qualify as a booter/stresser service under the government expert's own definition. And since DownThem utilized AmpNode servers, the government's own evidence established that AmpNode equally did not qualify as a booter/stresser service. Nor was AmpNode powerful enough to ever cause damage. (AOB-31-32)

Moreover, the difference between the requisite power for a booter/stresser service as defined by the government's expert Tzvetanov, and the power offered by DownThem, was staggering. According to Tzvetanov, the low-end of a booter/stresser service is 5-10 Gbps, which is 5,000-10,000 Mbps. The highest level of power from DownThem that the government was able to

achieve in four different attempts at testing, utilizing the most powerful methods, was 37.3 Mbps. Thus the most power DownThem could produce was 0.7% (or 7/1000) the power of the lowest end of stresser services as defined by the government's expert Tzvetanov.

Since the government introduced no evidence of damage, the government relied heavily on representations and communications on the Websites. However, the government failed to prove that any Website representations or communications were authored by or read by Gatrel. Customers who had questions or complaints could start a ticket. Someone with administrative privileges would respond. Various people were alleged to have served as administrators, including Vynide, Durham, Nachos and Martinez. (5-ER-1038-44) Others expressed interest in providing customer service. (12-ER-3115, 12-ER-3120)

For a felony conviction, the government was required to prove that Gatrel damaged ten protected computers within a one-year period. Since there was no evidence of damage, Gatrel requested that the jury be required to return a unanimous verdict on which ten computers were damaged. The district court's refusal to require unanimity violated the Supreme Court's precedents.

Furthermore, Gatrel contended that the indictment must be dismissed for lack of venue. Gatrel resided in and never left Illinois during the relevant

period. The government filed the indictment in the Central District of California, relying upon the purported presence of codefendant Martinez in the Central District. However, at the last minute the government elected not to call Martinez to testify at trial, and therefore did not introduce any evidence during the ten-day trial, which stretched over four weeks, to establish venue in the Central District. The government futilely attempted to establish venue with the equivocal and baseless testimony of the case agent.

Finally, at sentencing, the district court erred in calculating the applicable Sentencing Guidelines range when it imposed duplicative enhancements for sophistication of the offense.

### G. Ninth Circuit Memorandum

The Ninth Circuit Memorandum affirmed Gatrel's convictions and sentence.

The Memorandum rejected Gatrel's claim of insufficient evidence. The Memorandum stated that the government presented overwhelming evidence that Gatrel conspired to and attempted to damage protected computers through the two Websites. The Memorandum stated that there was documentary evidence of Gatrel bragging about his services, explaining their power, and providing customer support. Whether either service could have caused damage to protected computers was irrelevant to the sufficiency of

evidence, because no actual damage was required to return a verdict of guilty. (App. 3)

The Memorandum held that no specific unanimity instruction was necessary. The statutory element was straightforward. (App. 5)

The Memorandum rejected Gatrel's claim of improper venue. First, with respect to the conspiracy charge, the Memorandum stated that it was unnecessary for Gatrel to either enter into or commit an overt act in furtherance of the conspiracy "within the district, as long as one of his co-conspirators did." The Memorandum stated that Gatrel's co-conspirator Martinez lived and administered DownThem in the Central District of California, so venue was proper there. (App. 5-6)

Second, the Memorandum turned to the claim of causing and attempting to cause computer impairment. Given Martinez' role in administering the site and launching attacks, the Memorandum stated that the jury could have concluded that—wherever Gatrel lived—his attempts to cause impairment to protected computers involved criminal activity committed in the Central District of California. (App. 6)

The Memorandum held that the district court did not abuse its discretion in imposing the two enhancements. The sophisticated-means enhancement did not increase Gatrel's punishment based on "a kind of harm

that has already been fully accounted for" in the protected-computers enhancement. (App. 7)

## REASONS FOR GRANTING THE WRIT

### A. Gatrel's Convictions Must Be Reversed for Insufficient Evidence

To establish a violation of §1030(a)(5)(A), the government was required to prove that Gatrel knowingly caused the transmission of a program, information, code or command, thereby intentionally causing damage to a protected computer. However, the government failed to prove the essential element that Gatrel intended to damage any computer, let alone ten computers as required by §1030(c)(4)(B)(i). Instead, the government's evidence established that Gatrel could not have intended, attempted, aided or conspired to damage any computer because the government's own evidence conclusively established that the subject Websites had no power to do so.[1] At

[1] At trial the government presented evidence of the FBI's PCAP data from 20 DownThem tests. (10-ER-3265) Utilizing Tzvetanov's methodology to perform the calculations (9-ER-2060-61), the average of all the FBI tests was 5.21 Mbps. Recall that Tzvetanov testified that low-end of booter services was at least 5-10 Gbps, and the high end was up to 40 Gbps. (9-ER-2045-46) Thus the *low*-end of Tzvetanov's definition of a booter service was 192 times more powerful than the average DownThem test.

trial the government could not produce a single example of any computer that had been damaged by DownThem or AmpNode, even with direct testing. The government did not produce a single witness to testify that their computer had been damaged. Nor were the government's expert or agent witnesses able to identify a single computer that had been damaged by DownThem or AmpNode. Peterson first tested DownThem in December 2015, almost six years before Gatrel was tried. Thus the government had almost six years in which to find evidence of damage and to find witnesses to testify to service impairment, and was unable to do so. Peterson received copies of the Website database in November 2018, almost three years before trial, but still was unable to develop any evidence of damage. Instead, Peterson's six-year investigation revealed that most of the time DownThem did not work, and when it did work the most that DownThem offered was 0.7% (or 7/1000) the power of the lowest end of stresser services as defined by the government's expert Tzvetanov.

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The seven highest PCAP test results introduced in evidence by the government (13-ER-3265) generated values of 0.73 Mbps, 3.09 Mbps, 8.84 Mbps, 12.77 Mbps, 14.60 Mbps, 26.66 Mbps, and 37.33 Mbps, respectively. All of those values are infinitesimal fractions of the *minimum* power (5-10 Gbps, or 5,000-10,000 Mbps) that Tzvetanov testified was necessary for a booter service.

Additionally, Gatrel's conduct established that he had no intent to cause damage. When the FBI showed up at his door early in the morning, Gatrel waived his rights, talked to the FBI for hours, including during breakfast, gave the FBI copies of the Websites, gave the FBI his computer, and engaged in uncounseled follow-up communications with the FBI for months via phone calls and text messages. (5-ER-1234)

Lacking any evidence of damage, the government relied heavily upon representations made to customers in the Websites or in the Websites' customer service communications. Indeed, Tzvetanov testified that since there was no data available for AmpNode he relied exclusively on customer comments for his opinion. (9-ER-2090) However, he investigated none of the comments.

It was these communications that the Memorandum relied upon in holding that there was sufficient evidence that Gatrel conspired to and attempted to damage protected computers through the Websites (citing "documentary evidence of Gatrel bragging about his services, explaining their power, and providing customer support," App. 3).

However, in so finding, the Memorandum ignored that the government never proved that it was Gatrel who authored these communications. The indictment alleged that not only Gatrel, but also Martinez and others, responded to requests from potential or current customers. (11-ER-2580) The

government's experts noted that other staff addressed customers. Notably, the government obtained a four-level leadership role enhancement on the ground that Gatrel had numerous coadministrators who dealt with customers. (CSD-18, 3-ER-484)

The government argued that Gatrel admitted that email addresses such as ampnodehosting@gmail.com were his email addresses. (GAB-49) However, the very name of the email address "ampnodehosting" establishes it as an email address for the business. It was entirely appropriate and customary for Website administrators to use Website business email accounts when conducting Website business.

Significantly, the government's expert Peterson had six years to traceback the emails to their true authors but he made no attempt to do so. Peterson, who had studied the Website databases, was careful to specify that he could not determine from the government's selected Website exhibits who was communicating on behalf of the Websites. E.g. 7-ER-1499 ("whoever at this point is operating ampnodehosting@gmail"); 7-ER-1501 ("I see response from whoever controlled that account [ampnodehosting] at that time"). Similarly, the government's expert McCoy, who had also studied the databases, when asked whether an e-mail exchange with a DownThem admin was with Gatrel, responded that he didn't know who the exchange was with, and could identify the author only as the "presumed administrator of

DownThem." (7-ER-1645) McCoy repeatedly characterized User 1 as the "presumed admin of DownThem." (E.g., 8-ER-1801, 8-ER-1813)

Despite their experts' acknowledgement that the identity of the author of the communications could not be ascertained from the government's exhibits, the government insisted on portraying to the jury that Gatrel was the author of all the tickets and emails. The government knew this to be baseless. This practice is all the more indefensible because at sentencing, the government argued for and obtained a four-level role enhancement on the ground that Gatrel had four coadministrators who helped with customer service and responded to tickets and emails.

The Memorandum ignored that the government never proved that Gatrel was the author of the subject communications, even though the government had six years to do just that. Since the Memorandum relied upon the exhibits of communications puffing about the Websites, commenting on their power and providing customer support, when the government failed to prove that Gatrel was the author of such communications, the Memorandum ignored that the government submitted insufficient evidence to prove Gatrel guilty. The government did not prove the essential elements of §1030. Gatrel's convictions and sentence must be reversed.

## B. Gatrel's Convictions Must Be Reversed for Jury Instruction Error

To prove violation of §1030(C)(4)(B)(i),[2] the government was required to prove that Gatrel knowingly caused the transmission of a program, information, code or command, and as a result of such conduct, intentionally caused (or, in the case of an attempted offense, would, if completed, have caused) without authorization, damage affecting ten or more protected computers during any one-year period. The defense requested a jury instruction requiring a unanimous jury verdict on which ten computers were allegedly damaged. (10-ER-2401-03, 10-ER-2412-13) The government opposed the requirement of unanimity. (10-ER-2404-06) The district court denied the instruction on the ground that the district court thought the case law did not really support requiring unanimity. (10-ER-2446-50, 10-ER-2474) The district court misunderstood this Court's precedents.

A unanimous verdict was required in this case for various reasons. For example, in *Richardson v. United States*, 526 U.S. 813, 815 (1999), the Supreme Court addressed a statute forbidding any person from engaging in a "continuing criminal enterprise." 21 U.S.C. § 848(a). The Supreme Court

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[2] Section 1030(C)(4)(B)(i) increased the maximum penalty for violation of §1030(a)(5)(A) from one year (§1030(c)(4)(G)(i)) to ten years.

held that the jury must agree unanimously about which specific violations make up the violations comprising the "continuing criminal enterprise." The jury "must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual element 'violations' necessary to make up that 'continuing series.'"

The requirement that jurors agree on each violation is compelled by this Court's precedents regarding the critical importance of unanimous jury determinations. In *Erlinger v. United States*, 2024 WL 3074427, 2024 U.S. LEXIS 2715 (2024), this Court held that the Fifth and Sixth Amendments require a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions for ACCA purposes. In so finding, this Court conducted an extensive analysis of the history of the jury trial right. The Court observed that, by "requiring a unanimous jury to find every fact essential to an offender's punishment, [the Fifth and Sixth Amendments] seek to constrain the Judicial Branch, ensuring that the punishments courts issue are not the result of a judicial 'inquisition' but are premised on laws adopted by the people's elected representatives and facts found by members of the community." This Court reiterated that "Virtually 'any fact' that 'increase[s] the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a

unanimous jury beyond a reasonable doubt." *Erlinger*, 2024 U.S. LEXIS 2715, *22.

Gatrel was convicted of damaging ten or more computers, even though the government found it impossible to prove damage to a single computer. Therefore, not only is unanimity required pursuant to the Supreme Court's holdings in *Richardson*, inter alia, it is also required under the principle that a specific unanimity instruction is required "if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts." *United States v. Gonzalez*, 786 F.3d 714, 717 (9th Cir. 2015) (internal quotation marks omitted). *See also United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (holding that unanimity instruction regarding specific conspiracy should have been given in light of proof of multiple conspiracies).

Where, as here, in order to transform Gatrel's offense from a misdemeanor to a felony, in order to achieve a ten-fold increase in the penalty to which Gatrel was subjected, Gatrel must have committed ten specific additional offenses, jury unanimity is required. Each of the ten additional offenses would if charged subject Gatrel to criminal liability. Therefore the jury must be unanimous regarding each such predicate offense.

Accordingly, the district court erred and Gatrel's convictions should be reversed.

### C. Gatrel's Convictions Must Be Reversed for Improper Venue

The Memorandum found that venue was proper in the Central District of California because coconspirator Martinez lived and administered DownThem in the Central District of California.

However, in so finding, the Memorandum ignored that the government never proved that Martinez lived in or administered the Website from the Central District of California.

The indictment alleged that venue would be based upon the actions of codefendant Martinez. At the eleventh hour the government decided not to call Martinez, and consequently did not introduce evidence that Martinez entered into any conspiracy, or performed any act, within the Central District.

Accordingly, the government was obliged to rely upon Peterson's ambivalent testimony, which did not establish that Martinez resided in the Central District. Peterson (who generated the wrong address for Gatrel, obtained a search warrant for an address that was not Gatrel's address, and executed a search warrant at an address that was not Gatrel's address (AOB-57)), was sufficiently chastened that he did not testify under oath that he found Martinez at Martinez' residence in the Central District. Instead, Peterson equivocated and thus his testimony did not establish that Martinez

resided in the Central District, or that the database was located in the Central District. Significantly, Peterson testified that "I believed after several days of investigation that [Martinez] was located here in the Central District of California." Then Peterson testified that "I went to the place that I *believed* was his residence and I -- we had conversation, and then he gave me another copy of the data base that I had received from Gatrel." (5-ER-1130; emphasis added) As Gatrel demonstrated, had Peterson actually found Martinez at Martinez' residence, Peterson would have testified that "I went to his residence," not "I went to the place that I believed was his residence." (AOB-58) Significantly, the Memorandum did not address Peterson's repeated and equivocal use of the word "believed" with respect to the location of Martinez' residence.

The reason that Peterson repeatedly used the word "believed" in the past tense was because Peterson believed that in fact the residence at which Peterson located Martinez was not Martinez' residence but that of his parent. (2-ER-209)

Gatrel established that the government acknowledged that the residence at which Peterson located Martinez was his parent's residence. The government's Answering Brief responded that "the jury could have reasonably concluded that Martinez – a young man – still lived with his parents and did not own a house." (GAB-62) The government cited no basis

for this claim. The government chose not to present Martinez as a witness; as a result, there was no basis in the record for any conclusion that Martinez was a kid still living with his mother. The jury had no idea whatsoever regarding Martinez' age, appearance, financial status or living situation.

The government further contended that the jury could conclude that Martinez lived in Los Angeles based upon his statements in different tickets that "im from LA," and that "im back I was gone, I went to see my family at LA so I was offline, im back." (GAB-63)

In the first ticket, when Martinez said he was "from LA," that necessarily meant that he was not in LA at the time of the ticket. *See, e.g.*, https://www.merriam-webster.com/dictionary/from (from is "used as a function word to indicate a starting point of a physical movement," with the example given of "came here from the city"). Thus at the time he wrote that ticket, Martinez was not in LA.

In the second ticket, Martinez said he was gone (from the computer) when he went to LA to see his family and was offline when he was in LA. The second ticket made it clear that when Martinez was at his computer, he was not in LA. There was no interpretation in which the tickets established that Martinez lived in LA. Instead, the tickets established that Martinez' family lived in LA and when he traveled to see them in LA he did not have internet access.

The government's theory of venue is meritless for an additional reason; Peterson's encounter with Martinez occurred after the conspiracy terminated. According to the indictment, the conspiracy ended on November 19, 2018, the date of the FBI's interview with Gatrel. Peterson spoke to Martinez for the first time after he had spoken with Gatrel. (5-ER-1130, 10-ER-2578)

The government equally baselessly contended that the fact that Martinez was able to download a copy of the DownThem database in Pasadena meant that venue was established in Pasadena. The government's own arguments disprove its position on this issue. The government acknowledged that a database may be accessed from various locations, anywhere in the world where there is internet access. (GAB-64, n.10) If the availability of internet access were the test for venue, that would eviscerate any meaning of the concept of proper venue.

As Gatrel established, the database for the Websites was located in Canada. (AOB-57 n.16) The government did not address this evidence at all, much less refute it. The government failed to meet its burden of proof.

Accordingly, the indictment was improperly filed and Gatrel's convictions thereunder must be reversed.

## D. Gatrel's Sentence Must Be Reversed for Impermissible Double Counting of Sentencing Guidelines Enhancements

### 1. The District Court Must Correctly Calculate the Sentencing Guidelines Range

All sentencing proceedings are to begin by determining the applicable Sentencing Guidelines range. The district court must correctly calculate the Sentencing Guidelines range. The Guidelines are the starting point and the initial benchmark, and are to be kept in mind throughout the process, *Kimbrough v. United States*, 552 U.S. 85, 108 (2007), and *Gall v. United States*, 552 U.S. 38, 40 (2007).

### 2. The Application of the Sophisticated Means Enhancement Was in Error Because It Constituted Impermissible Double Counting

The district court erred in applying the two-level enhancement for sophisticated means in light of the offense-specific four-level enhancement which already encompassed sophisticated means. This impermissible double counting violated the requirement that all sentencing proceedings are to begin by correctly calculating the applicable Sentencing Guidelines range.

The PSR applied both a two-level enhancement under §2B1.1(b)(10) for sophisticated means, in addition to a four-level enhancement for a §1030(a)(5)(A) conviction under §2B1.1(b)(19)(A)(ii). "Impermissible double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been

fully accounted for by application of another part of the Guidelines." *United States v. Gallegos*, 613 F.3d 1211, 1216 (9th Cir. 2010). While the same conduct can be the predicate for multiple enhancements, each must "serve[] a unique purpose." *Id*. The two enhancements at issue here serve the same purpose.

The Sentencing Commission enacted a four-level enhancement in 2003 for violation of §1030(a)(5)(A), in response to a Congressional directive to consider, among other things, "the level of sophistication and planning involved in the offense." Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002). See U.S.S.G. Amend. 654 (2003). A conviction under §1030(a)(5)(A), which prohibits the intentional transmission of a "program, information, code, or command" to cause damage to a computer, involves conduct which could be considered "sophisticated" when compared to a basic fraud offense. However, the Sentencing Commission has addressed that, at Congress's directive, in the offense-specific Guideline enhancement. Because that enhancement already penalizes the increased sophistication of §1030(a)(5)(A) offenses, the generic sophisticated-means enhancement should not apply.

The district court upheld the imposition of the duplicative enhancements on the ground that the same conduct can be the predicate for multiple enhancements where each serves a unique purpose. The district

court observed that in the Homeland Security Act of 2002, the Sentencing Commission was directed to consider not only "the level of sophistication and planning involved in the offense," but also other factors such as loss, commercial advantage or private financial benefit. (1-ER-9) However, that does not negate the fact that §2B1.1(b)(10)(C) and §2B1.1(b)(19)(ii) both enhance sentences for sophisticated means. And in this case the government did not prove loss, commercial advantage or private financial benefit (because the government failed to deduct refunds and expenses from gross revenues).[3] Since §2B1.1(b)(10)(C) enhances only for sophisticated means, then it is duplicative of the aspect of §2B1.1(b)(19)(ii) that targets sophisticated means.

Given Congress' specific directive to increase punishment under §1030(a)(5)(A) based on the offense's sophisticated nature, it is impermissible double counting to also apply the generic two-level increase. The enhancement in §2B1.1(b)(10)(C) must therefore be vacated.

### E. Compelling Reasons Warrant Review of Gatrel's Claims

There are compelling reasons to grant review of Gatrel's claims. Gatrel was convicted of conspiracy to damage, and damaging and attempting to damage protected computers, absent any evidence whatsoever of damage or

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[3] At sentencing Gatrel told the court that he left the businesses with less than a dollar. (1-ER-46)

intent to damage. A conviction for attempt requires the government to prove beyond a reasonable doubt that, inter alia, the defendant intended to intentionally cause damage to a computer. (3-ER-642) A conspiracy conviction requires the government to prove beyond a reasonable doubt that the defendant became a member of the conspiracy knowing of its object to impair protected computers and intending to help accomplish the object of impairment of a protected computer. Accordingly, all the crimes of which Gatrel was convicted required proof that he intended to impair protected computers. (3-ER-635)

However, as discussed above, there was no evidence of damage to protected computers, or that Gatrel intended to damage protected computers. Nor was there evidence of any communications from Gatrel on any facet of the alleged crimes.

Instead, the evidence established that the Websites were wholly incapable of damaging protected computers. The evidence did not establish that Gatrel authored any communications, and Gatrel's extraordinary and prolonged cooperation with the FBI established that he had no intent to damage protected computers.

The fact that DownThem and AmpNode had no power to damage established that Gatrel had no intent to damage and therefore could not be guilty of conspiracy or attempt to damage.

## CONCLUSION

For the foregoing reasons, Gatrel respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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