No. 08-5316

IN THE SUPREME COURT OF THE UNITED STATES

NICASIO MENDOZA-GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The federal aggravated identity theft statute prescribes a mandatory two-year term of imprisonment for any person who, "during and in relation to" certain other specified crimes, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." 18 U.S.C. 1028A(a)(1). The question presented is whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the "means of identification" in question belonged to another person.

IN THE SUPREME COURT OF THE UNITED STATES

No. 08-5316

NICASIO MENDOZA-GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 520 F.3d 912.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2008. A petition for rehearing was denied on May 1, 2008 (Pet. App. 10a). The petition for a writ of certiorari was filed on July 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted of one count of falsely claiming to be a United States citizen for purposes of obtaining employment, in violation of 18 U.S.C. 1015(e) (Count One); one count of using a false identification document for purposes of demonstrating eligibility for employment, in violation of 18 U.S.C. 1546(b)(1) (Count Two); one count of using a fraudulently obtained social security card as evidence of authorization to work in the United States, in violation of 18 U.S.C. 1546(a) (Count Three); one count of using a false social security number to obtain employment compensation, in violation of 42 U.S.C. 408(a)(7)(B) (Count Four); and one count of aggravated identity theft, in violation of 18 U.S.C. 1028A (Count Five). Pet. App. 2a-3a; Modified Presentence Investigation Report (PSR), p. 1. He was sentenced to 30 months of imprisonment. Pet. App. 3a. The court of appeals affirmed. Id. at 1a-9a.

1. Section 1028A(a)(1) prescribes a mandatory two-year term of imprisonment for any person who

> during and in relation to any felony violation enumerated in [Section 1028A(c)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.

18 U.S.C. 1028A(a)(1). The statute further provides that a district court "shall not place on probation any person convicted of a violation of this section," 18 U.S.C. 1028A(b)(1), nor may the

term of imprisonment generally "run concurrently with any other term of imprisonment * * * including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used," 18 U.S.C. 1028A(b)(2). The term "means of identification" is defined to mean "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any * * * name, social security number, date of birth, [or] official State or government issued driver's license or identification number." 18 U.S.C. 1028(d)(7)(A).

2. Petitioner is a citizen of Mexico. 3/13/07 Tr. 90; PSR, p. 2. On July 11, 2006, petitioner completed the Department of Homeland Security's Form I-9, Employment Eligibility Verification (Form I-9) in connection with obtaining employment in Marshalltown, Iowa. Pet. App. 2a. On that form, petitioner falsely stated that his name was Dinicio Gurrola III and he falsely claimed to be a citizen or national of the United States. Ibid.; 3/13/07 Tr. 51. Petitioner also submitted a Minnesota identification card that had been issued in Gurrola's name but had petitioner's photo on it, Pet. App. 2a; 3/13/07 Tr. 54, as well as a social security card issued in Gurrola's name, Pet. App. 2a; 3/13/07 Tr. 54-55.

3. Petitioner was charged in a five-count indictment with one count of aggravated identity theft and four additional charges involving his false claim of citizenship and his use of false

identification documents. Pet. App. 2a. At trial, petitioner moved for a judgment of acquittal. 3/13/07 Tr. 97-100. With respect to the Section 1028A count, petitioner argued, inter alia, that the government was required "to prove * * * that [he] knew that there was actually an individual, a living breathing individual named Dinicio Gurrola, III." Id. at 99. The district court denied that motion. 3/18/07 Tr. 108-110. Petitioner did not object to the district court's jury instructions, id. at 110, and the jury found petitioner guilty on all counts, Pet. App. 3a. The district court sentenced petitioner to six months of imprisonment on each of the non-Section 1028A(a)(1) counts and ordered that those sentences would run concurrently with each other. Pet. App. 3a; Sent. Tr. 21. The court further sentenced petitioner to 24 months of imprisonment on the Section 1028A(a)(1) count and ordered that sentence would run consecutively to the other counts. Ibid.

4. The court of appeals affirmed in a published opinion. Pet. App. 1a-9a. It rejected petitioner's contention that, under Section 1028A(a)(1), the government was required "to prove beyond a reasonable doubt that [petitioner] had actual knowledge that the identification he used belong to an actual person." Id. at 3a.

The court of appeals began with the plain language of the statute and concluded that it was unambiguous. Pet. App. 4a-5a. The court explained that "[t]he last antecedent rule holds that qualifying words and phrases usually apply only to the words or

phrases immediately preceding or following them, not to others that are more remote." Pet. App. 4a-5a (citing 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 47:33 (7th ed. 2007)). Accordingly, it stated that the placement of the adverb "knowingly" "before the verbs 'transfers, possesses, or uses, indicates that 'knowingly' modifies those verbs, not the later language in the statute." Ibid. (quoting United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008)). The court stated that "[i]f Congress had wished to extend the knowledge requirement to the entire provision, 'it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification known to belong to another actual person.'" Id. at 5a (quoting Hurtado, 508 F.3d at 609). The court also stated that it was "preposterous to think that the same Congress that so plainly and firmly intended to increase the penalty" for identity theft would "require the Government to prove that the defendant kn[ew] he wrongfully possesse[d] the identity 'of another person,'" because such a requirement "would place on the prosecution an often impossible burden." Ibid. (quoting United States v. Villanueva-Sotelo, 515 F.3d 1234, 1255 (D.C. Cir.) (Henderson, J., dissenting), reh'g denied, No. 07-3055 (June 13, 2008)).

The court of appeals acknowledged that its construction of Section 1028A(a)(1) -- though consistent with the Fourth Circuit's decision in United States v. Montejo, 442 F.3d 213, cert. denied, 127 S. Ct. 366 (2006), and the Eleventh Circuit's decision in Hurtado, see Pet. App. 5a -- was inconsistent with the D.C. Circuit's decision in Villanueva-Sotelo, which had relied on "statutory structure, relevant legislative history and congressional purposes." Id. at 6a. The court reiterated, however, that Section 1028A's language was "unambiguous" and that there was no warrant to "look beyond" it. Id. at 7a. The court also stated that it would reach the same conclusion even if it were "to look at legislative history and congressional intent." Ibid. The court observed that "[a] primary purpose of the statute was to increase the punishment for a defendant who wrongfully obtains and uses another person's personal data, which is clearly what occurred here." Ibid. (internal quotation marks and citations omitted; brackets in original).

The court of appeals further acknowledged that this Court "has in some circumstances interpreted the term 'knowingly' in similarly worded criminal statutes to modify terms in addition to the verbs directly adjacent to 'knowingly.'" Pet. App. 7a (citing Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), and Liparota v. United States, 471 U.S. 419 (1985)). The court of appeals

explained, however, that in those cases an alternative construction may have "criminaliz[ed] unwitting, innocent and perhaps even constitutionally protected conduct." Id. at 7a-8a. In this case, the court stated, "there is no such concern," first, because "a defendant can only be convicted for violating § 1028A(a)(1) when he commits the offense 'during and in relation to'" certain other specified crimes, id. at 8a (quoting 18 U.S.C. 1028A(a)(1)), and second, because "the use of a means of identification of another person without lawful authority is not on its face innocent conduct," ibid.[1]

5. The court of appeals denied a petition for rehearing en banc. Pet. App. 10a.

DISCUSSION

Petitioner renews his contention (Pet. 6-10) that he was entitled to a judgment of acquittal on the Section 1028A(a)(1) count because the government did not establish that he knew that the means of identification that he used belonged to another actual person.[2] The court of appeals correctly rejected that claim. We agree with petitioner, however, that there is now a clear conflict

[1] The court of appeals also rejected petitioner's contention that the government's evidence at trial had been insufficient to establish that Gurrola "existed as a real person." Pet. App. 9a. Petitioner does not renew that claim before this Court. See Pet. i, 6-10.

[2] The same question is also presented in Flores-Figueroa v. United States, petition for cert. pending, No. 08-108 (filed July 22, 2008).

among the courts of appeals with respect to that question. In addition, the proper interpretation of Section 1028A(a)(1) presents an important and recurring issue and the question is squarely presented in this case. Accordingly, this Court's review is warranted.

1. Section 1028A applies if a defendant, "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." 18 U.S.C. 1028A(a)(1). As the court of appeals correctly held (Pet. App. 4a-9a), the statute does not require the government to show that the defendant knew that the means of identification in question did, in fact, belong to another person. "[A]s a matter of common usage," the adverb "knowingly" is not sensibly read as "modify[ing] the entire lengthy predicate that follows it." United States v. Montejo, 442 F.3d 213, 215 (4th Cir.), cert. denied, 127 S. Ct. 366 (2006). In addition, "[t]he last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote." Pet. App. 4a-5a (citing 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 47:33 (7th ed. 2007)).

Although the last-antecedent principle "is not an absolute and can assuredly be overcome by other indicia of meaning," Barnhart v.

Thomas, 540 U.S. 20, 26 (2003), there is no warrant for making an exception here. Petitioner's proposed construction would permit a defendant to escape liability under Section 1028A(a)(1) "so long as the defendant remained ignorant of whether th[e] other person [whose personal information he was using to facilitate another crime] is real." United States v. Hurtado, 508 F.3d 603, 609 (11th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 2903 (2008). But the harm experienced by the victim whose identity has been misappropriated does not vary depending on the defendant's knowledge of his existence, and, as the court of appeals recognized, requiring the government to establish that knowledge "would place on the prosecution an often impossible burden." Pet. App. 5a (quoting United States v. Villanueva-Sotelo, 515 F.3d 1234, 1255 (D.C. Cir.) (Henderson, J., dissenting) (internal quotation marks and citation omitted), reh'g denied, No. 07-3055 (June 13, 2008)). If Congress had meant "to extend the knowledge requirement" in such a fashion, ibid., "it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification 'known to belong to another person,'" ibid. (quoting Hurtado, 508 F.3d at 609). Cf. 18 U.S.C. 1546(a) (making it unlawful to "use[or] possess[] * * * any" forged, counterfeited, altered, or falsely made immigration document "knowing it to be forged, counterfeited, altered, or falsely made").

Petitioner errs in asserting (Pet. 8) that "[i]f 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." As petitioner acknowledges (Pet. 8), the distinguishing feature of the Section 1028A(a)(1) offense is the necessity of "a real victim." Unlike the underlying offenses whose penalties Section 1028A(a)(1) enhances, a defendant may not be found guilty under that provision unless the government establishes that the particular means of identification that the defendant possessed, transferred, or used without lawful authority did, in fact, belong to another actual person. See Villanueva-Sotelo, 515 F.3d at 1254 (Henderson, J., dissenting) (stating that "[a] primary purpose" of Section 1028A(a)(1) was to ensure that "the punishment for a defendant who wrongfully obtains and uses another person's personal data * * * more closely fit[] the harm the crime causes its victim" (internal quotation marks and citation omitted)).

Petitioner's reliance on what he perceives to be Congress's general purpose (Pet. 9-10) and the statute's legislative history (Pet. 10) do not justify the interpretation he proposes. "[S]tatutory prohibitions often go beyond the principal evil [contemplated by their drafters] to cover reasonably comparable evils." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79

(1998). At any rate, a committee report prepared in connection with Section 1028A(a)(1)'s enactment states that the crime of identity theft encompasses "all types of crimes in which someone wrongfully obtains and uses another person's personal data in some way that involves fraud or deception." H.R. Rep. No. 528, 108th Cong. 2d Sess. 4 (2004) (emphasis added).[3]

2. Although the court of appeals correctly resolved petitioner's case, petitioner is correct (Pet. 7-8) that the courts of appeals are divided on the question whether, in order to obtain a conviction under Section 1028A(a)(1), the government must establish that the defendant knew that the "means of identification" in question belonged to an actual person. Three courts of appeals, including the court here, have concluded that the statute does not require the government to establish such knowledge. See Pet. App. 4a-8a; Hurtado,508 F.3d at 610 ("§ 1028A(a)(1) did not require the government to prove that Hurtado knew that the means of identifica-

[3] The court of appeals' decision in this case is consistent with this Court's later-issued decision in United States v. Williams, 128 S. Ct. 1830 (2008). In Williams, the term "knowingly" was set off from and "introduce[d]" two distinct statutory subsections. Id. at 1839. In the Court's view, that structure "ma[de] clear that [the word 'knowingly'] applie[d] to [the relevant subsection] in its entirety." Ibid. In Section 1028A(a)(1), in contrast, the word "knowingly" appears near the middle of a single statutory subsection, and the question is to which of the subsection's remaining words that mens rea requirement extends. In addition, whereas the Court's statutory analysis in Williams occurred against the backdrop of a First Amendment overbreadth challenge, see id. at 1838, this case presents no risk of criminalizing or chilling "unwitting, innocent [or] perhaps even constitutionally protected conduct," Pet. App. 7a-8a.

tion that he possessed and used belonged to another actual person."); Montejo, 442 F.3d at 215-217. In contrast, three other courts of appeals have concluded that Section 1028A(a)(1) "requires proof that * * * the defendant knew that the means of identification belonged to another person." United States v. Miranda-Lopez, 532 F.3d 1034, 1035 (9th Cir. 2008); see United States v. Godin, 534 F.3d 51, 53-54 (1st Cir. 2008) ("[T]o obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person."); Villanueva-Sotelo, 515 F.3d at 1236 ("[S]ection 1028A(a)(1)'s mens rea requirement extends to the phrase 'of another person,' meaning that the government must prove the defendant actually knew the identification in question belonged to someone else.").[4] There were dissenting opinions in the Ninth Circuit and D.C. Circuit cases, see Miranda-Lopez, 532 F.3d at 1041-1044 (Bybee, J., concurring in part and dissenting in part); Villanueva-Sotelo, 515 F.3d at 1250-1261 (Henderson, J., dissenting), and courts of appeals on both sides of the split have denied

[4] Petitioner errs in contending (Pet. 9) that "[t]he split in authority [about Section 1028A(a)(1)] is proof itself that the knowledge element is ambiguous as to its reach." "A statute is not ambiguous * * * merely because there is a division of judicial authority over its proper construction." Reno v. Koray, 515 U.S. 50, 64-65 (1995) (internal quotation marks and citation omitted).

petitions for rehearing en banc, see Pet. App. 10a; Villanueva-Sotelo, No. 07-3055 (D.C. Cir. June 13, 2008).[5]

As the number of recent reported decisions indicates, see also Pet. 7-8 (citing district court decisions), the determination of the correct mens rea requirements under Section 1028A(a)(1) has the potential to affect numerous federal prosecutions. Because the division in the lower courts is unlikely to be resolved absent this Court's intervention, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

WILLIAM C. BROWN
Attorney

SEPTEMBER 2008

[5] In contrast, at the time this Court denied certiorari in Hurtado, the D.C. Circuit was the only court of appeals to have held that Section 1028A requires proof that the defendant knew that the means of identification in question belonged to another person and that court was still considering the government's petition for rehearing en banc.