

No. 19 - _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

HOWARD WEBBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a defendant commit aggravated identity theft in violation of 18 U.S.C. § 1028A by using another person's identifying information with that person's consent, as the majority of circuits, including the Ninth Circuit, have held? Or is consent a defense to aggravated identity theft, as the Seventh Circuit held in *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc)?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties.

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OPINION BELOW

The Ninth Circuit's decision below (*United States v. Webber*, 741 Fed.Appx. 511, No. 17-10242 (9th Cir. Nov. 1, 2018) (mem.)) was not published.

JURISDICTION

The Ninth Circuit issued its decision on November 1, 2018. App. 001a. Webber did not file a petition for rehearing or rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 18 United States Code Section 1028A(a)(1) provides:

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

I. First Indictment and Government Appeal

Howard Webber was initially charged, together with co-defendant Clifford Bercovich, in a 31-count indictment alleging aggravated identity theft, mail fraud, and conspiracy to commit mail and wire fraud. Indictment 2-8. The indictment alleged a scheme to defraud in which Webber obtained personal information from inmates and transcribed it onto an information sheet; Webber or someone assisting him transmitted the information to Bercovich; and Bercovich used the information to file false tax returns with fictitious wage figures to fraudulently obtain tax

refunds. *Id.* The indictment did not allege that Webber or Bercovich used the inmates' identifying information without their consent.

The district court dismissed the aggravated identity theft charges, finding that the government was required to allege that the defendants had used the inmates' identifying information without their consent. App. 006a. The government filed an interlocutory appeal. The Ninth Circuit issued an unpublished memorandum disposition reversing the district court. App. 004a. Webber and Bercovich jointly petitioned this Court for a writ of certiorari. This Court ordered the government to respond, and Webber and Bercovich replied to that response. This Court then denied the petition.

II. Superseding Indictment

The government obtained a superseding indictment. While alleging fewer total counts, the superseding indictment still charged Webber and Bercovich jointly with mail fraud and conspiracy to commit mail and wire fraud and charged Webber and Bercovich separately and individually with aggravated identity theft under Section 1028A. Superseding Indictment 2-7. The five Section 1028A counts against Webber were based on tax returns filed for inmates Jermaine Terrell, Norvell Coleman, and Lamar Clincy under the tax scheme alleged in the first indictment. *Id.* The superceding indictment, like the first indictment, did not allege that Webber or Bercovich used the inmates' identifying information without their consent.

Bercovich pleaded guilty, cooperated with the government, and testified against Webber at trial.

III. Trial and Sentence

The evidence at trial established that Webber, who was in custody for the bulk of the relevant time-period, recruited inmate-clients for whom Bercovich would prepare tax returns. Webber and Bercovich also hired inmate-recruiters. If the inmate-clients reported yearly income of \$7,000, they would be entitled to an IRS tax credit, from which Webber, Bercovich, and the inmate-recruiter would take a fee. Webber and the inmate-recruiters used an information sheet to collect the inmate-clients' personal information for Bercovich's use in preparing their taxes. The inmate-clients wrote their own names, dates of birth, and social security numbers on the information sheets. C.A. E.R. 435, 1055-57. Many of the inmate-clients were also inmate-recruiters. C.A. E.R. 815, 1048.

At the close of evidence, the district court instructed the jury that, with respect to the aggravated identity theft counts, "The government need not establish that the means of identification of Jermaine Terrell, Norvell Coleman, or Lamar Clincy was stolen." C.A. E.R. 79. The jury convicted on all counts. Webber filed a motion for judgment of acquittal, which was denied.

The district court imposed a 60-month sentence on the conspiracy/fraud counts, followed by 24 months on the aggravated identity theft counts. Webber is currently serving that 84-month sentence.

IV. Second Appeal

Webber appealed his conviction and sentence. The Ninth Circuit affirmed in an unpublished memorandum disposition. That court had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit, as well as the majority of the circuits to consider the issue, have held that a defendant commits identity theft by using another person's identifying information to commit an enumerated felony, even if acting with that person's consent. But the Seventh Circuit, in a unanimous *en banc* opinion, has taken the opposite view. *United States v. Spears*, 729 F.3d 753, 758 (2013) (*en banc*). In the Seventh Circuit, consent is a defense to aggravated identity theft. The split on the meaning of 18 U.S.C. § 1028A is particularly important because the statute carries an unusual mandatory minimum consecutive two-year sentence.

The interpretation of Section 1028A advanced by the government in Webber's trial and appeals and adopted by the Ninth Circuit is striking in its breadth. As the Seventh Circuit put it: the government's reading of Section 1028A would "require a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction[.]" *Spears*, 729 F.3d at 756. Webber is this hypothetical tax-return preparer. He was charged for assisting Bercovich with filing fraudulent tax returns for the inmate-clients, who appear to have consented to the filing of those returns by providing their information and recruiting others. This was fraud—for which Webber was convicted—but it was not identity theft because the inmate-clients gave their consent to Webber and Bercovich to file the returns.

Had Webber been charged in the Seventh Circuit, he would have still faced the mail and wire fraud charges but not the aggravated identity theft charges. He would, therefore, be serving a 60-month sentence instead of the 84 months he is currently serving. He faces this additional 24-month penalty—not because

Congress clearly defined the charged conduct as aggravated identity theft—but because “clever prosecutors riffing on equivocal language” have stretched the statute to include his conduct. *Spears*, 729 F.3d at 758. This Court’s review is needed to resolve the circuit split on this important issue.

I. There is a clear circuit split on whether consent is a defense to aggravated identity theft under Section 1028A.

The circuit courts have been unable to agree on whether a defendant who uses another person’s identity with that person’s consent may be convicted of aggravated identity theft. Two clauses of Section 1028A have been analyzed: the requirement that a means of identification be used “without lawful authority,” and the requirement that the means of identification be “of another person.” 18 U.S.C. § 1028A(a)(1). But the central issue remains the same: Is consent a defense to aggravated identity theft under Section 1028A?

A. In the majority of circuits, including the Ninth Circuit, consent is not a defense to aggravated identity theft under Section 1028A.

The majority of circuit courts to consider the issue have held that consent is not a defense under Section 1028A. These decisions have examined the statutory phrase “without lawful authority” and held that a person cannot confer “lawful authority” by consenting to the use of his or her identifying information to commit an illegal act. As the Eighth Circuit held, “whether [a defendant] used [another person’s] name without permission . . . or he obtained . . . consent in exchange for illegal drugs, [he] acted without lawful authority when using [the] identification.”

United States v. Hines, 472 F.3d 1038, 1040 (8th Cir. 2007). Other circuits have followed this reasoning. See *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499-

501 (1st Cir. 2011); *United States v. Otuya*, 720 F.3d 183, 189 (4th Cir. 2013); *United States v. Mahmood*, 820 F.3d 177, 189 (5th Cir. 2016), *cert denied*, 137 S.Ct. 122; *United States v. Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013); *United States v. Hurtado*, 508 F.3d 603, 608 (11th Cir. 2007), *abrogated by Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *United States v. Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013); *see also United States v. Naranjo*, 645 Fed.Appx. 50, *52-53 (2d Cir. April 6, 2016) (unpublished); *but see United States v. Miller*, 734 F.3d 530, 542 (6th Cir. 2013) (finding Section 1028A ambiguous on related grounds and applying Rule of Lenity).

Here, the district court dismissed the aggravated identity theft counts in the first indictment because the government did not allege that Bercovich and Webber acted without the inmates' consent. App. 006a. In reversing that decision, the Ninth Circuit issued an unpublished memorandum disposition relying on its per curiam decision in *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (2015) (per curiam), *cert denied*, 136 S.Ct. 283. App. 004a.

In *Osuna-Alvarez*, the defendant was charged with aggravated identity theft for using his twin brother's passport to enter the United States. The twin brother had been complicit in the scheme. 788 F.3d at 1184. On appeal, the defendant argued that, because he had his brother's consent, he did not violate Section 1028A. *Id.* The Ninth Circuit affirmed. *Id.* at 1185. It examined only the "without lawful authority" statutory language and held that, "regardless of whether the means of identification was stolen or obtained with the knowledge and consent of its owner, the illegal use of the means of identification alone violates § 1028A." *Id.* at 1185-86.

In Webber's second appeal, he preserved the issue raised in his first appeal, asking the Ninth Circuit to reverse because the inmate-clients consented to the use of their information. Webber C.A. Br. 56. The Ninth Circuit affirmed in an unpublished memorandum disposition that did not address consent. App. 001a.

B. In the Seventh Circuit, consent is a defense to aggravated identity theft.

The Seventh Circuit has taken a different view from the Ninth Circuit and other circuits in a unanimous en banc opinion. *Spears*, 729 F.3d 753. In *Spears*, the defendant created a counterfeit handgun permit using Tirsah Payne's real name and birthdate. *Id.* at 754. Payne used the counterfeit permit to try to purchase a gun, which led to Spears being convicted of aggravated identity theft. *Id.* at 754-55. On appeal, Spears argued that he did not violate Section 1028A because Payne consented to the use of her information.

In its decision, the Seventh Circuit focused, not on the meaning of "lawful authority," but on the requirement that the identifying information be "of another person." *Spears*, 729 F.3d at 755. Then-Chief Judge Easterbrook, writing for the court, first addressed the government's contention that "of another person" simply requires that the means of identification belong to a person other than the defendant. The court noted the broad reach of the statute under that interpretation:

If the prosecutor is right, § 1028A acquires a surprising scope. It would, for example, require a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction, because the return is transferred to the IRS, concerns a person other than the preparer, includes a means of identifying that person (a Social Security number), and facilitates fraud against the United States (which 1028A(c)(4) lists as a predicate crime).

Id. at 756.

The Seventh Circuit relied in part on the title of the statute, “Aggravated identity theft,” noting that this Court has also “used the caption of § 1028A to help explicate its text.” *Spears*, 729 F.3d at 756 (citing *Flores-Figueroa*, 556 U.S. at 655). The court drew a distinction between Section 1028A and a companion statute, 18 U.S.C. § 1028, entitled “Fraud and related activity in connection with identification documents.” *Id.* In the Seventh Circuit’s view, the difference between identity theft and identity fraud “helps resolve the ambiguity” of the text. *Id.*

The transaction between Spears and Payne, according to the Seventh Circuit, was identity *fraud* under Section 1028(a). But “instead of using § 1028, the prosecutor charged Spears under § 1028A—which, if it means what the prosecutor says, would convert most identity fraud into identity theft and add a mandatory, consecutive, two-year term to every conviction, even though § 1028 lacks any equivalent sentencing provision.” *Spears*, 729 F.3d at 757.

The court also looked to the statutory structure, finding justification there for Congress’s decision to impose more stringent punishment on those who commit identity *theft* instead of identity *fraud*. Identity theft “carries a harsher sentence” because Section 1028A concerns itself with “a short list of serious crimes” and because “identity *theft* has a victim other than the public at large.” *Spears*, 729 F.3d at 757.

The court consulted Section 1028A’s legislative history as well. “*Flores-Figueroa* observed that the examples in the legislative history of § 1028A involve people injured when a third party used their names or financial information (credit

card and Social Security numbers) without their consent.” *Spears*, 729 F.3d at 755 (citing *Flores-Figueroa*, 556 U.S. at 655). This indicates that Congress intended for consent to be a defense. Moreover, in briefs filed before this Court in *Flores-Figueroa*, the government gave “several reasons why the Solicitor General concluded that identity-theft crimes entail a victim whose information has been used without consent.” *Id.* at 757.

The *Spears* court concluded that, “the most one could say for the United States’ current position is that ‘another’ in § 1028A(a)(1) is ambiguous,” which required ruling for the defendant under the Rule of Lenity. 729 F.3d at 757. The court explained:

Crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language. A reasonable person reading § 1028A(a)(1) would not conclude that Congress has definitely used the word ‘another’ to specify every person other than the defendant, as opposed to a person whose information has been misappropriated.

Id. at 758.

II. This case is an appropriate vehicle to address the question presented.

Webber’s case would be an appropriate vehicle for the Court to grant certiorari and decide the question presented. To the extent that facts are relevant to the question presented, those facts have been fully developed at trial. There has also been a district court decision on a motion to dismiss on the question presented, App. 006a, jury instructions given that are inconsistent with a consent defense, C.A. E.R. 79, and two decisions from the Ninth Circuit, App. 001a, 004a.

In opposition to Webber’s first petition for a writ of certiorari, the government argued that the interlocutory character of the appeal at that time counseled against

review. Br. in Opp. 5-6. It noted that, if Webber and Bercovich “are convicted, petitioners can present their challenge to the Section 1028A charges, along with any other challenges to other convictions, in a single petition for a writ of certiorari following final judgment.” *Id.* at 6. Webber’s case is now in that posture. He has been convicted after trial, and his appeal is no longer interlocutory. His case presents a straightforward legal question that has been fully litigated below.

III. This petition raises an important question of federal law.

This petition is particularly important because the circuit split it identifies raises due process issues. To satisfy due process, a statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As the *Spears* court recognized—and as the circuit split demonstrates—an ordinary person cannot be expected to understand what Section 1028A prohibits. *See* 729 F.3d at 758. This is especially true where the conduct prohibited depends on the circuit in which the defendant is prosecuted.

The statute’s lack of clarity gives rise to another problem: “clever prosecutors riffing on equivocal language” in charging crimes. *Spears*, 729 F.3d at 758. The Court should grant Webber’s petition to ensure that Congress, not the ingenuity of prosecutors, determines whether a person faces criminal prosecution.

Resolving the circuit split is also important because its implications extend beyond criminal law to immigration. A person may be deported as an aggravated felon if convicted of a crime enumerated in 8 U.S.C. § 1101(a)(43). One such enumerated crime is a “theft offense.” 8 U.S.C. § 1101(a)(43)(G). The BIA has

construed “theft offense” to require a taking without consent. *Matter of Garcia-Madruga*, 24 I&N 436, 440 (B.I.A. 2008). Thus, arguably, only a person convicted of aggravated identity theft in the Seventh Circuit, where consent is a defense, should be deportable as an aggravated felon under Section 1101(a)(43)(G). This issue has already arisen in the First Circuit, *United States v. Soto-Mateo*, 799 F.3d 117, 123 (1st Cir. 2015), *cert denied*, 136 S.Ct. 1236, and will surely recur.

Clarifying Section 1028A is important to upholding due process for criminal defendants. The circuit split also implicates immigration law. And it matters deeply to those who, like Webber, are serving two additional years for aggravated identity theft when they would not be doing so if prosecuted in the Seventh Circuit. This petition presents an important question that this Court should resolve.

CONCLUSION

For the aforementioned reasons, the Court should grant this petition for a writ of certiorari and reverse the Ninth Circuit.

Respectfully submitted,

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January 30, 2019

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