RECORD NO. _____

IN THE
Supreme Court of the United States

JOVANNY RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Petitioner was convicted and sentenced without having an opportunity to establish an alibi due to a variance between the indictment and evidence at trial. Should the Court grant Certiorari or allow violations of citizens' due process rights?

2) The district court failed to follow Supreme Court authority and the result of the failure is that Petitioner was convicted and sentenced without a proper jury finding. Should the Court grant Certiorari or permit violations of Supreme Court authority, failing to maintain precedential uniformity?

3) The district court allowed Petitioner to be convicted based on an indictment that failed to provide sufficient details of two charges. Should the Court grant Certiorari or permit violations of the Fifth and Sixth Amendments, permitting violations of citizens' due process rights?

4) The district court's jury instruction conflicts with Supreme Court authority under *United States v. Lopez*, 514 U.S. 549, 559 (1995), which requires that an activity must "substantially affect" interstate commerce to establish a conviction and this conflict resulted in Petitioner being convicted under an erroneous jury instruction that was based on misapplied legal precedent. Should the Court grant Certiorari or permit flagrant departures from Supreme Court authority?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America
Jovanny Rodriguez
Henry Michel
Jesus Hilario-Bello
Oscar Minaya

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

In the underlying docket 14-882 in the Second Circuit Court of Appeals, Jesus Hilario Bello and Oscar Minaya are co-appellants, and I have been advised by their counsel that they will file Petitions for Certiorari.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

As a matter of upholding judicial uniformity, dignity and fairness, it is up to this Court to resolve a conflict among the Circuits, remedy the due process violations and remedy the lower courts' conflicts with this Court's and Appellate Court authority. A conflict among the Circuits, the lower court's failure to follow precedent, and due process violations, all warrant the grant of the writ.

OPINION BELOW

The decision of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A 1-13).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued a summary order affirming Petitioner's conviction on February 5, 2019 (A. 1). On April 22, 2019, the Court of Appeals denied Petitioner's Petition for panel rehearing, hearing *en banc* (A 14).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved are the Due Process Clause of the Fifth Amendment and the notice protections of the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted for his role in a series of robberies targeting narcotics dealers, business owners and others in New York City. Targets were often taken away from their homes and held at gun-point until they revealed the location of drugs, money and other valuables. Petitioner was charged, in the thirteenth superseding indictment, along with eight other individuals, with conspiracy to commit Hobbs Act robbery (Count One), conspiracy to commit kidnapping (Count Two), several substantive Hobbs Act robbery charges (Counts Four, Seven, Eight, Nine, Ten) two substantive kidnapping charges (Counts Five, Eleven), three counts of use of a firearm in connection with a crime of violence (Counts Three, Six, Twelve) and, narcotics conspiracy (Count Fifteen).

Petitioner was convicted of Counts One, Two, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve and Fifteen of the Indictment and the district court imposed the following sentence: Concurrent terms of imprisonment of twenty-years on Counts One, Four, Seven, Eight, Nine and Ten; concurrent life terms on Counts Two, Five and Eleven; a concurrent ten-year-term of imprisonment on Count Fifteen; a consecutive seven-year term of imprisonment on Count Six; and a consecutive twenty-five-year term of imprisonment on Count Twelve.

Panel Decision

On February 5, 2019, a panel of the Second Circuit Court of Appeals affirmed the decision of the District Court. After finding that Appellant had forfeited his challenge regarding the specificity of the indictment because it was not raised before trial, the Court held that the indictment's specification of the vicinity and approximate dates of the alleged crimes was sufficient to fairly inform Appellant of the charges and enable him to invoke a double jeopardy defense should it be necessary. Further, the Court rejected Appellant's challenge to the District Court's aiding and abetting jury instruction under the Hobbs Act. Appellant objected to the Court's instruction that aiding and abetting could arise from a finding that a defendant was present at the scene during the commission of the crime of violence and that the defendant's conduct at the scene facilitated the carrying of a firearm, thus aiding and abetting the confederate's carrying of the firearm. Appellant argued that this instruction allowed the jury to find him guilty based only on his conduct at the scene, without any finding of the advance knowledge that *Rosemond v. United States*, 572 U.S. 65 (2014) requires. The Court held that the challenge was foreclosed by precedent, and that any difference between the standard articulated in *Rosemond* and the jury instruction given in Petitioner's case, if error, was harmless. In addition, in regard to Appellant's argument that he was prejudiced by the variance between the indictment and evidence at trial relating to Count Nine's Hobbs Act robbery, the Court held that testimony that the crime took place in the

year 2010 did not prove facts different from the indictment's allegation that the crime took place in November 2010 and that Appellant established no prejudice.

On April 22, 2019, the Court of Appeals denied Petitioner's Petition for panel rehearing, hearing *en banc*.

REASONS FOR THE GRANTING OF THE WRIT

POINT I

THE COURT MUST RESOLVE A CONFLICT AMONG THE CIRCUITS ON THE ISSUE OF WHAT CONSTITUTES A VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE AT TRIAL BECAUSE THERE IS AN INCONSISTENT APPLICATION OF THE DUE PROCESS CLAUSE.

There is a conflict among the circuit courts regarding what constitutes a variance between the indictment and the evidence at trial. Count Nine of the indictment alleged that the Hobbs Act robbery occurred in November of 2010. The testimony at trial was that the robbery occurred "in 2010," without any further specificity. Because the government failed to prove that the robbery occurred reasonably near November 2010, the proof at trial varied from the indictment in a manner that prejudiced Petitioner. *United States v. Ross*, 412 F.3d 771, 774-75 (7th Cir. 2005); *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991-92 (9th Cir. 1997).

The Court of Appeals affirmed the decision of the district court, finding that "proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983). The Court of Appeals held that the testimony that the crime took place in the year 2010

did not prove facts different from the indictment's allegation that the crime took place in November 2010 and that Appellant established no prejudice.

"A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Salmonese*, 352 F.3d 608, 621-22 (2d Cir. 2003)(quoting *United States v. Frank*, 156 F.3d 332, 337 n.5 (2d Cir. 1998). Some variance in proof at trial from the date stated in an indictment has been permitted where qualified by a phrase such as "on or about." *United States v. Somers*, 496 F.2d 723, 743-46 (3d Cir. 1974). Where the "on or about" language is used, the government need not prove the exact date of the offense "as long as a date reasonably near that named in the indictment is established." *United States v. Ross*, 412 F.3d 771, 774 (7th Cir. 2005); *United States v. Blanchard*, 542 F.3d 1133, 1143 (7th Cir. 2008)(six-day variance between "on or about" date specified in the indictment and date proved at trial, was not unreasonable); *United States v. Leibowitz*, 857 F.2d 373, 379 (7th Cir. 1988)(twenty-one-day variance between date proved at trial and "on or about" date alleged in indictment was "reasonably near"). In Petitioner's case, because trial testimony referred to the crime being committed "in 2010," varying from the "November 2010" date listed in the indictment, there was no date "reasonably near that named in the indictment" that was established during trial. *Ross*, 412 F.3d at 774. Hence, while circuit courts have found six-day and twenty-one-day variances to be reasonable, *Blanchard*, 542 F.3d at 1143;

Leibowtiz, 857 F.2d at 379, this was not the situation in Petitioner's case. "2010" is a broad period of time when compared to a six-day or twenty-one-day variance.

In addition, even in the "on or about" charging situation, variances may not be allowed that result in prejudice to the defendant. *United States v. Akande*, 200 F.3d 136, 141-42 (3d Cir. 1999); *Ross*, at 744 (citing *Berger v. United States*, 295 U.S. 78 (1935), and *Kotteakos v. United States*, 328 U.S. 750 (1946); *Frank*, 156 F.3d at 337 n. 5. While the Second Circuit found that Petitioner established no prejudice, it is evident that allowing such variance in this case was prejudicial to Petitioner considering that there would be no way for Petitioner to prepare to establish an alibi for such an extended and broad period of time ("2010").

It does not appear that the Second Circuit Court of Appeals set any limit on the degree of latitude the Constitution permits the government where an indictment alleges that an offense occurred "on or about" a certain date, and the proof at trial indicates a date different from the "on or about" date. The variance in Petitioner's case, by far exceeds the month or less variances permitted by the Seventh Circuit. In Count Nine, Petitioner stands convicted of robbing an unnamed drug dealer in 2010, rather than robbing an unnamed drug dealer in November 2010, as alleged in the indictment. This situation akin to the cases in which other circuits have found variances in dates to be prejudicial. See, e.g., *Ross*, 412 F.3d at 774-75 (disallowing four year variance); *Tsinhnahijinnie*, 112 F.3d at 991-92 (disallowing a two-year variance); *United States v. Casterline*, 103 F.3d 76, 78-79 (9th Cir. 1996)(excluding conduct that occurred seven months before the date

charged in the indictment, resulting in reversal for insufficiency). As in *Tsinhnahijinnie*, where the 9th Circuit found that the two-year variance violated defendant's Fifth Amendment Rights to have fair notice of what he was accused of and not to be twice put in jeopardy on the accusation, 112 F.3d at 992, the permitted variance at issue in the case at bar is an important matter. However, the Seventh and Ninth Circuit decisions conflict with the Second Circuit decision below, resulting in an inconsistent application of the Constitution. And Petitioner's due process rights were violated when he lacked notice and was not afforded an opportunity to establish an alibi for such a broad period of time.

Thus, because the Court of Appeals' decision below affirming the variance conflicts with the decision of other United States Courts of Appeal, this Court should exercise its supervisory power to maintain uniformity within the judicial system and provide Petitioner with his Due process rights.

POINT II

THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH THIS COURT'S AUTHORITY IN *ROSEMOND v. UNITED STATES*, 572 U.S. 65 (2014). PETITIONER WAS CONVICTED WITHOUT THE TRIAL COURT REQUIRING A JURY FINDING THAT PETITIONER HAD ADVANCED KNOWLEDGE THAT A FIREARM WOULD BE USED IN CONNECTION WITH THE UNDERLYING ROBBERY OFFENSE, CALLING FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Court of Appeals' decision affirming the aiding and abetting jury instruction used at trial was such a far departure from this Court's decision in

Rosemond v. United States, 572 U.S. 65 (2014) so as to warrant review by this Court. *Rosemond* requires "advance knowledge" that a firearm would be used in connection with the underlying offense in order for a person to be convicted of a Section 924(c) count under an aiding and abetting theory. *Rosemond* overruled previous case law that permitted convictions based upon the defendant's participation in the underlying offense together with knowledge that a confederate was carrying a firearm. *Id.* at 77-78. The district court erred in instructing the jury that aiding and abetting liability under Section 924(c) can arise from a finding that a defendant "was present at the scene during the commission of the crime of violence" and that the "defendant's conduct at the scene facilitated or promoted the carrying of a gun and thereby aided and abetted the other person's carrying of the firearm."

Because the instruction allowed the jury to find Petitioner liable for aiding and abetting Hobbs Act robbery based only on his conduct at the scene, without any finding of the "advance knowledge" required by *Rosemond*, the Court of Appeals should have reversed Petitioner's convictions on Counts Three, Six and Twelve and the writ is required to ensure conformity with this Court's precedent. The instructions given by the district court in connection with the Section 924(c) counts failed to state that a potential aider and abettor needed "advance knowledge" of the use of a firearm by a confederate. Furthermore, while the instruction given required that the defendant "facilitate or encourage" the use of a firearm in connection with the underlying offense, an instruction that may have appeared as requiring

"advance knowledge," the instruction actually given made it clear that such facilitation or encouragement could occur during the crime itself: these instructions imposed liability merely if the "defendant's conduct at the scene facilitated or promoted the carrying of a gun," rather than advanced knowledge (emphasis added)(A.371).[1] Consequently, the jury instructions violated *Rosemond's* requirement that such an aider and abettor have "advance knowledge" of the firearm in order to commit the substantive Section 924(c) offense under an aiding and abetting theory and thus allowed Petitioner's conviction in violation of *Rosemond*. *Id*. at 77-78. Thus, because this instruction was such a far a departure from this Court's decision in *Rosemond*, this Court must exercise its supervisory power to maintain uniformity with Supreme Court precedent.

POINT III

THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S AND APPELLATE COURT AUTHORITY ON THE NOTICE AND DOUBLE JEOPARDY PROTECTIONS UNDER THE FIFTH AND SIXTH AMENDMENTS.

In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." U.S. Const. Amend. VI. *Russell v. United States*, 369 U.S. 749 (1962) established the criteria by which the sufficiency of an indictment is to be measured: First, courts must examine whether the indictment "contains the elements of the

[1] Numerical reference is to the page of co-appellant Minaya's appendix filed on June 23, 2015 and is available on this Court's docket in 14-882, docket entry 277.

offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet." Second, courts must assess whether "'in case any other proceedings are taken against the defendant for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" *Id*. at 763-64 (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290 (1985); *Rosen v. United States*, 161 U.S. 29, 34 (1896); *Hagner v. United States*, 285 U.S. 427, 431 (1932). Thus, an indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875) (citations omitted). A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. *Cruikshank*, at 558. The *Cruishank* opinion demonstrates that these principles have been well-established for quite some time. *Valentine v. Konteh*, 395 F.3d 626, 631 n. 1 (6th Cir. 2005).

In Petitioner's case, the indictment failed to charge Counts Seven and Nine with sufficient precision to inform Petitioner of the charges. Further, the indictment, even when coupled with the evidence at trial, failed to provide Petitioner with enough detail to enable him to plead double jeopardy in a future prosecution based on the same set of events. *Russell*, 369 U.S. at 763-764; *United States v. Hoang Van Tran*, 234 F.3d 798, 805 (2d Cir. 2000); *De Vonish v. Keane*, 19 F.3d 107, 108 (2d Cir. 1994); *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

Count Seven alleged that "[i]n or about 2010" . . . Rodriguez, and others robbed "Victim-3," who they believed had narcotics, and thereby affected commerce, in the vicinity of "183rd Street and Tremont Avenue," Bronx, New York. There is no location in the Bronx to match the indictment's location, as there is no street named "183rd Street" in the Bronx, New York, only East and West 183rd Street. Additionally, there is no street named "Tremont Avenue," in the Bronx, only East Tremont Avenue and West Tremont Avenue. Further, neither East nor West 183rd Street intersects with East or West Tremont Avenues. In fact, East and West Tremont Avenues run parallel to East and West 183rd Street and are over eight blocks from each other. Consequently, Petitioner had no notice of where this alleged robbery, occurred. The indictment provided far from sufficient notice of the charges. *Russell*, 369 U.S. at 763-64; *Rosen*, 161 U.S. at 34; *Hagner*, 285 U.S. at 431.

At trial, in relation to Count Seven, alleged coconspirator Juan Marte testified that a man known as "Veterano" made a fake deal with a drug dealer to purchase cocaine so that the crew could steal the cocaine from the dealer as he left his home to meet the fake buyer. Domingo Bautista testified that the robbery was done in "2009 to 2010." Marte testified the robbery occurred "towards" May 2010.

Bautista identified Government's Exhibit 310 (A. 83)[2] as the location where the robbery occurred. Marte did not identify Exhibit 310. Detective Vincent Harden

[2] Exhibit 310 (contained in the Appendix) is a photograph of two buildings, a sidewalk and street without any identifiers such as a street name.

testified that Exhibit 310 was a photograph taken on "Loring Place"[3] in the Bronx, near University Avenue and "183rd."

Count Nine of the indictment alleged, in substance, that in or about November 2010, Petitioner and others affected commerce by robbing "Victim-4" who was believed to be in possession of narcotics in the vicinity of 187th Street, Bronx, New York. There is no street named 187th Street, in the Bronx, only East and West 187th Streets. East and West 187th Street span approximately 1.2 miles.

The two co-conspirator witnesses, Domingo Bautista and Carlos Villalona, did not provide any further detail as to the date of the alleged crime, in fact, they both testified that the robbery occurred sometime in 2010. Bautista and Villalona identified Government's Photo Exhibit 309 as the building in which the target kept his drugs, which, according to government witness Detective Harden, was located at 444 East 187th Street, in the Bronx.

Due process requires that criminal charges provide defendants with the ability to protect themselves from double jeopardy. In Petitioner's case, the indictment in relation to Counts Seven and Nine, even when considered with the evidence at trial, contained far from sufficient specificity to enable Petitioner to plead his convictions as a bar to future prosecutions. *Cruikshank*, at 558.

In *Russell*, this Court found that indictments are only constitutionally sufficient if "the record shows with accuracy to what extent a defendant may plead

[3] There is no street named Loring Place in the Bronx, New York. There are streets named Loring Place North and Loring Place South.

a former acquittal or conviction" in proceedings taken against him for a similar offense. 369 U.S. at 764.

For the robbery alleged in Count Seven, it is not clear, even from the trial testimony, when the robbery occurred. Additionally, the victim is not named. Bautista testified that the robbery was done in "2009 to 2010." Marte testified that the robbery occurred "towards" May 2010. The location of the robbery charged by Count Seven of the indictment, 183rd Street and Tremont Avenue, Bronx, New York, does not exist. In addition, the photo of the alleged location, identified by only one of the coconspirator witnesses, could be any location in New York City, or many other cities. It has no street names on it, or other unique feature to distinguish it from other streets. Despite the Court of Appeals' panel's assertion to the contrary, without any supporting justification, neither the indictment, nor the facts alleged at trial, provide sufficient detail that Petitioner may be able to establish double jeopardy in a future prosecution.

For the Count Nine robbery, while the indictment alleged that it occurred in November of 2010, the trial testimony expanded the date specified in the indictment to the whole year period of 2010.[4] This time frame is meaningless as it encompasses no particularity. The victim was not named. The photograph identified in Government's Exhibit 309, while somewhat more distinct than Exhibit 310, could be any apartment numbered 444 of which there must be scores in the Bronx alone, as

[4] This expansion of the date of the indictment was a prejudicial variance. *See*, Point I, *supra*.

there are no further identifying features such as street names or other unique features. There is far from sufficient detail to enable Petitioner to plead double jeopardy in a future prosecution based upon the same set of events. *Russell*, 369 U.S. at 764. The Court of Appeal's decision to the contrary contradicts this Court's and Appellate Court precedent because *Russell*'s requirement that there be sufficient detail to enable Petitioner to plead double jeopardy in a future prosecution for the same event has obliterated.

Although Petitioner did not raise these claims in the district court, the district court's error in permitting Petitioner's convictions of Counts Seven and Nine to stand was plain. Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). In *United States v. Olano*, 507 U.S. 725, 734 (1993), this Court set out specific limitations on appellate courts' ability "to correct an error not raised at trial," holding that "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-467 (1997)(quoting *Olano*, 507 U.S. at 732). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Olano*, 507 U.S. at 732)(internal quotations marks and citations omitted)); see *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994)(adopting the *Olano* limitations). Petitioner bears the burden of persuasion on appeal to show that the district court committed plain error. See *Viola*, 35 F.3d at 41.

Courts of Appeal have long held that where a defendant's conviction violates the double jeopardy clause of the United States Constitution, without having raised the issue below, the error may be found to be plain. See *United States v. Gore*, 154 F.3d 34, 43-44 (2d Cir. 1998)(citing *United States v. Coiro*, 922 F.2d 1008, 1013-1015 (2d Cir. 1991); *United States v. Schales*, 546 F.3d 965, 980 (9th Cir. 2008)(citing *United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008); *United States v. Jarvis*, 7 F.3d 404, 410, 412-13 (4th Cir. 1993)(finding a double jeopardy violation plain error under *Olano*).

An "error is 'plain' if the ruling was contrary to law that was clearly established by the time of the appeal." *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009). The Court of Appeals' decision affirming that Petitioner's indictment and conviction did not violate double jeopardy protections, and was thus not plain error, was such a far departure from this Court's decisions, so as to warrant review by this Court. It is clearly established that to comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. See, e.g., *Russell*, 369 U.S. at 763-764; *Hoang Van Tran*, 234 F.3d at 805; *De Vonish*, 19 F.3d at 108; *Stavroulakis*, 952 F.2d at 693. Thus, an indictment is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *United States v. Cruikshank*, 92 U.S. 542, 558 (1875)

(citations omitted). A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. *Cruikshank*, at 558. Because Petitioner has no specifics with which to establish when, where, and what victim Counts Seven and Nine reference, the protections against double jeopardy established by the Fifth Amendment rights were violated. The error clearly affects Petitioner's substantial rights as his convictions on Counts Seven and Nine violate his fundamental rights under the Fifth Amendment to the Constitution. In *Olano*, this Court stated that the phrase "affecting substantial rights" generally "means that the error must have been prejudicial: it must have affected the outcome of the District Court proceedings." *Jarvis*, 7 F.3d at 412-13 (quoting *Olano*, 507 U.S. at 734). Stressing the effect of a double jeopardy violation on defendant's substantial rights, the Fourth Circuit has explained that it would be "difficult to imagine an error capable of more drastically effecting the outcome of judicial proceedings than permitting the Government to obtain a conviction for an offense whose prosecution was barred *ab initio* by the constitutional guarantee of freedom from being "twice put in jeopardy of life or limb." *Jarvis*, 7 F.3d at 412-13 (citing U.S. Const. amend. V).

Finally, the error here seriously affects the fairness, integrity, and public reputation of judicial proceedings because judicial proceedings are devoid of integrity where a defendant's fundamental constitutional rights to notice of the charges against him and to be free from double jeopardy are involved. See *United States v. Pablo*, 696 F.3d 1280, 1287 (10th Cir. 2012)(citing *United States v. James*,

257 F.3d 1173, 1182 (10th Cir. 2001)(We apply plain error requirements "less rigidly when reviewing a potential constitutional error.") In addition, the Supreme Court, in holding that a double jeopardy violation constituted plain error, has stated "we cannot imagine a course more likely to seriously affect the fairness, integrity, or public reputation of judicial proceedings, than for us to permit (defendant's) conviction, obtained in such flagrant violation of the Double Jeopardy Clause, to stand." *Jarvis*, 7 F.3d at 413 (quoting *Olano*, 113 S.Ct. at 1779). Similarly, courts have explained that "because the prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure, this [double jeopardy] error threatens the fairness, integrity, and public reputation of our judicial proceedings. *United States v. Giberson* 527 F.3d 882, 891 (9th Cir.2008)(quoting *Davenport*, 519 F.3d at 947).

Consequently, the petition for certiorari should be granted. *United States v. Moreno-Montenegro*, 553 Fed. Appx. 29, 30-32 (2d Cir. 2014)(plain error in violation of the double jeopardy clause, for district court to accept guilty plea to one count of conspiracy to import heroin into the United States in violation of 21 U.S.C. §§ 963, 960(a)(1), 960(b)(1)(A), & 952(a), and one count of conspiracy to distribute heroin intending that it would be unlawfully imported into the United States in violation of 21 U.S.C. § 963, 960(a)(3), 960(b)(1)(A) & 959(a)(1) where it was clear that the defendant had entered into a single conspiracy, not two).

In sum, the Court of Appeals' decision rejecting Petitioner's claims conflicts with this Court's and Appellate Court precedent, and was such a far departure from

the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's supervisory power.

POINT IV

THE COURT OF APPEALS FAILURE TO REMEDY THE DISTRICT COURT'S JURY INSTRUCTION WHICH PERMITTED PETITIONER'S CONVICTION OF HOBBS ACT ROBBERY WITH ONLY A MINIMAL AFFECT ON INTERSTATE COMMERCE IS SUCH A FAR DEPARTURE FROM THIS COURT'S PRECEDENT AS TO WARRANT REVIEW.

This Court has identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities, "which have a substantial relation to interstate commerce, those activities that substantially affect interstate commerce." *United States v. Lopez,* 514 U.S. 549, 558-59 (1995)(citations omitted).

In its *Lopez* decision, this Court restated certain "first principles" as the foundation upon which it based its analysis of the Commerce Clause. The first of these principles is that the federal government is one of "enumerated powers." *Lopez*, 514 U.S. at 552; see U.S. Const., art. I, § 8. These enumerated powers are few and defined, while the powers which are to remain in state governments are "numerous and indefinite." *Id*. (citing The Federalist No. 45, at 292-93 (James

Madison) (Clinton Ressiter ed., 1961)). "Just as the separation and independence of the coordinate branches of the federal government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id*. (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The next principle, which this Court cited, is that limitations on the commerce power are inherent in the very language of the Commerce Clause itself. *Id*. at 553. "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.,* (quoting *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

The third principle to which this Court referred was that the power of the Commerce Clause "is subject to outer limits." *Lopez*, 514 U.S. at 557. Quoting from its decision in *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), the Court warned that the scope of interstate commerce power, "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin*, 391 U.S. at 37).

Finally, this Court in *Lopez* clearly reaffirmed the principle that the federal government does not have a general police power. *Id*. at 566.

Using these first principles, this Court in *Lopez* then identified "three broad categories of activity that Congress may regulate under its commerce power." *Id*. at 558. First, Congress may regulate the use of the channels of interstate commerce (hereinafter "*Lopez* Part I"). *Id*. (citing *United States v. Darby*, 312 U.S. 100, 114 (1941) and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964)). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities ("*Lopez* Part II"). *Id*. (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914); *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911); and *Perez v. United States*, 402 U.S. 146, 150 (1971). And finally, Congress may regulate those intrastate economic activities having a substantial relation to interstate commerce or those activities that substantially affect interstate commerce ("*Lopez* Part III"). 514 U.S. at 558-59 (citing *Jones & Laughlin*, 301 U.S. at 37 and *Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27 (1968). The commission of robberies of drug dealers within a state does not involve the channels or instrumentalities of interstate commerce. Thus, the first two categories of Congress' commerce power do not apply here.

Under the last category, *Lopez,* Part III, this Court recognized that its case law had not always been clear as to whether an activity must "affect" or "substantially affect" interstate commerce. Nevertheless, this Court clearly concluded that, "consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activity 'substantially affects'

interstate commerce." 514 U.S. at 559. In reviewing the history of its own decisions relating to the exercise by Congress of the Commerce Clause power, this Court in *Lopez* twice expressly pointed out that it has never said that, "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id*. at 558, 559 (quoting *Wirtz*, 392 U.S. at 197 n. 27).

The Hobbs Act is thus constitutional only as applied to a robbery or a robbery conspiracy only if the robbery substantially affects interstate commerce. To the extent that the Hobbs Act is read to make it a federal crime to commit a robbery, which affects interstate commerce "in any [insubstantial or de minimis] way or degree," it is unconstitutional under *Lopez*. Petitioner has been convicted of five Hobbs Act robbery counts[5] under 18 U.S.C. § 1951(a), which prohibits individuals from, in any way or degree, obstructing, delaying, or affecting commerce or the movement of any article or commodity in commerce, by robbery or extortion to any person or property. 18 U.S.C. § 1951(a).

The district court instructed the jury that the requirement of showing an effect on commerce involves only a "minimal burden" of proving a connection to interstate or foreign commerce and is satisfied by conduct that affects commerce "in any way or degree." The court further instructed that the requirement may be satisfied by a showing of "a very slight effect" on interstate or foreign commerce. "Even a potential or subtle effect on commerce will suffice," instructed the court. For example, explained the court, "if a successful robbery of money *would* prevent

[5] Counts One, Four, Seven, Eight, Nine and Ten are Hobbs Act counts.

the use of those funds to purchase articles, which travel through interstate commerce, that would be a sufficient effect on interstate commerce." This instruction permits a conviction for Hobbs Act robbery for any robbery of money. Even though this instruction is an accurate explanation of the law in the 2nd Circuit, the law of the 2nd Circuit interprets the Hobbs Act statute too broadly, permitting convictions for state crimes over which the federal government has no legal jurisdiction. *Stirone v. United States*, 361 U.S. 212, 218 (1960)(in a Hobbs Act crime, the charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference).

The evidence submitted at trial in Petitioner's case in support of the overt acts charged in furtherance of the conspiracy to commit Hobbs Act robbery simply set forth that property was taken. There was no testimony to support any notion that the stolen property had any impact on interstate commerce at all.

Thus, the Court of Appeals' decision affirming that any minimal effect on interstate commerce is sufficient, was such a far departure from this Court's decisions so as to warrant review by this Court.

The Second Circuit Court of Appeals and other Circuit Courts have held that a *de minimis* effect on interstate commerce is all that is required to establish a Hobbs Act violation. The Second Circuit Court of Appeals held in *United States v. Davila*, 461 F.3d 298, 307 (2d Cir. 2006) that *Lopez* was not controlling in Hobbs Act cases because *Lopez* was concerned with a statute that lacked an explicit jurisdictional element and as a result, required more than a minimal or theoretical

effect on interstate commerce. *Davila*, at 307. *See also*, *United States v. Reed*, 756 F.3d 184 (2d Cir. 2014); *United States v. Davis*, 750 F.3d 1186, 1194 n. 7 (10th Cir. 2014); *United States v. Powell*, 693 F.3d 398, 402-403 (3d Cir. 2012); *United States v. Peterson*, 236 F.3d 848, 851-852 (7th Cir. 2001); *United States v. Nghia Le*, 256 F.3d 1229, 1232 (11th Cir. 2001); *United States v. Baylor*, 517 F.3d 899, 901-902 (6th Cir. 2008); *United States v. Griffin*, 493 F.3d 856, 861 (7th Cir. 2007); *United States v. Boyd*, 480 F.3d 1178, 1179 (9th Cir. 2007); *United States v. Foster*, 443 F.3d 978, 983 n.3 (8th Cir. 2006); *United States v. Urban*, 404 F.3d 754, 766 (3d Cir. 2005); *United States v. McCormack*, 371 F.3d 22, 28 (1st Cir. 2004), vacated on other grounds, 543 U.S. 1098, 125 S. Ct. 992, 160 L. Ed. 2d 998 (2005).

However, for over forty-five years, members of the judiciary have opposed the current expansive view of the commerce clause over intrastate crime, as evidenced by Justice Stewart's dissent in *Perez v. United States*, 402 U.S. 146 (1971). In *Perez*, the defendant, a loan shark, was convicted under the Consumer Credit Protection Act (CCPA), which prohibited extortionate credit transactions. *Perez*, 402 U.S. at 146-47. The defendant appealed, arguing that the CCPA was an unconstitutional use of Congress' commerce clause power because there was no interstate activity involved in loan sharking. *Perez*, 402 U.S. at 146, 149. The Supreme Court held that the CCPA prohibiting loan sharking was within Congress' power under the commerce clause because Congress had a rational basis to believe the conduct effected interstate commerce. *Id.* at 154. The Court reasoned that reports given to Congress suggest loan sharking is a national problem because it is one way that

organized interstate crime groups finance their national operation upon stealing millions a year "from America's poor through loan-sharking alone. "*Id*. at 156-57. In dissent, Justice Stewart argued that under the Court's above interpretation of the statute, an individual could be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce. *Id*. at 157. Justice Stewart explained that the framers of the constitution did not intend such local activities to be prosecuted through federal law and that it is not adequate to say that loan sharking is a national problem, for all crime is a national problem. *Id*. He further elaborated that it is not enough to say that some loan sharking has interstate characteristics, for any crime may have an interstate setting, and that "the circumstance that loan sharking has an adverse impact on interstate business is not a distinguishing attribute, for interstate business suffers from almost all criminal activity, be it shoplifting or violence in the streets." *Id*. at 157-58. Consequently, convicting Petitioner under Hobbs Act robbery for wholly local activities is an unconstitutional use of Congress' commerce power given that there was no evidence of the stolen property effecting interstate commerce.

Further supporting Petitioner's argument that a conviction of Hobbs Act robbery, when applied to a crime that does not have a substantial effect upon interstate commerce, constitutes overreach of congressional power, are members of the judiciary in *United States v. McFarland*, 311 F.3d 376, 398, 409-410 (5th Cir. 2002). Circuit Judge Garwood, (joined by seven other circuit judges, in dissent),

explained that Hobbs Act robbery falls into *Lopez* category III, and that for this category of Hobbs Act robbery, robberies are only within Congress' Commerce Clause power only if they "substantially" affect interstate commerce. Further, opined Judge Garwood, there is no rational basis to aggregate all the undifferentiated mass of robberies covered by the Hobbs Act's general proscription of any and all robberies which "in any way or degree . . . affect[] commerce." To allow such aggregation in *Lopez* category three cases would, without adequate justification, bring within the scope of the Commerce Clause the proscription of local violent (and other) crimes not constituting the regulation of commercial activity, crimes prototypical of those that historically have been within the reserved police power of the states, contrary to the principle that the Commerce Clause is limited to matters that are truly national rather than truly local. *Id* (Garwood, *dissenting).* Consequently, in the case at bar, the Court should find that allowing Petitioner's Hobbs Act robbery conviction would allow the court to federalize a crime that the Framers intended to deny the national government and reposed in the states.

Circuit Judge Torruella's opinion in *United States v. Jimenez-Torres*, 435 F.3d 3, (1st Cir. 2006), is an additional example of judicial members cautioning against the overreaching of congressional power under the Commerce Clause. In *Jimenez-Torres*, the court held that the robbery of a gas station owner's home supported a conviction of Hobbs Act robbery where the local crime effected the gas station business, which was engaged in interstate commerce. *Jimenez-Torres*, 435

F.3d at 10. The court reasoned that because the station received its gas from a refinery located in the United States Virgin Islands, this was sufficient to establish the station was engaged in interstate commerce. *Id.* at 8. Because the owner's murder resulted in the permanent closing down of the gas station and depleted the assets available to the gas station to participate in interstate commerce, the robbery effected interstate commerce. *Id.*

However, Judge Torruella opined that the Supreme Court precedent that required her to affirm the defendant's conviction is an extension of Congress' power to regulate interstate commerce beyond what the Constitution authorizes. *Id.* at 13. Noting that there was no connection between the defendant and the decedent's business, and that the robbery took place in a *home*, where money was found in the kitchen, Judge Torrella explained that this was not sufficient to suggest the robbery effected interstate commerce. *Id.* at 15. Judge Torruella contended that while Congress does have a widespread range of regulatory powers, such powers unchecked would allow the government to cast a net that "would elbow out large chunks of traditional state criminal jurisdiction and federalize such crimes." *Id.* at 14. Judge Torruella cited *Lopez,* 514 U.S. at 567 and *United States v. Morrison*, 529 U.S. 598, 618 (2000), as offering the appropriate Commerce limitations because each case gives "validity to the constitutional dogma that establishes that . . . 'the suppression of violent crime and vindication of its victims' is a power that 'the Founders denied the National Government and reposed in the States.'" *Jimenez-Torres*, 435 F.3d at 14.

Similarly, in the case at bar, the Court should exercise its supervisory power and find that allowing Petitioner's Hobbs Act robbery conviction would allow the court to federalize a crime that the Framers intended to deny the national government and reposed in the states. *Jimenez-Torres*, 435 F.3d at 14 (citing *Morrison*, 529 U.S. at 618)(Torruella, *concurring*).

In sum, the district court's instruction that in relation to the Hobbs Act robberies charged in Petitioner's case, the government had only a "minimal burden" of proving a connection to interstate or foreign commerce, which would be satisfied by conduct that affects commerce "in any way or degree," and that "[e]ven a potential or subtle effect on commerce will suffice," permitted Petitioner to be convicted of Hobbs Act robbery for robberies which had no substantial effect upon interstate commerce, violating the Constitution's commerce clause, permitting improper overreach of Congressional power. This Court has warned against Congress using the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority. *Morrison*, 529 U.S. at 615 (citing *Lopez*, 514 U.S. at 564). "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Morrison*, 529 U.S. at 611 (citing *Lopez,* 514 U.S. at 577)(Kennedy, *concurring*).

POINT V

JOINDER OF CO-APPELLANTS' ARGUMENTS

Pursuant to Fed. R. App P. 28(i), Petitioner joins those arguments of his co-appellants that may apply to him.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: July 5, 2019

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RECORD NO. _____

IN THE
Supreme Court of the United States

JOVANNY RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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14-882(L)
United States v. Rodriguez, et al.

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 TO 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 5th day of February, two thousand nineteen.

PRESENT:

PIERRE N. LEVAL,
BARRINGTON D. PARKER,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

No. 14-882 (L); 14-1129 (Con); 14-1891 (Con); 14-1892 (Con); 14-4042 (Con)

JOVANNY RODRIGUEZ, HENRY MICHEL, JESUS HILARIO-BELLO, OSCAR MINAYA, JASON VERAS,

Defendants-Appellants,

EDWIN HENRIQUEZ, ANGELO MICHEL, JOSE ORTEGA, JOHNNY NUNEZ, KATIA GATON, RICHARD J. TREJO, FELIZ ROBINSON, ALEXANDRO BELLO, ROMALDO ESPINAL, RICHARD PEREZ,

ANSELMO VIDAL RODRIGUEZ,

Defendants. [1]

FOR APPELLANTS:

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LAWRENCE MARK STERN, Esq., New York, NY, *for Appellant Jesus Hilario-Bello.*

ANDREW M. ST. LAURENT, Harris, O'Brien, St. Laurent & Chaudhry LLP, New York, NY, *for Appellant Oscar Minaya.*

Royce Russell, Emdin & Russell, LLP, New York, NY, *for Appellant Henry Michel.*

David S. Hammer, Esq., New York, NY, *for Appellant Jason Veras.*

FOR APPELLEE:

JESSICA ORTIZ (Megan L. Gaffney, Michael A. Levy, *on the brief*), Assistant United States Attorneys, *for* Geoffrey Berman, United States Attorney for the Southern District of New York, New York, NY.

Appeal from judgments of the United States District Court for the Southern District of New York (Keenan, *J.*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court are hereby **AFFIRMED**.

Defendants-Appellants Jovanny Rodriguez, Jesus Hilario-Bello, and Oscar Minaya appeal from judgments of conviction entered on March 18, 2014, against Rodriguez, and

[1] The Clerk of Court is directed to amend the caption in this case to conform to the above.

May 27, 2014, against Hilario-Bello and Minaya.[2] We assume the parties' familiarity with the underlying facts, procedural history, and issues identified for review, and we refer to these only as necessary to explain our decision to affirm. At the defendants' request, we have held this order pending release of our Court's decisions in *United States v. Hill*, No. 14-3872, and *United States v. Barrett*, No. 14-2641.

I. Jovanny Rodriguez

Rodriguez and Hilario-Bello challenge the specificity of the indictment. Neither of these defendants raised this argument before trial, as required by Federal Rule of Criminal Procedure 12(b)(3)(B). *See United States v. Spero*, 331 F.3d 57, 61–62 (2d Cir. 2003). Nor has either established cause for this failure or prejudice resulting from any deficiency in their indictments. This challenge is therefore forfeited. *See id* at 62.

Even were the challenge not forfeited, however, we identify no plain error that might require vacatur. An indictment is sufficient "if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974). An indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998) (internal quotation marks omitted). Here, the indictment's specification of the vicinity and approximate dates of the alleged crimes was sufficient to fairly inform both of these

[2] On December 12, 2014, and February 18, 2015, respectively, counsel for Defendants-Appellants Henry Michel and Jason Veras moved for permission to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). On September 22, 2015, and September 24, 2015, respectively, the government moved to dismiss the appeals based on Michel and Veras's appeal waivers, or for summary affirmance. Because those appeals were consolidated with the instant appeals of Rodriguez, Hilario-Bello, and Minaya, these motions too have been held in abeyance.

Upon due consideration, it is hereby ORDERED that the *Anders* motions are granted, the motions to dismiss are GRANTED with respect to Michel and Veras's appeals of their terms of imprisonment and supervised release, and the motions for summary affirmance are GRANTED with respect to Michel and Veras's appeals of their convictions and special assessments. Veras's request for appointment of new counsel for the purposes of this appeal is DENIED as moot. The Clerk of Court is directed to close all remaining motions in these cases.

defendants of the charges and to enable them to defend against the charges and invoke a double jeopardy defense should they be indicted again for the same acts.

Rodriguez next argues that he was prejudiced by the alleged variance between Count Nine's charge of a Hobbs Act robbery occurring "in or about November 2010" and the evidence at trial, which established only that a robbery occurred in the year 2010. An actionable variance occurs "when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003) (internal quotation marks omitted). We have cautioned, however, that "proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment," and therefore "this court has consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) (internal quotation marks omitted). Testimony that the crime took place in 2010 does not prove facts different from the indictment's allegation that the crime took place in November 2010. Furthermore, Rodriguez has established no prejudice resulting from the variance he alleges, as our Court's precedent requires for this challenge to succeed. *See United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

Rodriguez next challenges the District Court's instruction to the jury that, under the Hobbs Act, "[t]he requirement of showing an effect on commerce involves only a minimal burden of proving a connection to interstate or foreign commerce, and is satisfied by conduct that affects commerce in any way or degree." Rodriguez App'x at 79. As Rodriguez himself acknowledges, however, this challenge is foreclosed by our precedent, which endorses the standard articulated by the District Court. *See, e.g., United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007) (only *de minimis* showing of effect on interstate commerce required for Hobbs Act robbery conviction); *United States v. Wilkerson*, 361 F.3d 717, 726 (2d Cir. 2004) ("slight," "potential[,] or subtle effect" on interstate commerce suffices to support Hobbs Act conviction (internal quotation marks omitted)). Rodriguez points to no intervening Supreme Court decision that disturbs our Circuit precedent. *See id.* at 732

(acknowledging binding nature of Circuit precedent absent overruling by en banc panel or Supreme Court). This challenge thus fails.

II. Jesus Hilario-Bello

In addition to challenging the specificity of the indictment, Hilario-Bello alleges that the District Court's conduct during trial impaired his right to a fair trial. In particular, he contends that the District Court engaged in "[j]udicial [v]ouching" for cooperators, Hilario-Bello Br. at 18; that the District Court delivered various improper instructions to the jury, *id.* at 27–28, 31–32; that the District Court improperly precluded certain areas of cross-examination, *id.* at 28–31; and that the District Court improperly held multiple off-the-record conferences, *id.* at 32–34. Because Hilario-Bello did not object at trial to any of the District Court's challenged statements or actions, we review for plain error. *See United States v. Botti*, 711 F.3d 299, 308 (2d Cir. 2013) (failure to object to jury instruction); *United States v. Filani*, 74 F.3d 378, 387 (2d Cir. 1996) (failure to object to questioning of witnesses). His failure to object contemporaneously to the court's holding off-the-record conferences, however, forfeits that challenge. *See United States v. Amico*, 486 F.3d 764, 778 (2d Cir. 2007).

On such review, our role "is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985). The trial judge "has an active responsibility to insure that issues are clearly presented to the jury," and may fulfill this responsibility by questioning witnesses. *Id.* at 403; Fed. R. Evid. 614(b). At the same time, although this Court "must give the judicial officer presiding at the trial great leeway . . . the presiding judge cannot interrogate so zealously as to give the jury an impression of partisanship or foster the notion that the judge believes one version of an event and not another." *Filani*, 74 F.3d at 386. The actions taken by the District Court that Hilario-Bello characterizes as amounting to a "display of the appearance of judicial bias," Hilario-Bello Br. at 22, were minor and do not amount to reversible plain error.

We further discern no plain error in the District Court's instructions to the jury. Hilario-Bello contends that the District Court's instruction to the jury that "defense counsel were 'allowed to try' to attack the credibility of cooperating witnesses," somehow conveyed the court's belief that defense counsel had not succeeded in doing so and that the defense's "cross-examinations were merely standard stratagem[s] in the trial game." Hilario-Bello Br. at 27. This argument misreads the record. The District Court instructed the jury that "defense counsel are allowed to try to attack the credibility" of law enforcement witnesses "on the ground that [their] testimony may be colored by a personal or a professional interest in the outcome of the case." Hilario-Bello App'x at 62. This instruction was not plainly erroneous. The District Court similarly did not commit error, much less plain error, when it instructed the jury not to allow "fear, prejudice, bias, or sympathy interfere with" their deliberations. *Id.* at 49. This is a standard jury instruction. *See* Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions; Criminal* 2-12 (2015).

We further identify no plain error in the District Court's decision to preclude cross-examination of cooperating witnesses regarding their conversations with their counsel about their cooperation agreements. Assuming, without deciding, that the District Court erred by precluding counsel for Hilario-Bello from questioning witnesses about such conversations, any error was harmless. Counsel had the opportunity to cross-examine cooperators about their understanding of their cooperation agreements, thus preserving his opportunity to expose potential bias. *See United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981). Absent a contemporaneous objection, this sufficed.

Hilario-Bello next argues that he was prejudiced before the jury by the government's elicitation of testimony from a cooperating witness regarding an uncharged act involving a gun obtained by the witness from Hilario-Bello, and by other testimony regarding "uncharged crimes and bad acts." Hilario-Bello Br. at 37. We review the District Court's evidentiary rulings for abuse of discretion. *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004). Federal Rule of Evidence 404(b) provides that "[e]vidence of a crime, wrong, or other act" may be admitted for purposes such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid.

404(b). This Court takes an "inclusionary approach" to Rule 404(b), allowing such evidence to be admitted "for any purpose other than to demonstrate criminal propensity." *LaFlam*, 369 F.3d at 156 (internal quotation marks omitted). The government argues that it introduced the challenged testimony to establish that Hilario-Bello had access to guns. The cooperator's testimony may be allowed for that purpose. *See United States v. Zappola*, 677 F.2d 264, 270 (2d Cir. 1982) ("[T]estimony that [witness] had seen a handgun at [defendant's] house six months before [the crime] . . . was properly admitted as probative of [defendant's] access to such a weapon."). The District Court did not abuse its discretion in so ruling.

Hilario-Bello's remaining challenges to prior "bad acts" testimony concern responses to questions asked by his own attorney. Testimony prompted by one's own attorney does not provide a proper basis for an evidentiary objection. *See United States v. Nersesian*, 824 F.2d 1294, 1308–09 (2d Cir. 1987) (defendants could not complain on appeal regarding effects of testimony elicited by their counsel).

Hilario-Bello further contends that his trial counsel was ineffective. Ineffectiveness claims are rarely suitable for resolution on direct appeal because, unless the issue was raised and adjudicated in the district court, there is rarely an adequate record allowing informed appellate consideration. We therefore decline to address this claim now, and note that Hilario-Bello may pursue such claims on collateral review. *See United States v. Khedr*, 343 F.3d 96, 99–100 (2d Cir. 2003).

III. Oscar Minaya

Minaya challenges the District Court's jury instruction regarding aiding and abetting liability under 18 U.S.C. §§ 2, 924(c). In *Rosemond v. United States*, 572 U.S. 65 (2014), issued several months after Minaya's conviction, the Supreme Court clarified that satisfaction of the intent requirement for aiding and abetting liability under section 924(c) requires establishing the defendant's "advance knowledge" that "one of his confederates will carry a gun." *Id.* at 77–78. To support a conviction, the defendant must have this knowledge "at a time [when he] can do something with it—most notably, opt to walk away." *Id.* at 78.

Minaya objects to the District Court's instruction to the jury that aiding and abetting liability under section 924(c) can arise from a finding that a defendant "was present at the scene during the commission of the crime of violence" and that the "defendant's conduct at the scene facilitated or promoted the carrying of a gun and thereby aided and abetted the other person's carrying of the firearm." Minaya App'x at 371. According to Minaya, this instruction wrongly allowed the jury to find him liable for aiding and abetting Hobbs Act robbery based only on his conduct at the scene, without any finding of the advance knowledge that *Rosemond* requires. We are not persuaded.

Any difference between the standard articulated in *Rosemond* and the jury instruction given by the District Court, if error, was harmless. The District Court instructed the jury as follows:

> [I]t is not enough to find that the defendants performed an act of [sic] facilitate or encourage the commission of the underlying crime of violence *with only knowledge* that a firearm would be used or carried in the commission of that crime. Instead, you must find that the defendant you are considering performed some act that facilitated or encouraged the actual using, carrying of, or possession of the firearm in relation to the underlying crime.

Id. at 370 (emphasis added).

In *Rosemond*, the Supreme Court concluded that liability rests on the defendant's decision "to go ahead with his role in the venture that shows his intent to aid an armed offense," as opposed to withdrawing or attempting to alter the plan when he learns of the presence of a gun. 572 U.S. at 78 (emphasis omitted). Requiring the jury to find not only that the defendant knew a firearm would be used, but that the defendant also "facilitated or encouraged the actual using, carrying of, or possession of the firearm," Minaya App'x at 370, precludes convicting accomplices who "know[] nothing of a gun until it appears at the scene . . . [and who] have no realistic opportunity to quit the crime." *Rosemond*, 572 U.S. at 78. Even if a defendant's actual knowledge of the presence of the gun is first gained at the scene, when a defendant facilitates or encourages the use, carrying, or possession of a gun with such knowledge, the defendant has still formed the advance "intent to aid an armed offense" and "go[ne] ahead with his role in the venture" so as to support liability under *Rosemond*. *Id.*

(emphasis omitted). While the language of the District Court's instruction may not have been optimal, the finding of facilitating the actual use, carrying, or possession of a firearm it called for was sufficient to comport with *Rosemond*.

Minaya next challenges the admission into evidence of certain testimony that the District Court ruled qualified under Fed. R. Evid. 801(d)(2)(E) as covered by certain exclusions to the rule against hearsay. When a defendant properly objects at trial, we review a district court's admission of evidence under Rule 801(d)(2)(E) for clear error alone. *United States v. Coppola*, 671 F.3d 220, 246 (2d Cir. 2012).[3] Under Rule 801(d)(2)(E), "a district court may admit an out-of-court declaration that would otherwise be hearsay if it finds by a preponderance of the evidence (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *Id.* (internal quotation marks omitted). Discussion of past events may be treated as made "in furtherance of the conspiracy" if the discussions served "some current purpose," *United States v. Thai*, 29 F.3d 785, 813 (2d Cir. 1994), including the purpose to "provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy." *United States v. Desena*, 260 F.3d 150, 158 (2d Cir. 2001) (internal quotation marks omitted).

Minaya objects to the admission of testimony given by various cooperating witnesses recounting their respective conversations with members of the conspiracy about actions earlier undertaken as part of the conspiracy. Minaya Br. at 22–25. But the District Court could have concluded, without error, that the testimony Minaya objects to recounted statements made by members of the conspiracy to inform other members of the conspiracy "as to the progress or status of the conspiracy." *United States v. Maldonado-Rivera*, 922 F.2d 934, 958–59 (2d Cir. 1990).

[3] Minaya also challenges the admission of other testimony to which he failed to object below. Minaya Br. at 22. As to the admission of these statements, our review is limited to plain error. *Coppola*, 671 F.3d at 246 n.20. Because Minaya has not demonstrated clear error, much less plain error, we do not detail here which statements were objected to and which were not objected to below. *See id.*

Minaya next argues that, during its summation, the government impermissibly asked the jury to rely on speculation—not evidence of actual drug quantities—in concluding that the charged conspiracy involved 1 kilogram of heroin. The jury's ultimate conclusion about the quantities involved subjected him to a ten-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(i). Minaya did not object to the government's statement in summation. We therefore review for plain error. *See United States v. Williams*, 690 F.3d 70, 77 (2d Cir. 2012).

The jury completed a special verdict form in which it recorded its findings that the charged conspiracy involved not only 1 kilogram of heroin, but also 5 kilograms of cocaine. Each of these findings independently triggers a ten-year mandatory minimum sentence. *See* 21 U.S.C. § 841(b)(1)(A)(i)–(ii). The portion of the government's summation to which Minaya objects addressed only heroin. Even assuming, without deciding, that the government's argument regarding the 1 kilogram of heroin was improper, Minaya provides no reason to conclude that it would affect the jury's separate finding that he was responsible for 5 kilograms of cocaine. Because this second finding is sufficient on its own to support Minaya's sentence, we identify no plain error affecting Minaya's substantial rights.

The District Court sentenced Minaya to three consecutive 25-year sentences based on its finding that his convictions under Counts 6, 12, and 14—for use of a firearm during the commission of a crime of violence—were second or subsequent convictions to his conviction under Count 3 for violating section 924(c)(1)(A)(ii) for brandishing a firearm during and in relation to the offense conduct in Counts 1 and 2. Minaya argues that, under *Alleyne v. United States*, 570 U.S. 99 (2013), the jury, not the sentencing court, had to make that determination. This Court has held that the mandatory consecutive 25-year term of imprisonment required by section 924(c)(1)(C)(i) for a second or subsequent conviction under section 924(c) applies to multiple section 924(c) convictions adjudged in a single proceeding. *United States v. Robles*, 709 F.3d 98, 100–01 (2d Cir. 2013). That is, under *Robles*, a finding of guilt on multiple section 924(c) counts contained in one indictment can give rise to "stacked" mandatory minimum sentences of 25 years for the second and subsequent section 924(c) convictions.

Minaya argues, however, that the Supreme Court's decision in *Alleyne*, issued after we decided *Robles*, undermines *Robles* and requires us to hold that a jury must determine whether, in any individual proceeding, a section 924(c) conviction is second or subsequent. In *Alleyne*, the Court held that "facts that increase mandatory minimum sentences must be submitted to the jury." 570 U.S. at 116. *Alleyne* complements the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that facts that increase a defendant's maximum potential punishment constitute elements of the offense and must be determined by a jury. *See* 570 U.S. at 107–08.

Notably, *Apprendi* expressly excluded the fact of a prior conviction from its catalogue of those elements that must be found by a jury to enhance the defendant's sentencing exposure. 530 U.S. at 490 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)). And in *Alleyne*, the Court explicitly declined to revisit this exception. 570 U.S. at 111 n.1 ("[W]e recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today.").

Minaya urges nonetheless that his sentence falls outside the *Alleyne* and *Apprendi* exception for prior convictions because the finding of a second or subsequent offense based on a *concurrent* conviction resulting from a *single* indictment—thus a conviction that is essentially concurrent to the first offense—is not in his view a "prior" conviction for purposes of section 924(c). Our ruling in *Robles* is to the contrary, however, and we are not persuaded that *Alleyne* abrogated our holding in *Robles*. The imposition of a sentence on a second or subsequent conviction based on multiple section 924(c) convictions stemming from a single indictment does not risk violating the Sixth Amendment jury right that was the focus of *Apprendi* and *Alleyne*; the jury has already concluded beyond a reasonable doubt that the defendant committed each section 924(c) violation.

Minaya next contends that, by its length, his sentence violates the Eighth Amendment's proscription of cruel and unusual punishment. His challenge is answered by our precedent establishing that "[l]engthy prison sentences . . . do not violate the Eighth

Amendment's prohibition . . . when based on a proper application of the Sentencing Guidelines or statutorily mandated consecutive terms." *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003). Minaya's sentence of 92 years' imprisonment was the minimum sentence mandated by his multiple convictions. Accordingly, although it is very lengthy, we cannot conclude in these circumstances that it violates the Eighth Amendment.

Finally, after argument, Minaya's counsel submitted a letter to the Court arguing that recent case law called into question whether a Hobbs Act violation constitutes a "crime of violence" for purposes of 18 U.S.C. § 924(c)(3).[4] *See United States v. Rodriguez*, No. 14-882, Doc. 401 (filed Feb. 11, 2016). On the parties' consent, we held the appeal in abeyance pending this Court's decisions in *United States v. Hill*, No. 14-3872, and *United States v. Barrett*, No. 14-2641. In those appeals, respectively, the defendants argued that Hobbs Act robbery and conspiracy to commit Hobbs Act robbery do not qualify as "crimes of violence" for purposes of section 924(c)(3) in light of the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (invalidating the so-called residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague).

On May 9, 2018, this Court resolved the question presented in *Hill*, holding that "Hobbs Act robbery is a crime of violence under 18 U.S.C. § 924(c)(3)(A)." *United States v. Hill*, 890 F.3d 51, 53 (2d Cir. 2018). And, on September 10, 2018, the Court decided *Barrett*, holding that a Hobbs Act robbery conspiracy is also categorically a crime of violence under section 924(c)(3) because "the agreement element of conspiracy so heightens the likelihood that the violent objective will be achieved that the conspiracy itself can be held categorically to present a substantial risk of physical force." *United States v. Barrett*, 903 F.3d 166, 177 (2d Cir. 2018). These decisions require us to reject Minaya's argument that his convictions under section 924(c) should be vacated in light of *Johnson*.

[4] Rodriguez and Hilario-Bello, who were also convicted under 18 U.S.C. § 924(c), joined in the request made by Minaya's counsel, and our analysis of *Hill* and *Barrett* applies equally to their convictions.

* * *

We have considered Defendants-Appellants' remaining arguments and conclude that they are without merit. Accordingly, the judgments of the District Court are hereby **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 22nd day of April, two thousand nineteen.

United States of America,

Appellee,

v.

Jovanny Rodriguez, Henry Michel, Jesus Hilario-Bello, Oscar Minaya, Jason Veras,

Defendants - Appellants,

Edwin Henriquez, Angelo Michel, Jose Ortega, Johnny Nunez, Katia Gaton, Richard J. Trejo, Feliz Robinson, Alexandro Bello, Romaldo Espinal, Richard Perez, Anselmo Vidal Rodriguez,

Defendants.

ORDER

Docket Nos: 14-882 (L)
14-1129 (Con)
14-1891 (Con)
14-1892 (Con)
14-4042 (Con)

Appellant, Jovanny Rodriguez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk