

## Fixing Flores Assuring Adequate Penalties for Identity Theft and Fraud

By Janice Kephart

This *Backgrounder* proposes statutory language fixes to federal identity theft and aggravated felony language in 18 U.S.C. §§ 1028 and 1028A to reverse the practical implications of the May 2009 Supreme Court ruling in *Flores-Figueroa v. United States*.<sup>1</sup> *Flores* crippled prosecutors' longstanding practice of using the aggravated identity theft statute by requiring that prosecutors now also prove that a defendant knew he was using a real person's identity information, as opposed to counterfeit information not connected to an actual person. The statute is an important tool for immigration enforcement. Proving a defendant's knowledge about his crime is always difficult, and impossible in some cases, even where there is substantial harm and clear victims. This is especially the situation with illegal aliens who buy identity information from third parties. The inevitable result of the *Flores* decision is to enable perpetrators an easy defense and to tie prosecutors' hands. The defendant in the case was an illegal alien working at a steel plant in Illinois.

The fixes proposed in this report attempt to encapsulate the original intent of Congress when it broadened federal criminal identity theft law in 1998 and added mandatory sentencing guidelines for identity theft in 2004. Ensuring adequate penalties for the ever-evolving crime of identity theft and fraud and better protecting victims of this pervasive crime was of paramount importance both times federal law was amended. *Flores* identified an inadvertent flaw in the statutory language and has now put the responsibility on Congress to fix the language or deal with the untenable result of an additional burden of proof on prosecutors, resulting in fewer identity theft cases being prosecuted or more defendants being let off the hook for serious crimes due to a legal loophole.

This report:

- Provides an independent analysis of 250 identity theft and fraud cases prosecuted in every state by the Department of Justice and sentenced under the aggravated identity theft statutes (Sections 1028 and 1028A) within the past three years.
- Reviews legislative history of both Sections 1028 and 1028A.
- Analyzes the Circuit Court and Supreme Court cases that led to the current interpretation of Section 1028A.
- Proposes minor but important changes in the statutory language for Sections 1028 and 1028A.

We conclude that, while the Supreme Court's decision in the *Flores* case arguably may be supported by the plain language of Section 1028A, the decision goes against a clear reading of congressional intent. More importantly, the practical result of *Flores* will be to chill prosecutors' use of the aggravated identity theft felony charges. Perpetrators of identity fraud will be emboldened due to less concern about penalties and culpability, while victims and the federal government will have less effective tools to combat the ever-proliferating means of identity fraud, especially within the context of immigration violations and illegal hiring practices.

Congress should act to correct the *Flores* interpretation of 18 U.S.C. § 1028A quickly. This *Backgrounder* shows a way forward.

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*Janice Kephart is the Director of National Security Policy at the Center for Immigration Studies.*



**Recommendation:** Amend Title 18, United States Code, Chapter 47, Sections 1028 and 1028A to (1) ensure persons who commit identity theft or fraud for the purpose of unauthorized employment or hiring or harboring unauthorized employees are punishable under both Sections 1028 and 1028A; (2) expand the mandatory aggravated identity theft felony charge under Section 1028A to include fraud relating to a means of identification, identity documents, or authentication features, whether genuine or false; (3) make clear that a defendant who possesses or otherwise uses identity information not his own without lawful authority and in the commission of another felony is still punishable for aggravated identity fraud, regardless of the defendant's "knowledge" of the victim.

## Introduction

Identity fraud can be perpetrated by anyone. Immigrant or American, those who commit identity fraud mutilate credit ratings and reputations, empty bank accounts, charge up credit cards, file false tax returns, submit false medical claims, commit a variety of immigration violations, and assume innocent identities for criminal or terrorist purposes. The Senate Judiciary Subcommittee on Technology, Terrorism, and Government Information amended the federal document fraud and identity theft statute, 18 U.S.C. § 1028, in 1998 to define identity *theft* as assuming an entire identity and identity *fraud* as assuming pieces of an identity compiled with other real or false information to create a new identity. Identity fraud in this report refers to both identity theft and identity fraud, as "theft" is a subset of "fraud." Identity fraud traditionally has been considered to encompass those acting either purposefully or in reckless disregard of the fact that the identity information belongs to a real person. Either way, the crime and the harm remain; there is always a victim of some kind with identity fraud.

Illegal aliens engage in varieties of identity fraud Americans are unlikely to commit, including illegally applying for U.S. IDs such as passports or driver's licenses, as well as using those IDs to obtain jobs they are not authorized to have.

Since 1998, Congress has recognized the growing threat of identity crime to our citizens, our economy, and our national security. In 1998, Congress amended the document fraud criminal statute of 18 U.S.C. § 1028, "Fraud and related activity in connection with identification documents, authentication features, and information," to include misuse of identity *information* as a crime, not just identity *documents*. The goal was to provide federal prosecutors with adequate tools to en-

sure that identity fraudsters are charged and go to jail for their crimes, while victims are able to get restitution and re-establish their reputations. In 2004, Congress passed the Identity Theft Penalty Enhancement Act. The act was aimed at ensuring that identity thieves committing substantial felonies, including immigration violations, received mandatory sentencing of another two years (or five for terrorism offenses) after serving time for the underlying crime related to the identity theft.

The Aggravated Identity Theft statute, as it is commonly known, has been used extensively by prosecutors against all varieties of identity fraudsters. In our research of 250 aggravated identity theft cases prosecuted by U.S. Attorneys in 48 of 50 states since February 2006, we found that these cases cost America over one billion dollars and that 46 of the 250 cases we reviewed, or 18 percent, stated clearly that the defendants were foreign-born. Within those 46 cases (14 had multiple defendants), 64 defendants were illegal aliens and 15 were resident aliens. In six other cases, the defendant's immigration status was unclear.

Government and media reporting consistently indicate that the breadth and depth of identity crimes is substantially expanding. All states but Vermont and the District of Columbia have specific identity theft laws on the books. On the federal level, the Federal Trade Commission's national Identity Theft Data Clearinghouse currently holds more than 1.6 million victim complaints about identity theft.<sup>2</sup> According to a 2007 U.S. Department of Justice National Crime Victimization Survey (NCVS) of 1.6 million monetary victims surveyed in 2005, 1.1 million had suffered misuse of personal information and 790,000 had suffered both misuse of identity information and financial loss.<sup>3</sup> Interestingly, where identity information was used — as was the case in *Flores* — these households lost about three times as much money as did those where no personal information was stolen, about \$4,850, on average.<sup>4</sup> Another assessment of the costs concluded that:

*Identity theft, the biggest source of U.S. consumer fraud, costs a record \$56.6 billion in cash, goods, and services. Two-thirds of victims have no out-of-pocket expense (because banks and credit card companies seldom ask victims to cover any charges); for about 3 million victims, the average cost of repairing their credit was nearly \$1,200; and for all victims the average time to set the record straight was 40 hours.<sup>5</sup>*

The victim numbers remain high despite technological advances curbing some types of identity theft

and the fact that law enforcement action was in high gear at least through the end of 2008.<sup>6</sup> (There are no reports yet on 2009 law enforcement numbers.) In October 2008, the President's Identity Theft Task Force released its annual report making recommendations for combating identity theft. The 31 recommendations were divided into topic areas including prevention, victim assistance, and law enforcement. The law enforcement section includes the most recommendations, with 14. These recommendations assert that a multi-agency, organized law enforcement approach is essential to fighting identity theft and supporting victims. The first recommendation is to recognize the urgency of establishing federal resources in one place with a National Identity Theft Law Enforcement Center. In addition to organizing investigations across agencies, U.S. Attorneys and state prosecutors need to "increase prosecutions of identity theft" and, to support that effort, close gaps in the federal statutes used to prosecute ID theft-related offenses.<sup>7</sup>

In general, the U.S. Secret Service takes the lead for financial crimes, along with the FBI and Immigration and Customs Enforcement (ICE);<sup>14</sup> other agencies also have some identity theft jurisdiction. With regard to the common scenario, presented in *Flores*, of an illegal alien using identity fraud to get in, stay in, or work in the United States, the President's 2008 Identity Theft Task Force report lauded the work of ICE.

In a section titled "Identity Theft by Illegal Aliens," the Task Force highlighted two key priorities. First, the expansion of ICE's identity fraud investigative efforts, noting that ICE's Identity and Benefit Fraud Program and its Document and Benefit Fraud Task Forces (DBFTFs), targeting counterfeiting houses that supply identity information to illegal aliens, were increasingly successful.<sup>8</sup> Only created in 2006, there are now 17 task forces nationwide.<sup>9</sup> The DBFTFs target the criminal organizations that facilitate the "unlawful entry, residence, and employment of illegal aliens" by partnering with other agencies such as the Department of Labor, the Social Security Administration, the U.S. Postal Service, USCIS, the Department of State, and various state and local law enforcement agencies.<sup>10</sup>

In addition, the President's Identity Theft Task Force noted that ICE's Worksite Enforcement Program targets employers who knowingly violate federal law to recruit and hire illegal aliens and encourage document fraud and identity theft to support their workforce. The program has been used to tap the know-how of the FTC, the SSA, OIG, and state labor agencies to bust employ-

ers. The strong indication is that the ICE task forces (in the last administration where they received significant leadership support) have helped spur arrests, indictments, and convictions across the country.

U.S. Attorney's Offices and state prosecutors all have a responsibility to enforce identity theft laws within their jurisdictions, and of course not all of these cases involve illegal aliens. Regarding cases that met the threshold for federal or state prosecution, fiscal year 2006 (plus the first half of 2007) saw 1,609 convictions on state and federal indictments against illegal aliens and counterfeiters.<sup>11</sup> For just federal indictments representing both American and foreign-born defendants committing identity fraud, in 2006 alone there were 1,946 indicted and 1,534 convicted. In fiscal year 2007, 2,470 defendants were charged and 1,943 were convicted. This was a 26.9 percent increase in numbers of defendants charged, and a 26.7 percent increase in the number of defendants convicted of identity theft.<sup>12</sup> Overall, while these statistics are not directly comparable, there is strong evidence that the illegal alien population absorbs a significant amount of law enforcement and prosecutorial resources. Clearly, having the laws on the books to support prosecutorial activity is essential.

## Analysis of Prosecutions

While the President's Identity Theft Task Force reported in 2008 that a total of 4,416 defendants were charged with federal identity theft under both Sections 1028 and 1208A and 3,477 were convicted in the two-year period of 2006-2007, our research narrowed the field to only those charged with aggravated identity theft under 18 U.S.C. § 1028A(a)(1) from 2006 to 2009 in order to get a more comprehensive analysis of what types of cases were pursued using Section 1028A, and the facts involved in these cases. Data from 2009 were included in order to report the most current cases. The analysis encompassed a total of more than 250 aggravated identity theft prosecutions from 2006 to 2009.<sup>13</sup>

Some of our key findings:

- **Financial Harm.** Over one billion dollars in harm (\$1,036,725,413.35) from 250 cases, or an average of \$5,183,627 per case. \$944,536,946.99 of the financial harm was in fraudulent medical billings. The medical cases were comprised mostly of two cases, one of which was worth \$148 million with three defendants,<sup>14</sup> and a \$793 million case involving a conspiracy of 44 defendants.<sup>15</sup>

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- **Violent Crime.** In six cases the defendant's purpose was to use the identity in furtherance of a violent crime. Five of these involved foreign nationals, all of whom were illegal. Three involved homicides<sup>16</sup> and two were linked to drug-related trafficking.<sup>17</sup>
  - **Document Fraud.** 126 cases involved use of physical IDs to support the identity theft or crime; only 112 were based wholly on computer hacking or some form of digital identity theft. The remaining 12 cases were unclear regarding the type of identity information stolen.
  - **Foreign Nationals.** In total, 197 (79 percent) of these cases appear to have involved American citizens, while 46 (18 percent) involved foreign nationals.<sup>18</sup> Seven of these 243 cases involved both foreign nationals and American citizens. The remaining seven cases did not indicate the defendants' legal status.
    - Illegal immigrants comprise less than 4 percent of the U.S. population, indicating that illegal alien use of identity fraud is significantly higher than their population should otherwise suggest, with 18 percent of the cases reviewed here involving illegal aliens.
    - Of the 46 cases involving foreign nationals, 36 (78 percent) involved illegal aliens, while the remaining 10 (22 percent) involved those with legal or unstated status in the United States.
    - Within those 46 cases, 64 defendants were illegal aliens and 15 were resident aliens (14 cases had multiple defendants).
    - Just seven worksite enforcement cases (6.4 percent of illegal alien cases) included 43 total defendants, corresponding to 38 percent of illegal defendants.<sup>19</sup> Of these 43 defendants, 26 were illegal workers and eight were resident aliens involved in management. Another nine defendants were Americans in management positions.
    - Illegal aliens also commit substantial financial identity fraud. For example:
      - Fadi Kouriani, a Lebanese national who had entered illegally from Mexico, caused about \$1.7 million in identity fraud damage by stealing Social Security numbers, adding fictitious names, and bilking credit card companies.<sup>20</sup>
      - Ali Hammoud, another Lebanese man, tried to defraud the state of Florida for \$5.7 million and was successful in acquiring \$3.9 million. The day after his theft, he tried to board a plane to Lebanon. There was significant evidence linking him to Hezbollah. He had also charged \$900,000 in unrecoverable checks for cars, trucks, and off-road vehicles to be delivered to the Middle East.<sup>21</sup>
      - A Romanian national used a phishing scam involving 7,000 individuals, costing those victims a total of \$700,000, and was sentenced in May 2009.<sup>22</sup>
      - Two Kenyan sisters who came to the United States on student visas stole personal information from about 500 nursing home victims in 27 states, filing 540 fraudulent tax returns worth \$15 million and receiving at least \$2.3 million. In 2008, one sister was sentenced to 14 years in jail with no parole, the other five years.<sup>23</sup>
- We found that foreign nationals replicate the identity-fraud crimes Americans commit, except perhaps for the more unusual overseas terrorism nexus, as noted above. In fact, 46 of the 250 cases we reviewed (18 percent) stated clearly that the defendants were foreign born. Within those 46 cases, 64 defendants were identified as illegal aliens and 15 were resident aliens. To put that 18 percent in perspective, almost 1 in 5 of the identity fraud cases involve those who are foreign-born. That 18 percent is significantly higher than the estimated illegal alien population, which is less than 4 percent. While 4 percent is still a high number, it appears that illegal aliens make up a larger percentage of identity fraud cases than their population in the United States would otherwise suggest.
- The identity fraud numbers for aliens, especially illegal aliens, are likely high for three reasons:
1. Foreign nationals commit the same types of crimes as Americans.
  2. In addition, foreign nationals, especially illegal aliens, commit certain types of identity fraud Americans have no reason to commit, including illegally applying for U.S. passports, illegally entering or re-entering

the country, applying for immigration benefits, and, in the most publicized of situations, using identity fraud to obtain jobs they are not authorized to have.

3. Identity fraud is becoming essential with the increasing strength of biometric border-related identity programs such as US Visit, the Western Hemisphere Travel Initiative, E-Verify, and the implementation of the secure driver license act known as REAL ID.

These programs are not easy to bypass without assuming the complete identity of a real person. In fact, getting a job today with a law-abiding employer is not likely unless an illegal alien obtains a real person's identity information or document. Pure counterfeit (i.e., counterfeit that does not include a real person's identity information) no longer will pass muster, making identity fraud the new rubric for any counterfeiter wanting to stay in business.

Some scholars and activists state repeatedly that illegal aliens in the job market are "not intending any harm" when they commit identity fraud. That argument should be considered debunked; it is at best naïve and out of touch with current trends. In fact, any illegal alien trying to get hired today knows he has to secure the identity of a real person. Proving the alien knows he has used real identity information, however, is another story altogether.

To be clear, immigrants, both legal and illegal, commit the same types of identity fraud American citizens do: stealing financial and personal information for personal gain by purse-stealing, dumpster-diving, hacking into computers, or fraudulent cold calls. They defraud banks, the IRS, credit card companies, and health care providers.

But there are at least four areas of identity fraud and identity theft that are not committed by Americans, and only are committed in the illegal-alien context: (1) illegal entry; (2) application for immigration benefits; (3) application for a U.S. passport, driver's license, or state-issued ID; and (4) work authorization. In some instances, illegal aliens directly steal identity information and misappropriate such information for their own use. In other instances, illegal aliens acquire the information from a third party, including alien smugglers and identity fraud document rings.

## Statutory Language and Legislative History

In 1998, Congress passed by unanimous consent a significant amendment to Title 18 § 1028 in an effort to address the growing crime of identity theft. The law emerged out of the Senate Judiciary Subcommittee on Technology, Terrorism, and Government Information, with its chairman and lead sponsor Sen. Jon Kyl (R-Ariz.), along with other key sponsors, including Sens. Leahy (D-Vt.), Feinstein (D-Calif.), and full committee chairman Hatch (R-Utah). At that time, identity theft was involved in 95 percent of financial crimes and identity theft losses had nearly doubled in two years, to about \$745 million.<sup>24</sup>

The purpose of the law, known at that time as Senate Bill 512, The Identity Assumption and Deterrence Act, was to ensure culpability and penalties for identity fraudsters while maximizing support of law enforcement and providing relief for identity fraud victims for the first time. More specifically, Section 1028 was amended primarily for three reasons: (1) to extend the criminal fraud provisions pertaining to identity *documents* to identity *information*, such as digital photos or Social Security numbers increasingly used in online crimes; (2) to capture the many instances where a counterfeit identity is created using a real person's identity information mixed with fake documents, features, or information; and (3) to "recognize the individual victims of identity theft crimes and establish their right to restitution, including all costs related to regaining good credit or reputation."<sup>25</sup> The law also established the Federal Trade Commission's complaint and education service as well as enhanced penalties for identity fraud and theft.

The substantive addition to Section 1028 was 1028(a)(8)(d)(7), where the knowing transfer, possession, or use of identity information, described as a "means of identification," was defined as:

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

*(A) name, Social Security number, date of birth, official state- or government-issued driver's license or identification number, alien registration number, government passport number, or employer or taxpayer identification number;*

*(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;*

*(C) unique electronic identification number, address, or routing code; or*

*(D) telecommunication identifying information or access device.*

As the 1998 Senate Judiciary Committee Report states quite clearly, the new provisions of Section 1028 were intended to enable prosecutors to deal effectively, within one statute, with both identity fraud and theft.<sup>26</sup> The committee report stated:

*Today, criminals do not necessarily need a document to assume an identity; often they just need the information itself to facilitate these types of crimes. By amending Section 1028, this statute can keep pace with criminals' technological advances. In addition, an amended Section 1028 ... eliminates the need for investigators and prosecutors to distinguish between identity takeover (S.512) and false identification (S.512 and Section 1028). The Committee believes that an amended Section 1028 will prove both more useful and efficient for prosecutors than a separate new offense.<sup>27</sup>*

In 2004, the House Judiciary Committee amended Section 1028 and added Section 1028A, which was tagged “Aggravated Identity Theft” and mandated a consecutive two-year jail sentence for “knowingly” using the identity information of another person in the commission of a felony. The language of Section 1028A was narrow, specifying only one of eight enumerated charges under Section 1028 as qualifying for the two-year penalty under 1028A, that being the “means of identification” listed in Section 1028(a)(7), which was added in 1998.

The legislative history of Section 1028A makes clear that its intent is to assure that perpetrators of identity fraud and theft receive adequate penalties, while broadening the crime to “possession” in addition to “transfer” and “use.” In addition, the first sentence of the “Need for the Legislation” section of the House Report defines “identity theft” and “identity fraud” interchangeably as “all types of crimes in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits.”<sup>28</sup>

More specifically, the Section 1028A amendment was to provide a “mandatory consecutive penalty enhancement of two years for any individual who knowingly transfers, possesses, or uses the means of identification of another person in order to commit a serious federal predicate offense.”<sup>29</sup> (The law lists the predicate offenses, including immigration violations, false citizenship crimes, firearm offenses, and other serious crimes.)

The amendment also provides five years for identity theft and false identity documents used to support a terrorism offense. The report goes on to show how the new sentencing requirements will “make it easier for prosecutors to convict identity thieves by allowing prosecution for *simply possessing* [emphasis added] false identity documents with the intent to commit a crime.”<sup>30</sup> The report further states that prosecutors could prove (1) intent to do unlawful activity or (2) use, transfer, or possession of another person’s identity information. Nowhere does Congress add on that their purpose is to require prosecutors to prove knowledge of any wrongdoing beyond “unlawful activity:”

*The words “in connection with” would broaden the reach of Section 1028(a)(7) in two important ways. First, it will make possible the prosecution of persons who knowingly facilitate the operations of an identity-theft ring by stealing, hacking, or otherwise gathering in an unauthorized way other people’s means of identification, but who may deny that they had the specific intent to engage in a particular fraud scheme. Second, it will provide greater flexibility for the prosecution of Section 1028(a)(7) offenses. With this proposed change, prosecutors would have the option of proving that the defendants either had the requisite specific intent to commit a particular unlawful activity or engaged in the prohibited use, transfer, or possession of others’ means of identification in connection with that unlawful activity.<sup>31</sup>*

Unfortunately, nowhere in the House report is the issue addressed of whether a defendant has to “know” his victim is a real person or not. However, it is clear that the House intended to widen the breadth of prosecutors’ ability to vigorously pursue identity fraud. The House report focused instead on whether a defendant simply “used, possessed, or transferred” the identity information illegally or intended to engage in unlawful activity with the identity information; it seems relatively clear that a knowledge requirement of the victim was not intended, as that reading creates an outcome that inoculates some defendants and not others, which is clearly not what Congress was intending when it added mandatory sentencing guidelines designed to “broaden the reach of” the identity theft statute.

## The Immigration Context

The extent of fraud in the worksite arena was largely unknown when Section 1028 was amended in 1998.

While the 1986 Immigration Reform and Control Act (IRCA) explicitly prohibited unauthorized persons from working in the United States, the system left employers with few tools to distinguish fraudulent from genuine documents or identity information. It also left law enforcement hamstrung by long and tedious paper audit processes where identity theft was hard to prove, and cases rarely pursued. The extent of the problem was unknown.

Even so, it was well understood that identity fraud often formed the foundation for immigration crimes. As the 1998 Senate report made clear, assuring penalties for immigration-related identity fraud that included exclusion and deportation were important:

*Similarities in the nature and method of false document and false information crimes make use of the same three-year and misdemeanor penalties reasonable. An added advantage of incorporating identity information crimes into the penalties set out in Section 1028 is that such inclusion automatically makes identity information crimes subject to exclusion (Section 212(a)(2)) and deportation (Section 237 (a)(2)) provisions of the Immigration and Nationality Act.”<sup>32</sup>*

The 2004 Enhanced Penalty Act language also targeted abuse of immigration benefits, as well as the identity theft rings that support the many varieties of immigration fraud. Former Secretary of Homeland Security Michael Chertoff noted the relationship between immigration enforcement in the employment context and identity theft and document fraud in a 2008 DHS Leadership Journal posting where he noted he had three priorities for these types of investigations. One of these was to “focus on disrupting the infrastructure that supports illegal immigration, which includes aggressively targeting those who engage in identity theft, document fraud, and/or human smuggling.”<sup>33</sup>

In the year prior to the *Flores* decision, worksite enforcement cases increased substantially, from 3,667 administrative arrests and 716 criminal arrests in 2006 to 3,000 administrative arrests and 875 criminal arrests just in the first half of 2008.<sup>34</sup> With technology helping the federal government improve its ability to prove identity theft in illegal hiring cases, prosecutors began to use the aggravated identity theft charge with confidence in worksite enforcement cases.

The sudden surge in worksite cases not only reflected a policy shift under Secretary Michael Chertoff and ICE Assistant Secretary Julie Myers to greater ensure the rule of law, but also the growing recognition of

the nexus between criminal and immigration law. Both Chertoff and Myers were former federal prosecutors (Chertoff was a former U.S. Attorney and federal judge) who understood the value of using federal criminal law to focus on immigration-related crimes. Their joint perseverance sent a clear message to employers and illegal aliens that use of identity theft to further illegal hiring practices was unacceptable and would be punished. The vigor with which the federal government began to use Sections 1028 and 1028A in worksite enforcement was exemplified by three key highly publicized worksite meatpacking cases between May and August 2007: Swift & Company in Texas, with 53 undocumented workers charged;<sup>35</sup> George’s Processing in Missouri, with 136 charged;<sup>36</sup> and Smithfield Processing in North Carolina, with 25 charged.<sup>37</sup>

Employers’ repeated denials of wrongdoing based on their compliance with the paper-based I-9 process began to hold little weight with investigators with the evolution of technology to verify a worker’s legal status. Everyone remains well aware that the paper I-9 process is nearly incapable of accurately verifying work authorization. The I-9 process is, and will remain, a way to mask fraud for those employers who lack an incentive to hire only legal workers.

However, with the advent of E-Verify in 2006 displacing the old paper “verification” process at many worksites (E-Verify is now more than 99.5 percent effective in culling through new hires to determine work authorization),<sup>38</sup> law enforcement increasingly has been able to cull employers who intend to comply with federal work authorization laws, and those that do not. More to the point, E-Verify — while not being perfect — is extremely good at determining work authorization quickly and efficiently.<sup>39</sup>

E-Verify’s popularity with employers is evident, with a 274 percent growth rate since its inception in 2007. Even Congress has finally recognized its value, providing a three-year reauthorization in the 2009 Homeland Security Appropriations bill after a year of uncertainty as to the program’s future. The underlying result for any illegal alien seeking to get hired today is that E-Verify is difficult to bypass without assuming a real person’s identity. With more than 500,000 worksites using E-Verify now — accounting for perhaps one out of four new hires nationwide this year — illegal aliens know employment is increasingly unlikely without committing identity fraud. Counterfeits will not work in E-Verify. Thus, an argument from litigators on behalf of the traditional view of the illegal worker who just wants a job and “doesn’t intend to harm anyone”<sup>40</sup> is simply out of touch with current trends. The only way for an

illegal alien to get a job in the United States today, and minimize the risk of getting caught, is to harm *a real person*.

### ***Illegal Alien Cases Led to Supreme Court Review***

In six of the seven cases decided among the Circuit Courts that led to the Solicitor General recommendation that the Supreme Court resolve the growing interpretative dispute pertaining to the Aggravated Identity Theft statute,<sup>41</sup> the identity theft involved an illegal alien using a false identity to gain a privilege that by law belongs to legal immigrants or U.S. citizens. Three involved work authorization, one a passport application, one an attempted re-entry after deportation, and one use of false and stolen identities to support assimilation into the United States after three prior illegal entries and two deportations. All of these cases were decided within a span of eight months except for the 2006 *Montejo* decision, and within 24 months of the October 20, 2008 grant of certiorari in *Flores*.<sup>42</sup>

Four cases had been decided in favor of the government (whereby only possession, use, or transfer of a victim's identity information without lawful authority is required) and three in favor of the defendant (*mens rea* requires the government prove actual knowledge of the victim's identity) prior to the Supreme Court agreeing to take up this mushrooming split between the circuits. Interestingly, in all three cases that ruled in favor of the defendant there was dissent, some of which gave Congress clues as to how to reconstruct the enhanced penalties in order to better avoid issues of statutory interpretation in the future.

In at least three of the six alien cases, the facts explicitly state that the illegal alien had bought the identity information from a third party for a price. The D.C. Circuit made clear in *United States v. Villanueva-Sotelo*, the case of the three-time illegal entrant, that the government must prove the defendant "knew it was a real person's" identity information:

*Villanueva-Sotelo admits he knew the card was a fake. Although the government can prove that the alien registration number displayed on the card belonged to another individual, it concedes — critically for this case — that it lacks any evidence that Villanueva-Sotelo actually knew this.*<sup>43</sup>

The decisions that agreed with *Villanueva-Sotelo* (which agree with the Supreme Court's decision in *Flores*) make it extremely difficult for the prosecution to prove beyond a reasonable doubt that the defendant

actually knew the identity information belonged to another person in instances where it is either (1) unclear how the identity information was obtained; or (2) the identity information was acquired from a third party.<sup>44</sup> However, the Eleventh Circuit considered such a reading of Section 1028A absurd, and against the clear intent of Congress:

*An extension of the knowledge requirement to the phrase "of another person" in Section 1028A(a)(1), as advocated by Hurtado, would allow a defendant to use the identification of another person fraudulently in the commission of another enumerated felony so long as the defendant remains ignorant of whether that person is real. The plain language of Section 1028A(a)(1) does not dictate such a reading.*<sup>45</sup>

Thus *Flores* (and a few of its sister cases) seemed to represent an irreconcilable divide that forced resolution by the Supreme Court. Understanding these underlying cases, their facts, and the reasoning of seasoned judges on this issue makes clear that however the judges ultimately ruled, they all agreed that the statutory language lacked sufficient clarity. These cases also made evident that illegal alien cases are the most difficult, as the "knowledge" requirement (*mens rea*) is often at its most difficult to prove. These cases also struggle with congressional intent, some viewing the legislative process with skepticism, some narrowly as to whether the particular language issue raised in *Flores* was resolved by the 2004 House Report or not, and some more broadly, as to what the overall intent of Congress was in passing the mandatory sentencing guidelines at all. Having worked on the 1998 amendment of this law, this author is biased toward viewing congressional intent from its overall purpose as a guiding principle for resolving less clear questions like the one raised in *Flores*.

Understanding *Flores* in context then, is the purpose of this section.

### ***Circuit Court Cases Where Government Need Not Prove Defendant's Actual Knowledge of Identity Theft***

#### ***United States v. Flores-Figueroa, Illegal Alien Unauthorized Work Case (April 23, 2008)***

*Background:* Flores-Figueroa is a Mexican national who had worked at L&M Steel Services in Illinois since 2000. Flores used the assumed name of Horacio Ramirez<sup>46</sup> and

used a fake birth date and Social Security number along with a counterfeit alien registration card. Six years later, (with the advent of more worksite enforcement), Flores-Figueroa asked his employer to file a new set of Social Security and alien numbers for him, using his real name. This time the numbers belonged to real people. His employer reported him to ICE and he was charged with aggravated identity theft.<sup>47</sup>

*Defendant's Argument:* The government lacked proof that Flores knew that the means of identification belonged to another person.<sup>48</sup>

*Eighth Circuit Holding:* Relying on the precedent of *Mendoza*, the court held:

*We resolved this issue and determined that under the plain language of the statute, “knowingly” modified only the verbs “transfers, possesses, or uses,” and not the phrase “of another person.” Therefore the Government need not prove that Flores knew the means of identification belonged to another person. Flores does not challenge the sufficiency of the Government’s evidence that the means of identification he possessed belonged to another person. Accordingly, we affirm Flores’s conviction.*<sup>49</sup>

## ***United States v. Mendoza-Gonzalez, Illegal Alien Unauthorized Work Case (March 28, 2008)***

*Background:* Swift & Company pork processing plant in Marshalltown, Iowa, used the paper I-9 Form for its employees. Mendoza-Gonzalez filed his Form I-9 for Swift by using a photo ID card in the name of Dinicio Gurrola III to verify his identity as a “citizen or national of the United States.”<sup>50</sup>

*Defendant's Argument:* Mendoza interpreted Section 1028A to require that the Government must prove beyond a reasonable doubt that Mendoza (1) had actual knowledge that he was stealing a real person’s ID; that (2) Gurrola was an actual person; and (3) Gurrola was still alive when his stolen ID was used by Mendoza.<sup>51</sup>

*Eighth Circuit Holding:* Citing both a Supreme Court case and statutory construction authority, the Court held that “§ 1028A(a)(1) is unambiguous and that the Government was not required to prove that Mendoza-Gonzalez knew that Gurrola was a real person to prove he violated § 1028A(a)(1).”<sup>52</sup>

## ***United States v. Hurtado, Illegal Alien Passport Fraud Case (November 21, 2007)***

*Background:* Hurtado paid \$7,000 for a fraudulent visa from Colombia to come to the United States and then committed identity fraud again in order to obtain a U.S. passport to pose as an American travelling to Colombia visiting his family. He paid \$1,500 for a driver’s license and birth certificate in the name of Marcos Alexis Martinez Colon from a man in Boston named “Orlando” to support a passport application. Upon investigation, Hurtado had a suite of Colon IDs on him, including a debit card he was using to make deposits into an account associated with Colon.<sup>53</sup>

*Defendant's Argument:* Hurtado claimed that the government did not prove that Hurtado committed aggravated identity theft because there was no proof that (1) Hurtado had knowledge that Colon was an actual person; or (2) that Hurtado acquired the identity information “without lawful authority,” which he argued meant that he personally stole the documents from Colon.<sup>54</sup>

*Eleventh Circuit Holding:* The conviction was upheld. The phrase “without lawful authority” means that the defendant acted without any authority to use Colon’s identification, and that the Section 1028A(a)(1) terms “transfers, possession, or use of identification” do not require that the information be stolen, but covers a “wide range of activities.” In addition, the Court concluded the following regarding the knowledge requirement:

*If Congress had intended to extend the knowledge requirement to other portions of this subsection, it could have drafted the statute to prohibit the knowing transfer, possession, or use, without lawful authority, of the means of identification “known to belong to another actual person.” An extension of the knowledge requirement to the phrase “of another person” in § 1028A(a)(1), as advocated by Hurtado, would allow a defendant to use the identification of another person fraudulently in the commission of another enumerated felony so long as the defendant remains ignorant of whether that person is real. The plain language of § 1028A(a)(1) does not dictate such a reading.*<sup>55</sup>

## ***United States v. Montejo, Illegal Alien Unauthorized Work Case (March 29, 2006)***

*Background:* Montejo walked into the United States in January 2002 and purchased, in Phoenix, a Resident

Alien card and a Social Security card for \$60, knowing they were false. He then used the IDs to get a job with a Norfolk, Va., company called Network Industries, Ltd. Montejo provided Network Industries with a Resident Alien card with his photo, but fabricated numbers, and a Social Security card bearing his name.

Unknown to Montejo, the alien registration number he used was assigned to a naturalized U.S. citizen. The Social Security number used by Montejo was also assigned to another person. Montejo was not caught until August 2004 when ICE found the documents in Montejo's possession, and he admitted the facts.

*Defendant's Argument:* Montejo motioned for acquittal reasoning that he obtained a Resident Alien card in his name knowing its associated number was not his own, but that he did not know if the number was assigned to another person.

*Fourth Circuit Holding:* Montejo's motion was denied based on statutory language, purpose, and legislative history: "The legislative history shows that Congress was concerned with aggravated identity theft, exactly what was charged in this case. Montejo stole the identity of two entirely innocent people, the holder of the alien identity number and the holder of the Social Security number."<sup>56</sup>

### *Circuit Court Cases Where Government Must Prove Defendant's Actual Knowledge of His Identity Theft*

#### ***United States v. Godin, American Bank Fraud Case (July 18, 2008)***

*Background:* In 2006, Godin defrauded eight banks using seven fabricated Social Security numbers that were derivatives of her Social Security number, closed some accounts, and then deposited checks drawn on the closed accounts into the still open accounts. Godin then withdrew funds from the falsely inflated accounts. The banks lost a total of about \$40,000. Of the seven synthesized SSNs, one belonged to another person. In that instance she used the number to open a Bank of America account; all the other personal information was hers, except for the SSN.<sup>57</sup>

*Defendant's Argument:* The government failed to meet its burden of proof that Godin knew that the made-up Social Security number belonged to another person.<sup>58</sup>

*First Circuit Holding:* The Court's majority held that neither the statutory language nor legislative history made clear the meaning of Section 1028A(a)(1). The "rule of lenity" requires that ambiguity be decided in favor of the defendant. With that rule in mind, the Court held "that the 'knowingly' *mens rea* requirement extends to 'of another person.' In other words, to obtain a conviction under § 1028A(a)(1), the government must prove that the defendant knew that the means of identification transferred, possessed, or used during the commission of an enumerated felony belonged to another person. The government did not do so here. Accordingly, we reverse Godin's conviction."<sup>59</sup>

*Chief Judge's Concurring Opinion:* Chief Judge Lynch concluded that the interpretation of the language could go either way and suggested that "Congress may wish to clarify in new legislation the scope of the enhanced penalties."<sup>60</sup>

#### ***United States v. Miranda-Lopez, Illegal Alien Re-Entry Case (July 17, 2008)***

*Background:* Roberto Miranda-Lopez, a previous deportee from El Salvador, tried to re-enter the United States using a resident alien card in the name of Jorge A. Garcia Fregoso at the San Ysidro, Calif., port of entry in March 2006. Miranda was in the front passenger seat of the vehicle as it approached the inspection booth. The driver handed the officer three identification cards for the vehicle's three passengers, but the photos on the cards did not match the occupants of the vehicle. However, Miranda, when asked if he was the individual Fregoso listed on the card, said "yes." Fingerprints were then taken, and did not match. In secondary inspection, all three men in the car were shown to be imposters.<sup>61</sup>

*Defendant's Argument:* Having lost at trial, the court permitted the defendant to file a new motion not previously raised — that the government failed to prove that Miranda actually knew that the identification belonged to another person.<sup>62</sup>

*Ninth Circuit Holding:* In its *de novo* review of statutory interpretation, the Ninth Circuit stated it would "follow the D.C. Circuit's reasoning in *United States v. Villanueva-Sotelo*." The Ninth Circuit found the legislative intent of Section 1028A(a)(1) ambiguous and thus the "longstanding" rule of lenity requires us to resolve any ambiguity in the scope of a criminal statute in favor of the defendant." The Court concluded this despite acknowledging the dissent's argument that the majority's

ruling was “absurd” and clearly not within the statute’s intent.<sup>63</sup>

*Partial Concurrence and Partial Dissent:* In his opinion, Judge Bybee made something akin to a recommendation. He stated that “knowingly” modifies “without lawful authority” and thus “the entire phrase ‘of another person or a false identification document’ could be excised from the statute” as surplus and unnecessary language.<sup>64</sup>

***United States v. Villanueva-Sotelo, Illegal Alien Document Fraud Case (February 15, 2008).***

*Background:* Gustavo Villanueva-Sotelo had three previous illegal entries and two deportations. In August 2006, Washington, D.C., police stopped Villanueva and requested identification. Villanueva presented the officers with what appeared to be a legitimate government-issued permanent resident/work card that pictured Villanueva and displayed his own name, Mexico as his country of origin, and an alien registration number. Villanueva admitted he knew the card was a fake. The government could prove the alien number belonged to someone else, but lacked evidence that Villanueva knew the alien number belonged to another person. The court held that the government had to prove Villanueva’s knowledge of his identity fraud, and did not meet its burden of proof.<sup>65</sup>

*Prosecution’s Argument:* The government argued that the court, in dismissing its aggravated identity theft count against Villanueva-Sotelo, interpreted the word “knowingly” in section 1028A(a)(1) to “modify both the verbs and the object, that is, ‘means of identification of another person’” erroneously.<sup>66</sup>

*D.C. Circuit Holding:* In reasoning similar to *Godin*, the majority held that there was “reasonable doubt” as to the statute’s meaning and congressional intent, that the “rule of lenity” was required to come into play to resolve the issue, and concluded: “we hold that section 1028A(a)(1)’s *mens rea* requirement extends to the phrase ‘of another person,’ meaning that the government must prove the defendant actually knew the identification in question belonged to someone else.”<sup>67</sup>

*Dissent:* Circuit Judge Henderson, in her dissent, takes on the majority’s view that the language is ambiguous by adding clarity as follows:

*Apparently the majority believes that Villanueva-Sotelo’s conduct does not constitute aggravated identity theft because his “accidental misappropriation,”* *Maj. Op. at 22, of another’s identification number — the “accident,” I assume, relating to his ignorance of the fact that the identification he knows to be false is assigned to another person — would not constitute “theft.”* See *Maj. Op. at 16 (“As th[e] title demonstrates, the statute concerns ‘theft,’ i.e., ‘the felonious taking and removing of personal property with intent to deprive the rightful owner of it.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) (emphasis added); see also BLACK’S LAW DICTIONARY 1516 (8th ed. 2004). ... Here the Congress has made clear — in discussing the same title the majority reads as limited to common-law theft — that identity “theft” is a much broader offense than the majority prefers. The House Judiciary Committee Report accompanying the ITPEA explains that “the terms ‘identity theft’ and ‘identity fraud’ refer to all types of crimes in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits.” H.R. Rep. No. 108-528, at 4 (2004) (emphases added) (House Report); see also id. at 25 (statement of Rep. Coble) (“Identity theft and identity fraud are terms used to refer to all types of crimes in which an individual’s personal or financial data is misused, typically for economic gain or to facilitate another criminal activity.” (emphasis added)).<sup>68</sup>*

*proportion,” Maj. Op. at 22, of another’s identification number — the “accident,” I assume, relating to his ignorance of the fact that the identification he knows to be false is assigned to another person — would not constitute “theft.”* See *Maj. Op. at 16 (“As th[e] title demonstrates, the statute concerns ‘theft,’ i.e., ‘the felonious taking and removing of personal property with intent to deprive the rightful owner of it.’ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2369 (1993) (emphasis added); see also BLACK’S LAW DICTIONARY 1516 (8th ed. 2004). ... Here the Congress has made clear — in discussing the same title the majority reads as limited to common-law theft — that identity “theft” is a much broader offense than the majority prefers. The House Judiciary Committee Report accompanying the ITPEA explains that “the terms ‘identity theft’ and ‘identity fraud’ refer to all types of crimes in which someone wrongfully obtains and uses another person’s personal data in some way that involves fraud or deception, typically for economic or other gain, including immigration benefits.” H.R. Rep. No. 108-528, at 4 (2004) (emphases added) (House Report); see also id. at 25 (statement of Rep. Coble) (“Identity theft and identity fraud are terms used to refer to all types of crimes in which an individual’s personal or financial data is misused, typically for economic gain or to facilitate another criminal activity.” (emphasis added)).<sup>68</sup>*

## Supreme Court Ties Prosecutors Hands

With *Flores-Figueroa*, the Supreme Court took on an unpublished, *per curiam* Eighth Circuit decision with tremendous political interest in its outcome.<sup>69</sup> The Court had previously denied certiorari to the related Fourth Circuit Court decision *Montejo*, which did have a published decision. The issue in both cases was the same: whether a conviction under the federal aggravated identity theft statute 18 U.S.C. § 1028A(a)(1) requires that the defendant actually know that false identity information used in commission of another felony is that of another person, or simply know that such information is not his own and is fabricated. In both cases, the Circuit Courts had decided against the defendant and in favor of the government; namely that the government need not prove the defendant had actual knowledge of a real person’s identity to be convicted of the federal crime of aggravated identity theft.

**Justice Breyer for the Majority.** The Supreme Court reversed the Eighth Circuit in *Flores*, holding instead that the government must prove that the defendant actually knew he was using a real person's identity information in the commission of another crime. The Court did so based primarily on the wording of § 1028A(a)(1):

*Section 1028A(a)(1) requires the government to show that the defendant knew that the means of identification at issue belonged to another person. As a matter of ordinary English grammar, “knowingly” is naturally read as applying to all the subsequently listed elements of the crime. ... Courts ordinarily interpret criminal statutes consistently with the ordinary English usage.*<sup>70</sup>

The court's rendering of the language did not include the references to standard legal guides, as did the circuit court cases. Nor did the court acknowledge ambiguity of the statutory language, as all the circuit cases that ruled in favor of the defendant did. Instead, the court concluded that the use of language in the statute was so plain it need not refer to other guides to make its determination, other than a few precedent Supreme Court cases that had interpreted the use of “knowingly” in other statutes. The court left little to argue with — even though its conclusion was in the minority of the circuits — especially since the *Flores* decision had no dissent, just two separate concurring opinions by Justices Scalia and Alito.

**Justice Alito's Concurrence.** Only Justice Alito put up any dissent about the Court's embrace of “ordinary English usage” to resolve *Flores* unequivocally:

*I think the court's point about ordinary English usage is overstated. Examples of sentences that do not conform to the court's rule are not hard to imagine. For example: ‘The mugger knowingly assaulted two people in the park — an employee of company X and a jogger from town Y.’ A person hearing this sentence would not likely assume that the mugger knew about the first victim's employer or the second victim's home town. What matters in this example, and the court's, is context.*<sup>71</sup>

Where Alito had trouble was where the statutory language, in context, produced an absurd result; and he thus agreed with the majority after boiling down the problem to the same one that the D.C. Circuit had in *Villanueva*:

*The Government's interpretation leads to exceedingly odd results. Under that interpretation, if a defendant uses a made-up Social Security number without having any reason to know whether it belongs to a real person, the defendant's liability under Section 1028A(a)(1) depends on chance: If it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated. I therefore concur... insofar as it may be read to adopt an inflexible rule of construction that can rarely be overcome by contextual features pointing to a contrary reading.*<sup>72</sup>

Justice Alito's concern, then, turned on the practical result of the statute's interpretation, and not on sentence reconstruction, as did the majority's opinion. Alito's opinion is that unless the statute is interpreted strictly, different defendants under the prosecutorial interpretation are treated differently by the law, not based on the outcome of what they did or on their actual intent to pose as someone other than themselves to commit a crime, but on whether there exists a real victim or not. That seemed to elude common sense to Alito, so he concurred with the majority.

Government authorities can more easily prove *mens rea* where there is an investigation stemming from the identity theft itself, such as computer hacking of personal information; employees who steal the personal information of their employer, clients, or patients; or those that dumpster dive, steal purses, or use familial ties in an unlawful manner. However, where the investigation is not an identity theft or fraud investigation *per se*, and the identity fraud is collateral to other crimes, the *Flores* decision has inadvertently carved out an exception that largely lets off the hook those picked up in any investigation not specifically focused on identity theft. Often, (although not always), these felonies involve illegal entry, passport fraud, or unauthorized work where the source of the illegally acquired identity information is unknown.

The Court acknowledged this potential problem when it wrote:

*Perhaps of greatest practical importance, there is the difficulty in many circumstances of proving beyond a reasonable doubt that a defendant has the necessary knowledge. Take an instance in which an alien who unlawfully entered the United States gives an employer identification documents that in fact belong to others. How is the Government to*

*prove that the defendant knew that this was so? The Government may be able to show that such a defendant knew the papers were not his. But perhaps the defendant did not care whether the papers (1) were real papers belonging to another person or (2) were simply counterfeit papers. The difficulties of proof along with the defendant's necessary guilt of a predicate crime and the defendant's necessary knowledge that he has acted "without lawful authority," make it reasonable, in the Government's view, to read the statute's language as dispensing with the knowledge requirement.<sup>73</sup>*

However, the court then dismissed the issue of burden of proof by narrowly defining identity theft crimes, and suggesting that only these crimes, and not other crimes such as work authorization violations, were worthy to pursue on aggravated identity theft charges:

*We do not find this argument sufficient, however, to turn the tide in the Government's favor. For one thing, in the classic case of identity theft, intent is generally not difficult to prove. For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else's trash to find discarded credit card and bank statements, or pretends to be from the victim's bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively easy to prove, and there will be no practical enforcement problem.<sup>74</sup>*

But despite acknowledging the problem their interpretation created, the court dismissed the overarching purpose of the statute and its legislative history as follows: "To the extent that Congress may have been concerned about criminalizing the conduct of a broader class of individuals, the concerns about practical enforceability are insufficient to outweigh the clarity of the text."<sup>75</sup>

Is this the policy that the federal government wants to stand? That those who know how to hide their intended use of identity information for the purpose of committing other felonies should be shielded from the law? Should there be a distinction in the law between those who by the luck of the draw happen not to have used a real person's identity information, and those who

do? What about those who buy or use counterfeit identity information for the purpose of evading the law with reckless disregard for victims, as was the case with all the circuit court cases reviewed here? In any of these situations, there is a victim that is "real:" defrauded banks; state, local, and federal government institutions; or an employer. If there is a legitimate owner of that identifying information involved as well, the policy should be to use the restitution provisions to provide as much compensation as necessary to restore reputation and financial status to the victim, including clearing any criminal record that may have resulted from the identity theft.

## A Legislative Fix

The unintended consequence of the Supreme Court's *Flores* decision has potential to be disturbingly far-reaching. By narrowing the use of the aggravated identity theft charge, prosecutors' hands are tied. Victims are left with little recourse where actual knowledge of the identity fraud or theft remains elusive. The system has victimized the victim further, while providing the defendant — whose harm has been proven — a way out. However, having a defendant go free based on whether or not the fraudulent identity information belonged to a real victim also seems absurd. Instead, the *mens rea* should fall on the intent of the defendant to cause harm or act in reckless disregard for his victim's harm while in the commission of another felony, eliminating from the burden of proof the "knowingly" requirement.

The *Flores* decision has reoriented the intent of the statutes from supporting victims of identity fraud to carving out exceptions in favor of defendants who had, at minimum, *constructive* knowledge of their identity fraud or theft. Congress should rethink Sections 1028 and 1028A in an attempt to untie prosecutors' hands so that all victims of identity fraud are assured relief where the government can prove that identity information the defendant knows is not his own is used without lawful authority.<sup>76</sup> The importance of Congress amending Sections 1028 and 1028A in light of the Supreme Court decision in *Flores* is further buttressed by the growing breadth and depth of identity fraud, as discussed previously. Nor should illegal aliens have a better chance of getting out of an aggravated identity theft charge than Americans.

Even Justice Breyer seemed to imply that Congress should consider amending the statute with plain, ordinary language to create the "practical enforceability" across the range of identity fraud crimes that the Supreme Court says is unsupported by the current statutory language. The goal is to use plain, ordinary language

to assure adequate penalties regardless of a defendant's "knowledge" of his identity crime, and to provide identity fraud victims as much relief as possible from those who have caused harm to their reputations and finances. In that light, below are suggested fixes to the statutory language.

## Proposed Language Changes to Sections 1028 and 1028A

When illegal aliens use third parties to purchase ID documents or information, they should not be immune to a charge of aggravated identity theft. Fraudulent ID rings earn millions from criminals and illegal aliens whose only purpose in obtaining such documents is to misrepresent themselves and further assimilate into the United States. While the federal government works on these rings to bring them to justice, their clients — who knowingly buy their products — should not be let off the legal hook because they don't "know" their victims.

When an illegal alien, criminal, or terrorist approaches a third party for a fraudulent ID of any kind, the purpose is to acquire an identity other than his own. These clients have, at minimum, actual knowledge that the identity information they are provided is fraudulent. They also are well aware, with the advent of biometric and database software query programs like E-Verify and US Visit, that they are highly unlikely to pass muster with a completely fake identity. Indeed, to be work-authorized in today's job market or to obtain a driver's license or passport, it is increasingly the case that a *real* person's identity must be used. Whether a third party tells a buyer that or not is irrelevant; the buyer's intent is to defraud the U.S. government, private employer, or other entity for an illegal purpose without regard for a potential victim. If the purpose for which the identity information is used is illegal or "without lawful authority," then the activity of using, transferring, or possessing that identity information should be treated as *constructive* knowledge to commit identity fraud or theft sufficient for the purposes of an aggravated felony and deportation.

The central issue should be that the person committing the identity fraud or identity theft intended to use an identity *other than his own* without lawful author-

ity. It should not matter whether the person intended to commit identity fraud or theft, or whether he knew *for sure* he was stealing a real person's identity or thought *just maybe* he was. What the turning point under Section 1028 should be instead — and this will require us to recalibrate the crime in criminal code the way the crime continues to expand in the real world — is whether (1) identity information (2) other than their own (3) was used, possessed, or transferred (4) without lawful authority. If such crime was committed in conjunction with a felony, it should be deemed an aggravated felony under Section 1028A(a)(1). In addition, Section 1028A(a)(1) should reflect the breadth of offenses of Section 1028, and not remain narrow to simply identity theft, which is only one of eight crimes listed in Section 1028.

Thus, two main changes need to occur to Sections 1028 and 1028A to (1) answer the concerns of the Supreme Court in *Flores*; (2) assure that perpetrators of identity fraud do not have an illegitimate defense against the unlawful activities they knowingly commit; (3) make clear that identity theft in regard to illegal hiring practices is fully within the scope of enhanced penalties under Section 1028; and (4) broaden the aggravated identity theft charge in Section 1028A to all varieties of identity fraud covered in Section 1028.

Below is a series of proposed changes that could accomplish the goal of fixing *Flores*. They are included with the current statutory language as typical track changes, crossing out current text and adding new text in red. The goal is for Congress to save time on fixes by using as much existing language as possible.

### *Proposed Change No. 1:*

**Title 18, Part I, Chapter 47 § 1028.** Fraud and related activity in connection with identification documents, authentication features, and information\_(a) Whoever, in a circumstance described in subsection (c) of this section — (7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of ~~another person~~ **other than his own** with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of federal law, or that constitutes a felony under any applicable state or local law;

*Proposed Change No. 2:*

**Title 18, Part I, Chapter 47 § 1028(b).** The punishment for an offense under subsection (a) of this section is —

(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed —

(D) to facilitate or assist in harboring or hiring unauthorized workers (as defined in section 8 U.S.C. §1324 relating to the harboring of illegal aliens), § 1342a (relating to the unlawful employment of aliens), and § 1324c (relating to document fraud);

*Proposed Change No. 3:*

**Section 1028A. Aggravated identity theft fraud and related activity in connection with identification documents, authentication features, and information**

(a) **Offenses.**—

(1) **In general.**— Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person other than his own; an authentication feature, a false authentication feature, document-making implement, identification document, or false identification document as defined in Section 1028 of this title shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of two years.

(2) **Terrorism offense.**— Whoever, during and in relation to any felony violation enumerated in section 2332b (g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person other than his own or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of five years.

## Conclusion

The President's Identity Theft Task Force was pleased to say in its 2008 report that all the U.S. Attorneys had accepted its recommendation from the prior year and had designated an Identity Theft Coordinator for each of the 93 U.S. Attorney's offices. "Typically, this coordi-

nator is an Assistant U.S. Attorney (AUSA) with extensive experience in prosecuting identity theft cases. These coordinators serve as liaisons between the district office and the various communities served. Federal, state, and local law enforcement agencies rely on these AUSAs for information, advice, and emergency prosecutorial decisions. This effort builds on existing programs in various U.S. Attorneys' Offices to coordinate identity theft resources."<sup>77</sup>

However, that will not matter much if prosecutors have their hands tied and cannot pursue criminal law to bring those who commit identity fraud to justice. The May 4, 2009, ruling of the Supreme Court in *Flores* reinterpreted the frequently used Aggravated Identity Theft statute from its common usage, narrowing substantially the types of cases where the government can meet its evidentiary burden. In essence, the court in *Flores* agreed with the defendant that if the government could not prove that the defendant actually knew he had acquired a real person's identity information to stay employed illegally, he could not be convicted of aggravated identity theft. Interestingly, *Flores* did not contend that he did not know he had used a real person's identity information unlawfully, just that the government could not prove it.

*Flores* turns congressional intent, coordinated law enforcement, and prosecutorial priorities upside down, unintentionally carving out an exception in many illegal alien cases — and in many American citizen cases as well — that any defendant able to claim ignorance as to whether a *real person's* identity information was acquired unlawfully cannot be prosecuted for aggravated identity theft. The *Flores* decision has the potential to significantly limit prosecutors' ability to punish criminals and protect victims. It is up to Congress to fix the Aggravated Identity Theft statutory language so identity fraud can be prosecuted fairly and vigorously. What it all comes down to is that the result of *Flores* should not be acceptable to Congress, or the American people. Only Congress can fix it, and it should be done as expeditiously as possible through either the House or Senate Judiciary Committees in order to minimize the consequences of *Flores* in identity theft prosecutions around the country.

## End Notes

<sup>1</sup> See Adam Liptak and Julia Preston, “Justices Limit Use of Identity Theft Law in Immigration Cases,” *The New York Times*, May 4, 2009, <http://www.nytimes.com/2009/05/05/us/05immig.html>.

<sup>2</sup> The President’s Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, September 2008, pp. 29-30, <http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf>.

<sup>3</sup> Katrina Baum, “National Crime Victimization Survey Identity Theft, 2005, Bureau of Justice Statistics Special Report,” November 2007, p. 1, <http://www.ojp.usdoj.gov/bjs/pub/pdf/it05.pdf>.

<sup>4</sup> *Ibid.*, p. 5.

<sup>5</sup> “Identity theft costs a record \$56.6 billion,” *Identity Theft Daily*, February 24, 2009, [http://www.identity-theftdaily.com/index.php/20090223506/Prevention/Identity-theft-costs-a-record-\\$56.6-billion.html](http://www.identity-theftdaily.com/index.php/20090223506/Prevention/Identity-theft-costs-a-record-$56.6-billion.html).

<sup>6</sup> *Ibid.*: “Fortunately, ID theft is declining after cases reported to the Federal Trade Commission (FTC) nearly tripled from 2001 through 2004. The number of identity fraud victims in the United States was 8.1 million in 2007, a 3.6 percent decrease from the 8.4 million in 2006 and a 9.0 percent decrease from 2005 according to Javelin Strategy & Research. Awareness by consumers and creditors coupled with technological safeguards has helped curb cases of identity fraud.” In addition, more secure issuance practices for driver’s licenses and digitization of birth and death records are helping to catch fraud at its inception.

<sup>7</sup> The President’s Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, September 2008) p. 30, <http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf>.

<sup>8</sup> *Ibid.*, pp. 42-43.

<sup>9</sup> Statement of John Morton, “The Fiscal Year 2010 Budget for Immigration and Customs Enforcement, Customs and Border Protection, and the U.S. Coast Guard,” U.S. House Homeland Security Committee, June 11, 2009, [http://www.ice.gov/doclib/pi/news/testimonies/morton\\_06\\_11\\_09.pdf](http://www.ice.gov/doclib/pi/news/testimonies/morton_06_11_09.pdf).

<sup>10</sup> “More than 80 arrested in Florida following marriage fraud roundup,” ICE press release, May 8, 2009, <http://www.ice.gov/pi/news/newsreleases/articles/080509orlando.htm>.

<sup>11</sup> *Ibid.*: “Over the past four years, the number of document and benefit fraud investigations launched by ICE has increased from 2,334 in Fiscal Year (FY) 2004 to 3,591 in FY 2005, to 5,222 for FY 2006 and the first half of FY 2007. Corresponding criminal indictments in these cases have increased from 767 to 875 to 1,595, while arrests have risen from 1,300 to 1,391 to 2010 and convictions have increased from 559 to 992 to 1,609.”

<sup>12</sup> The U.S. Attorney federal numbers are taken from The President’s Identity Theft Task Force, *Combating Identity Theft: A Strategic Plan*, September 2008, p. 37, <http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf>; while the ICE numbers are taken from “More than 80 arrested in Florida following marriage fraud roundup,” ICE press release, May 8, 2009, <http://www.ice.gov/pi/news/newsreleases/articles/080509orlando.htm>.

<sup>13</sup> A thank you to CIS interns Matt Graham, a junior at Duke University, and Zachary Nunez, a graduate of George Washington University, for helping sift through the U.S. Attorney press releases, indictments, court dockets, and news stories that underlay this research.

<sup>14</sup> “DME Defendants Sentenced in Multi-Million Dollar Medicare Fraud Scheme,” August 28, 2008, U.S. Attorney’s Office for the Southern District of Florida press release, <http://www.usdoj.gov/usao/fls/PressReleases/080828-04.html>.

<sup>15</sup> “U.S. Attorney Announces Health Care Fraud Charges against Forty-One Defendants,” September 30, 2008, U.S. Attorney’s Office for the Southern District of Florida press release, <http://www.usdoj.gov/usao/fls/PressReleases/080930-01.html>.

<sup>16</sup> “Fugitive Convicted of Identity Theft-Related Offenses,” ICE Press Release, March 19, 2009, <http://www.ice.gov/pi/nr/0903/090319miami.htm> (wanted for double murder in Colombia); and “ICE agents arrest INTERPOL fugitive wanted for murder,” ICE Press Release, May 22, 2009 (wanted for murder of husband with entry to the United States on same day of murder), <http://www.ice.gov/pi/nr/0905/090522orlando.htm>. For the Polanco case, see also INTERPOL alert at [http://www.interpol.int/public/data/wanted/notices/data/2008/35/2008\\_7535.asp](http://www.interpol.int/public/data/wanted/notices/data/2008/35/2008_7535.asp); and “Van driver in Cottonwood school bus crash charged with identity theft, falsely representing Social Security number,” ICE press release, February 29, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080229minneapolis.htm>.

- <sup>17</sup> “Mexican Drug Trafficker Convicted of Aggravated Identity Theft,” Department of Justice press release, August 10, 2009, <http://sanantonio.fbi.gov/dojpressrel/pressrel09/sa081009.htm>; and “Francisco Javier Miranda-Espinosa Sentenced to Serve Over 11 YEARS in Federal Prison for Aggravated Identity Theft and Conspiracy to Launder Monetary Instruments,” U.S. Attorney’s Office for the District of Colorado press release, February 15, 2006, [http://www.usdoj.gov/usao/co/press\\_releases/archive/2006/February06/2\\_16\\_06.html](http://www.usdoj.gov/usao/co/press_releases/archive/2006/February06/2_16_06.html).
- <sup>18</sup> Total charges in the 46 cases involving foreign nationals: Falsely Claiming to be a U.S. Citizen: 13; Illegal Re-Entry After Removal: 24; Passport Fraud: 5; Possession of Fraudulently Obtained Documents: 6; Possession of False U.S. ID Documents: 4; Social Security Fraud: 25; Production of False ID Documents: 4; Fraudulently Obtained U.S. Citizenship: 2.
- <sup>19</sup> The seven worksite enforcement cases reflected in our study do not include the Circuit Court cases that led to *Flores* being accepted for certiorari. Cases noted here are:
1. U.S. v. Gonzalez, *Superseding Indictment*, (September 16, 2009) <http://www.jacksonfreepress.com/v3/images/documents/Jose%20Gonzalez%20new%20indictment.pdf>.
  2. “Eight arrested in RICO for visa fraud, human trafficking conspiracy; ICE-led investigation reveals \$6 million scheme to employ illegal aliens in 14 states,” ICE press release, May 27, 2009, <http://www.ice.gov/pi/nr/0905/090527kansascity.htm>.
  3. “Nine Defendants Plead Guilty to Federal Identity Fraud Charges Involving Employment at Howard Industries,” U.S. Attorney’s Office for the Southern District of Mississippi press release, December 3, 2008, <http://www.usdoj.gov/usao/mss/press/DECEMBER2008/Howard%20defendants%20pleas.pdf>.
  4. “East Texas (Human Resources, Pilgrim’s Pride) woman arrested on identity fraud charges,” ICE press release, October 9, 2008, <http://www.ice.gov/pi/nr/0810/081009texarkana.htm>.
  5. “Twelve indicted by federal grand jury in Idaho on identity theft and immigration violations,” ICE press release, April 17, 2008, <http://www.ice.gov/pi/news/newsreleases/articles/080417boise.htm>.
  6. “Grand jury indicts 7 employees from George’s chicken processing plant,” ICE Press Release, October 17, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/071017springfield.htm>.
  7. “Five former poultry plant employees plead guilty to immigration, identity theft violations,” ICE press release, September 10, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/070910springfield.htm>.
  - <sup>20</sup> “Lebanese Credit Card Fraudster Sentenced to Four Years in Prison,” U.S. Attorney’s Office for the Central District of California, September 26, 2006, <http://www.usdoj.gov/usao/cac/pressroom/pr2006/127.html>.
  - <sup>21</sup> Lucy Morgan, “Scheme thwarted after nearly taking Florida for millions,” *St. Petersburg Times*, July 30, 2008.
  - <sup>22</sup> “Romanian national sentenced for possessing unauthorized credit card numbers, identity theft,” U.S. Attorney’s Office for the District of Minnesota news release, May 26, 2009, <http://www.usdoj.gov/usao/mn/econ/econ0315.pdf>.
  - <sup>23</sup> “Two Kenyan Women Sentenced for \$15 Million Tax Fraud Conspiracy; Leader Sentenced to 14 Years in Prison, Sister Sentenced to Five Years,” U.S. Attorney’s Office for the Western District of Missouri news release, November 13, 2008, <http://www.usdoj.gov/usao/mow/news2008/wavinya.sen.htm>; see also “Two Kenyan sisters sentenced to 14 years and 5 years in prison for \$15 million tax fraud conspiracy,” ICE press release, November 13, 2008, <http://www.ice.gov/pi/nr/0811/081113kansascity.htm>.
  - <sup>24</sup> Sen. Jon Kyl, Opening Statement of Chairman, “S. 512, Identity Theft,” May 20, 1998.
  - <sup>25</sup> “The Identity Theft and Assumption Deterrence Act, S. 512,” 105<sup>th</sup> Congress, 2d Session 1998, 105 S. Rpt. 274, p.4.
  - <sup>26</sup> On this note, Senate Report 105-274 mimics the statutory language, stating “This Senate report uses the terms ‘identity fraud’ and ‘identity theft’ interchangeably. ‘Identity fraud’ relates to stealing an identity for counterfeit purposes, while ‘identity theft’ pertains to assuming someone else’s identity.”
  - <sup>27</sup> *Ibid.*, p. 5.
  - <sup>28</sup> “Identity Theft Penalty Enhancement Act,” 108th Congress, 2nd Session 2004, 108 H. Rpt. 528, p.4.
  - <sup>29</sup> *Ibid.* at p.8.

- <sup>30</sup> *Ibid.*
- <sup>31</sup> *Ibid.*
- <sup>32</sup> Senate Report, p. 10.
- <sup>33</sup> “Myth v. Fact: Worksite Enforcement,” Department of Homeland Security *Leadership Journal*, July 9, 2008, <http://www.dhs.gov/journal/leadership/2008/07/myth-vs-fact-worksite-enforcement.html>.
- <sup>34</sup> *Ibid.*
- <sup>35</sup> “53 former employees at Swift & Company meat processing plant in Cactus, Texas, charged in federal indictments,” ICE press release, January 10, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/070110amarillo.htm>.
- <sup>36</sup> “136 workers apprehended after worksite enforcement at George’s Processing poultry-processing plant as part of an ongoing criminal investigation,” ICE press release, May 23, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/070523springfield.htm>.
- <sup>37</sup> “25 charged in N.C. identity theft investigation,” ICE press release, August 28, 2007, <http://www.ice.gov/pi/news/newsreleases/articles/070828raleigh.htm>.
- <sup>38</sup> Janice Kephart, testimony for the record before the U.S. House Committee on Oversight and Government Reform, July 23, 2009, <http://cis.org/Testimony/E-Verify-ChallengesAndOpportunities>.
- <sup>39</sup> For more on how E-Verify works, and statistical analysis of the program, please see Janice Kephart, “If It’s Fixed, Don’t Break It: Moving Forward with E-Verify,” Center for Immigration Studies, September 2008, <http://cis.org/Everify>.
- <sup>40</sup> Adam Liptak and Julia Preston, “Justices Limit Use of Identity Theft Law in Immigration Cases,” *The New York Times*, May 5, 2009.
- <sup>41</sup> Response to Petitioner’s Brief, *Flores-Figueroa v. United States*, January 23, 2009.
- <sup>42</sup> *United States v. Flores-Figueroa*, ScotusWiki, [http://www.scotuswiki.com/index.php?title=Flores-Figueroa\\_v.\\_United\\_States](http://www.scotuswiki.com/index.php?title=Flores-Figueroa_v._United_States).
- <sup>43</sup> *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008).
- <sup>44</sup> *United States v. Flores-Figueroa*, 274 Fed.Appx. 501 (8th Circuit 2008), cert. granted Oct. 20, 2008; *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Circuit 2008), petition for cert. filed (U.S. July 15, 2008) (No. 08-5316); *United States v. Hurtado*, 508 F.3d 603 (11th Circuit 2007); *United States v. Montejó*, 442 F.3d 213 (4th Circuit 2006), cert. denied \_\_\_ U.S. \_\_\_, 127 S.Ct. 366 (2006) (“knowingly” does not require defendant know the stolen identity information belonged to a real person). *Mendoza* was the case relied upon in the 8th Circuit *Flores-Figueroa* decision. However, three other cases held that “knowingly” does require the defendant to know the identity information belonged to a real person): *United States v. Godin*, 534 F.3d 51 (1st Circuit 2008); *United States v. Miranda-Lopez*, 532 F.3d 1034 (9th Circuit 2008); *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Circuit 2008).
- <sup>45</sup> *United States v. Hurtado*, 508 F.3d 603 (11th Circuit 2007).
- <sup>46</sup> *Flores-Figueroa v. United States*, On Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals, Brief for the United States (Sept. 2008).
- <sup>47</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_ (2009), <http://www.supremecourt.us.gov/opinions/08pdf/08-108.pdf>.
- <sup>48</sup> *United States v. Flores-Figueroa*, 274 Fed.Appx. 501 (8th Circuit 2008).
- <sup>49</sup> *United States v. Flores-Figueroa*, *United States v. Flores-Figueroa*, 274 Fed.Appx. 501 (8th Circuit 2008).
- <sup>50</sup> *United States v. Mendoza-Gonzalez*, <http://docs.google.com/gview?a=v&q=cache:aBQPim4q9FgJ:caselaw.findlaw.com/data2/circs/8th/072660P.pdf+Mendoza-Gonzalez+identity+theft+facts&hl=en&gl=us>
- <sup>51</sup> *United States v. Mendoza-Gonzalez*. The only real issue should have been the “actual” knowledge issue. Whether Gurrola was known to be an actual person, and especially that he was still alive, seem to hold little basis in a statutory interpretation. No other defense counsel raised the issue of whether the government proved beyond a reasonable doubt that the defendant knew the victim was alive or not.

<sup>52</sup> *United States v. Mendoza-Gonzalez*. More specifically, the court stated the following: “The last antecedent rule holds that qualifying words and phrases usually apply only to the words or phrases immediately preceding or following them, not to others that are more remote. See 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:33 (7th ed. 2007). ‘While [the last antecedent rule] is not an absolute and can assuredly be overcome by other indicia of meaning ... construing a statute in accord with the rule is quite sensible as a matter of grammar.’ *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (internal quotation omitted). Therefore, we find that the plain language of § 1028A(a)(1) limits ‘knowingly’ to modifying ‘transfers, possesses, or uses’ and not ‘of another person.’”

<sup>53</sup> *United States v. Hurtado*, [http://epic.org/privacy/flores-figueroa/hurtado\\_11th\\_cir.pdf](http://epic.org/privacy/flores-figueroa/hurtado_11th_cir.pdf).

<sup>54</sup> *United States v. Hurtado*.

<sup>55</sup> *United States v. Hurtado*.

<sup>56</sup> *United States v. Montejo*, <http://openjurist.org/442/f3d/213/united-states-v-montejo>.

<sup>57</sup> *United States v. Godin*, [http://epic.org/privacy/flores-figueroa/godin\\_1st\\_cir.pdf](http://epic.org/privacy/flores-figueroa/godin_1st_cir.pdf).

<sup>58</sup> *United States v. Godin*.

<sup>59</sup> *United States v. Godin*.

<sup>60</sup> *United States v. Godin*, Concur. Op., p. 10.

<sup>61</sup> *United States v. Miranda-Lopez*.

<sup>62</sup> *United States v. Miranda-Lopez*.

<sup>63</sup> *United States v. Miranda-Lopez*.

<sup>64</sup> *United States v. Miranda-Lopez*.

<sup>65</sup> *United States v. Villaneuva-Sotelo*, Maj. Op. <http://www.altlaw.org/v1/cases/1420821>.

<sup>66</sup> *United States v. Villaneuva-Sotelo*, Maj. Op.

<sup>67</sup> *United States v. Villaneuva-Sotelo*, Maj. Op.

<sup>68</sup> *United States v. Villaneuva-Sotelo*, Dissent.

<sup>69</sup> At least five of the seven amicus briefs filed in this case from interested parties were clearly seeking a political outcome in favor of the defendant for a variety of reasons, including the Advocates for Human Rights; Electronic Privacy Information Center; the Mexican American Legal Defense and Educational Fund; National Association of Criminal Defense Lawyers; and Professors of Criminal Law. One organization considered itself neutral, the Professors of Linguistics, and one party filed in support of the government and victims, the Maryland Crime Victims’ Resource Center, Inc. See Docket for No. 08-108, *Ignacio Carlos Flores-Figueroa, Petitioner v. United States*, <http://www.supremecourtus.gov/docket/08-108.htm>.

<sup>70</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Maj. Op.

<sup>71</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Concur Op.

<sup>72</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Concur Op.

<sup>73</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Maj. Op.

<sup>74</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Maj. Op.

<sup>75</sup> *United States v. Flores-Figueroa*, 556 U.S. \_\_\_\_ (2009), Maj. Op.

<sup>76</sup> The phrase “without lawful authority” is not defined in Section 1028. However, *Hurtado* states that “without lawful authority” is much wider than meaning “theft” and includes transfer, possession, or use outside the purview of the law.

<sup>77</sup> *Combating Identity Theft: A Strategic Plan*, The President’s Identity Theft Task Force, September 2008, p. 39, <http://www.ftc.gov/os/2008/10/081021taskforcereport.pdf>.



## Fixing Flores Assuring Adequate Penalties for Identity Theft and Fraud

By Janice Kephart

This *Backgrounder* proposes statutory language fixes to federal identity theft and aggravated felony language in 18 U.S.C. §§ 1028 and 1028A to reverse the practical implications of the May 2009 Supreme Court ruling in *Flores-Figueroa v. United States*.<sup>1</sup> *Flores* crippled prosecutors' longstanding practice of using the aggravated identity theft statute by requiring that prosecutors now also prove that a defendant knew he was using a real person's identity information, as opposed to counterfeit information not connected to an actual person. The statute is an important tool for immigration enforcement. Proving a defendant's knowledge about his crime is always difficult, and impossible in some cases, even where there is substantial harm and clear victims. This is especially the situation with illegal aliens who buy identity information from third parties. The inevitable result of the *Flores* decision is to enable perpetrators an easy defense and to tie prosecutors' hands. The defendant in the case was an illegal alien working at a steel plant in Illinois.

Center for Immigration Studies  
1522 K Street, NW, Suite 820  
Washington, DC 20005-1202  
(202) 466-8185 • (202) 466-8076  
center@cis.org • www.cis.org

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