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CITIZENS CRIME COMMISSION OF NEW YORK CITY

NEW YORK STATE LAW ENFORCEMENT COUNCIL

ONE HOGAN PLACE  
NEW YORK, NY 10013  
212.335.8927  
212.335.3808 F

[WWW.NYSLEC.ORG](http://WWW.NYSLEC.ORG)

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LEGISLATIVE PRIORITIES

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## PREFACE

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The Council's members represent the leading law enforcement professionals throughout the state, including the Attorney General of the State of New York, the District Attorneys Association of the State of New York, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the Council has been an active voice and participant in improving the quality of justice and in the continuing effort to provide for a safer New York.

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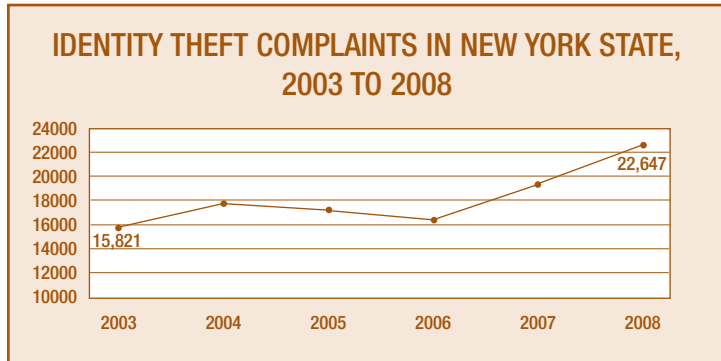
Counsel  
*Robert T. Johnson, Bronx County District Attorney*

Coordinator  
*Leroy Frazer, Jr., New York County District Attorney's Office*



## 5. DETER CRIMINALS WITH GREATER PENALTIES FOR AGGRAVATED IDENTITY THEFT

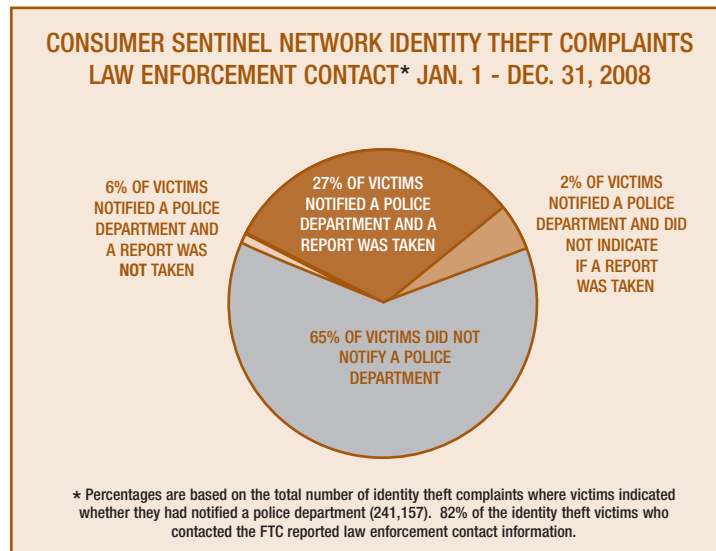
In 2008, complaints from New Yorkers to the Identity Theft Data Clearinghouse rose by 37 percent from just two years prior, from 16,452 to 22,647.<sup>1</sup> New York routinely lands in the list of states with the most frequent occurrences of identity theft. Statewide, arrests for the crimes of identity theft and unlawful possession of personal identification information nearly quadrupled over five years, going from 200 in 2003 to 780 in 2008.<sup>2</sup> Not only the number, but also the seriousness of identity theft crimes encountered by law enforcement is increasing, with Identity Theft in the First Degree arrests skyrocketing from 54 in 2003 to 261 in 2008.<sup>3</sup>



Identity theft complaints from New York consumers to the Federal Trade Commission increased by 50 percent over the past five years.

Source: Fed. Trade Comm'n, "Consumer Fraud and Identity Theft Complaint Data: January-December 2008" (Feb. 2008), available at [www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2008/New%20York%20CY-2008.pdf](http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2008/New%20York%20CY-2008.pdf)

This data may significantly underrepresent the true number of identity thefts. According to the Federal Trade Commission, nationwide there were 1.2 million fraud and identity theft complaints registered to the Sentinel Network in 2008.<sup>4</sup> Of those, merely 27 percent generated a police report; 65 percent of victims never even contacted law enforcement.



Source: Federal Trade Commission, *Consumer Sentinel Network Data Book for January - December 2008* (Feb. 2009), available at [www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf](http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf).

Given those numbers, it is estimated that one out of every 200 people will be a victim of fraud and identity theft this year.<sup>5</sup> Each victim of identity theft suffers from an invasive crime that is time-

consuming to recover from. One in six households victimized by identity theft spends one month or more resolving problems related to the crime.<sup>6</sup> In addition to lost productivity and administrative hassle, an invasive crime like identity theft causes psychological harm. Victims “frequently report feelings of violation, anger, anxiety, betrayal of trust, and even self-blame or hopelessness.”<sup>7</sup>

Yet penalties remain low and prosecutors lack the statutory tools for identity theft that they have in other, similar crimes. The New York State Law Enforcement Council recommends a comprehensive legislative package to make the prosecution of identity theft in New York more vigorous, efficient, and equitable.

## CREATE AN AGGRAVATED IDENTITY THEFT STATUTE

### Low Penalties Attract Criminals to Identity Theft

New York needs serious penalties to deal with the most egregious identity thieves: those who steal large amounts of money, target vulnerable populations, and victimize large numbers of people. In spite of mounting complaints about identity theft and increasingly complex schemes and sophisticated criminals, the highest penalty for identity theft in New York State is a class D felony. This stands in contrast to other criminal frauds and larcenies, nearly all of which have class B or C felony-level charges available for the most serious cases.<sup>8</sup> The relatively low penalties for identity theft make it an attractive -- that is, low-risk and high-profit -- alternative to other kinds of financial crimes and frauds.

By creating an aggravated identity theft statute, New York will signal to identity thieves that their crimes are taken every bit as seriously as any other financial crime. Higher penalties will not

only punish egregious offenders, but deter would-be thieves who will recognize the potential costs of their actions.

### Penalize Thieves Who Steal Large Amounts of Money

Under New York identity theft law, the theft of \$1,000,000 is no more serious than the theft of \$2,000.01. Using another's identity to take any amount over \$2,000 is considered Identity Theft in the First Degree, a D felony.<sup>9</sup> The penalties and dollar thresholds defined by the identity theft statutes stand in stark contrast to other theft and fraud crimes like grand larceny or insurance fraud, which provide C felonies for theft of over \$50,000 and B felonies for theft of over \$1,000,000. A class B felony such as Grand Larceny in the First Degree carries a minimum prison sentence of one year,<sup>10</sup> while a D felony such as Identity Theft in the First Degree generally results in probation on a first conviction. Creating an aggravated identity theft statute for large amounts of money would be consistent with New York's treatment of other frauds and thefts.

NEW YORK'S PENALTIES FOR GRAND LARCENY FAR EXCEED PENALTIES FOR IDENTITY THEFT						
AMOUNT STOLEN	GRAND LARCENY	CATEGORY	SENTENCE RANGE	IDENTITY THEFT	CATEGORY	SENTENCE RANGE
\$1,000.01	Grand Larceny 4°	E Felony	0-4 Years	Identity Theft 2°	E Felony	0-4 Years
\$3,000.01	Grand Larceny 3°	D Felony	0-7 Years	Identity Theft 1°	D Felony	0-7 Years
\$50,000.01	Grand Larceny 2°	C Felony	0-15 Years	Identity Theft 1°	D Felony	0-7 Years
\$1,000,000.01	Grand Larceny 1°	B Felony	1-25 Years	Identity Theft 1°	D Felony	1-7 Years
IDENTITY THEFT OF MORE THAN \$1,000,000 IS PUNISHED AT THE SAME LEVEL AS GRAND LARCENY OF \$3,000.01 - \$50,000.						

### Create Higher Penalties for Identity Theft Against Many Victims

New York police and prosecutors have uncovered identity thieves who victimize more than 100 people. Some of these criminals have made a strategic choice to cover their tracks by targeting as many victims as possible. In order to escape detection while still enjoying a steady stolen income, such criminals use many victims' identities but limit each use to a relatively small amount. In this way, they reduce the chances that victims will notice suspicious account activity and pursue the matter with law enforcement.

#### *Operation DiscoverMax*

In 2008, more than 20 people were part of a group involved in a multi-state, forged-credit-card ring. The ringleaders procured credit card numbers, some of which were stolen or purchased over the internet, while others were created in-house. In addition, the group had people who acted as shoppers -- purchasing items using the stolen and forged credit cards. They shopped primarily at Apple stores in New York City and, eventually, up and down the East Coast.

In the end, there were hundreds of victims. However, of the defendants arrested and indicted, all except the top three defendants were convicted of misdemeanors and sentenced to one year of jail or less. Even though these defendants were responsible for procuring and utilizing hundreds of credit card numbers, or purchasing and setting up the equipment used to make the forged credit cards, most were not facing any kind of mandatory jail time.

Although hundreds of victims' personal identifying information were possessed by this group, there currently is no appropriate charge for such criminal conduct.

Several states already include the number of victims as a factor in their identity theft statutes.<sup>11</sup> New York should add this provision to appropriately penalize identity thieves who target multiple victims.

COMPARISON OF MAXIMUM PUNISHMENTS IN SEVERAL STATES FOR IDENTITY THEFT INVOLVING MULTIPLE VICTIMS	
NUMBER OF VICTIMS	MAXIMUM PRISON TIME (IN YEARS) FOR IDENTITY THEFT
<b>OREGON</b> 	5  10
<b>MINNESOTA</b> 	1  10  20
<b>FLORIDA</b> 	5  15  30
<b>NEW YORK</b> 	7  7

## **Punish the Financial Exploitation of the Vulnerable and Elderly**

In 2008 the State Legislature created an aggravated identity theft statute for identity theft victims who are deployed in the armed services, because they “are easy targets for identity thieves.”<sup>12</sup> This statute should be expanded to include higher penalties for those who steal from other vulnerable victims, such as the elderly and mentally disabled. Not only are these victims often specifically targeted by identity thieves, but they also find it more difficult to recover from the theft.

Identity thieves find such victims to be attractive targets for a variety of reasons. Members of these groups are more likely to be socially isolated in general, which makes it less likely that they will hear about, and be on guard against, the latest identity theft schemes. Lack of technological savvy leaves them at a disadvantage when it comes to avoiding and detecting suspicious activity concerning their accounts. Dependence on caregivers can also open the door for unscrupulous health aides or financial advisors to steal the personal information of clients and plunder their life savings. The repercussions of identity theft are especially devastating to vulnerable and elderly victims when they live on a fixed income, which makes it difficult or impossible to recoup their lost savings through new earnings.

Several states, including Delaware, Illinois, Ohio, and Pennsylvania, provide for enhanced penalties for identity thieves who target the elderly or disabled.<sup>13</sup> Elderly and disabled victims also already hold a special status under several existing New York statutes; for example, enhanced penalties are available for physical endangerment or sexual abuse of “vulnerable elderly,” “incompetent or physically disabled,” or “mentally disabled or mentally

incapacitated” persons.<sup>14</sup> New York should extend this protection of its most vulnerable victims against predatory identity thieves.

## **ENHANCE THE USE OF EXISTING CRIMINAL STATUTES AGAINST IDENTITY THIEVES**

### **Add Social Security Numbers to the List of Personal Identification Information**

In addition to the crime of identity theft, New York has a related crime for defendants who unlawfully possess “personal identification information” knowing that such information is intended to be used to further a crime. The statute lists different types of “personal identification information,” including bank account numbers, mother’s maiden name, and computer passwords.<sup>15</sup> However, Social Security numbers (SSNs) are glaringly omitted from this list.

For identity thieves, a victim’s SSN is the most versatile and important form of personal information.<sup>16</sup> SSNs provide easy access to bank funds, brokerage accounts, and other important and private information. In fact, SSNs are even more useful than other types of personal identification information because identity thieves need SSNs in order to open fraudulent new accounts. The damage resulting from the theft of a SSN is long-lasting: unlike a credit card account number, password, or Personal Identification Number (PIN), a SSN is extremely difficult to change, even after its security has been compromised.

Since SSNs are common targets of identity thieves, and provide the greatest opportunities for misuse, amending the crime of Unlawful Possession of Personal Identification Information to include SSNs will enhance the value of this statute.

### **Allow Identity Theft Rings to Be Prosecuted as Organized Crime**

Efforts to combat large identity theft rings are impaired by the inability to use existing statutes designed to take down organized criminal enterprises. In 1986, the the Organized Crime Control Act (OCCA) became law, creating, among other things, the B-felony crime of Enterprise Corruption, a high-level charge for the leaders of organized criminal enterprises.

By definition, Enterprise Corruption can only be used when the organization has engaged in certain specific criminal acts, including many types of theft and fraud.<sup>17</sup> However, the Enterprise Corruption statute was created years before legislators and the general public were even aware of anything called “identity theft,” thus identity theft is not one of the crimes enumerated in OCCA. Unsurprisingly, organized crime leaders are now turning to identity theft as a low-risk, high-margin criminal activity. Surveys of actual cases reveal the level of profits to be found in organized identity theft: rings with six or more defendants cause a median loss of \$150,000.<sup>18</sup> Despite the shift toward organized identity theft rings, law enforcement is hampered by its inability to target those at the highest levels of these organizations.

It is past time to add identity theft to the list of specific criminal acts that can be prosecuted using Enterprise Corruption.

### **Allow Related Crimes to Be Charged Along with Identity Theft in a Single Jurisdiction**

A special provision in the Criminal Procedure Law gives prosecutors broad jurisdiction over identity theft, in recognition of the fact that this crime can and does frequently cross county lines.<sup>19</sup> In New York, a defendant can be charged with identity theft in any

county where part of the crime took place or where the victim lived, even if the defendant was not physically present in that county. However, this special provision does not extend to the crimes that nearly always accompany identity theft, such as grand larceny or criminal possession of a forged instrument.

As a result, a single defendant may face simultaneous prosecutions in two or more counties for various crimes related to an identity theft, all arising from the same criminal transaction. These redundant prosecutions are an unnecessary and inefficient drain on judicial, prosecutorial, and public defender resources.

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### ***Fifty Thousand Dollar Theft Unchargeable in Prosecution of Multi-County Identity Theft Case***

In October 2006, Michael Oluwashola was arrested in a Nassau County store for attempting to purchase appliances using a stolen identity. He stole more than \$2,000 in Nassau County using a credit card account under a stolen identity and more than \$50,000 to a different credit card account under the same name, in a different jurisdiction.

Since the defendant stole a total of \$52,000 using a single stolen identity, Nassau County could charge Identity Theft in the First Degree to cover the whole amount even though much of the criminal activity occurred in another jurisdiction.

However, jurisdiction under the larceny statutes is more limited. Unfortunately for Nassau prosecutors, the \$50,000 in charges to one account had occurred outside their county, meaning that they could not charge the defendant with larceny for that amount. Furthermore, if another DA had tried to prosecute the defendant for the \$50,000 grand larceny, a C felony, both offices would have

been left open to accusations of double jeopardy, since both prosecutions would have stemmed from the criminal use of a single stolen identity.

Had an aggravated identity theft statute existed for identity theft of large amounts of money, or if prosecutors had broader venue to charge grand larceny when it is part of an identity theft scheme, the defendant's most serious crimes would not have gone unpunished. It was clear from evidence seized that using some of 50 stolen identities, the defendant netted over \$200,000 within a matter of months. But due to the current statutory limitations, he pleaded guilty to Identity Theft in the First Degree, a D felony, Scheme to Defraud in the First Degree, an E felony, and Unlawful Possession of Personal Identification Information in the Third Degree, an A misdemeanor and was sentenced to one year in jail. If Oluwashola had received a C felony he could have received up to 15 years.

*People v. Oluwashola, Nassau County*

New York should amend the Criminal Procedure Law so that prosecutors in identity theft cases can charge all of the related crimes which form part of the criminal venture.

## Summary

Consumers need to be protected now more than ever from financial crimes such as identity theft.<sup>20</sup> As the statutes currently stand, identity theft is a high-yield, low-risk crime. By creating an aggravated identity theft statute, criminals who steal large amounts of money, steal from many victims, or exploit a vulnerable victim would face much-needed higher penalties. Including

SSNs in personal identification information is a small but important fix to a critical omission in the current law. Identity theft has become a lucrative option for crime rings; by adding it to Enterprise Corruption, law enforcement could prosecute members of organized crime that perpetrate identity theft scams. Lastly, related crimes should be given the same jurisdictional leeway as identity theft, allowing criminals to be charged for crimes such as grand larceny that may have happened in multiple venues.

1. Fed. Trade Comm'n, "Identity Theft Victim Complaint Data: New York Jan. 1- Dec. 31, 2006" (Feb. 7, 2007), available at [www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2006/New%20York%20CY-2006.pdf](http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2006/New%20York%20CY-2006.pdf); Fed. Trade Comm'n, "Consumer Fraud and Identity Theft Complaint Data: January-December 2008" (Feb. 2009), available at [www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2008/New%20York%20CY-2008.pdf](http://www.ftc.gov/bcp/edu/microsites/idtheft/downloads/CY2008/New%20York%20CY-2008.pdf)
2. N.Y. Div. of Crim. Justice Serv., "Computerized Criminal History System" (Sept. 2009) (unpublished statistical report, on file with LEC).
3. Ibid.
4. Federal Trade Commission, Consumer Sentinel Network Data Book for January - December 2008 (Feb. 2009), available at [www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf](http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2008.pdf).
5. Brandon Cornett, "Identity Theft Statistics - And How to Avoid Becoming One," (Aug. 4, 2009), available at <http://www.homebuyinginstitute.com/help/2009/08/identity-theft-statistics-and-how-to.html>.
6. Katrina Baum, Ph.D., "Identity Theft, 2005," U.S. Dep't of Just. (Nov. 2007), available at [www.ojp.usdoj.gov/bjs/pub/pdf/it05.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/it05.pdf).
7. The President's Identity Theft Task Force "Combating Identity Theft: A Strategic Plan" (April 2007) available at <http://www.idtheft.gov/reports/StrategicPlan.pdf>.
8. C felonies, punishable by up to 15 years in prison, include Health Care Fraud in the Second Degree (N.Y. Penal Law § 177.20), Insurance Fraud in the Second Degree (N.Y. Penal Law § 176.25), and Grand Larceny in the Second Degree (N.Y. Penal Law § 155.40); B felonies, which carry mandatory prison time for a first conviction, include Health Care Fraud in the First Degree (N.Y. Penal Law § 177.25), Insurance Fraud in the First Degree (N.Y. Penal Law § 176.30), and Grand Larceny in the First Degree (N.Y. Penal Law § 155.42).
9. N.Y. Penal Law § 190.80.
10. N.Y. Penal Law § 70.00(3)(b).
11. Ariz. Rev. Stat. Ann. §§ 13-2009; Cal Pen. Code §§ 530.5-530.7 Fla. Stat. § 817.568; 720 Ill. Comp. Stat. § 5/16 G; Minn. Stat. § 609.527; N.J. Stat. Ann. §§ 2C:21-17, 2C:43-6(a)(2); Nev. Rev. Stat. §§ 205.463-465; N.C. Gen. Stat. § 14-113.22; Or. Rev. Stat. § 165.800; Tex. Pen. Code § 32.51; Va. Code Ann. § 18.2-186.3.
12. Senator John A. DeFrancisco, "Memorandum Ch. 226," 2008 N.Y. Laws (2008).
13. Del. Code Ann. Tit. 11, § 903(c); 720 Ill. Comp. Stat. 5/16G-20(a)(1); Ohio Rev. Code Ann. § 2913.49(I)(3); 18 PA. Cons. Stat. § 4120(c)(2).
14. See, e.g., N.Y. Penal Law §§ 130.30(2), 130.45(2), 130.66(2), 260.25, 260.30, 260.32, 260.34.

15. N.Y. Penal Law § 190.81.
16. Thomas B. Leary, "Prepared Statement of the Federal Trade Commission on Identity Theft and Social Security Numbers before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce," Fed. Trade Comm'n (Sept. 28, 2004), available at [www.ftc.gov/os/testimony/040928test.shtm](http://www.ftc.gov/os/testimony/040928test.shtm).
17. N.Y. Penal Law § 460.10(1).
18. Gary R. Gordon, et al., "Identity Fraud Trends and Patterns: Building a Data-Based Foundation for Proactive Enforcement," Ctr. For Identity Management and Information Protection, Utica College (Oct. 2007), available at [www.utica.edu/academic/institutes/ecii/publications/media/cimip\\_id\\_theft\\_study\\_oct\\_22\\_noon.pdf](http://www.utica.edu/academic/institutes/ecii/publications/media/cimip_id_theft_study_oct_22_noon.pdf).
19. N.Y. Crim. Proc. Law § 20.40(4)(l).
20. Liz Pulliam Weston, "Tough Times are Ripe for ID Theft," MSN Money (Oct. 20, 2008).