

## Chapter XIII

# Factual Innocence for Identity Theft Victims

*by Steven G. Counelis*

The essential feature of identity theft is the lost ability to authenticate who we are. Within our complex economic and legal worlds, a prosecutor is ideally situated to assist identity theft victims restore their ability to authenticate their name and themselves.

### **I. Scenario—Identity Theft per Penal Code Section 530.5**

As a prosecutor, you have done your duty. You have successfully prosecuted an especially despicable identity thief and sent the crook off to state prison.

Yet your victims have lost their good name and remain in economic and emotional turmoil in the wake of the criminal case. They complain that they cannot recover from the defendant's conduct because financial institutions, creditors, and merchants refuse to believe their poor credit score as a result of an identity thief. The victims are unable to convince the financial institutions of their factual innocence and that they are not responsible for the losses incurred by the defendant in their names.

### **II. What Can the Prosecutor Do?**

The answer is to assist the victim in placing his name on California's Identity Theft Victim Database.<sup>1</sup>

The prosecutor has easy access and professional knowledge (compared to a pro per litigant) to the court system in order to obtain the prerequisite judicial certificate and findings of factual innocence on behalf of a victim.

The Department of Justice maintains the database. As of August 2005, only 39 persons were registered.<sup>2</sup> One year later, 56 were registered. Clearly, prosecutors and the public are underutilizing this resource.

#### **A. Penal Code Section 530.6: Factual Innocence Certificates and Orders**

Prosecutors (as well as pro per victims and the court sua sponte) have a very powerful tool in Penal Code section 530.6 to reclaim a victim's good name. Based upon a reasonable belief and "declarations, affidavits, police reports, or other material," the prosecutor may apply and move for an expedited determination of a victim's factual innocence.<sup>3</sup> This may be done under the following circumstances:

- The perpetrator of the identity theft was arrested for, cited for, or convicted of a crime under the victim's identity, or

- Where a criminal complaint has been filed against the perpetrator in the victim's name, or
- Where the victim's identity has been mistakenly associated with a record of criminal conviction.

If the court finds that the petition or motion is meritorious and that there is “no reasonable cause” to believe the above circumstances are true, then the court shall find the victim factually innocent of that offense and issue an order “certifying” this determination. There is no statutory basis for considering these procedures “contested hearings” and thus a defendant has no standing to oppose the prosecutor or victim's request for a factual innocence determination.

## **B. Form CR-150 — “Certificate of Identity Theft: Judicial Finding of Factual Innocence”**

The Judicial Council has promulgated the required form for the prosecutor's use. Officially known as the “Certificate of Identity Theft: Judicial Finding of Factual Innocence,” the prosecutor should fill out the form with the victim's personal identifying information (name, DOB, gender, height, weight, eye and hair color, race, age, California Driver's License number, booking number, and other identifying information). The prosecutor must also obtain the victim's right thumbprint with the assistance of an investigator and place it on the form.

The form provides the court three “factual finding” options from which to choose. The choices are not necessarily mutually exclusive and selecting all three may be appropriate in your case. The prosecutor should check off the factual finding(s) box(es) appropriate to the case. The form should be completed in all respects prior to submitting it for the court's signature.

Every Form CR-150, Certificate of Identity Theft: Judicial Finding of Factual Innocence, that is filed with the court is confidential. The clerk's office must maintain these forms in a manner that will protect and preserve their confidentiality. The court, the identity theft victim, the prosecution, and law enforcement agencies may have access to Form CR-150. The court may allow access to any other person on a showing of good cause.<sup>4</sup>

## **C. Particularized Ex Parte Application for Factual Innocence per Penal Code Section 530.6**

It is also highly advisable to prepare a particularized ex parte application for the court to find the victims “factually innocent” of the defendant's underlying criminal conduct. The prosecutor should draft an additional order that specifies each account and financial transaction that was fraudulently opened or used by the defendant during the commission of the crime.

## **D. Sample Language**

The Court takes judicial notice of its own file number XXXXXXXX, the defendant's guilty pleas, factual bases, police reports contained therein, probation reports, victim impact statement, documents received pursuant to subpoena duces tecum, and attached CONFIDENTIAL “CERTIFICATE OF IDENTITY THEFT: JUDICIAL FINDING OF FACTUAL INNOCENCE.”

The Court finds that DEFENDANT #1 and DEFENDANT #2 were convicted on July 1, 2XXX of the crimes of IDENTITY THEFT [Penal Code section 530.5] and GRAND THEFT [Penal Code section 487(a)] wherein the defendants used the personal identifying information of VICTIM.

The Court finds that DEFENDANT #1 and DEFENDANT #2 stole personal identifying information, specifically the name, Social Security Number, and date of birth of VICTIM in the commission of the crimes for which they were convicted.

The Court finds that DEFENDANT #1 and DEFENDANT #2, in the commission of the crimes for which they were convicted, established a CINGULAR WIRELESS account (#XXXXXX) in the name of VICTIM.

The Court further finds, pursuant to Penal Code section 530.6(b), that VICTIM'S identity was unlawfully associated with the above listed commercial accounts and that there is no reasonable cause to believe VICTIM was responsible for obtaining credit, goods or services from those accounts.

Accordingly, the court finds, pursuant to Penal Code section 530.6(b), that the People's Ex Parte Application is meritorious, and that there is no reasonable cause to believe that VICTIM committed the offenses in this case, and that VICTIM is factually innocent of such offenses.

#### **E. Supporting Documentation**

It is essential to provide the court supporting documentation and exhibits. The statute explicitly authorizes the use of declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties or ordered to be part of the record by the court.<sup>5</sup> In other words, hearsay is admissible. Most striking is the absence of any requirement for a formal evidentiary hearing. This relatively relaxed evidentiary approach affords the prosecutor and the victim an efficient process by which to obtain an immediate judicial determination of factual innocence.

#### **F. Sealing the Order**

Prosecutors must not fail to include in the particularized factual innocence order a specific court order to seal, delete, or label the name and associated personal identifying information contained in court records, files, and indexes accessible by the public to show that the data is impersonated and does not reflect the defendant's identity.<sup>6</sup> Clearly, the prosecutor must preclude the possibility that the victim's personal identifying information required on Form CR-150 and the ex parte application not become the source documents for future victimization by other criminals.

#### **G. Timing the Filing of the Factual Innocence Order**

Once completed, the Form CR-150 and the ex parte application may be filed with the court per local rules.

After a signature by the court, the prosecutor should request from the court and clerk at least four certified copies of Form CR-150 and the ex parte application. One copy is for the district attorney files, and three copies go to the victim for applying to the DOJ Identity Theft Victim Database and for future personal use with creditors or police.<sup>7</sup>

An expedited judicial determination of a victim's factual innocence may be heard. The statute permits such an expedited determination as soon as a perpetrator has been arrested or cited, convicted of a crime under the victim's identity, or where a criminal complaint has been filed against the perpetrator in the victim's name, or where the victim's identity has been mistakenly associated with a record of criminal conviction.<sup>8</sup>

As a practical matter, prosecutors may find it most effective to file the ex parte application and Form CR-150 prior to the conclusion of a preliminary hearing or at a sentencing hearing. During these occasions the courts are necessarily more knowledgeable regarding the facts of the criminal case. Some circumstances may justify filing Form CR-150 and the application at other times during the pendency, or upon conclusion of the criminal case.

Prosecutors may receive requests for assistance from identity theft victims who were victimized in cases adjudicated several years earlier. Stolen personal identifying information is traded indefinitely among the criminal element. Victims could be haunted for years after the initial criminal case would have been concluded. There is no statute of limitation with respect to seeking remedial findings of factual innocence for these victims, too.

Most judges, commissioners, and court clerks have never had the opportunity to rule or process Form CR-150 or the ex parte application for a finding of factual innocence. Therefore, prosecutors will need to educate court staff regarding the purpose of the Form CR-150 and the ex parte application, why multiple certified copies are requested, and why the court should seal the documents. Whenever possible, file the forms under existing case numbers in order to provide the court and staff a legal and factual reference point for all orders to be issued.

## **H. The Next Steps for the Victim: California's Identity Theft Victim Database**

Once the prosecutor has obtained signed Form CR-150 orders and ex parte applications for findings of factual innocence, the victim has accomplished the first and most daunting step toward being placed on California's Identity Victim Database. The prosecutor should provide the victim with stamped, certified copies of the factual innocence orders. The prosecutor should further explain the following process for the victim to follow:<sup>9</sup>

### **1. Live Scan fingerprinting**

The victim will need to make an appointment to be fingerprinted at the closest law enforcement agency to complete this electronic fingerprinting process. The Live Scan operator will retain the ORIGINAL copy of the request form and return the SECOND COPY — Requesting Agency and THIRD COPY — Applicant to the prosecutor, who then will mail the second copy to DOJ at the conclusion of this process.

### **2. Application form**

The victim must complete a form entitled: IDENTITY THEFT: APPLICATION FOR REGISTRATION AS VICTIM.

### 3. Send to DOJ

The victim must mail the following documents: completed Application for Registration as Victim form; Court Order Second Copy — Live Scan Service form (BCII-8016) to the DOJ at:

California Department of Justice  
BCIA/Command Center, Rm. G210  
P.O. Box 903417  
Sacramento, CA 94203-4170  
Attn: ID Theft Registry

Once the DOJ receives the completed application, it will compare and authenticate the information the victim provided, including fingerprint information, against the Department of Motor Vehicles database. DOJ will issue victims a Personal Identification Number (PIN) that is their password to access verification of their registration as a victim.

A toll-free number [(888) 880-0240] provides the victim or police access to the database to confirm a victim's registration and court-certified true identity. This allows police to confirm whether or not the person before them is the person for whom they are looking.

The victim may designate individuals or agencies to be notified of the victim's registration via certified letter. Victims may direct notifications to persons or entities of their choosing. Access to the database is limited to criminal justice agencies, victims of identity theft, and individuals and agencies authorized by the victims (e.g., financial institutions, creditors, credit bureaus, prospective employers, or any other entity for which the victim's identity has been in question).<sup>10</sup>

In this manner, the victim is able to re-authenticate who they are regarding their finances and legal history.

#### I. Victim Resources

Office of Privacy Protection—California Department of Consumer Affairs:  
<http://www.privacyprotection.ca.gov/cover/identitytheft.htm>

Office of the Attorney General—California Department of Justice: <http://caag.state.ca.us/idtheft/>

#### J. Prosecutor Resources

Official court forms: <http://www.courtinfo.ca.gov/cgi-bin/forms.cgi>

Online fillable or nonfillable CR-150 form: <http://www.courtinfo.ca.gov/cgi-bin/forms.cgi>

All Rules of Court: <http://www.courtinfo.ca.gov/rules/>

## K. A Proposed Protocol to Assist Victims Postconviction

Upon a conviction for Penal Code section 530.5(a) or 530.5(d), every deputy district attorney should assist every victim to the greatest possible extent to regain their identity through a Judicial Finding of Factual Innocence, pursuant to Penal Code section 530.6.

The deputy district attorney shall offer the victim the opportunity to obtain a certificate of factual innocence from the court with the assistance of the District Attorney's office. Upon receiving an affirmative request for such an order, the deputy district attorney shall do the following:

1. Prepare a "Certificate of Identity Theft: Judicial Finding of Factual Innocence" (Judicial Council Form CR-150) for presentation to the court.
2. Prepare a written ex parte application for a court order pursuant to Penal Code sections 530.5 and 530.6 specifying the victim's name and identifying information, facts accepted by judicial notice, and findings of fact related to the specific criminal conduct for which there is no reasonable cause to believe the victim is responsible.
3. Present all originals to the court for signature.
4. Request the court to seal the court's order to protect the victim's personal identifying information from public disclosure.
5. Request the court and clerk to provide at least four certified copies of the signed Form CR-150 and ex parte application and order of factual innocence.
6. Provide the victim three certified copies of the Form CR-150 and ex parte application and order of factual innocence.
7. Provide the victim a copy of the Office of Privacy Protection's Victim Guide to using the Identity Theft Registry. (See <http://www.privacyprotection.ca.gov/sheets/cis8englsih.pdf>.)
8. Provide the victim a copy of the Attorney General's Web page entitled "Registry Application Process." (See <http://caag.state.ca.us/idtheft/packet.htm>.)

### ENDNOTES

1. The database was created by Penal Code § 530.7 (A.B. 1862 (Torlakson), Chapter 631, Stats. 2000).
2. Interview with Jack Ellering, DOJ Supervisor of Identity Theft Registry [August 18, 2005]. Contact: (916) 227-3244 or [jack.ellering@doj.ca.gov](mailto:jack.ellering@doj.ca.gov).
3. Penal Code § 530.6(b): A person who reasonably believes that he or she is the victim of identity theft may petition a court, or the court, on its own motion or upon application of the prosecuting attorney, may move, for an expedited judicial determination of his or her factual innocence, where the perpetrator of the identity theft was arrested for, cited for, or convicted of a crime under the victim's identity, or where a criminal complaint has been filed against the perpetrator in the victim's name, or where the victim's identity has been mistakenly associated with a record of criminal conviction. Any judicial determination of factual innocence made pursuant to this section may be heard and determined upon declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties or ordered to be part of the record by the court. Where the court determines that the petition or motion is meritorious and that there is no reasonable cause to believe that the victim committed the offense for which the perpetrator of the identity theft was arrested, cited, convicted, or subject to a criminal complaint in the victim's name, or that the

victim's identity has been mistakenly associated with a record of criminal conviction, the court shall find the victim factually innocent of that offense. If the victim is found factually innocent, the court shall issue an order certifying this determination.

4. See Rule of Court 4.601(b) at <http://www.courtinfo.ca.gov/rules/titlefour>.
5. Penal Code § 530.6(b).
6. Penal Code § 530.6(c).
7. See the Department of Consumer Affairs, Office of Privacy Protection's guide how to use California's Identity Theft Registry (database) at <http://www.privacyprotection.ca.gov/sheets/cis8englsih.pdf>.
8. Penal Code § 530.6(b).
9. See Attorney General's Registry Application Process page at <http://caag.state.ca.us/idtheft/packet.htm>.
10. Penal Code § 530.7(c).

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