

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the matter of )  
 )  
HERBERT L. SCHOENBOHM )  
Kingshill, Virgin Islands )  
 )  
For Amateur Station and )  
Operator Licenses )  
 )

WT Docket No. 95-11

TO: Administrative Law Judge  
Edward Luton

**REPLY TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF WIRELESS TELECOMMUNICATIONS BUREAU**

Herbert L. Schoenbohm ("Schoenbohm"), by his attorney, hereby replies to the Proposed Findings of Fact and Conclusions of Law, filed in this proceeding under date of May 12, 1997, by the Wireless Telecommunications Bureau ("WTB"). In reply thereto, it is alleged:

**I. Issue (c)(2) Simply Fizzled, and the WTB Would Be Well Advised to Admit Same.**

1. In its Proposed Findings of Fact and Conclusions of Law, the WTB argues that Schoenbohm used his amateur radio facilities for communications about how to obtain illicit access codes. The WTB claims that by dialing telephone numbers, some of which may have been unlisted, Schoenbohm was using or demonstrating

"illicit access codes".

2. This is a silly argument. The WTB does not cite a single rule, statute, policy or case precedent for the proposition that it is somehow wrong to dial unlisted telephone numbers. Indeed, the evidence of record does not even show that Schoenbohm dialed any unlisted telephone numbers. Since the numbers that he dialed were the numbers of businesses who were seeking communications from the public, it is very doubtful that any of the numbers were unlisted.

3. In any event, thousands and thousands of unlisted numbers are dialed deliberately every day. It is common practice for telemarketers to go through a telephone book; pick telephone numbers at random and add "1" to each of numbers for the deliberate purpose of reaching unlisted telephone numbers. This is called the "1 plus" system. If after adding a "1" to a telephone number the telemarketer finds that the number is not in service, he or she simply adds another "1" and keeps going until he or she reaches a valid number which may or may not be listed.

4. Pollsters do the same thing for the purpose of getting a truly random sample, on the assumption that people who have unlisted numbers may have different beliefs and opinions than people who have listed numbers. If dialing unlisted numbers is somehow wrong, every pollster for the Democratic and Republican parties has done wrong and should be appropriately punished. Of course, there is nothing wrong with dialing an unlisted number and, in any event, there is no evidence that Schoenbohm dialed any

unlisted numbers. The WTB would be well advised to simply admit that Issue (c)(2) fizzled out and produced no evidence adverse to Schoenbohm.

**II. The WTB's Arguments Concerning Schoenbohm's Testimony About His Conviction Are Predicated Upon a False and Misleading Characterization of the Pertinent Statute.**

5. At ¶4 of its Proposed Findings, the WTB characterizes the statute under which Schoenbohm was convicted as follows:

"In Government v. Schoenbohm, No. Crim: 1991/0108 (D.V.I. Dec. 30, 1992), Schoenbohm was convicted in the U.S. District Court for the District of the Virgin Islands (District Court) of violating 18 U.S.C. §1029(a)(1) (fraudulent use of counterfeit access device). Section 1029 provides, in pertinent part, that whoever:

knowingly and with intent to defraud uses one or more counterfeit access devices . . . shall, if the offense affects interstate or foreign commerce, be punished as provided . . . It defines an 'access device' as 'any plate, card, code, account number, or other means of access that can be used . . . to obtain money, goods, services or any other thing of value . . . ."

6. A photocopy of 18 U.S.C. §1029, taken from Westlaw Publishing's U.S. Code Annotated, is attached hereto and marked Exhibit A. As can be seen, the real statute bears little resemblance to the WTB's characterization of the statute. In truth it is not necessary to use a counterfeit access device in order to be convicted under the provisions of §1029(a)(1). That section makes it a crime to produce, use or traffic in any counterfeit access device. The WTB in its Proposed Findings has simply omitted the language pertaining to production and trafficking.

7. The language concerning production of counterfeit

access devices and trafficking therein is crucial to an understanding of Schoenbohm's testimony, both at the rehearing and upon remand. Under that language a person can be convicted, even if he does not use a counterfeit access device, if he manufactures or produces any sort of electrical, mechanical or other physical device that can be used to make telephone calls without paying for them. Under that language, an individual can be convicted if he buys a device from another individual or if he sells such a device to another individual. Presumably, under the broad term "trafficking" a conviction could be sustained even if it were shown that an individual simply gave or loaned such a device to another person or received such a device from another person even if there was no consideration involved. All that would be required would be "intent to defraud".

8. Of course, possession is an essential element of production and trafficking. It is impossible to buy, sell or use a counterfeit access device without possessing it. Therefore, it was perfectly reasonable and appropriate for Schoenbohm to make it clear that he did not possess any such electrical or mechanical device; that the only device that he possessed was telephone numbers in his mind.

9. In its findings at ¶8, the WTB calls attention to testimony at page 66 of the transcript in which the ALJ stated, "And what's possession got to do with it? This just muddies the water." Schoenbohm, evidently intimidated by the ALJ, responded, "That's true." At page 60 of the transcript, however, Schoenbohm

attempts to explain why he used the term "possession". He explained that in his mind, ". . . if one actually traffics and produces and manufactures . . . that is really the -- the hub of the reason for that particular statute. And it makes counterfeiting a far more serious offense than the actual use of an unauthorized access device. . . ." Schoenbohm hopes that the ALJ has not made up his mind on this issue. Schoenbohm's effort to show that he did not manufacture counterfeit access devices or sell or traffic in such devices was perfectly truthful. He did not have any such devices in his possession. It is reasonable for him to make that clear. As Schoenbohm pointed out at page 47 of the transcript, the reference in the statute to "trafficking" clearly contemplates that somebody will have an unauthorized access device, probably a counterfeit calling card or something of that sort, because if they did not have that device in their possession they could not traffic any such device.

**III. Schoenbohm Has Not Been Guilty of Any Misrepresentation or Lack of Candor.**

10. In Roy M. Speer, 1996 WL 335785, the FCC made the following observations concerning misrepresentation and lack of candor:

"It is indisputable that a permittee's or a licensee's candor 'is an issue of utmost importance to us.' Fox Television Stations, Inc., 10 FCC Rcd 8452, 8478 (1995). While lack of candor is characterized by failure to disclose material information, misrepresentation is characterized by making a material false statement to the Commission. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). An intent to deceive is an

essential component of both. See Pinelands, Inc., 7 FCC Rcd 6058, 6065 (1992). Indeed, the nature of the misrepresentation or lack of candor is essentially irrelevant, because it is the 'willingness to deceive' that is most significant. FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946)." 1996 WL 335785.

11. Here, although the WTB refers vaguely to "misrepresentations", it really has been unable to pinpoint any false statements by Mr. Schoenbohm, because there were no false statements. Thus, the WTB is reduced to an attempt to construct a case based upon "lack of candor". However, even here, the case fails.

12. A good example of this is the testimony regarding pension rights. At the first hearing, Schoenbohm submitted exhibits showing that as a result of his conviction he had been fired from his job at the Virgin Islands Police Department and lost pension rights worth \$150,000. These facts were true and the WTB does not question that these facts are true. However, at ¶31 of its Conclusions, the WTB claims that Schoenbohm should not have testified as he did that his exhibits were true and correct, because the exhibits did not disclose that, as a part of a new job, Schoenbohm had regained his pension rights.

13. The problem with this argument is that Schoenbohm's exhibits specifically disclose that he had a new government job. From that fact, someone who was familiar with the government pension system might infer that there was possibility that Schoenbohm would be able to regain his pension rights. Counsel for the WTB did, in fact, ask Schoenbohm if that was the case, and

Schoenbohm answered the questions as well as he could (Tr. 67-68). It was unreasonable for counsel to expect Schoenbohm to know all of the details of his pension rights at that point in time. Schoenbohm had been on the job only a few weeks at the time of the first hearing, and any fair-minded person would find it quite believable that he had not yet investigated to determine what effect the new job might have on his pension. Certainly, it is not true as the WTB argues that Schoenbohm Exhibit 1 was incorrect, when it said as it did that Schoenbohm lost his pension rights. He did lose those rights, and the fact that he later regained them is not the point. At the time when the pension rights were lost Schoenbohm had no idea he would be able to get them back and for two years the loss of those pension rights, which was a direct result of his conviction, was something he and his family had to deal with.

14. Finally, with respect to the matter of solicitation of ex parte communications, Schoenbohm's explanation of what occurred is perfectly reasonable. He says that he learned from his attorney that the ex parte rule prohibited him from soliciting any political intervention in the hearing proceeding; but that it was permissible for other people who were not parties to the proceeding to write letters on his behalf. In a private conversation with a friend, Malcolm Swan, Schoenbohm described what he had learned. He then went on to describe things that could be put in a letter of support, such as, e.g., Schoenbohm's work providing emergency communications during hurricanes. However, Schoenbohm did not

request Swan to write any letters on his behalf. He spoke of a "gentleman that you [Swan] plan to write". The WTB seems to assume that that gentleman was Victor Frazer, the delegate to the Virgin Islands. However, that does not make sense. The record shows that Schoenbohm already knew Victor Frazer and that, in fact, he was so close to Frazer that Frazer gave him a job. No useful purpose would have been served by having Swan write to Frazer since Frazer was already a Schoenbohm supporter.

15. To the contrary, Schoenbohm's explanation of what occurred is perfectly believable, i.e., that he had just found out about the ex parte rules from his attorney; that he was explaining those rules to Swan; and that he was describing the things that might go into a letter. It is reasonable for Schoenbohm to think that he was not making a solicitation, because the transcript of his conversation with Swan shows that he was talking about a letter that somebody already planned to write and he was not asking that person to write a letter on his behalf (Schoenbohm Ex. 3, pp. 6-9). However, if Schoenbohm had known that there was a prohibition against solicitation, he would not have used the language that he did, lest it be misinterpreted as a solicitation (Schoenbohm Ex. 8, pg. 3).

16. The WTB's argument, set forth at ¶40 of its Conclusions, is that Schoenbohm knew or should have known of the prohibition against soliciting ex parte presentations, because the prohibition is a logical corollary to the basic prohibition against ex parte presentations. This argument is a "stretch". It assumes

that, if the rule contained no prohibition against solicitation, such a prohibition could be read into the rule anyway. Clearly, the people who drew the rule did not think that would be the case. Otherwise, they would not have included a specific provision dealing with solicitation. 47 C.F.R. §1.1210. Schoenbohm was not clairvoyant and, in the absence of specific advice from his attorney or a detailed study of Part 1 of the Commission's Rules and Regulations, there was no reason why he should have known of the prohibition against solicitation.

#### IV. Other Matters.

17. The WTB brings up a matter which it has brought up before, i.e., the fact that Mr. Schoenbohm did not elect to present character witnesses as had been done in Richard Richards, 1995 WL 170663 (Rev. Bd. 1995). Mr. Richards was apparently a successful businessman with at least two businesses: an LPTV broadcast station, and a marijuana farm. The record shows that Schoenbohm had a low paying job as a radio talk show host, until he became employed by the Virgin Islands government. Even then, he was a salaried employee. Most salaried employees live from paycheck to paycheck. The notion that Schoenbohm could have afforded to fly a flock of witnesses from the Virgin Islands to Washington is preposterous. However, Schoenbohm's reputation and veracity is evident by the fact that both the Governor and the Delegate chose to hire him for responsible work, notwithstanding their knowledge

of his conviction.

May 23, 1997

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Respectfully submitted,

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By:   
\_\_\_\_\_  
Lauren A. Colby  
His Attorney

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EXHIBIT A

**Note 4a**

as required to convict defendant for knowingly possessing with intent to use unlawfully five or more false identification documents, government is required to establish uses to which defendant intended to put false identifications and that those intended uses would violate one or more federal, state, or local laws. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

**5. Identification documents**

For purposes of statute prohibiting fraud and related activity in connection with identification documents, "identification document" is an authentic or real document issued by some governmental body and a "false identification document" is *inter alia* a document procured by false statements or fraud and also may be a non-authentic document. *U.S. v. Smith, D.Or.1988, 685 F.Supp. 1523, affirmed in part, reversed in part on other grounds 876 F.2d 898, certiorari denied 110 S.Ct. 194, 493 U.S. 869, 107 L.Ed.2d 149.*

**6. Possession of document-making implements**

Defendant violated statute prohibiting fraud and related activity in connection with identification documents, by possessing document-making implements which would be used in production of false identification document by possessing Texas seal, two blank Rhode Island birth certificates, blank New Jersey driver's license, two blank Social Security cards and blank chauffeur's license form, and by possessing identification document that appeared to be identification document of United States which was stolen or produced without authority knowing that such document was stolen or produced without authority by her possession of blank Social Security card. *U.S. v. Smith, D.Or.1988, 685 F.Supp. 1523, affirmed in part, reversed in part 876 F.2d*

**§ 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;
- (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;
- (3) knowingly and with intent to defraud possesses fifteen or more devices which are counterfeit or unauthorized access devices; or
- (4) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

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

(b)(1) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(2) Whoever is a party to a conspiracy of two or more persons to commit an offense under subsection (a) of this section, if any of the parties engages in any conduct in furtherance of such offense, shall be fined an amount not greater than the amount provided as the maximum fine for such offense under subsection (c) of this section or imprisoned not longer than one-half the period provided as the maximum imprisonment for such offense under subsection (c) of this section, or both.

(c) The punishment for an offense under subsection (a) or (b)(1) of this section is—

- (1) a fine of not more than the greater of \$10,000 or twice the value obtained by the offense or imprisonment for not more than ten years, or both, in the case of an

898, certiorari denied 110 S.Ct. 194, 493 U.S. 869, 107 L.Ed.2d 149.

**7. Instructions**

In prosecution for knowingly possessing with intent to use unlawfully five or more false identification documents, citation to jury of particular law which defendant's intended uses of false identification documents would have violated was required; unlawfulness was determined not by reference to abstract notions of right and wrong, but by standards prescribed by appropriate lawmaking bodies, and to demonstrate unlawfulness, jury had to be instructed that particular conduct would have violated specific law. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

**8. Weight and sufficiency of evidence**

Government's proposed inference that defendant intended unlawful uses of multiple false identification documents which she possessed as there were no possible lawful uses for false identifications was not sufficient to establish that defendant's intended uses of false identifications would violate federal, state, or local laws, so as to permit conviction for knowingly possessing with intent to use unlawfully five or more false identification documents. *U.S. v. Rohn, C.A.4 (Md.) 1992, 964 F.2d 310.*

**9. Admissibility of evidence**

Any incidental prejudice suffered by defendant charged under federal statute with making false identification cards as result of evidence that defendant's activities violated Illinois law as well as federal law did not require mistrial, where any prejudice was outweighed by probative value of state employee's testimony on element of government's case. *U.S. v. Bell, C.A.7 (Ill.) 1992, 980 F.2d 1095.*

offense under subsection (a)(2) or (a)(3) of this section which does not occur after a conviction for another offense under either such subsection, or an attempt to commit an offense punishable under this paragraph;

(2) a fine of not more than the greater of \$50,000 or twice the value obtained by the offense or imprisonment for not more than fifteen years, or both, in the case of an offense under subsection (a)(1) or (a)(4) of this section which does not occur after a conviction for another offense under either such subsection, or an attempt to commit an offense punishable under this paragraph; and

(3) a fine of not more than the greater of \$100,000 or twice the value obtained by the offense or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this paragraph.

(d) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

(e) As used in this section—

(1) the term "access device" means any card, plate, code, account number, 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);

(2) the term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(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; and

(6) the term "device-making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under chapter 224 of this title. For purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(Added Pub.L. 98-473, Title II, § 1602(a), Oct. 12, 1984, 98 Stat. 2183 and amended Pub.L. 99-646, § 44(b), Nov. 10, 1986, 100 Stat. 3601; Pub.L. 101-647, Title XII, § 1205(f), Nov. 29, 1990, 104 Stat. 4831.)

**HISTORICAL AND STATUTORY NOTES****1990 Amendment**

Subsec. (f). Pub.L. 101-647 inserted provision defining the term "State" for purposes of this subsection.

**1986 Amendment**

Subsec. (f). Pub.L. 99-646 substituted "chapter 224 of this title" for "title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481)".

**Report to Congress**

Section 1603 of Pub.L. 98-473, provided that: "The Attorney General shall report to the Con-

gress annually, during the first three years following the date of the enactment of this joint resolution [Oct. 12, 1984], concerning prosecutions under the section of title 18 of the United States Code [this section] added by this chapter."

**Legislative History**

For legislative history and purpose of Pub.L. 98-473, see 1984 U.S. Code Cong. and Adm. News, p. 3182. See, also, Pub.L. 99-646, 1986 U.S. Code Cong. and Adm. News, p. 6139; Pub.L. 101-647, 1990 U.S. Code Cong. and Adm. News, p. 6472.

## Note 10

vice fraud and sentences imposed upon codefendants was not unjustified or proper; presentence report disclosed circumstances unique to defendant, including prior criminal record and allegations of defendant's illegal activities while incarcerated. *Farmer v. U.S.*, D.Md.1990, 737 F.Supp. 884.

## 11. Conspiracy

Evidence was sufficient to sustain convictions of conspiracy to possess and traffic in unauthorized and counterfeit credit card drafts, notwithstanding defendants' contention that the Government failed to prove that an overt act was committed in furtherance of the conspiracy; transaction in which defendants gave undercover agent approximately \$1,000,000 in credit card drafts was an overt act separate from the agreement which corroborated criminal intent to fraudulently convert credit card drafts. *U.S. v. Luttrell*, C.A.9 (Cal.) 1989, 889 F.2d 806, rehearing granted 906 F.2d 1384, vacated in part on other grounds and amended on rehearing 923 F.2d 764, certiorari denied 112 S.Ct. 1558, 118 L.Ed.2d 207.

## 12. Possession

Defendant could be convicted of unlawful possession of 15 or more unauthorized access devices, even though defendant did not use at least 15 credit cards at same moment in time; defendant did not show that he disposed of any of the credit card numbers after his unauthorized use, and therefore could hardly claim that his possession ended at any specific point. *U.S. v. Farkas*, C.A.8 (Minn.) 1991, 935 F.2d 962.

## 13. Weight and sufficiency of evidence

Despite lack of eyewitness identification of defendant, evidence was sufficient to support defendant's conviction for fraud for his use of credit cards not owned by him to pay for hotel and other expenses; perpetrator gave same fictitious name and/or telephone number, rounded tip on credit vouchers in same manner, purchased jewelry from hotel shop and charged it to room and left prior to scheduled end of stay without checking out, as defendant had in similar crimes for which he had been convicted after being identified by eyewitnesses. *U.S. v. Momeni*, C.A.9 (Hawaii) 1993, 991 F.2d 493.

Airline testimony, handwritten travel itineraries, and controlled deliveries of particular tickets was sufficient to show that defendant used unauthorized credit cards to obtain airline tickets of a value aggregating more than \$1,000 during the

year 1988 even though the only information concerning sale to him of credit card numbers related to 1989. *U.S. v. Powell*, C.A.10 (Colo.) 1992, 973 F.2d 885.

Evidence was sufficient to show, in trial for unlawful use of access device to obtain cash in excess of \$1,000, that defendant was involved in credit card fraud scheme, where defendant was owner of telemarketing companies and the only person with control over bank account, and thus it was incredible to argue that defendant was not responsible for his employees' actions in obtaining and illegally using access devices. *U.S. v. Farkas*, C.A.8 (Minn.) 1991, 935 F.2d 962.

Evidence supported defendant's convictions for conspiracy to knowingly use unauthorized access device, and knowingly using and aiding in use of unauthorized access device, both with intent to defraud and gain property in excess of \$1,000; evidence showed that defendant and another used same credit card, which did not belong to either of them, to obtain total of \$4,000 in travelers checks. *U.S. v. Edwards*, D.Del. 1993, 816 F.Supp. 272.

## 14. Indictment

Indictment that charged defendant with credit card fraud was not duplicative, even though it charged defendant with use of same unauthorized credit card at two separate retail stores, where two acts charged were part of single scheme to defraud in that they involved same two persons, same credit card, occurred back-to-back on same day, defendant allegedly urged sales clerk at second store to approve purchase because first store had just done so, and failure to charge credit card uses as separate offenses did not prejudice defendant since defendant could request bill of particulars and jury instruction to make findings as to each act charged. *U.S. v. Brewer*, S.D.N.Y.1991, 768 F.Supp. 104.

## 15. Admissibility of evidence

Photographic array used for out-of-court identification of defendant charged with credit card fraud was not unduly suggestive where six photographs were used, all subjects were black males of approximately same age with short hair and mustaches, defendant's photo contained no unusual or distinctive features, no names, dates, or suggestive markings appeared under any of photos, and there was no allegation that array was tainted by suggestive comments from officer. *U.S. v. Brewer*, S.D.N.Y.1991, 768 F.Supp. 104.

## § 1030. Fraud and related activity in connection with computers

## (a) Whoever—

(1) knowingly accesses a computer without authorization or exceeds authorized access, and by means of such conduct obtains information that has been determined by the United States Government pursuant to an Executive order or statute to require protection against unauthorized disclosure for reasons of national defense or foreign relations, or any restricted data, as defined in paragraph y of section 11 of the Atomic Energy Act of 1954, with the intent or reason to believe that such information so obtained is to be used to the injury of the United States, or to the advantage of any foreign nation;

(2) intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information contained in a financial record of a financial

institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);

(3) intentionally, without authorization to access any computer of a department or agency of the United States, accesses such a computer of that department or agency that is exclusively for the use of the Government of the United States or, in the case of a computer not exclusively for such use, is used by or for the Government of the United States and such conduct affects the use of the Government's operation of such computer;

(4) knowingly and with intent to defraud, accesses a Federal interest computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer;

(5) intentionally accesses a Federal interest computer without authorization, and by means of one or more instances of such conduct alters, damages, or destroys information in any such Federal interest computer, or prevents authorized use of any such computer or information, and thereby—

(A) causes loss to one or more others of a value aggregating \$1,000 or more during any one year period; or

(B) modifies or impairs, or potentially modifies or impairs, the medical examination, medical diagnosis, medical treatment, or medical care of one or more individuals; or

(6) knowingly and with intent to defraud traffics (as defined in section 1029) in any password or similar information through which a computer may be accessed without authorization, if—

(A) such trafficking affects interstate or foreign commerce; or

(B) such computer is used by or for the Government of the United States; shall be punished as provided in subsection (c) of this section.

(b) Whoever attempts to commit an offense under subsection (a) of this section shall be punished as provided in subsection (c) of this section.

(c) The punishment for an offense under subsection (a) or (b) of this section is—

(1)(A) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(1) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than twenty years, or both, in the case of an offense under subsection (a)(1) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(2)(A) a fine under this title or imprisonment for not more than one year, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(2), (a)(3) or (a)(6) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(3)(A) a fine under this title or imprisonment for not more than five years, or both, in the case of an offense under subsection (a)(4) or (a)(5) of this section which does not occur after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph; and

(B) a fine under this title or imprisonment for not more than ten years, or both, in the case of an offense under subsection (a)(4) or (a)(5) of this section which occurs after a conviction for another offense under such subsection, or an attempt to commit an offense punishable under this subparagraph.

(d) The United States Secret Service shall, in addition to any other agency having such authority, have the authority to investigate offenses under this section. Such authority of the United States Secret Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Attorney General.

## FEDERAL SENTENCING GUIDELINES

See § 2F1.1.

## LAW REVIEW COMMENTARIES

Credit card fraud: The neglected crime. 76  
*J.Crim.L. & Criminology* 746 (1985).

## NOTES OF DECISIONS

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## 1. Constitutionality

Criminal fraud statute, prohibiting use of counterfeit and unauthorized "access devices," was not unconstitutionally vague or overbroad as it applied to defendant's use of stolen credit cards or forged credit card receipts to obtain unauthorized payments, though definition of "access devices" had been left open to protect new and vulnerable types of funds transfer systems; although statute anticipated new forms of "access devices," it offered both adequate warning to defendant that his conduct was unlawful and adequate guidance to judges and juries. *U.S. v. Lee, C.A.4 (Va.) 1987, 815 F.2d 971.*

Restaurant checks with credit card account numbers imprinted on them were "access devices" within statute proscribing possession of counterfeit or unauthorized access devices with intent to defraud; there is no requirement that the number be printed on any particular medium and fact that the numbers were printed on paper did not bring them within the statutory exception for transfer originated solely by paper instrument; the exception applies to passing bad or forged checks. *U.S. v. Caputo, C.A.2 (N.Y.) 1987, 808 F.2d 963.*

## 2. Devices within section

"Cloned" satellite television descramblers did not provide unauthorized "means of account access" within criminal statute prohibiting trafficking, possession, use and manufacture of "counterfeit access devices," since there was no resulting debit to legitimate subscribers' accounts, even though operators of satellite television services undoubtedly suffered economic losses from revenues as result of use of cloned descrambler modules by viewers who would otherwise have had to subscribe to obtain transmissions. *U.S. v. McNutt, C.A.10 (Ok.) 1990, 908 F.2d 561.*

Long distance telephone service access codes were "access devices," within meaning of statute

making it crime to possess or traffic in counterfeit or unauthorized access devices. *U.S. v. Brewer, C.A.5 (Tex.) 1987, 835 F.2d 550.*

Cellular telephone used for purpose of "free riding" on telephone system or transferred to another for that purpose does not constitute an "access device" within statute proscribing fraud in connection with access devices, where telephone cannot gain access to identifiable valid customer or subscriber account, despite contention that calls from such telephone represent direct accounting loss to the cellular telephone company and that calls may be billed to such company by long-distance carrier. *U.S. v. Brady, D.Utah 1993, 820 F.Supp. 1346.*

## 2a. Things of value

Sales taxes on goods and services obtained with unauthorized access device were includable when determining aggregate value of goods and services obtained, since sales tax was "thing of value." *U.S. v. Picquet, C.A.5 (La.) 1992, 963 F.2d 54.*

## 3. Interstate commerce

Illicit possession of out-of-state credit card account numbers is "offense affect(ing) interstate or foreign commerce" within meaning of federal statute prohibiting possession of counterfeit credit cards. *U.S. v. Rushdan, C.A.9 (Cal.) 1989, 870 F.2d 1509.*

Fraudulent credit card transaction affects interstate commerce, for purpose of criminal statute, to extent that bank channels are used for gaining approval of charges. *U.S. v. Scartz, C.A.6 (Ohio) 1988, 838 F.2d 876, certiorari denied 109 S.Ct. 303, 102 L.Ed.2d 822.*

Interstate telephone call by bank manager to credit card authorization center concerning defendant's attempt to secure cash advance on credit card was sufficient in and of itself to prove element of "effect on interstate commerce" in federal prosecution for use of counterfeit access device. *U.S. v. Lee, C.A.4 (Md.) 1987, 818 F.2d 302.*

## 4. Fraudulent activity prohibited

Testimony of credit card holder's brother that he had custody of card while cardholder was out of country, that he was in position to know of authorized uses of card, and that he did not know of any authorization given to defendant, was relevant to issue of authorization in prosecution of defendant for fraudulent use of credit card. *U.S. v. Momeni, C.A.9 (Hawaii) 1993, 991 F.2d 493.*

Fraudulent use of American Express account numbers, which defendant obtained by surreptitiously gaining access into American Express computer system, came within statutory prohibition on use of unauthorized "access device" even

though the numbers had not been assigned to any person; the statutory language "account number, or other means of account access," applied to the transactions made by defendant. *U.S. v. Taylor, C.A.8 (Minn.) 1991, 945 F.2d 1050.*

Credit cards that defendant acquired by submitting fictitious information were "counterfeit access devices," and, thus, defendant could be convicted of using counterfeit access devices; using fictitious information to obtain cards was functionally equivalent to manufacture of counterfeit device. *U.S. v. Brannan, C.A.9 (Cal.) 1990, 898 F.2d 107, certiorari denied 111 S.Ct. 100, 498 U.S. 833, 112 L.Ed.2d 71.*

Defendant could be convicted of both unauthorized use of a credit card and use of a counterfeit credit card with respect to use of the same card in the same transaction. *U.S. v. Gugino, C.A.2 (N.Y.) 1988, 860 F.2d 546.*

Credit card fraud statute did not cover unauthorized use of credit cards as false identification in connection with frauds upon victims who were neither owners nor issuers of cards. *U.S. v. Blackmon, C.A.2 (N.Y.) 1988, 839 F.2d 900.*

Long distance telephone service access codes fabricated by defendant could be "counterfeit," within meaning of statute making it crime to possess or traffic in counterfeit access devices, even though codes matched valid code numbers in telephone company computer. *U.S. v. Brewer, C.A.5 (Tex.) 1987, 835 F.2d 550.*

## 5. Fifteen or more devices

Jury justifiably concluded that defendant unlawfully possessed at least 15 unauthorized access devices, where 14 witnesses gave permissible testimony regarding credit card fraud scheme, Government introduced evidence of credit card debits from expired or invalid credit cards, and there was evidence of abnormally high number of chargebacks in defendant's bank account. *U.S. v. Farkas, C.A.8 (Minn.) 1991, 935 F.2d 962.*

Statutory prohibition against knowing possession of 15 or more counterfeit or unauthorized access devices did not permit aggregation of separate possessions of fewer than 15 stolen credit cards. *U.S. v. Russell, C.A.8 (Mo.) 1990, 908 F.2d 405.*

Defendant could be convicted of possessing 15 or more unauthorized long distance telephone service access codes, even though only five codes possessed by defendant were working; requiring each code number possessed by defendant to be active as prerequisite to conviction would serve as disincentive for credit card or long distance telephone companies to immediately invalidate stolen or lost numbers to protect themselves. *U.S. v. Brewer, C.A.5 (Tex.) 1987, 835 F.2d 550.*

## 6. Contact between issuer and defrauder

Statute prohibiting unauthorized use of access device does not require direct contact between the issuer and the defrauder. *U.S. v. Jacobowitz, C.A.2 (N.Y.) 1989, 877 F.2d 162, certiorari denied 110 S.Ct. 186, 493 U.S. 866, 107 L.Ed.2d 141.*

## 7. Separate offenses

Credit card fraud statute established separate criminal offense for use of each unauthorized access device for which \$1,000 of value was obtained during one-year period, and statute's "one or more" language covered situations where multiple unauthorized access devices were required in conjunction with each other to complete fraudulent transaction. *U.S. v. Iredia, C.A.5 (Tex.) 1989, 866 F.2d 114, certiorari denied 109 S.Ct. 3250, 492 U.S. 921, 106 L.Ed.2d 596, rehearing denied 110 S.Ct. 224, 493 U.S. 884, 107 L.Ed.2d 176.*

Defendant alleged to have charged \$3,639.93 worth of merchandise on one credit card over a four-month period and \$1,339.52 worth of merchandise on two other credit cards over a separate two-month period could be charged with two counts of using unauthorized access devices, though violated statute prohibited one from fraudulently using one or more access devices during any one-year period, and by such conduct obtaining anything of value aggregating \$1,000 or more during that period; statute's \$1,000 value requirement, and not one-year period in which that requirement had to be met, was key to defining separate offenses under statute. *U.S. v. Newman, D.Nev. 1988, 701 F.Supp. 184.*

## 8. Aggregation of value of goods

Sentence of 36 months imprisonment was not unconstitutionally disproportionate to crime of access device fraud, where maximum penalty for crime was ten years, defendant was found with over 52 unauthorized instant cash cards, social security cards, credit cards, and drivers licenses, had been convicted of similar fraudulent activity, and received a substantial part of his income from such activity. *U.S. v. Morse, C.A.8 (Minn.) 1993, 983 F.2d 851.*

Amounts obtained with multiple unauthorized access devices could be aggregated when determining sufficiency of evidence to support conviction for unlawful use of access device to obtain cash in excess of \$1,000. *U.S. v. Farkas, C.A.8 (Minn.) 1991, 935 F.2d 962.*

Amounts of value of goods obtained by defendant in different districts could be aggregated to reach jurisdictional amount for unlawful use of credit cards in interstate commerce to obtain anything of value aggregating \$1,000 or more; it was not necessary that defendant obtain at least \$1,000 worth of value in a particular district in order to be prosecuted in that district. *U.S. v. Ryan, C.A.10 (Kan.) 1990, 894 F.2d 355.*

## 9. Guidelines, upward departure

Departure from the Guidelines range of 33 to 41 months upward to 60 months was reasonable for defendant convicted of two counts of credit card fraud; following factors were present: likelihood of recidivism, prior similar adult conduct not resulting in criminal convictions, and need to isolate defendant from community to prevent further crimes. *U.S. v. Christoph, C.A.6 (Ohio) 1990, 904 F.2d 1036, certiorari denied 111 S.Ct. 713, 498 U.S. 1041, 112 L.Ed.2d 702.*

## 10. Sentence or punishment

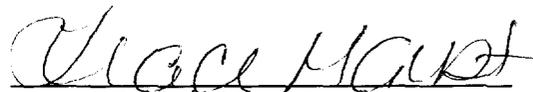
Disparity between sentence imposed upon defendant convicted of conspiracy and access de-

CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 23<sup>rd</sup> day of May, 1997:

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