IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

NO. _____

Nicasio Mendoza-Gonzalez,

Petitioner,

-vs.-

United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

1. Whether aggravated identity theft as proscribed by 18 U.S.C. § 1028A(a)(1) requires knowledge that the identity belonged to a real person?

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The petitioner, Nicasio Mendoza-Gonzalez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 07-2660, entered on March 28, 2008, and made final with the denial of rehearing and rehearing en banc on May 1, 2008.

OPINION BELOW

On March 28, 2008, the court of appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The opinion of the court of appeals is published at *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008).

JURISDICTION

The court of appeals entered its judgment on March 28, 2008. The defendant's petition for rehearing and for rehearing *en banc* was denied on May 1, 2008. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

§ 1028A. Aggravated identity theft

(a) Offenses.–

> **(1) In general**.–Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

STATEMENT OF THE CASE

On December 19, 2006, defendant was charged in a five-count indictment with various fraud-related offenses stemming from defendant's alleged use of a false identity to obtain employment in the United States. Count 1 charged that

defendant made a false claim of citizenship on a form "I-9" in violation of 18 U.S.C. § 1015(e). Count 2 alleged the false use of an identification document (a Minnesota identification card) in violation of 18 U.S.C. § 1546(b)(1). Count 3 charged the false use of a social security card as evidence of authorized employment in the United States, in violation of 18 U.S.C. § 1546(a). Count 4 charged defendant with false use of a social security card to obtain employment compensation in violation of 42 U.S.C. § 408(a)(7)(B). Count 5 charged defendant with aggravated identity theft in violation of 18 U.S.C. § 1028A. Pretrial proceedings were routine and, following resolution of motion in limine matters, jury trial commenced as scheduled on March 13, 2007.

The evidentiary portion of trial was completed in one day, with defendant declining to present evidence. (Trial Tr. pp. 104, 107-108). Motion for judgment of acquittal was denied as to all counts, though ruling with respect to the aggravated identity count was briefly reserved while the court reviewed legal issues raised by the motion. (Trial Tr. pp. 97-103, 108-110). The case was submitted to the jury on the morning of March 14, 2007, and following short deliberations the jury found defendant guilty as charged in all five counts. (Court Minutes -- Docket No. 27; Verdict -- Docket No. 28).

In the light most favorable to the verdict, the evidence showed that defendant obtained employment at the Swift meat packing plant in Marshalltown, Iowa, by presenting a Minnesota picture ID and a social security card bearing the name Dinicio Gurrola III. (Trial Tr. pp. 49-51, 54, 61-67, 89-90; Govt. Exs. 1, 6). The evidence also allowed the jury to find that defendant misrepresented his citizenship on an I-9 form submitted with defendant's employment application. (Trial Tr. pp. 59, 90; Govt. Ex. 1).

There was no evidence on the circumstances of defendant's acquisition of the Gurrola ID and social security card, and scant evidence on the existence of Dinicio Gurrola III. A Swift Human Resources official testified that the social security number presented as that of Mr. Gurrola was verified as a "real number" to "that individual" -- Mr. Gurrola. (Trial Tr. pp. 55-56). An investigator of the Inspector General's Office for the Social Security Administration also testified that certified records for that social security number showed that a social security card, and several duplicates, had been issued to a Dinicio Gurrola III. (Trial Tr. pp. 77-84; Govt. Ex. 4).

The certified social security record showed that a card was first issued to a purportedly five-year-old Dinicio Gurrola III in August, 1981, upon application of his mother Carolyn. (Govt. Ex. 4). A duplicate or replacement card was issued in

September, 1985, upon application of the father and presentment of a baptismal certificate and immunization record. (Govt. Ex. 4). A third card was then obtained in October, 1991, upon self-application by Dinicio Gurrola III. (Govt. Ex. 4). Finally, the record showed a fourth card issuing in June, 2001, to Dinicio Gurrola III, who listed what appears to be a California prison address. (Govt. Ex. 4; Trial Tr. pp. 84-85).

The presentence report determined an advisory guidelines range of 6-12 months on counts 1-4, and noted the mandatory consecutive two-year term of imprisonment required for the aggravated identity theft offense (count 5). (PSR ¶22, 30). On June 21, 2007, the district court sentenced defendant to a total of 30 months of imprisonment -- concurrent six-month terms on counts 1-4 and a consecutive 24-month term for count 5. (Sent. Tr. p. 21). The court also imposed a total of two years of supervised release. (Sent. Tr. p. 21).

Defendant duly appealed his conviction on the aggravated identity theft charge, asserting *inter alia* that the government failed to prove that he had actual knowledge that the identity he possessed belonged to a real person. *Mendoza-Gonzalez*, 520 F.3d at 914. A three judge panel of the Eighth Circuit unanimously rejected that argument, holding that "18 U.S.C. § 1028A(a)(1) does not require the Government to prove that the defendant knew that the means of identity belonged

to another actual person." *Mendoza-Gonzalez*, 520 F.3d at 917. Defendant's timely petition for rehearing and rehearing en banc was thereafter denied on May 1, 2008.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SPLIT OF AUTHORITY IN BOTH THE CIRCUIT AND DISTRICT COURTS OVER WHETHER THE KNOWLEDGE ELEMENT OF THE FEDERAL IDENTITY THEFT STATUTE, 18 U.S.C. § 1028A(a)(1), REQUIRES PROOF THAT THE ACCUSED ACTUALLY KNEW THE IDENTITY BELONGED TO A REAL PERSON. BECAUSE IDENTITY THEFT IS WIDELY CHARGED IN THIS AND OTHER JURISDICTIONS, IT IS IMPORTANT TO RESOLVE THE CONFLICTING INTERPRETATIONS OF THE STATUTE.

The Eighth Circuit in this matter followed the narrow majority view that the knowledge element for aggravated identity theft under 18 U.S.C. § 1028A(a)(1) does not encompass knowledge that the false identity belonged to a real person. Defendant respectfully submits this is an erroneous reading of the statute, and that the correct view is espoused by the majority opinion in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008).

To support conviction for aggravated identity theft as charged here, the government was required to prove that Mr. Mendoza "knowingly" used or possessed the "means of identification of another person" during and in relation to

any of the fraud offenses outlined in his other charges (use of false identification to satisfy federal immigration law; false use of a social security card as evidence of authorized employment; and false representation of a social security number to receive employment compensation). 18 U.S.C. § 1028A(a)(1). Does this mean that defendant must know only that he is possessing or using a false identity, or does it mean additionally that defendant must be aware that the false identity is that of another actual person?

One circuit court and several district courts have held that the knowledge requirement for this offense encompasses not merely knowledge that the means of identification is false, but knowledge that the identification belongs to a real person. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1243-1244 (D.C. Cir. 2008) (rehearing en banc denied, 6/13/08); *United States v. Sanchez*, No. 08-17, 2008 WL 1926701 (E.D.N.Y. April 30, 2008); *United States v. Hairup*, No. 2:07-cr-566, 2008 WL 471710 (D. Utah Feb. 19, 2008); *United States v. Salazar-Montero*, 520 F.Supp.2d 1079 (N.D. Iowa 2007); *United States v. Beachem*, 399 F.Supp.2d 1156, 1158 (W.D. Wash. 2005). The majority view, however, is that the knowledge required for a § 1028A(a)(1) identity theft offense is simply knowledge that the identification in question is fraudulent. *United States v. Hurtado*, 508 F.3d 603, 608-610 (11th Cir. 2007), cert. denied, 2008 WL 488011

(U.S. June 9, 2008); *United States v. Montejo*, 442 F.3d 213, 215-217 (4th Cir.), cert. denied, 127 S.Ct. 366 (2006); *United States v. Estrada-Sanchez*, No. 08-49, 2008 WL 2315733 (D. Maine June 5, 2008); *United States v. Mata-Lara*, 527 F.Supp.2d 887, 893-896 (N.D. Iowa 2007); *United States v. Godin*, 489 F.Supp.2d 118, 120 (D. Me. 2007); *United States v. Contreras-Macedas*, 437 F.Supp.2d 69, 78-79 (D. D.C. 2006); *United States v. Crounsset*, 403 F.Supp.2d 475, 483 (E.D. Va. 2005).

Defendant respectfully submits that the § 1028A(a)(1) knowledge element required the government to prove that defendant knew he used the identification of a real person. Defendant submits it is the existence of a real victim of identity theft and knowledge of the same that justifies the consecutive two-year term of imprisonment that attaches to a § 1028A(a)(1) offense.

If the knowledge element is interpreted narrowly to require only proof that one knows the identification in question is false, then the conduct punished is not materially different than the underlying fraudulent activity the § 1028A(a)(1) offense is meant to enhance. The § 1028A(a)(1) offense, of course, does require a real victim, while the fraud crimes it enhances theoretically can be committed without using the identification of a real person. Certainly one reason for the

passage of § 1028A(a)(1) was to increase punishment for the component fraud crimes that have real victims of stolen identities.

The additional aggravating fact, however, that distinguishes a § 1028A(a)(1) offense from its component fraud offenses is not simply the existence of a real person behind the pilfered identification, but a defendant's knowledge that he has usurped the identification of a real person. The mens rea of one who knows the purloined identity is real is deserving of greater punishment than one who merely believes that he has adopted a generically false identity for himself. Congress' intent behind § 1028A(a)(1) was to increase the punishment for those who "steal" identities of others. See *Villanueva-Sotelo*, 515 F.3d at 1243-1244; *Beachem*, 399 F.Supp.2d at 1158. It would be irrational to increase the punishment of one who was unaware that his false identity had been stolen from another person.

The Eighth Circuit in this matter focused on the grammatical structure of § 1028A(a)(1), but "rules of grammar are malleable," *Hairup*, 2008 WL 471710, at *2, and it certainly is not illogical or unreasonable to read the knowledge element as encompassing knowledge that the identity belonged to another actual person. The split in authority among the district and circuit courts is proof itself that the knowledge element is ambiguous as to its reach.

Thus, the focus should be on the Congressional purpose of enhancing punishment for those who "steal" the identities of others. See *Villanueva-Sotelo*, 515 F.3d at 1243-1245; *Sanchez*, 2008 WL 1926701, at *5. The legislative history contains a "long list of examples evincing the statute's focus on intentional theft," *Villanueva-Sotelo*, 515 F.3d at 1245, and the harsh mandatory penalty makes most sense when the statute is read to require the intentional or knowing theft of another's identity.

> Given the legislative history's repeated references to the concern for the growing number of intentional identity thefts caused in large part by modern technology, this kind of mandatory additional punishment is understandable. And in those cases of actual intended theft of another's identity, the punishment seems to fit the concern. A criminal receives an extra two years in prison if when committing a crime he steals someone else's identity. But if Congress intended to impose such a serious remedy on those who inadvertently or unknowingly implicate another person's identity . . . Congress could, and should, have clearly said so. . . .

Hairup, 2008 WL 471710, at *4; see also *Sanchez*, 2008 WL 1926701, at *5 ("Nor does it seem entirely just or effective to subject a defendant to two years additional imprisonment for a circumstance . . . over which the defendant has little control.")

CONCLUSION

For the foregoing reasons petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX