

WHITE-COLLAR CRIME

Aggravated Identity Theft—Three Years After 'Dubin v. United States'

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Defendants convicted of fraud and other white-collar offenses face a longer sentence if they are also convicted of “aggravated identity theft” under 18 U.S.C. §1028A(a)(1). The provision applies when a defendant, “during and in relation to” certain enumerated offenses, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.”

Conviction for aggravated identity theft requires imposition of a two-year sentence served consecutively to the sentence for the underlying offense—akin to the mandatory five-year consecutive sentence for use of a firearm during drug trafficking.

In *Dubin v. United States*, 599 U.S. 110 (2023), the Supreme Court sought to explain what it means to “use[]” another person’s means of identification “in relation to” a predicate offense under Section 1028A. The Court held that such use occurs “when this use is at the crux of what makes the conduct criminal.” Justice Neil Gorsuch, concurring in the decision, wrote that this “at the crux” test was unlikely to fix the problems that have “long plagued lower courts” in applying



Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

Section 1028A; Congress alone can fix the problem. Three years later, Congress has yet to get us out of what Gorsuch called a “statutory quagmire,” and circuit courts continue to wrestle with how to apply the court’s holding.

In this article, we discuss three open issues following *Dubin*. First, we look at how appellate courts have been interpreting the “at the crux” language; as it turns out, they have read the language narrowly. Second, we analyze an emerging circuit split as to whether district courts must specifically instruct juries on the “at the crux” test. Lastly, we note questions not answered in *Dubin* that will be subject to further development.

The Dubin Framework

Before *Dubin*, courts were divided on the scope of Section 1028A(a)(1). In *United States v. Dubin*, 27 F.4th 1021 (5th Cir. 2022), the Fifth Circuit allowed a defendant's conviction for aggravated identity theft to stand, even though the district court had found the crux of the case was fraudulent billing, not identity theft. The defendant had overbilled Medicaid by misrepresenting the qualifications of the employee who performed psychological testing, while using real patients' names and Medicaid numbers on the fraudulent bills. The parties disagreed over the proper interpretation of the terms "uses" and "in relation to" in the statute.

A unanimous court reversed the Fifth Circuit, holding that the defendant's conduct did not constitute aggravated identity theft because "the crux of the healthcare fraud was a misrepresentation about the qualifications of petitioner's employee," and the patient's name was "an ancillary feature of the billing method employed." *Dubin*, 599 U.S. at 132. Justice Sonya Sotomayor, writing for the court, explained that "being at the crux of criminality requires more than a causal relationship," and in fraud cases, the means of identification "must be used in a manner that is fraudulent or deceptive."

Gorsuch, in a concurring opinion, wrote that the "at the crux" formulation was insufficient to prevent the test from being used as a "fig leaf" for judges and jurors to use their "own subjective moral judgments" about whether the crime is "one that warrants a two-year mandatory minimum." He attributed the problem to the statute's vagueness regarding what it means to "us[e]" another person's identification.

"At the Crux"

Courts have generally construed *Dubin's* "at the crux" language narrowly, which has had the effect of pushing back on prosecutors' use of Section 1028A to add at least another two years to defendants' sentences.

In *United States v. Omotayo*, 132 F.4th 181 (2d Cir. 2025), the Second Circuit reversed a Section 1028A conviction of a defendant who, in connection with bank fraud, possessed fraudulent invoices bearing another person's name as a "contingency plan" in case a bank asked questions. The government argued that the invoices met *Dubin's* standard because the defendant had intended to use the person's identity to deceive the bank about who approved the wire transfer.

The court first asked whether the identification was a "key mover" playing an "integral role in the success of the scheme," and then whether the government showed "more than a causal relationship, such as facilitation of the offense or being a but-for cause of its success." The court found the identity misuse was ancillary to the bank fraud scheme because having a real name on the invoices would have at most "marginally 'advanced'" the bank fraud because the invoices also contained payee, payor, service rendered, date, and amount information.

The Fourth Circuit followed similar logic in *United States v. McDonald*, 166 F.4th 440 (4th Cir. 2026), holding that identity misuse must be a "necessary element" of the charged predicate offense. In *McDonald*, the defendant fraudulently induced an economic development authority to wire \$2 million to a settlement company, then used another individual's identity to facilitate a real estate transaction.

The defendant was convicted of wire fraud, bank fraud, money laundering, and aggravated identity theft. On appeal, the government argued that misuse of the other identity was critical to the wire fraud scheme and satisfied *Dubin*.

The court disagreed and vacated the defendant's aggravated identity theft conviction. Because the wire fraud charge focused on the defendant's inducement of the original \$2 million transfer, not the later misuse of another individual's identity, the court concluded that the identity

misuse was “ancillary” to the wire fraud. The misuse was not necessary to the fraud insofar as the defendant “could have been convicted” of wire fraud “[e]ven if [the defendant] had decided not to engage in” the second phase of the scheme.

In *United States v. Motley*, 168 F.4th 588 (9th Cir. 2026), the Ninth Circuit likewise read Section 1028A narrowly. The defendant used relatives’ names to incorporate durable medical equipment companies, enroll them in Medicare and submit claims for patients who did not need the equipment. The government charged health care fraud, conspiracy to launder monetary instruments, and aggravated identity theft, and the defendant was convicted on all counts.

On appeal, the government argued that the defendant’s submissions for reimbursement constituted aggravated identity theft because the companies and authorizations were in her relatives’ names only. The court applied a two-step test, taking the Fourth Circuit’s analysis one step further. First, the Ninth Circuit analyzed whether use of the defendant’s relatives’ identities was independently fraudulent or deceitful.

The court found it was not because the relatives had given the defendant full authority to run the companies and the reimbursement claims listed only the names of the companies. Second, the court evaluated whether the government had demonstrated that “use of [her relatives’] names was critical to the success” of the scheme, which aligns with the Fourth Circuit’s “necessity” test. The court concluded that the crux of the healthcare fraud was “billing for medically unnecessary [equipment] and for repairs that never took place,” which was “a lie about what services were performed, not about who received or provided them.”

In *United States v. Gladden*, 78 F.4th 1232 (11th Cir. 2023), the Eleventh Circuit applied Section 1028A differently to two co-defendants. The court vacated the aggravated identity theft conviction of one defendant whose misuse of identifying information was “ancillary” to a

health care fraud scheme because the fraudulent statements concerned medical necessity, not who received prescriptions. But the court affirmed a Section 1028A conviction of a second defendant who misused patients’ identities to refill prescriptions.

Because the “deception centered on the identity of the individual receiving the product,” the court concluded that defendant’s identity theft was at the crux of the scheme. 78 F.4th at 1245; see also *United States v. Abrams*, 165 F.4th 784, 807 (3d Cir. 2026) (affirming Section 1028A conviction of defendant who forged signatures on tax returns, contracts and patent-license agreements which were used to deceive investors because the identity misuse was “the metaphorical key[] that unlocked the cash drawer.”)

Jury Instructions

Courts have reached different conclusions as to whether trial juries must be instructed on the “at the crux” requirement.

The Ninth Circuit held in *United States v. Ovsepiyan*, 113 F.4th 1193 (9th Cir. 2024), that a jury instruction that addressed only the “possession” prong of Section 1028A(a)(1), and did not define “in relation to,” was deficient under *Dubin*. Given “the indeterminacy of the phrase ‘in relation to’” and *Dubin*’s “adoption of a ‘narrower reading,’” the court found the bare statutory language in the jury instructions insufficient to convey what the law requires.

The instructions did not inform the jury that a defendant “possesses” another’s means of identification “in relation to” a predicate offense only when the possession is “at the crux” of the defendant’s carrying out of the predicate offense, as required by *Dubin*. The court found that the faulty instructions prejudiced the defendant and vacated his conviction and sentence on the aggravated identity theft count.

The Fourth Circuit reached the opposite conclusion in *United States v. Jackson*, 126 F.4th 847, 868 (4th Cir. 2025). In that case, the jury

instructions did not require the jury to make a finding that the alleged misuse of the victim's identity was at the "crux" of what made the predicate offense criminal.

The Fourth Circuit held that *Dubin* "did not alter our understanding of the elements of the aggravated-identity-theft offense or require additional factual findings in each prosecution" (emphasis in original), but rather clarified the scope of the "use" and "in relation to" elements. No separate "crux" instruction was necessary, and the instructions were not inherently defective. See also *Abrams*, 165 F.4th at 809 (*Dubin* "did not explicitly add a new element to §1028A, nor did it mandate a 'crux' instruction in every case.").

Unanswered Questions

Besides the "crux" standard, courts have been left to grapple with the meaning of the "without lawful authority" language in Section 1028A, which the court in *Dubin* expressly declined to address.

The Ninth Circuit addressed the issue in *United States v. Parviz*, 131 F.4th 966 (9th Cir. 2025), reaffirming its prior holding that Section 1028A "does not require theft as an element of the offense." Under this approach, a defendant may be convicted even when the person whose identity was used consented to providing the information, so long as the defendant then used it unlawfully.

In *Parviz*, the defendant forged a nurse practitioner's signature on a letter to support a fraudulent passport application, even though the nurse had some general awareness of the defendant's intent. The court rejected the argument that the nurse's "complicity" negated the "without lawful authority" element.

As *Parviz* demonstrates, the interaction between "without lawful authority" and the "at the crux" rule remains unclear. *Dubin* concluded that the trio of statutory verbs "transfer," "possess," and "use" should be read to "capture various aspects of 'classic identity theft,'" with "transfer" and "possess" referring to two steps of theft and "uses" supplying the deceitful aspect. Whether the court's interpretation of these verbs means that theft must be proven as an element of the offense, or simply underscores the fraud-focused nature of the statute, remains to be seen.

Conclusion

As it turns out, *Dubin* significantly narrowed the reach of the aggravated identity theft statute. The subsequent case law makes clear the "at the crux" requirement should not be construed in the manner of the jurisdictional requirement of a mailing in mail fraud, which requires only that mailing be "incident to an essential part of the scheme'... or 'a step in [the] plot.'" See *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989).

After *Dubin*, courts are generally requiring more than a simple causal relationship with the underlying offense to meet the "at the crux" standard. But courts are still working through the implications of the language in different factual circumstances.

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