12-39

To Be Argued By:
SARALA V. NAGALA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-39

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOEY CHIBUKO, aka Steven Buckley, aka Joseph Pride, aka Stephen Ray Buckley, aka Steven Buckeley, aka Steven R. Buckley,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. Judgment entered on December 29, 2011. Defendant's Appendix ("DA__") 19-20. On December 31, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA17. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

1. Whether the district court plainly erred in imposing three consecutive 24-month sentences for aggravated identity theft, where the defendant stole the identity of a developmentally-disabled victim named Steven Buckley and continues to insist, despite trial evidence to the contrary, that he is the real Steven Buckley.
2. Whether the district court plainly erred in imposing sentencing enhancements for obstruction of justice and relocation of the fraud scheme.
3. Whether the district court erred with respect to any of the defendant's largely unpreserved *pro se* arguments.

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Preliminary Statement

The defendant, Joey Chibuko, is an egregious identity thief whose fraudulent behavior began when he entered the United States from Nigeria in 1993 and spanned over the next seventeen years, crisscrossing at least three states. His pattern of criminal acts culminated in his stealing the identity of a developmentally-disabled

man named Steven Buckley, which led to his conviction after a jury trial on one count of making a false statement in a United States passport application, two counts of Social Security fraud, two counts of identity fraud, three counts of aggravated identity theft, and one count of making a false claim to United States citizenship. Incredibly, the defendant still insists that he is Steven Buckley, despite significant trial testimony to the contrary. He claims that he was born to Buckley's parents, on Buckley's birthday, in the town where Buckley was born, and that he was sent to Nigeria to live with his aunt, where he took on the name "Joey Chibuko." Presentence Report ("PSR"), Addendum ¶ 9. Recognizing the glaring incredulity of the defendant's sole defense, the jury convicted him and the district court sentenced him to an effective term of 168 months' imprisonment and three years' supervised release. DA19-20.

In the portion of this appeal in which he is represented by counsel, the defendant challenges his sentence as procedurally unreasonable because the district court imposed three consecutive 24-month sentences for his three aggravated identity theft convictions. He also challenges the district court's application of the enhancements for relocation of a fraudulent scheme and obstruction of justice. Both of these issues are reviewed for plain error, and neither requires remand.

Separately, in two *pro se* briefs, the defendant raises various Fourth Amendment, Sixth Amendment, evidentiary, pleading-related, and sentencing arguments, many of which were waived or are reviewed for plain error, and none of which have any merit.

Statement of the Case

On September 9, 2010, the defendant was arrested pursuant to a criminal complaint charging him with making a false statement in a United States passport application, in violation of 18 U.S.C. § 1542. DA6.

On October 6, 2010, a federal grand jury returned a nine-count indictment against the defendant, charging him with one count of making a false statement in a United States passport application, in violation of 18 U.S.C. §1542; two counts of Social Security fraud, in violation of 42 U.S.C. § 408(a)(7)(B); two counts of identity fraud, in violation of 18 U.S.C. §§ 1028(a)(4) and (b)(1)(A)(ii); one count of making a false claim to United States citizenship, in violation of 18 U.S.C. § 911; and three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A. DA24-29.

Prior to trial, the defendant moved *in limine* to preclude the government from eliciting testimony regarding prior bad acts under Federal Rules of Evidence 402, 403, and 404(b). DA12-

13. The district court denied the defendant's motions *in limine*, after allowing the defense to propose limiting instructions regarding the evidence and barring the government from introducing certain evidence. DA12-13. The defendant did not move to suppress any evidence before trial.

A jury trial commenced on May 19, 2011, and on May 24, 2011, the jury returned a verdict of guilty on all nine counts. DA13.

The defendant's sentencing hearing was held on December 20, 2011. DA16. The district court (Vanessa L. Bryant, J.) imposed the following sentence: concurrent 96-month terms on the counts of making a false statement in a passport application (count one) and identity fraud (counts three and eight); concurrent 36-month terms on the counts of Social Security fraud (counts two and seven) and making a false claim to U.S. citizenship (count five); and consecutive 24-month terms on each of the three counts of aggravated identity theft (counts four, six, and nine). DA19. This resulted in a total effective sentence of imprisonment of 168 months. DA20. The defendant was also sentenced to an effective term of supervised release of three years, and to a $25,000 fine that was to be suspended unless the defendant entered the United States illegally after serving his sentence and being deported. DA20.

The defendant timely appealed. DA89. He is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal[1]

A. The offense conduct

On January 11, 1993, the defendant obtained a United States tourist visa in Lagos, Nigeria. PSR ¶ 5. The visa depicted a photograph of the defendant, the name "Joey Chibuko Chibuko," a false birthdate of April 1, 1956, and a country of citizenship of Nigeria. PSR ¶ 5. In support of his visa application, the defendant falsely stated that he was married with children. PSR ¶ 5.

On March 4, 1993, the defendant entered the United States with authorization to remain for six months. Within two weeks, the defendant applied for a Social Security number using his false birthdate of April 1, 1956. PSR ¶ 6. He also obtained a series of California driver's licenses that misrepresented his birthdate. PSR ¶ 6. The defendant's tourist visa expired on September 4, 1993, but he remained in the United States illegally. PSR ¶ 6.

On December 13, 1993, the defendant married Tamara Holmes, an American citizen. PSR ¶ 7. He applied for legal residence in the country based on his marriage; in support of his applica-

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[1] Additional facts relevant to some of the *pro se* issues are set forth below.

tion, he appeared to have submitted a fraudulent birth certificate that was identical in format and appearance to a birth certificate issued in the name "Joey Pride" that was seized from the defendant's residence in September 2010. PSR ¶ 7. Ms. Holmes knew the defendant as "Joey Chibuko." Shortly after the defendant's application for legal residency was granted, his relationship with Ms. Holmes deteriorated, partially because the defendant was physically abusive. PSR ¶ 7.

On October 31, 1996, the defendant was arrested by the Oakland, California, police department and charged with credit card theft offenses. PSR ¶ 8. The defendant and his brother had stolen identification of patients at a medical center and obtained and used fraudulent credit cards in the patients' names. PSR ¶ 8. Following his arrest, the defendant was released on bond and told Ms. Holmes that he was fleeing to London. PSR ¶ 8. On November 18, 1996, the defendant was charged with 26 counts of theft of access cards or account information and one count of receiving stolen property. PSR ¶ 8. By that time, the defendant had already fled to Massachusetts. The California case was dismissed in 2006 for failure to locate the defendant. PSR ¶ 8. In May 1997, his condition residency expired, rendering his presence in the country illegal once again. PSR ¶ 8.

In connection with his flight to Massachusetts, the defendant assumed the identity of

"Ray Awommack." PSR ¶ 9. He created a fraudulent California identification card in that name and a fraudulent Social Security card using a Social Security number that was assigned to Raymond Anthony Womack, a San Francisco resident. PSR ¶ 9. The defendant presented both of these fraudulent documents in support of his June 1997 application for employment at the Greater Lynn Mental Health and Retardation Association. PSR ¶ 9. He was hired by that organization to provide direct support services to clients on an as-needed basis. PSR ¶ 9.

From at least July 1998 through October 1998, the defendant worked the weekend shift at a Greater Lynn group home where Steven Raymond Buckley, a developmentally-delayed man, was a resident. PSR ¶ 10. He also began a relationship with Tina Mack, whom he later married, and who had observed the defendant possessing many identification documents not belonging to him. PSR ¶ 12. Between 1998 and 2003, the defendant falsely represented himself on several employment applications. PSR ¶ 15.

In June 2003, the defendant, identifying himself as Steven Ray Buckley, applied for a U.S. passport in Connecticut, which formed the basis of count one of the indictment. PSR ¶ 17. In 2006 and 2009, the defendant, identifying himself as Steven Buckley, presented fraudulent documents to support employment applications at two human services agencies. PSR ¶ 15. These

actions formed the basis of counts two through four and seven through nine of the indictment. In February 2008, the defendant falsely claimed he was a United States citizen on his voter registration form, forming the basis for count five of the indictment; he subsequently voted in elections. PSR ¶ 15.

In addition, the defendant fraudulently received, in the name of Steven Ray Buckley, unemployment benefits totaling $66,000 from the State of Connecticut. PSR ¶ 25.

During this time, the real Steven Ray Buckley reported that he had received multiple notices from credit card companies and collection agencies seeking to collect debts incurred by the defendant. PSR ¶ 24. At least once, the defendant advised a collection agency that another individual with his name who was living in Massachusetts (the real Steven Buckley) had incurred the debt. PSR ¶ 24.

B. Sentencing

The PSR calculated the defendant's total offense level at 24. PSR ¶¶ 35-57. The calculation grouped counts two, three, seven, and eight (the Social Security fraud and identity fraud counts) and calculated a total offense level for this group at 24, which included a base offense level of 6, a fourteen-level loss calculation enhancement because the reasonably foreseeable harm was more than $400,000 but less than $1 million, a two-

level enhancement because the defendant used a means of identification unlawfully to obtain any other means of identification, and a two-level enhancement for a vulnerable victim. PSR ¶¶ 37-43. The calculation then grouped counts one and five (false statement in a passport application and false claim to U.S. citizenship) and calculated an offense level for this group at 12, including a base offense level of 8 and a four-level enhancement for fraudulent use of a U.S. passport. PSR ¶¶ 44-49. Under the grouping rules, the combined adjusted offense level remained 24. PSR ¶¶ 50-57.

The PSR also noted that the court, in its discretion, could run the three 24-month sentences for the three aggravated identity theft counts concurrent or consecutive to one another (although they had to run consecutive to any other sentence imposed). PSR ¶¶ 95-96. The PSR calculated the minimum Guidelines range, based on a total offense level of 24 and three concurrent 24-month terms for the aggravated identity theft counts, as 75-87 months, and the maximum Guidelines range, based on the same total offense level and three consecutive 24-month terms for the aggravated identity theft counts, as 123-135 months. PSR ¶ 96.

Four days before sentencing, the Probation Office filed an addendum to the PSR adjusting the enhancements. In particular, the addendum removed from its Group One calculation the two-

level enhancement for use of a means of identification unlawfully to obtain any other means of identification; added a two-level enhancement because the defendant abused his position of trust as the victim's caretaker; added a two-level enhancement because the defendant relocated the fraudulent scheme; and added a two-level enhancement for obstruction of justice because the defendant continued to lie about being the real Steven Buckley throughout the presentence investigation. PSR, Addendum ¶¶ 3-10. The Group Two calculation remained the same. PSR, Addendum ¶¶ 11-16. Thus, the resulting combined adjusted offense level was 28. PSR, Addendum ¶¶ 17-24. Again, the report noted that the court could run the aggravated identity theft sentences concurrently or consecutively. PSR, Addendum ¶ 96. Under the new calculations, the effective minimum Guidelines range, if the court ran the aggravated identity theft sentences concurrently, was 102-121 months, and the maximum Guidelines range, if the court ran those sentences consecutively, was 150-169 months. PSR, Addendum ¶ 96.

The government's sentencing memorandum explained that U.S.S.G. Section 5G1.2 provides guidance on whether sentences on multiple § 1028A convictions should be imposed consecutively. District Ct. Docket #104 at 6-7. The memorandum described Application Note 2(B) to § 5G1.2, which provides that the court should

consider the nature and circumstances of the underlying offense, whether the underlying offenses are groupable, and whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence. Government's Appendix ("GA")191-92; U.S.S.G. § 5G1.2, comment. (n.2(B)).

In its remarks at the sentencing hearing, the government discussed at length the nature of the offenses and the reasons that consecutive § 1028A sentences would be justified. *See* DA47-55. In particular, the government elaborated on the defendant's 17-year criminal spree, including his arrest in California. DA49-50. It then described how the defendant gained employment under false pretenses at the Greater Lynn Mental Health and Retardation Association, where he met Steven Buckley, DA50, and how the defendant abused his former wife, Tina Mack, DA51-52. The government emphasized the "circumstances of the offense" were "egregious," "unique," and "not the circumstances you would expect to normally find in an identity theft case or social security fraud case." DA53.

Defense counsel argued that the court had discretion not to sentence the defendant to consecutive § 1028A sentences and stated that even if the sentences were run concurrently, "that's still a significant sentence." DA61. Importantly, defense counsel neither mentioned § 5G1.2 in his

remarks nor requested that the court elaborate on the § 5G1.2 factors when it imposed the sentence.

During the sentencing hearing, the district court emphasized the defendant's persistent lies, noting that the defendant "has a bit of a revisionist memory; appears to be able to offer almost patently fallacious explanations or excuses for everything that he has found to have been done wrong; everything that occurred was someone else's fault, someone else's error, and the Court finds these explanations and excuses lacking in merit and credibility." DA37-38. The court further chastised the defendant for victimizing a vulnerable person: "it is just unspeakable that Mr. Chibuko would steal the identity of an individual who was orphaned, adopted, and then orphaned again, who by virtue of accident of birth was relegated to living in a group home for the developmentally disabled. That is just utterly vile and unthinkable." DA65-66.

The court then correctly calculated the defendant's total offense level as 28. DA39-47, 66-67. This calculation included a base offense level of 6, a fourteen-level enhancement for loss calculation, a two-level enhancement for relocation of the fraudulent scheme, a two-level enhancement for a vulnerable victim, a two-level enhancement for an abuse of a position of trust, and a two-level enhancement for obstruction of justice. DA39-47, DA66; PSR, Addendum ¶¶ 3-24. The

court recognized that the defendant's placement into Criminal History Category I likely underestimated the severity of his criminal history, but nonetheless found that his Guidelines range for the non-aggravated identity theft counts was 78-97 months' imprisonment, the specified range for an individual with a total offense level of 28 who falls into Criminal History Category I. DA66, DA78-79, DA82-83. The court then correctly calculated that, if all three 24-month aggravated identity theft sentences were to be served concurrently, the Guidelines range would be 102-121 months' imprisonment. DA67. If, on the other hand, the aggravated identity theft sentences were to be imposed consecutively, the recommended Guidelines range would be 150-169 months' imprisonment. DA67.

The court specifically noted that under 18 U.S.C. § 3553, it must "consider the nature and circumstances of the offense," including particularly the "number, frequency, and duration" of the offenses. DA67. The court noted that identity theft crimes "are crimes that undermine the very fabric of our society as they deprive individuals of their very identity, and they undermine the banking system which is the core of our well-being." DA67. The defendant's "history and characteristics," too "warrant[ed] a stiff sentence," in the court's view, because he "engaged in a persistent cross-country crime wave spanning 17 years, beginning in California and con-

tinuing on to Massachusetts and ultimately here in Connecticut." DA67.

The court went on to describe that the defendant:

> left each of the jurisdictions on the heels of a criminal prosecution, apprehension, and possible imprisonment. This activity supports the conclusion that a stiff sentence is necessary to reflect not only the seriousness of the offense, but to also reflect the history and characteristics of the Defendant, engender respect for the law, to punish the Defendant, and because these offenses are difficult to detect and to punish, a stiff sentence in this case has the unique benefit of affording an adequate deterrence to others from engaging in what is becoming a rampant type of crime.

DA68. It further noted:

> The Court has determined that you are not Steven Buckley. You came into this country with a passport indicating that your name is Joey Chibuko. There's absolutely no documentation other than fraudulent documentation and your own specious statements that even suggest that you're anyone other than Joey Chibuko. That's who you are. That's who you came into this country as, and noth-

> ing has changed and you are not the individual whose social security number you fraudulently placed on those loan applications.

DA76. The court then imposed a total effective sentence of imprisonment of 168 months. DA20.

Importantly, the court noted that, even had it imposed a non-Guidelines sentence, it "would have imposed the same sentence." DA79. Put another way, the court would have imposed the same sentence based on its analysis of the sentencing factors in § 3553(a) regardless of the appropriate advisory Guidelines range. DA83.

Summary of Argument

The district court did not abuse its discretion in sentencing the defendant to three consecutive 24-month sentences for his aggravated identity theft convictions. The court's comments make clear that it considered the relevant factors in determining that the sentences should run consecutively, rather than concurrently. These facts included the defendant's 17-year cross-country span of flagrant criminal conduct concluding in theft of the identity of a developmentally-disabled man. And any failure to cite specifically § 5G1.2 did not constitute plain error since the court's explanation of its sentencing decision tracked the language of § 5G1.2 and adequately explained its justification for determining that

three consecutive 24-month terms was appropriate.

Similarly, the court did not plainly err in applying the obstruction of justice and relocation enhancements. The defendant's repeated insistence, throughout the trial and presentence investigation, that he was the *real* Steven Buckley justified imposition of the obstruction enhancement. Further, it is undisputed that the defendant hopped from jurisdiction to jurisdiction on his crime spree, attempting to avoid apprehension by law enforcement, and thereby warranting application of the two-level relocation enhancement.

Finally, none of the defendant's largely unpreserved *pro se* arguments has merit. He failed to file a motion to suppress or a motion to dismiss below, so that he waived any challenge to the issuance or execution of the search warrant for his residence and any claim that the indictment was multiplicitous. Moreover, the search warrant for the defendant's residence was properly issued, was not based on stale information, was executed in a timely fashion and included authorization for a search of the basement. And each of the indictment's counts were based on violations of statutes that either required proof of different elements or were based on entirely distinct sets of facts.

As to his continuing objection to the admission of § 404(b) evidence, it has no merit because

the evidence at issue was admitted for a proper purpose and was accompanied by a specific limiting instruction.

His challenge to the composition of the jury fails because the jurors' answers to the court's questions at jury selection revealed no bias, and defense counsel failed to claim any such bias.

Lastly, the loss calculation at sentencing was fully supported by the evidence and was specifically agreed to by defense counsel.

Argument

I. The district court properly sentenced the defendant to three consecutive 24-month terms for his aggravated identity theft convictions.

A. Governing law and standard of review

1. 18 U.S.C. § 3553(a)

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005) rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence."

See United States v. Fernandez, 443 F.3d 19, 26 (2d Cir. 2006).

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 551 U.S. 338, 341 (2007); *Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012).

A district court commits procedural error when it "'(1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the § 3553(a) factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation.'" *Id.* (quoting *United States v. Conca*, 635 F.3d 55, 62 (2d Cir. 2011)).

Substantive review is exceedingly deferential. This Court has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *United States v. Cavera*, 550 F.3d 180, 189 (2d. Cir. 2008) (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). In particular, sentences are substantively unreasonable if they are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the

administration of justice." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (quoting *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)).

Substantive reasonableness review is conducted based on the totality of the circumstances. *See Cavera*, 550 F.3d at 190. The appellant bears a "heavy burden because review of a sentence for substantive reasonableness is particularly deferential." *Broxmeyer,* 699 F.3d at 289. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Cavera*, 550 F.3d at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.*

> That deference derives from a respect for the distinct institutional advantages that a district court enjoys over their appellate counterparts in making an 'individualized assessment' of sentence under 18 U.SC. § 3553(a). Among those advantages is the district court's unique factfinding position, which allows it to hear evidence, make credibility determinations and interact directly with the defendant (and often, with his victims), thereby gaining insights not always conveyed by a cold record.

Broxmeyer, 699 F.3d at 289 (internal citations omitted).

2. 18 U.S.C. § 1028A sentences

The aggravated identity theft statute, 18 U.S.C. § 1028A(a), provides: "Whoever, during and in relation to [an enumerated felony], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." If a defendant is convicted under this statute, the two-year term of imprisonment generally must run consecutive to any other term of imprisonment imposed "under any other provision of law." 18 U.S.C. § 1028A(b)(2). In addition, section 1028A(b)(4) allows the sentencing court discretion to choose whether multiple section 1028A sentences should be served consecutively or concurrently to one another:

> [A] term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy state-

> ments issued by the Sentencing Commission pursuant to section 994 of title 28.

Id.

Section 2B1.6 of the Sentencing Guidelines, which applies to § 1028A convictions, refers to the commentary to § 5G1.2, concerning multiple counts on conviction, for guidance regarding the sentences on multiple counts of § 1028A violations. *See* U.S.S.G. § 2B1.6, comment. (n.1(B)). The application notes for Section 5G1.2, in turn, provide that the court should consider the following non-exhaustive list of factors when determining whether multiple convictions under § 1028A should run concurrently with, or consecutively to, each other: (i) the nature and seriousness of the underlying offenses; (ii) whether the underlying offenses are groupable under § 3D1.2; and (iii) whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or consecutive sentence for multiple counts of § 1028A. *See* U.S.S.G. § 5G1.2, comment. (n.2(B)). Notably, two of the three non-exhaustive factors either are encompassed in § 3553(a) or explicitly reference that section and its factors.

This Court has not decided whether a sentencing court must explicitly mention the § 5G1.2 commentary or its factors in imposing consecutive § 1028A sentences, but several other circuits—the Third, Eleventh, and Ninth, all in unpublished decisions—have upheld consecutive

§ 1028A sentences where the sentencing court did not specifically mention § 5G1.2 or its factors in announcing the sentence, especially when the record was clear that the court considered the nature and seriousness of the underlying offenses and the other § 3553(a) factors. *See United States v. Corbin*, 474 Fed. Appx. 66, 69 (3rd Cir. Apr. 12, 2012) (unpublished) (noting that, although the district court "did not explicitly mention the guideline commentary," the omission was not plain error because the district court "carefully considered the nature and seriousness" of the prior offenses and the § 3553(a) factors, "thus covering two of the three factors under § 5G1.2"); *United States v. Bradshaw*, 445 Fed. Appx. 176, 180-181 (11th Cir. Sept. 7, 2011) (unpublished) (although the sentencing court did not "explicitly mention the specific Guidelines commentary" regarding multiple § 1028A sentences, the transcript revealed that the court considered "two of the three factors" in § 5G1.2's comments, including the nature and seriousness of the underlying offenses and the § 3553(a) factors); *United States v. Egu*, 379 Fed. Appx. 605, 608 (9th Cir. May 17, 2010) (unpublished) (although the district court "could have more specifically addressed why consecutive sentences were appropriate despite the groupability" of the underlying offenses—one of the § 5G1.2 commentary factors—"both § 1028A and the Guidelines give district courts discretion to run § 1028A

sentences consecutively, and we cannot say that the district court abused such discretion here").

The Eighth Circuit, in a published decision, has also set a fairly minimal standard for what is required of the sentencing court when sentencing on multiple § 1028A convictions. In *United States v. Dvorak*, 617 F.3d 1017 (8th Cir. 2010), the district court made passing reference to the commentary of § 5G1.2 but did not address groupability or the other factors in any detail. *Id.* at 1028. The Court, in upholding consecutive sentences, held that the sentencing court's mere mention of § 5G1.2 was sufficient because the court had "implicitly based her sentence on at least one of those factors [from the § 5G1.2 commentary] by noting the seriousness of the crimes committed," and as a result had not abused its discretion in sentencing the defendant to consecutive terms. *Id.* at 1029.

3. Standard of review

This Court generally reviews a sentence for procedural and substantive reasonableness under a "deferential" abuse of discretion standard. *See United States v. Hernandez,* 604 F.3d 48, 52 (2d Cir. 2010); *Cavera*, 550 F.3d at 189. However, where a procedural objection issue was not raised before the district court, this court utilizes a "rigorous" plain error analysis. *See United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007); *United States v. Cassesse*, 685 F.3d 186, 188 (2d Cir. 2012). To show plain error, the de-

fendant must demonstrate: (1) an error; (2) the error is obvious; (3) the error affected substantial rights (which typically means it affected the outcome of the proceedings); and (4) the error seriously affects the fairness and integrity of the judiciary. *See United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010).

B. Discussion

1. The district court did not commit procedural error in failing to mention § 5G1.2.

The defendant concedes that he did not argue below that the court should have explicitly mentioned the § 5G1.2 factors in determining whether to run the § 1028A sentences concurrently or consecutively. Def.'s Br. at 19-20.[2] Thus, plain error review applies.

The sentencing court here effectively considered two of the three non-exhaustive, descriptive factors from § 5G1.2, even if it did not mention § 5G1.2 itself. *See* U.S.S.G. § 5G1.2, comment.

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[2] Although he argued generally that the § 1028A sentences should run concurrently rather than consecutively, DA61, the specific procedural deficiency he makes on appeal with respect to the § 5G1.2 factors was not raised in the district court and is therefore reviewed for plain error. *See* Def. Br. at 19-20 (acknowledging that plain error review applies); DA74 (defendant admits that all of his objections have been conveyed to the court).

(n.2(B)) (listing the nature and seriousness of the underlying offenses, whether the underlying offenses are groupable under § 3D1.2, and whether the purposes of sentencing set forth in § 3553(a) are better achieved by concurrent or consecutive sentences as non-exhaustive factors for consideration). Like the sentencing courts in *Corbin*, *Bradshaw*, and *Egu*, the district court here discussed the nature and seriousness of the crimes and how the purposes of § 3553(a) were served by imposition of consecutive sentences on the defendant's three § 1028A convictions:

> In determining the appropriate sentence to impose, the Court must consider the factors set forth in 18 United States Code Section 3553. The Court must consider the nature and circumstances of the offense [the first of the § 3553(a) factors]. In this case, the number, frequency, and duration of the offenses are of particular concern. Further, these are crimes that undermine the very fabric of our society as they deprive individuals of their very identity, and they undermine the banking system which is the core of our well-being. Identity theft has become rampant. It is difficult to detect and difficult to prosecute. It undermines individual security. Mr. Chibuko's history and characteristics [another of the § 3553(a) factors] also warrant a stiff sentence. Mr.

> Chibuko has engaged in a persistent cross-country crime wave spanning 17 years, beginning in California and continuing on to Massachusetts and ultimately here in Connecticut. He left each of the jurisdictions on the heels of a criminal prosecution, apprehension, and possible imprisonment.
>
> This activity supports the conclusion that a stiff sentence is necessary to reflect not only the seriousness of the offense, but also to reflect the history and characteristics of the Defendant, engender respect for the law, to punish the Defendant, and because these offenses are difficult to detect and to punish, a stiff sentence in this case has the unique benefit of affording an adequate deterrence to others from engaging in what is becoming a rampant type of crime.
>
> A significant sentence would also deter the Defendant from continuing his persistent violation of the law, and to protect the public, the vulnerable people such as Mr. Buckley from further crimes which the Defendant has in the past committed.

DA67-68; *see also* DA69-70, DA76.

As is clear from these remarks, the district court analyzed the nature and seriousness of the

offense of which the defendant was convicted, as well as many of the factors set forth in §3553(a)(2). The court found that the defendant's crimes were particularly egregious, given the significance of identity theft in our society and the defendant's pattern of criminal activity. DA67-68. The court made specific observations regarding the applicability of the § 3553(a) factors, concluding that the defendant's history and characteristics—specifically his habit of moving jurisdictions to evade detection and apprehension by law enforcement—and the difficulty in detecting and prosecuting identity theft crimes required a strict sentence. DA67-68.

Having analyzed the nature and seriousness of the defendant's crimes, the district court appropriately justified its decision to impose consecutive sentences for the defendant's § 1028A convictions. Although it could have explicitly mentioned the § 5G1.2 commentary, the failure to do so is not procedural error, much less plain error. *See Corbin*, 474 Fed. Appx. at 69 ("[w]e do not require sentencing courts to explicitly discuss the non-exhaustive factors in the commentary to § 5G1.2," particularly where the district court "carefully considered" the nature and seriousness of the offenses and the § 3553(a) factors); *Bradshaw*, 445 Fed. Appx. at 180-81 (there is "no binding precedent that requires the district court to explicitly discuss" the commentary of § 5G1.2); *Egu*, 379 Fed. Appx. at 608 (alt-

hough the district court "could have more specifically addressed" the § 5G1.2 factors, including groupability, the court did not abuse its discretion in imposing consecutive sentences); *see also United States v. Collins*, 640 F.3d 265, 270 (7th Cir. 2011) ("any oversight of not addressing [the] specific provision [5G1.2] was not reversible error"). To require that the court explicitly mention the § 5G1.2 commentary, even where it has directly referenced and passed on many of the component parts of § 5G1.2 on the record, would be to impose a "formulaic requirement[]" of a "robotic incantation[]" during sentencing, which this Court has repeatedly disavowed. *See United States v. Keller*, 539 F.3d 97, 101 (2d Cir. 2008) (rejecting a requirement that a sentencing court make an explicit on-the-record statement about its variance discretion and collecting cases).

Moreover, even though the court did not explicitly mention § 5G1.2 or its commentary, the government's sentencing memorandum, its comments at sentencing, and the PSR (which the court considered when deciding the appropriate sentence, *see* DA70) described that Guidelines provision and analyzed its applicability. *See* GA191-92; PSR ¶ 36 (referencing U.S.S.G. § 2B1.6, the guideline applicable to § 1028A); PSR, Addendum ¶ 96 (noting that the court may, in its discretion, sentence a defendant to consecutive terms of imprisonment for multiple convictions under § 1028A). The government's sentenc-

ing memorandum, in particular, argued that even though the defendant's underlying offenses were groupable—one of the factors from the commentary to § 5G1.2—the circumstances of this case were "not typical" and warranted consecutive 24-month sentences. GA192; *see also* DA46-47, DA55 (arguing for consecutive sentences because of the egregious facts of the case). Thus, the district court did consider § 5G1.2 and its commentary in imposing consecutive sentences.[3]

The defendant relies chiefly upon a 2012 case from the Seventh Circuit, *United States v. Dooley*, 688 F.3d 318 (7th Cir. 2012), and a 2007 unpublished decision from the Fourth Circuit, *United States v. Godwin*, 242 Fed. Appx. 898 (4th Cir. Aug. 9, 2007) for his argument that the district court was required specifically to mention § 5G1.2 when imposing consecutive sen-

[3] The defendant argues that, because a § 3553(a) analysis is required in every sentencing, this Court cannot conclude that the district court considered the relevant Guidelines sections in deciding whether to impose consecutive or concurrent sentences. *See* Def.'s Br. at 19. But the fact that § 5G1.2's factors overlap with § 3553(a)'s factors does not mean that the court did not satisfactorily explain its discretion to impose consecutive sentences; it simply means that many of the same considerations are relevant to both analyses.

tences on multiple § 1028A convictions.[4] In *Dooley*, the Seventh Circuit remanded a case for resentencing where the sentencing court did not mention § 5G1.2 or its commentary in sentencing the defendant to two consecutive 24-month sentences for § 1028A convictions. 688 F.3d at 321. But the government there had conceded that plain procedural error occurred, and both parties had jointly requested remand for resentencing. *See* GA40-73. In particular, the government argued for remand "because the record is insufficient to allow this court [the Seventh Circuit] to discern whether the district court considered the relevant guidelines factors." GA61. The Seventh Circuit, following the parties' request, remanded the case for resentencing. 688 F.3d at 321. The case itself, however, does not support the defendant's argument here, especial-

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[4] The defendant also relies on *United States v. Lee*, 502 F.3d 780, 781 (8th Cir. 2007), a precursor to *Dvorak* (upholding consecutive sentence where district court merely mentioned § 5G1.2). *Lee* merely holds that the district court must give "adequate reasons" for the decision to impose consecutive sentences. There, the government conceded that the sentencing court "did little to explain" why it imposed consecutive sentences, and the Eighth Circuit remanded for resentencing without indicating any requirement that the sentencing court explicitly invoke § 5G1.2 in its sentencing remarks. *Id.*

ly considering that, just a year earlier, the Seventh Circuit had held in *Collins*, 640 F.3d at 270, that "any oversight of not addressing" § 5G1.2 "was not reversible error" in a case where the sentencing court had imposed two consecutive sentences for § 1028A violations.

And, although *Godwin* took the strict view that a sentencing court must explicitly "refer to the commentary for [§ 5G1.2] for guidance regarding the imposition of sentences under the two counts," *Godwin*, 242 Fed. Appx. at 899, it is an unpublished decision with no precedential value. Moreover, in *Godwin*, the district court did not even consider, much less mention, any of the factors from § 5G1.2—resulting in plain error and remand for resentencing. *Id.* at 900. And *Godwin* would appear to be inconsistent with this Court's rejection of "robotic incantations" of sentencing provisions. *See Keller*, 539 F.3d at 101; *United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996).

In the end, the district court here adequately explained its reasons for imposing consecutive § 1028A sentences, and any error in the sentencing colloquy on this issue was harmless, given the court's detailed analysis of the § 3553(a) factors and its statement that it would have imposed the same sentence regardless of the appropriate advisory Guidelines range. DA79, DA83. Not only would any error not have affected the outcome of the sentencing, but it cannot

seriously affect the fairness and integrity of the judiciary where the sentence was appropriately justified under the relevant factors. *See Marcus*, 130 S. Ct. at 2164.

2. The imposition of consecutive sentences was substantively reasonable.

As noted above, substantive reasonableness review is exceedingly deferential, and sentences are substantively unreasonable only if they are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice." *Broxmeyer*, 699 F.3d at 289. Deference is appropriate because, after a trial, a sentencing court has heard evidence, made credibility determinations and interacted directly with the defendant, "thereby gaining insights not always conveyed by a cold record." *Id.*

Here, the district court was justified in exercising its discretion to impose consecutive sentences for the defendant's three § 1028A convictions. As the court described, Chibuko's identity theft offenses "undermine the very fabric of our society," because they "deprive individuals of their very identity." DA67. And Chibuko's pattern of criminal activity, which spanned 17 years and three states, demonstrated both his utter disrespect for the law and his long history of criminal conduct, which required a strict sentence to specifically deter. DA67; *see also Egu*,

379 Fed. Appx. at 608 (describing the defendant's "sophisticated, extensive, and long-lasting" scheme as justification for consecutive sentences). From the time he entered the United States in 1993, he has lied about who he is and left a trail of victims in his wake. *See United States v. Stevens*, __ F.3d __, 2012 WL 6699094, *2 (11th Cir. Dec. 21, 2012) (given the seriousness of the offenses and the defendant's extensive history of fraudulent conduct, consecutive sentences were "clearly reasonable"). One of those victims was a developmentally disabled man for whom the defendant was supposed to care; as the district court found, "it is just unspeakable that Mr. Chibuko would steal the identity of an individual who was orphaned, adopted, and then orphaned again, who by virtue of an accident of birth was relegated to living in a group home for the developmentally disabled." DA65. The court was entitled to weigh all of these actions against the defendant in imposing consecutive sentences.

The defendant argues that, because the aggravated identity theft counts all involved the same victim, did not cause the victim any financial harm, and were committed in the course of obtaining employment and registering to vote, the district court abused its discretion in imposing consecutive sentences. However, he ignores the fact that the victim did suffer some financial loss and had to contest certain charges as a result of the defendant's fraud, including a collec-

tions notice that was originally served on the defendant, but that he referred to the victim. *See* DA52-53. And, importantly, as the district court recognized, the theft of one's identity is intensely personal and can cause significant mental anguish, as it did to Mr. Buckley here. DA51 ("when the Government interviewed Mr. Buckley initially in preparation for trial and presented him with a birth certificate that Mr. Chibuko had stolen from him, which had been given [to] him by his mother, Mr. Buckley was emotional and he almost could not process how it was that we had come to obtain a birth certificate that he thought at some point he had simply lost."). The defendant would like to underplay the harm that he caused the victim, but the district court appropriately found his conduct "utterly vile and unthinkable." DA66.[5]

In addition, each time the defendant utilized a fraudulent identification to apply for a job or vote, he denigrated the integrity of the American

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[5] Although Chibuko claims that the vulnerable victim enhancement already accounts for this harm, he has cited no case law providing that the district could not have applied the vulnerable victim enhancement *and* considered harm to the victim in deciding whether to impose consecutive or concurrent sentences. Moreover, although the fraudulent mortgages do not relate directly to the aggravated identity theft charges, Chibuko's fraud did cause substantial financial loss to those banks.

governmental system. *See Collins*, 640 F.3d at 270 (district court's consideration of harm to society from defendant's crimes was reasonable). Indeed, by falsely claiming to be a United States citizen when he registered to vote, his fraud infected a bedrock principle of our democracy: the right to vote.

Finally, the defendant claims that the factors from the § 5G1.2 commentary weigh in favor of concurrent sentences. But the nature and circumstances of the underlying offenses, discussed at length above, support consecutive sentences. Although the commentary to § 5G1.2 lists crimes of violence and terrorism offenses as crimes that may justify consecutive sentences, those are not exclusive examples. *See* U.S.S.G. § 5G1.2, comment. (n.2(B)(i)). If they were, consecutive § 1028A sentences would be relatively rare. Nor does the fact that the underlying offenses were groupable prohibit consecutive sentences; although concurrent sentences are "generally" appropriate for groupable offenses, the district court recognized that this was not the typical case. *See* DA66-70. Finally, the court engaged in a sufficient analysis of the § 3553(a) factors to justify its decision to impose consecutive, rather than concurrent sentences, and ultimately imposed a within-Guidelines sentence. The court also noted that it would have imposed the same sentence had it departed from the Guidelines range. DA79.

In sum, it was not substantively unreasonable for the district court to impose three consecutive 24-month sentences on the defendant for his § 1028A convictions, given the nature of his crimes, his lengthy criminal spree, and the fact that, to this day, he insists that he is Steven Buckley, not Joey Chibuko. In fact, the district court noted that the defendant's similar adult conduct would have justified placing him in Criminal History Category II, pursuant to U.S.S.G. § 4A1.3(a)(2)(E), but it sentenced the defendant as if he fell into Category I. DA78-79. The consecutive 72-month sentence on the § 1028A convictions cannot be viewed as shockingly high, shockingly low, or otherwise unsupportable as a matter of law. *Broxmeyer*, 699 F.3d at 289.

II. The district court properly applied the obstruction of justice and the relocation-of-the-fraudulent-scheme enhancements.

The district court properly calculated the Guidelines range based on the PSR. DA66. Although the district court did not directly address the relocation or obstruction of justice enhancements in its sentencing remarks, it made sufficient factual findings to justify imposition of the enhancements under a plain error standard of review, as is discussed further below.

A. Standard of review

The defendant did not raise below the argument that it did not make sufficient factual findings to justify the obstruction of justice and relocation enhancements. *See* DA36-37 (noting the defendant's objections to factual statements); DA74-75 (defendant acknowledging that all of his objections had been addressed).[6] Thus, this claim is reviewed for plain error. *See Villafuerte*, 502 F.3d at 208; *Cassesse*, 685 F.3d at 188.

B. Governing law

1. Relocation enhancement

In order to properly apply the two-level enhancement from U.S.S.G. § 2B1.1(b)(10)(A) on the basis of relocation of the fraud scheme, there must be evidence that the defendant "relocated, or participated in relocating, the fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials." This finding must be made by a preponderance of the evidence. *United States v. Cho*, 713 F.3d 716, 722 (2d Cir. 2013). Evidence that the defendant used false identification in the commission of his offense and after relocating supports a finding

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[6] Defendant's counsel's general objections to application of the enhancements, *see* DA59, are insufficient to preserve the procedural argument that the court did not make sufficient factual findings to justify the enhancements.

that the defendant relocated the fraud scheme in an attempt to evade detection by law enforcement. *See United States v. Vega-Iturrino*, 565 F.3d 430, 433 (8th Cir. 2009); *see also United States v. Paredes,* 461 F.3d 1190, 1192 (10th Cir. 2006) (fleeing one jurisdiction after arrest justifies relocation enhancement).

2. Obstruction of justice enhancement

U.S.S.G. § 3C1.1 provides as follows:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of convic-tion and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

This enhancement "is to be imposed only if the obstruction, or attempted obstruction, was 'willful[].'" *United States v. Khedr*, 343 F.3d 96, 102 (2d Cir. 2003) (quoting § 3C1.1). Accordingly, "the district court must make a finding that the defendant had a 'specific intent to obstruct justice.'" *United States v. Carty*, 264 F.3d 191, 194 (2d Cir. 2001) (*per curiam*); *United States v. Hernandez*, 83 F.3d 582, 585 (2d Cir. 1996). In determining whether this intent exists, the court

may "rely on circumstantial evidence and on all reasonable inferences" which flow from it. See *United States v. Cassiliano*, 137 F.3d 742, 747 (2d Cir. 1998). "The facts necessary to support an obstruction of justice enhancement need to be proven only by a preponderance of the evidence." *Carty*, 264 F.3d at 194 (citing *Cassiliano*, 137 F.3d at 747).

Providing materially false information to a probation officer with respect to a presentence or other investigation for the court qualifies a defendant for the obstruction of justice enhancement. U.S.S.G. § 3C1.1, comment. (n.4(H)). *See, e.g., United States v. Ruiz*, 249 F.3d 643, 648-49 (7th Cir. 2001) (finding that lie to probation officer regarding past criminal history justified obstruction enhancement); *United States v. Dorn*, 39 F.3d 736, 740 (7th Cir. 1994) (material falsehoods to probation officer regarding witness intimidation qualified for obstruction enhancement).

C. Discussion

1. Relocation enhancement

Because the defendant failed to object to imposition of this enhancement below, this Court may reverse only if, in applying the enhancement, the district court made an obvious error that affected the defendant's substantial rights and seriously affects the fairness and integrity of the judiciary. *See Marcus*, 130 S. Ct. at 2164.

Here, the district court made several factual findings that justified imposition of the relocation enhancement. First, the court adopted the factual findings of the PSR, DA38, which detail that, after the defendant was charged in California in 1996 for an identity theft scheme, he said he was fleeing to London, PSR ¶ 8, but actually fled to Massachusetts, PSR ¶ 9. In Massachusetts, he adopted a new identity, likely to avoid being arrested for his outstanding charges in California. He continued his pattern of jurisdiction-hopping by relocating to Connecticut in 2001 and obtaining a false Connecticut driver's license in yet another name. PSR, Addendum ¶¶ 14-17. Each time, the defendant was attempting to evade authorities and to continue his fraudulent activity. DA42-43 (government attorney explaining basis for relocation enhancement). The district court also specifically found that "Mr. Chibuko has engaged in a persistent cross-country crime wave spanning 17 years, beginning in California and continuing on to Massachusetts and ultimately here in Connecticut. He left each of the jurisdictions on the heels of a criminal prosecution, apprehension, and possible imprisonment." DA67-68.

These factual findings are more than sufficient to justify imposition of the relocation enhancement under a plain error standard. The court specifically mentions the three jurisdictions that the defendant relocated to (and his

adoption of different identities in those jursdictions), and stated that he left those jurisdictions in order to avoid detection by law enforcement. *See Vega-Iturrino*, 565 F.3d at 433; *Paredes,* 461 F.3d at 1192. At the very least, application of the enhancement on this trial and sentencing record would not be an obvious error that would rise to the level of seriously affecting the fairness of the judiciary.

2. Obstruction of justice enhancement

On plain error review, the district court here made sufficient findings that the defendant intended to obstruct justice by insisting, throughout the trial, his presentence interview, and his sentencing, that he was Steven Buckley, rather than Joey Chibuko—a fact that was material to the entire case. Initially, as with the relocation enhancement, the court adopted the factual findings of the PSR, DA38, which had advocated for the obstruction enhancement "because the defendant has maintained that he is Steven Buckley (i.e. the victim), and that lie is material to the presentence investigation, and to the sentencing of the defendant." PSR, Addendum ¶ 9; *Ruiz*, 249 F.3d at 648-49; *Dorn*, 39 F.3d at 740. Additionally, at the beginning of the sentencing proceeding, the Court noted that the defendant "has a bit of revisionist memory; appears to be able to offer almost patently fallacious explanations or excuses for everything that he has found

to have been done wrong; everything that occurred was someone else's fault, someone else's error, and the Court finds these explanations and excuses lacking in merit and credibility." DA37-38.

These statements demonstrate the court's view of the defendant's intent in advancing his story that he was Steven Buckley. In particular, the court's explicit rejection of his "explanations and excuses" as "lacking in merit and credibility," demonstrates that the court believed the defendant was intentionally lying about his story. Moreover, toward the end of the sentencing proceeding, the court asked the defendant in what name he had applied for mortgages. When the defendant responded with the name "Steven Buckley," the court made the specific finding that the defendant was not Steven Buckley but was, in fact, Joey Chibuko. DA76 ("The Court has determined that you are not Steven Buckley . . . .).

The court's remarks indicate that it believed that the defendant was fraudulently representing himself to be Steven Buckley for many years, including throughout the presentence investigation, which is tantamount to a finding that the defendant intended to obstruct justice by maintaining that he was someone whom he was not. Although the district court did not specifically mention the obstruction enhancement, any error was harmless because of the findings that the

court made on the record regarding the defendant's pervasive intent to deceive others—including the jury, the probation office, and the court—about his true identity.[7] Given these factual findings, it was not plain error for the court to apply the obstruction of justice enhancement, as application of the enhancement on this record would not cast doubt on the fairness and integrity of the judiciary.

[7] It is worth noting that the defendant has signed both of his *pro se* briefs under the name "Joey Chibuko," which is an acknowledgement that his story about being "Steven Buckley" was a lie.

III. The defendant's *pro se* arguments are without merit.

The defendant makes a number of claims in two *pro se* briefs: (1) the warrant to search his home was unsupported by probable cause, executed belatedly, and did not authorize a search of the defendant's basement, where significant incriminating evidence was found; (2) testimony was improperly admitted under Fed. R. Evid. 404(b); (3) the indictment was multiplicitous; (4) the loss amount was improperly calculated at sentencing; and (5) the composition of the jury violated the defendant's Sixth Amendment rights. All of these arguments, most of which are unpreserved, are meritless.

A. The defendant's suppression arguments were waived and, in the alternative, are meritless.

1. Relevant facts

On September 2, 2010, United States Magistrate Judge Donna Martinez issued a search warrant for 45 Vera Street in West Hartford, Connecticut, the defendant's primary residence. GA1-13. The affidavit in support of the search warrant application described that that the affiant, a special agent with the United States Department of State, Diplomatic Security Service, had been contacted because two United States passports had been applied for and issued to two

different people, each identifying himself as Steven Ray Buckley. GA15.

In July 2010, agents interviewed the Steven Ray Buckley who had applied for a passport in 2000, along with the man who had submitted an affidavit as an identifying witness, Mark Clapper. GA15, GA18-19. Buckley noted that he had been paying off a debt to CitiBank that was incurred in his name, but not by him, and Clapper confirmed that he worked as a care provider for Buckley, who had been facing financial troubles since his identity had been stolen by someone in Connecticut. GA18-19.

The affidavit further described multiple identification documents that were issued in the name of Steven Buckley, but with photographs that bear striking likeness to those of the defendant. GA17-18. A Connecticut driver's license bearing the defendant's name and photograph was associated with the 45 Vera Street address. GA18. Voter registration records, city records, and an interview with the defendant also confirmed that the defendant resided at the Vera Street address. GA19-21.

Finding that the appropriate showing of probable cause had been made, the magistrate judge issued a search warrant for 45 Vera Street and three vehicles registered to "Steven R Buckley" at that address. The warrant covered the entire residence, including the basement. GA1, GA7-13.

The warrant was to be executed by September 13, 2010. GA1. Agents executed the warrant on September 9, 2010, one week after issuance and within the required execution period. *See* GA2-5.

Special Agent Neil Horn assisted in conducting the search of the residence, which included the first floor, the basement, and a room at the basement level that was locked. GA80-82, GA85-87, GA106-07. The locked room was accessible only to the defendant and his family. GA86, GA106-07. Chibuko's wife, Ebere Chibuko Buckley, gave the agents the keys to the locked basement room upon their request. GA86, GA106-07. The agents were careful not to search the second floor of the residence, which was a rental property at 47 Vera Street. GA81-82.

The search resulted in the seizure of multiple identification documents that were admitted at trial, including some that were seized from the locked basement room. Specifically, agents found a Nigerian birth certificate in the name "Joey Obe Pride," a Nigerian passport issued to "Joey Pride," a United States passport in the name of "Steven Ray Buckley," and a Social Security card in the name "Steven Buckeley" in a satchel located in a closet in that room. GA88-89, GA99, Tr.5/20/11 at 130-139. Agents also found a membership card for the People's Diplomatic Party of Nigeria bearing the name "Joseph Chibuko" and a checkbook from First Bank of Nigeria bearing

the name "Chibuko Joey Chibuko" on a dresser inside the room, GA90-92, and several documents bearing the name "Ray Awommack" on a desk in the room. GA100, GA102, GA104-05.

2. Governing law and standard of review

a. Waiver

Fed. R. Crim. P. 12(e) provides that a party "waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or any extension" thereof absent a showing of good cause. Rule 12(b)(3)(C), in turn, encompasses motions to suppress evidence. The waiver rule is strict; where a defendant "has not provided, much less established, any reasonable excuse for his failure" to raise the suppression issue in a timely fashion, the argument is forfeited. *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (referencing prior version of rule); *United States v. McCullough*, __ F.3d __, 2013 WL 1729712 (2d Cir. Apr. 23, 2013). "A strategic decision by counsel not to pursue a claim, inadvertence of one's attorney, and an attorney's failure to consult with his client are all insufficient to establish 'cause.'" *Yousef*, 327 F.3d at 125. Such a waiver forecloses even plain error review. *See McCullough*, 2013 WL 1729712 at *1. And, of course, even if the Court finds that good cause exists, the unpreserved Fourth Amendment arguments are still subject to plain

error review. *See United States v. Plitman,* 194 F.3d 59, 62 (2d Cir. 1999).

b. Staleness

Generally, in reviewing a magistrate's probable cause determination, this Court affords substantial deference to the magistrate's finding and limits its review to whether the issuing officer had a substantial basis for the finding of probable cause. *United States v. Singh*, 390 F.3d 168, 181 (2d Cir. 2004).

A number of factors determine whether probable cause was too stale to justify issuance of the warrant. These factors include the length and nature of the criminal activity, whether the activity is ongoing or continuous in nature, and the type of property sought. *Singh*, 390 F.3d at 181. The passage of time between events described in the affidavit and issuance of the warrant is not controlling; it is "but one factor to be considered, along with the kind of property sought and the nature of the criminal activity." *Id.*; *see also United States v. McCall*, 740 F.2d 1331, 1336 (4th Cir. 1984) ("The vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. . . . Rather, we must look to all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized.") (citing *United States v. Johnson*, 461

F.2d 285, 287 (10th Cir. 1972)). Notably, if the evidence is not of a type that is ordinarily destroyed or moved about from one place to another, as identification documents or business records would be, the likelihood of staleness is lower. *Singh*, 390 F.3d at 181; *McCall*, 740 F.2d at 1336.

c. Timeliness of execution

A warrant must be executed within a reasonable time after its issuance. *United States v. Marin-Buitrago*, 734 F.2d 889, 894 (2d Cir. 1984). Under the version of Rule 41 applicable here, the agents had fourteen days from the warrant's issuance to execute it. Fed. R. Crim. P. 41(e)(2)(A)(i) (2010); *see also* GA1; *United States v. Bedford*, 519 F.2d 650, 655-57 (3d Cir. 1975).

d. Scope of warrant for house

The Fourth Amendment requires that the warrant "particularly" describe the place to be searched. U.S. Const., amend. IV. It is well-established that "[i]t is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925). A lawful search extends to all areas and containers in which the object of the search may be found. *See, e.g., United States v. Ross*, 456 U.S. 798, 820-21 ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may

be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search").

Following this general precept, several courts have held that searches of basements pursuant to warrants that list street addresses or buildings as the premises to be searched are reasonable. *See United States v. Weinbender*, 109 F.3d 1327, 1330 (8th Cir. 1997) (where warrant authorized search of entire home, search of basement that involved removing drywall to find hiding place was justified); *United States v. Canestri*, 376 F. Supp. 1149, 1152 (D. Conn. 1974) (upholding search of locked storeroom in basement of house that was named in the warrant, even where the defendant did not reside at the location); *United States v. Vaughan*, 875 F. Supp. 36, 44 (D. Mass. 1995) (search of basement that was connected to area occupied by subject of the search was reasonable and within scope of the warrant that named a street address and the subject of the search).[8]

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[8] Searches of other areas adjacent or near the premises named in the warrant are also reasonable. *See, e.g.*, *United States v. Elliott*, 893 F.2d 220, 225 (9th Cir. 1990) (search of storeroom adjacent to apartment was within scope of warrant); *United States v. Heldt*, 668 F.2d 1238, 1265 (D.C. Cir. 1981) (warrant for suite of offices of individual authorized search of adjacent, freestanding penthouse accessed through offices); *Commonwealth v. Scala*, 404 N.E.2d 83, 89

3. Discussion

a. The defendant waived any suppression challenge.

Rules 12(e) and 12(b)(3)(C) are clear that if a motion to suppress is not raised prior to the district court's motion deadline, the suppression issue is waived absent good cause. Here, like in *Yousef*, the defendant had "ample opportunity to raise and develop this argument" in the district court and has not "provided, much less established, any reasonable excuse for his failure to [do] so." *Id.*, 327 F.3d at 125. Thus, he has forfeited his arguments that evidence seized from his home should have been suppressed.

(Mass. 1980) (where attic was not visible from exterior but was adjacent to and accessible from upstairs apartment, warrant's scope included attic). *But see United States v. King,* 227 F.3d 732, 752-53 (6th Cir. 2000) (vacating conviction because defendant-tenant had a reasonable expectation of privacy in the basement which was searched pursuant to a warrant that only referred to a street number and more specifically, to the "downstairs" unit). *King* is distinguishable both because it involved a tenant who did not have control over the basement, whereas the defendant was the owner of the entire duplex, and because the warrant in *King* specified parts of the residence to be searched, whereas the warrant here applied to the entire residence except for the rental unit.

b. If the arguments are not waived, they lack merit because the warrant was properly issued and executed.

If the Court entertains the defendant's suppression arguments, affirmance is required under the plain error standard because the probable cause supporting issuance of the warrant was not stale, the warrant was executed within an appropriate time period, and the basement was well within the scope of the warrant's authorization.

First, the facts and circumstances of this case, together with the nature of the defendant's criminal activity and of the property being sought—fraudulent identification records—demonstrate that the affidavit's probable cause was not stale. To begin, the affidavit chronicled many investigative steps beginning in the summer of 2010, including an interview with the defendant at his Vera Street residence mere days before the search took place.

The affidavit also described a number of identification documents issued in various names associated with the defendant that had been issued over a long span of time, suggesting ongoing criminal activity. GA14-36. In particular, the defendant had engaged in identity fraud persistently for fourteen years before the warrant was sought, justifying the conclusion that the defendant's residence would contain evidence of

that activity. *See Singh,* 390 F.3d at 181. Fraudulent identification documents, unlike drugs or other types of contraband, are created to be used over time and are "not ordinarily destroyed or moved about from one place to another." *McCall*, 740 F.2d at 1336 (noting that where the records sought were bank records and "identification papers," staleness concerns were less relevant). Finally, the penultimate event described in the affidavit—the agents' interview of the defendant at his home, where he admitted his records were kept—happened less than a week before the warrant was obtained. For these reasons, the probable cause on which the search warrant was based was not stale, and admitting evidence seized pursuant to that warrant did not amount to plain error.

Second, the warrant was executed seven days after it was obtained, which is well within the limitations set forth both in the warrant itself and in Rule 41. The defendant's argument that the warrant grew stale within those seven days or that it was executed belatedly is wholly without merit.

Finally, the warrant here applied to the entire premises of 45 Vera Street, including the basement. The agents acted reasonably in concluding that the basement, which was accessible only to the residents of 45 Vera Street and was part of that residence, was part of the house to which the warrant applied. GA1; *see Wein-*

bender, 109 F.3d at 1330 (warrant authorizing search of entire home included basement, even though drywall had to be removed to reach basement); *Canestri*, 376 F. Supp. at 1152 (upholding search of locked storeroom in basement where warrant named residence); *Vaughan*, 875 F. Supp. at 36 (basement search authorized). The fact that the basement was not visible from outside explains why the warrant did not specifically include it. *See Scala*, 404 N.E.2d at 89. The reasonableness of the government's conduct is also underscored by the fact that the agents did not search 47 Vera Street, which the government did not have probable cause to search and which was purposefully excluded from the scope of the warrant. GA7.[9]

And even if the warrant conceivably did not extend to the basement, the agents relied in good faith on the warrant's terms—which provided authority to search the entirety of 45 Vera Street without exception—in searching the basement. *See United States v. Leon*, 468 U.S. 897 (1984).

In sum, if the Court determines that the defendant has not waived his suppression arguments, it should reject them on their merits be-

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[9] The defendant's argument that the protective sweep doctrine should not apply here is inapposite, as the agents relied on the search warrant, and did not conduct a warrantless search as in *United States v. Hassock*, 631 F.3d 79, 83 (2d Cir. 2011).

cause the search of the defendant's residence was reasonable and did not violate the Fourth Amendment, and the district court's failure to exclude evidence seized as a result of the search did not constitute plain error. Also, in light of the overwhelming evidence of the defendant's guilt introduced at trial that came from locations other than the basement, the district court's admission of evidence seized from that particular location did not prejudice the defendant's substantial rights or call into question the integrity of the justice system.

B. The court properly admitted Rule 404(b) evidence.

1. Relevant facts

Shortly before trial, the defendant moved *in limine* to exclude certain evidence the government intended to offer pursuant to Fed. R. Evid. 404(b). DA11-12. Specifically, the defendant objected to the introduction of evidence regarding his 1996 California arrest and the resulting indictment for theft of access card or account information and receipt of stolen property, after which he fled California. He also objected to the introduction of his 1999 Massachusetts arrest for assault and battery of his then-pregnant wife, after which he presented himself to the police as "Joey Pride" and advised that his country of birth was "Africa." GA158-61.

The district court denied all of the defendant's motions *in limine*, but offered the defendant an opportunity to propose a limiting instruction regarding the California and Massachusetts arrests and prohibited the government from introducing any testimony regarding domestic violence, except insofar as such testimony was relevant to identification of the defendant. *See* DA12-13. The court then gave a limiting instruction during the final jury charge instructing the jury to use such information only for proper purposes, including identity, motive, opportunity, knowledge, and intent. GA38-39. Specifically, the court instructed the jury as follows:

> [Y]ou may not consider evidence that the defendant has previously been arrested or committed the acts described above as substitute for proof that the Defendant committed the charged offenses. Nor may you consider this evidence as proof that the defendant has a criminal personality or a bad character. Further, you should not speculate as to the basis for the Defendant's arrests, or the outcome of the arrest. This evidence was admitted for a much more limited purpose[], namely to show the Defendant's identity, his motive, the extent to which he had an opportunity to commit the charged offenses, and his knowledge and intent. If you con-

sider the evidence, you must do so only for this limited purpose.

GA38-39.

At trial, the government offered Rule 404(b) testimony from Tamara Holmes-Chibuko, the defendant's ex-wife, who testified about the defendant's 1996 arrest; Tina Mack, the defendant's ex-wife who was involved in the 1999 Massachusetts arrest;[10] Department of Homeland Security Fraud Adjudications Officer William Balcerzak, regarding the defendant's application for permanent residency; Oakland Police Detective Jerry Harris, regarding the 1996 California arrest; and Lynn, Massachusetts, police officer Michael Eddows regarding the 1999 Massachusetts arrest.

Holmes-Chibuko, the defendant's ex-wife, testified that she knew the defendant as "Joey Chibuko." GA115. She also testified that he had been arrested in 1996, while they were married, and that he planned to flee to London after the arrest. GA127-29.

Harris testified that he arrested the defendant in 1996, but did not disclose the nature of the offense. GA151-52.

Eddows testified that he arrested the defendant in 1999, and, at that time, the defendant

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[10] The defendant does not challenge the admissibility of Tina Mack's testimony on appeal.

identified himself as "Joey Pride" and gave his place of birth was "Africa." GA158-59, GA161.

Balcerzak testified that the defendant was arrested for something "related to theft" in 1996 and that a conviction of that type would have rendered him "inadmissible to the United states and led to the termination of his conditional residence." GA146. He also testified that the defendant had lied on a visa application to enter the United States by stating that his birthday was in 1956 rather than 1965 and that he had children when he did not. GA136-37. He further testified that the defendant had voluntarily admitted these errors and that the immigration authorities had waived that fraud as a ground for inadmissibility. GA137-42.

2. Governing law and standard of review

Under Rule 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, such evidence is admissible for another, proper purpose "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* This Court has adopted an "inclusionary approach" and allowed evidence to be admitted "for any purpose other than to show a defendant's criminal pro-

pensity." *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002); *see also United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000).

In *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), the Supreme Court outlined the test for admissibility of "other act" evidence under Rule 404(b). First, to be admissible, the evidence must be offered for one of the identified proper purposes, such as proof of motive, identity, knowledge, or intent. Second, the offered evidence must be relevant to an issue in the case. Third, the probative value of the evidence must not be substantially outweighed by the potential for unfair prejudice. Fourth, if requested to do so, the court must give an appropriate limiting instruction to the jury. *Id.*; *see also United States v. McCallum*, 584 F.3d 471 (2d Cir. 2009) (applying the four-part *Huddleston* analysis).

This Court reviews the district court's evidentiary rulings for an abuse of discretion. *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004). Under this standard, district courts have "broad discretion to weigh potential prejudice against probative value" and rulings are not overturned unless "arbitrary or irrational." *Id.* (internal quotations and citations omitted). An abuse of discretion occurs when a decision is made that "cannot be located within the range of permissible decisions or is based on a clearly er-

roneous factual finding or an error of law." *Rigas*, 490 F.3d at 238.

3. Discussion

The defendant argues that the testimony elicited from his ex-wife, the police officers, and the immigration representative regarding his 1996 California arrest and 1999 Massachusetts arrest should not have been admitted. Both arrests, however, were relevant to the issues of motive, identity, and opportunity—permissible purposes under Rule 404(b).

Regarding the 1996 arrest, the government presented limited evidence that the defendant was arrested in California and charged with an offense that would have jeopardized both his liberty and his immigration status in the United States. GA146, GA151-55. It also presented evidence that the defendant intended to flee California and in fact did flee. GA127-29, GA151-55. That evidence was highly probative of the defendant's motive for adopting, stealing, and using new identities, including that of the true Steven Buckley. *See United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995); *see also United States v. Miller*, 641 F. Supp.2d 161, 166 (E.D.N.Y. 2009) (evidence that there was an outstanding arrest warrant for the defendant was relevant to his motive for obtaining a new identity). The evidence was also relevant to opportunity, as the defendant's flight from California explained how

he came to be in Massachusetts. Also, the evidence linked the defendant to one of his prior aliases (Joey Pride) and, as a result, to his true identity.

The probative value of the 1996 arrest was not substantially outweighed by the potential for unfair prejudice because the government took steps to minimize the prejudicial nature of the evidence. For instance, the government did not elicit that the 1996 arrest related to identity theft, that it was for a felony, or that there was also an associated search that turned up fraudulent identification documents. Moreover, the district court gave a limiting instruction that would have minimized any possible prejudicial impact. *See United States v. Snype*, 441 F.3d 119, 129 (2d Cir. 2006) ("[T]he law recognizes a strong presumption that juries follow limiting instructions."). The district court surely did not abuse its discretion in admitting the evidence under these circumstances.

The same is true of the 1999 arrest, after which the defendant identified himself as "Joey Pride." That arrest involved a charge of assault and battery against the defendant's then-wife. Rather than eliciting any details about the underlying offense, however, the government limited the testimony to matters of the defendant's identity and his knowledge that he was not whom he purported to be, as the district court required. DA12 (denying motion *in limine* re-

garding identity that he presented to Massachusetts authorities because "testimony of his possession of means of identification other than his [own] is relevant and its relevance outweighs any prejudice"). The district court also specifically excluded any evidence of domestic violence absent a proffer that could establish its relevance, which the government did not pursue.

Also, the defendant's admission on his booking card that he was born in "Africa" is direct evidence that he was not an American citizen, which is an element of the false claim to American citizenship charge. And the fact that he held himself out to be someone else other than Joey Chibuko or Steven Buckley was relevant to the jury's evaluation of his actual identity and his opportunity to present different identities, seemingly on command. In addition, the evidence helped to explain other evidence in the case, including a Nigerian passport seized from the defendant's West Hartford residence bearing the name "Joey Pride." Finally, the defendant's booking photograph and fingerprints from the Massachusetts arrest were clearly relevant to identity because they matched fingerprints taken at the defendant's other encounters with the authorities.

Here, too, because the evidence offered by the government was appropriately limited to only those facts that were highly probative of central issues in the case and not unfairly prejudicial to

the defendant, the district court did not abuse its discretion in admitting the evidence. Moreover, the limiting instruction cured any unfair prejudice that could have resulted. *See LaFlam*, 369 F.3d at 157 (limiting instruction reduced any potential prejudice that introduction of 404(b) evidence may have caused). The trial court's discretion on this evidentiary matter is "accorded great deference"; there has been no showing here that the court acted arbitrarily or irrationally. *United States v. Scott*, 677 F.3d 72, 83-84 (2d Cir. 2012).

C. The defendant has waived his argument that indictment was multiplicitous.

The defendant claims for the first time on appeal that the charges in the indictment are multiplicitous, in violation of the Double Jeopardy clause, because they "constitute multiple punishments for the same act." Def.'s *Pro Se* Brief at 15. A motion alleging a defect in the indictment, however, must be brought before the district court's motion deadline or it is waived. Fed. R. Crim. P. 12(e), 12(b)(3)(B). The defendant has not shown good cause why this argument could not have been raised prior to trial, rendering it forfeited. *See Yousef*, 327 F.3d at 125. Even if the argument has not been waived, however, it is unpersuasive.

1. Governing law and standard of review

"An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). The "touchstone" of the double jeopardy analysis is whether Congress intended to authorize separate punishments for the offensive conduct under separate statutes. *Id.* at 146.

If the statutes make clear that Congress intended to impose cumulative punishments, the double jeopardy clause is not violated. *See United States v. Khalil*, 214 F.3d 111, 117 (2d Cir. 2000); *see also United States v. Fiore*, 821 F.2d 127, 130 (2d Cir. 1987) ("If the offenses charged are set forth in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize punishment under each provision."). Congress specifically authorized cumulative punishment for aggravated identity theft convictions under § 1028A. *See United States v. Bonilla*, 579 F.3d 1233, 1242 (11th Cir. 2009) (describing legislative history of § 1028A);[11] *see also Flores-Figueroa v. United*

[11] *Bonilla* held that charges under both 18 U.S.C. § 1028(a)(7) and 18 U.S.C. § 1028A based on the

States, 556 U.S. 646, 655 (2009) (noting that Congress separated identity fraud in § 1028(a) from identity theft in § 1028A).

If Congressional intent is not clear from the statutes themselves, the question is whether the separate counts require proof of separate facts and contain different elements. *See Khalil*, 214 F.3d at 118 ("if each section requires proof of at least one fact that the other does not, there are two offenses, and it is presumed that the legislature intended to authorize prosecution and punishment under both") (citing *Blockburger v. United States*, 284 U.S. 299 (1932)); *see also United States v. Finley*, 245 F.3d 199, 205 (2d Cir. 2001).

Generally, a motion alleging a defect in the indictment must be raised before trial or is waived. *See* Fed. R. Crim. P. 12(b)(3)(B) and 12(e); *SEC v. Palmisano*, 135 F.3d 860, 863 (2d Cir. 1998). Multiplicity arguments are waived, in

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same conduct were multiplicitous because any predicate offense that would qualify for § 1028A would also qualify under § 1028(a)(7), which penalizes possession of a means of identification in connection with any unlawful activity. *See id.*, 579 F.3d at 1242-43. Here, it is § 1028(a)(4)—which criminalizes possession of a means of identification if the defendant intends that such means be used to defraud the United States—that is at issue, and not all crimes that would serve as predicate offenses for § 1028A would also qualify under § 1028(a)(4).

particular, when the multiplicity is clear from the face of the indictment and thus should have been recognized earlier. *See United States v. Handakas*, 286 F.3d 92, 97 (2d Cir. 2002), *overruled on other grounds*; *Chacko*, 169 F.3d at 145-46 (noting that double jeopardy challenge can be waived if not asserted at the district court). Even if the claim is not waived, it is reviewed for plain error. *See United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009).

2. Discussion

The defendant appears to be making two multiplicity arguments. First, he maintains that the charges for identity fraud under 18 U.S.C. § 1028(a)(4), aggravated identity theft under 18 U.S.C. § 1028A, and false claim to United States citizenship under 18 U.S.C. § 911 are multiplicitous "because they constitute multiple punishments for the same act." Def.'s *Pro Se* Br. at 15. He also claims that the three § 1028A charges were multiplicitous. Def.'s *Pro Se* Br. at 16. Both arguments are meritless.

The defendant's first multiplicity argument fails because each of the counts charged in the indictment—identity fraud, aggravated identity theft, and false claim to United States citizenship—has an element that the others do not and, thus, requires proof of a fact that the others do not. *See Khalil*, 214 F.3d at 118. For instance, the false claim to citizenship charge requires proof that the defendant is not an American citi-

zen, which the other two offenses do not require. *See* 18 U.S.C. § 911. Similarly, identity fraud under § 1028(a)(4) requires proof that the defendant possessed an identification feature, and aggravated identity theft under § 1028A requires proof that the defendant is engaging in one of several enumerated predicate felonies. Each offense therefore requires proof of a fact that the others do not.

The defendant's second argument that the three aggravated identity theft charges under § 1028A are multiplicitous likewise fails because each § 1028A charge is based on different conduct and different predicate offenses in different years. The first § 1028A charge (Count Four) was based on the defendant's possession of a Connecticut driver's license bearing the name "Steven R. Buckley" in 2006. The second charge (Count Five) was based on his possession of a means of identification in connection with his false claim to United States citizenship in 2008. And the third charge (Count Nine) was based on his use of the name and birthdate of Steven Buckley on an I-9 employment eligibility form in 2009. Because each § 1028A charge involved separate acts in different years, three separate counts were justified.[12] Indeed, if multiple ag-

[12] The defendant's cases are irrelevant to the determination of whether three separate § 1028A charges were justified, as they concern other statutes. *See, e.g., United States v. Kerley*, 544 F.3d 172, 179 (2d

gravated identity theft charges were not allowed based on distinct conduct, U.S.S.G. § 5G1.2, which advises on sentencing issues for multiple counts of § 1028A, would be unnecessary.

In sum, the defendant has not established, on plain error review, that the indictment was multipicitous.

D. The defendant waived any objection to the loss amount calculation at sentencing.

The defendant's *pro se* brief argues that his sentence was inappropriately enhanced by 14 levels because the loss to the mortgage companies for his properties was a result of the housing market downturn, rather than his criminal conduct.

Cir. 2008) (where willful failure to pay child support statute was not clear as to whether obligations to multiple children constituted separate counts, indictment alleging two counts was multiplicitous); *United States v. Wallace*, 447 F.3d 184, 188 (2d Cir. 2006) (multiple counts of firearms possession that resulted in the same shooting were multiplicitous); *Finley*, 245 F.3d at 207 (two charges for continuous possession of firearm in furtherance of simultaneous predicate offenses consisting of virtually the same conduct was multiplicitous); *United States v. Johnpoll*, 739 F.2d 702, 715 (2d Cir. 1984) (where indictment was unclear about whether stolen securities were transported as part of one scheme or as separate transactions, it was multiplicitous).

At sentencing, however, defense counsel specifically conceded that the loss calculation was "accurate," rendering the issue waived. DA57-58.[13] *See United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) (if, "as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review"); *United States v. Yo-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

Even if the argument had been preserved, it would fail. The PSR noted that the defendant had fraudulently applied for mortgages and purchased three residential properties using the Buckley identity. PSR ¶ 22. At sentencing, the government, defense counsel, and the probation officer agreed that, because the properties could be sold by the banks, the fair market value of each of the properties should be subtracted from the outstanding loan balances to arrive at the proper loss amount. DA39-40 (government explaining loss amounts on three properties), DA57-58 (defense counsel noting that "the calculations that have been proffered appear accurate"). Nevertheless, the defendant claims that the loss amount attributable to him was only

[13] Trial counsel's generalized objection to the facts in the PSR to remain consistent with the defense at trial that the defendant was the *real* Steven Buckley is insufficient to preserve any loss calculation objection.

about $250,000 and that a 12-level enhancement for loss amount, rather than a 14-level enhancement, should have been applied. Def.'s *Pro Se* Br. at 18-19.

The district court did not err in applying the 14-level enhancement. The defendant's actions in obtaining the mortgages fraudulently were the primary cause of the losses. But for his fraudulent mortgage applications and other criminal conduct, the banks would not have suffered losses attributable to him. Moreover, the loss calculation subtracted the fair market value of the properties to account for any money the banks would still be able to recoup. Thus, even though the banks had not yet sold the properties, the loss calculation was fair, as it gave the defendant the benefit of the market value subtractions before calculating the ultimate loss by the banks.

E. The defendant's Sixth Amendment rights were not violated by the composition of the jury.

The defendant's supplemental *pro se* brief argues that three allegedly biased jurors were seated on the jury, depriving him of his right to a fair trial. Once again, his argument fails on plain error review.

The typical procedural vehicle for a challenge based on juror bias is a motion for a new trial. Although defense counsel filed a Rule 33 motion

for a new trial, *see* DA14 (Docket #88), that motion did not raise juror bias as a ground for a new trial; it simply argued that the evidence was insufficient to convict the defendant of the various charges. *Id.* Having not raised the juror bias issue in his Rule 33 motion, the argument is reviewed for plain error on appeal. *See United States v. Olano*, 507 U.S. 725, 736 (1993) (holding that error must be plain, impact substantial rights and seriously affect the fairness, integrity, or public reputation of judicial proceedings).

The Sixth Amendment guarantees criminal defendants the right to be tried by an impartial jury. U.S. Const., amend. VI. Matters of actual bias of a juror are left within the district court's sound discretion because a finding of actual bias "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. 412 (1985).

The defendant claims that Juror 14 (a medical transcriptionist) and Juror 40 (who worked in patient care at Hartford Hospital) should not have been empanelled because his criminal conduct involved stealing the identity of a "patient." Def.'s Supp. *Pro Se* Brief at 3. But trial counsel did not challenge the empanelment of either juror for cause—indeed, neither juror was questioned at *voir dire* about their occupations—and the defendant makes no plausible argument that either was actually biased at trial. *See* GA181,

GA184; *see United States v. Garcia*, 936 F.2d 648, 653 (2d Cir. 1991) (noting district court's unique ability to determine, based on jurors' answers to judge's questions, trial court's determination as to whether juror could fairly and impartially hear a case). Empanelment of these jurors therefore was not plain error.

The defendant also claims that Juror 13 was biased because he indicated he would draw an adverse inference against a defendant who chose not to testify. But trial counsel below conceded that Juror 13 had been "rehabilitated" on this issue, as evidenced by the following colloquy at jury selection.

> Court: But if that thought came to your mind, if you're sitting there and you're saying to yourself, you know, why didn't he testify, would the little voice then say to you I can't consider that. The only thing I can consider is whether the evidence presented proves him guilty beyond a reasonable doubt. And can you put that aside, can you assure us that even though you may feel that way, you can put it aside and follow the instruction?
>
> Juror: Yeah, I think I could. When you put it like that, when you explain it that way, yeah, I think I could.

GA173. Trial counsel later stated, "Because I was satisfied when he -- when we finished with

him here, I was satisfied that he was rehabilitated. . . So I felt it was an issue [on which] he was rehabilitated." GA179.[14] In light of Juror 13's answers to the district court's questions on this issue, as well as trial counsel's concession that Juror 13 had been rehabilitated, the defendant's argument fails. Although Juror 13 initially indicated that he might have trouble disregarding a defendant's decision not to testify, he specifically stated, in response to questions by counsel and the court, that he would draw no adverse inference from this decision. GA168-73.

[14] The objection that trial counsel maintained against Juror 13—regarding how he would weigh the testimony of someone who had been convicted of a crime—is not raised by the defendant on appeal. GA176.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 8, 2013

Respectfully submitted,

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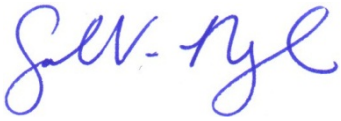

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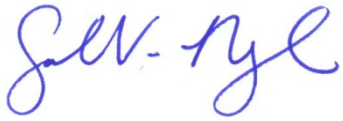
Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 15,416 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification. On June 13, 2013, the Court granted the government's motion for permission to file an oversized brief of up to 17,000 words.



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Addendum

18 U.S.C. § 1028A

(a) Offenses.--

(1) In general.--Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(2) Terrorism offense.--Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(b) Consecutive sentence.--Notwithstanding any other provision of law--

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(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 [FN1]), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), or section 664 (relating to theft from employee benefit plans);

(2) section 911 (relating to false personation of citizenship);

(3) section 922(a)(6) (relating to false statements in connection with the acquisition of a firearm);

(4) any provision contained in this chapter (relating to fraud and false statements), other than this section or section 1028(a)(7);

(5) any provision contained in chapter 63 (relating to mail, bank, and wire fraud);

(6) any provision contained in chapter 69 (relating to nationality and citizenship);

(7) any provision contained in chapter 75 (relating to passports and visas);

(8) section 523 of the Gramm-Leach-Bliley Act (15 U.S.C. 6823) (relating to obtaining customer information by false pretenses);

(9) section 243 or 266 of the Immigration and Nationality Act (8 U.S.C. 1253 and 1306) (relating to willfully failing to leave the United States after deportation and creating a counterfeit alien registration card);

(10) any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses); or

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408,

1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act).

U.S.S.G. § 5G1.2

(a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.

(b) For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

(d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all

counts shall run concurrently, except to the extent otherwise required by law.

(e) In a case in which subsection (c) of § 4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

U.S.S.G § 5G1.2,
Application Note 2(B)

Section 1028A of title 18, United States Code, generally requires that the mandatory term of imprisonment for a violation of such section be imposed consecutively to any other term of imprisonment. However, 18 U.S.C. 1028A(b)(4) permits the court, in its discretion, to impose the mandatory term of imprisonment on a defendant for a violation of such section "concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, provided that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission. . .".

In determining whether multiple counts of 18 U.S.C. 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors:

(i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. 1028A in a case in which an underlying offense for one of the 18 U.S.C. 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. 2332b(g)(5)(B).

(ii) Whether the underlying offenses are groupable under § 3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under § 3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. 1028A.

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(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an op-

portunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) Waiver of a Defense, Objection, or Request. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.