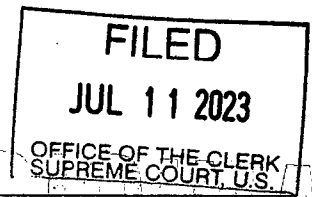


No. 23-5437

In The
SUPRME COURT OF THE UNITED STATES



ADEDAYO HAKEEM SANSUI,

Petitioner,

V.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Adedayo Hakeem Sanusi
Pro Se Appellant
15211-509
FCI-Pollock
P.O. Box 4050
Pollock, LA 71467

QUESTIONS PRESENTED

1. Whether the Appellant is deprived of Due Process and fundamental fairness where the district court applies a sophisticated means enhancement based upon reasonings not articulated in the Sentencing Guidelines and where there is a circuit split as to the interpretation and application of the sentencing guidelines as it pertains to the definition of sophisticated means.
2. Whether the Appellant was deprived of Due Process and Fundamental fairness where the district court applies an upward variance, making the sentence substantively unreasonable, without articulating "fact-specific" reasons for the departure.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Adedayo Hakeem Sansui, indigent, was the criminal defendant in the district court, and unsuccessful upon direct review.

Respondent United States of America was the plaintiff in the district court and the successful appellee in the court of appeals.

The Solicitor General of the United States of America has been served along with respondent.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS BELOW.....	ii
TABLE OF CONTENTS.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
A. Original Proceedings.....	3
REASONS FOR GRANTING THE PETITION.....	4
(1) Error In Application of the Sophisticat-Means Enhancement....	4
(2) Suanusi's Sentence Was Substantially Unreasonable.....	10
THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT.....	11
CONCLUSION.....	12
APPENDIX:	
Index To Appendix	
Fifth Circuit's Opinion Denying Direct Appeal.....	A1
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
1. Gall U.S. at 49–50, 128 S. Ct. 586.....	2,4,10
2. Guerrant v. United States 142, S. Ct. 640, 211 L. Ed. 2d 522(2022)..	2,5
3. United States v. augare, 800 F.3d 1173, 1175–76 (9th Cir. 2015)...	6
4. United States v. Bane, 720 F.818, 826–27 (11th Cir. 2013).....	5
5. United States v. Ghertler, 605 F.3d 1256, 1267 (11th Cir. 2010)...	5
6. United States v. Valdez, 726 F.3d 684, 695 (5th Cir. 2013).....	5
7. United States v. Mitchell, 914 F.3d 581, 586–87 (8th Cir. 2019)..	5
8. United States v. Smith, 142 S. Ct. 640, 211 L. Ed. 2d 522 (2022)...	2
 <u>Statues</u>	
28 U.S.C. § 1251(1).....	1
28 U.S.C. 1291.....	1
U.S.S.G. 2B1.1(b)(10)(C).....	2,5
2B1.1 Comment n. 9(B).....	2,5
18 U.S.C. § 3553(a)	
 <u>Constiution</u>	
U.S.Const. Amend V.....	2

No. _____

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

ADEDAYO HAKEEM SANUSI,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Adedayo Sanusi respectfully prays that his Petition for a Writ of Certiorari be granted to review the judgment of the Fifth Circuit.

OPINIONS BELOW

The opinions of the Fifth Circuit court of Appeals, the initial opinion affirming the district court's judgment is included in the Appendix, which is attached.

JURISDICTION

Jurisdiction in the Court of Appeals was involved pursuant to 28 U.S.C. § 1291. The Fifth Circuit Court of Appeals entered its judgment affirming the district court's judgment on April 5, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution is implicated in this Petition. U.S. Const. Amend. V. In addition, United States Sentencing Guidelines § 2B1.1(b)(10)(C) is implicated herein.

STATEMENT OF THE CASE

It is well established and settled law that the laws passed upon by Congress and the Sentencing Guidelines set forth by the Sentencing Commission must be uniformed among all of the Circuit Courts of Appeals and by each of the district court. Evidence of the Supreme Court's preference that the Sentencing Commission resolve disputes about the Guidelines continues to this day. Guerrant v. United States, 142 S. Ct. 640, 640-41, 211 L. Ed. 2d 522 (2022).

It is, also, well established and settled law that the Sentencing Guidelines and laws in which a defendant is prosecuted under are specific and clear, giving said defendant notice and the opportunity to defend himself, that is present an adversarial challenge to said prosecution. The Guidelines cannot be arbitrary or capricious, being left open for interpretation and thereby leaving the defendant without any ability to challenge them.

Finally, it is well established and settled law that the sentence imposed must be substantively reasonable, and any variance from the Guidelines must be imposed with the articulation of "fact-specific reasons that are consistent with the factors enumerated in 18 U.S.C. § 3553(a)." United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006); Gall, U.S. at 49-50, 128 S. Ct. 586. A non-Guidelines sentence is unreasonable when it is supported by or gives significant weight to irrelevant or improper factor(s).

These are the predicaments that the Petitioner finds that he has been placed in by the district court and Fifth Circuit.

The Sentencing Guidelines prescribes a two-level enhancement for use of "sophisticated means pursuant to USSG § 2B1.1(b)(10)(C). Sophisticated means is defined as especially intricate offense conduct pertaining to the execution or concealment of an offense. USSG § 2B1.1 comment. n.9(B). Further, conduct such as

hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. (Id).

District Courts, such as the one in this case, and Circuit Court's of Appeals, such as the Fifth Circuit have gone away from the specific definition of sophisticated means, as defined in the Guidelines, and have made it so that this enhancement is allowed to apply in any and every case. No defendant, including the Petitioner is able to defend himself in the face of an sophisticated means enhancement, where Courts have determined that even when there is nothing complex or intricate about his/her conduct beyond the actual commitment of the crime, yet the enhancement applies. Mr. Sanusi argues that his right to due process was violated, where the district court and court of appeals imposed the sophisticated means enhancement, not based upon his crime being especially complex or especially intricate, in the offense conduct pertaining to the execution or concealment of the offense, but based upon arbitrary and capricious reasoning.

To determine whether a sentence is substantively reasonable, a district court should consider "the totality of the circumstance, including the extent of any variance from the Guidelines range." The district court is unable to consider the totality of the circumstances when it fails to give the parties, especially the defendant, any opportunity to present arguments against an upward variance when the Court announces it's intent to vary upward. Sanusi argues, herein, that the Fifth Circuit erred in it's determination that under the totality of the circumstances, the degree of the variance was no so disproportionate so as to overcome the factors that supported its imposition and that the district court was in the superior position to determine the importance of particular facts under § 3553(a), where the district court failed to hear arguments challenging it's intent to vary upward.

A. Original Proceedings

On July 8, 2020, the Petitioner, Adedayo Hakeem Sanusi (hereinafter "Sanusi"), was indicted by a Grand Jury in the Eastern District of Texas, in a three-count

indictment charging him in Count One of Possession of Fifteen or More Access Devices, (18 U.S.C. 1029(a)(3), in count Two of Aggravated Identity Theft (18 U.S.c. 1028A), and in Count three of Illegal Possession of Device-Making Equipment (18 U.S.C. 1029(a)(4)). On April 15, 2021, Sanusi, at a Change of Plea Hearing, plead guilty to all three counts without the benefit of a plea agreement. On November 10, 2021, Sanusi was sentence. After the district court heard arguments on Sanusi's objections to the PSR, the Court announced on the record that he would be departing from the advisory guidelines. Counsel for Sanusi made not objection, asked for no continuance in light of the Court's intent to depart, nor was allowed to make any arguments against the departure. The Court sentenced Sanusi to 60 months on Counts 1 and 3, which was an increase of 122% from the advisory guidelines for those Counts, and a 24-month sentence as to count two.

Sanusi appealed his sentence asserting that the district court erred in it's denial of his objection to the "sophisticated-means" enhancement, and that his sentence was substantively unreasonable where the district court used factors that were: (1) already considered whent he Setnencing Commission created the guidelines along with fact-specific enhancements; (2) the guideliens in this case provided a sentence that was reasonable when considering the specific facts of Sanusi's criminal conduct; (3) there was no specific, unique characteristic of Sanusi's case that was not already contemplated in the guidelines calculation; and (4) the district court essentially doubled Sanusi's sentence without any articulated fact-specific reasoning was inconsistent with Gall and constituted an abuse of the trial court's dicretion.

On April 5, 2023, the Fifth Circuit affirmed the district court's judgment. This Petition for Writ of Certiorari timely follows.

REASONS FOR GRANTING THE PETITION

(1) ERROR IN APPLICATION OF THE SOPHISTICATE-MEANS ENHANCEMENT

It is clear and without question that the Guidelines must be applied with uniformity, and not in arbitrary and caprious ways which make it impossible for a defendant to present a challenge to their application. This Court time after time

has expressed upon lower Court's the importance and Constitutional ramifications of the applications of the Guidelines being applied differently between the Circuit Courts, and in ways that leave defendants without the ability to present any adversarial challenge to them. Guerrant v. United States, 142 S. Ct. 640, 640-41, 211 L. Ed. 2d 522 (2022).

When a Guidelines enhancement or any provision is created, enacted, or applied in such a way that it does not give the Petitioner notice of said rule, nor the opportunity to challenge the application of said enhancement in unambiguous terms, the enhancement or rule itself, nor the application of the the enhancement cannot stand.

In the present case, the Sentencing Guidelines has defined "sophisticated means" as 'especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense... Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.' United States v. Valdez, 726 F.3d 684, 695 (5th Cir. 2013) (quoting § 2B1.1 cmt. n. 8(B). Section 2B1.1(b)(10)(C) is only to be applied when a defendant's offense conduct involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.

There is a clear circuit split as to the definition of sophisticated means and as to what constitutes sophisticated means.

Some Courts have determined that there is no required that an individual's actions be sophisticated. United States v. Gherlter, 605 F.3d 1256, 1267 (11th Cir. 2010). Some Courts have determined that the use of repetitive, coordinated conduct to perpetuate a fraud scheme supports a sophisticated means enhancement. United States v. Bane, 720 F.3d 818, 826-27 (11th Cir. 2013); United States v. Mitchell, 914 F.3d 581, 586-87 (8th Cir. 2019). Some Courts have determined that the application of the sophisticated means enhancement applies in cases involving "some" method that made it more difficult for the offense to be detected, even if that method was not by itself particularly sophisticated. United States v. Valdez, 726 F.3d 684, 695 (5th Cir. 2013).

~~In contradiction, at least one Circuit has determined that fraudulent conduct~~
that took place over a long period of time is sufficient to justify the enhancement. Repeated actions alone do not constitute sophisticated means. Rather, the defendant's steps to commit or conceal the offense should also be "coordinated" and "comparable in 'sophistication' to schemes held to warrant the enhancement.'" Thomsen, 830 F.3d at 1073 (quoting United States v. Augare, 800 F.3d 1173, 1175-76 (9th Cir. 2015)).

Sanusi, first, argues that this Court should grant the Petition for writ of certiorari to resolve this circuit split and to bring uniformity to the application of this guidelines enhancement. Any defendant facing prosecution on fraud related charges is likely to receive a lower sentence than defendants in other circuits, solely because the Ninth Circuit has a narrower, and in Sanusi's perspective, more accurate interpretation of the definition and application of the sophisticated means enhancement. Defendants should not and cannot, under the constitution, face the prospective of a longer sentence, simply based upon the fact of the circuit or district in which their criminal conduct occurred, or in which they are charged. All defendant's must face equal prosecution, and potential for sentencing no matter there location. When the application of a guidelines enhancement is applied differently, solely based upon location and that circuit's interpretation of the guidelines, this Court must step in to rectify the circuit split. Thus, it is essential that this Court grant the petition herein.

Sanusi, also, argues that this Court should grant the Petition for writ of certiorari to review and decide whether or not the "sophisticated means enhancement is violates the right against double jeopardy in this it allows double counting.

Fraud and identity theft cases, by their nature, are repetitive, are meant to deprive another of property, monies, their identities, include the use of computers, the internet, use fictitious entities, shell companies, and are meant to avoid detection. These issues and means of committing fraud or identity theft crimes were contemplated by Congress in it's enactment of the fraud and identity theft

statutes, specifically the statutes in which Sanusi was convicted under, that is Possession of Fifteen or More Access Devices, Illegal Possession of Device-Making Equipment, and Aggravated Identity Theft. Because this criminal conduct was contemplated and included in Congress's enactment of fraud related statutes, it amounts to double-counting and violates a defendant's right against double jeopardy by the application of the sophisticated means enhancement. This is because a defendant, such as Sanusi is being applied an additional penalty for conduct in which he is already being prosecuted and sentenced for. Thus, this Court should grant this writ of certiorari to determine whether the "sophisticated means" enhancement violates the constitution.

Lastly, Sanusi argues that this Court should grant this writ of certiorari to, if it does not find that the sophisticated means enhancement must be struck down completely, clearly define and narrow the definition of sophisticated means, thereby limiting its application. Currently, lower courts are finding that the sophisticated means enhancement applies for any and every reason, even when those very courts determine that the defendant's conduct, nor the conduct for the criminal activity as a whole involved sophistication, was not intricate, nor complex.

For example in Sanusi's case, the government argued, in order to sustain the enhancement, that Sanusi was utilizing fake internet profiles to persuade others to send him money. It was asserted that Sanusi, as part of the scheme, generated false identification documents, assumed people's identities, produced unauthorized counterfeit credit cards, and used the altered credit cards for fraudulent transaction. Each of these actions were contemplated and accounted for in the offenses of conviction. Mr. Sanusi was convicted of possession of access devices and for illegal possession of access device-making equipment, along with aggravated identity theft. He was literally prosecuted and sentenced for, under the statutes of conviction, for the very same conduct used to support the enhancement. Identity theft is by its nature to assuming people's identities, making false identification documents, and obtaining something of gain from the actions. And the offenses of possession of device

device-making equipment and possessing access devices is specifically a prosecution possess and producing unauthorized counterfeit credit cards, and the use of altered credit card for fraudulent transactions.

There is simply nothing in these actions that are especially complex or intricate. These actions are par for the course in committing fraud schemes, and

In addition, it was argued that the enhancement applied because Sanusi utilized internet platforms to talk to victims, impersonate various people, and obtain money and access to accounts. He used victims identities to open accounts and obtain credit cards, acquire loans, and attempt to buy property. Again, this is par for the course and actually integral in the offenses of conviction. Assuming one's identity is by its nature identity theft. The use of that identity to open an account and obtain credit cards is by its essence identity theft, and turns into, upon the obtaining of the credit cards, possession of access devices. The credit cards are the access devices.

The Fifth Circuit Court of Appeals clearly erred in its determination to affirm the district court's application of the sophisticated means enhancement. And if this Court does not reverse that decision, not only will Sanusi, but all other similarly situated defendants, will suffer from constitutional violations by the arbitrary and capricious way in which the enhancement is applied. The enhancement is being applied based upon conduct contemplated in the statutes of conviction. These defendant's in pleading guilty have admitted to this conduct and cannot deny it. The sophisticated means enhancement was not meant to consider this conduct. It was meant to consider conduct that was especially complex or intricate, yet district court's are applying the enhancement to cases such as Sanusi for conduct not defined in the Guidelines. The Guidelines define specially complex or especially intricate offense conduct pertaining to the execution or concealment of the offense as conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts.

Mr. Sanusi was not charged, convicted of, nor was it alleged that he engaged in any such conduct, yet the enhancement was applied. It was simply not argued by

by the Government nor Probation that Sanusi hide assests, or transactions through the use of fictitious entities or corporate shells or offshore accounts.

What should be of great importance to this Court, is that while the Guidelines is very specific in it's defination and listing of the conduct which constitute's sophisticated means, Circuits have determined, and in their determinations added to the list of conduct which constitutes sophisticated means, by finding that the application notes doe not contain an exhaustive list of the ways a defendant can use sophisticated means to conceal a crime.

Sanusi argues that the Guidelines do contain an exhaustive list of ways a defendant can use sophisticated means to conceal a crime, and that this Court should limit the enhancement to the list set forth in the guidelines.

In addition, Sanusi argues that if this Court determines that the Guidelines does not contain an exhaustive list of ways a defendant can use sophisticated means, it violates the right to due process, by failing to give notice. A defendant has the right, prior to any prosecution, or the commission of a crime to be informed of what constitute a violation of the law by having that law codified. Without an exhaustive list, district court are allowed to apply their own interpretation of sophsiticated means, and means a defendant is found to use sophisticated means based upon any courts theory of what sophisticated means is.

Some courts have determined that repetitive actions are sophisticated means. Some courts have detemrined that simply the length of time in which the crime was committed, or not discovered constitutes sophisticated means. Nothing in the guidelines contemplates or even hints at these actions being especially complex or intricate. It could be that a defendant could steal a credit card, have an falsedid made, and use that credit card once a year for 10 years, without discovery, yet be enhanced for sophisticated means simply because it took 10 years for the person whose credit card was stolen from or law enforcement to discover the identity theft crime.

What about in cases were a person asssumes the identity of a deceased person, and simply lives as that person, not even attempting to conceal the identity theft, yet the person's family, not looking for identity theft does not discover the

the theft of their loved one's identity for many years. Under the "not exhaustive list" theory, this alone would support a sophisticated means enhancement, in addition to the identity theft conviction.

To allow the circuit courts of appeals and district courts to continue to apply this enhancement in arbitrary and capricious ways, will continue to allow and actually cause defendants such as Mr. Sanusi to be deprived of the right to due process, the right to defend himself, the right to be informed of the charges against him, and the right to present an adversarial challenge to the allegations. Thus, the writ of certiorari should be granted.

(2) SANUSI'S SENTENCE WAS SUBSTANTIALLY UNREASONABLE

Sanusi argued that his sentence was substantially unreasonable where the district court varied upward from the guidelines range and imposed a sentence 122% greater than the guidelines range without making specific findings as to the reasons for the variance and without giving Sanusi the opportunity to argue against the variance once the district court declared it's intention to vary upward.

In denying this claim, the Fifth Circuit determined that the record establishes that the district court gave fact-specific reasons for varying upward and that its reasons were consistent with the 18 U.S.C. § 3553(a) factors.

To determine whether a sentence is substantively reasonable, a district court should consider "the totality of the circumstances, including the extent of any variance from the Guidelines range." Gall, 552 U.S. at 51, 128 S. Ct. 586. A district court must articulate its reasons for a particular sentence more thoroughly when it imposes a non-Guidelines sentence, and the reasons should be fact-specific and consistent with the factors enumerated in 18 U.S.C. § 3553(a).

When articulating its reasonings behind this substantial upward variance to Mr. Sanusi's sentence, the district court stated it viewed Mr. Sanusi's actions as doing "a great economic harm," and stated that the court needed to "provide just punishment and promote respect for the law and to... kind of also discourage people who keep doing these financial crimes." Beyond that, the court gave no specific reason for more than doubling Sanusi's sentence.

In affirming Sanusi's sentence, the Fifth Circuit failed to consider that the Sentencing Commission had already considered these factors when it created the guidelines. In fact, the mandatory and consecutive nature of the 18 U.S.C. § 1028(A) statute was enacted precisely with consideration of the factors articulated by the district court. The district court found nothing in Mr. Sanusi's case to be egregious or aggravating. There were not 10s or 100s of victims as in many fraud cases. The loss amount was not extremely high, and was relatively lower than similarly situated cases. The guidelines in this case provided a sentence that was reasonable when considering the specific facts of Sanusi's criminal conduct. There was no specific, unique characteristic of Sanusi's case that was not already contemplated in his guideline calculation. More than doubling Sanusi's sentence without any articulated fact-specific reasoning was inconsistent with Gall and constituted an abuse of the discretion.

It is imperative that this Court grant certiorari on this issue, and vacate the judgment of the Fifth Circuit, not because this court has not considered this issue previously, but to allow this erroneous ruling to stand, allows lower courts to find or determine that this Court's previous rulings to be irrelevant, not-binding, or simply to ignore this Court's rulings and to apply any standard it feels is applicable.

In order to uphold the precedents of this Court, it must enforce its previous rulings by granting the petition herein, and by casting down any attempt by lower courts to impose sentences without fact-specific reasonings, especially where those courts are imposing upward variances.

THE QUESTIONS PRESENTED ARE EXCEEDINGLY IMPORTANT

The Supreme Court should grant Sanusi's request for a Writ of Certiorari, on both questions presented herein, because they are both exceedingly important, go to the heart of due process and fundamental fairness, and will resolve a circuit split. It is of the greatest importance for defendants to be presented with the same risk of sentence exposure no matter where their crimes are committed. It is of constitutional magnitude for defendants to be able to present an adversarial