03-1789-cr(L)

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1789-cr(L);
04-0836-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

CARLOS J. DELGADO
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court imposed sentence on May 7, 2004, and entered judgment on May 10, 2004. GSA-136-37. The defendant filed his notice of appeal on May 7, 2004. GSA-138. This Court has jurisdiction over the defendant's challenge to his conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly determined that the government presented sufficient evidence to satisfy the $1,000 statutory monetary threshold of 18 U.S.C. § 1029(a)(2).

2. Whether there was a constructive amendment of the indictment or a variance which substantially prejudiced the defendant.

3. Whether the district court correctly found that the government presented sufficient evidence to satisfy the interstate commerce element.

4. Whether the government engaged in grand jury abuse.

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BRIEF FOR THE UNITED STATES OF AMERICA

The defendant was convicted after a jury trial of trafficking in unauthorized access devices. Specifically, he sold information relating to six Visa and MasterCard credit cards to an undercover agent for $3,000. The district court sentenced the defendant to 37 months of imprisonment.

The defendant now appeals, raising a number of issues, including insufficient evidence on the statutory monetary threshold, constructive amendment of the indictment and insufficient evidence on the interstate commerce element of the offense. The government presented overwhelming evidence of the defendant's guilt and clearly satisfied the elements of the offense of trafficking in unauthorized access devices. The defendant's conviction should be affirmed.

STATEMENT OF THE CASE

On August 6, 2003, a federal grand jury in Connecticut returned a one-count indictment charging the defendant with of trafficking in unauthorized access devices in violation of 18 U.S.C. § 1029(a)(2). A-9-10.

After a colloquy conducted by the district court pursuant to *Faretta v. California*, 422 U.S. 806 (1975), the defendant elected to proceed *pro se*. The defendant had two court-appointed lawyers present at counsel table acting as standby counsel. Trial by jury was held on December 1 and 2, 2003. On December 2, 2003, the jury found the defendant guilty.

The defendant was sentenced on May 7, 2004, and the district court entered judgment on May 10, 2004. GSA-136. The district court sentenced the defendant to 37 months of imprisonment, to be followed by 3 years of supervised release. The district court did not fine the defendant but ordered him to pay a $100 special assessment. *Id.*

On May 7, 2004, the defendant filed a timely notice of appeal. GSA-138.

STATEMENT OF FACTS

This case began when federal investigators received information from a cooperating witness (the "CW") that a person by the name of Carlos was selling stolen credit card numbers. GSA-2-3. Investigators arranged through the CW to have an undercover agent meet with Carlos to purchase stolen credit numbers from him. GSA-3. A meeting was eventually set up for November 19, 2002. GSA-4.

Prior to the meeting, the agents placed a recording device on Special Agent Dee Wilson of the Social Security Administration, who was acting undercover as the CW's friend who wanted to buy card numbers. GSA-4. Wilson was going to purchase seven credit cards from Carlos for $500 each. GSA-5. Wilson was provided $3,500 in "buy" money in one hundred dollar denominations. GSA-5-6. The money was photocopied prior to its use in order to have a record of the serial numbers. GSA-6-7.

The defendant, the undercover agent and the CW met in a McDonald's in Hartford on the day of the transaction. The entire recorded conversation between the defendant and the undercover agent was introduced into evidence and played for the jury. GSA-9; GSA-17. After their discussion, the defendant and the undercover agent, along with the CW, went to the undercover agent's car, which is where the undercover agent was keeping the $3,500. GSA-18. At the car, Delgado provided the undercover

agent with receipts and other pieces of paper with Visa and MasterCard information -- including account number, expiration date, cardholder name and personal information about the cardholders -- for six people, not seven, as Carlos had originally indicated. GSA-19-20. The undercover agent provided Delgado with $3,000 (for six cards at $500 each). Delgado counted the 30 one hundred dollar bills before ending the transaction. GSA-21.

Moments after the transaction was completed, agents attempted to arrest Carlos, but he fled when they identified themselves as law enforcement. GSA-23-24. He was apprehended a short time later and identified as Carlos Delgado. GSA-24-25. Agents searched Delgado and seized from his person (among other things) the $3,000 that he had received from the undercover agent. GSA-8, GSA-25-26. Delgado initially waived his *Miranda* rights and informed agents that he had purchased the credit card information for $50 per account number, but he subsequently indicated that he wanted to consult with a lawyer. GSA-27-31.

Delgado was ultimately indicted on one count of violating 18 U.S.C. § 1029(a)(2). The indictment alleged that Delgado "produced, used and trafficked in" eight Visa and MasterCard credit cards. The names and account numbers of each of the eight cardholders were set out in the indictment. A-9-10. To streamline the trial, however, the government presented evidence only with respect to six of the eight cards alleged in the indictment -- specifically, the six credit cards that were involved in the sale to the undercover agent. The government did not

present evidence about the first two Visa credit cards listed in the indictment. *See* A-9-10.

In addition to presenting evidence of the transaction between the defendant and the undercover agent set forth above, the government called the six individuals whose MasterCard or Visa account information had been sold by the defendant to the undercover agent. All six cardholders testified that they had made a transaction at the Eagle's Nest tattoo parlor in Willimantic, Connecticut in the fall of 2002 using a MasterCard or Visa. GSA-33, 38, 43-44, 49, 52-53, 56. All six cardholders testified that they did not know the defendant and that they had never authorized the defendant to use or sell their account information in any way. GSA-35-36, 41, 47, 50, 54, 59-60.

The government's evidence showed that three of the six credit cards whose account information the defendant sold to the undercover agent were issued by out-of-state financial institutions. GSA-34, 56-58, 74, 105-11, 128-29, 130-33. Representatives of each of the issuing banks for the six MasterCard and Visa cards also testified. Their testimony showed that even the three Visa and MasterCard account numbers issued by financial institutions within Connecticut had traveled across state lines electronically and through the mail, both in connection with being issued and with being used in connection with interstate financial transactions prior to the time that the defendant trafficked in them. In addition, a representative of Visa International testified that in any given transaction made with a Visa card, the Visa account number and expiration date will travel through one of Visa's central processing centers in San Francisco, California and McLean, Virginia. GSA-

98-100. He also testified that banks in the Visa network lose approximately $200 million annually in the trafficking of counterfeit credit cards. GSA-101-02.

SUMMARY OF ARGUMENT

The defendant raises four issues in challenging his conviction. First, he argues that the government did not present sufficient evidence to satisfy the $1,000 monetary threshold requirement of 18 U.S.C. § 1029(a)(2). He claims that "[t]he statute ties the $1000 to the fraudulent use [of a credit card] rather than trafficking." Def.'s Br. at 11. The plain language of the statute, however, provides that anyone who "traffics in or uses one or more unauthorized access devices during any one-year period, and *by such conduct* obtains anything of value aggregating $1,000 or more during that period" commits the offense. The phrase "such conduct" clearly refers to the earlier clause of the sentence prohibiting trafficking or use. Thus, the statute plainly states that the $1,000 may be obtained by trafficking *or* use, and the government clearly presented sufficient evidence that Delgado obtained $3,000 by trafficking in unauthorized access devices.

Second, the defendant argues that there was a constructive amendment of the indictment or, failing that, a variance which resulted in substantial prejudice to him. The defendant claims that the constructive amendment occurred because the indictment conjunctively charged him with production, use and trafficking, while the government only presented evidence of trafficking. *See* Def.'s Br. at 12. But it is clear that the government's evidence and the district court's instructions only

narrowed the scope of the indictment, which does not run afoul of the notice and review functions served by a grand jury's issuance of an indictment. Nor was there any variance, much less one which substantially prejudiced the defendant, as the government's evidence did not prove facts materially different from those alleged in the indictment.

Third, the government presented sufficient evidence on the interstate commerce element. While the defendant claims that none of the credit cards involved were issued by out-of-state banks, the record demonstrates that three of the six credit cards whose account information the defendant sold to the undercover agent were issued by out-of-state financial institutions. Moreover, even the three Visa and MasterCard account numbers issued by financial institutions within Connecticut had traveled across state lines electronically and through the mail and had been used in interstate financial transactions prior to the time that the defendant sold them. Indeed, as was evident from the trial testimony about the way Visa and MasterCard credit cards are issued and used, the credit cards are themselves instrumentalities of interstate commerce.

Finally, there was no abuse of the grand jury by the government. The defendant claims that the government knowingly presented false testimony to the grand jury, but he has not even demonstrated that false or misleading testimony was provided to the grand jury, let alone that the government knew it was false or misleading. The defendant's conviction should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THE GOVERNMENT PRESENTED SUFFICIENT EVIDENCE TO SATISFY THE MONETARY THRESHOLD REQUIREMENT

A. Relevant Facts

Special Agent Christine Martin of the FBI testified that the she provided the undercover agent in this case, Special Agent Dee Wilson, with $3,500 in buy money. GSA-5-6. Special Agent Martin testified that the price for information relating to each credit card that the defendant was going to provide was $500. GSA-5. Special Agent Wilson gave the defendant $3,000 in cash in exchange for the information that the defendant provided to her relating to six Visa or MasterCard credit cards. When the defendant was searched by agents in connection with his arrest moments after the transaction with the undercover agent, he had on his person 30 one hundred dollar bills whose serial numbers matched the serial numbers on the "buy" money provided to the undercover agent. GSA-8.

The district court instructed the jury regarding the monetary threshold element as follows:

> The first element which the government must prove beyond a reasonable doubt to establish the offense charged is that the defendant trafficked in one or more unauthorized access devices during any one-year period, and in so doing obtained

> anything of value having an aggregate amount of $1,000 or more during that same time period. . . .
>
> To satisfy the part of this element requiring that the government prove that in trafficking in unauthorized access devices in any one-year period, the defendant obtained anything of value amounting to $1,000 or more, no one item need be worth $1,000, and no item should be disregarded in determining whether the $1,000 threshold is satisfied merely because the value of a particular item is small. The $1,000 threshold may be satisfied by any number of small or large transactions, with one or more unauthorized access devices, provided first, that the total value of goods, services or money adds up to at least $1,000; and second, that the $1,000 was obtained during a twelve-month period.

A-46-47. The defendant did not object to this instruction, offered no instruction of his own on the issue, and did not claim in closing argument that the government had not met its burden with respect to the monetary threshold set forth in the statute. Nor did the defendant move for judgment of acquittal based on any purported insufficiency of the government's evidence on this element. GSA-121-27.

B. Governing Law and Standard of Review

The statute at issue in this case, 18 U.S.C. § 1029(a)(2), provides that anyone who "traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period" is, if the offense affects interstate commerce, guilty of violating the statute. "The term 'access device' includes credit cards, *see* 18 U.S.C. § 1029(e)(1), and an 'unauthorized access device' is defined as 'any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud,' *id.* § 1029(e)(3)." *United States v. Jacobowitz*, 877 F.2d 162, 165 (2d Cir. 1989). The term "'traffic' means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of." 18 U.S.C. § 1029(e)(5).

Because the defendant did not move for judgment of acquittal based on insufficient evidence of the monetary threshold, this Court's review should be for plain error. GSA-121-27 (showing that defendant did not move for judgment of acquittal based on insufficient evidence of the $1,000 monetary threshold). A trilogy of decisions by the Supreme Court interpreting Federal Rule of Criminal Procedure Rule 52(b)[1] has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732

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[1] Rule 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

(1993). Under plain error review, before an appellate court can correct an error not raised at trial, a defendant bears the burden of demonstrating (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67; *see also United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004), *cert. denied*, 124 S. Ct. 2055 (2004).

C. Discussion

There was no error here, much less plain error. The government's evidence clearly showed that the defendant obtained $3,000 from the undercover agent by trafficking in six unauthorized access devices. The defendant does not dispute this. Rather, although he cloaks his argument as one based on the sufficiency of the evidence, he effectively is challenging the jury instructions, which made clear that the $1,000 monetary threshold was satisfied if the "government prove[d] that in trafficking in unauthorized access devices in any one-year period, the defendant obtained anything of value amounting to $1,000 or more." A-46-47; *see* Def.'s Br. at 11 (noting the district court's charge). But regardless of how the argument is framed, it has no merit.

The defendant asserts that "the statute is ambiguous in spelling out how the $1000.00 aspect is to be calculated"

(Def.'s Br. at 10), yet argues that the statute should be read to "tie[] the $1000 to the fraudulent use [of the cards] rather than trafficking." Def.'s Br. at 11; *see also* Def.'s Br. at 9-10 (stating that "this monetary threshold must arise from the use of the cards themselves and not for any . . . monetary exchanges associated with the illegal sale of the access devices themselves"). The defendant's interpretation has no basis in the plain language of the statute, and he has cited no authority in support of it.[2]

It is well established that "'[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language.'" *Salinas v. United States*, 522 U.S. 52, 55 (1997) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)). Here, the statute is unambiguous that the thing of value aggregating $1,000 or more may be obtained by trafficking in *or* using an unauthorized access device.[3] The statute provides that anyone who "traffics in or uses

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[2] His reliance on *United States v. Picquet*, 963 F.2d 54 (5th Cir. 1992), for instance, is of no help to him. *See* Def.'s Br. at 11. *Picquet* merely stands for the proposition that the "anything of value" language in the statute means just that -- anything. The court rejected a cramped reading of the statute that would have excluded sales tax from constituting something of value. *Id.* at 56.

[3] *Cf. United States v. Cox*, 324 F.3d 77, 82 (2d Cir.), *cert. denied*, 540 U.S. 854 (2003) (holding that a defendant may be properly convicted under 18 U.S.C. § 924(c) if he either uses *or* carries a firearm in connection with a drug trafficking offense).

one or more unauthorized access devices during any one-year period, and *by such conduct* obtains anything of value aggregating $1,000 or more during that period" is, if the offense affects interstate commerce, guilty of a crime. 18 U.S.C. § 1029(a)(2) (emphasis added). The phrase "such conduct" clearly refers to the earlier clause of the sentence prohibiting trafficking or use. The statute simply does not limit proof of the $1,000 threshold to the "use" of credit cards but rather states quite plainly that the $1,000 may be obtained by trafficking *or* use.

Moreover, the reading of the statute that the defendant urges upon this Court would render the "traffics in" language mere surplusage, as he asserts that only by "use" of an unauthorized access device can the government prove the $1,000 the monetary threshold. Thus, under the defendant's reading, prosecutions for trafficking under § 1029(a)(2) could never be brought because the government could not satisfy the monetary threshold with mere trafficking; the government would always have to prove use. Thus, in addition to conflicting with the plain language of the statute, the defendant's reading would be in conflict with traditional canons of statutory interpretation. *See, e.g.*, *Cooper Indus. v. Aviall Svcs.*, No. 02-1192, slip op. at 7 (U.S. Dec. 13, 2004) (applying canon of interpretation disfavoring readings of statutes that render statutory language superfluous); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (stating that "[j]udges should hesitate" before treating statutory language as "surplusage").

In short, the defendant has shown no error -- either relating to the government's evidence or the district

court's instructions -- and certainly no plain error in light of the absence of any controlling authority on point for him. *See Whab*, 355 F.3d at 158 (noting that "'[w]ithout a prior decision from this court or the Supreme Court mandating the jury instruction that [defendant], for the first time on appeal, says should have been given, we could not find any such error to be plain, if error it was'") (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)).

II. THE DISTRICT COURT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT AND NO VARIANCE OCCURRED WHICH SUBSTANTIALLY PREJUDICED THE DEFENDANT

A. Relevant Facts

The indictment returned by the grand jury charged that, from late October 2002 through November 19, 2002, the defendant "knowingly and with intent to defraud, produced, used and trafficked in counterfeit and unauthorized access devices." The indictment alleged that the defendant did so in connection with eight Visa or MasterCard credit cards, all of which were set out in the indictment. A-9-10. The indictment alleged that this conduct was "in violation of Title 18, United States Code, Section 1029(a)(2)" (A-10), and the caption of the indictment indicates the same violation with a parenthetical, "Trafficking in Unauthorized Access Devices." A-9.

At trial, the government did not put on any evidence regarding the first two Visa cards listed in the indictment, and did not present any evidence of use with respect to the other six cards listed in the indictment. GSA-116-17. Rather, the government presented evidence that the defendant had trafficked in the last six of the eight Visa and MasterCard credit cards listed in the two-page indictment. *See* GSA-118-19.

Accordingly, at the charge conference, the government requested that the district court instruct the jury only on trafficking in one or more unauthorized access device and not on the use of an unauthorized access device. GSA-115. The defendant objected to the deletion of "use" in the jury instructions because "the indictment . . . includes -- use." GSA-115-16.

The district court noted the defendant's objection but agreed with the government that instructing the jury on trafficking and not on use is "consistent with what this case is all about." GSA-115-16. The district court noted that the government is not required to prove "use" under the statute: "The fact is the statute is written in such a fashion that mere trafficking, without necessarily the use, is sufficient . . . . In other words, the government doesn't have to wait [un]til the card is used and a loss is incurred before the offense that [C]ongress decided to criminalize is accomplished." GSA-116.

In response to the defendant's argument on this point that the indictment included "use," the district court stated:

> I'm aware of that, but it would be improper for the jury to consider and convict you, as they could if the word 'use' was submitted to them for consideration, because there's gonna be no evidence, as I understand it, there's been none to the present time, that any of the credit cards were used.
>
> So, it would be inappropriate that you be convicted, if you were to be convicted, on the basis of use of any one of the credit cards that has been the subject of evidence. That would be unfair to you, and so therefore since the statute is cast the way it is, I'm going to delete the word "use" because it's not applicable to this case.

GSA-117. The district court proceeded to instruct the jury as follows on that issue:

> The first element which the government must prove beyond a reasonable doubt to establish the offense charged is that the defendant trafficked in one or more unauthorized access device during any one-year period, and in so doing obtained anything of value having an aggregate amount of $1,000 or more during that same time period.

A-45.

B. Governing Law and Standard of Review

"Constructive amendment occurs when 'the terms of the indictment are in effect altered by the presentation of

evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment.'" *United States v. Wallace*, 59 F.3d 333, 337 (2d Cir. 1995) (quoting *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)). In cases where that happens, the constructive amendment "results in the defendant being 'convicted on a charge the grand jury never made against him,'" which violates the grand jury clause of the Fifth Amendment. *Wallace*, 59 F.3d at 337 (quoting *United States v. Morgenstern*, 933 F.2d 1108, 1115 (2d Cir. 1991)).

No constructive amendment occurs "'[w]here charges are "constructively narrowed" or where a generally framed indictment encompasses the specific legal theory or evidence used at trial.'" *Wallace*, 59 F.3d 337 (quoting *Morgenstern*, 933 F.2d at 1115). "'[N]arrowing the scope of an indictment . . . does not offend the notice and review functions served by a grand jury's issuance of an indictment.'" *Wallace*, 59 F.3d at 337 (quoting *United States v. Smith*, 918 F.2d 1032, 1036 (2d Cir. 1990)). As the Supreme Court stated in *United States v. Miller*, 471 U.S. 130, 136 (1985), "[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime."

A variance may occur when the terms of the indictment are unaltered, but the evidence presented by the government at trial "proves facts materially different from

those alleged in the indictment." *United States v. Helmsley*, 941 F.2d 71, 89 (2d Cir. 1991); *see also Wallace*, 59 F.3d at 338. A variance "does not broaden the possible basis for conviction beyond that contained in the indictment." *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992). Accordingly, a variance "will furnish the ground for overturning a verdict only if the defendant first shows that the variance 'result[ed] in *substantial* prejudice.'" *Wallace*, 59 F.3d at 338 (emphasis in original) (quoting *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir. 1990)).

A ruling on whether a constructive amendment of the indictment or an improper variance occurred is an issue of law that is reviewed by this Court *de novo*. *See Wallace*, 59 F.3d at 336. The defendant concedes on appeal that review of this issue should be for plain error. *See* Def.'s Br. at 15 (noting the issue should be reviewed for plain error due to the "absence of a specific objection"). However, although the defendant did not object specifically on the grounds that a constructive amendment and/or a prejudicial variance had occurred, he did object to the district court's refusal to instruct the jury on "use" under the statute, stating that "the indictment . . . includes -- use." GSA-115-17.

C. Discussion

Regardless of whether this Court reviews this issue *de novo* or for plain error, it is clear that there was neither a constructive amendment of the indictment nor a variance resulting in substantial prejudice to the defendant. The government's evidence and the district court's jury

instructions did nothing more than "[n]arrow[] the scope of [the] indictment." *Wallace*, 59 F.3d at 337. The defendant had clear notice of the charges against him in the indictment, as "the crime and the elements of the offense that sustain[ed] the conviction [we]re fully and clearly set out in the indictment." *Miller*, 471 U.S. at 136. Notably, the defendant does not contend otherwise. *See* Def.'s Br. at 12 (stating that "defendant was on notice that he had to defend against . . . trafficking in fraudulent . . . access devices").[4] Rather, the defendant complains of the fact that the indictment conjunctively charged him with production, use and trafficking. *See* Def.'s Br. at 12. But it is clear that "the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime." *Miller*, 471 U.S. at 136.

The government's evidence concerned only trafficking in unauthorized access devices; there was no evidence of production or use of unauthorized access devices. Therefore, as the district court pointed out in refusing to give on instruction on "use," it would have been improper, given the lack of any such evidence, for the court to instruct the jury that it could convict the defendant on the production or use of unauthorized access devices, and the district court therefore correctly instructed the jury only on trafficking. GSA-117. "The rule that a jury's guilty

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[4] That the defendant had such notice is also clear from the transcript of the grand jury testimony of Special Agent Martin, which he has attached as an appendix to his *pro se* brief and which the government provided to him during pre-trial discovery.

verdict on a conjunctively worded indictment stands if the evidence is sufficient with respect to any of the acts charged, 'obviously extends to a trial court's jury instructions in the disjunctive in the context of a conjunctively worded indictment.'" *United States v. Rioux*, 97 F.3d 648, 661 (2d Cir. 1996) (quoting *United States v. Cusumano*, 943 F.2d 305, 311 (3d Cir. 1991)); *see also United States v. Coriaty*, 300 F.3d 244, 249-50 (2d Cir. 2002). That rule obviously also extends to a trial court's jury instructions that omit from the jury charge what was charged in the indictment conjunctively.

In short, the indictment set forth the elements of trafficking, the district court properly narrowed those charges based on the evidence presented at trial, and there was no constructive amendment that violated the defendant's right to a grand jury indictment.

Nor was there a variance that resulted in any prejudice to the defendant, much less substantial prejudice. The defendant claims that the prejudice is "lack of notice" (*see* Def.'s Br. at 14), but concedes elsewhere that "defendant was on notice that he had to defend against . . . trafficking in fraudulent . . . access devices." Def.'s Br. at 12. The gist of the defendant's claim of prejudice seems to be that he was not on notice that the government did not have to prove what it alleged conjunctively in the indictment -- that the defendant produced, used and trafficked in unauthorized access devices -- but rather had to prove only

that he trafficked in such access devices. That is not prejudice, just a mistaken view of the law.[5]

The short of the matter is that the government's evidence did not prove "facts materially different from those alleged in the indictment." *Helmsley*, 941 F.2d at 89; *see also Wallace*, 59 F.3d at 338. Indeed, the government proved the very facts alleged in the indictment -- that the defendant trafficked in six Visa and MasterCard account numbers set forth in the indictment, and that in doing so he obtained more than $1,000 in a twelve-month period. There was no variance that resulted in any prejudice, much less substantially so.

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[5] The defendant's decision to represent himself at trial does not afford him any greater rights than if he had been represented by counsel. *See Ferreta v. California*, 422 U.S. 806, 834 n.46 (1975) (stating that "the right of self-representation" is not "a license not to comply with relevant rules of procedural and substantive law," and that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"). Moreover, the defendant had the benefit of two court-appointed attorneys at counsel table throughout the trial.

III. THE DISTRICT COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE INTERSTATE COMMERCE ELEMENT

A. Relevant Facts

The government presented evidence relating to the interstate commerce element with respect to each of the last six Visa and MasterCard credit cards listed in the indictment. Three of the victim-cardholders testified that their Visa or MasterCard credit cards were issued by out-of-state financial institutions. Moreover, representatives of all the issuing financial institutions and of Visa testified about the interstate authorizing and processing aspects of Visa and MasterCard credit cards.

Susan Pinto & Vincent Plagenza. Cardholder Susan Pinto testified that her MasterCard was issued by Household Bank, an out-of-state bank. GSA-34, 39-40, 128-29. Cardholder Vincent Plagenza testified that he had a General Motors branded MasterCard with a mailing address of Baltimore, Maryland, and that after he learned that his card had been compromised, he received a replacement card in the mail from Salinas, California. GSA-40, 45-46, 112-13, 134-35. Geney Ross of Household Credit Services ("Household") in Chesapeake, Virginia, which issued MasterCard credit cards to both Susan Pinto and Vincent Plagenza, testified that Household issues its MasterCard credit cards out of Salinas, California, and that Household's processing

centers are located in Nevada and California. GSA-101, 105, 111.

Rachelle Lesieur. Cardholder Rachelle Lesieur testified that her Visa credit card was issued by Capitol One in Richmond, Virginia, which is where payments were sent and where customer service inquiries were to be made. GSA-56-58, 132-33. Matthew Sharp of Capitol One testified that Capitol One issues Visa and MasterCard credit cards to customers throughout the nation that can be used throughout the world. GSA-74. Sharp explained that in the ordinary course when a customer applies and is approved for a Capitol One Visa or MasterCard, Capitol One creates a card number in Richmond, Virginia, embosses a card with the number, encodes the magnetic strip on the back of the card, and mails it from Virginia to the customer. GSA-74-5. Capitol One does not have a processing center in Connecticut. GSA-79.

Sharp testified that a transaction conducted on a Capitol One Visa or MasterCard would entail the account information, including the account number itself, being electronically routed from the point of sale at the merchant to the merchant's bank to Visa or MasterCard, and ultimately to Capitol One's processing center in Virginia, where the transaction would be declined or accepted. GSA-75-7. Sharp testified that the transactions on Rachelle Lesieur's account statement would in the normal course follow that same electronic path. GSA-78.

Lynnanne Ritz-Walsh. Tracey Pollock testified that her employer, a bank named the Savings Institute located in Willimantic, Connecticut, issued a MasterCard credit

card to Lynnanne Ritz-Walsh. GSA-64-5. Pollock testified that when her bank issues a MasterCard to a client, an account number is generated at the bank in Connecticut and then wired to a company in Rhode Island, which embosses a card with that number on it. The card then gets mailed from Rhode Island to the client's address. GSA-62. Pollock further testified that in any transaction undertaken with a MasterCard issued by the Savings Institute, the account number, as well as other information, would be routed through either Wisconsin or Arizona, among other places, which where is an electronic processor for the Savings Institute is located. GSA-63, 71-72. Pollock testified, for instance, that in connection with Ritz-Walsh's transaction at the tattoo parlor in Willimantic, the account number traveled through Milwaukee, Wisconsin at approximately 2:50 p.m. on October 3, 2002. GSA-66-68, 135. Pollock also testified that, after the bank learned that the account number had been compromised, the bank caused another card to be issued and mailed to Ritz-Walsh in Connecticut from Rhode Island. GSA-69-70.

Cheryl Walsh. John Switzer of the Savings Bank of Manchester ("SBM"), which issued a Visa credit card to cardholder Cheryl Walsh, testified that SBM uses the services of a card processor in St. Petersburg, Florida. GSA-81. New SBM credit cards are issued from the processor in Florida, and transactions made on the card are processed there, as are account statements. GSA-81-2. After application and approval, SBM sends an account number electronically to its processor in Florida, which then embosses a card and mails it to the client. GSA-82. The client then activates the card through an 800 number

that dials into the processor in Florida. GSA-83. When a client makes a transaction on the SBM Visa or MasterCard, the account information, including the account number, travels electronically to the processor in Florida to determine whether the transaction will be approved or declined. GSA-83. Payments on an SBM Visa or MasterCard are also mailed to Florida. GSA-84. Switzer testified that after SBM was notified that Cheryl Walsh's SBM Visa credit card had been compromised, a replacement card was generated out of Florida by SBM's processor. GSA-85-6.

Elizabeth Bailey. Robin Fujio of Liberty Bank in Middletown, Connecticut, testified that the account numbers for the MasterCard that Liberty Bank issues are generated out of Rhode Island, where the card is created and mailed to the customer. GSA-88-9. Liberty Bank uses a transaction processor called NYCE, which processes individual transactions made on Liberty-issued MasterCards in New Jersey. GSA-89-90. NYCE provides Liberty with the data necessary for Liberty to settle a transaction made on the card, i.e., to credit the merchant. GSA-91. Fujio testified that for the transaction conducted by Elizabeth Bailey on her Liberty Bank-issued MasterCard at the tattoo parlor, and indeed for every transaction on the card, the account number and other information would travel through these interstate channels to be processed. GSA-92-94. Fujio also testified that Liberty Bank received information that Bailey's card number had been compromised. GSA-95. The bank deactivated the card and issued a new one, which was mailed from Rhode Island to the client. *Id.*

In addition, Bluford Tinnell, the director of Fraud Control at Visa International, testified that Visa has central processing centers in San Francisco, California and McLean, Virginia. GSA-98-100. In any given transaction made with a Visa card, Visa receives the account number, expiration date and any additional data that is encoded on the electronic strip on the back of the card, although a transaction made by telephone may only include the account number and the expiration date. GSA-99. Tinnell testified that an individual could use a Visa account number, expiration date and cardholder name to make purchases, and testified that banks in the Visa network lose approximately $200 million annually in the trafficking of counterfeit credit cards. GSA-101-02.

At the close of the government's evidence, the defendant moved for judgment of acquittal under Federal Rule of Criminal Procedure 29. GSA-121-22, 124-25. The defendant argued that there was "no evidence suggesting that there [wa]s any loss or any fraud either had on either institution or cardholders." The defendant also argued that there was "no effect o[n] interstate commerce." GSA-122. The government responded that it had satisfied the interstate commerce element in a number of ways, including the fact that three of the six Visa and MasterCard credit cards in which the defendant trafficked were issued by out-of-state financial institutions, and that each of the six account numbers had previously traveled in, and been used in connection with, interstate commerce on numerous occasions and in numerous ways. GSA-122-23. The government further argued that the natural and probable consequence of defendant's offense

conduct would have been the use of the credit cards in interstate commercial transactions. GSA-123.

The district court denied the defendant's motion and submitted the case to the jury. GSA-125-27. On the issue of interstate commerce, the district court noted that there was sufficient evidence of potential and actual impact on interstate commerce to permit the jury to find that the element had been proven. GSA-127.

B. Governing Law and Standard of Review

One of the elements the government must prove in a prosecution under 18 U.S.C. § 1029(a)(2) is that the offense affected interstate or foreign commerce. In *United States v. DeBiasi*, 712 F.2d 785, 790 (2d Cir. 1983), this Court addressed the interstate commerce element in connection with § 1029(a)'s predecessor statute, and stated that "Congress intended to use its broadest constitutional powers" in targeting crimes involving credit cards for federal prosecution. The breadth of that jurisdiction is clear from *DeBiasi*, in which this Court held that, with respect to a conspiracy to use counterfeit credit cards, "the agreement that particular cards . . . would ultimately be used in transactions affecting interstate commerce to obtain as much money as possible . . . [gave] rise to a sufficient threat to interstate transactions as to trigger federal jurisdiction." *Id.*

Other courts have reached similar conclusions with respect to the jurisdictional basis of § 1029(a) itself. *See United States v. Lee*, 818 F.2d 302, 305 (4th Cir. 1987) ("The statutory language of the statute as enacted, together

with the legislative history, establishes that Congress intended [§ 1029] to provide 'a very broad jurisdictional basis.'") (quoting legislative history); *United States v. Rushdan*, 870 F.2d 1509, 1512-14 (9th Cir. 1989) (stating that "Congress intended a broad jurisdictional base for federal prosecution of counterfeit credit cards crimes").

In *Rushdan*, 870 F.2d at 1512, the Court of Appeals for the Ninth Circuit reversed the district court's judgment of acquittal (after the jury returned a guilty verdict) on a charge of possessing stolen credit card numbers in violation of 18 U.S.C. § 1029(a)(3), on interstate commerce grounds. The district court granted the motion on the grounds that the defendant's "possession of out of state account numbers could have no effect on interstate commerce because the account numbers were supplied by an undercover agent and [the defendant] had no opportunity to use them." In reversing, the Ninth Circuit -- relying in part on cases decided under 18 U.S.C. § 922(g), the felon-in-possession statute, pursuant to which the government need only prove that the firearm at some point crossed state lines -- held that "section 1029 does not require a present nexus with interstate commerce; it is enough that [the defendant] has possession of out of state account numbers." *Id.* at 1514 n.3. Accordingly, the court held that "illicit possession of out of state credit card account numbers is an 'offense affect[ing] interstate or foreign commerce' under 18 U.S.C. § 1029(a)." *Id.* at 1514. *See also United States v. Bolton*, 68 F.3d 396, 400 n.3 (10th Cir. 1995) (finding the interstate commerce element satisfied where "[t]he large majority of access devices in [d]efendant's possession had out-of-state addresses").

This Court has concluded in connection with other statutes that possession of items that have previously traveled in interstate commerce, and possession of instrumentalities of interstate commerce, fall within the reach of statutes designed to regulate conduct within the full breadth of Congress's power under the Commerce Clause. *See, e.g.*, *United States v. Palozie*, 166 F.3d 502, 505 (2d Cir. 1999) (per curiam) (holding in connection with 18 U.S.C. § 922(g), which prohibits a felon from possessing a firearm "in or affecting interstate commerce," that the full Commerce Clause power encompasses "a firearm whose only connection to commerce was the previous crossing of a state line"); *United States v. Fabian*, 312 F.3d 550, 554 (2d Cir. 2002) (stating in Hobbs Act prosecution that "the government [need] make only a *de minimis* showing to establish the necessary nexus for Hobbs Act jurisdiction," and that "all that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect") (internal quotation marks omitted), *cert. denied*, 538 U.S. 1025 (2003); *see also United States v. Silverio*, 335 F.3d 183, 187 (2d Cir. 2003) (per curiam) (stating that "in the absence of an actual effect on interstate commerce, a defendant's belief about the nature of his crime may be determinative" under *Fabian*); *cf. United States v. Griffith*, 284 F.3d 338, 347-48 (2d Cir. 2002) (rejecting Commerce Clause challenge to conviction under 18 U.S.C. § 2251(a) where sexual images on videotape were transported in interstate commerce); *United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002) (concluding that intrastate mailings satisfied Commerce Clause because "private and commercial interstate carriers, which carry mailings between and among states and countries, are

instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate").

A defendant who challenges his conviction based upon the sufficiency of the evidence bears a heavy burden. *See United States v. Velasquez*, 271 F.3d 364, 370 (2d Cir. 2001). In reviewing the evidence, this Court "consider[s] all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. *Griffith*, 284 F.3d at 348.

C. Discussion

The government clearly presented sufficient evidence to satisfy the interstate commerce element. The defendant argues that his "conduct did not have any effect on interstate commerce . . . because none of the credit card account numbers he was charged with selling were issued out of state." Def.'s *Pro Se* Br. at 10; *see also* Def.'s *Pro Se* Br. at 8 (claiming that "all six (6) of the account numbers alleged to have been sold a federal agent were in[-] state account numbers issued by local banks"). The defendant's argument simply misstates the record. As the government's evidence showed, three of the six credit cards whose account information the defendant sold to the undercover agent were issued by out-of-state financial institutions. GSA-34, 56-58, 74, 105-11, 128-34.

In addition, as the trial evidence set forth above demonstrates, even the three Visa and MasterCard account numbers issued by financial institutions within Connecticut had traveled across state lines electronically

and through the mail and had been used in interstate financial transactions prior to the time that the defendant trafficked in them.

Indeed, as was evident from the evidence about the way in which the Visa and MasterCard credit cards at issue were issued and used, the six credit cards that Delgado trafficked in are themselves instrumentalities of interstate commerce. Moreover, their effective use -- and even their value to a trafficker such as the defendant -- depends upon channels of interstate commerce. Their very purpose is to enable individuals to obtain goods and services anywhere in the world by use of channels of interstate and foreign commerce (such as electronic wire facilities). *See United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir. 1997) (concluding in § 1029(a)(3) prosecution that "cellphone ID numbers, which are an integral part of the use of cellular phones, are . . . instrumentalities of interstate commerce"); *see also United States v. Alvelo-Ramos*, 957 F. Supp. 18, 19 (D.P.R. 1997) (stating in cell phone cloning prosecution under § 1029(a) that the "very nature of a telephone is that it may be used for interstate or international connections," and the "fact that the defendant did not use the phone to its full interstate capability does not imply the theft was not one of interstate magnitude"), *aff'd*, 187 F.3d 623, 1998 WL 1085823 at *2 (1st Cir. 1998) (unpublished).

Moreover, owing directly to the defendant's offense conduct, the Visa and MasterCard credit cards belonging to the cardholder victims had to be canceled due to the defendant's offense conduct and re-issued by the respective financial institutions. Several of these re-

issued cards were created outside the state of Connecticut and mailed to the respective cardholder-victims in Connecticut. This may not have had a substantial effect on interstate commerce, but it did not have to -- all that is required is a minimal effect. *See Lee*, 818 F.2d at 305 (holding that a single interstate telephone call was in and of itself sufficient to meet § 1029's interstate commerce component); *see also United States v. Wilkerson*, 361 F.3d 717, 727 (2d Cir.) (affirming Hobbs Act conviction despite "exceedingly thin evidence concerning the interstate commerce element"), *cert. denied*, 125 S. Ct. 225 (2004).

And, of course, the Visa and MasterCard credit cards at issue would clearly have been used in interstate commerce transactions had the defendant not sold them to an undercover agent. Thus, the natural and probable consequence of the defendant's conduct would have resulted in fraudulent interstate transactions. *Cf. Fabian*, 312 F.3d at 554 (stating that in Hobbs Act prosecution "all that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect"); *DeBiasi*, 712 F.2d at 790 (holding, in connection with conspiracy to use counterfeit credit cards under predecessor statute, that "the agreement that particular cards . . . would ultimately be used in transactions affecting interstate commerce to obtain as much money as possible . . . [gave] rise to a sufficient threat to interstate transactions as to trigger federal jurisdiction"). The government's evidence on the interstate commerce element was sufficient to support the defendant's conviction under the statute.

IV. THERE WAS NO GRAND JURY ABUSE

A. Relevant Facts

The one-count indictment alleged that the defendant "produced, used and trafficked in" unauthorized access devices -- specifically, eight Visa and MasterCard credit cards. Each of the eight cardholders and account numbers was set out in the indictment. A-9-10.

In the course of her grand jury testimony, FBI Special Agent Christine Martin testified that she

> and another agent contacted the customers and/or the banks and determined that each of these accounts were either opened as a fraudulent account, had fraud reported on it, or the customer themselves said, I don't know a Carlos Delgado. I never gave him my credit card and . . . I never authorized him to use it.

Def.'s *Pro Se* Br., App. at 16. The prosecutor then posed a follow-up question:

> Q: So is it fair to say then that with respect to all eight of the credit card numbers that are reflected on the proposed indictment Carlos Delgado was not authorized in any way to use or traffic in those account numbers?
>
> A: That is correct.

Id.

To streamline the trial, the government presented evidence only with respect to six of the eight Visa and MasterCard credit cards alleged in the indictment, which were the six credit cards that were involved in the sale to the undercover agent. The government did not present evidence concerning the first two Visa credit cards listed in the indictment. The six cardholders whose account information was sold to the undercover agent all testified at trial that they did not know the defendant and that they never authorized him to use or sell their Visa or MasterCard credit card account information. GSA-35-36, 41, 47, 50, 54, 59-60.

B. Governing Law and Standard of Review

The Supreme Court has held that, "as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). In setting forth the standard for assessing such prejudice, the Court concluded that dismissal of an indictment for prosecutorial misconduct before the grand jury "is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." *Id.* at 256 (quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986)) (O'Connor, J., concurring); *see also United States v. Rioux*, 97 F.3d 648, 662 (2d Cir. 1996) (same); *United States v. Brooks*, 125 F.3d 484, 498 (7th Cir. 1997) (finding failure to prove that the claimed perjurious remarks substantially influenced the grand jury's decision to indict).

C. Discussion

This Court should summarily reject the defendant's argument on this point. Wholly apart from the issue of prejudice in light of his conviction by a petit jury, the defendant has not shown that any testimony provided in the grand jury was perjurious or misleading, much less that it was purposefully so. The defendant argues that "[d]uring the grand jury proceedings, a federal agent testified that all six of the accounts had been fraudulently set up and used by the defendant. This was untrue." Def.'s *Pro Se* Br. at 11. In support, the defendant cites pages 15 and 16 of Special Agent Martin's grand jury transcript. *See id.* at 13.

The problem is that Special Agent Martin did not testify in the grand jury that "all six of the accounts had been fraudulently set up and used by the defendant." She testified that she and another agent contacted the customers and/or the banks and determined that the accounts at issue were either opened as fraudulent, had fraud reported on them, or the customer indicated that Delgado did not have authority to make use of the customer's credit card. It is clear from the next question posed to her that her testimony on this score is with respect to all eight credit cards alleged in the indictment -- and not just the six on which the government presented evidence at trial.

Indeed, it was clear from the government's trial evidence that the six accounts were not opened fraudulently and that, because the defendant sold the accounts to an undercover agent, they were not used

fraudulently. All six cardholders testified that they made a transaction at the Eagle's Nest tattoo parlor in Willimantic, Connecticut in the fall of 2002 using their validly opened MasterCard or Visa. GSA-33, 38, 43-44, 49, 52-53, 56. All six cardholders testified that they did not know the defendant and that they had never given the defendant authorization to use or sell their account information. GSA-35-36, 41, 47, 50, 54, 59-60.

The government did not present evidence at trial with respect to the first two Visa credit cards listed in the indictment, electing instead to focus on the six credit cards which Delgado sold to the undercover agent. But during Delgado's cross-examination of Special Agent Martin, the defendant elicited hearsay testimony from her that at least one of the first two Visa credit cards listed in the indictment, and about which the government did not present evidence, had in fact been opened fraudulently. GSA-10-15.

Special Agent Martin's grand jury testimony was not misleading, much less by design, and certainly did not prejudice the defendant in any respect.

CONCLUSION

For the foregoing reasons, the Court should affirm the defendant's conviction.

Dated: December 23, 2004

Respectfully submitted,

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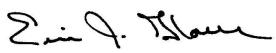

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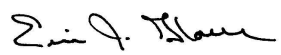
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,037 words, exclusive of the Table of Contents, the Table of Authorities, this Certification, and the Addendum of Statutes and Rules.



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ADDENDUM

18 U.S.C. § 1029. Fraud and related activity in connection with access devices

(a) Whoever--

> (1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices; [or]
>
> (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period;
>
> . . . .

shall, if the offense affects interstate or foreign commerce, be punished as provided in subsection (c) of this section.

. . . .

(c) Penalties.--

> (1) Generally.--The punishment for an offense under subsection (a) of this section is--
>
> > (A) in the case of an offense that does not occur after a conviction for another offense under this section--
> >
> > > (i) if the offense is under paragraph (1), (2), (3), (6), (7), or (10) of subsection (a), a fine under this title or imprisonment for not more than 10 years, or both . . .

. . . .

(e) As used in this section--

(1) the term "access device" means 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);

. . . .

(3) the term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;

(4) the term "produce" includes design, alter, authenticate, duplicate, or assemble;

(5) the term "traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of;

. . . .