No. 21-7301

IN THE

SUPREME COURT OF THE UNITED STATES

BOGDAN NICOLESCU — PETITIONER

VS.

UNITED STATES OF AMERICA — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IV. QUESTIONS PRESENTED

1. Whether Application Note 2 of the Commentary to U.S.S.G. § 2B1.6 bars the application of the U.S.S.G. § 2B1.1(b)(11)(B)(i) 2-level enhancement for the "trafficking of any unauthorized access device" to an offense underlying an Aggravated Identity Theft conviction under 18 U.S.C. § 1028A.

2. Whether the Wireless Telephone Protection Act, Pub. L. No. 105-172, § 2(e), 112 Stat. 53, 55 (1998), had instructed the Sentencing Commission to amend the Guidelines so as to punish offenses *other* than those involving the cloning of wireless telephones through U.S.S.G. §§ 2B1.1(b)(11)(A)(i) and (B)(i).

LIST OF PARTIES

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

[X] 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:

1. BOGDAN NICOLESCU, Appellant - Defendant
2. RADU MICLAUS, Appellant - Defendant
3. UNITED STATES OF AMERICA, Appellee - Plaintiff.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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

IX. 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

[x] reported at **2021 U.S. App. LEXIS 33237**

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

[x] is unpublished.

X. JURISDICTION

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

The date on which the United States Court of Appeals decided my case was **November 9, 2021**.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: **January 11, 2022**, and a copy of the order denying rehearing appears at **Appendix C**.

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

XI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.S.G. § 2B1.1(b)(11):

"If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; ***(B) the production or trafficking of any (i) unauthorized access device*** or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12." (emphasis added to the relevant part)

2. U.S.S.G. § 2B1.6 cmt. n.2:

"**Inapplicability of Chapter Two Enhancement.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). 'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(7)."

3. 18 U.S.C. § 1028A. Aggravated identity theft.
(attached in full as APPENDIX E; just §1028A(a)(1) reproduced here)

"In general. 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 provided for such felony, be sentenced to a term of imprisonment of 2 years."

4. Wireless Telephone Protection Act ("WTPA"), Public Law 105–172
(attached in full as APPENDIX F; just §2(e)(1) reproduced here)

"IN GENERAL. Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and the policy statements of the Commission, if appropriate, to provide an appropriate penalty for offenses involving the cloning of wireless telephones (including offenses involving an attempt or conspiracy to clone a wireless telephone)."

5. 18 U.S.C. § 1029. Fraud and related activity in connection with access devices

XII. STATEMENT OF THE CASE

A. Procedural Background

On July 8, 2016, an indictment was filed against Bogdan Nicolescu, Tiberiu Danet, and Radu Miclaus in the United States District Court for the Northern District of Ohio. The indictment charged them with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343 and § 1349; twelve counts of wire fraud, in violation of 18 U.S.C. § 1343; one count of conspiracy, in violation of 18 U.S.C. § 371; one count of conspiracy to traffic in counterfeit service marks, in violation of 18 U.S.C. § 2030(a)(1); five counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1); and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). The indictment further alleged a sentencing enhancement for false registration of a domain name, pursuant to 18 U.S.C. § 3559(g)(1).

On September 28, 2018, Bogdan Nicolescu, Tiberiu Danet, and Radu Miclaus were arrested by the Romanian National Police at the request of the United States government. The three were extradited from Romania to face the federal charges pending in the Northern District of Ohio.

Tiberiu Danet pled guilty and Nicolescu and Miclaus proceeded to trial. Trial began in March 25, 2019. The presentation of evidence lasted 10 days. The jury heard closing arguments and received its instructions on April 9, 2019. The jury

returned its verdicts on April 11, 2019. The jury convicted Nicolescu and Miclaus on all counts but acquitted them of the sentencing enhancement for registering false domains.

The district court calculated Petitioner's offense level at 43 based on the application of numerous guideline enhancements. By agreement of the parties, the court reduced the advisory guidelines range to 235 to 240 because of the statutory maximum for the offenses. The court sentenced Petitioner to 240 months in custody.

B. Case Facts

Beginning around 2007, the FBI opened an investigation into the criminal activity of they dubbed the "Bayrob" (a combination of "eBay" and "robbery"), comprised, according to the government's theory of the case, of Nicolescu, Danet, Miclaus, and a handful of other coconspirators. At trial, the government adduced evidence that the Bayrob group set up auctions that appeared to show vehicles for sale by US-based sellers. In reality, Bayrob had neither vehicles to sell nor an US address. Instead, the group operated from Romania and made use of another set of victims, the US-based "money mules," who, believing they were employed by a legitimate financial company, were receiving the money from the eBay victims via bank wire transfers and forwarding it via Western Union to Europe, where individuals associated with Bayrob collected these payments and brought the money back to Romania. Upon conviction, the Bayrob group has been found to be responsible of a loss amount between $3.5 million and $4.5 million.

C. Facts Relevant to this Petition

At some point in 2014, Bayrob began employing a custom-made trojan horse malware to facilitate two new money making schemes: Cryptocurrency mining and stealing various credentials and credit card numbers from the victims' computers. The group thus began widely disseminating the trojan horse malware through spam emails. Once a victim downloaded and executed the malware from the email, the trojan horse ran quietly in the background until the unsuspecting victim tried to visit certain popular websites, including eBay, Facebook, PayPal, Gmail, Yahoo, and Walmart. At that point, instead of connecting to the real website, the malware discreetly redirected the victim's computer to a look-a-like website created by Bayrob, which collected the victim's account credentials, identities, and credit-card information, and stored it al on Bayrob's servers.

At sentencing the district court held that Bayrob had collected more than 70,000 account credentials through this method, including 25,000 stolen credit-card numbers[1]. It was also held that Bayrob used the stolen credit cards to pay its own expenses, and, relevant to this petition, sold some of the stolen credit cards on Alphabay, a website on the dark web. The district court then applied the U.S.S.G. § 2B1.1(b)(11)(B)(i) enhancement for trafficking unauthorized access devices, which, as defined under 18 U.S.C. §§ 1029(e)(1) and (3), include credit cards. Petitioner objected indicating that U.S.S.G. § 2B1.6 cmt. n.2 (2018) precludes the application of this enhancement in conjunction with an 18 U.S.C. § 1028A conviction, but was

1 These figures are still in dispute.

overruled by the district court.

Petitioner then appealed the decision to the United States Court of Appeals for the Sixth Circuit. On October 6, 2021, the Court of Appeals affirmed his convictions, vacated his sentence, and remanded the case for resentencing based on the incorrect application of other enhancements.

However, a divided panel affirmed the application of the U.S.S.G. § 2B1.1(b)(11)(B)(i) enhancement, challenged herein, despite admittedly "chart[ing] a new course among our sister circuits."

The appellants then petitioned for rehearing en banc on this issue alone. Miclaus also requested a panel rehearing and the panel addressed his question, denied it, and, on November 9, 2021, issued an amended decision and ordered both appellants to amend their petitions.

Finally, the amended petitions were denied by the Circuit on January 11, 2022, which lead to the present petition.

Contrary to the other circuits' decisions, in this case the panel found that trafficking necessarily requires more than transferring, as the plain meaning of the word, they reasoned, includes a commercial aspect and therefore falls outside the exclusionary language of U.S.S.G. § 2B1.6 cmt. n.2.

However, under the 18 U.S.C. § 1029(e)(5) definition of "traffic," a commercial aspect is neither required nor implied, and, as this petition will demonstrate, Id. § 1029 is the proper context under which the guideline must be read, thus precluding its application in conjunction with an aggravated identity theft conviction.

XIII. REASONS FOR GRANTING THE PETITION

A. Circuit Split *(five-to-one against the Sixth Circuit)*

The fact that the United States Court of Appeals for the Sixth Circuit "has entered a decision in conflict with the decision[s] of [five other] United States court[s] of appeals on the same important matter" constitutes a compelling reason for which a petition for a writ of certiorari may be granted by this Court. *See Sup. Ct. R. 10(a) and 10*.

The United States Sentencing Guidelines call for a two-level enhancement for trafficking in access devices, U.S.S.G. § 2B1.1(b)(11)(B)(i). But if a defendant is also convicted of aggravated identity theft, 18 U.S.C. § 1028A, Application Note 2 to U.S.S.G. § 2B1.6 prohibits applying any enhancement "for the transfer, possession, or use of a means of identification."[2]

Every other circuit to have addressed this issue has agreed—a defendant convicted of aggravated identity theft cannot receive a two-level enhancement under § 2B1.1(b)(11) for trafficking in access devices because trafficking necessarily involves transfer[3], noting also that under § 1029(e)(5) "the term 'traffic' means transfer," and requires nothing more. *See APPENDIX D* for these quotations.

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2 A "means of identification," as defined under 18 U.S.C. § 1028(d)(7), includes "unauthorized access devices," as defined under 18 U.S.C. §§ 1029(e)(3) and (1), which include credit cards.

3 Pursuant to Sup. Ct. R. 14.1(i)(vi), APPENDIX D quotes at length the following cases: *United States v. Jones*, 551 F.3d 19, 25 (1st Cir. 2008); *United States v. Doss*, 741 F.3d 763, 767-68 (7th Cir. 2013); *United States v. Lyons*, 556 F.3d 703, 708 (8th Cir. 2009); *United States v. Charles*, 757 F.3d 1222, 1226-27 (11th Cir. 2014); *United States v. Taylor*, 818 F.3d 671, 675 (11th Cir. 2014); *United States v. Giannone*, 360 Fed. Appx. 473, 477-78 (4th Cir.), *cert. denied*, 560 U.S. 973, 130 S. Ct. 3429, 177 L. Ed. 2d 339 (2010); *United States v. A.M.*, 927 F.3d 718, 721-22 (3d Cir. 2019); *United States v. Dumitru*, 991 F.3d 427, 435 n.28 (2d Cir. 2021).

B. Conflict with Decisions of the Supreme Court of the United States

The fact that the United States Court of Appeals for the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" constitutes a compelling reason for which a petition for a writ of certiorari may be granted by this Court. *See Sup. Ct. R. 10(c) and 10*.

Specifically, in affirming the U.S.S.G. § 2B1.1(b)(11)(B)(i) enhancement[4], the majority did not consult any of the traditional canons of statutory construction, conflicting with several decisions of this Court, as the following subsections show:

1. The Context, Generally

> "[W]e do not make a 'fortress out of the dictionary'. And we have, therefore, consistently ***refused*** to pervert the process of interpretation by ***mechanically applying definitions in unintended contexts.***"

Farmers Reservoir and Irrig. Co. v. McComb, 337 U.S. 755, 764, 69 S. Ct. 1274, 93 L. Ed. 1672 (1949)(emphasis added)(quoting and citing *L. Hand, J., in Cabell v. Markham*, (CCA2d NY) 148 F.2d 737, 739 (1945), aff'd 326 U.S. 404, 90 L. Ed. 165, 66 S. Ct. 193 (1945), and citing *Lawson v. Suwannee Fruit & S. S. Co.*, 336 U.S. 198, 611, 69 S. Ct. 503 (1949); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 76 L. Ed. 1204, 52 S Ct 607 (1932))

The majority, however, ignored the context and relied solely on the dictionary definitions of "transfer" and "traffic," reasoning it was appropriate because the Guidelines did not define these terms. This Court has many times held otherwise.

> "Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, ***[but as well by] the specific context*** in which that language is used, and ***the broader context of the statute as a whole.***' [I]t is a 'fundamental principle of statutory construction (and, indeed, of language

4 Section III.D of the appellate decision (APPENDIX A, pp. 21-27).

itself) that ***the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.***' Ordinarily, a word's usage accords with its dictionary definition. ***In law as in life, however, the same words, placed in different contexts, sometimes mean different things.***

We have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute."

Yates v. United States, 574 U.S. 528, 537, 135 S. Ct. 1074, 191 L. Ed. 2d 64 (2015)(emphasis added)(brackets in original)(quoting and citing Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997), and Deal v. United States, 508 U.S. 129, 132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993))

2. Statutory Context *(in pari materia)*

"[U]nder the *in pari materia* canon of statutory construction, ***statutes addressing the same subject matter*** generally should be ***read as*** if they were ***one law.***"

Wachovia Bank v. Schmidt, 546 U.S. 303, 315-16, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006)(emphasis added)(internal quotation marks and citation omitted).

However, the majority failed to observe that U.S.S.G. § 2B1.1(b)(11)(B)(i) mirrors the statutory text of 18 U.S.C. §§ 1029(a)(1) and (2) only—no other statute defines offenses punished by this enhancement.

The Sixth Circuit's own precedent, United States v. Boucha, 236 F.3d 768, 771 (6th Cir. 2001) holds a similar view, instructing a reading of the Guidelines in the context of 18 U.S.C. § 2119, even when the defendant is convicted under § 2113:

"it seems unreasonable not to look to other circuits' interpretation of 'person or presence' in the context of § 2119, the federal carjacking statute, ***as the Sentencing Guidelines mirror this portion of the federal statutory language.***" Ibid. (emphasis added)

Thus, just as the dissent[5] and all the other circuits[6] suggest, this guideline is

5 APPENDIX A, pp. 29-30.

6 APPENDIX D.

properly read within the context of 18 U.S.C. § 1029, using the 18 U.S.C. § 1029(e)(5) definition of "traffic," and therefore its application in conjunction with an aggravated identity theft conviction is barred.

3. Statutory Context *(noscitur a sociis)*

> "To choose between [] competing definitions of a statutory term, [the United States Supreme Court] look[s] to the context in which the words appear. Under the familiar interpretive canon *noscitur a sociis*, '***a word is known by the company it keeps***.' While 'not an inescapable rule,' this canon is often '***wisely applied*** where a word is capable of many meanings in order ***to avoid the giving of unintended breadth to the Acts of Congress***.'"

McDonnell v United States, 136 S. Ct. 2355, 2368, 195 L. Ed. 2d. 639, 655 (2016)(emphasis added)(quoting and citing *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d. 859, 1961-2 C.B. 254 (1961))

The U.S.S.G. § 2B1.1(b)(11)(B)(i) enhancement punishes "the production or ***trafficking*** of any [] ***unauthorized access device*** or ***counterfeit access device***." (emphasis added). Within this context, "trafficking" should be known by the company it keeps, the terms "unauthorized access device" and "counterfeit access device," both of which being defined and used only in 18 U.S.C. § 1029.

"As used in this section ... the term 'traffic' means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of;" *18 U.S.C. §§ 1029(e) and (e)(5)*. Again, the same conclusion suggested by the dissent and the other circuits is reached: The application of this enhancement is barred by the aggravated identity theft conviction.

4. Legislative History

> "[W]hile the clear meaning of statutory language is not to be ignored, 'words are inexact tools at best,' and hence ***it is essential that the words of a statute be placed in their proper context by resort to the legislative history.***"

Tidewater Oil Co. v United States, 409 U.S. 151, 157, 93 S. Ct. 408, 34 L. Ed. 2d 375 (1972)(quoting and citing *Harrison v Northern Trust Co.*, 317 US 476, 479, 87 L Ed 407, 63 S Ct 361 (1943))

U.S.S.G. § 2B1.1, cmt. (backg'd) informs that "[t]he Subsections (b)(11)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 *[sic]* of the Wireless Telephone Protection Act, Public Law 105–172." The Wireless Telephone Protection Act (hereinafter "WTPA") deals with a singular statute, 18 U.S.C. § 1029, which is therefore the proper context in which this guideline—including the term "trafficking"—should be read, again in accord with the dissenting opinion and with the other circuits, and thus barring the enhancement's application.

5. Congressional Intent
[C. The Sentencing Commission Acted Against Congressional Intent]

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question ***whether Congress has directly spoken*** to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for ***the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.***"

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)(emphasis added)

While it does not appear that Pub. L. 105-172 contains a "section 4," it did, under §2(e)(1), instruct the Sentencing Commission to

> "review and amend the Federal sentencing guidelines and the policy statements of the Commission, if appropriate, ***to provide an appropriate***

> ***penalty for offenses involving the cloning of wireless telephones*** (including offenses involving an attempt or conspiracy to clone a wireless telephone)." (emphasis added)

The congressional intent is clear: The Sentencing Commission was mandated to introduce this enhancement in order to punish a restricted class of offenses—those that involve the cloning of wireless telephones.

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9.

By indicating with specificity the offense type, Congress could not have intended that the Sentencing Commission punish any other offenses through this enhancement. And, under U.S.S.G. § 2B1.1, cmt. (backg'd), the Commission did explain that "[t]he Subsections (b)(11)(A)(i) and (B)(i) implement the instruction [from the WTPA]". Therefore it cannot be said that the Commission had exercised here any broader authority it may otherwise have.

> "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9

The congressional intent thus supports, albeit under a different rationale, the inapplicability of the enhancement in this particular case.

Moreover, restricting the applicability of this enhancement to offenses involving the cloning of wireless telephones only, as Congress intended, is an issue of importance beyond the particular facts and parties involved in this case, as well as a separate and compelling reason for which a petition for a writ of certiorari may be granted.

6. The Specific Controls the General

"[A] more specific statute will be given precedence over a more general one ..." *Busic v. United States*, 446 U.S. 398, 406, 100 S. Ct. 1747, 64 L. Ed. 2d 381 (1980)

18 U.S.C. § 1029, entitled "Fraud and related activity in connection with access devices," and identified by the dissent and the other circuits as the proper source for the "traffic" definition, is, as evidenced *supra*, the most specific statute with regards to "access devices," as well as the only statute that the WTPA operates upon.[7]

Conversely, the majority argued that the definition in 18 U.S.C. § 1028(d)(12) could instead be used[8]. But even that definition cannot support the majority's theory, as it simply adds the restrictive clause "as consideration for anything of value" to the otherwise verbatim Id. § 1029(e)(5) definition of "traffic."[9] Therefore, Id. § 1028(d)(12) defines "traffic" as a subset of, and fully encompassed within, the Id. § 1029(e)(5) definition. As a result, the Id. § 1029 semantics, which are more specific to "access devices," remain applicable and will take precedence, and the applicability of the enhancement is consequently barred.

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7 The guideline, *verbatim*, also indicates this connection: "'Unauthorized access device' has the meaning given that term in 18 U.S.C. § 1029(e)(3)." *See* U.S.S.G § 2B1.1 cmt. n.10(A).

However, the Majority Opinion at p. 21 (APPENDIX A) reads: "*See* U.S.S.G § 2B1.1 cmt. n.10(A) (defining 'unauthorized access device' as 'any card ... that can be used ... to obtain money, goods, services, or any other thing of value' that has been 'stolen ... with intent to defraud')."

It appears the majority *avoided the context* here, running afoul right from the start of "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *General Dynamics Land Systems, Inc. v Cline*, 540 U.S. 581, 596, 157 L. Ed. 2d 1094, 124 S. Ct. 1236 (2004) (internal quotation marks omitted)(brackets in original).

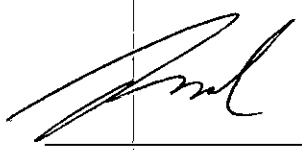
8 Majority Opinion at p. 23 n.6 (APPENDIX A)

9 It also adds "transport" to the definition, but that too is either a subset or a synonym of "transfer."

XIV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Bogdan Nicolescu

Date: March 2, 2022