No. 22-

IN THE
Supreme Court of the United States

BRADLEY LANE CROFT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The federal aggravated identity theft statute provides: "Whoever, during and in relation to any felony violation enumerated [elsewhere in the statute], 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." 18 U.S.C. § 1028A(a)(1).

A question presented for review in this case is whether an accused commits the crime of aggravated identity theft by merely uttering, mentioning, or reciting someone else's name when committing fraud or any other predicate offense. There is a split in the Circuits, and this issue is presently before this Court on a Petition for Writ of Certiorari filed on August 2, 2022, in *United States v. Dubin*, Case No. 22-10. Petitioner, Bradley Lane Croft, respectfully requests that is Court grant this Petition to resolve the conflict.

Further, a second question presented for review is whether the evidence is insufficient to support the wire fraud conviction, and consequently the money laundering conviction, in this case. Petitioner, Bradley Lane Croft, submits that in affirming the District Court on this issue, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") has decided an important federal question in a way that conflicts with relevant decisions of this Court. A compelling reason is thus presented in support of discretionary review.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Bradley Lane Croft:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BRADLEY LANE CROFT, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Croft respectfully submits the District Court committed reversible error by convicting him of the offense of aggravated identity theft. Mr. Croft set out to start a company that would train veterans as dog handlers. He sought and was granted the privilege of using Veterans Administration funds to provide this training. The Government asserted that Mr. Croft used certain individuals as qualified instructors for the veterans. Moreover, the Government argued the instructors did not give Mr. Croft permission to use their names as instructors with the Veterans Administration.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Bradley Lane Croft*, No. 21-50380 (5th Cir. May 24, 2022), appears at Appendix A to this Petition and is published but unreported at *United States v. Croft*, No. 21-50380, 2022 WL 1652742 (5th Cir. May 24, 2022).

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, San Antonio Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUNDS FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Croft. This action is on a criminal prosecution initiated by the Government. Mr. Croft pleaded not guilty to a multi-count indictment, waived a jury, and proceeded to a trial before the Court. The District Court found Mr. Croft guilty of all counts.

Mr. Croft argued to the Fifth Circuit that the District Court committed reversible error by convicting him of wire fraud, aggravated identity theft, and other offenses not relevant to this Petition. The Fifth Circuit rejected all arguments in an opinion dated May 22, 2022, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. 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 offence 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.

U.S. CONST. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Background:

Petitioner, Bradley Lane Croft, set out to start a veterans' assistance program which would make him eligible for the receipt of funds from the various veterans' programs in exchange for training dog handlers and their dogs to work with different organizations. He hoped to qualify for funds from various veterans' assistance programs to fund the training. He also hoped that shelter canines could be saved from death and used as successful working dogs. With the assistance of his daughter, Mr. Croft began his dog-training work in his garage. He also worked out of hotel rooms and a twenty-five-foot travel trailer.

Mr. Croft diligently sought out qualified instructors to assist him with this endeavor. He found several individuals who were qualified in the dog-training area and brought them to his business for their input. With the passage of time and hard work, Mr. Croft's organization purchased real estate to further establish a viable undertaking. The name of his business was Universal K9 Academy ("Universal K9").

During this time period, Me. Croft also began to determine how he could fund the training of veterans as dog handlers though the Veterans' G.I. Bill. This revenue was controlled by the Texas Veterans Commission ("TVC"). In order to be eligible to train veterans, and to be paid via the G.I. Bill, Mr. Croft was required to satisfy the TVC that his group was qualified to offer this training.

However, by its representative's own admission, the TVC's process for such certification was not a simple task. For example, rules for certification that apply to

established colleges do not apply to dog training and cosmetic schools. Thus, it was undisputed that it was not uncommon that applications were frequently, and on numerous occasions for many applicants, returned for any number of reasons.

This is what happened to Mr. Croft. He would apply for certification and the TVC would return the application to him for corrections, with instructions that he re-submit the form with more information or different types of documentation in order to be approved. Indeed, the representative admitted that this back and forth for these types of requests for G.I. Bill support was not infrequent. Put simply, the process was a bureaucracy.

Through all of this, Mr. Croft remained diligent and attempted to comply with TVC's demands. In the end, years later, Mr. Croft was approved because, as the TVC representative explained, only one approved instructor was necessary and Mr. Croft presented an application that met this requirement.

Mr. Croft went to work and trained numerous veterans to be dog handlers. The Veterans Administration (sometimes referred to as "VA") paid Mr. Croft for this work. At some point, the VA became concerned about Universal K9 based on a vague complaint from an employee at TVC "concerning the processes that Universal K9 was using." This ignited an investigation by numerous federal agencies. Subsequently, Mr. Croft was indicted and arrested.

The Government claimed that Mr. Croft committed numerous felonies, including aggravated identity theft and fraud, because the listed instructors on file with the TVC did not actually do the training of the dog handlers and their dogs. Crucial to this case was that no person ever assumed the identity of one of the instructors.

The Government claimed great harm in this case, despite the fact that during the bench trial it did not introduce evidence that the dog handlers or their dogs were not correctly trained for service. Indeed, the Government's witnesses, and the defense witnesses, testified otherwise. Respectfully, all of this shows that the evidence is not sufficient to uphold the single convictions in this case for aggravated identity theft or fraud. In fact, Mr. Croft is in prison because he was a "made man" by the TVC.

The Indictment

The initial indictment in this case was filed on August 22, 2018, and the superseding indictment was filed on October 17, 2018. ROA.145-57. The first eight counts were for wire fraud allegedly committed in the first three months of 2018. ROA.151-52. Four more counts were added for alleged identity thefts that occurred on or about October 4, 2015. ROA.152-53. The "victims" were identified as Victim 1, Victim 2, Victim 3 and Victim 4. ROA.152-53. Two more counts were added for money laundering. ROA.152-53. More specifically, Count 13 concerned a motor home that was purchased by Mr. Croft and Count 14 was relevant to real property where the business was located. ROA.152-53. Finally, two counts were added for allegedly making false tax returns for the calendar years of 2016 and 2017, respectively. ROA.154-55.

Arrest to Trial

Mr. Croft was arrested on the charges in the initial indictment on August 23, 2018. ROA.57-60. He entered a plea of not guilty. ROA.67-68. Motions and proceedings followed for a year. ROA.3-17. Jury selection began on October 8, 2019. ROA.17. However, during that day, Mr. Croft waived a jury and proceeded with a bench trial. ROA.477.

THE BENCH TRIAL

The TVC and the Veterans Administration

The Veterans Administration's G.I. Bill is implemented in Texas by the TVC, the Texas Veterans Commission. ROA.1972-74. Rufus Coburn worked at the TVC in various capacities. ROA.1973. His job included "approval authority for the various institutions." ROA.1973. Mr. Coburn testified that, while "just about any school" can get approved, ROA.1974, these schools must "lead to a vocational objective." ROA.1975. Hence, the TVC, per the Code of Federal Regulations, has a "process for the approval." ROA.1975-76.

To this end, TVC had a "fill-in-the-blank form" to apply as [a non-college, non accredited institution] to teach and instruct veterans under the G.I. Bill. ROA.1976. However, by Mr. Coburn's own admission, he could not remember anyone completing the forms correctly the first time. ROA.1976. Thus, this application process was described as an "iterative process." ROA.1976. Indeed, TVC's staff would work directly with the applying institution to "figure out a way that within the parameters of the [Code of Federal Regulations] that [the TVC] could approve the school." ROA.1977. After approval, usually within two-to-three years, the TVC would follow-up to make sure the institution was

providing the training as agreed. ROA.1977. Mr. Coburn said that, if there were problems, "we tried to work with the school to ameliorate those deficiencies." ROA.1977.

On the form, applicants were required to provide a "roster of administration and instructional staff with credentials or license numbers." ROA.1978-79. Applicants were told: "If you don't provide that information, you don't get approved." ROA.1979. Consistent with this, and Mr. Coburn's other observations, Mr. Croft's first application for approval of Universal K-9 was returned as deficient. ROA.1979-80.

The TVC rejected Mr. Croft's first application on January 18, 2013. ROA.1983-84. It was then that Mr. Coburn opened-up a dialog with Mr. Croft. ROA.1980. It was then that the above-referenced "iterative process" took over Mr. Croft's application procedure. *See* ROA.1980-81. Thus, the TVC rejected numerous applications in the years to come. ROA.1990-2010.

Finally, on March 4, 2016, an application that had been revised on numerous occasions due to TVC's rejections, was ultimately approved by the TVC and the Veterans Administration. ROA.2011, 2014.

Mr. Coburn admitted that TVC previously had not had a dog training school or dog handling school apply for approval. ROA.2021. Thus, this was the TVC's "first exposure" to dog handlers or a dog training school. ROA.2022.

Mr. Coburn further testified that there were many deserving veterans for this program. ROA.2026. It was also established that Mr. Croft would respond timely to TVC's

repeated rejections of his applications and requests for information, and that Mr. Croft's efforts were sincere. ROA.2040.

As Mr. Croft's attorney completed his cross-examination, he asked Mr. Coburn some final questions about who applies to TVC what is required for an application to be deemed sufficient for approval. ROA.2056. The following exchange took place:

> A. From accredited State universities to on-the-job training programs and everything in between, the whole panoply of schools that we dealt with. And each of the program specialists, with the exception of flight schools, we did not have a unique specialist for any particular type of school.
>
> Q. And in regard to the application itself, is there any requirement in the application–and I'm going back to what we had mentioned before, referred to before as Roman numeral two J, roster of administrative and instructional staff, is it set out anywhere that a threshold amount of instructors that need to be present, in other words, for an application to be approved?
>
> A. No, there is not a specific number of instructors, but there's got to be at least one with qualifications.
>
> Q. As a matter of fact, there have been applications approved with one instructor?
>
> A. That would not surprise me. I don't recall one right offhand, but I'm sure there have been if the school is small enough.

ROA.2056.

Mr. Coburn further established that instructional staff changes can be updated with the TVC. ROA.2063. He added that the list of instructors must be valid at the time of approval and any change should be updated by the organization. ROA.2064.

Mr. Dworakowski, another Government witness, testified that the Veterans Administration can contact the institution which was paid and hold it accountable for any overpayment. ROA.2104. He then discussed that a complaint about Universal K9 was brought to the Office of the Inspector General's attention. ROA.2106. However, he was not able to say that a veteran or instructor had ever complained about Universal K9 or Mr. Croft, with the exception of one veteran. ROA.2106.

Wes Keeling

Wes Keeling is a former police officer from Midlothian, a small town near Dallas, Texas. ROA.2332. He found Mr. Croft's website because he wanted to be a dog handler and train dogs to work in law enforcement. ROA.2332-34. Thus, Mr. Keeling contacted Mr. Croft and traveled to San Antonio to take a two week course at Universal K9. ROA.2334-36. Mr. Croft provided Mr. Keeling with a shelter dog and eventually he used the dog in his police work. ROA.2337-39.

In 2014, Mr. Keeling approached Mr. Croft and asked him if he could add "criminal interdiction for law enforcement" classes at Universal K9. ROA.2338-39. An agreement was reached and Officer Keeling taught between ten to fifteen courses. ROA.2341-42. However, Officer Keeling began to express to Mr. Croft that he was concerned because he did not want to teach "law enforcement sensitive classes to civilians." ROA.2342.

The relationship between the two men began to change. Mr. Keeling testified that, "after [Mr. Croft] obtained VA [referring to the Veterans Administration] approval, the classes got huge." ROA.2342. However, Mr. Keeling also said that, while the two had talked

about the Veterans Administration approval on numerous occasions, he did not know when Mr. Croft had obtained VA approval. Their business relationship ended in 2017. ROA.2343-46.

The remainder of Mr. Keeling's testimony was a list of denials that he gave Mr. Croft permission to use his name with the TVC. ROA.2344, 2353, 2356. Indeed, contrary to his earlier testimony, Mr. Keeling now claimed that he did not know when Mr. Croft actually got approved by the Veterans Administration. *Compare* ROA.2342 (stating that "classes got huge" after Mr. Croft "obtained VA approval"), *with* ROA.2343 (stating that he did not know "when [Mr. Croft] actually, finally did get approved" by the Veterans Administration).

After his training and teaching work ended with Universal K9 in 2017, Mr. Keeling quickly began to exploit his friendship with Mr. Croft by opening a competing business. Since January of 2018, Mr. Keeling has owned and run his own dog handling and dog training school. ROA.2332, 2379. Mr. Keeling even took part of Mr. Croft's business name with him. ROA.2379. He named his school "Sector K9." ROA.2379. In fact, just like Mr. Croft, Mr. Keeling uses shelter dogs. ROA.2385.

In any event, Mr. Keeling testified that, before trial, federal agents questioned him about Mr. Croft. ROA.2389-99. He said that when he talked to them he told them he had nothing to do with Mr. Croft's applications to the TVC and the Veterans Administration. ROA.2389-99.

At the close of the cross-examination of Mr. Keeling, he was questioned about four defense exhibits: "59A," "59B," "59C," and "59D." ROA.2399. Mr. Keeling testified that

defense exhibit 59A was an email from his work email. ROA.2399. It was a letter purporting to be from him that was written on the Midlothian Police Department's letterhead. ROA.2399. Mr. Keeling admitted that the letter was indeed on Midlothian stationary and that it was written during the time when he was a police officer with the city. ROA.2399. However, after reading the letter, he said: "I never wrote that" and "that's not even my signature." ROA.2399. When asked about defense exhibit 59C, Mr. Keeling testified that he "didn't write that either." ROA.2399.

Mr. Keeling agreed that defense exhibit 59A was an email sent on May 10, 2015, from his email address at the Midlothian Police Department to Mr. Croft's email address at Universal K9. ROA.2399. Mr. Keeling also agreed that the subject of the email was "VA Letter and Certification" for Universal K9, with attachments referenced on the email. ROA.2399-400, ROA.3298 (defense exhibit 59A). The attachments to the email are defense exhibits 59B, 59C and 59D. Mr. Keeling's message to Mr. Croft on defense exhibit 59A provides: "Let me know if I need to change anything or add anything." ROA.3298.

With respect to attachments 59B and 59C, Mr. Keeling testified that "they have my name on them." ROA.3240. When asked: "Do they concern your certification, your background, your history" with dog handling and training, Mr. Keeling said: "No." ROA.2400.

Defense exhibit 59B is a letter dated September 29, 2015, from Mr. Keeling to Ms. Glasgow at the Veterans Administration. ROA.3299. It provides that Mr. Keeling is the Curriculum Supervisor and Instructor and Universal K9 in San Antonio, Texas. ROA.3299.

The letter goes on to discuss Mr. Keeling's Texas law enforcement certifications and lists the numerous courses he was teaching with respect to classes at Universal K9. ROA.3299.

Defense exhibit 59C is a letter addressed to "To whom it may concern," which provides the same information as defense exhibit 59B. ROA.3300. Mr. Keeling's name is at the end of the letter. ROA.3300. Mr. Keeling also identified defense exhibit 59D. This is a "Certificate of Completion," with his name, for "Basic Instruction Courses" from the Midlothian Police Department. ROA.3301-02.

When asked if these four exhibits were an "email from you to Bradley Croft," he answered, "No, not after seeing the rest of the email, absolutely not." ROA.2400. More specifically, Mr. Keeling added: "I'm denying B and C right now." ROA.2400. Dustin Bragg

Like Mr. Keeling, Dustin Bragg was from a small town police department near Dallas, Texas. ROA.2238-39. Somewhere around 2014, Mr. Bragg contacted Mr. Croft because his friend, Mr. Keeling, had been to Universal K9 for dog training classes. ROA.2240. Eventually, Mr. Bragg went on to help Mr. Keeling teach "no more than three" interdiction classes. ROA.2242-43. Mr. Bragg claimed that he never talked to Mr. Croft about the TVC application and never gave permission to Mr. Croft to use his name on the application. ROA.2245-69. It is not surprising that this portion of Mr. Bragg's testimony was identical to that of Mr. Keeling because the two were close friends. ROA.2240. Indeed, Mr. Bragg went to Sector K9 for the training of the dog he was using. ROA.2279.

Jesse Stanley

Jesse Stanley was a dog trainer and instructor, who came in contact with Mr. Croft in December of 2012. ROA.2151-52. He called Mr. Croft and sought employment at Universal K9, Mr. Croft's dog handling and training company. ROA.2156. Mr. Croft and Mr. Stanley them talked about the possibility of contracts for dog handling and training at various military bases in the Texas area. ROA.2156. Mr. Stanley also explained to Mr. Croft that one of his instructors before he came to Universal K9 had been Arthur Underwood. ROA.2157. Mr. Stanley testified that he was familiar with Mr. Croft's attempts to use Veterans Administration benefits to help members and former members of the military train their dogs. ROA.2160. Mr. Stanley also stated that he did not give Mr. Croft permission to use his name on the application to the TVC. ROA.2176-78.

It is important to observe at this juncture that Mr. Stanley had been handling dogs and training dogs since 1996. ROA.2152. Mr. Stanley wanted those present to know that the term "working dog" is very vague. ROA.2200. However, Mr. Stanley's ultimate observation was that "a working dog is a dog that is trained to do the mission you're requesting him to do." ROA.2200.

Mr. Stanley further testified that the one specific representation in the TVC application was true. ROA.2192. He confirmed he was "a military kennel master and certified in that" as provided in the application. ROA.2192.

Richard Cook

Richard Cook was listed as the owner and president of Universal K9, and, in his role as SCO, he was the person who was responsible for completing the TVC applications. ROA.2010, 2093. Sadly, long before he worked at Universal K9, Mr. Cook was the victim of a random act of violence when he was shot while driving out of Brooks Army Medical Center in San Antonio, Texas. ROA.2340. Mr. Cook suffered an injury to his head and multiple facial fractures. ROA.2430. Although he survived, the incident caused him to have a speech impediment, memory loss, the loss of his left eye and a cognitive head injury. ROA.2430.

Mr. Cook testified that, when he met Mr. Croft, he connected with him because both men had been though long battles to obtain custody of their daughters. ROA.2345. Mr. Cook testified that Mr. Croft offered him a job with Universal K9 because Mr. Croft wanted to obtain Veterans Administration approval for the school to train veterans as dog handlers. ROA.2346. Mr. Cook said he was happy and elated to have the job. ROA.2437.

Mr. Cook said that while he was employed at Universal K9, he generally worked as a recruiter with the veterans. ROA.2457. He testified that, over the years at Universal K9, he witnessed what happened at the school. ROA.2509. Mr. Cook said that students regularly attended and enjoyed their classes. ROA.2509. He testified that Mr. Croft did a good job running the business. ROA.2509. Mr. Cook further said that the students believed in the school, and he believed in the school, and that if he did not believe he would have had "nothing to do with" Universal K9. ROA.2509. He additionally testified that the veterans

went on to get jobs as dog handlers. ROA.2510. Mr. Cook also verified that "these were real students and real veterans." ROA.2519.

Mr. Cook went on to say that Mr. Croft handled Universal K9's business affairs. ROA.2445. In this regard, Mr. Cook said that he sometimes assisted Mr. Croft with paperwork involving the day-to-day finances of the school. ROA.2445.

TVC Program Specialist Bebe Glasgow

Mr. Croft called Bebe Glasgow to the stand. ROA.2764. In her role as a Program Specialist at the TVC, Ms. Glasgow was the individual who initially evaluated Universal K9's applications for certification. ROA.2759-63. Ms. Glasgow testified that these "non-college, non-degree schools are unique." ROA.2764.

As noted above, the Government declared that the investigation into Mr. Croft did not begin as the result of a veteran complaining about his or her training at Universal K9. *See* ROA.2768-70. Rather, it was by the Government's own admission, that the investigation was begun as a result of representations by the TVC. ROA.2768-70. Thus, Ms. Bebe Glasgow (initials "B.G."), who was part of the team at TVC reviewing the applications for Veterans Administration approval of Universal K9, was called by the defense. ROA.2757, 2766-69. The defense pointed out that the search warrant affidavit which issued in this case declared that the investigation into Mr. Croft began when the Veterans Administration received information from an employee of TVC, with the initials "B.G.," advising it that Universal K9 had received an unusually large amount of Veterans Administration education funds from 2016 to 2018. ROA.2769-72. Despite the fact that no one contested that "B.G." was Bebe

Glasgow, when asked if she had any direct knowledge of the statement in the affidavit she said: "No." ROA.2771-72.

The Verdict

After the defense closed, the District Court asked the parties to submit their closing arguments in writing. ROA.110-13. The parties did so, and appeared for the announcement of the verdict on November 6, 2019. ROA.2814-16. The District Court found Mr. Croft guilty on all counts. ROA.2816-17.

Sentencing

Mr. Croft was sentenced on April 30, 2021. ROA.2877. Specifically, the Court sentenced Mr. Croft to a prison term of 70 months on counts 1 though 8 and counts 13 and 14, to run concurrently. ROA.2907-08. The Court sentenced Mr. Croft to a prison term of 24 months on counts 9 and 10, and also sentenced him to a prison term of 24 months on counts 11 and 12. ROA.2908. Thus, the Court determined that the 48-month sentence for identity theft would run consecutive to counts 1 though 8 and 13 and 14. ROA.2908.

In the Judgment, the Court clarified Mr. Croft's sentence in the following fashion: "counts 1 though 8 and counts 11 though 16 [will] run concurrently with each other and consecutive to the 24 months in counts 9 and 10." ROA.1671. The Court added that "counts 9 and 10 are to run consecutively to each other." ROA.1671. Thus, Mr. Croft was sentenced to spend 118 months in the custody of the Bureau of Prisons. ROA.1671.

Appeal

The Judgment was entered on May 18, 2021. ROA.1669-79. A notice of appeal was timely filed on May 7, 2021. ROA.1664. Relevant to this appeal was the argument that the evidence was insufficient to prove aggravated identity theft, wire fraud, and money laundering. The Fifth Circuit disagreed with Mr. Croft that it was and affirmed the Judgment of the District Court on May 24, 2022. Thus, this Petition for Writ of Certiorari is timely filed on August 22, 2022.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Identity Theft

A.
Overview

The Circuit courts are openly, and without any distinction based on factual scenarios, divided over the reach of the federal aggravated identity theft statute. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") and the Fifth Circuit, as the holding by the Fifth Circuit in this case reflects, have determined that the mere utterance or recitation of someone else's name as part of a predicate offense (*i.e.,* fraud) is sufficient to prove aggravated identity theft. By contrast, the remainder of the Circuits have rejected such a broad reading of the statute and rendered acquittals for numerous defendants convicted of aggravated identity theft. Based on this division, Mr. Croft respectfully requests that this Court grant this Petition.

The significance of this issue in this case is clear. As Judge Costa, who was just one of several dissenters, explained in his dissent in the Fifth Circuit decision addressing the issue in this case, the message of the Supreme Court of the United States is unmistakable: "courts should not assign federal criminal statutes a 'breathtaking' scope when a narrower reading is reasonable." *United States v. Dubin*, 27 F.4th 1021, 1037 (5th Cir. 2022) (Costs, J., dissenting) (citing *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021)), *petition for cert. filed July 5, 2022*). The dissent by Judge Costa cites numerous cases wherein this Court has cautioned the Circuits to refrain from permitting the Government from defying the clear reach of federal criminal statutes. *Id.* As this Court instructed in *Van Buren*, the Courts must resist attaching "criminal penalties to a breathing taking amount of commonplace activity." 141 S. Ct. at 1661. Thus, Judge Costa's dissent in *Dubin* correctly observed, an overly broad reading of the aggravated identity theft statute, as was done by the majority, means a "mandatory two-year sentence can be tacked on to each and every act of . . . fraud." 27 F.4th at 1037.

B.
The Disagreement Among the Circuit Courts

As noted, there is disagreement among the Circuit Courts on this issue, with only the Fourth Circuit and the Fifth Circuit giving such a broad reading to the aggravated identity theft statute. As several Judges below recognized, "there is undeniably a split among circuit courts has to how § 1028A(a)(1) should be construed. *Dubin*, 27 F.4th at 1021-22 (Owen, C.J., concurring). In the Fourth and Fifth Circuits, a defendant is guilty of aggravated identity theft and subject to mandatory prison time whenever he recites someone else's

name as part of a predicate. *Id.* at 1038-43. Thus, Mr. Croft's conviction for aggravated identity theft was affirmed by the Fifth Circuit. (Appendix A). Yet, as the dissents in *Dubin* established, had he been prosecuted in any Circuit other than the Fourth or Fifth, he would have been acquitted.

The Fourth Circuit affirmed a conviction under circumstances similar to Mr. Croft's case. In *United States v. Abdelshafi*, 592 F.3d 602, 605 (4th Cir. 2010), the owner of a transportation company for Medicaid patients submitted claim forms that were fraudulent because they "substantially inflated mileage amounts" and claimed reimbursement for some "trips that did not, in fact, occur." The Fourth Circuit upheld the defendant's conviction because, although he "had authority to possess the [patients'] Medicaid identification numbers, he had no authority to use them unlawfully so as to perpetuate a fraud." *Id.* at 609.

However, in the First, Second, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, simply reciting a person's name while committing fraud or some other predicate offense is not aggravated identity theft. The Fifth Circuit has explained that these Circuits use "varying rationales" to reach this result. (Owen, C.J., concurring). This underscores the need for this Court's discretionary review. In any event, as discussed below, these Circuits share the same basis for their decision: some sort of theft involving a person's identity is required for aggravated identity theft.

For example, in *United States v. Michael*, 882 F.3d 624, 629 (6th Cir. 2018), the Sixth Circuit held that the defendant would not have committed aggravated identity theft where

the means of identification of the person, whose identity was allegedly stolen, "would not have facilitated the fraud." The First Circuit and Ninth Circuit have followed suit. In *United States v. Berroa*, 856 F.3d 141, 155-57 (1st Cir. 2017), the First Circuit "reversed convictions for aggravated identity theft where the underlying crime was the sue of fraudulently obtained medical licenses to write prescriptions for real patients, because the defendants 'did not attempt to pass themselves off as the patients.'" The Ninth Circuit followed suit by reversing convictions for aggravated identity theft because neither "the defendant nor his co-defendants attempted to pass themselves off as the patients [whose identities were allegedly stolen]." *United States v. Hong*, 938 F.3d 1040, 1050-51 (2019)

The Second, Eighth, and Eleventh Circuits have followed a type of causation test, used in *Michael* by the Sixth Circuit as discussed above. For example, the mere forgery of "another person's name" on a loan application is not aggravated identity theft. *United States v. Munksgard*, 913 F.3d 1327, 1329-30 (11th Cir. 2019). In *United States v. Wedd*, 993 F.3d 104, 123 (2d Cir. 2021), the Second Circuit explained that "the salient point . . . is whether the defendant used the means of identification to further or facilitate the . . . fraud." Likewise, the Eighth Circuit has similarly concluded that a defendant cannot be convicted of aggravated identity theft by merely reciting a person's name during a predicate crime. *United States v. Gatwas*, 910 F.3d 362, 365-68 (8th Cir. 2018).

Significantly, in *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013), the Seventh Circuit sitting en banc aligned itself with the majority of the Circuits. In *Spears*, the Seventh Circuit determined that Courts should avoid a reading of the aggravated identity

theft statute to "require a mandatory two year consecutive sentence every time a tax-return preparer claims an improper deduction." *Id.* Thus, the Seventh Circuit ruled "another person" refers "to a person who did not consent to the use of the means of identification." *Id.* at 758.

In sum, these cases establish there is a split in the Circuits on the significant issue as to how the aggravated identity theft statute should be applied. Therefore, Mr. Croft respectfully requests that this Court exercise its supervisory power to resolve the division in the defendant's favor and prevent convictions merely because a person is convicted of aggravated identity theft in the Fifth or Fourth Circuits.

C.

The True Scope of the Aggravated Identity Theft Statute

As one of the dissenters in *Dubin* observed: "This tradition of 'exercis[ing] restraint in assessing the reach of a federal criminal statute' comes 'both out of deference to the prerogatives of Congress . . . and out of concern that 'a fair warning should be given . . . in language that the common world will understand, of what the law intends to do if a certain line passed.'" 27 F.4th at 1041 (Costa, J., dissenting) (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (alterations in original)). As this Court declared in *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019), criminal "statutes must give people of common intelligence fair notice of what the law demands of them." (internal quotations omitted). For the reasons discussed below, these observations are fully consistent with this Court's jurisprudence.

The language used in the aggravated identity theft statute, 18 U.S.C. § 1028A, was "borrowed and modified from 18 U.S.C. § 1028(a)(7). *United States v. Spears*, 729 F.3d 753, 756 (7th Cir. 2013). The purpose of the legislation was to combat identity thieves who financially devastate the victims whose identities are stolen. H.R. 4151, 1998 WL 971795. Significantly, the individuals whose names were used in the application in this case were never harmed, financially or otherwise.

Moreover, this is precisely how the federal government has defined 18 U.S.C. § 1028A, the aggravated identity theft statute. The United States Government's identity theft protection website, run by the Federal Trade Commission, supports this conclusion. The website is intended as a resource for victims report and recover from identity theft. It provides checklists, letters, and other sample documents to guide victims through the recovery process. Https://www.identitytheft.gov/Warning-Signs-of-Identity-Theft. The scenarios therein involve "identity thieves" who have "Stolen Your Information." *Id.* This is also true for the United States Department of Justice's identity theft website. Https://www.justice.gov/criminal-fraud/identity-theft/identity-theft-and-identity-fraud. Importantly, none of these scenarios compare to Mr. Croft's circumstance, yet he is now a convicted aggravated identity thief.

Therefore, the legislative history of 18 U.S.C. § 1028A does not support the Fifth Circuit's conclusion as to the scope of aggravated identity theft. Nor does it support Mr. Croft's conviction of the same in this case.

D.

There Was No Identity Theft In This Case

As the Fifth Circuit explained in this case, *Dubin* is dispositive on the aggravated identity theft issue. (Appendix A at page 3). In *Dubin*, an en banc Fifth Circuit endorsed the above "broader" interpretation of the aggravated identity theft statute established by the Fourth and Fifth Circuits. 27 F.4th at 1023-25. However, the Fifth Circuit was itself notably divided on the issue in *Dubin*. *Id.* at 1022, 1033, 1037. Indeed, in the opinion in this case, the Fifth Circuit observed that *Dubin* foreclosed relief for Mr. Croft. (Appendix A at page 4). Mr. Croft respectfully argues that the dissenters in *Dubin* establish why this Court should grant this Petition.

As an initial matter, the dissenters are on point with respect to why there was no aggravated identity theft in this case. The majority opinion is based solely on the bare dictionary definition of the word "use." *Dubin*, 27 F.4th at 1038 (Elrod, J., dissenting). As Judge Elrod observes, "this is not the way that we are to interpret that chameleon-like word 'use.'" *Id.* (citing *Bailey v. United States*, 516 U.S. 137, 143 (1995)). As this court has determined, the Courts should never construe a statute based "solely on a dictionary definition of its component words." *Yates v. United States*, 574 U.S. 528, 539 (2015)). It is the objective of the Courts to determine the meaning of a word, based not only on the word itself, but a review of the whole "statute and the sentencing scheme, to determine the meaning Congress intended." *Bailey,* 516 U.S. at 143. As noted above, Congress did not intend to make the mere utterance of another person's name aggravated identity theft. *Dubin*, 27 F.4th at 1042 (Costa, J., dissenting). Thus, in this regard, such an "utterance" is

not aggravated identity theft because it must be read in tandem with the phrase "during and in relation to." *Id.* Indeed, as Judge Costa observed:

> The Sixth Circuit reads "uses" in tandem with "during and in relation to" to hold that an aggravated-identity-theft conviction requires the government to show that a defendant "used the means of identification to further or facilitate the health care fraud." *United States v. Michael*, 882 F.3d 624, 628 (6th Cir. 2018). If a defendant's use of another's name is only incidental to the fraud, there is no identity theft. *Id.* at 629. But if the use of the name is "integral" to the fraud, there is identity theft. *Id.*

Id.

Respectfully, when the term "use" is evaluated in the context of the aggravated identity theft statute, and in accordance with the legislative history of the statute, there is no aggravated identity theft in this case because Mr. Croft merely uttered and recited the identities of others. There is no evidence that Mr. Croft ever impersonated one of the individuals, or had someone else impersonate any of the individuals, whose names were listed on the application forms. Nor is there evidence that Mr. Croft, or any of the persons listed on the application forms, impersonated any instructor. Moreover, the alleged "victims" were never harmed in the fashion provided above based on the Government's description of what is suffered by victims of identity theft. Mr. Croft therefore respectfully requests that this Court grant this Petition and resolve the conflict between the Circuit Courts in his favor.

II.
Wire Fraud and Money Laundering

With respect to wire fraud in this case, Mr. Croft argued the evidence was insufficient to show he committed this offense. Crucial to his argument was the testimony of Mr.

Coburn, that the TVC only needed one certified instructor on the application to justify veteran benefits in this case. (Opening Brief, page 36) (citing ROA.2056). Mr. Croft argued that one such instructor was Wes Keeling, and thus the use of the other three instructors was irrelevant to the issue of fraud. (Opening Brief, pages 36-37). As discussed above, there was an email from Mr. Keeling that showed he sent information to Mr. Croft for the specific purpose of including his name on the application. (Opening Brief, pages 36-37). The Government never rebutted this evidence. Mr. Croft argues, as he did before the Fifth Circuit, that all of this means there was no fraud in this case. (Opening Brief, pages 36-37)

As the Government explained in its brief, "a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." (Government's Brief, page 29) (quoting *United States v. Harris*, 821 F.3d 704, 718 (5th Cir. 2011)). Therefore, Mr. Croft asserts to this Court, as he did to the Fifth Circuit, that any misrepresentation about the trainers was not material because only one participating trainer needs to be qualified and the evidence on Mr. Keeling shows he was qualified and was voluntarily part of the application to the TVC. (Opening Brief, pages 15-16). Stated another way, any other alleged misrepresentations about the trainers were not material and hence did not constitute fraud. (Opening Brief, pages 31-38). Furthermore, other evidence in the record shows any alleged misrepresentations by Mr. Croft were not material. Mr. Coburn described the process for the approval of "non-college degree, non-accrediting institutions" as an "iterative process." (Opening Brief, page 6) (citing ROA.1976). Indeed, he could not recall anyone completing

the forms correctly the first time. *Id.* Thus, this process did not have hard or fast rules, but rather it was designed to improve the process used by the TVC to determine how the final decisions were made. Therefore, this Court should grant this Petition on this issue and find the evidence was insufficient to show wire fraud.

As observed by the Fifth Circuit, Mr. Croft's challenge to the money laundering counts was that the predicate wire fraud convictions were not proven. (Appendix A at page 4). However, because the Fifth Circuit affirmed the wire fraud convictions, the argument on the money laundering counts was rendered moot. Thus, in the event the wire fraud counts are set aside, Mr. Croft would renew his arguments on the money laundering counts.

CONCLUSION

For the reasons set forth above, Mr. Croft respectfully submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, BRADLEY LANE CROFT, respectfully requests that this Honorable Court grant this Petition and review the decision of the Fifth Circuit which affirmed the District Court. Mr. Croft also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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