No. 16-326

# In the Supreme Court of the United States

RASHIA WILSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

IAN HEATH GERSHENGORN
*Acting Solicitor General*
*Counsel of Record*
LESLIE R. CALDWELL
*Assistant Attorney General*
KIRBY A. HELLER
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner qualified for a two-level enhancement under Sentencing Guidelines § 2B1.1(b)(11)(B)(i) because her offense involved the production of unauthorized access devices.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not published in the *Federal Reporter* but is reprinted at 649 Fed. Appx. 827. A prior opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted at 593 Fed. Appx. 942.

## JURISDICTION

The judgment of the court of appeals was entered on May 11, 2016. On August 3, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 8, 2016, and the petition was filed on September 7, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petition-

er was convicted of wire fraud, in violation of 18 U.S.C. 1343, and aggravated identity theft, in violation of 18 U.S.C. 1028A. She was sentenced to 234 months of imprisonment, to be followed by three years of supervised release.[1] The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A3. On remand, the district court sentenced petitioner to 252 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. *Ibid.*; see *id.* at A1-A9.

1. Between April 2009 and September 2012, petitioner and her boyfriend, Maurice Larry, acquired the names, social security numbers, and dates of birth for approximately 1475 individuals from resources on the internet and from medical records that they purchased from a medical billing company employee. Presentence Investigation Report (PSR) ¶ 35. Petitioner and Larry then used the information to file thousands of fraudulent income tax returns requesting a total of $11,381,155 in refunds. PSR ¶¶ 35-39. Although the Internal Revenue Service rejected many of the returns, petitioner and Larry received $3,147,477 in refunds, primarily in the form of reloadable debit cards. PSR ¶¶ 35, 39. Petitioner and Larry subsequently redeemed the debit cards for cash and expensive personal items. PSR ¶ 35.

During the course of the investigation, law enforcement officers learned that petitioner, a convicted felon, had rented a firearm at a local shooting range, and

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[1] Following a separate guilty plea, petitioner was convicted of two counts of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court consolidated the two cases for sentencing and sentenced petitioner to a total of 252 months of imprisonment. Pet. App. A3.

the officers found photographs that petitioner had posted on Facebook that depicted her holding a gun. PSR ¶¶ 22-24. Officers obtained a warrant to search petitioner's residence and recovered a .22 caliber handgun. PSR ¶ 25.

2. In October 2012, a federal grand jury sitting in the Middle District of Florida charged petitioner with two counts of unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1). PSR ¶¶ 1-3. She pleaded guilty to both counts. PSR ¶¶ 5-6.

In December 2012, a federal grand jury returned a separate 57-count indictment, charging petitioner with conspiracy to commit wire fraud, file fraudulent tax returns, and obtain fraudulent tax refunds, in violation of 18 U.S.C. 371; nine counts of wire fraud, in violation of 18 U.S.C. 1343 and 2; 19 counts of filing fraudulent tax returns, in violation of 18 U.S.C. 287 and 2; 14 counts of theft of government funds (the fraudulently obtained tax refunds), in violation of 18 U.S.C. 641 and 2; and 14 counts of unlawfully using the identification of another person during and in relation to the felony offense of theft of government property, in violation of 18 U.S.C. 1028A and 2 (aggravated identity theft). PSR ¶¶ 8-16. Pursuant to a plea agreement, petitioner pleaded guilty to one count of wire fraud and one count of aggravated identity theft. PSR ¶¶ 18, 20.

At petitioner's request, the district court consolidated the two cases for sentencing. Pet. App. A3. The court sentenced petitioner to a total of 252 months of imprisonment, composed of two concurrent 18-month sentences on the firearms offenses, a consecutive 210-month sentence on the wire fraud count, and a consec-

utive two-year sentence on the aggravated identity theft count. *Ibid.*

3. Petitioner appealed the sentences in both cases. The court of appeals vacated the sentences and remanded for resentencing because the district court failed to apply the grouping rules under the Sentencing Guidelines and erred in calculating petitioner's criminal history score. Pet. App. A3, A5-A9.

4. In a revised PSR, the Probation Office calculated the adjusted offense level on the wire fraud count to be 37, which included a two-level enhancement because petitioner produced unauthorized or counterfeit access devices when she duplicated the victims' Social Security numbers to electronically submit the fraudulent tax returns. PSR ¶¶ 65, 69; Addendum to PSR 1-2; see Sentencing Guidelines § 2B1.1(b)(11)(B)(i). Applying the Sentencing Guidelines' grouping rules to the wire fraud and firearms convictions, the Probation Office recommended an advisory Guidelines range of 188 to 235 months of imprisonment, based on a total offense level of 34 and a criminal history category of III. PSR ¶ 156. The Probation Office also noted that the Guidelines sentence for the aggravated identity theft conviction was the two-year term of imprisonment required by statute. PSR ¶ 158.

Petitioner objected to the two-level production enhancement in the PSR, arguing that, although she had "used" unauthorized or counterfeit access devices to implement her scheme, she had not "produced" them. Gov't C.A. Br. 14-15; see *id.* at 14-16. The district court overruled the objection and adopted the factual findings and Guidelines calculations in the PSR. 3/5/15 Re-Sent. Tr. (Tr.) 9-10.

The district court again sentenced petitioner to a total of 252 months of imprisonment. The total term consisted of concurrent sentences of 120 months of imprisonment on each felon-in-possession count and 228 months on the wire fraud count, and a consecutive sentence of 24 months on the aggravated identity theft count. Tr. 27-28. The court noted that "had [the court] sentenced [petitioner] in separate cases, this would have been the bottom of the Guidelines" and that "it was not [the court's] intent to reduce those Guidelines [in the separate cases] by granting the motion to have one sentencing for the convenience of the parties." Tr. at 28. Taking into account "the nature and circumstances of the offense" as well as petitioner's "personal characteristics," the court explained that its intent all along was to "give that sentence [of 252 months of imprisonment] and that "[h]ad [the court] made that statement on the record, that that was [its] intent to give that sentence, this case would not have been remanded in the first place." *Ibid.*

5. The court of appeals affirmed. Pet. App. A1-A9. As relevant here, the court rejected petitioner's claim that the district court erred by applying the two-level production enhancement under Sentencing Guidelines § 2B1.1(b)(11)(B)(i). The court of appeals stated that the undisputed facts in the PSR showed that "to obtain the improper tax refunds, it was necessary for [petitioner] to duplicate others' Social Security numbers by entering them into tax preparation software with intent to defraud the United States." Pet. App. A6. It therefore concluded that, based on the enhancement's plain language, the district court correctly concluded that the relevant conduct for petitioner's

wire fraud conviction included the production of unauthorized access devices.[2] *Ibid.*

**ARGUMENT**

Petitioner renews her claim (Pet. 5-11) that the district court erred in applying the two-level enhancement to her offense level for the production of unauthorized access devices under Sentencing Guidelines § 2B1.1(b)(11)(B)(i). The court of appeals' decision interprets the advisory Sentencing Guidelines, and therefore review of the decision is unwarranted. In any event, the court of appeals' decision correctly interpreted the relevant Guidelines provision and does not conflict with any decision of this Court or of any other court of appeals. And this case would be a poor vehicle for addressing the question presented. Accordingly, the petition should be denied.

1. As an initial matter, the Court's review is not warranted because the question presented involves the interpretation of a provision of the advisory Sentencing Guidelines. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines to eliminate a conflict between the circuits or to correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sen-

[2] Although the court of appeals affirmed petitioner's sentences, it remanded the case for correction of a clerical error in the written judgments. Pet. App. A8-A9.

tencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

Review by this Court of Guidelines decisions is particularly unnecessary in light of *Booker*, which rendered the Guidelines advisory only. Thus, even if a sentencing court were not required to adjust the applicable Guidelines offense level under Section 2B1.1(b)(11)(B)(i), the court could still consider the same facts, if reliable, when fashioning the ultimate sentence pursuant to 18 U.S.C. 3553(a). See 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *Booker*, 543 U.S. at 251-252 (similar). Likewise, a sentencing court could exercise the discretion afforded by Section 3553(a) and, in appropriate cases, discount the impact of an applicable Section 2B1.1(b) enhancement.

2. Petitioner's specific claim also does not warrant further review because the court of appeals correctly interpreted the relevant Guidelines provision.

Under the Sentencing Guidelines, the offense level of a defendant convicted of fraud is increased by two levels if the offense involved "the production or trafficking of any [] unauthorized access device or counterfeit access device." Sentencing Guidelines § 2B1.1(b)(11)(B)(i). For purposes of this provision, an application note to Section 2B1.1(b)(11) provides that "'[p]roduction' includes manufacture, design, al-

teration, authentication, duplication, or assembly." Sentencing Guidelines § 2B1.1, comment. (n.10(A)).

The court of appeals correctly concluded that petitioner's wire fraud offense involved the production—*i.e.*, "duplication"—of unauthorized access devices—*i.e.*, social security numbers.[3] Although the Sentencing Guidelines do not define the word "duplication," the ordinary meaning of "duplicate" is to "identically copy from an original." *United States* v. *Melendrez*, 389 F.3d 829, 833 n.7 (9th Cir. 2004) (quoting *The American Heritage College Dictionary* 426-427 (3d ed. 2000) (brackets omitted)); see also *Black's Law Dictionary* 613 (10th ed. 2014) (defining "duplicate" as "[t]o copy exactly"). Thus, as the court explained, petitioner "duplicate[d] others' Social Security numbers by entering them into tax preparation software with intent to defraud." Pet. App. A6.

Petitioner's contrary reading of Section 2B1.1(b)(11)(B)(i) is mistaken in several respects. First, while acknowledging that "duplication," "in its

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[3] The application note also states that "'[u]nauthorized access device' has the meaning given that term in 18 U.S.C. § 1029(e)(3)." Sentencing Guidelines § 2B1.1, comment. (n.10(A)). Section 1029(e)(3) defines "unauthorized access device" as including "any access device that is * * * obtained with the intent to defraud." 18 U.S.C. 1029(e)(3). Section 1029(e)(1), in turn, defines "access device" as including "any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number * * * or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds." 18 U.S.C. 1029(e)(1). Petitioner does not contest that the social security numbers and debit cards at issue in this case fall within the statutory and Guidelines definitions.

broadest sense, could mean the simple act of copying social security numbers and inputting them into Turbo Tax," Pet. 7, petitioner argues that, under the interpretive canon of *noscitur a sociis*, the term "duplication" must be construed in light of the other "specialized forms of production" listed in the application note's definition. Pet. 6-7. Accordingly, petitioner claims, the meaning of "duplication" should be narrowed to refer to "instances involving the duplication of a replica of an access device." Pet. 7-8.

Petitioner's narrow reading is unsupported. The Guidelines define "production" broadly, and that "far-reaching definition clearly encompasses a wide range of behaviors." *United States* v. *Taylor*, 818 F.3d 671, 678 (11th Cir.), cert. denied, 137 S. Ct. 387 (2016). Giving broad effect to the production enhancement also makes sense in light of the expansive statutory definition of unauthorized and counterfeit "access devices" to which it applies. See, *e.g.*, *United States* v. *Abozid*, 257 F.3d 191, 196 (2d Cir.) (noting that Congress included "a broad definition of 'access device'" in 18 U.S.C. 1029), cert. denied, 534 U.S. 1005 (2001); *United States* v. *Sepulveda*, 115 F.3d 882, 887 n.10 (11th Cir. 1997) ("Congress drafted the statute broadly to address the misuse of account numbers without regard to the particular mechanics or technologies involved in such conduct.") (internal quotation marks omitted). Thus, while the duplication of an object such as a "card" or "plate" may involve creating copies or a replica of that physical object, the duplication of a "personal identification number" entails copying the number itself. Cf. *United States* v. *Norwood*, 774 F.3d 476, 480-482 (8th Cir. 2014) (rejecting defendant's argument that the "mere copying" of account numbers

onto a new medium does not qualify as the production of any other means of identification under Sentencing Guidelines § 2B1.1(b)(11)(C)(i)); *Melendrez*, 389 F.3d at 835-836 (affirming application of the enhancement under prior version of Sentencing Guidelines § 2B1.1(b)(9)(C)(i); defendant "produced another means of identification (the Social Security number) by duplicating the source ID number on bogus identification documents"). And, where, as here, the fraud involves the electronic submission of an unauthorized Social Security number or other personal identification number, a defendant "duplicates" the number by "copying" it into the software program.

Petitioner also argues (Pet. 7) that the court of appeals' "logic" would "swallow the rule" against impermissible double counting reflected in the application note to Sentencing Guidelines § 2B1.6, the Guideline section applicable to aggravated identity theft under 18 U.S.C. 1028A. Application note 2 to Guidelines § 2B1.6 provides that where Section 1028A's mandatory two-year consecutive sentence "is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense." Sentencing Guidelines § 2B1.6, comment (n.2). By its terms, Application note 2 applies only when (1) the defendant is also being sentenced for the crime underlying the Section 1028A offense, and (2) the enhancement for the underlying offense involves "the transfer, possession, or use" of a means of identification. *Ibid.* Application note 2 does not bar an enhancement under Section 2B1.1(b)(11)(B)(i) for cases involving the production of unauthorized

access devices because "production" of an unauthorized or counterfeit access device is not included in Application note 2's list of excepted enhancements. See, *e.g.*, *Taylor*, 818 F.3d at 676-678; *United States* v. *Jones*, 792 F.3d 831, 835-836 (7th Cir.), cert. denied, 136 S. Ct. 435 (2015); *United States* v. *Damyanov*, 503 Fed. Appx. 224, 225 (4th Cir. 2013); see *United States* v. *Sharapka*, 526 F.3d 58, 62 (1st Cir. 2008) (Application note 2 "applies to certain enhancements under § 2B1.1(b)(10) [2005] but not to all.").

While petitioner is correct that the court of appeals' decision means that any case involving the copying or reproduction of a Social Security number would be a "production" case that is not covered by Section 2B1.6, there is nothing problematic with that result. Contrary to petitioner's suggestion, the fact that the same conduct justifies multiple increases in the sentence does not, by itself, result in impermissible double counting. See, *e.g.*, *United States* v. *Young*, 811 F.3d 592, 601 (2d Cir. 2016); *United States* v. *Smith*, 719 F.3d 1120, 1123-1124 (9th Cir. 2013). "Double counting occurs when the same conduct on the part of the defendant is used to support separate increases under separate enhancement provisions which necessarily overlap, are indistinct, and serve identical purposes." *United States* v. *Rojas*, 531 F.3d 1203, 1207 (10th Cir. 2008) (citation and internal quotation marks omitted). Double counting is permitted, however, "if the Sentencing Commission intended that result and each guideline section in question concerns conceptually separate notions relating to sentencing." *United States* v. *Flanders*, 752 F.3d 1317, 1340 (11th Cir. 2014) (citation and internal quotation marks omitted), cert. denied, 135 S. Ct. 1188 (2015); see *United States*

v. *Walters*, 775 F.3d 778, 782 (6th Cir.) ("[N]o double counting occurs if the defendant is punished for distinct aspects of his conduct.") (citations and internal quotation marks omitted), cert. denied, 135 S. Ct. 2913 (2015). The two-year sentence under Section 2B1.6 (incorporating the statutory term of imprisonment) is based on a defendant's illegal use of a means of identification to commit another felony. The enhancement under Section 2B1.1(b)(11)(B)(i), on the other hand, reflects a defendant's increased culpability for producing an unauthorized or counterfeit access device and does not depend on its use.

Petitioner's reliance (Pet. 8-9) on other provisions in Section 2B1.1(b)(11) is also unavailing. For example, she argues that Section 2B1.1(b)(11)(A)'s enhancement for possession of "device-making equipment" "suggests" that the production enhancement in Section 2B1.1(b)(11)(B)(i) requires "the creation of something through the use of specialized 'device-making equipment.'" Pet. 8. That argument is belied by the text of the "production" subsection, which does not contain petitioner's proposed limitation.

Petitioner's reliance (Pet. 8-9) on the commentary to Subsection (b)(11)(C)(i) fares no better. That subsection "applies in a case in which a means of identification of an individual other than the defendant * * * is used without that individual's authorization unlawfully to produce or obtain another means of identification." Sentencing Guidelines § 2B1.1, comment. (n.10(C)(i)). The examples to which petitioner points merely clarify how one means of identification might be used to obtain another. See, *e.g.*, *id.* § 2B1.1, comment. (n.10(C)(ii)(I)) ("A defendant obtains an individual's name and social security number from a

source * * * and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully."). Contrary to petitioner's contention, the example's description of the conduct as "obtain[ing] a bank loan" has no bearing on whether that same conduct would constitute "producing" an unauthorized access device under Section 2B1.1(b)(11)(B)(i). Sentencing Guidelines § 2B1.1, comment (n.10(C)(ii)(I)). Nor does the court of appeals' construction of the term "production" render the enhancement in Subsection (b)(11)(C)(i) "redundant." Pet. 9. Subsection (b)(11)(C)(i) applies to a specific form of identity theft involving means of identification, and items that qualify as "means of identification" may not qualify as "access devices." See *United States* v. *Alexander*, 725 F.3d 1117, 1119 (9th Cir. 2013) ("It is plain from the language of [18 U.S.C. 1028A(a)(1), which is incorporated into § 2B1.1(b)(11)(C)] that although every access device is a means of identification, not all means of identification are access devices.").

3. The court of appeals' decision below does not conflict with decisions from other circuits. Petitioner contends (Pet. 9-11) that decisions from the Fourth and Eighth Circuits support her interpretation of the "production" enhancement, but those cases did not address the question presented here.[4] In *United States*

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[4] Petitioner also cites *United States* v. *Wiley*, 407 Fed. Appx. 938 (6th Cir. 2011), for the proposition that the defendant's assembly of false driver's licenses by placing his photograph on blank driver's license cards is "precisely the type of behavior that the guideline attempts to capture under the rubric of 'production.'" *Id.* at 943 (citation and quotation marks omitted). The court of appeal's

v. *Taylor*, 374 Fed. Appx. 392 (4th Cir. 2010), the defendant was convicted of aggravated identity theft and bank fraud, and the district court applied a two-level enhancement under what is now Subsection (b)(11)(C)(i) for the defendant's use of Social Security numbers in the commission of the bank fraud. As explained above, Subsection (b)(11)(C)(i) provides for a two-level increase for the unlawful use of "any means of identification" to "obtain any other means of identification." Sentencing Guidelines § 2B1.1(b)(11)(C)(i). The Fourth Circuit, in an unpublished opinion, concluded that the district court plainly erred because the application note to Section 2B1.6 prohibited the application of the enhancement. See *Taylor*, 374 Fed. Appx. at 393. Contrary to petitioner's contention (Pet. 10-11), the court of appeals did not consider the question whether the defendant's conduct triggered the enhancement, let alone whether the defendant's conduct "only amounted to the 'use' of a counterfeit access device" rather than a "production."

In *United States* v. *Salem*, 587 F.3d 868 (8th Cir. 2009), the defendant's scheme involved placing a fraudulent bar code label on a store item to obtain a lower price when the item was scanned. The court of appeals concluded that the "production" enhancement did not apply because "there was no evidence presented at sentencing about how Salem procured the fraudulent bar code labels used in his scheme, or who produced or manufactured them." *Id.* at 870-871. That holding is not in tension with the decision below.

4. Finally, this case would be an inappropriate vehicle to consider the question presented. Even assum-

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observation does not rule out the application of the enhancement in other circumstances, including those here.

ing that the court of appeals erred in concluding that petitioner produced an unauthorized access device by entering others' Social Security numbers into the tax preparation software, the production enhancement would still have applied because petitioner also willfully caused the production of unauthorized debit cards on which the fraudulent tax refunds were deposited. See *Taylor*, 818 F.3d at 678-679 (production enhancement applies when a defendant "willfully causes" the production by an innocent party of an unauthorized access device). And it is unlikely that any error in calculating the wire fraud Guidelines affected petitioner's sentence. In resentencing petitioner to the same term of imprisonment that it had imposed during the first sentencing, the district court explained that, by granting petitioner's motion to consolidate the two separate cases for sentencing, it did not intend to reduce the Guidelines that would have applied if petitioner had been sentenced on separate occasions. The court then refashioned the sentences on the four counts of conviction to reach a sentence of 252 months of imprisonment because "252 months is the appropriate sentence given the nature and circumstances of the offense and the personal characteristics of the defendant." Tr. 28.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
*Acting Solicitor General*
LESLIE R. CALDWELL
*Assistant Attorney General*
KIRBY A. HELLER
*Attorney*

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