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Flores-Figueroa v. United States response to petition

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No. 08-108

In the Supreme Court of the United States

IGNACIO CARLOS FLORES-FIGUEROA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted in 274 Fed. Appx. 501.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. The petition for a writ of certiorari was filed on July 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to two counts of misuse of immigration documents, in violation of 18 U.S.C. 1546(a), and one count of entering the United States without inspection, in violation of 8 U.S.C. 1325(a). Pet. App. 2a. Following a bench trial, petitioner was also

convicted of two counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). Pet. App. 2a. He was sentenced to 75 months of imprisonment, to be followed by three years of supervised release. *Id.* at 6a, 8a. The court of appeals affirmed. *Id.* at 1a-3a.

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

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

18 U.S.C. 1028A(a)(1). The statute further provides that a district court “shall not place on probation any person convicted of a violation of this section,” 18 U.S.C. 1028A(b)(1), nor may the term of imprisonment generally “run concurrently with any other term of imprisonment * * * including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used,” 18 U.S.C. 1028A(b)(2). The term “means of identification” is defined to mean “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any * * * name, social security number, date of birth, [or] official State or government issued driver’s license or identification number.” 18 U.S.C. 1028(d)(7) and (7)(A).

2. Petitioner is a native and citizen of Mexico. 5/10/07 Tr. 33; Presentencing Report 2 (PSR). In 2000, petitioner began working at a steel company in East Moline, Illinois, under the assumed name of Horacio Ramirez. 5/10/07 Tr. 10-11; PSR para. 4. In 2006, petitioner told his employer that he wanted to be known as Ignacio C. Flores and to change the social security and

alien registration numbers that the employer had on file for him. 5/10/07 Tr. 10; PSR para. 4. In connection with that request, petitioner presented the employer with a counterfeit social security card and a counterfeit alien registration card. Pet. App. 2a; 5/10/07 Tr. 11, 15-16, 27; PSR para. 4. The counterfeit social security card listed a social security number that had been assigned to another person, 5/10/07 Tr. 27, and the counterfeit alien registration card contained an alien registration number that had been assigned to a different person, *id.* at 11-12, 17-18. Petitioner was in possession of the counterfeit documents when he was arrested. *Id.* at 13-16.

3. Petitioner was charged in a five-count indictment with one count of entering the United States without inspection, two counts of misuse of immigration documents, and two counts of aggravated identity theft. Pet. App. 2a, 4a-5a; Indictment 1-3. At a bench trial on the aggravated identity theft counts, petitioner moved for a judgment of acquittal on the ground that the government had not established that petitioner knew that the social security and alien registration numbers that he used had been assigned to other people. Pet. App. 2a; 5/10/07 Tr. 30. The district court denied that motion, *id.* at 32, concluding that Section 1028A(a)(1) “does not require the government to prove that [petitioner] knew that the identifying information [on the counterfeit documents] belonged to an actual individual,” *id.* at 49. The court found petitioner guilty on both aggravated identity theft counts. *Id.* at 50.

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-3a. The court stated that its recent decision in *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), reh’g denied (May 1, 2008), petition for cert. pending, No. 08-5316

(filed July 15, 2008), had “resolved th[e] issue” raised by petitioner. Pet. App. 3a. Applying the holding of *Mendoza-Gonzalez*, the court of appeals stated that the government was not required to show that petitioner “knew that the means of identification belonged to another person.” *Ibid.*

DISCUSSION

Petitioner renews his contention (Pet. 16-28) that he was entitled to a judgment of acquittal on the Section 1028A(a)(1) counts because the government did not establish that he knew that the social security and alien registration numbers that he used had been assigned to other people. The court of appeals correctly rejected that claim. We agree with petitioner, however, that there is now a clear and entrenched conflict among the courts of appeals with respect to that question and that the proper interpretation of Section 1028A(a)(1) presents an important and recurring issue that warrants this Court’s review. See Gov’t Pet. Resp. at 7-13, *Mendoza-Gonzalez v. United States*, petition for cert. pending, No. 08-5316 (filed July 15, 2008).

The government has suggested that the Court grant the earlier-filed petition for a writ of certiorari in *Mendoza-Gonzalez*, which presents the same question as the petition for a writ of certiorari in this case. Pet. at ii, *Mendoza-Gonzalez, supra* (No. 08-5316). *Mendoza-Gonzalez* is also the case in which the Eighth Circuit issued the published decision upon which the panel relied (see Pet. App. 3a) in its brief unpublished decision in this case. Accordingly, if the Court grants review in *Mendoza-Gonzalez*, it should hold the petition for a writ of certiorari in this case pending its decision in *Mendoza-Gonzalez* and then dispose of the petition as

appropriate in light of the Court's resolution of that case.

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Mendoza-Gonzalez v. United States*, petition for cert. pending, No. 08-5316 (filed July 15, 2008), and then dispose of this case accordingly.

Respectfully submitted.

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