

No. 24-

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**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether aggravated identity theft convictions must be reversed when the real “crux” of the fraud turns, not on any person’s name, but on their qualifications. *See United States v. Dubin*, 599 U.S. 110 (2023).

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BRADLEY LANE CROFT, requests that this Honorable Court grant this Petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals affirming his convictions for aggravated identity theft. Mr. Croft submits the decision of the Fifth Circuit is in conflict with the decision of this Court in *United States v. Dubin*, 599 U.S. 110 (2023), particularly as reflected in the opinion dubitante issued by Circuit Judge Ho, and therefore a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL 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 Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Bradley Lane Croft*, No. 21-50380 (5th Cir. December 1, 2023), appears at Appendix B to this Petition and is reported at *United States v. Croft*, 87 F. 4th 644 (5th Cir. 2023).

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, San Antonio Division, appears at Appendix C 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 following a bench trial in an identity theft fraud case. The Fifth Circuit affirmed the decision of the District Court. This Court subsequently granted Mr. Croft's Petition for Writ of Certiorari and remanded this case to the Fifth Circuit for further consideration in light of *United States v. Dubin*, 599 U.S. 110 (2023). *Dubin v. Croft v. United States*, 143 S. Ct. 2635 (Mem) (2023). The Fifth Circuit again affirmed the decision of the District Court. A copy of the reported decision by the Fifth Circuit appears at Appendix A. A copy of the Judgment appears at Appendix B. 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:

More than a decade ago, Mr. Croft set out to start a program for veterans to become trained dog handlers. But it could not be done without financing. Mr. Croft hoped to qualify for funds from various veterans' assistance programs. Then, he 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, Mr. Croft also began to explore how he could fund the training of veterans as dog handlers through 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 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. 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.

More importantly, the Government never investigated the veterans who were actually trained by Universal K9. While instructors who were listed on the applications with TVC testified that they did not train veterans for Universal K9, the Government never showed the veterans were, in fact, trained by unqualified instructors. As discussed below, the evidence is not sufficient to uphold the four convictions in this case for aggravated identity theft.

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 (emphasis added).

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 then 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 through 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 through 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 through 8 and 13 and 14. ROA.2908.

In the Judgment, the Court clarified Mr. Croft's sentence in the following fashion: "counts 1 through 8 and counts 11 through 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. The Judgment was entered on May 18, 2021. ROA.1669-79.

The Fifth Circuit - Initial Opinion

Mr. Croft previously argued on direct appeal to the Fifth Circuit that the evidence was insufficient to support a conviction for aggravated identity theft. In affirming the convictions, the Fifth Circuit cited its opinion in *Dubin*, which has now been overruled by this Court. This Court subsequently remanded this case to the Fifth Circuit for an analysis of Mr. Croft's aggravated identity theft convictions under the new standard of review this Court employed in *Dubin*. On remand, the Fifth Circuit again affirmed Mr. Croft's convictions and denied relief. *United States v. Croft*, 87 F. 4th 644 (5th Cir. 2023). The

First Petition to this Court

Mr. Croft timely filed a Petition for Writ of Certiorari with this Court on August 22, 2022. Mr. Croft argued that his convictions for aggravated identity theft should be reversed based on the arguments made to this Court in *Dubin* and for insufficiency of the evidence. During the pendency of the Petition, this Court handed down a reversal of the Fifth Circuit's affirmance of the aggravated identity theft conviction in *Dubin*. 599 U.S. 110 (2023). Thus, this Court remanded this case to the Fifth Circuit to reconsider in light of the opinion of this Court in *Dubin*.

The Opinion of the Fifth Circuit on Remand

The Fifth Circuit affirmed Mr. Croft's convictions for aggravated identity theft allegedly pursuant to an analysis conducted under the decision of this Court in *Dubin*. *United States v. Croft*, 87 F.4th 644 (5th Cir. 2023). The portions of the opinion relevant to this Petition are discussed in the arguments and authorities section of this Petition.

However, the decision, although unanimous, was not issued without doubt cast upon it by one panel member. The Honorable James C. Ho, Circuit Judge for the Fifth Circuit Court of Appeals, issued an opinion dubitante. This opinion is not only relevant to this Petition, it establishes that a correct analysis under *Dubin* requires that the aggravated identity theft convictions in this case must be reversed. The dubitante is additionally persuasive because the majority did not mention, must less discuss, this opinion.

This Petition

This Petition is filed to address the aggravated identity theft convictions in this case. Mr. Croft argues that the analysis of the Fifth Circuit in its decision following remand fails to comport with the standard of review set forth in *Dubin*, as amplified by Circuit Judge Ho in his dubitante opinion.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. *United States v. Dubin*, 599 U.S. 110 (2023).

A. The Majority Opinion

In *Dubin*, this Court set out to establish a clear standard of review for cases involving the aggravated identity theft statute, 18 U.S.C. § 1028(A). This Court observed that the Government impermissibly sought to “push the statutory envelope” of the aggravated identity theft statute beyond its limits. *See* 599 U.S. at 131. Indeed, when the Government’s “push” was reviewed in *Dubin*, this Court unanimously concluded that, “taken together, from text to context, from content to common sense, § 1028(A)(a)(1) is not amenable to the Government’s attempt to push the statutory envelope.” *Id.* (emphasis added).

This Court explained:

A defendant “uses” another person’s means of identification “in relation to” a predicate offense when this use is at the crux of what makes the conduct criminal. To be clear, being at the crux of the criminality requires more than a casual relationship, such as “facilitation” of the offense or being a “but-for cause of its “success.” *Post*, at 1575, 1576-77 (GORSUCH, J., concurring in judgment). Instead, with fraud or deceit crimes like the one in this case, the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be

succinctly summarized as going to “who” is involved.

Id. at 131-32.

Prior to the ruling of this Court in *United States v. Dublin*, 599 U.S. 110 (2023), review of cases brought under 18 U.S.C. § 1028A for alleged identity theft were inconsistent throughout the appellate courts. This Court in *Dublin* therefore set out the standard for reviewing convictions under 18 U.S.C. § 1028A. In doing so, this Court pointed out that “many lower courts have responded to such prosecutions with more restrained readings of the aggravated identity theft statute. The Fifth Circuit did not. *Dublin*, 599 U.S. at 116 (emphasis added). This Court then went on to evaluate the statute and provide the analysis to be undertaken when reviewing convictions under 18 U.S.C. 1028A. *Id.* at 116-117.

Relevant to this Petition are the numerous conclusions and legal standards amplified in *Dublin*. The Court first determined that “the government’s broad reading, covering any time another person’s means of identification is employed in a way that facilitates a crime, bears little resemblance to an ordinary meaning of identity theft.” *Dublin*, 599 U.S. at 122. The Court then went on to find that the government’s analysis of 1028A(a)(i) also fails to “fairly capture the ordinary meaning of identity theft” and consequently “[t]he government’s reading would, in practice, place garden-variety over billing at the core of [18 U.S.C.] § 1028A.” *Id.*

The Court next defined the terms in relation to “as used in § 1028A(a)(1). *Id.* at 122. To this end, the Court determined that, in order to prove identity theft, the government must show that “the use of the means of identification is at the crux of the underlying criminality.”

Id. at 123. This “crux” was also defined as the “key mover” in the criminality. *Id.* As this Court concluded: “In other words, identity theft is committed when a defendant uses the means of identification itself to defraud or deceive. *Dubin*, 599 U.S. at 123. This Court further explained that “use of the means of identification would therefore be at the locus of [the criminal] undertaking, rather than merely ‘passive,’ ‘passing’ or ancillary employments in a crime.” *Id.* (quoting *Jones v. United States*, 848 U.S. 848, 855-56 (2002)). Ultimately, this Court concluded:

In sum, [18 U.S.C.] § 1028A(a)(i)’s title and text are mutually reinforcing. Both point toward requiring the means of identification to be at the crux of criminality.

Id. at 127.

The Concurring Opinion of Justice Gorsuch

As indicated above, Justice Gorsuch wrote an opinion concurring in the judgment. *Dubin*, 599 U.S. at 132-39 (Gorsuch, J., concurring in judgment). Initially, Justice Gorsuch observed that the Government was attempting to label “almost every adult American” guilty of aggravated identity theft. *Id.* at 133. Justice Gorsuch therefore declared that such a “vague law [referring to 18 U.S.C. § 1028A(a)(i)] is no law at all.” *Id.*

In his concurrence, Justice Gorsuch also made a critical observation about fraud and identity theft. *Id.* at 135. He pointed out that “[i]n virtually every fraud, a ‘means of identification’ plays some critical role in the mail or wire fraud’s success—good luck in committing mail or wire fraud, for instance, without relying heavily on the name of the individual and likely the names of other third parties.” *Id.* Critically, Justice went on to

question “just how much causation must a prosecutor establish to a § 1028A(a)(1) conviction. *Dubin*, 599 U.S. at 135 (Gorsuch, J., concurring in judgment). “For that matter, how does one even determine the extent to which a ‘means of identification’ ‘caused’ an offense, as compared to the many other necessary inputs?” *Id.*

Upon conducting a further analysis, Justice Gorsuch additionally pointed out that “the Constitution’s promise of due process means that criminal statutes must provide rules ‘knowable in advance,’ not intuitions discovered only after a prosecutor has issued an indictment and a judge offers an opinion.” *Id.* In other words, “[t]o satisfy the constitutional minimum of due process, [criminal statutes] must at least provide ‘ordinary people’ with ‘fair notice of the conduct they punish.’” *Id.* at 138 (quoting *Johnson v. United States*, 576 U.S. 591, 595 (2015)). Thus, Justice Gorsuch opined that 28 U.S.C. § 1028A(a)(1) is void for vagueness and unconstitutional. *Id.* at 138-39.

II. The Opinion of the Fifth Circuit in this Case on Remand

Subsequent to issuing the opinion in *Dubin*, this Court vacated the judgment against Mr. Croft and remanded this case to the Fifth Circuit for further consideration in light of *Dubin v. Croft v. United States*, 143 S. Ct. 2635 (Mem) (2023). Following briefing and oral argument, the Fifth Circuit issued a published opinion affirming Mr. Croft’s aggravated identity theft convictions. *United States v. Croft*, 87 F.4th 644 (5th Cir. 2023). Fifth Circuit Judges James E. Graves Jr., Stephen A. Higginson and James C. Ho were on the panel. Judge Ho did not dissent, but he did issue a dubitante opinion casting doubt on the judgment of the Court. *Id.* at 650-52 (Ho, J., dubitante). The opinion of the Court, written by Circuit

Judge Higginson, affirms Mr. Croft’s convictions without addressing the dubitante opinion written by Circuit Judge Ho.

In the opinion, the Fifth Circuit observed that “a defendant uses another person’s means of identification in relation to a predicate offense when this use is at the crux of what makes the conduct criminal.” *Croft*, 87 F.4th at 647 (quoting *Dubin*, 599 U.S. at 131). The panel then noted that Mr. Croft had listed four trainers who “had never reported for work.” *Id.* at 648. The panel also observed that three of those individuals testified they did not give Mr. Croft permission to use their names, while a fourth individual had died. *Id.* at 647.

Based on these observations, the Fifth Circuit ruled that “Croft’s misrepresentation about ‘who’ was teaching courses at Universal K-9 were the basis—and heart of—his wire fraud convictions.” *Id.* at 648. The conclusions of the Court are discussed below with an in depth analysis of the dubitante opinion.

III. The Opinion Dubitante

A. The Panel Opinion Makes No Comment

As noted, the decision of the panel made no comment on the dubitante opinion which casts doubt on the judgment in this case. *See United States v. Croft*, 87 F. 4th 644, 645-48 (5th Cir. 2023). In this dubitante opinion, the Honorable James C. Ho, United States Circuit Judge for the Fifth Circuit Court of Appeals, wrote a thorough discussion of the aggravated identity theft statute, the decision of this Court in *Dubin*, and the reasons that doubt had to be cast on the decision of this Court to affirm the District Court. *See id.* at 648-49.

Respectfully, because the decision in this case is to become *stare decisis* in an area

of the law in which this Court has only recently set forth the proper standard of review, this Court must evaluate and apply Circuit Judge Ho's dubitante opinion to provide the correct analysis as announced in *Dubin*. In other words, the Fifth Circuit's opinion in this case is not the thorough review to which all identity theft cases should be subjected by the Courts, and when that thorough analysis is properly applied, the decision of the Fifth Circuit affirming the District Court must be reversed.

B. The Specifics of the Dubitante

In the dubitante opinion, Circuit Judge Ho observes that the opinion of the Fifth Circuit prior to remand by this Court took a position "that has now been rejected by [the Supreme Court]." *Croft*, 87 F. 4th at 651. "It goes without saying," Circuit Judge Ho pointed out, "that we're duty bound to follow Supreme Court precedent, whether we agree with it or not." *Id.* Therefore, the jurist observed, "*Dubin* might require us to reverse the [28 U.S.C.] § 1028A(a)(1) convictions in this case." *Id.*

Circuit Judge Ho then explained "it would be reasonable" to conclude "that the real 'crux' of Croft's fraud turned, not on any person's name, *but rather on their qualifications to teach.*" *Id.* (emphasis added).

In *Dubin* itself, for example, the Court concluded that the crux of the fraud was the qualifications of the defendant's employee—not the name of the customer. The defendant's "use of the patient's *name* was not at the crux of what made the underlying overbilling fraudulent. The crux of the healthcare fraud was a misrepresentation about the *qualifications* of [the defendant's]

employee. The patient's *name* was an ancillary feature of the billing method employed." *Dubin*, 599 U.S. at 132, 143 S.Ct. 1557 (emphasis added).

Id. (emphasis in original).

“[P]ut simply, the fraud [in *Dubin*] was in misrepresenting *how* and *when* services were provided . . . not *who* receives the services. *Croft*, 87 F.4th at 651 (emphasis in original). And, there are questions left unanswered by the majority on the opinion:

So how do the principles articulated in *Dubin* cut in this appeal? Was the crux of the fraud here the *names* of the defendant’s employees—or their *qualifications*? Was the crux of Croft’s fraud “*who* received the services”—or who delivered them? Or was it “*how* . . . services were provided”?

Id. (emphasis in original). Thus, there are inquiries to be made before this case can be reconciled with *Dubin*. *Id.*

Importantly, Circuit Judge Ho encouraged review by this Court. He explained:

If nothing else, this case may help illustrate Justice Gorsuch’s observation that the new test announced by the Supreme Court in *Dubin* could prove difficult to administer in practice.

Id. at 651-52.

IV. Applying the Evidence

The crux of the healthcare fraud conviction which was reversed in *Dubin* was a misrepresentation about qualifications. 599 U.S. at 132. Of crucial import, the customer’s name was an ancillary feature of the billing method employed. *Id.* In this case, the prosecution alleges that the four trainers who were listed on the applications as instructors at K-9 University did not instruct at K-9 University. Based on this observation, Circuit Judges Graves and Circuit Judge Higginson affirmed the four aggravated identity theft convictions because “Croft’s misrepresentations about ‘who’ was teaching the courses at K-9 University were the basis—and heart of—his wire fraud convictions.” *Croft*, 87 F.4th at

648.

When we say that the names of the instructors were stolen, all that matters in this case is that K9 use qualified instructors and that was never proven. More importantly, Justice Gorsuch's observation that this statute is likely vague for vagueness is bolstered by Circuit Judge's Ho's observation that the names in this case are ancillary and the actual qualifications to teach the veterans never was addressed.

All of the testimony before the District Court makes clear it was the qualifications of those who would teach the veterans, and not their names or identifications, which was the crux of the fraud in this case. Indeed, Rufus Coburn, who worked for the TVC and reviewed Mr. Croft's applications, testified to the importance of qualifications and stated only one qualified instructor would be needed to satisfy the TVC's requirements to operate a dog training school for veterans. ROA.608. Indeed, he declared there was nothing important about the identities of the four individuals who were named as instructors during the application process. Instead, the TVC was solely concerned with whether the individual was qualified as a canine trainer. ROA.610. Again, proof that the instructors who trained the veterans were unqualified was something the Government never proved.

The analysis the Fifth Circuit employed is contrary to that set out in *Dubin*. It is true that "a defendant uses another person's means of identification in relation to a predicate offense when this use is at the crux of what makes the conduct criminal." *Croft*, 87 F.4th at 647 (quoting *Dubin*, 599 U.S. at 131). Yet, the alleged facts cited by the Fifth Circuit (Mr. Croft listed four trainers who never reported for work, the individuals did not give Mr. Croft

permission to use their names, and one individual was deceased) do not show that the identifications were at the crux of what made the alleged conduct criminal. As in *Dubin*, the names of the individuals were ancillary to their qualifications. Accordingly, Mr. Croft's convictions for aggravated identity theft must be reversed.

CONCLUSION

For the reasons set forth above, Mr. Croft submits the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and thus a compelling reason is presented for discretionary review.

WHEREFORE, PREMISES CONSIDERED, Petitioner, BRADLEY LANE CROFT, requests that this Court grant this petition and issue a Writ of Certiorari. Mr. Croft also requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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