No. 14-1846

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,	)	
	)	Appeal from the United States District
Plaintiff-Appellee,	)	Court for the Northern District of
	)	Indiana, South Bend Division
v.	)	
	)	No. 2:10-cr-00123
Willie J. Harris,	)	
	)	The Honorable Philip P. Simon
Defendant-Appellant.	)	
	)	
	)	

APPELLANT'S OPENING BRIEF AND REQUIRED SHORT APPENDIX

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ORAL ARGUMENT REQUESTED

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Appellate Court No: 14-1846

Short Caption: *United States v. Harris*

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Willie Harris

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JURISDICTIONAL STATEMENT

Willie Harris was charged with conspiracy, identity theft, and credit card fraud. (Doc. 1). The district court's jurisdiction was based on 18 U.S.C. § 3231, which gives district courts of the United States original jurisdiction of all offenses against the laws of the United States. A jury found Harris guilty, and on April 4, 2014, Harris was sentenced to 13 years. (Doc. 578).

On April 11, 2014, Harris filed a timely notice of appeal. (Doc. 577). On April 17, 2014, Harris filed a second notice of appeal. (Doc. 582). This Court dismissed Harris' second notice of appeal on May 16, 2014. (Doc. 598).

This Court's jurisdiction is based on 28 U.S.C. § 1291, which bestows jurisdiction of appeals from final decisions of district courts, along with 18 U.S.C. § 3742(a), which provides courts of appeals with jurisdiction in appeals of sentences.

STATEMENT OF THE ISSUES

I. Police were called because a woman in a bank was attempting a fraudulent transaction. Moments later, officers arrived and immediately arrested Harris, who was sitting in his car outside the bank. Harris was handcuffed and in the back of a police car as other officers arrested the actual suspect.

Was the detention and arrest of Harris legal?

II. An officer searched Harris' truck after arrested passenger Darrielle Watkins asked for her coat and backpack. The officer also confiscated an incriminating notebook. Harris, despite being in custody, was never asked if the truck was his or whether he consented to the search.

Was the search legal?

III. Harris was convicted of conspiracy, credit card fraud, and identity theft. Much of the evidence against him consisted of testimony by co-Defendants who were related or friends, and obtained via plea agreement.

Was the evidence sufficient to convict?

IV. The district court enhanced Harris' sentence based on or being a manager, using sophisticated means, the number of victims, and relocating the scheme. With these assessments, Harris was sentenced to 156 months.

Did the district court err in its sentencing determination?

STATEMENT OF THE CASE

Willie Harris and others were accused of obtaining the names and credit card numbers of unknown individuals in 21 states. The credit cards were used to make purchases, buy gift cards, and obtain cash advances. A jury convicted Harris of two counts of identity theft, three counts of credit card fraud, aggravated identity theft, and conspiracy to commit fraud. The district court sentenced Harris to 13 years. He now appeals.

STATEMENT OF THE FACTS

Willie Harris, and Then Darrielle Watkins, Are Arrested

On April 7, 2008, Harris and friend Darrielle Watkins were in a pickup truck. (Doc. 592 at 71-72). Watkins was 17 and Harris 18. Harris drove into a handicapped parking spot at a Chase bank in Munster, Indiana. (Doc. 325 at 11). Watkins entered the bank for a cash advance. Surmising the transaction was fraudulent, bank personnel notified the Munster police. (Doc. 325 at 8). Officers arrived immediately as the Munster police station is a few blocks from the bank. (Doc. 592 at 72). The first-arriving officers arrested Harris, who never entered the bank and was sitting in his truck. (Doc. 339; Short Appendix ("App.") at A3). They placed him in a police car. Other officers then entered the bank and arrested Watkins. (*Id*.). They found she had paper with identifying information of the actual cardholder, along with a second credit card also not in Watkins' name. (Doc. 325 at 8; Doc. 592 at 73-75).

Harris' Truck Is Searched

Detective Janiga spoke to Watkins while she sat in the back of a police car. (Doc. 325 at 8). He recognized Watkins was a minor. (Doc. 592 at 70). Watkins asked for her backpack and jacket in Harris' truck. (Doc. 592 at 11-12). Janiga went into Harris' truck and took a backpack, notebook, and wallet from it, although Watkins never asked about the notebook or wallet. (Doc. 325 at 20). She said the backpack was hers but the notebook belonged to Harris. (Doc. 325 at 15). Watkins never said the truck was hers or consented to the search. (Doc. 325 at 21). Further, Watkins

apparently had an ID, not a driver's license, and was not found with keys, title, or registration to the truck. (Doc. 325 at 33).

Meanwhile, Harris was in the back of another squad car. (Doc. 325 at 11-12). Janiga never asked Harris if the truck was his before entering it or if he consented. (Doc. 325 at 27). In fact, Janiga never spoke with Harris before searching the truck. (Doc. 325 at 21). Officers never obtained a warrant to search the vehicle, nor did they confiscate it. (Doc. 325 at 26). At the station, Harris said he drove Watkins to the bank and that the notebook was hers. (Doc. 325 at 16). When officers probed further, Harris invoked his Sixth Amendment rights. (*Id*.). He and Watkins were released. (Doc. 325 at 19).

The next day, Janiga perused the notebook and photocopied it. (Doc. 592 at 95). The notebook contained identifying information of over a dozen people. (Doc. 592 at 62). Janiga determined that a credit card found on Watkins was issued to Mark Sulzman. (Doc. 325 at 10). Janiga called Sulzman, who acknowledged his account had been compromised. (*Id*.). Janiga also recovered 50 latent fingerprints from the notebook with 48 linked to Harris. (Doc. 592 at 155).

Harris Is Investigated

In March of 2009, Chase Bank notified postal inspector Carroll Harris about $26,000 worth of suspicious transactions. (Doc. 592 at 220). He began investigating and determined the culprits were Defendants Shana King, Diontria Frazier, and Joniette Davis. (Doc. 592 at 220). The investigation progressed and Willie Harris was later implicated. (*Id*.).

In August of 2010, Janiga, Carroll Harris, and postal inspector Cecil Frink executed a search warrant on Willie Harris' Atlanta apartment. (Doc. 592 at 186). They seized computers, thumb drives, and Harris. (*Id*.). A second notebook with personal identifying information was also recovered in a Chevy Impala registered to Melvin Adams. (Doc. 592 at 214). That notebook was not tested for fingerprints. (Doc. 592 at 215).

The Conspiracy

The indictment alleged a conspiracy spanning from March 2007 to January 2010 and covering 21 states. (Doc. 1; Doc. 592 at 62). The Defendants named in the original indictment included Harris, Amber Fields, Alnese Frazier, Diontria Frazier, Shana King, Joniette Davis, Lauren Price, and Robert Sanders. (Doc. 1). There were seven unindicted co-conspirators: Kenyetta Williams, Darrielle Watkins, D'Juana Harris, Tereza Harris, Jamin Osborn, Brittany Sims, and Ardis Holmes. (Doc. 593 at 31). Inspector Frink said those individuals were not charged because they were either minors or close to 18. (Doc. 593 at 65). All of Harris' co-Defendants except Robert Sanders pled guilty and testified against him at trial.

Harris' Motion to Suppress and Reject

Harris argued he was detained, arrested, and searched without a warrant, and thus sought to suppress the items seized from his truck. (Doc. 306 at 1, 2; Doc. 325 at 34). The district court disagreed. (Doc. 339; App. at A2). Glossing over the arrest, the Court noted that while Watkins had no authority to consent to a search, probable cause existed. (App. at A10).

Harris went to trial on Count 1, conspire and attempt to commit fraud with identification documents, Counts 4 and 5, identity theft, Counts 6, 8, and 9, credit card fraud, and Count 10, aggravated identity theft. Sanders was tried on Count 1, conspiracy. (Doc. 593 at 77).

The Compromised Accounts

The prosecution opened its case with a slew of witnesses whose accounts Defendants compromised. These individuals all testified that they did not know Harris or any other Defendant. For example, Kenneth Douglas was unfamiliar with the names added as users onto his accounts. (Doc. 587 at 30-32). Douglas admitted Discover and Chase reimbursed him for the unauthorized charges. (Doc. 587 at 38). Humbert Minella testified about unauthorized charges on her American Express card. (Doc. 587 at 46). However, she did not suffer any monetary loss herself. (Doc. 587 at 48). Richard Tulikangas had his Chase card compromised, but sustained no losses himself. (Doc. 587 at 54). Over a dozen others testified similarly. (Doc. 587 at 67-252).

The Financial Institution Evidence

The prosecution also presented evidence from Chase, Discover, and American Express, along with certified documents from Citibank and BMO Harris, to show the credit cards were compromised. (Vols. 3 at 17-121; 4 at 11-99).

Diann Henn works for Chase as a regional fraud investigator, and she retrieved the fraudulent transactions, along with the authorization logs, which have the dates of the transactions. (Doc. 588 at 18). She also accessed DVR video

snapshots, images captured at Chase branches of the person making the fraudulent transaction. (Doc. 588 at 85-86). Henn explained that an "account take over" is where an individual calls on a customer's account, and changes a phone number or address without the customer's permission. (Doc. 588 at 23-24). If an account is taken over and the authorized user requests a card, Chase overnights a card via UPS or US mail. (Doc. 588 at 24). For example, Henn explained that on Roy Harmon's account, Jarod Moore was added. Chase then sent a card via UPS. (Doc. 588 at 129). Further, Katrina Thompson was added as a user on Gordon Culbertson's account. (Doc. 588 at 139-41). Fraudulent transactions of $22,408.22 then occurred. (*Id*.).

Henn also explained that once Chase finds unauthorized transactions, it credits that account and replaces the money, with Chase absorbing the loss. (Doc. 588 at 25).

Christine Kulagowski, a Special Agent with American Express, also testified. (Doc. 589 at 85). She explained that the names of the fraudulent users added to American Express accounts were Jared Moredock, Michael S. Frazier, and Jared L. Moredock. (Doc. 589 at 90). None of the American Express cardholders suffered a personal loss due to Defendants' conduct. (Doc. 589 at 92).

Co-Defendant Amber Fields

Amber Fields pled guilty to conspiracy to commit identity theft, credit card fraud, and bank fraud. (Doc. 590 at 9-10). As part of her plea agreement, she blamed Harris. (Doc. 590 at 10). She was also rewarded with a count being dismissed. (*Id*.).

Fields knew Harris for a few years. (Doc. 590 at 13). Harris flew her to Atlanta because he wanted her to get money. (*Id*.). However, Fields admitted going to Georgia to get an ID to enter clubs and later using it for cash advances. (Doc. 590 at 24). The cash advances ranged from $1500 to $6000. (Doc. 590 at 21). Of the proceeds, Fields would net $1000 and Harris the rest. (*Id*.). At Harris' prompting, Fields got four Macy's gift certificates worth $1000 each in Milwaukee. (Doc. 590 at 44). Fields used the aliases of Christy Wright and Samaria Friend. (Doc. 590 at 24).

Co-Defendant Alnese Frazier

Alnese Frazier pled guilty to conspiracy to commit identity theft, credit card fraud, and bank fraud. (Doc. 590 at 109). As part of her plea, she also blamed Harris. (Doc. 590 at 110).

Alnese is related to two co-Defendants. Diontria Frazier is Alnese's sister and Shana King is Alnese's cousin. (Doc. 590 at 110-13). Alnese knew Harris for nine years but saw him sporadically. (Doc. 590 at 113-14). Alnese's friend, Chanel Montgomery, gave Alnese her birth certificate and Social Security card so that Alnese could get an ID to enter bars. (Doc. 590 at 115-17). Harris provided Alnese with a lease agreement, and she went to the driver's license branch for an ID with Montgomery's name. (Doc. 590 at 116-17). Alnese used credit cards from Harris in the name of Katrina Thompson for cash advances. (Doc. 590 at 120, 123).

Harris told her to withdraw $3500 or $4500, from which Alnese kept between $1000 and $1500. (*Id*.). Alnese's phone activated Gordon Culbertson's card. (Doc. 593 at 35). Further, Culbertson's card was sent to an Indianapolis address, 5339

Winterberry Drive, where Alnese lived. (Doc. 593 at 36-38). Cameras captured Alnese and Harris attempting unauthorized transactions. (Doc. 590 at 126; 146-47). Harris had Alnese visit Atlanta. (Doc. 590 at 154). Alnese said she went to Atlanta for the nightlife, however they got a cash advance of $2500. (Doc. 590 at 178).

Co-Defendant Shana King

Shana King pled guilty to Count 1. (Doc. 591 at 30). Part of her plea agreement was to finger Harris as the ringleader. (Doc. 591 at 31). King met Harris once at her aunt's house, although Harris denied this. (Vols. 6 at 83; Doc. 594 at 6). King was a cousin of Diontria and Alnese Frazier, and a friend of Joniette Davis. (Doc. 591 at 33, 63).

King's involvement was limited to a single day's transactions. (Doc. 591 at 81). Diontria Frazier gave her a credit card. (Doc. 591 at 39, 70). Diontria drove King to a Chase Bank in Indianapolis and took a $7500 cash advance, and then to Fifth Third Bank for another cash advance. (*Id*.). Diontria accompanied King and stood with her at the teller's window. (*Id*.). After King received the money, she gave it to Diontria. (*Id*.). Diontria then paid King $4000. (Doc. 591 at 71).

King never received a credit card from Harris. (Doc. 591 at 72). She also never received mail from him nor sent mail to him. (*Id*.).

Co-Defendant Diontria Frazier

Diontria Frazier pled guilty to Count I. (Doc. 591 at 85). After her plea agreement, she was placed on pretrial release. (Doc. 591 at 87). She violated her bond by driving on a suspended license. (*Id*.). She was later arrested for criminal

conversion. (*Id*.). Probation officers also discovered hydrocodone, oxycodone, $400 in cash, and a scale with white powder in her home. (Doc. 591 at 89).

Diontria knew Harris for nine years. (Doc. 591 at 91). Harris explained that Diontria's boyfriend worked for a credit bureau in Indianapolis, enabling her to get identifying information via credit bureau forms. (Doc. 593 at 116-17). Diontria got an ID in the name of Katrina Thompson. (Doc. 591 at 94). Harris purchased a bus ticket from Indianapolis to Georgia for Diontria. (Doc. 591 at 98). When she arrived, they went to a Georgia DMV, where she used a birth certificate and Social Security card from Harris to get an ID. (Doc. 591 at 99). Credit cards were also mailed to Diontria's home. (Doc. 591 at 107). Bank cameras captured Diontria and Harris attempting unauthorized transactions. (Doc. 591 at 113).

Diontria admitted participating in three fraudulent credit card actions. (Doc. 591 at 141). One was with Shana King, another with Robert Sanders, and the third by herself. (*Id*.). Diontria admitted to being "pretty tight" with Joniette Davis, Shana King, and Alnese Frazier. (Doc. 591 at 151).

Co-Defendant Joniette Davis

Davis is a cousin of Shana King and a friend of Diontria Frazier. (Doc. 591 at 63, 93). Images were captured of Davis, along with Shana King and Diontria Frazier, making unauthorized purchases at Best Buy. (Doc. 591 at 112). The prosecution did not call Davis to testify.

Co-Defendant Lauren Price

Price pled guilty to two counts in the indictment, conspiracy and identity theft. (Doc. 591 at 195). Price got an ID from her friend Tomika Lee. (Doc. 591 at 198). After the ID expired, Price and Harris went to a license bureau and got a new one. (Doc. 591 at 200). They then went to a bank and got a cash advance of $4500. (Doc. 591 at 202). Price once saw Harris' notebook, which she claimed had identifying information. (Doc. 592 at 50). Price worked at Americall, where Harris said she purloined identifying information. (Doc. 593 at 110-11). However, she denied this. (Doc. 592 at 37).

Co-Defendant Robert Sanders

Sanders went to trial, but did not present a defense. (Doc. 594 at 21). Co-Defendants said Sanders used IDs with the names Jarod Moore and Michael Frazier. (Doc. 593 at 66). Sanders made a cash advance of $5000 at a Chase Bank using the Michael Frazier ID, and then attempted to get $2000 more but was caught by police in Speedway, Indiana. (Doc. 593 at 68-69).

Unindicted Co-Conspirator Darrielle Watkins

Watkins testified that Harris picked her up from high school and went to a bank, but recalled nothing else. (Doc. 589 at 167).

Willie Harris

Harris moved for a directed finding of acquittal. (Doc. 593 at 70-72). Unsuccessful, Harris then testified in his defense and rested. (Doc. 594 at 21).

Harris acknowledged his Indiana state court conviction for identity deception, theft, and fraud. (Doc. 593 at 100-01). He was still a juvenile when the conspiracy related activity began in March 2007 as he turned 18 in August of 2007. (Doc. 595 at 78). Harris used fake IDs with the names Jarod Moore and Jarod Moredock to enter bars because he was under 21. (Doc. 594 at 9-10, 12). He visited these clubs with Alnese Frazier, Amber Fields, and Robert Sanders. (*Id*.). He never used a credit card with the name Jarod Moore. (Doc. 594 at 18).

Some credit cards were sent to Harris' residence at 3110 Godby Road, Apartment 5 H, Atlanta, Georgia. Harris also lived at 2409 Crestridge Drive in Atlanta, an address where credit cards were mailed. (Doc. 594 at 6-9). Harris further spent time at 1450 West 35th Avenue, Gary, Indiana. (Doc. 589 at 47-48). Many cards were sent to 4447 Grant Street in Gary. (Doc. 589 at 45-46). Harris said Lauren Price and her father sent cards there. (Doc. 593 at 130, 171). Early in the investigation, Inspector Frink found the house on 4447 Grant was vacant. (*Id*. at 39).

Harris admitted committing credit card fraud eight times after experiencing financial trouble in Atlanta. (Doc. 593 at 123). However, he did it alone. (Doc. 593 at 124). Other than this activity and that underlying his previous state conviction, Harris engaged in no other credit card fraud. (*Id*.). Nor did he assist Alnese Frazier with credit card fraud. (Doc. 593 at 125-26). Finally, Harris denied arranging for anyone to visit Atlanta. (Doc. 593 at 175).

The Verdict

The jury found Harris guilty of Count 1, conspire and attempt to commit fraud with identification documents, 18 U.S.C. § 1028(f); Counts 4 and 5, identity theft and aiding and abetting, 18 U.S.C. § 1028(a)(7); Counts 6, 8, and 9, credit card fraud and aiding and abetting, 18 U.S.C. § 1029(a)(2); Count 10, aggravated identity theft and aiding and abetting, 18 U.S.C. § 1028A. (Doc. 594 at 104-05). The jury found Sanders guilty on Count 1, conspiracy. (Doc. 594 at 104).

The Post-Trial Motions

Harris filed four post-trial motions. First, a judgment of acquittal based on insufficient evidence. (Doc. 546). Second, that the prosecution violated Federal Rule of Criminal Procedure 11 by using evidence provided in his proffer agreement in its case-in-chief. (Doc. 547). Third, the return of items seized by the government and forfeited without notice. (Doc. 548). Fourth, to compel evidence of the number of victims and loss amounts before sentencing. (Doc. 549). The district court denied the motions. (Doc. 573; App. at A18).

The Sentence

The PSR provided that Harris faced a maximum statutory term of 30 years' incarceration for conspiracy (Count I), a maximum statutory term of 15 years for identity theft (Counts 4 and 5), and a maximum statutory term of 10 years for credit card fraud (Counts 6, 8, and 9). (Doc. 562 at 1). Harris also faced a statutory mandatory period of two years imprisonment for aggravated identity theft (Count 10), to be served consecutively. (*Id*.). At the sentencing hearing, Inspector Frink

testified for the prosecution. (Doc. 595 at 25). Barbara Steinpas described the duress caused by the theft of her identity and the impact on her credit. (Doc. 595 at 88-89).

Harris' initial offense level was seven. (Doc. 596 at 55). The district court added twelve points for the amount of loss, which was between $200,000 and $400,000. (Doc. 596 at 11, 55). The court added four points for the number of victims. (Doc. 596 at 55). The court found sophisticated means and a relocation of the scheme to another jurisdiction, for two more points. (*Id*.). Two additional points were initially added (but later withdrawn) because Harris used a minor. (Doc. 596 at 56). Harris' manager status meant a three level adjustment, plus a two level adjustment for obstruction of justice, for a total offense level of 32. (*Id*.). The criminal history category was three. (*Id*.). The incarceration range was 151 to 188 months. (*Id*.).

Harris was sentenced to 13 years. (Doc. 578; App. at A40). The 156-month sentence consisted of 132 months on Counts 1, 4, and 5, and 120 months on Counts 6, 8, and 9. (*Id*.). The sentences imposed on Counts 1, 4, 5, 6, 8, and 9 are concurrent. (*Id*.). The 24 months on Count 10 are consecutive. (*Id*.). Further, Harris was ordered to pay restitution to four financial institutions: JP Morgan Chase, $175,414.46; Discover Financial Services, $41,959.83; Citibank, $11,040.08; and American Express, $70,884.30, for a total of $299,298.67. (App. at A47; Doc. 595 at 33-34).

Harris appeals. (Doc. 577).

SUMMARY OF THE ARGUMENT

I. An arrest first, ask questions later approach is anathema to the Constitution. The police detained and arrested Harris for waiting in a handicapped parking spot outside the bank. The only basis for the arrest was that a woman inside made a fraudulent transaction. Law enforcement may arrest a person only upon individualized suspicion he is or has engaged in criminal behavior. That axiom was discarded. Defying the Fourth Amendment, Harris was arrested, not based on any individualized suspicion, but because he was in the parking lot of a bank where a woman was committing a crime.

II. Warrantless searches subvert the Constitution. The police trampled over the Fourth Amendment a second time by searching Harris' vehicle without getting his consent or identifying that he was the owner. The fruits of this Fourth Amendment be damned approach was a notebook listing the personal information of over a dozen people, and the conviction and 13-year sentence of Harris. Permitting the search to stand will give the government *carte blanche*. Reviewed *de novo*, the Court should restore the Fourth Amendment and reverse.

III. The last man standing, Harris was convicted by co-Defendants enticed by generous plea deals. Painting themselves as pawns, the co-Defendants had nothing to lose and everything to gain by blaming Harris. If further incentive was needed, the co-Defendants were family or friends. This suspect testimony was the fault line on which Harris' conviction was built. The evidence was insufficient.

IV. Harris' sentence was littered with erroneous enhancements. The four-level enhancement for the number of victims was based on an incorrect version of the Sentencing Guidelines, warranting remand per *Peugh v. United States*, 133 S.Ct. 2072 (2013). Further, Harris was a minor when the illegal activity commenced. He was convicted of non-violent crimes, where the individual victims suffered no pecuniary loss. And the difference in sentences between Harris (13 years in prison) and his co-Defendants (not a day) is not a gap but a chasm. Resentencing is necessary.

ARGUMENT

I. As a Male Sitting in a Car Outside The Bank, Harris' Detention and Arrest Defy the Fourth Amendment When The Suspect Was a Female in the Bank.

A. Standard of Review.

In reviewing a district court's denial of a motion to suppress, the Court examines conclusions of law *de novo* and findings of fact for clear error. *United States v. Booker,* 612 F.3d 596, 599 (7th Cir. 2010). Whether the defendant was subjected to a lawful investigative stop is a legal question reviewed *de novo. United States v. Tirrell*, 120 F.3d 670, 674 (7th Cir. 1997).

B. The Detention and Arrest of Harris Were Illegal Because There Was No Probable Cause Particularized to Him.

The district court's suppression ruling focused on the search of Harris' truck, to the neglect of his arrest. (App. at A1-A2). The court's blasé approach to the arrest is summed up thusly: "[t]hese first-arriving officers apparently had taken Harris into custody because he was sitting in the back of a squad car. It's a little unclear why he had been arrested, but presumably the officers suspected that he was involved in the fraud attempt that brought them to the bank." (App. at A3). Nothing else was said. The court made critical presumptions in skipping to the search—that stopping, detaining, and arresting Harris were permissible. The reality is that they were not. While the search of Harris' vehicle is fraught with illegalities, the Court need not even reach it as Harris' stop and the evidence derived from it should be suppressed.

The Fourth Amendment protects the right of the people against unreasonable

searches. U.S. CONST. AMEND. IV. This guarantee extends to the innocent and guilty alike. *McDonald v. United States*, 335 U.S. 451, 453 (1948).

1. There Was No Basis to Stop and Detain Harris.

Terry v. Ohio permits police to stop and detain a person for investigative purposes if they have reasonable suspicion that criminal activity is afoot. 392 U.S. 1, 21–22 (1968). Reasonable suspicion is "some objective manifestation" the person stopped is involved in criminal conduct. *United States v. Cortez,* 449 U.S. 411, 417 (1981). In evaluating reasonable suspicion, courts examine the totality of circumstances known to the officer at the time of the stop. *United States v. Quinn*, 83 F.3d 917, 921 (7th Cir. 1996). Courts first consider whether the officer's action was justified at its inception and then whether it was related to the circumstances justifying the interference. *United States v. Smith*, 3 F.3d 1088, 1095 (7th Cir. 1993).

Detaining Harris upon arriving at the bank was not justified. Being called to a scene does not authorize officers to sweep up whomever they find in their wake. The district court noted it was unclear why Harris was handcuffed and in the back of a police car before officers entered the bank. (App. at A3). But questions persist, and the district court's truncated analysis cannot survive *de novo* review.

To be present at a crime is not evidence of guilt as an aider or abettor. *United States v. Williams*, 341 U.S. 58, 64 n. 4 (1951). Nor is it unlawful to be in the company of another. *United States v. Heath*, 188 F.3d 916, 922 (7th Cir. 1999). Thus, proximity to a suspected crime without indicia of a person's involvement is not probable cause. *United States v. Ingrao,* 897 F.2d 860, 863 (7th Cir. 1990).

Affirming Harris' stop and detention will contradict *United States v. Bohman*, 683 F.3d 861 (7th Cir. 2012). There, police stopped a car exiting a property suspected to house a meth lab. *Id*. at 863-64. That suspicion stemmed from a tip, but when police stopped the car, they had not yet corroborated the tip. *Id*. at 864-65. The Court found no reasonable suspicion for the stop because the only information pointing to criminal activity was the defendant emerging from the property. *Id*. Similarly, the Munster police knew nothing about Harris, other than that he was sitting in the bank parking lot. Reasonable suspicion did not exist.

The illegalities of the Munster police are further highlighted by *United States v. Rivers*, 121 F.3d 1043 (7th Cir. 1997). The *Rivers* defendant was a passenger in a car driven by a friend, who had an outstanding warrant. *Id*. at 1044. Police followed the car into a parking lot and pulled in front of it. *Id*. The driver was removed from the car, found with cocaine, and arrested. *Id*. Once the driver was in the police car, officers approached the defendant. *Id*. A patdown search revealed the defendant also had cocaine. *Id*.

The defendant sought to suppress the cocaine. The Court noted that proximity to others suspected of criminal activity does not confer probable cause to search that person. *Id*. at 1045. But where a suspected drug dealer was arrested in a parking lot and "police would legitimately want to ask the defendant a few questions, if only to determine whether he was competent to take charge of [the driver's] vehicle," it was reasonable to patdown the defendant. *Id*.

The instant facts are the flipside of *Rivers*. The actual suspect in *Rivers* was stopped and detained first. Here, an uninvolved male bystander sitting in his car (as known to a reasonable officer) was stopped and detained before the actual female suspect was even located. (App. at A3). Being a stone's throw from the police station, officers were on the scene immediately. (Doc. 592 at 72). And while officers said Harris' truck was parked in a handicapped space, there was no evidence this spurred Harris' stop. No parking citation was issued. As the Fourth Amendment does not permit police to snatch anyone at the scene, Harris' stop and detention fail *Terry*.

2. There Was No Basis to Arrest Harris.

The problems with Harris' arrest mirror those of his detention since the two were simultaneous. Harris was arrested because he was in a parking lot outside a bank where a woman made a fraudulent transaction, when there was no outstanding warrant for him. (App. at A3). There must be "a high degree of suspicion" to arrest without a warrant. *United States v. Serna-Barreto*, 842 F.2d 965, 966 (7th Cir. 1988). And subsequent evidence of guilt cannot validate probable cause. *United States v. Reed*, 443 F.3d 600, 603 (7th Cir. 2006).

a. This is a Mere Presence Case Like *Ybarra*.

In *Ybarra v. Illinois*, officers executed a warrant to search a tavern and its bartender for drugs. 444 U.S. 85, 88 (1979). Officers searched the patrons and the defendant was found with heroin. *Id*. at 89. The Court ruled that "mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id*. at 91, citing *Sibron v. New York*,

392 U.S. 40, 62-63 (1968). A search or seizure of a person must thus be supported by probable cause particularized to that person. 444 U.S. at 91-92. Particularity is not met because there was probable cause to search or seize another or to search the premises. *Id*.

Ybarra instructs that the Fourth and Fourteenth Amendments protect the legitimate expectations of privacy of persons, not places. *Id*. at 91. The particularized suspicion requirement means Harris' conduct, not Watkins', controls. And mere proximity in time and place to another committing a crime cannot establish probable cause. Because Harris simply was in the parking lot of a building Watkins was in, his arrest was illegal.

b. This is Not A Common Enterprise Case Like *Pringle*.

The prosecution seeks to replace the probable cause requirement of individualized suspicion with a probable cause standard of guilt by association. The Supreme Court rejected this in *Maryland v. Pringle*, 540 U.S. 366 (2003). The *Pringle* defendant was one of three men riding in a car with cocaine in a common area. The Court held it was reasonable to infer the three men knew of and exercised control over the cocaine, establishing probable cause for each. *Id*. at 372. In distinguishing *Ybarra*, *Pringle* noted the men were in a small car, not a public tavern. A car passenger "will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of their wrongdoing." 540 U.S. at 373.

The same cannot be said here. Harris was not in a car with Watkins when arrested. (Doc. 325 at 10-12). He was in a parking lot open to bank patrons and the public. (App. at A3). Moreover, officers did not know his connection to Watkins. (*Id*.). It is specious to suggest that bank patrons and the general public will be engaged in a common enterprise with other bank patrons. If a warrantless arrest can be premised on a patron being in a parking lot while a crime occurred inside an establishment, the Fourth Amendment is a dead letter.

c. Circuit Court Case Law Further Imperils the Arrest.

Also supporting reversal is *Ingrao*, 897 F.2d 860 (7th Cir. 1990). Officers were investigating a house next to a gangway. *Id*. at 861. They observed suspicious individuals walking out of the gangway. Officers then arrested the defendant after he emerged from the gangway with a bag. *Id*. at 861. But officers could not connect the defendant to a house on either side of the gangway. *Id*. at 863-64. The Court held probable cause was absent because the defendant's only ties to the suspicious activity was his presence in the gangway. *Id*. at 863-64. Given the facts known to officers, the defendant could have been an innocent resident, visitor of a house next to the gangway, or pedestrian. *Id*. Like *Ingrao*, nothing connects Harris to the fraudulent cash advance inside the bank.

Finally, agents lacked particularized suspicion the defendant was committing a crime in *United States v. Collins*, 427 F.3d 688 (9th Cir. 2005). An informant met with a suspect to purchase stolen checks. *Id*. at 690. The suspect told the informant his contacts were coming with checks. *Id*. Agents watched the suspect in his car in a

parking lot. *Id*. Two cars, one driven by the defendant, arrived and parked next to the suspect's car. *Id*. Agents saw the defendant talking to the driver of the other car. *Id*. at 690-91. The defendant then went into a restaurant and was arrested. *Id*. at 690. The arrest was suppressed. "Before arresting [the defendant] in the public parking lot, the agents had never suspected [the defendant], or even heard of him.... There simply was no individualized suspicion of [the defendant], save whatever was lent by proximity and timing." *Id*. at 691-92. That is what occurred here.

Ingrao and *Collins* confirm Harris' arrest cannot stand because officers did not know Harris or his connection to the activity in the bank. He could have been a bank patron waiting on a friend as easily as an accomplice to Watkins. Per Supreme Court and Seventh Circuit precedent, this necessitates reversal.

C. The Tainted Evidence From The Unlawful Arrest Warrants Suppression.

Evidence obtained by dint of an illegal arrest should be suppressed as fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 47 (1963). The Fourth Amendment does not preclude the use of evidence obtained in its violation. *Herring v. United States*, 555 U.S. 135, 139 (2009). But subject to inapplicable exceptions, the exclusionary rule bars tangible materials seized during an unlawful search, testimony about knowledge acquired during the search, and derivative evidence. *Murray v. United States*, 487 U.S. 533, 536-37 (1988). The exclusionary rule ensures respect for the Constitution "by removing the incentive to disregard it." *Brown v. Illinois*, 422 U.S. 590, 600 (1975). *Brown* set forth three factors for determining whether the causal chain is attenuated from the illegal conduct: (1) the time elapsed

between the illegality and acquiring the evidence; (2) intervening circumstances; and (3) the flagrancy of the official misconduct. *Id*. at 603-04.

The taint of Harris' illegal arrest cannot be cleansed. First, the time between his arrest and the police getting the notebook was a few minutes. (App. at A3-A4). Second, no intervening circumstances—other than an illegal search—occurred between the arrest and getting the notebook. Third, the misconduct was flagrant. The Munster police plucked Harris from his car because, he was there. (App. at A3). This arrest first, ask questions later approach is inexcusable. And while the exigencies of a bank holdup or hostage situation might justify sealing off the parking lot, the offense that brought waves of officers was a fraudulent cash advance.

The notebook was the catalyst for the investigation and Harris' prosecution. But as the notebook is fruit of the poisonous tree, it should have been barred.

D. Summation.

Basing an arrest on proximity to suspected criminal activity instead of particularized suspicion guts *Ybarra*. Officers arrested Harris because he was in the vicinity of a crime. Probable cause is absent as a matter of law, and suppression is the remedy.

II. The Warrantless Search of Harris' Vehicle Violated The Fourth Amendment When No Consent or Probable Cause Existed.

A. Standard of Review.

Conclusions of law on a denial of a motion to suppress are reviewed *de novo* and findings of fact for clear error. *Booker,* 612 F.3d at 599. Probable cause determinations are mixed questions of law and fact reviewed *de novo*. *Id*.

B. Harris' Truck Was Searched.

In its suppression ruling, the district court first considered whether Detective Janiga's entry into Harris' vehicle and removal of items constituted a search under the Fourth Amendment. (App. at A6). The court answered affirmatively.

A car's interior is subject to Fourth Amendment protection from unreasonable searches. *New York v. Class*, 475 U.S. 106, 114-15 (1986). Thus, an officer intruding on a vehicle's interior space is a search for Fourth Amendment purposes. *United States v. Jones*, 132 S.Ct. 945, 952 (2012) ("In *Class* . . . we concluded that an officer's momentary reaching into the interior of a car constituted a search."). The prosecution may again attempt to evade *Jones* and *Class* by claiming Janiga did not intend to search Harris' vehicle. This is a nonstarter. An officer's intent is irrelevant in determining whether a search occurred. *United States v. Mann*, 592 F.3d 779, 784 (7th Cir. 2010). Finally, *Jones* and *Class* aside, seizures of property are subject to Fourth Amendment scrutiny even if no search within the meaning of the Amendment occurred. *Soldal v. Cook County*, 506 U.S. 56, 62 (1992).

C. Consent to Search Harris' Truck Was Absent.

The district court next considered if Watkins' request for her backpack and jacket constituted sufficient consent to search Harris' truck. (App. at A1). The court found it did not because "it wasn't her truck to consent to be searched." (App. at A7).

Consent renders a search reasonable under the Fourth Amendment. *United States v. Muriel*, 418 F.3d 720, 725 (7th Cir. 2005). However, the consenting person must have apparent authority over the vehicle. *United States v. Crowder*, 588 F.3d

929, 935-36 (7th Cir. 2009). A third party has apparent authority when it would appear to a reasonable person, given the information officers possessed, that the individual has common authority over the property. *Id*. This authority rests on mutual use of the property by persons having joint control. *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974). In other words, a non-owner can consent only if she can access and operate the vehicle. *Crowder*, 588 F.3d at 936.

The prosecution must demonstrate consent. *United States v. Groves*, 470 F.3d 311, 318-19 (7th Cir. 2006). It cannot do so. Watkins never consented to a search. Nor did she exhibit apparent authority over Harris' truck. First, Janiga admitted he never asked Watkins if the vehicle was hers or who owned it:

> Q: Now, did you determine who owned the vehicle?
>
> A: I never determined who owned the vehicle….
> I mean, I was told that Willie Harris was the driver of that truck, but I was never instructed on who the owner of that truck was.
>
> Q: When you entered the vehicle and acquired what you acquired from it, did you know who the owner was at that time?
>
> A: No.

(Doc. 325 at 21). Second, Watkins did not have keys, title, or registration to the vehicle. (Doc. 325 at 33). Third, she could not operate the vehicle and apparently had no drivers' license. (*Id*.). Fourth, she had access to the vehicle only when unlocked. (Doc. 325 at 11, 21). Thus, Watkins could not consent.

Watkins' passenger status confirms lack of consent for another reason. Individuals lacking ownership of a car do not have a reasonable expectation of

privacy while a passenger. *United States v. Smith*, 697 F.3d 625, 630 (7th Cir. 2012) (no Fourth Amendment violation because defendant was a passenger). In *United States v. Watson*, the defendant could not challenge a search because a passenger "claims neither a property nor a possessory interest in the car, so even an illegal search of it would not have infringed *his* Fourth Amendment rights." 558 F.3d 702, 705 (7th Cir. 2009) (emphasis in original). If Watkins has no privacy interest in Harris' truck, she cannot consent to a search of it.

D. Probable Cause to Search Did Not Exist.

The district court next examined whether Janiga had probable cause to search Harris' vehicle. The court found he did. (App. at A10).

The Fourth Amendment creates a general presumption against warrantless searches. *Katz v. United States*, 389 U.S. 347, 357 (1967). The automobile exception to the Fourth Amendment warrant requirement permits a search *sans* warrant if there is probable cause to believe the search will uncover evidence of a crime. *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2005). Probable cause exists where a prudent person would believe that contraband or evidence of a crime will be found in the place to be searched. *United States v. Zahursky*, 580 F.3d 515, 521 (7th Cir. 2009). The question is whether there was a fair probability that evidence of a crime would be found in Harris' truck. *See id*. Under the test, officers may draw reasonable inferences. *United States v. Reed*, 443 F.3d 600, 603 (7th Cir. 2006).

Precedent highlights the flaws of the district court's ruling. Probable cause exists where an officer has an actual basis to believe a specific and identifiable type

of evidence is in a car. For example, an officer smelled marijuana from outside the car in *United States v. Franklin*, 547 F.3d 726, 734 (7th Cir. 2008). An informant told police a car would contain contraband in *United States v. Alexander*, 573 F.3d 465, 476 (7th Cir. 2009). Finally, officers saw a suspect enter his car after leaving a drug buy in *United States v. Bullock*, 632 F.3d 1004, 1013 (7th Cir. 2011). The district court here admitted "there's nothing that specific in this case." (App. at A10).

The court should have ended its analysis there. Instead, it went on: "[b]ut there is something unique about the crime of identity theft that makes this case a little bit different from run-of-the-mill cases." (*Id*.). This reasoning has two problems. First, Harris was apparently detained because his car was in a handicapped parking spot, not for identity theft. There was no basis to search his car based on a parking infraction. Nor was there a basis to believe specific evidence concerning identity theft was in the truck—the evidence was already found on Watkins. (Doc. 325 at 8; Doc. 592 at 73-75). Second, the district court's identity theft carve-out is ad hoc. There is no authority altering the probable cause requirement for non-narcotic offenses. Since identity theft involves an intangible, information, the district court's approach would permit law enforcement to scour a car for any scrap of paper and confiscate cellphones, computers, or anything else the search dredges up, warrantless.

The district court concluded that Janiga knew facts sufficient for a reasonable person to think evidence was in Harris' truck. (App. at A14). But as a matter of law, a prudent officer would not believe mere proximity of two individuals suggests a

relationship. *United States v. Slone*, 636 F.3d 845, 849 (7th Cir. 2011). Further, Janiga admitted Watkins never asked him to retrieve the notebook, since it was not hers. (Doc. 325 at 20-21). Nor did Janiga speak to Harris before searching the truck. (*Id*. at 21). Finally, Janiga did not know why Harris was removed from his vehicle and put in the squad car. (*Id*. at 28). Probable cause did not exist, and crafting a probable cause lite is reversible error.

While analogous identity theft case law is scarce, a few district court decisions demonstrate the holding here is unworkable. A motion to suppress evidence of identity theft was denied in *United States v. Igbara*, No. 01 CR 1092, 2002 WL 31779812 (N.D. Ill. Dec. 9, 2002). But in *Igbara*, credit cards, credit reports, and various papers strewn about a hotel room were found in plain view during a consensual search, and it was apparent to agents the evidence was incriminating. *Id*. at *1-2. In *United States v. Alabi*, a consensual search of a car revealed 67 Wal–Mart cash cards, $5673 in cash, and a bundle of paperwork listing 500 names with birth dates, Social Security numbers, and addresses. 943 F.Supp.2d 1201, 1291-92 (D.N.M. April 30, 2013). *See also United States v. Bass*, No. 11-20704, 2012 WL 1931246, *9 (E.D. Mich. May 29, 2012) (the intrinsic nature of a drivers license and credit card did not establish probable cause for identity theft).

These cases establish the probable cause requirement is not suspended or diluted because identity theft is at issue. Additionally, a lone spiral bound notebook in Harris' truck is far removed from stacks of credit cards and credit reports. More importantly, officers already found the incriminating evidence on Watkins. (Doc. 325

at 8; Doc. 592 at 73-75). There was thus no probable cause to believe evidence of identity theft was in Harris' truck. Indeed, Janiga took the notebook not because it might be evidence but because he thought it belonged to Watkins. (Doc. 325 at 11-12). Since Janiga had no basis to believe specific evidence of identity theft was in Harris' truck, the search lacked probable cause.

E. The Search Was Also Unreasonable Under *Gant*.

While the absence of probable cause warrants a new trial, an additional reason to reverse is provided by *Arizona v. Gant*, 556 U.S. 332 (2009). The *Gant* defendant was detained and arrested for driving while on a suspended license. *Id*. at 336. Officers searched his car while he was handcuffed and sitting in a police car. *Id*. Because the defendant could not access his car to get weapons or evidence, the search incident to arrest exception was inapplicable. *Id*. at 347. Rather, the Court held police can only search a car after an occupant's arrest if it is reasonable to believe the arrestee might access the car, or that the car has evidence of the arresting offense. *Id*. at 351.

The district court cited *Gant* in claiming that probable cause is not needed for "the warrantless search of an arrestee's car that uncovers evidence of the arresting offense. Instead . . . police have broader authority to conduct a search incident to arrest." (App. at A12). The district court's reliance on *Gant* is misplaced. First, the arrest was lawful in *Gant* because the defendant had an outstanding warrant. 556 U.S. at 336. In contrast, there was no basis to arrest Harris. A search incident to arrest presumes a lawful arrest. *Weeks v. United States*, 232 U.S. 383, 392-93 (1914).

But no warrant existed, and officers did not know Harris' involvement with Watkins. (App. at A3). Sitting in a handicapped parking spot is not enough.

Second, a cuffed and police car-cloistered Harris could not access weapons or evidence. (Doc. 325 at 22-23). Because Harris was secured and could not reach his truck, *Gant* precludes the search. While *Gant* also held a search is authorized when evidence relevant to the crime may be found, lacking a legal arrest of Harris, there was no evidence relevant to his arrest. Nor was there evidence relevant to Watkins' offense because it was already found on Watkins. (Doc. 325 at 8). And any notion that Harris' parking infraction might support a search are dashed by *Slone*: "a traffic arrest, for example, will not often furnish the basis for a search…." 636 F.3d at 852. *Slone* further instructs that in some instances, the offense of the arrest will supply a reasonable basis for searching a car. *Id*., citing *Gant*. But again, the actual culprit (Watkins) was caught with the incriminating evidence before the search of the truck. (Doc. 325 at 8; Doc. 592 at 73-75). Thus, there was no evidence in the truck of Watkins' identity theft arrest, nor Harris' parking violation. Contrary to the district court, *Gant* prohibits, not permits, the search.

F. The Tainted Evidence From The Illegal Search Should Be Suppressed.

The notebook spawned the investigation. And like the evidence obtained from the arrest, the fruit of the poisonous tree doctrine excludes evidence from the search. *See Brown*, 422 U.S. at 603-04. First, the search and getting the notebook occurred simultaneously. Second, no intervening circumstances occurred between the two events. Third, the manner of the search was flagrant. Janiga failed to make two

simple inquiries—who owned the truck, and would that person consent to a search. (Doc. 325 at 21). Failing to take such elementary steps is deliberate since Janiga knew Harris drove the truck. (*Id*.). Ultimately, the question is whether the notebook came from exploiting an illegality. *See Wong Sun*, 371 U.S. at 488. It did. The Munster police had no lawful basis for entering Harris' truck and taking items from it. The primary taint cannot be purged.

G. Summation.

"Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Delaware v. Prouse* 440 U.S. 648, 662-63 (1979).

III. The Evidence Against Harris Was Insufficient.

A. Standard of Review.

Challenges to the sufficiency of evidence are reviewed in the light most favorable to the prosecution; as long as a rational trier of fact could have returned a verdict of guilty, the sentence will be affirmed. *United States v. Groves*, 470 F.3d 311, 323–24 (7th Cir. 2006). Nevertheless, speculation cannot be the basis for proof beyond a reasonable doubt. *Id*. at 324. Further, the denial of a motion for acquittal under Federal Rule of Criminal Procedure 29 is reviewed *de novo. United States v. Hach*, 162 F.3d 937, 942 (7th Cir. 1998).

B. The Evidence of Identity Theft Stemmed From Biased Testimony.

To prove identity theft, the prosecution had to show Harris: 1) knowingly transferred, possessed, or used another person's identification; 2) knew the

identification belonged to another person; 3) acted with intent to commit or aid and abet credit card fraud; 4) acted unlawfully; and 5) the identification was transported in the mail. *See* Seventh Circuit Pattern Instruction for 18 U.S.C. § 1028(a)(7).

For aggravated identity theft, the prosecution had to prove Harris: 1) committed the underlying felony offense of credit card fraud; 2) knowingly transferred, possessed, or used identification during or relation to the offense; 3) did so unlawfully; and 4) knew the identification belonged to another. *See* Seventh Circuit Pattern Instruction for 18 U.S.C. § 1028A.

The prosecution's case was premised on the co-Defendants' testimony. The Court will not typically reassess the credibility of a witness when evaluating an insufficient evidence claim. *United States v. Griffin*, 310 F.3d 1017, 1022 (7th Cir. 2002). Further, the co-Defendants' testimony here is not incredible merely because they testified via plea agreement. *See United States v. Ofcky*, 237 F.3d 904, 908-09 (7th Cir. 2001). However, the facts of this case, seven unindicted co-conspirators and six co-Defendants who turned state's evidence, should merit some consideration. More so because the co-Defendants who blamed Harris were family and friends. Diontria Frazier is Alnese's Frazier's sister. (Doc. 590 at 110-13). Shana King was a cousin of Diontria and Alnese Frazier, and a friend of Joniette Davis. (Doc. 591 at 33, 63). It is inconceivable that their stories were not concocted, especially given that each avoided jail time for blaming Harris. Moreover, Diontria Frazier was arrested for criminal conversion and found with hydrocodone, oxycodone, and a scale with

white powder. (Doc. 591 at 87-89). Questionable testimony from biased witnesses should not be the basis for Harris' conviction, and 13-year sentence.

C. The Evidence of Credit Card Fraud Stemmed From Biased Testimony.

For credit card fraud, the prosecution must prove Harris 1) knowingly used or trafficked in an unauthorized credit card; 2) obtained at least $1,000 in any one year period by doing so; 3) did so with the intent to defraud; and 4) affected interstate commerce. *See* Seventh Circuit Pattern Instruction for 18 U.S.C. § 1029(a)(2). Like the identity theft charges, the prosecution used biased testimony of the co-Defendants. For the same reason, the credit card fraud evidence was insufficient.

IV. Harris' Sentence Is Flawed Due to Multiple Enhancements.

A. The Number of Victims Enhancement Was Erroneous.

1. Standard of Review.

The court enhanced Harris' sentence under Sentencing Guideline § 2B1.1 because the number of victims exceeded 50. (Doc. 596 at 55). Procedural sentencing errors are reviewed *de novo. United States v. Annoreno*, 713 F.3d 352, 356 (7th Cir. 2013). The Court considers whether the sentencing judge properly calculated the guideline range, recognized the range was not mandatory, considered the sentencing factors, and based a sentence on facts not clearly erroneous. *Id*. at 357.

2. *Peugh* warrants remand.

In *Peugh v. United States*, 133 S.Ct. 2072 (2013), the Supreme Court held that the *ex post facto* clause is violated if a defendant is sentenced under Guidelines promulgated after he committed his criminal acts if that version provides a higher

sentencing range than the version at the time of the offense. *Id*. at 2085-86. *Peugh* is implicated here because under the 2012 Guidelines, Harris received a four-level enhancement under § 2B1.1(b)(2)(B) as the offense involved more than 50 victims. (Doc. 596 at 50-52). The definition of "victim" in the application notes of § 2B1.1 includes anyone whose means of identification was used unlawfully. U.S.S.G. § 2B1.1 App. Notes 1, 4(E).

Harris' conduct occurred between March 2007 and August 2010. The Guidelines version controlling during Harris' most recent conduct was the 2008 edition. That version did not define victim like the November 2012 version, in that Application Note 4(E) is absent. Thus, a victim under the 2008 Guidelines is anyone who sustained an actual loss, not one whose means of identification was used unlawfully. Harris' victims never sustained an actual loss but still qualified because Harris unlawfully used their identification. Those victims would not have counted under the 2008 Guidelines.

Under *Peugh*, it was procedural error to not use the 2008 Guidelines. In using the 2012 Guidelines, Harris' sentence was enhanced in violation of the *ex post facto* clause. *See* 133 S.Ct. at 2084-85. A sentence based on an incorrect Guidelines range is plain error. *United States v. Farmer*, 543 F.3d 363, 375 (7th Cir. 2008). The blueprint for remand is *United States v. Williams*, 742 F.3d 304 (7th Cir. 2013). The Court remanded in *Williams* because the defendant would not have received an upward adjustment for over 10 victims if the 2008 Guidelines in place when he committed his crimes were used. *Id*. at 306. The Court should follow *Williams* and

remand here.

B. The Manager Enhancement Was Erroneous.

1. Standard of Review.

Harris was given three points due to his management or supervision of the criminal activity. (Doc. 595 at 126). The district court's finding regarding a defendant's role in the offense is a factual one reviewed for clear error. *United States v. Hankton*, 432 F.3d 779, 793 (7th Cir. 2005).

2. Harris Did Not Manage the Co-Defendants.

Section 3B1.1(b) of the Guidelines permits a three-level enhancement to a defendant's sentence if the defendant "was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants…." U.S.S.G. § 3B1.1(b). While § 3B1.1 never defines "manager" or "supervisor," the terms mean someone who helps manage or supervise a scheme. *United States v. Grigsby*, 692 F.3d 778, 790 (7th Cir. 2012). The Guidelines list seven factors courts may consider in applying the enhancement: (1) decision-making authority; (2) the nature of participation; (3) recruiting accomplices; (4) taking a larger share of the criminal proceeds; (5) the degree of participation in planning the offense; (6) the nature of the illegal activity; and (7) the degree of control and authority exercised over others. U.S.S.G. § 3B1.1, cmt., n.4; *United States v. Weaver*, 716 F.3d 439, 432 (7th Cir. 2013). However, no single factor is essential, and a court need not assign equal weight to each factor. *Id*.

The Court has held the § 3B1.1 enhancement cannot be applied unless the defendant exercised some control over others involved in the offense. *United States v. Anderson*, 580 F.3d 639, 650 (7th Cir. 2009). The enhancement requires ongoing supervision, not a one-off request from one equal to another. *United States v. Figueroa*, 682 F.3d 694, 697–98 (7th Cir. 2012). The activities of Harris' co-Defendants were closer to the one-off activities of an independent contractor, not those of a supervised underling in a hierarchical scheme. Further, co-Defendant Diontria Frazier would be a manager under the district court's logic. She gave Shana King a credit card, drove her to banks, and accompanied her at the teller's window. (Doc. 591 at 39, 70). Diontria paid King $4000. (Doc. 591 at 71). Diontria also drove Robert Sanders to different locations for cash advances. (Doc. 595 at 96). Yet Diontria was not labeled a manager.

Like *Weaver*, the district court erred in finding Harris was a manager. *See* 716 F.3d at 444 (manager enhancement improper because defendant simply fronted drugs to others, and urged them to sell it quickly and pay him). Harris' criminal conduct was not part of a single scheme. Co-Defendants such as Amber Fields, Alnese Frazier, and Joniette Davis were willing cohorts and not individuals whose activities Harris supervised. Harris acted like the defendant in *Weaver*: his role was that of a service provider, making arrangements that enabled the criminal conduct of fourteen others, but not a participant in their conduct in that he did not always share in the proceeds and was not fully aware of their conduct. *See* 716 F.3d at 444. Thus, there was no single, hierarchically arranged scheme.

Additionally, Inspector Frink admitted at sentencing that co-conspirators received cards in their own names at their own homes. (Doc. 595 at 96). Lauren Price was involved through her father, and she had cards sent to their home. (Doc. 595 at 119). Yet Harris was saddled for what co-conspirators independently did. The prosecution viewed Harris as the mastermind and the others lackeys. But there was too much activity and too many people for Harris to manage, especially given the distance between Indiana and Georgia. (Doc. 595 at 121-22). This is further embodied by the fact no co-Defendant received a manager enhancement. Assigning it to Harris was improper.

C. The Sophisticated Means Enhancement Was Erroneous.

1. Standard of Review.

The Court applies the clear error standard to the district court's finding that the defendant used sophisticated means in his criminal conduct. *United States v. Friend*, 104 F.3d 127, 129 (7th Cir. 1997).

2. Harris' Notebook Operation Was Amateur.

The court found the two-level § 2B1.1(b) enhancement applied because sophisticated means were involved. (Doc. 595 at 71). The court cited the breadth of the conspiracy and amount of funds siphoned. (*Id*. at 71-72). The court also reasoned that Harris got victims' passwords and social security numbers, and moved to Georgia. (*Id*.).

Use of sophisticated means under § 2B1.1(b)(9)(C) means complex or intricate offense conduct. U.S.S.G. § 2B1.1(b)(9)(C), Application Note 8(B). For example, in a

telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction. *Id*. Hiding assets through fictitious entities, corporate shells, or offshore financial accounts also indicates sophisticated means. *Id*. Harris' shopping spree scheme, which began when he was a minor, was not sophisticated. He did not set up corporate shells, offshore financial accounts, or the like. The operation was so rudimentary that cards were sent to his home, along with residences of co-Defendants. (Doc. 594 at 6-9). Moreover, Harris and co-Defendants were caught multiple times, spared true punishment only by government inertia. This is hardly sophisticated.

Further, the sophisticated means enhancement demands a greater level of concealment or planning than that of a typical fraud case. *United States v. Anobah*, 734 F.3d 733 (7th Cir. 2013). In *Anobah*, the enhancement was affirmed because the defendant's scheme involved properties in two states, straw purchasers, and drafting false loan applications. *Id*. at 738-39. The defendant also utilized a builder, real estate agent, banker, and accountant. *Id*. The professionals of *Anobah* contrast sharply with the high school students here.

3. Moving to Georgia Did Not Evince Sophistication.

Finally, Harris' move to Georgia proves little. Consider the timeline. The investigation began in the Spring of 2008, and at that time it was inconceivable any conspirator knew they were suspects. It was not until May of 2008 when postal inspectors began questioning conspirators. (Doc. 593 at 136). Yet Harris moved to Atlanta in December of 2007 and obtained a Georgia drivers license in January

2008, months before the hint of an investigation. (Doc 592 at 11-12, 40; Doc. 593 at 170-71). Thus, the notion Harris moved to escape the law is belied by the calendar.

D. The Relocation Enhancement Was Erroneous.

1. Standard of Review.

The Court reviews the district court's factual findings supporting an enhancement for clear error. *United States v. Powell*, 576 F.3d 482, 498 (7th Cir. 2009). The Court reviews *de novo* whether those findings support the enhancement. *Anderson*, 580 F.3d at 648.

2. Harris Did Not Go to Georgia to Escape Law Enforcement.

Along with the sophisticated means enhancement, Harris' move to Georgia also implicated U.S.S.G. § 2B1.1(b)(10)(A), which prescribes a two-level increase if Harris relocated a fraudulent scheme to another jurisdiction and did so to evade law enforcement. The district court found the § 2B1.1(b)(10)(A) enhancement applied because Harris went to Georgia. (Doc. 595 at 71-72). The court stressed Harris' comment to Inspector Frink in Atlanta that "you didn't have to come all the way down here. I left Indiana. What else did you want me to do." (Doc. 595 at 57, 70). The court believed this proved Harris' state of mind in evading Frink. (Doc. 595 at 70).

The Court has not had not addressed the relocation enhancement in a published decision. But the obstruction of justice enhancement provides some guidance. For example, in *United States v. Porter*, the defendant was interviewed by a case agent, had hired an attorney, and was negotiating a plea agreement when he fled the jurisdiction. 145 F.3d 897 (7th Cir. 1998). The Court concluded the

obstruction of justice enhancement was proper because the specific intent could be inferred from the defendant's conduct. *Id*. at 903. As set forth above, the sequence of events demonstrates Harris could not have intended to evade law enforcement if he, nor any of his cohorts, knew the jig was up. And Harris' offhand remark when apprehended does nothing to change this. The relocation enhancement was improper.

V. The District Court Imposed An Unreasonable Sentence.

A. Standard of Review.

The Court reviews the reasonableness of a sentence for abuse of discretion. *Gall v. United States*, 552 U.S. 38 (2007).

B. Unwarranted Sentence Disparities Abound.

The Sentencing Guidelines are advisory. As such, the sentencing court need not apply the Guidelines in determining the sentence. *United States v. Booker*, 543 U.S. 220 (2005). Further, § 3553(a) instructs that a sentencing court consider "the need to avoid unwarranted sentence disparities among defendants with similar record records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6).

The Court does not view disparities between co-defendants alone as sufficient to vacate a sentence, but it will vacate a sentence based on unjustifiable disparities between co-defendants. *United States v. Omole*, 523 F.3d 691, 700 (7th Cir. 2008). Harris' sentence dwarfs those of his culpable co-Defendants who, with the exception of Sanders, served no time. While all of Harris' co-Defendants (except Sanders) pled

guilty, none spent a day in jail. Harris got 13 years. Furthermore, the restitution assessed to the co-Defendants was less than $40,000 while Harris was saddled with $299,298. (Doc. 531 at 5). Admittedly, the co-Defendants' guilty pleas explain some variance in punishment, but not 13 years. More so when those guilty pleas were obtained by promises of dropped charges and freedom. The prosecution piled on Harris, securing the testimony of six co-Defendants and letting seven others walk. The contrast of 13 years with nothing defines an unwarranted sentence disparity.

C. The 13-Year Sentence Violates The Parsimony Provision.

Harris' sentence also implicates § 3553's parsimony provision, which requires that a sentence be "'sufficient, but not greater than necessary' to accomplish the goals of sentencing." *Kimbrough v. United States*, 552 U.S. 87, 101 (2007) (quoting 18 U.S.C. § 3553(a)). The failure to achieve this aim again becomes clear when Harris' sentence is compared to the co-Defendants who served no time. Harris was given 13 years for crimes of a non-violent nature. While identity theft is not a victimless crime, and causes significant turmoil for those victims, there was ultimately no pecuniary loss suffered by the individual account holders here. Further, Harris was a minor when the illegal activity commenced, as were his co-Defendants. (Doc. 595 at 78). Thirteen years is too much.

CONCLUSION

The Fourth Amendment does not fluctuate based on the underlying offense. Affirming the district court would allow law enforcement to operate unchecked by

reasonable suspicion or probable cause. Harris requests that the Court reverse for entry of a judgment of acquittal, a new trial, or resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. 32(a)(7) for a brief produced with a monospaced font. The length of this brief is 10,831 words according to the Microsoft word count function.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I, Christopher Keleher, hereby certify that fifteen paper copies of the Appellant's Brief and Required Short Appendix were sent within 7 days of filing on the Court's ECF system via hand delivery to:

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Appellant's Brief and Required Short Appendix upon the party listed herein, by mailing same on September 3, 2014 at 115 South LaSalle, Suite 2600, Chicago, Illinois 60603 to:

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CIRCUIT RULE 30(d)(a and b) STATEMENT

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 30(d)(a and b), versions of the brief that are available in non-scanned PDF format.

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REQUIRED SHORT APPENDIX

Opinion and Order on Motion to Suppress and Reject, Doc. 339, April 18, 2013……A1

Opinion and Order on Post-Trial Motions, Doc. 573, April 4, 2014…….A18

Final Judgment and Sentencing, Doc. 578, April 16, 2014……..……..……..A40