

April 1, 2020

VIA EMAIL TO:

XXXX XXXXX, Esq.
Assistant United States Attorney
XXXX.XXXXX@usdoj.gov

RE: XXXXXXX XXXXXXX XXXXXXX
Criminal No. 19-XXXXX-DPW

Dear XXXX:

Thank you for reproducing the discovery in this case. I was able to review the materials, including the recorded interview.

I wanted to take this opportunity now to furnish some information regarding my client with an eye toward reaching an agreement on disposition of this case. Please bear in mind that due to the coronavirus crisis, I have not yet had an opportunity to meet with Mr. XXXXXX face to face. I have had limited opportunities to speak with him on the phone. I describe below the information I was able to gather under these less-than-ideal conditions.

Mr. XXXXXX was born on August 4, 1987 in the rural outskirts of the city of Bani, Dominican Republic. He has two older brothers, one younger brother and one younger sister. Like most families in this developing country, his family was poor. He grew up in a cinder block house with a sheet metal roof. Electricity service was intermittent. His family had access to potable water only via limited, biweekly ration.

Mr. XXXXXX's father supported the family by working at the Bani public market. His mother was a homemaker.

Like his siblings, Mr. XXXXXX joined the workforce as a small child. Starting at age 5, he worked at the market with his father and siblings from 5 a.m. until 12:30 p.m. That same year, he started school. His classes were from 1 p.m. to 5 p.m. from September to June.

Between 1998 and 1999, Mr. XXXXXX's father abandoned the family. As a result, beyond the emotional wreckage occasioned by their now broken home, Mr. XXXXXX's family had to contend with a future in which their financial support was gone. Their already fragile connection to basic resources stretched to the breaking point. Mr. XXXXXX's older brothers initially took the lead in attempting to support his mother and siblings. In short order, it became clear that they could not carry this burden alone, and Mr. XXXXXX stepped in to earn what he could. His increased hours at work left little time to study. After failing the 8th grade, he left school to devote all his effort to maintaining the household.¹ He had not yet turned 13.

Mr. XXXXXX quickly recognized that his minimal education combined with his home country's weak economy rendered meaningful work opportunities scarce. He worked full-time at the public market, from 6:00 a.m. until closing time around 5:00 p.m. He earned around 1,200 - 1,500 pesos per week (approximately 30 - 40 USD). He also found work as a mechanic's helper on Saturdays, where he would get paid 150 - 200 pesos (around 3 - 4 USD) for a day's work cleaning tools and helping with engines and transmissions.

Mr. XXXXXX girlfriend became pregnant when he was 17; the news of which brought even greater urgency to his financial responsibilities.

Mr. XXXXXX's son XXXX XXXXXXXX was born on March 11, 2005. For the first 18 months of his son's life, Mr. XXXXXX worked 13-hour days, plus weekends, to support his mother, his siblings, his son, and his son's mother. Even working at this pace, his efforts yielded far short of what he needed to provide the basic necessities for his family.

¹ Mr. XXXXXX unfortunately is not alone in his country in failing to complete the 8th grade. According to the Borgen Project, a non-profit organization dedicated to combatting global poverty, "about 40 percent of students drop out of school before eighth grade" as a direct consequence of the rampant poverty in the Dominican Republic. Available at <https://borgenproject.org/education-in-the-dominican-republic/> (last visited March 27, 2020).

Ultimately, near his 19th birthday, Mr. XXXXXX traveled to the United States in pursuit of a living wage. This was not an easy choice for him because it meant that he would be separated from his loved ones, including his young son. But to Mr. XXXXXX, having no means to support his family in his impoverished home country, this was a necessary sacrifice.

Upon his arrival to the United States, Mr. XXXXXX found lodging at his friend XXXXXX's apartment in Lowell. Mr. XXXXXX was eager to find work. To that end, XXXXXX's boyfriend XXXX offered to help him obtain a license, which he told Mr. XXXXXX would authorize him to work.² XXXX provided Mr. XXXXXX with documents bearing the name XXXXX XXXXXXXXXXXX XXXX. XXXX did not inform Mr. XXXXXX how the documents were generated or obtained.

I would like you to take a moment to consider Mr. XXXXXX's understanding of the legal significance of those documents. Mr. XXXXXX had a very different understanding of what those documents meant than the reality with which you and I are familiar.

Mr. XXXXXX had no idea where the documents came from. Although I recognize that you contend otherwise, Mr. XXXXXX did not have any inkling that the documents belonged to another person. Rather, Mr. XXXXXX's belief was that the documents reflected that he had legally become XXXXX XXXXXXXXXXXX XXXX. Having said that, I will underscore that understanding sounds as silly to me as I am sure it does to you. However, assessing Mr. XXXXXX's belief through the lens of our education and sophistication is of limited utility.

Instead, I ask you to consider the significance of these documents from Mr. XXXXXX's perspective. When Mr. XXXXXX came to this country, he was just a teenager. He attended school in the slums of Bani. He was unable to continue his education beyond the 8th grade. Even those minimal years of schooling cannot be compared to the American standards to which we are accustomed. His school days were only four hours long. Against that backdrop, consider that Mr. XXXXXX was alone in a foreign country and unable to speak the language. He had absolutely no support system here. His only source of information was the rumor and lore to which he was exposed in the squalid flats,

² The birth certificate furnished in discovery bears an issue date of July 18, 2006, which corresponds with Mr. XXXXXX's present memory of having received it when he was around nineteen. USA000030.

alleys, and street corners he shared with the other non-members of society in his neighborhood. Viewed from this perspective, it is easier to see how Mr. XXXXXX might have such an unsophisticated understanding of the legal significance of his documents.

One need look no further than the applications themselves to appreciate the scope of Mr. XXXXXX's ignorance.

First, the different handwriting on the application forms suggests that Mr. XXXXXX did not fill them out. Rather, acquaintances who had some familiarity with the English language filled out the forms for him. He did not read them, nor were they read to him. It appears that somebody else actually signed most of the applications.

The first three applications appear to be written and signed in the same neat, fluid handwriting. USAO00023 - USAO00028. Those applications are signed "XXXXXX XXXX" in the same handwriting. Notably, the social security card which purports to bear Mr. XXXXXX's signature is signed "XXXXXX XXXXXXXXXXXX," not "XXXXXX XXXX," reinforcing the inference that whoever filled out the form was not making contemporaneous reference to the social security card. USAO00029.

The fourth and fifth applications are written and signed in a different neat, fluid handwriting. USAO00019 - USAO00022. In contrast to USAO00023 - 00029, these applications are signed "XXXXXX A. XXXXXXXXXXXX."

The sixth application, dated June 2, 2011, bears yet another, distinctly cruder block-letter style handwriting. USAO00017 - USAO00018. During his recorded interview, Mr. XXXXXX acknowledged that this application bore his signature, which is reflected in crude block lettering like the writing in the body of the application. Beyond the crude lettering, the application is replete with mistakes. Mr. XXXXXX misspelled Jackson Street as "Jacson St." He included his middle initial in the box calling for his first name. Most strikingly, in the field marked "issue date," and again in the field marked "date," Mr. XXXXXX filled in XXXXX XXXXXXXXXXXX's date of birth rather than the date of his signature.

As the application which Mr. XXXXXX at least took part in completing, the 2011 application is the most probative of his state of mind. Aside from the crude handwriting underscoring his minimal education, his difficulty with the form revealed by

his placement of his date of birth in two wrong fields, his misplacement of his middle initial, and the misspelling of his own street name, undercuts any confidence that Mr. XXXXXX possessed any real understanding of its meaning.

The final application is the one at issue in light of the statute of limitations and the wording of the indictment. The less crude handwriting, the different signature, and the absence of the spelling and date mistakes contained in the 2011 application suggest that this application may have been filled out by yet another individual. USAO00015 - USAO00016.

Examined together, these applications combine to create an inference that Mr. XXXXXX failed to understand their content. Certainly, were this a civil contract matter, Mr. XXXXXX would be bound by the terms contained therein. But this is a criminal case. He is not subject to criminal sanction for what he "should have known." Rather, he is liable for his intentional acts, as reflected by the specific intent element contained in the statute.

In sum, I agree that the applications bear XXXXX XXXXXXXXXXXX's personal information, which Mr. XXXXXX submitted in order to obtain an identification card and licenses. But I am less able to agree that Mr. XXXXXX "with intent to deceive, falsely represent[ed] a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person." 42 U.S.C. § 408(a)(7)(B). He neither filled out the forms nor understood their content. And given his limitations, it is not inconceivable that he genuinely believed the documents he received reflected his lawful identity to be XXXXX XXXXXXXXXXXX.

By so stating, bear in mind that I do not take the position that the charges were inappropriate in light of the investigation and the evidence. They were not. Rather, what I would like you to consider is whether you can agree there might be a reasonable doubt as to whether my client possessed the specific intent required to satisfy the relevant statute.

I would similarly ask you to reflect further on the aggravated identity theft charge. Having listened to my client's recorded statement, I am more convinced than ever that my client did not know that the XXXXX XXXXXXXXXXXX papers belonged to another person. He adamantly maintains that he did not know. Again, I am not asking that you simply accept his representation. Rather, I would like you to consider whether,

in light of all the circumstances, a reasonable doubt may exist as to his actual knowledge that the XXXXXXXXXX identity actually belonged to a real person. If he believed the documents legally changed his name to XXXXX XXXXXXXXXX, the statute is not satisfied, just as the statute is not satisfied if he believed the documents were simply made up.³ Flores-Figueroa v. United States, 556 U.S. 646, 657 (2009) ("We conclude that § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person").

Following his dramatic rooftop arrest on September 5, 2019, Mr. XXXXXX fully cooperated with investigators. Post-Miranda, he provided a recorded statement in Spanish. As is commonly the case, it appears that a fellow officer, who was not a certified translator, assisted in the interview. Reviewing the interview, there were several statements that were not translated. The interview has not yet been formally transcribed or translated. Having said that, and though I am far from fluent in Spanish, I believe I was able to understand much of what was stated.

From my review of the recording, Mr. XXXXXX readily acknowledged that he was XXXXXXXXXX XXXXXXX, and that he held himself out as XXXXX XXXXXXXXXX for purposes of obtaining credentials from the Massachusetts RMV. He initialed in the places directed, acknowledging the same with descriptive phrases including "esta es mi foto." See, e.g., USAO00058. But while Mr. XXXXXX agreed to most of what agents claimed, he also consistently maintained that he had no knowledge that the documents belonged to another person named XXXXX XXXXXXXXXX.

In my review of the discovery, I have found no evidence of any kind to the contrary. While I recognize the position that Mr. XXXXXX should have known, I see nothing beyond assumption and speculation to support that position.⁴

³ I use the term "made up" in the sense of the fake IDs youths, at least in my days, were prone to use to facilitate underaged alcohol purchases, in the vein dramatized by Christopher Charles Mintz-Plasse's character's use of a false Hawaii state license issued under the name "McLovin" in the 2007 feature film "Superbad."

⁴ In fact, it may also be difficult for the Government to establish that Mr. XXXXXX knew that the social security number was actually "a means of identification," which proof the statute requires. United States v. Godin, 534 F.3d 51, 57-58 (1st Cir. 2008). Given his lack of any formal education, much less the education required to grasp the function of various bureaucracies outside of his birth nation, including the federal social security administration, it is doubtful that Mr. XXXXXX was aware that a

Finally, I know you have considered the reason why Mr. XXXXXX went to the RMV in May 2016. Mr. XXXXXX was not seeking to obtain a document to facilitate a criminal livelihood, to escape capture on warrants, or to steal someone's credit. His sole purpose was to obtain a license so he could work. Immediately after obtaining this license, Mr. XXXXXX enrolled in an asbestos removal certification course, following which he was able to obtain his asbestos removal certificate on December 2, 2016. USAO00040.

This is one of I'm sure countless cases that have come across your desk, in which an individual sought to escape the poverty and suffering that was otherwise their lot in life by virtue of their birth to a poor family in a destitute nation. Mr. XXXXXX did not choose his birthplace, nor did he come here with hopes of being a criminal.

Rather, he came here, a boy himself, with the goal of providing a better life for his son and his family. When he arrived here, Mr. XXXXXX quickly learned that the streets were not paved with gold, and that opportunities were scarce for an uneducated young man who had no skills and could not speak the language. Mr. XXXXXX's criminal history suggests that, in his early years in this country, he made regrettable associations and choices which resulted in his prior arrests.

But in many ways, Mr. XXXXXX beat the curve. He was able to break away from the criminal lifestyle following his conviction on April 12, 2013 for an offense which occurred in 2011. USAO00088.⁵ Since then, Mr. XXXXXX has focused on building a peaceful life surrounded by family in his adopted home country.

In seeking his asbestos removal license, Mr. XXXXXX was not looking for shortcuts or easy money. Rather, he was eagerly pursuing a license which would grant him the privilege of working in a physically demanding and dangerous profession. Asbestos removal is not a job that most Americans would choose. But he fought to get that job with all his heart, for the sake of providing a better life for his family.

social security number is a government issued numbered commonly utilized as a form of identification.

⁵ Mr. XXXXXX earlier received a CWO in 2007 for a drug case out of Lowell. He was also charged in a 2015 animal fighting case in Worcester, which was dismissed.

At the time of his arrest, Mr. XXXXXX's roots in this country were deep. Aside from his father, all of his immediate relatives reside in the United States. Mr. XXXXXX is the proud father of three United States Citizen children: XXXXXXX XXXXXX (age 12), XXXXX XXXXXX (age 10) and XXXXXXX XXXXXX (age 6). Best of all, Mr. XXXXXX was able to bring his first child, XXXX XXXXXXX XXXXXX to the United States. XXXX XXXXXXX is now 15 years old, has a green card, and is doing great academically at the Lawrence vocational technical school. Mr. XXXXXX succeeded by delivering his children from the life of poverty and suffering in the slums of Bani which was otherwise their destiny. Now, their lives are anchored in a safe and free country, where they can concern themselves, as they should, with childish matters; where they can go to school; where they are limited only by their own desire to succeed. Mr. XXXXXX is extremely proud and grateful that he was able to do this for all of his children.

Yet every inch Mr. XXXXXX was able to climb is another inch which he now must fall as a consequence of his arrest. Mr. XXXXXX's new reality is a life consumed by the unimaginable pain of being ripped away from the family which is the heart of his very existence. This penalty is far greater than any sentence which your office could ever seek or the court could ever impose.

Whatever the ultimate result of this case, Mr. XXXXXX will be alone to pick up the pieces of his life. His focus now is to complete his sentence as quickly as possible, following which he will inevitably be deported. Once that process is complete, Mr. XXXXXX will find what work he can to try to support his beloved children, who will now grow up without their father.

In our earlier phone conversation, you indicated that you would be willing to sign an agreement to a "C" plea in which the aggravated identity theft charge would be dismissed with an agreed upon recommendation as to the sentence on the social security number charge. As I understood it, your position was based solely on the equities of the case and Mr. XXXXXX's personal circumstances. I appreciated that very much. It is obvious to me that you are seeking a fair disposition.

I also am hopeful that we can arrive at a fair disposition of the case. However, as I alluded to earlier, my hope is that a fair disposition will involve dismissal of the aggravated identity theft charge, not conditioned on a negotiated plea. I ask this because, as outlined above, not only do I believe

substantial mitigating factors exist in Mr. XXXXXX's case, but I also believe that he lacked knowledge that the XXXXX XXXXXXXXXXXX name belonged to a real person.

The base offense level for violation of 42 U.S.C. § 408(a)(7)(B), in cases involving "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification," is 12. USSG §2B1.1(b)(11).

With acceptance of responsibility, Mr. XXXXXX's offense level is adjusted to 10. §3E1.1(a).

Mr. XXXXXX's criminal record shows the Rockingham, NH Superior Court sentenced him on two dockets (cycle 1 and cycle 2) on April 12, 2013. USA000088 - USA000089. The sentences for cycle 1 and cycle 2 are not counted separately because the offense date and sentencing date are the same. USSG §4A1.2(a)(2). That same guideline provision sets the governing sentence as whichever carried "the longest sentence of imprisonment." Id.

As to cycle 1, the Court imposed a 3-7 year suspended sentence, with no sentence of imprisonment. As to cycle 2, the record reflects that the Court imposed a 1-year split sentence, with 90 days deemed served and the balance suspended. Thus, the controlling sentence is contained in cycle 2.

I am hoping that we can get our hands on the actual sentencing documents underlying cycle 2, because Mr. XXXXXX informs me that he only served 6 days in jail, not 90. If Mr. XXXXXX's memory is correct, this conviction generates only 1 criminal history point ("CHP"). If the record is correct, the conviction generates 2 CHP.

The guideline range for a level 10 offense at Criminal History Category ("CHC") II is 8 to 14 months. If Mr. XXXXXX only has 1 CHP, he falls into CHC I with a guideline range of 6-12 months.

As of today's date, Mr. XXXXXX has already been detained for six months and twenty-eight days. This is already beyond the low-end of the guidelines if he is at CHC I. But even if he pleaded guilty today, his period of incarceration is far from over. Rather, because of his prior conviction and CWO (each of which constitute "aggravated felonies" under immigration law), and because of his undocumented status, Mr. XXXXXX will begin a

whole new period of detention in immigration custody. Thus, Mr. XXXXXX will continue to serve additional time while he awaits his deportation from his adopted home.

Having said all of this, and notwithstanding the legal issues which I have raised in connection with the 42 U.S.C. §408(a)(7)(B) indictment, I would like you to consider a C plea as to that charge with an agreed upon recommendation of time served.

To the extent this disposition is somewhat less than what you originally had in mind, I am hopeful that the additional perspective I have attempted to furnish in this letter might allow you some flexibility.

Finally, though I am loathe to join the chorus of lawyers⁶ clamoring for benefit to their client in the wake of the current public health crisis, I would simply like to point out that because this case involves no elements of violence or threat to public safety, and will inevitably end with this particular defendant being removed from this country, that Mr. XXXXXX might be the sort of individual most suitable for expeditious removal from the federal detainee / sentenced prisoner population. There are many uncertainties regarding this virus, other than that correctional facilities, like cruise ships, constitute an ideal environment for the spread of infectious diseases such as the coronavirus. I understand that this country recently earned the dubious distinction of being designated the "epicenter" of the epidemic and, on a more local level, I am aware that at least one positive case of the virus has been reported involving a case worker assigned to the Plymouth County House of Correction, where Mr. XXXXXX is held.⁷ To the extent this is a consideration within your office, and the facilities in which it houses prisoners, I ask you to consider whether, from an epidemiological standpoint, it may become difficult to rationalize detaining Mr. XXXXXX further.

⁶ Yesterday, the Massachusetts SJC heard oral arguments on an emergency petition which sought release of several classes of incarcerated individuals, including all individuals detained on the basis of risk of flight, as opposed to a dangerousness determination. <https://www.aclum.org/en/news/aclu-macd1-statements-sjc-lawsuit-release> (last visited April 1, 2020). Separately, in consideration of a motion to stay sentence, the SJC issued a rescript today directing the trial court to give careful consideration "during this pandemic, to the risk that the defendant might die or become seriously ill if kept in custody." Commonwealth v. Christie, __ Mass. __, SJC-12927 (April 1, 2020).

⁷ <https://www.bostonglobe.com/2020/03/23/nation/plymouth-sheriffs-department-employee-tests-positive-covid-19/> (last visited March 27, 2020)

Thank you for the time you have taken in reviewing this letter. Please let me know your thoughts when you get a chance. As always, I would be happy to discuss this case further with you when you get a chance.

Sincerely,
/s/ Murat Erkan
Murat Erkan