No. 24-6562

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DEREK JONES — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Derek Jones, Reg. No. 29399-509
(Your Name)

FPC Lompoc, 3705 W. Farm Road
(Address)

Lompoc, CA 93436
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. What are the admissive effects of a defendant's guilty plea? Specifically, does an unconditional guilty plea admit facts alleged in an indictment or information which are not essential (i.e., "surplus") to proving an element of the charged offense?

The Supreme Court's intervention is essential to resolve confusion and conflict as to whether a guilty plea necessarily admits those factual allegations in an indictment which are not elements of the charged offense. Circuit courts have struggled to interpret the Supreme Court's pronouncement in *United States v. Broce*. Circuit courts are almost evenly divided as to whether a sentencing judge may rely upon a guilty plea to establish nonessential or "surplus" facts alleged in an indictment or information. However, treating guilty pleas as conclusively establishing surplus allegations undermines protections provided to defendants by the Sentencing Guidelines, Rule 11, and the Due Process Clause. Treating guilty pleas as establishing surplus allegations can also result in a defendant being punished more severely for entering a guilty plea than if he had been convicted following trial. This case is an ideal vehicle for the Supreme Court to resolve the circuit split and announce its fulsome rejection of the anachronistic and profoundly unfair rule under which some circuits still construe guilty pleas as admitting surplus allegations.

2. What scope of appellate review is required, and what standard of review is to be applied, in response to a factual-basis challenge to a guilty plea?

The Supreme Court's intervention is likewise necessary to avoid confusion and conflict as to whether a conviction obtained through a guilty plea may be challenged for lacking an adequate factual basis and , if so, what is the duty of the reviewing court when presented with such a challenge. Federal circuits are divided as to whether unconditional guilty pleas waive factual basis challenges on appeal. Even among the circuits that allow factual basis challenges there is further disagreement as to what standard of review applies. This case provides a timely opportunity to resolve these circuit splits, particularly in light of the scrutiny to which the Supreme Court has recently subjected the Government's more expansive theories of wire fraud.

LIST OF PARTIES

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

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

RELATED CASES

United States v. Derek Jones, No. 21-cv-059, US District Court for the Southern District of New York, Judgment entered January 17, 2023.

United States v. Derek Jones, Nos. 23-6113-cr(L) and 23-6220-cr(CON), United States Court of Appeals for the Second Circuit, Summary Order entered July 11, 2024.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES, RULES AND GUIDELINES

18 USC sec. 1028A	
18 USC sec. 1343	(6, 10, 19)
28 USC sec. 2225	(6)
Fed. R. of Crim. Proc. 11	(14, 29)
Fed. R. of Crim. Proc. 21(b)	(7)
USSG Ch. 1 Pt. A (4)	(28)
USSG Sec. 6B1.2	(28)

OTHER

Scott and Stuntz, 101 *Yale Law Journal* 1909 (1992).

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

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

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

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

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

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

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

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

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was **July 11, 2024**.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **September 4, 2024**, and a copy of the order denying rehearing appears at Appendix **C**.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V

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.

18 USC section 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.

STATEMENT OF THE CASE

A. Jones's Guilty Plea as to a Very Narrow Subset of the Alleged Misconduct Was Construed By the Sentencing Court as an Admission of Surplus Allegations in an Overbroad Count of Wire Fraud.

On November 1, 2021, Petitioner Derek Jones entered an open guilty plea to resolve a single count of wire fraud in the Southern District of New York.[1] Jones admitted that in early 2018 he sent one email to one "investor" that overstated the cash-on-hand for one business. By way of context, at the time of the communication at-issue, this investor -- "NC" -- was already a partner in that business and pursuant to his partnership agreement NC was to receive compensation of at least $120,000 annually.[2] Nonetheless the Government alleged that NC was at least partly influenced by inaccurate information in Jones's email when NC decided to exercise a $25,000 equity-match option as part of his compensation package -- that is, he contributed $25,000 and the business then credited an additional $25,000 to NC's capital account thereby doubling NC's ownership stake in Realize Ventures LLC, the management entity for a small venture-capital fund.[3] Also by way of context, Realize Ventures ultimately deployed the $25,000 received from NC as promised: it made legitimate investments of equity into legitimate start-up companies.[4]

On January 17, 2023, as a consequence of his guilty plea Jones was sentenced to 66 months in federal prison, ordered to forfeit more than $8.6 million in assets, and

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[1] The plea was "open" in the sense that Jones made no agreement with the Government.

[2] This partnership agreement is attached as Exhibit 48 to the Sentencing Allocution Statement of Derek Jones (Dist. Ct. Doc. 187). A copy of Jones's Allocution Statement -- without the 64 exhibits that accompanied the original filing -- is included for this Court's convenient reference as Appendix G.

[3] The above-referenced partnership agreement contains detailed information on this equity-match mechanism.

[4] See, for example, Paragraph 70 of the Sentencing Allocution Statement of Derek Jones (Appendix G); see also the testimony of "BG," the co-managing partner of Realize Ventures who identified several specific portfolio investments which he personally and directly supervised. In a letter dated January 16, 2023, BG wrote: "...the work being done at Realize Ventures was indeed real and... success for all stakeholders was intended and earnestly pursued." A copy of this letter (Dist. Ct. Doc 182-1) is attached hereto as Appendix H.

required to pay nearly $5.5 million in restitution. Relative to the $25,000 equity match that was the sole subject of Jones's allocution during his change-of-plea hearing and also the sole factual basis for his guilty plea, the amount of the forfeiture order is 347 times larger than the investment in question. The amount of the restitution order is 218 times larger than the investment in question. By another pertinent measure, the forfeiture and restitution orders respectively obligate Jones to pay 17 times and 11 times more than the total investments received by the subject business from third parties (i.e., from individuals or entities other than Jones himself).[5]

How is this outcome possible in a criminal justice system that purports to be transparent, predictable, and fair? It's possible because in at least four appellate circuits -- including the Second Circuit from which this matter arises -- a sentencing judge is permitted to construe a guilty plea as an admission of all facts alleged in an indictment, whether or not they establish or even relate to elements of the charged offense.[6] Notwithstanding the reality that Jones's only admitted misconduct was the transmittal of a single inaccurate email that apparently encouraged a single investment of $25,000, a district court in New York was permitted to construe his plea as an admission of the indictment's extraordinarily broad and ultimately unsubstantiated allegation that "from at least... 2012 through at least... 2019, [Jones] ran an investment fraud scheme that defrauded victims out of at least... $5.8 million."[7] By contrast, a district court in California (or Michigan, or New Jersey) would have been prohibited from construing Jones's plea as proof of anything more than what Jones specifically admitted in his plea colloquy, and the Government would have been required to prove any and all additional facts pertinent to his sentencing.[8] Astoundingly, the very same plea and allocution by

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[5] See, for example, Paragraph 77 of Jones's Sentencing Allocution Statement (Appendix G).

[6] See, for example, *Diaz v. Reno*, 2000 US. Dist. LEXIS 5370, Case No. 97-CV-6580 (S.D.N.Y.) ("Diaz, by his guilty plea, admitted all the facts alleged in the indictment").

[7] A copy of the Superseding Indictment (Dist. Ct. Doc. 46) is included as Appendix I hereto.

[8] See, for example, *United States v. Cazares*, 121 F.3d 1241, 1247 (9th Cir. 1997) ("allegations not necessary to be proved for a conviction... are not admitted by a plea"); *United States v. Louchart*, 680 F.3d

Jones -- in response to the very same allegations -- would have had a profoundly different legal effect if it had instead been delivered in a federal courtroom in the District of New Jersey, just on the other side of the Hudson River.

At the time of his plea Jones was unaware that controlling authority in the Second Circuit (and also the Seventh, Eighth, and Tenth Circuits) effectively precluded his ability to argue at sentencing that he was culpable for only a small fraction of the misconduct alleged in the Superseding Indictment and that the corresponding amount of economic loss -- the primary "driver" of sentencing for financial crimes -- was only a small fraction of the amount alleged by the Government. Instead Jones had been advised by his appointed counsel that in the Second Circuit: (a) a guilty plea does not admit surplus facts alleged in an indictment, specifically including those related to the scope or duration of the alleged offense; and (b) a defendant has a right to compel an evidentiary hearing specifically to determine the scope or duration of the alleged offense. In reality, appointed counsel misstated the law of the Second Circuit in both regards.[9]

B. Most Notably, Without Requiring Proof Beyond the Plea Itself, the Sentencing Court Accepted the Government's Narrative that Jones Pursued a Single Continuous Scheme Spanning Seven Years.

On or about January 28, 2021 a grand jury in the Southern District of New York charged Jones in a three-count indictment: one count of wire fraud (18 USC 1343) and two counts of aggravated identity theft (18 USC 1028A). At his arraignment on

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635, 640 (6th Cir. 2012) ("admission of facts from a guilty plea is limited to elements of the crime charged or those explicitly admitted to by the defendant"); *Valensi v. Ashcroft*, 278 F.3d 203, 216 (3rd Cir. 2002) ("just as the Government may obtain a conviction if only one of the several allegations... in the indictment is proven, so may a defendant plead guilty to only one of the allegations required to prove an element of her crime").

[9] If this Court elects not to review the instant matter, Jones intends to pursue ineffective-assistance-of-counsel claims, aided by a more fully developed record, pursuant to 28 USC 2255. Should this Court instead resolve the circuit-split with a definitive pronouncement that a guilty plea admits only those facts constituting elements of the charged offense, Jones's Sixth Amendment claims may be unnecessary, particularly if the matter is remanded for trial.

February 10 Jones entered a plea of not guilty as to all three counts. In the weeks that followed, the Government provided their "3500 material" to Jones and made an unsolicited offer to drop the two counts of aggravated identity theft (which an Assistant US Attorney acknowledged had been included solely for "leverage") if Jones would plead guilty to a single count of wire fraud and stipulate to a specific loss amount and schedule of "victims." Jones responded that he was not guilty of wire fraud and declined the Government's offer. In early May 2021 the Government made another unsolicited offer whereby Jones would plead guilty to a single count of wire fraud and stipulate to a "floor" as to loss amount but without specifying a total loss amount or identifying specific "victims" -- facts which were to be determined later via evidentiary hearing(s). Jones again responded that he was not guilty of wire fraud and declined the Government's offer. In late May 2021 Jones filed a Rule 21(b) motion to transfer the case to the Central District of California, which is where Jones resides, where all of the businesses referenced in the indictment are located, and where all of the anticipated witnesses for the defense are based. (Dist. Ct. Doc. 26). In August 2021 Judge Loretta Preska denied the transfer request and set the matter for trial in New York on November 8, 2021. (Dist. Ct. Doc. 37.)

On or about September 7, 2021 a grand jury in SDNY returned a Superseding Indictment which was, like the one that preceded it, overly broad and factually inaccurate. On September 17, 2021 defense counsel filed a Motion to Strike Surplusage from the Superseding Indictment, along with a Motion for Bill of Particulars. (Dist. Ct. Docs. 50, 51, and 52.). The Motion to Strike identified several allegations which were "not relevant to the crime charged." These included allegations that Jones: (a) sent misleading financial documents to a prospective landlord in an effort to lease an office for Realize Ventures; (b) "misappropriated" funds from his businesses to pay current or former investors; and (c) misled investors about the reasons for rescheduled meetings. The Motion to Strike pointed out that none of this conduct fit within any recognized definition or theory of wire

fraud. The Motion for Bill of Particulars likewise identified several inadequacies of the Superseding Indictment.

> Here, despite charging a continuous, seven-year (2012 to 2019) wire fraud scheme in Count One, the S1 indictment... offers just a few examples of his supposed misrepresentations, and even fewer examples of actual investments that supposedly resulted from them... [a]nd... provides no examples of supposed misrepresentations or investments for a full three years..., between 2012 and 2015. Moreover those investments [which] the S1 indictment does identify appear to be inaccurately described. For example, [Paragraph] 2(a) suggests that "Investor Victim 1" invested in an entity called 'BlueRidge' in July 2016 based on Mr. Jones's misrepresentation about the status of a BlueRidge project; but discovery reveals that "Investor Victim 1's" July 2016 investment actually was made into an entirely different entity, not BlueRidge.
>
> Accordingly, for Count One, the Court should order the Government to identify the following:
>
> -- The specific acts that it will allege Mr. Jones performed in furtherance of his alleged scheme to defraud from 2012 to 2019, including any false or fraudulent statements, representations, claims, or documents, the dates they were made, and the people to whom they were made;
>
> -- The particular projects, properties, and businesses pursued by BlueRidge, Realize, or any other of Mr. Jones's firms, that it will allege were the subject of any of Mr. Jones's alleged misrepresentations;
>
> -- The specific investments, including the dates they were made and the particular entities into which they were made, that it will allege were the result of Mr. Jones's fraudulent conduct;
>
> -- The specific acts of misappropriation of investments and funds, and the corresponding payments and transfers, that it will allege Mr. Jones made...;
>
> -- The specific lies that it will allege Mr. Jones told to "prolong and conceal the fraud scheme..."; and
>
> -- The name of each of Mr. Jones's firms that it will allege were not "viable operations". (Dist. Ct. Doc. 52.)

On October 15, 2021 Judge Preska denied the Motion to Strike Surplusage "as premature, subject to renewal at the close of the Government's evidence" (Dist. Ct. Doc. 70.) In her Order of the same date denying Jones's request for a Bill of

Particulars, Judge Preska noted that the Government had provided Jones with "files obtained from 21 investor-victims." (Dist. Ct. Doc. 72.) Her statement is remarkable for three reasons: first it indicates that, at a time when Jones should have enjoyed a presumption of innocence, Judge Preska had already formed a belief that Jones had defrauded at least 21 investors; second, by this time the Government had also provided a list identifying more than 50 alleged "investor victims" and yet only 21 people had provided any information to the Government and many of them vigorously denied being counted as "victims" (i.e., Jones's own sister, his mother-in-law, and his current business partner); and third, as further discussed herein, neither the Superseding Indictment nor the random harvest of documents received from 21 individuals provided any meaningful illumination of the Government's theory as to how Jones's conduct amounted to a "scheme or artifice to defraud" let alone one that allegedly spanned seven consecutive years.

On October 19, 2021 Jones renewed his request to transfer the case to the Central District of California owing to the inability of two key defense witnesses to travel across the country. At that time, one witness was hospitalized while undergoing cancer treatment and another was recovering from a significant stroke. (Dist. Ct. Doc. 76.) On October 25 this request was once again denied. (Dist. Ct. Doc. 82.) On October 26 the court heard the parties' respective motions *in limine*. Jones informed the court that he would present extensive evidence of his utilization of funds received from investors for legitimate business purposes (i.e., consistent with investors' expectations) including but not limited to payments to sellers of real estate and providers of professional services and investments in portfolio companies. (Dist. Ct. Doc. 88.) Defense counsel explained that such evidence was essential to rebut the Government's allegation that "Mr. Jones's businesses were entirely fraudulent and none of his projects were legitimate" and also that such evidence was probative of Jones's lack of intent to defraud. The Government responded that it was not arguing that all of Jones's business activities were

fraudulent. "That's not the Government's allegation," said the Assistant US Attorney in open court. (*Ibid.*) Judge Preska deferred her ruling.

A few days later when Jones decided to enter a guilty plea as to Count One of the Superseding Indictment, here was the constellation of issues he considered. First, a trial was scheduled to begin on November 8 and expected to last a month, on the opposite side of the country from Jones's home and family, at a time when two key defense witnesses were categorically unavailable. Second, Jones was still having to guess about the Government's theory of the case. Jones's good-faith efforts to clarify their theory had gotten nowhere: Judge Preska punted on the Motion to Strike Surplusage and denied the request for a Bill of Particulars. Third, because the earliest specific allegation of misconduct referenced in the Indictment was in 2016, Jones was informed and believed it would be impossible for the Government to establish that any funds received outside of the limitations period (i.e., prior of January 2016) were impacted by any alleged misconduct, unless the Government could prove that Jones had engaged in a single, continuous scheme (which the Indictment alleged but which Jones knew to be untrue). Fourth, as noted above, Jones was informed and believed that an evidentiary hearing was available by-right. Defense counsel repeatedly told Jones he could "win this thing at sentencing" by demonstrating -- at an evidentiary hearing which counsel described as a mini-trial -- that Jones had engaged in only a small fraction of the misconduct alleged in the Indictment. In this regard, defense counsel was heartened by the Government's express representation at the hearing on the motions *in limine* that the Government was decidedly not contending that all of Jones's businesses were impacted by fraud. The prosecution's statement on October 26, 2021 naturally implied that, notwithstanding the sweeping language of the Indictment, the Government was no longer pursuing a theory that Jones had engaged in a single, continuous scheme. Fifth and relatedly, Jones was informed by defense counsel that he could plead guilty to only a narrow subset of the alleged misconduct and that the Government would be required to prove every other fact germane to sentencing Jones, including

but not limited to establishing a causal nexus between every alleged instance of misconduct and a resulting "loss". Sixth and perhaps most significantly, appointed counsel advised Jones that his misleading email to a partner in Realize Ventures in early 2018, in which Jones overstated the cash-on-hand for one of the funds managed by Realize Ventures, constituted a violation of 18 USC 1343 under the "right to control" theory of wire fraud. Specifically, even though the Indictment did not articulate this theory (nor any other theory) of wire fraud, defense counsel explained that a right-to-control theory would be the Government's most likely strategy -- indeed, probably their only strategy -- by which to establish culpability. According to defense counsel, the email Jones sent in early 2018 could be regarded as inaccurate reporting of information that impacted an economic decision and accordingly Jones had perhaps deprived the recipient of that email of the right to control his own assets. (The subsequently invalidated "right to control" theory and its relevance to this case are discussed at greater length in Subsection D, below.)

The entirety of Jones's statement to the district court at his November 1 change-of-plea hearing was as follows:

> "With respect to Count One, Your Honor, during a portion of the time charged in that count in the indictment, I participated in a scheme to defraud other individuals by making material misrepresentations for the purpose of causing them to invest in my business. As an example of my misconduct, in February of 2018, I sent an email to an individual that overstated the balance of a bank account of one of my businesses. In addition, I communicated by telephone with one individual in the Southern District of New York. Your Honor, at the time of this misconduct, I knew it was wrong and illegal, and I am deeply sorry for my actions." (Dist. Ct. Doc. 86.)

Judge Preska expressly asked the Assistant United States Attorneys whether they wanted to add anything further concerning factual allegations, and they responded in the negative. There was no further discussion by the district court nor the prosecution regarding the factual basis for Jones's guilty plea, which was accepted by Judge Preska forthwith. (*Ibid.*)

The Presentence Investigation Report ("PSR") was an unpleasant surprise insofar as the Government's narrative to the Probation Department was a radical departure from their prior statements to defense counsel and to Judge Preska. For example, having said in open court on October 26 that they were not alleging that all of Jones's businesses were fraudulent, nor that all invested dollars were "intended loss," less than two months later that is exactly what their PSR narrative entailed. As explained in the Brief that Defendant-Appellant submitted to the Second Circuit, "The PSR... contained a much broader description of the relevant offense conduct than had been alleged in the [S]uperseding [I]ndictment or to which Mr. Jones had allocuted." (Appendix D at 8.) Additionally, the PSR identified three different offense-specific and role-based adjustments to the calculation of Jones's offense level, despite no such information appearing in the Indictment nor being the subject of any discussion during the plea colloquy. (*Ibid* at 9.) However, even the PSR did not suggest that Jones engaged in a single, continuous scheme. When reviewing "the seven-year picaresque narrated in the PSR, it is apparent that the alleged 'scheme' in fact consisted of a series of episodic, essentially unrelated misadventures in real-estate investing, involving a variety of companies and investment properties located in different states, implicating different investors, and encountering different misfortunes... [T]he PSR does not allege any regular or systematic fraud." (Appendix D at 8.)

In his sentencing memorandum dated May 18, 2022, Jones raised dozens of objections to the characterization of the offense conduct described in the PSR. (Dist. Ct. Doc. 100, at 13-22.) The memorandum also included numerous exhibits which corroborated that the businesses he managed were engaged in legitimate and substantial business activities. In their sentencing memorandum dated May 26, 2022, the Government attempted to side-step Jones's detailed objections by reverting to their (counterfactual) argument that Jones had admitted engaging in a single, continuous scheme spanning seven consecutive years and that the measure of loss should therefore be every dollar invested by a list of "victims" which the

Government insisted they alone were qualified to identify. (Dist. Ct. Doc. 107.) Nearly two-thirds of the "victims" on the Government's list had not been interviewed by the Government nor had they provided any documentation or other evidence suggesting that their investments were procured through any misconduct by Jones or other members of his management team(s). For example, and as noted above, the Government's list included the co-managing partner of Realize Ventures as well as Jones's own sister. Both of these so-called "victims" had actually submitted strongly worded letters of support that accompanied Jones's sentencing memorandum. The loss amount identified by the Government had also been inflated to more than $8.5 million -- $5 million more than the amount referenced by the AUSAs in plea discussions and $3 million more than the amount referenced in the Indictment despite the Government having produced no additional evidence of Jones's misconduct subsequent to their original batch of 3500 material in early 2021.

Upon receiving the Government's sentencing memorandum, Jones definitively informed his counsel he would exercise his right to an evidentiary hearing in order to refute the prosecution's ever-expanding allegations regarding the scope of misconduct and the resulting loss amount. However, on or about May 27, 2022, for the first time Jones became aware that an evidentiary hearing was not available as a matter of right and instead that it would entirely within Judge Preska's discretion to determine whether she -- not Jones -- would benefit from such a hearing. Naturally, having been consistently assured by appointed counsel for more than seven months that with a by-right evidentiary hearing he could "win this thing at sentencing," Jones found this revelation extremely disconcerting. On May 30, 2022, Jones requested appointment of new counsel and informed the district court that he would move to withdraw his guilty plea. (Dist. Ct. Doc. 109.)

On July 22, 2022 Jones's substitute counsel filed a Motion to Withdraw Plea of Guilty which included a sworn affidavit by Jones that his prior counsel failed to properly advise him concerning the consequences of pleading guilty. (Dist. Ct. Doc.

118.) In a supplemental memorandum filed August 3, Jones clarified that his guilty plea was not knowing and voluntary because it did not represent "a deliberate, intelligent choice between available alternatives." (Dist. Ct. Doc. 124.) At the conclusion of a hearing on September 13, Judge Preska denied Jones's request to withdraw his plea. Specifically, the district court articulated the following positions: (a) the factual basis of Jones's plea established that the offense conduct occurred within the district and within the statute of limitations; (b) although Jones "reject[s] the full scope of the scheme contesting, for example, the amount of the loss, the number of the victims, and the duration of the scheme... the defendant is not arguing actual innocence here"; and (c) Jones remains "free to seek a Fatico [evidentiary] hearing if [he] can show that such a hearing is warranted."[10]

On November 23, 2022, Jones filed a formal request for an evidentiary hearing. (Dist. Ct. Doc. 152.) The issues Jones identified for resolution via the hearing fell into two closely related categories: first, the scope of the "scheme" charged in Count One, especially since the conduct alleged in the Superseding Indictment involved several discreet and unrelated investment opportunities and the Government produced no evidence of fraud in connection with most of these (including investments well outside of the five-year limitations period); and second, the identity of the alleged "victims" because there was nothing in the allegations of the Indictment nor in the discovery produced by the Government connecting the majority of investors (nor the vast majority of invested dollars) to any material misrepresentation by Jones. (Appendix D at 14.)

The Government opposed Jones's request for an evidentiary hearing on the basis that Jones had pled guilty to a count that "unambiguously charged the defendant with using multiple businesses that he controlled to carry out [a] long-running fraud, including purported real estate development and investment firms using the names BlueRidge, Living City Residential, and Atiswin, and the purported venture

[10] Although the docket apparently does not contain a transcript of the September 13 hearing on the Rule 11 Motion, a summary of the hearing appears on pages 12 and 13 of Appendix D.

capital firm Realize Holdings." (Dist. Ct. Doc. 155.) Nevermind that Jones's allocution had referenced only "a portion of the time charged in the Indictment" and only a single isolated instance of overstating the cash-on-hand for a single business. Apparently satisfied that Jones's guilty plea necessarily constituted an admission that his misconduct was both (a) continuous and (b) included at least four different businesses, on December 9 Judge Preska issued an order summarily stating "the Court has determined that a Fatico hearing is not required to adjudicate the Defendant's objections." (Dist. Ct. Doc. 163.)

At this point the trajectory of the case was all but certain. When Judge Preska decided that she would not hold an evidentiary hearing -- despite the magnitude of vigorously disputed facts concerning the scope of misconduct, the resulting loss amount, and the appropriate consequences -- it became clear that she had irrevocably concluded Jones's plea was an admission of the surplusage alleged in the Superseding Indictment. The most significant of the surplus allegations were that Jones had perpetrated a single continuous scheme during seven consecutive years, and that it had involved four different business lines.

For all practical purposes, the sentencing hearing on January 17, 2023 was perfunctory. Jones's counsel presented the results of a forensic audit that powerfully corroborated Jones's defense and unequivocally demonstrated that he managed (or co-managed) legitimate enterprises which performed legitimate work and generally allocated invested capital consistent with investors' expectations. (Appendix D at 18.) As summarized in Jones's Sentencing Allocution Statement, a firm called Renaissance Associates (which Jones is informed and believes routinely performs forensic accounting services for the Department of Justice) compiled a database containing more than 25,000 transactions, drawing exclusively from bank records provided by the Government. This transaction database confirmed that Jones allocated 16% more to the subject business lines than the total sums referenced on the Government's schedule of funds received from investors. In other words, the forensic audit showed that instead of "skimming" from investors Jones was in fact

subsidizing the subject business lines at his own expense. (Appendix G at 46.) Specifically, the database showed that at least $3,948,251 were delivered and released to sellers or lessors of investment real estate or invested directly into portfolio companies; nearly $800,000 were paid to employees and advisors (excluding any compensation to Jones); more than $500,000 were paid to architects, engineers, and consultants; $238,000 went to overhead; and $179,772 were allocated for corporate legal fees. (*Ibid.*) Additionally, the subject businesses returned more than $3,400,000 of invested capital to investors. For this Court's convenient reference, a summary of sources and uses of the capital allocated to (and from) the businesses managed by Jones -- Exhibit 63 to his Allocution Statement -- is included as Appendix J. Jones's counsel also explained that the Government had largely failed to establish any causal nexus between alleged misrepresentations by Jones and financial losses by investors. (Appendix D at p. 19.) The district court expressed a mistaken impression that the Government had already reduced the loss amount to reflect the existence of certain business activities which the Government conceded were legitimate. The Government had not actually made any such adjustments to their "loss schedule." In any event, while the district court expressly acknowledged it had not encountered evidence connecting many of the subject investments to misrepresentations by Jones, Judge Preska explained that such evidence was "not required" because it had already concluded based on "undisputed evidence" (i.e., Jones's guilty plea) that four different businesses operated by Jones were "thoroughly fraudulent" and accordingly determined that Jones was responsible for the loss of "the total sum of investor money that flowed into accounts... of those entities." (Appendix D at p. 22-23.)[11] In other words, because Jones's plea was construed as an admission that he engaged in a single, continuous

[11] Ultimately the Government's loss schedule -- included here as Appendix K -- counted investments to accounts entirely unrelated to the four entities referenced in the Indictment. For example, deposits exceeding $400,000 for Jones Family LLC, Lomigosa Irrevocable Trust, and Chisholm Creek Land Partners LLC bear no relationship to any of these four entities. Other investments counted by the Government were not supported by bank records at all. For example, the sum of $410,000 is attributed to "Rachel J." based on a misinterpretation of a settled civil matter. No such deposit was ever received by any entity managed by or affiliated with Jones.

scheme spanning seven years and involving at least four different businesses, evidence of a causal nexus between a misrepresentation and a particular investment in a particular business at a particular time -- including time outside of the five-year limitations period for wire fraud -- was simply "not required" by the district court for sentencing purposes. Amazingly, under the law of the Second Circuit (as well as the Seventh, Eighth, and Tenth Circuits), Judge Preska was permitted to affirmatively disregard available evidence, decline to hold an evidentiary hearing to determine disputed materials facts, and adopt an indiscriminate "estimate" of loss simply because Jones had entered a guilty plea (albeit unknowing and involuntary) to the overbroad and factually inaccurate Count One of the Superseding Indictment.

C. The Second Circuit Misconstrued Jones's Guilty Plea Even More Spectacularly Than the District Court, Effectively Bootstrapping His Admission Concerning One Inaccurate Email to One Investor/Partner Into a Conviction for "Four Fraudulent Schemes."

The essence of the Summary Order by which the Court of Appeals for the Second Circuit disposed of the matter can be found in a single sentence: "The district court had no need to confirm which [information]... each investor received -- the fact that a person contributed funds to one of Jones's four schemes was conclusive of loss as to that person." (Appendix A at 11-12.)[12] In their Order the appellate panel repeatedly invokes the plural: "one of his investment schemes" (p. 5); "Jones's schemes" (p. 9); "his fraudulent schemes" (p. 9); "four 'thoroughly fraudulent' schemes" (p. 10); and "four fraudulent schemes" (p. 11). This is especially vexing because the panel was fully aware of Jones's "minimal... allocution" (p. 2) and his "claim[] to be guilty of [a] very narrow portion" (p. 5) of the alleged misconduct.

The Court of Appeals also fundamentally misunderstood the district court's ruling as to the two intertwined issues at the heart of the appeal: the scope of Jones's misconduct and the resulting loss amount. The appellate panel wrote,

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[12] The district court's judgment was "affirmed as modified." The Court of Appeals reduced the forfeiture amount by $55,000.

"Jones argues that the district court erred in concluding that 'every dollar invested... was the actual result of fraud.' But the district court did not so conclude." (Appendix A at 8.) "[T]he district court did not include in its loss calculation other business ventures controlled by Jones -- for example, Rincon Point and Chisholm Creek -- since the [G]overnment did not present evidence regarding whether those other ventures were fraudulent." (Appendix A at 9.) In reality, the district court did *not* exclude the Rincon Point hotel development or the Chisholm Creek mixed-use development from the loss amount, nor from the district court's formulation of a sentence based on the scope of the offense conduct. The district court also did *not* exclude, for example, the One Pier Avenue hotel project which, according to the forensic audit by Renaissance Associates, involved the payment of more than $1.55 million to the sellers of the land -- exactly as investors expected -- and which was accordingly not the subject of fraud allegations.[13]

Contrary to the appellate court's mistaken impression, Judge Preska ultimately included every dollar invested with Jones over a seven-year period, the overwhelming majority of which "loss" was not borne out by any evidence whatsoever of a causal nexus to alleged misconduct. Judge Preska made no modification to the Government's loss schedule, which in turn did not reflect any exclusion of any business or project despite the results of the forensic audit and despite the Government's concession at sentencing that it did not have any evidence of fraud in connection with numerous businesses or projects overseen by Jones.[14] Also contrary to the appellate court's mistaken impression, the district court did not find -- nor did the Government allege -- that Jones had perpetrated "four schemes." As discussed above, the Superseding Indictment accused Jones of a single count of wire fraud -- not four. Indeed, a much more fair and forthright process would have been to allege multiple counts if the Government really believed Jones had

[13] A "flow of funds" analysis for One Pier Avenue also accompanied Jones's Allocution Statement (Appendix G) as Exhibit 15 thereto.

[14] A Transcript of the Sentencing Hearing (Dist. Ct. Doc. 197) is included as Appendix F.

committed multiple "schemes" involving a variety of different businesses. That way, Jones would have generally avoided the scenario in which his guilty plea as to a single instance of misconduct involving a single business line could be misconstrued by the Government, the district court, and eventually the court of appeals. The Government instead chose to stuff the proverbial ten pounds of flour into a five-pound bag. The Government chose to allege a single continuous scheme covering seven consecutive years, praying that Jones would not go to trial and force them to prove their argument or at least force them to cogently articulate their theory of the case; praying that Jones would buckle under the pressure of two "leverage" counts of aggravated identity theft, each carrying a two-year mandatory minimum; and praying that Jones would enter a guilty plea as to even the narrowest sliver of misconduct and then exploit the Second Circuit's anachronistic rule that -- however earnestly Jones sought to tailor or limit or qualify the admitted misconduct -- his plea would be construed as an admission of all facts alleged in their sweeping Indictment.

D. Jones's 2021 Guilty Plea Was Predicated on the "Right to Control" Theory of Wire Fraud, Which this Court Invalidated Four Months After Jones's Sentencing.

As noted above, appointed counsel advised Jones that the Second Circuit recognized a "right to control" theory of wire fraud -- i.e., that "the property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets" and that a violation of 18 USC 1343 was occasioned by "the withholding of inaccurate reporting or information that could impact on economic decisions..."[15] The legal landscape in 2021 was such that even if, as Jones insisted (and continues to insist), he did not "run an investment scheme" with the intention of causing investors to part with money or property based on false pretenses, counsel advised Jones that he had nonetheless apparently violated 18 USC 1343 by depriving an investor of accurate and timely economic information

[15] See, for example, *United States v. Carlo*, 507 F.3d 799, 801-02 (2d Cir. 2007), and *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991).

consistent with the investor's "right to control" the deployment and allocation of his capital. Although counsel's guidance on this specific issue may have been closer to the mark when Jones entered his plea in November 2021 (and also when the district court imposed its sentence in January 2023), by May 2023 this Court had explicitly invalidated the "right to control" theory of wire fraud.[16]

As Jones repeatedly pointed out to the Court of Appeals, neither the factual basis identified by Jones during his plea colloquy nor any of the additional justifications the district court identified for the imposed sentence describe or constitute a fraud in the wake of the *Ciminelli* decision. Indeed, as further discussed herein, several of the "facts" upon which the district court relied in fashioning a sentence did not constitute wire fraud even before this Court definitively rejected the deprivation of a "right to control" assets as a basis for culpability.

E. The Court of Appeals Refused to Address Jones's Challenge to the Factual Basis for His Plea, As Well As the Government's Inability to Identify a Cognizable Fraud Theory.

In his appeal to the Second Circuit, Jones repeatedly identified the lack of a factual basis for his guilty plea, especially in light of the Supreme Court's rejection of the "right to control" theory just one month prior to the filing of the initial Brief for Defendant-Appellant. That Brief and the Reply that followed it also highlighted the Government's failure to articulate any cognizable theory of fraud throughout the district court proceedings. What follows are several examples of how Jones alerted the appellate panel to defects of Constitutional magnitude, the first six of which appeared in his opening Brief.

> 1. "[S]ome of the deceitful conduct upon which the district court relied in [determining loss amount and fashioning its sentence] does not even properly describe a 'fraud' under [Second Circuit] precedents or under the Supreme Court's recent opinion in *Ciminelli*." (Appendix D at 28.)
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> 2. "[T]he district court's factual findings, taken at face value, do not support the legal conclusion that every dollar obtained by Mr. Jones

[16] *Ciminelli v. United States*, 143 S.Ct. 1121 (2023).

over the entire seven-year period [alleged] in the indictment should be treated as actual loss. At sentencing, the government asserted that 'The crime that's charged in the indictment is lying to investors.' But this [Circuit's] precedents are clear that merely lying to investors is insufficient as a matter of law to establish fraud." (Appendix D at 38, citing to *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to... deceit are insufficient to maintain a mail or wire fraud prosecution").)

3. "Here, while the district court asserted that six examples of 'undisputed' evidence showed that Mr. Jones's fraud was pervasive, these examples of mere deceit identified by the district court do not establish a valid basis for fraud liability in the wake of *Ciminelli*, or even under *Regent Office Supply*." (Appendix D at 39.)[17]

4. "At a minimum... *Stanley* and *Ciminelli* require a remand to the district court to properly assess what alleged misrepresentations to which potential investors properly constitute a fraudulent scheme." (Appendix D at 41.)

5. "Indeed, it is not even clear that the factual basis for Mr. Jones's plea (that Jones misrepresented the amount of Realize's bank balance to a potential investor...) continues to establish the deprivation of a traditional property interest in the wake of *Ciminelli* -- or, even more broadly, whether venue continues to exist in the Southern District of New York if that transaction is found no longer to support a finding of fraud liability. Accordingly, both parties should have the opportunity to make additional arguments and determinations on remand reflecting which if any of the government's specific fraud allegations survive the Supreme Court's opinion in *Ciminelli*." (Appendix D at 42, 43.)

6. "The affidavit filed by Jones in support of his motion to withdraw his plea is clear that the specific objective of his defense was to have an opportunity to assert his lack of guilt as to the entirety of the scope of Count One. 'I always indicated that I was not guilty of the misconduct as charged in both the original Indictment and the Superseding Indictment." (Appendix D at 53.)

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[17] In *Regent Office Supply*, a seller of paper goods routinely lied to potential customers to induce their purchase(s) of stationary. While the Second Circuit found the company's practices "repugnant to the standards of business morality," it nonetheless held that these lies did not amount to a "scheme to defraud" because they did not affect the quality of the products that were ultimately made available to the customers, even if they might not have entered into the transaction had they been aware of the true facts. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1176 (2d Cir. 1970).

Then, in at least four additional places in his Reply Brief, Jones reiterated the nature and extent of these defects.

> 7. "Judge Preska... attempted to 'estimate' the existence of frauds themselves -- specifically, that every dollar Jones received over an eight-year period was fraudulently obtained -- in the absence of and in contradiction to 'available evidence'." (Appendix E at 10.)
>
> 8. "[T]he government presents no legal authority in which this Court [of Appeals] has endorsed a district court's 'estimating' underlying offense conduct..." (Appendix E at 11.)
>
> 9. "Jones demonstrated that the theory of the alleged fraudulent scheme that the government presented to Judge Preska at sentencing -- 'The crime that's charged in the indictment is lying to investors' -- does not even correctly state a crime under this Court's precedents." (Appendix E at 15.)
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> 10. "Jones further noted that the Supreme Court's recent opinion in *Ciminelli v. United States*..., rejecting this Court's right-to-control theory of fraud, sheds further doubt on which of the government's manifold and scattershot theories of fraud remain viable." (Appendix E at 15, fn 3.)

Despite these extensive and good-faith efforts by Jones to have the Second Circuit review the factual basis for his guilty plea, and relatedly to address whether the Government ever articulated a cognizable theory of fraud in this case, the appellate panel stated only that "Jones offered a minimal but legally sufficient allocution." (Appendix A at 2.) That was the entirely of the Second Circuit's discussion of these issues, despite them clearly being of Constitutional significance.

By way of additional context here, the district court announced -- and the appellate panel affirmed -- exactly six justifications for a pre-ordained determination that "the defendant's business was thoroughly pervaded by fraud, and the entire flow of funds into [four different] businesses are (*sic*) the measure of loss." (Appendix F at 40:20-22.) The six justifications were as follows. First, Jones "did not... own the properties he claimed." Second, Jones "did not... maintain that $105 million investment balance he claimed." Third, Jones "did not... have the

advisors or executives he claimed." Fourth, Jones "did not... rent the office he claimed." Fifth, Jones "did not... have the employees he claimed." And sixth, Jones "did not... use the investment funds he received for real estate investments." (Appendix F at 40:10-19.) Not only were these six justifications not supported by "undisputed evidence" (as erroneously stated by Judge Preska), but they were also not supported by the PSR or any other evidence that was properly before the district court.

The district court identified PSR Paragraphs 17 and 22 as the bases for a finding that Jones "did not... own the properties he claimed." However, the only property referenced in PSR Paragraph 17 is "the hotel at Semiahmoo" and the Paragraph notes that "it was accurate for Jones to represent to investors that he had led the acquisition of the hotel... in 2013 since Jones did acquire an interest in the hotel at that time..." Meanwhile PSR Paragraph 22 faults Jones principally for "brochures" exaggerating the progress of BlueRidge affiliates on four properties. However, this Paragraph also notes that "the brochures largely contained forward-looking statements that accurately reflected that Jones was continuing efforts to develop his projects." In any event, these PSR Paragraphs relate uniquely to BlueRidge which was explicitly not the subject of Jones's guilty plea, nor the subject of any meaningful documentary evidence submitted by the Government or analyzed by the court.

The district court identified PSR Paragraph 25 as the basis for a finding that Jones "did not... maintain that $105 million investment balance he claimed." This too relates uniquely to BlueRidge, which was not the subject of Jones's guilty plea. Incidentally, what PSR Paragragh 25 actually says is that "[b]y 2015, Jones claimed to be assembling a $105 million investment fund." This is noteworthy because (a) it has no bearing whatsoever on misconduct alleged to have occurred in 2012, 2013, or 2014, and (b) Jones was undisputedly "assembling" a fund with $105 million as a target and, as PSR Paragraph 25 also acknowledges, Jones "relied in good faith on indications from prospective investors and deal-partners regarding their desire to participate in various endeavors."

The district court identified PSR Paragraphs 26(a) and 28(a) as the bases for a fnding that Jones "did not... have the advisors or executives he claimed." The

Paragraph refer only to a "B.K." and a "D.S." as the "advisors" or "executives" in question. However, PSR Paragraph 26(a) expressly includes an acknowledgement that "B.K. agreed to work with Jones for approximately six months in late-2015 and early-2016 to help Jones launch the [Atiswin] wellness concept." This subparagraph relates uniquely to Atiswin which was explicitly not the subject of Jones's guilty plea, nor the subject of any meaningful documentary evidence provided by the Government or evidentiary analysis by the court. It also has no bearing whatsoever on misconduct alleged to have occurred prior to "late-2015." As for PSR Paragraph 28(a) -- which does at least relate to Realize Ventures -- it includes an acknowledgement that "D.S. agreed in concept to have her own company provide back-office support to Realize in exchange for a small percentage of Realize's eventual profits. Jones believes that D.S. therefore should not have been surprised to see her name or biographical information included either as an "affiliate" or "advisor" in Realize materials." The contents of this PSR Paragraph clearly do not describe the crime of wire fraud, or even an element of same. Additionally, the time frame referenced in PSR Paragraph 28(a) is "in 2017 and 2018."

The district court identified PSR Paragraph 35 as the basis for a finding that Jones "did not... rent the office he claimed." However, PSR Paragraph 35 does not identify any specific business or project that was associated with any particular office address, nor any investment that was even conceivably procured as a result of any confusion about an office location. Accordingly this PSR Paragraph does not allege anything remotely resembling wire fraud. Moreover, the earliest time referenced therein is June 2016.

The district court identified PSR Paragraphs 32 and 33 as the bases for a finding that Jones "did not... have the employees he claimed." However, PSR Paragraphs 32 and 33 relate to the "first identity theft victim" and "second identity theft victim" respectively, despite Jones having entered a plea of (emphatically) not guilty as to the identity theft charges in the Indictment -- charges which were subsequently dismissed. Additionally, PSR Paragraphs 32 and 33 both contain acknowledgements

that these individuals did, in fact, work for Jones -- one between 2013 and 2015 and the other between 2014 and 2016. Furthermore, PSR Paragraphs 32 and 33 do not identify any specific business or project that was associated with either of these individuals, nor do they identify any investments that were even conceivably procured as a result of any confusion about the nature or extent of the "employment" or other services provided. These PSR Paragraphs accordingly do not allege anything remotely resembling wire fraud. Regarding timing, the earliest occurrence of any alleged misconduct referenced in PSR Paragraph 32 is August 2016. PSR Paragraph 33 does not reference any timeframe whatsoever.

The district court identified PSR Paragraph 30 as the basis for a finding that Jones "did not... use the investment funds he received for real estate investments." As a preliminary matter, the sole subject of Jones's guilty plea was a venture capital fund, which had nothing at all to do with "real estate investments." Additionally, the record is replete with credible and undisputed evidence that Jones directly deployed millions of dollars toward the acquisition (or leasing) and development of real estate. In any event, PSR Paragraph 30 merely conveys in prose what the Government's loss schedule (included as Appendix K) conveys as a spreadsheet -- approximately $8.7 million were reportedly received from investors, and approximately $2.4 million were reportedly returned to investors. While Jones has clarified -- with the help of the forensic audit by Renaissance Associates -- that the $8.7 million figure is significantly inflated, and the $2.4 million figure is significantly understated, PSR Paragraph 30 does not actually contain any allegation concerning a specific business or project, nor does it contain any specific allegation (let alone evidence) of wire fraud. It also does not reference any specific timeframe or duration of alleged misconduct.

In sum, regarding the commencement or duration of alleged misconduct, only one of the above-summarized PSR Paragraphs cited by the district court references any investment activity prior to 2015. That single paragraph (PSR Paragraph 17) expressly acknowledges that with respect to Jones's acquisition of the Semiahmoo

Hotel in 2013 -- the only transaction referenced in that Paragraph -- "it was accurate for Jones to represent to investors that he... led the acquisition of the hotel... and did acquire an interest in the hotel at that time..." Out of the other eight PSR Paragraphs cited by the district court, seven of them reference dates in 2015 or later, and one references no date or duration whatsoever. Why is this important? Because according to the Government's own "loss schedule" more than $5.5 million -- i.e., more than two-thirds of the total -- were invested prior to January 2015. (Appendix K.) In fact, according to the Government's own "loss schedule" less than $1.3 million -- i.e., less than 15% of the total -- were invested during the five-year limitations period that applies to wire fraud offenses pursuant to 18 USC sec. 3282. In other words, even if every dollar received during the limitations period were the product of fraud -- a premise which Jones vigorously denies -- the maximum loss amount for which Jones could be held accountable is less than $1.3 million. That is, unless of course the district court were able to "bootstrap" Jones's guilty plea into an admission that he perpetrated a single and continuous scheme spanning each and all of seven consecutive years. [18] Similarly, regarding the nature and scope of alleged misconduct, as repeatedly pointed out in both briefs filed on behalf of Jones with the Second Circuit Court of Appeals, net of the various acknowledgments and qualifications appearing in the nine PSR Paragraphs cited by the district court and accepted by the appellate panel in support of their six rationalization for a fundamentally unsupportable determination of loss amount, not a single one describes a crime under contemporary wire fraud jurisprudence.

[18] It is well-settled that the statute of limitations for wire fraud does not begin running with the completion of the fraud scheme; rather, it runs from the date of the charged call or mailing in furtherance of the scheme. *United States v. Eckhardt*, 843 F.2d 989, 993 (7th Cir. 1988), citing to *Toussie v. United States*, 397 US 112 (1970). And although there is a lack of clarity regarding whether wire fraud can be deemed a continuing offense, *Toussie* and its progeny collectively stand for the proposition that any doubt should be resolved in favor of repose (i.e., protecting a defendant against untimely prosecution).

REASONS FOR GRANTING THE WRIT

A. The Supreme Court's Intervention Is Essential to Resolve Confusion and Conflict As to Whether a Guilty Plea Necessarily Admits Those Factual Allegations In an Indictment Which Are Not Elements of the Charged Offense.

1. Circuit Courts Have Struggled to Interpret the Meaning of the Supreme Court's Pronouncement in *United States v. Broce*.

In 1989 the Supreme Court held that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States v. Broce*, 488 US 563, 570 (1989). However, in the intervening 35 years this Supreme Court has not specifically decided whether a guilty plea also admits allegations in an indictment or information which are not essential to the conviction -- i.e., not elements of any charged offense. Meanwhile the circuit courts have struggled to interpret the meaning of the Supreme Court's pronouncement in *Broce*. Some have expressly declared that *Broce* "neither supports nor rejects the notion that surplusage is established by a guilty plea." See, for example, *United States v. Lopez*, 1994 U.S. App. LEXIS 10463, Case No. 93-50241 (9th Cir. 1994).

2. Circuit Courts Are Almost Evenly Divided As to Whether the Sentencing Judge May Rely Upon a Guilty Plea to Establish Nonessential or "Surplus" Facts Alleged in an Indictment.

The longstanding rule of the Second Circuit -- which decided the appeal from which this Petition arises -- is that "by pleading guilty [a defendant] admitted all the facts alleged in the information [or indictment] and waived all non-jurisdictional defects and defenses." *United States ex rel. Boucher v. Reincke*, 341 F.2d 977, 980 (2d Cir. 1965). The Second Circuit subsequently clarified its view that a guilty plea constitutes an admission of each and all of the underlying facts as presented by the government at the time of the plea specifically including non-essential facts such as the date or duration of the offense as charged in the indictment. *United States v. Whittaker*, 999 F.2d 38, 42 (2d Cir. 1993).

Second Circuit jurisprudence on this issue generally comports with the rules announced by the Seventh, Eighth, and Tenth Circuits. For example, the Seventh Circuit held that a defendant was precluded from denying his involvement during the first two years of a conspiracy, even though the trial court acknowledged his lack of involvement at that time, because the indictment to which he pled guilty alleged his involvement for the entire duration. *United States v. Tolson,* 988 F.2d 1494, 1501 (7th Cir. 1993). Similarly the Eighth Circuit held that a guilty plea to an indictment charging that a fraud scheme involved 135 victims precluded the defendant from arguing at sentencing that fewer victims were involved. *United States v. Eaves*, 849 F.2d 363, 365 (8th Cir. 1988). Likewise the Tenth Circuit ruled that by pleading guilty a defendant admitted not only that he committed the offense charged but also that, as alleged in the indictment, his mail fraud scheme continued until a specific date. *United States v. Morrison*, 938 F.2d 168, 171 (10th Cir. 1991). Incidentally the Tenth Circuit has cited the Supreme Court's decision in *Broce* to buttress its position that a guilty plea admits each all of the "well-pleaded facts" included in an indictment. *United States v. Hill*, 53 F.3d 1151, 1155 (10th Cir. 1995).

In 1997, the Ninth Circuit charted a different path and expressly rejected the *Tolson* and *Eaves* decisions by the Seventh and Eighth Circuits respectively. The Ninth Circuit instead announced that "allegations not necessary to be proved for a conviction... are not admitted by a plea." *United States v. Cazares*, 121 F.3d 1241, 1247 (9th Cir. 1997). In doing so, the Ninth Circuit acknowledged the existence of a circuit split. "We are aware that decisions in other circuits have... treated guilty pleas as admitting factual allegations in the indictment [which are] not essential to the government's proof of the offense." *Ibid.* "We decline to follow the reasoning of *Tolson* and *Eaves*, being persuaded that the better reasoning limits the effect of a guilty plea to an admission of [only] the facts essential to the validity of the conviction." *Cazares*, 121 F.3d at 1248. The Ninth Circuit also chastened the Government that "[t]he appropriate course is not... for the defendant [to be

required] to delete [non-essential conduct] from the guilty plea, but rather for the government at the plea colloquy to seek an explicit admission of any unlawful conduct which it seeks to attribute to the defendant." *Ibid.*

The Third and Sixth Circuits have apparently embraced the rationale espoused by the Ninth in *Cazares*. For example, in 2002 the Third Circuit held "just as the Government may obtain a conviction if only one of the several allegations... in the indictment is proven, so may a defendant plead guilty to only one of the allegations required to prove an element of her crime." *Valansi v. Ashcroft*, 278 F.3d 203, 216 (3rd Cir. 2002). In 2012 the Sixth Circuit ruled a defendant's "guilty plea did not, by itself, amount to an admission of responsibility for the 75 firearms charged in the indictment." *United States v. Louchart*, 680 F.3d 635, 640 (6th Cir. 2012). Echoing the *Cazares* decision, the Sixth Circuit clarified an "admission of facts from a guilty plea is limited to elements of the crime charged or those explicitly admitted to by the defendant." *Louchart,* 680 F.3d at 637.

And the Ninth Circuit has since refined the position it announced in *Cazares*. For example, in 2003 the Ninth Circuit ruled that "In assessing the scope of the facts established... by a guilty plea, [the court] must look at what the defendant actually agreed to -- that is what was actually established beyond a reasonable doubt." *United States v. Banuelos,* 322 F.3d 700, 707 (9th Cir. 2003). In 2004 the Ninth Circuit clarified that "[t]he government has the burden at the plea colloquy to seek an explicit admission of any unlawful conduct it seeks to attribute to the defendant." *United States v. Thomas*, 355 F.3d 1191, 1194 (9th Cir. 2004). This rule specifically extends to facts relevant to sentencing but not to conviction. For example, in 2019 the Ninth Circuit ruled that "[b]ecause drug type is not necessary to be proved for a conviction... [the defendant's] guilty plea did not constitute an admission that he conspired to import the drug type alleged in the indictment." *United States v. Juaregui,* 918 F.3d 1050, 1056 (9th Cir. 2019).

Accordingly, Petitioner is informed and believes and on this basis asserts that as of this writing the Second, Seventh, Eighth, and Tenth Circuits continue to adhere

to the rule that a guilty plea admits all facts alleged in an indictment (including but not limited to the dates or duration of alleged misconduct begins and ends), whether or not the alleged facts relate directly to elements of the offense. By contrast the Third, Sixth, and Ninth Circuits have concluded that a guilty plea admits only those allegations required to prove elements of the crime, in the absence of any further admission expressly elicited in a plea colloquy or by stipulation.

3. Treating Guilty Pleas as Conclusively Establishing Surplus Allegations Undermines Protections Provided to Defendants by the Sentencing Guidelines, Rule 11, and the Due Process Clause.

In introducing the Sentencing Guidelines Manual, the Sentencing Commission states that it "expects the guidelines to have a positive rationalizing impact upon plea agreements... [by] creat[ing] a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place... [so that parties] will no longer work in the dark." USSG Ch. 1 Pt. A(4). Similarly, the Sentencing Commission's commentary directs prosecutors to "disclose to defendants the facts and circumstances... that are relevant to the application of the sentencing guidelines." USSC Sec. 6B1.2, cmnt. Another specific aim of the Sentencing Commission in designing the Guidelines was to prevent prosecutors from altering the sentence a defendant receives by manipulating the allegations in his indictment. USSG Ch. 1 Pt. A(4)(a). The Commission notes that "the defendant's actual conduct (that which the prosecution can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence." USSC Ch. 1 Pt. A(4). This is why the Guidelines treat attendant circumstances -- such as the defendant's role in the offense, or the amount of money lost, as "real offense elements" that must be specifically proven. *Ibid.*

However, these worthy expectations, directives, and assumptions of the Sentencing Commission are all undermined by any scenario in which a guilty plea is construed as admitting allegations which do not prove elements of the charged offense. Specifically, treating guilty pleas as admissions of surplus allegations allows prosecutors to conceal their true intentions until the sentencing phase of the

case at which time a defendant might be unpleasantly surprised as to the scope of conduct for which he is to be held accountable, thereby defeating the Sentencing Commission's goals of fairness, transparency, and predictability. To be clear, one of the most fundamental protections provided by the Guidelines is the requirement that prosecutors demonstrate facts justifying sentence enhancements by a preponderance of the evidence. If such facts are simply deemed admitted for sentencing purposes, a prosecutor can evade this requirement by alleging facts in an indictment which she knows will be difficult if not impossible to prove at trial.

Indeed, allowing a prosecutor to utilize at sentencing facts not expressly admitted by a defendant, without disclosing her intent to do so, significantly increases the probability that the defendant will not understand the full consequences of his plea. It is in this context that treating a guilty plea as having conclusively established surplus allegations in an indictment also undermines the protections provided by Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 is designed to ensure that a defendant understands the ramifications of a guilty plea by requiring the judge to "inquire into the defendant's understanding of the nature of the charge and the consequences of his plea... [and] satisfy himself that there is a factual basis for the plea." *McCarthy v. United States*, 394 US 459, 467 (1969). However, Rule 11 does not require a judge to examine every factual allegation in the indictment; she is only required to examine those facts necessary to establish the elements of the charged offense. Accordingly, attempts by the Government to construe a guilty plea as admitting conduct that was not subjected to the requisite plea colloquy would directly conflict with Rule 11. Allowing the Government to forgo proving its allegations, and allowing a sentencing judge to effectively ignore the defendant's intent in agreeing to a plea, directly frustrates a central purpose of Rule 11: confirming that every defendant understands the nature of the charge and the consequences of his plea. This risk of an end-run around the protections of Rule 11 was specifically identified by the Ninth Circuit. *Cazares*, supra, 121 F.3d at 1248.

Similarly, whenever a defendant does not understand the consequences of a guilty plea, the Due Process Clause is implicated. See, for example, *Mabry v. Johnson*, 467 US 504, 509 (1984). When a defendant enters a plea she is primarily concerned with the punishment she will receive, and will generally not scrutinize the facts alleged in her indictment unless she suspects that a particular fact will impact her sentence. Given the complexity of the Guidelines -- among other factors -- the defendant might not recognize every fact that could lead to a sentence enhancement. However, because sentencing hearings -- by definition -- do not occur until after a defendant pleads guilty, the rule of the Second Circuit (and the Seventh, Eighth, and Tenth Circuits) requires a defendant to enter her plea before the Government reveals the sentence it will actually seek -- not just the maximum that it could theoretically seek. Allowing prosecutors to conceal the true effects of a plea until the sentencing phase undermines due process protections.

4. Treating Guilty Pleas as Establishing Surplus Allegations Can Also Result in a Defendant Being Punished More Severely for Entering a Plea than If He Had Been Convicted Following Trial.

In *Cazares*, the Ninth Circuit recognized that construing a guilty plea as admitting surplusage would have resulted in a sentence enhancement for one defendant but not for his co-defendant who was convicted by a jury, even though their offense of conviction was identical. *Cazares*, supra, 121 F.3d at 1247. The panel recognized the absurdity and injustice of a guilty plea having a more punitive effect that a jury verdict. *Ibid.*

Courts should not treat defendants who plead guilty more harshly than those convicted by juries. But the rule of the Second Circuit does just that, as illustrated rather explicitly by the instant matter. Defendants who plead guilty are neither more blameworthy nor more likely to be guilty than those who are convicted following a jury trial. In fact, research suggests that defendants who plead guilty are more likely to be innocent than those convicted at trial. See, for example, Scott and Stuntz, 101 *Yale Law Journal* 1909, 1912 (1992) (finding that innocent

defendants are generally more risk averse than guilty defendants and thus may seek to avoid the risk of trial by pleading guilty).

5. This Case Is an Ideal Vehicle for the Supreme Court to Resolve the Circuit Split and Announce Its Fulsome Rejection of the Anachronistic and Profoundly Unfair Rule Under Which Some Circuits Still Construe Guilty Pleas as Admitting Surplus Allegations.

There can be no question that Jones would have benefitted from putting on evidence at trial so as to limit the duration and scope of misconduct (including but not limited to any "related conduct" as contemplated by the Sentencing Guidelines). The Government did not -- indeed, cannot -- prove that Jones engaged in a single, continuous scheme from 2012 to 2019 as alleged in the Indictment.[14]

The Government also did not -- indeed, cannot -- prove that Jones intentionally deprived investors of money (or property) in connection with four separate and distinct businesses called BlueRidge Realty, Living City Residential, Atiswin Wellness, and Realize Ventures. Nevertheless Jones was sentenced as though the Government had proven all of this and more, owing to an outdated and profoundly unjust rule that allowed the district court to conclude (exactly as the Government asked it to) that Jones pleaded guilty to a count that "unambigously charged [him] with using multiple businesses that he controlled to carry-out [a] longrunning fraud, including... BlueRidge, Living City Residential, Atiswin, and... Realize [Ventures]." (Dist. Ct. Doc. 155.) As detailed in the Statement of the Case Subsection E, Judge Preska did not make any specific evidence-based finding that even one of these businesses was the subject of wire fraud, let alone all four. At no point during the sentencing hearing did she say "Jones engaged in the following

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[14] The Court of Appeals erroneously understood the Government was contending -- and that the district court had agreed -- that Jones engaged in four different schemes. That was plainly *not* the Government's contention nor the district court's finding. In any event, the Government's own "loss schedule" included as Addendum K reflects that the subject investment activity was clustered around specific projects or business lines at specific times. It was anything but continuous.

misconduct in connection with Living City Residential" or "Jones engaged in the following misconduct in connection with Atiswin." As further discussed herein, the six justifications announced at the sentencing hearing and affirmed by the appellate panel did not actual refer to any causal nexus between any specific misconduct and any specific loss associated with any of these four business lines. Instead, both the district court and the Court of Appeals relied on Jones's guilty plea to an overbroad count containing extensive surplusage to arrive at a generic and ultimately indefensible conclusion "that defendant's business operations for BlueRidge, Atiswin, Living City, and Realize were thoroughly fraudulent" and the measure of loss was every single dollar invested therein. (Appendix F at 40.)

B. The Supreme Court's Intervention Is Likewise Necessary to Avoid Confusion and Conflict As to Whether a Conviction Obtained Through a Guilty Plea May Be Challenged for Lacking an Adequate Factual Basis and, If So, What Is the Duty of the Reviewing Court When Presented with Such a Challenge.

1. Federal Circuits Are Divided As to Whether Unconditional Guilty Pleas Waive Factual Basis Challenges on Appeal.

A majority of federal circuits have addressed this question. The Sixth and Seventh Circuits have decided that a factual-basis challenge is waived by a guilty plea, whereas the First, Second, Third, Fourth, Fifth, and Eleventh Circuits permit factual-basis challenges even following an unconditional guilty plea. Meanwhille, the Eight Circuit appears to be experiencing intra-Circuit conflict.

On the "pro-waiver" side of the ledger, the Sixth Circuit concluded that a guilty plea waives "any claims not logically inconsistent with the issue of factual guilt, as well as the right to contest the factual merits of the charges against [the defendant]." *United States v. Freed*, 688 F.3d 24, 24 (6th Cir. 1982). The Seventh Circuit has similarly declared that a guilty plea "constitutes a waiver of any claim of insufficiency of proof on any element of that offense." *Milhem v. United States*, 834 F.2d 118, 120 (7th Cir. 1987).

In the "anti-waiver" camp, the First Circuit permitted a defendant to challenge the district court's factual basis for finding that that he possessed a specific number of pornographic items and instead determined that film-negatives did not fulfill the statutory requirement. Notably, this factual basis challenge was raised for the first time in the appellate court. *United States v. McKelvey*, 203 F.3d 66, 70 (1st Cir. 2000). The Second Circuit likewise permitted a factual basis review of a defendant's challenge to his conviction for a cocaine-distribution conspiracy when he had admitted involvement n a marijuana-distribution conspiracy. In vacating the conviction, the court stated that a lack of factual basis is a defect "so fundamental as to cast serious doubt on the voluntariness of the plea." *United States v. Adams*, 448 F.3d 492, 502 (2d Cir. 2006). The Third Circuit has also expressly permitted appellate review of the adequacy of the factual basis for a defendant's conviction by guilty plea. *United States v. Cefaratti*, 221 F.3d 502, 510 (3rd Cir. 2000). The Fourth Circuit has explained that a factual-basis challenge "goes to the heart of whether the guilty plea... is enforceable." *United States v. McCoy*, 895 F.3d 358, 364 (4th Cir. 2018). Fifth Circuit declared that a guilty plea does not categorically waive a factual-basis challenge and instead an appellate court "has the power to review if the factual basis for the plea fails to establish an element of the offense [to] which the defendant pled guilty..." *United States v. Baymon*, 312 F.3d 725, 727 (5th Cir. 2002). The Eleventh Circuit concurs that a factual-basis challenge goes to the heart of the enforceability – as well as the voluntariness – of any plea, whether or not a formal waiver was included. *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015).

The Eighth Circuit has an unresolved split between and among its own appellate panels. One panel permitted a factual-basis challenge to a cocaine-distribution conspiracy. *United States v. Mark*, 38 F.3d 1009, 1012 (8th Cir. 1994). Several years later another panel opined that "by entering an unconditional guilty plea... [defendant] waived his right to appeal the district court's conclusion that the interstate commerce element [of the charged offense] was satisfied." *United States v.*

Beck, 250 F.3d 1163, 1167 (8th Cir. 2001). When given the chance to resolve the internal split after the passage of another several years, an Eight Circuit panel declined to rule on the issue altogether. *United States v. Cheney*, 571 F.3d 764, 768 (8th Cir. 2009).

Although the Supreme Court has yet to address this issue directly, language from *McCarthy* provides support for the circuits that review defendants' subsequent assertions that their conduct fails to satisfy the factual elements of a criminal offense. Specifically, in 1969 the Supreme Court emphasized the need for careful judicial examination of the factual basis of a guilty plea in order to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." McCarthy v. *United States*, 394 US 459, 467 (1969).

2. Even Among the Circuits That Allow Factual-Basis Challenges to Guilty Pleas There Is Further Disagreement as to What Standard of Review Applies and What Extent of Review Is Required.

The First Circuit apparently applied a de novo standard where a factual-basis argument was raised for the first time on appeal. *McKelvey*, supra, 203 F.3d at 72 (vacating the conviction without any deference to the district court). The Second Circuit applied an abuse-of-discretion standard. *Adams*, supra, 448 F.3d at 498 ("We review for an abuse of discretion a district court's decision that a defendant's factual admissions support conviction"). By contrast, the Fifth Circuit applied a plain error standard. *Beymon*, supra, 312 F.3d at 728 ("[I]t was no plain error to accept that... there was a sufficient factual basis to support the plea").

3. This Case Provides a Timely Opportunity to Resolve These Splits Particularly In Light of the Scrutiny to Which the Supreme Court Has Recently Subjected the Government's More Expansive Theories of Wire Fraud.

As with the admissive effect of a guilty plea discussed above, because appellate circuits are also conflicted as to their obligation to consider factual-basis challenges,

a defendant who can establish an insufficient factual basis for her plea will have an opportunity to make that showing on appeal in some circuits but not in others. In light of the reality that 98% of federal convictions are accomplished through guilty pleas, resolving disagreement and confusion between and among the appellate circuits is crucial to maintaining consistency and fairness in a plea-bargaining process which for all practical purposes "is the criminal justice system." *Missouri v. Frye*, 566 US 134, 144 (2012).

The present matter is uniquely well-suited to this Court's elucidation of this issue because Jones's appeal stems from an "open" plea and therefore does not require any analysis of the enforceability of waiver language in a plea agreement. The focus is thus primarily on the obligations of an appellate court to consider a factual-basis challenge, and secondarily on the obligations of an appellate court when -- after the defendant pleads guilty -- the Supreme Court issues an intervening decision that impacts "the true nature of the charge against him." *Bousley v. United States*, 523 US 614, 618 (1998).

Jones respectfully submits that those circuits which refuse to consider factual-basis challenges on appeal defy -- indeed, defile -- the factual-basis requirement of Rule 11(b)(3). Not only does their position represent an end-run around the need for a defendant to have "real notice of the true nature of the charge" per Bousley and its progeny, it also violates a sacred separation-of-powers function by overriding protections designed to ensure that individuals who enter a guilty plea are indeed guilty of crimes deliberately created and enumerated by Congress rather than pseudo-crimes invented or at least improvised by zealous prosecutors. The criminality of admitted facts cannot be allowed to hinge on such "creative prosecutors" nor on "receptive judges." *Dubin v. United States*, 143 S.Ct. 1557, 1574.[2]

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[2] Incidentally, the *Dubin* case addresses 18 USC 1028A (Aggravated Identity Theft). There the Supreme Court emphatically -- and unanimously -- rejected the Government's overbroad interpretation of that statute and clarified that under no circumstance would it

When, as in the instant case, the Supreme Court interprets a statute after a guilty plea has been entered but while a direct appeal is still pending, the Supreme Court's interpretation naturally dictates the adequacy of the factual basis for that plea. Bousley, supra, 523 US at 619-21. This is because when the Supreme Court interprets a statute, it imparts its understanding of "what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 US 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law."). The upshot is that whenever the Supreme Court determines that a substantive federal criminal statute does not reach (i.e., does not "criminalize") certain conduct, a defendant who pleaded guilty without the benefit of the Supreme Court's interpretation may "stand[] convicted of 'an act that the law does not make criminal'." *Bousley*, supra, 523 US at 621 (quoting *Davis v. United States*, 417 US 333, 346 (1974)).

Here, although the Court of Appeals failed to even consider the possibility that he pled guilty to noncriminal conduct -- despite the issue having been raised at least 10 times in Jones's appellate briefs -- Jones presently stands convicted of various acts that 18 USC 1343 does not criminalize. As discussed at greater length above, those acts were apparently not criminal under established Second Circuit precedent like Regent Office Supply Co.[3] However, inasmuch as -- subsequent to Jones's plea -- Ciminelli definitively and unequivocally rejected the "right-to-control" theory that directly informed the only factual basis referenced in Jones's plea colloquy, the

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criminalize the (spurious) identify theft allegations which the Government made against Jones. *Dubin*, supra, 143 S.Ct. 15 1568. Although both 1028A counts in the Superseding Indictment were formally dismissed following Jones's sentencing, the potential for their "resuscitation" is of no concern to Jones should this matter be remanded by trial in the Southern District of New York (nor in the Central District of California, as Jones had twice requested).

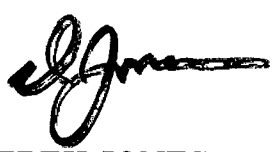
[3] *Regent Office Supply Co.*, supra; see also *Starr*, supra, 816 F.2d at 98) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution.")

paramount principles articulated by this Court in *Bousley*, *Rivers*, *Davis* and others now compel vacating Jones's conviction and remanding the case for trial.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,



DEREK JONES

DATE: December 3, 2024