

1
2 UNITED STATES COURT OF APPEALS

3
4 FOR THE SECOND CIRCUIT

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7
8 August Term, 2011

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10 (Argued February 6, 2012 Decided: March 29, 2012)

11
12 Docket Nos. 10-3427(Lead), 10-3911(Con), 10-4035(Con)

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14
15 UNITED STATES OF AMERICA,

16
17 *Appellee,*

18
19 -v.-

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21 KAY OYEWUMI, TAIWO ADEKANBI, AKA TAIYE, ADEMILOLA OGUNMOKUN, AKA
22 JIMMY, AKA ABURO, AKA OLASUPO OGUNMOKUN,

23
24 *Defendants,*

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26 FNU LNU, AKA TONY MCKINNON, AKA REGINAL DAVIS, AKA SAEED, AND TUNDE
27 OGUNRINKA, AKA BABA TOLANI,

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29 *Defendants-Appellants.*

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33 Before:

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35 WESLEY, CARNEY, *Circuit Judges*, CEDARBAUM, *District Judge*.*
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* Judge Miriam Goldman Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

1 Appeal from an order of the United States District
2 Court for the Southern District of New York (Sullivan, J.),
3 sentencing Defendant Appellant Saeed¹ to 110 months'
4 imprisonment pursuant to Saeed's conviction, after a jury
5 trial, for violations of 18 U.S.C. § 1001, 18 U.S.C.
6 § 1028A(a)(1), (c)(4), and 21 U.S.C. § 846.

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8 AFFIRMED.

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12 STEVEN R. PEIKIN (Alexander J. Willscher, Allison
13 Caffarone, *on the brief*), Sullivan & Cromwell,
14 New York, NY, *for Defendant-Appellant*.

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16 DANIEL S. GOLDMAN, Assistant United States
17 Attorney, (Katherine Polk Failla, Assistant
18 United States Attorney, *on the brief*), *for*
19 Preet Bharara, United States Attorney for the
20 Southern District of New York, New York, NY.

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24 WESLEY, *Circuit Judge*:

25 Appellant Saeed appeals his convictions for aggravated
26 identity theft and false statements, the district court's
27 pre-trial denials of his motions to suppress statements made
28 during a safety-valve proffer and for severance of Count One

¹We refer herein to Defendant-Appellant as Saeed even though Defendant-Appellant's true identity remains unknown both to us and the government. Defendant-Appellant refers to himself, in his briefing, as Reginald Davis. We decline to use "Davis" to identify Defendant-Appellant, however, because the jury convicted him of aggravated identity theft based on his use of the Davis identity. We therefore refer to Defendant-Appellant as Saeed, which is a religious name he has used in the past.

1 from Counts Four and Six of the indictment, and his 110-
2 month sentence. We hold that (1) Saeed's conviction was
3 supported by sufficient evidence; (2) the court's pre-trial
4 decisions on Saeed's motions were not erroneous; and (3)
5 Saeed's 110-month sentence is both procedurally and
6 substantively reasonable. Concluding that Saeed's claims on
7 appeal have no merit, we affirm both his convictions and
8 sentence.

9 **Background**

10 Following a jury trial, Saeed was convicted of
11 conspiring to distribute heroin in violation of 21 U.S.C.
12 § 846, aggravated identity theft in violation of 18 U.S.C.
13 § 1028A(a)(1) & (c)(4), and making false statements on a
14 matter within the jurisdiction of a federal agency in
15 violation of 18 U.S.C. § 1001.

16 Saeed's criminal activity came to light after Customs
17 and Border Patrol at Newark International Airport seized a
18 FedEx package from India containing 787 grams of heroin.
19 Immigration and Customs Enforcement ("ICE") agents executed
20 a controlled delivery of the package to its intended
21 Brooklyn address, which resulted in the arrest of two of
22 Saeed's co-conspirators, Temitope Mohammed and Bolaji

1 Olaiye. Subsequently, ICE received authorization to
2 intercept calls over a cell phone belonging to Kay Oyewumi,²
3 a leader of the heroin trafficking organization. The
4 intercepted calls implicated Saeed in the conspiracy and led
5 to his arrest on April 30, 2009.

6 Saeed was initially charged with participating in a
7 conspiracy to distribute, and to possess with intent to
8 distribute, one kilogram or more of heroin in violation of
9 21 U.S.C. §§ 812, 841(a), 841(b)(1)(A), and 846. During a
10 post-arrest interview Saeed identified himself as Reginald
11 Davis and admitted to some of his criminal activity.

12 On December 10, 2009, Saeed's counsel advised the
13 government that his review of his client's record indicated
14 that Saeed might be eligible for safety-valve relief
15 pursuant to 18 U.S.C. § 3553(f). The government responded
16 that it would not agree to recommend safety-valve relief
17 unless defendant revealed his true identity. Despite the
18 government's position regarding the safety valve, Saeed and
19 his attorney met with the government on December 21, 2009,

² Oyewumi is also an Appellant in this case. His appeal as well as the appeal of Ogunrinka, another co-conspirator whose case was also consolidated with this one, is being decided in a summary order filed concurrently with this opinion.

1 to provide the government with information proving he was
2 safety-valve eligible.

3 The meeting was held pursuant to a safety-valve proffer
4 agreement signed by Saeed, Saeed's counsel, the Assistant
5 United States Attorney, and a witness. During the
6 safety-valve proffer, the government questioned Saeed about
7 his identity. He identified himself (again) as Reginald
8 Davis; claimed he was born in Houston, Texas in 1984; and
9 provided what he asserted were the final four digits of his
10 social security number. During the meeting, the government
11 also asked Saeed questions about the narcotics conspiracy,
12 his involvement with Oyewumi and Olaiye, the length of his
13 participation in the conspiracy, and the amounts of heroin
14 he distributed.

15 After the safety-valve proffer, the government further
16 investigated Saeed's identity and informed the court that it
17 might seek additional charges against Saeed for false
18 statements and identity theft.

19 On March 4, 2010, the grand jury returned a superseding
20 indictment charging Saeed with four new counts related to
21 his false statements to the government about his identity
22 during his post-arrest interview and safety-valve proffer.

1 Ultimately, the government dropped two of these counts and
2 proceeded to trial only on: (1) Count One, involving the
3 narcotics conspiracy; (2) Count Four, charging Saeed with
4 making false statements about his identity during the
5 safety-valve proffer in violation of 18 U.S.C. § 1001; and
6 (3) Count Six, charging Saeed with aggravated identity theft
7 in violation of 18 U.S.C. § 1028A based on his use of the
8 identity of "Reginald Davis" during the safety valve
9 proffer.

10 Saeed made a number of pre-trial motions that are now
11 at issue on appeal. He moved to suppress statements he made
12 during the safety-valve proffer, arguing that the government
13 acted in bad faith when it continued the proffer after Saeed
14 continued to lie about his identity. Saeed also moved to
15 sever Count One from Counts Four and Six on the basis that
16 joinder was improper pursuant to Federal Rules of Criminal
17 Procedure 8 and 14. Both motions were denied. A jury trial
18 followed and Saeed was found guilty on all counts.

19 During sentencing, the government opposed safety-valve
20 relief on the basis that Saeed lied about his identity. The
21 district court denied safety-valve relief, imposed an
22 obstruction of justice enhancement, and ultimately sentenced

1 Saeed to 110 months' imprisonment. The 110-month sentence
2 included 86 months' imprisonment for Counts One and Four,
3 and 24 months' imprisonment (the mandatory minimum) to be
4 served consecutively (as required by statute) on Count Six.

5 Saeed appeals the jury's verdict on Counts Four and
6 Six, the district court's pretrial rulings, and his
7 sentence.

8 **Discussion**

9 On appeal, Saeed argues that: (1) there was
10 insufficient evidence to support the jury's guilty verdict
11 on Counts Four and Six; (2) the district court erred in
12 denying his motion to suppress his safety-valve statements;
13 (3) the district court erred in denying his motion to sever
14 Count One from Counts Four and Six; and (4) his sentence is
15 both procedurally and substantively unreasonable. These
16 arguments lack merit and there was no error below. We
17 therefore affirm Saeed's conviction and sentence.

18 **I. The Jury's Guilty Verdict on Counts Four and Six** 19 **was Supported by Sufficient Evidence.**

20 Saeed argues that there was insufficient evidence to
21 support the jury verdict on Counts Four and Six because the
22 government failed to present evidence that proved, as

1 required by 18 U.S.C. § 1001, that his false statements were
2 material.³ Under § 1001, a statement is material if it has
3 "a natural tendency to influence, or [be] capable of
4 influencing, the decision of the decisionmaking body to
5 which it was addressed," *United States v. Gaudin*, 515 U.S.
6 506, 509 (1995), or if it is "capable of distracting
7 government investigators' attention away from" a critical
8 matter, *United States v. Stewart*, 433 F.3d 273, 318 (2d Cir.
9 2006).

10 Here, Saeed's lies about his identity during the
11 safety-valve proffer clearly meet the definition of
12 "material." As a matter of common sense, providing a false
13 identity to officials conducting a safety-valve proffer has
14 both a "natural tendency to influence" and is "capable of
15 distracting" those officials. Indeed, there is little doubt
16 that providing a false identity can result in a significant
17 hindrance to law enforcement's investigation or prosecution
18 of crimes: Giving a false identity can impede the

³ In addressing Saeed's challenge to the sufficiency of the evidence, we "review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004). We will only reverse a conviction "if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." *Id.* at 459-60.

1 government's ability to develop information about the
2 subject crime, and to inform itself about the defendant and
3 any relevant criminal history. *See, e.g., United States v.*
4 *Oladipupo*, 346 F.3d 384, 385-86 (2d Cir. 2003).
5 Accordingly, any reasonable juror could have appropriately
6 concluded that Saeed's lies about his identity were material
7 to the government's investigation.

8 But the government offered more to support its burden
9 of proof. It introduced testimony that the purpose of a
10 safety-valve proffer is to determine eligibility for safety-
11 valve relief and that both truthfulness and criminal history
12 are elements to be considered in determining whether a
13 defendant is safety-valve eligible.⁴ This testimony was
14 enough to support the jury's finding that a defendant's lies
15 about his identity during a safety-valve proffer have a
16 natural tendency to influence or are capable of distracting
17 the government agents. That is *all* that is required for
18 materiality. Thus, viewing the evidence in the light most

⁴ Certainly, the government could have more explicitly connected the dots for the jury by introducing testimony regarding the way in which a defendant's truthful statements about his identity make it easier for the government to determine criminal history, or by presenting a witness to testify more specifically about the importance of truthfulness. But that the government could have done a better job does not mean it did not do a sufficient job.

1 favorable to the government-as we are required to do-the
2 jury's finding of materiality was eminently reasonable. See
3 *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993);
4 *United States v. Stanley*, 928 F.2d 575, 576-77 (2d Cir.
5 1991).

6 Nevertheless, Appellant argues that a few out-of-
7 circuit cases that found evidence insufficient to support a
8 § 1001 conviction counsel in favor of reversing his
9 conviction here. See *United States v. Ismail*, 97 F.3d 50
10 (4th Cir. 1996); *United States v. Kwiat*, 817 F.2d 440 (7th
11 Cir. 1987). We disagree; the cases are inapposite. Both
12 *Ismail* and *Kwiat* involved false statements made to one
13 agency when the government had to show the statements were
14 material to a different agency.

15 In *Ismail*, for example, defendant made a false
16 statement to a bank, and the government argued the statement
17 was material to the FDIC because the bank was FDIC insured.
18 The Fourth Circuit noted that the false statement charge
19 would have been appropriate if it was for "making a false
20 material statement in a matter within the jurisdiction of
21 the Secretary of Treasury, or the Internal Revenue Service,"
22 but was not appropriate where the charge was making a false

1 statement within the jurisdiction of the FDIC because the
2 statement was not made to that agency. 97 F.3d at 60-61.
3 *Ismail* thus holds only that where the connection between the
4 agency to which the statement is made and the agency to
5 which the statement is alleged to be material is tenuous,
6 the government must do more to prove materiality.

7 Similarly, in *Kwiat*, the Seventh Circuit found that a
8 false statement on a HUD form was not material to the FDIC
9 where the government's only evidence tending to prove
10 materiality was that the FDIC "sometimes looks at HUD-1
11 forms in banks' files to obtain information concerning real
12 estate loan transactions." 817 F.2d at 445. Again, the
13 connection between the agency to which the statement was
14 made and the agency to which it was alleged to be material
15 was speculative.

16 The connection here is apparent and direct. The false
17 statement was made to the same government agency to which it
18 was deemed material. Moreover, materiality in this instance
19 was obvious as a matter of common sense, and furthermore it
20 was a finding more than adequately supported by testimony
21 regarding the purposes and requirements of a safety-valve
22 proffer. We hold, therefore, that Saeed's convictions for

1 making false statements and aggravated identity theft were
2 well supported by sufficient evidence and affirm his
3 convictions on Counts Four and Six.

4 **II. The District Court Properly Denied Appellant's**
5 **Motion to Suppress Statements Made During the**
6 **Safety-Valve Proffer.**⁵

7 Saeed contends the district court erred in allowing the
8 government to introduce statements he made during the
9 safety-valve proffer held pursuant to 18 U.S.C. § 3553(f)
10 because the government acted in bad faith in continuing the
11 proffer after realizing Appellant did not plan to meet their
12 pre-condition that he reveal his identity and because the
13 government breached the proffer agreement. Appellant
14 misunderstands the nature and purpose of a safety-valve
15 proffer under § 3553(f).

16 Section 3553(f) gives defendants an opportunity to
17 prove their eligibility for safety-valve relief by providing
18 the government with "all information and evidence the

⁵When a defendant challenges the denial of a suppression motion, we review the district court's factual findings for clear error, viewing the evidence in the light most favorable to the government, and the legal conclusions *de novo*. *United States v. Stewart*, 551 F.3d 187, 190-91 (2d Cir. 2009); *United States v. Yousef*, 327 F.3d 56, 144 (2d Cir. 2003).

1 defendant has concerning the offense or offenses that were
2 part of the same course of conduct or of a common scheme or
3 plan." 18 U.S.C. § 3553(f)(5).⁶

4 Once a defendant has made a safety-valve proffer,
5 either in writing or through a debriefing, the government's
6 role is to evaluate the defendant's information and make a
7 recommendation to the court regarding the defendant's
8 safety-valve eligibility. The court, and not the
9 government, is ultimately charged with determining a
10 defendant's eligibility for safety-valve relief under
11 § 3553(f). *United States v. Gambino*, 106 F.3d 1105, 1110
12 (2d Cir. 1997).

13 In this case, Saeed, through counsel, requested a
14 safety-valve debriefing having been advised by the
15 government that it would recommend against safety-valve
16 relief unless Saeed came "clean about his true
17 identification." The government did not induce Saeed to

⁶ The government is not required to participate in a debriefing requested by a defendant pursuant to § 3553(f). However, if it does not participate, its refusal to meet with the defendant may "weigh in favor of a finding that a defendant's written proffer is complete." *United States v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999). To avoid such consequences, the government often participates in safety-valve debriefings when requested by the defendant.

1 participate in a safety-valve proffer. Saeed voluntarily
2 attended the safety-valve proffer with his attorney and
3 signed the proffer agreement, which informed him that any
4 statements he made during the session would be fully
5 admissible against him. Having been informed of the
6 government's precondition for recommending safety-valve
7 relief, Saeed nonetheless lied about his identity during the
8 proffer.

9 Contrary to Saeed's argument, the government was under
10 no obligation to save Saeed from himself once he failed to
11 reveal his true identity. The government had an obligation
12 to allow him to proffer pursuant to § 3553(f) to fulfill its
13 duty to evaluate whether safety-valve relief was appropriate
14 and make a recommendation to the judge. *Cf. United States*
15 *v. Schreiber*, 191 F.3d 103, 108 (2d Cir. 1999). The
16 government fully complied with its obligations under
17 § 3553(f).

18 Appellant's claim that the government violated the
19 proffer agreement is meritless. Saeed likens his
20 safety-valve proffer agreement to a plea agreement and
21 argues that cases like *United States v. Roe*, 445 F.3d 202,
22 207 (2d Cir. 2006), counsel in favor of suppressing his

1 proffer statements. But, safety-valve agreements are
2 fundamentally different from plea agreements: in a safety-
3 valve agreement, unlike in a plea agreement, the government
4 makes no representation that it will seek any downward
5 departure or recommend safety-valve relief. In Saeed's
6 case, the government merely promised to evaluate Appellant's
7 eligibility for safety-valve relief after the proffer,
8 subject to the conditions that it made known to Appellant.
9 That is exactly what it did. The government neither
10 breached the agreement nor acted in bad faith in allowing
11 the proffer to continue after Saeed lied about his identity.
12 Saeed's safety-valve statements were, therefore, properly
13 admissible at trial.

14 **III. The District Court Properly Denied Appellant's**
15 **Motion to Sever Count One from Counts Four and**
16 **Six.⁷**

17 Saeed argues that the district court violated Federal
18 Rules of Criminal Procedure 8(a) (joinder) and 14(a)
19 (discretionary severance) by permitting a joint trial of his
20 narcotics offenses and identity-related offenses. More

⁷ We review a district court's ruling on joinder *de novo*.
United States v. Shellef, 507 F.3d 82, 96 (2d Cir. 2007).

1 particularly, he contends that evidence of his participation
2 in the heroin distribution conspiracy prejudiced the jury's
3 consideration of the false statement and identity theft
4 charges brought against him. Assuming without deciding that
5 it was error to allow joinder, we easily conclude the error
6 was harmless.

7 To compel reversal on appeal by reason of misjoinder,
8 the defendant must demonstrate that joinder was erroneous
9 under Rule 8(a) and that it "result[ed] in actual prejudice
10 because it had substantial and injurious effect or influence
11 in determining the jury's verdict." *United States v.*
12 *Shellef*, 507 F.3d 82, 100 (2d Cir. 2007) (internal quotation
13 marks omitted). Alternatively, if joinder was proper under
14 Rule 8(a), defendant must show that the district court
15 abused its discretion by failing nonetheless to order
16 severance under Rule 14(a), and that the failure caused
17 "prejudice so severe that his conviction constituted a
18 miscarriage of justice." *United States v. Rittweger*, 524
19 F.3d 171, 179 (2d Cir. 2008).

20 Here, the independent evidence of Saeed's guilt on each
21 count was so overwhelming that the jury's knowledge of
22 Saeed's involvement in the drug conspiracy could not have

1 had a "substantial and injurious effect or influence" on the
2 verdict, and Saeed's conviction in no way could be said to
3 constitute a "miscarriage of justice." To focus only on the
4 highlights: Agent DiFilippo, who participated in the
5 proffer, testified that Saeed told him (among other things)
6 that Saeed's name was "Reginald Lynn Davis"; that Saeed was
7 born in Houston, Texas, in October 1984; and provided what
8 he asserted were the last four digits of his social security
9 number. These statements were wholly disproved by the
10 testimony of the real Reginald Lynn Davis, who came to New
11 York to testify at Saeed's trial. Davis verified that the
12 information given by Saeed to Agent DiFilippo pertained not
13 to Saeed, but to Davis. Davis's testimony was corroborated
14 by his duly authenticated birth certificate, issued by the
15 Texas Bureau of Vital Statistics.

16 In addition, the district court gave a limiting
17 instruction directing the jury that, "[e]ach count is a
18 separate offense or crime. Each crime must therefore be
19 considered separately by you, and you must return a separate
20 verdict on each count." Juries are presumed to follow such
21 instructions. *United States v. Whitten*, 610 F.3d 168, 191
22 (2d Cir. 2010). On this record Saeed's generalized claim of

1 prejudice from the alleged misjoinder falls woefully short
2 of demonstrating any actual "substantial and injurious
3 effect or influence" such as would warrant reversal of his
4 convictions on these counts.

5 **IV. Appellant's 110-Month Sentence is Both**
6 **Procedurally and Substantively Reasonable.**

7 *A. Procedural Reasonableness*

8 Saeed argues his sentence was procedurally unreasonable
9 because the court denied safety-valve relief. As discussed
10 above, the court's denial of safety-valve relief was
11 appropriate. By lying about his identity Saeed failed to
12 satisfy § 3553(f), which requires a defendant to truthfully
13 provide the government with all the information he has about
14 the offense and requires that a defendant not have more than
15 one criminal history point. 18 U.S.C. § 3553(f)(1), (5). A
16 defendant's identity is part of the information about which
17 section 3553(f)(5) requires a defendant to be truthful. By
18 lying about his identity, Saeed prevented the court from
19 determining his criminal history.⁸ Therefore, denial of the

⁸For instance, in this case, if Saeed had two prior felony convictions he would have been eligible for a term of life imprisonment. 21 U.S.C § 841(b)(1)(a). This example demonstrates that identity may be material for a number of reasons, and that the full extent of the benefit to Saeed of

1 safety-valve did not make Saeed's sentence procedurally
2 unreasonable.

3 *B. Substantive Reasonableness*

4 Appellant's argument that his sentence is substantively
5 unreasonable rests on his contention that the court relied
6 on Appellant's false statements as the basis for multiple
7 enhancements to his sentence. Specifically, Saeed claims
8 that the district court used his false-identity conduct as
9 the basis for: (i) a 24-month consecutive sentence on the
10 aggravated identity theft conviction; (ii) application of
11 the Guidelines' obstruction-of-justice enhancement; (iii)
12 denial of Saeed's application for an
13 acceptance-of-responsibility adjustment; and (iv) denial of
14 safety-valve relief.

15 As an initial matter, Appellant is mistaken when he
16 argues that the court relied on his false-identity conduct
17 when denying Appellant an acceptance-of-responsibility
18 adjustment or as a basis for imposing a 24-month consecutive
19 sentence on the conviction under 18 U.S.C. § 1028A. The
20 court denied acceptance points because although Saeed had
21 earlier offered to plead guilty to distribution of the

lying about his identity cannot be known.

1 amount of heroin for which the jury ultimately found him
2 responsible, he argued for acquittal at trial. The court
3 pointed out that had Appellant admitted to the substantive
4 offense and gone to trial only on the limited issue of the
5 quantity of heroin for which he was responsible, he might
6 have been eligible for acceptance points. The court imposed
7 a 24-month consecutive sentence under 18 U.S.C. § 1028A
8 because the statute required it. The statute also required
9 the court not to consider this mandatory minimum in
10 determining the appropriate sentence for the other
11 convictions.

12 The court properly considered Appellant's lies about
13 his identity in denying safety-valve relief, in applying an
14 obstruction of justice enhancement, and in applying the
15 sentencing factors in § 3553(a). We have previously
16 recognized that "[m]ultiple adjustments are properly imposed
17 . . . when they aim at different harms emanating from the
18 same conduct." *United States v. Sabhnani*, 599 F.3d 215, 251
19 (2d Cir. 2010) (internal quotation marks omitted). That is
20 exactly what happened here.

