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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

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

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

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

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

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

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

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

25 MR. RUSSELL: I think if the statement is,

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

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

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

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

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

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

1 JUSTICE ALITO: Why is it more ambiguous?

2 MR. RUSSELL: Because I think the "from"
3 preposition --

4 JUSTICE ALITO: Why isn't it less
5 unambiguous. I thought your argument was that this was
6 unambiguous.

7 MR. RUSSELL: I think the possessive form
8 makes it, through common usage, unambiguous. We don't
9 claim that it is grammatically impossible. But we do
10 think that in ordinary usage people would understand --

11 JUSTICE BREYER: So what if it isn't? I
12 mean, suppose you had a statute, and the statute says it
13 is a crime to mug a man from Denver. That's a Denver
14 ordinance, by the way, because no one else would pass
15 it. I mean, but if those were the elements of the
16 crime, I guess, we do normally apply knowingly to each
17 of them.

18 MR. RUSSELL: That is correct in the
19 criminal --

20 JUSTICE BREYER: Whether -- even if it isn't
21 ordinary usage.

22 MR. RUSSELL: That's right. We have more
23 than one argument. We think that as a matter of
24 ordinary usage --

25 JUSTICE BREYER: I was thoughtfully trying

1 to push you on to the next argument.

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

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

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

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

1 was -- you were using the means of identification.

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

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

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

21 MR. RUSSELL: That's right.

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

25 MR. RUSSELL: Correct.

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

4 MR. RUSSELL: That's right.

5 JUSTICE GINSBURG: -- this statute.

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

11 MR. RUSSELL: Correct.

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

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

25 JUSTICE ALITO: Now, you can -- what would

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE SCALIA: Yes. Yes.

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

16 JUSTICE SCALIA: Of course.

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

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

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

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

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

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

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

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

16 JUSTICE GINSBURG: I mean, that would --

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

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

25 All of this goes the question of what does

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. RUSSELL: I think that --

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

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

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

1 (Laughter.)

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

8 JUSTICE KENNEDY: Can you give me an
9 example?

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

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

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

24 MR. RUSSELL: Well --

25 JUSTICE KENNEDY: I mean, I suppose that

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

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

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

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

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

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

25 JUSTICE GINSBURG: Do you have any sense

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

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

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

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

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

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

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

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

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

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

23 MR. RUSSELL: Right.

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

1 can the statute you were just citing in appendix D.

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE KENNEDY: What is your view?

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

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

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

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

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

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

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

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

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

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

12 If I could reserve the remainder of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Russell.

15 Mr. Heytens.

16 ORAL ARGUMENT OF TOBY J. HEYTENS

17 ON BEHALF OF THE RESPONDENT

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

20 It is common ground that there are at least
21 three preconditions to liability under 18 U.S.C. section
22 1028A(a)(1): First and foremost, the defendant must
23 commit one of the separate predicate felonies that are
24 specifically enumerated in subsection (c). Second,
25 during the commission of that felony, the defendant must

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

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

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

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

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

6 So there are no victimless violations of
7 1028(a)(1), because if we are having this conversation
8 at all, there was a real victim involved in the case.
9 The reason the second individual is --

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

15 MR. HEYTENS: Justice Alito, I think the
16 answer to that relates to the definition of "means of
17 identification," which is reproduced in the appendix to
18 our brief. I believe it's 4a. That's 18 U.S.C.
19 1028(d)(7). The definition of "means of identification"
20 means "any name or number that may be used, alone or in
21 conjunction, to identify a specific individual." And we
22 understand that, especially in conjunction with the
23 words "of another person," to require, at least under
24 1028A(a)(1), that we have to be talking about a real
25 individual.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: Well, why not just says

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

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

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

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

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

1 something there is strict liability for.

2 MR. HEYTENS: Sure. I mean --

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

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

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

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

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

1 trafficking crime."

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

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

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

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

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

1 someone who deliberately employs someone that he has --

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

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

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

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

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

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

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

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

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

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

1 another person."

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

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

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

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

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

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

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

4 And then second, if --

5 JUSTICE SOUTER: Is it worth two years?

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

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

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

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

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

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

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

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

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

25 I would normally conclude from that that we

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

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

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

15 (Laughter.)

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

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

1 this extra two-year mandatory is identity theft.

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

6 MR. HEYTENS: I think that is --

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

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

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

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

6 JUSTICE BREYER: That's why I raised it.

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

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

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

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

1 that this is an ambiguous statute, unusually so.

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

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

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

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

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

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

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

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

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

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

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

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

21 JUSTICE SCALIA: Is this in the statute?

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

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

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

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

5 (Laughter.)

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

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

1 If I could go back --

2 CHIEF JUSTICE ROBERTS: Well, but in that
3 case you tell them, look, the person's got 10 years.
4 Right? If they find the guy, he is going to face up to
5 10 years for identity fraud.

6 MR. HEYTENS: He is going to face up to
7 10 years, Mr. Chief Justice. I think that's the
8 important thing. I think Congress rationally could have
9 been concerned that the guy is not actually going to get
10 10 years because there was evidence before them that the
11 person was not getting 10 years, that the person was
12 being, at least in the judgment of some people, not
13 receiving sufficient punishment to reflect that, that
14 there was a real person who was harmed by the conduct --
15 that was harmed by the conduct that eventually had an
16 adverse impact on him.

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

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

2 And I think that's highly significant.

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

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

16 MR. HEYTENS: You certainly can.

17 JUSTICE SCALIA: And it makes sense either
18 way.

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

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

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

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

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

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

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

25 Where they went wrong at the very beginning

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Four minutes, Mr. Russell.

23 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL

24 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

3 JUSTICE GINSBURG: There aren't too many
4 15-year olds who look like they're over 21?

5 MR. RUSSELL: That's right.

6 (Laughter.)

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

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

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

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

23 If the Court has no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

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

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