09-2395-cr

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-2395-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RANDY BAADHIO,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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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.

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Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 1, 2009. On June 4, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b).

This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, except that the Court does not have appellate jurisdiction with respect to the defendant's claim that the judgment should have included the district court's non-binding recommendation to the Federal Bureau of Prisons concerning his place of confinement. *See United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003). As to that claim, the Court has inherent jurisdiction to determine its own jurisdiction. *See Kuhali v. Reno*, 266 F.3d 93, 100 (2d Cir. 2001).

Issues Presented for Review

1. Was the defendant competent to enter a guilty plea, where the defendant unequivocally acknowledged that he understood the proceedings, both counsel for the defendant and counsel for the Government believed him to be competent, and the medical report diagnosing him with HIV/AIDS-associated dementia does not indicate that he would be unable to understand the proceedings or assist in his defense?

2. Did the district court commit plain error in imposing a sentence that would run consecutive to an earlier, undischarged term of imprisonment, where a consecutive sentence was recommended by the Sentencing Guidelines?

3. Does this Court have jurisdiction to review the omission from the written judgment of a non-binding recommendation to the Federal Bureau of Prisons concerning the defendant's place of confinement?

4. Should the Court grant defense counsel's *Anders* motion to withdraw, when there are no non-frivolous issues in this appeal?

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Preliminary Statement

On January 30, 2009, defendant Randy Baadhio pled guilty to fraud in connection with access devices, based on his fraudulent use of American Express credit cards that he obtained using the identities of individuals found on the Internet. The defendant had previously been convicted, on three occasions, of similar fraudulent activity.

The defendant's written plea agreement contained a waiver of appellate rights, pursuant to which the defendant agreed not to appeal if the sentence imposed was within a specified Guidelines sentencing range. The sentence imposed on the defendant, including a term of 57 months in prison, was within the specified sentencing range.

Nevertheless, the defendant appealed, and in response to his attorney's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), the defendant filed a *pro se* merits brief. The issues raised by the defendant are all frivolous, and one is beyond this Court's jurisdiction.

Because the issues raised by the defendant and the issues identified by defense counsel are frivolous, the Court should affirm in part, dismiss in part, and grant defense counsel's motion to withdraw.

Statement of the Case

On January 17, 2008, a federal grand jury returned a two-count Indictment against the defendant, charging him with fraud in connection with access devices, in violation of 18 U.S.C. § 1029(a)(2), and aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) & (c)(4). (*See* Appendix ("A") at 11-12).

On January 30, 2009, the defendant pled guilty to Count One of the Indictment. (*See* A 6-7). The remaining count against the defendant was dismissed on the Government's motion. (*See* A 8).

On May 29, 2009, the district court (Vanessa L. Bryant, J.) calculated a recommended Guidelines sentencing range of 51 to 63 months in prison. (*See* A 60). The district court then imposed sentence, including a term of 57 months in prison. (*See* A 99-100, 107). Judgment entered on June 1, 2009. (*See* A 8-9).

On June 4, 2009, the defendant filed a timely notice of appeal. (*See* A 9 & 110). On September 21, 2009, the defendant's attorney filed a motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738 (1967). On November 17, 2009, the defendant filed a *pro se* merits brief.

The defendant is currently serving his sentence.

Statement of Facts

A. The defendant's earlier, undischarged sentence

On April 29, 2005, before committing the instant offense, the defendant was convicted in New Jersey state court of one count of theft of services and one count of fraudulent use of a credit card. (*See* A 20). The conviction, which was the defendant's third conviction relating to credit card fraud or similar financial fraud, resulted in a sentence of eight years of imprisonment. (*See id.*).

In November 2006, while committed to a halfway house, the defendant escaped. (*See* A 89); Record on Appeal Doc. No. ("R. Doc.") 42 at 2.

B. The defendant's offense conduct

Immediately after his escape, the defendant again began to commit credit card fraud. Specifically, in November 2006, the defendant submitted fraudulent credit card applications to American Express, using names and Social Security numbers of individuals that he found on the Internet. (*See* A 28). From December 2006 through May 2007, the defendant received and fraudulently used approximately sixteen American Express credit cards. (*See id.*). The unauthorized charges on those credit cards totaled at least $142,423.40. (*See id.*).

After the defendant's arrest in June 2007, he offered to provide information to the FBI about a potential terrorist threat. (*See id.*); *see also* R. Doc. 42 at 3. Specifically, the defendant claimed that he had been introduced, through an individual that he met in the halfway house, to other individuals who knew of his expertise in physics. *See id.* The defendant claimed that those other individuals asked him for information concerning the development of a nuclear bomb. *See id.*

In February 2008, the defendant asked a fellow inmate to have somebody outside of prison leave messages for the defendant at a telephone number that the defendant knew was being monitored by the FBI. *See id.* at 3-4. The messages were intended to bolster the defendant's allegations of a nuclear terrorist threat. *See id.* at 4. They informed the defendant about a "large quantity of a yellow pallet" to be smuggled into the United States, and they asked the defendant to obtain "metal lithium, polonium,

and industrial purifiers," as well as corporate housing in five cities around the United States. *See id.*

In March 2008, during an interview by FBI agents, the defendant insisted that the "yellow pallet" and other materials were intended for building a nuclear bomb, that the messages were legitimate, and that he did not arrange to have the messages sent. *See id.* The defendant has since admitted that the information was false. (*See* A 28).

C. The defendant's guilty plea

On January 30, 2009, the defendant pled guilty to Count One of the Indictment pursuant to a written plea agreement. (*See* A 14-28). In the plea agreement, the parties set forth a stipulation regarding the application of the Sentencing Guidelines. (*See* A 19-20).

As to the offense level, the stipulation provided, in pertinent part, that a 10-level increase was warranted based on a loss amount in the range of $120,000 to $200,000, and that a 2-level increase was warranted based on the defendant's willful attempt to obstruct the administration of justice. (*See* A 19). The stipulation also stated that the defendant committed the instant offense while under another criminal justice sentence. (*See* A 20).

Based on an adjusted offense level of 18 and a criminal history category of V, the parties calculated a recommended Guidelines sentencing range of 51 to 63 months in prison, a term of 2 to 3 years of supervised release, and a fine of $6,000 to $60,000 (the "Stipulated

Guidelines Sentencing Range"). (*See* A 20-21). The defendant agreed not to appeal or collaterally attack any sentence within or below the Stipulated Guidelines Sentencing Range, and the Government agreed not to appeal any sentence within or above the Stipulated Guidelines Sentencing Range. (*See* A 21-22).

During the change of plea hearing, the district court advised the defendant of the rights he would be waiving by pleading guilty. (*See* A 31-34). Counsel for the Government then recited the elements of the offense, stated the maximum statutory penalties, and summarized the terms of the plea agreement. (*See* A 35-41). The district court then made the following inquiries of defense counsel:

> THE COURT: Have you explained to your client, the charges against him?
>
> MR. SEIFERT: Yes, Your Honor.
>
> THE COURT: And have you explained to him the elements of the charge?
>
> MR. SEIFERT: Yes, and we've reviewed Section 1029 a number of times also, prior to today.
>
> THE COURT: Did you go over with him, the Plea Agreement?
>
> MR. SEIFERT: Yes, at great length.

THE COURT: Did you have any difficulty communicating with your client?

MR. SEIFERT: No, Your Honor.

THE COURT: Do you believe that he understands these proceedings, and the consequences of pleading guilty?

MR. SEIFERT: Yes, I do.

(A 42). The court also engaged in the following colloquy with the defendant:

THE COURT: . . . Mr. Baadhio, what prescription drugs are you currently taking?

THE DEFENDANT: Quite a few. I don't remember them all.

THE COURT: Do they affect your ability to understand?

THE DEFENDANT: No.

THE COURT: Do they assist you in understanding?

THE DEFENDANT: No.

THE COURT: So they don't affect your mental faculties in any way?

THE DEFENDANT: No.

THE COURT: Are you currently, or have you recently been, under the care of a mental health professional?

THE DEFENDANT: No.

THE COURT: Would you please summarize your educational background?

THE DEFENDANT: I have a Ph.D in physics.

. . .

THE COURT: Have you understood all of the proceedings here today?

THE DEFENDANT: Yes.

THE COURT: Have you understood the rights that I explained to you, and those contained in your Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: Have you read the Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: Is the summary of the Plea Agreement complete and accurate?

THE DEFENDANT: Yes.

(A 44-46). The district court also inquired specifically about the defendant's waiver of appellate rights in the plea agreement:

THE COURT: You understand that the Plea Agreement includes a appeal waiver?

THE DEFENDANT: Yes.

. . .

THE COURT: Attorney Seifert, do you know of any reason why the Court should not accept the plea?

MR. SEIFERT: No, Your Honor.

THE COURT: Attorney Chin, are you aware of any reason why the Court should not accept the plea?

MR. CHANG: Your Honor, I would only ask if the Court would just ask that Mr. Baadhio understands the terms of the plea waiver, not simply that there is one, but that he understands that it waives all of his rights to appeal and to file

a subsequent habeas petition, as long as his sentence is within or below the stipulated range?

. . .

THE COURT: . . . So, Mr. Baadhio, you—you read the Plea Agreement, correct?

THE DEFENDANT: Yes.

THE COURT: You understand the Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: And you understand that it contains the terms that Mr. Chin just stated?

THE DEFENDANT: Yes.

THE COURT: And you understand the consequences of those terms?

THE DEFENDANT: Yes.

(A 46-47). The district court then found that the defendant's plea was "voluntarily and intelligently given" and accepted the plea. (A 48). The district court was never advised of the defendant's alleged diagnosis of HIV/AIDS-associated dementia during the plea proceeding. (*See* A 29-52).

D. The sentencing proceedings

The defendant was sentenced on May 29, 2009. (*See* A 8). The defendant's adjusted Guidelines offense level was determined by the court to be 18, and his criminal history category was determined to be V (*see* A 59-60), yielding a recommended Guidelines sentencing range of 51 to 63 months in prison. (*See* A 59-60). The defendant raised no objection to the court's Guidelines calculations (*see* A 61), which were entirely consistent with the Guidelines stipulation set forth in the defendant's plea agreement (*see* A 19-20).

After his attorney spoke (*see* A 64-78), the defendant addressed the court (*see* A 79-86). According to the defendant, he arranged for the false messages to be left for him because he was afraid to continue cooperating and because he wanted an opportunity to call the alleged terrorists and tell them that he would no longer participate. (*See* A 79-81). The defendant also claimed that he engaged in fraud in order to pay for medical treatment (*see* A 82-83), that he had a very low life expectancy (*see* A 83-84), and that he was then eligible for Social Security and Medicare to defray future medical expenses (*see* A 84-85).

During the defendant's statement, the district court actively questioned the defendant on issues relating to his cooperation with the Government, how he paid for his medical care, his life expectancy, his medical condition, and his eligibility for Social Security and Medicaid. (*See* A 81-86). During the questioning, the defendant showed

no difficulty in understanding and in responding to the court's inquiries. (*See id.*).

After hearing from the Government, the district court provided a thoughtful explanation of the sentence it would impose. With respect to the nature and circumstances of the offense, the court observed that the defendant stole money and the identity of other individuals over a prolonged period of time, not necessarily to pay for medical expenses, but to pay for extravagances such as limousines and lavish hotel rooms. (*See* A 93). With respect to the history and characteristics of the defendant, the court observed that the defendant had previously been convicted of essentially the same conduct. (*See* A 94). The court also observed that the defendant was gifted with a fine intellect and excellent education. (*See id.*; *see also* A 98 ("Mr. Baadhio has certainly demonstrated that he still maintains his keen intellectual ability . . . .")).

The district court then reviewed the purposes to be served by a sentence and other sentencing factors, before concluding that the defendant's recidivism was "indicative of the Court's need to impose a more, rather than a less severe sentence . . . because of the need to protect the public from further criminal acts by Mr. Baadhio" and to "impress upon [the defendant] a true understanding and appreciation of the significance of his conduct, and his need to rehabilitate . . . ." (A 99). The court imposed a sentence of 57 months in prison, together with a term of 3 years' supervised release, a $100 special assessment, and an order to pay restitution in the amount of $138,769.95. (*See* A 99-100).

After imposing sentence, the court advised the defendant that he had waived his right to appeal because the sentence imposed was within the recommended Guidelines sentencing range, but that a notice of appeal, if any, had to be filed within ten days. (*See* A 101-02).

Two days after the sentencing hearing, by letter dated May 31, 2009, the defendant moved *pro se* for "the return of [his] personal property under Rule 41(e), currently held by the FBI." R. Doc. 55 at 1. Specifically, the defendant requested his "computer files, clothing, books and various miscellaneous items." *Id.* In the letter, the defendant made no reference to the appeals waiver or to any claim that he misunderstood the scope of the waiver.

Summary of Argument

I. The defendant contends that he did not understand the plea agreement and suggests that the district court should have ordered a competency examination. *Cf. Parisi v. United States*, 529 F.3d 134, 139 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1376 (2009) (construing *pro se* submissions broadly).

To the contrary, the record clearly shows that the defendant was competent. *See* Point I.C., *infra*. Although the defendant has purportedly been diagnosed with HIV/AIDS-associated dementia, the existence of a mental illness does not mean that the defendant is necessarily unable to understand the proceedings against him or to assist in his own defense. *See id.* Both counsel for the defendant and counsel for the Government believed the

defendant to be competent, and the defendant's responses to the district court's questions demonstrated that he understood the proceedings against him. *See id.* Indeed, during the sentencing hearing, the district court specifically found that the defendant still possessed a "keen intellectual ability," providing strong evidence that the defendant was competent during the earlier plea proceeding. *See id.*

Also, the district court did not abuse its discretion by not ordering, *sua sponte*, a competency exam. The district court was not made aware of the defendant's purported diagnosis during the plea proceeding, and the statements of both counsel and the defendant offered no reason for the district court to question the defendant's competency. *See id.*

II. The defendant also argues that he should have received a reduced sentence or a concurrent sentence in connection with his earlier, undischarged sentence in New Jersey, relying on U.S.S.G. § 5G1.3(b). The defendant is mistaken, because U.S.S.G. § 5G1.3(b) applies only if U.S.S.G. § 5G1.3(a) does not apply. *See* Point II.C., *infra*. Because the defendant was an escapee on the New Jersey sentence, and because the instant offense was entirely committed after his escape, U.S.S.G. § 5G1.3(a) applied and the defendant's sentence was properly imposed consecutive to the New Jersey sentence. *See id.*

III. The defendant further argues that the district court should have repeated, in the written judgment, its oral recommendation to the Federal Bureau of Prisons ("BOP")

that the defendant be designated to a "federal medical facility where he can continue to obtain the medical care that he is currently receiving." But this Court does not have appellate jurisdiction to review the omission from the written judgment of a non-binding recommendation to the BOP. *See* Point III.C., *infra*. Nor is there any requirement that such a recommendation be included in the written judgment, because the BOP is required to review "any statement" by the sentencing judge, whether made during the oral pronouncement of sentence or included in the written judgment. *See id.*

IV. Finally, the motion of defense counsel to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), should be granted, because the issues raised by the defendant and identified by defense counsel are all frivolous. *See* Point IV.C., *infra*. In particular, while the defendant now claims to misunderstand the appellate waiver, the record clearly demonstrates that he had a proper understanding of the appellate waiver when he pled guilty. *See* Point IV.C.1., *infra*. The issues identified by defense counsel are also frivolous, as defense counsel properly concedes. *See* Point IV.C.2., *infra.*

Accordingly, the Court should affirm in part, dismiss in part, and grant the motion of defense counsel to withdraw.

Argument

I. The defendant was competent to plead guilty

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

A criminal defendant may not plead guilty "unless he does so 'competently and intelligently.'" *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings." *Id.* at 401 n.12 (distinguishing requirement of competence from requirement that guilty plea be knowing and voluntary).

A defendant's competence to plead guilty is evaluated under the same standard as a defendant's competence to stand trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" *Id.* at 396 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)).

"In making a determination of competency, the district court may rely on a number of factors, including medical

opinion and the court's observation of the defendant's comportment." *United States v. Nichols*, 56 F.3d 403, 411 (2d Cir. 1995). The burden is on the defendant to prove incompetence by a preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 360, 362 (1996) (dictum); *see also* 18 U.S.C. § 4241(d) (2006) (requiring determination of incompetence by a preponderance of the evidence); *cf. Nichols*, 56 F.3d at 410 (noting circuit split as to burden of proof but declining to resolve issue).

The court may give substantial weight to a defense attorney's affirmative representation that the defendant is competent, *see, e.g.*, *United States v. Quintieri*, 306 F.3d 1217, 1233-34 (2d Cir. 2002); *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995), and even to a defense attorney's "failure . . . to indicate that the defendant had any difficulty assisting in preparation or in comprehending the nature of the proceedings . . . ." *Quintieri*, 306 F.3d at 1233; *see, e.g.*, *United States v. Vamos*, 797 F.2d 1146, 1149 (2d Cir. 1986).

Moreover, a court is "entitled to accept a defendant's statements under oath at a plea allocution as true." *United States v. Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997). Indeed, such statements carry "a strong presumption of accuracy." *United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001); *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997).

A competency hearing is not required before every guilty plea, but "only when a court has reason to doubt the defendant's competence." *Godinez*, 509 U.S. at 401 n.13.

A court must order a competency hearing, *sua sponte* or on motion of either party, if there is "reasonable cause" to believe that the defendant may be incompetent, *i.e.*, "unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a) (2006); *Quintieri*, 306 F.3d at 1232. In deciding that a competency hearing is unnecessary, a court may rely solely on its own observations of the defendant. *See Nichols*, 56 F.3d at 414 (citing *United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980)).

Where neither party requests a competency hearing, a district court's decision not to conduct a hearing *sua sponte* is reviewed only for abuse of discretion. *Quintieri*, 306 F.3d at 1232-33.

C. Discussion

As an initial matter, the district court clearly did not abuse its discretion in not ordering a competency hearing *sua sponte* before accepting the defendant's guilty plea. The court was never advised of the defendant's alleged diagnosis of HIV/AIDS-associated dementia (*see* A 29-52), and the defendant and his attorney both represented that the defendant understood the proceedings (*see* A 42 & 46).

Even with the benefit of hindsight (and medical reports that were not part of the record during the plea proceedings), it is clear that the defendant was competent to enter a guilty plea. Although the medical report

submitted by the defendant indicates a diagnosis of HIV/AIDS-associated dementia, it does not indicate that the defendant was unable to understand the proceedings or to assist his attorney. "It is well-established that some degree of mental illness cannot be equated with incompetence to stand trial." *Nichols*, 56 F.3d at 412 (internal quotation marks omitted); *Vamos*, 797 F.2d at 1150.

Moreover, defense counsel had met with the defendant "a number of times" (A 42), believed that the defendant understood the proceedings and the consequences of pleading guilty (*see id.*), and raised no issue concerning the defendant's competence (*see* A 46). *See Quintieri*, 306 F.3d at 1233-34 (holding that district court properly relied on defense attorney's representation that defendant understood proceedings even though defendant complained of dizziness from being administered wrong psychiatric medicine). Counsel for the Government had also met with the defendant on several occasions in connection with the alleged terrorist threat and likewise raised no issue concerning the defendant's competency. (*See* A 46-47). Both attorneys knew the defendant and knew of the defendant's diagnosis; neither attorney considered the defendant's competency to be even a close question.

Similarly, the defendant's own statements, made in response to the district court's inquiries, also demonstrate his competency. When the defendant was first asked whether he was taking any drugs or other substances that might impair his ability to understand the proceedings, he

paused to consult with his attorney. (*See* A 44). When he was then asked to identify the prescription drugs he was taking, he answered: "Quite a few. I don't remember them all." (A 44-45).

But when asked whether the medications affected his mental faculties, he answered unequivocally: "No." (A 45). Likewise, when asked whether he understood the proceedings, he was also unequivocal: "Yes." (A 46). The defendant's answers to the district court's questions show that he was not simply answering by rote, but that he was able to give a nuanced answer when needed. Accordingly, the defendant's unequivocal admission that he understood the proceedings deserves "a strong presumption of accuracy." *Juncal*, 245 F.3d at 171.

Finally, the district court determined at sentencing that the defendant "still maintains his keen intellectual ability." (A 98). As shown in the sentencing transcript, the district court had carefully reviewed the medical reports. (*See* A 83-84 (questioning defendant about life expectancy); A 85-86 (questioning defendant about being HIV positive versus having AIDS)). The district court questioned the defendant closely and was able to observe his responses. (*See* A 81-86). Accordingly, the district court's finding that the defendant maintained his "keen intellectual ability" deserves deference, *see Vamos*, 797 F.2d at 1150, and provides further evidence that the defendant was competent at the earlier plea proceeding.

II. The district court did not commit plain error by running the defendant's sentence consecutively to his undischarged state sentence

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

Under the Sentencing Guidelines, a defendant subject to an earlier, undischarged term of imprisonment may be sentenced, under certain conditions, to a new term of imprisonment that is consecutive, partially concurrent, or concurrent to the earlier term of imprisonment. *See* U.S.S.G. § 5G1.3 (2008). Section 5G1.3(a) provides:

> If the instant offense was committed while the defendant was serving a term of imprisonment (including . . . escape status) . . . , the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.

Id. § 5G1.3(a).

If § 5G1.3(a) does not apply, § 5G1.3(b) permits a sentencing reduction for time served on the earlier term of imprisonment and permits the imposition of a concurrent sentence under two conditions: first, the earlier offense must be "relevant conduct" to the instant offense; and

second, the earlier offense must increase the Guidelines offense level for the instant offense. *See id.* § 5G1.3(b).

When a district court does not specify whether a new term of imprisonment is consecutive or concurrent to an earlier, undischarged term of imprisonment, the new term runs consecutive to the earlier term. *See* 18 U.S.C. § 3584(a) (2006) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently").

Sentencing issues not raised in the district court are forfeited, absent plain error. *See United States v. Margiotti*, 85 F.3d 100, 104 (2d Cir. 1996) (applying plain-error standard to claim that district court failed properly to apply U.S.S.G. § 5G1.3). To show plain error, a defendant must demonstrate "(1) error (2) that is plain and (3) affects substantial rights." *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007). Even then, the Court will exercise its discretion to correct the error "only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (internal quotation marks omitted). Reversal for plain error should "'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

C. Discussion

The defendant did not argue below that he was entitled to a reduced sentence or a concurrent sentence pursuant to U.S.S.G. § 5G1.3(b), so his claim is reviewed only for plain error. *See Margiotti*, 85 F.3d at 104. The defendant cannot show any error, much less plain error, with respect to the imposition of his sentence.

Specifically, the defendant stipulated that the instant offense was committed from November 2006 through May 2007. (*See* A 28; *see also* A 11 (charging that fraud occurred in 2007)). During the commission of the offense, the defendant was on escape status from an earlier term of imprisonment. (*See* A 89); *see also* R. Doc. 42 at 2. Accordingly, under § 5G1.3(a) of the Guidelines, the defendant's sentence was properly run consecutive to his earlier, undischarged term of imprisonment.

The defendant mistakenly seeks to invoke § 5G1.3(b), contending that the instant offense and the earlier offense were part of a "common scheme." *See* U.S.S.G. § 1B1.3(a)(2) & n.9 (2008) (defining "relevant conduct" with respect to offenses that are part of a common scheme or plan). But subsection 5G1.3(b) is inapplicable on its face, because subsection 5G1.3(a) applies. *See* U.S.S.G. § 5G1.3(b) (2008) ("If subsection (a) does not apply . . .").

Subsection 5G1.3(b) is also inapplicable, whether or not the earlier offense was relevant conduct to the instant offense, because the earlier offense was not used to increase the Guidelines offense level for the instant

offense. *See United States v. Williams*, 260 F.3d 160, 167-68 (2d Cir. 2001) ("Where the prior offense has not been 'counted' in setting the offense level for the present offense, there has been no 'double counting,' and the purpose of the Guideline is not implicated."). To the contrary, the defendant's adjusted offense level for the instant offense was based entirely on the loss amount of $142,423.40 and on other offense conduct post-dating his escape. (*Compare* A 19 (Guidelines stipulation) *with* A 28 (statement of offense conduct)). Accordingly, the defendant's earlier offense had no impact on his Guidelines offense level, so § 5G1.3(b) provided no basis for the imposition of a reduced or concurrent sentence.

III. This Court does not have jurisdiction to review the omission from the written judgment of a non-binding recommendation to the Bureau of Prisons

A. Relevant facts

In pronouncing sentence, the district court stated as follows: "The Court recommends that [the defendant] be housed in a federal medical facility where he can continue to obtain the medical care that he is currently receiving." (A 101).

Subsequently, the defendant asked the court to recommend that he be permitted to participate in a drug treatment program. (*See* A 102-04). The court found "no indication" in the record that the defendant was a drug addict. (A 103-04). Accordingly, the court stated: "I leave

his medical treatment to the discretion of medical professionals, and decline to make that recommendation." (A 103).

At the time of sentencing, the defendant was incarcerated at Wyatt Detention Center (*see* A 69), which is not a specially designated "federal medical center." The defendant acknowledged receiving "competent and appropriate treatment" at Wyatt (A 68-69), and he expressly waived any claim that he could not receive competent medical care in prison (*see* A 70).

B. Governing law and standard of review

The Federal Bureau of Prisons ("BOP") is responsible for designating an inmate's place of confinement. *See* 18 U.S.C. § 3621(b) (2006). While the BOP is required to consider "any statement . . . recommending a type of penal or correctional facility" made by a sentencing judge, *id.* § 3621(b)(4), such recommendations are "not controlling," *United States v. Pineyro*, 112 F.3d 43, 45 (2d Cir. 1997).

Because recommendations made to the BOP by a sentencing judge are not controlling, there is no appellate jurisdiction to review such recommendations. *See id.* (dismissing appeal from order declining to recommend state institution as place of federal confinement); *see also United States v. Yousef*, 327 F.3d 56, 165 (2d Cir. 2003) (holding that there was no appellate jurisdiction to review district court's recommendation as to place and conditions of confinement).

Instead, the defendant must pursue any challenge to his place of confinement "through the appropriate administrative and judicial channels." *Pineyro*, 112 F.3d at 45-46.

C. Discussion

The defendant mistakenly claims that the district court was required to include its oral recommendation as to his place of confinement in its written judgment. The defendant's claim should be dismissed for lack of appellate jurisdiction. His claim is also without merit, because there is no requirement that such recommendations be included in the written judgment.

The defendant's claim must be dismissed, because the Court lacks jurisdiction to review a non-binding recommendation made by a sentencing judge to the BOP—or, in this case, the purported absence of such a recommendation.

Appellate jurisdiction is lacking even though the district court made an oral recommendation in pronouncing sentence that is arguably inconsistent with the written judgment, which contains no such recommendation. *See United States v. McHugh*, 528 F.3d 538 (7th Cir. 2008). In *McHugh*, the district court made an oral recommendation that the defendant be given an opportunity to participate in a substance-abuse treatment program, but the written judgment included the additional caveat that any such program should "not include an early release." *Id.* at 539. The court of appeals dismissed the

appeal, which sought to redact the added caveat, holding that there was no appellate jurisdiction for lack of a justiciable controversy:

> [The sentencing judge] gave the Bureau of Prisons a suggestion, which the Bureau is free to accept or reject. In doing so he did not exercise the judicial power, and [the defendant's] request that we redact the suggestion likewise does not appeal to the judicial power. [The defendant's] lawyer is free to communicate with the Bureau of Prisons on this subject, but no Article III court may issue an advisory opinion changing a suggestion that does not affect the sentence.

Id. at 541.

Similarly, in this case, the district court's omission of any recommendation in the written judgment does not present a justiciable controversy. Notably, the statute governing the designation of the defendant's place of confinement draws no distinction between an oral recommendation by a sentencing judge and a written recommendation included in the judgment. *See* 18 U.S.C. § 3621(b)(4) (2006) (requiring consideration of "any statement . . . recommending a type of penal or correctional facility"). Nor does there appear to be any other legal authority requiring a sentencing judge's non-binding recommendation to be included in the written judgment.

In short, it simply makes no difference whether the sentencing judge's recommendation to the BOP was made orally or in the written judgment. In either case, the defendant or his attorney is free to bring the non-binding recommendation to the attention of the BOP, which recommendation the BOP is "free to accept or reject." *McHugh*, 528 F.3d at 541.

Insofar as the defendant contends that the district court recommended his designation to a federal medical center, the defendant is mistaken. In fact, the district court only recommended that he be assigned to a federal medical facility "where he can continue to obtain the medical care that he is currently receiving." (A 101; *see also* A 103-04 (deferring to judgment of medical professionals to determine appropriate treatment of the defendant)). There is nothing in the record to indicate that the defendant is receiving medical care that is of any lesser quality than he received at Wyatt. (*Cf.* A 68-71 (acknowledging adequacy of medical care at Wyatt)).

Accordingly, this aspect of the defendant's appeal should be dismissed for lack of jurisdiction.

IV. Defense counsel's motion to withdraw should be granted

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. Motions to withdraw by appellate counsel

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), appellate counsel may move to be relieved if "convinced, after conscientious investigation, that the appeal is frivolous." *Id.* at 741; *see also United States v. Urena*, 23 F.3d 707, 708 (2d Cir. 1994) (permitting both appointed and retained counsel to file *Anders* motions) (per curiam).

In support of an *Anders* motion, appellate counsel must file a brief "identifying by record references any issues that have at least arguable merit supported by legal authority, and explain why they are frivolous." *United States v. Arrous*, 320 F.3d 355, 358 (2d Cir. 2003). The motion will be granted only if: "(1) counsel has diligently searched the record for any arguably meritorious issue in support of his client's appeal, and (2) defense counsel's declaration that the appeal would be frivolous is, in fact, legally correct." *Id.* (internal quotation marks omitted).

If the defendant has waived the right to appeal, appellate counsel's *Anders* brief is required to address

"only the limited issues of: (1) whether defendant's plea and waiver of appellate rights were knowing, voluntary, and competent, or (2) whether it would be against the defendant's interest to contest his plea; and (3) any issues implicating a defendant's constitutional or statutory rights that either cannot be waived, or cannot be considered waived by the defendant in light of the particular circumstances." *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000) (citations omitted).

Finally, an *Anders* motion must be accompanied by an affidavit from defense counsel, establishing that the defendant was provided with a copy of the motion, brief, and a letter informing the defendant about the right to file a *pro se* brief, as well as any other steps reasonably necessary to provide notice in accordance with due process. *See United States v. Santiago*, 495 F.3d 27, 29-30 (2d Cir. 2007).

2. Waivers of appellate rights

This Court has long recognized that "[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993) (per curiam) (dismissing defendant's appeal consistent with waiver in plea agreement); *see also United States v. Monsalve*, 388 F.3d

71, 73 (2d Cir. 2004) (per curiam); *United States v. Djelevic*, 161 F.3d 104, 106 (2d Cir. 1998) (per curiam) ("It is by now well-settled that a defendant's knowing and voluntary waiver of his right to appeal a sentence within an agreed upon guideline range is enforceable.").

A waiver is generally enforceable against the defendant as long as the record clearly demonstrates that the defendant knowingly and voluntarily waived his right to appeal. *See United States v. Monzon*, 359 F.3d 110, 116 (2d Cir. 2004).

C. Discussion

1. The defendant's appellate waiver was knowing, voluntary, and competent

The defendant indisputably received a sentence within the Stipulated Guidelines Sentencing Range referenced in the appeals waiver. Because the defendant was competent, *see* Point I.C., *supra*, and because he knowingly and voluntarily agreed to waive his right to appeal if he received such a sentence (*see* A 47), his appeal should be dismissed. *See, e.g.*, *Monsalve*, 388 F.3d at 73; *Salcido-Contreras*, 990 F.2d at 53.

The defendant mistakenly contends that he was misinformed about the scope of the appeals waiver in the plea agreement. According to the defendant, the waiver provision preserved his right to appeal "under certain circumstances." *See* Pro Se Brief, dated Nov. 10, 2009, at 2. The defendant claims that it was "shocking and

devastating" when he was advised, after being sentenced within the Stipulated Guidelines Sentencing Range, that his appeal rights had been extinguished. *Id.* at 5.

In fact, the waiver provision did not preserve the defendant's right to appeal "under certain circumstances"; instead, it advised him that he had the right to appeal under certain circumstances but specified that he was waiving that right if sentenced within the Stipulated Guidelines Sentencing Range:

> The defendant acknowledges that under certain circumstances he is entitled to appeal his conviction and sentence. It is specifically agreed that the defendant will not appeal . . . the conviction or sentence . . . if that sentence is within or below the Stipulated Guidelines Sentencing Range . . . .

(A 21).

Although the defendant now misreads the waiver provision, he clearly understood it properly during the plea allocution. The defendant had read the plea agreement (*see* A 46), and he had reviewed the plea agreement "at great length" with his attorney (*see* A 42). The defendant also acknowledged that the description of the waiver provision provided by Government counsel was correct, both during the summary of the entire plea agreement (*see* A 40 & 46) and again with specific reference to the waiver provision (*see* A 47).

Moreover, in the defendant's letter to the district court two days after the sentencing hearing, the defendant made no reference at all to his purported misunderstanding of the appeals waiver. *See* R. Doc. 55 at 1. What the defendant now describes as "shocking and devastating" was obviously not a surprise to him at the time, *i.e.*, that having been sentenced within the Stipulated Guidelines Sentencing Range, his right to appeal had been waived.

In sum, there is no merit to the defendant's *ex post* contention that he misunderstood the waiver provision. Because the defendant knowingly and voluntarily waived his right to appeal, the waiver provision should be enforced.

2. There are no non-frivolous issues to be addressed on appeal

Finally, while a number of frivolous issues have been raised, there are no non-frivolous issues in this appeal. The motion of defense counsel to be relieved should therefore be granted.

As argued previously, the defendant was competent, *see* Point I.C., *supra*; he was not entitled to a sentencing reduction or a concurrent sentence in connection with his earlier, undischarged sentence, *see* Point II.C., *supra*; and he may not appeal the omission of a non-binding recommendation by the sentencing judge from the written judgment, *see* Point III.C., *supra*. The defendant also knowingly and voluntarily waived his right to appeal. *See* Point IV.C.1., *infra*. The Government respectfully submits

that all of these issues, raised by the defendant, are frivolous.

The defendant also argues that the district court should not have applied the two-level enhancement for obstruction of justice, despite the fact that the enhancement was explicitly included in the Guidelines stipulation in the plea agreement (*see* A 19) and no objection to the enhancement was made at sentencing (*see* A 60-61). This argument is also frivolous, because the defendant waived any challenge to the enhancement by explicitly agreeing to it, *see United States v. Jackson*, 346 F.3d 22, 24 (2d Cir. 2003) (declining to review role adjustment even for plain error where defendant explicitly agreed to adjustment), and because review is barred by the defendant's appellate waiver, *see United States v. Fisher*, 232 F.3d 301, 303 (2d Cir. 2000) (holding that appellate waiver barred claim concerning "application of the Guidelines"); *see also Gomez-Perez*, 215 F.3d at 319 ("[W]e have upheld waiver provisions even in circumstances where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines, but yet was still within the range contemplated in the plea agreement.").

Finally, discharging his obligation under *Anders*, defense counsel conscientiously examined the record and identified two colorable defects in the defendant's plea allocution. *See* Brief and Special Appendix for Defendant-Appellant, filed Sept. 21, 2009, at 16-19. First, defense counsel noted that the district court did not specifically advise the defendant of his right to court-appointed

counsel. (*See* A 32). As defense counsel indicated, asserting this claim would be frivolous, given the fact that the defendant already had court-appointed counsel throughout the proceedings. *See United States v. Saft*, 558 F.2d 1073, 1080 (2d Cir. 1977) ("In contrast to a defendant with retained counsel who might worry that his money might run out before or during trial, [the defendant] had already been assigned counsel, and there was no suggestion that counsel would abandon him if he went to trial."); *see also United States v. Parkins*, 25 F.3d 114, 119 (2d Cir. 1994) (holding that failure to use exact wording of Rule 11 concerning right to counsel did not render guilty plea defective).

Second, defense counsel pointed out that the district court did not ascertain whether the defendant understood the terms of the appellate waiver until prompted by counsel for the Government. (*See* A 46-47). This, too, would be a frivolous claim, because the district court eventually did ensure that the defendant understood the terms of the appellate waiver (*see* A 47), as confirmed by the record as a whole, *see* Point IV.C.1., *supra*.

Because there are no non-frivolous issues on appeal, the motion of defense counsel to withdraw should be granted.

Conclusion

Based on the foregoing, the Government respectfully submits that the Court should affirm in part, dismiss in part, and grant the motion of defense counsel to withdraw.

Dated: March 12, 2010

Respectfully submitted,

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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 7,399 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

ADDENDUM

§ 4241. Determination of mental competency to stand trial to undergo postrelease proceedings

(a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

* * *

§ 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.