

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

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IN THE  
**Supreme Court of the United States**

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KEITH WAYNE CARVER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Fourth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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June 24, 2019

## QUESTION PRESENTED

1. Whether the statutory phrase "can be used" contained in the definition of "access device" at 29 U.S.C. § 1029(e)(1) requires the Government prove usability of the device in order for that access device to be included in the loss amount calculation for sentencing guidelines purposes.

## PARTIES TO THE PROCEEDINGS

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

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	I
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF AUTHORITIES .....	vi
PETITION FOR WRIT OF CERTIORARI .....	1
OPINION BELOW .....	1
JURISDICTION .....	1
STATUTORY and GUIDELINES PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING THE WRIT .....	5
I.    The Circuit Courts are divided on this important statutory interpretation question .....	5
II.   The legislative history of 18 U.S.C. § 1029 establishes the phrase "can be used" includes a usability requirement. ....	8
III.  This case presents an ideal vehicle to establish the proper interpretation of the statutory definition .....	10
CONCLUSION .....	11

## APPENDICES

### Appendix A:

Opinion of the United States Court of Appeals for the Fourth Circuit, 916 F.3d 398 (4th Cir. 2019) . . . . .	1a
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## TABLE OF AUTHORITIES

Cases	
<i>United States v. Blackmon</i> , 839 F.2d 900 (2d Cir. 1988) .....	8
<i>United States v. Carver</i> , 916 F.3d 398 (4th Cir. 2019) .....	4, 5
<i>United States v. Goodchild</i> , 25 F.3d 55 (1st Cir. 1994) .....	9
<i>United States v. Hughey</i> , 147 F.3d 423 (5th Cir. 1998) .....	10
<i>United States v. Jones</i> , 557 F. Supp. 2d 630 (E.D. Pa. 2008) .....	6
<i>United States v. McNutt</i> , 908 F.2d 561 (10th Cir. 1990) .....	8
<i>United States v. Moon</i> , 808 F.3d 1085 (6th Cir. 2015) .....	5, 6
<i>United States v. Nguyen</i> , 81 F.3d 912 (9th Cir. 1996) .....	6
<i>United States v. Onyesoh</i> , 674 F.3d 1157 (9th Cir. 2012) .....	6
<i>United States v. Popovski</i> , 872 F.3d 552 (7th Cir. 2017) .....	7
<i>United States v. Rueda</i> , First Cir. Case No. 18-1962 .....	7
<i>United States v. Thomas</i> , 841 F.3d 760 (8th Cir. 2016) .....	7
Statutes	
15 U.S.C. § 1644(a) .....	8
18 U.S.C. § 2 .....	3
18 U.S.C. § 1028 .....	8
18 U.S.C. § 1028A .....	3
18 U.S.C. § 1029 .....	iii, 1, 5, 8
18 U.S.C. § 1029(a)(3) .....	3

18 U.S.C. § 1029(a)(4) .....	3
18 U.S.C. § 1029(e) .....	8
18 U.S.C. § 1029(e)(1) .....	I, 1, 3, 5
18 U.S.C. § 1029(e)(2) .....	1, 2, 3
18 U.S.C. § 1029(e)(3) .....	2, 3, 4, 7
28 U.S.C. § 1254(1) .....	1

#### United States Sentencing Guidelines

U.S.S.G. § 2B1.1 .....	2, 3, 5
U.S.S.G. § 2B1.1(b)(1)(C) .....	3
U.S.S.G. § 2B1.1 comment. n.3 .....	2
U.S.S.G. § 2B1.1 comment. n.3(F)(I) .....	2
U.S.S.G. § 2B1.1 comment. n.10(A) .....	2

#### Other Authorities

H.R. Rep. 98-894 (1984), <i>as reprinted in</i> 1984 U.S. Code Cong. & Ad. News 3689 .....	9, 10
S. Rep. No. 98-368 (1984), <i>as reprinted in</i> 1984 U.S. Code Cong. & Ad. News 3647 .....	9, 10

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

### OPINIONS BELOW

The published decision of the court of appeals appears at pages 1a – 7a of the appendix to this petition and is reported at 916 F.3d 398.

### JURISDICTION

The judgment of the court of appeals was entered on February 26, 2019. Petitioner did not seek rehearing.

On May 21, 2019, Chief Justice Roberts extended the time within which to file a petition for writ of certiorari to and including June 28, 2019. Jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

### STATUTORY and GUIDELINE PROVISIONS INVOLVED

18 U.S.C. § 1029(e)

(e) As used in this section—

(1) the term “access device” means any card, . . . account number, . . . personal identification number, . . . or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds . . .

(2) the term “counterfeit access device” means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(3) the term “unauthorized access device” means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud . . .

United States Sentencing Guidelines § 2B1.1:

U.S.S.G. § 2B1.1 Commentary Note 3:

Loss Under Subsection [§ 2B1.1] (b)(1).--This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule.--Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(I) Actual Loss.--“Actual loss” means the reasonably foreseeable pecuniary harm that resulted from the offense.

(ii) Intended Loss.--“Intended loss” (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

U.S.S.G. § 2B1.1 Commentary Note 3(F)(I):

Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.--In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. . . . For purposes of this subdivision, “counterfeit access device” and “unauthorized access device” have the meaning given those terms in Application Note 10(A).

U.S.S.G. § 2B1.1, Commentary Note 10(A):

“Counterfeit access device” (I) has the meaning given that term in 18 U.S.C. § 1029(e)(2); . . .

“Unauthorized access device” has the meaning given that term in 18 U.S.C. § 1029(e)(3).

## STATEMENT OF THE CASE

There is a significant division among the circuit courts regarding the interpretation of the statutory definition of “access device” found in 18 U.S.C. § 1029(e)(1). Some circuit courts do not require the Government to prove the illicit access device to be usable; the Ninth Circuit imposes a usability requirement. This split needs to be addressed by this Court to ensure the lower courts’ proper interpretation of the statutory terms “access device,” “counterfeit access device,” (18 U.S.C. § 1029(e)(2)) and “unauthorized access device” (18 U.S.C. § 1029(e)(3)), as well as those terms’ incorporation into the Sentencing Guidelines at § 2B1.1.

Petitioner Keith Wayne Carver pleaded guilty to possession of at least fifteen counterfeit or unauthorized access devices with intent to defraud and aid and abet, in violation of 18 U.S.C. §§ 1029(a)(3) and 2 (Count 1); possession of device making equipment with intent to defraud and aid and abet, in violation of 18 U.S.C. §§ 1029(a)(4) and 2 (Count 2); and aggravated identity theft and aid and abet, in violation of 18 U.S.C. §§ 1028A and 2 (a separate felony Information).

A Presentence Report (PSR) was prepared for sentencing. The probation officer added a four-level enhancement under U.S.S.G. § 2B1.1(b)(1)(C) for a loss amount greater than \$15,000 but less than \$40,000 based on the number of “cards” found during a search of Petitioner’s hotel room. Pursuant to the commentary of U.S.S.G. § 2B1.1 of the Guidelines, the total intended loss figure associated with these “cards” was determined to be \$28,382.02. Petitioner objected to the loss amount, arguing that many of the cards were not usable due to incomplete coding or other errors.

The district court ultimately overruled in part Petitioner's objection, implicitly finding usability was not required for the "loss" sentencing enhancement to apply. The district court sentenced Petitioner to 33 months' imprisonment as to Counts 1 and 2, with the terms to be served concurrently with each other, and 24 months' imprisonment as to the felony Information, to be served consecutively to the sentences on Counts 1 and 2, as required by statute. The district court also imposed three years' supervised release and a \$300 special assessment fee.

Petitioner appealed to the Fourth Circuit Court of Appeals, which affirmed the district court. The court rejected Petitioner's argument that the phrase "can be used" in the statute's definition of "access device" requires proof of usability. The Court of Appeals found that the definition of "unauthorized access device" at 18 U.S.C. § 1029(e)(3) "refutes" Petitioner's argument, and that Congress, "mindful of the need to encompass future technological changes, . . . wrote broadly to include any device of the general sort that people can use to get money." *United States v. Carver*, 916 F.3d 398, 402, 403 (4th Cir. 2019) (internal citation omitted). "The general words 'can be used' signify an intent to expand the reach of the definition [of access device]." *Id.* at 403.

## REASONS FOR GRANTING THE PETITION

The definition of “access device” located at 18 U.S.C. § 1029(e)(1) requires that an access device be a device that “can be used . . . to obtain” money, goods, or other items of value. There is a disagreement among the circuit courts as to whether the phrase “can be used” means that an access device be currently usable or whether, as found by the appellate court in Petitioner’s case, “can be used” simply refers to “the sort of thing that people use to obtain money (like a credit card or bank number).” *Carver*, 916 F.3d at 403. The Ninth Circuit holds that unauthorized access devices must be usable. The Fourth, Sixth, and Seventh Circuits hold the opposite.<sup>1</sup>

Clarification by this Court is needed on this issue not only is the term “access device” incorporated into two other statutory definitions, but also because (as is relevant to this case), this definition is incorporated into the federal Sentencing Guidelines in calculating “loss” under U.S.S.G. § 2B1.1. The improper application of this term not only impacts the calculation of the Sentencing Guidelines, but also may, in some instances, impact a defendant’s liability under 18 U.S.C. § 1029.

### I. The Circuit Courts are divided on this important statutory interpretation question.

The Circuit Courts are divided on the interpretation of the phrase “can be used” as that phrase is used in the definition of “access device” contained in 18 U.S.C. § 1029(e)(1). The Ninth Circuit holds that in calculating loss under the Guidelines, some

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<sup>1</sup> Petitioner respectfully takes the position that the Sixth Circuit’s decision on this issue is *dicta*, as the court found defendant had waived his right to appeal. *See United States v. Moon*, 808 F.3d 1085 (6th Cir. 2015).

proof of usability is required to count an “unauthorized access device whose usability is not readily apparent, such as an expired credit card number.” *United States v. Onyesoh*, 674, F.3d 1157, 1160 (9th Cir. 2012). In *Onyesoh*, the Ninth Circuit considered whether 500 expired credit card numbers could be used as part of the loss-amount calculation under the Guidelines. 674 F.3d at 1158. The court examined the language of the statute, which requires that in order for something to qualify as an access device, it must be “capable of obtaining ‘money, goods, services, or any other thing of value.’” *Id.* at 1160. The court then observed that while the statute was clearly “intended to target major fraud operations instead of individual use of an expired or revoked card . . . the kind of devices potentially covered by the statute says nothing about the quantum of proof necessary to establish usability. The legislative history simply does not address that issue.” *Id.* (quotation marks omitted).

The Ninth Circuit surveyed prior court precedent and found that “[n]o court, in this or any other circuit, has read usability out of the statute.” *Id.* In its survey of the law, the court found at least two prior decisions—one by the Ninth Circuit itself and the other by a district court in Pennsylvania—which had analyzed the issue and determined that the statute required the Government to prove that any allegedly stolen credit cards could have been used to obtain goods or services in order to qualify as an “access device” within the meaning of the statute. *See id.* (citing *United States v. Nguyen*, 81 F.3d 912, 914 (9th Cir. 1996), and *United States v. Jones*, 557 F. Supp. 2d 630 (E.D. Pa. 2008)). Consequently, based on the language and history of the statute and prior courts’ application of the statute, the Ninth Circuit held proof of

usability is required for a card to qualify as an access device for sentencing purposes. *See id.* at 1159.

The Sixth Circuit rejected this usability requirement, albeit in lengthy *dicta*. *See United States v. Moon*, 808 F.3d 1085, 1090 (6th Cir. 2015) (holding that defendant had waived his right to appeal in his plea agreement). In *Moon*, the circuit court pointed out “unauthorized access device” means, *inter alia*, any access device that is “lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.” *Moon*, 808 F.3d at 1092 (citing 18 U.S.C. § 1029(e)(3)). The court reasoned that because cards that are expired, revoked, or canceled are necessarily not usable, the statute does not require usability of access devices in general. *Id.* The court also noted that even if such cards could not be used to make purchases, they could still be used for other unlawful purposes such as creating fake identities. *Id.* *See also United States v. Popovski*, 872 F.3d 552 (7th Cir. 2017) (same).

In *United States v. Thomas*, 841 F.3d 760, 765 (8th Cir. 2016), the Eighth Circuit declined to rule on the issue and found no plain error by the district court “because neither the Supreme Court nor our court has addressed whether USSG § 2B1.1 contains a usability requirement, and other circuit courts are divided on the issue.” *Thomas*, 841 F.3d at 765.

At the time of the filing of this petition, this same issue is before the First Circuit Court of Appeals in *United States v. Rueda*, No. 18-1962. The *Rueda* case was argued before a three-judge panel of the First Circuit on June 3, 2019.

II. The legislative history of 18 U.S.C. § 1029 establishes the phrase “can be used” includes a usability requirement.

An examination of the legislative history of 18 U.S.C. § 1029 confirms that Congress meant the statutory phrase “can be used” to mean currently usable. Contrary to the positions taken by the Fourth, Sixth, and Seventh Circuits, Congress was not concerned in this statute with devices which might be used to create false identities, as “neither the statutory language nor the legislative history anywhere mentions the use of credit cards as false identification.” *United States v. Blackmon*, 839 F.2d 900, 914 (2d Cir. 1988); *see also United States v. McNutt*, 908 F.2d 561 (10th Cir. 1990) (same). That concern is covered by 18 U.S.C. § 1028 (“Fraud and related activity in connection with identification documents, authentication features, and information”).

Before 1984, fraudulent use of credit cards was federally prosecuted under a section that made it unlawful to

knowingly in a transaction affecting interstate or foreign commerce, use [ ] or attempt[ ] or conspire[ ] to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating \$1,000 or more.

15 U.S.C. § 1644(a) (1982). In response to a skyrocketing number of crimes relating to the fraudulent use of credit cards in the early 1980s, Congress enacted 18 U.S.C. § 1029, which significantly broadened the federal government’s ability to prosecute these types of crimes.

The original versions of both the House and Senate bills contained language prohibiting the fraudulent production, transfer, or possession of the defined cards

and/or account numbers if they “exist[ed] for the purpose of obtaining’ things of value or ‘for the purpose of initiating’ fund transfers.” S. Rep. 98-368 (“Senate Report”), at 11, *reprinted in* 1984 U.S. Code Cong. & Ad. News (“USCCAN”) 3647, 3657. *See also* H.R. Rep. 98-894 (“House Report”), at 14, 1984 USSCAN 3689, 3700. “Because of concern that a specific ‘purpose’ would be unnecessarily difficult for the prosecution to prove beyond a reasonable doubt, the bill reported by the [Senate] committee refers to devices that ‘can be used’ for those purposes, which establishes a more objective test.” Senate Report at 11, 1984 USCCAN at 3657. It was the phrase “alone or in conjunction with another access device” which was “intended to cover any account access elements or means of identification currently available or that may become technologically available, which may be used in connection with accounts but which themselves may not be ‘access devices.’” House Report at 19, 1984 USCCAN at 3705.

The phrase “expired, revoked, or canceled” in the definition of “unauthorized access device” was added by the Senate to prohibit the illicit use of those covered access devices where, “for instance, expired cards [] had been altered to appear valid.” Senate Report at 11, USSCAN at 3657. *See also United States v. Goodchild*, 25 F.3d 55 (1st Cir. 1994) (prosecution for use of unauthorized access devices which had been obtained after previous credit cards had expired upon death of legitimate user). Therefore, contrary to the positions of the Sixth, Seventh, and Fourth Circuits, the fact that the definition of “unauthorized access device” includes devices that are “expired, revoked, [or] canceled” does not mean that these cards “cannot be used” to obtain money or other items of value. *Carver*, 916 F.3d at 402.

Congress was focused upon the fraudulent *use* of such devices in connection with credit transactions. See House Report at 14, 1984 USSCAN at 3700 (“unauthorized” access device described as “genuine access devices *being used* without authority” (emphasis added); *id.* at 17, 1984 USCCAN at 3703 (“genuine but *being misused* (unauthorized)” (emphasis added); *id.* at 19, 1984 USCCAN at 3705 (section 1029(e)(1) encompasses “*manifestations* of access devices *used* between merchants and credit card companies for payment for access device transactions”) (emphases added). *See also* *United States v. Hughey*, 147 F.3d 423, 434 (5th Cir. 1998) (noting that Congress “drafted the statute broadly to include any fraud arising from unauthorized use or counterfeiting of . . . devices *capable of affording account access . . .*”) (citing Senate Report at 10) (emphasis added). To read a usability requirement out of the statute mean defendants can be prosecuted for having in their possession random sets of numbers that appear to be account numbers or credit card numbers and, as in Petitioner’s case, have an inflated amount of loss attributed to their offense under the Sentencing Guidelines. If it cannot be used to obtain goods, money, or other items of value, it is not an access device under the statute.

III. This case presents an ideal vehicle to establish the proper interpretation of the statutory definition.

This case presents this Court with the opportunity to address this significant issue of statutory interpretation. Not only was the issue preserved in the district court, but it was fully briefed and argued before the appellate court. As the circuit courts are divided over this statutory interpretation issue which impacts not only the calculation

of loss under the Guidelines but also may impact a defendant's liability under the statute.

## CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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