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IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMBROSIO D. CONSTANTINO, JR., and  
FRANKLIN R. BABAUTA,

Defendants.

CRIMINAL CASE NO. 15-00029

**ORDER**

On July 8, 2015, Defendant Franklin R. Babauta filed a Motion to Dismiss the Indictment, because the alleged offense in Count 1 did not rise to the level of a crime and the alleged offense in Count 2 occurred outside the statute of limitations for the offense.<sup>1</sup> *See* ECF No. 15. The court heard the motion on September 4, 2015, and at the request of the parties, the court issued additional briefing schedule to be completed on September 14, 2015.<sup>2</sup> *See* ECF No. 48. Representing the United States was Special Assistant U.S. Attorney Kurt E. Grunawalt. Representing Defendant Franklin R. Babauta was Mr. David J. Lujan, and Mr. Thomas J. Fisher

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<sup>1</sup> Defendant Ambrosio D. Constantino, Jr., filed a joinder to the dismissal of Count 2 of the Indictment. *See* ECF No. 19.

<sup>2</sup> Despite this opportunity, however, the parties did not submit any supplemental briefings.

1 for Defendant Ambrosio D. Constantino, Jr. Upon review of the relevant pleadings, and with due  
2 consideration of the parties' arguments and the applicable case law, the court hereby issues the  
3 following Order denying the Defendants' Motion to Dismiss the Indictment.

4 **I. Factual and Procedural Background**

5 On May 27, 2015, Defendants Ambrosio D. Constantino, Jr. ("Constantino") and  
6 Franklin R. Babauta ("Babauta") were charged by Indictment with Theft of Government  
7 Property (Count 1) and Aggravated Identity Theft (Count 2). *See* ECF No. 1.

8 On July 8, 2015, Defendant Babauta filed the instant Motion to Dismiss the Indictment  
9 pursuant to FED. R. CRIM. P. 12(b)(3)(B)(v).<sup>3</sup> *See* ECF No. 15. Therein, Defendant Babauta  
10 presented two arguments: dismissal of Count 1 because the alleged offense does not rise to the  
11 level of a crime; and dismissal of Count 2 because the alleged offense occurred outside the  
12 statute of limitations for the offense. *Id.* Defendant Constantino filed a Joinder, seeking dismissal  
13 of Count 2 for the same reason as Defendant Babauta. *See* ECF No. 19.

14 The case arises out of a program called the Guard Recruiting Assistance Program  
15 (hereinafter "G-RAP"), which provides referral bonuses to Army National Guard Reserve  
16 soldiers, known as Recruiter Assistants (hereinafter "RA"). *See* ECF No. 1. The defendants are  
17 charged with theft of \$2,000.00 referral bonus given under the G-RAP during the time period  
18 between on or about January 26, 2010 until on or about May 31, 2010. *Id.* According to the  
19 Government, Defendant Babauta was a Lieutenant Colonel in the Guam Army National Guard  
20 ("National Guard") and had been activated onto active duty as an Active Duty Operational  
21 Support officer from October 1, 2009 through September 30, 2010. *See* ECF No. 21 at 2.  
22 Defendant Constantino was a Major in the National Guard and had not been activated onto active  
23 duty. *Id.* The Government alleges that when Defendant Babauta's son signed up for the National

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24 <sup>3</sup> Defendant Babauta cited to FED. R. CRIM. P. 12(B)(3)(V), but such citation does not exist. The court will infer that Defendant Babauta's motion is based on FED. R. CRIM. P. 12(b)(3)(B)(v), failure to state a claim.

1 Guard, Defendant Babauta had Defendant Constantino act as an RA to claim for the \$2,000  
2 referral bonus even though Defendant Babauta's son went through a recruiter and not through  
3 Defendant Constantino. *Id.* at 3-4.

## 4 **II. Discussion**

5 Defendant Babauta argues that Count 1 of the Indictment should be dismissed "because  
6 Defendant was entitled to earn the G-RAP bonus when his son enlisted in the GUARNG, thus,  
7 his conduct does not rise to the level of Theft of Government Property[.]"<sup>4</sup> ECF No. 15, at 3. In  
8 his Motion to Dismiss and Reply to the Opposition, Defendant Babauta sets forth factual  
9 arguments in support of his assertion that he is entitled to the G-RAP money. *See* ECF No. 15, at  
10 3-4, and ECF No. 30, at 3.

11 The Government states the opposite and argues that neither Defendant Babauta nor  
12 Defendant Constantino was legally eligible to receive G-RAP recruiting bonus incentive. *See*  
13 ECF No. 21, at 5. Similar to Defendant Babauta, the Government provided his own factual  
14 arguments to refute the defendant's arguments.

15 The court finds that Defendant Babauta's argument has no merit. The Sixth Amendment  
16 reserves to the juries the determination of any fact. *See Apprendi v. New Jersey*, 120 S.Ct. 2348,

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17 <sup>4</sup> The court notes that other than Defendant Babauta's citation to FED. R. CRIM. P. 12(b)(3)(B)(v) as part of his  
18 motion caption, he failed to cite to any legal authority that would support his argument on this issue.

19 Pursuant to FED. R. CRIM. P. 12(b)(3)(B), a defendant may file a motion alleging a defect in the indictment  
20 or information. An indictment need only be a "plain, concise, and definite written statement of the essential facts  
21 constituting the offense charged." FED. R. CRIM. P. 7(c)(1). While a court is limited to the face of the indictment,  
22 *United States v. Ruiz-Castro*, 125 F.Supp.2d 411, 413 (Haw. 2000) (citations omitted), an indictment "should be  
23 read in its entirety, construed according to common sense, and interpreted to include facts which are necessarily  
24 implied," *United States v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000).

21 An indictment is sufficient if it contains "the elements of the charged crime in adequate detail to inform the  
22 defendant of the charge and to enable him to plead double jeopardy." *United States v. Awad*, 551 F.3d 930, 935 (9th  
23 Cir. 2009) (citation omitted). It is generally sufficient to track the words in the statute provided that the statute sets  
24 forth the elements of the crime and is accompanied by a statement of facts and circumstances to inform of the  
25 defendant of the charge. *Hamling v. United States*, 418 U.S. 87, 117 (1974).

26 In this case, the Indictment is sufficient as it contains the elements set forth in 18 U.S.C. § 641, which is the  
27 offense that defendants Babauta and Constantino were charged with.

1 2356 (2000). Accordingly, Defendant Babauta’s motion to dismiss Count 1 of the Indictment is  
2 hereby **DENIED**.

3 Next, Defendant Babauta argues that Count 2 of the Indictment should be dismissed  
4 because the alleged offense occurred outside of the five-year statute of limitations. *See* ECF No.  
5 15, at 4. Defendant Babauta argues that the alleged conduct occurred on January 26, 2010, when  
6 he supplied his son’s social security number to Defendant Constantino for input into the  
7 Docupak<sup>5</sup> system that date. *Id.* at 5. On that date, Defendant contends that any offense of  
8 Aggravated Identity Theft was completed because there was no further act required from  
9 Defendant Babauta. *Id.* The Indictment was not filed until May 27, 2015. *See* ECF No. 1.

10 The Government argues that the alleged conduct in Count 2 of the Indictment was within  
11 the five-year statute of limitations, because when Defendant Constantino inputted Defendant  
12 Babauta’s son’s Personal Identifiable Information into the G-RAP database on January 26, 2010,  
13 the offense of Aggravated Identity Theft could not have been completed yet, since the underlying  
14 felony had not occurred.<sup>6</sup> *See* ECF No. 21, at 5-6. The underlying felony, which is Theft of  
15 Government Property, was not completed until Defendant Constantino received the full bonus  
16 amount of \$2,000, which did not occur until May 31, 2010. *Id.* at 6.

17 Section 3282(a) of Title 18 of United States Code provides that “[e]xcept as otherwise  
18 expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not  
19 capital, unless the indictment is found or the information is instituted *within five years* next after  
20 such offense shall have been committed.” (emphasis added).

21 It is well settled that a statute of limitations begins to run when “the crime is complete.”  
22 *Toussie v. United States*, 397 U.S. 112, 115 (1970). However, when the offense involves an

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23 <sup>5</sup> Docupak is a company who has a contract with the U.S Army National Guard Bureau to administer the G-RAP.  
24 *See* ECF No. 1.

<sup>6</sup> The Government also argues the Wartime Statute of Limitations as an alternative. However, the court need not address this issue since it finds that Count 2 of the Indictment was filed within the applicable statute of limitations.

1 underlying felony, as does the instant case, “[a] limitation period begins to run *only when all the*  
2 *elements of the underlying offense have been committed.*” *United States v. Beardslee*, 197 F.3d  
3 378, 385 (9th Cir. 1999) *op. am. on denial of reh'g*, 204 F.3d 983 (9th Cir. 2000) (emphasis  
4 added).

5 In the instant case, Theft of Government Property is as much an element of 18 U.S.C. §  
6 1028A (Aggravated Identity Theft) as is the identity theft on which that theft is premised; absent  
7 Defendant's felony theft of government property, 18 U.S.C. § 1028A would not have been  
8 implicated. Accordingly, the court finds that Count 2 of the Indictment falls within the limitation  
9 period because a violation of 18 U.S.C. § 1028A is not complete until *both* identity theft and a  
10 “felony violation enumerated in subsection (c)”<sup>7</sup> have occurred. Defendants Babauta and  
11 Constantino’s motion to dismiss Count 2 of the Indictment is hereby **DENIED**.<sup>8</sup>

### 12 **III. Conclusion**

13 Based on the foregoing, the court **DENIES** Defendant Babauta’s motion to dismiss  
14 Count 1 of the Indictment, and further **DENIES** Defendants Babauta and Constantino’s motion  
15 to dismiss Count 2 of the Indictment. Because the court granted the motion to sever at the  
16 September 4, 2015 hearing, the court will issue a separate amended trial scheduling orders.

17 **SO ORDERED.**



18 /s/ Frances M. Tydingco-Gatewood  
19 Chief Judge  
20 Dated: Oct 13, 2015

21 <sup>7</sup> Section 1028A of Title 18, U.S.C. provides in relevant part the following: “(a)(1) In General.—Whoever, during  
22 and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without  
23 lawful authority, a means of identification of another person shall, in addition to the punishment provided for such  
24 felony, be sentenced to a term of imprisonment of 2 years. . . (c) Definition.—For purposes of this section, the term  
“felony violation enumerated in subsection (c)” means any offense that is a felony violation of—(1) section 641  
(relating to theft of public money, property, or rewards)[.]”

<sup>8</sup> At the September 4, 2015 hearing, Defendant Babauta also argued that he has lawful authority to possess the  
identification information of his son. However, this argument has no merit as it has already been addressed in *United*  
*States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015), and in that case, the Ninth Circuit has rejected the same  
argument that Defendant Babauta is making.