



**POST-POSTVILLE CLE CONFERENCE**

Kansas City, Missouri  
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*DEFENDING CRIMINAL PROSECUTIONS:  
ELEMENTS AND LEGAL LANDSCAPE OF CRIMINAL OFFENSES CHARGED AGAINST  
NON-CITIZEN CRIMINAL DEFENDANTS*

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## I. INTRODUCTION

On May 12, 2008, Immigration and Customs Enforcement (ICE) executed an immigration raid in what officials boasted was “the largest single-site operation of its kind in American history.” The target was Agriprocessors, Inc., the nation’s largest kosher slaughterhouse and meat packing plant located in the town of Postville, Iowa. Of Agriprocessors’ 968 employees, arrest warrants were issued for 697 employees. But because late-shift workers had not yet arrived on the morning of May 12, only 390 were arrested: 314 men and 76 women. Some were released on humanitarian grounds, including mothers with unattended children, and juveniles. In the end, 306 employees were held for prosecution. Instead of deporting the workers immediately for immigration violations, prosecutors chose to press criminal charges against the undocumented workers.

This memorandum describes and explains the elements of the four criminal offenses with which the Postville defendants were charged: (A) violation of 42 U.S.C. § 408(a)(7) (false statements concerning social security numbers); (B) violation of 18 U.S.C. § 1546(a) (fraud and misuse of visas, permits and other documents); (C) violation of 8 U.S.C. § 1326(a) (unlawful reentry); and (D) aggravated identity theft in violation of 18 U.S.C. § 1028A(a). It also presents case law construing these offenses, and the current circuit split regarding the “knowing” element of aggravated identity theft. It is our hope that this memorandum will serve as a quick reference guide to future public defenders faced with these circumstances.

## II. CRIMINAL OFFENSES CHARGED IN POSTVILLE

### A. 18 U.S.C. § 1028A(a) (Aggravated Identity Theft)

#### 1. Elements

Most of the workers arrested in the Postville raid were charged with aggravated identity theft in violation of 18 U.S.C. § 1028A(a). The elements of a section 1028A(a) offense are:

- (1) knowingly
- (2) transferring, possessing or using
- (3) without lawful authority
- (4) a means of identification<sup>1</sup> of another person
- (5) during and in relation to an enumerated felony.

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<sup>1</sup> “Means of identification” is defined as “any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual,” including but not limited to alien registration and social security numbers. 18 U.S.C. § 1028(d)(7).

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Section 1028A(c) lists the enumerated felonies that can serve as the predicate offense for an aggravated identity theft crime. This list includes violation of 18 U.S.C. § 1546(a) (fraud and misuse of visas, permits and other documents) and 42 U.S.C. § 408(a)(7) (false statements concerning social security numbers), which served as the predicate offenses for the Postville defendants charged with aggravated identity theft. (See discussion of predicate offenses below.) Conviction on the aggravated identity theft count carries a mandatory 2-year term of imprisonment, to run consecutively with (*i.e.*, in addition to) the sentence for the underlying felony.

2. Legal Analysis

Most of the caselaw construing section 1028A is devoted to the question of which elements of the offense are covered by the “knowingly” mens rea requirement. There is at present a circuit split on the question of whether “knowingly” modifies “of another person”; that is, whether the prosecution must prove that the defendant knew not only that the means of identification was false, but also that the identification actually belonged to another person.

a. Fourth, Eighth and Eleventh Circuits

Iowa is in the Eighth Circuit. The Eighth, Fourth and Eleventh Circuits have recently held that the “knowingly” requirement applies only to the verbs “transferring, possessing or using” and does *not* extend to the “of another person” element. In other words, in these Circuits, the government need not prove that the defendant knew that the means of identification he used actually belonged to another person (although the government must still prove that the identification did *in fact* belong to another person). See *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *reh’g and reh’g en banc denied*; *United States v. Hurtado*, 508 F.3d 603, 609 (11th Cir. 2007); *United States v. Montejo*, 442 F.3d 213, 215 (4th Cir. 2006).

*Mendoza-Gonzalez*, which is controlling authority in Iowa, is typical of these cases. In *Mendoza-Gonzalez*, the defendant completed a Form I-9 in which he falsely represented that he was a citizen or national of the United States, and verified his identity by submitting a photo identification card in the name of another person (“Dinicio Gurrola IIP”). After he was arrested in an ICE raid, Mendoza-Gonzalez was charged with 5 crimes, including making a false representation of a social security number in violation of 18 U.S.C. § 1546(a) and aggravated identity theft in violation of 18 U.S.C. § 1028A(a). *Mendoza-Gonzalez*, 520 F.3d at 913-14. On the identity theft charge, Mendoza-Gonzalez argued that the government was required to prove that he knew “Dinicio Gurrola III” was an actual person, and had failed to do so. Scrutinizing the plain language and grammar of the statute, the court held that section 1028A is unambiguous, that the knowledge requirement is limited to the verbs “transfer, possess or use,” and that the government need not, therefore, prove that Mendoza-Gonzalez knew that Gurrola was a real person. *Id.* at 915. Under this reasoning, it was sufficient for

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the government to prove that Gurrola was in fact a real person (whether living or dead), irrespective of whether the defendant was aware of that fact.

**b.** DC, First and Ninth Circuits

In decisions issued this year, the DC, First and Ninth Circuits broke with the Fourth, Eighth and Eleventh Circuits by holding that the “knowingly” mens rea requirement does extend to “of another person,” *i.e.*, that the government must prove beyond a reasonable doubt that the defendant knew that the means of identification belonged to another person. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1236 (D.C. Cir. 2008); *United States v. Godin*, No. 07-2332, 2008 U.S. App. LEXIS 15301 (1st Cir. July 18, 2008); *United States v. Miranda-Lopez*, No. 07-50123 (9th Cir. July 17, 2008). These three decisions all conclude that the statutory text is ambiguous as to whether “knowingly” applies to “of another person,” relying in part on the Supreme Court’s decision in *Liparota v. United States*, 471 U.S. 419 (1985), in which the Court held that a similar knowledge requirement was ambiguous. Having found the statutory language to be ambiguous, all three decisions conclude that the knowledge requirement should be construed to extend to “of another person.”<sup>2</sup>

The benefit of this construction to the defendant is clear from the fact that in all three of these cases the court reversed the aggravated identity theft conviction for insufficient evidence. The DC and Ninth Circuits, however, noted that the burden of proof adopted in these cases should not present a “major obstacle” to the prosecution given that “such knowledge [that the means of identification actually belongs to another person] will often be demonstrated by the circumstances of the case,” for example where the identification document contains someone else’s photo and does not appear to be a fake. *Villanueva-Sotela*, 515 F.3d at 1249; *Miranda-Lopez* (Slip Op. at 8859). As noted by the Chief Judge of the First Circuit, concurring in *Godin*, this circuit conflict appears ripe for resolution by the Supreme Court.

It should be noted that there is no dispute that the statute unambiguously requires proof that the defendant *knowingly* used a false means of identification. In the Postville ICE raid cases, the government alleged that the defendants knowingly used false alien registration numbers (“A numbers”). The only evidence offered by the government in support of that allegation was Form I-9s seized during the ICE raids. Each of the I-9s listed a false A number and was accompanied by a photocopy of a resident alien card containing a false A number. As in the 18 U.S.C. § 1546(a) context, there is a fact question in these cases as to whether the defendant himself/herself completed the I-9 or procured or used the resident alien card, or whether those acts were taken by the employer or an agent of the employer. If the defendant merely signed the Form I-9, without knowing that a false A number was used, and had no knowledge that a false A number was used in the accompanying resident alien

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<sup>2</sup> The circuits reached this conclusion by different routes, with the DC Circuit relying primarily on legislative history and the First and Ninth Circuits applying the rule of lenity.

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card, the government might not be able to prove to a jury that the defendant “knowingly” used a false means of identification.

**B. 42 U.S.C. § 408(a)(7) (False Representation of a Social Security Number)**

**1. Elements**

To establish a section 42 U.S.C. § 408(a)(7)(B) offense (false representation of a social security number), the prosecution must prove that the defendant:

- (1) for any purpose,
- (2) with intent to deceive,
- (3) represented a number to be the social security account number assigned to himself or another person,
- (4) when in fact such representation was false.

**2. Legal Analysis**

**a. Affirmative Representation Element**

As a threshold matter, the third element requires proof of an affirmative act of representation by the defendant. Mere possession of a false social security number does not violate § 408(a)(7)(B) absent additional facts from which a jury could infer that a false representation was made (either in the procurement or use of the false social security number). *United States v. McKnight*, 17 F.3d 1139, 1143-45 (8th Cir. 1994). In *McKnight*, the defendants were found to be in possession of false identification cards bearing social security numbers that were not their own. The court held that such possession alone was not sufficient to sustain a § 408(a)(7) conviction because the government had failed to come forward with any evidence – either direct or circumstantial – that the defendants ever *used* the false social security numbers. *Id.* (“Under the facts presented, proof of possession without more fails to create any credible inference that the social security numbers were misrepresented to anyone.”).<sup>3</sup>

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<sup>3</sup> A majority of the *McKnight* panel wrote separately to emphasize that mere possession of an identification card bearing a false social security number can, “in some instances,” provide a sufficient predicate for a jury inference that a defendant falsely represented a social security number. *Id.* at 1146 (Magill and Hansen, JJ., concurring). For example, if an accused is caught with a U.S. passport that is not counterfeit but that contains a false name and social security number, a jury could properly infer that the passport was procured through false representations to the passport authority. *Id.* at 1146 n.1. The court upheld a conviction for violation of § 408(a)(7)(B) on just such a theory in *United States v. Teitloff*, 55 F.3d 391 (8th Cir. 1995), where the defendant was in possession of a validly issued driver’s license containing the defendant’s own picture and a false name and social security number. The court held that the

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A related issue arises where the defendant claims that some person other than the defendant made the false representation. For example, in *United States v. Alexius*, No. 94-50216, 1995 WL 29227, \*4 (5th Cir. Jan. 11, 2005), the defendant was convicted of using a false social security number in an application for utility service. On appeal, the defendant argued that there was insufficient evidence that she herself – rather than a friend acting without the defendant’s authorization – had set up the utility service account. *Id.* The court ultimately upheld the conviction on the ground that the jury was in the best position to decide among competing inferences that could be drawn from the evidence, but noted that the government had “perhaps barely” satisfied its burden of presenting evidence sufficient to prove that the defendant was the person who made the false representation. *Id.*

In the Postville cases alleging violation of § 408(a)(7)(B), the charging documents alleged only that the employer’s payroll reports “reflect” that the defendants were registered on the company’s payroll using social security numbers that did not belong to them. The caselaw suggests that the government would need to have come forward with additional evidence (whether direct or circumstantial) to establish an affirmative false representation on the part of the defendants. If, for example, the Postville defendants’ employer completed the relevant employment documents with false social security numbers, but did so without the defendants’ authorization, there would be an argument that the defendants themselves never affirmatively misrepresented a social security number. Under those circumstances, the *Alexius* case suggests that whether the Postville defendants in fact assented to the false representation by the employer would have been a jury issue.

**b. Intent to Deceive Element**

The “intent to deceive” element requires proof that the defendant acted with the purpose to mislead some other person (any person or entity will suffice), whether or not anyone was in fact misled. *United States v. Sirbel*, 427 F.3d 1155, 1159-60 (8th Cir. 2005); see also *United States v. Johnson-Wilder*, 29 F.3d 1100, 1103-04 (7th Cir. 1994) (in § 408(a)(7) conviction, not necessary for government to show that defendant was trying to defraud party to whom false social security number was given). Good faith is a complete defense if the defendant’s conduct is shown to be inconsistent with an intent to mislead. *Sirbel*, at 1159-6.

Because intent is often difficult to prove directly, it may be proven by circumstantial evidence alone. *United States v. Rastegar*, 472 F.3d 1032, 1037 (8th Cir. 2007) (concurrent use of two different social security numbers could support jury inference of intent to deceive IRS); see also *Sirbel*, 427 F.3d at 1159-60 (jury could infer intent to deceive from fact of defendant’s knowledge that social security number he used had not been issued to him).

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evidence was sufficient to allow the jury rationally to infer that the defendant falsely represented his name and social security number to the driver’s license authority. *Id.* at 394.

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On the facts of the Postville ICE raids, there is an argument that the defendants never formed any intent to deceive because they did not understand what a social security number is or how it is used. The government would likely argue that an intent to deceive nevertheless can be inferred from the fact that the defendants were aware that they were in the United States illegally, and had an incentive to deceive the government as to their immigration status. The following cases may be instructive:

- In *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 913-14 (8th Cir. 2008), the defendant, an undocumented worker, was convicted of violating section 408(a)(7), among other convictions, based on false representations made in a Form I-9 in connection with his employment at a meat processing plant in Iowa. However, the section 408(a)(7) conviction was not appealed and did not form the basis for the court's opinion.<sup>4</sup>
- In *United States v. Perez-Campos*, 329 F.3d 1214, 1216-17 (10th Cir. 2003), the Tenth Circuit upheld a section 408(a)(7) conviction against an undocumented worker defendant who provided a false social security number to the police after being arrested for driving without a license. The court held that an intent to deceive could be inferred from, *inter alia*, the defendant's incentive to conceal from the police his prior criminal history (a previous immigration violation) and immigration status. *Id.*

**C. 18 U.S.C. § 1546(a) (Possession/ Use of a Fraudulent Immigration Document)**

**1. Elements**

Some of the Postville defendants were charged with possession or use of a fraudulent immigration document in violation of 18 U.S.C. § 1546(a). A conviction under the first paragraph of section 1546(a) requires the prosecution to establish that the defendant:

- (1) knowingly used, attempted to use, possessed, obtained or received,
- (2) an alien registration card or other document prescribed by statute or regulation as evidence of authorized stay or employment in the United States,<sup>5</sup>

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<sup>4</sup> The court's opinion in *Mendoza-Gonzalez* is discussed in more detail below in relation to the offense of aggravated identity theft.

<sup>5</sup> The universe of documents covered by the statute is described in the statute as "any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States." 18 U.S.C. § 1546(a). The charging documents for the Postville defendants allege use or possession of false resident alien cards.

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- (3) knowing that document to have been forged, counterfeited, altered, falsely made or procured by means of any false claim or statement.

## 2. Legal Analysis

Section 1546(a) thus contains two knowledge requirements – that (i) the defendant *knowingly* used or possessed the fraudulent immigration document, and (ii) did so *knowing* the document to have been falsely made or procured by fraud. *United States v. Polar*, 369 F.3d 1248, 1251-53 (11th Cir. 2004); *United States v. Uvalle-Patricio*, 478 F.3d 699, 702 (5th Cir. 2007).

With respect to the element of knowing possession or use, courts have upheld convictions based on circumstantial evidence of knowing possession. For example, the Eleventh Circuit has held that the government “need not prove actual possession in order to establish knowing possession; it need only show constructive possession through direct or circumstantial evidence.” *U.S. v. Campa*, 529 F.3d 980, 1003 (11th Cir. 2008). In *Campa*, the court upheld a conviction for knowing possession of a false identity document where the police found a counterfeit passport bearing the defendant’s photo concealed in a drawer in a co-conspirator’s apartment in which the defendant had once stayed. *Id.* The government had also introduced evidence of documents seized from the defendant’s residence that contained the false name that appeared on the counterfeited passport. *Id.* The court concluded that “a reasonable jury could have inferred from the appearance of Campa’s photograph on the passport and accompanying identity documents in the context of the other evidence that Campa was aware of the documents and that they were created for his use.” *Id.* at 1004; *see also U.S. v. Vega*, 184 Fed. Appx. 236, 240-41 (3d Cir. 2006) (circumstantial evidence sufficient to support inference that defendant was involved in production of false identity document).

In the Postville raid cases, the charging documents alleging violation of section 1546(a) allege, for each such defendant, that the defendant possessed and used a resident alien card containing an alien registration number assigned to another individual. In particular, the charging documents state that among the evidence seized by the ICE agents was, for each such defendant, an I-9 form bearing the defendant’s signature and attaching a photocopy of a resident alien card purportedly used by the defendant but containing an alien registration number not assigned to the defendant.

In order to obtain a conviction under this section, the prosecution would need to come forward with evidence sufficient to convince a jury that the defendant (a) knowingly used or possessed the false resident alien card, and (b) when using or possessing the card, *knew* that the card had been unlawfully obtained. As discussed above, the caselaw suggests that the prosecution could support a conviction on this charge through circumstantial evidence alone. Nevertheless, in cases where the defendant was unaware of what a resident alien card or alien registration number is, or how such means of identification are lawfully obtained, there may be a substantial issue of fact as to whether the defendant *knew* that the card had been

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unlawfully obtained, which would be a jury issue. Despite the potential availability of such avenues of defense, a review of the caselaw did not reveal any instances in which an undocumented worker successfully challenged a section 1546(a) conviction.

**D. 8 U.S.C. § 1326(a) (Unlawful Reentry)**

**1. Elements**

A few of the Postville defendants were charged with unlawful reentry in violation of 8 U.S.C. § 1326(a). The elements of a section 1326(a) offense are satisfied with respect to:

- (1) any alien who
- (2) unlawfully
- (3) enters, attempts to enter, or is found in, the United States,
- (4) after having been denied admission, excluded, deported, or removed or having departed the United States while under an order of exclusion, deportation or removal.

**2. Legal Analysis**

Having already “found” the defendant in the United States (element 4 above), the government’s burden in an unlawful reentry case is exceedingly low – it need only prove three additional, basic facts: that the defendant (1) is not a citizen or national of the United States, (2) previously had been deported or subject to an order of removal, and (3) had not obtained advance permission to reenter. *United States v. Burgos*, No. 06-4091, 2008 WL 3877257, \*1 (7th Cir. Aug. 22, 2008). Typically, the government will be able to meet that burden simply by introducing documentary evidence, including the previous warrant or order of removal and a document called a “certificate of nonexistence of record,” or “CRN,” which have been held to be business records not subject to the requirements of the confrontation clause. *See id.*

APPENDIX A

18 USCS § 1028A

§ 1028A. Aggravated identity theft

(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 shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense. Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence. Notwithstanding any other provision of law--

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(c) Definition. For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of--

(1) section 641 [18 USCS § 641] (relating to theft of public money, property, or rewards), section 656 [18 USCS § 656] (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 [18 USCS § 664] (relating to theft from employee benefit plans);

(2) section 911 [18 USCS § 911] (relating to false personation of citizenship);

- (3) section 922(a)(6) [18 USCS § 922(a)(6)] (relating to false statements in connection with the acquisition of a firearm);
- (4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7) [18 USCS § 1028(a)(7)];
- (5) any provision contained in chapter 63 [18 USCS §§ 1341 et seq.] (relating to mail, bank, and wire fraud);
- (6) any provision contained in chapter 69 [18 USCS §§ 1421 et seq.] (relating to nationality and citizenship);
- (7) any provision contained in chapter 75 [18 USCS §§ 1541 et seq.] (relating to passports and visas);
- (8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);
- (9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);
- (10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or
- (11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

**APPENDIX B**

**42 USCS § 408**

§ 408. Penalties

(a) In general. Whoever--

(1) for the purpose of causing an increase in any payment authorized to be made under this title [42 USCS §§ 401 et seq.], or for the purpose of causing any payment to be made where no payment is authorized under this title [42 USCS §§ 401 et seq.], shall make or cause to be made any false statement or representation (including any false statement or representation in connection with any matter arising under subchapter E of chapter 1, or subchapter A or E of chapter 9 of the Internal Revenue Code of 1939 or chapter 2 or 21 or subtitle F of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 1401 et seq. or 3101 et seq. or 6001 et seq.]) as to--

(A) whether wages were paid or received for employment (as said terms are defined in this title [42 USCS §§ 401 et seq.] and the Internal Revenue Code), or the amount of wages or the period during which paid or the person to whom paid; or

(B) whether net earnings from self-employment (as such term is defined in this title [42 USCS §§ 401 et seq.] and in the Internal Revenue Code) were derived, or as to the amount of such net earnings or the period during which or the person by whom derived; or

(C) whether a person entitled to benefits under this title [42 USCS §§ 401 et seq.] had earnings in or for a particular period (as determined under section 203(f) of this title [42 USCS § 403(f)] for purposes of deductions from benefits), or as to the amount thereof; or

(2) makes or causes to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under this title [42 USCS §§ 401 et seq.]; or

(3) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this title [42 USCS §§ 401 et seq.]; or

(4) having knowledge of the occurrence of any event affecting (1) his initial or continued right to any payment under this title [42 USCS §§ 401 et seq.], or (2) the initial or continued right to any payment of any other individual in whose behalf he has applied for or is receiving such payment, conceals or fails to disclose such event with an intent fraudulently to secure payment either in a greater amount than is due or when no payment is authorized; or

(5) having made application to receive payment under this title [42 USCS §§ 401 et seq.] for the use and benefit of another and having received such a payment, knowingly and willfully converts such a payment, or any part thereof, to a use other than for the use and benefit of such other person; or

(6) willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or

causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 205(c)(2) [42 USCS § 405(c)(2)]; or

(7) for the purpose of causing an increase in any payment authorized under this title [42 USCS §§ 401 et seq.] (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this title [42 USCS §§ 401 et seq.] (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose-

(A) willfully, knowingly, and with intent to deceive, uses a social security account number, assigned by the Commissioner of Social Security (in the exercise of the Commissioner's authority under section 205(c)(2) [42 USCS § 405(c)(2)] to establish and maintain records) on the basis of false information furnished to the Commissioner of Social Security by him or by any other person; or

(B) with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person; or

(C) knowingly alters a social security card issued by the Commissioner of Social Security, buys or sells a card that is, or purports to be, a card so issued, counterfeits a social security card, or possesses a social security card or counterfeit social security card with intent to sell or alter it; or

(8) discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States;

shall be guilty of a felony and upon conviction thereof shall be fined under title 18, United States Code, or imprisoned for not more than five years, or both.

(b)

(1) Any Federal court, when sentencing a defendant convicted of an offense under subsection (a), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to the victims of such offense specified in paragraph (4).

(2) Sections 3612, 3663, and 3664 of title 18, United States Code, shall apply with respect to the issuance and enforcement of orders of restitution to victims of such offense under this subsection.

(3) If the court does not order restitution, or orders only partial restitution, under this subsection, the court shall state on the record the reasons therefor.

(4) For purposes of paragraphs (1) and (2), the victims of an offense under subsection (a) are the following:

(A) Any individual who suffers a financial loss as a result of the defendant's violation of subsection (a).

(B) The Commissioner of Social Security, to the extent that the defendant's violation of subsection (a) results in--

(i) the Commissioner of Social Security making a benefit payment that should not have been made; or

(ii) an individual suffering a financial loss due to the defendant's violation of subsection (a) in his or her capacity as the individual's representative payee appointed pursuant to section 205(j) [42 USCS § 405(j)].

(5) (A) Except as provided in subparagraph (B), funds paid to the Commissioner of Social Security as restitution pursuant to a court order shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund, or the Federal Disability Insurance Trust Fund, as appropriate.

(B) In the case of funds paid to the Commissioner of Social Security pursuant to paragraph (4)(B)(ii), the Commissioner of Social Security shall certify for payment to the individual described in such paragraph an amount equal to the lesser of the amount of the funds so paid or the individual's outstanding financial loss, except that such amount may be reduced by the amount of any overpayments of benefits owed under this title, title VIII, or title XVI [42 USCS §§ 401 et seq., 1001 et seq., or 1381 et seq.] by the individual.

(c) Violations by certified payees. Any person or other entity who is convicted of a violation of any of the provisions of this section, if such violation is committed by such person or entity in his role as, or in applying to become, a certified payee under section 205(j) [42 USCS § 405(j)] on behalf of another individual (other than such person's spouse), upon his second or any subsequent such conviction shall, in lieu of the penalty set forth in the preceding provisions of this section, be guilty of a felony and shall be fined under title 18, United States Code, or imprisoned for not more than five years, or both.

(d) Effect upon certification as payee; definitions. Any individual or entity convicted of a felony under this section or under section 1632(b) [42 USCS § 1383a(b)] may not be certified as a payee under section 205(j) [42 USCS § 405(j)]. For the purpose of subsection (a)(7), the terms "social security number" and "social security account number" mean such numbers as are assigned by the Commissioner of Social Security under section 205(c)(2) [42 USCS § 405(c)(2)] whether or not, in actual use, such numbers are called social security numbers.

(e) Application of subsection (a)(6) and (7) to certain aliens.

(1) Except as provided in paragraph (2), an alien--

(A) whose status is adjusted to that of lawful temporary resident under section 210 or 245A of the Immigration and Nationality Act [8 USCS § 1160 or 1255a] or under section 902 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [8 USCS § 1255a note],

(B) whose status is adjusted to that of permanent resident--

(i) under section 202 of the Immigration Reform and Control Act of 1986 [8 USCS § 1255a note], or

(ii) pursuant to section 249 of the Immigration and Nationality Act [8 USCS § 1259], or

(C) who is granted special immigrant status under section 101(a)(27)(I) of the Immigration and Nationality Act [8 USCS § 1101(a)(27)(I)],

shall not be subject to prosecution for any alleged conduct described in paragraph (6) or (7) of subsection (a) if such conduct is alleged to have occurred prior to 60 days after the date of the enactment of the Omnibus Budget Reconciliation Act of 1990 [enacted Nov. 5, 1990].

(2) Paragraph (1) shall not apply with respect to conduct (described in subsection (a)(7)(C)) consisting of--

(A) selling a card that is, or purports to be, a social security card issued by the Commissioner of Social Security,

(B) possessing a social security card with intent to sell it, or

(C) counterfeiting a social security card with intent to sell it.

(3) Paragraph (1) shall not apply with respect to any criminal conduct involving both the conduct described in subsection (a)(7) to which paragraph (1) applies and any other criminal conduct if such other conduct would be criminal conduct if the conduct described in subsection (a)(7) were not committed.

APPENDIX C

18 USCS § 1546

§ 1546. Fraud and misuse of visas, permits, and other documents

(a) Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact--

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title [18 USCS § 2331])), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title [18 USCS § 929(a)])), 10 years (in

the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses--

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

(2) an identification document knowing (or having reason to know) that the document is false, or

(3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [8 USCS § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

**APPENDIX D**

**8 USCS § 1326**

§ 1326. Reentry of removed aliens

(a) In general. Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this or any prior Act,

shall be fined under title 18, United States Code, or imprisoned not more than 2 years or both.

(b) Criminal penalties for reentry of certain removed aliens. Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 235(c) [8 USCS § 1225(c)] because the alien was excludable under section 212(a)(3)(B) [8 USCS § 1182(a)(3)(B)] or who has been removed from the United States pursuant to the provisions of title V [8 USCS §§ 1531 et seq.], and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18, United States Code, and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[,] or

(4) who was removed from the United States pursuant to section 241(a)(4)(B) [8 USCS § 1231(a)(4)(B)] who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under title 18, United States Code, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment. Any alien deported pursuant to section 242(h)(2) [8 USCS § 1252(h)(2)] who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order. In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

- (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
- (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
- (3) the entry of the order was fundamentally unfair.

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