

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

**UNITED STATES**

**CRIMINAL ACTION**

**v.**

**DAVID RICE  
VLADIMIR PASCAL**

**NO. 11-344-01  
-02**

**DuBOIS, J.**

**May 30, 2014**

**MEMORANDUM**

**I. INTRODUCTION**

On June 23, 2011, defendants, David Rice and Vladimir Pascal, were charged in an eleven-count Indictment arising out of defendants' attempts to make purchases with counterfeit credit cards at retail stores in Pennsylvania. On the first day of trial, October 1, 2012, defendants plead guilty, pursuant to a plea agreement, to several counts of the Indictment, including fraud in connection with access devices, 18 U.S.C. § 1029(a)(1) and (2), and aggravated identity theft, 18 U.S.C. § 1028A(a)(1). On March 28, 2013, the Court sentenced defendants Rice and Pascal to, *inter alia*, 63 months and 42 months imprisonment, respectively.

Both defendants have filed Motions Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motions"), each arguing the same point — that their convictions and sentences for Aggravated Identity Theft violated the Due Process Clause of the U.S. Constitution because they did not admit, and the government did not establish, that defendants knew that the means of identification they used belonged to real persons. For the reasons set forth below, defendants' Motions are denied.

## II. BACKGROUND<sup>1</sup>

On August 27, 2010, defendant Rice purchased a diamond ring worth more than \$6,000 from the J.C. Penney store in North Wales, Pennsylvania, using a credit card in the name of L.P.<sup>2</sup> *See* Factual Basis for the Plea, Government’s Change of Plea Memorandum (Rice), at 7-8; Change of Plea Tr. 45-46, Oct. 1, 2012. Later that same day, Rice entered a Kay Jeweler store, where he attempted to open store credit by again using L.P.’s name, date of birth, and social security number. *Id.* Rice was approached by police officers, to whom Rice pretended to be L.P. *Id.* The officers arrested Rice and seized numerous credit cards in L.P.’s name. *Id.* Officers also found merchandise and receipts from purchases made with some of the seized credit cards. *Id.* L.P. did not know of, and did not authorize, Rice’s use of L.P.’s personal information. *Id.*

Approximately two months later, on November 19, 2010, defendants Pascal and Rice, and a third individual identified as K.B., entered the True Religion store in Limerick Township, Pennsylvania. *See* Factual Basis for the Plea, Government’s Change of Plea Memorandum

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<sup>1</sup> These facts are derived from the Factual Basis for the Plea section of the Government’s Change of Plea Memorandum, the summary of the government’s evidence presented at the change of plea hearing, and the Presentence Report. Defendants admitted at the change of plea hearing to the truth of the Factual Basis for the Plea section of the Government’s Change of Plea Memorandum, Change of Plea Tr. 45-46, Oct. 1, 2012, and to the summary of the government’s evidence presented at the change of plea hearing, *id.* at 54-55. Furthermore, defendants admitted to the relevant factual statements contained in the Presentence Report by failing to object to them. *See* Sentencing Hearing Tr. 28-34, Mar. 28, 2013 (objecting only to the amount of the loss and the number of victims); *United States v. Johnson*, 587 F.3d 203, 213 (3d Cir. 2009) (“[A] defendant admits the [Presentence Report’s] factual allegations by failing to object to them.”). The Court notes that although the Court did not have the Presentence Report at the change of plea hearing when it concluded that a factual basis existed for defendants’ guilty pleas, the information in the Presentence Report can be considered on review of a guilty plea. *See United States v. Cefaratti*, 221 F.3d 502, 509-10 (3d Cir. 2000) (noting that courts have “refused to set aside a guilty plea where the record as a whole, including evidence not presented to the district court at the plea hearing, demonstrates a factual basis for the defendant’s plea”).

<sup>2</sup> The victims have been identified by their initials to preserve their privacy.

(Pascal), at 4-6; Change of Plea Tr. 45-46. Pascal attempted to make a purchase with a counterfeit vanilla<sup>3</sup> credit card, which was encoded with the account number for a Florida resident identified as P.S. *Id.* Rice attempted to make a purchase as well, this time using a counterfeit credit card in the name of J.B. Change of Plea Tr. 49-50; Factual Basis for the Plea, Government's Change of Plea Memorandum (Rice), at 9-10. Because the number on the front of Rice's credit card did not match the account number encoded on the magnetic strip on the back, store personnel called the Limerick Township Police. Change of Plea Tr. 49; Presentence Report ¶ 19.

Upon the arrival of the police, Rice presented them with an identification card in the name of J.B. *See* Factual Basis for the Plea, Government's Change of Plea Memorandum (Rice), at 9-10. The police patted down Rice to check for weapons and found two thumb drives. *Id.* at 8. The drives were not seized at that time, and defendants were permitted to walk around the store. *Id.* When the police arrested Rice some time later on November 19, 2010, the police found only one thumb drive. *Id.* A store manager found the second thumb drive stuffed in some clothing later that day. *Id.* The second thumb drive included pictures of Rice, Pascal, and K.B., and personal profiles for 94 individuals, each profile containing account numbers, social security numbers, dates of birth, drivers' license numbers, addresses, credit reports and scores, emails, passwords, "log-on words," images of checks, and images of signatures. Presentence Report ¶ 23. The thumb drive contained, in total, over 660 means of identification. *Id.* The thumb drive included the account number of P.S. and the social security number, date of birth, and Texas address of J.B. *See* Factual Basis for the Plea, Government's Change of Plea Memorandum

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<sup>3</sup> A vanilla credit card is one on which there is no name imprinted.

(Pascal), at 5-6; Factual Basis for the Plea, Government's Change of Plea Memorandum (Rice), at 10.

Also stuffed into clothing at the True Religion store was a Texas identification card with defendant Pascal's picture on it but in the name of J.A. *See* Factual Basis for the Plea, Government's Change of Plea Memorandum (Pascal), at 6. On the floor of the True Religion store, the manager found a crumpled piece of paper with a Texas address, a social security number, and a date of birth. *Id.* The information on the crumpled piece of paper matched J.A.'s actual identifying information and was also found on the thumb drive. *Id.* When Pascal and Rice were arrested, several additional counterfeit access devices<sup>4</sup> were found, the account numbers of which were also stored on the thumb drive. *Id.* at 5; Factual Basis for the Plea, Government's Change of Plea Memorandum (Rice), at 9.

On June 23, 2011, defendants were charged in an eleven-count Indictment. On the first day of trial, October 1, 2012, both defendants plead guilty pursuant to plea agreements.<sup>5</sup>

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<sup>4</sup> An access device is defined by statute as:

any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument)

18 U.S.C. § 1029(e).

<sup>5</sup> Defendants' plea agreement contained a collateral-attack waiver. The government, in its briefing, mentioned the waiver but did not explicitly invoke it, opting rather to address the merits of defendants' claims. Because the Court concludes that defendants' claims are meritless, the Court does not decide whether the collateral-attack waiver applies to these claims.

Included among the counts to which defendants plead guilty were several counts of Aggravated Identity Theft, 18 U.S.C. § 1028A(a)(1).<sup>6</sup>

On March 28, 2013, the Court sentenced defendant Rice and defendant Pascal to, *inter alia*, 63 months and 42 months imprisonment, respectively. On March 10, 2014, and April 11, 2014, defendants Rice and Pascal filed the pending § 2255 Motions.

### **III. DISCUSSION**

#### **A. Factual Basis for Defendants' Pleas**

In their Motions, defendants contest their convictions for aggravated identity theft. To prove aggravated identity theft, the government must establish that defendants, during and in relation to certain enumerated felonies, “*knowingly* transfer[red], possesse[d], or use[d], without lawful authority, a means of identification *of another person*.” 18 U.S.C. § 1028A(a)(1) (emphasis added). This requires that the government prove that the defendant knew that the means of identification belonged to a real person. *See Flores-Figueroa v. United States*, 556 U.S. 646 (2009). Proving such knowledge is not difficult, however, “where a defendant has used another person’s identification information to get access to that person’s bank account.” *Id.* at

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<sup>6</sup> Defendant Pascal plead guilty to three counts: (1) Count Six, conspiracy to commit fraud in connection with access devices, 18 U.S.C. § 371; (2) Count Eight, fraud in connection with an access device and aiding and abetting, 18 U.S.C. §§ 1029(a)(1) and (2); and (3) Count Eleven, aggravated identity theft and aiding and abetting, 18 U.S.C. § 1028A(a)(1), (c)(4) and (2).

Defendant Rice plead guilty to nine counts: (1) Count One, fraud in connection with access devices and aiding and abetting, 18 U.S.C. §§ 1029(a)(1) and (2); (2) Count Two, fraud in connection with access device and aiding and abetting, 18 U.S.C. §§ 1029(a)(1) and (2); (3) Count Three, aggravated identity theft, 18 U.S.C. §§ 1029A(a)(1) and (c)(4); (4) Count Four, misuse of a social security number, 42 U.S.C. § 408(a)(7)(B); (5) Count Five, aggravated identity theft, 18 U.S.C. §§ 1029A(a)(1) and (c)(11); (6) Count Six, conspiracy to commit fraud in connection with access devices, 18 U.S.C. § 371; (7) Count Seven, fraud in connection with access devices and aiding and abetting, 18 U.S.C. §§ 1029(a)(1) and (2); (8) Count Nine, production of false identification document and aiding and abetting, 18 U.S.C. §§ 1028(a)(1) and (2); and (9) Count Eleven, aggravated identity theft and aiding and abetting, 18 U.S.C. §§ 1028A(a)(1), (c)(4) and (2).

656; *see also United States v. Norman*, 465 F. App'x 110, 119 (3d Cir. 2012) (describing the government's burden in such cases as "minimal"). It is this last requirement which defendants contest in their Motions, arguing that their conviction and sentence violated the Due Process Clause of the United States Constitution because they did not admit, and the government did not establish, that they knew that the means of identification they used belonged to a real person.

Defendants gave up the right to have the government prove each element of the offense beyond a reasonable doubt when they plead guilty. Accordingly, the Court construes defendants' argument as contending that the Court lacked a factual basis to accept defendants' guilty plea.<sup>7</sup> The Court rejects this argument.

Before entering judgment on a guilty plea, Federal Rule of Criminal Procedure 11 requires that the district court "determine that there is a factual basis for the plea." Fed. R. Crim. Proc. 11(b)(3). To so find, the district court need not be convinced of defendant's guilt beyond a reasonable doubt. *United States v. Cefaratti*, 221 F.3d 502, 509-10 (3d Cir. 2000). Rather, it "need only find sufficient evidence in the record as a whole to justify a conclusion of guilt." *United States v. Lessner*, 498 F.3d 185, 197 (3d Cir. 2007) (citing *Cefaratti*, 221 F.3d at 509-10). "The court may make that inquiry by looking to the defendant's own admissions, the government's proffer of evidence, the presentence report, or 'whatever means is appropriate in a

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<sup>7</sup> Defendants argue that the lack of a factual basis violated the Due Process Clause of the U. S. Constitution. The Due Process Clause, however, "does not require an on-the-record development of the factual basis supporting a guilty plea before entry of the plea. Rather, due process requires only that the plea be voluntary and intelligent." *Meyers v. Gillis*, 93 F.3d 1147, 1148 (3d Cir.1996); *see also Earls v. United States*, 66 F.3d 328 (7th Cir. 1995) ("A factual basis is not constitutionally required, except to the extent that it affects the voluntariness of the guilty plea."). In this case, because the Court concludes that there is a factual basis for defendants' pleas, the Court need not address the question whether defendants' pleas were involuntary based on the lack of a factual basis.

specific case-so long as the factual basis is put on the record.” *Cefaratti*, 221 F.3d at 509 (quoting *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998)).

Contrary to defendants’ contention, the record in this case provides a factual basis to conclude that defendants knew the means of identification they possessed belonged to real people. The primary reason for this is simple: defendants’ scheme *required* that the means of identification belong to real people because defendants were using those means of identification to access those people’s bank accounts. This is evident from defendants’ admissions. Defendant Rice admitted that he used a credit card in L.P.’s name to purchase a \$6,000 ring from a J.C. Penny store. Factual Basis for the Plea, Government’s Change of Plea Memorandum (Rice), at 7-8. He then used L.P.’s name, date of birth, and social security number in an attempt to open store credit at a Kay Jeweler store. *Id.* Defendant Pascal similarly used an access device with P.S.’s account number encoded on it in order to make a purchase at the True Religion store. Factual Basis for the Plea, Government’s Change of Plea Memorandum (Pascal), at 5-6. Without someone else’s funds or credit to access, defendants’ scheme would have been pointless. *Dolan v. United States*, No. 09-cv-893, 2009 WL 2852988, at \*7 (D. Conn. Sept. 2, 2009) (“There would be no point in taking financial information from a non-existent being when the purpose of the scheme was to use it to access existing credit or funds.”). These facts alone provide a sufficient factual basis to conclude that defendants knew they were using the means of identification of real people. *See Norman*, 465 F. App’x at 119 (“Because Smith’s involvement in the bank fraud scheme would have been pointless if the means of identification did not belong to real customers, the government’s burden was met.”).

Separate and apart from the already-sufficient facts described above, there are admissions from defendants in this case that provide a factual basis to conclude that defendants knew the

means of identification they possessed belonged to real people. Defendant Pascal admitted that “although the cards had his name printed on them, he was aware that the credit card numbers did not belong to him.” Factual Basis for the Plea, Government’s Change of Plea Memorandum (Pascal), at 7; Change of Plea Tr. 45-46. Furthermore, defendants both admitted that the personal profiles stored on the thumb drive they possessed contained, *inter alia*, credit reports and scores, emails, passwords, “log-on words,” images of checks, and images of signatures. Presentence Report ¶ 23. Finally, defendants both admitted that they possessed the actual dates of birth, social security numbers, and addresses of J.A., J.B., and L.P. Factual Basis for the Plea, Government’s Change of Plea Memorandum (Rice), at 7, 10; Factual Basis for the Plea, Government’s Change of Plea Memorandum (Pascal), at 6; Change of Plea Tr. 45-46.

These additional facts, separate and apart from the facts discussed previously, provide a sufficient factual basis to conclude that defendants knew that the means of identification they possessed belonged to real people. *See United States v. Graham*, 486 F. App’x 265, 270 (3d Cir. 2012) (“[D]rawing all inferences in favor of the government, a reasonable jury could infer Graham’s knowledge based on the fact that the check contained both Houston’s name and correct address.”); *United States v. Shifu Lin*, 508 F. App’x 398, 402 (6th Cir. 2012) (“Defendants do not contest that information identifying eleven individuals by name in conjunction with their credit-card numbers was found on their computer. This evidence is sufficient to support an inference that Defendants knew that at least some of the account numbers they purchased belonged to actual persons.”), *cert. denied*, 133 S. Ct. 1300 (2013), *cert. denied*, 133 S. Ct. 1508 (2013), *cert. denied*, 133 S. Ct. 1844 (2013); *United States v. Ross*, 334 F. App’x 317, 318-19 (11th Cir. 2009) (concluding that defendant’s admission that she “used a social security number belonging to M.D.,” and that she had “use[d] [her] name and someone [else’s]

social security number,” was sufficient to conclude that defendant knew she was using another person’s means of identification); *Mora v. United States*, No. 09-cv-23314, 2010 WL 4722489, at \*3 (S.D. Fla. Oct. 12, 2010) (“The successful use of the credit card number established that the credit card belonged to an actual person.”), *report and recommendation adopted*, No. 09-cv-23314, 2010 WL 4818399 (S.D. Fla. Nov. 15, 2010).

One final issue bears mentioning. The Indictment contained three Aggravated Identity Theft counts — Counts Three, Five, and Eleven. Defendant Rice pled guilty to all three. Defendant Pascal pled guilty only to Count Eleven.<sup>8</sup> Count Three charged defendant Rice with possession and use of L.P.’s credit card. Count Five charged defendant Rice with possession and use of L.P.’s Social Security number. Count Eleven charged both defendants with possession of the 660 means of identification stored on the thumb drive. The Court concludes that the evidence discussed above provides a factual basis for defendants’ guilty pleas as to all such counts. Specifically, the evidence establishes that the means of identification at issue in those counts belonged to real persons.

#### **B. Voluntariness of the Plea and Ineffective Assistance of Counsel**

In his Motion, defendant Rice makes two additional claims, both of which are meritless. He first argues that his plea was not knowing and voluntary because he did not know that the government, in order to prove Aggravated Identity Theft, must prove that he knew that the means of identification he used belonged to a real person. The Court rejects that argument. Prior to pleading guilty, defendant Rice filed a Motion to Dismiss the Aggravated Identity Theft Counts of the Indictment, arguing then what he again argues now: that “the Government has not and cannot offer any evidence that [he] knew that . . . the 660 other purported ‘victims’ were real

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<sup>8</sup> Defendant Pascal incorrectly identifies this as Count Four in his Motion.

people.” Def. Rice’s Mot to Dismiss at 4 (Document No. 89, filed Aug. 8, 2012). The Court held a hearing on that Motion on August 21, 2012. Both defendants were present at that hearing, at which the Court explicitly addressed the requirement that the government prove the defendants knew that the means of identification they possessed belonged to real people. Motions Hr’g Tr. 8:11-14, Aug. 21, 2012 (“[T]he issue is, the government hasn’t charged specifically that Defendant Rice knew that the person whose identity he was stealing was a real person.”). The Court ruled that the Indictment charged that defendants knew the persons whose identities they stole were real people and denied the Motion. *See Id.* at 10-11. Furthermore, in addition to addressing this exact point at the Motion to Dismiss hearing, the Court reiterated the elements of Aggravated Identity Theft at the change of plea hearing.<sup>9</sup> Change of Plea Tr. 39-40. Both defendants stated that they understood those elements, *id.* at 40:11-13, that they were satisfied with their plea counsel, *id.* at 6:18-24, and that they had read and understood the Indictment, *id.* at 13:4-15.

Next, defendant Rice argues that his trial counsel was ineffective for (1) advising him to plead guilty to Aggravated Identity Theft when the government’s evidence was insufficient to prove that he knew the means of identification he used belonged to real people and (2) failing to appeal this Court’s denial of his Motion to Dismiss the Indictment. The Court rejects these

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<sup>9</sup> The Court stated:

In order for a defendant to be found guilty of this crime, aggravated identity theft, the Government must prove each of the following essential elements beyond a reasonable doubt. One, that the item described in the Indictment is a means of identification *of another person*. Two, that the defendant possessed or used that means of identification. Three, that the defendant acted *knowingly* and without lawful authority. And four, that the defendant did so during and in relation to the offense of access device fraud . . . and Social Security Fraud . . . .”

Change of Plea Tr. 39-40 (emphasis added).

claims as well. First, trial counsel could not have appealed this Court’s denial of defendant’s Motion to Dismiss the Indictment because defendant’s guilty plea agreement contained an appellate waiver. Second, as previously discussed, defendant Rice’s underlying contention — that the government did not establish that he knew the means of identification he used belonged to real people — is meritless. Accordingly, trial counsel was not ineffective for advising defendant Rice to plead guilty to Aggravated Identity Theft or for failing to appeal defendant’s Motion to Dismiss the Indictment.<sup>10</sup>

#### **IV. CONCLUSION**

For all of the foregoing reasons, the Court denies defendants’ Motions to Set Aside, Vacate, or Correct Sentence by a Person in Federal Custody pursuant to 28 U.S.C. § 2255. An evidentiary hearing is not required because the record “conclusively show[s] that [defendants are] entitled to no relief.” 28 U.S.C. § 2255(b). Furthermore, a certificate of appealability will not issue because reasonable jurists would not debate this Court’s decision that defendants’ Motions do not state a valid claim of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). An appropriate order follows.

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<sup>10</sup> Defendant Pascal also states in his § 2255 Motion that he told his lawyer to appeal his conviction on the ground that the government did not prove that he knew the means of identification he possessed belonged to real people, but that his lawyer did not do so. To the extent defendant Pascal is making an ineffective assistance of counsel claim, this claim likewise is denied for the above-stated reasons. Counsel for Pascal could not have appealed his conviction because of the appellate waiver in his guilty plea agreement. Moreover, the Court has concluded that defendants’ underlying argument is meritless, and thus any failure to appeal this issue could not have prejudiced defendant Pascal.