No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

LANI LUCAS LIMANE a/k/a LUKASZ CHAD LIMANE,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

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

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I.

QUESTIONS PRESENTED

Count Eight of an Indictment charged Petitioner with aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). That statute criminalizes identity theft "during and in relation to any felony violation enumerated" in subsection 1028A(c). In Petitioner's case, Count Eight alleged that Petitioner committed identity theft "during and in relation to" the specific predicate offense set out in Count Seven of that same Indictment: Access device fraud in violation of 18 U.S.C. § 1029(a)(5). App. F.

Notwithstanding the specific allegation in the Indictment identifying access device fraud as the requisite predicate violation, Petitioner was advised at his rearraignment that he was pleading guilty to aggravated identity theft during and in relation to a completely different predicate offense: Wire fraud. [18 U.S.C. § 1343]. App. G. On plain error review, the Fifth Circuit held that altering the predicate violation to an offense other than the one expressly identified in the Indictment did not prejudice Petitioner. Accordingly, it affirmed Petitioner's conviction on his plea of guilty to the Count Eight charge of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). App. A.

QUESTION ONE

Was it plain error for a District Court to convict Petitioner on his plea of guilty to a crime never charged in the governing Indictment?

QUESTION TWO

When the substantive offense charged (i) is compound in nature and requires, as an essential element, proof of a qualifying predicate violation, and (ii) the indictment charges a specific felony as the qualifying predicate violation, is Rule 11 complied with when the plea colloquy informs Petitioner that he is pleading guilty to the substantive offense on the basis of a completely different predicate violation than the one identified in the Indictment?

QUESTION THREE

Did the Fifth Circuit correctly apply the plain error standard of review announced by this Court in *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004) in rejecting Petitioner's claim that it was plain error for the District Court to accept his plea?

II.

THE PARTIES

The parties to this case are the United States of America and Petitioner Lani Lucas Limane a/k/a Lukasz Chad Limane.

III.

RELATED CASES

This Petition arises out of a consolidated appeal to the United States Court of Appeals for the Fifth Circuit from four separate judgments entered by the United

States District Court for the Northern District of Texas. The four cases were assigned the following case numbers at the District Court level:

1. *United States v. Lukasz Chad Limane*, No. 3:21-cr-00539-1 (N.D. Tex.);
2. *United States v. Lukasz Chad* Limane, No. 3:21-cr-00600-1 (N.D. Tex.);
3. *United States v. Lani Lucas Limane*, No. 3:19-cr-00620-1 (N.D. Tex.);
4. *United States v. Lani Lucas Limane*, No. 3:20-cr-00028-1 (N.D. Tex).

Separate appeals were taken from the final judgments entered in all four cases. The Fifth Circuit originally assigned the four appeals separate Case Nos. 23-10112, 23-10114, 23-10115 and 23-10117. The cases were subsequently consolidated on appeal in response to Petitioner's motion.

On the merits, this Petition focuses on Petitioner's plea of guilty to the aggravated identity theft charge in Count Eight Of the Indictment at issue in case no. 3:20-CR-0028-S (N.D. Tex.). The three other cases are impacted only because, if the Petition is granted and the sentence for aggravated identity theft in case no. 3:20-CR-0028-S is reversed or vacated, the sentence imposed in each of the three other cases will have to be vacated or otherwise adjusted because all three provide that the sentence for aggravated identity theft runs consecutive to the other terms of imprisonment imposed in those cases.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lani Lucas Limane a/k/a Lukasz Chad Limane ("Petitioner") respectfully requests that a writ of certiorari issue to review the judgment below.

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. A copy of the Fifth Circuit's opinion appears at **Appendix A** to the Petition. The Fifth Circuit panel denied Petitioner's Petition for Rehearing on March 12, 2024. A copy of the order denying rehearing appears at **Appendix B** to the Petition.

The Magistrate Judge's Report and Recommendation recommending acceptance of Petitioner's plea of guilty to Counts 1 and 8 of the Indictment charging him with wire fraud and aggravated identity theft, respectively, appears at **Appendix C** to the Petition. The order of the United States District Court for the Northern District of Texas in Case No. 3:20-CR-00028-S (N.D. Tex. Nov. 2, 2021) accepting the Magistrate Judge's Report and Recommendation on Petitioner's plea and adjudicating Petititioner guilty of both wire fraud [Count 1 of the Indictment -

§ 1343] and aggravated identity theft [Count 8 of the Indictment - § 1028A(a)(1)] appears at **Appendix D** to the Petition.

II.

JURISDICTION

This Court has jurisdiction to entertain this Petition pursuant to 28 U.S.C. § 1254(1). The Fifth Circuit denied Petitioner's Petition for Rehearing on March 12, 2024. App. B. Justice Alito subsequently extended Petitioner's time to file a Petition for a Writ of Certiorari to and including July 10, 2024. Accordingly, pursuant to Rules 13.1, 13.3, 13.5 and 30.1 of the Rules of this Court, Petitioner's Petition for a Writ of Certiorari is timely as it is being filed on July 5, 2024.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition raises issues involving the following constitutional and federal statutory provisions:

A. Fifth Amendment To The Constitution Of The United States:

> 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.

B. 18 U.S.C. § 1028A(a)(1):

Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

C. 18 U.S.C. §§ 1028A(c)(4) & (5):

(c) DEFINITION.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—...

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

D. 18 U.S.C. § 1028(a)(7):

(a) Whoever, in a circumstance described in subsection (c) of this section—...

(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law;...

shall be punished as provided in subsection (b) of this section.

E. 18 U.S.C. § 1029(a)(5):

(a) Whoever—...

5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or

persons, to receive 0payment or any other thing of value during any 1-year period the aggregate value of which is equal to or greater than $1,000;...

shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

F. Fed.R.Crim.P. 11(b)(1)(G) and 11(b)(3):

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:...

(G) the nature of each charge to which the defendant is pleading;...

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea...

IV.

STATEMENT OF THE CASE

A grand jury sitting in the Northern District of Illinois returned an indictment (the "Indictment") charging Petitioner with, *inter alia*, multiple counts of wire fraud in violation of 18 U.S.C. § 1343, one count of access device fraud in violation of 18 U.S.C. § 1029(a)(5) and aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1). App. E.

Count 8 of the Indictment – the Count that charged Petitioner with aggravated identity theft – alleged that Petitioner

> knowingly transferred, possessed, and used, without lawful authority, a means of identification of another person, namely, the name, social security number, and employee number of former employees of Company A, **during and in relation to the offense described in Count Seven of this indictment** knowing that the means of identification belonged to another actual person;
>
> In violation of Title 18, United States Code Section 1028A(a)(1). ROA.39 [emphasis added].[1]

Count Seven of the Indictment, the predicate felony violation incorporated into Count Eight's charge of aggravated identity theft, alleged that Petitioner

> knowingly and with intent to defraud effected transactions with 1 or more access devices issued to another person or persons, namely, the name, social security number, and employee number of former employees of Company A, to receive payment during any l-year period the aggregate value of which was greater than $1,000;
>
> **In violation of Title 18, United States Code, Section 1029(a)(5).**

ROA.38 [emphasis added]. To the extent that § 1029(a)(5) qualifies as a predicate felony for purposes of § 1028A(a)(1), it must do so through § 1028A(c)(4).[2]

[1] An essential element of aggravated identity theft under § 1028A(a)(1) is that the defendant have committed identity theft "during and in relation to" one of the felony offenses listed in subsection 18 U.S.C. § 1028A(c).

[2] Subject to two specific exclusions, 18 U.S.C. § 1028A(c)(4) allows any felony in Chapter 47 of Title 18 relating to "fraud and false statements" to serve as a predicate "felony violation" for aggravated identity theft. Section 1028A(c)(4) excludes any felony violation that is a violation of §§ 1028(a)(7) or 1028A. As explained below, the § 1029(a)(5) offense, as alleged in the Indictment, is also a violation of § 1028(a)(7). Accordingly, Petitioner submits that the § 1029(a)(5) offense charged in Count Seven of the Indictment could not serve as a qualifying predicate offense for aggravated identity theft, as alleged in Count Eight of the Indictment. App. F, pp. 11-12.

After the case was transferred to the Northern District of Texas[3], Petitioner signed a plea agreement [App. H] and supporting factual resume [App. I] in which he agreed to plead guilty to two offenses charged in the Indictment: (i) wire fraud [18 U.S.C. § 1343], as charged in Count One; and (ii) aggravated identity theft [18 U.S.C. 1028A(a)(1), as charged in Count Eight. Contrary to what was alleged in the Indictment, however, Petitioner's plea agreement and factual resume identified wire fraud in violation of 18 U.S.C. § 1343 – not access device fraud in violation of 18 U.S.C. § 1029(a)(5) – as the operative predicate felony violation supporting his plea of guilty to aggravated identity theft. App. H & I.

Further, at his rearraignment, the Magistrate Judge conducted a colloquy with Petitioner under Fed.R.Crim.P. 11 in which Petitioner was informed that he was entering a plea of guilty to the offense of aggravated identity "during and in relation to" the predicate offense of "wire fraud." The plea colloquy did not include any mention of access device fraud or § 1029(a)(5), the actual predicate offense charged in the Indictment. App. G.

Petitioner's trial counsel did not object to the misinformation at Petitioner's rearraignment or at his subsequent sentencing. Accordingly, on appeal to the Fifth Circuit Petitioner asserted that it was plain error for the District Court to accept

[3] Petitioner absconded before the charges in the Indictment could be adjudicated. He was subsequently arrested in Texas and indicted in the Northern District of Texas on an unrelated charge. At that point, Petitioner consented to have the prior Illinois case transferred to the Northern District of Texas pursuant to Fed.R.Crim.P. 20. ROA.23-10114.10. The Illinois case was assigned Case No. 3:20-cr-00028-S-1 in the Northern District of Texas.

Petitioner's plea of guilty to Count Eight of the Indictment charging him with aggravated identity theft because

(i) The Indictment was constructively amended in violation of Petitioner's rights under the Fifth Amendment to the Constitution of the United States;

(ii) Petitioner was not informed of the true nature of the charge to which he was pleading guilty as required by the Due Process Clause of the Fifth Amendment and Fed.R.Crim.P. 11(b)(1)(G), rendering his plea uninformed, involuntary and constitutionally deficient;

(iii) The Factual Basis did not support Petitioner's conviction of the aggravated identity theft charge as required by Fed.R.Crim.P. 11(b)(3); and

(iv) The plain error standard of review applicable to appeals predicated on violations of Rule 11 of the Federal Rules of Criminal Procedure, as articulated by this Court in *United States v. Dominguez Benitez,* 542 U.S. 74 (2004) and *Greer v. United States*, 141 S. Ct. 2090 (2021) was satisfied.

The Fifth Circuit's Ruling:

The Fifth Circuit upheld Petitioner's conviction on his plea of guilty to aggravated identity theft, as charged in Count 8 of the Indictment, because the facts

Petitioner agreed to in supporting his conviction for wire fraud also supported his conviction for access device fraud. Accordingly, in the Fifth Circuit's view, swapping wire fraud as the predicate offense for access device fraud – all without returning to the grand jury – was inconsequential. It rejected Petitioner's arguments, concluding that there was no "clear or obvious constructive amendment" of Petitioner's indictment because

> the government maintained a single theory of conviction on the aggravated-identity-theft count because the indictment alleged, and Limane admitted at rearraignment, that Count 8 was based on his fraudulent transmission, by wire communication, of former Company A employees' access devices [citations omitted]. Contrary to Limane's contention that the crime charged in Count 8 constituted a different crime from the one to which he pleaded guilty, the record establishes that Counts 1 and 7 were based on the same fraudulent scheme, and Limane confirmed his understanding of that scheme at rearraignment. Further, the facts admitted by Limane establish the essential elements of aggravated identity theft. [citations omitted]. ***Limane's novel factual-basis challenge does not establish plain error***.

App. A, Slip Op., p. 2 [emphasis added].

Petitioner respectfully submits that the Fifth Circuit erred in two respects. First, Count 7 charged Petitioner with access device fraud in violation of § 1029(a)(5). ***That was the predicate offense the Government was required to prove because that was the predicate felony violation alleged in the Indictment.*** Second, substituting wire fraud [§ 1343] as the predicate offense – which is what both the District Court and Fifth Circuit did – was not an inconsequential because, for the

reasons described below, Petitioner could not have been convicted of aggravated identity theft "during and in relation to" the § 1029(a)(5) access device fraud offense alleged in Count 7.

Petitioner submits that

(I) he was convicted on his plea of guilty to an offense not charged in the Indictment in violation of his rights under the Fifth Amendment to the Constitution of the United States;

(II) the District Court's error in accepting Petitioner's plea of guilty to an offense not charged in the Indictment constituted plain error;

(III) Petitioner's plea of guilty was neither voluntary nor informed in violation of the Due Process Clause of the Fifth Amendment and Rule 11(b)(1)(G) of the Federal Rules of Criminal Procedure;

(IV) The District Court erred in accepting Petitioner's plea of guilty to Count Eight of the Indictment because the factual basis was insufficient to support Petitioner's plea of guilty to that Count; accordingly, accepting Petitioner's plea of guilty violated Fed.R.Crim.P. 11(b)(3); and

(V) the Fifth Circuit misapplied the plain error standard of review as announced by this Court in *Olano v. United States,* 507 U.S. 725, 736, 113 S.Ct. 1770 (1993), *United States v. Dominguez-Benitez*, 542 U.S.

74 (2004) and *Greer v. United States*, 141 S. Ct. 2090 (2021) in determining that Petitioner's substantial rights had not been prejudiced.

V.

REASONS FOR GRANTING THE WRIT

The Court should grant this Petition for the following reasons:

First, the Fifth Circuit's opinion stands for the proposition that a person can be convicted of a crime for which he was never indicted. That is inconsistent with the Fifth Amendment to the Constitution. *Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443 (1989); *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270 (1960). It also subverts the two-fold purpose of an indictment: (1) Notice to the defendant; and (2) providing the defendant with the ability to raise double jeopardy in the event of a subsequent prosecution. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108, 127 S.Ct. 782 (2007) (Indictment serves two functions: (i) it must contain the elements of the offense charged and fairly inform the defendant of the charge against which he must defend, and (ii) it must enable the defendant to plead an acquittal or conviction as a double jeopardy bar to future prosecutions).

Second, the Fifth Circuit's opinion conflicts with cases from this Court, from other Circuits and from the Fifth Circuit itself holding that, (I) where the charged offense is compound in character and the Indictment charges a specific

predicate offense, the Government must prove *the specific predicate offense charged in the indictment*[4]; and (II) where the defendant's conviction of a compound offense rests on his plea of guilty, the Rule 11 colloquy must demonstrate that the defendant understood the nature of the predicate offense that supports his conviction. *U.S. v. Bradley*, 381 F.3d 641, 647 (7th Cir. 2004) (allowing defendant to withdraw his plea of guilty to § 924(c) charge where record showed that "no one understood an essential element of the crime with which Mr. Bradley was charged, namely, the specific drug trafficking predicate offense.").

Third, Petitioner submits that Fifth Circuit misapplied this Court's plain error standard of review, as articulated in *Dominguez Benitez* and *Greer v. United States*, 141 S. Ct. 2090 (2021). Specifically, by characterizing as "novel" Petitioner's argument that § 1028A(c)(4) bars § 1029(a)(5), as alleged in the Indictment, from serving as the requisite predicate offense for aggravated identity theft, and, therefore, insufficient to support plain error, the Fifth Circuit confused the "clear or obvious" component of plain error with the "prejudice to substantial rights" component. As explained below, Petitioner's argument that § 1028A(c)(4) bars § 1029(a)(5), at least in the form alleged in the Indictment, from serving as the requisite predicate "felony violation" for the offense of aggravated identity theft,

[4] *Rosemond v. United States*, 572 U.S. 65, 71, 134 S. Ct. 1240 (2014) (construing 18 U.S.C. § 924(c)); *United States v. Jordan*, 22-2153 (3rd Cir. Mar 25, 2024)(published); *U.S. v. Randall*, 171 F.3d 195, 205 (4th Cir. 1999); *United States v. Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996); *U.S. v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994).

goes solely to the question whether the errors below resulted in substantial prejudice to Petitioner's rights – not whether there were errors that were plain or obvious.

Fourth, in its annual report for fiscal year 2023 the United States Sentencing Commission stated that "the overwhelming majority of sentenced individuals pleaded guilty (97.2%)."[5] Accordingly, ensuring compliance with Rule 11 of the Federal Rules of Criminal Procedure is essential to the integrity of the federal criminal justice system. A defendant must be fully informed of the nature of the charge to which he is pleading guilty (i.e. informed of each essential element of the charge to which he is pleading guilty). That is the minimum that Due Process and Rule 11(b)(1)(G) require.[6]

Fifth, the aggravated identity theft offense codified at 18 U.S.C. § 1028A(a)(1) is a complex offense that carries a "severe penalty." *Dubin v. United States*, 143 S.Ct. 1557, 1563 (2023) ("Section 1028A(a)(1) carries a severe penalty:

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[5] https://www.ussc.gov/about/annual-report-2023.

[6] Although a defendant may waive indictment by a grand jury [*United States v. Cotton*, 535 U.S. 625, 630 (2002)], the waiver of that Fifth Amendment right should never be presumed; it should clearly appear on the record that the defendant knowingly, intelligently and voluntarily waived his right to indictment. *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245 (1966); *Carnley v. Cochran*, 369 U.S. 506, 514, 82 S.Ct. 884 (1962) (A court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." (internal quotation marks omitted)); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938) ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' [citations omitted].").

a mandatory minimum sentence of two years in prison 'in addition to the punishment' for the predicate offense."). In his concurring opinion in *Dubin*, Justice Gorsuch not only recognized the challenge courts and citizens have in determining whether 18 U.S.C. § 1028A(a)(1) applies to given actions, but also took note of the serious mandatory sentence that results from the defendant's being convicted of that offense. *Dubin*, 143 S.Ct. at 1576 ("[T]here is nothing entertaining about a 2-year mandatory federal prison sentence.").

The Analysis:

1. A Defendant Cannot Be Held To Answer A Charge That Is Not Contained In The Indictment:

In *Schmuck v. United States*, 489 U.S. 705, 109 S.Ct. 1443 (1989) this Court stated the following:

> It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.

Schmuck, 489 U.S. at 717-718; *Stirone v. United States*, 361 U.S. 212, 217, 80 S.Ct. 270 (1960) ("[A] court cannot permit a defendant to be tried on charges that are not made in the indictment against him.").

Thus, it is settled law that the "[e]ssential elements of a criminal offense must be charged in an indictment and proved to a jury beyond a reasonable

doubt."[7] Further, if the Government seeks to broaden the scope of a charged offense, it must return to the grand jury and secure a superseding indictment. *United States v. Banks*, 29 F.4th 168, 173-174 (4th Cir. 2022) (It is the "exclusive province" of the grand jury to alter or broaden the charges against the defendant). If the defendant is convicted of an offense not charged in the indictment, there is a constructive amendment of the indictment in violation of the defendant's rights under the Fifth Amendment.[8] The prohibition on constructive amendments applies even when the conviction is predicated on a plea of guilty.[9]

In this case, the Fifth Circuit upheld Petitioner's conviction for the crime of aggravated identity theft based on Petitioner's plea of guilty to the predicate offense of wire fraud, ***even though wire fraud was not the predicate offense***

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[7] *United States v. O'Brien*, 560 U.S. 218, 130 S. Ct. 2169 (2010); *Jones v. United States*, 526 U.S. 227, 232, 119 S.Ct. 1215 (1999); *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887 (1974).

[8] An indictment is constructively amended

> when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them, thereby creating a substantial likelihood that the . . . jury convicted the defendant of an offense that the grand jury had not charged.

United States v. Mariano, 729 F.3d 874, 880 (8th Cir. 2013) (cleaned up).

[9] Although less common than constructive amendments that occur at trial, several courts have recognized that constructive amendments of an indictment can occur in the context of guilty plea proceedings. *United States v. Philpot*, No. 18-14897 (11th Cir. 2019); *United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014) (collecting cases); *see also, United States v. Tello*, 687 F.3d 785, 794-97 (7th Cir. 2012).

charged in Petitioner's Indictment. Count 8 of the Indictment charged Petitioner with aggravated identity theft. App. F, p. 12. It reads as follows:

> [Petitioner] knowingly transferred, possessed, and used, without lawful authority, a means of identification of another person, namely, the name, social security number, and employee number of former employees of Company A, during and in relation **to the offense described in Count Seven of this indictment**...
>
> in violation of §1028A(a)(1). App. F, p. 12, ROA.39 [emphasis added].

Count Seven charged that Petitioner

> knowingly and with intent to defraud effected transactions with 1 or more access devices issued to another person or persons, namely, the name, social security number, and employee number of former employees of Company A, to receive payment during any l-year period the aggregate value of which was greater than $1,000;
>
> **In violation of Title 18, United States Code, Section 1029(a)(5).**

App. F, p. 11; ROA.38 [emphasis added].

As described below, the specific predicate "felony violation" charged in Count Seven of Petitioner's Indictment – access device fraud in violation of § 1029(a)(5) – was an essential element of the aggravated identity theft offense charged in Count Eight of the same Indictment. Further, Petitioner's plea agreement, factual resume and plea colloquy conclusively show that he was led to believe that the charge in his Indictment did not depend on the Government's proving the specific predicate offense charged in the Indictment. App. F, G & H. Thus, the record shows that Petitioner pled guilty to an aggravated identity offense

he was never charged with, and that he did not have a complete understanding of the nature of that offense prior to entering his plea of guilty.

2. Cases Involving Offenses Requiring A Predicate Act Conflict With the Fifth Circuit's Ruling In This Case:

The principles described above have particular force when the offense charged is compound in nature and has as an element a separate predicate offense. In those cases, the Government must prove the incorporated predicate offense to secure the defendant's conviction of the charged offense. *Rosemond v. United States*, 572 U.S. 65, 71, 134 S. Ct. 1240 (2014) (construing 18 U.S.C. § 924(c)). Further, where the indictment identifies a *specific* predicate offense as an essential element of the compound offense, the Government must prove the *specific* predicate offense identified in the indictment. *U.S. v. Randall*, 171 F.3d 195, 205 (4th Cir. 1999) ("[I]f the government specifies in the indictment the § 924(c) predicate offense on which it is relying, '[a] conviction that rests, no matter how comfortably, on proof of another [predicate] offense cannot stand.'" [citations omitted]); *U.S. v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994).[10] The Fifth Circuit

[10] The Third Circuit emphasized that point in its recent opinion in *United States v. Jordan*, 22-2153 (3rd Cir. Mar 25, 2024) (published):

> [W]e hold that, as a rule, federal nested crimes that depend on alternative predicate crimes are divisible. As counsel explained at argument, the federal government's standard practice is to charge the elements of the specific predicate offense and require a unanimous jury verdict beyond a reasonable doubt on those elements. That is true for conspiracies, RICO charges, continuing criminal enterprises, and the like. ***In each case, the government must stick with proving***

itself has acknowledged this restriction. *United States v. Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996) (specific predicate offense alleged in indictment charging compound offense under 18 U.S.C. § 924(c) is an essential element of that offense and must be proved to the jury beyond a reasonable doubt; proof of different qualifying predicate offense is insufficient).[11]

In summary, when (i) the offense charged in the indictment is compound in nature, (ii) the indictment charges a specific qualifying predicate offense; and (iii) the Government proves a different predicate offense, the defendant's conviction cannot stand. That is true even if the Government proves (or the defendant admits to) a qualifying predicate offense, but one that differs from the predicate offense actually charged in the indictment.

The offense of aggravated identity theft is compound in nature. 18 U.S.C. § 1028A(a)(1). It requires the Government to prove, as an "essential element", that the defendant committed aggravated identity theft "during and in relation to any felony violation enumerated in subsection (c)." 18 U.S.C. § 1028A(a)(1); *See,*

> ***the particular predicate crime charged; it cannot vary from the indictment. So in such cases, the elements of the predicate crime charged become core elements of the nested crime.***

Id. at Slip Op., p. 13. [emphasis added].

[11] In *Reyes*, the Fifth Circuit upheld the conviction under plain error review because, despite recognizing that the constructive amendment of the Indictment was plain error, it exercised its discretion to leave the error uncorrected. *Reyes,* 102 F.3d at 1365.

Dubin v. United States, 599 U.S. 110, 143 S.Ct. 1557, 1564 (2023) (describing "in relation to 'healthcare fraud'" as an element of the charged § 1028A(a)(1) offense). The variety of predicate offenses that can serve as an element of aggravated identity theft under § 1028A(a)(1) renders that statute "divisible" in nature, meaning that the "statute effectively creates several different crimes." *Sasay v. Attorney Gen. U.S.*, 13 F.4th 291, 296 (3rd Cir. 2021).

As the Third Circuit put it, the predicate offenses in subsection 1028A(c)

> "represent alternative elements for an aggravated identity theft conviction because a jury could not convict a defendant under § 1028A(a)(1) without finding each element of the underlying felony violation and unanimously agreeing on that violation as the predicate felony for an aggravated identify theft conviction."

Sasay v. Attorney Gen. U.S., 13 F.4th at 297.

Accordingly, because the predicate offenses listed in § 1028A(c) create a variety of alternative essential elements, a specific predicate offense drawn from the list of eligible qualifying offenses in § 1028A(c) becomes an essential element of the aggravated identity theft charge under 18 U.S.C. § 1028A(a)(1). Proving a different qualifying predicate offense is not sufficient to sustain the defendant's conviction.

3. Wire Fraud and Access Device Fraud Are Not Interchangeable Predicate Offenses – Even When Based On The Same Facts:

The Fifth Circuit held that allowing wire fraud under § 1343 to serve as the requisite predicate offense was inconsequential to Petitioner's plea of guilty to the

charge of aggravated identity theft set out in Count Eight because the facts Petitioner admitted to in support of his conviction for wire fraud were sufficient to support his guilt of the predicate offense actually charged in Count Eight: Access device fraud under § 1349(a)(5). App. A. But a plea of guilty is not simply the defendant's acknowledgment that he committed ***the facts*** supporting the offense; in pleading guilty, the defendant admits his guilt of ***the substantive offense charged in the indictment***:

> By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime. That is why the defendant must be instructed in open court on "the nature of the charge to which the plea is offered," Fed.Rule Crim.Proc. 11(c)(1), and why the plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts," McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166 1171, 22 L.Ed.2d 418 (1969).

United States v. Broce, 488 U.S. 563, 570, 109 S.Ct. 757 (1989).[12]

As explained below, in the case *sub judice*, the offense of aggravated identity theft alleged in Count 8 – ***the charged offense*** – is not supported by the §

[12] It has long been held that a plea of guilty cannot be constitutionally valid unless it is an informed plea:

> A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941).

Bousley v. United States, 523 U.S. 614, 618 (1998).

1029(a)(5) predicate felony violation charged in Count Seven of the Indictment. Thus, by treating the aggravated identity theft charge as if the requisite predicate felony violation was wire fraud instead of the access device fraud offense actually charged in Count Eight, both the District Court and the Fifth Circuit overlooked a plain error that substantially prejudiced Petitioner's rights.

Importantly, wire fraud in violation of 18 U.S.C. § 1343 and access device fraud in violation of 18 U.S.C. § 1029(a)(5) are not equivalent predicate offenses for purposes of 18 U.S.C. § 1028A(a)(1). There is no question that wire fraud [18 U.S.C. § 1343] can serve as a predicate offense for the crime of aggravated identity theft; it is expressly listed as a qualifying predicate felony violation in 18 U.S.C. § 1028A(c)(5). In contrast, access device fraud is a qualifying felony violation only if it is eligible under 18 U.S.C. § 1028A(c)(4). That subsection reads as follows:

> **(c) DEFINITION.—**For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—...
>
> (4) any provision contained in this chapter (relating to fraud and false statements), **other than this section or section 1028(a)(7)**...

Id. [emphasis added]. Although § 1029(a)(5) is a "provision contained in this chapter" and relates to fraud, what happens when the § 1029(a)(5) felony violation alleged in the Indictment *is also "an offense that is a felony violation" of section 1028(a)(7)*? That is precisely what happened here. As Petitioner explained below, the charge in Count Seven (i.e. the predicate § 1029(a)(5) offense) describes not

only a felony violation under § 1029(a)(5), but also a felony violation under § 1028(a)(7), thereby triggering the "other than this section or section 1028(a)(7)" exclusion that appears in 18 U.S.C. § 1028A(c)(4). Here is the analysis:

First, 18 U.S.C. § 1028(a)(7), one of the two excluded felony violations, reads as follows:

> **(a)** Whoever, in a circumstance described in subsection (c) of this section—...
>
> **(7)** knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law...
>
> shall be punished as provided in subsection (b) of this section.

Count Eight of the Indictment charged Petitioner with aggravated identity theft. App. F, p. 12. It identified the predicate felony violation as the one set out in Count Seven of the Indictment, charging that Petitioner

> knowingly transferred, possessed, and used, without lawful authority, a means of identification of another person, namely, the name, social security number, and employee number of former employees of Company A, **during and in relation to the offense described in Count Seven of this indictment**, knowing that the means of identification belonged to another actual person
>
> In violation of Title 18, United States Code Section 1028A(a)(1).

App. F, p. 12.

Count Seven alleged that Petitioner

> knowingly and with intent to defraud effected transactions with 1 or more access devices issued to another person or persons, namely, the name, social security number, and employee number of former employees of Company A, to receive payment during any l-year period the aggregate value of which was greater than $ 1,000;
>
> In violation of Title 18, United States Code, Section 1029(a)(5).

App. F, p. 11; ROA.38 [No. 23-10114]. As described below, a comparison of the above-quoted charge in Count Seven with the essential elements of § 1028(a)(7) reveals that Count Seven states allegations that satisfy not only each and every essential element of § 1029(a)(5), but also each essential element of § 1028(a)(7).

Second, Count Seven's allegation that Petitioner "effected transactions" with "access devices" issued to other persons satisfies § 1028(a)(7)'s requirement that the defendant have "used" the "means of identification of another person."[13]

Third, Count Seven alleges that Petitioner, acting "knowingly and with intent to defraud", effected transactions "with" the social security numbers and

[13] Every "access device" [18 U.S.C. § 1029(e)(1)] is a "means of identification." [18 U.S.C. § 1028(d)(7)(D)]. As relevant here, a social security card is both a "means of identification" and an "access device." *United States v. Glenn*, 931 F.3d 424, 427 (5th Cir. 2019) (noting that another person's "social security numbers" are unauthorized access devices); *United States v. Jackson*, Case No. 16-50-111 (9th Cir. 2018) ("[A] Social Security card is an access device."); *U.S. v. Williams*, 355 F.3d 893 (6th Cir. 2003) ("'Means of identification' includes, inter alia, a name, social security number, unique electronic identification number, or telecommunication identifying information or access device as defined in 18 U.S.C. § 1029(e)."). Accordingly, a person who uses another's social security number (i.e. an "access device" and a "means of identification") satisfies essential elements of both 18 U.S.C. §§ 1028(a)(7) and 1029(a)(5).

other "means of identification" of other persons.[14] This satisfies § 1028(a)(7)'s requirement that the defendant acted with the intent to commit a violation of federal law, for the allegations, if proved, also establish a violation of § 1029(a)(5). Finally, we know from the language of Count Eight itself that Petitioner used the "access devices" of others referenced in Count Seven "without lawful authority."[15]

Thus, the offense charged in Count Seven of the Indictment not only describes a violation of § 1029(a)(5), but also describes a violation of § 1028(a)(7). Accordingly, it cannot serve as the predicate offense for the charge of aggravated identity theft. 18 U.S.C. § 1028A(c)(4). This means that the factual basis was insufficient to support Petitioner's conviction of aggravated identity theft, as charged in Count Eight of the Indictment. Fed.R.Crim.P. 11(b)(3).

4. The Fifth Circuit Misapplied *Olano* and *Dominguez Benitez*:

In *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770 (1993) this Court announced the following four requirements that must be satisfied to establish

[14] Knowingly effecting transactions with the means of identification of another person clearly satisfies the "use" requirement in § 1028(a)(7). *See, Voisine v. United States*, 136 S. Ct. 2272, (2016) (interpreting "use" to require a "volitional" act).

[15] If the "access devices" referenced in Count Seven were used with the consent of the individuals to whom they belonged, and if that constitutes the lawful use of those access devices, there is no aggravated identity theft at all because the offense of aggravated identity theft has, as an essential element, that the defendant transferred, possessed or used a "means of identification" of another **"without lawful authority."** 18 U.S.C. § 1028A(a)(1). Accordingly, the § 1029(a)(5) charge in Count Seven must have been committed "without lawful authority." The Fifth Circuit has held that § 1028A(a)(1) "criminalizes situations where a defendant gains lawful possession of a person's means of identification but proceeds to use that identification unlawfully and beyond the scope of permission granted." *United States v. Mahmood*, 820 F.3d 177, 187-188 (5th Cir. 2016).

plain error when a claim was forfeited below and is raised for the first time on appeal: (1) there must be an error "that has not been intentionally relinquished or abandoned"; (2) the error must be "plain—that is to say, clear or obvious"; (3) the error must have "affected the defendant's substantial rights"; and (4) the error must be one that "seriously affects the fairness, integrity or public reputation of judicial proceedings."

Here, as described above, there were significant errors that Petitioner never intentionally relinquished or abandoned (i.e. waived); they were forfeited. Further, the errors were "clear or obvious." As described above, it is axiomatic that (i) a defendant has a Fifth Amendment right to be prosecuted only for a felony charged by the grand jury in an indictment; (ii) a defendant must be informed of the true "nature of the charge" to which he is pleading guilty to satisfy both the Due Process Clause of the Fifth Amendment and Rule 11(b)(1)(G) of the Federal Rules of Criminal Procedure; and (iii) the District Court must determine that there is a factual basis for the plea. Fed.R.Crim.P. 11(b)(3). None of those requirements were satisfied in the case at bar. Petitioner pled guilty to an offense that was never charged in his Indictment, he was not properly advised as to the nature of the charge to which he was pleading guilty and the factual basis was insufficient to support his plea of guilty to Count Eight of the Indictment. Accordingly, the first

two *Olano* requirements are satisfied: There were errors and those errors were "clear or obvious."

Next, did the plea of guilty to the charge of aggravated identity theft as alleged in Count 8 of the Indictment affect Petitioner's "substantial rights"? The governing standard on the "substantial rights" issue in the context of a guilty plea was set out by this Court in *United States v. Dominguez Benitez,* 542 U.S. 74 (2004):

> "The question is what showing must thus be made to obtain relief for an unpreserved Rule 11 failing, and we hold that a defendant is obliged to show a reasonable probability that, but for the error, he would not have entered the plea."

Id. at p. 76. The Court reiterated the above-quoted *Dominguez Benitez* standard in *Greer v. United States*, 141 S. Ct. 2090 (2021), where it said that a defendant who challenges his plea of guilty on the basis of a Rule 11 error bears "the burden of showing that, if the District Court had correctly advised him of [an] element of the offense, there is a 'reasonable probability' that he would not have pled guilty" to Count 8 of the Indictment. *Id*. at p. 2097. Notably, the "reasonable probability" standard in this context is something less than "probable cause." *Dominguez Benitez,* 542 U.S. at 83, n. 9. As the Court noted in *Dominguez Benitez,* a defendant is not required to demonstrate that he would have prevailed at trial – or even that it is likely that he would have prevailed at trial. *Dominguez Benitez,* 542 U.S. at 85 ("[I]t is no matter that the choice may have been foolish...").

Petitioner submits that the Fifth Circuit erred by misapplying the substantial prejudice standard to forfeited Rule 11 errors. Petitioner was never informed that the Government was required to prove that he committed the offense of aggravated identity theft during and in relation to the felony violation described in 18 U.S.C. § 1029(a)(5), as charged in Count Seven of the Indictment. App. D, E & F. Instead, he was told that the predicate offense was wire fraud, a predicate felony violation that is nowhere mentioned in Count Eight. While the predicate offense of wire fraud in violation of § 1343 clearly qualifies as a predicate offense that can support a conviction for aggravated identity theft [*see,* 18 U.S.C. § 1028A(c)(5)], the same is not true for access device fraud in violation of § 1029(a)(5) - at least not in the form that offense is described in Count Seven of the Indictment. App. F. As explained above, because access device fraud in violation of § 1029(a)(5), as alleged in the Indictment, is also a violation of 18 U.S.C. § 1028(a)(7), it is barred from serving as the requisite predicate offense by 18 U.S.C. § 1028A(c)(4).

The fact that this argument is "novel" is irrelevant because it does not go to the question whether the errors were "plain or obvious"; it goes only to the "substantial prejudice" prong of *Olano* and *Dominguez Benitez.* The errors that are "plain or obvious" are (i) the District Court's acceptance of a guilty plea to a charge not made in the Indictment; (ii) the failure to properly inform Petitioner of the nature of the charge to which he is pleading guilty, as required by the Due

Process Clause of the Fifth Amendment and Fed.R.Crim.P. 11(b)(1)(G); and (iii) the District Court's failure to ensure that there was a sufficient factual basis to support Petitioner's plea of guilty to Count Eight of the Indictment, as required by Fed.R.Crim.P. 11(b)(3). "Substantial prejudice" exists under the *Dominguez Benitez/Greer* standard because Petitioner would not (in fact, could not) plead guilty to aggravated identity theft based on a § 1029(a)(5) offense that was barred by § 1028A(c)(4) from serving as the requisite predicate felony violation.

Why would Petitioner plead guilty to the aggravated identity theft charge in Count Eight of the Indictment when (i) there was at least a substantial argument that the government could not prove the aggravated identity theft charge alleged in Count Eight of the Indictment; and (ii) by pleading guilty to that offense, Petitioner was guaranteeing that he would receive a mandatory two-year term of imprisonment that would run consecutive to the other terms of imprisonment imposed by the District Court? 18 U.S.C. §§ 1028A(a)(1) & (b)(2) & (3)

CONCLUSION

For the reasons explained above, Petitioner Lani Lucas Limani a/k/a Lukacz Chad Limane respectfully requests that the Court (I) grant his Petition for a Writ of Certiorari, and, after considering the case on the merits, (II) vacate his conviction for Aggravated Identity Theft in Case No. 3:20-cr-00028-S-1; (III) vacate the sentences imposed by the District Court in Case Nos. 3:21-cr-00539-1, 3:21-cr-

00600-1, No. 3:20-cr-00028-1 and No. 3:19-cr-00620-1, each of which expressly references the sentence imposed for Petitioner's aggravated identity theft conviction and provides that it is to run consecutively to the other sentences imposed in those cases; (IV) remand the consolidated cases for further proceedings consistent with the Court's ruling; and (V) provide Petitioner with such other or further relief to which he may be justly entitled.

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