**15.9 Fraud in Connection with Identification Documents**

**—Aggravated Identity Theft (18 U.S.C. § 1028A)**

 The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with aggravated identity theft in violation of Section 1028A of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

 First, the defendant knowingly [transferred] [possessed] [used] without legal authority [a means of identification of another person] [a false identification document]; [and]

 [Second, the defendant knew that the means of identification belonged to a real person; and]

 [Second] [Third], the defendant did so during and in relation to [*specify felony violation*].

 A means of identification is used “during and in relation to” a crime when the means of identification is used in a manner that is fraudulent or deceptive and is at the crux of what makes the conduct criminal.

 [The government need not establish that the [means of identification of another person] [false identification document] was stolen.]

**Comment**

 *See United States v. Doe*, 842 F.3d 1117, 1119-20 (9th Cir. 2016) (setting out elements for a §1028A violation). Both direct and circumstantial evidence can establish that a defendant knew that the means of identification belonged to a real person. *Id*. at 1120-22. If the case involves circumstantial evidence of knowledge, consider the following instruction from *Doe* at 1121:

Repeated and successful testing of the authenticity of a victim's identifying information by submitting it to a government agency, bank or other lender is circumstantial evidence that you may consider in deciding whether the defendant knew the identifying information belonged to a real person as opposed to a fictitious one. It is up to you to decide whether to consider any such evidence and how much weight to give it.

 For offenses charged under § 1028A(a)(1), use only “a means of identification of another person” under the first element and select the applicable felony from § 1028A(c)(1)-(11) for insertion in the last element. For offenses charged under § 1028A(a)(2) [terrorism offense], select the applicable felony from 18 U.S.C. § 2332b(g)(5) for insertion in the last element. Do not use the bracketed second element in cases charging a false identification document under § 1028A(a)(2).

 Section 1028(d) provides definitions for the terms: “false identification document” and “means of identification.” A “means of identification” need not be a physical thing. *United States v. Barrogo*, 59 F.4th 440, 446 (9th Cir. 2023). The Ninth Circuit has held that a signature qualifies as a “means of identification.” *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008). A test account (i.e., an account created to test the functionality of a software application) may qualify as a “means of identification” provided that the accounts could be used to “‘identify a specific individual.’” *United States v. Kvashuk*, 29 F.4th 1077, 1089 (9th Cir. 2022). Because Congress “intended ‘to construct an expansive definition’ of the term ‘means of identification,’” the “purpose, prerequisites, and functionality” of a name or number “does not bear on whether they ‘identify a specific individual.’” *Id*.

 In *Flores-Figueroa v. United States*,556 U.S. 646, 647 (2009), the Supreme Court held that § 1028A requires that the government prove the defendant knew that the “means of identification” he or she unlawfully transferred, possessed or used belonged to a real person. The word “person” includes both living and deceased persons, and the government is not required to prove that the defendant knew the person was living when the defendant committed the crime of aggravated identity theft. *United States v. Maciel-Alcala*, 612 F.3d 1092, 1100-02 (9th Cir. 2010).

 If the government offers evidence at trial of uncharged identity theft against victims not included in the indictment, or if the government’s proof at trial includes uncharged conduct that would satisfy an element of the offense charged in the indictment, it may be necessary for the court to modify this instruction to name the specific victims whose identities the indictment accuses the defendant of stealing or to instruct the jury that it must find the conduct charged in the indictment before it may convict. *See United States v. Ward*, 747 F.3d 1184, 1192 (9th Cir. 2014) (holding it was reversible error to permit jury to convict on counts of aggravated identity theft against two victims named in indictment based on evidence presented at trial of uncharged conduct against identity-theft victims not named in indictment). *See* Instruction 6.10 (Activities Not Charged).

 The government need not prove that the identification document was stolen. *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9th Cir. 2015); *see also United States v. Gagarin*, 950 F.3d 596, 604-605 (9th Cir. 2020) (holding that government is not required to prove that other person did not consent to use of his or her means of identification).

“Use” of another person’s means of identification “in relation to” a predicate offense under § 1028A requires that the use of the means of identification is “at the crux of what makes the conduct criminal.” *Dubin v. United States*, 599 U.S. ­110, 131 (2023). This requires more than a causal relationship, so facilitating the commission of the offense or being a but-for cause of its success is insufficient. Instead, “the means of identification specifically must be used in a manner that is fraudulent or deceptive.” *Id*. For example, the forging of someone else’s signature on a fraudulent life insurance application constitutes a “use” within the meaning of § 1028A. *See* *United States v. Gagarin*, 950 F.3d 596, 603-04 (9th Cir. 2020). In addition, the use of a speech pathologist’s identifying information constituted a “use” within the meaning of § 1028A when the defendant manufactured two claim forms and submitted them to an insurer showing that the pathologist had provided services on dates when the pathologist was on leave and did not provide any services. *See* *United States v. Harris*, 983 F.3d 1125, 1126, 1128 (9th Cir. 2020). The Ninth Circuit explained that the defendant’s use of the pathologist’s identification “was central to the wire fraud” because the defendant used that information “to manufacture a fraudulent submission out of whole cloth” as opposed to “merely inflating the scope of services rendered during an otherwise legitimate appointment.” *Id*. at 1127-28. But employing a patient’s Medicare identification information to file Medicare claims that falsely identified the treatments as Medicare-eligible physical therapy services rather than as massages does not constitute a “use” within the meaning of § 1028A. *See* *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019). And employing a patient’s Medicare identification information to file a Medicare claim that misrepresents the qualifications of the treating healthcare provider is not a “use” of the patient’s identification information for purposes of § 1028A because the patient’s name was an ancillary feature of the fraudulent billing method employed. *Dubin*, 599 U.S. at 132.

*Revised August 2023*