No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW G. MUNKSGARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

LAW OFFICE OF STEPHEN N. BERNSTEIN

/s/ Stephen N. Bernstein

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QUESTIONS PRESENTED

Whether it is proper to presume that a certificate of FDIC insurance issued 23 years earlier, combined with the statement of a bank officer that FDIC insurance was in place two years after the date of the charged offense, proves beyond and to the exclusion of a reasonable doubt, the indispensable element of proof of FDIC insurance at the time of the offense.

Whether the Petitioner's conduct in signing a document with another's name, on behalf of a Corporation, where the third party bank acknowledged that it did not rely upon the signature in extending the loan, did not constitute "use" within the meaning of 18 U.S.C. 1028 as charged in Count Five.

No. 16-17654-AA

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

UNITED STATES OF AMERICA vs. MATTHEW MUNKSGARD

Appeal No. 16-17654-AA

District Court No.1:15-CR-12

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Bernstein, Stephen N.

Canova, Christopher P.

Davies, Robert G.

Grogan, Andrew J.

Lindsey, Herbert S.

Munksgard, Matthew G.

Walker, Honorable Mark E.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES ..... iv,v

OPINION BELOW 1

STATEMENT OF JURISDICTION..... 3

STATUTORY PROVISIONS INVOLVED..... 3

STATEMENT OF FACTS..... 4-6

SUMMARY OF THE ARGUMENT 6,7

REASONS FOR GRANTING THE WRIT 7-14

ISSUES 7,10

ISSUE I: WHETHER IT IS PROPER TO PRESUME THAT A CERTIFICATE OF INSURANCE ISSUED 23 YEARS EARLIER, COMBINED WITH THE TESTIMONY THAT THERE WAS FDIC INSURANCE TWO YEARS AFTER THE DATE OF THE OFFENSE, SATISFIES PROOF BEYOND A REASONABLE DOUBT OF INSURANCE AT THE TIME OF THE OFFENSE 7

ISSUE II: IN THE INSTANT CASE THE CONVICTION FOR VIOLATIONOF AGGRAVATED IDENTITY THEFT IN VIOLATION OF 18 U.S.C 1028A(a)(1) UNDER COUNT FIVE MUSTBE VACATED BECAUSE THE STATUTE DOES NOT APPLY TO PETITIONER'S CONDUCT 10

CONCLUSION 14

INDEX TO APPENDICES .....

A. DOC.149, OPINION FILED 1/30/19 U.S. COURT OF APPEALS FOR THE 11TH CIRCUIT App. A

B. 5/2/19, ORDER PETITION REHEARING App. B

C. DOC. 151, 5/10/19, LETTER ISSUING MANDATE App. C

CERTIFICATE OF SERVICE..... 14

TABLE OF AUTHORITIES

NOTE IN ALPHABEITICAL ORDER

CASES **PAGES**

Apprehendi vs. New Jersey

530 U.S.466, 477, 120 S.Ct.2348, 2356 (2000). 9

United States v. Berroa,

856 F.3d 141 (1st Cir. 2017)..... 10,11, 13,14

Cook vs. United States

320 F. 2d 258 (5th Circuit 1963)..... 8

United States vs. Fitzpatrick,

581 F. 2d 1221 (5th Circuit 1978) 7

United States v. Ford,

639 F.3d 718, 720 (6th Cir. 2011)..... 10

United States vs. Michael,

882. F. 3d 624 (6th Circuit 2018) 12

United States v. Miller,

734 F. 3d 530 (6th Cir. 2013)..... 11,12, 13,14

United States vs. Platenburg,

657 7. 2d 797, 800 (5th Circuit 1981)..... 8

STATUTES

18. U.S.C. § 1014 2,4,5,6,9,10

18 U.S.C. § 1028A 2,3,4,5,6, 9,10,11,13 14

28 U.S.C. § 1254(1) 3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Matthew G. Munksgard respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit entered on January 30, 2019

OPINION BELOW

Over a dissent from Judge Tjoflat, the Panel majority ordered oral arguments and on January 30th, 2019 entered an Order affirming the convictions acknowledging that the appeal "presents both a surprisingly close question of evidentiary sufficiency- so close, in fact, that it has prompted a dissent- and an interesting statutory - interpretation issue." The Panel majority notes that the sufficiency of evidence to establish that the Bank was FDIC -insured issue was "irritatingly familiar" and despite other cases where the Court has "rapped the government's knuckles, the evidence was hardly overwhelming." Yet the Panel

reluctantly found, in the light most favorable to the government, the proof was adequate. In the dissent, Judge Tjoflat noted that "there was no direct evidence that the Bank was insured in either 2013 or 2014- no documentary evidence, witness testimony or otherwise." Only three pieces of circumstantial evidence: a certificate that deposits were insured in 1990 (23 years before the offense); that it was currently insured in 2016, a couple of years after the offense; and a bank employee testimony that the Bank is only required to renew is FDIC certificate "every so often." The panel majority next held that Munksgard's conviction for Aggravated Identity Theft under Section 1028A was based on his signing Morris's name to the fraudulent contract with Cal-Maine Foods because this was a "use" of Morris's identity, which results in the mandatory consecutive term of two years imprisonment. The Panel dismissed the contention that there is any need to consider whether there was harm to Morris or whether the "use" of Morris's name was even considered by the Bank in approving the loan when compared to the other three bank fraud counts where the names were completely made up. In effect, whenever a real person's name is involved in a Section 1014 count, no matter whether there is any reliance, there is an automatic conviction of a 1028 offense.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals for the Eleventh Circuit issued their denial on Petition for Recovery and Petition for Rehearing En Banc on May 2, 2019. The Petitioner has filed timely a Petition for Writ of Certiorari on July 30, 2019.

STATUTORY PROVISION INVOLVED

The pertinent statute, 18 U.S.C. § 1028 (A) states:

> "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment for such felony, be sentenced to a term of imprisonment for a term of two years."

STATEMENT OF FACTS

Munksgard obtained his first drawdown line of credit from Drummond Bank in 2010 to fund his work as a land surveyor. After repaying that loan without incident, in 2012 he obtained two more drawdown lines. He repaid those loans. The next year he applied for another line of credit and supported his application with a contract with Cal-Maine Foods, but he signed Kyle Morris's name to the contract without Morris's' knowledge or permission. Munksgard obtained three more lines of credit with contracts signed by fictional employees. At trial, the Government presented three pieces of evidence to prove that Drummond was FDIC -insured when Munksgard submitted fraudulent materials: a certification indicating the bank's deposits were insured when it was initially chartered in 1990; testimony from a bank officer, David Clausson, that Drummond was currently (2016) FDIC insured two years after the conduct at issue, and Clausson's testimony that the Bank is only required to "renew" its F.D.I.C. certificate "every so often." Munksgard filed a pretrial Motion to Dismiss the Section 1028 Count (Doc. 50) arguing that even if the Government proved that he signed Morris's name to the surveying contract, that it still did not prove that he used a means of identification during the Count One 1014 violation. Munksgard filed a response analysis (Doc. 56) that Drummond had issued three additional lines of credit using fictitious names of individuals and all four drawdown lines of credit loans were made under

the same circumstances, so the name Kyle Morris had no impact. The District Court denied the Motion. (Doc. 57). At trial, Munksgard was convicted on all counts and sentenced him to six months concurrent on Counts 1 through 4 for violation of Section 1014. The Court also sentenced him to 24 months consecutive on 5 Count Five on Section 1028. A timely Notice of Appeal was filed on December 22,2016.

The Eleventh Circuit Court of Appeals denied the appeal. Over a dissent from Judge Tjoflat, the Panel majority ordered oral arguments and on January 30th, 2019 entered an Order affirming the convictions acknowledging that the appeal "presents both a surprisingly close question of evidentiary sufficiency- so close, in fact, that it has prompted a dissent- and an interesting statutory - interpretation issue." The Panel majority noted that the sufficiency of evidence to establish that the Bank was FDIC -insured issue was "irritatingly familiar" and despite other cases where the Court has "rapped the government's knuckles, the evidence was hardly overwhelming." Yet the Panel reluctantly found, in the light most favorable to the government, the proof was adequate. In the dissent, Judge Tjoflat noted that "there was no direct evidence that the Bank was insured in either 2013 or 2014- no documentary evidence, witness testimony or otherwise." Only three pieces of circumstantial evidence: a certificate that deposits were insured in 1990 (23 years before the offense); that it was currently insured in 2016, a couple

of years after the offense; and a bank employee testimony that the Bank is only required to renew is FDIC certificate "every so often."

The Panel majority next held that Munksgard's conviction for Aggravated Identity Theft under Section 1028A was based on his signing Morris's name to the fraudulent contract with Cal-Maine Foods because this was a "use" of Morris's identity, which results in the mandatory consecutive term of two years imprisonment. The Panel dismissed the contention that there is any need to consider whether there was harm to Morris or whether the "use" of Morris's name was even considered by the Bank in approving the loan when compared to the other three bank fraud counts where the names were completely made up. In effect, whenever a real person's name is involved in a Section 1014 count, no matter whether there is any reliance, there is an automatic conviction of a 1028 offense.

SUMMARY OF THE ARGUMENT

For the following reasons, this Court should grant Munksgard's petition for a writ of certiorari. First, this Court should clarify its position on the term "use" in regard to Identity Theft in view of the conflict of decisions in the Eleventh Circuit and the decisions in the Sixth Circuit and the First Circuit. Second, this Court should draw a definitive line on the question of insufficiency of evidence to establish that a bank was FDIC insured at the time of the offense when such

evidence is readily available and easy to produce, if it in fact exists, and reverse the conviction for Counts One through Four because the Government failed to produce such evidence despite years of judicial warning.

REASONS FOR GRANTING THE PETITION

I. WHETHER IT IS PROPER TO PRESUME THAT A CERTIFICATE OF INSURANCE ISSUED 23 YEARS EARLIER, COMBINED WITH THE TESTIMONY THAT THERE WAS FDIC INSURANCE TWO YEARS AFTER THE DATE OF THE OFFENSE, SATISFIES PROOF BEYOND A REASONABLE DOUBT OF INSURANCE AT THE TIME OF THE OFFENSE

There was no direct evidence that the Bank was insured in either 2013 or 2014 - no documentary evidence, witness testimony, or otherwise. There was only circumstantial evidence: (a) a certificate that deposits were insured in 1990, 23 years before alleged crime, (b) testimony from employee that Bank was currently insured (in 2016) two years after allegations, (c) testimony from same employee that Bank is only required to renew its FDIC certificate "every so often" (Panel op at 5). The Panel majority quotes United States vs. Fitzpatrick, 581 F. 2d 1221 (5th Circuit 1978) (per curiam) as standing for principle that a jury can reasonably infer that a bank was federally insured at time of the offense if it is presented with evidence that the bank was insured both prior to the date of offense and after the date of offense. However, as Judge Tjotlat pointed out in the Dissent, this was not

the main holding of the case (it was reversed on other grounds) but rather "dicta" (Dissent at p. 20) and therefore, not binding. The Panel majority also cites Cook vs. United States 320 F. 2d 258 (5th Circuit 1963) where defendant was convicted of robbing an FDIC insured bank and the Government presented testimony of the bank's vice president that deposits were insured by FDIC without clarifying that this was so on the date of the robbery. Id However, as was pointed out at oral argument and noted in the Dissent, Cook's attorney never objected, never filed a Motion for Judgment of Acquittal, and never filed a Motion for New Trial and the case was reviewed under "the plain error" standard, unlike the Appellant's position in this case. Therefore, Cook "endorsed preference for nearly universal prevalence" of FDIC insurance (which there is no jury instruction for, as pointed out by the Dissent) has no application here because "some indication" of insured status is not sufficient to prove the Bank was FDIC insured beyond a reasonable doubt. (Dissent p. 28 footnote 5). This case should be controlled by United states vs. Platenburg, 6577. 2d 797, 800 (5th Circuit 1981). The Panel's conclusion that "Coupled with the 'universal presumption' ... that all banks are federally insured'- and viewing the proof in the light most favorable to the government- we conclude that a reasonable juror could find that [the Bank] was insured by the FDIC on the dates of Munksgard's offenses" (panel Opinion. p.l0) is misplaced. As pointed out in the Dissent, Cook noted "the nearly universal prevalence of FDIC -insured

banks" -which is not the same as a universal presumption. This would be the reverse of the presumption of innocence and excuses the government's burden of proof beyond a reasonable doubt, contrary to Apprehendi vs. New Jersey 530 U.S.466, 477, 120 S.Ct.2348, 2356 (2000). Further, the jury could not properly apply such a universal presumption because there was no jury instructions provided but rather the standard instruction that "their decision must be based only on the evidence presented during the trial. " The conduct of the Petitioner in signing a document with another's name, on behalf of a Corporation where the third party bank acknowledged they did not rely upon the signature in extending a loan, did not constitute "use" within the meaning of 1028 as charged in Count Five. The Petitioner moved pre-trial to Dismiss Count Five of the Indictment, charged under 18 U.S.C 1028A(a)(I). (Doc. 50). The Government moved in opposition and the Court denied the motion. (Doc. 55, 57). Petitioner's Section 1028A conviction (Count Five) was predicated specifically on the Section 1014 violation alleged in Count One. In order to obtain Petitioner's conviction under Count Five, the Government had to prove that he committed the crime in Count One. Since the conviction on Count One is fatally flawed, the dependent conviction on Count Five must also be vacated. Additionally, Petitioner's conviction under Count Five must be vacated because Section 1028A(a)(1) does not apply to his conduct. That is, even if the Government proved everything it intended to prove, Munksgard did not

"use" Kyle Morris's name within the meaning of Section 1028A (a)(1). This argument is an issue of statutory interpretation and sufficiency of the evidence subject to de novo review. If the statute of conviction, as construed by this Court de novo, does not apply to the Petitioner's conduct as proven at trial, or the evidence is insufficient, the conviction must be vacated. United States v. Ford, 639 F.3d 718,720 (6th Cir. 2011).

II. IN THE INSTANT CASE THE CONVICTION FOR VIOLATION OF AGGRAVATED IDENTITY THEFT IN VIOLATION OF 18 U.S.C 1028A(a)(1) UNDER COUNT FIVE MUST BE VACATED BECAUSE THE STATUTE DOES NOT APPLY TO PETITIONER'S CONDUCT

The Government failed to prove any conduct that actually constitutes the "use" of a means of identification - in this case a name - for purposes of the statute. While the use of another's name can constitute Aggravated Identity Theft, the circumstances under which it is applicable is narrow, certainly narrower that the Government asserts. Munksgard argues that in two cases, another Circuit issued opinions that conflict with this Circuit's decision herein and that he did not "use" the name of Kyle Morris (Morris) in connection with violations of sections 1014 or 1028A. In United States v. Berroa, judgement was reversed for convictions of Aggravated Identity Theft. 856 F.3d 141 (lst Cir. 2017). In Berroa, multiple

defendants used falsified scores to obtain medical licenses in Puerto Rico (Id.) Among other charges, the defendants were indicted for Aggravated Identity Theft for using patient names and addresses to issue prescriptions to those patients. (Id. At 148). Berroa and another defendant were convicted of the Aggravated Identity Theft charges. (Id. At 155). Berroa challenged his conviction and the Court reversed, reasoning that, though the defendants, "in a colloquial sense, ... could be said to have 'used' their patients' names in writing prescriptions, they certainly did not attempt to pass themselves off as the patients." (Id. At 156) The Court ultimately read the term "use" to require that a defendant "attempt to pass him or herself off as another person or purport to take some other action on another person's behalf." (Id. At 156). The ruling in Berroa is consistent with that of another circuit to have addressed this particular issue within the evolving landscape of the Aggravated Identity Theft statute. In the United States v. Miller, a 6th Circuit case to which the Berroa Court referred, the Court reversed a conviction of Aggravated Identity Theft and concluded that the defendant had not, in fact, used the names in question within the meaning of 1028A. 734 F. 3d 530 (6th Cir. 2013). While the Government in Miller relied on the plain meaning of "use," Miller successfully argued that, although he lied about what two individuals had done in securing a loan from a bank, he did not pass himself off as either one of those individuals or act on their behalf. Id. at 541. The Court found that, while Miller

may have lied about what others did, he did not act on behalf of the other individuals. This distinction was noted in United States vs. Michael, 882. F. 3d 624 (6th Circuit 2018) when the Court compared it's ruling to Miller, it stated: "Miller's lies about what other individuals did, the Court reasoned, were insufficient where he acted on behalf of an entity rather than on behalf of individuals. 734 F.3d at p. 541 n.5. Michael, however, "portrayed himself as acting on behalf of "two individuals: AS. and P.R. Id." Michael p.628. Munksgard created a surveying contract between himself, on behalf of Pardue, and Morris, on behalf of Cal-Maine Foods. (Doc. 128 p. 556-58, 603). The surveying contract was used as purported collateral for a draw down line of credit between Appellant and DCB. Of note, the contract is between Pardue and Cal-Maine and Morris's name was used only as a representative on the Cal-Maine contract. (Id. 603-04). Appellant signed Morris's name to the surveying contract but did not take anything from Morris nor did he obligate Morris to do anything. Morris was a real person known to Appellant. In fact, they were good friends from days gone by. (Doc. 127 p. 263; Doc. 128 p.613,614). The draw down line of credit was issued to Appellant and only Appellant, in his true identity, and he alone was responsible for the line of credit to the Bank. (Id. P.593). In fact, Morris testified that that the use of his name on the Cal-Maine contract was in fact incidental to the credit line. While it is well settled that actual harm need not be suffered by a victim of Aggravated Identity Theft, the

lack of consequence related to the "use" of one's name certainly lends credence to its' incidental nature. Morris was not given any advice on what steps to take by Special Agent Baxter having been a victim of this purported identity theft; Morris was in fact required to take no steps to do anything or cure anything as a result of the use of his name. Morris's credit was not damaged by the use of his name and Morris acknowledged that he had no personal responsibility for his name being used on the Cal-Maine surveying contract and he suffered no financial loss. (Doc. 127 p. 286-87). In Berroa, the Court elaborated, "the government's reading of the statute is virtually unlimited in scope. Indeed, if, as the government implies, 'use' of a 'means' of identification is to be given its broadest possible meaning, it could encompass every instance of specified criminal misconduct in which defendant speaks or writes a third party's name." Berroa at 156. The Court further cautioned, they would not "presume that Congress intended this extreme result." Id. Much like Miller, who acknowledged that he had lied about what others had done, Appellant, while admitting that he placed Morris's name on the surveying contract, asserts that he did not "use" Morris's name with the intent to pass himself off as Morris, that he did not act on behalf of Morris, that he did not steal Morris's identity, that he did not impersonate Morris or obtain anything of value in Morris's name. Appellant contends that the conduct alleged does not constitute "use" of Morris's name within the meaning of 18 U.S.C. §1028A; that is, his supplying supporting

documents for a line of credit obtained from DCB showing Morris' s false authorization on behalf of Cal-Maine Foods to contract with Appellant. Consistent with Miller and Berroa, Appellant's interpretation of 1028A dictates vacating his conviction on Count Five.

CONCLUSION

On the basis of the foregoing, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Date: July 30, 2019

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