

No.: \_\_\_\_\_

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
Gordon A. Driver - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

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

\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI

\_\_\_\_\_  
In Pro se

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## QUESTIONS PRESENTED

1. Whether my conviction for wire fraud is an impermissible extraterritorial application of the wire fraud statute, where the factual basis for my guilty plea failed to establish that the fraudulent conduct occurred within the United States.
2. Whether extraterritorial foreign injuries can be added to domestic injuries for calculation of relevant conduct for sentencing purposes under the wire fraud statute.
3. whether the District Court is obligated to subtract the value of all assets, intellectual property and trading losses to offset the victims loss for the purpose of calculating loss under the sentencing guidelines.

## LIST OF PARTIES

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

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## OPINIONS

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

1. The opinion of the United States Court of Appeals for the Ninth Circuit that reviewed the merits is unpublished. It was affirmed.

## JURISDICTION

Pursuant to 18 U.S.C. §3231, the district court had jurisdiction over this federal criminal proceeding. However, even if the prosecution exceeded the permissible scope of the statute, the district court retained jurisdiction to decide the case.

This Court has jurisdiction over this petition under 28 U.S.C. §1291 and 18 U.S.C. §3742(a). The district court entered both its judgment and commitment order and amended judgment on October 26, 2015. I filed my timely notice of appeal the following week on November 4, 2015. The United States Court of Appeals for the Ninth Circuit decided my case on June 9, 2017.

A timely petition for rehearing was thereafter denied on August 23rd, 2017.

An extension of time to file the petition for a writ of certiorari was granted by the Honorable Justice Kennedy to and including December 21st, 2017, On November 14th, 2017, in application No. 17A530.

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

## STATEMENT OF CASE

My conviction and sentence is about government overreach -- overreach in overstepping national boundaries and impermissibly imposing United States criminal law on foreign conduct involving foreign investors and foreign losses; overreach in attempting to hold me responsible for massive amounts of relevant conduct that was not proven to be in violation of U.S. criminal laws or the proximate cause of investor losses; and overreach in overstating the facts in the government's zeal to secure the harshest possible sentence, on top of massive civil penalties and restitution, notwithstanding my guilty plea, significant mitigation, and repayment of substantial sums to investors. Ultimately, the government's overreach led to me, a Canadian citizen, being sentenced to a staggering 151 months in U.S. prison for conduct the Canadian authorities did not even see fit to prosecute.'

As recent Supreme Court authority makes clear, the United States' prosecution in this case constitutes an impermissible extraterritorial application of the wire fraud statute, because the factual basis for my guilty plea plainly did not establish that the deceptive conduct that is the focus of the wire fraud statute occurred within the United States. See RJR Nabisco, Inc. v. European Cmty., 136 S.Ct. 2090, 2100-2101 (2016). In affirming my conviction, the Panel relied on United States v. Garlick, 240 F.3d 798 (9th Cir. 2001), to conclude that it was sufficient to establish a domestic application that the charged offense involved a domestic wire. The Panel overlooked, however, that more recent Supreme Court authority makes clear that the "focus" of the wire fraud statute is the deceptive conduct and overrules Garlick

I WAS LIVING WITH MY FAMILY AND CONDUCTING MY BUSINESS IN CANADA FROM 2003 UNTIL 2009, DURING THE WHOLE CHARGING PERIOD.



insofar as Garlick held that the "focus" of the wire fraud statute is the use of the wires.

The Panel also overlooked that my 151-month sentence was driven largely by Canadian foreign injury affecting Canadian victims, and the 9th Circuit has made clear that foreign injury may not be included in relevant conduct. United States v. Chao Fan Xu, 706 F.3d 965, 992 (9th Cir. 2013). The Supreme Court's recent pronouncements have solidified this holding. At a minimum, the district court should have made, but did not make, any meaningful determination as to what amount of the relevant conduct was domestic, rather than foreign, and what losses were properly counted in determining my Sentencing Guidelines range.

A Supreme Court review is necessary because the Panel overlooked or misapprehended several key legal points regarding extraterritorial application of the wire fraud statute and inclusion of foreign injury at sentencing, and its decision conflicts with decisions of the Supreme Court on important issues of law. See Fed.R.App. 40(a)(2); Fed.R.App. 35(a), (b)(1); 9th Cir.R. 35-1. A Supreme Court review is warranted here specifically to address the continuing validity of the 9th Circuit's decision in Garlick, Fed.R.App.P 35(b)(1)(A), and to address the important issues of whether the wire fraud statute may be applied extraterritorially and what constitutes extraterritorial application. Fed.R.App.P. 35(b)(1)(B). A Supreme Court review is also warranted because the Panel's decision regarding the consideration of foreign injury in sentencing creates a direct conflict with another decision of the 9th Circuit and calls for the Supreme Court to bring the 9th Circuit into line with the majority of other circuits and hold that relevant conduct

must constitute a crime under U.S. criminal laws. See Fed.R.App.P. 35(b)(1)(A), (B); 9th Cir. R. 35-1.

I have a background in software development. In the early 2000's, I was introduced to a software program for use in selecting profitable commodity futures trades. Although initially interested in improving the performance of that software, I came to learn that the software did not work. I therefore decided to design my own system which I believed would be profitable in trading e-mini S&P 500 futures contracts. Though the system did deliver remarkable profits in simulated trading, it initially did not deliver such profits in the real market. I believed that there was a defect in the software's live trade execution, and that I could fix it. I solicited investors -- most of whom were Canadian -- primarily through third parties, and I described the performance of the software in simulated trading until the live trading matched the performance of the simulated trading.

In 2009, the government -- as well as the SEC, the CFTC, and the OSC (a Canadian regulatory agency) -- began investigating me. Even with the heavy penalties and restitution of over 50 million dollars entered against me in the civil arena in both the United States and Canada, the United States government filed an indictment charging me with, 1.3 million dollars U.S. loss, among other things, wire fraud in violation of 18 U.S.C. §1343 and making a false statement in violation of 18 U.S.C. §1001, in 2012.

I was never charged in Canada.

I. The Panel Misapprehended the Law When it Relied on Ninth Circuit Case Law that Has Been Superseded by Supreme Court Precedent.

The Supreme Court has made clear that in the absence of a clearly expressed Congressional intent, statutes are presumed not to apply extraterritorially. See, e.g., Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 255 (2010). The Supreme Court has recently provided clear guidance on how to determine whether a statute is being applied extraterritorially:

If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

RJR Nabisco, 136 S.Ct. at 2094. Courts must, therefore, determine what conduct is the focus of the statute and look to where that conduct took place in order to determine whether application of the statute was domestic or extraterritorial.

In its disposition, the Panel rejected my argument that the wire fraud statute had been applied extraterritorially, stating that "[t]he focus of [the mail and wire fraud statutes] is upon the misuse of the instrumentality of communication." United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001) (quoting United States v. Alston, 609 F.2d 531, 536 (D.C. Cir. 1979)). However, the Panel's reliance on Garlick, 240 F.3d at 792, was misplaced as the Supreme Court's subsequent opinions have clarified that the focus of the wire fraud statutes is the conduct itself, not the effects of that conduct. This Supreme Court analysis is inconsistent with the Court's finding in Garlick and thus necessarily supersedes it.

In Pasquantino v. United States, 544 U.S. 349 (2005), the Supreme Court focused on the location of the criminal conduct itself, not the results of that conduct. The Supreme Court clarified that "the domestic element of petitioners' conduct is what the Government is punishing in this prosecution." Id at 371. The Supreme Court then relied on this understanding in Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247 (2010), where it stated that the focus of the wire fraud statute is the deceptive conduct.

While the use of United States wires may establish jurisdiction, the Supreme Court has made clear that this inquiry is separate from the inquiry regarding the focus of the statute and extra-territorial application. See RJR Nabisco, Inc., 136 S.Ct. at 2100-2101. Satisfying the jurisdictional element alone is insufficient to rebut the presumption against extraterritoriality. See RJR Nabisco, Inc., 136 S.Ct. at 2100-2101; see also Morrison, 561 U.S. 247. The two inquiries must not be conflated, or the presumption against extraterritoriality would serve no purpose. Thus, the Supreme Court has made clear, post-Garlick, that the question of extraterritorial application turns on the "focus" of the statute, not the jurisdictional hook which may be an effect of that conduct. In the case of wire fraud, the Supreme Court's case law makes clear that the focus of the statute is the deceptive conduct itself, not on the "effect" of the conduct, the use of the wire.

Here, rather than relying on these Supreme Court cases, the Panel erroneously relied on Garlick, which predates and is in conflict with the Supreme Court's analysis on the issue. 240 F.3d at 792. This reliance on Garlick is directly tied to the

inappropriate conflation of the jurisdictional and extraterritorial inquiries. The Panel's conflation of the two inquiries was clear throughout oral argument, as the Panel expressed confusion regarding why any additional information was necessary beyond the concession that U.S. wires were used.

This confusion reflected the misunderstanding regarding the difference between jurisdictional requirements and the focus inquiry necessary to determine extraterritorial application and overreach.

II. Regarding Mr. Driver's Sentencing Arguments, The Panel Overlooked Key Circuit Case Law Requiring the District Court to Engage in Meaningful Analysis and Consideration of the Actual Domestic Criminal Conduct Leading to Loss, Creating an Intra-Circuit Conflict

In calculating my 151-month sentence, the district court failed to engage in any analysis or make any factual findings regarding the relevance of specific conduct, the criminality of specific conduct, or the the appropriateness in considering such conduct. These failures led the district court to impermissibly consider foreign injury and overvalue the loss amount in direct contradiction with the 9th Circuit's precedent. Despite clear circuit authority holding that foreign injury cannot be included in loss amount, the Panel found no plain error. In doing so, the Panel came to a conclusion which is in direct conflict with the Ninth Circuit's and other circuits' case law not only on the issue of inclusion of foreign injury, but also on the issue of whether relevant conduct must be criminal and the requirement that sentencing courts engage in meaningful analysis of what losses were proximately caused by the defendant's criminal conduct.

A. The Panel's Decision Is in Direct Conflict with Ninth Circuit's Case Law Clearly Establishing that Foreign Injury could Not be Considered Relevant Conduct for Sentencing Purposes.

This Court has clearly and unequivocally answered "no" to the question of whether district courts may consider foreign injury when determining loss calculation for sentencing purposes. The Panel's finding that the Court's loss calculation was not clearly or obviously wrong overlooks this Court's decision in United States v. Chao Fan Xu, 706 F.3d 965 (9th Cir. 2013). In Chao Fan Xu, the Court was unequivocally clear that, "applying the relevant conduct analysis to Defendant's foreign conduct was not permissible." 706 F.3d at 992-93. Yet here, the district court expressly did so, relying on foreign injury for sentencing purposes, stating, "a substantial part of a fraudulent scheme was committed from outside of the United States [...] [T]he conduct in Canada, which included some Canadian victims, it was something looked into by the Canadian authorities." The district court never engaged in consideration or analysis as to whether this foreign injury was properly included or whether it was entirely foreign and therefore separate from the domestic crime. This failure to even consider whether or not inclusion of the foreign injury was proper is clear and obvious error in light of Chao Fan Xu, as it is in direct conflict with it, yet the Panel failed to even cite the case. United States v. Walls, 784 F.3d 543, 546 (9th Cir. 2015). This sentencing error warrants reversal. Molina-Martinez v. United States, 136 S.Ct. 1338, 1345 (2016).

Additionally, the Supreme Court's decisions, discussed above, bolster this Court's decision in Chao Fan Xu. As the Supreme

Court has made clear, the presumption against extraterritoriality generally limits the U.S. government's ability to punish individuals for criminal conduct that occurs outside of U.S. borders.

The focus of the wire fraud statute is on punishing domestic deceptive conduct. See Pasquantino, 544 U.S. 349; see also Morrison, 561 U.S. 247. Accordingly, it is an improper expansion of the government's power to punish an individual, whether through a charging decision or a sentencing calculation, based on allegedly deceptive conduct that occurred in another country. The fact that the Panel overlooked this critical case law and found no plain error creates a serious conflict with Ninth Circuit and Supreme Court precedent.

Further, by reviewing for plain error and failing to address the merits of my arguments, the Panel's result creates confusion and inconsistencies. In United States v. Joseph, 716 F.3d 1273, 1276 n.4 (9th Cir. 2013), this Court made clear that when presented with a pure question of law, the Court is not limited to the plain error standard. The interpretation of the sentencing guidelines is considered "purely one of law." United States v. Evans-Martinez, 611 F.3d 635, 642 (9th Cir. 2010). Similarly here, although not a direct interpretation of the sentencing guidelines, the issue is a pure question of law, as it involves the legal question of whether or not the district court could consider foreign injury in its sentencing analysis. The district court never even acknowledged this inquiry and therefore never reached any factual consideration of whether my Canadian conduct was being improperly included in my sentencing calculation.

B. The Panel's Decision Is in Conflict with the Law of Majority of the Circuits Holding that Relevant Conduct Must Be Criminal.

The notion that foreign injury cannot be considered for sentencing purposes is consistent with the principle that conduct must be criminal to be considered relevant conduct. The Ninth Circuit remains one of the few circuits yet to confront this issue, United States v. Christensen, 732 F.3d 1094, 1110 (9th Cir. 2013) (Tashima J., dissenting) (noting lack of Ninth Circuit authority and listing cases from other circuits). Every other circuit to have reached the issue has concluded. On October 30, 2017, the U.S. Court of Appeals for the Second Circuit defined domestic injury. (Bascunan v. Elsaca, 2017 BL388077, 2nd Cir. No. 16-3626-CV, 10/31/17). The Court said "the fact that a defendant's use of bank accounts located within the United States to facilitate or conceal the theft of property located outside the United States, on it's own, does not establish that a civil rico plaintiff has suffered a domestic injury."

In United States v. Catchings, 708 F.3d 710, 712, 720 (6th Cir. 2013), the Sixth Circuit stated unequivocally that relevant conduct must be conduct for which the defendant, "could potentially be incarcerated." This must be the case because otherwise, sentencing courts would "become mired with the impossibly subjective task of determining the relevative benignness of various legally permissible acts." United States v Griffith, 584 F.3d 1004, 1013 (10th Cir. 2009). This sentiment has been reiterated by multiple other circuits. See United States v. Schaefer, 291 F.3d 932, 940-41 (7th Cir. 2002); United States v. Dove, 247 F.3d 152, 155 (4th Cir. 2001); United States v. Jain, 93 F.3d 436, 443 (8th Cir.

1996); United States v. Peterson, 101 F.3d 375, 385 (5th Cir. 1996); United States v. Dickier, 64 F.3d 818, 830-31 (3rd Cir. 1995); see also United v. Norris, 452 F.3d 1275, 1281 n.1 (11th Cir. 2006) (expressing no opinion on whether relevant conduct must be criminal but noting that several circuits have held that relevant conduct must be criminal).

It logically follows that where conduct occurs beyond the reach of U.S. criminal law, it cannot be considered criminal conduct and therefore cannot be included in relevant conduct. To find otherwise would leave sentencing courts in the same impossible position of determining the subjective wrongfulness of foreign injury and its impact of foreign alleged victims. Yet this is precisely the subjective inquiry the district court undertook here. Despite Canada's decision not to charge me with any crime, the district court used that conduct to enhance my sentence in the United States. The outcome of this case leaves the Ninth Circuit as the outlier, as the Panel's failure to recognize error essentially leads to the conclusion that noncriminal conduct may be considered relevant conduct.

Given the clear consensus among the other circuits, and the policy reasons underscoring that consensus, this cannot have been the intent of the Panel.

C. The Panel Failed to Recognize Case Law Requiring the District Court to Engage in Meaningful Analysis of Relevant Conduct for Sentencing Purposes.

The district court's failure to engage in any analysis of the relevant conduct has consequences reaching beyond issues concerning the consideration of foreign injury. The district court's findings reflect a concerning pattern of sentencing courts blindly

accepting the government's muddled loss and victim calculations with no meaningful analysis as to the reliability or accuracy of those calculations. Although the district court need not calculate the loss with, "absolute precision," United States v. Showalter, 569 F.3d 1150, 1161 (9th Cir. 2009), it must be based on a meaningful analysis ensuring that any loss suffered is a proximate result of criminal conduct. See, e.g., United States v. Hicks, 217 F.3d 1038, 1049 (9th Cir. 2000); United States v. Leonard, 529 F.3d 83, 93 (2nd Cir. 2008). The Ninth Circuit reversed where, as here, a district court simply relies on an investor lost provided by the government. Showalter, 569 F.3d at 1160-61.

The Ninth Circuit's recent decision in United States v. Geringer, No. 15-10353, 2016 U.S. App. LEXIS 21565, at \*3 (9th Cir. Dec. 2, 2016), demonstrates the requirements of such meaningful analysis at sentencing. The Court there, relying on United States v. W. Coast Aluminum Heat Treating, Co., 265 F.3d 986, 992 (9th Cir. 2001), reversed a sentencing determination where the district court failed to consider the value of an investment fund's assets in calculating loss. The Ninth Circuit made clear that a victim's loss should be offset by the victim's benefit for purposes of sentencing.

Here, the district court plainly erred by failing to engage in any such meaningful analysis, instead merely determining that because investors, both domestic and foreign, had lost money trading, all of their trading loss should be included in the loss amount calculation. Investors knew the I was trading their funds in commodities futures, where loss is always an inherent risk. The fact that investors lost money through use of my trading software

does not by itself reflect any criminal conduct. However, the government's calculation, as adopted by the district court, reflected no analysis as to whether the investors' loss was actually the proximate result of the fraudulent conduct rather than the natural result of live trading. Moreover, my trading software had legitimate value and provided benefits to the investors using it to trade.

In the sentencing transcript of the district court the government admits the software had generated 1.3 million dollars in leasing sales therefore placing a value on the software intellectual property. Transcript at page 35, line 20. Later in the transcript the government withdrew it's request for a forfeiture after the court entered a judgment of forfeiture against me. (Transcript page 85).

In calculating the amount of loss, the district court, however, failed to consider the value of this asset at the time the government shut my business down. In light of this Court's precedent, the district court's failure to engage in a meaningful loss analysis was plainly erroneous.

As the Panel overlooked these critical Ninth Circuit cases, and established intra-circuit and inter-circuit splits and conflicts with Supreme Court law, a Supreme Court review is necessary.

With International Commerce becoming more prevelant, this ruling will impact many citizen's foreign and American, by providing clarification of law that will be consistent for all circuits.

#### CONCLUSION

The Petition for Certiorari should be granted.

Executed this the 19 day of December, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gordon A. Driver", with a long horizontal flourish extending to the right.

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