IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - x

IGNACIO CARLOS FLORES- :

FIGUEROA, :

Petitioner :

v. : No. 08-108

UNITED STATES. :

- - - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, February 25, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 a.m.

APPEARANCES:

KEVIN K. RUSSELL, ESQ., Bethesda, Md.; on behalf of the Petitioner.

TOBY J. HEYTENS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:12 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-108, Flores-Figueroa versus United States.

Mr. Russell.

ORAL ARGUMENT OF KEVIN K. RUSSELL

ON BEHALF OF THE PETITIONER

MR. RUSSELL: Mr. Chief Justice, and may it please the Court:

In common usage to say that somebody knowingly transfers, possesses or uses something is to say that that person knows what it is that he is transferring, possessing or using. If I say that John knowingly used a pair of scissors of his mother, I am saying not simply that John knew he was using something that turned out to be his mother's scissors or even that John knew he was using scissors which turned out to be his mother's, I am saying that John knew that the scissors he was using belonged out to be his mother.

The same principle follows under the Federal aggravated identity theft statute, which calls for a two-year mandatory sentence for anyone who during and in relations certain predicate --

JUSTICE ALITO: Doesn't that depend on the

context? You can think of examples where you have exactly the same usage and the person wouldn't necessarily know about the ownership of the thing in question?

MR. RUSSELL: I haven't been able to think of one. And the government hasn't been able to come up with one.

CHIEF JUSTICE ROBERTS: How about so and so stole a car that belonged to Mr. Jones. I suppose you could say that the person knew it was Mr. Jones' car, but more likely somebody stole the car that turned out to be Mr. Jones's.

MR. RUSSELL: I think that that formulation gives rise to a little bit more ambiguity in that context. I think if you said stole the car of Mr. Jones, it is not particularly ambiguous. But at the very least, this is a formulation that claim.

JUSTICE SCALIA: You think he knowingly stole the car that belonged to Mr. Jones, would that be the parallel?

MR. RUSSELL: Yes, I'm sorry if I left that part out.

JUSTICE SCALIA: You left out the "knowingly." Once you put in "knowingly" --

MR. RUSSELL: I think if the statement is,

you know, John knowingly stole the car of Mr. Jones, that strongly implies that John knew that the car belonged to Mr. Jones.

JUSTICE ALITO: I repeat, doesn't that depend on the context that you say somebody says to you, you know, a car was stolen from our street last night. Oh, what car was stolen? Oh, it was the car of Mr. Jones. He knowingly stole the car of Mr. Jones. It doesn't necessarily mean that the person who stole the car knew that it was Mr. Jones's car.

MR. RUSSELL: I do think that the formulation that John knowingly stole the car of Mr. Jones most naturally is understood to imply that John knew whose car it was he was stealing.

We don't claim that the government has an interpretation that's grammatically impossible. We are just simply saying that by far the most common usage of this kind of formulation, particularly in a criminal statute, is that the knowledge element applies to the --

JUSTICE ALITO: Who did the mugger mug? He mugged the man from Denver. You think that he knowingly mugged the man from Denver. Do you think that means that the mugger knew that the man was from Denver?

MR. RUSSELL: I think that is a more ambiguous statement.

JUSTICE ALITO: Why is it more ambiguous?
MR. RUSSELL: Because I think the "from" preposition --
JUSTICE ALITO: Why isn't it less unambiguous. I thought your argument was that this was unambiguous.
MR. RUSSELL: I think the possessive form makes it, through common usage, unambiguous. We don't claim that it is grammatically impossible. But we do think that in ordinary usage people would understand --
JUSTICE BREYER: So what if it isn't? I mean, suppose you had a statute, and the statute says it is a crime to mug a man from Denver. That's a Denver ordinance, by the way, because no one else would pass it. I mean, but if those were the elements of the crime, I guess, we do normally apply knowingly to each of them.
MR. RUSSELL: That is correct in the criminal --
JUSTICE BREYER: Whether -- even if it isn't ordinary usage.
MR. RUSSELL: That's right. We have more than one argument. We think that as a matter of ordinary usage --
JUSTICE BREYER: I was thoughtfully trying

to push you on to the next argument.

MR. RUSSELL: Well, we do think that in a criminal statute you ordinarily assume, this Court has said that a conventional Mens Rea element extends to all of the elements of the offense.

And Congress knows how to deviate from that when it wants to. It did so, for example, in the statute that the Court construed in the X-Citement Video case, where it referred to a person knowingly transporting a visual depiction, comma, if that visual depiction has certain characteristics. And this Court recognized that that kind of formulation most naturally is read to end the knowledge requirement as the comma, if.

Congress didn't do that here. In fact, there is no textual indication that would lead one to believe that it didn't intend anything other than a completely conventional Mens Rea requirement in this case.

JUSTICE GINSBURG: Mr. Russell, am I correct in understanding that the government goes with you almost all the way, and its only the last three words "of another person," that they agree knowingly applies to "without lawful authority," and that it applies to a means of identification? You have to know that it

was -- you were using the means of identification.

MR. RUSSELL: As I understand that is not their position. That's the back-up to their back-up position. The first position is that it only applies to the verbs. Then they say, well, if you don't accept that then, maybe it goes through "without lawful authority." And if you don't accept that, then maybe it goes halfway through the phrase "means of identification of another person.

So, they do raise all three alternatives. That last argument, I think, fails both for text common usage reasons and in light of this tradition element that we have been discussing. Textually, there is something no textual cue that the knowledge requirement stops halfway through the direct object phrase, "means of identification of another person."

JUSTICE GINSBURG: If the first -- this alien's first effort to get papers that would qualify for him, if I -- if I remember correctly, the first time around he used an assumed name, not his own name.

MR. RUSSELL: That's right.

JUSTICE GINSBURG: He used a false date of birth. He got a Social Security card that happened to belong -- to be the number of no live person --

MR. RUSSELL: Correct.

JUSTICE GINSBURG: -- and -- and that would not have violated. Even in the government's reading that would not have violated --

MR. RUSSELL: That's right.

JUSTICE GINSBURG: -- this statute.

But the second time around, your case, he did use his own name. And the question was -- and it turned out that both the Social Security card and the alien registration, they were two different people but they were both live.

MR. RUSSELL: Correct.

JUSTICE GINSBURG: So that does make it a crime. But when the number turned out to be that belonged to anybody that does not, you don't get the two-year add-on.

MR. RUSSELL: Just to be clear, the only reason the government alleges that there is a crime here is because it turned out that those numbers had been assigned to somebody else. Under our view, that's not enough. That's enough to show that he committed the predicate offenses, and received very substantial punishment for that, but it's not enough to show that he was qualified for an additional two years mandatory sentence as an aggravated identity thief.

JUSTICE ALITO: Now, you can -- what would

happen if the -- the defendant doesn't -- doesn't act knowingly as to the question whether the identifying information belongs to a real person but is simply reckless as to whether the identifying information belongs to a real person? Suppose that someone buys an identification card and looks at it, and it looks like it might be a real identification card on which that persons picture has been inserted in place of the real picture, but the person can't be sure and it might really be an entirely fake card. Would that be a violation?

MR. RUSSELL: Ordinarily recklessness does not satisfy a knowledge requirement. Willful blindness ordinarily does. But recklessness in itself ordinarily does not.

JUSTICE KENNEDY: Would it be enough to go to the jury on the hypothetical Justice Alito gives you?

MR. RUSSELL: I think so. I think the government is free to present circumstantial evidence.

JUSTICE KENNEDY: You agree that you could go to the jury whenever there is an identity card that does reflect the identity of a real person but there is no other knowledge that the government's case is introduced that shows -- that there is no other evidence that the government has introduced showing knowledge?

MR. RUSSELL: If there is -- I think that could be a component of circumstantial evidence case. I don't think it would be enough. Particularly in a case like this where --

JUSTICE KENNEDY: Suppose he has five different cards with five different real people, would that be enough to go?

MR. RUSSELL: I don't think so in itself. Particularly in a case like this where the person gets up and testifies that they didn't know. The fact that there is these numbers here --

JUSTICE KENNEDY: No, no. No. The fact that he testified, that doesn't have anything to do with whether or not the case goes to the jury. Does the government make its case sufficient to resist the motion -- the directed motion for acquittal if it just puts in the fact that you have five identity cards and there are five different people and they are all real people?

MR. RUSSELL: No, I don't think so. And in fact, the fact that they are five different people probably tends to undermine the evidence.

JUSTICE SCALIA: You are making it very hard for me to vote with you, I must say. I thought you had a pretty good -- a pretty good case. But if you are

going to say somebody who has five identity cards, faces of individuals, presumably they are real individuals --

MR. RUSSELL: I'm sorry, maybe I am misunderstanding the hypothetical.

JUSTICE SCALIA: I thought that was the hypothetical. Five different -- the person has five identity cards of real people, and -- and you don't know that he knows that its the identity cards of a real person, but he used it.

MR. RUSSELL: Okay. If there -- if these are identity cards that have the picture of somebody other than him on them --

JUSTICE SCALIA: Yes. Yes.

MR. RUSSELL: -- which is an unusual thing --

JUSTICE SCALIA: Of course.

MR. RUSSELL: But if that's the case, then, yes, I think that -- you know, that there would be -- that that picture belongs to the person whose number is there, and that they could do that. The ordinary --

JUSTICE KENNEDY: No, no. You have to have the further inference that he knows that.

MR. RUSSELL: I think a jury could reasonably infer that the person wouldn't -- would not, that if you have an ID card with somebody else's name,

somebody else's number, somebody else's picture, that that belongs to somebody else.

JUSTICE GINSBURG: That's not -- that's not this case. In this case he had his own name. And I don't know whether there was a picture on the alien registration card. I don't know -- he used his own name. Did he use his own photograph?

MR. RUSSELL: I don't know the answer to that question. I mean, Social Security cards don't have pictures.

JUSTICE KENNEDY: That was going to be my next question. The next question is suppose it was the Petitioner's own name but somebody else's number.

MR. RUSSELL: I would tend to think that that's not sufficient. Of course --

JUSTICE GINSBURG: I mean, that would --

JUSTICE KENNEDY: Even if he had five different cards, all with his name, but all with the identification numbers of other real people?

MR. RUSSELL: Again, I would -- I would think not. I can understand that people could disagree with that. And of course, the government is free to raise those kinds of arguments in other cases where this comes up.

All of this goes the question of what does

it take to show that somebody knows something. The question before the Court right now, and the only question, is whether the government has to show that knowledge at all. And in this case, you know, the government's principal argument, I think their strongest argument is that reducing the mens rea requirements in that way serves the purpose of facilitating prosecutions and therefore protection of the victim, and we don't deny that it had that effect. And we don't deny that this statute is directed at protecting victims, but that could be said of an awful lot of criminal statutes.

JUSTICE ALITO: What if the defendant chooses a name -- uses a name other than his or her own name? I guess has a identification card made up with that, and doesn't know for sure that the name that's chosen actually belongs to another person, but because it's not an extremely uncommon name, has -- knows that it's virtually certain that that name belongs to some other person who is unknown to him? Is that a violation?

MR. RUSSELL: I think -- again, you have this issue of recklessness versus knowledge. If he knew that in fact it belonged to it, if he used John Doe, it turns out there are several hundred John Doe's in this country, and it does raise a difficult question about

how this statute ought to apply when you are using something that is so commonly identifying somebody, but it's hard to say that its identifying anybody in particular.

The definition of the means of identification in this statute says that it has to be a name or number that is capable of identifying a particular person, so I think you get into questions when you're talking about common names, about how the statute -- whether the statute would be satisfied.

JUSTICE ALITO: Well, what if it's not an extremely common name, but not an extremely uncommon name? And what if it's -- what if the defendant chooses Kevin K. Russell? Would that be a violation?

MR. RUSSELL: You would have to show that he knew that that was a name belonging to a specific person.

JUSTICE ALITO: He would have to know that there is such a person.

MR. RUSSELL: He would have to know that there is such -- he wouldn't have to know me, but he would have to know that there is such a person. But again --

JUSTICE KENNEDY: Does he have to know that? Suppose he uses John Smith. Does it suffice that -- do

we have to show that he knows there is a John Smith in the phone book, someplace in the United States?

MR. RUSSELL: I think so. I think he would have to know who that John Smith was, but he would have to know there is a John Smith. And that -- I mean, that kind of scenario does raise difficult questions about.

JUSTICE KENNEDY: But I want an answer to the question.

MR. RUSSELL: Well, I think the answer is the one that I gave you, which I think is disputable, but it's -- the answer is that he has to know that there is a specific person named John Smith.

JUSTICE KENNEDY: And it can't be submitted to the jury on the basis that anybody knows that there is a John Smith?

MR. RUSSELL: I think that --

JUSTICE KENNEDY: Can -- can it go to the jury without any other evidence other than the fact that -- his possession of the card?

MR. RUSSELL: If it's a sufficiently common name that he ought to know that there is somebody bearing that name, then yes, I would agree it would go to the jury on that.

JUSTICE SOUTER: If the name said Anthony Kennedy, would that go to the jury?

(Laughter.)

MR. RUSSELL: I -- again -- it's hard to draw lines here, but I think the ultimate question is, you know, could a reasonable jury think that somebody using that name has to know there is a specific person with that name, a specific person with that name? And quite possibly they could.

JUSTICE KENNEDY: Can you give me an example?

MR. RUSSELL: It go to the jury. An awful lot of name examples would.

I think simply in this case, though, when you are talking about a number, I don't think -- it's a much harder case to say that simply having a number on the card should -- should lead you to know that that name very likely belongs to somebody else. In fact, there are nine -- there are -- there a billion possible combinations for security -- Social Security numbers, and only about 400 million have been issued. But to get back -- I --

JUSTICE KENNEDY: But if you say this goes to the jury, it doesn't leave very much to your knowledge argument.

MR. RUSSELL: Well --

JUSTICE KENNEDY: I mean, I suppose that

defense counsel can get up, say the government hasn't shown that he knew this, and then the government says that of course he knows it -- I don't think you have accomplished very much.

MR. RUSSELL: Well, it does. I think the jury still has to make the finding that he knew it. And in a case like this where my client testified that he didn't know it, where the government didn't contest that, didn't argue that there were substantial evidence showing that he did know it, it's going to be outcome-determinative. In that --

JUSTICE GINSBURG: How do these operations work? He went to Chicago to buy false identification papers. Did, the first time he go to the same outfit as the time he used a false name?

MR. RUSSELL: The record doesn't disclose that, and I don't know.

JUSTICE GINSBURG: These are outfits that specialize in making false identifications?

MR. RUSSELL: Again, the record doesn't disclose how sophisticated the operation was. In this case it could just be a guy who does this; it could be a very sophisticated operation. I think it's kind of all over the place out there, in the real world.

JUSTICE GINSBURG: Do you have any sense

of -- because there are any people with false identification papers, how many times it turns out to be the number of a live person, and how many times it turns out like it was in the first instance in this case; it is just a number, a made-up number that doesn't belong to anybody?

MR. RUSSELL: I'm afraid I don't have a good sense of that. But just to be clear, in addition to being able to just say on the face of the fact about the identification that the government can present circumstantial evidence to the jury, in a great number of cases, particularly the kinds that Congress was most concerned about, the way that they -- the defendant obtained the identification and the way that they used it provides powerful circumstantial evidence of knowledge.

Somebody who breaks into a computer system or unauthorizedly uses access to a computer system or goes dumpster diving looking for IDs obviously knows that they are going to end up with an ID that belongs to another person, and if they use the ID to get into a real person's bank account, then it is awfully good information that they were aware that that was an ID that belonged to another person, because there's no sense in trying to break into the bank account of a

non-existent person. And so we don't think that this is a case in which the government faces some kind of insurmountable burden in proving knowledge in a way that is particularly different than -- than other kinds of situations in which the law commonly requires the government to prove what a defendant knew or did not.

To get back to the victim-focused nature of this, you know, Congress could -- we don't dispute that Congress could make a policy judgment that it would be good to hold defendants strictly liable when they used an identification that turns out to belong to somebody else. Sometimes the law does. Most commonly with respect to sentencing enhancement provisions of the sort that the government points to with respect to the quantity of selling drugs in a school zone. But when Congress makes that choice, Congress makes that clear in the decks of the statute, so if you look at the drug quantity of the school zone provisions that are in appendix E and D of the yellow brief appendix, in appendix D you see Congress establishes in subsection A of that provision the "unlawful act," and it says it's unlawful for any person knowingly to manufacture, distribute, et cetera, a controlled substance.

It includes in that provision a knowledge requirement, which, by the way, nobody thinks means only

that the government has to show that they knowingly manufactured something which turned out to be a controlled substance. Everybody agrees that the knowledge requirement in that position extends to the direct object phrase "controlled substance."

CHIEF JUSTICE ROBERTS: Well, that doesn't help you much because it can't be knowingly manufacture something is the crime. I mean, you do have to go on to have that make any sense. You don't have to go on to make your provision make any sense, that he knowingly, you know, uses a means of identification.

MR. RUSSELL: I disagree as matter of common usage. But I think when Congress intends to have a statute read that way, versus a statute that looks like this one, which in subsection (b) lays out the facts that are aggravating, that they are going to find separately, the drug quantity in subsection (b) of 21 USC 48-

CHIEF JUSTICE ROBERTS: No, I guess --I guess basically this is what I was trying to say earlier as well. You have in your statute in between there, the modifier "without lawful authority."

MR. RUSSELL: Right.

CHIEF JUSTICE ROBERTS: So that means that it can stop at a lot more number of earlier places then

can the statute you were just citing in appendix D.

MR. RUSSELL: Well, to answer that question -- and then I'd like to return to the school zone example -- the fact that Congress put in "without lawful authority" and enclosed it with commas I think simply reflects that Congress understood that, by inserting that phrase between transitive verbs and the direct object, it was interrupting the natural flow of the sentence. And I don't think it means -- so the first comma may tell the reader to pause, but the second comma I think just as clearly indicates to the reader that the flow of the sentence continues.

And so that I don't think you would say a sentence that says, John knowingly used without permission a pair of scissors of his mother's. You would still read that to mean that John knew that the scissors he was using belonged to his mother. That the insertion of the parenthetical I think indicates that Congress knew it could put it at the end and not change the meaning or put it here.

But when Congress intends to write a statute that -- that holds people strictly liable for aggravating circumstances or writes something like the quantity provisions where, in subsection (b), Congress sets out the punishment that is deserving because of

that aggravating factor, and it does not include a mens rea requirement in subsection (b). And in the school zone provision, Congress likewise has no mens rea requirement with respect to the knowledge of the person being in a school zone.

JUSTICE GINSBURG: What about the government's argument in this case that Congress was really going after people who have false identification because of its concern to protect the victim, that is the person whose number is misused? So the government is urging that we take a victim-centered approach to the statute.

MR. RUSSELL: I do think it's a fair point, that this was a statute that was concerned with victims. Lots of criminal statutes are. But we don't ordinarily read it -- Congress doesn't ordinarily enact even victim-focused statutes without mens rea requirements, and courts don't ordinarily narrowly construe them, even though it's true that omitting mens rea requirements or narrowly construing them furthers the purpose of protecting of the victim. In fact, by far more -- far more commonly, as the LaFave treatise that we cite to you explains, we don't hold defendants criminally strictly liable for all of the consequences of their crimes. It gives the example of somebody who breaks

into a house intending to rob it and accidentally sets it on fire -- you know, they're engaged in unlawful conduct to start with -- and so they're not fully to blame there, but nonetheless we don't hold them criminally liable for arson because they didn't intend it.

Now, Congress could make a choice. Congress could choose to hold that arsonist strictly liable -- or the robbery suspect strictly liable for the arson, just as Congress could hold defendants like Petitioner strictly liable for the fact that he ends up using an identification that belongs to somebody else.

But our point is simply there are reasons why Congress might not do that, including the nominalist kind of penalties that end up being meted out here, where you have people -- two people with identical culpability ending up with substantially different punishments, or people with substantially different culpability ending up with identical punishments.

You have the classic aggravated identity thief who breaks into a bank account using a means of identification he knows belongs to somebody else. It's exactly the same sentence, under the government's view, as somebody like Petitioner who just unknowingly used a number in order to get a job.

Now, it's not impossible that Congress could make that policy choice, but when it does it tends to write statutes that look very different than this. It writes ones that look like -- that are quantity statutes that I just read or the school zone statute.

JUSTICE KENNEDY: It's not a clear -- what -- what if the accused knowingly uses a card -- identity belonging to a dead person? Is that a real person?

MR. RUSSELL: I think that's an open question in the circuits. Some circuits have said that it has to be a means of identification belonging to a living person, but that's -- that's not settled.

JUSTICE KENNEDY: What is your view?

MR. RUSSELL: My view -- I mean, the statute says "of another person." I think you would ordinarily presume that to mean a live person. But ultimately, I guess, it really doesn't matter to the outcome of my case.

JUSTICE STEVENS: Well, it does, though, in a way, because I understand your theory is there are two basic kinds of crimes. You just use the document for your own source if you want to get the job or you want entry into the country or something like that. That's a minor crime. But if you are -- it's identity theft

where you are pretending to be somebody else so you can get advantage of his credit and his assets and his access to computers. That's a much more serious crime.

Now, if it's a dead person, it seems to me to be in the former category, rather than in the latter.

MR. RUSSELL: That's true. Certainly, using the identification of a dead person doesn't impose the kind of harms on real victims that Congress seemed to be most focused on in this case. And certainly, our interpretation of the statute we don't think unduly interferes with that protective function, precisely because the government ought to, in a great many cases, very easily show that the way that the person used the means of identification shows that they knew that it belonged to somebody else.

JUSTICE GINSBURG: His conduct would amount to identity -- what did it say -- is there a crime of identity fraud?

MR. RUSSELL: Well, that's what we have been using to refer to the underlying predicate offense here, which is the misuse of the immigration documents. But that's -- that applies whenever somebody uses an immigration document -- and there is another statute for Social Security cards -- that doesn't belong to them. And the government only has to prove that they knew that

it didn't belong them. And that in itself is a substantial protection for people who might be unknowing victims or victims of somebody like my client. He is substantially deterred from risking their credit by the mere fact that he is going to face a substantial penalty for using the false document in and of itself. So --

JUSTICE GINSBURG: It would be equally false if the Social Security number were fictitious -- it didn't belong to --

MR. RUSSELL: Didn't belong to anybody. That's correct.

If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Russell.

Mr. Heytens.

ORAL ARGUMENT OF TOBY J. HEYTENS

ON BEHALF OF THE RESPONDENT

MR. HEYTENS: Mr. Chief Justice, and may it please the Court:

It is common ground that there are at least three preconditions to liability under 18 U.S.C. section 1028A(a)(1): First and foremost, the defendant must commit one of the separate predicate felonies that are specifically enumerated in subsection (c). Second, during the commission of that felony, the defendant must

use something that is in fact a means of identification of another person. And, third, that use of the means of identification of another person must itself be without lawful authority and must have the effect of facilitating the defendant's commission of the underlying predicate felony.

The question in this case is whether the government must also show that the defendant was specifically aware that the means of identification that he uses to facilitate his underlying crime was that of another person. And the answer to that question is no.

JUSTICE GINSBURG: Mr. Heytens, did the prosecutor give the right answer to Judge Friedman in the district court when Judge Friedman asked: Where I take two people and one of them gets false Social Security cards and it happens that the number belongs to no live person, and another person goes to the same outfit, but the card that he gets does belong to a live person -- he doesn't know in either case -- did the prosecutor give the right answer when he said, when it turns out to be a fictitious number, no two-year add-on, but if it turns out to be a real number, two years' mandatory addition? The prosecutor says, yes, that's the difference. Was that the right answer?

MR. HEYTENS: Yes, it was. If I could

explain, the first -- the reason that the first defendant is not guilty, is that it is an absolute precondition for liability under this statute that the means of identification in question be that of another person.

So there are no victimless violations of 1028(a)(1), because if we are having this conversation at all, there was a real victim involved in the case. The reason the second individual is --

JUSTICE ALITO: If I could just interrupt you, why does "of another individual" -- why can't that be read to mean "of a person other than the person who is using the identification," whether this other person is real or not?

MR. HEYTENS: Justice Alito, I think the answer to that relates to the definition of "means of identification," which is reproduced in the appendix to our brief. I believe it's 4a. That's 18 U.S.C. 1028(d)(7). The definition of "means of identification" means "any name or number that may be used, alone or in conjunction, to identify a specific individual." And we understand that, especially in conjunction with the words "of another person," to require, at least under 1028A(a)(1), that we have to be talking about a real individual.

JUSTICE STEVENS: Mr. Heytens, this raises the question I was talking to your opponent about. Do you think that Congress intended there to be a more severe punishment for somebody who really steals another person's -- knowingly steals somebody else's identity so he can cash in on his credit and so forth? It seems to me, arguably, that's the important difference.

MR. HEYTENS: Justice Stevens, I agree that a person who deliberately sets out to misappropriate the identity of a known individual is almost certainly more culpable than someone who does not do it but inadvertently does so.

But I don't think that is controlling in this case for a very important reason, and the very important reason -- again, to go back to what I said at the outset -- is we are not having this conversation unless the defendant has already committed the predicate felony, and he is subject to punishment for that predicate felony. For example, in this case, the predicate felony subjected Mr. Flores-Figueroa to a term of up to 10 years of imprisonment, above and beyond the two years.

JUSTICE STEVENS: Yeah, but I think -- I thought that argument cut against you, because what you are saying is everybody is on the hook. There's a basic

problem here, which iis -- I will call it identity fraud -- and yet you get an extra two years if it just so happens that the number you picked out of the air belonged to somebody else.

MR. HEYTENS: I understand how from the defendant's perspective -- to use the Justice -- the example that Justice Ginsburg used as well, but it may seem from the defendant's perspective that he just so happened to take a real person's number. But I think the critical fact here is that it not really seemed that way from the perspective of the real individual whose number he ended up using. And I think that's the critically important fact.

JUSTICE BREYER: Well, I think that's what we normally bring into sentencing. I mean, normally, and that we don't impose mandatory. We impose mandatory sentences when the person does something, you know, that's wrong and he knows it is wrong.

When harm occurs, and the harm wasn't known or intended, you can take care of it if you are a judge. You increase the sentence. That's the problem.

MR. HEYTENS: Justice Breyer, my answer to your question and probably only of interest to those members of the court who find legislative history probative, but I think for those who do, the very

significant answer to that is that the one thing the legislative history makes very clear is that at least some members of Congress believed that judicially discretionary sentences before this statute were enacted were failing to adequately take into account the harm suffered by real victims.

There is very clear legislative briefs to that effect. The statement of just leaving up to the judge to take into account the impact --

JUSTICE STEVENS: -- history, do you know what people who are stealing identities of people who have been bilked or -- I think that --

MR. HEYTENS: I certainly agree, Justice Stevens, that there is a portion of the House report that lists nine specific cases in which Congress -- of which some members of Congress -- people obviously report -- made the judgment that people who would engage in the sort of conduct that Congress wants to reach had received short sentences under the previous regime. There are nine specific examples given in the House report.

I acknowledge freely that eight of those nine examples very clearly by the description involve individuals who must have known that they were using --

JUSTICE BREYER: Well, why not just says

"means of identification," then? I mean, it's odd to write a statute that has elements and you put the word "knowingly," and the knowingly is supposed to modify some elements but not others. I can't think of other statutes that do that. There may be some.

It's pretty peculiar. You could have left off the last element. I mean, if you are drafting a criminal statute, anyone would know that.

MR. HEYTENS: There are two responses to that, Justice Breyer. First of all, Congress has written in some statutes that clearly increase the -- that know -- it doesn't go all the way through, because they repeat the knowingly requirement in those statutes.

For example -- and it's the appendix to the reply, Appendix G, at page 23A, the appendix to the reply brief, that reproduces 18 U.S.C. 922(q)(2)(A), which is a statute that repeats another one of the requirements in the text of the statute, which under Petitioner's argument doesn't make any sense at all. He would just --

JUSTICE BREYER: Give me one where what they have done is they have used "knowingly" at the beginning, and there are four elements of the crime, and -- I'm not saying there are none, but I would like to know what they are where "knowingly" doesn't modify

something there is strict liability for.

MR. HEYTENS: Sure. I mean --

JUSTICE BREYER: That's going to be jurisdictional -- probably jurisdictional hooks, like -- there could be -- there could be some. But I don't see -- you tell me.

MR. HEYTENS: I will give you two. There's the statute that is at issue before this Court in Morissette v. United States, and it's the statute that was construed by the D.C. Circuit in an opinion by Justice Ginsburg in United States v. Chin.

The statute in Morissette says, "knowingly converts his use anything of value of the United States." In Morissette, this Court held the defendant had to have knowledge of the facts sufficient to make his conduct a conversion. He has to know that the property has an owner, that it is not abandoned, and he has to known that the owner is not him.

But the lower courts have uniformly held that under that statute the defendant does not need to know that the property in question belonged to the United States.

Or take the Chin statute. The Chin statute says "knowingly and intentionally uses, hires or employs a person under the age of 18 to avoid detection of drug

trafficking crime."

In Chin the D.C. Circuit said in every other court of appeals who have considered the question has said the defendant does not need to be specifically aware that the individual in question is less than 18 years old.

JUSTICE STEVENS: But the reason for that is that it is an equally culpable act where you steal something off of a field than Morissette. I agree the Morissette case supports you, even though they relied on it, which is interesting to me. But that's a -- you are distinguishing between two equally culpable acts. It doesn't even make any difference whether he knew the owner was some private farmer or the United States.

In this case, you have got two really big categories of different kinds, and instead they are treated alike is the thing that troubles me here.

MR. HEYTENS: Justice Stevens, I get a Morissette -- the hypothetical defendant standpoint of Mr. Morissette. It doesn't really depend on whether he knows the property belongs to the Federal Government or he thinks he is stealing from his neighbor. He is a bad person either way.

I don't think that is true of the Chin statute, though I tend make a very strong argument that

someone who deliberately employs someone that he has --

JUSTICE STEVENS: You can do it in this statute. That is the point.

MR. HEYTENS: Sure. Under this statute I think the significance is, first and foremost, we are not having this discussion unless he has already committed an underlying -- felony.

JUSTICE STEVENS: Even that isn't -- I mean, here you are treating it as if it is a separate thing. That is fair enough. And what are the words "of another person" doing there if really they are not supposed to make any difference in terms of mental state?

MR. HEYTENS: What they are doing there is -- this goes back to my point this is the victim, but, in fact, what they are doing there is to say this statute does not apply unless the names or numbers in question is actually that of a specific individual.

JUSTICE BREYER: I could understand your argument if you are saying you cannot tell from the tell simply from the text what the answer is. You can only tell the answer if you say -- know what the answer is if you say Congress had victims in mind, and if we are going to worry about victims, we are not going to worry -- we are going to take a narrow rather than a broad view of "knowingly."

If that's your position, you agree that if you simply look at the text of this statute without considering confessional policy, you don't win?

MR. HEYTENS: We don't concede that the text of the statute alone unambiguously resolves the issue --

JUSTICE SOUTER: Does it -- does it even come close to supporting it? I mean, let's start out with your analogous position. Your analogous position is that the "knowingly" simply refers to the -- the -- the three acts which are specified by which the identification can be -- can be -- the misidentification can be perpetrated.

Transfers, possesses or uses. Could Congress possibly have said, gee, he might not know that he was acting to transfer or to possess or to use. That is not the serious possibility. So, "knowingly" has to refer to something more than the three possible acts.

And once you get beyond the three possible acts, and you say, well, we are going to draw the line between "without authority" and "another person," that seems like an arbitrary line. And the arbitrariness of the line seems even more obvious when the "without a lawful authority" is set off as a parenthetical. And the real logic of the statute -- the real -- the operative description is "a means of identification of

another person."

That's why, it seems to me, if you look at the text, you could say, well, of course, the "knowingly" has got to refer to the everything that follows, both lawful authority and another person.

And that's why, it seems to me, if you are going to win, you have got to win on the grounds that Congress wouldn't have meant what seems so natural, because Congress wanted to help victims not defendants.

Where am I going wrong there, if I'm going wrong?

MR. HEYTENS: I think, as I said before, we do not contend that this statutory text standing along ambiguously supports our position enough to terminate the inquiry. And I certainly agree that the purpose is an important part of our argument.

I think there are two important things to -- briefly, two of the things you said there. Once you extend "knowingly" to about -- I think the significance is with the effect of once you extend "knowingly," first to "lawful authority" and then to the "use of identification."

Once you extend it to "without lawful authority," any conceivable argument that the other side can have about criminalizing innocent or inadvertent

conduct disappears, because then at that point the defendant knows specifically that he is acting in manner that is contrary to law.

And then second, if --

JUSTICE SOUTER: Is it worth two years?

MR. HEYTENS: I think -- I think it is.

JUSTICE SOUTER: The only thing that we know for sure that is that Congress said it is not worth two years extra unless that of another person was involved. And if that is so significant or necessarily significant in getting a two-year add-on, then it seems reasonable, I suppose, that Congress -- the state of mind -- that.

MR. HEYTENS: Well, I think, first of all, at that point the defendant already has two different culpable states of mind. He has the culpable state of mind to commit the underlying felony and he has the culpable state of mind with regard to -- now, I agree with you, Justice Souter, there's argument you can make both ways as a matter of policy. I think so -- some of the policy with my colleague on the other side illustrates why Congress would have made the decision it did.

And it's all of those pieces what the defendant is reckless, where the defendant is willfully ignorant or the defendant simply doesn't know because --

JUSTICE SOUTER: All Congress has got to do is to say "recklessly."

MR. HEYTENS: It is certainly true that Congress has --

JUSTICE SOUTER: It's an -- it's an accepted term. Every -- well, almost everybody knows what -- is a model Penal Code standard, and so on. All they have to do is put the word "recklessly" in there. It would cover every "knowingly" case. It wouldn't omit anything that is covered by this, and it would solve precisely that problem. And they didn't do it.

MR. HEYTENS: I certainly agree there are other ways that Congress could have written the statute to make it clear. But I think it -- they could have written the statute in a way that would be more clear, both that would resolve the case in favor of the Petitioner, and it would resolve the case in favor of us. So I don't know how that cuts either way.

JUSTICE SOUTER: Well, I tell you what cuts one way or another. I -- I find it -- I find it, well, not surprising because I have heard -- I have heard the government do it before. You acknowledge that this is an ambiguous statute. That -- that on its face it -- it could mean the one thing or the other.

I would normally conclude from that that we

apply the Rule of Lenity. Since it could go either way, let's assume that the defendant gets the -- the tie goes to the defendant. What -- why shouldn't I resolve it that way?

MR. HEYTENS: Well, under the Rule of Lenity, Justice Scalia, the tie does go to the defendant. But, as the Court has made clear again and again including in its opinion in Hayes, the fact that the statutory text has a certain amount of ambiguity doesn't automatically trigger the Rule of Lenity. The Rule of Lenity --

CHIEF JUSTICE ROBERTS: Shouldn't it -- shouldn't it -- is it time to revisit the Court's decision in Hayes?

(Laughter.)

MR. HEYTENS: The Court -- what the Court said yesterday in Hayes is precisely what it said before in Liparota. The Rule of Lenity comes into play at the end of the proper statutory interpretation after you consider text, purpose, legislative history, and all other --

JUSTICE BREYER: All that is true, and that is actually where I was going. It -- it seems to me where the ambiguity is precisely -- is that none of us doubts, I don't think, that what Congress is after with

this extra two-year mandatory is identity theft.

And where the argument lies is between did Congress do this by punishing people only who intend to engage in identity theft or people who, while not intending to do so, have that effect. That's the issue.

MR. HEYTENS: I think that is --

JUSTICE BREYER: And I don't thing I can resolve that one way or the other from anything you have said. It is rather hard to say. So, therefore, suppose I use the Rule of Lenity this way, which I am trying out. I am not buying it.

In the case of mandatory-minimum sentences, there is a particularly strong argument for a Rule of Lenity with bite. And that is because mandatory minimums, given the human condition, inevitably throw some people into the box who shouldn't be there. And if this person should be there and we put him outside, the judge could give him the same sentence anyway.

So the harm by mistakenly throwing a person outside the box through the Rule of Lenity to the government is small. The harm to the individual by wrongly throwing him into the box is great. The Rule of Lenity is, therefore, limited to a very small subset of cases where it has particular force, but this is one of them.

MR. HEYTENS: Justice Breyer, I -- I guess what I would say first and foremost is I -- I would -- I think that would be a fairly significant reconceptualization of the purpose of the Rule of Lenity.

JUSTICE BREYER: That's why I raised it.

MR. HEYTENS: Right. The Court -- if I can just explain why I think that is --

JUSTICE SCALIA: You have to rename it the rule of, you know, who gets hurt the most or something.

MR. HEYTENS: The rule -- the Court has said over and over again that the two purposes of the Rule of Lenity are providing fair warning to people before their conduct subjects them to criminal punishment and to demonstrate the proper respect for the lawmaking powers of Congress. I don't think the fact that a statute imposes a mandatory minimum triggers either one of those concerns in and of itself.

JUSTICE GINSBURG: Then what about the -- the even division -- I think it is an even division, 3/3 -- is it a 3/3 split? And if you wanted one indication that this statute is indeed grievously ambiguous, it is that -- that good minds have reached opposite conclusions with well-reasoned decisions on both sides. So it seems to me that this is a very strong argument

that this is an ambiguous statute, unusually so.

And I factor into that the answer that was given to Judge Friedman's question, which astonished me the first time I read it: That the prosecutor would say, Your Honor, I am saying no different degree of culpability. One happened to get a fictitious number; the other happened to get a real number; two years for the second one. There is no difference at all in the state of mind of -- of the two defendants. That's -- that's why I think the -- the ambiguity argument is strong. Why in the world would Congress want to draw such a line?

MR. HEYTENS: Well, again, if I could -- there are several things there. If I could start with the last one, why would Congress want to draw such a line, I think the reason Congress would want to draw such a line is for several reasons.

First and foremost is the fundamentally fix-and-focus nature of this statute. And I -- I agree that at least on first blush that Judge Friedman's policy does strike a number of people as implausible.

But I think if you step back, things like that are not uncommon throughout the criminal law. The -- the precise same objection could be made to the existence of the felony-murder rule. Two people go out

to engage in precisely the same unlawful course of conduct. Neither one of them wants to kill anybody, and neither one of them wants anyone to get hurt. In one of them the gun goes off, and in one of them the gun doesn't go off. And one of them is now guilty of felony murder, and the other one is guilty of -- of robbery, which is admittedly a serious crime but not as serious of a crime as murder. There are other examples of that.

CHIEF JUSTICE ROBERTS: Yes, but in this particular case, when you talk about identity theft, it is inconceivable the defendant would not know about fact that there is another person involved. And so the -- the mens rea issue is easy in this case. The only time it's -- it's difficult is when he didn't -- when he did not use it for an identity-theft purpose.

MR. HEYTENS: Well, I think I -- if I understand the question correctly, I think there are certainly many cases in which the manner in which the defendant uses the means of identification will, itself, provide powerful circumstantial evidence that he knows there is, in fact, another person. Because otherwise the action won't make any sense.

JUSTICE STEVENS: And those are the category of cases in which Congress wanted to have a more severe penalty.

MR. HEYTENS: I certainly agree that those are actually some of the categories of cases. I -- I -- what I guess I disagree about is that those are the only category of cases. And I -- I can try another tack on that.

When you -- when you review the -- the House report, the legislative history that talks about the reason, the background, the need for the legislation, Congress repeatedly trots out a great many statistics about the number of people who are victimized by identity theft, the amount of dollar harm that is caused to people and businesses by identity theft, and --

JUSTICE STEVENS: In any of those cases did they talk about unknowing identity theft?

MR. HEYTENS: What I guess I am saying, Justice Stevens, is in none of those cases did Congress -- when it was trotting out those statistics did Congress distinguish between situations in which the victim was able to determine whether the defendant knew that he existed. I mean --

JUSTICE SCALIA: Is this in the statute?

MR. HEYTENS: It is not in the context of the statute, Justice Scalia.

JUSTICE SCALIA: Well, let's not say Congress, then. Does -- does the Committee?

MR. HEYTENS: The Committee report, I apologize, Justice Scalia. The Committee report --

JUSTICE STEVENS: You might not convince Justice Scalia of this, but you might convince me.

(Laughter.)

MR. HEYTENS: What I am saying is when the courts were talking about the harm suffered by -- the amount of harm, in the course of talking about the number of people who report that they were victims, there is no distinction made whatsoever based on the distinction that the Petitioner would like to draw. And I think there is a very good, practical reason for that.

A person who discovers that there is a problem with their Social Security number having been misused, for example, by someone, that person is almost certainly not going to be able to figure out whether the person who used their Social Security number knows that they exist or not. All they know is that problems are now showing up on their credit reports. All they know is they are getting questions from the Social Security Administration. About this earned income that they haven't paid taxes on, for example. The person who is in the position of the victim is not well positioned to determine how the perpetrator got hold of their identifying information.

If I could go back --

CHIEF JUSTICE ROBERTS: Well, but in that case you tell them, look, the person's got 10 years. Right? If they find the guy, he is going to face up to 10 years for identity fraud.

MR. HEYTENS: He is going to face up to 10 years, Mr. Chief Justice. I think that's the important thing. I think Congress rationally could have been concerned that the guy is not actually going to get 10 years because there was evidence before them that the person was not getting 10 years, that the person was being, at least in the judgment of some people, not receiving sufficient punishment to reflect that, that there was a real person who was harmed by the conduct -- that was harmed by the conduct that eventually had an adverse impact on him.

I think that fundamentally was the motivating force behind the statute, the need to have a statute that takes adequate and discreet account for the presence of real victims. Now the Petitioner, for example, refers to the statement of having a method-statute excuse, as having a mandatory minimum. It's not correct to say the statute has a mandatory minimum. This statute has a mandatory, discreet, prescribed punishment. It is not two years up to

something else. It is two years, and exactly two years.

And I think that's highly significant. Because I think what it says is that Congress thought there was a discreet measure of punishment that was appropriate to reflect the presence of a real victim. The fact that there is a real victim gets you two years. You get whatever else you get on your underlying felony, which can take into account all sorts of other considerations about your crime, but the fact that there was a discreet victim is an independent harm to that person that should be taken into account in imposing criminal punishment.

JUSTICE SCALIA: You could also say you get two years for knowing that there is a discreet victim. I mean -- I -- you can describe it either way.

MR. HEYTENS: You certainly can.

JUSTICE SCALIA: And it makes sense either way.

MR. HEYTENS: You certainly can describe it either way, but I think in light of the concern that the harms to real victims are not being adequately taken into account, it doesn't seem to us to make sense to make the presence of that additional punishment turn on whether the defendant is specifically aware that the victim existed, and I think at the end of the --

JUSTICE GINSBURG: You -- you gave earlier the felony murder example of the one who, the gun goes off, he didn't mean to kill anybody. But I thought homicide is -- it's an answer to your argument that this statute was entirely victim-centered, because a person is just as dead if he's the victim of a reckless driver as a premeditated murder, and yet we certainly distinguish the penalties in those cases, no matter that the harm was identical.

MR. HEYTENS: We certainly do, Justice Ginsburg, and we don't make the extravagant claim that law doesn't look to relative moral culpability in assigning criminal punishment. I'm responding to the argument on the other side that that's all the law ever looks to. The law frequently looks to two different things; it looks to relative culpability levels, but it also looks at the existence of harm. If you want to continue with the homicide example, if you look at moral culpability, two people who both intentionally attempt to cause the death of another human being without any legal excuse for doing so, from a culpability standpoint they engaged in precisely the same level of moral wrong; but law treats attempted murder and completed murder extremely differently from one another. And that's because in one case, as Justice Ginsburg points out, you

have a real victim, a person dies; there is a discreet level of harm to the victim that is not -- that does not occur when fortunately the person who tries to kill someone else fails.

And I think at the end of the day that is the most important issue in this case. You see this argument again and again and again, especially in the circuits -- let me go back to Justice Ginsburg's point about the three circuits that have gone either way.

First, as a -- as just a threshold matter, this Court has said repeatedly that the fact that courts have disagreed about the proper interpretation of a statute doesn't suffice to trigger the rule of lenity, because this Court almost never takes a case where there is not a circuit split. And to say the existence of a circuit split makes the statute ambiguous would mean that the criminal defendant wins every time; and the Court has not said that.

But -- but also I think where those courts have fundamentally gone wrong is they have essentially said this is a crime about theft; theft requires you to know that there is a real owner; if you don't know there is a real owner, that is not theft. And I think where they went wrong was at the very beginning.

Where they went wrong at the very beginning

is asking the question of whether it is natural to refer to someone like Petitioner as a thief. We think the more appropriate question as the district court said in Godin is whether it would be at all unusual to refer to the two innocent people whose Social Security number and alien registration number Petitioner used to facilitate his two underlying felonies were the victims of identity theft.

CHIEF JUSTICE ROBERTS: Well, the problem with that is the statute says identity theft; it doesn't say anything about victims.

MR. HEYTENS: It certainty does, Mr. Chief Justice, but it says identity theft; it says -- not "theft," and I think the question is whether you refer to those people as having -- identity theft occurred in this case. And I think if you look at from the victim's perspective, which we think the perspective that Congress was looking at it from, the answer to that question is yes. And for that reason we ask that the judgment of the Eighth Circuit be affirmed. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Four minutes, Mr. Russell.

REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

ON BEHALF OF THE PETITIONER

MR. RUSSELL: Thank you, Mr. Chief Justice.

I would like to address just a couple of quick questions about the text, and then -- other issues as appropriate.

Justice Breyer, you asked if there were examples of other statutes in which knowledge requirements didn't extend to all the elements, but the government gave two examples. The first, Morissette, is clearly an example with a jurisdictional element. All of the circuit courts that say that the knowledge requirement doesn't extend to, of the United States, do so on the grounds that because there is a jurisdictional elements and jurisdictional elements don't extend -- don't require mens rea.

With respect to the Chin example, I do acknowledge that there -- there is a decision that this Court hasn't reviewed in which the D.C. Circuit says it doesn't extend to the age of the victim. That falls within a category of special cases where courts have treated the victimization of children differently, in part because it's so difficult and nearly impossible to group the defendant's knowledge of the age of the victim.

That kind of practical barrier simply doesn't exist here for all the reasons we've discussed earlier about the government's ability to rely on

circumstantial evidence to show the defendant's state of mind here.

JUSTICE GINSBURG: There aren't too many 15-year olds who look like they're over 21?

MR. RUSSELL: That's right.

(Laughter.)

MR. RUSSELL: That's right. With respect to the victim-focused nature of this, again, it's true that -- that criminal law takes into account both defendant culpability and harm to victims; but the ordinary resolution is to reserve punishment in the criminal system for those who intend the harms that they inflict. There are, of course, exceptions like felony murder. As the history of this points out, that kind of treatment tends to be reserved for serious bodily injury or death kinds of harm, and there is no reason to think that Congress thought, although identity theft is serious, that this fell within that kind of category of exceptions. There are of course these other exceptions where Congress relies on facts not known to the defendant for sentencing enhancement, but as I've mentioned earlier, it tends to write those statutes in a way that makes clear that those enhancement factors are separate and apart from the underlying events, and they don't include an expressed mens rea requirement then.

The government has to say that any case, any statute that looks like this, that has been treated as a sentencing enhancement provision.

Finally, with respect to the rule of lenity, the government I think has acknowledged that the statutory text is at least ambiguous with respect to whether or not it compels their conclusion. They acknowledge that you can make policy arguments both ways about what would be a good idea about how to treat this kind of conduct, and I think regardless of your view of what the trigger of the rule of lenity is, this is a classic case for it.

If Congress intended the government's interpretation, the government is free to go back to Congress, and there is every reason to believe that Congress will be receptive. The problem with overconstruing a mandatory sentence or a mandatory minimum, as Justice Breyer was alluding to, is that it does have this particularly harsh effect, and one that is as a practical matter hard to undo in the legislative process, which as the Court has recognized, is another function served by the rule of lenity.

If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:09 p.m., the case in the above-entitled matter was submitted.)