

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
)	
)	
v.)	CRIMINAL No. 07-57-P-H
)	
JACOB GITHINJI THUO,)	
)	
DEFENDANT)	

ORDER ON DEFENDANT’S MOTION TO DISMISS

The defendant’s motion to dismiss Count 3 of the Indictment is **DENIED**. First, contrary to his argument, it is not multiplicitous of Count 1 (multiple punishments for conduct amounting to a single offense). Count 3 charges the crime of aggravated identity theft, 18 U.S.C. § 1028A. It requires proof that the defendant used the identity of another person, not an element of Count 1, which requires proof only that the defendant used a social security number not assigned to him (for example, it could be an unassigned number). See United States v. Nascimento, 491 F.3d 25, 48 (1st Cir. 2007).¹ (Because the result is clear, I do not dismiss this part of the motion as premature, although the defendant does not face double jeopardy since he has not yet been convicted of anything.)

¹ Additionally, the structure and language of section 1028A plainly reveal Congress’s intent to allow cumulative punishments for aggravated identity theft and the underlying predicate felony; “Congress may, of course, so provide if it wishes.” See Garrett v. United States, 471 U.S. 773, 794–95 (1985).

Second, contrary to the defendant's argument, the Indictment does charge an offense under section 1028A. That section requires proof of using the identity of another person while committing a listed felony. Count 3 does charge one of the felonies listed in section 1028A(c)(11). The defendant argues that the parenthetical language in that subsection—"(relating to false statements relating to programs under the Act)"—is limiting language, but it is clear from parallel parentheticals in other subsections that the language is merely descriptive, not limiting. See United States v. Monjaras-Castaneda, 190 F.3d 326, 330 (5th Cir. 1999).

SO ORDERED.

DATED THIS 20TH DAY OF SEPTEMBER, 2007

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CRIMINAL DOCKET FOR CASE #: 2:07CR57 (DBH)**

United States of America

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