

APPENDIX

(1028A Charging Memorandum)



Memorandum

Subj: Charging 18 U.S.C. § 1028A	Date: Updated as of 2016
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To: AUSAs
From: Andrew Brown

Because 1028A carries a mandatory minimum, mandatory consecutive prison term of two years, it is one of the most powerful statutes available to us in fraud cases; it gives us plea bargaining leverage that can be used to resolve cases early, or at least determine which cases are actually going to trial, obviating useless trial preparation. Section 1028A is undercharged, however, because too many AUSAs do not understand the statute, and others are overly cautious in their charging decisions.

Section 1028A Does Not Require Identity Theft

In particular, many AUSAs erroneously think it requires identity theft, doubtless because Section 1028A is titled, “Aggravated identity theft.” The plain language of the statute itself, however, establishes that no identity theft is required. In 2015, the Ninth Circuit held in U.S. v. OsunaAlvarez, 788 F.3d 1183, that identity theft was not required for a 1028A conviction. In that case, the defendant used his twin brother’s passport with his brother’s permission. Defendant argued therefore that the “without lawful authority” element had not been met. After canvassing nine other circuits,

App. 2

all of which had rejected this argument, the Ninth Circuit joined them and upheld defendant's conviction. Id. at 1185. Cf., United States v. Abdelshafi, 592 F.3d 602, 608 n.4 (4th Cir. 2010) (noting that the title of § 1028A does not limit the plain meaning of the text of the statute, which does not require theft); United States v. Hurtado, 508 F.3d 603, 607 (11th Cir. 2007) (rejecting the defendant's argument that in order to prove the "without lawful authority" element of § 1028A(a)(1), the government must show that he stole the identification documents), overruled on other grounds by Flores-Figueroa v. United States, 556 U.S. 646 (2009). Recently, the Ninth Circuit model jury instruction has been modified to make explicit that no identify theft is required. It provides that the elements of Section 1028A require only the following:

First, the defendant knowingly [transferred] [possessed] [used] without legal authority a means of identification of another person; and

Second, the defendant knew that the means of identification belonged to a real person; and

Third, the defendant did so during and in relation to [specify felony violation].

The Government need not establish that the means of identification of another person was stolen.

Ninth Circuit Model Instruction 8.83 (modified to omit terrorism prong). Thus, merely using another person's name "without legal authority" during and in relation to a predicate felony satisfies the statute.

Not “Stolen” But “Without Lawful Authority”

Section 1028A obviously applies when someone’s name or other means of identification is used without their knowledge or consent. But it also applies when that person consents to the use of his identity, but the manner of use of that identity is not lawful. E.g., United States v. Rentana, 641 F.3d 272, 275 (8th Cir. 2011) (“the person assigned a particular social security number does not possess the lawful authority to authorize other persons to represent that number as their own in order to commit other crimes.”).

In United States v. Mobley, 618 F.3d 539 (6th Cir.2010), the defendant admitted using his wife’s name and social security number to submit fraudulent credit applications, but he argued that the district court lacked a sufficient factual basis to accept his guilty plea to Section 1028A because it did not determine whether he acted “without lawful authority” when he used his wife’s social security number. The Sixth Circuit summarily rejected this argument: “That a defendant’s use of any social security number—including his own—to submit fraudulent credit applications must be ‘without lawful authority’ is obvious.” *Id.* at 547–48. There was no need to determine whether the defendant had his wife’s permission to use her social security number because using any means of identification to commit a fraud is using it “without lawful authority.”

In Abdelshafi, the defendant ran a medical transportation service that subcontracted work from an HMO. The HMO provided Abdelshafi with the identifying

App. 4

information of patients he was to transport. But Abdels-shafi used this identifying information to bill also for transportation that never occurred, and was convicted of 1028As for doing so. On appeal, he argued that he could not be guilty of 1028A because he possessed the information with lawful authority as it had been turned over to him by the HMO for use in his business. 592 F.3d at 605-6. While his possession of the information was lawful, the Fourth Circuit rejected his argument because his use of the information was without lawful authority when he submitted it in fraudulent bills. *Id.* at 608.

Under these cases, the critical question is the use to which the means of identification was directed. But almost by definition this will be resolved in the government's favor: 1028A only applies when the means of identification is used or possessed "during and in relation to" certain enumerated felonies; and the case law says you cannot use or possess a means of identification with "lawful authority" when you use it to commit a crime.

The "Means of Identification" Requirement

"Means of identification" is defined in Section 1028(d)(7) as:

any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual

The most common means of identification is a name, which also includes a forged signature even if it is

illegible. United States v. Blixt, 548 F.3d 882, 887-88 (9th Cir. 2008). The Ninth Circuit has held that a bank account number and routing number are means of identification, which is very useful in counterfeit check cases. United States v. Alexander, 725 F.3d 1117, 1120 (9th Cir. 2013) (holding that a counterfeit check bearing the bank routing and account number of the victim, along with the victim’s name, supported a 1028A conviction: “a ‘routing code’ expressly meets the definition of a ‘means of identification’ under § 1028(d)(7)(C)”) (I contend the quoted language is a misreading of the statute, but it is in a unanimous, published opinion, so you may wish to follow it, and not me). Any information that uniquely identifies an individual will constitute a means of identification, and the defendant does not have to have all of it. For example, the name “Andrew Brown” is hardly unique, nor is my date of birth, but *both* are means of identifying me even if the defendant only has one and not the other. The Eleventh Circuit has held that usernames and passwords together are a means of identification, United States v. Barrington, 648 F.3d 1178 (11th Cir. 2011) (“the usernames and passwords, considered together, constituted a ‘means of identification’ for those specific individuals”), but logically that holding would apply to the usernames alone, too.

“Another Person” Requirement

Obviously, this must be someone other than the defendant. Businesses and corporations are not persons, and so do not count. Dead persons are still persons,

App. 6

however, and so come within the statute. United States v. Maciel-Alcala, 598 F.3d 1239, 1242-48 (9th Cir. 2010). As suggested by the cases described above, co-conspirators are also persons.
