

2011

# Utah v. Manuel Hurtado Rincon : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
 :  
 Plaintiff/Appellee, :  
 :  
 vs. :  
 :  
 MANUEL HURTADO RINCON, :  
 : Appellate Court No. 20110897-CA  
 Defendant/Appellant. :

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BRIEF OF APPELLANT

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THIS APPEAL IS FROM A CONVICTION AND SUBSEQUENT SENTENCING TO IDENTITY FRAUD, A SECOND DEGREE FELONY IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE MICHAEL DIREDA PRESIDING.

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FILED  
UTAH APPELLATE COURTS

JAN 20 2012

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH, :  
Plaintiff/Appellee, :  
vs. :  
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, )  
Plaintiff/Appellee, )  
vs. )  
MANUEL HURTADO RINCON, ) Dist. Court No. 101902812  
Defendant/Appellant. ) App. Ct. No. 20110897

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*BRIEF OF APPELLANT*

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**JURISDICTION AND NATURE OF PROCEEDINGS**

The Appellant is appealing from a Judgment, Sentence and Commitment of the Second District Court for Weber County, Utah, dated September 9, 2011. The Defendant was convicted at a bench trial of Identity Fraud, a second degree felony, in violation of U.C.A. §76-6-1102. He was sentenced by the Honorable Michael Direda to an indeterminate term of not less than one year or more than fifteen years in the Utah State Prison. Jurisdiction for the Appeal is conferred upon the Utah Court of Appeals pursuant to U.C.A. §78A-4-103(2)(e). Defendant has been deported to Mexico.

## ISSUES ON APPEAL AND STANDARD OF REVIEW

### POINT I

**DID THE TRIAL COURT ERR WHEN IT FAILED TO GRANT DEFENDANT'S MOTION TO DISMISS BASED UPON VAGUE AND UNCLEAR STATUTORY LANGUAGE OF THE OFFENSE OF IDENTITY FRAUD?**

*Preservation of Issue:* This issue was preserved by the Defendant filing the Motion to Dismiss and renewing the issue at the bench trial regarding the issues addressed in the Motion to Dismiss on August 31, 2011. (R. 072/7-8; R. 033)

*Standard of Review:* This is a mixed question of fact and law. The trial court's legal conclusion should be reviewed for correctness, according no deference to the trial court's conclusion. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)<sup>1</sup>. The trial court's findings of fact should be reviewed under a clearly erroneous standard of review. "[Q]uestions of law are reviewed for correctness, and the trial court's factual findings are reversed only if clearly erroneous." *State v. Harmon*, 910 P.2d 1196 (Utah 1995).

### POINT II

**BASED UPON THE VAGUENESS OF THE STATUTE AND PLAIN LANGUAGE, WAS THE EVIDENCE PROVIDED AT TRIAL BY THE STATE INSUFFICIENT TO CONVICT THE DEFENDANT OF IDENTITY FRAUD?**

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<sup>1</sup> Abrogated on other grounds, see, *Campbell v. State Farm Mut. Auto. Ins. Co.* 2001 UT 89, ¶ 13, 65 P.3d 1134,



**Preservation of Issue:** The issue was preserved by the filing of an appeal from the verdict of a bench trial. (R. 068)

**Standard of Review:** “ When reviewing a bench trial for sufficiency of evidence, we must sustain the trial court’s judgment unless it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made.’ “ *Spanish Fork City v. Bryan*, 1999 UT App 61, ¶5, 975 P.2d 501 (citations omitted). “However, ‘before we can uphold a conviction it must be supported by a quantum of evidence concerning each element of the crime as charged from which the [factfinder] may base its conclusion of guilt beyond a reasonable doubt.’ “ *Id.* (citation omitted). We review the trial court’s legal conclusions for correctness. *See State v. Pena*, 869 P.2d 932, 936 (Utah 1994), *State v. Larsen*, 2000 UT App 106, 999 P.2d 1252, 1255

## **CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES**

### **UNITED STATES CONSTITUTION**

#### **FIFTH AMENDMENT - Rights of Persons**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## UTAH CODE ANNOTATED

### **§68-3-11. Rules of construction as to words and phrases.**

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.

### **§76-6-1102. Identity Fraud**

(2) (a) A person is guilty of identity fraud when that person:

(i) obtains personal identifying information of another person whether that person is alive or deceased; and

(ii) knowingly or intentionally uses, or attempts to use, that information with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, employment, any other thing of value, or medical information.

(b) It is not a defense to a violation of Subsection (2)(a) that the person did not know that the personal information belonged to another person.

(3) Identity fraud is:

(a) except as provided in Subsection (3)(b)(ii), a third degree felony if the value of the credit, goods, services, employment, or any other thing of value is less than \$5,000; or

(b) a second degree felony if:

(i) the value of the credit, goods, services, employment, or any other thing of value is or exceeds \$5,000; or

(ii) the use described in Subsection (2)(a)(ii) of personal identifying information results, directly or indirectly, in bodily injury to another person.

### **§76-8-309. Escape and aggravated escape -- Consecutive sentences -- Definitions.**

(1) (a) (i) A prisoner is guilty of escape if he leaves official custody without lawful authorization.

(ii) If a prisoner obtains authorization to leave official custody by means of deceit, fraud, or other artifice, the prisoner has not received lawful authorization.

(b) Escape under this Subsection (1) is a third degree felony except as provided under Subsection (1)(c).

(c) Escape under this Subsection (1) is a second degree felony if:

(i) the actor escapes from a state prison; or  
(ii) (A) the actor is convicted as a party to the offense, as defined in Section 76-2-202; and

(B) the actor is an employee at or a volunteer of a law enforcement agency, the Department of Corrections, a county or district attorney's office, the office of the state attorney general, the Board of Pardons and Parole, or the courts, the Judicial Council, the Office of the Court Administrator, or similar administrative units in the judicial branch of government.

(2) (a) A prisoner is guilty of aggravated escape if in the commission of an escape he uses a dangerous weapon, as defined in Section 76-1-601, or causes serious bodily injury to another.

(b) Aggravated escape is a first degree felony.

(3) Any prison term imposed upon a prisoner for escape under this section shall run consecutively with any other sentence.

(4) For the purposes of this section:

(a) "Confinement" means the prisoner is:

(i) housed in a state prison or any other facility pursuant to a contract with the Utah Department of Corrections after being sentenced and committed and the sentence has not been terminated or voided or the prisoner is not on parole;

(ii) lawfully detained in a county jail prior to trial or sentencing or housed in a county jail after sentencing and commitment and the sentence has not been terminated or voided or the prisoner is not on parole; or

(iii) lawfully detained following arrest.

(b) "Escape" is considered to be a continuing activity commencing with the conception of the design to escape and continuing until the escaping prisoner is returned to official custody or the prisoner's attempt to escape is thwarted or abandoned.

(c) "Official custody" means arrest, whether with or without warrant, or confinement in a state prison, jail, institution for secure confinement of juvenile offenders, or any confinement pursuant to an order of the court or sentenced and committed and the sentence has not been terminated or voided or the prisoner is not on parole. A person is considered confined in the state prison if he:

(i) without authority fails to return to his place of confinement from work release or home visit by the time designated for return;

(ii) is in prehearing custody after arrest for parole violation;

(iii) is being housed in a county jail, after felony commitment, pursuant to a contract with the Department of Corrections; or

(iv) is being transported as a prisoner in the state prison by correctional officers.

(d) "Prisoner" means any person who is in official custody and includes persons under trusty status.

(e) "Volunteer" means any person who donates service without pay or other compensation except expenses actually and reasonably incurred as approved by the supervising agency.

### **§78A-4-103(2)(e) Court of Appeals Jurisdiction.**

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(e) appeals from a court of record in criminal cases, except those involving a conviction or charge of a first degree felony or capital felony;

### **STATEMENT OF THE CASE**

The Defendant was charged in the Second District Court of Weber County with Identity Fraud, a second degree felony. (R. 001-002) An Evidentiary hearing was held on Defendant's Motion to Dismiss on April 5, 2011. (R. 044) A bench trial was held August 31, 2011, before the Honorable Michael Direda. (R. 072) At that trial, Defendant was convicted of Identity Fraud, a second degree felony. The Defendant was sentenced on September 9, 2011, to an indeterminate term of one to fifteen years at the Utah State Prison. The final order was signed on September 9, 2011. (R. 062) The Defendant timely filed a notice of appeal on October 6, 2011. (R.068) The Defendant has since been deported to Mexico.

### **STATEMENT OF THE FACTS**

A woman by the name of Gertrude Willison had applied for unemployment in the state of Nevada after being laid off of a job at Sierra Nevada Corporation. (R. 072/15) Ms. Willison had applied for benefits in May 2010 and received

benefits though November 1, 2010. (R. 072/15) Once November arrived, Ms. Willison called Social Security to extend her unemployment benefits. (R. 072/15) The claims representative she spoke with told her that based upon her Social Security Number, she was working in Ogden, Utah, for Jay Morgan Confections; and her unemployment benefits were terminated. (R. 072/15) Ms. Willison had never worked in Ogden, Utah; and based upon her unemployment benefits being terminated, Ms. Willison contacted the Phoenix, Arizona Police Department to file a report. (R. 072/16) Ms. Willison was able to reinstate her unemployment benefits one month later. (R. 072/16)

Ms. Willison contacted the Ogden Police Department, and Detective Richard Childress was assigned to the case. (R. 072/21) Detective Childress contacted Workforce Services and found the Social Security number provided by Ms. Willison was linked to a Mr. Hurtado or Mr. Rincon who was employed at Jay Morgan Confections in Ogden, Utah. (R. 072/22) Detective Childress spoke with the president of Jay Morgan and was provided a W-4 form that indicated the Social Security number was being used by Mr. Manuel Hurtado Rincon.

Upon interview with Mr. Rincon, Mr. Rincon stated that he had used the number in California and Utah for the purpose of employment and that he had made up the number years ago for the purpose of work. (R. 072/25, 43) Mr. Rincon testified that he never purchased the number from anyone. (R. 072/45) He

further testified he had never taken or seen identification with that Social Security number on it aside from his documents, which consisted of an IRS tax identification card, and that he simply made the number up in his head. (R. 072/43-45)

### SUMMARY OF ARGUMENT

The Defendant raises two issues on appeal. First, that the Statute of Identity Fraud is constitutionally vague. The word “obtain” in the Identity Fraud Statute implies that an overt act, such as dumpster diving, is required to be found guilty of Identity Fraud. Here, Defendant believed that as long as he did not perform an overt act, such as theft, looking over someone’s shoulder, etc., to come up with a Social Security number, then he is not in violation of Identity Fraud. The statutory language of Identity Fraud is such that individuals or reasonable knowledge and experience would be confused with such language.

Second, the State failed to provide sufficient evidence to show that the Defendant violated each element of the offense of Identity Fraud. The State was unable to show Defendant obtained, based upon an overt act, the Social Security number and that he had knowledge that what he was doing was in violation of the law.

## ARGUMENT

### POINT I

#### **THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT DEFENDANT'S MOTION TO DISMISS BASED UPON VAGUE AND UNCLEAR STATUTORY LANGUAGE OF THE OFFENSE OF IDENTITY FRAUD.**

The Utah and U.S. Supreme Courts have continually held that “a statute is unconstitutionally vague” if “the terms of the law are so ambiguous that persons of ordinary intelligence are unable to determine whether their acts conform to the law,” or if the ambiguity in the law “encourages arbitrary and erratic arrests and convictions.” *Due South, Inc. v. Department of Alcoholic Beverage Control*, 2008 UT 71, 93; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

The Utah Code §76-6-1102, lists out the elements of Identity Fraud. That statute reads:

#### **76-6-1102. Identity fraud crime.**

(2) (a) A person is guilty of identity fraud when that person:

(i) obtains personal identifying information of another person whether that person is alive or deceased; and

(ii) knowingly or intentionally uses, or attempts to use, that information with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, services, employment, any other thing of value, or medical information.

Utah case law further defines the elements of Identity Fraud in *State v. Chukes*, 2003 UT App 155, as stating, “Identity fraud requires proof that the defendant (1) intentionally or knowingly; (2) obtained personal identifying

information of another person without that person's authorization; and (3) used or attempted to use that personal identifying information "with fraudulent intent, including to obtain, or attempt to obtain, credit, goods, ... [or] any other thing of value ... in the name of another person without the consent of that person." *Id.*

In the present case, the State failed to prove that the second element of Identity Fraud occurred without reasonable doubt. While courts require that a quantum of evidence be presented at trial, the only evidence the state presented was testimony of a witness that stated her Social Security number had been used. There was no witness or proof presented that showed the Defendant did an overt act to constitute obtaining.

Based upon the reading of the Identity Fraud statute and upon the reading of Federal and Utah State case law, charging and convicting a defendant of Identity Fraud would be unreasonable and unconstitutional based upon the plain language of the statute, the vagueness of the statute and defendant's lack of knowledge.

Plain Language. The statute of Identity Fraud first requires that "a person obtain personal identifying information of another." UCA §76-6-1102(2)(a). Black's Law Dictionary defines the word "obtain" as: to get hold of by effort; to get possession of. The Dictionary® further defines "obtain" as: "To succeed in gaining possession of as the result of planning or endeavor; acquire." Clearly the word "obtain" implies that a person must obtain information by an act, effort, or



some movement of the persons being that would result in them taking, looking, or finding identifying information and then using said information to commit the crime of Identity Fraud.

In the present case, Defendant had come to the U.S.A. and was searching for employment. Defendant had never met Gertrude Willison; had never seen any identifying documents regarding Ms. Willison; in fact, Defendant had never even been in the same state as Ms. Willison. Defendant had simply crafted up a nine digit number. He made no effort to steal the number, he made no effort to look over a person's shoulder to get the information, and he simply invented a number that he believed belonged to no one.

Based upon the plain language of the statute, the statute would require that the Defendant "obtain personal identifying information" through effort, such as an individual obtains a degree, or that you obtain goals – each imply work and effort. In this case, there was no effort or overt act which resulted in obtaining the information. The Utah Appellate Court in *State v. Germonto*, 2003 UT App 217, stated that: "In considering the plain language of a statute, courts 'presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.'" *Id.* In the present case, the plain meaning of the word "obtained" requires that there be some overt act or effort to get the

information. Making up a nine-digit number would not rise to the definition of “obtain.”

In the *Germonito* case, the court looked at the plain language of Utah’s escape statute. The Defendant in that case argued that there was not a plain meaning of the word “official custody.” However, the Court held that the statute plainly states that “[a] prisoner is guilty of escape if he leaves official custody without authorization.” Utah Code Ann. §76-8-309(1). Subsection (7)(b) defines “official custody” as “confinement in the state prison.” The court ultimately held that the statute did sufficiently define the word “official custody” and the plain meaning was clear.

Using the *Germonito* court’s analysis, the word “obtain” again implies that there has to be an act or effort in order to commit the crime. Further, in the statute it requires knowledge to the use of the information. In the case at bar, there was no intent or desire to obtain a specific person’s information; rather, the Defendant just made up a nine-digit number, and the plain language of the statute is unclear and therefore unconstitutional.

In addition, the U.S. Supreme Court in *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009), explained how the wording of a statute requires a reading in plain language. In *Flores-Figueroa*, the issue revolved around identity theft and the word knowledge in the statute. The Supreme Court stated, “The manner in which

the courts ordinarily interpret criminal statutes is fully consistent with the ordinary English usage.” *Id.*

In the present case, the ordinary English usage would imply that some act or effort is necessary to obtain specific information. Utah Code Ann. §68-3-11 lists out rules of construction. In that statute it reads, “Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition.” *Id.*

The Utah Supreme Court in *Herold Selman, Inc. v. Box Elder County*, 2011 UT 18, 251 P.3d 804, stated: “When interpreting statutes, our “primary objective ... is to give effect to the legislature’s intent.’ To discern legislative intent, ‘we look first to the statute’s plain language.” In doing so, “[w]e presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning.” Additionally, “[w]e read the plain language of the statute as a whole [ ] and interpret its provisions in harmony with other statutes in the same chapter.” “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.” *Id.*

Here, if we were to apply the rules of construction and look to the legislative intent though the plain meaning of the word, it would be clear that the legislature

specifically used the word “obtain” to prevent theft of an actual “person’s” identifying information. For example, in U.C.A. §76-6-1102, the statute in question, the term “person” is specifically used multiple times regarding the “person’s” information, whether that “person” is alive or deceased. Clearly, the intent of the statute is to prevent instances such as stealing a wallet for personal information, dumpster diving for information, or looking over a person’s shoulder to obtain said information. Although it is not a defense that the individual did not know the number belonged to anyone, there is no reference to simply inventing a number or the illegality of crafting up your own number without going out to obtain said information. Based upon the plain language of the statute and the word “obtain,” Defendant should not have been convicted of the crime Identity Fraud.

Vagueness. In addition to looking at the plain language of the statute, the statute is unconstitutionally vague. The Utah Supreme Court in *State v. MacGuire*, 2004 UT 4, listed out requirements that are necessary to determine whether a statute is vague. The *MacGuire* Court stated. “In order to establish that the ... provisions are impermissibly vague, a defendant must demonstrate either (1) that the statutes do not provide “the kind of notice that enables ordinary people to understand what conduct [is prohibited],” or (2) that the statutes “encourage arbitrary and discriminatory enforcement.” *Id.*

The Utah Supreme Court in *Due South, Inc. v. Department of Alcoholic Beverage Control*, 2008 UT 71, stated: “A statute is unconstitutionally vague if the terms of the law are so ambiguous that persons of ordinary intelligence are unable to determine whether their acts conform to the law,” or if the ambiguity in the law “encourages arbitrary and erratic arrests and convictions.” *Id.* In *Due South Inc.*, the Court ultimately held that the statute regarding serving alcohol to patrons was not unconstitutionally vague because it was not a strict liability statute, stating that the servers are only liable if they intentionally, knowingly, or recklessly permit another to drink to a degree they may endanger themselves or another. *Id.*

The Court further indicated in *State v. Green*, 2004 UT 76, that: “[V]agueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct.” *State v. Morrison*, 2001 UT 73, ¶ 13. “As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.*

In the case at bar, if Defendant were to read the statute it states that he would have to obtain personal identifying information. A person of reasonable intelligence would be inclined to understand that as, “I may not steal identifying

information.” Here, Defendant invented a nine-digit number, he did not steal it, he did not look over someone’s shoulder to get the information, he merely crafted up a number believing it belonged to no one and did not act with the requisite intent required by the statute. Applying the *MacGuire* court’s analysis to this case, (1) the statute does not provide the kind of notice that enables ordinary people to understand what conduct is prohibited. Based upon the standards set forth by the Utah Supreme Court, the statute of identity fraud is unconstitutionally vague in that it does not allow an individual of ordinary intelligence to understand what is prohibited.

Defendant’s Knowledge. The prosecution argued in the trial court, and may argue before this Court, that Utah Code Ann. §76-6-1102(3) overcomes the defense position in this particular case. That section provides: “it is not a defense to a violation of subsection 2(a) that the person did not know that the personal information belonged to another person.” The prosecution, however, misconstrues the Defendant’s position in that respect. The Defendant submits that the plain reading of Utah Code Ann. §76-6-1102(2(a)) still requires the prosecution to prove that the Defendant “obtained” the personal identifying information of another as a specific element of the offense. The fact that the Defendant did not obtain this number, but rather created a number, falls outside the parameters of the offense as set forth by the Utah Legislature. This position is supported by a Supreme Court

of the United States decision in the case of *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009), wherein the Court ruled on an almost identical case to the case at bar and held “that in order to convict a defendant of aggravated identity theft for “knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person,” government must prove that defendant knew that “means of identification” he or she unlawfully transferred, possessed, or used did, in fact, belong to another person.” *Id.*

The facts of *Flores-Figueroa* were that Defendant was a citizen of Mexico. In 2000, to gain employment, Defendant gave his employer a false name, birthday and Social Security number, along with a counterfeit alien registration card. The numbers on the Social Security card and the alien registration card were not those of a real person. In 2006, Defendant presented his employer with new counterfeit Social Security and alien registration cards; these cards used his real name. But this time the numbers on both cards were in fact numbers assigned to other people. Defendant’s employer reported this information, and Customs discovered the numbers belonged to other people. The United States then charged Defendant with aggravated identity theft. *Id.*

The U.S. Supreme Court held that, “In order to convict defendant of aggravated identity theft for knowingly transfer[ring], possess[ing], or us[ing], without lawful authority, a means of identification of another person, government

must prove that defendant knew that means of identification he or she unlawfully transferred, possessed, or used did, in fact, belong to another person, as opposed to being a counterfeit; it is not enough for government to show that defendant knew that he or she was transferring, possessing, or using a means of identification without lawful authority, unless government also shows that defendant knew that this means of identification belonged to another person.” *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009).

In the present case, Defendant stated that he was unaware that the Social Security number he used belonged to another person. Defendant did not gain the information from a document; he simply made up a nine digit number. There is no evidence that Defendant knew the number belonged to Gertrude Willison or any other person, he even stated he just made the number up. (R. 072/45) Thus, by the *Flores* case law, Defendant should not have been charged with identity fraud based upon the knowledge element required for the crime.

The U.S. Supreme Court in *Flores* paid great attention to what our legal system has long held important which is beyond a reasonable doubt. In *Flores*, the court looked at the arguments from the Government and stated:

“Finally, and perhaps of greatest practical importance, there is the difficulty in many circumstances of proving beyond a reasonable doubt that a defendant has the necessary knowledge. Take an instance in which an alien who unlawfully entered the United States gives an employer identification documents that *in fact* belong to others. How is the Government to prove that the defendant *knew* that



this was so? The Government may be able to show that such a defendant knew the papers were not his. But perhaps the defendant did not care whether the papers (1) were real papers belonging to another person or (2) were simply counterfeit papers. The difficulties of proof along with the defendant's necessary guilt of a predicate crime and the defendant's necessary knowledge that he has acted "without lawful authority," make it reasonable, in the Government's view, to read the statute's language as dispensing with the knowledge requirement."

The U.S. Supreme Court in *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009) then went on to explain the errors in the Government's position and held:

We do not find this argument sufficient, however, to turn the tide in the Government's favor. For one thing, in the classic case of identity theft, intent is generally not difficult to prove. For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else's trash to find discarded credit card and bank statements, or pretends to be from the victim's bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively easy to prove, and there will be no practical enforcement problem. For another thing, to the extent that Congress may have been concerned about criminalizing the conduct of a broader class of individuals, the concerns about practical enforceability are insufficient to outweigh the clarity of the text. Similar interpretations that we have given other similarly phrased statutes also created practical enforcement problems but had Congress placed conclusive weight upon practical enforcement, the statute would likely not read the way it now reads. Instead, Congress used the word "knowingly" followed by a list of offense elements. And we cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in

English or through ordinary interpretive practice, of the words that it wrote.” *Flores-Figueroa v. U.S.*, 129 S.Ct. 1886 (2009).

Thus, in order to convict a defendant of a crime such as identity theft or fraud which has an element of knowledge, the government must show that the defendant knew that the means of identification at issue belonged to another person or at least could have belonged to another person.

In the present case, Defendant did not have the knowledge required by the statute, nor did he have the “knowledge to obtain” as spoken of in the case of *State v. Chukes*, 2003 UT App 155. Defendant had no intent to steal identifying information from another nor did he then use any information for a purpose such as accessing another’s bank account. Instead, Defendant believed he was the only user of the Social Security number and used the number strictly for productive means such as obtaining work and building credit. Such use and such lack of knowledge does not rise to the offense of Identity Fraud and does not meet the requirement stated in *Green*, which requires that a statute adequately give notice of what is proscribed in a way ordinary people can understand the prohibited conduct. Here, Defendant did not have a criminal intent and did not have knowledge that creating a number that he believed belonged to no one was Identity Fraud. The statute of Identity Fraud does not make it clear as to whether or not inventing a number constitutes a violation of said offense.

## POINT II

### **BASED UPON THE VAGUENESS OF THE STATUTE AND PLAIN LANGUAGE, THE EVIDENCE PROVIDED AT TRIAL BY THE STATE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF IDENTITY FRAUD.**

The due process clause (see the Fifth Amendment of the U.S. Constitution) “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In Re Winship*, 397 U.S. 358, 364 (1970).

In the case at bar, the State did not provide sufficient evidence to prove its case beyond a reasonable doubt. An appellate court should only overturn a conviction for insufficient evidence “when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime.” *State v. Layman*, 1999 UT 79, ¶ 12, 985 P.2d 911.

The Defendant recognizes the difficult burden he must overcome in challenging a trial court’s failure to dismiss for lack of evidence. The court’s power “to review a jury verdict challenged on grounds of insufficient evidence is limited.” *State v. Rudolph*, 2000 UT App 155, ¶ 22, 3 P.3d 192. The Utah Supreme Court has said, “[s]o long as there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made, our inquiry stops.” *State v. Mead* 2001 UT 58, ¶ 67, 27 P.3d

1115, (citations omitted). Additionally, in *State v. Workman*, 852 P.2d 981, 984 (Utah 1993) the Court stated, “[o]rdinarily, a reviewing court may not reassess credibility or reweigh the evidence, but must resolve conflicts in the evidence in favor of the jury verdict.” *Id.*

The Utah Appellate Courts have, however, ruled that absent sufficient evidence establishing each element of the offense charged, an Appellate Court may overturn a conviction. *State v. Workman*, *infra* at 985. Furthermore, in the case of *State v. Shumway*, 2002 UT 124, 63 P.3d 94, the Utah Supreme Court reversed the trial court’s conviction of evidence tampering. In that case, there was some expert testimony that opined that a second, smaller knife had also been used in a murder of an individual, although no physical evidence was provided. In reversing that conviction, the Court held:

After giving full weight to all of the evidence supporting [the defendants] conviction of evidence tampering, we conclude that the evidence is insufficient to sustain his conviction. At most, the evidence supports only the proposition that [the defendant] had the opportunity to destroy or conceal the second implement, if indeed it ever existed. *Id.* at ¶ 18.

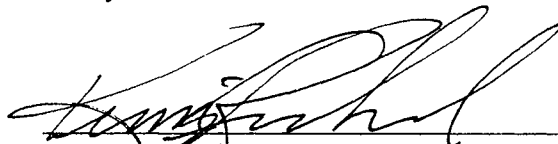
While the Defendant is cognizant of the requirement to marshal evidence in support of the verdict, the Defendant submits that even with an extensive marshaling of evidence the verdict cannot be supported. It is undisputed that a Social Security number was used for employment purposes. However, the State was never able to provide any evidence that showed that Defendant performed an

overt act to obtain the number illegally. It is undisputed that the number was simply invented. In the absence of any evidence that the Defendant obtained the Social Security number from some source, the mere act of inventing a Social Security number does not meet the statutory requirements of obtaining a Social Security number nor did he have the requisite knowledge of the crime Identity Fraud.

### CONCLUSION

Based on the above, the Defendant respectfully requests this Court to reverse his conviction for Identity Fraud.

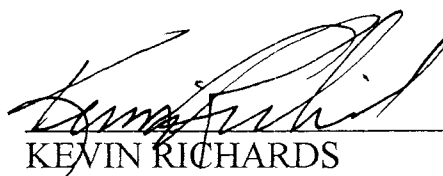
DATED this 19<sup>th</sup> day of January 2012



KEVIN RICHARDS  
Attorney for Appellant

### CERTIFICATE OF MAILING

I certify that I mailed two copies of the foregoing Brief of Appellant together with a searchable CD, to Attorney General, Attorney for the Plaintiff, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0180, postage prepaid this 20<sup>th</sup> day of January 2012.



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UTAH APPELLATE COURTS

FEB 01 2012

IN THE UTAH COURT OF APPEALS

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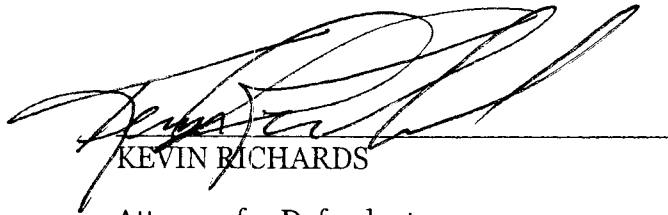
STATE OF UTAH,	)	<b>CERTIFICATE OF</b>
	)	<b>COMPLIANCE</b>
Plaintiff, / Appellee	)	
vs.	)	
MANUEL HURTADO RINCON,	)	District Court No. 101902812
	)	Appellate Case No. 20110897
Defendant/ Appellant	)	

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THE ABOVE-NAMED, Defendant/Appellant, by and through his attorney, Kevin G. Richards hereby certifies the following:

1. The Appellant's Brief complies with the type-volume limitation of Rule 24(f)(1) of the Utah Rules of Appellate Procedure because: a) this brief contains 5,700 words, with 536 lines of text excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B); b) the brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word in a 14 point font size in 23 pages.

DATED this 20th day of January, 2012.

  
\_\_\_\_\_  
KEVIN RICHARDS  
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing *Certificate of Compliance*, postage prepaid, on this 30 day of January, 2012 to the following:

John J. Nielsen  
Assistant Attorney General  
Heber M. Wells Building  
160 East 300 South, 6<sup>th</sup> Floor  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854



Attorney/Secretary

# ADDENDUM A



SECOND DISTRICT COURT - OGDEN  
WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, : MINUTES  
Plaintiff, : SENTENCING  
 : SENTENCE, JUDGMENT, COMMITMENT  
 :  
vs. : Case No: 101902812 FS  
MANUEL HURTADO RINCON, : Judge: MICHAEL DIREDA  
Defendant. : Date: September 9, 2011

PRESENT

Clerk: angik  
Prosecutor: HEWARD, GARY R  
Defendant  
Defendant's Attorney(s): KEVIN G RICHARDS

SEP 12 2011

DEFENDANT INFORMATION

Date of birth: June 23, 1971  
Audio  
Tape Number: 2D090911 Tape Count: 10:02-10:25

2011 SEP 12 P 2 30  
2ND DISTRICT COURT

CHARGES

1. IDENTITY FRAUD - 2nd Degree Felony  
Plea: Not Guilty - Disposition: 08/31/2011 Guilty

HEARING

Defense counsel addresses the court.  
State addresses the court.  
Defendant addresses the court.  
Court sees no legal reason as to why sentencing should not be imposed and proceeds with sentencing.

SENTENCE PRISON

Based on the defendant's conviction of IDENTITY FRAUD a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.  
The prison term is suspended.

ALSO KNOWN AS (AKA) NOTE

MANUEL HURTADO-RINCON

Case No: 101902812 Date: Sep 09, 2011

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SENTENCE JAIL

Based on the defendant's conviction of IDENTITY FRAUD a 2nd Degree Felony, the defendant is sentenced to a term of 60 day(s)

Restitution Amount: \$287.04 Plus Interest  
Pay in behalf of: GERTRUDE WILLISON

SCHEDULED TIMEPAY

The following cases are on timepay 101902812.

The defendant is to pay \$287.04 monthly on the 9th.

The number of payments scheduled is 0 plus a final payment of \$288.69.

The first payment is due on 12/09/2011 the final payment of \$288.69 is due on 12/09/2011. The final payment may vary based on interest.

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).  
Probation is to be supervised by Ogden District Court.  
Defendant to serve 60 day(s) jail.

PROBATION CONDITIONS

The defendant shall violate no law, either federal, state or municipal.

The defendant shall not return to the United States unless legal to do so.

The defendant shall serve 60 days in the Weber County Jail with credit for time served with a release to Immigrations Customs Enforcement.

The defendant shall pay restitution in the amount of \$287.04 on behalf of Gertrude Willison payable to the court within 90 days.  
Final review 9/9/14.

Date: \_\_\_\_\_

9/9/11

  
MICHAEL DIREDA  
District Court Judge