

No. 18-682

In the Supreme Court of the United States

MANUEL ENRIQUE SANTANA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner used “a means of identification of another person” for purposes of a conviction for aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1), when he used the names and forged signatures of other individuals to deposit stolen U.S. Treasury tax-refund checks that identified those intended payees by their names and addresses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 739 Fed. Appx. 543.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2018. On September 18, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 22, 2018, and the petition was filed on November 21, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of ten counts of theft of government property,

in violation of 18 U.S.C. 641; and five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). Judgment 1. Petitioner was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-5a.

1. Petitioner worked as a manager of the Orlando Grill and Restaurant, a restaurant owned by his family in Orlando, Florida. 2 Tr. 12-13. According to petitioner, the restaurant provided a check-cashing service to its customers. See *ibid.*; Pet. 3.

Between February and March 2014, petitioner deposited 47 U.S. Treasury tax-refund checks that had been issued to various other individuals into bank accounts that petitioner owned or controlled, using forged indorsements of the identified payees. See Pet. 4; Pet. App. 2a-3a; Gov't C.A. Br. 2, 5. Each check identified the intended payee by name and street address. See Trial Exs. 3B, 7, 9, 11, 13, 15, 16, 19, 21, 23, 27, 28, and 29; D. Ct. Doc. 35 (Jan. 10, 2017) (redacted versions of trial exhibits). The indorsement line on each check bore the forged signature of the intended payee to whom the check had been issued and, in all but one instance, also bore petitioner's signature. See *ibid.*; Gov't C.A. Br. 2. Such a "double" indorsement allows a person other than a check's designated payee to deposit it. See 1 Tr. 206-207; Gov't C.A. Br. 2.

Petitioner deposited the checks into accounts he controlled without the consent of the intended payees. See 1 Tr. 228-268. Petitioner personally deposited each check, either through a bank teller or at an ATM. See Gov't C.A. Br. 2.

2. In August 2016, a grand jury in the Middle District of Florida returned an indictment charging petitioner with ten counts of theft of government property, in violation of 18 U.S.C. 641; and five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A(a)(1). Indictment 1-2. Each theft-of-government-property count corresponded to one of the checks that petitioner had deposited. *Ibid.* Each aggravated-identity-theft count corresponded to an individual whose tax-refund checks were involved. *Ibid.*

A total of 17 of the intended payees whose checks petitioner deposited testified at trial. All 17 testified that they had filed federal tax returns for tax year 2013 and expected tax refunds, and none had received, signed, or deposited the U.S. Treasury refund checks that had been issued to them and that petitioner had deposited into his own accounts. The victims each confirmed that their names and addresses listed on the U.S. Treasury checks that petitioner deposited were accurate. None of the payees had given anyone else permission to deposit their tax-refund checks, recognized petitioner, or had ever visited the restaurant that petitioner managed. See 1 Tr. 228-268; 2 Tr. 12.

Petitioner testified and admitted that he deposited all 47 checks at issue into his bank accounts. 2 Tr. 11, 22. Petitioner asserted, however, that he deposited the checks in connection with the check-cashing service provided by the restaurant he managed and that, in each case, he had verified the customer's identification. 2 Tr. 12-18, 32-36, 38-39. Petitioner stated his belief that, during a ten-day period in February and March 2014, the 47 people who gave him the checks at issue must have shown him fake identification. 2 Tr. 38-39.

At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal, arguing only that the evidence was insufficient because the charged offenses "are all crimes that require specific intent" and that the government had not introduced evidence "with regard to the specific intent." 2 Tr. 3-4. The district court denied the motion. 2 Tr. 4. The court found that the evidence showed that U.S. Treasury checks had been made payable to certain individuals, had been directed to those individuals' residences, had come into petitioner's possession, and had been deposited in his own accounts, and "[m]any of those checks were deposited with significant cash being drawn back out." 2 Tr. 5. The court further found that the 17 victims who testified all indicated that they had not signed the checks or authorized their signatures to be placed on them, did not know petitioner, and had never been to petitioner's restaurant. *Ibid.* The court determined that the government's evidence indicated "that the checks were misappropriated and were deposited in a manner that's indicative of a scheme to defraud." 2 Tr. 5.

Petitioner renewed his motion at the close of all of the evidence based "on the same argument." 2 Tr. 89. The district court denied the renewed motion "for the reasons previously stated." *Ibid.* The jury found petitioner guilty on all counts. 2 Tr. 153. The court sentenced petitioner to a total of 48 months of imprisonment, consisting of 24 months of imprisonment on each of the theft-of-government-property counts, to run concurrently with one another; and 24 months of imprisonment on each of the aggravated-identity-theft counts, to run consecutively to the theft counts but concurrently with one another. Judgment 3.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-5a. As relevant here, petitioner contended that the evidence was insufficient because the government had “presented no proof that [petitioner] possessed a driver’s license or other means of identification bearing another person’s signature or personal identification.” Pet. C.A. Br. 7. The court rejected that contention. Pet. App. 3a.

Section 1028A prohibits the knowing transfer, possession, or use, without lawful authority, of “a means of identification of another person,” in relation to one of several enumerated felonies, including 18 U.S.C. 641. 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c). The statute defines the phrase “means of identification” 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, 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 defined in [18 U.S.C. 1029(e)]).

18 U.S.C. 1028(d)(7).

The court of appeals observed that it had previously held that “a person’s name and forged signature is a means of identification” for purposes of Section 1028A. Pet. App. 3a (citing *United States v. Wilson*, 788 F.3d 1298, 1310 (11th Cir.), cert. denied, 136 S. Ct. 518 (2015)). The court found that “[t]he payee’s names and signatures” that petitioner had used in this case “were plainly means of identification, and the evidence showed that [petitioner] deposited checks that had the signatures of what appeared to be the payees, even though the payees testified that they did not sign the checks issued in their name.” *Id.* at 3a-4a.¹

ARGUMENT

The court of appeals correctly determined that the trial evidence was sufficient to establish that petitioner committed aggravated identity theft in violation of 18 U.S.C. 1028A(a)(1) by using “a means of identification of another person” to commit another specified crime. Its unpublished decision does not conflict with any decision of this Court or of another court of appeals. Even if petitioner’s statutory arguments otherwise warranted this Court’s review, this case would be an unsuitable vehicle to address them.

1. The court of appeals correctly determined that the evidence at trial was sufficient for a rational jury to find that petitioner committed aggravated identity theft in violation of 18 U.S.C. 1028A(a)(1). Pet. App. 3a-4a.

a. Section 1028A prohibits the knowing transfer, possession, or use, without lawful authority, of “a means

¹ Petitioner also contended (*inter alia*) in the court of appeals that insufficient evidence existed that he possessed the requisite mens rea. Pet. App. 2a-3a. The court rejected that contention, *ibid.*, and petitioner does not seek review of that ruling in this Court.

of identification of another person,” “in relation to” any one of several enumerated felonies, including 18 U.S.C. 641. 18 U.S.C. 1028A(a)(1); see 18 U.S.C. 1028A(c). Petitioner admitted at trial that he deposited U.S. Treasury tax-refund checks that identified other persons as the intended payees into his own bank accounts. 2 Tr. 22; see Gov’t C.A. Br. 2-4. The victims testified consistently that they had never received the checks, had not signed them or authorized anyone else to indorse them on their behalf, did not recognize petitioner, and had not visited his restaurant. See 1 Tr. 228-268; Gov’t C.A. Br. 3. The checks that petitioner deposited identified the intended payee by name and street address and bore the payee’s purported signature on the indorsement line. See, *e.g.*, Trial Ex. 19; D. Ct. Doc. 35-20 (Jan. 10, 2017) (redacted version of Trial Exhibit 19).²

Petitioner contends (Pet. 12-18) that the evidence was nevertheless insufficient to show that he violated Section 1028A(a)(1) on the ground that “[t]he use of a name alone is not the use of a ‘means of identification’

² Petitioner does not dispute that a signature is a “name” under the statute. See Pet. 14 (whether the name on a check “is handwritten or typed has no bearing on whether it is a ‘means of identification’ under 18 U.S.C. § 1028A”). Every court of appeals to have considered the issue has reached the same conclusion. See, *e.g.*, *United States v. Wilson*, 788 F.3d 1298, 1311 (11th Cir.) (“[A] signature is understood to be a person’s written name.”), cert. denied, 136 S. Ct. 518 (2015); *United States v. Porter*, 745 F.3d 1035, 1042 (10th Cir. 2014) (“[A] signature is a form of ‘name’ for purposes of § 1028(d)(7)’s definition of ‘means of identification.’”); *United States v. Williams*, 553 Fed. Appx. 516, 518 (6th Cir.) (same), cert. denied, 572 U.S. 1157 (2014); *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008) (“[N]othing in the language of the statute that suggests the use of another’s name in the form of a signature is somehow excluded from the definition of ‘means of identification.’”).

under Section 1028A.” Pet. 12 (emphasis omitted). This case does not implicate that question because petitioner’s factual premise—that he used only his identity-theft victims’ names—is incorrect. Section 1028 provides that a name can constitute a “‘means of identification’” if the name can “be used, alone *or in conjunction with* any other information, to identify a specific individual.” 18 U.S.C. 1028(d)(7) (emphasis added). As the court of appeals has accordingly held, if a name in combination with additional information enables identifying a specific individual, it is a “means of identification.” See *United States v. Wilson*, 788 F.3d 1298, 1311 (11th Cir. 2015) (“Under the statute, the use of a name, alone or in conjunction with any other information, clearly constitutes a means of identification so long as the name could be combined with other information to identify a specific individual.”), cert. denied, 136 S. Ct. 518 (2015). Petitioner does not appear to argue otherwise. See Pet. 13 (“[N]ames * * * must be used ‘in conjunction with other information’ to constitute ‘means of identification’ under the statute.”).

In this case, petitioner did not use his victims’ names alone but instead in conjunction with additional identifying information. The U.S. Treasury tax-refund checks that he deposited referred to each payee by name *and* street address. See pp. 2-3, *supra*. The payees for each of the five counts of aggravated identity theft testified that the checks deposited by petitioner accurately reflected their addresses at the time. 1 Tr. 245, 250, 233, 253, 255. Regardless of whether the use of a name alone could constitute a means of identification, a jury could rationally conclude in these circumstances that the use of the names and addresses could and did “identify * * * specific individual[s],” 18 U.S.C. 1028(d)(7)—namely,

the intended payees to whom the refund checks had been issued at the listed addresses. See, e.g., *United States v. Gonzalez*, 666 Fed. Appx. 847, 850 (11th Cir. 2016) (per curiam) (“[A] check with a first name, last name, and address that all match a specific person’s previous identification information contains sufficiently unique identifiers to tie the check to that person.”), cert. denied, 137 S. Ct. 1834 (2017); cf. *United States v. Johnson*, 716 Fed. Appx. 169, 171 (4th Cir. 2018) (per curiam) (“[A] real person’s name with that real person’s actual birthdate is enough ‘to identify a specific individual.’”). Indeed, one of the primary purposes of a check is to identify a specific payee.

At a minimum, the fact that the checks in this case contained additional information that made it possible to identify the specific person named would make this an unsuitable vehicle for addressing petitioner’s broader contention that a “name alone” (Pet. 12) can never identify a specific person. To the extent petitioner contends that the trial evidence in this particular case was in fact limited to names alone, that factbound contention does not warrant further review.

b. In any event, even if the U.S. Treasury tax-refund checks had used only the victims’ names and had not included the additional address information, petitioner’s categorical contention that a name alone can never be a “means of identification” lacks merit. Section 1028(d)(7) defines “means of identification” as “any *name* or number that may be used, alone or in conjunction with any other information, to identify a specific individual.” 18 U.S.C. 1028(d)(7) (emphasis added). The statute further provides that the term “includ[es],” among other things, “any * * * *name*, social security number, date

of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number." 18 U.S.C. 1028(d)(7)(A) (emphasis added). It follows from that definition that a "name" alone can constitute a "means of identification" if it is capable of being "used * * * to identify a specific individual." 18 U.S.C. 1028(d)(7).

Whether a name can be used to identify a particular individual depends on the circumstances. Most obviously, if a particular name is not shared by more than one individual, no sound basis exists to conclude that the name alone cannot identify that one individual. More commonly, a defendant may use a name in a context in which it refers to a specific person with that name, regardless of whether another person might happen to have the same name. Here, for example, the U.S. Treasury issued checks to particular individuals that it determined were entitled to refunds, and petitioner deposited those checks bearing forged indorsements purportedly signed by the listed payees, indicating that he used the names on the checks to refer to the payees. See pp. 2-3, *supra*. The government was required to prove at trial that petitioner "*knew*" that each name he used, "in fact, belonged to another person," *i.e.*, that it "refer[red] to a real person." *Flores-Figueroa v. United States*, 556 U.S. 646, 647, 655 (2009) (internal quotation marks omitted). And although he disputed the sufficiency of the proof of mens rea below, petitioner does not contest in this Court the lower courts' determinations that he acted with the requisite knowledge. See Pet. App. 3a; 2 Tr. 4-6.

Petitioner argues (Pet. 14-15) that Congress must not have intended “means of identification” to encompass names by themselves because a previous version of the statutes referred only to identification documents. But as he acknowledges, before Section 1028A was enacted, Congress had amended Section 1028(d)(7)’s definition, expanding it to encompass (*inter alia*) “name[s]” as well as various documents. Pet. 15 (citing Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, § 3(a)-(h)(1), 112 Stat. 3007-3009). “When Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995).

Petitioner is also incorrect (Pet. 16-18) that interpreting ““means of identification”” to encompass names would “federalize numerous crimes traditionally policed by the States.” Pet. 16 (emphasis omitted). Petitioner asserts (Pet. 16-17) that, although Section 1028A itself requires a “predicate felony offense involving a federal element,” another criminal provision that incorporates the definition of “means of identification,” 18 U.S.C. 1028(a)(7), “has no parallel requirement,” Pet. 16, because it prohibits the misuse of the “means of identification of another person” in connection with, *inter alia*, “unlawful activity * * * that constitutes a felony under any applicable State or local law,” 18 U.S.C. 1028(a)(7). Section 1028(a)(7), however, contains a separate safeguard against unwarranted intrusion into local or state affairs. It applies only when either (i) the misuse “is in or affects interstate or foreign commerce” or (ii) “the means of identification * * * is transported in the mail” in the course of committing the offense, 18 U.S.C.

1028(c)(3). Congress thus considered and explicitly delineated the appropriate balance of federal and state interests when it enacted 18 U.S.C. 1028 and 1028A.

2. Petitioner contends (Pet. 6-12) that review is warranted to resolve a disagreement among the courts of appeals concerning whether a name alone can be a means of identification for purposes of Section 1028A(a)(1). That contention lacks merit.

As petitioner recognizes (Pet. 9-10), the court of appeals' decision, applying its earlier precedent in *Wilson*, 788 F.3d at 1310-1311, is consistent with the decisions of at least five other courts of appeals. See Pet. 9-10 (citing *United States v. Morel*, 885 F.3d 17 (1st Cir. 2018), cert. denied, 139 S. Ct. 174 (2018); *United States v. Miller*, 734 F.3d 530 (6th Cir. 2013); *United States v. Thomas*, 763 F.3d 689, 692-693 (7th Cir. 2014); *United States v. Blixt*, 548 F.3d 882 (9th Cir. 2008); *United States v. Porter*, 745 F.3d 1035, 1039-1049 (10th Cir. 2014)).

Petitioner contends (Pet. 6-8) that the decision below is inconsistent with the Fourth Circuit's decision in *United States v. Mitchell*, 518 F.3d 230 (2008). That is incorrect. In *Mitchell*, the defendant used a fake Georgia driver's license and counterfeit checks in the name of another person (Marcus Jackson) to buy merchandise and return it for cash refunds. *Id.* at 231-232. The driver's license number on Mitchell's false license did not, however, match any entry in the state database, and "the particulars of name, address, and date of birth" on the license were "a hopeless muddle of non-matching and matching information" that could not be linked to any actual driver named Marcus Jackson. *Id.* at 236. Because the information used by Mitchell "simply could

not be used to identify a specific” individual named Marcus Jackson, the Fourth Circuit vacated petitioner’s conviction under Section 1028A. *Ibid.*

That case-specific conclusion does not conflict with the court of appeals’ decision here. Unlike a fake driver’s license or counterfeit check, the U.S. Treasury tax-refund checks at issue in this case referred to particular, real persons—the intended payees—by name and street address. See pp. 2-3, *supra*. Petitioner notes (Pet. 7-8) the Fourth Circuit’s passing statement that a “name alone, for example, would likely not be sufficiently unique to identify a specific individual because many persons have the same name,” *Mitchell*, 518 F.3d at 234, but that does not in itself suggest that the Fourth Circuit would reach a different conclusion than the Eleventh Circuit did if presented with the facts of this case. And although the Eleventh Circuit in *Wilson* observed that inconsistency may exist between the Fourth Circuit’s approach in *Mitchell* and that of other circuits, see *Wilson*, 788 F.3d at 1310, any such inconsistency is not implicated here. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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