

No. 17-834

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

RAMIRO GARCIA, DONALDO MORALES,
AND GUADALUPE OCHOA-LARA,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

JOINT APPENDIX

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Petition for Writ of Certiorari filed December 7, 2017
Petition for Writ of Certiorari granted March 18, 2019

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JA 1

RELEVANT DOCKET ENTRIES
JOHNSON COUNTY KANSAS DISTRICT COURT
12CR01924

State of Kansas v. Ramiro Garcia

* * *

09/14/2012 INITIAL CHARGE# 21-6107(c)(1)(A
IDENTITY THEFT FILED

* * *

09/14/2012 FILE STAMP 9/14/2012, AFFIDAVIT

09/14/2012 FILE STAMP 9/14/2012, COMPLAINT,
INITIATION OF ACTION

* * *

02/14/2013 FILE STAMP 2/14/2013, DEFENDANT'S
FIRST MOTION TO SUPPRESS

02/14/2013 FILE STAMP 2 / 1 4 / 2 0 1 3 ,
MEMORANDUM, IN SUPPORT OF
DEFENDANT'S FIRST MOTION TO
SUPPRESS DOCUMENTS

* * *

02/28/2013 FILE STAMP 2/28/2013, STATE'S
RESPONSE TO, DEFENDANT'S FIRST
MOTION TO SUPPRESS DOCUMENTS

* * *

04/10/2013 <***** Bench Notes*****>
MOTION TO SUPPRESS

JA 2

DOCUMENTS-PARTIES MAKE
ARGUMENT-COURT DENIES
MOTION

* * *

04/24/2013 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY D GRANT,DEFENDANT
APPEARS WITH ATTORNEY S
P A R K E R , C O N T I N U A N C E
,DEFENDANT ORDERED TO
PERSONALLY APPEAR AT NEXT
COURT HEARING ,COMMENT
M O T I O N T O S U P P R E S S
STATEMENTS-DENIED (BMC)(TC)

* * *

06/09/2014 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY SCOTT AND
HERNDERSON,DEFENDANT
APPEARS WITH ATTORNEY
P A R K E R , F I N D I N G
G U I L T Y , P R E S E N T E N C E
INVESTIGATION ORDERED
/LSIR,CONTINUED BY DEFENSE
,DEFENDANT ORDERED TO
PERSONALLY APPEAR AT NEXT
COURT HEARING (KPM)(AH)

06/10/2014 FILE STAMP 06/10/2014, JURY
INSTRUCTIONS

* * *

08/05/2014 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY SCOTT,DEFENDANT

JA 3

APPEARS WITH ATTORNEY
PARKER, DEFENDANT SENTENCED
TO CUSTODY OF SECRETARY OF
CORRECTIONS, JAIL FOR A PERIOD
OF 7M//, PROBATION GRANTED FOR
18M (KPM)(AH)

* * *

08/07/2014 FILE STAMP 08/07/2014, PSI FILED

* * *

08/11/2014 FILE STAMP 08/07/2014, JOURNAL
ENTRY OF JUDGMENT

08/11/2014 FILE STAMP 08/11/2014, NOTICE OF
APPEAL

* * *

10/31/2014 FILE STAMP 10/31/2014, TRANSCRIPT
OF PROCEEDINGS MOTION TO
SUPPRESS TAKEN APRIL 24, 2013 BY
TERESA CATALANO-JOHNSON,
RPR, CSR

* * *

11/06/2014 FILE STAMP 11/06/14, TRANSCRIPT
OF HEARING TAKEN MARCH 12, 2014
BY AMANDA L. HEARN, RPR, CSR

11/06/2014 FILE STAMP 11/06/14, TRANSCRIPT
OF HEARING TAKEN MARCH 24, 2014
BY AMANDA L. HEARN, RPR, CSR

* * *

11/06/2014 FILE STAMP 11/06/14, TRANSCRIPT

JA 4

OF JURY TRIAL TAKEN JUNE 9, 2014
BY AMANDA L. HEARN, RPR, CSR

* * *

11/20/2014 FILE STAMP 11/20/14, TRANSCRIPT
OF PROCEEDINGS MOTIONS
HEARING TAKEN APRIL 10, 2013 BY
GLORIA J. O'MALLEY, CSR, CCR

* * *

02/25/2016 PROBATION TERMINATED

JA 5

RELEVANT DOCKET ENTRIES

KANSAS SUPREME COURT

112502

State of Kansas v. Ramiro Garcia

Date	Description
* * *	
08-SEP-17	J U D G M E N T D O C K E T E D - PUBLISHED OPINION / Judgment of the Court of Appeals affirming the district court is reversed.
23-AUG-17	RULE 6.09 LETTER / Rule 6.09 Letter by Appellant, Ramiro Garcia
* * *	
21-OCT-16	PETITION FOR REVIEW - GRANTED / (re: opinion) by Ramiro Garcia.
26-FEB-16	PETITION FOR REVIEW / Petition fo Review (re: opinion) by RAMIRO GARCIA.
29-JAN-16	J U D G M E N T D O C K E T E D - UNPUBLISHED OPINION / Affirmed. Per Curiam.
29-DEC-15	RULE 6.09(B) LETTER / Rule 6.09 (b) letter by State of Kansas.
* * *	
06-OCT-15	BRIEF RECEIVED / Brief of appellee the State of Kansas.

JA 6

* * *	
09-JUN-15	BRIEF RECEIVED / Brief of appellant Ramiro Garcia : Aple Brf Due 07/13/2015
* * *	
23-SEP-14	DOCKETING STATEMENT/Docketing Statement - Ramiro Garcia (PROPOSED)
* * *	

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12 CR 1924

[Filed September 14, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
Defendant.)
)

NO DRUGS

AFFIDAVIT

Comes now the affiant, of lawful age, being first duly sworn upon oath, in support of a probable cause finding for the detention of the defendant or the issuance of an arrest warrant, states as follows:

1. On 8/26/12 Overland Park Police Officer Gibson stopped a vehicle in the area of West 99th Street and Nall, Overland Park, Johnson County, Kansas. He contacted the driver who was identified with a Kansas Driver license as RAMIRO GARCIA. GARCIA said he was driving to work at Bonefish Grill. GARCIA was checked through a computer and was found to have been previously arrested in May, 2012 for Identity Theft. Officer Gibson contacted Det. Russell and explained the situation. Det. Russell met GARCIA and

reminded him that he was not to be working since he was in the U.S. illegally and did not have a social security number to work. GARCIA was released.

2. On 8/27/12, Det. Russell and Homeland Security Agent Zumhofe collected employment information from Bonefish Grill regarding GARCIA. Manager Khalil Booshehri provided a W-4 that GARCIA completed on 5/25/12 which showed a social security number ending in 8562. The number was issued to sixteen year Felisha Munguia from Edinburg, Texas.

3. Officers have been unable to locate GARCIA following the original stop on 8/26/12.

4. The above information was provided from the reports of the Overland Park Police Department.

/s/Eric B. Smith

Affiant

Subscribed and sworn to before me by affiant, Eric B. Smith (OPPD #906) on this 12th day of September, 2012.

/s/Terri A. Bowman

Notary Public

<p>TERRI A. BOWMAN Notary Public - State of Kansas My Appt. Expires September 28, 2013</p>
--

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12 CR 1924

[Filed September 14, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
Defendant.)

COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

NO DRUGS

I, Danetta F. Mendenhall, Assistant District Attorney of said County, being duly sworn on oath state to the Court that

RAMIRO ENRIQUEZ GARCIA

did the following:

COUNT I - That on or about the 25th day of May, 2012, in the City of Overland Park, County of Johnson, and State of Kansas, RAMIRO ENRIQUEZ GARCIA did then and there unlawfully, willfully and feloniously obtain, possess, transfer, use, sell or purchase any personal identifying information, or document

containing the same, to wit: social security number belonging to or issued to another person, to wit: Felisha Munguia, with the intent to defraud that person, or anyone else, in order to receive any benefit, a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)

NO CONTACT

VICTIM(s) WITNESSES

whether/not he posts bond

/s/Danetta F. Mendenhall
Danetta F. Mendenhall/tb #22146
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000

Subscribed and sworn to before me this 11th day of September, 2012.

/s/Terri A. Bowman
Notary Public

WITNESSES:

Bonefish Grill personnel

Officer M. Gibson

Agent Zumhofe

Agent J. Espinosa

Khalil Booshehri

Det. Russell

Social Security Administration personnel

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DIVISION**

Case No.: 12 CR 1924

[Filed February 14, 2013]

STATE OF KANSAS,)
Plaintiff,)
)
vs.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
Defendant.)
)

DEFENDANT'S FIRST MOTION TO SUPPRESS

COMES NOW the Defendant, by and through counsel Stephen L. Parker of Abogados Parker & Parker, P.A., and respectfully moves this Honorable Court for its order, judgment and decree suppressing the I-9 Employment Verification Eligibility document. This motion is based on two arguments. First, the Defendant argues that there is no legal basis for the traffic stop and thus all evidence obtained after the stop should be suppressed for lack of probable cause for the stop. Second, the Defendant argues that the Immigration Reform and Control Act preempts State law, and provides that the I-9 and any information contained in or appended to such form "may not be used for purposes other than for enforcement of this chapter." 8 U.S.C. 1324a(b)(5).

WHEREFORE, and by reason of the above and foregoing, the Defendant respectfully moves this Honorable Court set the matter for a suppression hearing at the convenience of Court and counsel.

Respectfully submitted,

/s/Stephen L. Parker

Stephen L. Parker

Abogados Parker & Parker, P.A.

Attorneys at Law

535 Central Ave.

Kansas City, KS 66106

Phone: (913) 381-1610

Fax: (913) 403-8749

Attorney for Defendant

* * *

JA 13

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DIVISION**

Case No.: 12 CR 1924

[Filed February 14, 2013]

State of Kansas,)
Plaintiff,)
)
vs.)
)
Ramiro Enriquez Garcia,)
Defendant.)
)

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S FIRST MOTION TO
SUPPRESS DOCUMENTS**

COMES NOW the Defendant, by and through counsel Stephen L. Parker of Abogados Parker & Parker, P.A., and submits the following Memorandum in support of his Motion to Suppress:

FACTS

On May 25th, 2012, Mr. Garcia was a subject of a traffic stop in Overland Park for an unknown reason. In the course of this seizure, Mr. Garcia was asked where he was going. He responded to the officer that he was going to work. The officer then conducted a background check and discovered Mr. Garcia had a prior arrest for identity theft earlier that year. An agent of Homeland Security was then contacted, and

an Overland Park detective was called to the scene for further investigation. Later, Overland Park officers went to Bonefish Grill, a restaurant in Leawood, Kansas to collect employment information for Mr. Garcia. The employer turned over to the Overland Park officers the I-9 Employment Eligibility Verification document and W-4 document that prospective workers are required to sign and have on file with their employers pursuant to the Immigration Reform and Control Act, 8 U.S.C. 1324a (hereinafter “IRCA”). It is alleged by the State that the Social Security number on the W-4 document was not assigned to the Defendant by the Social Security Administration.

ARGUMENTS AND AUTHORITIES

A. Law enforcement must have a reasonable suspicion to conduct a traffic stop.

It is well established in the law that an officer must have a legal reason to conduct a traffic stop on a vehicle. In the present case, no legal reason is given for the stop in the narratives. In his narrative, the officer alludes to a traffic stop but fails to provide specific information regarding the legal basis for the stop. Here, there is no probable cause given to conduct a seizure therefore all evidence obtained after the stop should be suppressed as “fruit of the poisonous tree”.

B. Federal law preempts state law and prevents the State from using the I-9 in this case.

The Immigration Reform and Control Act bars use of the I-9 form and “any information contained in or

appended to such form” for purposes other than enforcement of the federal immigration statute and the federal perjury and false statement provisions. 8 U.S.C. 1324a(b)(5). As the charges here are brought by the State of Kansas, the State cannot use the I-9 document and “any information contained in or appended to such form” as a basis for proving its case, its admission should be suppressed, and any charges based on the information contained in the I-9 should be dismissed.

The I-9 form was developed by the United States Attorney General in order to comply with 8 U.S.C. 1324a(b)(1)(A), which requires attestation by employer of eligibility verification on “a form designated or established by the Attorney General by regulation.” 8 C.F.R. 274a.2(a) (2005) (noting I-9’s designation as the form to be used in employment-eligibility verification system). The I-9 form is entitled “Employment Eligibility Verification.” On it, the Defendant provided his name, along with a social security number and an address. He also checked the box indicating that he is a citizen of the United States.

The IRCA provides that the I-9 form “and any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter and sections 1001, 1028, 1546, and 1621 of title 18.” 8 U.S.C. 1324a(b)(5). Thus, the IRCA provides that the employment-eligibility verification system “may not be used for law enforcement purposes, other than for enforcement of this chapter” or the federal perjury and false-statement provisions also referenced in section 1324a(b)(5). 8 U.S.C. 1324a(d)(2)(F). Moreover, if the IRCA preempts

state law, 1324a(b)(5) controls and the I-9 cannot be used in this case.

The United States Supreme Court recently addressed the preemptive effect of the IRCA, holding that the law did not preempt Arizona's unauthorized-alien employment law. Chamber of Commerce v. Whiting, 131 S.Ct. 1968, 1973, 179 L. Ed. 2d 1031 (2011). However, the majority considered the preemptive effect of section 1324a(b)(5) with respect to sanctions on employers for employing illegal aliens, not employees. In fact, Justice Sotomayor stated in her dissent that "[u]se of the I-9 form is thus limited to federal proceedings, as the majority acknowledges." Id. at 2001. Thus, although Whiting stands for the proposition that the IRCA does not preempt state law with regard to employers, it also recognized that the I-9 form cannot be used in conjunction with State prosecutions.

"A state law is preempted if the state law obstructs the accomplishment of the full purposes and objectives of the federal legislation." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L. Ed. 2d 443 (1984). IRCA largely targets employers for the sanctions it imposes, as only the federal perjury and false statement provisions referenced in section 1324a(b)(5) are aimed at the employee. See United States v. Arizona, 641 F.3d 339, 358 (9th Cir.2011). But those federal statutes are to be enforced by federal authorities, not state prosecutors. And, as the Ninth Circuit noted in United States v. Arizona, the IRCA evidences "Congress' intent that systematic state immigration enforcement will occur under the direction

and close supervision of the Attorney General.” Id. at 352. The enforcement of Kansas’ making a false writing statute and identity theft statute is not subject to that direction and supervision. “Moreover, state making false writing prosecutions could shift the immigration enforcement focus from the employer to the employee.” State of Minnesota v. Reyuna, 807 N.W.2d 473, 480 (Minn. Ct. App. 2011). Thus, a Kansas prosecution for false statements and identity theft on the I-9 form would “tend to obstruct the full purposes and objectives of IRCA.” Id.

Although there are no Kansas cases directly on point, Defendant would encourage the Court to consider Reyuna, a recent Minnesota Court of Appeals case involving similar facts. There, law enforcement executed a search warrant and obtained the defendant’s I-9. The defendant was charged with perjury because the State of Minnesota alleged she falsely claimed be a citizen of the United States because she checked that box on the form.

The Court found that “[f]ederal immigration statutes preempt the state charge of perjury based on the I-9 employment-eligibility verification form.” Reyuna at 484. In doing so, the Court outlined the above arguments, including the United States Supreme Court’s findings in Whiting, where the court concluded that “[u]se of the I-9 form is thus limited to federal proceedings.” Whiting at 2001. The defendant’s conviction for perjury was reversed. Reyuna at 484.

CONCLUSION

In reversing the conviction for perjury in Reyuna, the Minnesota Court of Appeals interpreted 8 U.S.C. 1324a(b)(5) on its face and in conjunction with the United States Supreme Court's ruling in Whiting and held that the IRCA preempts State prosecutions because such prosecutions would tend to obstruct the full purposes of the federal law. The Court should apply that same reasoning here and rule that the I-9 form, and any information contained in or appended to such form, cannot be used as the basis for a State prosecution because it is to be used only for the purposes set forth in IRCA. The State should be prohibited from mentioning, using, or alluding to the I-9 Form, and any information contained in the I-9 form, in their prosecution of the defendant. The I-9 and W-4 should be suppressed from evidence and both counts should be dismissed.

WHEREFORE, Defendant respectfully requests the Court enter an order suppressing the I-9 in this case and dismiss Count 1.

Respectfully submitted,

/s/Stephen L. Parker
Stephen L. Parker
Abogados Parker & Parker, P.A.
Attorneys at Law
535 Central Ave.
Kansas City, KS 66106
Phone: (913) 381-1610

JA 19

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DIVISION**

**CASE NO. 12CR1924
COURT NO. 13**

[Filed February 28, 2013]

STATE OF KANSAS,)
Plaintiff,)
)
v.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
Defendant.)
)

**RESPONSE TO DEFENDANT'S
FIRST MOTION TO SUPPRESS DOCUMENTS**

COMES NOW the State of Kansas, by and through Assistant District Attorney Dustin L. Grant, and in response to the defendant's First Motion to Suppress Documents asks the Court to deny the same. In support, the State submits the following:

STATEMENT OF FACTS

For the purposes of this Response, the State does not dispute the material facts as set out by the defendant in his Motion. It should be noted though that this incident occurred on August 26, 2012, and not May 25. Additionally, after the defendant filed his Motion, the State obtained a copy of the traffic citation issued

to the defendant on August 26, 2012, which indicates that the defendant was cited for speeding. A copy of that citation is attached as Exhibit 1 and will be provided to defense in discovery.

ARGUMENTS AND AUTHORITIES

The defendant's Motion argues two points. First, the defendant argues a lack of reasonable suspicion to support the traffic stop. Second, the defendant argues that the State cannot prosecute the defendant for falsifying information on the I-9 Form, and that this prohibition somehow extends to the W-4 Form. However, based upon the citation issued in this case, there was reasonable suspicion to conduct a traffic stop. Additionally, *Arizona v. United States* does not support the defendant's position.

I. Reasonable suspicion existed to conduct this traffic stop.

The citation issued in this case indicates that Officer Gibson cited the defendant for driving at a speed greater than the posted limit. Specifically, the citation notes that the defendant was traveling 49 miles per hour in a 35 mile per hour zone, which was verified using LIDAR. This excessive speed provides sufficient basis to conduct a traffic stop.

II. Federal law does not prevent the State from prosecuting this case.

The defendant's general argument is a preemption argument based in large part upon *Arizona v. United States*, 567 U.S. ---, 132 S.Ct. 2492 (2012). However, the decision in *Arizona* does not support an argument

that K.S.A. 21-6107, Kansas's identity theft statute, is preempted. In *Arizona*, the United States Supreme Court held that federal law preempted three of the four provisions in Arizona's controversial immigration law, S.B. 1070. For the case before this Court, the Supreme Court's discussion of §3 of S.B. 1070 is relevant.

A. Analyzing Arizona v. United States

Section 3 of S.B. 1070 created a new state misdemeanor that prohibited the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code sections 1304(e) or 1306(a).” In effect, Arizona created a State criminal statute with the sole purpose of punishing individuals who violated the specified federal statutes.

In holding § 3 unconstitutional, the Court relied on Congress' power to preempt State law. *Id.* at 2500-02. Specifically, the Court relied on the principle of field preemption, stating: “Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible.” *Id.* Therefore, even though § 3 merely codifies federal law within the Arizona criminal code, Arizona is prohibited from doing so because Congress occupies the entire field of alien registration. *Id.* at 2502.

The *Arizona* Court also stated that allowing Arizona to impose its own penalties for violations of 8 U.S.C. §1304(e) or 1306(a) would conflict with the framework created by Congress. The Court was concerned that Arizona “would have the power to bring criminal charges against individuals for violating [§ 1304(e) or 1306(a)] even in circumstances where federal officials

in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” *Id.* at 2503. Additionally, the Court addressed the fact that § 3 and the federal statutes are inconsistent when it comes to penalties. *Id.* Under the federal statutes, the misdemeanor is punishable by a “fine, imprisonment, or a term of probation.” *Id.* However, § 3 did not allow for probation or the possibility of a pardon. According to the Court, the inconsistent penalties create a conflict with the framework created by Congress. *Id.*; *Wis. Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (“[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity.” (internal quotation marks omitted)).

Based on the above reasoning, the core of which relied on the fact that § 3 specifically invokes 8 U.S.C. §1304(e) and 1306(a), the Court found that “Congress intended to preclude States from ‘complement[ing] the federal law, or enforce[ing] additional or auxiliary regulations’” when it comes to the field of alien registration. *Id.* at 2503. The Court did, however, take special care to point out that the issue of immigration is unique from many other areas of law, in that issues stemming from immigration policy “can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.” *Id.* at 2499.

B. Distinguishing Arizona v. United States from the instant case

The defendant’s Motion fails to properly apply *Arizona* to the case before this Court by failing to

acknowledge that a central factor in the Court's reasoning is absent from the facts at hand. Unlike § 3 of the Arizona law, K.S.A. 21-6107 does not create punishments for violating federal law.

The most important distinction when looking at *Arizona* and the facts before this Court is that Kansas is not attempting to punish individuals for violating federal law. K.S.A. 21-6107 is the State criminal statute concerning identity theft. The statute neither invokes federal law nor provides a punishment for violating federal law. The Kansas criminal statute in question merely provides a punishment for individuals who commit the general crime of identity theft.

Furthermore, several courts have found that the federal law does not necessarily preempt States from enforcing their criminal statutes. See *State v. Wallace*, 160 Ohio App. 3d 528 (Ohio Ct. App. 2005) (finding that the prosecution of the defendant under an Ohio theft statute was not preempted by the Social Security Act); *Faith v. Caldwell*, 944 S.W.2d 607 (Tenn. Ct. App. 1996) (finding that the Social Security Act provides that "a court of competent jurisdiction" may determine that a representative payee has misused an individual's benefit and that the federal statutes and regulations contain no language indicating an intent to preempt state court jurisdiction); *Commonwealth v. Morris*, 394 Pa. Super. 185, 575 A.2d 582 (Pa. Super. Ct. 1990) affd, 529 Pa. 61, 601 A.2d 806 (Pa. 1992) (finding that "under our federalism, the states have the principal responsibility for prosecuting crimes. Therefore, the penalty provision of the Social Security Act at issue here is subject to a presumption that

Congress did not intend by its passage to preempt a state's enforcement of its criminal law"). By applying the above case law to the facts before this Court, it follows and the State would argue that the Immigration Reform and Control Act does not preempt Kansas from prosecuting individuals under its State identity theft statute.

Since Kansas is prosecuting the defendant for violating its State identity theft statute and not for being illegally employed, the defendant's argument fails.

CONCLUSION

The defendant is charged with violating the Kansas criminal statute for identity theft for information relating to forms other than the I-9. The U.S. Supreme Court's decision in *Arizona v. United States* does not support the defendant's argument that federal law precludes the State from prosecuting violations of State criminal statutes. Unlike *Arizona*, Kansas is not seeking to enforce federal law. The defendant's application of the decision in *Arizona* is too broad. States are not preempted merely because an area of federal law is involved. As stated in subsections (a) and (b) of 26 U.S.C. §7205, the penalties provided within are separate from any other penalty provided by law. Had Congress intended to preempt States from enforcing violations of their own statutes, it certainly had the opportunity to do so.

For the above reasons, the defendant's First Motion to Suppress Documents should be denied.

JA 25

/s/Dustin L. Grant

Dustin L. Grant #24153

Assistant District Attorney

Johnson County Courthouse

P.O. Box 728

Olathe, KS 66051

* * *

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

**Case No. 12CR1924
Appellate No.: 112502A**

[Filed April 10, 2013]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
)
Defendant.)
)

TRANSCRIPT OF PROCEEDINGS
(Motions Hearing)

The above-captioned matter came on for a motions hearing before the HONORABLE BRENDA M. CAMERON, Judge of the Tenth Judicial District of Kansas, Division 13, at Olathe, Kansas, on the 10th day of April, 2013.

APPEARANCES:

FOR THE STATE:

Mr. Dustin Grant
100 North Kansas Avenue
Olathe, Kansas 66061

FOR THE DEFENDANT:

Mr. Stephen L. Parker
535 Central
Kansas City, Kansas 66101

* * *

[p.3]

* * * * * **P R O C E E D I N G S** * * * * *

THE COURT: The State of Kansas versus
Ramiro Garcia 12CR1924.

MR. GRANT: May it please the Court, the
State appears by Dustin Grant.

MR. PARKER: May it please the Court, Your
Honor, Ramiro Garcia appears in person with counsel,
Steven Parker. We also have the assistance of the
interpreter.

(Whereupon, the Spanish interpreter was
duly sworn.)

THE COURT: Have you been able to speak
with Mr. Garcia today?

THE INTERPRETER: I have.

THE COURT: Do you understand one
another?

THE INTERPRETER: We do.

THE COURT: We're here on the defendant's
motions. Are the parties ready to proceed?

MR. GRANT: Your Honor, I had subpoenaed officer Mike Gibson who conducted the traffic stop in this case. I just e-mailed my trial assistant. He was subpoenaed, a court notice went out. I just now received an e-mail that he is working an aggravated burglary. He informed her that he did not get the Court notice. However, I have a confirmation that it was sent. I don't know if the Court wants to proceed on a portion of the motion or as much of the motions as we

[p.4]

can.

At the end of the day, the purpose of getting Officer Gibson was to testify about a traffic stop. I do have a video of the traffic stop that has been provided to defense. It's a few minutes long and has been provided to defense.

Without Officer Gibson I cannot lay foundation. The traffic stop in the video is what I believe would be the best evidence of any factual disputes. Quite honestly, I don't know if there are a whole lot of factual disputes at the end of the day.

I will leave it to the Court's discretion how to proceed, and then, obviously, Mr. Parker what he would like to do is to do consultation with his client, but I believe we can proceed with at least a portion of the motions today. I apologize to all the parties that Officer Gibson is not here.

THE COURT: Thank you, Mr. Grant. Mr. Parker, do you want to take a few minutes?

MR. PARKER: Judge, may I speak briefly with my client?

THE COURT: Sure.

MR. PARKER: Thank you, Your Honor. I have had a chance to speak briefly with Mr. Garcia.

One of the we will concede, Judge, that one of the allegations in one of our motions to suppress was the issue of probable cause to initiate the traffic stop.

[p.5]

In the State's response they did clarify the reason for that traffic stop, and there's been additional discovery materials provided to us, including the video that was made during the traffic stop in addition to Exhibit 1, which was attached to the State's response, which was a photocopy of the Overland Park traffic ticket for speeding, I think, 49 in a 35 speed limit.

So we now -- I believe that issue is moot as to the motion, as to that part of the motion that addresses the PC for initial contact.

As to the motion to suppress my client's statements to this officer, I think based on the factors in *Jacquez*, I would need the opportunity to cross-examine him as to the various circumstantial factors that that case addresses as to whether or not the detention was custodial, was merely investigatory or something beyond simply a traffic stop.

Obviously, the detention went beyond the initial purpose for a speeding ticket stop and turned into

something else. So I think that testimony would be important.

We also have a motion pending as to the use of the I-9 and the subsequent transfer of that number onto a W-4 form that is digitally signed.

So we can perhaps take that motion up today, or we can perhaps do them all at the same time, but that would be my brief comment. My client has deferred to my advice, and I

[p.6]

would defer to the Court's ruling.

THE COURT: Well, it sounds as though we'll need that witness for cross-examination. Regarding his statements, is the motion to suppress the document based, or the documents based on the I-9, is that something that is here that you're agreeing can be addressed with argument of counsel?

MR. GRANT: I believe so, Your Honor. That would only be legal argument.

MR. PARKER: I believe so, Judge.

THE COURT: Why don't we address that since we have time set aside, and I'll set side the other motion so that we can have the officer here. It is your motion, Mr. Parker. Do you want to address that?

MR. PARKER: Thank you, Your Honor.

May I approach, Your Honor?

THE COURT: You may.

MR. PARKER: I'm not going to be offering this into evidence, I just wanted to provide it for the Court's reference for purposes of this hearing.

THE COURT: You're not going to be offering this?

MR. PARKER: Well, maybe for the limited purpose of this hearing.

MR. GRANT: The State stipulates to any [p.7] foundation for that. I'm not opposed to accepting that as a defense exhibit.

THE COURT: Let's have it marked then, and I'll consider it, if you're moving to admit it. I'll consider it for this hearing only so the record is clear. I think we ought to mark it.

MR. PARKER: Your Honor, I have marked a photocopy of the 2012 W-4 form as Defense Exhibit No. 1. If I may give that to the Court?

THE COURT: It is admitted.

(Whereupon, Defendant's Exhibit No. 1 was admitted into evidence.)

MR. PARKER: Your Honor, as to the Defendant's first motion to suppress, which relates to the admissibility of the I-9, Employment Verification Eligibility Document, we would stand on the motion.

By now I'm sure the Court is very familiar with these arguments, and I believe Arizona applies to the

I-9. I believe that the State is not relying on the I-9 document as a basis of this prosecution. I'm just saying that.

Our argument, Judge, extends somewhat further in that the information contained in the I-9 is also transferred in this case to what's been marked as Defendant's Exhibit No. 1, which is an electrically -- it appears to be an electronically-produced document at the employer, Bone Fish

[p.8]

restaurant in which he purports that my client electronically signed that document, which is something he has no recollection of.

I don't know what their process for electronic signatures are, but that would obviously be something that would be a foundation issue if that is in fact the basis for prosecution.

It appears that's the document that the State is going to be relying on in a trial. So we hope to extend the motion to suppress that document since it does not bear my client's actual physical signature and information from that derived from that was derived from the I-9, which is not a document that should be relied on in this prosecution. So that's basically our argument, Your Honor.

THE COURT: Thank you, Mr. Grant?

MR. GRANT: Your Honor, I agree that the State is not intending to rely on the I-9 Form but the

W-4 form, and specifically the Social Security number on that W-4 form on Exhibit 1 before the Court.

The defense's argument, as I understand it, basically seeks to extend in some fashion the reach or the purpose of the I-9 Form that's simply because some piece of information is contained on the I-9 Form, you can't ever use any of that information on anything else.

Why the defense is not arguing: Well, my client is on the I-9, so you can't prosecute for anything related to name,

[p.9]

the defense's argument is because the defendant's Social Security number is on that I-9 Form. Well, he also put it on this other form, and you can't use any information on the I-9 Form to prosecute them. Therefore, the State can't prosecute for using someone else's Social Security number on the W-4 document.

The State doesn't believe that the cases the defense cites intend to extend the argument to that degree, to that extent.

Aside from that, Your Honor, I would rely upon the argument I made in my written response to the defendant's motion and ask the Court to deny the motion to suppress.

THE COURT: And regarding the argument on the digital signature?

MR. GRANT: Your Honor, I think that would be a foundation issue that the State is going to have to meet at trial. We're going to have to lay foundation for

this document. I think we can sufficiently through the witnesses from Bone Fish Grill who will come in to testify regarding the procedures of filling out electronic signature documents. That's not an uncommon practice, so I don't think the State will have too much of a burden or a difficult time laying that appropriate foundation. But I don't -- again, I don't believe that case law supports the defense's argument.

THE COURT: Okay. Counsel, thank you.

[p.10]

I'm going to, as I said, continue the motion to suppress, given that that witness is not here and you all need him here on the motion to suppress statements. I appreciate your arguments regarding the documents and the motion to suppress. I agree that Defendant's 1 is something for which the State will have to provide proper foundation, and whether or not they can do that will be left for another day whether they offer that to prove up their case.

But regarding the motion to suppress documents, I understand the argument, and the motion to suppress documents will be denied today.

How much time do we need on the motion to suppress statements?

MR. GRANT: A half hour.

MR. PARKER: A half hour.

THE COURT: It sounds as though I have time opening up, I have jury trials that are getting continued, but I could hear this April 24 at 1:30.

JA 35

MR. PARKER: Judge, I'm going to be Austin,
what day is that?

THE COURT: That's a Wednesday.

MR. PARKER: I think that will be fine.

MR. GRANT: That works for the State, yes.
The time again?

THE COURT: April 24 at 1:30.

* * *

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DIVISION NO. 13**

**Case No. 12CR1924
Appeal No. 14-112502-A**

[Filed April 24, 2013]

STATE OF KANSAS,)
)
Plaintiff,)
)
v.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
)
Defendant.)
)

**MOTION TO SUPPRESS
TRANSCRIPT OF PROCEEDINGS**

BE IT REMEMBERED that on the 24th day of April, 2013, the above-entitled matter comes on for hearing before the HONORABLE BRENDA CAMERON, Judge of Division 13 of the Tenth Judicial District Court of the State of Kansas, Olathe, Kansas.

APPEARANCES:

For the Plaintiff:

Mr. Dustin Grant
Assistant District Attorney

JA 37

Johnson County Courthouse
100 North Kansas Avenue
Olathe, Kansas 66061

For the Defendant:

Mr. Stephen L. Parker
Parker & Parker, P.A.
535 Central Avenue
Kansas City, Kansas 66101

* * *

[p.3]

TRANSCRIPT OF PROCEEDINGS

THE COURT: State of Kansas vs. Ramiro
Enriquez Garcia, 12CR1924.

MR. GRANT: May it please the Court, the
State of Kansas appears by Dustin Grant.

MR. PARKER: May it please the Court,
Your Honor, Ramiro Garcia appears in person
through counsel Stephen Parker with the assistance
of an interpreter.

THE COURT: Ms. Bustamante, if you will
raise your hand and be sworn.

(Whereupon, the interpreter, Ms.
Bustamante, was sworn by the Court.)

THE COURT: Have you been able to
speak with Mr. Garcia today?

THE INTERPRETER: Yes, Your Honor.

THE COURT: And do you understand one another?

THE INTERPRETER: Yes, Your Honor.

THE COURT: Very good.

We're set today on the defendant's motion to suppress statements. Are parties ready to proceed?

MR. GRANT: Yes, Your Honor.

MR. PARKER: Yes, Your Honor.

THE COURT: State may call its first

[p.4]

witness.

MR. GRANT: The State calls Officer Gibson to the stand.

MIKE GIBSON,

called as a witness on behalf of the State, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRANT:

Q. Sir, could you state your name.

A. Mike Gibson.

Q. And how are you employed?

A. As a police officer with the City of Overland Park, Kansas.

Q. And what are your duties with Overland Park?

A. I'm currently a patrol officer.

Q. Okay.

Were you working as a patrol officer on August 6th, 2012?

A. Yes.

Q. During that date did you -- on that date did you conduct a traffic stop of a vehicle driven by a Ramiro Garcia?

A. Yes.

Q. Do you see that -- did you contact the driver of that vehicle?

[p.5]

A. Yes.

Q. And do you see that person in the courtroom here today?

A. Yes.

Q. And is it this individual seated at the counsel table?

A. In the orange and white striped shirt.

Q. Okay.

What was the reason for the traffic stop?

A. A speeding violation.

Q. Did you cite the defendant for that speeding violation?

A. Yes.

Q. When you initially made contact with the driver of the vehicle -- I guess let me ask you this: Was the defendant the driver?

A. Yes.

Q. Was he the sole occupant of the vehicle?

A. Yes.

Q. Okay.

When you first made contact with the defendant, tell us about your interaction with him.

A. I advised him I stopped him for speeding. I think I asked him for his driver's license or identification. I think he first handed me a Mexican ID card. I think I saw he had a Kansas ID card in his wallet. He handed me his insurance as well. I think he was wearing some type of work -- like a white cook. I think he had some

[p.6]

type of -- so --

Q. Okay.

Did you ask him where he was going?

A. I asked where -- I think I asked him, "Where are you headed? Are you headed to work?" Just making small talk.

Q. And what was his response?

A. I think he replied Bonefish.

Q. Is that a restaurant in Overland Park?

A. I think it's in Leawood.

Q. Okay.

How long into your initial traffic stop and when you first made contact with the defendant did you ask him where he was headed?

A. Within the first minute.

Q. After you made contact with him and then asked him where he was going and obtained his identification documents, what did you do at that point?

A. I came back to my police car and we checked the name for driver's license and criminal history.

Q. Is that something you routinely do on every traffic stop?

A. Yes.

Q. And those actions, were those related only to the traffic infraction that you had observed?

[p.7]

A. Yes.

Q. When you ran his name and identifiers, what information did you learn?

A. That he had been contacted in reference to identity theft and/or identity fraud, and it listed one of our detective's names.

Q. Okay.

Did you contact that detective?

A. Yes.

Q. And where was that detective when you located him?

A. Like he was two blocks away working patrol that day.

Q. Okay.

And did he respond to that location?

A. Yes.

MR. DUSTIN: One moment.

No further questions.

THE COURT: Cross-examination?

MR. PARKER: Thank you.

CROSS-EXAMINATION

BY MR. PARKER:

Q. Thank you, Officer Gibson, for testifying today.

When you contacted Mr. Garcia, would you characterize him as cooperative or uncooperative?

A. Cooperative.

Q. Okay.

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And was this traffic stop sometime in the middle of the afternoon?

A. Yes, I think I put 10:55 a.m.

Q. Okay.

And you mentioned small talk. Is it part of your typical routine when you make a traffic stop to engage in small talk with the individual driver?

A. Periodically, yes. Yes.

Q. And would it be your testimony then that part of the small talk was to ask him where he was headed?

A. Yes.

Q. Okay.

Is that something that might be routine in your interaction with folks driving?

A. It is most likely, yes.

Q. And he voluntary told you where he was going; is that right?

A. Yes. I think he just responded Bonefish.

Q. And when you did your check on the computer back in the patrol vehicle, did you -- there were no warrants or wants or anything related to him being

-- any active reasons to detain him at that time; is that right?

A. No.

Q. You just noticed that there had been a previous contact with Detective Russell; is that right?

[p.9]

A. Yes.

Q. And when you discovered that he had previously had contact with Detective Russell, had you already made the decision to write the traffic ticket at that point?

A. Yes.

Q. Had that process been perhaps started, or do you remember?

A. I don't think I completed the ticket after Detective Russell had come over.

Q. Okay.

And did Detective Russell then respond to the scene?

A. Yes.

Q. And at that point did you hand the contact or the investigation over to the detective?

A. Yes.

Q. Okay.

And so your basic role here was to observe a traffic infraction, stop the vehicle, issue a citation, and then upon inquiry pass it off to the detective?

A. I think I called the detective. He contacted Mr. Garcia while I was finishing with the ticket. Then when he got done, I gave him a ticket. That would be the end.

Q. Would it also be your testimony that he was free to go

[p.10]

after being given the citation?

A. Yes.

Q. Okay.

You did not arrest him; is that correct?

A. No.

Q. Okay.

Were you present when the detective spoke with him?

A. I don't recall. I don't think I was. I probably got out at the very end when I handed him the ticket, but I think Detective Russell spoke with him personally

—

Q. Okay.

A. -- in his car.

Q. Okay. Excuse me.

And so you did not contact Bonefish; is that right?

A. No.

Q. Okay.

Other than you and the detective, were there any other officers present?

A. No.

Q. About how long would you guess, if you recall, did this contact between my client and you and the detective last?

A. Maybe 15 minutes.

Q. You said the detective was nearby, within a couple of blocks?

[p.11]

A. Yes, he was just --

Q. So his response was pretty prompt, I assume?

A. Yes.

Q. And when the detective arrived given my client's demeanor, was he handcuffed at all or did he just have a normal conversation --

A. I think he sat in his truck the entire time. I don't remember us asking him to get out.

Q. So as far as you know --

A. No.

Q. -- he was not handcuffed?

A. No, he was not handcuffed.

Q. And then at some point he was told he was free to leave; is that right?

A. Yes.

Q. Okay.

MR. PARKER: I believe that's all I have of this witness at this time.

THE COURT: Any redirect?

MR. GRANT: No, Your Honor.

THE COURT: Thank you for your testimony. You may step down.

(Witness excused.)

MR. GRANT: No further evidence by the State.

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT**

Case No. 12CR1019

Case No. 12CR1924

Court No. 14

[Dated March 12, 2014]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
)
Defendant.)
)

TRANSCRIPT OF HEARING

BE IT REMEMBERED that on this 12th day of March, 2014, the above-entitled cause comes on for a hearing before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the State of Kansas:

MR. ALEX SCOTT
JOHNSON COUNTY DISTRICT
ATTORNEY'S OFFICE
100 North Kansas Avenue
Olathe, KS 66061

For the Defendant:

MR. STEPHEN L. PARKER
ABOGADOS PARKER & PARKER, P.A.
535 Central Avenue
Kansas City, KS 66101

* * *

[p.5]

THE COURT: Okay. Is there -- So the one that's going to trial is identity?

MR. SCOTT: It is, Judge.

THE COURT: Okay. It will be -- How many -- Okay. Usually they take -- You just have one witness on this one?

MR. SCOTT: We anticipate four witnesses, Judge, two of them being very brief.

THE COURT: Okay. That's fine.

Is there going to be any affirmative defenses?

I'm just trying to figure out --

MR. PARKER: Judge, may it please the Court.

Steve Parker on behalf of Mr. Garcia.

He has been cooperating with the federal government as it relates to the employer on the first case.

THE COURT: Right.

MR. PARKER: It was a pattern of them --

THE COURT: Who was it?

I forgot.

MR. PARKER: Insulite was the name of the company in Olathe. The glass company -- huge glass company.

There was a pattern of them directing

[p.6]

employees to change social security numbers.

He worked under three different numbers during a ten year period.

That case is going away.

He's here legally now.

He's here under -- He has a status and has a social security number and is working legally.

His immigration lawyer is obviously trying to keep that the way it is.

He has family, U.S. citizen children.

We would love to plea this case to anything other than a deportable offense.

So the other -- In terms of affirmative defenses, I don't believe there are none.

We've lost our suppression issue in front of Judge Cameron on this case due to the traffic stop.

So we're simply doing damage control.

THE COURT: He's here legally now?

MR. PARKER: He does have status.

THE COURT: Does he have any other priors?

MR. PARKER: He has no priors.

His employer directed him to change his social security number on several occasions.

I have work pay stubs from ten years under three different identities where they would bring

[p.7]

people -- They brought a person to the workplace to take his picture in front of a blank piece of paper they hung up.

THE COURT: On this case?

MR. PARKER: No.

In the other case.

THE COURT: Okay. But on this case -- This is the only thing he has, Mr. Scott?

MR. SCOTT: Based on what we're able to ascertain, that would be a fair statement, yeah.

MR. PARKER: He's going to -- I mean it's going to destroy the family.

The young kids are citizens.

THE COURT: You know, I'll -- Typically, the issue in these cases are very narrow and --

MR. PARKER: We would plead him to a misdemeanor identity -- the use of a false ID.

That will not get him deported.

THE COURT: Mr. Scott, do you have any flexibility in this?

MR. SCOTT: Unfortunately, I do not, Judge.

I understand the position.

I've staffed that with our Economic Crimes Section Chief, and I just do not have any flexibility.

THE COURT: It just seems unfair.

[p.8]

MR. SCOTT: I understand that, Judge.

MR. PARKER: In all due respect, it's my understanding Mr. Howe's going up to the legislature trying to get further concessions on this law.

They've carved out the heart of the identity theft statute in the last three years.

We're literally on -- It's really a vague, broad statute.

I mean it's just very frustrating.

I can't do anything for my client.

THE COURT: Will there be any degree of whining that might change you or your staff's position?

MR. SCOTT: Judge, Mr. Parker has done a tremendous job advocating his position as he's described it to you.

I've taken all of that to people that make more money than I do and tell me how to do my job.

I don't have anywhere to go on it, Judge.

I'm sorry.

I will once again take up --

THE COURT: Who's the head of it?

MR. SCOTT: Vanessa Riebli, Judge.

THE COURT: Will there be any opposition by the Defendant -- Do you want a continuance of this trial to do further discovery?

[p.9]

MR. PARKER: Judge, we would certainly --

THE COURT: Is there -- What I'm trying to figure out is if there's any degree -- It just doesn't -- I

mean he could do a stipulation of fact which would be the same thing you'll be testifying to, and the result would be the same.

MR. SCOTT: We're --

THE COURT: But typically what happens is most of these guys never get documented by the time they come to trial, so they're deported.

This is a -- This is an anomaly.

MR. SCOTT: I understand, Judge.

THE COURT: I'm just saying it has such an impact on families that -- I just can't believe that --

MR. PARKER: If I may approach, Judge.

Judge, this is the employment authorization card as well as his driver's license.

Your Honor, I think our situation is -- If I may approach, we basically -- What we're seeing --

THE COURT: Is there anything that's going to happen good for him with the legislature -- with the INS?

MR. PARKER: I don't think the current United States Congress is capable of changing immigration law the way it sits now.

[p.10]

He -- The fact is that these cases -- From what I've been told by Eric Gamble -- He's tried, I think, four or five of them; one mistrial, one hung jury,

perhaps another mistrial, jury misbehavior resulting in a mistrial.

I mean the bottom line is jury nullification is basically the only thing that is out there other than just procedural issues.

Then we have to appeal it to a Court of Appeals immediately.

I have a case up on appeal right now.

Because if we don't appeal it, they're subject to immediate removal.

So the immigration lawyers have us taking everything to the Court of Appeals.

It's a tremendous cost of -- Judicial economy is not being served.

These cases do not involve witnesses who have been -- victims who have been harmed.

The victims --

THE COURT: I understand.

MR. PARKER: -- don't come to court. They don't testify.

THE COURT: I mean the legality is -- I'm not pre-judging it.

[p.11]

But it's like all the other cases.

The law is the law.

They come here for a reason. They do what they have to.

Sometimes it's with the assistance of the employer. I understand that.

But it's still a violation of law.

I -- It doesn't matter if I like the law or not.

I have to follow it.

But this is the only case I've ever had where the guy actually got citizenship or is a resident legally after being charged.

Is diversion a possibility?

MR. SCOTT: It's not, Judge.

THE COURT: Okay.

MR. SCOTT: Judge, I'm completely understandable with what the Court's saying.

THE COURT: I'm just saying we're destroying families.

MR. SCOTT: Judge, I understand that.

But to that extent, I'm charged with carrying out certain policies.

THE COURT: I understand.

We all have our responsibilities.

[p.12]

I'm just saying -- That's why -- The most powerful people in this courtroom is always the prosecutors, because you have the discretion before you.

I don't have the discretion to ignore the law.

So let's -- It's teed up.

Let's go and do it and see what happens.

JA 58

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT**

Case No. 12CR1924

Court No. 14

[Dated March 24, 2014]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
)
Defendant.)
)

TRANSCRIPT OF HEARING

BE IT REMEMBERED that on this 24th day of March, 2014, the above-entitled cause comes on for a hearing before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the State of Kansas:

**MR. ALEX SCOTT
MS. ANN HENDERSON**

JOHNSON COUNTY DISTRICT
ATTORNEY'S OFFICE
100 North Kansas Avenue
Olathe, KS 66061

For the Defendant:

MR. STEPHEN L. PARKER
ABOGADOS PARKER & PARKER, P.A.
535 Central Avenue
Kansas City, KS 66101

* * *

[p.4]

Mr. Booshehri was not authorized by the corporation to disclose some of the information that he did, but we just needed to get the right individual.

We do have that person now.

THE COURT: Okay. Mr. Parker?

MR. PARKER: Judge, I did inquire with the State, and they indicated that they did mail the subpoenas certified mail to Mr. Booshehri. Over the weekend, I was curious as to whether or not they actually served him or not.

I know a lot of municipalities around here just mail subpoenas.

If people don't show up, then cases get dismissed.

So I was curious to see what level of service or what nature of service was done.

They indicate that they did mail it via certified mail, and apparently he did sign for it.

MR. SCOTT: He did.

He was here personally as well.

MR. PARKER: Okay. So I in conversations with Alex on Friday afternoon basically said "Is there any way we can just resolve this case and plea to something else, a non-deportable offense?"

I would like to request the Court order

[p.5]

mediation in this case.

I think that this is the type of case, given that my client now has status and is here working legally, that this case certainly would further the interest of society as well as my family -- my client's family if he could have a chance to remain in the country and not be deported since we are having witness issues on this case.

So we would request the Court order mediation in this matter.

We would oppose any continuance request today.

THE COURT: Okay. When do you want to set this for a hearing next?

MR. SCOTT: Judge, I have availability of witnesses, so whenever the Court's available.

The State would not be available April 7 or May 14 or the two weeks following.

THE COURT: What about May 5?

MR. SCOTT: We're unavailable that date, Judge.

THE COURT: June 9?

MR. SCOTT: We're available.

MR. PARKER: Yes, Your Honor.

THE COURT: Okay. So the final pre-trial

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will be June 4 at 8:30.

The jury trial will be June 9 at 9.

Mr. Parker, the State knows they can always mediate.

I'm obviously a big proponent of that.

But I don't -- I don't know that it's always wise to order it.

So I'm -- I would encourage the State to mediate it.

But my experience, having been the primary criminal mediator for years, is that sometimes their policies prevent mediation from being what you would hope.

So -- This may be one of the cases.

My bigger concern is that if the information that you provided earlier was accurate, and I have no reason to disbelieve that it isn't, wherein you stated that the company provided different social security numbers for your client --

MR. SCOTT: It was a different employer, Judge.

THE COURT: It was a different employer?

MR. SCOTT: Yes, sir.

THE COURT: Okay.

MR. SCOTT: That case was dismissed, Judge.

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**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT**

Case No. 12CR1924

Court No. 14

[Dated June 9, 2014]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
RAMIRO ENRIQUEZ)
GARCIA,)
)
Defendant.)
)

TRANSCRIPT OF JURY TRIAL

BE IT REMEMBERED that on this 9th day of June, 2014, the above-entitled cause comes on for a jury trial before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the State of Kansas:

**MR. ALEX SCOTT
MS. ANN HENDERSON**

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JOHNSON COUNTY DISTRICT
ATTORNEY'S OFFICE
100 North Kansas Avenue
Olathe, Kansas 66061

For the Defendant:

MR. STEPHEN L. PARKER
ABOGADOS PARKER & PARKER, P.A.
535 Central Avenue
Kansas City, Kansas 66101

* * *

[p.110]

We will have breaks in the afternoon.

I will tell you that we take breaks not only for you, but for the court reporter.

Sometimes you'll say "Golly. That's a long break".

Well, sometimes even though you're gone, we're still working.

The court reporter has to continue doing her job.

We need to take breaks, because it's very tedious work.

With that said, the State can do their opening.

MS. HENDERSON: Thank you, Judge.

Good morning, ladies and gentlemen of the jury, Judge Moriarty, Counsel.

This is a straightforward case. It is an identity theft case in which the State alleges that Mr. Ramiro Garcia used another person's social security number to obtain and keep employment here in Johnson County, Kansas.

In August 26, 2012, Officer Gibson stopped Mr. Garcia for a traffic infraction.

When he makes contact with Mr. Garcia, he notes he's wearing a Bonefish Grill shirt.

[p.111]

Officer Gibson contacts Detective Justin Russell.

As luck would have it, Detective Russell was on duty that day and actually in the area of the traffic stop.

Detective Russell comes to the area of the traffic stop, and he makes contact with Mr. Garcia.

Mr. Garcia tells Detective Russell that he's on his way to work at Bonefish Grill.

The next day, Detective Russell goes to Bonefish Grill, and he contacts Khalil Booshehri. Mr. Booshehri is the supervisor of Mr. Garcia.

He verifies that in fact Mr. Garcia does work at Bonefish Grill, and he provides employment documents to Detective Russell.

You're also going to hear from Jason Gajan. He is a managing partner at Bonefish Grill.

He will explain the hiring process that Mr. Garcia went through in order to obtain employment at Bonefish as well as the documents that were used in that employment process.

On these documents, Mr. Garcia provides a social security number. That number, ladies and gentlemen, is [REDACTED]-8562.

Mr. Garcia was hired and paid under that [p.112] number.

Mr. Gajan will tell you that Mr. Garcia would not have been employed at Bonefish Grill without a social security number or a permanent alien number.

Here's the problem.

This number was not issued to Mr. Garcia.

You're going to hear from Special Agent Joseph Espinosa who is with the Social Security Administration.

He'll tell you by a search of the Social Security Administration Master File Database that this social security number that he used to have the benefits of the wages earned at Bonefish Grill was issued in 1996 to a Felisha Marie Munguia of Edinburg, Texas. She is seventeen years old.

You can't work in Kansas using someone else's social security number, and that is what Mr. Garcia did.

At the conclusion of this evidence, the State will ask you to find Mr. Garcia guilty of identity theft.

Thank you.

THE COURT: Okay. Defendant's going to reserve.

State can call their first witness.

MR. SCOTT: Officer Mike Gibson.

* * *

[p.119]

Q. Did Mr. Garcia tell you where he was going?

A. Yes.

Q. Where was he going?

A. To work.

Q. Where was that?

A. Bonefish in Leawood, Kansas.

Q. Thank you.

Now, based on that information that he was working at Bonefish Grill, did you do any follow up regarding that information?

A. Yes.

Q. What did you do?

A. Contacted the business the following day and requested employment documentation for Mr. Garcia.

Q. Who did you contact at Bonefish Grill?

A. I believe it was Khalil. His last name spelling is B-o-o-s-h-e-h-r-i.

Q. So Khalil Booshehri?

A. Yes.

Q. Were you able to verify with Mr. Booshehri that Mr. Garcia did in fact work at Bonefish Grill?

A. Yes.

Q. Now, you indicated that you gathered some documents.

Do you recall what kind of documents those were?

[p.120]

A. Employment application documents, possibly the W-2, the I-9 documents.

Q. Did you gather -- So you gathered documents regarding his employment there?

A. Correct.

Q. Okay. On that employment information, was there any type of social security number that Mr. Garcia was being paid under?

A. Yes.

Q. Do you recall what that number was?

A. I have the last four listed in my report as 8562.

Q. Do you have anywhere in your report where there are all of the numbers?

A. I don't believe I put it in my report, no.

Q. Were you able to get those -- that information off the particular documents and do -- and do any kind of verification with those documents?

A. Yes.

Q. What did you do?

A. Verified that -- who that social security number in particular was issued to through the Social Security Administration.

Q. Who did you contact to do that?

A. Special Agent Joseph Espinosa.

Q. Was he able to check to see if that social

[p.121]

security number was issued to Mr. Garcia?

A. Yes, he was.

Q. Was it in fact issued to Mr. Garcia?

A. No, it was not.

Q. Who was it issued to?

A. Felisha Munguia of Edinburg, Texas.

Q. Now, I believe, Detective Russell, that you indicated that you went the next day to Bonefish Grill.

So that would have been on August 27?

A. Yes.

Q. Did you attempt to also contact Mr. Garcia at Bonefish Grill?

A. Yes.

Q. Was he there?

A. No, he was not.

Q. Was he supposed to report to work?

A. Yes.

MS. HENDERSON: I don't have any further questions.

THE COURT: Okay. Cross-examination?

MR. PARKER: Judge, just for the record, I'm going to object to that last question.

The response was so quick.

I couldn't get my objection done.

That was a hearsay objection for that last

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[p.123]

Q. Okay. Did this happen in the management office?

A. At Bonefish in Leawood?

Q. Yes, sir.

A. Like a closet, but yes.

Q. Okay.

A. A little office.

Q. Tell me how that went.

Did he access a website and download some documents, or how did that go?

A. I don't recall.

Q. Okay. But to your recollection, he did not have a physical file containing documents that he handed over to you?

A. Not to my recollection, no.

Q. Okay. The documents he handed to you were completed electronically with eSignatures; is that correct?

A. I believe the I-9 was.

But the other documents I don't recall having an eSignature on them.

Q. Okay. If you recall, and if you don't that's fine, but if you recall, were any of the documents provided to you by Bonefish physically signed by a human being?

A. I'd have to look at the documents that I was

[p.124]

provided.

I don't recall.

Q. Okay. Officer Gibson testified that he did a traffic stop and called you to the scene I believe the day before you went to Bonefish.

Do you recall how long that traffic stop was when you were there?

A. Five minutes probably that I was there at the most, maybe ten.

Q. My client was cooperative?

A. Yes.

Q. Okay. Based on that, you elected not to arrest him at that point?

A. Correct.

Q. Okay.

MR. PARKER: I believe that's all I have of this witness, Your Honor.

THE COURT: Okay. You can step down.

Thank you.

MS. HENDERSON: Judge, I do have one follow-up question.

THE COURT: Okay. I'm sorry.

You can.

REDIRECT EXAMINATION

BY MS. HENDERSON:

* * *

[p.140]

* * *

JASON GAJAN,

called as a witness on behalf of the State,
having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MS. HENDERSON:

Q. Please state your name.

A. Jason Gajan.

Q. Could you please spell that for the court reporter.

A. G-a-j-a-n.

[p.141]

Q. Thank you.

What is your occupation?

A. Managing partner for a restaurant group in Kansas City.

Q. What restaurant is that?

A. The Bonefish Grill.

Q. That's in Johnson County, Kansas?

A. Yes.

Q. How long have you been a managing partner for Bonefish Grill?

A. At the Leawood location, three years.

Q. Were you a managing partner there in the summer of 2012?

A. I was.

Q. Okay. I'd like to have you tell the jury a little bit about what your duties are, specifically your duties in May of 2012 as a managing partner at Bonefish Grill.

A. To provide great food and service to our guests. Honestly, give them an awesome dining experience.

With that comes a lot of duties.

A lot of people don't know that there's like only four of us that run the restaurants.

So we have hiring, we do some of the payroll processing, repairs and maintenance, the janitorial

* * *

[p.149]

* * *

CONTINUED DIRECT EXAMINATION

BY MS. HENDERSON:

Q. Now, I'm going to publish this, which means I'm

[p.150]

going to show it here.

If you can't see it, you can step down.

But I'm going to ask you a couple questions about it.

A. Okay.

Q. All right. So when you -- You indicated that someone would have to fill out this application, and then you would access that information; correct?

A. Correct.

Q. So what is some of the information that's important to you on this application when you are reviewing that?

A. The most important things are probably work history and references at times, availability.

Q. In terms of the name and his address that he gave, was this the information that you received on this application?

A. It is.

Q. Would the e-mail address also be important in terms of the hiring process for Bonefish Grill?

A. It would.

Q. Why is that?

A. We need to access -- Once we hire somebody or agree that all the terms meet somebody that we'd like

to hire, we need their e-mail address to kind of give them

[p.151]

a welcoming packet at that time for them to fill out their information.

Q. Again, this is because you are a paperless process in terms of the hiring as well as moving through the hiring process and the paying process?

A. That's correct.

Q. Now, once you have received and once you received Mr. Garcia's application, what was the next thing that you did?

A. If I recall, we decided to hire him.

So then at that time, we would bring him into the restaurant and start his paperwork.

At that time, we would e-mail his paperwork to him. It would be a welcoming letter; "Welcome. Congratulations. You've been hired at Bonefish Grill", set up an online password and a username for him to be able to access his pay stubs in the future or change addresses, that type of information. Then it also goes through all the -- what it used to be, paper files; signing off "Don't come to work when you're sick". You've got to sign for that. You know, "You have to wear slippers instead of shoes", those type of documents.

Q. All right. Those kind of documents would be done in the restaurant?

[p.152]

A. Sometimes.

Q. Okay. Then when you say you would bring them in, what type of information do you have to see from the prospective employee?

A. I have to -- Before I can send that welcoming letter -- e-mail, we have to have their date of birth and their social security.

Q. You would have obtained that from Mr. Garcia in person?

MR. PARKER: Judge, I object.

Leading again.

THE COURT: Sustained.

Q. (By Ms. Henderson) You can answer.

THE COURT: Sustained.

MS. HENDERSON: Sorry.

Q. (By Ms. Henderson) So you -- This -- This information, the date of birth and the social security number, you could not go forward without that information?

A. Correct.

I could not send him the information that he needed to start his hiring process.

Q. You would not have hired Mr. Garcia if a social security number had not been provided?

MR. PARKER: Judge, I object.

[p.153]

That's a hypothetical.

THE COURT: It assumes facts not in evidence.

It hasn't been established who hired.

MS. HENDERSON: All right.

Q. (By Ms. Henderson) So once the process -- Does it require you to see a physical card of a social security number?

A. Later it does.

Q. So I'm just ahead of myself?

A. Correct.

Q. All right. So what's the next step?

A. So he gets his -- He'll get his e-mail.

He fills out all the information, including, I believe, his W-4 and his I-9 at that time. He does it wherever -- either at the restaurant on our laptop that we have, or he can do it from home or the library.

At that time, we get that information back, and then we take over the computer system side of it.

Q. All right.

MS. HENDERSON: Judge, may I approach?

THE COURT: Yes.

(An item was marked State's Exhibit 2 by the reporter.)

Q. (By Ms. Henderson) Mr. Gajan, I'm going to show you what's been marked as State's Exhibit 2.

[p.154]

Do you recognize that?

A. It's his W-4 form.

Q. Right.

You were just describing the process in which the employee, in this case Mr. Garcia, would need to input the information for this to be filled out?

A. Correct.

So they input their information, and then we actually get the physical card. Sometimes it's a residence card.

Then we have to, before we can continue, put the numbers in manually on our own.

Q. Now, in this case, there is a social security number on this W-4?

A. That's correct.

Q. Does this -- What is that social security number?

A. It's [REDACTED]-8562.

Q. So what you're saying then is you would have had to see a physical card with that number on it?

A. Correct.

MS. HENDERSON: State --

Q. (By Ms. Henderson) Does this form fairly and accurately reflect the form that the information is inputted from your system?

A. Correct.

[p.155]

Q. You could not go forward in the hiring process without the information being put on this form?

A. Correct.

MS. HENDERSON: State would move to admit State's Exhibit 2.

MR. PARKER: Judge, we would rely on the previous objections.

Lack of foundation.

There's no records custodian here.

There's no affidavit from the records custodian indicating that that's a true and correct copy of what's in the computer.

It's not signed by a human individual.

There's no hearsay exception that's been met.

THE COURT: It will be received.

MS. HENDERSON: Permission to publish?

THE COURT: Yes.

Q. (By Ms. Henderson) Can you see that, Mr. Gajan?

A. I can.

Q. So in this form, I had you read off the social security number.

There is -- There's -- Can you tell the Court what this means; digitally signed, Ramiro Garcia. What does that mean?

A. Well, that final step, I log in with my password,
[p.156]

pull up the information. Then it wants me to input the numbers.

Once all that data is generated, it comes to a last page. It says "Digitally sign all these to make sure that they're valid".

Q. So are you signing this, the digitally signed by Ramiro Garcia?

A. I'm digitally signing it.

Q. Okay. Is he signing it? Is he at some point indicating that this is the correct information?

A. In the previous step, he did sign that.

Q. So if he -- If Mr. Garcia had not previously digitally signed it, would you have signed it?

A. No.

Q. He must sign it before you do?

A. Yeah.

If he couldn't have signed it, then he would have never been hired.

Q. All right. He signed it verifying that this number was his number?

A. That's correct.

MS. HENDERSON: Judge, may I approach?

THE COURT: Yes.

You don't need to ask anymore.

(An item was marked state's Exhibit 3 by the
[p.157]
reporter.)

Q. (By Ms. Henderson) Mr. Gajan, I'm also showing you what's been marked as State's Exhibit 3.

Do you recognize that?

A. I do.

Q. What do you recognize that to be?

A. It's a K-4 form.

Q. If you could, explain to the jury what that form is.

A. It's one of the documents that he has to digitally sign.

Q. So again, after the application process, you must sign a W-4 and a K-4 to go forward in the application process?

A. That's correct.

Q. Okay. This is again digitally signed by Mr. Garcia?

MR. PARKER: Judge, I'll object.

That's a leading question.

THE COURT: Is it signed?

MS. HENDERSON: Digitally signed.

THE COURT: Overruled.

Q. (By Ms. Henderson) You can answer.

A. Yes.

Q. Does this fairly and accurately represent the
[p.158]

information that you reviewed that Mr. Garcia provided to Bonefish Grill?

A. Yes.

MS. HENDERSON: State moves to admit State's Exhibit 3.

MR. PARKER: Judge, we object on the basis of lack of foundation.

There's no records custodian here to verify –

THE COURT: Do you want to incorporate your objections?

MR. PARKER: Yes, on all these ongoing -- ongoing to all these documents.

THE COURT: Okay. It will be received over objection.

MS. HENDERSON: Permission to publish?

THE COURT: Yes.

Q. (By Ms. Henderson) Can you see that, Mr. Gajan?

A. I can.

Q. Again, is this the information in which Mr. Garcia would have input into the computer and would have populated to this form?

A. It is.

Q. Again, what is the social security number that was given?

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A. [REDACTED] -- I'll have to get up to read it.

[REDACTED]-8562.

Q. Again, the signature on there indicates to you --

A. Yes.

Q. What does it indicate?

A. That it was digitally signed by him.

Q. By Mr. Garcia?

A. Uh-huh.

Q. Thank you.

Now, after filling out these forms, what's the next step in the hiring process at Bonefish?

A. Once we've signed all the documents and checked all the documents and we've done our digitally -- digital signatures, we give him his training material and set a schedule.

Q. Was Mr. Garcia hired by Bonefish Grill?

A. He was.

Q. Now, once someone is hired, how do employees record their hours that they work at Bonefish Grill?

A. All the hours are recorded through our point of sale system at the restaurant.

The system that we just talked about with the hiring process talks to our point of sale system in the restaurant.

Point of sale system is where all the servers

* * *

[p.180]

THE COURT: Okay. Any redirect?

MS. HENDERSON: Just a second, Your Honor.

No, Your Honor.

THE COURT: Okay. Sir, you can step down.
Watch your step.

A. Thank you.

THE COURT: Next witness?

MR. SCOTT: State calls Special Agent
Joseph Espinosa.

SPECIAL AGENT JOSEPH ESPINOSA,

called as a witness on behalf of the State,
having been first duly sworn,
testified as follows:

MR. SCOTT: May I have leave to approach
this witness?

THE COURT: Yes, you may.

DIRECT EXAMINATION

BY MR. SCOTT:

Q. Will you state your name, sir.

A. Joseph Espinosa.

Q. Mr. Espinosa, what is it you do for a living?

A. I'm a Special Agent with the Social Security
Office of the Inspector General.

Q. How long have you worked in that particular
capacity?

[p.181]

A. I've been here for five years.

Q. What is your primary role in terms of daily duties with the Office of the Inspector General?

A. Primarily we conduct fraud investigations involving social security programs at the federal level and at the state level. This would include theft of government money from the programs and identity theft.

Q. In the course of that work, do you do a lot of work with things that would have been promulgated under the Social Security Act?

A. Yes, specifically under the Social Security Act.

Q. I want to ask you a little bit about that.

Maybe for some of us that may not be quite as familiar with the Social Security Act. could you tell the jury what exactly the Social Security Act is.

A. Sure.

It started back to 1935 under the Roosevelt Administration. Congress passed the Social Security Act as part of the new deal.

As a result of that, the Social Security Act provided programs for retirement, survivors, and disabilities.

Within those programs -- To be ensured in those programs, they created the social security number so

that the government could track the earnings of American

[p.182]

workers and understand -- to ensure their status in the program.

Q. Since it was made to track earnings or as a way to do so, has it gained significance as a form of identification?

A. It has.

Since that time throughout present day, it has become widely known as a common form of identification.

In fact, in 1998, Congress officially recognized it as such.

Q. Would that have been through the Identity Theft Act?

A. It was, yes.

Q. Does your social security play a role in things like your credit cards, credit reporting agencies?

A. It does. It's the primary means that they keep track of that as well.

Q. Can you tell the jury how it is someone comes to get a social security number.

A. When you're born in the United States, you're entitled to a social security number immediately.

Back whenever I was born, it required my parents to go and actually petition the Social Security Administration and apply for a card for me.

Now, I think it was mid-1990s, late '90s, it's a [p.183]

process called Enumeration at Birth. So if you're born in a medical facility, the facility is responsible for submitting that paperwork to the Social Security Administration on your behalf.

Q. In other words, during Enumeration at Birth, someone goes in, has a child, and then part of the exit paperwork is something that will eventually become a social security number; correct?

A. That is correct.

Q. Are social security numbers uniquely assigned? By that, I mean does a social security number ever get re-used?

A. It does not.

Q. Is there any circumstances under which someone's social security number would be assigned, re-assigned, re-issued to somebody else?

A. No.

Once it's issued to you, it's yours indefinitely.

Q. I want to talk about this case specifically and ask you back in 2012, were you working a joint investigation with Overland Park Police, specifically

Justin Russell, into a gentleman named Ramiro Garcia and his employment at Bonefish Grill?

A. Yes.

Q. Do you recall what your role was in that [p.184] investigation?

A. Detective Russell contacted me and asked me to verify a social security number.

Q. When someone like Detective Russell calls you to verify a number -- I assume you've done that for him before; correct?

A. I have, yes.

Q. What steps do you take to assist him and verify that number?

A. In this particular case, whenever he called and submitted the request to my office, I conducted a search of the social security number he provided through the Social Security Master File Database.

This is a closed network -- government network database that I only have access to and others in the Social Security Administration.

I conducted the search and determined that the number he provided did not belong to the individual that he was inquiring about.

Q. When you say you have access to it as well as the Social Security Administration Officers, is it password protected?

A. It is.

Q. In other words -- I think you eluded to it.

But if I wanted to go check even my own social
[p.185]
security number, would I be able to access that database?

A. No, you would not.

Q. When you ran the number in this case, did you find it to be a social security number assigned to an individual?

A. I did, yes.

(An item was marked state's Exhibit 5 by the reporter.)

Q. (By Mr. Scott) Special Agent, I'm showing you what I've marked as State's Exhibit 5 for identification purposes.

Can you tell me what that is.

A. This is a Social Security Certification that I requested from Headquarters Social Security.

Q. What is the social security number at issue of that particular document?

A. Ending in 8562.

I'm sorry.

Yeah, 8562.

Q. Okay. When you run that through the database, are you able to see other documents that would be associated with that number?

A. Yes, I am.

So specifically what this contains is the -- On [p.186]

the first page of State's Exhibit 5 is a self-authenticating document with some legal language on it certifying that the number 8562 is in fact assigned to another person than the Defendant.

On the second page, if the jury would like to see it, this is a computer print-out of exactly what I would see in the database. It gives some specific information on biographical data on the individual the number is assigned to; their date of birth, where they were born, their mother and father, and the date of issuance for the card.

MR. SCOTT: Judge, pursuant to statute, I'll move to admit State's 5 under 60-460(m).

MR. PARKER: No objection, Your Honor.

THE COURT: It will be received.

MR. SCOTT: May I publish, Judge?

THE COURT: Yes.

Q. (By Mr. Scott) Rather than pull the TV back out, Agent Espinosa, the front page with this red ribbon on it, that's the certification from your agency; is that correct.

A. That is correct.

Q. Then Page 2 is actually kind of a tiny page here; correct?

What specifically again is Page 2?

[p.187]

A. Page 2 is what I would see on my computer screen. So it's a snapshot of that database -- the Social Security Administration Master File Database that I referenced earlier.

Q. Then Page 3 which is a full page, do you recognize what that is?

A. Yes.

This is a computer application for a social -- a replacement social security card.

Q. When we're talking about the number ending in 8562, who is that number assigned to?

A. Felisha Marie Munguia.

Q. Are you able to ascertain what her date of birth is?

A. Yes.

She was born on June 24, 1996.

Q. In this case, are you able to tell whether or not she got her number through the Enumeration At Birth process?

A. Yes.

So the -- Initially, the first number she received she did get through the Enumeration At Birth process.

This paper application -- The third addendum -- second addendum to the certification is a

[p.188]

computer-generated replacement card application that -- It appears her mother may have applied for her to get a replacement card on or about June 14 of 2000.

Q. When she applied for that new replacement card, does that last little strip of paper show you that one was given?

A. It does.

In fact, it specifically gives the date that the card was issued; again, on or about June 14 of 2000.

Q. On or about June 14 of 2000, was it the same social security number ending in 8562 that was given to Ms. Munguia?

A. It is, yes.

Q. We'll turn away from that document a little bit.

I want to ask you generally about some concepts with the social security number.

You stated that the number has gained some significance.

Can you tell the jury maybe just a little bit about what some particular consequences could be if someone's social security number is used by someone else.

A. Sure.

I can give you some examples of cases that I've had in the past.

[p.189]

If I were to come and use your social security number and obtain credit lines, purchase a home, buy vehicles, open up bank accounts, go to the doctor and rack up numerous medical bills, everything as I mentioned earlier is tracked by your social security number. So then you would be held liable for that to a certain extent until further investigation is done.

I'm not suggesting that it happened in this case.

It's purely just an example.

Q. What about if someone is working under a number such as is alleged in this case? Could it appear that Ms. Munguia is making more wages than she would be reporting?

A. Yes.

Q. How would that work?

A. So in a case specifically like this if I were to come and work under your social security number, it would

report back wages for you presumably making you insured into federal government programs that you may have not otherwise been entitled to.

Conversely to that, let's say that you were receiving some disability or retirement benefits from one of these government programs. These earnings could adversely affect you, because it would indicate that you are working when in fact you might not be working, and

[p.190]

you could be terminated from those benefits.

Q. Specifically to someone in the age range of like fifteen to eighteen, would -- wages reported under a social security number that that individual didn't earn, would that impact someone's ability to get things like student loans or Pell Grants?

A. It could, yes.

Q. Insomuch as it shows more wages being earned than have actually been earned; correct?

A. That is correct.

MR. SCOTT: Can I have just one minute, Judge?

Q. (By Mr. Scott) Special Agent, I want to refer you back to State's 5.

Does it tell you whereabouts Ms. Munguia lived when that social security number was applied for?

A. I can tell you on the first Enumeration At Birth, so it's submitted by the hospital, there's no paper application.

It indicated that she was born in Edinburg, Texas.

On the actual paper application, it does have a -- an address for her and -- of Argyle, Texas.

Q. Anywhere on there any area remotely connected to Johnson County, Kansas or the Kansas City metropolitan

[p.191]

area?

A. Nothing identified on this application.

Q. We talked and -- Maybe we use it as a term of art.

But when I ask you the last four numbers on a social security number, are those unique, or is it a security thing? Why is it that we just talk about the last four?

A. Primarily for the protection and disclosure of the entire number.

Q. But in this case, how many digits are assigned to Ms. Munguia's social security number?

A. There's a total of nine.

Q. Is that nine digit number what is unique to each individual?

A. It is, yes.

MR. SCOTT: Thank you, Judge.

THE COURT: Okay. Thank you.

Cross-examination?

CROSS-EXAMINATION

BY MR. PARKER:

Q. Thank you, Mr. Espinosa, for testifying.

You never actually spoke with Felisha Marie Munguia; is that correct?

A. No, I did not.

* * *

[p.209]

May I stray from the podium?

THE COURT: Sure.

MR. SCOTT: May it please the Court, Counsel, ladies and gentlemen.

Good afternoon.

I trust that we've been good stewards of your time thus far, and I'm going to try to stay with that same theme right now.

Mr. Garcia was a hard worker.

Nothing in this case refutes that.

He did well at his job.

Mr. Booshehri did everything but tell you he was a very valuable employee.

Mr. Gajan had nothing bad to say about him.

He worked hard for Bonefish.

He was paid by them.

All of that is well and good except for the one fact that in the State of Kansas, you cannot work under someone else's social security number.

In this case, he worked under the social security number that was assigned to Felisha Munguia.

You're going to have this packet of instructions that the Judge is going to give you.

Like he said, you don't have to write it down.

[p.210]

But such is the law, there's a definition of intentional. There's another definition of intent. Then there's all these definitions that you have to link together.

So what I want to do is I want to go over a couple of the important ones that you're going to have back there with you.

Hopefully what this will do is kind of give you a starting point on where you want to look and some of the things you're going to have to connect together.

The first one that I'll show you is what we call the elements instruction.

That is basically this charge that Mr. Garcia committed the crime of identity theft.

I know everybody's not going to see that perfectly, but hopefully at least Instruction No. 3 up there at the top.

So what that shows you is the elements that the State's required to prove beyond a reasonable doubt.

In this case, there are some that you know right off the bat.

No. 1, that this occurred in Johnson County on or about May 25, 2012.

You'll see that date on the W-4. You'll see it on the K-4.

[p.211]

We know that Jason Gajan and Khalil Booshehri both told you that that would have been when he was hired and that he worked shortly thereafter.

Numeral 1 up at the top, that this information belonged to Felisha Munguia.

You wonder what is the personal identifying information?

Well, you've got a big old line of about -- I think the Judge called it 140-some-odd-words about what personal identifying information is.

The one I want you to look at is right here on about the third line; a social security number.

The personal identifying information of Felisha Munguia that was used to satisfy Element No. 1 is her social security number.

How do you know that that was assigned to her, because Felisha Munguia did not sit there and tell you "This is my social security number"?

Who did, however, was Joseph Espinosa.

He works for the Social Security Administration.

He keeps and maintains those records.

His job is to bring that document in and say "This social security number ending in 8562 belongs to Felisha Munguia and not Ramiro Garcia".

[p.212]

Element No. 3 while we're jumping around here, did so with the intent or in order to receive a benefit.

There's a definition later on in the instructions that isn't really a definition.

Like I said, such is the law.

You are to use your common sense in determining what a benefit is.

In this case, what is the State alleging?

That Mr. Garcia worked for Bonefish Grill, that he was paid wages.

Now, you may hear that wages that someone's entitled to is not a benefit.

But use your common sense about that.

He would not have gotten those wages had he not given that social security number.

On top of those benefits, he also got to eat.

He got overtime pay.

All of those are things that he did after he gave a social security number.

He gave that to Bonefish Grill in order to receive those benefits.

As Mr. Gajan told you, he would not have hired him if he did not have a social security number.

He provided him a social security number

[p.213]

ending in 5862 that's assigned to Felisha Munguia, and he did that in order to receive benefits.

The final element there is that he did so with the intent to defraud.

You're going to have a definition of intent to defraud which is listed in No. 4.

It gives a technical definition there about deceiving another person, inducing something.

In this case, we know that Mr. Gajan was induced to give him a paycheck because he gave him a social security number.

If he had not given him that, he would not have been paid under that number, and he would not have worked at Bonefish Grill.

The final instruction I want to talk to you about briefly is listed as No. 2 in your packet, and that's intentional.

The State must prove that he did this act intentionally.

Did anyone tell you exactly what Mr. Garcia's thoughts were and what he was intending to do when he sat there?

Absolutely not.

In the State of Kansas, sometimes things have to be proved by attenuation of what we call

[p.214]

circumstantial evidence.

In this case, you're going to be able to use your common knowledge and your common sense to determine what his intent was in this case.

When he sat down and filled out the W-4, the K-4, the application, and received payment, was it his intent to receive a paycheck and benefits from Bonefish Grill?

You know that he wouldn't have received those had he not given that number.

Jason Gajan told you that when he gets that number, he crosschecks it with a document that's given to him.

So therefore, he would not have given that number if Jason Gajan had not confirmed that that was the number he was in fact given.

In this case, he gave a number that belonged to Felisha Munguia.

As I told you before, Mr. Garcia's a good employee.

Nothing wrong with that.

But in the State of Kansas, what he did constitutes a crime.

Thank you.

THE COURT: Okay. Mr. Parker?

* * *

[p.221]

out for you just so you know what we're talking about when you get back there, Jury instruction No. 4 is the definitions instruction.

There it talks about deception with the intent to defraud property, person, and benefits.

Since this legislature has not defined what that word means, we've put this instruction here; "Benefits is not defined by our statute".

You should use your common knowledge as to the definition as to what that word means in this context of this case.

Again, I thank you for your time.

This is a very big day in my client's life. It's a very important day for him and his young family.

We would really appreciate that you consider all the evidence and find him not guilty.

THE COURT: Okay. Thank you.

You have three and a half minutes left.

MR. SCOTT: Thank you, Judge.

I'm glad Mr. Parker ended with that, because this is a big day for Felisha Munguia too, because her social security number was used by Mr. Garcia.

That's why I go back to Mr. Garcia immediately.

This case is very simple.

[p.222]

This is about what Mr. Garcia did.

If you look at Instruction No. 3 -- Can you snag that there, Steve?

If you look at Instruction No. 3 which is the elements, it's going to say that he used the personal identifying information.

At no point in there does it require you to consider whether or not Felisha Munguia consented to him doing it.

If she had consented, it wouldn't be a crime.

In this case, nobody consented.

It was used without her knowledge.

In this case, he took that social security number and took it to Bonefish Grill.

The example that Mr. Parker gives about the girl going to The Wheel using an identification, what she's doing is receiving a benefit. She's receiving something from The Wheel that she would not get if he didn't give that personal identifying information.

Exact same factual scenario that you have here.

Sometimes the law is different in situations whether it be you're getting a beer from The wheel or you're getting a paycheck from Bonefish Grill.

He received something that he would not have

[p.223]

been entitled to had he not given that social security number.

The definition about whether or not he got a benefit, Mr. Parker talked to you about the fact that benefit is up to you in essence. It is for you to use your common knowledge.

Whether or not a paycheck is a benefit and Mr. Parker's contention that it is not a benefit, you know better than that.

You know that a paycheck, whether or not he's entitled to it -- He certainly is. He worked.

But it's a benefit of his employment there.

Same as the meal he gets when he's working on the line. A benefit of him being there is that he doesn't have to go out and get his own meal.

These are all things that he received from Bonefish that he would not have been entitled to had he not given a social security number to Jason Gajan.

I told you at the beginning he worked hard. He did his job. He was compensated for it.

But the way he was compensated was illegal in the State of Kansas.

He received a paycheck, a benefit for working under a social security number that belonged to Felisha Munguia.

[p.224]

He would not have gotten that job as Jason Gajan told you had he not given that number.

The only thing left for you to do is to go back there, deliberate, and check the box that says he's guilty of identity theft.

Thank you.

(At this time, the Bailiff was sworn in by the court reporter.)

THE COURT: Ladies and gentlemen, the jury is now submitted to you.

What will take place next is you'll go back there.

We'll have a set of instructions for each of you.

The exhibits will go back for your inspection as well.

From this point on, you're in charge of your own time.

So in other words, if you -- some of you want to take a break, you can do that.

But the one admonition I will tell you is you may not discuss this case in any form whatsoever unless all of you are present together in the jury room.

So in other words, if five of you want to take a break and the other seven remaining stay in the

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STATE'S EXHIBIT 2

Form W-4 (2012)

[Fold-Out Exhibit, see next page]

Form W-4 (2012)

Purpose. Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay. Consider completing a new Form W-4 each year and when your personal or financial situation changes.

Exemption from withholding. If you are exempt, complete only lines 1, 2, 3, 4, and 7 and sign the form to validate it. Your exemption for 2012 expires February 18, 2013. See Pub. 505, Tax Withholding and Estimated Tax.

Note. If another person can claim you as a dependent on his or her tax return, you cannot claim exemption from withholding if your income exceeds \$950 and includes more than \$300 of unearned income (for example, interest and dividends).

Basic instructions. If you are not exempt, complete the **Personal Allowances Worksheet** below. The worksheets on page 2 further adjust your withholding allowances based on itemized deductions, certain credits, adjustments to income, or two-earners/multiple jobs situations.

Complete all worksheets that apply. However, you may claim fewer (or zero) allowances. For regular wages, withholding must be based on allowances you claimed and may not be a flat amount or percentage of wages.

Head of household. Generally, you can claim head of household filing status on your tax return only if you are unmarried and pay more than 50% of the costs of keeping up a home for yourself and your dependent(s) or other qualifying individuals. See Pub. 501, Exemptions, Standard Deduction, and Filing Information, for information.

Tax credits. You can take projected tax credits into account in figuring your allowable number of withholding allowances. Credits for child or dependent care expenses and the child tax credit may be claimed using the **Personal Allowances Worksheet** below. See Pub. 505 for information on converting your other credits into withholding allowances.

Nonwage income. If you have a large amount of nonwage income, such as interest or dividends, consider making estimated tax payments using Form 1040-ES, Estimated Tax for Individuals. Otherwise, you may owe additional tax. If you have pension or annuity

income, see Pub. 505 to find your withholding on Form W-4.

Two earners or multiple jobs. If you are a working spouse or more than one job, figure the total number of allowances you are entitled to claim on all jobs using worksheets from only one Form W-4. Your withholding usually will be most accurate when all allowances are claimed on the Form W-4 for the highest paying job and zero allowances are claimed on the others. See Pub. 505 for details.

Nonresident alien. If you are a nonresident alien, see Notice 1392, Supplemental Form W-4 Instructions for Nonresident Aliens, before completing this form.

Check your withholding. After your Form W-4 takes effect, use Pub. 505 to see how the amount you are having withheld compares to your projected total tax for 2012. See Pub. 505, especially if your earnings exceed \$130,000 (Single) or \$180,000 (Married).

Future developments. The IRS has created a page on IRS.gov for information about Form W-4, at www.irs.gov/w4. Information about any future developments affecting Form W-4 (such as legislation enacted after we release it) will be posted on that page.

PENSAD 800-631-6889

STATE'S EXHIBIT

2

Jury Trial 6/19/14

Personal Allowances Worksheet (Keep for your records.)

<p>A Enter "1" for yourself if no one else can claim you as a dependent</p> <p>B Enter "1" if: <input type="checkbox"/> You are single and have only one job; or <input type="checkbox"/> You are married, have only one job, and your spouse does not work; or <input type="checkbox"/> Your wages from a second job or your spouse's wages (or the total of both) are \$1,500 or less.</p> <p>C Enter "1" for your spouse. But, you may choose to enter "-0-" if you are married and have either a working spouse or more than one job. (Entering "-0-" may help you avoid having too little tax withheld.)</p> <p>D Enter number of dependents (other than your spouse or yourself) you will claim on your tax return</p> <p>E Enter "1" if you will file as head of household on your tax return (see conditions under Head of household above)</p> <p>F Enter "1" if you have at least \$1,900 of child or dependent care expenses for which you plan to claim a credit (Note. Do not include child support payments. See Pub. 503, Child and Dependent Care Expenses, for details.)</p> <p>G Child Tax Credit (including additional child tax credit). See Pub. 972, Child Tax Credit, for more information. • If your total income will be less than \$61,000 (\$90,000 if married), enter "2" for each eligible child; then less "1" if you have three to seven eligible children or less "2" if you have eight or more eligible children. • If your total income will be between \$61,000 and \$84,000 (\$90,000 and \$119,000 if married), enter "1" for each eligible child</p> <p>H Add lines A through G and enter total here. (Note. This may be different from the number of exemptions you claim on your tax return.) ►</p>	<p>A _____</p> <p>B _____</p> <p>C _____</p> <p>D _____</p> <p>E _____</p> <p>F _____</p> <p>G _____</p> <p>H _____</p>
--	---

For accuracy, complete all worksheets that apply.

- If you plan to itemize or claim adjustments to income and want to reduce your withholding, see the **Deductions and Adjustments Worksheet** on page 2.
- If you are single and have more than one job or are married and you and your spouse both work and the combined earnings from all jobs exceed \$40,000 (\$10,000 if married), see the **Two-Earners/Multiple Jobs Worksheet** on page 2 to avoid having too little tax withheld.
- If neither of the above situations applies, stop here and enter the number from line H on line 5 of Form W-4 below.

Separate here and give Form W-4 to your employer. Keep the top part for your records.

Form W-4 Department of the Treasury Internal Revenue Service		Employee's Withholding Allowance Certificate OMB No. 1545-0074 2012	
1 Your first name and middle initial ramiro		2 Your social security number 8562	
Last name garcia		3 <input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Married, but withhold at higher Single rate. Note. If married, but legally separated, or spouse is a nonresident alien, check the "Single" box.	
Home address (number and street or rural route) 8346 riggs st City or town, state, and ZIP code overland Park KS 66212-		4 If your last name differs from that shown on your social security card, check here. You must call 1-800-772-1213 for a replacement card. ► <input type="checkbox"/>	
5 Total number of allowances you are claiming (from line H above or from the applicable worksheet on page 2)		6 \$ 4	
7 I claim exemption from withholding for 2012, and I certify that I meet both of the following conditions for exemption. • Last year I had a right to a refund of all federal income tax withheld because I had no tax liability, and • This year I expect a refund of all federal income tax withheld because I expect to have no tax liability. If you meet both conditions, write "Exempt" here		8	
Under penalties of perjury, I declare that I have examined this certificate and, to the best of my knowledge and belief, it is true, correct, and complete.			
Employee's signature (This form is not valid unless you sign it.)		Digitally Signed By: ramiro garcia on 5/25/2012 5/25/2012	
8 Employer's name and address (Employer: Complete lines 8 and 10 only if sending to the IRS.) OS Restaurant Services, LLC 2202 North West Shore Blvd Suite 500 Tampa FL 33607		9 Office code (optional) 10 Employer identification number (EIN) 59 3549811	

For Privacy Act and Paperwork Reduction Act Notice, see page 2.

Cat. No. 10220Q

Form W-4 (2012)

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STATE'S EXHIBIT 3

K-4 (2012)

**Kansas Employee's Withholding
Allowance Certificate**

[Fold-Out Exhibit, see next page]

K-4

(9/07)

KANSAS**EMPLOYEE'S WITHHOLDING ALLOWANCE CERTIFICATE**

KENDRA 800-631-6989

**STATE'S
EXHIBIT****3**

Jury Trial 6/9/14

The following instructions will assist you in completing the worksheet and K-4 form below. After you have completed the K-4 form, detach it and give it to your employer. For assistance with this form, call KDOR (Kansas Department of Revenue) at 785-368-8222.

Purpose of the K-4 form: A completed withholding allowance certificate will let your employer know how much Kansas income tax should be withheld from your pay on income you earn from Kansas sources. Because your tax situation may change, you may want to refigure your withholding each year.

Exemption from withholding: To qualify for exempt status you must, 1) Verify with KDOR that last year you had the right to a refund of all STATE income tax withheld because you

had no tax liability; 2) Verify with KDOR that this year you will receive a full refund of all STATE income tax withheld because you will have no tax liability.

Notes: Your status of "Single" or "Joint" may differ from your status claimed on your Federal Form W-4. Claiming more than the proper amount may result in taxes owed when filing your state income tax.

Basic Instructions: If you are not exempt, complete the **Personal Allowances Worksheet** below. The allowances claimed on this form should not exceed that claimed under "Exemptions" on your Kansas income tax return. To avoid owing taxes when you file, follow the suggested allowance rate selection on line A below. This form must be

filed with your employer; otherwise, your employer must withhold Kansas income tax from your wages without exemption at the "Single" allowance rate.

Head of household: Generally, you may claim head of household filing status on your tax return only if you are **unmarried** and **pay more than 50% of the cost of keeping up a home for yourself and for your dependent(s).**

Nonwage income: If you have a large amount of nonwage Kansas source income, such as interest or dividends, consider making estimated tax payment using form K-40ES, Estimated Tax for Individuals. Otherwise, you may owe additional tax when filing your state income tax return.

Personal Allowance Worksheet (Keep for your records)**A Allowance Rate:**

If you are a single filer mark "Single"

If you are married and your spouse has income mark "Single"

If you are married and your spouse does not work mark "Joint"

☐ Single☒ Joint

B Enter "0" or "1" if you are married or single and no one else can claim you as a dependent (entering "0" may help you avoid having too little tax withheld)

B _____

C Enter "0" or "1" if you are married and only have one job, and your spouse does not work (entering "0" may help you avoid having too little tax withheld)

C _____

D Enter "1" if you will file head of household on your tax return (see conditions under "Head of household" above)

D _____

E Enter the number of dependents you will claim on your tax return. Do not claim yourself or your spouse or dependents that your spouse has already claimed on their form K-4.

E _____

F Enter "1" if you have at least \$1,500 of child or dependant care expenses for which you plan to claim a credit and your household income is below \$50,000

F _____

G Add lines B through F and enter the total here

G 4 _____


▼ Cut here and give this K-4 form to your employer. (Keep the top portion for your records.)

K-4

(9/07)

Kansas Employee's Withholding Allowance Certificate

Whether you are entitled to claim a certain number of allowances or exemptions from withholding is subject to review by KDOR. Your employer may be required to send a copy of this form to KDOR.

1 Print your first name and middle initial ramiro		Last Name garcia		2 Social Security Number 8562	
Mailing Address 8346 riggs st			3 Allowance Rate Mark the allowance rate selected in line A above.		
City or Town, State, and ZIP Code overland Park KS 66212-			<input type="checkbox"/> Single <input checked="" type="checkbox"/> Joint		
4 Total number of allowances you are claiming (from line G above)				4 4	
5 Enter any additional amount you want withheld from each paycheck (this is optional)				5 \$	
6 I claim exemption from withholding. You must meet the conditions explained in the "Exemption from withholding" instructions above. If you meet those conditions, write "Exempt" on this line. Note: KDOR will receive your federal W-2 forms for all years claimed Exempt.				6 NOT EXEMPT	
Under penalties of perjury, I declare that I have examined this certificate and to the best of my knowledge and belief it is true, correct, and complete.					
SIGN HERE  Digitally Signed By: ramiro garcia on 5/25/2012					
7 Employer's name and address				DATE 5/25/2012	
				8 EIN (Employer Identification Number)	

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STATE'S EXHIBIT 5

[SEAL]

SOCIAL SECURITY

C E R T I F I C A T I O N

Pursuant to the provisions of Title 42, United States Code, Section 3505, and the authority vested in me by 45 F.R. 47245-46, I hereby certify that I have legal custody of certain records, documents, and other information established and maintained by the Social Security Administration, pursuant to Title 42, United States Code, Section 405, and that the annexed are true and complete copies of certain of such documents in my custody as aforesaid.

I also certify that the annexed computer printouts showing the dates the information was recorded are true and complete copies of such documents in my custody for Social Security Number [REDACTED]-8562 in the name of Felisha Marie Munguia.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Social Security Administration to be affixed this 01 day of March, 2013.

/s/Rob L. Rinker

Rob L. Rinker

Supervisory Management Analyst

Security Records Branch

Office of Earnings Operations

Office of Central Operations

JA 112

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

Case No. 12CR1924

Division 14

[Filed June 9, 2014]

STATE OF KANSAS,)
Plaintiff,)
)
vs)
)
RAMIRO GARCIA,)
Defendant.)
)

COUNT I
VERDICT FORM

☒ We, the jury, find the defendant guilty of identity theft.

/s/Roger A. S[] 6/9/2014
Presiding Juror 3:21pm

☐ We, the jury, find the defendant not guilty of identity theft.

Presiding Juror

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**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT
DIVISION NO. 14**

**Case No. 12CR1924
Division 14**

[Filed June 10, 2014]

STATE OF KANSAS,)
Plaintiff,)
)
vs)
)
RAMIRO GARCIA,)
Defendant.)
)

JURY INSTRUCTIONS

* * *

JURY INSTRUCTION NO. 2

The State must prove that the defendant committed the crime intentionally. A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State.

P.I.K. 4th 52.010

JURY INSTRUCTION NO. 3

In Count I the defendant is charged with the crime of identity theft. The defendant pleads not

guilty. To establish this charge, each of the following claims must be proved:

1. The defendant used the personal identifying information belonging to Felisha Munguia.
2. The defendant did so with the intent to defraud: Felisha Munguia or anyone else.
3. The defendant did so in order to receive a benefit.
4. This act occurred on or about May 25, 2012 in Johnson County, Kansas.

“Personal identifying information” includes, but is not limited to, the following: name; birth date; address; telephone number; drivers license number or card or non-drivers license identification number or card; social security number or card; place of employment; employee identification numbers or other personal identification numbers or cards; mother’s maiden name; birth, death or marriage certificates; electronic signatures; and any financial number, or passwords that can be used to access a person’s financial resources, including, but not limited to, checking or savings accounts, credit or debit card information, demand deposit or medical information.

JURY INSTRUCTION NO. 4

“Deception” means knowing creating or reinforcing a false impression, including false impressions as to law, value, intention or other state of mind. Deception as to a person’s intention to perform a promise shall not be inferred from the fact alone that such person did not subsequently perform the promise. Falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive reasonable persons, is not deception.

“Intent to defraud” means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.

“Property” means anything of value, tangible or intangible, real or personal.

“Person” means an individual, public or private corporation, government, partnership, or unincorporated association.

“Benefit” is not defined by our statute. You should use your common knowledge as to the definition as to “benefit”.

21-5111(e) (o) (t)

JURY INSTRUCTION NO. 5

It is not a defense to this charge that the defendant did not know that such personal

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identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.

K.S.A. 21-6107

JA 117

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

CASE NO. 12CR1924

[Filed August 7, 2014]

STATE OF KANSAS)
PLAINTIFF)
)
VS)
)
RAMIRO ENRIQUEZ GARCIA)
)
DEFENDANT)
)

PRESENTENCE INVESTIGATION

[Fold-Out Exhibit, see next 2 pages]

2013 KANSAS SENTENCING GUIDELINES
PRE-SENTENCE INVESTIGATION REPORT -
FACE SHEET

1. Judicial District: 10th

County and ORI number: Johnson (KS046015J)

Case Number: 12CR1924 ☐ DV Case

Name: GARCIA, Ramiro Enriquez

A/K/A's: See page 2

Age: 32 K.B.I. No: KS11240284

Sex: ☒ Male ☐ Female

Race: ☒ W ☐ B ☐ A.I. ☐ A

Ethnicity: ☒ Hispanic ☐ Non-Hispanic

Address: 8346 Riggs St.
Overland Park, KS 66212

Citizenship: ☐ U.S. ☒ Citizen of: Mexico

Detainer or Other Charges Pending? ☒ Yes ☐ No

Subject in Custody Awaiting Sentencing? ☐ Yes ☒ No

Begin: 9/20/2012 End: 9/21/2012 = 2 day(s)
Begin: End: = day(s)
Begin: End: = day(s)

Incarceration Credit: 2 day(s)

DNA Sample Taken (K.S.A. 21-2511): ☒ Yes ☐ No

2. IF OFFENDER WAS UNDER 18 YEARS OF AGE WHEN CRIME(S)
WAS COMMITTED AND WAS TRIED AS AN ADULT, OFFENDER
WAS:

- ☐ Adjudicated as an Adult Under K.S.A. 2010 Supp. 38-2347
☐ Automatically Considered Adult Because of a Prior Felony

3. Names of Co-Defendants, if any:

N/A

4. Defense Attorney: Stephen Parker

Type of Counsel Prior to Sentencing:

- ☒ Retained ☐ Appointed ☐ Self
☐ Waived Orally ☐ Waived in Writing

Prosecuting Attorney: Alex Scott

Sentencing Judge: Hon. Kevin P. Moriarty

Date of Guilty Plea or Judgment: 6/9/2014

Date of Sentencing: 8/5/2014

5. Pre-Sentence Investigator: Janelle Hutchins

Date Assigned: 6/9/2014 Date Submitted: 7/22/2014

6. PRIMARY OFFENSE:

(Count 1)

Identity Theft

K.S.A. No: 21-6107

Offense Date: 5/25/2012

IF Drug Offense (Indicate statute for controlled substance):

☐ 65-4105 ☐ 65-4107 ☐ 65-4109 ☐ 65-4111 ☐ 65-4113

Name of Drug:

Amount of Drug (IF Distribution Offense):

(Check all that apply)

- ☒ Felony ☐ Misdemeanor ☐ Off-grid ☐ Nongrid
☐ Person ☒ Nonperson ☐ Drug ☒ Nondrug
☐ Attempt (K.S.A. 2012 Supp. 21-5301)
☐ Conspiracy (K.S.A. 2012 Supp. 21-5302)
☐ Solicitation (K.S.A. 2012 Supp. 21-5303)

Severity Level or Class: 8 Criminal History Score: 1

Maximum Good Time: ☐ 15% ☒ 20%

Sentencing Range:

Aggravated 9 Standard 8 Mitigated 7

- ☐ Presumptive Prison ☐ Presumptive Prison per Special Rule
☒ Presumptive Probation ☐ Border Box
☒ Special Rule Applies:

#10 CRIME COMMITTED WHILE ON FELONY BOND

☐ This Offense **REQUIRES REGISTRATION** (Attach Registration Supplement)

☐ Sentence Enhancement:

- ☐ Firearm Finding (drug felony only): ☐ 6 months ☐ 18 months
☐ Ballistic Resistant Material Finding: ☐ 30 months

Drug Treatment: ☐ Mandatory ☐ With Court Finding

Not Eligible: ☐ Criminal History ☐ Residency
☐ 3rd or Subsequent Conviction Felony Possession
☐ Low Risk SASSI Score
☐ High Risk SASSI but Low or Low/Moderate Risk LSI-R Score

Postrelease Supervision Duration: ☒ 12 months ☐ 24 months

☐ 36 months ☐ 60 months ☐ Lifetime Postrelease

☐ No Postrelease (not applicable to crimes committed on or after July 1, 2013)

Probation Duration: ☐ 12 months ☒ 18 months ☐ 24 months
☐ 36 months ☐ Other:

DUI Supervision: (12 months) ☐ Court Services ☐ Comm Corr.
☐ One month enhanced penalty if child <14 in vehicle (KSA 8-1567(c))

Electronic Monitoring: ☐ Lifetime (KSA 2012 Supp. 21-6604(r))

2013 KANSAS SENTENCING GUIDELINES – PRE-SENTENCE INVESTIGATION REPORT

CURRENT OFFENSE INFORMATION

(This page only - NOT PUBLIC RECORD)

CASE NO. 12CR1924

OFFICIAL VERSION:

The State's version of facts as described in the affidavit filed by the Johnson County District Attorney's Office is appended to this report.

OTHER PENDING INFORMATION:

PENDING:

ICE PROCEEDINGS: AR-201070885

DEFENDANT'S VERSION:

Defendant's Date of Birth: **3/30/1980**

Defendant's Social Security Number: **N/A**

The Defendant is also known by the following identifiers (if any): AKA: Ramiro Garcia-Enriquez, Jesus J. Gonzalez, Ramiro Garcia Enriquez, Daniel Gonzalez; Additional DOB: 1-4-80

The defendant did complete his presentence investigation packet, but chose not to submit his version of the offense for inclusion in this report.

VICTIM'S INJURY/DAMAGE/STATEMENT(S):

TOTAL RESTITUTION:

Unknown

OWED TO:

1) Name: F.M. (juvenile victim)

Street Address: CONFIDENTIAL

City/State/ZIP:

Amount Due: Unknown

VICTIM STATEMENT(S):

Victim contact information was not made available, but it appears as though the victim suffered no financial loss.

JA 118

RELEVANT DOCKET ENTRIES
JOHNSON COUNTY KANSAS DISTRICT COURT
12CR00462

State of Kansas v. Donaldo Morales

* * *

03/06/2012 INITIAL CHARGE# 21-4018(C).F
IDENTITY THEFT FILED INITIAL
CHARGE# 21-3711 MAKING A FALSE
WRITING FILED INITIAL CHARGE#
21-3711 MAKING A FALSE WRITING
FILED INITIAL CHARGE# 21-3711
MAKING A FALSE WRITING FILED

* * *

03/06/2012 FILE STAMP 3/6/2012, AFFIDAVIT
03/06/2012 FILE STAMP 3/6/2012, COMPLAINT,
INITIATION OF ACTION

* * *

09/17/2012 FILE STAMP 09/17/12, MOTION TO
DISMISS, COUNTS II AND III FOR
LACK OF JURISDICTION
09/27/2012 FILE STAMP 9/27/2012, STATE'S
RESPONSE TO, DEFENDANT'S
MOTION TO DISMISS COUNTS II AND
III

* * *

09/28/2012 COUNT 2 21-3711 MOTION GRANTED
TO/FOR TO DISMISS, FINDING

JA 119

DISMISSED BY JUDGE (THB)(DG)

09/28/2012 COUNT 3 21-3711 MOTION DENIED
TO/FOR TO DISMISS (THB)(DG)

* * *

10/02/2012 FILE STAMP 10/1/2012, AMENDED
COMPLAINT

* * *

06/05/2013 COUNT 1 21-4018(C).F PLAINTIFF
A P P E A R S B Y
GONTESKYL,DEFENDANT APPEARS
WITH ATTORNEY GOODWIN,JURY
TRIAL WAIVED BY DEFENDANT ,
CONDITION (KPM)(AH)

* * *

08/14/2013 COUNT 1 21-4018(C).F PLAINTIFF
A P P E A R S B Y
GONTESKY,DEFENDANT APPEARS
W I T H A T T O R N E Y
G O O D W I N , F I N D I N G
G U I L T Y , P R E S E N T E N C E
INVESTIGATION ORDERED /LSI-
R,CONTINUED BY DEFENSE
(KPB)(AH)

08/14/2013 COUNT 3 21-3711 FINDING GUILTY,
(KPM)(AH)

08/14/2013 COUNT 4 21-3711 FINDING GUILTY
(KPM)(AH)

* * *

11/13/2013 COUNT 1 21-4018(C).F DEFENDANT
APPEARS WITH ATTORNEY
GONTESTKY,DEFENDANT APPEARS
W I T H A T T O R N E Y
GOODWIN,DEFENDANT SENTENCED
TO CUSTODY OF SECRETARY OF
CORRECTIONS ,JAIL FOR A PERIOD
OF 7M//,CONCURRENT CT3/CT4,
PROBATION GRATED FOR
18M,COURT COSTS TO DEFENDANT
(KPM)()

* * *

11/13/2013 COUNT 3 21-3711 DEFENDANT
SENTENCED TO CUSTODY OF
SECRETARY OF CORRECTIONS,JAIL
F O R A P E R I O D O F
7M//,CONCURRENT CT4/CT1,
PROBATION GRANTED FOR 18M
(KPM)()

11/13/2013 COUNT 4 21-3711 DEFENDANT
SENTENCED TO CUSTODY OF
SECRETARY OF CORRECTIONS,JAIL
F O R A P E R I O D O F
7M//,CONCURRENT CT3/CT1,
PROBATION GRANTED FOR 18M
(KPM)()

* * *

11/13/2103 FILE STAMP 11/13/2013, NOTICE OF
APPEAL

* * *

JA 121

11/15/2013 FILE STAMP 11/15/2013, JOURNAL
ENTRY OF JUDGMENT

* * *

07/24/2014 FILE STAMP 07/24/14, TRANSCRIPT
OF BENCH TRIAL TAKEN AUGUST
14, 2013 BY AMANDA L. HEARN, RPR,
CSR

* * *

12/04/2014 FILE STAMP 12/03/2014, ORDER OF
EARLY TERMINATION OF
PROBATION

* * *

JA 122

RELEVANT DOCKET ENTRIES

KANSAS SUPREME COURT

111904

State of Kansas v. Donaldo Morales

Date	Description
* * *	
08-SEP-17	J U D G M E N T D O C K E T E D - PUBLISHED OPINION / Judgment of the Court of Appeals affirming the district court is reversed.
23-AUG-17	RULE 6.09 LETTER / Rule 6.09 Letter by Appellant, Donaldo Morales
* * *	
21-OCT-16	PETITION FOR REVIEW - GRANTED / (opinion) by Donaldo Morales.
05-FEB-16	PETITION FOR REVIEW / Petition for Review (opinion) by DONALDO MORALES.
08-JAN-16	J U D G M E N T D O C K E T E D - UNPUBLISHED OPINION / Affirmed. Per Curiam
* * *	
15-JUL-15	BRIEF RECEIVED / Brief of appellee the State of Kansas.
* * *	

JA 123

19-MAR-15	BRIEF RECEIVED / Brief of appellant Donaldo Morales : Aple Brf Due 04/20/2015
* * *	
12-JUN-14	DOCKETING STATEMENT / Docketing Statement - Donaldo Morales (PROPOSED)
* * *	

JA 124

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12CR00462

[Filed March 6, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
DONALDO BOANERGES)
MORALES,)
Defendant.)

**NO CONTACT
VICTIM(s) WITNESSES
NO DRUGS**

AFFIDAVIT

Comes now the affiant, of lawful age, being first duly sworn upon oath, in support of a probable cause finding for the detention of the defendant or the issuance of an arrest warrant, states as follows:

1. Overland Park Police recently received information that DONALDO BOANERGES MORALES had made a benefits claim with the Social Security Administration on August 8, 2011. The social security number used under this claim was not issued to MORALES. Further investigation revealed MORALES had used the same social security number ending in 3479 when he went to work at Jose Pepper's

restaurant. On 10-01-10, MORALES completed an I-9, a K-4, and a W-4 form for the restaurant. He used the same fraudulent Social Security number on each form. Investigation revealed that number was actually issued to Ernesto Melara.

2. On 3/5/12 Overland Park Detective Russell, along with Social Security Administration Agent Espinosa, found MORALES at his residence in Lenexa. MORALES admitted to knowing the social security number did not belong to him and said he only used it to work.

3. The above information was provided from the reports of the Overland Park Police Department.

/s/G. Powell #618

Affiant

Subscribed and sworn to before me by affiant, G. Powell #618, on this 6th day of March, 2012.

/s/Dorothy R. Horn

Notary Public

DOROTHY R. HORN Notary Public - State of Kansas My Appt. Expires 9-7-15

JA 126

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12CR00462

[Filed March 6, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
DONALDO BOANERGES)
MORALES,)
Defendant.)
)

**NO CONTACT
VICTIM(s) WITNESSES
NO DRUGS**

COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Danetta F. Mendenhall, Assistant District Attorney of said County, being duly sworn on oath state to the Court that

DONALDO BOANERGES MORALES

did the following:

COUNT I -- That on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, willfully, knowingly, feloniously and

with the intent to defraud for any benefit, obtain, possess, transfer, use or attempt to obtain, possess, transfer or use an identification document or personal identification number, to-wit: Social Security number, of another person to wit: Ernesto Melara, other than issued lawfully for use of the possessor, a severity level 8 non-person felony, in violation of K.S.A. 21-4018, K.S.A. 21-4704 and K.S.A. 21-4707. (identity theft)

COUNT II – Further, that on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud make, generate, distribute or draw or cause to be made, generated, distributed or drawn, a written instrument to-wit: I-9 document, with knowledge that such information falsely states some material matter or is not what it purports to be, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

COUNT III – Further, that on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud make, generate, distribute or draw or cause to be made, generated, distributed or drawn, a written instrument to-wit: W-4 document, with knowledge that such information falsely states some material matter or is not what it purports to be, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

COUNT IV – Further, that on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud make, generate, distribute or draw or cause to be made, generated, distributed or drawn, a written instrument to-wit: K-4 document, with knowledge that such information falsely states some material matter or is not what it purports to be, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

/s/Danetta F. Mendenhall
Danetta F. Mendenhall /tb #22146
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000

Subscribed and sworn to before me this 6th day of March, 2012.

/s/Terri A. Bowman
Notary Public

<p>TERRI A. BOWMAN Notary Public - State of Kansas My Appt. Expires September 28, 2013</p>
--

WITNESSES:

Jose Pepper's personnel
Social Security Administration personnel
Ernesto Melara

JA 129

Agent J. Espinosa
Overland Park Det. J. Russell

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

**Case No. 12CR462
Court No. 11**

[Filed September 17, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
)
DONALDO BOANERGES)
MORALES.,)
Defendant.)
)

MOTION TO DISMISS COUNTS II AND III
FOR LACK OF JURISDICTION

COMES NOW the Defendant, Donaldo Boanerges Morales, by and through his attorney Kelly N. Goodwin, Assistant Public Defender, and moves this court for an order dismissing the above-referenced matter. In support thereof, the defendant submits the following:

FACTS

Overland Park Police received information that Mr. Morales was receiving benefits under a Social Security number that was not issued to Mr. Morales. Overland Park Police contacted Mr. Morales' former employer, Jose Pepper's restaurant. Police claim Mr. Morales

filled out an I-9, a K-4 and a W-4 form at the restaurant.

ARGUMENTS

Under 8 U.S.C. § 1324a(b)(1)(A), an individual must attest on a form under penalty of perjury that an applicant for employment is authorized to work in the United States. The potential employer or employing entity must examine and determine the sufficiency of documents evidencing both identity and employment authorization.

The form used for the purposes of section 1324a(b)(1)(A) is called an I-9 form. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208 (“The term ‘I-9 or similar form’ means the form used for purposes of section [1324a(b)(1)(A)].”) The Form I-9 specifically incorporates the language of section 1324a and its requirements for employee verification.

Under 8 U.S.C. § 1324a(b)(5), “a form designated or established. . . under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement” of limited federal statutes concerning identity theft, identity fraud, perjury and related crimes. An I-9 clearly falls under subsection (b)(5), as the title of the subsection is “Limitation on use of attestation form.” As was previously established, and I-9 is *the* attestation form used by employers to verify work authorization.

Therefore, based on the language of section 1324a, a state cannot use an I-9 for the purpose of convicting

an individual of identity theft, identity fraud, or making a false writing under a State statute. Additionally, any information contained in the I-9, including names and social security numbers, and any supporting documents cannot be used for State conviction purposes.

This contention is supported by the language in Justice Kennedy's majority opinion in the recent Supreme Court case concerning the Arizona SB 1070 immigration law. In the opinion, Justice Kennedy states that "Congress has made clear . . . that any information employees submit to indicate their work status 'may not be used' for purposes other than prosecution under specified federal criminal statutes for fraud, perjury and related conduct." *Arizona v. United States*, 132 S.Ct. 2492, citing 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G)). The opinion acknowledges that Congress has struck a "careful balance . . . with respect to unauthorized employment of aliens." While the State statute itself is not preempted by the federal statute criminalizing identity theft, the use of an I-9 to convict an individual under the state statute is preempted. Congress has made clear the issues involving identity theft and fraud should be enforced through specific federal statutes, including under 8 U.S.C. § 1028 (the federal identity theft statute). Therefore, the use of an I-9 form to convict an individual under a state criminal statute is in conflict with the express will of Congress to regulate employment of unauthorized individuals, a field in which Congress has plenary powers. *See Arizona*, 132 S. Ct. at 2498 ("The Government of the United States

has broad, undoubted power over the subject of immigration and status of aliens.”).

Additionally, the State statute creates a “further intrusion upon the federal scheme” of regulating employment of unauthorized aliens and corresponding identity theft and fraud violations. *See Arizona*, 567 U.S. at 2503. There is a significant inconsistency between the Kansas statute and the federal statute criminalizing identity theft: The federal statute states it is a crime for an individual to “knowingly” and unlawfully possesses transfer or use another’s identity. *See* 8 U.S.C. § 1028. According to the Supreme Court’s 2009 decision in *Flores-Figueroa v. United States*, the “knowingly” requirement of the statute attaches to every element of the offense. *See* 556 U.S. 646 at 652. Therefore to be convicted under the federal statute, the individual must know that they are using the identity of another real person. *Id.* at 657.

This is not the case with the Kansas statute. The Kansas legislature removed the “knowingly” language from the statute in April 2010. *See* K.S.A. 21-4018 (2010) (“Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document . . . belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit.”). In fact, the Kansas legislature added a subsection to section 21-4018 specifically stating “[i]t is not a defense that the person did not know that such identifying information belongs to another person.” This wording appears to be a direct response to the decision in *Flores-Figueroa*. But, in so doing, the

Kansas legislature ignores the language in the federal statute. Additionally, the federal statute outlaws the possession of another person's identification documents "with the intent such document . . . be used to defraud the United States." 18 U.S.C. § 1028 (a)(4). The Kansas statute, however, outlaws only the possession of another's identification with the intent to defraud any person for any benefit. It does not explicitly require the identification information be used with the intent to defraud somebody. Arguably, a person who possessed another's identification information and intended to defraud another person without even using the identification information could be charged under the identity theft statute in Kansas. The wording of the Kansas statute is significantly broader than that of the federal statute and clearly conflicts with the express language adopted by Congress.

As stated above, a prosecutor cannot use an I-9, W-4 or other federal documents used by employees to indicate their work status for purposes of convicting an individual under a state statute, due to the language in 8 U.S.C. § 1324a, and in this case, also because of the conflicting language in the federal and state statutes. Additionally, prosecutors may be precluded in general from charging undocumented workers under state identity theft and identity fraud statutes. As Justice Kennedy wrote in the *Arizona* decision, the federal government "has broad, undoubted power over the subject of immigration and status of aliens." Congress expressly included the "knowingly" requirement in the federal identity theft/fraud statute, choosing to limit the individuals who may be found guilty to those with this specific intent. Furthermore, the legislative history

behind the Immigration Reform and Control Act of 1986 (“IRCA”) “underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in unauthorized employment.” *Arizona v. U.S.*, 567 at 2504.

Contrarily, the Kansas statute broadens the categories of potential offenders, and thus “interfere(s) with the careful balance struck by Congress with respect to unauthorized employment of aliens,” including any alleged identity theft and identity fraud committed by undocumented aliens in pursuit of employment. *Id.* at 2505. For these reasons, the federal statute therefore preempts the use of K.S.A. 21-6107 in this context because the Kansas statute directly conflicts with federal authority to police illegal immigration and unauthorized employment. As such, Defendant cannot be charged under K.S.A. 21-6107, and these counts should be dismissed.

WHEREFORE, Mr. Morales respectfully requests that his Motion to Dismiss Counts II and III be granted.

Respectfully submitted,

/s/ Kelly N. Goodwin

Kelly N. Goodwin #22573
127 S. Kansas Ave.
Olathe, KS 66061
913-829-8775
Attorney for the Defendant

JA 136

* * *

NOTICE OF HEARING

Take notice that the above Motion will be called on for hearing on the 28th day of September, 2012, at 10:00 AM in Courtroom 11 of the Johnson County Courthouse.

/s/ Kelly N. Goodwin
Kelly N. Goodwin #22573
Attorney for the Defendant

**IN THE DISTRICT COURT OF
JOHNSON COUNTY CRIMINAL DIVISION**

**CASE NO. 12CR462
COURT NO. 11**

[Filed September 27, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
v.)
)
DONALDO BOANERGES)
MORALES,)
Defendant.)
)

**STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS COUNTS II AND III**

COMES NOW the State of Kansas, by and through Assistant District Attorney Dustin L. Grant, and in response to Defendant's Motion to Dismiss Counts II and III, asks the Court to grant the Motion with respect to Count II, but deny the Motion with respect to Count III. In support, the State submits the following:

STATEMENT OF FACTS

The defendant is charged with one count of identity theft and three counts of making a false information. The defendant filled out several employment forms using a Social Security Number (SSN) that had been issued to another person. The State charged the

defendant with one count of Identity Theft and three counts of Making a False Information. Count II relates to the defendant's use of the SSN on an I-9 form, and Count III relates to the defendant's use of the SSN on the W-4 form. The State is not opposed to dismissing Count II, but is opposed to dismissing Count III for the reasons cited below.

ARGUMENTS AND AUTHORITIES

I. Defendant's argument with respect to the W-4 is not supported by *Arizona v. United States*, 567 US __, 132 S.Ct. 2492 (2012).

While the defendant's argument regarding 8 U.S.C. § 1324a(b)(5) regarding the I-9 form may have merit given the seemingly explicit prohibition to using the I-9 form for anything other than immigration enforcement, it does not apply *carte blanche* to all federal forms as the defendant argues in his motion.

In *Arizona v. United States*, 567 US __, 132 S.Ct. 2492 (2012), the Supreme Court of the United States held that federal law preempted three of the four provisions in Arizona's controversial immigration law, S.B. 1070. The Supreme Court's discussion of § 3 of S.B. 1070 in *Arizona* is relevant to this motion.

A. *Understanding the relevant portions of Arizona v. United States.*

Section 3 of S.B. 1070 created a new state misdemeanor in Arizona that prohibited the "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)." In effect, Arizona created a

state criminal statute with the sole purpose of punishing individuals who violated a specified federal statute.

In holding § 3 unconstitutional, the Court in *Arizona* relied on Congress' power to preempt State law. *Id.* at 2500-02. Specifically, the Court relied on the principle of field preemption, stating, "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible." *Id.* Therefore, even though § 3 merely codifies federal law within the Arizona criminal code, Arizona is prohibited from doing so because Congress occupies the entire field of alien registration. *Id.* at 2502.

The Court also stated that allowing Arizona to impose its own penalties for violations of 8 U.S.C. §1304(e) or 1306(a) would conflict with the framework created by Congress. The Court was concerned that Arizona "would have the power to bring criminal charges against individuals for violating [§ 1304(e) or 1306(a)] even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503. Congress shared this concern as well when it drafted the statutes that Arizona sought to enforce. *Id.* at 2504. In fact, a commission established by Congress determined that the prosecution of illegal aliens for working or seeking employment "would be inconsistent with [the] federal policy and objectives" established by the Immigration Reform and Control Act. *Id.*

Regarding inconsistencies in the penalties afforded by the federal statutes and § 3, the Court noted that

under the federal statutes, the misdemeanor is punishable by a “fine, imprisonment, or a term of probation” while § 3 did not allow for probation or the possibility of a pardon. *Id.* at 2503. According to the Court, the inconsistent penalties create a conflict with the framework created by Congress. *Id.* (quoting *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286 (1986) (“[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity.” (internal quotation marks omitted))).

Based on the above reasoning, the core of which relied on the fact that § 3 specifically invokes 8 U.S.C. §1304(e) and 1306(a), the Court found that “Congress intended to preclude States from ‘complement[ing] the federal law, or enforce[ing] additional or auxiliary regulations’” when it comes to the field of alien registration. *Arizona*, 132 U.S. at 2503. However, the Court also took special care to point out that the issue of immigration is unique from many other areas of law, in that issues stemming from immigration policy “can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.” *Id.* at 2499.

B. The holding in Arizona v. U.S. is not applicable to the facts in the instant case.

The Defendant’s Motion fails to properly apply *Arizona v. United States* to the case before this Court by failing to acknowledge that a central factor in the Court’s reasoning is absent from the facts at hand. Unlike § 3 of the Arizona law, K.S.A. 21-3711 does not create punishments for violations of federal law.

The most important distinction when looking at *Arizona v. United States* and the facts before this Court is the fact that Kansas is not attempting to punish individuals for violations of federal law. K.S.A. 21-3711 is a State criminal statute concerning making false information. It neither invokes federal law nor provides a punishment for violations of federal law. The Kansas criminal statute in question merely provides a punishment for individuals who commit the general crime of making false information. Furthermore, several courts have found that the federal law does not preempt State criminal statutes. See *State v. Wallace*, 160 Ohio App. 3d 528 (Ohio Ct. App. 2005) (finding that the prosecution of the defendant under an Ohio theft statute was not preempted by the Social Security Act); *Faith v. Caldwell*, 944 S.W.2d 607 (Tenn. Ct. App. 1996) (finding that the Social Security Act provides that “a court of competent jurisdiction” may determine that a representative payee has misused an individual’s benefit and that the federal statutes and regulations contain no language indicating an intent to preempt state court jurisdiction); *Commonwealth v. Morris*, 394 Pa. Super. 185, 575 A.2d 582 (Pa. Super. Ct. 1990) *aff’d*, 529 Pa. 61, 601 A.2d 806 (Pa. 1992) (finding that “under our federalism, the states have the principal responsibility for defining and prosecuting crimes. Therefore, the penalty provision of the Social Security Act at issue here is subject to a presumption that Congress did not intend by its passage to preempt a state’s enforcement of its criminal law.”). By applying the above case law to the facts in the instant case, it follows that no federal law preempts Kansas from prosecuting individuals under its State making false information statute.

Since Kansas is prosecuting the defendant for violations of State statute, the defendant's motion to dismiss Count III should be denied.

CONCLUSION

The defendant is charged with violations of State criminal statutes for making false information relating to his W-4 form. The defendant's Motion based upon *Arizona v. United States* does not apply in that unlike Arizona, Kansas is not seeking to enforce federal law. Furthermore, the State criminal statutes Kansas seeks to enforce do not conflict with federal statutes. For the above reasons, the defendant's Motion with respect to Count III should be denied.

/s/Dustin L. Grant

Dustin L. Grant #24153

Assistant District Attorney

Johnson County Courthouse

P.O. Box 728

Olathe, KS 66051

* * *

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12CR462

[Filed October 1, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
DONALDO BOANERGES)
MORALES,)
Defendant.)

AMENDED COMPLAINT

I, Dustin L. Grant, Assistant District Attorney of said County, being duly sworn on oath state to the Court that

DONALDO BOANERGES MORALES

did the following:

COUNT I – That on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, willfully, knowingly, feloniously and with the intent to defraud for any benefit, obtain, possess, transfer, use or attempt to obtain, possess, transfer or use an identification document or personal identification number, to-wit: Social Security number, of another person to wit: Ernesto Melara, other than

issued lawfully for use of the possessor, a severity level 8 non-person felony, in violation of K.S.A. 21-4018, K.S.A. 21-4704 and K.S.A. 21-4707. (identity theft)

COUNT II – Dismissed

COUNT III – Further, that on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud make, generate, distribute or draw or cause to be made, generated, distributed or drawn, a written instrument to-wit: W-4 document, with knowledge that such information falsely states some material matter or is not what it purports to be, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

COUNT IV – Further, that on or about the 1st day of October, 2010, in the County of Johnson, State of Kansas, DONALDO BOANERGES MORALES did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud make, generate, distribute or draw or cause to be made, generated, distributed or drawn, a written instrument to-wit: K-4 document, with knowledge that such information falsely states some material matter or is not what it purports to be, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

JA 145

/s/Dustin L. Grant

Dustin L. Grant #24153

Assistant District Attorney

P.O. Box 728

Olathe, Kansas 66051-0728

(913) 715-3000

Subscribed and sworn to before me this 28 day of
September, 2012.

/s/Angela Morris

Notary Public

ANGELA MORRIS

Notary Public - State of Kansas

My Appt. Expires March 31, 2014

WITNESSES:

Jose Pepper's personnel

Ernesto Melara

Overland Park Det. J. Russell

Social Security Administration personnel

Agent J. Espinosa

** Amended to dismiss Count II*

JA 146

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT**

Case No. 12CR462

Court No. 14

[Dated August 14, 2013]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
DONALDO BOANERGES)
MORALES,)
)
Defendant.)
)

TRANSCRIPT OF BENCH TRIAL

BE IT REMEMBERED that on this 14th day of August, 2013, the above-entitled cause comes on for a bench trial before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the State of Kansas:

**MR. JACOB GONTESKY
JOHNSON COUNTY DISTRICT ATTORNEY'S**

OFFICE
100 North Kansas Avenue
Olathe, KS 66061

For the Defendant:

MS. KELLY GOODWIN
JOHNSON COUNTY PUBLIC DEFENDER'S
OFFICE
115 East Park Street, Suite A
Olathe, KS 66061

* * *

[p.5]

SHERRI ANN MILLER,

called as a witness on behalf of the State,
having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. GONTESKY:

Q. Could you please state your name.

A. Sherri Ann Miller.

Q. Ms. Miller, where are you currently employed?

A. With Randstad Staffing.

Q. In the fall of 2010, where were you employed?

A. North Star Restaurants.

Q. For those not familiar with North Star Restaurants, in the Kansas City metro area, what would be the presence of North Star?

A. North Star is the corporate organization that owns Jose Pepper's and Cactus Grill.

Q. When you worked there in the fall of 2010, what was your role?

A. Risk manager and payroll manager.

Q. As risk manager and payroll manager, what were some of your duties?

A. To process all of the company's payroll for all of the different locations. Also to oversee any risk management issues that they would have on-site.

[p.6]

Q. Did you also participate in the hiring process for new employees that were hired by the Jose Pepper's or Cactus Grill locations?

A. Processing the paperwork for payroll, yes.

Q. Okay. In processing the paperwork for payroll, what types of paperwork did you process there?

A. The state tax forms, the federal tax forms, and also the I-9.

Q. Okay. When a new employee would come to a restaurant location to apply for employment, what types of documents would they bring in?

A. That they would bring with them?

Q. Right.

A. They would need to bring proof of eligibility to work in the United States.

Q. Okay.

A. Along with completing the packet of paperwork.

Q. Then would you review that paperwork?

A. Yes.

Q. Okay.

(An item was marked state's Exhibit 1 by the reporter.)

MR. GONTESKY: May I approach the witness, Your Honor?

THE COURT: Sure.

[p.7]

Q. (By Mr. Gontesky) I'm handing you what's been marked for purposes of identification as State's Exhibit No. 1.

Do you recognize that document?

A. Yes, I do.

Q. That do you recognize that document to be?

A. The I-9 Form.

Q. When you say the I-9 Form, is that an I-9 Form that you accepted by an applicant for a job?

A. Yes, it is.

MS. GOODWIN: Judge, at this time, I'm going to object.

The I-9 refers to Count No. 2 in the complaint, and it was dismissed.

THE COURT: It was dismissed.

But he can -- It doesn't make it not receivable.

I'm not going to make any findings based upon that.

MS. GOODWIN: Judge, I guess before we proceed any further -- I don't think that I necessarily need to.

But I'm going to go ahead and renew my motion that I filed September 27 of 2012 asking to dismiss Counts 2 -- Count 2 which was dismissed and also Count 3

[p.8]

that the Court denied for lack of jurisdiction.

I would just like to renew that motion at this time.

THE COURT: It's noted.

The ruling will be the same.

You may proceed.

MR. GONTESKY: Thank you, Judge.

Q. (By Mr. Gontesky) Regarding that document in front of you, is that a document that you received personally while you were employed for North Star?

A. Yes, it is.

Q. How do you know that you received that document personally?

A. It has my handwriting and my signature.

Q. Is that the original document containing your handwriting and signature?

A. Yes, it is.

Q. What is the date of that document?

A. October 1, 2010.

Q. Who is the individual that that document pertains to?

A. Donaldo Morales.

Q. Okay.

MR. GONTESKY: At this time, the State moves to admit Exhibit No. 1 into evidence.

[p.9]

THE COURT: Any objection to No. 1?

MS. GOODWIN: No objection to No. 1, Judge.

THE COURT: It's received.

Q. (By Mr. Gontesky) The I-9 Form that was completed, do you see the individual in the courtroom that completed that I-9 Form in your presence in October of 2010?

A. Yes, I do.

Q. Could you indicate for the Court where he's sitting and what he's wearing.

A. He's sitting in the middle of that table in the white shirt.

Q. When that document was filled out, did -- Does that document describe on it what identifying documents Mr. Morales supplied to you to become employed with your establishment?

A. Yes.

Q. What documents did he supply to you?

A. A resident -- permanent resident card and also a social security card.

(An item was marked state's Exhibit 4 by the reporter.)

MR. GONTESKY: May I approach the witness, Your Honor?

THE COURT: Sure.

[p.10]

Q. (By Mr. Gontesky) I'm handing you next what's been marked for purposes of identification as State's Exhibit No. 4.

Do you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

A. The photocopy that I would have made after receiving the two forms of identification.

Q. Is that the photocopy of the identification that you received related to Mr. Morales's application for employment in October of 2010?

A. Yes, it is.

MR. GONTESKY: At this time, the State moves to admit Exhibit No. 4 into evidence.

MS. GOODWIN: Judge, I'm going to object based on foundation and hearsay.

I don't think that she is the witness that can testify as to these documents.

MR. GONTESKY: Judge --

THE COURT: Maybe I missed something.

I thought -- Ask again who gave --

MR. GONTESKY: Okay. Will do, Judge.

Q. (By Mr. Gontesky) When Mr. Morales gave you that I-9 that you already testified to, you stated he also supplied you with a permanent resident card and a social

[p.11]

security card; is that correct?

A. Correct.

Q. Is that exhibit in front of you, Exhibit No. 4, a photocopy of those two documents that Mr. Morales supplied to you?

A. Yes.

It's part of the procedure.

Once we document it on the I-9, we make a photocopy and it stays with the file.

Q. Okay. So you do not keep the applicant's original social security card and permanent resident card.

You keep a photocopy?

A. Correct.

Q. Okay. That is the photocopy for Mr. Morales?

A. To the best of my knowledge, correct.

MR. GONTESKY: At this time, the State moves to admit Exhibit No. 4.

MS. GOODWIN: Judge, I have the same objection.

THE COURT: It will be received.

Foundation has been laid.

MR. GONTESKY: Thank you, Judge.

(At this time, the court reporter asked all the parties to slow down.)

[p.12]

Q. (By Mr. Gontesky) Regarding the social security card that is part of Exhibit No. 4, what are the last four --

THE COURT: Can I see Exhibit No. 4?

Okay.

Q. (By Mr. Gontesky) What were the last four digits of that social security number?

A. 3479.

(Items were marked state's Exhibits 2 and 3 by the reporter.)

MR. GONTESKY: May I approach the witness, Your Honor?

THE COURT: Yes.

You don't need to ask anymore.

MR. GONTESKY: Thank you, Judge.

Q. I'm handing you two more exhibits; State's Exhibits 2 and 3.

Do you recognize those documents?

A. Yes, I do.

Q. What do you recognize those documents to be?

A. Part of the hiring packet given to each employee; the state withholdings --

Q. Okay.

A. -- and the federal withholdings.

Q. Are those documents that would have been
[p.13]
completed by an applicant and yourself as part of the
process of employment?

A. Correct, yes.

Q. Is one of them a K-4 and one of them a W-4?

A. Yes, sir.

Q. Are these two documents pertaining to the
employment of the Defendant in this case, Mr.
Morales?

A. To the best of my knowledge, yes.

MR. GONTESKY: At this time, the State
moves to admit Exhibit 2 and Exhibit 3.

MR. GOODWIN: Judge, I object based on
foundation.

I think this is a little different than Exhibit
1.

THE COURT: It is.

It's -- It's different than Exhibit 4.

You have to -- You're going to have to lay
foundation as to how she has them.

MR. GONTESKY: Will do, Judge.

THE COURT: Or under 60-460(m).

MR. GONTESKY: Will do, Judge.

Q. (By Mr. Gontesky) When Mr. Morales came in to be hired by your company, is it standard practice for you all to fill out a K-4 and a W-4 document?

A. Correct.

[p.14]

In order for the employee to be hired and then to be paid, they must fill out the documents.

Q. Okay. So who actually fills out the document?

A. The employee fills out the document.

Q. Do you supply them with a blank copy and then they fill it out?

A. Correct.

Q. Okay. After they fill it out, they turn it into your?

A. Correct.

Q. Did Mr. Morales give you this K-4 and this W-4?

A. To the best of my knowledge, yes.

Q. How do you know that those two came from Mr. Morales?

A. It has his signature on it, and I would have not been able to process payroll without them.

Q. Okay. After you receive those documents, what do you do with them in the standard course of your business?

A. They're put into an employee file after they're processed for payroll.

Q. That is where this K-4 and this W-4 were kept?

A. Correct.

Q. Until your office gave them up to a detective who had requested them?

* * *

[p.18]

So I don't think that the State has laid foundation -- I mean if they brought somebody in with North Star that was their records keeper, I don't think I would have necessarily a valid objection.

But I don't think Ms. Miller since she doesn't work there anymore can testify about them if she doesn't have any direct knowledge to the documents.

MR. GONTESKY: We do have another witness we could call from North Star, Judge.

If I may ask another question of the witness?

THE COURT: Sure.

CONTINUED DIRECT EXAMINATION

BY MR. GONTESKY:

Q. Would an employee be hired if they did not complete a K-4 and a W-4?

A. No, sir, they would not.

THE COURT: Okay.

Q. (By Mr. Gontesky) Was Mr. Morales in fact hired by your company?

A. If he filled out these documents, yes, he did.

THE COURT: Hold it.

Do you know if he was hired or not? Do you know if he worked f or you guys?

A. I recognize him.

That was three years ago, sir.

* * *

[p.23]

(An item was marked State's Exhibit 5 by the reporter.)

REDIRECT EXAMINATION

BY MR. GONTESKY:

Q. I'm going to hand you what's been marked for purposes of identification as State's Exhibit No. 5.

Do you recognize that document?

A. Yes.

It's a standard application.

Q. Who was that standard application purported to be filled out by?

A. Donaldo Morales.

Q. What would have been done with that application after it was filled out?

A. It would have been kept with the rest of his paperwork in his employee file.

Q. Would you have received the I-9 that was previously admitted and the photocopy of the permanent resident card and the social security card if they were not accompanied by a job application by that same person?

A. I made the copy of the social security cards.

I did not receive copies of the social security cards.

Q. Okay. Then I'll correct my question.

[p.24]

Would you have made the copies of the social security card and permanent resident card and also completed an I-9 which you previously testified to -- Would you have done those without an accompanying job application?

A. No.

Q. Okay. That job application is for Mr. Donaldo Morales?

A. Correct.

Q. The one in front of you?

A. Correct.

Q. Is there a social security number on that document?

A. Yes, there is.

Q. What are the last four digits of it?

A. 3479.

Q. Is that the job application that you believe accompanied the I-9 and the social security card and permanent resident card that you received in October of 2010?

MS. GOODWIN: Objection, Judge.

Speculation.

THE COURT: Sustained as to that question.

Q. (By Mr. Gontesky) Do you recognize that application?

[p.25]

A. As a standard application, yes, I do.

Q. Okay. Would it have been part of an employee file?

A. Yes.

Q. Whose employee file?

A. To the best of my knowledge, Donaldo Morales.

Q. It would match the information that you received on the I-9 and the photocopied exhibits that are part of Exhibit No. 4?

A. Correct.

The name, address, date, and social security number would match.

Q. You stated you would not have received Exhibit 4 and Exhibit 1, the I-9, if they were not accompanied by a job application?

A. Correct.

MR. GONTESKY: At this time, the State moves to admit Exhibit No. 5.

MS. GOODWIN: I'm going to object, Judge, based on foundation; the same objections I have to 2 and 3.

I think she testified that to the best of her knowledge that she -- that would have been what was filled out and put in his file.

But I don't think that that is enough to meet

* * *

[p.29]

Jose Pepper's, what is the general process that they go through?

A. They'll come in -- If it's going into the restaurant, they come in and fill out an application, do an interview with a manager that's on-site there, and then we usually do second interviews. Then they'll bring them back in if they want to hire them and do an orientation with them.

Q. Okay. Is there paperwork that is filled out if an individual -- if the decision is made to hire an individual?

A. At the orientation, we do the I-9, W-4, K-4 if it's in Kansas, and their normal payroll -- just the payroll file that has the information on it of the rate of pay and things like that.

Q. Okay. In front of you is State's Exhibit No. 5.

Do you see that document there in front of you?

A. Yes.

Q. Do you recognize that document?

A. Yes.

Q. What do you recognize that document to be?

A. That's Donald's -- Donaldo Morales's application he filled out.

Q. After Mr. Morales filled out that application, what would have been done with that application by your

[p.30]

office?

A. I didn't do anything with it.

I think that -- If I remember correctly, our manager that was working, James Deterding, interviewed him and talked with him.

Then Sherri would have filled out the -- his I-9 and W-4.

Q. Okay. When Sherri -- You mean Sherri Miller?

A. Sherri Miller, yes.

Q. Okay. When Sherri Miller would have assisted Mr. Morales in filling out the I-9 and the W-4, would they have also completed a K-4?

A. Yes.

Q. Okay. Then would all of those documents be routed to your office?

A. Yes.

The employee file would then be, after they're entered into payroll, brought into our -- We have -- I have a file cabinet that has all current employees.

Well, their I-9 would go out -- would go into the I-9 book. That's kept separate.

Then the -- His application would be in his employee file.

Q. So the K-4, W-4, and application would have gone into his employee file?

[p.31]

A. Yes.

Q. Okay. That employee file, those are controlled within your office?

A. Yes.

Q. That's where the originals are kept?

A. Yes.

Q. In your care, custody, and control through that period?

A. Yes.

Q. Okay. That's the general business practice of Jose Pepper's?

A. At that -- Yes. At the corporate office, it is.

Q. Okay. Did you at some time supply a detective with the original documents that you see before you?

A. Yes.

Q. Okay. When was that approximately?

A. I believe about a month and a half ago.

Q. Okay.

A. Maybe two months.

I can't remember exactly.

Q. Prior to the time that you handed those documents to a detective, were those all part of the same employee file?

A. Yes.

Q. Okay. Of the same individual?

[p.32]

A. Yes.

Q. Not separate individuals?

Okay. That individual -- The name on those documents is Donaldo Morales?

A. Yes.

Q. Okay. So that would include the I-9, the K-4, the W-4, and then Exhibit No. 4 which is a photocopy of a permanent resident card and a social security card?

A. Yes.

Q. As well as Exhibit 5, the job application itself?

A. Yes.

Q. When an employee file is created in your office, why do you do that?

A. To fill out the paperwork to make sure that we can get them in -- put into the system. Obviously, to check the documents and the -- their tax withholding and to get their -- open up their records.

Q. Okay. Based on your knowledge of this employee file, was Mr. Morales in fact offered a job with Jose Pepper's?

A. Yes.

Q. Okay. Did Mr. Morales receive pay for the work he did for Jose Pepper's?

A. Yes.

Q. Did he receive pay through the social security

[p.33]

number that was listed on the I-9, K-4, W-4, and the photocopied identification cards that are part of Exhibit No. 4?

A. Yes.

Q. Okay. So he received pay after being hired in October of 2010?

A. Yes.

Q. Would you have been able to pay Mr. Morales money if he did not supply you with a social security number?

A. No.

I can't put them in our -- into our payroll system without it.

Q. The payroll system, can you describe for the Court how the -- how your payroll system operates.

A. Yeah.

We put the information into our file.

Then our -- I put in -- I do the payroll for this location.

They clock in and out of a terminal called a POS.

That generates their -- like a timecard for each -- We pay every other week.

So then I get that report, and I just enter their hours into that.

Q. Then it's processed by another --

A. It's processed -- Back then, it was Paychecks.

* * *

[p.39]

duties, or you can stay here and listen.

SPECIAL AGENT JOSEPH ESPINOSA,

called as a witness on behalf of the State,
having been first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. GONTESKY:

Q. Could you please state your name.

A. Joseph Espinosa, E-s-p-i-n-o-s-a.

Q. Mr. Espinosa, where are you currently employed?

A. I'm a special agent with the Social Security Administration Office Of The Inspector General in Kansas City.

Q. How long have you been with the Social Security Administration?

A. Since 2009.

Q. I'd like to ask if you recall being dispatched to North Star Restaurants, a company here in Johnson County, Kansas earlier in 2012.

A. Yes.

Q. Okay. What information did you have when you were dispatched to North Star Restaurants?

A. I had received some information from the State of Kansas Department Of Labor Workers' Compensation Division as part of our task force that there was an

[p.40]

individual working there under a different social security number -- under a social security number that did not match the information that they had on file.

Q. Okay. So what action did you take when you learned of that?

A. As a routine course of business, I conducted my own investigation on that -- a preliminary investigation.

I researched the Social Security Master File Database which is an internal Social Security Administration database that houses all of the information for -- any time a social security number is issued; biographical data, etc.

Q. Okay. When you did that, did you then respond to that location to investigate further?

A. I did, yes.

Q. When you responded to North Star Restaurants, what did you do?

A. We made contact with the HR manager and asked to verify the information that they had on file for this employee.

We wanted to give the individual the benefit of the doubt and make sure there wasn't a typo on the information provided by the State of Kansas.

So we obtained the documents from the company.

[p.41]

Q. When you say you obtained the documents -- Before you on the witness stand are documents that have been already labeled as State's Exhibits 1 through 5. They have been previously admitted already.

Do you recognize those documents?

A. Yes, I do.

Q. Were those documents part of the investigation that you were conducting at that time?

A. Yes.

Q. Okay. When you received those documents, what did you do with that information?

A. We took this information, and we tried to locate the individual.

We ultimately ended up locating the Defendant and executing a probable cause arrest.

Q. Okay. After the Defendant was arrested -- Let me first ask do you recognize the individual that you arrested that day? Do you see him in the courtroom?

A. Yes, sir, I do.

Q. Could you indicate where he's sitting and what he's wearing.

A. The Defendant is sitting over here with headphones on, blue jeans, and a long-sleeve shirt.

Q. Did you speak with Mr. Morales that day when you took him into custody?

[p.42]

A. I did, yes.

Q. Did you provide him with a Miranda warning?

A. Yes, I did.

Q. After you provided him with that Miranda warning, did you ask him about the circumstances of his employment at Jose Pepper's Restaurant?

A. Yes.

Q. What did you ask him?

A. Specifically, I asked him how long he had been in the country.

I believe he responded twenty or so years.

I also had asked him how he obtained the social security card that he had provided Jose Pepper's.

Q. Okay. That social security card that you referenced, is that the same social security card that is photocopied in State's Exhibit 4 before you?

A. Yes, it is.

Q. The one with the number ending in 3479?

A. Yes, sir, it is.

Q. When you asked Mr. Morales about that specific social security card, what did he tell you?

A. He said that he had purchased it from -- by means of a friend of a friend basically.

Q. Did he tell you why he purchased it?

A. He said that he purchased it specifically so that [p.43]
he could work.

Q. Did he offer you anymore information that day?

A. Nothing to further the relevant charges.

Q. Okay. Did you then investigate the case further with the Social Security Administration?

A. Yes, I did.

(An item was marked state's Exhibit 7 by the reporter.)

MR. GONTESKY: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (By Mr. Gontesky) I'm handing you what's been marked as State's Exhibit No. 7.

Do you recognize that document?

A. Yes, sir, I do.

Q. What do you recognize that document to be?

A. This is a document that I requested from the Social Security Administration certifying that the social security number ending in 3479 was in fact assigned to the original person it was assigned to.

Q. Okay. When you did that research, did you find out who that social security number had been assigned to?

A. Yes, I did.

Q. Let me ask you a couple of background questions
[p.44]

not simply related to this case.

But what is a social security number?

A. The social security number was a means for the government basically to track earnings.

It was created after the Social Security Act was passed in 1936.

Q. Okay.

A. Shortly after 1937, social security numbers began being issued.

It was a means for the government to track earnings for the purposes of retirement ultimately whenever one became eligible to retire.

Q. Are social security numbers unique to every individual?

A. Yes, sir, they are.

Q. After a social security number is assigned to an individual by the government, does that social security number remain with them for the duration of their lifetime?

A. It remains indefinitely.

Even after one passes away, the number remains assigned to that individual, and it is never re-issued.

Q. Okay. Regarding this social security number at issue in this case ending in 3479, did you learn who that number is issued to?

[p.45]

A. Yes, sir, I did.

Q. Who is that?

A. Mr. Ernesto Melara.

Q. Does Mr. Melara -- Were you able to ascertain his birthday?

A. Yes.

He was born on March 16 of 1972.

Q. When you spoke with Mr. Morales, you confirmed Mr. Morales, the Defendant in this case, was not the individual that that number had been assigned to?

A. That is correct.

MR. GONTESKY: At this time, Judge, the State moves to admit Exhibit No. 7, the self-authenticating certified document from the Social Security Administration dealing with the social security number at issue in this case ending in 3479.

MS. GOODWIN: Judge, I'm going to object based on foundation.

THE COURT: Overruled.

It will be accepted under 60-460(o).

MR. GONTESKY: Thank you, Judge.

I have no further questions of this witness.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MS. GOODWIN:

* * *

[p.61]

The Court's -- Has he -- Does he have any other priors ever for anything other than two speeding tickets?

MR. GONTESKY: Give me one minute, Judge.

MS. GOODWIN: Judge, I have a little bit of brief argument before, I guess, we're finished.

MR. GONTESKY: Judge, my unofficial records reflect that there was a theft conviction in 1995 where he was found guilty in California.

THE COURT: Okay. Do you want to make any additional documents?

MR. GONTESKY: Judge, I believe as though the State has clearly established the elements of both identity theft, which was use of this social security number with the intent to defraud Jose Pepper's to receive a benefit, being a paycheck, and that social security number did not belong to Mr. Morales.

Mr. Morales testified in his own words that he knew social security numbers were needed to obtain employment and that they had a role in receiving taxes.

Yet rather than go into a Social Security Office to obtain a number, he bought a number from somebody in a park.

He knew that certain people couldn't get them from the government depending on how they were here.

[p.62]

So rather than going to the government, he sought out somebody in a park to buy the number.

Judge, I believe as though the State has established the elements of identity theft in this case.

Further, the two counts of making false information, Count No. 3 relating to the W-4 which was admitted and Count 4 related to the K-4 which was admitted, the elements of both of those counts were clearly established by Mr. Morales himself when he testified that his handwriting is found on the original documents that were admitted in the State's case.

Those exhibits are before you, Judge.

They both constitute making a false information, because Mr. Morales acting in his own identity helped complete those tax forms with his employer so that he could obtain a benefit, being a paycheck.

All the while, that number did not belong to Mr. Morales.

He knew that that was what he needed to be able to get a job.

But he knew he needed to avoid problems, so he would not file taxes with that number.

Judge, I'm asking you to make the leap -- the short leap from him knowing that created tax problems to

* * *

[p.64]

Judge, I guess I'd have the same arguments with Counts 3 and Counts 4; that they have to show that somebody was defrauded.

They haven't shown any evidence that Jose Pepper's or Mr. Melara was defrauded in any way by this social security number being used.

They've -- They haven't shown anything that Mr. Morales had the intent to defraud anybody.

He testified that the only reason he used this number was because he needed to get a job.

He knew that you needed a social security number to get a job, but he didn't know where it came from. He didn't know if it belonged to anybody.

If anything, he was trying to do the right thing by not filing taxes.

So I'd ask that you find him not guilty on Counts 1, 3, and 4, because I don't think the State has met their burden that he tried to defraud or harm Jose Pepper's or Mr. Melara.

THE COURT: Okay. The Court is going to find that the Defendant did present to Jose Pepper's the five exhibits that were received into evidence.

The five exhibits are -- Three of them are very important, because they're social security number, W-4, and the other social security -- the employment

[p.65]

document.

Clearly, he knew that you don't go to a park to buy government documents. That's not where we typically go to find those. He knows that.

That's why he didn't file taxes, because he knew that he'd get in trouble.

The elements are that he defrauded.

It doesn't say who he has to defraud.

The Court is going to find that -- the Defendant guilty of Counts 1, 3, and 4.

Because the person -- He didn't defraud, per se, this individual who may be dead.

I think you can still defraud a dead person.

I also think that you can defraud your employer, because they think that you're a legal citizen.

They could get penalties by hiring people that are not documented individuals.

So I mean the elements are met.

The crime has been, I think, clearly presented.

There's absolutely no doubt in my mind that he presented these documents for the reason that he could get a job.

What's always a stretch is when you find

[p.66]

somebody who has been here twenty-four years. He's worked. He's paid taxes. He doesn't get the benefit.

I don't know if he would have gotten money back or not.

But one thing we do know is that he's putting money into the kitty that will never be taken out at a time when we need more money in the kitty. He's putting money into social security that he'll never be able to draw out.

So it's not like he stole money from the government.

He wanted to work.

He did work.

He has been here twenty-four years.

Three of his kids were born here.

He has a legal social security number now.

This isn't a case of equity.

It's a case of criminal -- I can't find him not guilty.

I'm finding him guilty.

I'll give the parties an opportunity on the defrauding if I'm wrong to file a motion to reconsider because I said it's -- you can defraud a dead person.

You can defraud a company that would not otherwise hire you. I presume that you can also defraud other

[p.67]

unidentified individuals who could have taken that job if his -- if he had not taken it.

I understand -- The flip side is that sometimes we have people who want to work that may be undocumented.

There's people that do have social security numbers, and they have not applied for some of those jobs.

So I understand all the arguments.

This isn't a matter of fairness.

This is a matter of what the criminal law says.

So I'm going to find the Defendant guilty.

I'm going to set it for sentencing on October 16 at 3:00.

MS. GOODWIN: Judge, would you consider allowing me to set it for a motion's hearing?

THE COURT: Yes.

What I'm going to do is do it both at the same time.

MS. GOODWIN: Okay.

JA 182

THE COURT: That gives -- October 16 at
3:00.

He'll get a PSI and LSIR done.

I do not -- I am going to assume the limited
criminal history you have is accurate.

**IN THE DISTRICT COURT OF
THE STATE OF KANSAS IN AND
FOR THE TENTH JUDICIAL DISTRICT**

Case Number: 12CR00462

Court Number: 14

[Filed December 3, 2014]

_____)
The State of Kansas,)
Plaintiff,)
)
vs.)
)
DONALDO B MORALES,)
)
Defendant,)
_____)

ORDER

On 3, the above captioned defendant was placed on probation for the charge of 21-4018(C) .F, IDENTITY THEFT; 21-3711, MAKING A FALSE WRITING; 21-3711, MAKING A FALSE WRITING. The Court ordered probation is for 18 months. The above defendant has completed 13 months of his court-ordered probation. All related costs are paid. All special conditions have been completed, it is hereby recommended by this Court Service Officer, JACK PEPPER, that early termination be considered.

Early termination of probation is effective this date.

JA 184

Court Services Officer:

_____Approved _____Denied

/s/Kevin P. Moriarty
Judge's signature

Date

JA 185

RELEVANT DOCKET ENTRIES
JOHNSON COUNTY KANSAS DISTRICT COURT
12CR00012

State of Kansas v. Ochoa-Lara

* * *

01/03/2012 INITIAL CHARGE# 21-6107(c)(1)(A
IDENTITY THEFT FILED INITIAL
CHARGE# 21-6107(c)(1)(A IDENTITY
THEFT FILED INITIAL CHARGE# 21-
3711 MAKING A FALSE WRITING
FILED JUDGE THB ASSIGNED TO
CASE

* * *

01/03/2012 FILE STAMP 1/3/2012, AFFIDAVIT
01/03/2012 FILE STAMP 1/3/2012, COMPLAINT,
INITIATION OF ACTION

* * *

03/04/2013 FILE STAMP 03/04/2013, MOTION TO
DISMISS, COUNTS I, II AND III FOR
LACK OF JURISDICTION

03/15/2013 FILE STAMP 03/15/2013, STATE'S
RESPONSE TO, DEFENDANT'S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION

* * *

04/04/2013 COUNT 2 21-6107(c)(1)(A, FINDING
DISMISSED BY PROSECUTION

JA 186

COUNT 3 21-3711, FINDING
DISMISSED BY PROSECUTION

04/04/2013 ADD CHARGE 21-6107(c)(1)(A
IDENTITY THEFT, CHRG. TYPE F, SEV.
LVL 8, PN N

04/04/2013 FILE STAMP 4/4/2013, AMENDED
COMPLAINT

* * *

06/04/2013 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY RIEBLI, DEFENDANT
APPEARS WITH ATTORNEY
DUPREE, JURY TRIAL WAIVED BY
DEFENDANT , CONTINUED BY
DEFENSE, DEFENDANT ORDERED TO
PERSONALLY APPEAR AT NEXT
COURT HEARING (KPM)()

* * *

03/11/2014 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY GONTESKY FOR
RIEBLI, DEFENDANT APPEARS WITH
ATTORNEY DUPREE, FINDING
GUILTY, PRESENTENCE
INVESTIGATION ORDERED
/LSIR, DEFENDANT ORDERED TO
PERSONALLY APPEAR AT NEXT
COURT HEARING , CONTINUED BY
DEFENSE (KPM)()

03/11/2014 COUNT 4 21-6107(c)(1)(A FINDING
GUILTY (KPM)()

* * *

03/11/2014 FILE STAMP 3/11/2014, STIPULATED
FACTS

05/08/2014 COUNT 1 21-6107(c)(1)(A PLAINTIFF
APPEARS BY HURST,DEFENDANT
APPEARS WITH ATTORNEY
DUPREE,DEFENDANT SENTENCED
TO CUSTODY OF SECRETARY OF
CORRECTIONS ,JAIL FOR A PERIOD
OF 7M//,CONCURRENT UR CT4,
PROBATION GRANTED FOR 18M
(KPM)(AH)

05/08/2014 COUNT 4 21-6107(c)(1)(A DEFENDANT
SENTENCED TO CUSTODY OF
SECRETARY OF CORRECTIONS,JAIL
FOR A PERIOD OF 7M//,CONCURRENT
UR CT1 (KPM)(AH)

* * *

05/19/2014 FILE STAMP 5/21/2014, JOURNAL
ENTRY OF JUDGMENT

* * *

05/21/2014 FILE STAMP 05/14/2014, NOTICE OF
APPEAL

* * *

09/09/2014 FILE STAMP 09/09/14, TRANSCRIPT OF
BENCH TRIAL TAKEN MARCH 11,
2014 BY AMANDA L. HEARN, RPR, CSR

* * *

JA 188

RELEVANT DOCKET ENTRIES

KANSAS SUPREME COURT

112322

State of Kansas v. Ochoa-Lara

Date	Description
* * *	
08-SEP-17	J U D G M E N T D O C K E T E D - PUBLISHED OPINION / Judgment of the Court of Appeals affirming the district court is reversed.
* * *	
21-OCT-16	PETITION FOR REVIEW - GRANTED / (re: opinion) by Guadalupe Ochoa-Lara.
10-DEC-15	PETITION FOR REVIEW / Petition for Review (re: opinion) by GUADALUPE OCHOA-LARA.
25-NOV-15	J U D G M E N T D O C K E T E D - PUBLISHED OPINION / Affirmed. Goering.
* * *	
04-MAY-15	BRIEF RECEIVED / Brief of appellee the State of Kansas.
* * *	
16-JAN-15	BRIEF RECEIVED / Brief of appellant Guadalupe Ochoa-Lara : Aple Brf Due 02/18/2015

JA 189

* * *	
22-AUG-14	DOCKETING STATEMENT/Docketing Statement - Guadalupe Ochoa-Lara (PROPOSED)
* * *	

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12 CR 12

[Filed January 3, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
GUADALUPE OCHOA-LARA,)
Defendant.)
)

AFFIDAVIT

Comes now the affiant, of lawful age, being first duly sworn upon oath, in support of a probable cause finding for the detention of the defendant or the issuance of an arrest warrant, states as follows:

1. During November and December of 2011, Overland Park Police Department officers and DHS/ICE agents were conducting gang member contacts within Overland Park, Kansas. Officers were attempting to contact Christian Ochoa, who is a documented gang member, at 9135 Robinson, Apartment 2G, Overland Park, Johnson County, Kansas. At that location, officers learned that the apartment was leased to a Guadalupe Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara used a social security number issued to another individual to lease the apartment. Officers contacted Tiffany McFarland, who is lawfully

issued the social security number used by Ochoa-Lara, and she advised she had no knowledge her number was being used. McFarland later reported that she contacted the IRS and was notified that income had been reported on her social security number since 2006 which was not earned by her. Officers learned that Ochoa-Lara was employed at the Long Branch Steakhouse in Lenexa, Johnson County, Kansas.

2. Officers contacted personnel for Long Branch Steakhouse and confirmed that Ochoa-Lara did work at the Lenexa location from approximately May of 2011 to December of 2011. Officers reviewed the Form W-4 completed by Ochoa-Lara on May 10, 2011 in Lenexa, Johnson County, Kansas and observed he used the social security number issued to McFarland. In addition, Ochoa-Lara completed a Form I-9 and again used the social security number issued to McFarland and also the permanent resident alien number issued to Pierrie Lecuyer.

3. The above information was provided from the reports of the Overland Park Police Department.

/s/Steven L. Edwards
Affiant

Subscribed and sworn to before me by the affiant, Steven L. Edwards, on this 3rd day of January, 2012.

/s/Janelle Miño
Notary Public

JA 192

Ochoa-lara.12g

Janelle Miño
Notary Public-State of Kansas
My Appt. Expires: 4/16/2012

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No. 12 CR 12

[Filed January 3, 2012]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
GUADALUPE OCHOA-LARA,)
Defendant.)
)

COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Vanessa M. Riebli, Assistant District Attorney of
said County, being duly sworn on oath state to the
Court that

GUADALUPE OCHOA-LARA

did the following:

COUNT I - That between the 10th day of May, 2011
and the 6th of December, 2011, in the County of
Johnson, State of Kansas, GUADALUPE OCHOA-
LARA did then and there unlawfully, willfully and
feloniously obtain, possess or use any personal
identifying information, or document containing the
same, to wit: social security number, belonging to or
issued to another person, to wit: Tiffany McFarland,
with the intent to defraud that person, or any one else,

in order to receive any benefit, a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)

COUNT II - Further, that between the 10th day of May, 2011 and the 6th of December, 2011, in the County of Johnson, State of Kansas, GUADALUPE OCHOA-LARA did then and there unlawfully, willfully and feloniously obtain, possess or use any personal identifying information, or document containing the same, to wit: resident alien card number, belonging to or issued to another person, to wit: Pierrie Lecuyer, with the intent to defraud that person, or any one else, in order to receive any benefit, a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)

COUNT III - Further, that on or about the 10th day of May, 2011, in the County of Johnson, State of Kansas, GUADALUPE OCHOA-LARA, did then and there unlawfully, feloniously, willfully, knowingly and with intent to defraud or induce official action, make, generate, distribute or draw or cause to be made, generated, distributed or drawn a written instrument, to-wit: I-9, with knowledge that such information falsely states some material matter, a severity level 8 non-person felony, in violation of K.S.A. 21-3711, K.S.A. 21-4704 and K.S.A. 21-4707. (making a false information)

/s/Vanessa M. Riebli

Vanessa M. Riebli #19285

Assistant District Attorney

P.O. Box 728

JA 195

Olathe, Kansas 66051-0728
(913) 715-3000

<p>SHERI GODINEZ Notary Public • State of Kansas My Appt. Expires September 23, 2015</p>
--

Subscribed and sworn to before me this 3rd day of
January, 2012.

/s/Sheri Godinez
Notary Public

WITNESSES:

Officer S. Edwards
Tiffany McFarland
DHS personnel
Pierre Lecuyer
DHS Agent Ben Gatrost
Social Security Administration personnel
Long Branch Steak House personnel
Tony Olsen

JA 196

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

Case No.: 12CR12

Court No.: 14

[Filed March 4, 2013]

STATE OF KANSAS,)
)
Plaintiff,)
)
v.)
)
GUADALUPE OCHOA-LARA,)
)
Defendant.)
)

MOTION TO DISMISS COUNTS I, II AND III
FOR LACK OF JURISDICTION

COMES NOW the Defendant, Guadalupe Ocho-Lara, by and through his attorney Mark A. Dupree, Sr., and moves this court for an order dismissing the above-referenced matter. In support thereof, the defendant submits the following:

FACTS

On Mr. Ocho-Lara was arrested on two counts of identity theft and one count of making a false information. Overland Park Police contacted Mr. Ocho-Lara former employer, Long Branch Steakhouse's

restaurant. Police claim Mr. Ocho-Lara filled out an I-9 and a W-4 form at the restaurant.

ARGUMENTS

Under 8 U.S.C. § 1324a(b)(1)(A), an individual must attest on a form under penalty of perjury that an applicant for employment is authorized to work in the United States. The potential employer or employing entity must examine and determine the sufficiency of documents evidencing both identity and employment authorization.

The form used for the purposes of section 1324a(b)(1)(A) is called an I-9 form. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208 (“The term ‘I-9 or similar form’ means the form used for purposes of section [1324a(b)(1)(A)].”) The Form I-9 specifically incorporates the language of section 1324a and its requirements for employee verification.

Under 8 U.S.C. § 1324a(b)(5), “a form designated or established. . . under this subsection and any information contained in or appended to such form, may not be used for purposes other than for enforcement” of limited federal statutes concerning identity theft, identity fraud, perjury and related crimes. An I-9 clearly falls under subsection (b)(5), as the title of the subsection is “Limitation on use of attestation form.” As was previously established, and I-9 is *the* attestation form used by employers to verify work authorization.

Therefore, based on the language of section 1324a, a state cannot use an I-9 for the purpose of convicting

an individual of identity theft, identity fraud, or making a false writing under a State statute. Additionally, any information contained in the I-9, including names and social security numbers, and any supporting documents cannot be used for State conviction purposes.

This contention is supported by the language in Justice Kennedy's majority opinion in the recent Supreme Court case concerning the Arizona SB 1070 immigration law. In the opinion, Justice Kennedy states that "Congress has made clear . . . that any information employees submit to indicate their work status 'may not be used' for purposes other than prosecution under specified federal criminal statutes for fraud, perjury and related conduct." *Arizona v. United States*, 132 S.Ct. 2492, citing 8 U.S.C. §§ 1324a(b)(5), (d)(2)(F)-(G)). The opinion acknowledges that Congress has struck a "careful balance . . . with respect to unauthorized employment of aliens." While the State statute itself is not preempted by the federal statute criminalizing identity theft, the use of an I-9 to convict an individual under the state statute is preempted. Congress has made clear the issues involving identity theft and fraud should be enforced through specific federal statutes, including under 8 U.S.C. § 1028 (the federal identity theft statute). Therefore, the use of an I-9 form to convict an individual under a state criminal statute is in conflict with the express will of Congress to regulate employment of unauthorized individuals, a field in which Congress has plenary powers. *See Arizona*, 132 S. Ct. at 2498 ("The Government of the United States

has broad, undoubted power over the subject of immigration and status of aliens.”).

Additionally, the State statute creates a “further intrusion upon the federal scheme” of regulating employment of unauthorized aliens and corresponding identity theft and fraud violations. *See Arizona*, 567 U.S. at 2503. There is a significant inconsistency between the Kansas statute and the federal statute criminalizing identity theft: The federal statute states it is a crime for an individual to “knowingly” and unlawfully possesses transfer or use another’s identity. *See* 8 U.S.C. § 1028. According to the Supreme Court’s 2009 decision in *Flores-Figueroa v. United States*, the “knowingly” requirement of the statute attaches to every element of the offense. *See* 556 U.S. 646 at 652. Therefore to be convicted under the federal statute, the individual must know that they are using the identity of another real person. *Id.* at 657.

This is not the case with the Kansas statute. The Kansas legislature removed the “knowingly” language from the statute in April 2010. *See* K.S.A. 21-4018 (2010) (“Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document . . . belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit.”). In fact, the Kansas legislature added a subsection to section 21-4018 specifically stating “[i]t is not a defense that the person did not know that such identifying information belongs to another person.” This wording appears to be a direct response to the decision in *Flores-Figueroa*. But, in so doing, the

Kansas legislature ignores the language in the federal statute. Additionally, the federal statute outlaws the possession of another person's identification documents "with the intent such document . . . be used to defraud the United States." 18 U.S.C. § 1028 (a)(4). The Kansas statute, however, outlaws only the possession of another's identification with the intent to defraud any person for any benefit. It does not explicitly require the identification information be used with the intent to defraud somebody. Arguably, a person who possessed another's identification information and intended to defraud another person without even using the identification information could be charged under the identity theft statute in Kansas. The wording of the Kansas statute is significantly broader than that of the federal statute and clearly conflicts with the express language adopted by Congress.

As stated above, a prosecutor cannot use an I-9, W-4 or other federal documents used by employees to indicate their work status for purposes of convicting an individual under a state statute, due to the language in 8 U.S.C. § 1324a, and in this case, also because of the conflicting language in the federal and state statutes. Additionally, prosecutors may be precluded in general from charging undocumented workers under state identity theft and identity fraud statutes. As Justice Kennedy wrote in the *Arizona* decision, the federal government "has broad, undoubted power over the subject of immigration and status of aliens." Congress expressly included the "knowingly" requirement in the federal identity theft/fraud statute, choosing to limit the individuals who may be found guilty to those with this specific intent. Furthermore, the legislative history

behind the Immigration Reform and Control Act of 1986 (“IRCA”) “underscores the fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in unauthorized employment.” *Arizona v. U.S.*, 567 at 2504.

Contrarily, the Kansas statute broadens the categories of potential offenders, and thus “interfere(s) with the careful balance struck by Congress with respect to unauthorized employment of aliens,” including any alleged identity theft and identity fraud committed by undocumented aliens in pursuit of employment. *Id.* at 2505. For these reasons, the federal statute therefore preempts the use of K.S.A. 21-6107 in this context because the Kansas statute directly conflicts with federal authority to police illegal immigration and unauthorized employment. As such, Defendant cannot be charged under K.S.A. 21-6107, and these courts should be dismissed.

WHEREFORE, Mr. Ocho-Lara respectfully requests that his Motion to Dismiss Counts I, II and III be granted.

/s/ Mark A. Dupree, Sr.
Mark Dupree, Sr., #23256
Dupree and Dupree LLC,
- Attorneys at Law
100 E. Park Ste. 8, Olathe, KS 66061
Website: www.DupreeandDupree.com
Email: mark.lawdupree@gmail.com
Cell: 913-732-3281
Office: 913-839-7654
Fax: 913-904-0836

JA 202

NOTICE OF HEARING

Take notice that the above Motion to Dismiss will be called on for hearing on the 18th day of March, 2013, at 10:30a.m. in Courtroom 14 of the Johnson County Courthouse.

/s/ Mark A. Dupree, Sr.

Mark A. Dupree, Sr.

* * *

JA 203

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL DEPARTMENT**

Case No. 12CR12

Court No. 14

[Filed March 15, 2013]

STATE OF KANSAS,)
Plaintiff,)
)
vs.)
)
GUADALUPE OCHOA-LARA,)
Defendant.)

**STATE’S RESPONSE TO DEFENDANT’S
MOTION TO DISMISS FOR LACK OF
SUBJECT MATTER JURISDICTION**

COMES NOW, the State of Kansas, by and through Vanessa M. Riebli, an Assistant District Attorney, and moves this Court to deny the defendant’s motion to dismiss. In support, the State asserts the following:

STATEMENT OF FACTS

During November and December of 2011, Overland Park Police Department officers and DHS/ICE agents were conducting gang member contacts within Overland Park, Kansas. Officers were attempting to contact Christian Ochoa, who is a documented gang member, at 9135 Robinson, Apartment 2G, Overland

Park, Johnson County, Kansas. At that location, officers learned that the apartment was leased to a Guadalupe Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara used a social security number issued to another individual to lease the apartment. Officers contacted Tiffany McFarland, who is lawfully issued the social security number used by Ochoa-Lara, and she advised she had no knowledge her number was being used. McFarland later reported that she contacted the IRS and was notified that income had been reported on her social security number since 2006 which was not earned by her.

Officers learned that Ochoa-Lara was employed at the Long Branch Steakhouse in Lenexa, Johnson County, Kansas. Officers contacted personnel for Long Branch Steakhouse and confirmed that Ochoa-Lara did work at the Lenexa location from approximately May of 2011 to December of 2011 and completed an employment application using the social security number issued to McFarland. Officers reviewed the Form W-4 completed by Ochoa-Lara on May 10, 2011 in Lenexa, Johnson County, Kansas and observed he used the social security number issued to McFarland.

The State acknowledges that based upon the recent United States Supreme Court decision in *Arizona v. United States*, 567 US __, 132 S.Ct. 2492 (2012), the Form I-9 and resident alien number should not be used as a basis for prosecution. Thus, the State will move to dismiss Counts 2 and 3 of the Complaint. However, the State does not agree with the defendant's argument that it is prohibited from prosecuting the crime of

identity theft for the defendant's use of Ms. McFarland's social security number.

ARGUMENTS AND AUTHORITIES

I. The State of Kansas may prosecute crimes of identity theft under the principal of concurrent jurisdiction.

Pursuant to *California v. Zook*, 336 U.S. 725, 731 (1949), an act perpetrated by an individual may be both a federal and state crime. In such situations, the States have concurrent jurisdiction to prosecute these crimes. *Id.* Indeed, a presumption exists that Congress did not intend to preempt state law criminalizing a specific act, unless Congress expressly states otherwise. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The fact that immigrants are occasionally prosecuted for identity theft does not automatically implicate preemption. “[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . [E]ven if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.” *DeCanas v. Bica*, 424 U.S. 351, 355-56 (1976).

The Kansa identity theft statute, K.S.A. 21-6107, does not mention illegal immigrants, unauthorized aliens, or any other similar term. As a result, Kansas' identity theft statutes would likely be considered a “local regulation” that has “some purely speculative and indirect impact on immigration.” Most

importantly, K.S.A. 21-6107 does not conflict with federal law as set forth below. Therefore, state courts do not lack subject matter jurisdiction over the prosecution of identity theft cases.

II. *Arizona v. United States*, 132 S. Ct. 2492 (2012), does not preempt Kansas from prosecuting individuals for identity theft.

In *Arizona v. United States*, 132 S.Ct. 2492 (2012), the Supreme Court of the United States held that federal law preempted three of the four provisions in Arizona’s controversial immigration law, S.B. 1070. For the case before this Court, the Supreme Court’s discussion of §3 of S.B. 1070 is relevant.

Section 3 of S.B. 1070 created a new state misdemeanor that prohibited the “willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code sections 1304(e) or 1306(a).” In effect, Arizona created a State criminal statute with the sole purpose of punishing individuals that violated the specified federal statutes.

In holding § 3 unconstitutional, the Court relied on Congress’ power to preempt State law. *Id.* at 2500-02. Specifically, the Court relied on the principle of field preemption, stating: “[w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible.” *Id.* Therefore, even though §3 merely codifies federal law within the Arizona criminal code, Arizona is prohibited from doing so because Congress occupies the entire field of alien registration. *Id.* at 2502.

Additionally, the Court stated that allowing Arizona to impose its own penalties for violations of 8 U.S.C. § 1304(e) or 1306(a) would conflict with the framework created by Congress. The Court was concerned that Arizona “would have the power to bring criminal charges against individuals for violating [§1304(e) or 1306(a)] even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies.” *Id.* at 2503.

The Court also addressed the fact that § 3 and the federal statutes are inconsistent when it comes to penalties. *Id.* Under the federal statutes, the misdemeanor is punishable by a “fine, imprisonment, or a term of probation.” *Id.* However, § 3 does not allow for probation or the possibility of a pardon. According to the Court, the inconsistent penalties create a conflict with the framework created by Congress. *Id.*; See *Wisconsin Dept., supra*, at 286 (“[C]onflict is imminent whenever two separate remedies are brought to bear on the same activity.” (internal quotation marks omitted)).

Based on the above reasoning, the core of which relied on the fact that § 3 specifically invokes 8 U.S.C. § 1304(e) and 1306(a), the Court found that “Congress intended to preclude States from ‘complement[ing] the federal law, or enforce[ing] additional or auxiliary regulations’” when it comes to the field of alien registration. *Id.* at 2503. The Court did, however, take special care to point out that the issue of immigration is unique from many other areas of law, in that issues stemming from immigration policy “can affect trade, investment, tourism, and diplomatic relations for the

entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.” *Id.* at 2499.

The defendant’s Motion fails to properly apply *Arizona v. United States* to the case before this Court by failing to acknowledge that a central factor in the Court’s reasoning is absent from the facts at hand. Unlike § 3 of the Arizona law, K.S.A. 21-6107 does not create punishments for violations of federal law.

The most important distinction when looking at *Arizona v. United States* and the facts before this Court is the fact that Kansas is not attempting to punish individuals for violations of federal law. K.S.A. 21-6107 is the State criminal statute concerning identity theft. The statute neither invokes federal law nor provides a punishment for violations of federal law. The Kansas criminal statute in question merely provides a punishment for individuals who commit the crime of identity theft. Furthermore, several courts have found that the federal law does not necessarily preempt States from enforcing their criminal statutes. See *State v. Wallace*, 160 Ohio App. 3d 528 (Ohio Ct. App. 2005) (finding that the prosecution of the defendant under an Ohio theft statute was not preempted by the Social Security Act); *Faith v. Caldwell*, 944 S. W.2d 607 (Tenn. Ct. App. 1996) (finding that the Social Security Act provides that “a court of competent jurisdiction” may determine that a representative payee has misused an individual’s benefit and that the federal statutes and regulations contain no language indicating an intent to preempt state court jurisdiction); *Commonwealth v. Morris*, 394 Pa. Super.

185, 575 A.2d 582 (Pa. Super. Ct. 1990) aff'd, 529 Pa. 61, 601 A.2d 806 (Pa. 1992) (finding that “under our federalism, the states have the principal responsibility for prosecuting crimes. Therefore, the penalty provision of the Social Security Act at issue here is subject to a presumption that Congress did not intend by its passage to preempt a state’s enforcement of its criminal law”). By applying the above case law to the facts before this Court, it follows and the State would argue that the Immigration Reform and Control Act does not preempt Kansas from prosecuting individuals under its State identity theft statute.

As to the issue of inconsistent penalties addressed by the Court in *Arizona v. United States*, the facts before this Court raise no such concerns. K.S.A. 21-6107 punishes individuals for violating Kansas’s identity theft statute. The statute does not punish individuals for violating federal law. The case before this Court is entirely different from the situation that confronted the Court in *Arizona v. United States*. In that case, Arizona attempted to create a State misdemeanor punishment for violations of 8 U.S.C. §1304(e) and 1306(a). *Arizona*, at 2503. Since K.S.A. 21-6107 represents a State criminal law violation, the possibility of a conflict like the one present in *Arizona v. United States* does not exist.

Wherefore, the State respectfully moves the Court to deny defendant’s motion.

JA 210

Respectfully Submitted,

/s/Vanessa M. Riebli

Vanessa M. Riebli # 19285
Assistant District Attorney
Johnson County Courthouse
P.O. Box 728
Olathe, KS 66051
(913) 715-3032

* * *

JA 211

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS**

Case No.12CR12

[Filed April 4, 2013]

STATE OF KANSAS,)
Plaintiff,)
)
VS.)
)
GUADALUPE OCHOA-LARA,)
Defendant.)
)

AMENDED COMPLAINT

STATE OF KANSAS, JOHNSON COUNTY, ss:

I, Vanessa M. Riebli, Assistant District Attorney of said County, upon information and belief, state under oath to the court that

GUADALUPE OCHOA-LARA

did the following:

COUNT I – That between the 10th day of May, 2011 and the 30th of June, 2011, in the County of Johnson, State of Kansas, GUADALUPE OCHOA-LARA did then and there unlawfully, willfully and feloniously possess or use any personal identifying information, or document containing the same, to wit: social security number, belonging to or issued to another person, to wit: Tiffany McFarland, with the intent to defraud that person, or any one else, in order to receive any benefit,

a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)

COUNT II – DISMISSED

COUNT III – DISMISSED

COUNT IV – Further, that between the 1st day of July, 2011 and the 6th of December, 2011, in the County of Johnson, State of Kansas, GUADALUPE OCHOA-LARA did then and there unlawfully, willfully and feloniously possess or use any personal identifying information, or document containing the same, to wit: social security number, belonging to or issued to another person, to wit: Tiffany McFarland, with the intent to defraud that person, or any one else, in order to receive any benefit, a severity level 8, nonperson felony, in violation of K.S.A. 21-6107, K.S.A. 21-6804 and K.S.A. 21-6807. (identity theft)

I declare under penalty of perjury that the foregoing is true and correct.

Executed by and on this date.

/s/Vanessa M. Riebli
Vanessa M. Riebli #19285
Assistant District Attorney
P.O. Box 728
Olathe, Kansas 66051-0728
(913) 715-3000

JA 213

**IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CRIMINAL COURT DEPARTMENT**

Case No. 12CR12

Court No. 14

[Dated March 11, 2014]

STATE OF KANSAS,)
)
Plaintiff,)
)
vs.)
)
GUADALUPE OCHOA-LARA,)
)
Defendant.)
)

TRANSCRIPT OF BENCH TRIAL

BE IT REMEMBERED that on this 11th day of March, 2014, the above-entitled cause comes on for a bench trial before the HONORABLE KEVIN P. MORIARTY, Judge of Division No. 14 of the Tenth Judicial District of the State of Kansas, at Olathe, Kansas.

APPEARANCES:

For the State of Kansas:

**MR. JACOB GONTESKY
JOHNSON COUNTY DISTRICT ATTORNEY'S
OFFICE**

100 North Kansas Avenue
Olathe, KS 66061

For the Defendant:

MR. MARK DUPREE, SR.
DUPREE AND DUPREE, LLC
100 East Park Street, Suite 8
Olathe, KS 66061

* * *

[p.5]

MR DUPREE: Thank you, Judge.

THE COURT: The Court has reviewed these facts.

It's clear from these facts that I do not need to re-state that the Defendant is guilty of Counts 1 and 4.

These are felonies.

So I have to order a pre-sentence investigation and an LSIR.

Is there an immigration hold at the present time?

MR. DUPREE: There, is Judge.

He has -- Well, there's an immigration hold.

But he has an attorney for that.

He bonded out.

There's a whole immigration case going on simultaneously.

So --

THE COURT: Okay.

MR. DUPREE: In fact, quite honestly, if the Court recalls, the reason why we're still here is trying to work both cases at the same time.

So however much time the Court wants to give, we are not --

THE COURT: Yeah.

STATE'S EXHIBIT 1
IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS

[Filed March 11, 2014]

STIPULATED FACTS

RE: *STATE OF KANSAS V. GUADALUPE OCHOA-LARA*, CASE NUMBER 12CR12

1. During November and December of 2011, Overland Park Police Department officers and DHS/ICE agents were attempting to contact Christian Ochoa-Lara at 9135 Robinson, Apartment 2G, Overland Park, Johnson County, Kansas. At that location, officers learned that the apartment was leased to Guadalupe Ochoa-Lara. Officers obtained a copy of the lease and determined Guadalupe Ochoa-Lara, the defendant, used a social security number issued to another individual to lease the apartment. Officers contacted Tiffany McFarland, who is lawfully issued the social security number used by Guadalupe Ochoa-Lara to rent the apartment, and she advised she had no knowledge her number was being used and did not consent to it being used. McFarland later reported that she contacted the IRS and was notified that income had been reported under her social security number which she reported was not earned by her.

2. Officers determined that Guadalupe Ochoa-Lara was employed at the Long Branch Steakhouse in Lenexa, Johnson County, Kansas. Officers contacted personnel for Long Branch Steakhouse and confirmed that Guadalupe Ochoa-Lara did work at the Lenexa

location from approximately May of 2011 to December of 2011. Officers reviewed the Form W-4 completed by Ochoa-Lara on May 10, 2011 in Lenexa, Johnson County, Kansas and observed he used the social security number issued to McFarland to complete the form. Personnel for Long Branch Steakhouse confirmed a social security number is required in order for individuals to be hired by their company and also for both federal and state tax withholding purposes.

3. Investigators reported Guadalupe Ochoa-Lara does not have a social security number lawfully issued to him and he used McFarland's number in order to gain employment.

DATE: 3/11/14

/s/Vanessa M. Riebli
Vanessa M. Riebli #19285
Assistant District Attorney
Johnson County District Attorney's Office

/s/Mark Dupree
Mark Dupree #23256
Attorney for the Defendant

/s/Guadalupe Ochoa Lara
Guadalupe Ochoa-Lara, Defendant

JA 218

**2011 Kansas Sentencing Guidelines Journal
Entry of Judgment**

[Fold-Out Exhibit, see next 5 pages]

For Court Use Only (Seal)

2011 KANSAS SENTENCING GUIDELINES JOURNAL ENTRY OF JUDGMENT

Please use Journal Entry based on OFFENSE DATE

SECTION I. CASE IDENTIFYING INFORMATION		1. Transaction No.	
2. STATE v. <u>Guadalupe Ochoa-Lara</u> <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female		3. Court O.R.I. Number KS0406015J	4. K.B.I. Number <u>KS3 3308820</u>
5. County JOHNSON	6. Court Case Number <u>12CR12</u>	7. Sentencing Judge <u>Hon. Kevin Moriarty</u>	8. Sentencing Date <u>5/8/14</u>
9. Defense Counsel: <input checked="" type="checkbox"/> Appointed <input type="checkbox"/> Retained <input type="checkbox"/> Self <input type="checkbox"/> Waived Orally <input type="checkbox"/> Waived in Writing Counsel Name (please print) <u>Mark Dupree</u>			
10. Type of Proceeding (Trial) <input checked="" type="checkbox"/> Bench Trial (includes a plea on stipulated facts) <input type="checkbox"/> Jury Trial <input type="checkbox"/> Guilty Plea <input type="checkbox"/> Nolo contendere Plea			
11. Date of Conviction: <u>3/11/14</u>			
12. Pre-Trial Status of Offender <input type="checkbox"/> In Custody <input checked="" type="checkbox"/> Released on Bond <input type="checkbox"/> Other Release			
SECTION II. CRIMINAL HISTORY CLASSIFICATION			
1. Offender's Overall Criminal History Classification as Found by the Court: <input type="checkbox"/> A <input type="checkbox"/> B <input type="checkbox"/> C <input type="checkbox"/> D <input type="checkbox"/> E <input type="checkbox"/> F <input type="checkbox"/> G <input checked="" type="checkbox"/> H			
2. Objection to Criminal History? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes, By: <input type="checkbox"/> Defendant or <input type="checkbox"/> State Court's Ruling on Objection: <input type="checkbox"/> Criminal history was amended <input type="checkbox"/> Criminal history was not amended			
SECTION III. CURRENT CONVICTION INFORMATION			
1. Name of PRIMARY Offense of Conviction: <u>Identity Theft</u> Count No.: <u>I</u> Date of Offense: <u>5/10/11 - 6/30/11</u> <input type="checkbox"/> Designated by court as domestic violence case based upon special finding (see #14 this section)			
2. K.S.A. Title, Section, Subsection(s): <u>21-4018</u> <input type="checkbox"/> Attempt (formerly K.S.A. 21-3301) <input type="checkbox"/> Conspiracy (formerly K.S.A. 21-3302) <input type="checkbox"/> Solicitation (formerly K.S.A. 21-3303)			
3. Grade of Offense: (Check one in each row.) <input checked="" type="checkbox"/> Felony, Severity Level <u>8</u> <input type="checkbox"/> Misdemeanor, Class _____ <input type="checkbox"/> Person <input checked="" type="checkbox"/> Nonperson			
4. Offense Category: <input checked="" type="checkbox"/> Nondrug <input type="checkbox"/> Drug <input type="checkbox"/> Off-grid <input type="checkbox"/> Nongrid			
5. Presumptive Sentencing Range: (Enter terms from appropriate grid.) Aggravated <u>9</u> Standard <u>8</u> Mitigated <u>7</u> Check applicable box(es) <input type="checkbox"/> Presumptive Prison <input checked="" type="checkbox"/> Presumptive Probation <input type="checkbox"/> Border Box <input type="checkbox"/> Drug Treatment for up to 18 months. (formerly K.S.A. 21-4729) <input type="checkbox"/> Special Rule Applies (Complete Special Rules Supplemental Page and Attach)			
THIS FORM MUST BE ACCOMPANIED BY A COPY OF THE PRESENTENCE INVESTIGATION FORM PURSUANT TO K.S.A. 22-3439 AND A DOCUMENT CONTAINING INFORMATION REQUIRED BY K.S.A. 22-3426. PLEASE USE AN ADDITIONAL OFFENSES PAGE FOR ADDITIONAL OFFENSES OF CONVICTION.			

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KANSAS SENTENCING GUIDELINES JOURNAL ENTRY OF JUDGMENT

(PAGE 2)

6. SPECIAL RULE APPLICABLE: ☐ Yes ☒ No If Yes, enter the number(s) and brief description(s) corresponding to the applicable special rule. (Complete Special Rules Supplemental Page and Attach): _____

7. SPECIAL FINDING that the crime was SEXUALLY MOTIVATED pursuant to the KS Offender Registration Act

7a. Did the court make a special finding that the crime was sexually motivated?

☐ Yes ☒ No

7b. IF YES to 7a, did the court find that the act involved non-forcible sexual conduct, the victim was at least 14 and the offender was no more than 4 years older than the victim? (2011 H Sub for SB 37)

☐ Yes ☒ No

7c. IF YES to 7a and NO to 7b, PLEASE COMPLETE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

8. Was offender determined by the Court to be an AGGRAVATED HABITUAL SEX OFFENDER? (formerly K.S.A. 21-4642)
IF YES, PLEASE COMPLETE SEX OFFENSE SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

☐ Yes ☒ No

9. Is offender being sentenced pursuant to section 267 of chapter 136 of the 2010 Session Laws of Kansas (formerly K.S.A. 21-4643) where offender is 18 years of age or older and the victim is less than 14 years of age?
IF YES, PLEASE COMPLETE SEX OFFENSE SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

☐ Yes ☒ No

10. Downward departure [formerly K.S.A. 21-4719(a)] for a crime of extreme sexual violence (formerly defined in K.S.A. 21-4716)?
IF YES, PLEASE COMPLETE SEX OFFENSE SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

☐ Yes ☒ No

11. Did offender, as determined by the court, commit the current crime with a deadly weapon?

☐ Yes ☒ No

IF YES, PLEASE COMPLETE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

12. Was offender convicted of a violation of statutes formerly codified at K.S.A. 21-36a03, Manufacture or attempted manufacture or K.S.A. 21-36a09, or 21-36a10, Possession of precursors with intent to manufacture?

☐ Yes ☒ No

IF YES, PLEASE COMPLETE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

(personal use exemption eliminated effective July 1, 2011)

13. Was offender convicted of a violation of the statute formerly codified at K.S.A. 21-36a05(a)(1), Cultivation, Distribution, Possession with intent to distribute opiates, opium or narcotic drugs or any stimulant in K.S.A. 65-4107(d)(1), (d)(3), or (f)(1)?

☐ Yes ☒ No

IF YES, PLEASE COMPLETE OFFENDER REGISTRATION SUPPLEMENT AND ATTACH IT TO JOURNAL ENTRY.

14. Determination of domestic violence case designation

14a. Did offender, as determined by the trier of fact, commit a domestic violence offense?

☐ Yes ☒ No

14b. If YES to 14a above, did the court find that offender had no prior domestic violence conviction or diversion, AND that offender did not use the present domestic violence offense to coerce, control or punish the victim?

☐ Yes ☒ No

14c. If YES to 14a and NO to 14b, PLEASE CHECK THE DOMESTIC VIOLENCE CASE DESIGNATION BOX.

☐ DV Case

SENTENCE IMPOSED:

1. Guideline Range Imposed: ☐ Aggravated ☐ Standard ☒ Mitigated ☐ Departure - COMPLETE SECTION IV

2. Prison Term: KDOC 2 months (including enhancement sentence)

(Enter months above then check one of the following) ☐ Prison sentence imposed or ☒ Underlying with probation granted

** or Underlying with KDOC Drug Trtmt Prog. (min. 120 days)

☐ Enhancement Sentence- Drug with Firearm: ☐ 6 months ☐ 18 months [formerly K.S.A. 21-4705(g)]

Ballistic Resistant Material: ☐ 30 months [formerly K.S.A. 21-4704(s)]

☐ Off-grid Crime:

☐ Life - Minimum 15 yrs. ☐ Life - Minimum 20 yrs. ☐ Hard 25 ☐ Hard 40 ☐ Hard 50

☐ Mandatory minimum years = 50 years (600 months) or _____ months pursuant to guidelines, given offender's criminal history, whichever is greater

☐ Life Imprisonment without Parole ☐ Death Penalty

3. Postrelease Supervision Term: ☒ 12 months ☐ 24 months ☐ 36 months ☐ 60 months (sex offense) - COMPLETE SECTION IV

☐ No Postrelease K.S.A. 22-3716(e) ☐ Lifetime Postrelease ☐ Parole ☐ Lifetime Parole

4. Nongrid Term: (Jail) (For misdemeanor or nongrid felony.) _____ ☐ months ☐ days

(Enter county jail term above then check one of the following) ☐ Jail sentence imposed or ☐ Underlying with probation granted.

☐ 3rd D.U.I. (w/12 mo. supervision) ☐ 4th & Subs. D.U.I. (w/12 mo. supervision) ☐ 3rd & Subs. Domestic Battery w/in 5 yrs. ☐ Animal Cruelty

☐ Probation granted after serving term of _____ ☐ months ☐ days

☐ Assignment to a work release program (formerly K.S.A. 21-4603d (a)(11))

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**This option is included in statute, but is unavailable.

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5. Probation Term (If Granted): ☐ 12 months ☒ 18 months ☐ 24 months ☐ 36 months ☐ 60 months
☐ Drug Treatment for up to 18 months. Formerly K.S.A. 21-4729 ☐ Other: _____
☐ Extended Period (formerly K.S.A. 21-4611(c)(5)) for: _____ months
Probation Supervision to: ☒ Court Services ☐ Community Corrections ☐ Unsupervised
County Jail Time Imposed AS A CONDITION OF PROBATION: _____ days
** Assignment to Correctional Conservation Camp

Comments: _____

SECTION IV. DEPARTURE INFORMATION

1. Type of Departure: (Check all that apply.)
☐ Downward Durational ☐ Upward Durational ☐ Downward Dispositional ☐ Upward Dispositional
☐ Postrelease Supervision (up to 60 months for sexually motivated offense) – K.S.A. 22-3717(d)(1)(D)(i)
[“Sexually motivated” defined in K.S.A. 22-3717(d)(2).]
2. Reasons Cited as Basis for Departure:

SECTION V. OTHER CONDITIONS

1. General/Special Conditions of Probation (COMPLETE AND ATTACH ORDER OF PROBATION TO THIS JOURNAL ENTRY if needed)

2. Costs Ordered:

Total Restitution (Please complete #3 below.)	\$ <u>8</u>	Correctional Supervision Fee (Felony \$120; Misd. \$60)	\$
Court Costs (including surcharge)	\$	BIDS Attorney Fee	\$
Total Fines (*See Below)	\$	BIDS Application Fee	\$
DNA Database Fee (K.S.A. 21-2511 & 75-724.)	\$	Court-Appointed Attorney Fee	\$
Extradition Costs	\$	Community Corrections Fee (offenses after 1/4/07)	\$
Domestic Violence Special Program Fee	\$	Booking/Fingerprint Fee	\$ <u>45.-</u>
Apprehension Fee (Escape/Agg. Escape)	\$	Reward Reimbursement	\$
Alcohol and/or Drug Evaluation Fee	\$	Children's Advocacy Center Assessment Fee	\$
Witness Fee	\$	Medical Costs/Expenses Reimbursement	\$
KBI Lab Fee	\$	SB 123 Offender Reimbursement (at least \$300)	\$
Other Lab Fee	\$	Other: _____	\$
Domestic Violence Assessment/Recommendations	\$	TOTAL COSTS	\$

* ☐ Includes fine for DUI offense committed on or after 7/1/11. Clerk will send \$250 to the state treasurer.

3. Restitution to be paid as follows:

Amount	Name and Address
\$	
\$	
\$	
\$	
\$	

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KANSAS SENTENCING GUIDELINES JOURNAL ENTRY OF JUDGMENT

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SECTION VI: RECAP OF SENTENCE

1. Sentence Imposed:

Total Prison Term (if sentence imposed is to prison): _____
Total County Jail Term: _____ ☐ Consecutive to Prison Term
Total Underlying Jail Term (if sentence imposed is probation): 7 mo
Total Underlying Prison Term (if sentence imposed is probation): 7 mo

☐ For each count, the Court pronounced the complete sentence, including the maximum potential good time percentage. Formerly K.S.A. 21-4704(e)(2) and 21-4705(c)(2).

2. Postrelease Supervision Term: ☒ 12 months ☐ 24 months ☐ 36 months ☐ 60 months
☐ No Postrelease K.S.A. 22-3716(e) ☐ Lifetime Postrelease ☐ Parole ☐ Lifetime Parole

3. Probation Term Imposed (select one): ☐ 12 months ☒ 18 months ☐ 24 months ☐ 36 months ☐ 60 months
☐ Drug Treatment for up to 18 months. Formerly K.S.A. 21-4729.
☐ Extended Period (formerly K.S.A. 21-4611(c)(5)) for: _____ months
☐ Other: _____

**Correctional Conservation Camp

4. Jail Credit: Enter dates (m/d/yy only) and days of potential jail credit for this case and check "A" if the days are actually awarded, or "N" if the days are not awarded by the court. (attach additional pages if necessary)

*Location-	From:	To:	=	Days	<input type="checkbox"/> A <input type="checkbox"/> N	*Location-	From:	To:	=	Days	<input type="checkbox"/> A <input type="checkbox"/> N
	4/9/12	4/11/12	=	3	<input checked="" type="checkbox"/> A <input type="checkbox"/> N				=		<input type="checkbox"/> A <input type="checkbox"/> N
			=		<input type="checkbox"/> A <input type="checkbox"/> N				=		<input type="checkbox"/> A <input type="checkbox"/> N
			=		<input type="checkbox"/> A <input type="checkbox"/> N				=		<input type="checkbox"/> A <input type="checkbox"/> N
			=		<input type="checkbox"/> A <input type="checkbox"/> N				=		<input type="checkbox"/> A <input type="checkbox"/> N

*Enter appropriate letters to indicate the type of location where credit may have been earned:

J=Jail TL=Treatment (Locked) TU=Treatment (Unlocked) RL=Residential (Locked) RU=Residential (Unlocked)

Sentencing Date: _____ - Total Number of Days of Jail Credit Actually Awarded _____ = Sentence Begins Date: _____

5. Prior Case(s) to Which the Current Sentence is to Run Concurrent or Consecutive:

Case No.	County	Sentence	Concurrent <input type="checkbox"/>	or Consecutive <input type="checkbox"/>
<u>n/a</u>				

Others: _____

6. Miscellaneous Provisions:

- ☒ Defendant informed of right to appeal within 14 days of this date. K.S.A. 22-3608(c). (Required by case law)
☒ Defendant informed of potential rights of expungement (formerly K.S.A. 21-4619(g)).
☐ Defendant informed of duty to register as an offender pursuant to the Kansas Offender Registration Act, 2011 H Sub for SB 37 (Please complete OFFENDER REGISTRATION SUPPLEMENT and attach it to the Journal Entry.) Formerly K.S.A. 22-4905(b)(2)

OFFENDER REGISTRATION SUPPLEMENT and attach it to the Journal Entry.) Formerly K.S.A. 22-4905(b)(2)

- ☐ Defendant must submit specimens of blood or an oral or other biological sample, if not previously submitted, pursuant to K.S.A. 21-2511(c).
☐ Defendant must obtain psychological evaluation and shall complete the recommended treatment pursuant to K.S.A. 22-3717(d)(1)(D)(iv).
☐ Defendant has been processed, fingerprinted and palmprinted. K.S.A. 21-2501(b)
☐ Court remands Defendant to custody of Sheriff to begin serving sentence.
☐ Court remands Defendant to custody of Sheriff to await transportation to the custody of the Secretary of Corrections.
☐ Defendant to report to County Jail on the _____ day of _____, 20__ at _____ O'clock ☐ a.m. ☐ p.m. to start serving sentence.
☐ House arrest is authorized for remaining _____ days after Defendant completes mandatory _____ hours in the County Jail.
☐ Work release recommended (if accepted, defendant is to abide by recommendations of the program).
☐ Defendant's financial resources and burden imposed by BIDS application and attorney fees considered by the court pursuant to K.S.A. 22-4513 and *State v. Robinson*, 281 Kan. 538, 132 P.3d 934 (2006).
☐ Defendant to undergo domestic violence assessment pursuant to Section 7 of Chapter 101 of the 2010 Session Laws of Kansas.
☐ Other Comments: _____

*This option is included in statute, but is unavailable.

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SECTION VI. RECAP OF SENTENCE CONTINUED

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7. Border Box Findings (formerly K.S.A. 21-4704(f)): (Check if appropriate)

- ☐ An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and
☐ the recommended treatment program is available and the offender can be admitted to the program within a reasonable period of time; or,
☐ the non-prison sanction will serve community safety interests by promoting offender reformation

8. If made, Motion for New Trial: ☐ Granted ☐ Denied

9. If made, Motion for Judgment of Acquittal: ☐ Granted ☐ Denied

10. If made, Motion for Arrest of Judgment: ☐ Granted ☐ Denied

11. Additional Comments:

- defendant used the social security number validly issued to Tiffany McFarland for employment purposes without permission + knowledge of Tiffany McFarland

SECTION VII. SIGNATURES

1. Judge's Signature:

Date: 5/8/14

Signed: [Signature]

Printed: Hon - Kevin Murphy

2. Prosecuting Attorney:

Signed: [Signature]

Printed: Vanessa M. Diebel

Supreme Court Number: 19285

Date: 5/8/14

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3. Defense Attorney:

Signed: [Signature]

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Supreme Court Number: 23256

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