

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                                  |   |                        |
|----------------------------------|---|------------------------|
| <b>IBRAHIM FOFANA,</b>           | : | <b>CIVIL ACTION</b>    |
|                                  | : | <b>NO. 13-907</b>      |
| <b>Petitioner,</b>               | : |                        |
|                                  | : |                        |
| <b>v.</b>                        | : | <b>CRIMINAL ACTION</b> |
|                                  | : | <b>NO. 09-662</b>      |
| <b>UNITED STATES OF AMERICA,</b> | : |                        |
|                                  | : |                        |
| <b>Respondent.</b>               | : |                        |
|                                  | : |                        |
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|                                  | : |                        |

**MEMORANDUM OPINION**

**Tucker, J.**

**May \_\_\_\_, 2013**

Presently before the Court is Defendant Ibrahim Fofana’s Habeas Corpus Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 161) and the Government’s Response (Doc. 163). Upon consideration of the parties’ motions with briefs and exhibits, and for the reasons set forth below, Defendant’s motion will be ***granted in part and denied in part.***

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Defendant Ibrahim Fofana (“Fofana”) was charged by indictment with the following: one count of conspiracy to commit access device fraud, in violation of 18 U.S.C. § 1029(b)(2); one count of production, use, or trafficking in one or more counterfeit access devices, in violation of 18 U.S.C. § 1029(a)(1), and aiding and abetting that crime, in violation of 18 U.S.C. §2; eight counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A, and aiding and abetting that crime, in violation of 18 U.S.C. §2; one count of possession of 15 or more counterfeit or

unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3); and one count of possession of device-making equipment, in violation of 18 U.S.C. § 1029(a)(4). These charges arose from Fofana's participation in an agreement with others to produce, use, and traffic in counterfeit access devices; his possession and use of counterfeit access devices; and his transfer, possession, and use, and aiding and abetting the transfer, possession, and use, of means of identification of other people during April 2009.

Prior to his scheduled trial date, Fofana signed a plea agreement with the Government pursuant to which he agreed to plead guilty to Count One (conspiracy), Count Two (access device fraud), Counts Three through Eight (aggravated identity theft), Count Eleven (possession of 15 or more fraudulent devices), and Count Twelve (possession of device-making equipment) of the indictment. In that plea agreement Fofana, among other things, stipulated to a loss amount between \$200,000 and \$400,000. The Government agreed to move for the dismissal of Counts Nine and Ten of the indictment, and stipulated to two points credit for Fofana's acceptance of responsibility. On the date scheduled for trial, September 13, 2010, Fofana entered a guilty plea after a plea colloquy.

The sentencing hearing was held on December 14, 2010. The final presentence report (PSR) set forth that the base offense level for Fofana's crimes was 6. The characteristic of intended loss between \$200,000 and \$400,000 raised the base offense by 12 levels. The existence of 10 or more victims raised that by 2 more. Fofana's possession of device-making equipment raised that by 2 more. Further, because Fofana was deemed to be the organizer and leader of the conspiracy he was given 4 additional points for his role in the offense. In

accordance with the plea agreement, Fofana received two points off for acceptance of responsibility. Thus, Fofana ultimately had a total offense level of 24.

In addition, Fofana had a criminal history category of VI that resulted in an advisory sentencing guidelines range of 100-125 months. In light of Fofana's conviction on six counts of aggravated identity theft, at least one two-year term was required to run consecutively to the sentence for the underlying crimes, see 18 U.S.C. § 1028A, giving Fofana an effective guidelines sentencing range of 124-269 months.

At the sentencing hearing, Fofana's attorney raised two objections to the PSR. First, Fofana's attorney argued that he should not receive the four-point enhancement for a leadership role in the offense. Second, defense counsel argued that the defendant's criminal history score overstated the seriousness of his criminal history. The court addressed the defendant's objections to the PSR and requests for variance or downward departure. The court overruled Fofana's objection to the four-point leadership enhancement, finding that the evidence was clear that Fofana was the leader of the criminal conspiracy. *Id.* at 21. The court then rejected the defendant's argument that his criminal history score substantially over-represented the seriousness of his criminal history, finding that Fofana had 14 criminal history points.

The Court imposed a sentence of 124 months in prison, the bottom of the advisory guidelines range, with only one of the possible six two-year consecutive sentences for aggravated identity theft imposed as consecutive to the sentences on the other counts. Fofana appealed, claiming that his sentence was "procedurally and substantively unreasonable." The Third Circuit disagreed, and affirmed the sentence. In particular, the Third Circuit, noting that this Court had "sentenced Fofana to the shortest term of imprisonment within the Sentencing Guidelines range,

124 months,” concluded that, “having found no procedural error, we have little difficulty finding Fofana’s sentence substantively reasonable.”

Fofana has now filed this habeas petition pursuant to 28 U.S.C. § 2255, alleging three grounds for relief. First, Fofana claims his counsel was ineffective in that his counsel allegedly advised him that he was not subject to a leadership enhancement. Fofana claims that had he known that he could be subject to such an enhancement, he would not have pled guilty, and would instead have proceeded to trial. Second, Fofana claims his counsel was ineffective for not challenging, at sentencing, the Sentencing Commission’s decision setting the loss amount for stolen credit card numbers at \$500 per number. Third, Fofana claims that his counsel was ineffective for not objecting to the district court’s imposition of a general sentence, and for not appealing that general sentence. The Court will examine each of these claims in turn.

## II. DISCUSSION

In Strickland v. Washington, the Supreme Court of the United States held that, in order for a defendant to prove ineffective assistance of counsel, he must satisfy a two-part test. 466 U.S. 668, 687 (1984). First, the defendant must show that his counsel’s performance was so deficient such that the attorney was not functioning as is required by the Sixth Amendment right to counsel. Id. This prong of the Strickland analysis depends largely on the standards set by the legal profession. Accordingly, the “proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Id. at 688. Further, in applying the “professional norms” standard, “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and courts “must indulge a strong presumption that counsel’s conduct falls within

the wide range of reasonable professional assistance.” Id. at 689. Thus, the Supreme Court in Strickland held, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id.

In addition, the second prong of the Strickland analysis requires that the defendant also demonstrate that his attorney’s deficient performance must prejudice the defense and, as a result, the defendant must have been deprived of a fair trial. Id. at 687. This prong requires that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694.

#### **A. Leadership Enhancement**

Fofana first alleges that his attorney informed him that he and his co-conspirators were equally culpable for the offense, and therefore Fofana was not subject to a leadership enhancement for his role in the offense. Fofana claims that had he known that he could be subject to such an enhancement, he would not have pled guilty, and would instead have proceeded to trial.

The Court finds that this claim fails the first prong of the Strickland test. First, the express language of the plea agreement provided that Government was free to argue the application of any unstipulated provision of the Sentencing Guidelines. (Plea Agreement ¶6.) As such, it defies logic that Fofana’s defense attorney would have represented to him that the leadership enhancement could not be applied to Fofana. Further, at his change of plea hearing, Fofana informed the Court that he understood that the Government could make any sentencing

recommendations it deemed appropriate. (Tr. Change of Plea Hr'g 7:20 – 8:7.)<sup>1</sup> Moreover, also at the change of plea hearing, the Court asked Fofana whether anyone had promised him what sentence he would receive, and he answered in the negative. (Id. at 12:4 -12:7.) Accordingly, the Court does not find credible Fofana's current assertion that his attorney made any assurances to him regarding the applicability of an enhancement. The Court also does not find credible Fofana's assertion that he would not have pled guilty had he known he was subject to an enhancement. If Fofana had not pled guilty, but instead proceeded to trial and been convicted, he would not have had two counts of the indictment dismissed, and would not have gotten a two-point reduction in his offense level for acceptance of responsibility. This would have raised his guidelines range for imprisonment by at least 20 months. The risk of conviction and, therefore, the risk of a greater sentence, is undoubtedly something Fofana took into account in opting to accept the plea agreement.

Further, even assuming *agguendo* that Fofana's allegation is true, Fofana still cannot satisfy the second prong of the Strickland analysis. The Third Circuit has repeatedly held that any errors of misinformation provided by defense counsel regarding a potential sentence is not

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<sup>1</sup> Specifically, the Court asked Fofana the following questions:

[The Court]: The Government also is in a position to make whatever sentencing recommendation as to imprisonment, fine, forfeiture, restitution[,] and other matters that the Government deems appropriate. Do you understand that?

[Defendant]: Yes, Your Honor.

[The Court]: The Government also may comment on the evidence and circumstances of the case and bring to the Courts's[sic] attention all facts which they think are relevant to sentencing. Do you understand that?

[Defendant]: Yes, Your Honor.

(Tr. Change of Plea Hearing 7:20 – 8:7.)

grounds for reversal where the in-court guilty plea colloquy accurately states the potential maximum sentence and the lack of any other guarantees as to the potential sentence. See United States v. Shedrick, 493 F.3d 292, 299 (3d Cir. 2007); United States v. Jones, 336 F.3d 245, 254-55 (3d Cir. 2003); Scarborough v. Johnson, 300 F.3d 302, 303-04 (3d Cir. 2002); United States v. Mustafa, 238 F.3d 485, 491 (3d Cir. 2001); United States v. Macon, 91 Fed. Appx. 239, 243 (3d Cir. 2004). In the instant case, at the change of plea hearing during the colloquy with Fofana, the Court reviewed the possible maximum penalties Fofana faced, see Tr. Change of Plea Hr'g 10:2-12:2, established that Fofana understood that the Government could seek whatever sentence it thought appropriate, id. at 7:20 – 8:7, and emphasized that the Court was not bound by any stipulation between the parties, id. at p. 9:12-20. As such, the Court finds Fofana cannot prove he was prejudiced by the attorney's alleged misrepresentations.

Accordingly, any alleged misrepresentations by defense counsel with regard to the sentencing provisions do not provide a basis for relief under 28 U.S.C. §2255, and this claim of Fofana's Petition is denied.

#### **B. Sentencing Commission's Policy Regarding Loss Amount**

Fofana next claims his counsel was ineffective for not challenging, at sentencing, the Sentencing Commission's policy setting the loss amount for stolen credit card numbers at \$500 per number.

The Court likewise finds this claim to be without merit and does not satisfy the first prong of the Strickland analysis. Fofana stipulated in the plea agreement as to loss in the range set by this provision. (See Plea Agreement ¶6(a).) As such, defense counsel was not free to argue against the loss amount at sentencing. Indeed, Fofana's defense counsel withdrew his

objection to the loss amount (previously asserted in Fofana's Sentencing Memorandum) for precisely this reason.<sup>2</sup> Fofana's defense counsel cannot be found ineffective for not challenging the Sentencing Commission's determination of the loss amount when there were no grounds for doing so. Moreover, Fofana offers no basis on which the Court would have either accepted or rejected defense counsel's objection to the policy.

Additionally, even assuming *arguendo* that Fofana's counsel was ineffective for not objecting to the policy, Fofana cannot prove he was prejudiced by this failure to object. Fofana argues that *if* his counsel had made the objection, and *if* the sentencing court had then failed to accept the objection, then *maybe* his case would have been remanded for sentencing by the Third Circuit. (Def.'s Pet. at 7.) Prejudice cannot be demonstrated by mere speculation as that the sentencing court might have committed error by not accepting certain arguments. Prejudice also cannot be demonstrated by mere speculation as to what the Third Circuit would have done.

Accordingly, this claim also does not provide a basis for relief under §2255.

### **C. General Sentence**

Finally, Fofana claims that his counsel was ineffective for not objecting to the district

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<sup>2</sup> Specifically, defense counsel stated the following during the Sentencing Hearing:

[Defense counsel]: First I would like to tell the Court that we are withdrawing our objection to...the double counting issue as to the amount of loss, the intended loss and we are withdrawing that objection.

The Court: Okay.

[Defense counsel]: Upon further calculation, even if there was a certain amount of double counting of numbers, it is still within the guideline range and we did stipulate to that at the time of entering the plea. So to argue about those numbers would detract from the Defendant's acceptance of responsibility and a fair evaluation of the nature of the offence.

(Tr. Sentencing Hearing, 2:19-3:7.)

court's imposition of a general sentence, and for not appealing that general sentence. Fofana argues that the general sentence exceeds the statutory maximum for some, but not all, of the individual counts. The Government responds by stating the following:

Although the defendant has not shown that his attorney's failure to object to that sentence, or to raise the issue of the general sentence on appeal, was unreasonable under prevailing professional norms, and, as such, cannot meet the standard for showing that his counsel was ineffective, Section 2255 does provide that a prisoner in custody may file a Petition under Section 2255 not only to allege a constitutional violation, such as ineffective assistance of counsel, but also to assert "that the sentence was in excess of the maximum authorized by law." 28 U.S.C. §2255(a). A generous reading of the defendant's Petition suggests that the defendant may be asserting that grounds for relief, and seeking a correction of his sentence.

(Govt's Resp. at 11.) The Government further states that "[t]he record in this case makes clear that the Court and the parties were all well aware of the statutory maximums, and the mandatory minimums, but that at the sentencing hearing, the Court, like the parties, was focused on the issue of the appropriate overall sentence, or 'total punishment.'" (*Id.* at 12) (citing U.S.S.G. § 5G1.2, app. N. 1 (2012)). In addition, as previously stated, Fofana's sentencing has been upheld by the Third Circuit. However, the Government states, because Fofana's general sentence of 124 months exceeds the statutory maximum on some counts of conviction, the sentence with respect to those counts does appear to be "in excess of the maximum authorized by law," within the meaning of § 2255. Accordingly, the Government submits that Fofana's Petition should be granted to the extent that it seeks a correction of sentence.

The Court agrees. Consistent with the Government's recommendation, the Court shall correct its general sentence by imposing a specific sentence on each count of Fofana's conviction. The Court imposes the following sentences, concurrent with one another:

- Five years (60 months) on Count One (conspiracy to commit access device fraud);

- 100 months on Count Two (production, use, and trafficking in counterfeit access devices);
- 100 months on Count Eleven (possession of 15 or more counterfeit access devices; and
- 100 months on Count Twelve (possession of device-making equipment)

In addition, the Court imposes the following sentences, to be concurrent to one another, but consecutive to the sentences on Counts Two, Eleven and Twelve:

- Two years (24 months) on each of Counts Three, Four, Five, Six, Seven and Eight (aggravated identity theft).

The Court does not find that a full re-sentencing hearing is neither necessary. Accordingly, Fofana's Petition, to the extent it seeks a correction of his general sentence, is granted.

### **III. CONCLUSION**

For the foregoing reasons, the Court shall correct the sentences on the counts of the convictions, as set forth above. Thus, Fofana's habeas petition is granted with respect to this claim. However, Fofana's petition is denied with respect to his other claims. No certificate of appealability shall be issued.

An appropriate order follows.

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|                                  | : |                        |
| <b>Respondent.</b>               | : |                        |
|                                  | : |                        |
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**ORDER**

**AND NOW**, this \_\_\_\_ day of May, 2013, upon consideration of Petitioner Ibrahim Fofana’s Habeas Corpus Petition to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Doc. 161), and the Government’s Response (Doc. 163), **IT IS HEREBY ORDERED AND DECREED** that Petitioner’s Habeas Corpus Petition is **GRANTED IN PART AND DENIED IN PART.**<sup>1</sup>

**BY THE COURT:**

**/s/ Petrese B. Tucker**

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Hon. Petrese B. Tucker, U.S.D.J.**

<sup>1</sup> This Order accompanies the Court’s Memorandum Opinion dated May \_\_\_\_, 2013.