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SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Ave. Denver, CO 80203	
Certiorari to the Colorado Court of appeals Case Number No. 10CA587	
THE PEOPLE OF THE STATE OF COLORADO Petitioner v. EDUARDO DEJESUS PEREZ Respondent	♦ COURT USE ONLY ♦
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules, with the exception of the word count. Specifically, the undersigned certifies that:

The brief does **not** comply with C.A.R. 28(g). This brief contains 12,829 words. A motion requesting that this Court accept the brief in excess of the maximum word count has been filed along with this brief.

The brief complies with C.A.R. 28(k).

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review.

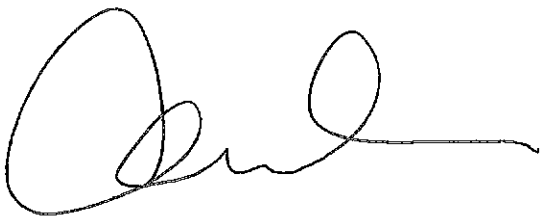

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

ISSUE ANNOUNCED BY THE COURT

Whether the court of appeals erred in concluding that Colorado's identity theft statute, section 18-5-902, C.R.S. (2012), requires proof that the offender knew the information he exploited belonged to a real person, and if so, whether no rational juror could reasonably infer that an offender knew the social security number he used over a five-year period belonged to a real person.

STATEMENT OF THE CASE

The Seventeenth Judicial District Attorney charged Eduardo Dejesus Perez by Complaint and Information filed in the Adams County District Court on August 10, 2009, with, *inter alia*, identity theft (class 4 felony) in violation of C.R.S. § 18-5-902(1)(a),(f)(2009) (v1, p8).

The identity theft charge alleged in pertinent part that:

> Between and including September 1, 2003 and August 4, 2009, Eduardo Dejesus Perez unlawfully, feloniously, and knowingly used . . . the personal identifying information, . . . of [SG] without permission or lawful authority to obtain cash, . . . or any other thing of value.

Mr. Perez pled not guilty on October 29, 2009. (v1, p72) Mr. Perez proceeded to jury trial on February 1-2, 2010. Following deliberations, the jury returned guilty verdict to the foregoing charge. (v1,p64,65; v4, p200-201)

On February 5, 2010, the trial court imposed a two-year probationary term upon Mr. Perez. (v1,p66; CD,2/5/10,p8-9) Based on trial testimony, the court found Mr. Perez to have been an "exemplary employee." (2/5/10,p8)

In a published decision, the court of appeals vacated this conviction holding that the State had presented insufficient evidence to sustain the charge. *People v. Perez*, ___ P.3d ___ 2013 WL 6795153 (Colo. App. 2013).

STATEMENT OF THE FACTS

The prosecution called SG, the alleged victim in Count 1 of the Information, as its first witness. The prosecution did not ask about and SG did not volunteer her Social Security number. In addition, the prosecution offered no documentation regarding SG's Social Security number.

SG stated that she received a call from a social caseworker indicating that she, SG, had received income from employment. If this were so, this would create a problem for her and her eligibility for the government benefits she was then receiving. CD,2/1/10,p204-205. While never stating what her Social Security number was, SG said that she was concerned someone was using it. *Id.* She also said that she had never given Mr. Perez permission to use it. *Id.* SG stated said she had never worked at restaurants like I-Hop, Red Lobster, Old Chicago or Famous Dave's. *Id.*,p205-206. She said she went down to the police station and filled out a form indicating that someone was using her Social Security number. *Id.* at p206-207.

The prosecution called Detective Svela. Svela testified he was assigned the case by a supervisor almost two weeks after SG filled out the complaint. *Id.*,p216-217.

Svela said that the allegation was "relatively simple . . . regarding fraudulent use of her Social Security number." *Id.*,p217. Svela never told the jury what he believed to be SG's Social Security number.

Svela said he contacted Jim White with the Colorado Department of Labor and Employment to research data on "that Social Security number." *Id.* Again, Svela never said what that number was. Svela said that White reported back to him "a listing of the employers who had reported income under [SG]'s Social Security number." *Id.*,p219. This testimony, per court order, was not offered for its truth. *Id.*,p218.

White testified for the prosecution last. White said he conducted a wage inquiry for a particular Social Security number, XXX-XX-XXXX[1]. (v4,p44; People's Exhibit 6, admitted v4, p45) White investigated fraud with respect to persons claiming unemployment benefits. Employers were required to submit a quarterly report on the earnings that they had paid out under every Social Security number and then White's fraud unit would "cross match this against the benefits that they have been paid." (v4, p42) The "they" in his analysis, were the persons claiming unemployment benefits and the inquiry included determining whether they were claiming too many benefits or were in conformity with the law. *Id.*

[1] In an abundance of caution given that the record on appeal is not sealed and the number at issue may actually belong to a person, counsel has not set forth the actual number.

White did not offer any testimony regarding whether Mr. Perez had any knowledge on the subject of unemployment benefits vis-a-vis Social Security numbers, withholdings, or taxes and the prosecution did not ask him about these areas either. White did not say who the Social Security number at issue purportedly belonged to and People's Exhibit 6 likewise did not provide who this number purportedly belonged to. In addition, the prosecution did not ask SG to review or comment on People's Exhibit 6 and the number appearing on it.

White recounted, consistent with People's Exhibit 6, the employers' quarterly earnings for the number on the exhibit. *Id.*, p45-47. White testified in reference to the number and the several employers set forth therein dating back to 2003. *Id.*,p51-56. For example, the prosecution asked White, "[s]how the jurors the time period that someone was using this Social Security number to work at Red Robin? [White]: We are looking at the first and second quarter of 2005." *Id.*,p56.

Svela testified that when he received this report, People's Exhibit 6, from White, he contacted SG "to cross reference any employment that was for her or stuff she was reporting that was not for her." *Id*,p65. Svela contacted only Famous Dave's BBQ, and did not contact any of the other employers reflected on People's Exhibit 6. *Id.*,p66-67. As indicated, SG said she never worked at such places.

Crystal Ferguson, a manager at Famous Dave's, testified that Mr. Perez, indeed, worked at the restaurant. *Id.*,p4-5. Famous Dave's is located in Thornton, Colorado. *Id.* Identifying information and forms indicating Mr. Perez's employment with Famous Dave's were admitted through Ferguson. *Id.*,p16 (People's Exhibit's 2-5). This included, for example, W-4 and I-9 forms, that indicated in writing a Social Security number of XXX-XX-XXXX. *Id.* Ferguson was not the person who took Mr. Perez's application, reviewed the foregoing forms, and took two forms of identification from him. *Id.*,p14. Ferguson never saw the original Social Security card, the front of which only is depicted in People's Exhibit 5. *Id.*,p15. In addition, she was not present and did not transpose the numbers on the Social Security card to the forms. *Id.*,p15,p21.

Ferguson also testified that when a prospective employee submits an application and information on it, Famous Dave's does not check the name of the person or gender of that person against the Social Security number supplied. *Id.*,p25-26. Ferguson was not aware of any protocol to check for such information. *Id.*

The State asserts that when Svela contacted Ferguson, she "immediately recognized S.G.'s Social Security number as the one Defendant provided when he was hired." Answer Brief, p4. Ferguson did not say any such thing. Svela came to the restaurant after speaking with Ferguson several times by phone. Svela told Ferguson

"there was some kind of issue with Eddie's Social Security number." (v4,p9) Ferguson then retrieved Mr. Perez's file and gave it to Svela. *Id.* As indicated, Ferguson had never before looked at any of the documents in the file. In addition, Ferguson could not have "immediately recognized" it as the one Mr. Perez had given "when he was hired" because she was not the manager who took Mr. Perez's application and reviewed the information with him. *Id.*,p14. She was not the manager who had transposed the numbers from the Social Security card to the application. *Id.*,p15.

The State asserts that Mr. Perez's employment application "confirmed that he was the one who had used SG's Social Security number to work for at least four local restaurants." Answer Brief, p4. The record does not support this assertion. The prosecution below failed to establish what SG's Social Security number was. No witness testified to the number assigned to SG, not even SG.

Mr. Perez did not use a false identity or pretend to be someone he was not; that is, Mr. Perez gave his correct name, date of birth, address, and phone number[2]. *See* (v4, p20-21, 22-23; People's Exhibits 1-4). Ferguson worked with Mr. Perez for over a year and said Mr. Perez was known as "Eddie." (v4, p20))

The prosecution did not object to the elemental jury instruction in this case requiring that Mr. Perez know he was using the identifying information of another. *See*

[2] The prosecution presented no evidence to the contrary.

(v4,p127,133-134) In closing argument the prosecutor asserted: "I have to prove that he [Mr. Perez] was using a Social Security number that didn't belong to him, that he knew it belonged to another person and that he did it to obtain cash or another thing of value. This is straightforward." (v4,p159).

SUMMARY OF THE ARGUMENT

I. The Court should dismiss the State's petition has having been improvidently granted since (1) the State conceded in the trial court or the court of appeals that the *mens rea* "knowingly" applied to the element "of another"; and (2) while the Court of appeals vacated the conviction because the State had presented insufficient evidence to show that Mr. Perez knowingly used the personal identifying information of another person, the court of appeals did not consider whether the evidence was insufficient on another substantive ground. Mr. Perez also asserted the prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain cash, credit, property, services, or any other thing of value. *See* C.R.S. § 18-5-902(1)(a). Mr. Perez's conviction should be vacated on this ground as well since his use of the Social Security number to obtain a job is not proscribed by the plain language of the identity theft statute; that is, he obviously did not use the number with the intent to obtain cash, credit, property, services, or any other thing of value. *See People v. Beck*, 187 P.3d 1125, 1129 (Colo. App .2008).

II. Under the identity theft statute, C.R.S. § 18-5-902(1)(a), "knowingly" applies to the element "of another." The plain language of the statute provides that a defendant must knowingly use the personal identifying information of another. When a statute includes a culpable mental state, that mental state is deemed to apply to every element of the crime unless the General Assembly clearly intended the contrary. C.R.S. § 18-1-503(4). There is no indication in the statute that the General Assembly intended to limit the applicability of the knowingly *mens rea* to any one word or phrase or that it not apply to the element "of another." *See id.* Further, as a matter of ordinary English grammar, it is natural to read the word "knowingly" in the identity theft statute as applying to all subsequently listed elements of the crime including the element "of another." C.R.S. § 2-4-101 (2010); *see Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

III. The evidence is insufficient to sustain the identity theft conviction on at least two grounds where: (1) The prosecution failed to present any evidence that Mr. Perez knowingly used personal identifying information of another; and (3) The prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain cash or any other thing of value. *U.S. Const.* amends. V, XIV; *Colo. Const.* art. II, § 25.

ARGUMENTS

I. The Court should dismiss the State's petition as having been improvidently granted.

Colorado Revised Statutes § 18-5-902(1)(a), requires that a defendant knowingly use the personal identifying information of another.

The prosecution did not object to the elemental jury instruction in this case requiring that Mr. Perez "knowingly" use the identifying information "of another." *See* (v4,p127,133-134) Also, in closing argument the prosecutor asserted: "I have to prove that he [Mr. Perez] was using a Social Security number that didn't belong to him, that he knew it belonged to another person and that he did it to obtain cash or another thing of value. This is straightforward." (v4,p159).

In the court of appeals, the State did not dispute that for conviction the jury must find beyond a reasonable doubt that the defendant knowingly use the personal identifying information of another. In its Answer Brief to the Court of appeals, the State conceded that the prosecution was required to prove and the jury was required to find, beyond a reasonable doubt, that Mr. Perez knowingly used the personal identifying information of another person.

At oral argument on the matter, held April 2, 2013, when asked by Judge Navarro if he did not dispute that "knowingly" applied to the element "of another,"

the assistant attorney general hedged and said, for the first time, that he did disagree that knowingly applied but that for the sake of argument in Mr. Perez's case he assumed the element applied as instructed by the trial court and there was no need to resort to statutory construction. When pressed, the assistant attorney general contended there were some very good reasons why knowingly should not apply. Judge Navarro pointed out and the assistant attorney general agreed that no such reasons were set forth in his Answer Brief. The Answer Brief filed by the assistant attorney general said nothing, implied or otherwise, to suggest that knowingly did not so apply. The assistant attorney general concluded by asserting that Mr. Perez's case should be decided narrowly on the sufficiency of the evidence issue before the court.

This Court should dismiss the State's Petition for Writ of Certiorari as having been improvidently granted since the State deliberately decided not to contest the construction of the identity theft statute as understood by the parties and trial court below and by Mr. Perez on direct appeal in the court of appeals.

This Court should also dismiss the petition as improvidently granted because, while the court of appeals vacated the conviction because the State had presented insufficient evidence to show that Mr. Perez knowingly used the personal identifying information of another person, the court of appeals did not consider whether the evidence was insufficient on another substantive ground. Mr. Perez also asserted the

prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information *with the intent to obtain cash, credit, property, services, or any other thing of value. See* C.R.S. § 18-5-902(1)(a). As more fully set forth below, Mr. Perez's conviction should be vacated on this ground as well since his use of the Social Security number to obtain a job is not proscribed by the plain language of the identity theft statute; that is, he obviously did not use the number with the intent to obtain cash, credit, property, services, or any other thing of value. *See People v. Beck*, 187 P.3d 1125, 1129 (Colo. App .2008).

II. Under the identity theft statute, "knowingly" applies to the element "of another."

A. Standard of review.

This Court reviews issues of statutory construction *de novo. Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010); *People v. Cross*, 127 P.3d 71, 73 (Colo. 2006); *CLPF–Parkridge One, L.P. v. Harwell Invs., Inc.,* 105 P.3d 658, 661 (Colo. 2005); *Colo. Dep't of Labor & Employment v. Esser,* 30 P.3d 189, 194 (Colo. 2001).

B. Applicable rules of statutory construction.

With regard to statutes, to discern legislative intent, a court should look primarily to the language of the statute. *People v. Morgan*, 785 P.2d 1294 (Colo. 1990); *People v. Dist. Court*, 713 P.2d 918, 921 (Colo. 1986). Words and phrases should be

given effect according to their plain and ordinary meaning. *People v. Dist. Court*, 713 P.2d at 921; *Engelbrecht v. Hartford Acc. & Indem. Co.*, 680 P.2d 231, 233 (Colo. 1984); *People v. Lewis,* 680 P.2d 226 (Colo.1984). In addition, "'[w]ords and phrases [in our statutes] shall be read in context and construed according to the rules of grammar and common usage.'" *Holliday v. Bestop, Inc.*, 23 P.3d 700, 705 (Colo. 2001) quoting C.R.S. § 2-4-101 (2010); *People v. McCoy*, 821 P.2d 873, 875 (Colo. App. 1991) (same).

Constructions which defeat the obvious legislative intent should therefore be avoided. *People v. Dist. Court,* 713 P.2d at 921; *Tacorante v. People,* 624 P.2d 1324 (Colo.1981); *People v. Meyers,* 182 Colo. 21, 510 P.2d 430 (1973). To reasonably effectuate the legislative intent, a statute must be read and considered as a whole. *People v. Dist. Court*, 713 P.2d at 921. A court should also consider the consequences of a particular construction and avoid constructions that produce illogical or absurd results. *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.,* 109 P.3d 585, 593 (Colo. 2005); *Leonard v. McMorris,* 63 P.3d 323, 326 (Colo. 2003).

If the language is clear and the intent appears with reasonable certainty, there is no need to resort to other rules of statutory construction. *People v. Zapotocky*, 869 P.2d 1234, 1238 (Colo. 1994) ("When the statutory language is clear and unambiguous, the statute must be interpreted as written without resort to interpretive rules and statutory construction."); *People v. Goodale*, 78 P.3d 1103, 1107 (Colo. 2003) (citing *Zapotocky*, "If

the statute is 'clear and unambiguous,' we must interpret it as written. Only when the statute is unclear or ambiguous may we look beyond the words of the statute to legislative history or rules of statutory construction."); *Robles v. People*, 811 P.2d 804 (Colo. 1991); *People v. Dist. Court*, 713 P.2d at 921.

A "cardinal rule" of statutory construction is that criminal statutes are to be strictly construed in favor of the accused. *Hrapski v. People*, 658 P.2d 1367, 1369 (Colo. 1983) ("No useful purpose would be served by a discussion of the People's arguments that probable cause existed based on the strained statutory construction and impermissible inferences suggested by the district attorney. The cardinal rule of statutory construction is that criminal statutes are to be strictly construed in favor of the accused."); *accord People v. Roybal*, 618 P.2d 1121 (Colo. 1980). Also, when the meaning of a criminal statute is ambiguous, the rule of lenity requires that the statute be construed in favor of the accused. *People v. Summers*, 208 P.3d 251, 258 (Colo. 2009); *People v. Terry*, 791 P.2d 374, 377 n.4 (Colo. 1990); *People v. District Court*, 713 P.2d at 922; *People v. Lowe*, 660 P.2d 1261 (Colo. 1983).

C. The plain language of the identity theft statute and C.R.S. § 18-1-503(4) control here: the element "knowingly" applies to the element "of another."

"The *mens rea* of a statute may speak to conduct, or to circumstances, or to result, or to any combination thereof, but not necessarily to all three." *Copeland v. People,* 2 P.3d 1283, 1286 (Colo. 2000).

As relevant here the identity theft provision at issue, C.R.S. §18-5-902(1)(a) provides:

> (1) A person commits identity theft if he or she:
>
> (a) Knowingly uses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment.

"Personal identifying information" is defined as meaning "information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; a social security number; a password; a pass code; an official, government-issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number." C.R.S. § 18-5-901(13). The

phrase "of another" means, in pertinent part, "that of a natural person, living or dead, or a business entity."

Colorado Revised Statutes § 18-1-503(4) (2009) provides that, "when a statute defining an offense prescribes as an element thereof a culpable mental state [for one element], that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears." Per this provision, if a statute defining an offense contains a specific *mens rea* requirement, that mental state is deemed to apply to every element of the offense. *People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001); *People v. Trevino*, 826 P.2d 399, 402 (Colo. App. 1991) (citing C.R.S. § 18-1-503(4)); *see, e.g.*, *Oram v. People*, 255 P.3d 1032, 1037-38 (Colo. 2011) (Court construes Colorado's second-degree burglary statute when considering a claim of insufficient evidence to determine the extent of application of the *mens rea* "knowingly": "A person commits second degree burglary if he '*knowingly* breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.' § 18-4-203(1) (emphasis added). When a statute includes a culpable mental state, that mental state is deemed to apply to every element of the crime unless the General Assembly clearly intended the contrary. § 18-1-503(4). There is no such indication that the General Assembly intended the knowingly standard in

the burglary statute to be limited to the phrase 'breaks an entrance into.' Therefore, a knowingly mental state must apply to each element of the burglary statute."); *and compare People v. Bornman*, 953 P.2d 952, 954 (Colo. App. 1997) (Court considers and finds instructional error where theft instruction did not inform jury that *mens rea* knowingly, in conformity with theft statute[3], applied to all succeeding elements; "the principal issue of fact presented for jury resolution was whether defendant was aware that his exercise of control over the vehicle was unauthorized. Yet, the instruction allowed a guilty verdict to be returned without a determination that defendant was aware of his lack of authority."); *People v. Dunoyair*, 660 P.2d 890, 894 (Colo. 1983) (Court considers Colorado's criminal mischief statute[4], stating that "[t]he gravamen of criminal mischief is the knowing causation of damage to another's property with resulting economic loss to the owner or possessor of the property."); *People v. Thoro Products Co.*, 45 P.3d 737, 746 (Colo. App. 2001), aff'd, 70 P.3d 1188 (Colo. 2003)

[3] The theft statute, C.R.S. § 18-4-401 provides that: "(1) A person commits theft when he or she knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception; or receives, loans money by pawn or pledge on, or disposes of anything of value or belonging to another that he or she knows or believes to have been stolen."

[4] The criminal mischief statute, C.R.S. § 18-4-501 provides that: "(1) A person commits criminal mischief when he or she knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode."

("We conclude that the indictment adequately alleged, and the prosecution proved, sufficient failures to act when there was a duty to do so, and the requisite knowledge and damage to the property of another."); *see also Coleby*, 34 P.3d at 426 (J. Coats, dissenting) (C.R.S. § 18-1-503(4) "is a legislatively prescribed rule of statutory construction."; C.R.S. § 18-1-503(4) "indicates that when a statute prescribes as an element of an offense that a defendant act . . . 'knowingly' . . . it means that he must act with that same degree of culpability with regard to every element of the offense, unless a different legislative intent clearly appears. Therefore, if the legislature makes it a crime for someone to 'knowingly' do something, it intends that the actor be guilty only if he acts knowingly with regard to all of the conduct and attendant circumstances necessary for commission of the crime, rather than merely the act or circumstance that immediately follows the word 'knowingly.'").

Here, the plain language of the identity theft statute provides that a defendant must knowingly use the personal identifying information of another. There is no indication in the statute that the General Assembly intended to limit the applicability of the knowingly *mens rea* to any one word or phrase or that it not apply to the element "of another." Here, the court of appeals thus properly understood the provision and correctly held that the General Assembly did not intend to limit the application of the *mens rea* knowingly to only some elements or that it not apply to the

element "of another." *People v. Perez*, ___ P.3d ___, ___ 2013 WL 6795153, *2-3 (Colo. App. 2013); C.R.S. § 18-1-503(4); *see Copeland,* 2 P.3d at 1286.

The *mens rea* knowingly therefore applies to the element concerning the personal identifying information "of another." *See* C.R.S. § 18-1-503(4); *Coleby*, 34 P.3d at 424; *Trevino*, 826 P.2d at 402; *see, e.g.*, *Oram*, 255 P.3d at 1037-38. The court of appeals thus also properly construed the plain language of the identity theft statute and properly applied C.R.S. § 18-1-503(4) when it held that "the culpable mental state of knowingly applies to the element concerning the personal identifying information 'of another.'" *Perez*, ___ P.3d at ___, *3; accord *People v. Jauch*, 2013 COA 127 cert. denied, 13SC816, 2014 WL 3703082 (Colo. July 28, 2014) (Following *Perez* holding: "Therefore, to prove identity theft, the prosecution must show that a defendant knowingly used the identifying information or a financial device belonging to another person or entity."); *see Coleby*, 34 P.3d at 424; *Trevino*, 826 P.2d at 402. The court of appeals decision should therefore be affirmed.

The State's position to the contrary is meritless. Underscoring the lack of merit, the State does not even cite to or discuss the critical legislatively prescribed rule of construction with respect to culpable mental states, C.R.S. § 18-1-503(4). This omission is all the more perplexing given that the State cites to *Gorman v. People,* 19 P.3d 662 (Colo. 2000) and *Copeland v. People,* 2 P.3d 1283 (Colo.2000), in support of its

position. In both cases this Court considered C.R.S. § 18-1-503(4) and its potential applicability in order to, in turn, determine the extent of applicability of the *mens rea* and element(s) in question.

Be that as it may, *Gorman* and *Copeland* are distinguishable from Respondent's case for much the same reasons that this Court held they were distinguishable from the statutory context presented in *Coleby*, 34 P.3d at 424. As indicated, in both *Gorman* and *Copeland* the Court considered the applicability of section 18-1-503(4). In *Gorman,* the Court ruled that section 18-1-503(4) was inapplicable to the contributing to the delinquency of a minor statute since the General Assembly did not specify a culpable mental state in the statute. *Gorman*, 19 P.3d at 666. Considering this omission, the Court concluded in *Gorman* that the culpable mental state of knowingly applied to the act of contributing to the delinquency of a minor, but not to the statute's age element. *Id.* at 665-66. This Court noted the principle that elements of a particular offense may have differing *mens rea* requirements, and that the culpable mental state of a statute may speak to conduct, circumstances, result, or any combination thereof, but not necessarily to all three. *Id.* at 666.

In *Copeland,* this Court cited to C.R.S. § 18-1-503(4), and held that the General Assembly had indicated its clear intent not to apply the arson statute's *mens rea* requirement of "knowingly" or "recklessly" to the statute's endangerment provisions.

2 P.3d at 1287. This Court relied on the wording of the statute and its prior decision in *People v. Garcia,* 189 Colo. 347, 541 P.2d 687 (1975) to conclude that the legislature intended to hold the arsonist responsible for the fire's result, whether or not he was aware of or intended the consequences. *Copeland,* 2 P.3d at 1287.

Gorman and *Copeland* are likewise distinguishable from Respondent's case. Unlike the statute in *Gorman,* the identity theft statute, C.R.S. § 18-5-902(1)(a), prescribes as an element within the statute the culpable mental state of "knowingly" and no intent to limit its application clearly appears. Moreover, unlike the statute in *Copeland,* the legislature evidenced no clear intent to limit the application of the knowledge requirement in section C.R.S. § 18-5-902(1)(a).

The State also cites to and relies upon *People v. Cross*, 127 P.3d 71 Colo. 2006) and *People v. Noble*, 635 P.2d 203 (Colo. 1981). *Cross* and *Noble* are distinguishable for much the same reasons *Gorman* and *Copeland* are distinguishable. In both *Cross* and *Noble*, again this Court considered the applicability of C.R.S. § 18-1-503(4), but again found statutory language within each of the respective provisions to limit the applicability of the *mens reas* at issue.

In *Cross*, the Court considered Colorado's stalking statute. A jury convicted Cross of harassment by stalking--credible threat, contrary to C.R.S. § 18-9-111(4)(b)(I) (2005), and harassment by stalking--serious emotional distress, contrary to C.R.S. §

18-9-111(4)(b)(III) (2005). *Cross*, 127 P.3d at 72. The court of appeals had reversed the defendant's convictions finding that the trial court instructions had erroneously omitted the *mens rea* "knowingly." This Court held that the trial court's instruction actually possessed "the virtue of utilizing the statute's actual language." *Cross*, 127 P.3d at 77. This Court held, therefore, that the court of appeals determination to find error was indefensible. "In the face of section 18-9-111(4)(b)(III)'s actual wording and the accompanying statement of legislative intent, the court of appeals' decision to inject 'knowingly' before every element of the section cannot stand." *Id.* This Court, reviewing the applicable statutes, held that, "[t]he General Assembly clearly intended otherwise. Applying 'knowingly' to the phrase 'in a manner that would cause a reasonable person to suffer serious emotional distress' is untenable because it injects a subjective standard where the legislature clearly specified an objective inquiry." *Id.* The Court further observed, given the specific statutory framework and "extensive statement of purpose" for these provisions, adding "knowingly" to modify the foregoing element would lead to absurd results that the legislature "surely did not intend." *Cross*, 127 P.3d at 75,78. In sum, the Court concluded that the stalking statute's mental state of "knowingly" did not apply to all elements of the offense because the addition of 18-9-111(4)(b)(III) and the legislative statement of purpose demonstrated the legislature's intent to limit the knowledge requirement.

In *Noble*, considering the felony child abuse statute, C.R.S. § 18-6-401, this Court held that the requirement of "knowingly" did not refer to the actor's awareness that his conduct is practically certain to cause the proscribed result. Rather, the Court held that "knowingly" referred to the actor's general awareness of the abusive nature of his conduct in relation to the child or his awareness of the circumstances in which he commits an act against the well-being of the child. *Id.*, 635 P.2d at 210. The Court held that, "[if the legislature intended criminal responsibility to hinge on the actor's awareness that his conduct is practically certain to cause the proscribed result, it hardly would have established as an alternative to the element of 'knowingly' the culpable mental state of 'negligently.'" The Court held that the legislature's inclusion of the latter *mens rea* and providing that child abuse may be committed by acting "negligently," indicated the legislature's intent to define the mental culpability for the offense in terms of conduct or circumstance rather than solely in terms of result. *Id.*

Cross and *Noble* are thus distinguishable from Mr. Perez's case as well. None of the circumstances present in *Cross* and *Noble* that indicated the legislature's intent to limit the applicability of the *mens rea* knowingly are present in Mr. Perez's case involving the identity theft statute.

In sum, the State's reliance upon *Copeland*, *Gorman*, *Cross* and *Noble* are misplaced and none of these cases supports the State's interpretation of the identity theft statute.

The Supreme Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) also supports the court of appeals and Mr. Perez's construction of the identity theft statute. In *Flores-Figueroa* the Court interpreted a similar federal identity theft statute providing that to be convicted the defendant must "*knowingly* transfers, possesses, or use[], without lawful authority, *a means of identification of another person.*" 18 U.S.C. §1028A(a)(1) (emphasis added). The statute proscribed "[a]ggravated identity theft." *Id.*, 556 U.S. at 647. The Court considered the question whether the statute required the Government to show that a defendant *knew* that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact, belonged to "another person." The Supreme Court concluded that it did. *Id.*

The Supreme Court applied a basic interpretive principle that is equally applicable under Colorado law. That is, the requirement that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." C.R.S. § 2-4-101 (2010); *Holliday v. Bestop, Inc.*, 23 P.3d at 705; *McCoy*, 821 P.2d at 875. The Supreme Court stated that, "[t]he manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English

usage. That is to say courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa*, 556 U.S. at 652. Looking at the foregoing federal statute and consistent with this interpretive principle, the Court held that "[a]s a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all subsequently listed elements of the crime." *Flores-Figueroa*, 556 U.S. at 657.

Flores-Figueroa is thus instructive and supports the court of appeals and Mr. Perez's construction of the identity theft statute since as a matter of ordinary English grammar, it is natural to read the word "knowingly" in the identity theft statute as applying to all subsequently listed elements of the crime including the element "of another." *See* C.R.S. § 2-4-101; *Holliday v. Bestop, Inc.*, 23 P.3d at 705; *McCoy*, 821 P.2d at 875. The State's assertion that "knowingly" does not apply to the element "of another" is not only contrary to the plain language of the statute and dictate of C.R.S. § 18-1-503(4), it is also inconsistent with ordinary English usage. *See* C.R.S. § 2-4-101; *Holliday v. Bestop, Inc.*, 23 P.3d at 705; *McCoy*, 821 P.2d at 875; *Flores-Figueroa, supra.*

In sum, the State's argument, nearly identical to the one made by the Government in *Flores-Figueroa*, fails because (1) the plain language of the statute and Colorado's legislatively prescribed rule of statutory construction in C.R.S. § 18-1-

503(4) require that "knowingly" apply to the element "of another" since no limitation on its applicability clearly appears in the statute; and (2) as a matter of ordinary English grammar, it is natural to read Colorado's identity theft statute's word "knowingly" as applying to all subsequently listed elements of the crime including the element "of another." The State's view should therefore be rejected and the court of appeals' interpretation of the identity theft statute should be affirmed.

D. The addition of C.R.S. § 18-5-113(3) in 2011 by the General Assembly now arguably covers the conduct and circumstances in this case but not proscribed by the identity theft statute.

In 2011, in the wake of this Court's decision in *Montes-Rodriguez v. People*, 241 P.3d 924 (Colo.2010), the General Assembly added the following subsection to the criminal impersonation statute, specifically cross-referencing the identity theft statute and a particular definition within the latter scheme. The criminal impersonation statute, C.R.S. § 18-5-113(3) provides: "(3) For the purposes of subsection (1) of this section, using false or fictitious personal identifying information, as defined in section 18-5-901(13), shall constitute the assumption of a false or fictitious identity or capacity." In the identity theft statute, C.R.S. § 18-5-901(13) provides:

> (13) "Personal identifying information" means information that may be used, alone or in conjunction with any other information, to identify a specific individual, including but not limited to a name; a date of birth; *a social security number*; a password; a pass code; an official, government-

> issued driver's license or identification card number; a government passport number; biometric data; or an employer, student, or military identification number. (emphasis added).

The relatively new subsection (3) in the criminal impersonation statute would now arguably cover the circumstances in Mr. Perez's case. While he did not knowingly use the identifying information of another, under this new provision he assumed a false or fictitious identity or capacity since he used a false or fictitious Social Security number. This provision also addresses the State's concern over those potentially victimized by someone's use of personal identifying information where the offender does not know, as here, that it is another person's information. This Court should not, however, read into the identity theft statute an analogous proscription since such language does not exist therein.

E. There is no need to resort to other rules of construction or to legislative history since the plain language of the identity theft statute, C.R.S. § 18-1-503(4) and common English usage show that "knowingly" applies to the element "of another."

The court of appeals stated that it considered the statutory text and legislative history on the subject and found that there was no indication the General Assembly intended to limit the applicability of the *mens rea* "knowingly" to certain elements of the offense. *Perez*, ___ P.3d at ___, 2013 WL 1908991 at *3. The court's holding was

correct, but its resort to legislative history was unnecessary and so too is the State's effort in this regard. Only when a statute is unclear or ambiguous should an appellate court look beyond the words of the statute to legislative history or rules of statutory construction. When the statutory language is clear and unambiguous, as it is here, the statute must be interpreted as written without resort to such resources. *Goodale*, 78 P.3d at 1107; *Zapotocky*, 869 P.2d at 1238. This Court should follow these important rules and interpret the identity theft statute as written without resort to consideration of legislative history or other interpretive rules. *Id.*

F. Even if the Court reviews the legislative history on the identity theft statute, there is no support for an interpretation different than reflected in the plain language of the identity theft statute, required by application of C.R.S. § 18-1-503(4) and underscored by common English usage.

Even if the Court considers the legislative history on the identity theft statute, which it should not under applicable law, *see Goodale*, 78 P.3d at 1107 and *Zapotocky*, 869 P.2d at 1238, nothing said during the legislative sessions for the identity theft statute in 2006, when the statute was enacted, supports an interpretation different than reflected in the plain language of the identity theft statute, required by application of C.R.S. § 18-1-503(4) and underscored by common English usage.

The State nevertheless asserts that in 2006, First Judicial District Attorney Scott Storey "specifically discussed the 'of another language' in the identity theft statute as the key distinction between this offense [identity theft] and criminal impersonation because the victims of identity theft are real people rather than fictitious ones." Answer Brief, at p11, during a legislative session for the bill. HB 06-1326, 2/23/06, at 14:10.

In the first few minutes of his testimony, Mr. Storey recounted a couple stories of those who had been victims of identity theft. Included in this recounting was a couple who had been defrauded by a woman posing as a mortgage broker who took the couple's identifying information, adopted their identity, created false accounts and stole thousands in monies and merchandise. Mr. Storey also recounted several instances of people who would steal U.S. mail and then use the identifying information in the mail to secure goods and monies. Mr. Storey said that he was most concerned with meth users stealing mail and identifying information and then using that information for financial gain in order to buy more meth. He said that meth users and identity theft were "two peas in a pod." Both of Mr. Storey's vignettes thus set forth circumstances where the offenders knew they were using personal identifying information of other people. Mr. Storey did not recount a story where lack of such

knowledge was present or would come within the parameters of the new identity theft statute.

Mr. Storey eventually mentioned criminal impersonation as the then-current means of prosecuting identity theft. He said that given its low-level status as a class 6 felony, the consequences were outweighed by the benefits to those who would commit the offense. HB 06-1326, 11:23-11:50. He said that imposition of a class 6 felony was a "slap on the wrist" since probation was imposed and then such persons could go out and begin reoffending. This was in explanation of the consequences being insignificant.

Mr. Storey then rhetorically asked "How do we attack identity theft?" First, he said a proactive effort to educate folks about the potentiality of identity theft was necessary in order that folks could protect themselves. Second, he said creating a real deterrent was necessary. He mentioned some particular areas of the new statute. He said the new identity theft statute expanded venue for greater protection. He also mentioned the drafters had moved some sections of part 7 of the fraud provisions[5] over to the identity theft provisions to avoid any constitutional implications. He then mentioned that the new identity theft statute defined "of another" as including living

[5] *See*, *e.g.*, C.R.S. § 18-5-710 **Criminal possession of a financial transaction device,** repealed in 2006, relocated to C.R.S. § 18-5-903 **Criminal possession of a financial device**.

persons, dead persons and business entities. This latter reference was entirely consistent with the definition of "of another" found in C.R.S. § 18-5-901(11).

Mr. Storey then said the "meat of the bill" was "18-5-902" and that the "key here is that it creates a class 4 felony" up from a class 6 felony. This reference to a class 6 felony was probably in reference to the felony status of criminal impersonation that he had mentioned before, but he did not mention the latter offense by name.

Mr. Storey returned to the story he shared at the outset of his testimony involving mortgage fraud and the theft of the couple's identifying information. HB 6-1326, 11:51-16:42.

While Mr. Storey did not say that the "of another" language in the identity theft statute constituted "the key distinction" between this statute and criminal impersonation, the inclusion of the "of another" language following the *mens rea* "knowingly" does serve as one distinguishing feature of identity theft from criminal impersonation. The latter statute does not require that the false or fictitious identity used actually be "of another" or that the defendant know that the false or fictitious identity used actually belong to "another." On the other hand, the identity theft statute, as indicated, does require that the personal identifying information belong to an actual living person, a former living person or a business entity; and, as indicated, does require that the offender know this when he or she uses that information. Under

such circumstances, a person offending the identity theft statute commits a more serious offense than if he or she were only assuming a false or fictitious identity--an identity that may or may not belong to an actual living person, a former living person or a business entity.

Finally, while Mr. Storey did not specifically mention the *mens rea* of either offense and made no comparisons of the same *vis-a-vis* any particular elements, the scenarios presented by Mr. Storey to illustrate the crime of identity theft involved offenders who did possess the requisite *mens rea* for this offense and thus did know that they possessed the identifying information belonging to someone else. In sum, the legislative history supports the application of "knowingly" to the element "of another," not the other way around as the State asserts.

The State argues that the 2009 legislative sessions addressing the amendment of the identity theft statute to include the *mens rea* "with intent" supports its position. This legislative history is completely irrelevant and has nothing whatever to do with the language at issue here. There is nothing in the sessions to support its interpretive view. Instead, the State contends that during the legislative committee meeting that considered this proposed amendment none of the members said "that this statute applied to those offenders who knew that the information they used actually belonged to a real person", Answer Brief, p12-13, and that their silence shows that the identity

theft statute does not require that a person knowingly use the personal identifying information of another. The legislators indeed said nothing about such matters and had no occasion to since it was irrelevant to the amendment under consideration. The State's interpretive view based on silence is meritless.

The State presents a hypothetical where an individual repeatedly enters "financial identifying information", *see* C.R.S. § 18-5-901(7)(a), online to "with the hope that some of them are valid and will work," Answer Brief, p17, ostensibly to acquire monies or goods. This hypothetical is immediately distinguishable from Mr. Perez's case. A fraudster using a credit card number online and succeeding in obtaining monies or goods would know that it belonged to another since the number would truly only "work" (*i.e.*, the monies obtained or goods purchased) if it indeed belonged to another person. A credit card number alone is not enough. A fraudster would also need the cardholder's name, the CVV (security) number and the expiration date to complete the transaction. As Justice Breyer pointed out in *Flores-Figueroa*, where a defendant has used another person's identification information to get access to that person's bank account or to gain access as envisioned by the State here, "the Government can prove knowledge with little difficulty." 556 U.S. at 656.

The same is true in the context of the current identity theft tax refund fraud schemes. Bogus tax returns are filed using stolen Social Security numbers, yet the

fraudsters know they belong to real people and hope to collect the refund before the real living person does. *See* http://www.cbsnews.com/news/irs-scam-identity-tax-refund-fraud-60-minutes/ ("This is how it works. Someone steals your identity, files a bogus tax return in your name before you do and collects a refund check from the IRS. It's so simple, you would think it would never work, but it does. It's been around since 2008, and you'd think the IRS would have come up with a way to stop it, it hasn't. Instead the scam has gone viral, tripling in the past three years.").

The State also describes a hypothetical involving a fraudster who applies "for hundreds of credit cards or government-issued documents using a block of information," although the State does not indicate what the "block of information" consists of. Answer Brief, p18. The State refers to other subsections of the identity theft statute here. *See* C.R.S. §18-5-902(1)(d),(e). In these subsections as well as each and every subsection of the identity theft statute proscribing different conduct, the General Assembly was very clear on the applicable *mens rea*. The State's complaint about possibly not being able to meet its constitutional burden of proof with respect to the elements of these subsections vis-à-vis any particular fact pattern is not a reason to not construe the identity theft statute as the General Assembly has plainly written and intended.

In sum, court of appeals' construction of the identity theft statute is entirely consistent with the plain language of the statute, true to the legislatively prescribed rule of statutory construction under C.R.S. § 18-1-503(4) and common English usage. The court of appeals' decision should be affirmed.

III. The evidence is insufficient to sustain the identity theft conviction on at least two grounds where: (1) The prosecution failed to present any evidence that Mr. Perez knowingly used personal identifying information of another; and (2) The prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain cash or any other thing of value.

In the court of appeals, Mr. Perez raised more than one separate ground upon which the evidence was insufficient to sustain the identity theft conviction. Relevant here, Mr. Perez asserted that: (1) The prosecution failed to present any evidence that he knowingly used personal identifying information of another; and (2) The prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain cash or any other thing of value. The court of appeals vacated Mr. Perez's identity theft conviction on the first ground above and the issue upon which this Court granted review. The court of appeals did not address the second ground noted above. Mr. Perez first addresses the ground

upon which this Court granted review and upon which the court of appeals vacated the conviction. Thereafter, Mr. Perez reasserts that the conviction should be vacated because the State failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain cash or any other thing of value.

A. Standard of review.

Mr. Perez moved for a judgment of acquittal based on insufficient evidence and the court denied the motion; the claim is therefore preserved. (v4, p70-94,p146) This Court should review a claim of insufficient evidence *de novo*. *See e.g., Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010); *People v. Cook*, 197 P.3d 269, 279 (Colo. App. 2008) citing *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).

B. Applicable law regarding the requirement of sufficient evidence.

The Due Process Clauses prohibit the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970); *People v. Gonzales*, 666 P.2d 123,127(Colo.1983); *People v. Hardin*, 199 Colo. 229, 607 P.2d 1291, 1294 (1980); *People v. Bennett*, 183 Colo. 125, 515 P.2d 466, 469 (1978); *U.S. Const.* amends. V, XIV; *Colo. Const.* art. II, § 25. This Court must determine "whether the relevant evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient

to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt." *Bennett*, 515 P.2d at 469.

The United States Supreme Court has stated that the standard of proof beyond a reasonable doubt "operates to give 'concrete substance' to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding." *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). Under this standard, the Court observed that the jury must "reach a subjective state of near certitude of the guilt of the accused . . ." *See id.* In giving meaning to the reasonable doubt standard, this Court has similarly stated that "the evidence must be 'both substantial and sufficient' to support the determination of guilt beyond a reasonable doubt." *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988). It follows then that "[p]roof of a fact beyond a reasonable doubt is thus 'more powerful' than proof that the fact is 'more likely true than not;' more powerful, even, than proof 'that its truth is highly probable.'" *Rivas v. United States*, 783 A.2d 125, 133 (D.C.2001); *Smith v. United States*, 709 A.2d 78, 82 (D.C.1998)(en banc). Moreover, a modicum of evidence can never rationally sustain a conviction for a criminal offense under this standard. *See Jackson v. Virginia*, 443 U.S. at 320; *Gonzales*, 666 P.2d at 128.

Further, a criminal conviction cannot be based upon speculation, conjecture or guessing. *See Gonzales*, 666 P.2d at 128; *People v. Urso*, 129 Colo. 292, 269 P.2d 709,711

(1954). Therefore, while a jury is permitted to draw reasonable inferences from facts established, "presumption may not rest on presumption or inference on inference and this rule is doubly applicable in criminal cases." *Ayala v. People*, 770 P.2d 1265,1268 (1989); *Elliott v. People*, 115 Colo. 383, 174 P.2d 500,501 (1946).

1. The State failed to present any evidence that Mr. Perez knowingly used personal identifying information of another.

The State failed to present evidence that Mr. Perez knowingly used personal identifying information of another. At trial, the prosecution claimed there was sufficient evidence to show Mr. Perez knowingly used the personal identifying information of another person because he "knows it works or that it's a reasonable inference he knows it works and it's the number of another person because he continues to be able to get a paycheck on that." (v4, p83) In the court of appeals and in this Court, the State makes much the same argument together with a couple of new variants.

Here, the State also now contends that Mr. Perez knew it belonged to another because he "obtained and exploited a local victim's Social Security number." Answer Brief, p21. The State asserts that "[i]t is logical that Defendant used a local victim's Social Security number because it would be less likely to be questioned" and "it is beyond speculative to think Defendant obtained a random nine digits that just

happened to correspond to a real person with legal work status a few miles away." *Id.*, 21-22.

As indicated, the State did not introduce evidence that the Social Security number referred to by Jim White actually belonged to SG, and presented no evidence that Mr. Perez knew that he was using a "local" person's Social Security number. As the court of appeals correctly observed, "[t]here is no evidence regarding how defendant obtained the victim's Social Security number. Moreover, although the victim lived in Broomfield and defendant worked at restaurants in the greater Denver area, there is no evidence that defendant knew or ever met the victim." *Perez*, ___ P.3d at ___, *6. Indeed, there is no evidence that Mr. Perez "knew" that SG lived in Broomfield or that the series of numbers he was alleged to have put on forms had been assigned to a "local" person. There is no evidence that he had knowledge of either alleged fact or any fact from which to reasonably infer such knowledge.

The State's reference to "local" with the Social Security number seems to suggest that the numeric sequence of a Social Security number is itself unique and indicative of the location of its purported owner (if there is an owner of the number) and that Mr. Perez and anyone else would know this. That is, that the number here was associated with or connected to Colorado, Denver or its surrounding suburbs. The prosecution presented no evidence that any such inference could be drawn from

the number itself. Moreover, as indicated there was no evidence regarding how Mr. Perez obtained the Social Security number and there was no evidence that Mr. Perez knew or ever met SG.

In addition, the State's speculative argument makes no sense. If the number itself were facially indicative of a working number of a local resident, an inference that everyone would be familiar with including immigrants to this country, then certainly managers at Famous Dave's would have known or should know such a thing. Such circumstance would have served to raise suspicion and questions, not ameliorated them since it was an immigrant and not a "local" person submitting the number.

The State also asserts that "there was direct evidence that the Famous Dave's payroll system would only accept valid Social Security numbers that belonged to real people. . . " Answer Brief, p22. The State also later asserts that Famous Dave's used "a payroll system that rejected counterfeit numbers." *Id.*,p25. The State cites to the February 2, 2010 transcript, (volume 4) pages 6 to 8 and page 19, the testimony of Crystal Ferguson, an assistant manager at Famous Dave's restaurant. The foregoing assertions are not supported by the record. Ferguson did not testify that "Famous Dave's payroll system would only accept valid Social Security numbers that belonged to real people" or that Famous Dave's "payroll system that rejected counterfeit numbers." Ferguson never made any such representations or statements.

To the contrary, Ferguson said that Famous Dave's **does not check** the name of the employee against the Social Security number provided and **does not check** the gender of the employee against the Social Security number provided. In addition, Ferguson was unaware of any means of making such checks. (v4,p25-26). The court of appeals thus correctly held that, "[t]here also is no evidence that the employers verified that the Social Security number defendant provided was valid or that defendant was aware of any verification process. To the contrary, the restaurant manager testified that the restaurant does not verify an applicant's Social Security number and that she was not aware of any verification process available to employers." *Perez*, ___ P.3d at ___, *6.

Mr. Perez's case involves an allegation of the use of "personal identifying information" where the person using the information must know it belongs to another. As Justice Breyer pointed out in *Flores-Figueroa*, a person can obtain work and work for years, as the defendant did in that case, by submitting a Social Security number that is not assigned to anyone. *See, e.g.,* 556 U.S. at 648-649. Whether it works or not is irrelevant so long as the employer, as in Mr. Perez's case, does nothing to check the validity of the number. Further, even in the instance where, as here, Mr. Perez worked many jobs to support his family, the fact he no longer worked for those establishments says little about the validity or invalidity of the number. The

prosecution presented no evidence regarding the relationship between his work in these establishments and the number used.

Indeed, whether the Social Security number at issue was counterfeit or whether it actually belonged to another person did not foreclose getting remuneration for labor performed. *See, e.g.*, *id.* Further, no prosecution witness testified in Mr. Perez's case that only a valid number would result in monies being paid by an employer for work performed and, conversely, no witness testified that a counterfeit number would result in no monies being paid an employee for work performed. Moreover, no witness testified that Mr. Perez had any knowledge of any such matters. The court of appeals thus correctly held that "no evidence was presented at trial that an employee must submit a valid Social Security number in order to receive wages." *Perez*, ___ P.3d at ___, *6.

The State's reliance upon the prosecution exhibits introduced at trial fails as well. People's Exhibit 3, is a W-4 form that apparently set forth the Social Security number at issue. While this standard government form references the subjects of taxes and withholdings, it does not explain or discuss the relationship or connection between the Social Security number and receiving remuneration for labor performed, if any such connection exists. The form does not discuss this issue. Further, Crystal Ferguson did not testify that an explanation of such matters is provided prospective

employees upon submission of an application; and she did not and could not say that any such explanation had been given to Mr. Perez when he applied. Moreover, no documentation and no witness testified to the relationship between the Social Security number and such matters and no witness offered testimony on whether Mr. Perez had any knowledge of the same. The court of appeals thus correctly found that, "[t]he Form W–4 defendant completed does not state that a person must possess a valid Social Security number in order to receive wages from employment. Furthermore, the wage inquiry exhibit does not discuss the relationship between a Social Security number and tax withholdings." *Perez*, ___ P.3d at ___, *6.

People's Exhibit 6 reflects, at best, the wage earnings related to the Social Security number in question and nothing else. This exhibit similarly does not explain any relationship between the Social Security number and withholdings of any kind, including possible taxes. Jim White from the Colorado Department of Labor and Employment did not testify about such matters at all. In sum, no witness, and no documentation addressed any relationship between the Social Security number and withheld or taxed monies or on monies deposited into an account of an unknown individual. In sum, with respect to the operation and workings of Social Security numbers with respect to monies and taxes, the court of appeals thus correctly held that "even if one could infer from the evidence that an employee must present an

actual Social Security number to receive pay, there is no evidence or inference that defendant had any knowledge of this requirement." *Perez*, ___ P.3d at ___, *6.

The State cites to various federal statutes and *Weber v. Leaseway Dedicated Logistics*, 5 F. Supp2d 1219 (D.Kan.1998) for the proposition that a jury could infer Mr. Perez knew the tax deductions from his paychecks were being attributed to the true owner of the Social Security number he had provided. It is not true that deductions from a paycheck must be or necessarily are attributed to a "true owner" of the number. *See Flores-Figueroa*, 556 U.S. at 648-649; *see also* Illegal Immigrants Are Bolstering Social Security With Billions, *New York Times*, April, 5, 2005 (http://query.nytimes.com/gst/fullpage.html?res=9803EEDD1F3FF936A35757C0A9639C8B63&module=Search&mabReward=relbias:r,{%222=%22:=%22RI:14=%22}=&pagewanted=1; ("Starting in the late 1980's, the Social Security Administration received a flood of W-2 earnings reports with incorrect -- sometimes simply fictitious -- Social Security numbers. It stashed them in what it calls the 'earnings suspense file' in the hope that someday it would figure out whom they belonged to."). In any event, the court of appeals also correctly observed that "neither the case nor the cited statutory provisions bear upon or lead to an inference that defendant was aware here that the Social Security number at issue was 'of another.'" *Perez*, ___ P.3d at ___, *7.

The State contends that Mr. Perez's "consistent use" of the Social Security number with four employers "demonstrates he successfully tested the validity of this number." Answer Brief, p24. The State reasons that Mr. Perez "knew he was using valid identifying information because it was consistently accepted." *Id.* The employers accepted Mr. Perez's identifying information, but this says nothing about its "validity" in particular with respect to the Social Security number used. *See Flores-Figueroa*, 556 U.S. at 648-649; *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 751 (10th Cir. 2010) (Employers are required to obtain "verification documents" but what they do with them is another matter.); *see also* Illegal Immigrants Are Bolstering Social Security With Billions, *New York Times*, April, 5, 2005, *supra*. Indeed, employers have "safe harbor" whether the information obtained from a prospective employee is valid or invalid. *Chamber of Commerce of U.S. v. Edmondson,* 594 F.3d at 751 ("Congress opted to create a substantial safe harbor for employers that comply with the I–9 system. 8 U.S.C. § 1324a(b)(6)(A). Unless an employer persists in violating IRCA after being put on notice of its noncompliance or engages in a pattern or practice of violations, § 1324a(b)(6)(B), (C), employers who attempt to comply in good faith are protected from civil and criminal penalties under federal law, § 1324a(b)(6)(A)."). Moreover, here there is no evidence that Mr. Perez was aware of the federal requirements of his employers or aware of the import of any particular information on the documents he

filled out, particularly with respect to any employer obligations in the area of so-called "validity." And, again, the prosecution presented no evidence at trial concerning why Mr. Perez was no longer working at the other restaurants.

The court of appeals also addressed this area (even though it was not raised by the prosecution in the trial court) stating:

> Federal courts of appeals cases addressing sufficiency of the evidence challenges under the federal aggravated identity theft statute further support our conclusion. These courts have held that "a defendant's repeated and successful testing of the authenticity of a victim's identifying information prior to the crime at issue is powerful circumstantial evidence that the defendant knew the identifying information belonged to a real person as opposed to a fictitious one." *United States v. Doe,* 661 F.3d 550, 562–63 (11th Cir.2011) (citing *United States v. Gomez–Castro*, 605 F.3d 1245, 1249 (11th Cir.2010); *United States v. Holmes,* 595 F.3d 1255, 1258 (11th Cir.2010)).
>
> For example, in *Doe,* the court held that the evidence was sufficient to prove that the defendant knew the name and Social Security number he used in applying for a passport belonged to an actual person. *Id.* at 563–64. Although there was no direct evidence of the defendant's knowledge, before submitting a passport application he repeatedly and successfully tested the authenticity of the identifying information by using the victim's original birth certificate and Social Security card to obtain driver's licenses in two jurisdictions, and he opened a bank account and obtained a debit card using the same information. *Id.*
>
> Here, there is no evidence that defendant either subjected the victim's Social Security number to the level of government scrutiny described above, or possessed or used multiple forms of the victim's identifying information. *Compare United States v. Valerio,* 676 F.3d 237, 244–45 (1st Cir.2012) (holding that the evidence was sufficient to prove the defendant knew the means of identification belonged to a real person where the defendant possessed a birth certificate listing the victim's

> name and place of birth along with the victim's parents' names and places of birth; received credit reports with the victim's name; and subjected the victim's Social Security number to repeated government scrutiny), *with United States v. Gaspar,* 344 Fed.Appx. 541, 542–43 (11th Cir.2009) (holding that the government failed to prove the defendant knew the birth certificate she used to apply for a passport belonged to another person even though the defendant had previously used the birth certificate to obtain a driver's license and an identification card).

Perez, ___ P.3d at ___, *7. Indeed, here the prosecution presented no evidence that Mr. Perez "tested" the number to indicate its "validity" or that he had stolen other identifying information of SG and tested that information.

The prosecution showed only that Mr. Perez filled out forms when he applied for employment with Famous Dave's. Mr. Perez supplied his address, his date of birth, his telephone number, and a Social Security number. The act of providing a random series of nine numbers, without more, does not satisfy the requirement that the defendant know that he is using the personal identifying information of another. *Cf. Montes-Rodriguez v. People*, 241 P.3d 924 (Colo. 2010); *U.S. Const.* amends. V, XIV; *Colo. Const.* art. II, § 25. The court of appeals decisions should be affirmed.

Flores-Figueroa is instructive here as well and also supports the court of appeals decision and Mr. Perez's insufficient evidence claim. In *Flores-Figueroa*, the Supreme Court addressed a federal criminal statute forbidding "[a]ggravated identity theft." *Id.*, 556 U.S. at 647. This federal statute imposes a mandatory consecutive two–year prison term upon individuals convicted of certain other crimes if, during (or in

relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person.*" 18 U.S.C. §1028A(a)(1)(emphasis added). *Flores-Figueroa*, 556 U.S. at 647. The Court considered the question whether the statute required the Government to show that a defendant *knew* that the "means of identification" he or she unlawfully transferred, possessed, or used, in fact, belonged to "another person." The Court concluded that it did. *Id.*

Flores-Figueroa*,* like Mr. Perez, sought to secure employment. Flores-Figueroa gave his employer a false name, birth date, and Social Security number, along with a counterfeit alien registration card. The Social Security number and the number on the alien registration card were not those of a real person. In 2006, Flores-Figueroa presented his employer with new counterfeit Social Security and alien registration cards; these cards used his real name. "But this time the numbers on both cards were in fact numbers assigned to other people." *Id.*, 556 U.S. at 648-649.

At his bench trial, Flores-Figueroa moved for a judgment of acquittal on the "aggravated identity theft" counts, asserting the Government failed to prove that he *knew* that the numbers on the counterfeit documents were numbers assigned to other people. The Government did not argue that there was sufficient evidence owing to the fact that Flores-Figueroa knew the Social Security number "worked" or that

monies had been withheld, it instead asserted that the *mens rea* knowingly did not apply to the element "of another person." While the Court concluded that §1028A(a)(1) required the Government to show that the defendant knew that the means of identification at issue belonged to another person, *see Flores-Figueroa*, 556 U.S. at 657, neither the Government nor the Court even mentioned the possibility that substantial and sufficient evidence had nevertheless been offered on the point. Despite the fact that Flores-Figueroa worked for several years, like Mr. Perez, neither the Government nor any federal court asserted or found, respectively, that the evidence was nevertheless sufficient to establish the *mens rea* element.

Finally, the Court discussed examples of "classic case[s] of identity theft" where the *mens rea* is not difficult to prove.

> For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty. The same is true when the defendant has gone through someone else's trash to find discarded credit card and bank statements, or pretends to be from the victim's bank and requests personal identifying information. Indeed, the examples of identity theft in the legislative history (dumpster diving, computer hacking, and the like) are all examples of the types of classic identity theft where intent should be relatively easy to prove, and there will be no practical enforcement problem.

Flores-Figueroa, 556 U.S. at 656. Comparing Mr. Perez's case to the foregoing examples underscores that his case is not a case of identity theft.

2. The prosecution failed to present any evidence that Mr. Perez knowingly used the personal identifying information with the intent to obtain a thing of value as required under the identity theft statute.

Relevant here, Colorado's identity theft statute, C.R.S. § 18-5-902(1)(a), requires that a defendant knowingly use the personal identifying information of another "with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment." *Id.*

The act of a person giving a Social Security number to a potential employer in support of an application for employment does not constitute knowingly using that number with the intent to obtain a "thing of value" as required for conviction under the identity theft statute. The court of appeals' decision in *People v. Beck*, 187 P.3d 1125, 1129 (Colo. App .2008) is instructive and, indeed, on point supporting Mr. Perez's insufficient evidence claim.

In *Beck*, the prosecution appealed the district court's order dismissing an identity theft charge in response to the defendant's argument that providing false identifying information to a police officer making a traffic stop does not implicate the crime of identity theft because the person providing the information does not obtain a

"thing of value," as the statute requires. *Id.*, at 1128. The court observed that the phrase "thing of value" is not defined in the identity theft statute.

The court further observed that C.R.S. § 18-5-902(1) uses the phrase "thing of value," but that this statute does not explicitly incorporate the definition found in C.R.S. §18-1-901(3)(r). In addition, the court noted that C.R.S. §18-5-902(1) lists some, but not all, of the things of value listed in C.R.S. §18-1-901(3)(r). Under these circumstances, the court correctly concluded that the General Assembly did not intend to incorporate the general definition found in C.R.S. §18-1-901(3)(r) into C.R.S. §18-5-902(1). Instead, the court correctly held that the General Assembly had provided for a narrower scope of things of value in the identity theft statute. *Beck*, 187 P.3d at 1128-1129.

The court also held that because the phrase "thing of value" in the identity theft statute is not defined and is susceptible to various interpretations, the court employed the statutory construction principle of *ejusdem generis*, which provides that where a general term follows a list of things in a statute, the general terms are applied only to those things of the same general kind or class as those specifically mentioned. *Beck*, 187 P.3d at 1129 (citing *Winter v. People,* 126 P.3d 192, 195 (Colo. 2006)). On this basis, the court held that the phrase "thing of value" must be interpreted to apply only

to those things that share the characteristics of the items listed in the identity theft statute. The court thereafter stated and held that:

> The list of things in the identity theft statute includes items such as cash and things that can be lawfully exchanged for cash, or financial payments. They all have financial or economic value and can be lawfully obtained, or made in the case of a financial payment, through the use of a financial device or personal or financial identifying information. None is a public right, duty, or entitlement that cannot be lawfully obtained in exchange for payment. Accordingly, we reject the People's contention that, for purposes of the identity theft statute, the phrase "to obtain ... any other thing of value" includes the nonpecuniary benefits of misleading and influencing the actions of a police officer, such as obtaining the use of another person's driving record.

Beck, 187 P.3d at 1129.

As a matter of fact and law, Mr. Perez did nothing to constitute criminal liability under the identity theft provision. Mr. Perez filled out his employment application with Famous Dave's and provided his name, his date of birth, his address and his telephone number. He also provided a Social Security number. Supplying a potential employer with all of this information made it at least possible that he could receive consideration and then, ultimately, the nonpecuniary benefit of being hired for employment. Getting hired for a job, particularly in these difficult economic times, may indeed have intrinsic value and it may be viewed as the essence of a nonpecuniary benefit. The Social Security number, however, no more than the giving of his address or his telephone number, was not exchanged for "cash and things that can be lawfully

exchanged for cash, or financial payments" from Famous Dave's, as is required for culpability under the identity theft statute. *See Beck*, 187 P.3d at 1129.

While it can reasonably be inferred Mr. Perez received fair remuneration in exchange for his labor performed, these monies were not in exchange for a Social Security number. It was Mr. Perez's labor for which he received remuneration, not the alleged act of supplying a Social Security number in support of an application for employment. Also, any employment ultimately depended on the discretionary act of his potential employer. These circumstances do not satisfy the culpability requirements under the identity theft statute. *See id.*

The State in its Summary of the Argument erroneously contends that the "identity theft statute requires the prosecution to prove that the defendant 'knowingly' engaged in prohibited conduct (*e.g.*, that he used identifying information . . . with the intent to obtain a benefit)." Answer Brief, p5. The State's erroneous interpretation with respect to the applicability of "knowingly" to the element "of another" has been addressed in part 1 of this argument. The State's latter use of the term "benefit" is equally erroneous here, however. As indicated, the identity theft statute provides that the accused must knowingly use the personal identifying information of another "with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment." C.R.S. § 18-5-902(1)(a). The term "benefit" does not

appear in the statute. The term "benefit" is a legal term of art that does appear, however, in the criminal impersonation statute, C.R.S. § 18-5-113(1)(b)(II)[6]. As *Beck* makes clear, the General Assembly provided for a narrower scope of things of value in the identity theft statute. *Beck* correctly held that the phrase "thing of value" must be interpreted to apply only to those things that share the characteristics of the items listed in the identity theft statute. The General Assembly did not use the term "benefit" which is broader in scope and not otherwise subject to the limiting language provided in the identity theft statute.

In sum, Mr. Perez's act of using the Social Security number and giving it to a potential employer in support of his application for employment did not constitute knowingly using that number with the intent to obtain a "thing of value" as contemplated under the identity theft statute and the evidence is therefore insufficient to sustain the conviction and it should, therefore, be vacated. *See Beck*, *supra*.; .*U.S. Const.* amends. V, XIV; *Colo. Const.* art. II, § 25.

[6] Mr. Perez was charged under this section of the criminal impersonation statute and it provides, *inter alia*, that "(1) A person commits criminal impersonation if he or she knowingly: (b) Assumes a false or fictitious identity or capacity, legal or other, and in such identity or capacity he or she; (II) Performs any other act with intent to unlawfully gain a benefit for himself . . . or defraud another."

CONCLUSION

For the foregoing reasons and authorities, the court of appeals decision should be affirmed.

DOUGLAS K. WILSON
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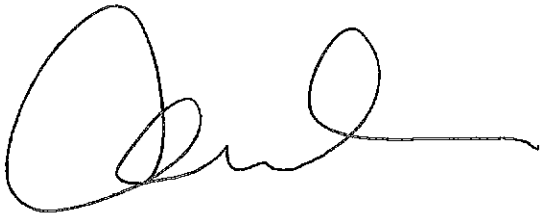

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CERTIFICATE OF SERVICE

I certify that, on October 17, 2014, a copy of this Answer Brief was electronically served through ICCES on Kevin E. McReynolds of the Attorney General's Office.