# 09-1736-cr(L)

*To Be Argued By*:
ELIZABETH A. LATIF

==========

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket Nos. 09-1736-cr (L)**
**09-3466-cr(CON), 09-3530-cr(CON)**

---

UNITED STATES OF AMERICA,

*Appellee,*

-vs-

ARBNOR GJINI, also known as Cookie, RICHARD DAVIS, also known as Poo Poo, also known as Shooter, also known as Buck, ANTONIO ROBINSON, also known as Biggie Smalls, also known as Dave, TONY DEJESUS,

(For continuation of Caption, See Inside Cover)

---

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

==========

**BRIEF FOR THE UNITED STATES OF AMERICA**

==========

DAVID B. FEIN
*United States Attorney*
*District of Connecticut*

ELIZABETH A. LATIF
SANDRA S. GLOVER *(of counsel)*
*Assistant United States Attorney*s

JERRYLE SNIDER, also known as Shitty, also known as Broadway, also known as Leroy, TRAYSON STEVENS, also known as Mitch, also known as Tray 8, also known as Jay, STACEY GOSS, also known as Binky, SASHA KOPPEL, DONDON FLETCHER, also known as Yellow, BRENT MENSKY, JOY YOUNG, also known as Petta, also known as G.P., ALAN DONALD, also known as Bo Donald, LAVAUGHN BROWN, also known as Vaughny, MIKE PETERS, BILL BOLLMANN, JOHN GODWIN, DAVID KARP, DAVID PETERS, LUIS SERRANO, DAVID WALSH, also known as Caddy and PATRICK SMITH,

*Defendants,*

TRAVIS SIMMS, also known as Tray Lo, also known as Love and ISNI GJURAJ,

*Defendants-Appellants*.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

**STATUTES**

**RULES**



**GUIDELINES**

## Statement of Jurisdiction

The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment as to the defendant Travis Simms entered on April 15, 2009. A11.[1] Simms filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on April 24, 2009. A11. Judgment as to the defendant Isni Gjuraj in the related cases 08-cr-233(MRK) and 07-cr-289(MRK) entered on August 6, 2009. GA15-16, 20. On August 13, 2009, Gjuraj filed a timely notice of appeal in 08-cr-233(MRK) pursuant to Fed. R. App. P. 4(b). GA20. On August 17, 2009, Gjuraj filed a timely notice of appeal in 07-cr-289(MRK) pursuant to Fed. R. App. P. 4(b). GA 16. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

---

[1] "A" refers to Travis Simms's Appendix. "GA" refers to Isni Gjuraj's Appendix. "GSA" refers to the Government's Supplemental Appendix. "Simms Br." refers to Simms's appellate brief. "Pro Se Br." refers to Gjuraj's pro se appellate brief.

## Statement of Issues Presented for Review

**Isni Gjuraj**:

I. Whether plain-error review bars a limited remand for re-sentencing on Count Two because the 320-month sentence imposed on that count runs concurrently to a 320-month sentence on Count Four and thus a remand could not change the total effective sentence.

II. Whether the defendant has shown that the district court's Rule 11 error in informing him that his maximum term of imprisonment was 30 years, when actually it was 20 years, affected his substantial rights, when he has not pointed to any record evidence to show that he would not have pleaded guilty if he had been informed of the lower maximum.

III. Whether Gjuraj's guilty plea bars any sufficiency challenge to the proof in support of his witness retaliation conviction and whether the indictment on its face sufficiently alleges the witness provided information to federal officials in any event.

IV. Whether Gjuraj's guilty plea bars any sufficiency challenge to the proof of the interstate commerce element of his Hobbs Act robbery conviction and whether, under plain error review, the indictment on its face sufficiently alleges the interstate commerce and *mens rea* elements.

V. Whether, under plain-error review, Gjuraj's below-Guidelines sentence was procedurally unreasonable in light of Gjuraj's arguments that: (a) the district court should not have used U.S.S.G. § 2A1.1 in sentencing him for the witness retaliation offense, (b) the district court gave undue weight to the Guidelines, (c) the district court failed to consider Gjuraj's personal characteristics, (d) the district court impermissibly relied on the impact on the victims, and (e) the district court failed to recognize its ability to depart from the crack/powder ratio set forth in the Guidelines.

**Travis Simms:**

VI. Whether the district court properly refrained from determining whether Simms's federal sentence should be served concurrently or consecutively to his state sentences where Simms was under primary federal jurisdiction at the time the federal sentence was imposed.

VII. Whether Simms's counsel was ineffective because he allowed Simms to enter a plea agreement that precluded him from arguing for a downward departure under the Guidelines or a non-guidelines sentence.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket Nos. 09-1736-cr (L)**
**09-3466-cr(CON), 09-3530-cr(CON)**

---

UNITED STATES OF AMERICA,
*Appellee,*

-vs-

TRAVIS SIMMS, also known as Tray Lo, also known as Love and ISNI GJURAJ,
*Defendant-Appellants.*

---

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

---

## BRIEF FOR THE UNITED STATES OF AMERICA

---

### Preliminary Statement

Isni Gjuraj was the leader of an extensive narcotics trafficking organization in Fairfield County, Connecticut, whose members used violence against those who threatened the vitality of the organization. Travis Simms was a member of the organization and sold cocaine base to street-level users. Gjuraj pleaded guilty to retaliating against a witness, cocaine base conspiracy, and Hobbs Act

robbery, and received a sentence of 320 months' imprisonment on the witness retaliation and drug charges and 240 months' imprisonment on the Hobbs Act Robbery, all to run concurrently. Simms pleaded guilty to possession with intent to distribute five grams or more of cocaine base and received a sentence of 108 months' imprisonment.

Although the district court sentenced Gjuraj to 320 months on the witness retaliation charge, in excess of the 20-year statutory maximum applicable at the time Gjuraj committed the offense, Gjuraj cannot demonstrate any prejudice to his substantial rights – as is required under plain error review – because he still faces a valid 320-month sentence on the drug charge. Nor is Gjuraj entitled to withdraw his guilty plea on the basis that the district court incorrectly informed him at the time of his plea that his maximum term of imprisonment was 30, rather than 20, years. This error did not affect Gjuraj's substantial rights because he has not established that he would not have pleaded guilty if he had been informed of the lower maximum.

Gjuraj's *pro se* challenges to the sufficiency of the evidence in support of the indictment and information are barred by his guilty plea, and Gjuraj's challenges to the face of the charging documents have no merit. Finally Gjuraj's *pro se* challenge to the procedural reasonableness of his below-Guidelines sentence should also be rejected because the record establishes that the district court properly calculated the applicable Guidelines range, carefully considered the factors enumerated in 18 U.S.C.

§ 3553(a), including Gjuraj's personal characteristics and the victim impact, considered the Guidelines advisory, and took into account the crack/powder disparity under the Guidelines.

Simms's arguments also lack merit. Simms was in federal custody and under federal primary jurisdiction when he pleaded guilty to and was sentenced for unrelated state crimes. Therefore, Simms is required to serve, and is indeed serving, his federal sentence first. Although Simms contends that the district court should have determined whether his federal sentence should be consecutive or concurrent to his state sentence, he was not subject to a *prior* state sentence and thus there was nothing for the court to order his sentence run concurrent or consecutive to.

Furthermore, Simms's ineffective assistance of counsel claim fails even if this Court were to consider it on direct appeal. The record reveals that Simms received substantial benefits in exchange for pleading guilty and waiving his right to argue for a departure or non-Guidelines sentence and Simms did not suffer prejudice in any event because (1) the district court lacked the authority to make the federal sentence concurrent with the state sentence, and (2) the district court imposed a non-Guidelines sentence.

For all these reasons, this Court should affirm the defendants' convictions and the sentences imposed by the district court.

## Statement of the Case

On March 12, 2008, a federal grand jury returned a 30-count Second Superseding Indictment charging Gjuraj, Simms, and 20 other individuals with various narcotics trafficking, firearm and witness tampering offenses. GA7, 23.

On October 29, 2008, Simms pleaded guilty to one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). A9, 36. On April 14, 2009, the district court (Mark R. Kravitz, J.) sentenced Simms to 108 months' imprisonment and four years' supervised release. A11, 31. Judgment entered April 15, 2009, and Simms filed a timely notice of appeal on April 24, 2009. A11.

On November 14, 2008, Gjuraj pleaded guilty to Count Two of the Second Superseding Indictment, charging him with retaliating against a witness, in violation of 18 U.S.C. §§ 1513(a)(1)(B), 1513(a)(2)(B), and 2, and Count Four of the Second Superseding Indictment, charging him with conspiracy to distribute and to possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(iii). GA11, 43. Gjuraj also pleaded guilty to a one-count Information, charging him with Hobbs Act robbery, in violation of 18 U.S.C. § 1951. GA18, 41, 43.

On August 5, 2009, the district court sentenced Gjuraj to 320 months' imprisonment on Counts Two and Four of the Second Superseding Indictment, to run concurrently,

and five years' supervised release. GA15, 95, 96. The district court also sentenced Gjuraj to 240 months' imprisonment on the Hobbs Act robbery, to run concurrently with the sentence imposed on Counts Two and Four, and three years' supervised release. GA20, 95, 99. Judgment entered on August 6, 2009. GA15-16, 20. Gjuraj filed timely notices of appeal on August 17, 2009, GA16 (witness retaliation and drug conspiracy), and August 13, 2009, GA20 (Hobbs Act robbery).

Both Simms and Gjuraj are currently serving their respective sentences.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. The defendants' offense conduct[2]

#### 1. The Gjuraj organization

In December 2006, the Federal Bureau of Investigation began an investigation in Norwalk, Connecticut, to address information regarding rampant narcotics trafficking in the Washington Village Housing Complex. PSR ¶ 6.

The FBI conducted undercover and controlled purchases of narcotics to determine the primary source of supply for the area. PSR ¶ 7-11. Initially, the undercover officers made small quantity, street-level purchases of

---

[2] This section is taken from the undisputed facts in Gjuraj's Presentence Report ("PSR").

crack cocaine from members of the organization including Simms, Trayson Stevens, and others. PSR ¶¶ 7-8. Later, law enforcement officers were able to make several controlled purchases of crack cocaine in quantities of 26.8, 28 and 125 grams. PSR ¶¶ 9-11.

On November 14, 2007, the FBI began a Title III wiretap investigation on Stevens's cellular telephone. PSR ¶ 13. The interceptions revealed that the conspirators' main sources of supply were defendants Gjuraj and Arbnor Gjini. PSR ¶ 27.

**2. The attempted murder of a federal witness**

The victim of Gjuraj's witness retaliation, referred to in Count Two of the Second Superseding Indictment as "John Doe" (hereinafter "the Victim"), was arrested in possession of 80 grams of crack cocaine and began cooperating with the government thereafter. PSR ¶ 15.

After the Victim identified Gjuraj as his supplier, Gjuraj was arrested in possession of approximately 125 grams of cocaine base. PSR ¶ 15. Gjuraj posted bond, and upon his release, went to co-conspirator Richard Davis's home and told Davis that he wanted to kill the Victim, or find someone to kill the Victim, because the Victim had set him up. PSR ¶ 16.

Davis arranged a meeting between Gjuraj and co-defendant Antonio Robinson. PSR ¶ 16. Gjuraj agreed to pay Robinson $1,000 and 100 grams of crack cocaine to kill the Victim. PSR ¶ 16. Gjuraj provided Robinson with

a .32 caliber gun to be used to commit the homicide. PSR ¶ 16.

Davis and Robinson located the Victim and Robinson shot him six times at close range in the chest, arm and hand. PSR ¶ 16. The shooting was witnessed by the Victim's daughter. PSR ¶ 16. The Victim, although severely and permanently injured, survived the shooting. PSR ¶ 30.

**3. The Hobbs Act robbery**

On February 16, 2005, Gjuraj and his brother-in-law drove to New Jersey to commit an armed robbery. PSR ¶ 29. Once they arrived in New Jersey, Gjuraj and his co-conspirator followed a 60-year old woman home from a grocery store. Gjuraj, whom the victim picked out of a lineup, pointed a handgun at the victim and told her to "[g]ive me your jewelry or I will shoot you." PSR ¶ 29. Gjuraj stole three pieces of jewelry and attempted to forcibly remove the victim's ring. PSR ¶¶ 29, 31.

**B. Gjuraj's guilty plea hearing**

On November 14, 2008, pursuant to a written plea agreement, GA43, Gjuraj pleaded guilty to Count Two of the Second Superseding Indictment charging him with retaliating against a witness, in violation of 18 U.S.C. §§ 1513(a)(1)(B), 1513(a)(2)(B), and 2, and Count Four of the Second Superseding Indictment charging him with conspiracy to distribute and to possess with intent to distribute 50 grams or more of cocaine base, in violation

of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A)(iii), and to a one-count Information charging him with Hobbs Act robbery, in violation of 18 U.S.C. § 1951. GA55.

As part of the plea agreement, Gjuraj stipulated to the following offense conduct:

> From in or about January 2007 to in or about February 2008, the defendant agreed with others named and not named in the Second Superseding Indictment to knowingly and intentionally distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base. The defendant acknowledges and stipulates that his conduct as a member of the narcotics conspiracy charged in Count Four, which includes the readily foreseeable conduct of other members of that conspiracy, involved at least 4.5 kilograms of a mixture and substance containing a detectable amount of cocaine base[.]
>
> Moreover, on December 24, 2007, defendant Gjuraj attempted to murder, or aided, abetted, induced or procured others named in the Second Superseding Indictment, to attempt to murder another individual with the intent to retaliate against that person for providing information to a law enforcement officer relating to the commission or possible commission of a narcotics trafficking offense. Defendant Gjuraj also procured a firearm for use in the commission of the offense with the intent and knowledge that it would be used to

> murder, or to attempt to murder, the victim. A firearm was discharged during the course of the offense and the victim sustained serious bodily injury.

GA54. The plea agreement also stipulated that Gjuraj's total offense level was 41 and that he fell within Criminal History Category I, thus carrying a range of imprisonment of 324 to 405 months, subject to a mandatory minimum term of imprisonment of 120 months. GA44, 47-48.

As described more fully below, at Gjuraj's guilty plea hearing, the district court erroneously informed Gjuraj that Count Two, the witness retaliation charge, carried a statutory maximum sentence of 30 years. GA61.

**C. Gjuraj's sentencing**

Gjuraj's Presentence Report recommended setting his offense level at 41 pursuant to the following calculations, which mirrored those set forth in the plea agreement:

On the witness retaliation charge, the PSR calculated the base offense level to be 33. PSR ¶35. Specifically, the PSR noted that although the offense of conviction was retaliation against a witness in violation of 18 U.S.C. § 1513, which is covered by U.S.S.G. § 2J1.2, the appropriate guideline was § 2A2.1(a)(1), for attempted murder, because, under § 1B1.2, the plea agreement contained a stipulation that established a more serious offense than the offense of conviction. PSR ¶35. The PSR then added two points under § 2A2.1(b)(1)(B) because the

victim sustained serious bodily injury and four levels under § 2A2.1(b)(2) because the offense involved the offer of something of pecuniary value for the murder. PSR ¶¶ 36-37. The adjusted offense level for Count Two was therefore 39. PSR ¶ 41.

On the drug charge, the PSR aggregated the total quantity of drugs involved the offense – 56 kilograms of cocaine base – to yield a base offense level of 38 under § 2D1.1(c)(1). PSR ¶ 42. The PSR then added two levels for possessing a firearm in connection with the offense, pursuant to § 2D1.1(b)(1). PSR ¶ 43. The PSR then added two levels because Gjuraj was a leader of the conspiracy, pursuant to 3B1.1(c). PSR ¶ 44. This resulted in an adjusted offense level of 42. PSR ¶ 47.

On the Hobbs Act robbery charge, the PSR established a base offense level of 20 under § 2B3.1(a). PSR ¶ 48. The PSR then added five levels for brandishing a firearm during the robbery, pursuant to § 2B3.1(b)(2)(C). PSR ¶ 49. This resulted in an adjusted offense level of 25. PSR ¶ 53.

The PSR then grouped the charges, calculating a total of 2 units. PSR ¶ 57. The PSR added two points to the highest adjusted offense level of 42, and arrived at a combined offense level of 44. PSR ¶¶ 58-60. The PSR then deducted three levels for acceptance of responsibility pursuant to § 3E1.1. PSR ¶ 61.

According to the PSR, Gjuraj fell within Criminal History Category I, PSR ¶ 67, which resulted in a range of

imprisonment of 324 to 405 months, PSR ¶ 87. The PSR indicated (incorrectly, as described more fully below) that Gjuraj faced a statutory maximum sentences of 30 years on Count Two, the witness retaliation charge. PSR ¶ 86.

At a sentencing hearing on August 5, 2009, the district court confirmed that Gjuraj had reviewed the PSR and had had an opportunity to discuss it with counsel. GSA70. Both defense counsel and the prosecutor indicated that they did not object to the facts in the PSR. GSA70, 71.

The court proceeded to adopt the factual statements in the PSR, GSA71, and the PSR's guideline analysis and calculations, resulting in a total offense level of 41, a Criminal History Category of I, and range of 324 to 405 months, GSA74-76. Gjuraj concurred in these calculations. GSA77. Gjuraj raised no objection to the parties mistaken understanding that the witness retaliation charge carried a statutory maximum of 30 years. GSA72.

After the parties addressed the court, the district court sentenced Gjuraj principally to 320 months on each of Counts Two and Four, to run concurrently with a 240-month sentence on the Hobbs Act Information. GSA168.

**D. Simms's proceedings**

On July 6, 2005, Simms was arrested by state authorities for possession of narcotics. Simms's Presentence Report ("Simms PSR") ¶ 26. In connection with this arrest, on April 25, 2006, Simms pleaded guilty in state court to sale of a hallucinogen or narcotic and was

sentenced to five years' imprisonment, suspended, and five years' probation. Simms PSR ¶ 26.

On May 29, 2007, while on probation for the above charge, Simms was arrested by state authorities for possession of marijuana. Simms PSR ¶ 27.

On September 28, 2007, while still on probation for the April 2006 conviction and on pretrial release for the possession of marijuana charge, Simms was arrested by state authorities and charged with sale of narcotics. Simms PSR ¶ 28.

On February 14, 2008, while the above charges were pending, Simms was indicted for his participation in the Gjuraj narcotics conspiracy. A3. In addition to the conspiracy count, he was charged with one count of possession with intent to distribute over five grams of crack cocaine. A17, 20. On February 20, 2008, Simms was arrested by the FBI on the federal indictment. A3. Simms has been in federal custody since the time of his federal arrest. Simms PSR ¶ 46.

On July 24, 2008, Simms was transported to state court in order to answer charges related to his May 29, 2007, and September 28, 2007, arrests, and the probation violation stemming from his April 25, 2006 conviction. Simms PSR ¶¶ 26-28. At that time, Simms pled guilty to all three charges. Simms PSR ¶¶ 26-28. The state court imposed one year imprisonment for the May 29, 2007, possession of marijuana, to run concurrently with the five year sentence imposed for the September 28, 2007, sale of

narcotics. Simms PSR ¶¶ 27-28. The state court also imposed a five year prison sentence that had been previously suspended on the April 2006 conviction, to run concurrently to the above two sentences. Simms PSR ¶ 26.

On October 29, 2008, Simms pleaded guilty to a count in the federal indictment charging him with of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). A9, 36. On April 14, 2009, the district court sentenced Simms to 108 months' imprisonment and four years' supervised release. A11.

At Simms's sentencing hearing, the district court calculated the applicable Guidelines range as 140 to 175 months, based on an adjusted offense level of 29 and a Criminal History Category of V. Simms PSR ¶ 55; GSA257. The parties agreed with these calculations, GSA257-58, although the defendant noted that this range differed from the stipulated plea agreement, which set forth a range of 108 to 135 months, A39, because the PSR increased the Criminal History Category based on the defendant's state court convictions that occurred after his federal arrest, GSA259.

As to the state convictions, the government noted that the underlying offenses were unrelated to the charges to which Simms pleaded guilty in the federal case. GSA259. The government also noted that Simms had been offered a "package deal" to include his federal and state cases, but that Simms rejected that deal "with full knowledge that he was going to therefore get more time and it was going to

be consecutive rather than concurrent time." GSA260-61. The government advised the district court that, at the time of Simms's July 24, 2008 state sentencing, the state court judge noted on the record that not only was he constrained from recommending that Simms's state sentences run concurrent with any later imposed federal sentence, but that he was specifically declining to make such a recommendation. GSA261-62.

The district court inquired whether the defendant had served any time in state custody on his state convictions, and both counsel agreed that he had not. GSA263. The district court noted that the state court judge had told Simms that he was "on [his] own with the federal case," but that Simms might be able to go back to state court after sentencing in federal court and "argue that [the state court judge] should make that sentence concurrent, not consecutive." GSA265. At the conclusion of Simms's sentencing hearing, the district court made the following comments regarding the defendant's state sentences:

> I think I'm going to leave you to your own devices with respect to those state claims. I don't know that I can do anything. Obviously, you are free to argue to the state system or to [the state court judge] that whatever sentence he imposed should run concurrently with my sentence, but I don't know any of the facts regarding the cases or anything. I'm not sure that there's anything that I can do on that, okay, sir?

GSA300.

## Summary of Argument

**Isni Gjuraj**:

I. Under plain-error review, Gjuraj is not entitled to a remand for the district court for re-sentencing on Count Two of the Second Superseding Indictment because the 320-month sentence imposed on that count runs concurrently to the 320-month sentence on Count Four, and so a remand on Count Two could not reduce the total effective sentence. This Court has repeatedly held that a defendant cannot carry his burden of establishing prejudice from a claimed sentencing error on one count where, as here, the overall sentence would remain unchanged due to a valid concurrent term of imprisonment on a separate count.

II. Gjuraj has not shown that the district court's mistaken statement during the Rule 11 colloquy that he faced a 30-year maximum, rather than a 20-year maximum, term of imprisonment on Count Two, affected his substantial rights. Specifically, Gjuraj has not shown, on the basis of record evidence, that if had been informed of the correct statutory maximum penalty, he would not have pleaded guilty.

III. Gjuraj's guilty plea bars any sufficiency challenge to the proof in support of his witness retaliation conviction. Accordingly, at this time, he may only challenge the sufficiency of the indictment, and on that ground, his argument also fails. On its face, the indictment

sufficiently alleges the witness provided information to federal officials.

IV. Gjuraj's guilty plea bars any sufficiency challenge to the proof of the interstate commerce nexus in support of his Hobbs Act robbery conviction, and the Information on its face sufficiently alleges the interstate commerce element. Additionally, although the Hobbs Act information lacked an explicit allegation that Gjuraj acted "knowingly" or "willfully," the requisite mental state was necessarily implied in the remaining allegations of the Information, which plainly and expressly charged Gjuraj with robbery.

V. Under plain-error review, Gjuraj's sentence was procedurally reasonable. The district court appropriately used Guideline § 2A2.1 in sentencing Gjuraj for the witness retaliation offense because his plea agreement contained a stipulation of offense conduct that established all the elements of attempted murder. Furthermore, the district court gave an appropriate weight to the Guidelines, sufficiently considered Gjuraj's personal circumstances, appropriately considered the impact on the victims, and recognized its ability to depart from the crack/powder ratio set forth in the Guidelines.

**Travis Simms:**

VI. At the time of Simms's sentencing, the federal court had primary jurisdiction, and therefore, the sentence the district court ordered must be served first. Because Simms has not started serving his state sentence, any

pronouncement made by the district court as to whether the federal sentence would be concurrent to the not-yet-running state sentence would have been an impermissible advisory opinion. Moreover, because Simms's state sentence had not started running as of the date of his federal sentencing, the district court lacked authority under § 3584 and § 5G1.3 to order a concurrent sentence.

VII. Simms's ineffective assistance claim fails because the record reveals that Simms received substantial benefits in exchange for pleading guilty and waiving his right to argue for a departure or non-Guidelines sentence. Simms did not suffer prejudice even if his attorney performed below an objective standard of reasonableness because the district court lacked the authority to make the federal sentence concurrent with the state sentence, and the district court gave a non-Guidelines sentence in any event.

## Argument[3]

### I. Plain-error review bars a limited remand for the district court to reconsider the 320-month sentence imposed on Count Two because it runs concurrently to a 320-month sentence on Count Four and thus any reduction would not change the total effective sentence.

#### A. Governing law and standard of review

On December 24, 2007, when Gjuraj committed the offense conduct underlying the witness retaliation charge in Count Two of the Superseding Indictment, the statutory maximum for that offense was 20 years. *See* 18 U.S.C. § 1513(a)(2)(B) (effective November 2, 2002 to January 6, 2008). At the time of the guilty plea, however, it had increased to 30 years. *See* 18 U.S.C. § 1513(a)(2)(B).

Because Gjuraj did not object to the sentence imposed on Count Two, however, his claim is reviewable only for plain error. *See* Fed. R. Crim. P. 52(b).

Under plain error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2)

---

[3] Both defendants argue that the appellate waivers in their respective plea agreements do not bar their arguments on appeal. For prudential reasons, the government is not seeking to enforce the appeal waiver against either defendant.

the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

**B. Discussion**

Gjuraj correctly notes that the parties (and the district court) operated under a misunderstanding that the statutory maximum for the witness retaliation charge in Count Two of the Second Superseding Indictment was 30, rather than 20, years, *see* 18 U.S.C. § 1513(a)(2)(B) (effective November 2, 2002 to January 6, 2008), and accordingly, that he was sentenced in excess of the statutory maximum

for his offense. Nevertheless, because he did not object to his sentence at the time, plain error review bars a remand for re-sentencing on that Count. Even if the district court were to reconsider its sentence on Count Two, Gjuraj would still face a valid, concurrent 320-month sentence on Count Four. Because his total effective sentence would remain unchanged, any error cannot have affected his substantial rights. Accordingly, he cannot satisfy the third or fourth prongs of plain-error analysis and a remand would be futile.

This argument is supported by a line of cases from *United States v. Rivera*, 282 F.3d 74 (2d Cir. 2000) (per curiam), to *United States v. Samas*, 561 F.3d 108 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009), providing that "an erroneous sentence on one count of a multiple-count conviction does not affect substantial rights where the total term of imprisonment remains unaffected . . . ." *United States v. Outen*, 286 F.3d 622, 640 (2d Cir. 2002); *see also United States v. Quinones*, 511 F.3d 289, 323 n.24 (2d Cir. 2007).

In *Rivera*, the defendant had been convicted and sentenced to life imprisonment on three counts, including (1) illegally possessing drugs, 21 U.S.C. § 841, (2) participating in a continuing criminal enterprise ("CCE"), 21 U.S.C. § 848, and (3) possessing a firearm in connection with a drug offense, 18 U.S.C. § 924(c). The defendant challenged his sentence on the grounds that the district court's findings about the quantity of drugs involved in the narcotics offense violated the Sixth Amendment, in light of *Apprendi v. New Jersey*, 530 U.S.

466 (2000). The Court rejected this contention, because the statutory maximum on the CCE count was life in prison, and so any judicial factfinding had not increased the maximum punishment to which the defendant was exposed. *Rivera*, 282 F.3d at 76-77.

The Court also rejected any claimed defects in the sentences on the drug and gun counts as "certainly harmless." *Id.* at 77. "Because [the defendant] could properly be sentenced to life imprisonment on the CCE count, a concurrent sentence on other counts is irrelevant to the time he will serve in prison, and we can think of no collateral consequences from such erroneous concurrent sentences that would justify vacating them." *Id.* at 77-78; *see also United States v. Friedman*, 300 F.3d 111, 128 (2d Cir. 2002) ("Because we have held that there is no basis to disturb his life sentence on [other] counts, however, his *Apprendi* claim related to his conviction for narcotics conspiracy is foreclosed by [*Rivera*].").

This Court reached a similar conclusion in *Outen*. There, the defendant had been convicted of two drug possession counts and one drug conspiracy count. The district court sentenced him to 60 months for each of the possession counts and 110 months for the conspiracy count. 286 F.3d at 639. The Court concluded that the conspiracy count carried a 60-month statutory maximum, and that the 110-month sentence therefore violated the Sixth Amendment. Nevertheless, resentencing was not warranted because his sentences would have been stacked to achieve the same overall punishment. *Id.* at 639-40; *see also United States v. McLean*, 287 F.3d 127, 135-37 (2d

Cir. 2002) (declining to remand or modify judgment where defendant failed to preserve *Apprendi* claim that sentence on each individual count exceed statutory maximum, because total effective sentence could have been imposed by running shorter sentences on each count consecutively); *United States v. Blount*, 291 F.3d 201, 213-14 (2d Cir. 2002) (same); *United States v. Feola*, 275 F.3d 216, 219-20 & n.1 (2d Cir. 2001) (per curiam).[4]

The principles from *Rivera* and *Outen* also guided this Court in *Quinones*. In that case, this Court decided not to grant a *Crosby* remand on several counts of conviction because the defendants faced a valid life sentence pursuant to 21 U.S.C. § 848. *See* 511 F.3d at 323 n.24 (applying plain-error analysis). "[A]ny resentencing on those counts would not change the fact that defendants will spend the rest of their lives imprisoned" on the remaining count. *Id.* The result in *Quinones* followed *a fortiori* from cases like *Outen*. In *Outen*, the Court affirmed notwithstanding an error that indisputably increased the sentence on one count of conviction. In *Quinones*, the Court affirmed notwithstanding a different error (mandatory application

---

[4] In light of *Booker*, a district court would no longer be required to run sentences consecutively to achieve the total punishment dictated by the Guidelines. Although this portion of *Outen* and related cases has been superseded, the Government cites these cases for the independent, and undisturbed, proposition that a sentencing error is not reversible "plain error" if it would not affect the validity of an equal or longer concurrent sentence on a separate count.

of the Guidelines) which may or may not have had an impact on the sentence for a count of conviction.

Most recently, this Court applied these principles in *Samas*. The defendant in *Samas* sought a remand pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), because the sentences on three of his counts of conviction were imposed by reference to the quantity-based cocaine-base guidelines in U.S.S.G. § 2D1.1, and, according to the defendant, the district court might not have appreciated its discretion to depart from the sentencing guidelines based on the powder to crack cocaine disparity. *Samas*, 561 F.3d at 111. Citing *Outen*, this Court held that, even if the district court erroneously imposed sentences of 151 months on the challenged counts, the defendant could not show "(as he must for plain error review) that the error affected his substantial rights, because those sentences are to run concurrently with the mandatory minimum sentence of 240 months on Count Four." *Id.*

In light of the unbroken line of cases from *Rivera* to *Samas*, Gjuraj cannot satisfy the requisites of plain-error review. He cannot establish that his substantial rights were violated because a remand on Count Two cannot reduce his total effective sentence of 320 months' imprisonment, based on the valid concurrent term of imprisonment on Count Four. Accordingly, a remand is inappropriate, and his sentence should be affirmed.

## II. The district court's error in informing Gjuraj at his plea colloquy that his maximum term of imprisonment on Count Two was 30, rather than 20, years did not affect his substantial rights.

### A. Governing law and standard of review

Under Rule 11 of the Federal Rules of Criminal Procedure, before a district court may accept a guilty plea, it must inform the defendant in open court of the nature of the charges and the consequences of pleading guilty, including, as relevant here, the maximum penalties applicable to the relevant offense. Fed. R. Crim. P. 11(b)(1)(H); *Zhang v. United States*, 506 F.3d 162, 167 (2d Cir. 2007). Rule 11 also provides that the court must determine that the plea is voluntary and not induced by force, threats or promises apart from a plea agreement. Fed. R. Crim. P. 11(b)(2).

Where, as here, a defendant challenges the validity of his guilty plea for the first time on appeal, this Court reviews for plain error. *See United States v. Dominguez Benitez*, 542 U.S. 74, 80-84 (2004); *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005); *see also* Part I.A., *supra* (setting out plain error standard of review).

In *Dominguez Benitez*, the Supreme Court held that a defendant attempting to obtain relief for an unpreserved claim of Rule 11 error under the substantial rights prong of the plain error test,"must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. Simply put, aggrieved defendants must

"satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is 'sufficient to undermine confidence in the outcome' of the proceeding." *Id*. (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

**B. Discussion**

Gjuraj argues that his plea to Count Two, the witness retaliation charge, was not knowing and voluntary because he was misinformed as to the relevant statutory maximum. Pro Se Br. 13. Because Gjuraj raises this issue for the first time on appeal, this Court reviews for plain error. *Vaval*, 404 F.3d at 151. Gjuraj cannot satisfy plain error review because he cannot show "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.

This Court's decision in *United States v. Westcott*, 159 F.3d 107 (2d Cir. 1998), is instructive. In that case, the defendant was incorrectly informed at his plea hearing that the applicable maximum term of imprisonment was fifteen years; the actual maximum term was five years. This Court observed that the rule requiring notice of the maximum penalties usually "acts to prevent the accused from being advised of the harshest possible penalty that awaits him if he pleads guilty, only to discover upon sentencing that his actual punishment exceeds that upon which he based his decision to forgo his right to trial." *Id*. at 113. This Court noted that "we are *less troubled* where as here the defendant at his own instance finds himself in a *somewhat better position* than he expected from the allegedly

mistaken allocution, than where a guilty plea puts the defendant in a worse position than the court previously told the defendant was possible." *Id*. (emphasis added). Because "[t]he wrong done to the happily surprised defendant is ordinarily less severe" in such a situation, the Court was "particularly comfortable in requiring . . . [t]he defendant [to] demonstrate that the misinformation mattered." *Id*.

Moreover, the *Westcott* Court made clear that in determining whether an error in the Rule 11 colloquy prejudiced the defendant, the focus is on record evidence, not on "speculative assumptions about the defendant's state of mind." *Id.* at 113 (internal quotations omitted).

Here, as in *Wescott*, Gjuraj can point to nothing in the record to suggest that his decision to plead guilty was influenced in any way by the statutory maximum term of imprisonment. *Id.* at 113-14; *see also id*. at 113 (citing *Long v. United States*, 883 F.2d 966, 968-69 (11th Cir. 1989) (per curiam) (where defendant pleaded guilty having been advised of 20-year maximum penalty, when actual maximum was ten years, mistaken advice could not have induced guilty plea)). In short, Gjuraj cannot demonstrate, as he must, "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.

Gjuraj has not identified *any* facts in the record indicating that he would not have pleaded guilty if he had known that the statutory maximum on Count Two was 20, rather than, 30 years. Accordingly, he has failed to meet

his burden of establishing plain error in the Rule 11 colloquy.

In any event, there is ample evidence in the record establishing that the government had a very strong case against Gjuraj, GSA58 (government's description of evidence in support of witness retaliation charge, including: testimony of victim, cooperating witnesses' testimony that Gjuraj coordinated murder of victim in retaliation for victim's providing information on Gjuraj's November 27 drug sale, and recorded telephone calls containing discussion of offense between Gjuraj and others). *See Dominguez Benitez*, 542 U.S. at 85 (in assessing whether defendant would have pleaded guilty even if he had he known of Rule 11 error, court may consider the strength of government's case and any possible defenses that appear from the record). Furthermore, Gjuraj can hardly claim that he would not have pleaded guilty to the witness retaliation charge upon learning that the maximum was merely 20 years, when he pleaded guilty at the same time to the Hobbs Act robbery Information, which had a maximum of 20 years, and he did not go to trial on that charge. GA84.

Nor do the cases cited by Gjuraj support his argument. In *United States v. Harrington*, 354 F.3d 178 (2d Cir. 2003), the Court found that misinformation as to a *mandatory minimum* sentence rendered a plea unknowing and involuntary. *Id*. at 185-86 ("Because a mandatory minimum sentence represents such a strong inducement to plea, where a defendant has been informed, as Main was, that he is facing such a sentence, that information is

presumptively significant in the defendant's decision-making."). And in *United States v. Showerman*, 68 F.3d 1524, 1528 (2d Cir. 1995), this Court held that a district court's failure to notify the defendant that it could impose restitution, when followed by an order of restitution, was not harmless error. These cases, about errors in information about mandatory minimums and restitution obligations, and which are necessarily tied to the facts in the respective records, say absolutely nothing about whether Gjuraj has demonstrated that an overstatement of a maximum penalty impacted his substantial rights.

In sum, Gjuraj has not established that, but for his misapprehension of the maximum penalty he faced on Count Two, he would not have entered the guilty plea, and therefore, his challenge to his plea fails. *See Vaval*, 404 F.3d at 151.

## III. The witness retaliation count was properly charged.

### A. Governing law and standard of review

#### 1. The witness retaliation statute

The witness retaliation statute, 18 U.S.C. § 1513, provides for the punishment of anyone

> [who] kills or attempts to kill another person with intent to retaliate against any person for . . . providing to a law enforcement officer any

> information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings[.]

§ 1513(a)(1)(B). "Law enforcement officer" is defined in the statute as "an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an advisor or consultant . . . authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4).

**2. Standards governing post-plea challenges to an indictment and prosecution**

It is well-established that a guilty plea "waives all challenges to prosecution except those going to the court's jurisdiction." *United States v. Lasaga*, 328 F.3d 61, 63 (2d Cir. 2003); *United States v. Kumar*, 617 F.3d 612, 620 (2d Cir. 2010). The alleged jurisdictional defect must "go to the court's power to entertain the prosecution" not to "the government's ability to prove its case." *Hayle v. United States*, 815 F.2d 879, 882 (2d Cir. 1987); *see Cotton*, 535 U.S. at 630 (defining "jurisdiction" as "the courts' statutory or constitutional *power* to adjudicate the case") (internal quotations omitted). "If the indictment alleges all of the statutory elements of a federal offense and the defendant's contention is that in fact certain of those elements are lacking, the challenge goes to the merits of the prosecution, not to the jurisdiction of the court to

entertain the case or to punish the defendant if all of the alleged elements are proven." *Hayle*, 815 F.2d at 882.

Accordingly, where a defendant pleads guilty, his or her ability to challenge the court's "jurisdiction" is limited to circumstances where "the face of the indictment discloses that the count or counts to which he pleaded guilty failed to charge a federal offense." *Id*. at 881; *see also United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997) (where defendant pleads guilty, this Court "will not entertain a challenge to the sufficiency of the evidence"); *United States v. Weinberg*, 852 F.2d 681, 684 (2d Cir. 1988) ("a challenge to the factual sufficiency of the government's case" is waived by a guilty plea).

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an "indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." This Court has observed that an indictment is valid if it tracks the language of the statute, *United States v. Frias*, 521 F.3d 229, 235 (2d Cir. 2008), and "'charges a crime with sufficient precision to inform the defendant of the charges he must meet and with enough detail that he may plead double jeopardy in a future prosecution based on the same set of events.'" *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (quoting *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992)). Moreover, an indictment "must be read to include facts which are necessarily implied by the specific allegations made." *Stavroulakis*, 952 F.2d at 693 (internal quotation marks omitted). "Convictions are no longer reversed because of minor and

technical deficiencies which did not prejudice the accused." *United States v. Goodwin*, 141 F.3d 394, 400 (2d Cir. 1997) (internal quotation marks omitted).

"The scrutiny given to an indictment depends, in part, on the timing of a defendant's objection to that indictment." *United States v. De La Pava*, 268 F.3d 157, 162 (2d Cir. 2001). "Where, for example, a defendant raises an objection after a verdict has been rendered, we have held that an indictment should be interpreted liberally, in favor of sufficiency." *Id*. "[T]he indictment will be deemed sufficient unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted." *United States v. Orena*, 32 F.3d 704, 714 (2d Cir. 1994) (internal quotation marks omitted).

**B. Discussion**

Gjuraj argues that the indictment's witness retaliation charge is "jurisdictionally defective," but even a cursory reading of his argument reveals that he is attempting to challenge the sufficiency of the evidence with respect to the nature of the officer to whom the witness provided information. Pro Se Br. 7-10. Gjuraj argues, citing *United States v. Draper*, 553 F.3d 174 (2d Cir. 2009), that "[t]here is no evidence to show that, prior to being shot, [the Victim] had any interaction with federal authorities or passed on any information to someone he believed would inform federal authorities." Pro Se Br. 8.

Gjuraj's argument is therefore not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case, here authorized by 18 U.S.C. § 3231. Even if the government fails to establish that the witness provided information to *federal* authorities, the district court is not deprived of jurisdiction to hear the case. *See Hayle*, 815 F.2d at 882 (finding that similar challenge, "absent the plea of guilty, would have created an issue of fact for trial; but there is no jurisdictional flaw apparent from the face of the indictment"). Therefore, Gjuraj's challenge is a sufficiency one. And as to the sufficiency argument, Gjuraj's guilty plea bars this challenge. *Id*. ("[The defendant's] plea waived any contention that the government would be unable to prove that the funds embezzled were moneys of the United States.").

Gjuraj is thus limited to challenging the face of the indictment to which he pleaded guilty. Because he is making this claim belatedly, "the indictment will be deemed sufficient unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted." *Orena*, 32 F.3d at 714 (internal quotation marks omitted).

Count Two alleges, in relevant part:

> On or about December 24, 2007, in the District of Connecticut, [the defendant and named others] . . . , did knowingly attempt to murder another person, to wit: John Doe, whose identity is known to the Grand Jury, with intent to retaliate against

> such person for providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense, namely narcotics trafficking.

GA26. Count Two tracks the language of the statute and alleges that the witness provided information to a "law enforcement officer." *See* 18 U.S.C. § 1513(a)(1)(B). Because § 1515 defines "law enforcement officer" as a federal official, *see* § 1515(a)(4), the indictment on its face alleged, in accordance with *Draper*, that Gjuraj retaliated against a witness who provided information to a federal official.

Though *Draper* requires the government to prove that the law enforcement officers were federal agents at trial, and the district court to charge the jury accordingly, 553 F.3d at 180-83, the government did not have to expand upon the definition of "law enforcement officer" in the indictment. *See United States v. Maggitt*, 784 F.2d 590, 598-99 (5th Cir. 1986) ("That the indictment failed to expressly include the statutory definition of a 'law enforcement officer' does not render the indictment insufficient or inadequate to serve its function."). Construing the indictment liberally in light of the absence of an objection to it in the district court, Gjuraj was fairly apprised that the government was charging him with engaging retaliating against a witness who provided information to federal authorities about the commission of a federal offense.

Furthermore, this Court has routinely rejected untimely challenges to indictments, even where such indictments omit allegations of a required element of the offense. *See, e.g.*, *United States v. Wydermyer*, 51 F.3d 319, 325-26 (2d Cir. 1995) (rejecting untimely challenge to money laundering indictment despite absence of express *mens rea* allegation and failure to allege effect on interstate commerce); *Stavroulakis*, 952 F.2d at 694-95 (despite absence of express allegation in bank fraud indictment of scheme to defraud a bank, "[c]ommon sense dictates that by charging a scheme to traffic in stolen, blank checks, the indictment accused defendant of engaging in a course of intentionally deceptive conduct directed at the drawee bank").

In sum, Gjuraj's untimely challenge to his indictment fails because, read liberally, Count Two sufficiently alleges the "federal official" element on its face.

## IV. The Hobbs Act count was properly charged.

As to his conviction on the Information charging a Hobbs Act robbery, Gjuraj argues that (1) there was insufficient proof as to the interstate commerce element, Pro Se Br. 21-24, and (2) the information failed to properly charge *mens rea*, Pro Se Br. 24-26.

### A. Governing law and standard of review

The Hobbs Act provides in part that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

by robbery or extortion or attempts or conspires so to do" shall be subject to federal criminal prosecution. 18 U.S.C. § 1951(a). The statute defines the term "robbery" in pertinent part as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property . . . ." 18 U.S.C. § 1951(b)(1).

The relevant law governing post-plea challenges to an indictment and prosecution is set forth in Part III.A., above. The law governing plain error review is set forth in Part I.A., above.

### B. Discussion

#### 1. Gjuraj's guilty plea waives his challenge to the sufficiency of the proof as to the interstate commerce element.

Just as his challenge to the witness retaliation charge, although Gjuraj's argument about the Hobbs Act charge is framed as a challenge to the district court's "jurisdiction," he is in effect challenging the sufficiency of the evidence on the interstate commerce element. Gjuraj's argument is therefore not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case. *See Hayle*, 815 F.2d at 882; *see also United States v. Turner*, 272 F.3d 380, 390 (6th Cir. 2001) ("Although the Hobbs Act's interstate commerce element is commonly referred to as a 'jurisdictional element,' the failure of the

government to prove a nexus between the crime and interstate commerce is not jurisdictional in a sense that it deprives the district court of subject matter jurisdiction.").

Gjuraj is thus limited to challenging the face of the charging instrument to which he pleaded guilty. The Information alleges, in relevant part:

> On or about February 16, 2005, in the District of New Jersey, [the defendant] did unlawfully obstruct, delay and affect commerce, and the movement of articles and commodities in commerce, by robbery, in that the defendant did unlawfully take and obtain personal property, that is, jewelry, from the person and presence of Sandra Grove, against her will by means of actual and threatened force, violence and fear of injury to her person.

GA41-42. Gjuraj does not argue any legal infirmity as to the face of the Hobbs Act Information. Nor could he. The Information on its face alleges that his actions obstructed, delayed, and affected "commerce" and the movement of articles and commodities in "commerce." GA41.

Gjuraj merely argues that the *proof* of interstate commerce was insufficient. Pro Se Br. 21-24. This sufficiency argument is precluded by his guilty plea, however. *Hayle*, 815 F.2d at 882 ("[The defendant's] plea waived any contention that the government would be unable to prove that the funds embezzled were moneys of the United States . . . .").

Furthermore, Gjuraj admitted at his plea allocution that the interstate element existed. He answered "yes" to the questions of whether he and his co-conspirator traveled to New Jersey "with the intent and knowledge that a robbery was going to be committed" and that following the robbery, he and the co-conspirator went to New York to the Diamond District to dispose of the jewelry stolen from the robbery. GA75-76. Gjuraj also stated that he took no issue with the government's description of the evidence it would have presented at trial as to the charges to which he pleaded guilty, which included reference to the interstate commerce element. GA78.

Accordingly, Gjuraj's challenge to his Hobbs Act conviction on this ground should be rejected.

**2. The Hobbs Act Information adequately alleged the required mental state.**

Gjuraj also argues, for the first time on appeal, that the Hobbs Act Information does not allege the requisite *mens rea* element. Pro Se Br. 24. The Court should reject this argument. Under plain error review, and the liberal construction principles that apply to review of an untimely challenge to an indictment, the Information more than adequately alleges the requisite mental state.[5]

---

[5] This very issue has been resolved by this Court in a summary order, *United States v. Tobias*, 33 Fed. Appx. 547, 549 (2d Cir. 2002).

As noted above, if a defendant fails to raise a timely objection to the sufficiency of an indictment, this Court "interpret[s] the indictment liberally in favor of sufficiency, absent any prejudice to the defendant." *Wydermyer*, 51 F.3d at 324. Here, Gjuraj makes no claim of prejudice. Indeed, he cannot make such a claim; Gjuraj *admitted* the requisite mental state during his plea colloquy. As to the Hobbs Act robbery, Gjuraj stated that he "drove a car knowing that there was going to be a robbery taking place." GA 73. He also answered "yes" to the questions of whether he and his co-conspirator traveled to New Jersey "with the intent and knowledge that a robbery was going to be committed" and "robbed" a woman at gunpoint and took her jewelry. GA75.

Apart from the absence of prejudice, the Information itself adequately charged the required mental state. The Information properly tracked the language of the statute, which does not expressly impose a "knowing" or "willful" requirement. GA41-42. Additionally, the Information alleged that Gjuraj committed a "robbery," which term necessarily implies knowing conduct. The term "robbery," as defined by the statute, requires that Gjuraj must "unlawfully" take or obtain the property of another "against the will" of that person through the threat of force or violence, which necessarily implies knowing and willful conduct.

This case is therefore indistinguishable from *United States v. Santeramo*, 45 F.3d 622, 624 (2d Cir. 1995) (per curiam), in which the Court considered a challenge to the sufficiency of an indictment charging a defendant with

using or carrying a firearm during or in relation to the commission of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). The indictment in *Santeramo* tracked the language of Section 924(c), which does not expressly impose a "knowing" requirement. Although the Court concluded that such knowledge was implicitly an element of the offense, it rejected the argument that the term "knowingly" must be expressly alleged in the indictment. *Id.* at 624. It was sufficient, this Court held, that the indictment alleged that the firearm was possessed "during and in relation" to another offense. *Id.* This language "fairly import[ed] the knowledge requirement of section 924(c)," because "clearly, a person cannot have possession or control of a firearm and allow the firearm to play a role in the crime unless the person knew of the firearm's existence." *Id*. (internal quotation marks omitted). Similarly, here, an armed robbery does not occur unintentionally, negligently, or recklessly. It occurs by knowing and willful design to deprive another person of property through the use or threatened use of force or violence.

Therefore, the Information adequately alleged the required *mens rea*, even by reference to the more demanding standards that would apply had Gjuraj raised a timely challenge to the indictment. *A fortiori*, under liberal construction principles applicable to an untimely challenge, the Information more than adequately alleged the required culpable mental state to sustain Gjuraj's conviction.

Gjuraj's reliance on *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999), is misplaced. There, the Ninth Circuit reversed a defendant's Hobbs Act conviction on the ground that "[t]he indictment charges [the defendant] only with 'unlawfully' affecting commerce by the 'wrongful' use of force." *Id.* at 1179. By contrast, the Information in this case did not merely allege an unlawful use of force; rather, it affirmatively alleged and described a robbery from which the requisite *mens rea* is necessarily implied. Furthermore, the Ninth Circuit emphasized that *Du Bo* involved a timely pre-trial challenge to the indictment and expressly limited its holding to "cases where a defendant's challenge is timely." *Id.* at 1180 n.3.

Accordingly, Gjuraj has failed to show any error at all, let alone plain error: the text of the Hobbs Act does not expressly include a "knowing" or "willful" requirement, and the Information properly tracked the language of the statute, necessarily implying the requisite mental state to support the charge.

Finally, as to the third and fourth prongs of "plain error" review, Gjuraj has neither shown prejudice nor that the fairness and integrity of judicial proceedings would be undermined from an affirmance of the Hobbs Act conviction. Gjuraj's conviction was based on his own admissions of his guilt, as well as an identification of Gjuraj by his victim. On this record, there can be no violation of his substantial rights.

## V. Gjuraj's sentencing arguments are without merit.

### A. Governing law and standard of review

At sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall v. United States*, 552 U.S. 38, 49-50 (2007). This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). "A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding

of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence, and must include 'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

After reviewing for procedural error, this Court reviews the sentence for substantive reasonableness under a "deferential abuse-of-discretion standard." *Cavera*, 550 F.3d at 189. The Court "will not substitute [its] own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." *Id*. (internal quotation marks omitted).

When a defendant fails to preserve an objection to the procedural reasonableness of a sentence, this Court reviews for plain error. *See United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008). The Court has not yet decided whether the plain error standard applies when a defendant fails to preserve an objection to the substantive reasonableness of a sentence. *See Verkhoglyad*, 516 F.3d at 134.

The governing law on plain error is set forth above in part I.A.

## B. Discussion

### 1. The district court used the correct guideline in calculating the applicable range.

Gjuraj argues that the district court used the incorrect Guideline in sentencing him on Count Two of the Second Superseding Indictment, the witness retaliation charge. Pro Se Br. 16. Gjuraj waived this argument, however, when he stipulated to this Guidelines calculation in his plea agreement, GA47-48, and agreed to this calculation at sentencing, GSA77. *See United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009) (holding that a defendant's express agreement that a jury instruction was satisfactory waived any challenge to that instruction on appeal). But even if this Court were to look beyond his waiver, it should review for plain error because, at a minimum, Gjuraj did not raise this issue below. *See Verkhoglyad*, 516 F.3d at 134.

And here, there was no error, plain or otherwise, because the district court faithfully applied the guidelines. United States Sentencing Guideline § 1B1.2(a) requires a district court to use the guideline applicable to a defendant's actual conduct, rather than the offense of conviction, whenever the defendant stipulates in a plea agreement to conduct that "establishes a more serious offense than the offense of conviction." As applied to this case, this guideline required the district court to apply the guideline applicable to the "more serious" conduct described in Gjuraj's stipulation of offense conduct, rather

than the guideline applicable to Gjuraj's offense of conviction.

Gjuraj was convicted of witness retaliation under 18 U.S.C. § 1513, and as he notes, Pro Se Br. 18, the Statutory Index for the 2008 Guidelines identifies U.S.S.G. § 2J1.2 as the appropriate guideline for that offense. Gjuraj fails to acknowledge, however, that this is not the end of the inquiry. Under § 1B1.2(a), the guideline applicable to the offense of conviction does not control if the stipulation of offense conduct establishes, as here, a more serious offense.

The stipulation of offense conduct signed by Gjuraj establishes a more serious offense than the offense of conviction, namely, attempted murder. *See* GA54. Thus, the stipulation provided that he "attempted to murder, or aided, abetted, induced or procured others named in the Second Superseding Indictment, to attempt to murder another individual." GA54. The stipulation also admitted that he "procured a firearm for use in the commission of the offense with the intent and knowledge that it would be used to murder, or to attempt to murder, the victim" and that "[a] firearm was discharged during the course of the offense and the victim sustained serious bodily injury." GA54.

Because Gjuraj expressly agreed with the statement of facts set forth in the stipulation of offense conduct, which established all the elements of attempted murder, his plea of guilty "contain[ed] a stipulation that specifically establishe[d] a more serious offense than the offense of

conviction." § 1B1.2(a). Accordingly, as directed by that guideline, the district court properly used U.S.S.G. § 2A2.1, the guideline applicable to the offense of attempted murder. GA86, PSR ¶ 35.

In short, the district court applied the proper guideline and there was no error.

**2. The district court adequately considered the relevant § 3553(a) factors**.

Gjuraj argues that the district court gave undue weight to the Guidelines, Pro Se Br. 28, failed to consider certain § 3553(a) factors, specifically, Gjuraj's personal characteristics, Pro Se Br. 29-31, impermissibly considered the impact on the victims, Pro Se Br. 31, and failed to recognize its ability to depart from the crack/powder ratio set forth in the Guidelines, Pro Se Br. 32. None of these arguments have any merit or establish any error, let alone plain error. *See Verkhoglyad*, 516 F.3d at 134.

The record reflects that the district court well understood its authority to sentence outside the Guideline range and did not give undue weight or presumption to the Guidelines. The district court correctly used the Guideline range as "'a benchmark or a point of reference or departure.'" *Fernandez*, 443 F.3d at 28 (quoting *United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2004)). Indeed, the district court specifically quoted *Kimbrough v. United States*, 552 U.S. 85 (2007), in describing its obligation to "'treat the guidelines as the starting point and

as the initial benchmark,'" and *Gall v. United States* in stating that the court "'may not presume that the guideline range is reasonable." GSA73. The district court also noted its understanding that the "guidelines ranges are merely recommended ranges, they're not hard and fast." GSA80. The district court also noted that "pre-*Booker*" arriving at a sufficient sentence "was a mathematical exercise, but now it is a matter of judgment and common sense." GSA162.

The district court also expressly considered and rejected Gjuraj's argument for a non-Guidelines sentence of 20 years. GSA167. Moreover, the district court found that a sentence *four months below* the applicable range was appropriate. GSA168.

As to Gjuraj's claim that the court failed to adequately consider his personal characteristics, this argument is refuted by the record. At the outset of the hearing, the court explicitly described its obligation to consider the § 3553(a) factors and noted that it was required to base its sentence on "an individualized assessment of the appropriate sentence for this particular defendant." GSA74. The district court also later described all of the § 3553(a) factors, GSA162-64, including its requirement to consider "[the defendant's] background and circumstances . . . [which] we've heard a lot about," GSA162. The district court also noted that it had read the letters submitted on behalf of Gjuraj, along with the parties' memoranda, GSA162, both of which discussed Gjuraj's personal circumstances and requests for departure extensively, GSA185, 229. Additionally, the district court

heard the defendant's argument as to a departure or non-guidelines sentence on the basis of Gjuraj's family history, gambling and substance abuse, and physical conditions. GSA78.

Furthermore, in determining the appropriate sentence, the district court's comments reflect its consideration of Gjuraj's personal characteristics. The court specifically noted its consideration of Gjuraj's connection with his family, that Gjuraj had shown remorse, that Gjuraj was articulate and had a "future," GSA165, and that the court accepted "[the defendant's] statement that [he] turned [his] life around," GSA163. The court also specifically noted "the abuse [the defendant] suffered as a child." GSA166. The court also specifically stated that it considered Gjuraj's "physical ailments" and found that they did not warrant a departure under the Guidelines, which were non-binding anyway, GSA79-80, but stated that the court would "take all these factors into account in deciding what's the appropriate sentence for [Gjuraj]," GA 79. Accordingly, the record reflects that the district court fully and adequately considered Gjuraj's personal circumstances in arriving at the appropriate sentence.

Contrary to Gjuraj's next argument, the district court was fully entitled to consider the impact on Gjuraj's victims in sentencing Gjuraj. In fact, the district court was required to consider victim impact in considering the first of the § 3553(a) factors – "the nature and circumstances of the offense." The district court did not depart upwardly on the basis of the victim impact, but merely noted the impact on the victims in its discussion of the relevant facts.

GSA147-48. This is consistent with its obligation to consider the nature and circumstances of the offense under § 3553(a).

Finally, the record reflects that the district court understood its ability to depart from the 100 to 1 crack/powder ratio in the Guidelines. The court gave a lengthy statement as to its discretion and described that it did not "feel that the 100 to 1 ratio is quite right. There's no reason really, frankly, to treat crack a lot differently than heroin or other drugs." GSA80. The district court stated that it would not "fixat[e] on a particular ratio," but rather would "take into account the fact that 100 to 1 doesn't make a whole lot of sense to me and to many other people," and would "stay flexible and try to focus in on the appropriate sentence for that particular defendant, considering all of the facts involved in the defendant's case and all of the factors under Section 3553(a)." GSA80-81. That the district court ultimately imposed a sentence that was only four months below the sentence recommended by the Guidelines using a 100 to 1 ratio does not mean that the district court did not appreciate its discretion to depart from the ratio. The district court's lengthy discussion above amply indicates that it understood its discretion.

In light of the foregoing, the district court did not commit any procedural error, let alone plain error, in sentencing Gjuraj, and his sentence should be affirmed.

## VI. The district court properly declined to order Simms's federal sentence to run concurrent to undischarged state sentences that were imposed while Simms was under federal primary jurisdiction.

### A. Governing law and standard of review

This Court reviews questions of statutory interpretation, and of Guidelines interpretation, *de novo*. *See United States v. Douglas*, — F.3d —, 2010 WL 4723209, at *3 (2d Cir. Nov. 23, 2010) (per curiam); *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

"In the context of successive criminal prosecutions by different sovereignties [the] chief rule which preserves our two systems of courts from actual conflict of jurisdiction means that the sovereignty which first arrests the individual acquires the right to prior and exclusive jurisdiction over him, and this plenary jurisdiction is not exhausted until there has been complete compliance with the terms of, and service of any sentence imposed by, the judgment of conviction entered against the individual by the courts of the first sovereignty." *In re Liberatore*, 574 F.2d 78, 89 (2d Cir. 1978) (internal quotations and citations omitted). In essence, "[t]he sovereign which first arrests a defendant has primary jurisdiction over him." *Chambers v. Holland*, 920 F. Supp. 618, 622 (M.D. Pa. 1996) (citing *In re Liberatore*).

"[P]rimary jurisdiction . . . refers to the determination of priority of custody and service of sentence between state and federal sovereigns." *Taylor v. Reno*, 164 F.3d 440, 444 n.1 (9th Cir. 1998) (internal quotation marks omitted). The lack of primary jurisdiction over a defendant "does not mean that a sovereign does not have jurisdiction over a defendant. It simply means that the sovereign lacks priority of jurisdiction for purposes of trial, sentencing and incarceration." *Id*. Regardless of the order in which a defendant receives sentences from different sovereigns, the defendant first serves the sentence imposed by the sovereign with primary jurisdiction. *Shumate v. United States*, 893 F. Supp. 137, 139 (N.D.N.Y. 1995) (citing *In re Liberatore*, 574 F.2d 78, 89-90 (2d Cir. 1978)).

Primary jurisdiction is extinguished when a sovereign releases a defendant through, for example, bail release, dismissal of charges, parole release, or expiration of sentence. *Roche v. Sizer*, 675 F.2d 507, 510 (2d Cir. 1982). However, transferring a defendant to another jurisdiction to face a charge does not release the defendant from a sovereign's primary jurisdiction. *See, e.g.*, *United States v. Cole*, 416 F.3d 894, 896-97 (8th Cir. 2005). Instead, such a defendant is simply "on loan" to the other sovereign. *Id*.

Title 18, United States Code, Section 3584(a) provides that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." 18 U.S.C. § 3584(a).

Section 5G1.3(c) of the United States Sentencing Guidelines is a "policy statement" applicable in cases, like this one, in which neither consecutive nor concurrent sentences are mandated. It provides that "[i]n any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." U.S.S.G. § 5G1.3(c).

The governing law on plain error is set forth above in part I.A.

**B. Discussion**

In this case, when the state authorities released Simms on bail, the state relinquished primary jurisdiction over him. *See Roche*, 675 F.2d at 510. Accordingly, when federal authorities arrested Simms on federal charges, they acquired primary jurisdiction. *See id*. Because Simms's appearance in state court for sentencing constituted a "loan" and was not a release of primary jurisdiction, *Cole*, 416 F.3d at 896-97, he remained in federal custody at that time. Therefore, at the time of his sentencing, the federal court had primary jurisdiction, and the sentence the district court ordered must be served first. *Shumate*, 893 F. Supp. at 139; *see also Taylor*, 164 F.3d at 445 (a sentence commences "'on the date the defendant is received in custody awaiting transportation to, or arrives . . . at, the official detention facility at which the sentence is to be served,' . . . not when sentence is imposed") (quoting 18

U.S.C. § 3585). Moreover, as all parties agreed, at the time of the federal sentencing, Simms had not served any time on his state sentence. GSA263. Thus, as the district court noted, *see* GSA300, it is up to the state court to decide whether its sentence should run concurrently or consecutively to the primary federal sentence.

Simms claims the district court's refusal to order the sentence to run concurrently or consecutively to the state sentence was error, and points to U.S.S.G. § 5G1.3(c). But that section does not apply to the facts of this case. Section 5G1.3(c) provides that "[i]n [a] case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the *prior* undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." (Emphasis added). Here, although Simms's state sentence had been imposed, it was not yet running, and hence was not a *prior* undischarged term of imprisonment.

Indeed, any pronouncement made by the district court as to whether the federal sentence should be concurrent or consecutive to the not-yet-running state sentence would have been tantamount to an impermissible advisory opinion. *See, e.g.*, *Jennifer Matthew Nursing and Rehabilitation Ctr. v. United States Dept. of Health and Human Servs.*, 607 F.3d 951, 957 (2d Cir. 2010) ("[A]

federal court lacks the power to render advisory opinions.") (internal quotation marks omitted).[6]

Although this Court has not reached the issue of whether a district court has jurisdiction to impose a federal sentence concurrently to a state sentence that has not yet began running, this Court reached a similar issue in *United States v. Donoso*, 521 F.3d 144, 147-48 (2d Cir. 2008) (per curiam). In *Donoso*, this Court held that a district court may not, under 18 U.S.C. § 3584, direct that a defendant's federal sentence run consecutively to a state sentence that has not yet been imposed by the state court. This Court reasoned that

> [t]he plain language of the first line of § 3584(a) clearly enumerates the two instances to which the statute applies: (1) where multiple terms of imprisonment are imposed at the same time; and (2) where a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment. The legislative history of the statute demonstrates, moreover, that in enacting § 3584(a) Congress was concerned with the imposition of a federal sentence on a defendant

---

[6] *But see United States v. Caldwell*, 358 F.3d 138, 144-45 (1st Cir. 2004) (remanding to district court to issue opinion on whether federal sentence should run consecutively or concurrently to imposed, but not yet running, state sentence, while acknowledging that federal court had no power to order sentence to run concurrently if state did not act).

> who was already serving either a federal or state sentence.

*Id*. at 149.

Accordingly, this Court held that "because the state court had not yet imposed any prison term on the then-pending state charge and would not do so until the next day, [the defendant] was neither sentenced to multiple terms of imprisonment, nor was he subject to an undischarged term of imprisonment." *Id*. Therefore, § 3584(a) did not apply to the defendant and the district court did not have the authority to direct that the defendant's federal sentence run consecutively to his state sentence. *See id.*; *see also United States v. Smith*, 472 F.3d 222, 226 (4th Cir. 2006) (when, at the time of a defendant's sentencing in federal court, that defendant has not been sentenced by the state court, he is not yet subject to an undischarged term of imprisonment, and "a court cannot impose its sentence consecutively to a sentence that does not yet exist").

Here, although the state court ordered the particular sentence it wanted Simms to serve, the state court did not direct that the sentence begin running. Therefore, Simms was not "subject to" an undischarged term of imprisonment. He certainly was not "serving" a prior state sentence. *Cf. McCarthy v. Doe*, 146 F.3d 118, 121-22 (2d Cir. 1998) (holding that presumptions of § 3584(a) did not apply to case in which defendant, at the time of federal sentencing, was still awaiting sentencing on pending state charges and concluding that "[i]t is apparent from the

Senate Report that the drafters of § 3584(a) were concerned with the imposition of a federal sentence on a defendant already serving either a state sentence or another federal sentence"). As with an unimposed sentence, the district court in the instant case could not impose Simms's federal sentence concurrently to a state sentence that did not yet exist because it had not yet started running. Accordingly, the district court lacked the authority under § 3584(a) or § 5G1.3 to run the sentence concurrently and therefore, did not commit any error in failing to order the sentence to run concurrently.

## VII. Simms's ineffective assistance of counsel claim fails.

### A. Governing law and standard of review

To establish an ineffective assistance of counsel claim, a defendant must "(1) demonstrate that his counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms; and (2) affirmatively prove prejudice arising from counsel's allegedly deficient representation." *Parisi v. United States*, 529 F.3d 134, 140 (2d Cir. 2008) (internal quotation marks omitted), *cert. denied*, 129 S. Ct. 1376 (2009). "To give appropriate deference to counsel's independent decisionmaking, we 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id*. at 141 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

To raise an ineffective assistance claim despite a guilty plea, a defendant "must show that the plea agreement was not knowing and voluntary because the advice he received from counsel was not within acceptable standards." *Id.* at 138 (internal quotation marks and alteration omitted)).

This Court reviews *de novo* a claim of ineffective assistance of counsel. *See United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001). When faced with a claim for ineffective assistance on direct appeal, this Court may: "'(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent 28 U.S.C. § 2255

petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us.'" *United States v. Hasan*, 586 F.3d 161, 170 (2d Cir. 2009) (quoting *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000)), *cert. denied*, 131 S. Ct. 317 (2010).

**B. Discussion**

Although the Court could decline to consider Simms's ineffective assistance of counsel claims in this direct appeal, the record at this juncture demonstrates that his claims are without merit. Simms argues that his trial counsel's "ineffective assistance resulted in a plea agreement that was against appellant's interests, and against public policy" because it limited Simms's right to argue for a departure or non-Guidelines sentence. Simms Br. 34. Specifically, Simms argues that the plea agreement prevented Simms from arguing that (1) his federal sentence should be concurrent to his state sentences, Simms Br. 34-35, and (2) the crack/powder disparity in the Guidelines should be rejected, Simms Br. 36-37.

*First*, this Court has held that a stipulation in a plea agreement not to seek a downward departure is not improper or unconscionable. *See United States v. Braimah*, 3 F.3d 609, 611-12 (2d Cir. 1993). Moreover, the record reveals that Simms received substantial benefits in exchange for pleading guilty and waiving his right to argue for a departure or non-Guidelines sentence. In exchange for Simms's plea, the government agreed to drop the conspiracy charges and not file a notice of prior

conviction under 21 U.S.C. § 851. GSA286-88. These actions prevented Simms from being subjected to a 20-year mandatory minimum sentence, a maximum of life, and other increased penalties. Furthermore, the Guidelines range set forth in the plea agreement did not take into account Simms's 2008 state court convictions and thus calculated his Criminal History Category as III, rather than VI. A39. This prevented the government from arguing for a sentence in the Guidelines range set forth in the PSR, namely, 140 to 175 months, Simms PSR ¶ 55. GSA267-68. Accordingly, Simms cannot show that the plea agreement was not knowing and voluntary because the advice he received from counsel was within acceptable standards. *Parisi*, 529 F.3d at 138.

*Second*, Simms did not suffer prejudice even if his attorney performed below an objective standard of reasonableness by negotiating a plea agreement that prevented him from arguing for a departure or non-Guidelines sentence because (1) the district court lacked the authority to make the federal sentence concurrent with the state sentence, *see* Part VI.B., and (2) the district court imposed a non-Guidelines sentence in any event, GSA296.

Furthermore, even though the plea agreement prohibited trial counsel from arguing for departure or non-Guidelines sentence, counsel advocated forcefully for Simms during the sentencing hearing, arguing that the Criminal History Category of V overstated Simms's criminal history, GSA259, 266, noting Simms's desire to rehabilitate himself, GSA270-71, 291-92, and arguing that even a "minimal" sentence would serve the purposes of

§ 3553(a), GSA271-72. Trial counsel's advocacy was effective: the district court sentenced Simms to a term of 108 months' imprisonment – the bottom of the stipulated Guidelines range and below the corrected Guidelines range of 140 to 175 months' imprisonment. Thus, Simms cannot show that any error "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693.

## Conclusion

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

Dated: December 1, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

ELIZABETH A. LATIF
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,978 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

ELIZABETH A. LATIF
ASSISTANT U.S. ATTORNEY

# ADDENDUM

**Fed. R. Crim. P. 52. Harmless and Plain Error.**

**(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

**(b) Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

**18 U.S.C. § 1513 (effective January 7, 2008). Retaliating against a witness, victim, or an informant**

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for--

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 30 years.

* * *

**18 U.S.C. § 1513 (effective November 2, 2002 to January 6, 2008). Retaliating against a witness, victim, or an informant**

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for--

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation [FN1] supervised release,, [FN2] parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is--

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 20 years.

* * *

**18 U.S.C. § 1951**

**(a)** Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

**(b)** As used in this section--

> **(1)** The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

**(2)** The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

**(3)** The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

**§ 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed --

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(C)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for --

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing

Commission into amendments issued under section 994(p) of title 28);

**(5)** any pertinent policy statement–

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

**(6)** the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

**(7)** the need to provide restitution to any victims of the offense.

* * *

**(c) Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

**(1)** is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

**(2)** is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied

upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

**§ 3584. Multiple sentences of imprisonment**

(a) Imposition of concurrent or consecutive terms.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms.--The court, in determining whether the terms imposed are to be ordered to run concurrently or

consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

**§ 1B1.2. Applicable Guidelines**

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense. Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See § 2X5.1 (Other Offenses). The

guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See § 1B1.9 (Class B or C Misdemeanors and Infractions).

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).

(c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

**§ 2A2.1. Assault with Intent to Commit Murder; Attempted Murder**

(a) Base Offense Level:

(1) 33, if the object of the offense would have constituted first degree murder; or

(2) 27, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) the victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

(2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by 4 levels.

**§ 5G1.3. Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment**

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three

(Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

**ANTI-VIRUS CERTIFICATION**

Case Name: U.S. v. Gjuraj

Docket Number: 09-1736-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/1/2010) and found to be VIRUS FREE.

Louis Bracco
*Record Press, Inc.*

Dated: December 1, 2010

# CERTIFICATE OF SERVICE

20091736-cr(L) United States of America v. Gjuraj

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First-Class Mail delivery to:

David S. Hammer
The Woolworth Building
233 Broadway, Suite 1800
New York, NY 10279
e-mail: Davyh@aol.com

Jane S. Smith, Esq.
10 October Circle
Lagrangeville, NY 12540
e-mail: jssmith1@optonline.net

*Attorneys for Defendants-Appellants*

I also certify that the original and five copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 1st day of December 2010.

Notary Public:

_____

**Sworn to me this**

December 1, 2010

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2011

_____

THOMAS BURKE
Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949