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A. *BROCK/HECTOR* HOLDS THAT THERE IS ONLY ONE ELEMENT TO A VIOLATION OF SECTION 440.105(4)(b)9, FLA. STAT.: USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT;

B. *HERNANDEZ* HOLDS THAT THERE ARE THREE ELEMENTS TO A VIOLATION OF SECTION 440.105(4)(b)9, FLA. STAT.: (1) USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT; AND (2) USING A FALSE SOCIAL SECURITY NUMBER TO FILE OR SUPPORT A WORKERS' COMPENSATION CLAIM; AND, (3) KNOWINGLY USING A FALSE SOCIAL SECURITY NUMBER TO FILE OR

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CLAIM.**

POINT TWO

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AN UNCONSTITUTIONAL RESULT; WHEREAS
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SECTION 440.105(4)(b)9, FLA. STAT.,
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STATEMENT OF THE CASE AND FACTS

The petitioner, Jordan Hector, was one of twelve undocumented workers of which eleven, including Hector, were identified as Hispanic. They were rounded up in a raid on Waste Pro USA, Inc., in Ft. Pierce, St. Lucie County, Florida, and charged with violating Section 440.105(4)(B)9, Fla. Stat., a felony of the third degree.

The handwritten portion of the "ARREST AFFIDAVIT" dated July 18, 2012, describes the charge as "W/C Fraud".

The typewritten portion of the "PROBABLE CAUSE AFFIDAVIT" dated July 18, 2012, describes the charge as "PRESENTING A FRAUDULENT SSN FOR THE PURPOSE OF EMPLOYMENT AND BENEFITS (F.S. 440.105(4)(B)9, A FELONY OF THE 3RD DEGREE".

The probable cause affidavit relates that ReliaStar Life Insurance Company d/b/a ING, indicated a suspicion that numerous employees of Waste Pro USA, Inc., had submitted false social security numbers for the purpose of employment. The Fraud Division of the Florida Department of Financial Services conducted an inquiry of records of the Division of Unemployment and the Department of Revenue which indicated that employee wages were reported by Waste Pro USA, for Jordan Hector using a social security number that was not issued to him.

The Fraud Division obtained an affidavit from Waste Pro USA, that the petitioner was hired on November 5, 2007, and that employee wages were reported to the State of Florida for the petitioner based on this social security number. Further, the petitioner completed a Homeland Security I-9 Employment Eligibility Verification form dated August 13, 2011, and again listed this social security number. The probable cause affidavit provided:

Therefore, on or about 08/13/2011 JORDEN HECTOR did knowingly present or cause to (sic) presented a false, fraudulent or misleading written statement to Waste Pro USA, Inc., as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits, in violation of Florida Statute, §440.15(4)(b)(9), a felony of the third degree.

The Information dated July 26, 2012, filed July 27, 2012, identified the petitioner Jordan Hector as being "Hispanic" under the designation "RACE". The Information provided:

B. Ct. 1. WORKERS' COMPENSATION FRAUD LESS THAN \$20,000-EVIDENCE OF IDENTITY (F-3)

August 13, 2011 **Jordan Hector** did knowingly present, or cause to be presented, a false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment or filing or supporting a claim for workers' compensation benefits, and the value of the benefits sought to be obtained was less then \$20,000, in violation of Florida Statute 440.105(4)(b)9;

The case of the petitioner, Hector Jordan, aka Jordan Hector, and the case of Armando Lopez-Bock, aka Francisco Brock, were consolidated before Circuit Judge Robert R. Makemson.

The defendants filed a motion to dismiss which among other things contended:

The defendants did not file a claim for workers' compensation nor cause to be presented any statement in support of a claim for workers' compensation.

The State filed a Traverse and Demurrer dated March 1, 2013, which stated:

4. The State agrees that the Defendants did not file a workers' compensation claim. (Emphasis added).

A hearing was conducted on the motion to dismiss on March 1, 2013.

At the hearing, the Judge stated at the end:

I'm going to find that the State is required to prove that they obtained employment for the purpose of worker compensation benefits, either filing or supporting a claim for workers' compensation benefits, they're all tied together. The state has agreed that they have not claimed nor filed for workers' compensation benefits...

The final order of dismissal was entered on March 12, 2013, granting the motion to dismiss since there was consensus that the defendants did not file, claim, or receive workers' compensation benefits.

The State appealed to the Florida Fourth District Court of Appeal which entered an opinion dated April 30, 2014 (rendered June 9, 2014), reversing the circuit court's dismissal of the charge and remanding the case to the circuit court for further proceedings based on *State v. Brock*, 39 Fla. L. Weekly D907 (4th DCA Apr. 30, 2014), decided the same day.

The Fourth DCA held in *Brock*, at D907-908:

Here, the statute is clear and unambiguous. Section 440.105(4)(b)9 makes it a crime to "present . . . any false, fraudulent, or misleading oral or written statement to any person as evidence of identity for the purpose of obtaining employment" The fact that this clause is followed by the word "or" is important as it indicates the statute may be violated in more than one way: by presenting false or fraudulent documents for the purpose of obtaining employment or providing the false or fraudulent documents to file or support a workers' compensation claim.

* * * * *

Therefore, it seems clear that the legislature specifically intended to make it a felony for a person to knowingly present any false or misleading identification for the purpose of obtaining employment, irrespective of the existence of any workers' compensation claim. (Emphasis added).

SUMMARY OF ARGUMENT

The Florida Supreme Court should exercise its discretionary jurisdiction to review the decision of the Fourth DCA in this case.

The decision expressly and directly conflicts with the decision of the First DCA in *Matrix Employee Leasing v. Hernandez*, 975 So. 2d 1217 (Fla.

1st DCA 2008), on the same point of law, that is, the interpretation of Section 440.105(4)(b)9, Fla. Stat. The First DCA in *Hernandez* decided that there are three elements to a violation of this statute. The Fourth DCA decided in *Brock/Hector* that there is only one element to a violation of this statute. The Fourth DCA decision in *Brock/Hector* produces an unconstitutional result: (1) it adopts immigration policy; (2) immigration policy is the exclusive province of Congress under the Supremacy Clause; and (3) it discriminates against aliens and Hispanics in violation of equal protection of the laws (strict scrutiny).

ARGUMENT

POINT ONE

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN *STATE OF FLORIDA V. HECTOR*, FLA. FOURTH DCA CASE NO. 13-961 (OPINION FILED APRIL 30 2014) [RENDERED JUNE 9, 2014] EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN *MATRIX EMPLOYEE LEASING V. HERNANDEZ*, 975 SO. 2D 1217 (FLA. 1ST DCA 2008) ON THE SAME POINT OF LAW WHEN:

A. *BROCK/HECTOR* HOLDS THAT THERE IS ONLY ONE ELEMENT TO A VIOLATION OF SECTION 440.105(4)(b)9, FLA. STAT.: USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT;

B. HERNANDEZ HOLDS THAT THERE ARE THREE ELEMENTS TO A VIOLATION OF SECTION 440.105(4)(b)9, FLA. STAT.: (1) USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT; AND (2) USING A FALSE SOCIAL SECURITY NUMBER TO FILE OR SUPPORT A WORKERS' COMPENSATION CLAIM; AND, (3) KNOWINGLY USING A FALSE SOCIAL SECURITY NUMBER TO FILE OR SUPPORT A WORKERS' COMPENSATION CLAIM.

The standard of review is de novo. *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

A comparison of the First District Court of Appeal's decision interpreting Section 440.105(4)(b)9, Fla. Stat., in *Matrix Employee Leasing v. Hernandez*, supra, with the Fourth District Court of Appeal's decisions interpreting Section 440.105(4)(b)9, Fla. Stat., in *Brock* and its companion, *Hector*, shows that there is express and direct conflict between the two cases on the same point of law, the interpretation of the same statute.

The difference is that the 1st DCA looked to the placement of the statute in the workers' compensation crimes section. They looked to sub-section 4's provision that a violation of sub-section 4 is "insurance fraud". They looked to the legislative intent which was to curtail workers' compensation fraud. To the contrary, the Fourth DCA did not look to the placement of the statute, nor to the purpose of the sub-section, nor to the

legislative intent. Instead, they looked only at the word "or" separating the phrase "obtaining employment or filing and supporting a workers' compensation claim". (Appendix, 5-6).

Hernandez

There are three elements to a violation of Section 440.105(4)(b)9, Fla. Stat. (1) using a false social security number to obtain employment; and (2) using a false social security number to file or support a workers' compensation claim; and (3) knowingly using a false social security number to file or support a workers' compensation claim.

Brock/Hector

There is only one element to a violation of Section 440.105(4)(b)9, Fla. Stat. (1) using a false social security number to obtain employment.

At the end of the opinion in *Brock* (Appendix, 6), the Fourth DCA attempted to distinguish *Brock/Hector* from the First DCA's opinion in *Hernandez* by saying that *Hernandez* was a workers' compensation case and *Brock/Hector* is a criminal case. This is a distinction without a difference. The cases interpret the same statute, Section 440.105(4)(b)9, Fla. Stat., but differently. They apply different tests for violation of the statute and the cases have different results: no violation in *Hernandez*; violations in *Brock* and *Hector*.

POINT TWO

THE HOLDING OF *BROCK/HECTOR* PRODUCES AN UNCONSTITUTIONAL RESULT; WHEREAS THE HOLDING OF *HERNANDEZ* DOES NOT;

A. THE HOLDING OF *BROCK/HECTOR* THAT AN UNDOCUMENTED WORKER USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT IS A FELONY UNDER SECTION 440.105(4)(b)9, FLA. STAT., VIOLATES THE SUPREMACY CLAUSE OF THE U. S. CONSTITUTION IN THAT IMMIGRATION POLICY IS THE EXCLUSIVE PROVINCE OF THE FEDERAL GOVERNMENT;

B. THE HOLDING OF *BROCK/HECTOR* THAT AN UNDOCUMENTED WORKER USING A FALSE SOCIAL SECURITY NUMBER TO OBTAIN EMPLOYMENT IS A FELONY UNDER SECTION 440.105(4)(b)9, FLA. STAT., DISCRIMINATES AGAINST ALIENS AND HISPANICS AND IS SUBJECT TO STRICT SCRUTINY IN REGARD TO EQUAL PROTECTION OF THE LAWS.

The standard of review is de novo. *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

The U.S. Constitution contains the Supremacy Clause. Art. VI, cl. 2, U.S. Const., which means that the laws of the United States are the supreme law of the land, the law of any state to the contrary notwithstanding. In *Arizona v. United States*, 567 U.S. _____, 132B S. Ct. 2492, 183 L. Ed. 2d 351 (2012), the U.S. Supreme Court held that the federal government has

preempted the field of immigration policy by the Immigration Reform Control Act of 1986 (IRCA).

Arizona had passed a statute that made it a misdemeanor for any unauthorized alien to knowingly apply for work.

The U.S. Supreme Court held that this violated the Supremacy Clause because Congress had made it a crime for employers to knowingly hire undocumented workers, but Congress has not criminalized the workers' actions. Therefore, a state could not do so. *Id.*, at 2504-2505. *Arizona v. U.S.*, *supra*, was quoted favorably by this Court on this same point of law recently in *Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants are Eligible for Admission to the Florida Bar*, 134 So. 3d 432, at 434-435 (Fla. 2014).


There is nothing in Section 440.105(4)(b)9, Fla. Stat., to suggest that the Florida Legislature intended to impact immigration policy in any way. The decision of the Fourth DCA in *Brock/Hector*, however, does. According to *Brock/Hector*, any and all undocumented workers can be charged and convicted of a felony for using any false identity to obtain employment, even though there is no workers' compensation connection. Whereas, under *Hernandez*, there must be a workers' compensation connection. If *Brock/Hector* were correct, then the Fourth DCA's

interpretation of the word "or" in the statute would be unconstitutional as applied. The similarity to the invalid Arizona statute is quite striking. The Fourth DCA's interpretation of the Florida statute impacts federal immigration policy just as much as the Arizona statute.

The petitioner and the others rounded up were identified as "Hispanic". Laws which discriminate against aliens or Hispanics violate constitutional guarantees of equal protection of the laws and are subject to strict scrutiny. *Graham v. Ramani*, 383 So. 2d 634 (Fla. 1980) and *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204 (Fla. 1989). There is no way that the Fourth District Court of Appeal's interpretation of Section 440.105(4)(b)9, Fla. Stat., could pass the strict scrutiny test on this account.

CONCLUSION

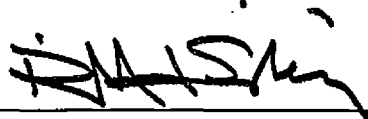
The Court should exercise its discretionary jurisdiction to review the *Brock/Hector* decision which expressly and directly conflicts with the First DCA's decision in *Hernandez* on the same point of law, the interpretation of Section 440.105(4)(b)9, Fla. Stat., in order to decide that *Hernandez* is correct and *Brock/Hector* is incorrect.


Richard A. Sicking

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 26th day of June, 2014, to: Pamela Jo Bondi, Attorney General (pam.bondi@myfloridalegal.com), co-counsel for respondent, Office of the State Attorney, State of Florida, The Capitol, PL-01, Tallahassee, FL 32399; and Don M. Rogers, Assistant Attorney General (CrimAppwpb@ myfloridalegal.com), co-counsel for respondent, Office of the State Attorney, State of Florida, 1515 N. Flagler Drive, Floor 9, West Palm Beach, FL 33401.

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Richard A. Sicking

CERTIFICATE OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been typed in 14 point proportionately spaced Times New Roman.

A handwritten signature in black ink, appearing to read "R. A. Sicking", is written over a horizontal line.

Richard A. Sicking