1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IGNACIO CARLOS FLORES- :

4 FIGUEROA, :

5 Petitioner :

6 v. : No. 08-108

7 UNITED STATES. :

8 - x

9 Washington, D.C.

10 Wednesday, February 25, 2009

11

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:12 a.m.

15 APPEARANCES:

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

17 the Petitioner.

18 TOBY J. HEYTENS, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the Respondent.

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1 P R O C E E D I N G S
2 (11:12 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 08-108, Flores-Figueroa v. United
5 States.
6 Mr. Russell.
7 ORAL ARGUMENT OF KEVIN K. RUSSELL
8 ON BEHALF OF THE PETITIONER
9 MR. RUSSELL: Mr. Chief Justice, and may it
10 please the Court:
11 In common usage, to say that somebody
12 knowingly transfers, possesses, or uses something is to
13 say that that person knows what it is that he is
14 transferring, possessing, or using. If I say that John
15 knowingly used a pair of scissors of his mother, I am
16 saying not simply that John knew that he was using
17 something which turned out to be his mother's scissors
18 or even that John knew he was using scissors which
19 turned out to be his mother's, I am saying that John
20 knew that the scissors he was using belonged to his
21 mother.
22 The same principle follows under the Federal
23 aggravated identity theft statute, which calls for a
24 two-year mandatory sentence for anyone who, during and
25 in relation certain predicate offenses --

1 JUSTICE ALITO: Doesn't that depend on the
2 context? You could think of examples where you have
3 exactly the same usage and the person wouldn't
4 necessarily know about the ownership of the thing in
5 question?
6 MR. RUSSELL: I haven't been able to think
7 of one. The government hasn't been able to come up with
8 one.
9 CHIEF JUSTICE ROBERTS: Well, how about so
10 and so stole the car that belonged to Mr. Jones?
11 MR. RUSSELL: I think --
12 CHIEF JUSTICE ROBERTS: I suppose you could
13 say that -- that the person knew it was Mr. Jones's car,
14 but more likely somebody stole the car that turned out
15 to be Mr. Jones's.
16 MR. RUSSELL: I do think that that
17 formulation gives rise to a little bit more ambiguity in
18 that context. I think, though, if you said "stole the
19 car of Mr. Jones," it's -- it's not particularly
20 ambiguous. At the very least, this is a formulation
21 that I think --
22 JUSTICE SCALIA: He says he knowingly stole
23 the car that belonged to Mr. Jones. Wouldn't that be
24 the parallel?
25 MR. RUSSELL: Yes, I'm sorry if I left that

1 part out.

2 JUSTICE SCALIA: You left out the

3 "knowingly."

4 MR. RUSSELL: Yes.

5 JUSTICE SCALIA: Once you put in

6 "knowingly" --

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

8 you know, John knowingly stole the car of Mr. Jones,

9 that strongly implies that John knew that the car

10 belonged to Mr. Jones.

11 JUSTICE ALITO: I repeat, doesn't that

12 depend on the context? You say -- somebody says to you,

13 you know a car was stolen from our street last night?

14 Oh, what car was stolen? Oh, it was the car of Mr.

15 Jones. He knowingly stole the car of Mr. Jones. It

16 doesn't necessarily mean that the person who stole the

17 car knew that it was Mr. Jones's car.

18 MR. RUSSELL: I do think that the

19 formulation that John knowingly stole the car of Mr.

20 Jones most naturally is understood to imply that John

21 knew whose car it was he was stealing.

22 We don't claim that the government's

23 interpretation is grammatically impossible. We are just

24 simply saying that, by far the most common usage of this

25 kind of formulation, particularly in a criminal statute,

1 is that the knowledge element applies to the --

2 JUSTICE ALITO: Who did the mugger mug? He

3 mugged the man from Denver. You think that he knowingly

4 mugged the man from Denver. You think that means that

5 the mugger knew that the man was from Denver?

6 MR. RUSSELL: I think that that's a more

7 ambiguous statement.

8 JUSTICE ALITO: Why is it more ambiguous?

9 MR. RUSSELL: Because I think the "from"

10 preposition --

11 JUSTICE ALITO: Why is it less unambiguous?

12 I thought your argument was that this was unambiguous.

13 MR. RUSSELL: I think the possessive form

14 makes it, through common usage, unambiguous. We don't

15 claim that it's grammatically impossible. But we do

16 think that in ordinary usage people would understand

17 that --

18 JUSTICE BREYER: Well, so what if it isn't?

19 I mean, suppose you had a statute, and the statute says

20 it is a crime to mug a man from Denver. That's a Denver

21 ordinance, by the way --

22 (Laughter.)

23 JUSTICE BREYER: -- because no one else

24 would pass it. But I mean, if those are the elements of

25 the crime, I guess, we do normally apply "knowingly" to

1 each of them.

2 MR. RUSSELL: That -- that is correct. In

3 the criminal --

4 JUSTICE BREYER: Whether -- even if it isn't

5 ordinary usage.

6 MR. RUSSELL: That's right. We have more

7 than one argument. We think that as a matter of

8 ordinary usage --

9 JUSTICE BREYER: I was slightly trying to

10 push you on to the next argument.

11 (Laughter.)

12 MR. RUSSELL: Well, we do think that, in a

13 criminal statute, you ordinarily assume -- this Court

14 has said that a conventional mens rea element extends to

15 all of the elements of the offense.

16 And Congress knows how to deviate from that

17 when it wants to. It did so, for example, in the

18 statute that the Court construed in the X-Citement Video

19 case, where it referred to a person "knowingly"

20 transporting a visual depiction, comma, "if" that visual

21 depiction had certain characteristics. And this Court

22 recognized that that kind of formulation most naturally

23 is read to end the knowledge requirement at the "comma,

24 if."

25 Congress didn't do that here. In fact,

1 there is no textual indication that would lead one to
2 believe that the -- it intended anything other than a
3 completely conventional mens rea requirement in this
4 case.
5 JUSTICE GINSBURG: Mr. Russell, am I correct
6 in understanding that the government goes with you
7 almost all the way, and its only the last three words,
8 "of another person," that -- they agree "knowingly"
9 applies to "without lawful authority" and that it
10 applies to "a means of identification"? You have to
11 know that it what you're using is a means of
12 identification.
13 MR. RUSSELL: As I understand it, that is
14 not their position. That's the back-up to their back-up
15 position. The first position is that it only applies to
16 the verbs, and then they say, well, if you don't accept
17 that, well, maybe it goes through "without lawful
18 authority." And if you don't accept that, then maybe
19 then it goes halfway through the phrase "means of
20 identification of another person."
21 So, they do raise all three alternatives.
22 That last argument, I think, fails both for text --
23 common usage reasons and in light of this tradition that
24 we've been discussing. Textually, there is simply no
25 textual cue that the knowledge requirement stops halfway

1 through the direct-object phrase, "means of
2 identification of another person."
3 JUSTICE GINSBURG: Is the first -- this
4 alien's first effort to get papers that would qualify
5 for him, if I -- if I remember correctly, the first time
6 around he used an assumed name, not his own name.
7 MR. RUSSELL: That's correct.
8 JUSTICE GINSBURG: He used a false date of
9 birth. He got a Social Security card that happened to
10 belong -- to be the number of no live person.
11 MR. RUSSELL: Correct.
12 JUSTICE GINSBURG: And -- and that would not
13 have violated. Even in the government's reading, that
14 would not have violated --
15 MR. RUSSELL: That's right.
16 JUSTICE GINSBURG: -- this statute.
17 But the second time around, your case, he
18 did use his own name. And the question was -- and it
19 turned out that both the Social Security card and the
20 alien registration, they were two different people, but
21 they were both alive.
22 MR. RUSSELL: Correct.
23 JUSTICE GINSBURG: So that does make it a
24 crime. But when the number turned out to be -- not
25 belong to anybody, then it's not -- you don't get the

1 two-year add-on?

2 MR. RUSSELL: Just to be clear, the only

3 reason the government alleges that there is a crime here

4 is because it turned out that those numbers had been

5 assigned to somebody else. Under our view, that's not

6 enough. That's enough to show that he committed the

7 predicate offenses, and he received very substantial

8 punishment for that, but it's not enough to show that he

9 was qualified for an additional two years' mandatory

10 sentence as an aggravated identity thief.

11 Now, you can --

12 JUSTICE ALITO: What would happen if the --

13 the defendant doesn't -- doesn't act knowingly as to the

14 question whether the identifying information belongs to

15 a real person but is simply reckless as to whether the

16 identifying information belongs to a real person?

17 Suppose that someone buys an identification card and

18 looks at it, and it looks like it might be a real

19 identification card on which that person's picture has

20 been inserted in place of the real picture, but the

21 person can't be sure. It might really be an entirely

22 fake card. Would that be a violation?

23 MR. RUSSELL: Ordinarily, recklessness

24 doesn't satisfy a knowledge requirement. Willful

25 blindness ordinarily does. But recklessness in itself

1 ordinarily does not.

2 JUSTICE KENNEDY: Would it be enough to go

3 to the jury on the hypothetical Justice Alito gives you?

4 MR. RUSSELL: I think so. The government is

5 free to present circumstantial evidence.

6 JUSTICE KENNEDY: You agree that you could

7 go to the jury whenever there is an identity card that

8 does reflect the identity of a real person but there's

9 no other knowledge that the government's case has

10 introduced that shows -- there's no other evidence that

11 the government has introduced showing knowledge?

12 MR. RUSSELL: If there's -- I think that

13 could be a component of a circumstantial evidence case.

14 I don't think it would be enough, particularly in a case

15 like this, where --

16 JUSTICE KENNEDY: Suppose I had five

17 different cards with five different real people. Would

18 that be enough to go?

19 MR. RUSSELL: I don't think so in itself.

20 Precisely -- particularly in a case like this, where the

21 person gets up and testifies that they didn't know. The

22 fact that there's these numbers here --

23 JUSTICE KENNEDY: No, no. No. The fact that

24 he testifies -- that doesn't have anything to do with

25 whether or not the case would go to the jury. Does the

1 government make its case sufficient to resist a
2 motion -- a directed motion for acquittal if it just
3 puts in the fact that you have five identity cards and
4 there are five different people that are all real
5 people?
6 MR. RUSSELL: No, I don't think so. And in
7 fact, the fact that there are five different people
8 probably tends to undermine the evidence.
9 JUSTICE SCALIA: You are making it very hard
10 for me to vote with you, I must say. I --
11 (Laughter.)
12 MR. RUSSELL: Well --
13 JUSTICE SCALIA: I thought you had a pretty
14 good -- a pretty good case, but if you are going to say
15 somebody who has five identity cards, faces of
16 individuals -- I mean, presumably they are real
17 individuals.
18 MR. RUSSELL: I'm sorry. I may be
19 misunderstanding the hypothetical --
20 JUSTICE SCALIA: That was -- that was the
21 hypothetical. Five different -- a person has five
22 identity cards of real people, and -- and you don't know
23 that he knows that it's the identity card of a real
24 person, but he used it.
25 MR. RUSSELL: Okay. If they -- these are

1 identity cards that have the picture of somebody other
2 than him on them --
3 JUSTICE SCALIA: Yes.
4 MR. RUSSELL: -- which is an unusual
5 thing --
6 JUSTICE SCALIA: Of course.
7 MR. RUSSELL: -- to try to use, but if
8 that's the case, then, yes, I think that -- you know,
9 that if there would be -- affirms that that picture
10 belongs to the person whose number is there, then they
11 could do that. The ordinary --
12 JUSTICE KENNEDY: No, no. You have to have
13 the further inference that he knows that.
14 MR. RUSSELL: I think that a jury could
15 reasonably infer that the person wouldn't -- would not,
16 that if you have an ID card with somebody else's name,
17 somebody else's number, somebody else's picture, that
18 that belongs to somebody else.
19 JUSTICE GINSBURG: That's not -- that's not
20 this case. In this case, he had his own name. And I
21 don't know whether there was a picture on the alien
22 registration card. I don't know if he -- he used his
23 own name. Did he use his own photograph?
24 MR. RUSSELL: I don't know the answer to
25 that question. I mean, Social Security cards don't have

1 pictures.

2 JUSTICE KENNEDY: That was going to be my

3 next question. So the next question is, suppose it's

4 the Petitioner's own name but somebody else's number.

5 MR. RUSSELL: I would tend to think that

6 that's not sufficient. Of course --

7 JUSTICE GINSBURG: Well, that --

8 JUSTICE KENNEDY: Even if he had five

9 different cards, all with his name, but all with the

10 identification numbers of other real people?

11 MR. RUSSELL: Again, I would think not. I

12 can understand that people could disagree with that.

13 And, of course, the government is free to raise those

14 kinds of arguments in other cases where this comes up.

15 All of this goes the question of what does

16 it take to show that somebody knows something. The

17 question before the Court right now, and the only

18 question, is whether the government has to show that

19 knowledge at all. And in this case, you know, the

20 government's principal argument, I think, their

21 strongest argument, is that reducing the mens rea

22 requirement in that way serves the purpose of

23 facilitating prosecutions and therefore protection of

24 victims.

25 And we don't deny that it has that effect.

1 And we don't deny that this statute is directed at
2 protecting victims, but that could be said of an awful
3 lot of criminal statutes.
4 JUSTICE ALITO: What if the defendant
5 chooses a name -- uses a name other than his or her own
6 name -- gets an identification card made up with that --
7 and doesn't know for sure that the name that's chosen
8 actually belongs to another person, but because it's not
9 an extremely uncommon name, has -- knows that it's
10 virtually certain that that name belongs to some other
11 person who is unknown to him?
12 MR. RUSSELL: I think --
13 JUSTICE ALITO: Is that a violation?
14 MR. RUSSELL: Again, you have this issue of
15 recklessness versus knowledge. If he knew that in fact
16 it belonged to -- if he used John Doe -- and, in fact,
17 it turns out there are several hundred John Doe's in
18 this country, and it does raise a difficult question
19 about how this statute ought to apply when you are using
20 something that is so commonly identifying somebody, but
21 it's hard to say that it's identifying anybody in
22 particular.
23 The definition of "means of identification"
24 in the statute says it has to be a name or number that
25 is capable of identifying a specific person. And so I

1 think you get into questions, when you're talking about
2 common names, about how the statute -- whether the
3 statute would be satisfied in that respect.
4 JUSTICE ALITO: Well, what if it's not an
5 extremely common name, but not an extremely uncommon
6 name? And what if it's -- what if the defendant chooses
7 Kevin K. Russell? Would that be a violation?
8 MR. RUSSELL: You would have to show that he
9 knew that that was a name belonging to a specific
10 person.
11 JUSTICE ALITO: He had -- he would have to
12 know that there is such a person?
13 MR. RUSSELL: He would have to know that
14 there is such -- he wouldn't have to know me, but he
15 would have to know that there is such a person. But
16 again --
17 JUSTICE KENNEDY: Does he have to know it's
18 that -- but suppose he uses John Smith. Does it suffice
19 that -- do you have to show that he knows there is a
20 John Smith in the phone book, someplace in the United
21 States?
22 MR. RUSSELL: I think so. I don't think
23 he'd have to know who that John Smith was, but he'd have
24 to know there is a John Smith. And that -- I mean, that
25 kind of scenario does raise difficult questions about --

1 JUSTICE KENNEDY: But I want an answer to
2 the question.
3 MR. RUSSELL: Well, I think the answer is
4 the one that I gave you, which I think is disputable,
5 but it's -- the answer is yes, he has to know that there
6 is a specific person named John Smith.
7 JUSTICE KENNEDY: And it can't be submitted
8 to the jury on the ground that anybody knows there's a
9 John Smith?
10 MR. RUSSELL: I think --
11 JUSTICE KENNEDY: Can -- can it go to the
12 jury without any other evidence, other than the fact of
13 his possessing the card?
14 MR. RUSSELL: If it's a sufficiently common
15 name that he ought to know that there is somebody
16 bearing that name, then yes, I would agree that it could
17 go to the jury on that.
18 JUSTICE SOUTER: If the name were Anthony
19 Kennedy, would that go to the jury?
20 (Laughter.)
21 MR. RUSSELL: I -- again -- it's hard to
22 draw lines here, but I think the ultimate question is,
23 you know, could a reasonable jury think that somebody
24 using that name has to know that there is a person with
25 that name, a specific person with that name? And quite

1 possibly they could.

2 JUSTICE SOUTER: Can you give me an example?

3 It go to the jury, wouldn't it?

4 MR. RUSSELL: An awful lot of name examples

5 would. I think simply in this case, though, when you

6 are talking about a number -- I don't think -- it's a

7 much harder case to say that simply having a number on a

8 card should -- should lead you to know that that name

9 very likely belongs to somebody else. In fact, there

10 are nine -- there are -- there a billion possible

11 combinations for security -- Social Security numbers,

12 and only about 400 million have been issued. But to get

13 back -- I --

14 JUSTICE KENNEDY: But if you say this goes

15 to the jury, it doesn't leave very much to your

16 knowledge argument.

17 MR. RUSSELL: Well --

18 JUSTICE KENNEDY: I mean, I suppose that

19 defense counsel could get up and say, the government

20 hasn't shown that he knew this. And then the government

21 says, of course, he knows this. I don't think you have

22 accomplished very much.

23 MR. RUSSELL: Well, it -- I think the jury

24 still has to make the finding that he knew it. And in a

25 case like this, where my client testified that he didn't

1 know it, where the government didn't contest that,
2 didn't argue that there were circumstantial evidence
3 showing that he did know it, it's going to be
4 outcome-determinative. In that --
5 JUSTICE GINSBURG: How do these operations
6 work? When he went to Chicago to buy false
7 identification papers, did the first time -- did he go
8 to the same outfit as the time he used a false name?
9 MR. RUSSELL: The record doesn't disclose
10 that, and I don't know.
11 JUSTICE GINSBURG: These are --
12 CHIEF JUSTICE ROBERTS: Can I --
13 JUSTICE GINSBURG: These are outfits that
14 specialize in making false identifications?
15 MR. RUSSELL: Again, the record doesn't
16 disclose how sophisticated the operation was. In this
17 case, it could just be, you know, a guy who does this;
18 it could be a very sophisticated operation. I think
19 it's kind of all over the place out there, in the real
20 world.
21 JUSTICE GINSBURG: Do you have any sense
22 of -- because there are many people with false
23 identification papers -- how many times it turns out to
24 be the number of a live person, and how many times it
25 turns out like it was in the first instance in this

1 case: It's just a number, a made-up number that doesn't
2 belong to anybody?
3 MR. RUSSELL: I'm afraid I don't have a good
4 sense of that.
5 But just to be clear, in addition to being
6 able to just say on the face of the fact about the
7 identification that the government can present
8 circumstantial evidence to the jury, in a great number
9 of cases, particularly the kinds that Congress was most
10 concerned about, the way that they -- the defendant
11 obtained the identification and the way that they used
12 it provides powerful circumstantial evidence of
13 knowledge.
14 Somebody who breaks into a computer system
15 or unauthorizedly uses access to a computer system or
16 goes dumpster diving looking for IDs obviously knows
17 that they are going to end up with an ID that belongs to
18 another person. And if they use the ID to try to get
19 into a real person's bank account, then it's awfully
20 good information that they were aware that that was an
21 ID that belonged to another person, because there's no
22 sense in trying to break into the bank account of a
23 nonexistent person.
24 And so we don't think that this is a case in
25 which the government faces some kind of insurmountable

1 burden in proving knowledge in a way that's particularly
2 different than -- than other kinds of situations in
3 which the law commonly requires the government to prove
4 what a defendant knew or didn't know.
5 To get back to the victim-focused nature of
6 this, you know, Congress could -- we don't dispute that
7 Congress could make a policy judgment that it would be
8 good to hold defendants strictly liable when they used
9 an identification that turns out to belong to somebody
10 else. Sometimes the law does that, most commonly with
11 respect to sentencing enhancement provisions of the sort
12 that the government points to with respect to drug
13 quantity or selling drugs in a school zone.
14 But when Congress makes that choice,
15 Congress makes that clear in the text of the statute.
16 And so if you look at the drug quantity or the school
17 zone provisions, which are in appendix E and D of the --
18 of the yellow brief appendix, in appendix D you see that
19 Congress establishes in subsection (a) of that provision
20 the "unlawful act," and it says it's unlawful for any
21 person "knowingly to manufacture, distribute," et
22 cetera, a controlled substance.
23 It includes in that provision a knowledge
24 requirement, which, by the way, nobody thinks means only
25 that the government has to show that they knowingly

1 manufactured something which turned out to be a
2 controlled substance. Everybody agrees that the
3 knowledge requirement in that position extends to the
4 direct object phrase, "controlled substance."
5 CHIEF JUSTICE ROBERTS: Well, but that's --
6 that doesn't help you much because it can't be
7 "knowingly manufacture" something is the crime. I mean,
8 you do have to go on to have that make any sense. You
9 don't have to go on to make your provision make any
10 sense, that he knowingly, you know, uses a means of
11 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 or writes a statute that looks
15 like this one, which in subsection (b) lays out the
16 facts that are aggravating, that they are going to
17 punish separately, the drug quantity in subsection (b)
18 of 21 U.S.C. 841 --
19 CHIEF JUSTICE ROBERTS: No, I -- I guess
20 maybe this was what I was trying to say earlier as well.
21 I mean, you have in your statute, in between there, the
22 modifier "without lawful authority."
23 MR. RUSSELL: That's 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 that 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 federal quantity provisions where, in subsection (b),
25 Congress sets out the punishment that is deserving

1 because of that aggravating factor, and it does not
2 include a mens rea requirement in subsection (b).
3 And in the school zone provision, Congress
4 likewise has no mens rea requirement with respect to the
5 knowledge of the person 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 identifications
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 is a statute that's 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 victims. In fact, by far more -- far more
22 commonly, as the LaFave treatise that we cite to you
23 explains, we don't hold defendants criminally strictly
24 liable for all of the consequences of their crimes. It
25 gives the example of somebody who breaks into a house

1 intending to rob it and accidentally sets it on fire --
2 you know, they're engaged in unlawful conduct to start
3 with and so they're not fully blameless, but nonetheless
4 we don't hold them criminally liable for arson because
5 they didn't intend it.
6 Now, Congress could make a choice. Congress
7 could choose to hold that arsonist strictly liable -- or
8 the robbery suspect strictly liable for the arson, just
9 as Congress could hold defendants like Petitioner
10 strictly liable for the fact that he ends up using an
11 identification that belongs to somebody else.
12 But our point is simply there are reasons
13 why Congress might not do that, including the anomalous
14 kind of penalties that end up being meted out here,
15 where you have people -- two people with identical
16 culpability ending up with substantially different
17 punishments, or people with substantially different
18 culpability ending up with identical punishments.
19 If you have the classic aggravated identity
20 thief who breaks into a bank account using a means of
21 identification he knows belongs to somebody else, it's
22 exactly the same sentence, under the government's view,
23 as somebody like Petitioner who just unknowingly used a
24 number in order to get a job.
25 Now, it's not impossible that Congress could

1 make that policy choice, but when it does, it tends to
2 write statutes that look very different than this. It
3 writes ones that look like the quantity statute that I
4 just cited or the school zone statute.
5 JUSTICE KENNEDY: It's not a clear statute.
6 What -- what if the accused knowingly uses a card --
7 identity belonging to a dead person? Is that a real
8 person?
9 MR. RUSSELL: I think that's an open
10 question in the circuits. Some circuits have said that
11 it has to be a means of identification belonging to a
12 living person, but that's -- that's not settled.
13 JUSTICE KENNEDY: What is your view?
14 MR. RUSSELL: My view -- I mean, the statute
15 says "of another person." I think you would ordinarily
16 presume that to mean a live person. But ultimately, I
17 guess, it really doesn't matter to the outcome of my
18 case.
19 JUSTICE STEVENS: Well, it does, though, in
20 a way, because I understand your theory is there are two
21 basic kinds of crimes. You just use the document for
22 your own source if you want to get the job or you want
23 entry into the country or something like that. That's a
24 minor crime. But if you are -- it's identity theft
25 where you are pretending to be somebody else so you can

1 get advantage of his credit and his assets and his
2 access to computers. That's a much more serious crime.
3 Now, if it's a dead person, it seems to me
4 to be in the former category, rather than in the latter.
5 MR. RUSSELL: That's true. Certainly, using
6 the identification of a dead person doesn't impose the
7 kind of harms on real victims that Congress seemed to be
8 most focused on in this case. And certainly, our
9 interpretation of the statute we don't think unduly
10 interferes with that protective function, precisely
11 because the government ought to, in a great many cases,
12 very easily show that the way that the person used the
13 means of identification shows that they knew that it
14 belonged to somebody else.
15 JUSTICE GINSBURG: This -- this conduct
16 would amount to identity -- what did it say -- is there
17 a crime of identity fraud?
18 MR. RUSSELL: Well, that's what we have been
19 using to refer to the underlying predicate offense here,
20 which is the misuse of the immigration document. But
21 that's -- that applies whenever somebody uses an
22 immigration document -- and there is another statute for
23 Social Security cards -- that doesn't belong to them.
24 And the government only has to prove that they knew that
25 it didn't belong them. And that in itself is a

1 substantial protection for people who might be unknowing
2 victims or victims of somebody like my client. He is
3 substantially deterred from risking their credit by the
4 mere fact that he is going to face a substantial penalty
5 for using the false document in and of itself. My
6 client's --
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 a false Social
16 Security card 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 said, 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 at 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 a 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 2 years.
23 CHIEF JUSTICE ROBERTS: Yes, but I think --
24 I thought that argument cut against you, because what
25 you are saying is everybody is on the hook. There's a

1 basic problem here, which is -- I'll call "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 belongs 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's not seen that way
11 from the perspective of the real individual whose number
12 he ended up using. And I think that's the critically
13 important fact.
14 JUSTICE BREYER: Why? Because that's what
15 we normally bring into sentencing. I mean, normally, in
16 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's wrong.
19 When -- when harm occurs, and the harm
20 wasn't known or intended, you can take care of it if you
21 are a judge. You increase the sentence.
22 MR. HEYTENS: Well, Justice --
23 JUSTICE BREYER: What's the problem?
24 MR. HEYTENS: Justice Breyer, my answer to
25 your question will probably be only of interest to those

1 members of the Court who find legislative history
2 probative, but I think for those who do, the very
3 significant answer to that is that the one thing the
4 legislative history makes very clear is that at least
5 some members of Congress believed that judicially
6 discretionary sentences before this statute were enacted
7 were failing to adequately take into account the harm
8 suffered by real victims.
9 There's very clear legislative history to
10 that effect. The statement that just leaving it up to
11 the judge to take into account the impact of --
12 JUSTICE STEVENS: Does the legislative
13 history deal with people who are stealing identities of
14 people who have been -- or bilking identities? I think
15 that legislative history cuts the other way.
16 MR. HEYTENS: I certainly agree, Justice
17 Stevens. There's a portion of the House report that
18 lists nine specific cases in which Congress -- or some
19 members of Congress with the people authored the
20 report -- made the judgment that people who had engage
21 in the sort of conduct that Congress wanted to reach had
22 received short sentences under the previous regime.
23 There are nine specific examples given in the House
24 report.
25 I acknowledge freely that eight of those

1 nine examples very clearly, by the description, involve
2 individuals who must have known that they were using --
3 JUSTICE BREYER: Why not just says "means of
4 identification," then? I mean, it's odd to write a
5 statute that has elements and you put the word
6 "knowingly," and the "knowingly" is supposed to modify
7 some elements but not others. I can't think of other
8 statutes that do that. There may be some.
9 It's pretty peculiar. You could have left
10 off the last element. I mean, if you are drafting a
11 criminal statute, anyone would know that.
12 MR. HEYTENS: There are two responses to
13 that, Justice Breyer. First of all, Congress has
14 written in some statutes that clearly presuppose that
15 "knowingly" doesn't go all the way through, because they
16 repeat the knowingly requirement in those statutes.
17 For example -- and it's the appendix to the
18 reply, appendix G, at page 23a of the appendix to the
19 reply brief, that reproduces 18 U.S.C. 922(q)(2)(A),
20 which is a statute that repeats a knowingly requirement
21 in the text of the statute, which under Petitioner's
22 argument doesn't make any sense at all, because you
23 would just construe "knowingly" --
24 JUSTICE BREYER: Give me one where what
25 they've done is they have used "knowingly" at the

1 beginning, and there are four elements of the crime, and
2 -- I'm not saying there are none, but I'd like to know
3 what they are where "knowingly" doesn't modify something
4 there is strict liability for.
5 MR. HEYTENS: Sure. I'll give you two --
6 JUSTICE BREYER: That's going to be
7 jurisdictional -- probably jurisdictional hooks, like
8 Hobbs Act, and there could be -- there could be some.
9 But I don't see -- you tell me.
10 MR. HEYTENS: I'll give you two. There's
11 the statute that's at issue before this Court in
12 Morissette v. United States, and there's the statute
13 that was construed by the D.C. Circuit in an opinion by
14 Justice Ginsburg, in United States v. Chin.
15 The statute at issue in Morissette says,
16 "knowingly converts to his use anything of value of the
17 United States." In Morissette, this Court held the
18 defendant had to have knowledge of the facts sufficient
19 to make his conduct a conversion. He has to know that
20 the property has an owner, that it's not abandoned, and
21 he has to know that the owner is not him.
22 But the lower courts have uniformly held
23 that, under that statute, the defendant does not need to
24 know that the property in question belongs to the United
25 States.

1 Or take the Chin statute. The Chin statute
2 says "knowingly and intentionally" uses, hires, or
3 employs a person under the age of 18 to avoid detection
4 of a drug trafficking crime.
5 In Chin, the D.C. Circuit said -- and every
6 other court of appeals to have considered the question
7 has said -- the defendant does not need to be
8 specifically aware that the individual in question is
9 less than 18 years old.
10 JUSTICE STEVENS: But the reason for that is
11 it's an equally culpable act where you steal something
12 off of a field as in Morissette. I agree the Morissette
13 case supports you, even though they relied on it, which
14 is interesting to me. But that's a -- you are
15 distinguishing between two equally culpable acts. It
16 doesn't even make any difference whether he knows the
17 owner was some private farmer or the United States.
18 In this case, you've got two really big
19 categories of different crimes, and to say they are
20 treated alike is the thing that troubles me here.
21 MR. HEYTENS: Justice Stevens, I agree that
22 Mr. Morissette's culpability, or the hypothetical
23 defendant in standpoint of Mr. Morissette, doesn't
24 really depend on whether he knows the property belongs
25 to the Federal Government or he thinks he is stealing

1 from his neighbor. He is a bad person either way.
2 I don't think that's true of the Chin
3 statute, though. I think we make a very strong argument
4 that someone who deliberately employs someone that he
5 has --
6 JUSTICE BREYER: You can do it --
7 JUSTICE STEVENS: That's the point.
8 MR. HEYTENS: Sure. Under this statute, I
9 think the significance is, first and foremost, we are
10 not having this discussion unless he has already
11 committed an underlying predicate felony.
12 JUSTICE BREYER: Even that isn't -- I mean,
13 here you're treating it as if it is a separate thing.
14 That's fair enough. And what are the words "of another
15 person" doing there if really they are not supposed to
16 make any difference in terms of mental state?
17 MR. HEYTENS: What they are doing there
18 is -- this goes back to my point that this is a
19 victim-focused statute. What they are doing there is to
20 say, this statute does not apply unless the name or
21 number in question is actually that of a specific
22 individual. Take the --
23 JUSTICE SOUTER: I can -- I can understand
24 your argument if you're saying, look, you can't tell
25 simply from the text what the answer is. You can only

1 tell the answer if you say -- know what the answer is if
2 you say Congress had victims in mind, and if we are
3 going to worry about victims, we are not going to worry
4 about -- we are going to take a narrow, rather than a
5 broad, view of "knowingly."
6 Is that your position? Do you agree that if
7 you simply look at the text of this statute without
8 considering congressional policy, you don't win?
9 MR. HEYTENS: We don't concede that the text
10 of the statute alone unambiguously resolves the issue in
11 our favor --
12 JUSTICE SOUTER: Well, but does it -- does
13 it even come close to supporting it? I mean, let's
14 start out with your analogous position. Your analogous
15 position is that the "knowingly" simply refers to the --
16 the -- the three acts which are specified by which the
17 identification can -- can be -- the misidentification
18 can be perpetrated.
19 Transfers, possesses, or uses. Could
20 Congress possibly have said, gee, he might not know that
21 he was acting to transfer or to possess or to us?
22 That's not a serious possibility. So, "knowingly" has
23 to refer to something more than the three possible acts.
24 And once you get beyond the three possible
25 acts, and you say, well, we're going to draw the line

1 between "without authority" and "another person" -- that
2 seems like an arbitrary line. And the arbitrariness of
3 the line seems even more obvious when the "without
4 lawful authority" is set off as a parenthetical. And
5 the real object of the statute -- the real -- the
6 operative description is "a means of identification of
7 another person."
8 That's why, it seems to me that, if you look
9 at the text, you could say, well, of course, the
10 "knowingly" has got to refer to everything that follows,
11 both "lawful authority" and "another person."
12 And that's why, it seems to me, if you're
13 going to win, you've got to win on the grounds that
14 Congress wouldn't have meant what seems so natural,
15 because Congress wanted to help victims, not defendants.
16 Where am I going wrong there, if I'm going
17 wrong?
18 MR. HEYTENS: Justice Souter, I -- I think,
19 as I said before, we do not contend that this statutory
20 text standing along ambiguously supports our position
21 and thus terminates the inquiry. And I certainly agree
22 that the purpose is an important part of our argument.
23 I think there are two important things
24 to just unpack briefly -- two of the things you said
25 there. Once you extend "knowingly" to -- I think the

1 significance is with the effect of once you extend
2 "knowingly," first to "lawful authority" and then to the
3 "use of identification." Once you extend it to "without
4 lawful authority," any conceivable argument that the
5 other side can have about criminalizing innocent or
6 inadvertent conduct disappears, because then at that
7 point the defendant knows specifically that he is acting
8 in manner that is contrary to law.
9 And then, second, if --
10 JUSTICE SOUTER: But Is it worth two years?
11 MR. HEYTENS: I think -- I think it is.
12 JUSTICE SOUTER: The only thing that we know
13 for sure is that Congress said it's not worth two years'
14 extra unless that of another person was involved. And
15 if that is what is so significant or necessarily
16 significant in getting a two-year add-on, then it seems
17 reasonable to suppose that Congress thought that the
18 state of mind had to touch that.
19 MR. HEYTENS: Well, I think, first of all,
20 at that point the defendant already has two different
21 culpable states of mind: He has the culpable state of
22 mind to commit the underlying felony, and he has the
23 culpable state of mind with regard to his crime.
24 Now, I agree with you, Justice Souter,
25 there's arguments you can make both ways as a matter of

1 policy. I think, though, some of the colloquies with my
2 colleague on the other side illustrate why Congress
3 would have made the decision it did, and it's all of
4 those cases where the defendant is reckless, where the
5 defendant is willfully ignorant, or the defendant simply
6 doesn't know because he --
7 JUSTICE SOUTER: All Congress has got to do
8 is to say "recklessly."
9 MR. HEYTENS: It's certainly true that
10 Congress --
11 JUSTICE SOUTER: It's an -- it's an accepted
12 term. Every -- well, almost everybody knows what it
13 means. There's a model Penal Code standard, and so on.
14 All they have to do is put the word "recklessly" in
15 there. It would cover every "knowingly" case. It
16 wouldn't omit anything that is covered by this, and it
17 would solve precisely that problem. And they didn't do
18 it.
19 MR. HEYTENS: I certainly agree there are
20 other ways that Congress could have written the statute
21 to make it clear. But I think it -- they could have
22 written the statute in a way that would be more clear,
23 both that would resolve the case in favor of Petitioner
24 and that would resolve the case in favor of us. So I
25 don't know how that cuts either way.

1 JUSTICE SCALIA: Well, I'll tell you what
2 cuts one way or another. I -- I find it -- I find it,
3 well, not surprising because I've heard -- I've heard
4 the government do it before. You acknowledge that this
5 is an ambiguous statute. That -- that on its face, it
6 -- it could mean the one thing or the other.
7 I would normally conclude from that that we
8 apply the rule of lenity. Since it could go either way,
9 let's assume that the defendant gets the -- you know,
10 the tie goes to the defendant. Why -- why shouldn't I
11 resolve it that way?
12 MR. HEYTENS: Well, under the rule of
13 lenity, Justice Scalia, the tie does go to the
14 defendant. But, as the Court has made clear again and
15 again, including in its opinion in Hayes yesterday, the
16 fact that the statutory text has a certain amount of
17 ambiguity isn't "off to the races" we trigger the rule
18 of lenity. The rule of lenity --
19 CHIEF JUSTICE ROBERTS: Should -- should it
20 -- is it time to revisit the Court's decision in Hayes?
21 (Laughter.)
22 MR. HEYTENS: The Court -- what the Court
23 said yesterday in Hayes is precisely what it had said
24 before in Muscarello. The rule of lenity comes into
25 play at the end of the process of statutory

1 interpretation, after you consider text, purpose,
2 legislative history, and all other --
3 JUSTICE BREYER: All that is true, and
4 that's actually where I was going. It -- it seems to me
5 where the ambiguity is precisely is that none of us
6 doubts, I don't think, that what Congress is after with
7 this extra two-year mandatory is identity theft.
8 And where the argument lies is between, did
9 Congress do this by punishing people only who intend to
10 engage in identity theft or people who, while not
11 intending to do so, have that effect? That's the issue.
12 MR. HEYTENS: I think that is the effect.
13 JUSTICE BREYER: And I don't think I can
14 resolve that one way or the other from anything you have
15 said. It's rather hard to say. So, therefore, suppose
16 I use the rule of lenity this way, which I am trying
17 out, I'm not buying it: In the case of
18 mandatory-minimum sentences, there is a particularly
19 strong argument for a rule of lenity with bite. And
20 that is because mandatory minimums, given the human
21 condition, inevitably throw some people into the box who
22 shouldn't be there. And if this person should be there
23 and we put him outside, the judge could give him the
24 same sentence anyway.
25 So the harm by mistakenly throwing a person

1 outside the box through the rule of lenity to the
2 government is small. The harm to the individual by
3 wrongly throwing him into the box is great. The rule of
4 lenity is, therefore, limited to a very small subset of
5 cases where it has particular force, but this is one of
6 them.
7 MR. HEYTENS: Justice Breyer, I -- I guess
8 what I would say first and foremost is I -- I think that
9 would be a fairly significant reconceptualization of the
10 purpose of the rule of lenity --
11 JUSTICE BREYER: That's why I raised it.
12 MR. HEYTENS: Right. The Court -- if I
13 could just explain why I think that --
14 JUSTICE SCALIA: You'd have to rename it the
15 rule of, you know, who gets hurt the most or something.
16 MR. HEYTENS: The rule of mandatory minimums
17 --
18 JUSTICE SCALIA: Not lenity.
19 MR. HEYTENS: The Court has said over and
20 over again that the two purposes of the rule of lenity
21 are providing fair warning to people before their
22 conduct subjects them to criminal punishment and to
23 demonstrate a proper respect for the lawmaking powers of
24 Congress. I don't think the fact that a statute imposes
25 a mandatory minimum triggers either one of those

1 concerns in and of itself.

2 JUSTICE GINSBURG: But what about the -- the

3 even division -- I think it's an even division, 3/3 --

4 is it a 3/3 split? And if you wanted one indication

5 that this statute is indeed grievously ambiguous, is

6 that that good minds have reached opposite conclusions

7 with well-reasoned decisions on both sides. So it seems

8 to me that this is a very strong argument that this is

9 an ambiguous statute, unusually so.

10 And I factor into that the answer that was

11 given to Judge Friedman's question, which astonished me

12 the first time I read it: That a prosecutor would say,

13 yes, the same -- no different degree of culpability.

14 One happened to get a fictitious number; the other

15 happened to get a real number. Two years for the second

16 one. There is no difference at all in the state of mind

17 of -- of the two defendants. That's -- that's why I

18 think the -- the ambiguity argument is strong. Why in

19 the world would Congress want to draw such a line?

20 MR. HEYTENS: Well, again, if I could --

21 there are several things there. If I could start with

22 the last one, why would Congress want to draw such a

23 line, I think the reason Congress would want to draw

24 such a line is for several reasons.

25 First and foremost is the fundamentally

1 victim-focused nature of this statute. And I -- I agree
2 that, at least on first blush, that Judge Friedman
3 colloquy does strike a number of people as implausible.
4 But I think if you step back, things like
5 that are not uncommon throughout the criminal law. The
6 -- the precise same objection could be made to the
7 existence of the felony-murder rule. Two people go out
8 to engage in precisely the same unlawful course of
9 conduct. Neither one of them wants to kill anybody.
10 Neither one of them wants anyone to get hurt. In one of
11 them the gun goes off, and in one of them the gun
12 doesn't go off. And one of them is now guilty of felony
13 murder, and the other one is guilty of -- of robbery,
14 which is admittedly a serious crime but not as serious
15 of a crime as murder. There are other examples of that
16 --
17 JUSTICE STEVENS: Yes, but in this
18 particular case, if you talk about identity theft, it's
19 inconceivable that the defendant would not know about
20 fact that there's another person involved. And so the
21 -- the mens rea issue is easy in this case. The only
22 time it's -- it's difficult is when he didn't -- when he
23 did not use it for an identity-theft purpose.
24 MR. HEYTENS: Well, I think I -- if I
25 understand the question correctly, I think there are

1 certainly many cases in which the manner in which the
2 defendant uses the means of identification will, itself,
3 provide powerful circumstantial evidence that he knows
4 there is, in fact, another person. Because otherwise
5 the actions won't make any sense.
6 JUSTICE STEVENS: And those are the category
7 of cases in which Congress wanted to have a more severe
8 penalty.
9 MR. HEYTENS: I certainly agree that those
10 are at least some of the category of cases. I -- what I
11 guess I disagree about is that those are the only
12 category of cases.
13 And if I -- if I could try another tack on
14 that, when you -- when you review the House report, the
15 legislative history that talks about the reason, the
16 background and need for the legislation, Congress
17 repeatedly trots out a great many statistics about the
18 number of people who are victimized by identity theft,
19 the amount of dollar harm that is caused to people and
20 businesses by identity theft, and --
21 JUSTICE STEVENS: And in any of those cases
22 did they talk about unknowing identity theft?
23 MR. HEYTENS: What I guess I am saying,
24 Justice Stevens, is in none of those cases does Congress
25 -- when it's trotting out those statistics -- does

1 Congress distinguish between situations in which the
2 victim was able to determine whether the defendant knew
3 that he existed. I mean --
4 JUSTICE SCALIA: Is this in the statute?
5 MR. HEYTENS: It is not in the text of the
6 statute, Justice Scalia.
7 JUSTICE SCALIA: Well, let's not say
8 Congress, then. Does -- does the Committee?
9 MR. HEYTENS: The Committee report, I
10 apologize, Justice Scalia. The Committee report --
11 JUSTICE STEVENS: You won't convince Justice
12 Scalia of this, but you might convince me.
13 (Laughter.)
14 MR. HEYTENS: Fair enough. What I'm saying
15 is, in the course of talking about the harm suffered by
16 victims, the amount of harm, in the course of talking
17 about the number of people who report that they were
18 victims, there is no distinction made whatsoever based
19 on the distinction Petitioner would like to draw. And I
20 think there's a very good, practical reason for that. A
21 person who discovers that there is a problem with their
22 Social Security number having been misused, for example,
23 by someone, that person is almost certainly not going to
24 be able to figure out whether the person who used their
25 Social Security number knows that they exist or not.

1 All they know is that problems are now showing up on
2 their credit report. All they know is they are getting
3 questions from the Social Security Administration about
4 this earned income that they, you know, perhaps haven't
5 paid taxes on, for example. The person who is in the
6 position of the victim is not well positioned to
7 determine how the perpetrator got hold of their
8 identifying information.
9 If I could go back --
10 CHIEF JUSTICE ROBERTS: Well, but in that
11 case, you tell them, look, the person's got 10 years.
12 Right? I mean, if they find the guy, he's going to face
13 up to 10 years for identity fraud.
14 MR. HEYTENS: He's going to face up to
15 10 years, Mr. Chief Justice. I think that's the
16 important thing. I think Congress rationally could have
17 been concerned that the guy is not actually going to get
18 10 years because there was evidence before them that the
19 person was not getting 10 years, that the person was
20 being, at least in the judgment of some people, not
21 receiving sufficient punishment to reflect that, that
22 there was a real person who was harmed by the conduct --
23 that was harmed by the conduct that eventually had an
24 adverse impact on him.
25 I think that fundamentally was the

1 motivating force behind the statute, the need to have a
2 statute that takes adequate and discrete account for the
3 presence of a real victim.
4 Now, the Petitioner, for example, refers to
5 the statement of having met the statute -- excuse me --
6 as having a mandatory minimum. It's not correct to say
7 the statute has a mandatory minimum. This statute has a
8 mandatory, discrete, prescribed punishment. It's not
9 two years up to something else. It's two years, and
10 exactly two years.
11 And I think that's highly significant.
12 Because I think what it says is that Congress thought
13 there was a discrete measure of punishment that was
14 appropriate to reflect the presence of a real victim.
15 The fact that there is a real victim gets you two years.
16 You get whatever else you get on your underlying felony,
17 which can take into account all sorts of other
18 considerations about your crime, but the fact that there
19 was a discrete victim is an independent harm to that
20 person that should be taken into account in imposing
21 criminal punishment.
22 JUSTICE SCALIA: You could also say you get
23 two years for knowing that there is a discrete victim.
24 I mean -- I -- you can describe it either way.
25 MR. HEYTENS: You certainly can.

1 JUSTICE SCALIA: And it makes sense either
2 way.
3 MR. HEYTENS: You certainly can describe it
4 either way, but I think in light of the concern that the
5 harms to real victims are not being adequately taken
6 into account, it doesn't seem to us to make sense to
7 make the presence of that additional punishment turn on
8 whether the defendant is specifically aware that the
9 victim existed, and I think at the end of the --
10 JUSTICE GINSBURG: You -- you gave earlier
11 the felony murder example of the one who -- the gun goes
12 off, he didn't mean to kill anybody. But I thought
13 homicide is -- it's an answer to your argument that this
14 statute is entirely victim-centered, because a person is
15 just as dead if he's the victim of a reckless driver as
16 a premeditated murder, and yet we certainly distinguish
17 the penalties in those cases, no matter that the harm
18 was identical.
19 MR. HEYTENS: We certainly do, Justice
20 Ginsburg, and we don't make the extravagant claim that
21 law doesn't look to relative moral culpability in
22 assigning criminal punishment. I'm responding to the
23 argument on the other side that that's all the law ever
24 looks to.
25 The law frequently looks to two different

1 things: It looks to relative culpability levels, but it
2 also looks at the existence of harm. If you want to
3 continue with the homicide example, if you look at moral
4 culpability, two people who both intentionally attempt
5 to cause the death of another human being without any
6 legal excuse for doing so, from a culpability
7 standpoint, have engaged in precisely the same level of
8 moral wrong, but law treats attempted murder and
9 completed murder extremely differently from one another.
10 And that's because in one case, as Justice Ginsburg
11 points out, you have a real victim. When the person
12 dies, there is a discrete level of harm to the victim
13 that is not -- that does not occur when, fortunately,
14 the person who tries to kill someone else fails.
15 And I think, at the end of the day, that is
16 the most important issue in this case. You see this
17 argument again and again and again, especially in the
18 circuits -- let me go back to Justice Ginsburg's point
19 about the three circuits that have gone either way.
20 First, as a -- as just a threshold matter,
21 this Court has said repeatedly that the fact that courts
22 have disagreed about the proper interpretation of a
23 statute doesn't suffice to trigger the rule of lenity,
24 because this Court almost never takes a case where there
25 is not a circuit split. And if you said the existence

1 of a circuit split makes the statute ambiguous would
2 mean that the criminal defendant wins every time; and
3 the Court has not said that.
4 But -- but also I think where those courts
5 have fundamentally gone wrong is they have essentially
6 said, this is a crime about theft; theft requires you to
7 know that there's a real owner; if you don't know
8 there's a real owner, that's not theft. And I think
9 where they went wrong was at the very beginning. Where
10 they went wrong at the very beginning is asking the
11 question of whether it would be natural to refer to
12 someone like Petitioner as a thief.
13 We think the more appropriate question, as
14 the district court said in Godin, is whether it would be
15 at all unusual to refer to the two innocent people whose
16 Social Security number and alien registration numbers
17 Petitioner used to facilitate his two underlying
18 felonies were the victims of identity theft. If --
19 CHIEF JUSTICE ROBERTS: Well, but the
20 problem with that is the statute says "identity theft";
21 it doesn't say anything about victims.
22 MR. HEYTENS: It certainty does, Mr. Chief
23 Justice, but it says "identity theft"; it says -- not
24 "theft," and I think the question is whether you refer
25 to those people as having had -- if identity theft

1 occurred in this case. And I think if you look at it
2 from the victim's perspective, which is we think the
3 perspective that Congress was looking at it from, the
4 answer to that question is yes.
5 And for that reason we ask that the judgment
6 of the Eighth Circuit be affirmed. Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Four minutes, Mr. Russell.
9 REBUTTAL ARGUMENT OF KEVIN K. RUSSELL
10 ON BEHALF OF THE PETITIONER
11 MR. RUSSELL: Thank you, Mr. Chief Justice.
12 I would like to address just a couple of
13 quick questions about the text, and then address a
14 couple of other issues about the purpose.
15 Justice Breyer, you asked if there were
16 examples of other statutes in which knowledge
17 requirements didn't extend to all the elements. The
18 government gave two examples. The first, Morissette, is
19 clearly an example with a jurisdictional element. All
20 of the circuit courts that say that the knowledge
21 requirement doesn't extend to "of the United States" do
22 so on the grounds that it's because there's a
23 jurisdictional element, and jurisdictional elements
24 don't extend -- don't require mens rea.
25 With respect to the Chin example, I do

1 acknowledge that there -- there is a decision that this
2 Court hasn't reviewed in which the D.C. Circuit said it
3 doesn't extend to the age of the victim. That falls
4 within a category of special cases where courts have
5 treated the victimization of children differently, in
6 part because it's so difficult and nearly impossible to
7 prove the defendant's knowledge of the age of the
8 victim.
9 That kind of practical barrier simply
10 doesn't exist here for all the reasons we've discussed
11 earlier about the government's ability to rely on
12 circumstantial evidence to show the defendant's state of
13 mind here.
14 JUSTICE GINSBURG: There aren't too many
15 15-year-olds who look like they're over 21?
16 MR. RUSSELL: That's right.
17 (Laughter.)
18 MR. RUSSELL: That's right. With respect to
19 the victim-focused nature of this, again, it's true that
20 -- that the criminal law takes into account both
21 defendant culpability and harm to victims, but the
22 ordinary resolution is to reserve punishment in the
23 criminal system for those who intend the harms that they
24 inflict.
25 There are, of course, exceptions like felony

1 murder. As the LaFave treatise points out, that kind of
2 treatment tends to be reserved for serious bodily injury
3 or death kinds of harm. And there's no reason to think
4 that Congress thought, although identity theft is
5 serious, that this fell within that kind of category of
6 exceptions. There are of course these other exceptions
7 where Congress relies on facts not known to the
8 defendant for sentencing enhancement, but as I've
9 mentioned earlier, it tends to write those statutes in a
10 way that makes clear that those enhancement factors are
11 separate and apart from the underlying events, and they
12 don't include an express mens rea requirement there.
13 And the government hasn't cited any case, any statute
14 that looks like this, that has been treated as a
15 sentencing enhancement provision.
16 Finally, with respect to the rule of lenity,
17 the government I think has acknowledged that the
18 statutory text is at least ambiguous with respect to
19 whether or not it compels their conclusion. They've
20 acknowledged that you can make policy arguments both
21 ways about what would be a good idea about how to treat
22 this kind of conduct. And I think, regardless of your
23 view of what the trigger of the rule of lenity is, this
24 is a classic case for it.
25 If Congress intended the government's

1 interpretation, the government is free to go back to
2 Congress, and there's every reason to believe that
3 Congress would be receptive. The problem with over-
4 construing a mandatory sentence or a mandatory minimum,
5 as Justice Breyer was alluding to, is that it does have
6 this particularly harsh effect, and one that is, as a
7 practical matter, hard to undo in the legislative
8 process, which as the Court has recognized, is another
9 function served by the rule of lenity.
10 If the Court has no further questions.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.
13 (Whereupon, at 12:09 p.m., the case in the
14 above-entitled matter was submitted.)
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