No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2018

AMAURY VILLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, AMAURY VILLA, respectfully seeks to leave to proceed *in forma pauperis*, without payment of filing fees and costs.

Counsel certifies that, in proceedings before the lower court in this case, petitioner was represented by counsel assigned pursuant to the Criminal Justice Act, Title 18 U.S.C. §3006A.

Dated: October 22, 2018
Syracuse, New York

JOHN A. CIRANDO, ESQ.
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(315) 474-1285

Counsel of Record for Petitioner

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented here for determination are as follows:

1. Whether appellant received the effective assistance of counsel?

2. Whether appellant’s sentence was properly calculated?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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FOR THE REASONS STATED ABOVE, THE PETITION FOR CERTRIORARI SHOULD BE GRANTED.

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Amaury Villa, the petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit which appears at Appendix A.

OPINIONS BELOW

There is no opinion for the judgment of conviction, entered April 29, 2015, resulting from a guilty plea in United States District Court, District of Connecticut (Janet Bond Arterton, J.). The judgment of conviction is included in Appendix B at pages B-1-3.

The Summary Order of the United States Court of Appeals for the Second Circuit, entered on August 6, 2018, appears at Appendix A, pages 1-3 of the Petition, and is reported at United States v. Villa, 2018 U.S. App. LEXIS 21654 [2nd Cir., 8/6/2018].

The Mandate was issued on August 27, 2018, and appears at Appendix C, pages 1-8 of the Petition.

JURISDICTION

The date upon which the United States Court of Appeals for the Second Circuit decided the case was August 6, 2018 (Appendix A, pp. 1-3). The Mandate was issued on August 27, 2018 (Appendix C, pp. 1-3).

No petition for a rehearing was timely filed in the instant case.

The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254[1].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

- No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment:

- In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Guidelines Manual, November 1, 2010, §2B1.1 –
PART B – BASIC ECONOMIC OFFENSES

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, PROPERTY DESTRUCTION, AND OFFENSES INVOLVING FRAUD OR DECEIT

*** * ***

- §2B1.1 – Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States.

*** * ***

(b) Specific Offense Characteristics

*** * ***

Commentary

*** * ***

Application Notes:

3. Loss Under Subsection (b)(1). – This application note applies to the determination of loss under subsection (b)(1).

(A) General Rule. – Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.

(i) Actual Loss. – "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.

*** * ***

* * *

(C) Estimations of Loss. – The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. §3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

> *(i) The fair market value of the property unlawfully taken, copied, or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*

STATEMENT OF THE CASE

In an Indictment, filed on March 12, 2012, appellant Amaury Villa, along with co-defendants, were charged with the crimes of CONSPIRACY TO COMMIT THEFT FROM INTERSTATE SHIPMENT (Title 18 U.S.C. §371), and THEFT FROM INTERSTATE SHIPMENT (Title 18 U.S.C. §659).

In a Superseding Indictment, filed on November 6, 2013, appellant alone was charged with the crimes of CONSPIRACY (Title 18 U.S.C. §371), THEFT FROM INTERSTATE SHIPMENT (Title 18 U.S.C. §659) (4 counts), and INTERSTATE TRANSPORTATION OF STOLEN PROPERTY (Title 18 U.S.C. §2314).

On November 6, 2013, appellant was arraigned on the Superseding Indictment.

On May 2, 2014, appellant entered a plea of guilty before the District Court. The District Court informed appellant that the Government did not consent to him entering a conditional guilty plea, as required by Federal Rule of Criminal Procedure §11[a][2]. The District Court inquired if it was appellant's intention to enter an unconditional guilty plea to all Counts of the Superseding Indictment, which appellant responded affirmatively.

The District Court informed appellant of the right to remain silent and the right to counsel. The District Court of then affirmed that appellant: was 39 years old; graduated from

high school in Cuba; did not receive any higher education; has not been in the care of any physician, psychiatrist, or any social worker; has not taken any drugs, alcohol, or medication in the past 48 hours; and has not been treated for any addictions to substances.

The District Court then affirmed defense counsel Perez: has not had any issues communicating with appellant; believes appellant understands his rights he is waiving; believes appellant understands the nature of the proceedings; believes appellant has the competence to plead guilty at that time; informed appellant of how the Federal Sentencing Guidelines operate; and informed appellant of all collateral consequences of his guilty plea, including possible deportation.

Appellant affirmed that he: was satisfied with the representation of defense counsel Perez; received a copy of the Superseding Indictment; and understood the charges against him.

The District Court then informed appellant of further rights he waived by pleading guilty. Specifically, those rights were: the right to be proven guilty beyond a reasonable doubt; the right to trial by jury; the right to be presumed innocent; the right to confront adverse witnesses; the right to produce evidence; and the right to remain silent.

The District Court ascertained that appellant was not a United States citizen, and further informed him of the

consequences of his guilty plea. Appellant then affirmed that he was willing to give up all of the rights discussed.

The District Court informed appellant that if he wished to continue to plead guilty to all counts of the Superseding Indictment, he faced a maximum penalty of a 55-year term of imprisonment followed by a 3-year term of Supervised Release. The District Court also informed appellant of his exposure to a possible fine under Title 18 U.S.C. §§3572 and 3612, as well as restitution from the underlying offense.

The District Court continued to inform appellant of his right to appeal the conviction and the processes by which he could do so. The District Court explained the statutory elements of each count within the Superseding Indictment, and appellant affirmed that he understood such elements.

As to the factual allocution of the Superseding Indictment, appellant affirmed that: he participated in a conspiracy from January 7, 2010, to March 19, 2010; the conspiracy was an agreement between others to enter into a warehouse to steal pharmaceuticals; said warehouse was owned by Eli Lilly; the pharmaceuticals were valued over $5,000; he intended to steal said pharmaceuticals and convert them to his own use; he was aware that the pharmaceuticals were part of an interstate shipment; and he agreed to transport said stolen pharmaceuticals to Miami, Florida.

The Government reaffirmed that these factual details would be proven through direct and circumstantial evidence at trial. Defense counsel Perez objected to the Government's statement that it would produce evidence that showed that appellant knew, at the time of the incident, that the pharmaceuticals stolen in Connecticut were going to be shipped to other states. Defense counsel Perez conceded that the fact that the pharmaceuticals were created in Indianapolis, Indiana, and then transported to Enfield, Connecticut, would satisfy the necessary element of interstate shipment.

Appellant waived his right to the reading of the Superseding Indictment, and then plead guilty with short affirmatory responses. The District Court accepted appellant's guilty plea as knowing, intelligent, and voluntary.

On June 13, 2014, a draft of appellant's Pre-Sentence Report was prepared. The Pre-Sentence Report concluded that Eli Lilly suffered a loss in excess of $80 million, but acknowledged that a different evaluation was provided in the amount of approximately $60 million. The Pre-Sentence Report also acknowledged that Eli Lilly was paid a contractually negotiated amount of $42 million in light of an insurance claim they submitted following the theft.

On June 30, 2014, defense counsel Perez filed appellant's first Motion objecting to the Pre-Sentence Report.

On July 2, 2014, appellant's final Pre-Sentence Report was prepared. The final Pre-Sentence Report similarly reported the financial impact to Eli Lilly as it did within the draft of the Pre-Sentence Report filed on June 3, 2013. The final Pre-Sentence Report explained that the $42 million recovered through insurance proceeds was based on the transfer-in value.

On July 23, 2014, the Government submitted a Motion requesting a Curcio Hearing. The Government alleged that defense counsel Perez visited appellant's co-defendant Yosmany Nunez at a detention facility in Florida, without notifying Nunez's attorneys.

On July 24, 2014, a supplement to appellant's second Pre-Sentence Report was prepared. The supplement addressed objections contained within defense counsel Perez's first Motion objecting to the Pre-Sentence Report filed on June 30, 2014. The final Pre-Sentence Report was amended to state that appellant conspired and agreed to steal pharmaceuticals "that were later found to be valued at $80,000,000".

On July 25, 2014, defense counsel Perez filed a Sentencing Memorandum on behalf of appellant. Defense counsel Perez indicated that appellant's base level offense should decrease due to the fact: 1) that the amount of loss of the stolen property involved in the offense was less than argued by the Probation Department and the Government; 2) that the two-level

enhancement for appellant's status as a person who is in the business of receiving and selling stolen property is inapplicable (U.S.S.G. §2B1.1[b][4]); 3) that the two-level enhancement for appellant obtaining special skill or knowledge of alarm systems was improper (U.S.S.G. §2B1.1[b][9]); 4) that the two-level enhancement for appellant's status as a leader or organizer were improper (U.S.S.G. §3B1.1[c]); 5) and that appellant's criminal history level being improperly calculated (JA-554-574).

On July 31, 2014, a Curcio Hearing was held, to determine whether defense counsel Perez created a conflict of interest in her representation of appellant when she contacted Nunez. The District Court appointed J. Patten Brown, Esq., as independent counsel for appellant, for the purpose of the Curcio Hearing. Nunez's counsel did not believe there was a conflict of interest and that the communications between defense counsel Perez and Nunez were privileged. Nunez invoked his Fifth Amendment right not to testify at the Curcio Hearing. The District Court was concerned with whether the communication between defense counsel Perez and Nunez influenced appellant's guilty plea. The District Court questioned defense counsel Perez if she told Nunez to not tell his attorney of their conversation, which defense counsel Perez denied.

Independent counsel Brown told the Court that appellant did not dispute his guilt, he was made aware of the conversation between defense counsel Perez and Nunez, that the conversation did not influence his decision to plead guilty, and he wished to maintain having defense counsel Perez represent him.

On September 9, 2014, defense counsel Perez filed her Curcio Hearing supporting exhibits. Included were: telephone messages between Nunez's temporary counsel and defense counsel Perez; Docket Sheet for the Southern District of Florida Case No. 14-6117 against Nunez; Notice of Temporary Appearance of Counsel filed by attorney Frank Rubio, Esq., in the Southern District of Florida, Case No. 14-6117; Order of Initial Temporary Appearance (Barry Seltzer, J.) in the Southern District of Florida, Case No. 14-6117; District of Connecticut Courtroom Minutes; and Broward County Jail Inmate Visitor Log.

On March 26, 2017, defense counsel Perez filed Supplemental Objections to the Pre-Sentence Report. Defense counsel Perez objected to factual allegations that appellant met with Alexander Marquez prior to the theft, and that appellant met with co-defendants in Miami, Florida to inventory the stolen goods and re-package them into moving boxes.

On October 28, 2014, the District Court of Connecticut issued an Order regarding the Curcio Hearing. The Court found

that there was no conflict of interest, and that defense counsel Perez was allowed to continue to represent appellant.

On February 24, 2015, the Government filed a Sentencing Memorandum. The Government stated that appellant faced a maximum term of imprisonment of 55-years for all Counts of the Superseding Indictment. The Government also contended that appellant's base offense level is 6 (U.S.S.G. §2B1.1[a][2]), and a 24 level increase based on the wholesale value of the stolen pharmaceuticals (U.S.S.G. §2B1.1[b][1][M]). The Government applied a 3 level reduction for appellant's acceptance of responsibility, for a final offense level of 27.

With an offense level of 27 and a criminal history category 5, appellant's guideline range would be a 120-150 month term of imprisonment, a fine between $12,500 and approximately $160,000,000 and a term of Supervised Release of 1-3 years. The Government also contended that two enhancements are possible: 2 level enhancement for use of sophisticated means (U.S.S.G. §2B1.1[b][9][C]), and a 2 level enhancement for appellant's role in the offense as a leader or organizer (U.S.S.G. §3B1.1[c]) (JA-705-706). The Government asked for the maximum term of imprisonment [150 months] for appellant based upon the seriousness of the offense and the need for deterrence.

On March 26, 2015, defense counsel Perez filed, a second supplement to appellant's original Pre-Sentence Report

objections. Defense counsel Perez contended that the Government's claim that Eli Lilly's total loss was around $60 million was incorrect. Defense counsel Perez's contention was based upon information obtained from a separate law suit between Eli Lilly and National Union against ADT/TYCO, as well as prior information submitted to the District Court. Defense counsel Perez concluded that the accurate and appropriate loss figure was close to $46 million. Defense counsel Perez continued to contend that appellant did not obtain special skill or knowledge of alarm systems.

On March 30, 2015, the District Court sentenced appellant. Defense counsel Perez continued to indicate that the Government's calculation of loss amounts was incorrect, there was a lack of evidence to support the proposition that appellant had any knowledge or information in the alarm systems used by Eli Lilly at their warehouse, appellant was not a leader or organizer of the conspiracy, and aspects of his criminal history are incorrect.

The District Court ordered the final Pre-Sentence Report to reflect that the Government withdrew enhancements based upon appellant's role and sophisticated means.

The District Court used the 2010 Sentencing Guideline for its calculations to avoid any ex-post facto problems. The District Court concluded that there was no dispute that grouping

Counts One through Six for calculation under U.S.S.G. §3D1.2[d] is proper. Therefore, the guideline for the crime of INTERSTATE TRANSPORT OF STOLEN PROPERTY is a level 6 under U.S.S.G. §2B1.1[a][2].

The District Court concluded it was reasonably foreseeable that the loss amount was over $50 million, resulting in a sentencing enhancement of 24 levels under U.S.S.G. §2B1.1[b][1][M]. Defense counsel Perez contended that the Government's calculation of the loss amount is unreliable. The District Court then stated its requirements under U.S.S.G. §2B1.1[3][c] to calculate loss, and concluded that the loss amount is greater than $50 million, and, therefore, requires a 24 level increase to appellant's sentence.

The District Court acknowledged that appellant has a 2 level reduction for his personal acceptance of responsibility. The Government orally moved for an additional point reduction for acceptance of responsibility. The District Court adjourned the proceeding and scheduled it to be continued at a later date.

One April 8, 2015, defense counsel Perez filed appellant's third supplemental Motion in support of her Pre-Sentence Report objections. Defense counsel Perez continued to object the District Court's calculation of loss amount, contending that the loss amount calculation was $46 million.

On April 10, 2015, the District Court continued to sentence appellant. The District Court concluded that appellant had a combined offense level of 27 and a Category V Criminal History. Defense counsel Perez maintained that the correct loss amount calculation was $46 million. After hearing statements from defense counsel Perez and the Government, the District Court sentenced appellant to serve a 98-month term of imprisonment for Counts Two through Six, and a 60-month term of imprisonment for Count One. The District Court ordered a 36-month term of Supervised Release on all Counts. Further, the District Court ordered restitution, imposed jointly and severally among all the codefendants, in the amount of $60,994,213.

Appellant filed his Notice of Appeal on November 7, 2016.

On August 6, 2018, in a Summary Order the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction (Appendix A). The Second Circuit declined to decide the ineffective assistance of counsel claim, and determined that the District Court's loss calculation was not clearly erroneous.

Appellant is currently incarcerated at the Pinellas County Jail in Clearwater, Florida.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Court should grant the instant Petition for a Writ of Certiorari to resolve whether there is sufficient evidence on the Record to determine that appellant was denied the effective assistance of counsel. Second, this Court should resolve the split in the Circuits in how to determine "actual loss" under U.S.S.G. §2B1.1, and when it is appropriate to depart from the market value rule.

I. Whether Appellant Received the Effective Assistance of Counsel?

This Court should conclude that the Second Circuit incorrectly held that there was insufficient evidence on the Record to hear appellant's claim of ineffective assistance of counsel.

The Sixth Amendment of the Constitution of the United States provides that in all criminal prosecutions, the accused shall enjoy the right to have the effective assistance of counsel (see Strickland v. Washington, 466 U.S. 668, 686 [1984]; Morales v. United States, 635 F.3d 39, 43 [2nd Cir. 2011]). This Court has found that "an accused's right to be represented by counsel is a fundamental component of our criminal justice system" (United States v. Cronic, 466 U.S. 648, 653 [1984]; see also Herring v. New York, 422 U.S. 853 [1975]).

The Court of Appeals may hear and decide a claim of ineffective assistance of counsel on direct appeal where: 1) defendant has new counsel on appeal; and 2) argues no ground of ineffectiveness that is not fully developed in the trial record (United States v. Williams, 205 F.3d 23, 35 [2nd Cir. 2000]). The Court of Appeals may decline to hear the claim, remand the claim to the District Court for a necessary fact finding Hearing, or decide the claim (United States v. Colon-Torres, 382 F.3d 76, 84-84 [1st Cir. 2004]).

In determining the ineffectiveness of counsel, this Court in Strickland (supra at 693-694) set forth a two-prong test whereby a defendant must demonstrate, first, that his attorney's conduct fell "outside the wide range of professional competent assistance" and, second, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different (United States v. Washington, 715 F.3d 975, 981 [6th Cir. 2013]; Stanley v. Schriro, 598 F.3d 612, 619 [9th Cir. 2010]).

In assessing the reasonableness of counsel's performance under the first prong of Strickland (supra at 689), the conduct in question should be viewed from counsel's perspective, without the distorting effects of hindsight (Duncan v. Morton, 256 F.3d 189, 200 [3rd Cir. 2001]). Actions or omissions that may be considered sound trial strategy do not constitute ineffective

assistance of counsel (Henry v. Poole, 409 F.3d 48, 63 [2nd Cir. 2005]; United States v. Gaskin, 364 F.3d 438, 468 [2nd Cir. 2004]).

Under the prejudice component, the second prong, counsel's errors must prejudice petitioner in that a reasonable probability exists that the outcome was altered by the errors (Strickland, supra at 694; see also Williams v. Taylor, 529 U.S. 362, 391 [2000]; Rosario v. Ercole, 601 F.3d 118, 123 [2nd Cir. 2010]). Although "a defendant is generally required to show prejudice to prevail on an ineffective assistance of counsel claim, 'this is not so when counsel is burdened by an actual conflict of interest'" (LoCasio v. United States, 395 F.3d 51, 56 [2nd Cir. 2005] --- quoting United States v. Schwarz, 283 F.3d 76, 91 [2nd Cir. 2002]). In other words, if a defendant shows an actual conflict of interests that adversely affected his counsel's performance, prejudice is presumed (Cuyler v. Sullivan, 446 U.S. 335, 348; Schwarz, supra at 91). However, if there is no evidence the conflict actually effected defense counsel's performance, no relief can be obtained (Dukes v. Warden, 406 U.S. 250, 256 [1972]; Sullivan, supra at 349-350).

In the case at bar, there is sufficient evidence to determine that defense counsel's actions deprived petitioner of the effective assistance of counsel.

At the Curcio Hearing, these facts were undisputed: defense counsel represented petitioner since February of 2013; defense counsel filed a Motion and stated in a Telephonic Hearing claiming that Yosmany Nunez was a material witness, the government should produce Nunez, and Nunez was a government agent; Nunez was not represented by defense counsel in the underlying proceeding; security control logs of the detention facility where Nunez was being held indicate that he was visited on the evening of April 24, 2014 by petitioner's defense counsel; that meeting lasted for over 100 minutes; defense counsel did not have permission to see Nunez from Nunez's attorney; and there was no joint defense agreement formed between Nunez and petitioner; and Nunez invoked his Fifth Amendment right not to testify at the Hearing.

The Government and Nunez's attorneys, Frank Rubio, Jr., Esq., and Rodney Bryson, Esq., argued that petitioner's defense counsel informed Nunez that he should not tell his attorney that they met. Defense counsel Perez claimed that she did not tell Nunez this, and continually pointed to her phone records, which simply showed the phone numbers she called and their length of conversation, in an attempt to show that she was in continuous contact with Nunez's attorneys. Nunez's attorneys, however, dispute that they were informed of the meeting by defense counsel, but were told by their client, Nunez, after the fact.

Nunez did not dispute his attorney's representation that defense counsel Perez told him not to tell his attorneys of their meeting.

Defense counsel contended that she spoke about a joint defense agreement with Nunez's attorneys, but they did not formally agree upon one, because at that moment in time there was no formal retainer between Nunez and his future attorneys.

The facts established at the Curcio Hearing suggest that petitioner's counsel's conduct fell "outside the wide range of professional competent assistance" (Strickland, supra at 693-694). The decision to meet with Nunez without the permission of his attorneys, and without the existence of a joint defense agreement falls outside the bounds of competent assistance and was not sound trial strategy (Strickland, supra at 693-694; Poole, supra at 63).

The facts also indicate that the meeting prejudiced petitioner by depriving him of a loyal attorney (Strickland, supra 692). Regardless of what was said during the meeting, the fact that the meeting took place deprived petitioner of an attorney who had his best interest at heart (Sullivan, supra at 348; Schwarz, supra at 91). The claim that defense counsel told Nunez not to tell anyone about the meeting further suggests that the intent of the meeting was not in petitioner's best interest because such a request indicates that the meeting created a

conflict of interest which would adversely affect petitioner's representation (Sullivan, supra at 348; Warden, supra at 256).

As such, there is sufficient evidence to show defense counsel's actions satisfied both prongs of the Strickland (supra at 693-694) test.

This Court should review the instant issue to further clarify the meaning of effective representation, and to remand the matter to the Second Circuit to decide whether petitioner was denied the effective assistance of counsel as guaranteed by the Sixth Amendment.

II. Whether Appellant's Sentence was Properly Calculated?

This Court should conclude that the District Court erroneously determined that the market price was the proper method of interpreting "actual loss" under U.S.S.G. §2B1.1[b]. As such, the correct calculation of a defendant's offense level is critical to furthering the basic purposes of criminal punishment: deterrence; incapacitation; just punishment; and rehabilitation.

The standard of review for sentencing is one of reasonableness (United States v. Booker, 543 U.S. 220, 260-262 [2005]). Procedural error occurs in situations in which the District Court miscalculates the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the Title 18 U.S.C. §3553[a] factors;

bases its sentence on clearly erroneous facts; or deviates from the Guidelines without explanation (Gall v. United States, 552 U.S. 38, 51 [2007]).

...as to the standard of review.

Review of a District Court's sentencing decision on appeal is for the abuse of discretion (Gall, supra). For purposes of the Sentencing Guidelines the District Court's factual determinations are reviewed for clear error, and its interpretation of the Sentencing Guidelines are reviewed de novo (United States v. Harris, 597 F.3d 242, 250 [5th Cir. 2010], citing United States v. Cisneros-Gutierrez, 517 F.3d 751, 764 [5th Cir. 2008]; see United States v. Lacey, 699 F.3d 710, 717 [2nd Cir. 2012]).

The appropriate method for calculating the loss amount under U.S.S.G. §2B1.1[b] is a legal determination and must be reviewed de novo (see United States v. Walker, 234 F.3d 780, 783 [1st Cir. 2000]; see United States v. Margulies, 442 Fed. Appx. 727, 730 [3rd Cir. 2001]; see Harris, supra at 250; see United States v. Erpenbeck, 532 F.3d 423, 433 [6th Cir. 2008]; see United States v. Hardy, 289 F.3d 608, 613 [9th Cir. 2002]; see United States v. Machado, 333 F.3d 1225, 1227 [11th Cir. 2003]).

It is respectfully submitted that, on appeal, the Court of Appeals for the Second Circuit improperly determined that the instant issue should be reviewed for clear error.

Petitioner's contention was that the District Court improperly applied U.S.S.G. §2B1.1[b]. Defense counsel submitted an overabundance of material to support the contention that the correct method of calculating the "actual loss" was to use the transfer-in formula. The Government argued the proper method of calculating the "actual loss" was the net effective formula. The District Court's decision as to which method most accurately represented the "actual loss" suffered by Eli Lilly pharmaceuticals is a legal determination and must be reviewed de novo (see Walker, supra at 783; see Margulies, supra at 730; see Harris, supra at 250; see Erpenbeck, supra at 433; see Hardy, supra at 613; see Machado, supra at 1227).

The Second Circuit claimed that the District Court's decision to adopt the net effective formula was a factual finding, but this is incorrect. Defense counsel did not challenge the factual proffers of the Government, instead she indicated that the transfer-in method was the correct legal calculation of "actual loss" because it represented the cost of replacement to Eli Lilly. While the District Court determined at Sentencing that the "net effective price as the measure of the fair market value", it recognized "it may not be the only methodology used" and therefore the real debate in the instant case was which method was the best reflection of "actual loss".

The 1st, 3rd, 5th, 6th, and 9th, 11th Circuits all agree that on appellate review, the decision of the District Court as to which method to use to calculate "actual loss" under U.S.S.G. §2B1.1[b] must be reviewed de novo because it is a legal application of the Sentencing Guidelines (see Walker, supra at 783; see Margulies, supra at 730; see Harris, supra at 250; see Erpenbeck, supra at 433; see Hardy, supra at 613; see Machado, supra at 1227).

As such, this Court should review the issue due to the Second Circuit's failure to properly determine the standard of review. In the alternative, if the Second Circuit properly determined the standard of review, this Court should review the instant case to resolve the split in the Circuits.

...as to the proper application of U.S.S.G. §2B1.1[b].

A Sentencing Court must consider the value of the stolen property when calculating a defendant's total offense level (U.S.S.G. §2B1.1[b][1]). The Court must make a "reasonable estimate of the loss," based on "available information" (U.S.S.G. §2B1.1 cmt. n.3[C]). The Court should factor the "fair market value of the property unlawfully taken" (U.S.S.G. §2B1.1 cmt. n.3[C]).

Market value is generally determined as the price at which the goods would exchange hands between fully informed and willing parties (United States v. Cartwright, 411 U.S. 546, 551

[1973]). Fair market value is “[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's length transaction" (Fair Market Value, Black's Law Dictionary [10th ed. 2014]). The District Court’s calculation of the market price cannot be speculative, but can be a reasonable estimate (United States v. Patterson, 595 F.3d 1324, 1327 [11th Cir. 2010]).

The Court of Appeals for the 5th and 8th Circuits hold that the retail value of the goods stolen should always be used as the measure of fair market value for convictions under Title 18 U.S.C. §659 (United States v. Watson, 966 F.2d 161, 163 [5th Cir. 1992]; United States v. Russell, 913 F.2d 1288, 1292-93 [8th Cir. 1990]). While the Court of Appeals for the 1st, 6th, 9th, and 10th Circuits recognize there are different markets for a single good, and hold that the market price for a stolen good should be measured by the market it is put up for sale in (United States v. Machado, 333 F.3d 1225, 1228 [11th Cir. 2003]; United States v. Hardy, 289 F.3d 608, 613-14 [9th Cir. 2002]; United States v. Carrington, 96 F.3d 1, 6 [1st Cir. 1996]; United States v. Williams, 50 F.3d 863, 864 [10th Cir. 1995]; United States v. Warshawsky, 20 F.3d 204, 213 [6th Cir. 1994]). The market value determination for goods stolen from a wholesaler is the wholesale price (United States v. Stoupis, 530 F.3d 82, 86 [1st Cir. 2008]).

"If the fair market value is impracticable to determine or inadequately measure the harm, the cost to the victim of replacing that property" may be used (U.S.S.G. §2B1.1 cmt. n.3[C][i]). The market value is an inadequate measure of harm when the evaluation does not reflect economic reality or the actual loss to the victim (United States v. Crandall, 525 F.3d 907, 914 [9th Cir. 2008]; see United States v. Johnson, 162 F. App'x 526, 530 [6th Cir. 2006]).

In the case of an ambiguous criminal statute the doubt should always be resolved in the favor of the defendant (United States v. Bass, 404 U.S. 336, 348 [1971]). The Rule of Leniency applies to substantive interpretations of statutes, but also to the penalties the statues impose (Bifulco v. United States, 447 U.S. 381, 387 [1980]).

In the instant matter, the District Court incorrectly determined that the net effective price was the most accurate reflection of market price and the correct measure of "actual loss" to Eli Lilly. The District Court should have, as a matter of law, determined "actual loss" as the cost of replacement, not the market price (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Crandall, supra at 914; Bifulco, supra at 387).

Initially it should be noted, what is considered "market price" in the instant matter was extremely contested. The

District Court considered whether the net wholesale price, the net effective price, or the transfer-in price was the most accurate reflection of market price.

Under the approach of the 5th and 8th Circuits, the correct measure of market price would be retail value, which the District Court never considered (Watson, supra at 163; Russell, supra at 1292-93). Under the approach taken by other Circuits, the wholesale value of the drugs is the correct measure of market price (Hardy, supra at 613-14; Carrington, supra at 6; Williams, supra at 864; Warshawsky, supra at 213; Machado, supra at 1228). The District Court rejected both figures as not providing an adequate or accurate measure of loss to Eli Lilly. The District Court reasoned the retail value of the drugs and the wholesale value of the drugs severely overcompensated Eli Lilly for its loss. Once the District Court determined that the market price (either the wholesale value or retail value) was an improper measure of loss, it should have determined loss as the replacement cost of the goods (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Crandall, supra at 914; Johnson, supra at 530).

However, the District Court continued with the market price analysis and determined that the net effective cost of the goods was the most accurate reflection of market price. The net effective price was the wholesale price less any subsequent discounts or rebates Eli Lilly's costumers could redeem for the

goods. The District Court improperly interpreted the Guidelines because the net effective price was not the market price. The market price was the price at which Eli Lilly offered the goods for sale, which was the wholesale price (Stoupis, supra at 86; Hardy, supra at 613-14; Carrington, supra at 6; Williams, supra at 864; Warshawsky, supra at 213; Machado, supra at 1228).

The market price should have been determined to be the wholesale price of $80,000,000 because that was the price which Eli Lilly offered the goods for sale (Stoupis, supra at 86; Hardy, supra at 613-14; Carrington, supra at 6; Williams, supra at 864; Warshawsky, supra at 213; Machado, supra at 1228). The District Court recognized that the net-wholesale price overcompensated Eli Lilly, but at this point it should have departed from the market price analysis (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Crandall, supra at 914; Johnson, supra at 530).

A District Court can depart from the market price analysis because the value would under compensate the victim and does not reflect the economic reality (Crandall, supra at 914; Johnson, supra at 530) A District Court should then also be able to depart when the value overcompensates the victim for the same reason (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Crandall, supra at 914; Johnson, supra at 530).

The wholesale price would overcompensate Eli Lilly for multiple reasons. First, Eli Lilly offers goods up for sale at

wholesale price, but rarely does it receive 100% of the wholesale price from its customers. Eli Lilly offers rebates to down stream customers who look to the mid-level supplies for the discounts. The mid-level supplies then look to Eli Lilly to redeem the discounts. Though Eli Lilly offered the goods for sale at the wholesale price, it never receives the wholesale price for its goods. As such, the market price would actually over compensate Eli Lilly. Second, Eli Lilly received an insurance claim payout equal to the transfer-in price. The payment allowed Eli Lilly to transfer-in a shipment to replace the stolen goods. The net-wholesale evaluation will not only allow Eli Lilly to have physically replaced the stolen goods, but after paying back the insurance carrier Eli Lilly would receive a substantial windfall. Therefore, because of the factual scenario and the economic reality, the market price would overcompensate Eli Lilly, and the District Court should have departed from the market value analysis (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Crandall, supra at 914; Johnson, supra at 530).

Moreover, the Rule of Leniency supports the contention that the District Court should depart from the market price rule when the evaluation overcompensates the victim (Bass, supra at 348; Bifulco, supra at 387). The Circuits have clearly held that when the market price undercompensates the victim, it may depart from the market price rule (Crandall, supra at 914; Johnson, supra at

530). However, it is not clear from the face of the U.S.S.G. §2B1.1 whether a departure is warranted when the market price overcompensates the victim (U.S.S.G. §2B1.1 cmt. n.3[C][i]). Applying the Rule of Leniency in ambiguous situations, the District Court should be allowed to depart from the market price rule when such a formula overcompensates the victim (Bass, supra at 348; Bifulco, supra at 387). Therefore, since the wholesale price would have overcompensated Eli Lilly, the District Court should have departed to a different method of calculation which would favor petitioner (Hardy, supra at 613-14; Bass, supra at 348; Bifulco, supra at 387).

Under such an analysis, once the District Court determined the market price was not appropriate it should have then determined the cost of replacement to Eli Lilly (U.S.S.G. §2B1.1 cmt. n.3[C][i]). In the instant case, an independent expert evaluated the goods using the transfer-in price, and found the goods to be valued at approximately $40,000,000. The transfer-in price was the most appropriate measure of the Eli Lilly's loss because it represented the cost to Eli Lilly to replace the stolen goods from up the supply chain. The transfer-in price "utilize[d] advance pricing agreements with each affiliate, local taxing authority and an acceptable profit margin" as well as targeted operating expenses and earnings. The transfer-in price was the best method of determining the internal and

replacement value of the stolen goods. As such, since the "actual loss" should be determined by the replacement cost to Eli Lilly, not the market price, the District Court erred in calculated petitioner's total offense level (U.S.S.G. §2B1.1 cmt. n.3[C][i]; Cartwright, supra at 551; Crandall, supra at 914; Johnson, supra at 530).

It is respectfully submitted that, the District Court failed to properly interpret U.S.S.G. §2B1.1 when it found that the net effective price represented the market price and the "actual loss" to Eli Lilly (Hardy, supra at 613-14; Carrington, supra at 6; Williams, supra at 864; Warshawsky, supra at 213; Machado, supra at 1228). The District Court's erroneous interpretation doomed petitioner to an additional two-level enhancement in its Guidelines calculation which caused the District Court to impose a procedurally unreasonable sentence (United States v. Booker, supra at 260-262; Gall, supra at 51).

This Court should review the instant issue to first, resolve the split in the Circuits as to how to correctly calculate market price in terms of U.S.S.G. §2B1.1[b], and second, clarify as to when it is permissible for a District Court to depart from the market price analysis, and third, to remand the instant case back to the District Court so that it may impose a procedurally reasonable sentence.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE PETITION FOR CERTRIORARI SHOULD BE GRANTED.

Respectfully Submitted,

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Counsel of Record for Petitioner

Dated: October 22, 2018

APPENDIX A

United States v. Villa

United States Court of Appeals for the Second Circuit

August 6, 2018, Decided

No. 15-1421-cr

Reporter
2018 U.S. App. LEXIS 21654 *; __ Fed.Appx. __; 2018 WL 3737949

UNITED STATES OF AMERICA, Appellee, v. AMAURY VILLA, Defendant-Appellant, AMED VILLA, AKA RICARDO SAAVEDRA, YOSMANY NUNEZ, AKA EL GATO, ALEXANDER MARQUEZ, RAFAEL LOPEZ, Defendants.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from a judgment of the United States District Court for the District of Connecticut. (Arterton, J.).

United States v. Villa, 2014 U.S. Dist. LEXIS 152588 (D. Conn., Oct. 27, 2014)

Counsel: FOR APPELLANT: JOHN A. CIRANDO (Bradley E. Keem, Elizabeth deV. Moeller, on the brief), D.J. & J.A. Cirando, Esqs., Syracuse, New York.

FOR APPELLEE: ANASTASIA E. KING, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, on the brief), for John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut.

Judges: PRESENT: PETER W. HALL, SUSAN L. CARNEY, Circuit Judges, JOHN G. KOELTL, District Judge.*

Opinion

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant-Appellant Amaury Villa ("Villa") pleaded guilty unconditionally to one count of conspiring to commit theft from an interstate shipment and interstate transportation of stolen property, in violation of *18 U.S.C. § 371*; four substantive counts of theft from interstate shipment, in violation of *18 U.S.C. § 659*; and one substantive count of interstate transportation of stolen property, in violation of *18 U.S.C. § 2314*. In doing so he rejected the government's plea offer. The district court sentenced Villa to a total of 98 months' imprisonment [*2] to run concurrently with a 140-month sentence already imposed by the United States District Court for the Southern District of Florida. The district court also imposed an order of restitution in the amount of $60,994,213 jointly and severally upon Villa and his codefendants. Villa appeals from the district court's judgment entered on April 29, 2015.

We assume the parties' familiarity with the facts, record of prior proceedings, and arguments on appeal, which we reference only as necessary to explain our decision to affirm.

I. We Decline To Decide Villa's Ineffective Assistance Of Counsel Claim.

When faced with a claim for ineffective assistance of counsel on direct appeal, we may: "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to *28 U.S.C. § 2255*; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Morris, 350 F.3d 32, 39 (2d Cir. 2003)*. The third course of action is appropriate when the factual record is fully developed and resolution of the *Sixth Amendment* claim

* Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

on direct appeal is "beyond any doubt" or "in the interest of justice." United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003) (internal quotation marks omitted). But we have expressed [*3] a "baseline aversion to resolving ineffectiveness claims on direct review." United States v. Williams, 205 F.3d 23, 35 (2d Cir. 2000). This aversion is due in part to the reasoning that "the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." Khedr, 343 F.3d at 100. Here, we lack the factual record necessary to decide Villa's ineffective assistance claim, and Villa recognizes as much in his reply brief, *see* Appellant's Reply Br. 5 ("*Without knowing what the conversation entailed* [between defense counsel and one of Villa's co-defendants], one cannot say if it rendered appellant's guilty plea involuntary or voluntary." (emphasis added)). We therefore decline to decide this claim on direct appeal.

II. Villa's Guilty Plea Was Not Entered In Plain Error.

Villa contends that the district court did not comply with the requirements set forth in Rule 11(b)(1)(K) and Rule 11(b)(3).[1] Where, as here, a defendant fails to raise an objection to an alleged violation of Rule 11, we review for plain error. United States v. Tulsiram, 815 F.3d 114, 119 (2d Cir. 2016) (per curiam).

Villa first argues that the district court violated Rule 11(b)(1)(K) by "fail[ing] to disclose the amount of restitution that appellant possibly faced," Appellant's Br. 28, although he acknowledges that the district court informed him generally [*4] that "there may be restitution," *id.* (quoting JA475). "In the Rule 11 context, the plain-error standard requires a defendant to establish that the violation affected substantial rights and that there is a reasonable probability that, but for the error, he would not have entered the plea." Tulsiram, 815 F.3d at 120 (internal quotation marks omitted). The district court complied with Rule 11(b)(1)(K) by advising Villa that "[t]here may be restitution." JA475. Moreover, Villa received notice that he might face a substantial financial obligation as a result of his plea because the PSR provided that "[r]estitution is mandatory in this case" and stated, as to Counts 1 and 6, a "maximum fine [of] $160,000,000." PSR ¶¶ 82, 86. And Villa represented to the district court that he had read and understood the PSR. "Where a defendant, before sentencing, learns of information erroneously omitted [from the plea colloquy] in violation of Rule 11 but fails to attempt to withdraw his plea based on that violation, there can be no reasonable probability that, but for the Rule 11 violation, he would not have entered the plea, and the plain error standard is not met." United States v. Vaval, 404 F.3d 144, 152 (2d Cir. 2005) (internal quotation marks and alterations omitted). Villa never objected to the restitution order [*5] before the district court, even when the amount was announced at sentencing, and did not move to withdraw his plea. He therefore has not demonstrated a reasonable probability that, but for any Rule 11(b)(1)(K) error, he would not have entered the plea.

Villa also argues that the district court failed to determine that there was a factual basis for the plea, as required by Rule 11(b)(3). And he asserts he never represented to the district court that he had direct knowledge of where the stolen property would be sent or that he had any knowledge that property was intended for interstate shipment.

These arguments lack merit. First, there is no *mens rea* requirement for the jurisdictional element of *18 U.S.C. § 659*. "A substantive violation of *18 U.S.C. § 659* does not require knowledge of the interstate or foreign character of the goods." United States v. Green, 523 F.2d 229, 233-34 (2d Cir. 1975). Second, even if 18 U.S.C. § 2314 contains a *mens rea* requirement with respect to its jurisdictional element, *but see* Appellee's Br. 17-18, the district court took care to ensure that Villa knowingly had participated in *interstate* transportation of stolen goods, whether or not he knew exactly where the goods would be transported. *See* JA488-92. It was not plain error for the district court to find the jurisdictional elements of [*6] *sections 659* and 2314 satisfied.

III. Villa's Double Jeopardy Claims Are Meritless.

As a general matter, "[o]n appeal, we review [ ] double jeopardy issue[s] *de novo*." United States v. Maslin, 356 F.3d 191, 196 (2d Cir. 2004) (citing United States v. Estrada, 320 F.3d 173, 180 (2d Cir. 2003)). Villa argues that (1) the conspiracy charge is unlawfully duplicative

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[1] Villa's counsel on appeal erroneously cites the version of Rule 11 in effect before the rule's 2002 amendments. *See* Appellant's Br. 28 (citing "Rule 11(c)(1)"); id. at 29 (citing "Rule 11(f)"). The substantive requirements he references are now found in subsections (b)(1)(K) and (b)(3). *Compare* Fed. R. Crim. P. 11 (2001), *with* Fed. R. Crim. P. 11 (2002), *and* Fed. R. Crim. P. 11 (2018). Rule 11 was last amended in 2013, before Villa's May 2014 change-of-plea hearing, and thus the current version of the rule governs here.

of the conspiracy charge in his Florida case, and (2) his Florida conviction for possession of stolen goods precludes convictions in Connecticut for theft from an interstate shipment. Villa's Double Jeopardy claims are without merit. With respect to the conspiracy counts, it is plain from an application of the *Korfant* factors that Villa was charged with two separate conspiracies, one in Florida and one in Connecticut. *United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985)* (per curiam). The conspiracies covered a different time, had different participants, and also had a different geographic focus. With respect to the substantive counts, under *Blockburger* we ask "whether each charged offense contains an element not contained in the other charged offense." *United States v. Chacko, 169 F.3d 140, 146 (2d Cir. 1999)* (discussing *Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)*). Because the substantive count under *§ 2315* in the Florida indictment contains an additional element not contained in the substantive counts under *§ 659* in the Connecticut indictment, and *§ 659* contains an element not contained in *§ 2315*,[2] the charges are not multiplicitous. [*7]

IV. The Loss Calculation Was Not Clearly Erroneous.

We review for clear error a district court's factual findings of loss for the purposes of the United States Sentencing Guidelines. *United States v. Binday, 804 F.3d 558, 595 (2d Cir. 2015)*. For sentencing purposes, "loss" is "the greater of actual loss or intended loss." *U.S.S.G. § 2B1.1 cmt. n.3(A)*. And "actual loss" is "the reasonably foreseeable pecuniary harm that resulted from the offense." *U.S.S.G. § 2B1.1 cmt. n.3(A)(i)*.[3] It is incumbent upon the district court to make "a reasonable estimate of the loss," and we grant "appropriate deference" to such an estimate. That estimate should be based on "available information" and "tak[e] into account" factors such as "[t]he fair market value of the property unlawfully taken . . . or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property." *U.S.S.G. § 2B1.1 cmt. n.3(C)*.

"In determining a loss amount for purposes of Guidelines calculation, a district court's findings must be grounded in the evidence and not derive from mere speculation." *United States v. Coppola, 671 F.3d 220, 249 (2d Cir. 2012)*. "A district court is not required to calculate loss with absolute precision, but need only by a preponderance of the evidence make a reasonable estimate of the loss given the available information." [*8] *Binday, 804 F.3d at 595* (internal quotation marks omitted).

The dispute as to loss here boils down to a difference of opinion regarding which methodology of loss calculation should be used. The court considered, at great length and on the record, the competing arguments. It ultimately concluded as follows: "[W]hile the Court recognizes the efforts that have been undertaken by defense counsel with respect to challenging the reliability of the numbers and . . . what the methodology covers, the Court is satisfied that the available information set out in the reports of the knowledgeable people . . . fairly reflect that the loss amount in this case should be greater than fifty million dollars . . . ." JA806-07. After hearing more on the topic at sentencing, the district court further concluded that although it recognized the methodology promoted by the government "may not be the only methodology to be used," it "seems to reflect . . . fair market value." JA883. The district court's decision was not clearly erroneous but rather was adequately supported by the record before it.

V. Conclusion.

We have considered all Appellant's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the [*9] judgment of the district court.

End of Document

[2] *Compare Modern Federal Jury Instructions-Criminal § 25.01* (Theft from Interstate Shipment) (Instruction 25-2) (identifying as element "that at the time of the theft the property was part of an interstate shipment as described in the statute"), *with Modern Federal Jury Instructions-Criminal § 54.06* (Sale or Receipt of Stolen Property) (Instruction 54-47) (identifying as element "that after the property had been stolen, converted or taken, it crossed a boundary of a state or of the United States").

[3] The district court stated that it "use[d] the 2010 [Sentencing Guidelines] [M]anual . . . to avoid any ex post facto problems." JA758. All citations to the Guidelines Manual in this Order similarly refer to the 2010 version.

APPENDIX B

AO245b (USDC-CT Rev. 9/07)

UNITED STATES DISTRICT COURT
District of Connecticut

UNITED STATES OF AMERICA

v.

AMAURY VILLA

JUDGMENT IN A CRIMINAL CASE

CASE NO. *3:12CR00040-1 (JBA)*
USM NO: *56726-018*

Anastasia Enos King, AUSA
Assistant United States Attorney

Maria Elena Perez, Esq.
Defendant's Attorney

THE DEFENDANT: pled guilty to counts 1,2-5 & 6 of the Superseding Indictment.

Accordingly the defendant is adjudicated guilty of the following offenses:

Title & Section	Nature of Offense	Offense Concluded	Counts
Title 18 U.S.C. §371	Conspiracy to Commit Theft from an Interstate Shipment	October 14, 2011	1
Title 18 U.S.C. §659	Theft from Interstate Shipment	October 14, 2011	2-5
Title 18 U.S.C. §2314	Interstate Transportation of Stolen Property	October 14, 2011	6

The following sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total of 60 months on Count 1 and 98 months on Counts 2,3,4,5 & 6. Sentence on Count 1 shall run concurrently to sentence on Counts 2,3,4,5 & 6. Sentence imposed shall also run concurrently to sentence imposed in Case No. 12cr20234. (Southern District of Florida)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of 3 years on each of Counts 1,2,3,4,5 & 6 of the Superseding Indictment. Supervised Release imposed shall run concurrently to each other. The Mandatory and Standard Conditions of Supervised Release as attached, are imposed. In addition, the following Special Conditions are imposed:

1. Defendant shall not incur new credit card charges above $250 on current credit cards or open additional lines of credit without the prior permission of the probation officer until the defendant's criminal debt obligation is paid. The defendant shall not add any new names to any lines of credit, shall not be added as a secondary card holder on another's line of credit, and shall provide the probation officer with electronic access to any online management of any lines of credit, including lines of credit for businesses/LLCs that are owned, operated or otherwise associated with the defendant.
2. Defendant must permit the probation officer to monitor investment and retirement accounts, to include coordinating with the account administrator to notify the probation officer of any activity on the account.
3. Defendant shall not encumber personal homes or investment properties without permission of the Court, and shall not transfer, sell give away, barter, or dissipate in any way any assets, including personal property (i.e.: motor vehicles, recreational vehicles) without the express permission of the probation officer and notification to the Court.
4. Defendant shall not possess a firearm or other dangerous weapon.
5. As the defendant is a bona fide resident of the Southern District of Florida, supervision is transferred to that district.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments (as follows) or (as noted on the restitution order).

Special Assessment:	$600.00	$100.00 special assessment on each Count 1, 2-5 & 6 of the Superseding Indictment
Fine:	Waived	
Restitution:	$60,994,213.00	owed jointly and severally amount co-defendants, payable immediately, at a rate of no less than $150 per month. The monthly payment schedule may be adjusted based on the defendant's ability to pay as determined by the probation office and approved by the Court.

It is further ordered that the defendant will notify the United States Attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs and special assessments imposed by this judgment, are paid.

JUDICIAL RECOMMENDATION(S) TO THE BUREAU OF PRISONS

The Court recommends that defendant be incarcerated at a facility as close to Miami, Florida as possible to facilitate visitation with family and friends.

The defendant is remanded to the custody of the United States Marshal.

April 10, 2015
Date of Imposition of Sentence

/s/
Janet Bond Arterton
United States District Judge
Date: April 28, 2015

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
Joseph P. Faughnan
United States Marshal

By _____
Deputy Marshal

CERTIFIED AS A TRUE COPY
ON THIS DATE _____
ROBERTA D. TABORA, Clerk
BY: _____
Deputy Clerk

CONDITIONS OF SUPERVISED RELEASE

In addition to the Standard Conditions listed below, the following indicated (■) Mandatory Conditions are imposed:

MANDATORY CONDITIONS

■ (1) The defendant shall not commit another federal, state or local offense;

■ (2) The defendant shall not unlawfully possess a controlled substance;

☐ (3) The defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. section 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant;

☐ (4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter for use of a controlled substance;

☐ (5) If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine;

■ (6) The defendant shall (A) make restitution in accordance with 18 U.S.C. sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. section 3013;

☐ (7) (A) In a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105-119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) In a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

■ (8) The defendant shall cooperate in the collection of a DNA sample from the defendant.

While on supervised release, the defendant shall also comply with all of the following Standard Conditions:

STANDARD CONDITIONS

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
(2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
(4) The defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
(6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment, or if such prior notification is not possible, then within five days after such change;
(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
(10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
(13) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
(14) The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

The defendant shall report to the Probation Office in the district to which the defendant is released within 72 hours of release from the custody of the U.S. Bureau of Prisons. Upon a finding of a violation of supervised release, I understand that the court may (1) revoke supervision and impose a term of imprisonment, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant **Date**

_____ _____
U.S. Probation Officer/Designated Witness **Date**

APPENDIX C

15-1421-cr
United States v. Villa

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of August, two thousand eighteen.

PRESENT: PETER W. HALL,
SUSAN L. CARNEY,
Circuit Judges,
JOHN G. KOELTL,
District Judge.[*]

UNITED STATES OF AMERICA,
Appellee,

v. No. 15-1421-cr

AMAURY VILLA,
Defendant-Appellant,

AMED VILLA, AKA RICARDO SAAVEDRA, YOSMANY NUNEZ, AKA EL GATO, ALEXANDER MARQUEZ, RAFAEL LOPEZ,
Defendants.

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[*] Judge John G. Koeltl, of the United States District Court for the Southern District of New York, sitting by designation.

C-1

FOR APPELLANT:	JOHN A. CIRANDO (Bradley E. Keem, Elizabeth deV. Moeller, *on the brief*), D.J. & J.A. Cirando, Esqs., Syracuse, New York.
FOR APPELLEE:	ANASTASIA E. KING, Assistant United States Attorney (Marc H. Silverman, Assistant United States Attorney, *on the brief*), *for* John H. Durham, United States Attorney for the District of Connecticut, New Haven, Connecticut.

Appeal from a judgment of the United States District Court for the District of Connecticut (Arterton, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendant-Appellant Amaury Villa ("Villa") pleaded guilty unconditionally to one count of conspiring to commit theft from an interstate shipment and interstate transportation of stolen property, in violation of 18 U.S.C. § 371; four substantive counts of theft from interstate shipment, in violation of 18 U.S.C. § 659; and one substantive count of interstate transportation of stolen property, in violation of 18 U.S.C. § 2314. In doing so he rejected the government's plea offer. The district court sentenced Villa to a total of 98 months' imprisonment to run concurrently with a 140-month sentence already imposed by the United States District Court for the Southern District of Florida. The district court also imposed an order of restitution in the amount of $60,994,213 jointly and severally upon Villa and his codefendants. Villa appeals from the district court's judgment entered on April 29, 2015.

We assume the parties' familiarity with the facts, record of prior proceedings, and arguments on appeal, which we reference only as necessary to explain our decision to affirm.

I. We Decline To Decide Villa's Ineffective Assistance Of Counsel Claim.

When faced with a claim for ineffective assistance of counsel on direct appeal, we may: "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). The third course of action is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is "beyond any doubt" or "in the interest of justice." *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003) (internal quotation marks omitted). But we have expressed a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000). This aversion is due in part to the reasoning that "the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." *Khedr*, 343 F.3d at 100. Here, we lack the factual record necessary to decide Villa's ineffective assistance claim, and Villa recognizes as much in his reply brief, *see* Appellant's Reply Br. 5 ("*Without knowing what the conversation entailed* [between defense counsel and one of Villa's co-defendants], one cannot say if it rendered appellant's guilty plea involuntary or voluntary." (emphasis added)). We therefore decline to decide this claim on direct appeal.

II. Villa's Guilty Plea Was Not Entered In Plain Error.

Villa contends that the district court did not comply with the requirements set forth in

Rule 11(b)(1)(K) and Rule 11(b)(3).[1] Where, as here, a defendant fails to raise an objection to an alleged violation of Rule 11, we review for plain error. *United States v. Tulsiram*, 815 F.3d 114, 119 (2d Cir. 2016) (per curiam).

Villa first argues that the district court violated Rule 11(b)(1)(K) by "fail[ing] to disclose the amount of restitution that appellant possibly faced," Appellant's Br. 28, although he acknowledges that the district court informed him generally that "there may be restitution," *id.* (quoting JA475). "In the Rule 11 context, the plain-error standard requires a defendant to establish that the violation affected substantial rights and that there is a reasonable probability that, but for the error, he would not have entered the plea." *Tulsiram*, 815 F.3d at 120 (internal quotation marks omitted). The district court complied with Rule 11(b)(1)(K) by advising Villa that "[t]here may be restitution." JA475. Moreover, Villa received notice that he might face a substantial financial obligation as a result of his plea because the PSR provided that "[r]estitution is mandatory in this case" and stated, as to Counts 1 and 6, a "maximum fine [of] $160,000,000." PSR ¶¶ 82, 86. And Villa represented to the district court that he had read and understood the PSR. "Where a defendant, before sentencing, learns of information erroneously omitted [from the plea colloquy] in violation of Rule 11 but fails to attempt to withdraw his plea based on that violation, there can be no reasonable probability that, but for the Rule 11 violation, he would not have entered the plea, and the plain error standard is not met." *United States v. Vaval*, 404 F.3d 144, 152 (2d Cir. 2005) (internal quotation marks and

[1] Villa's counsel on appeal erroneously cites the version of Rule 11 in effect before the rule's 2002 amendments. *See* Appellant's Br. 28 (citing "Rule 11(c)(1)"); *id.* at 29 (citing "Rule 11(f)"). The substantive requirements he references are now found in subsections (b)(1)(K) and (b)(3). *Compare* Fed. R. Crim. P. 11 (2001), *with* Fed. R. Crim. P. 11 (2002), *and* Fed. R. Crim. P. 11 (2018). Rule 11 was last amended in 2013, before Villa's May 2014 change-of-plea hearing, and thus the current version of the rule governs here.

alterations omitted). Villa never objected to the restitution order before the district court, even when the amount was announced at sentencing, and did not move to withdraw his plea. He therefore has not demonstrated a reasonable probability that, but for any Rule 11(b)(1)(K) error, he would not have entered the plea.

Villa also argues that the district court failed to determine that there was a factual basis for the plea, as required by Rule 11(b)(3). And he asserts he never represented to the district court that he had direct knowledge of where the stolen property would be sent or that he had any knowledge that property was intended for interstate shipment.

These arguments lack merit. First, there is no *mens rea* requirement for the jurisdictional element of 18 U.S.C. § 659. "A substantive violation of 18 U.S.C. § 659 does not require knowledge of the interstate or foreign character of the goods." *United States v. Green*, 523 F.2d 229, 233–34 (2d Cir. 1975). Second, even if 18 U.S.C. § 2314 contains a *mens rea* requirement with respect to its jurisdictional element, *but see* Appellee's Br. 17–18, the district court took care to ensure that Villa knowingly had participated in *interstate* transportation of stolen goods, whether or not he knew exactly where the goods would be transported. *See* JA488–92. It was not plain error for the district court to find the jurisdictional elements of sections 659 and 2314 satisfied.

III. Villa's Double Jeopardy Claims Are Meritless.

As a general matter, "[o]n appeal, we review [ ] double jeopardy issue[s] *de novo*." *United States v. Maslin*, 356 F.3d 191, 196 (2d Cir. 2004) (citing *United States v. Estrada*, 320 F.3d 173, 180 (2d Cir. 2003)). Villa argues that (1) the conspiracy charge is unlawfully duplicative of the conspiracy charge in his Florida case, and (2) his Florida conviction for possession of stolen

goods precludes convictions in Connecticut for theft from an interstate shipment. Villa's Double Jeopardy claims are without merit. With respect to the conspiracy counts, it is plain from an application of the *Korfant* factors that Villa was charged with two separate conspiracies, one in Florida and one in Connecticut. *United States v. Korfant*, 771 F.2d 660, 662 (2d Cir. 1985) (per curiam). The conspiracies covered a different time, had different participants, and also had a different geographic focus. With respect to the substantive counts, under *Blockburger* we ask "whether each charged offense contains an element not contained in the other charged offense." *United States v. Chacko*, 169 F.3d 140, 146 (2d Cir. 1999) (discussing *Blockburger v. United States*, 284 U.S. 299 (1932)). Because the substantive count under § 2315 in the Florida indictment contains an additional element not contained in the substantive counts under § 659 in the Connecticut indictment, and § 659 contains an element not contained in § 2315,[2] the charges are not multiplicitous.

IV. The Loss Calculation Was Not Clearly Erroneous.

We review for clear error a district court's factual findings of loss for the purposes of the United States Sentencing Guidelines. *United States v. Binday*, 804 F.3d 558, 595 (2d Cir. 2015). For sentencing purposes, "loss" is "the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). And "actual loss" is "the reasonably foreseeable pecuniary harm that resulted from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A)(i).[3] It is incumbent upon the district

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[2] *Compare* Modern Federal Jury Instructions-Criminal § 25.01 (Theft from Interstate Shipment) (Instruction 25-2) (identifying as element "that at the time of the theft the property was part of an interstate shipment as described in the statute"), *with* Modern Federal Jury Instructions-Criminal § 54.06 (Sale or Receipt of Stolen Property) (Instruction 54-47) (identifying as element "that after the property had been stolen, converted or taken, it crossed a boundary of a state or of the United States").

[3] The district court stated that it "use[d] the 2010 [Sentencing Guidelines] [M]anual . . . to avoid any ex post

court to make "a reasonable estimate of the loss," and we grant "appropriate deference" to such an estimate. That estimate should be based on "available information" and "tak[e] into account" factors such as "[t]he fair market value of the property unlawfully taken . . . or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property." U.S.S.G. § 2B1.1 cmt. n.3(C).

"In determining a loss amount for purposes of Guidelines calculation, a district court's findings must be grounded in the evidence and not derive from mere speculation." *United States v. Coppola*, 671 F.3d 220, 249 (2d Cir. 2012). "A district court is not required to calculate loss with absolute precision, but need only by a preponderance of the evidence make a reasonable estimate of the loss given the available information." *Binday*, 804 F.3d at 595 (internal quotation marks omitted).

The dispute as to loss here boils down to a difference of opinion regarding which methodology of loss calculation should be used. The court considered, at great length and on the record, the competing arguments. It ultimately concluded as follows: "[W]hile the Court recognizes the efforts that have been undertaken by defense counsel with respect to challenging the reliability of the numbers and . . . what the methodology covers, the Court is satisfied that the available information set out in the reports of the knowledgeable people . . . fairly reflect that the loss amount in this case should be greater than fifty million dollars . . . ." JA806–07. After hearing more on the topic at sentencing, the district court further concluded that although it recognized the methodology promoted by the government "may not be the

facto problems." JA758. All citations to the Guidelines Manual in this Order similarly refer to the 2010 version.

only methodology to be used," it "seems to reflect . . . fair market value." JA883. The district court's decision was not clearly erroneous but rather was adequately supported by the record before it.

V. Conclusion.

We have considered all Appellant's remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit