IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* CARL DELANO TORJAGBO A/K/A KARL LUCIUS DELANO	Criminal Action No. 1:22-CR-171-MLB-RDC

Response in Opposition to Defendant's Motion to Dismiss Count Two

The United States of America, by Theodore S. Hertzberg, United States Attorney, and Kelly K. Connors and Nicholas L. Evert, Assistant United States Attorneys for the Northern District of Georgia, files this Response in Opposition to Defendant's Motion to Dismiss Count Two (Doc. 188).

A valid indictment need only allege the essential elements of the charged offense, provide the defendant notice of the charges against him, and enable the defendant to plead double jeopardy in the future if necessary. Count Two of the Second Superseding Indictment in this case more than satisfies those standards, and Defendant fails to show otherwise.

ARGUMENT AND AUTHORITY

"There is a strong presumption an indictment is valid." *United States v. Jones*, Crim. Action No. 1:05-CR-617-WSD, 2007 WL 2301420 (N.D. Ga. July 18, 2007), *citing Ward v. United States*, 694 F.2d 654, 658 (11th Cir. 1982). A valid indictment is "specific enough 'to inform the defendant of the charge against him and to enable him to plead double jeopardy in any future prosecution for the same offense.' These requirements are satisfied if the indictment tracks the language of the statute and sets forth the essential elements of the offense." *United States v. Brantley*, 461 Fed. App'x 849, 851 (11th Cir. 2012); *see also United States v. Jordan*, 582 F.3d 1239, 1245 (11th Cir. 2009) (same); *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) ("'For an indictment to be valid, it must contain the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet.'") (quoting *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003)); *United States v. Critzer*, 951 F.2d 306, 307–08 (11th Cir. 1992) ("An indictment must be sufficiently specific to inform the defendant of the charge against him and to enable him to plead double jeopardy in any future prosecution for the same offense. . . . Constitutional requirements are fulfilled by an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime." (citations and internal quotation marks omitted)).

An indictment must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged" and a citation to the statute that the defendant is alleged to have violated. Fed. R. Crim. P. 7(c)(1). "[A]n indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Stavroulakis*, 952 F.2d 686, 693 (11th Cir. 1992). "It is not necessary for an indictment . . . to allege in detail the factual proof that will be relied upon to support the charges." *Sharpe*, 438 F.3d at 1263 n.3 (*quoting United*

States v. Crippen, 579 F.2d 340, 342 (5th Cir. 1978)).[1] Where the factual allegations of the indictment sufficiently state the offense charged, the indictment is not deficient and a motion to dismiss the indictment must be denied. *See, e.g.*, *United States v. Ferguson*, 142 F.Supp.2d 1350, 1353 (S.D. Fla. 2000).

It is well-established that "'[t]he sufficiency of a criminal indictment is determined from its face.'" *Sharpe*, 438 F.3d at 1263 (*quoting United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004)). "In ruling on a motion to dismiss for failure to state an offense, a district court is limited to reviewing the *face* of the indictment and, more specifically, the *language used* to charge the crimes." *Id.* at 1263 (*citing Critzer*, 951 F.2d at 307). In determining whether an indictment is sufficient, the Court should "read it as a whole and give it a common sense construction." *Jordan*, 582 F.3d at 1245 (quotation marks omitted). Moreover, the court should view the indictment's factual allegations in the light most favorable to the government, and linguistic precision is not required. *United States v. deVegter*, 198 F.3d 1324, 1327, 1330 (11th Cir. 1999). "'Practical, rather than technical, considerations govern the validity of an indictment.'" *United States v. Pena*, 684 F.3d 1137, 1147 (11th Cir. 2012) (*quoting United States v. Adams*, 83 F.3d 1371, 1375 (11th Cir. 1996)). "It is well-settled that 'a court may not dismiss an indictment . . . on a determination of facts that should have been developed at trial.'" *Sharpe*, 438 F.3d at 1263 (*quoting United States v. Torkington*, 812 F.2d 1347,

[1] Decisions of the former Fifth Circuit issued before October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

1354 (11th Cir. 1987)). All of this black letter law is to say that "[t]here is no summary judgment … in criminal cases." *Critzer*, 951 F.2d at 307.

1. Count Two is Facially Valid

Count Two of the Second Superseding Indictment charges that, in violation of Title 18, United States Code, Section 1028A(a)(1) and Section 2:

> On or about February 16, 2021, in the Northern District of Georgia and elsewhere, the Defendant, Carl Delano Torjagbo, a/k/a Karl Lucius Delano, aided and abetted by others unknown to the Grand Jury, knowingly possessed and used, without lawful authority, a means of identification of another person, that person being M.S., during and in relation to the bank fraud scheme charged in Count 1 of this Second Superseding Indictment.

Doc. 180 ¶ 15.

Title 18, United States Code, Section 1028A(a)(1) provides: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." One of the crimes listed in subsection (c) of Section 1028A is bank fraud. 18 U.S.C. § 1028A(c)(5).

Count Two thus "track[s] the language of [18 U.S.C. § 1028A(a)(1)] and state[s] the time and place (in approximate terms) of the alleged crime[,]" and is therefore legally sufficient. *See Stavroulakis*, 952 F.2d at 693. Indeed, in connection with a prior motion, Defendant seemingly conceded that Count Two adequately charged aggravated identity theft. *See* Doc. 178 at 2 ("At this time, Mr. Torjagbo does not allege Count 2 fails to adequately charge the offense of aggravated identity theft.").

Defendant's argument based on *Dubin v. United States*, 599 U.S. 110 (2023), is misplaced at this early stage, as it is essentially an improper request for a pre-trial summary judgment on Count Two.

A number of courts have rejected *Dubin*-based motions to dismiss as premature. In *United States v. Da Costa*, the defendant moved to dismiss certain counts of the indictment based on *Dubin*. *United States v. Da Costa*, No. 23-CR-610 (PKC), 2024 WL 3014329, at *3 (S.D.N.Y. June 13, 2024). The court rejected this argument, finding, "[t]he text of the Indictment describes conduct that, facially, could make acts of identity theft the crux of the charged offenses. It would be premature at this stage to adjudicate whether the alleged acts of identity theft were the 'crux' of the charged offenses or 'merely an ancillary feature.'" *Id.* at *4.

Similarly, in *United States v. Watson*, the defendant argued, based on *Dubin*, that an aggravated identity theft count should be dismissed because the facts set out in the indictment failed to show that his use of another person's identity was at the crux of what made his conduct criminal. *United States v. Watson*, No. 23-CR-82 (EK), 2024 WL 1858199, at *5 (E.D.N.Y. Apr. 29, 2024). The court rejected this argument, explaining that the argument spoke "to the sufficiency of the government's proof, which [was] properly reserved for a trial jury." *Id.*

The Government will present evidence of Count Two at trial, and the Court can and will weigh the sufficiency of that evidence after it has been presented.

The Court should reject Defendant's premature request to have the Court weigh the sufficiency of the Government's evidence before it has been presented.

Even if the Court were to entertain Defendant's premature motion, it should be denied. In *United States v. Fullerton*, the indictment contained an aggravated identity theft count premised on the defendant having falsely claimed that six individuals were employees of his business, and submitting their names, Social Security numbers, and fake W-2s in connection with his PPP loan application. *United States v. Fullerton*, No. 1:21-CR-216-RP, 2023 WL 6150782, at *4 (W.D. Tex. Sept. 20, 2023). Defendant argued that the count must fail "because the only purpose of this information was to complete fully the PPP applications and maximize the amount loaned, which was not the crux of the alleged scheme." *Id.* (internal quotation marks omitted). The court rejected this argument, reasoning:

> [The defendant's] alleged use of the six employees' information was "used in a manner that is fraudulent or deceptive," *Dubin*, 143 S. Ct. at 1573, because the employees did not work at his business nor did their information actually appear on W-2 forms in connection to his business. Instead, the use of the information was crucial to being able to fill out the fraudulent loan applications because the amount of the PPP loans so heavily depended on the number of employees that a business had. If Defendant did not include the employees' information, he would have been unable to secure the loans. Further, this use of their information falls under *Dubin* because PPP loans were, among other things, supposed to be used to pay the salaries of an applicant business's employees. By allegedly asserting that EMPLOYEES 1–6 worked at his business, Defendant[] misrepresented who was to be receiving the PPP funds.

Id. As the government expects to establish at trial, this is almost exactly what happened with M.S., and the Court should thus deny Defendant's motion for the same reasons.

Conclusion

For the reasons presented here, the United States respectfully requests that the Court deny Defendant's Motion to Dismiss Count Two (Doc. 188).

Respectfully submitted,

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June 12, 2025

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