No. 24-

IN THE

Supreme Court of the United States

VICTOR RIVERA,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err by requiring Petitioner to object with specificity at sentencing and identify a particular provision of the plea agreement that had been breached by the government to preserve his claim for appellate review, in conflict with this Court's precedent in *Holguin-Hernandez v. United States*, 589 U.S. 169 (2020)?

2. In applying plain error review, did the Second Circuit err by considering only whether the government's breach was obvious at the time of sentencing as opposed to the time of appellate consideration, in conflict with this Court's precedent in *Henderson v. United States*, 568 U.S. 266 (2013)?

LIST OF PROCEEDINGS

This case arises from the following proceedings:

United States v. Rivera, No. 22-2081 (2d Cir. Aug. 21, 2024) (affirming the judgment)

United States v. Rivera, 1:20 Cr. 600 (AKH) (S.D.N.Y. Sept. 13, 2022) (sentencing and judgment)

United States v. Michols Pena, 1:20 Cr. 600 (ER) (S.D.N.Y.) (pending)

United States v. Johan Araujo, 1:20 Cr. 600 (AKH) (S.D.N.Y. July 6, 2023) (judgment)

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The Second Circuit's opinion affirming the District Court's judgment and sentence is reported at *United States v. Rivera*, 115 F.4th 141 (2d Cir. 2024), and included in the Appendix. App.1a-23a.[1]

An excerpt from the transcript of the sentencing proceedings in the District Court is unreported and included in the Appendix. App.24a-40a.

JURISDICTION

The Second Circuit entered judgment on August 21, 2024, and denied Rivera's petition for panel rehearing or rehearing *en banc* on November 14, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

Federal Rule of Criminal Procedure 51(b) provides: "A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b).

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[1] "App." refers to the Appendix filed with this Petition, and "PSR" refers to the Presentence Investigation Report prepared by the United States Probation Department (the "Probation Office") in connection with Rivera's sentencing. Unless otherwise indicated, internal citations, modifications, and quotation marks have been omitted in this Petition.

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

INTRODUCTION

Over 97 percent of federal criminal convictions are obtained through guilty pleas, and in over 75 percent of those cases, the defendants entered into plea agreements with the government.[2] Unfair surprises that increase a defendant's sentencing range above that to which the government stipulated in a plea agreement undermine the fairness, integrity, and public reputation of the related judicial proceedings and "threaten to make the widespread practice of plea bargaining unworkable." *United States v. Fernandez*, 877 F.2d 1138, 1145 (2d Cir. 1989).

This case raises two questions that require this Court's intervention to ensure procedural due process for defendants, like Victor Rivera, who rely on plea agreements that the government does not honor. First, when the government breaches a plea agreement at sentencing, must a defendant object with specificity

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[2] U.S. Sentencing Comm'n, 2023 Sourcebook of Federal Sentencing Statistics (Tbl. 11) (2023), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/Table11.pdf (accessed Feb. 3, 2025); American Bar Association, Criminal Justice Section, Plea Bargain Task Force Report 36 n.9 (2023), available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf (accessed Feb. 3, 2025). *See also Missouri v. Frye*, 566 U.S. 134, 144 (2012) ("In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.").

and identify the precise provision of the agreement has been breached to preserve the challenge for appeal? Second, in applying plain error review, may an appellate court consider only whether the government's breach would have been obvious to the lower court (*i.e.*, at the "time of error") as opposed to whether it was obvious at the time of appellate consideration?

Rivera pled guilty pursuant to a plea agreement with the government, in which the parties stipulated to the applicable sentencing range under the United States Sentencing Guidelines (the "Guidelines"). At sentencing, the government breached its plea agreement with Rivera by improperly advocating for a significantly higher Guidelines range based on criminal history information that was available to it at the time of Rivera's plea, but not included in the plea agreement. App.16a. Rivera's counsel objected and brought the government's obligations under the plea agreement to the District Court's attention, arguing that it would be unfair to Rivera if the terms of the agreement were not enforced. App.26a–27a.

Under Rule 51(b) of the Federal Rules of Criminal Procedure and this Court's precedent, Rivera's objections were sufficient to preserve the challenge for appeal. *Holguin-Hernandez v. United States*, 589 U.S. 169, 173–74 (2020) (holding that a defendant may preserve a challenge for appeal merely by bringing the claimed error "to the court's attention" and is not required to "use any particular language"). The Second Circuit, however, concluded that Rivera's objections "fell short" because he had not "specifically contended that any provision of the plea agreement was

breached." App.8a. In so holding, the Second Circuit demanded more than required under Rule 51(b) and this Court's precedent and violated Rivera's right to due process. U.S. Const. amend. V.

The Second Circuit then reviewed Rivera's challenge to the breach for plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). This Court has made clear that the "plainness" of an error is determined at the time of appellate consideration, not at the time of error. *Henderson v. United States*, 568 U.S. 266, 269 (2013). Yet, having found that the government had breached the plea agreement, the Second Circuit concluded that Rivera could not demonstrate that the error was plain, because the breach could not have been "obvious to the trial judge." App.18a. Contrary to this Court's precedent in *Henderson*, the Second Circuit stated that for an error to be "sufficiently clear or obvious as to be plain error," it "must be so plain that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.*

The Second Circuit reasoned that the error could not have been obvious at the time of sentencing because it had not previously interpreted a specific term (the word "available") in the plea agreement to define the scope of the government's commitments. App.18a. In so holding, the Second Circuit erred in two respects: First, the interpretation of the plea agreement here was governed by controlling precedent stating that any ambiguities in a plea agreement must be construed

strictly against the government. *See, e.g.*, *United States v. Wilson*, 920 F.3d 155, 162 (2d Cir. 2019). Thus, this case required only the application of well-established precedent, not the extension of it, to determine that the government had breached its agreement. Second, the court of appeals erred by categorically concluding that an error cannot be plain if it requires the extension of precedent because the error would not have been obvious to the trial judge. Because the circuits are divided on this last point, this Court's intervention is required to ensure that the plain error standard of review is applied consistently.

This Court should grant Rivera's petition for a writ of certiorari to clarify that (a) at sentencing, defendants need not object with specificity or identify a particular provision of a plea agreement that has been breached to preserve a challenge for appellate review; and (b) an error that is obvious at the time of appellate consideration may satisfy the plain error standard, even if the reviewing court's decision involves an extension of precedent.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Victor Rivera grew up in an impoverished, dangerous neighborhood in Puerto Rico, where he often went without food or electricity at home. PSR ¶¶ 158–59; App.28a–29a. At the age of nine, Rivera was diagnosed with schizophrenia, bi-polar disorder, anxiety, depression, and attention deficit/hyperactivity disorder. PSR ¶¶ 159, 167; App.28a. Rivera left school in the seventh grade. PSR ¶ 179. In 2011, when Rivera was 19, he witnessed both of his

parents die in a fire that burnt his home to the ground. PSR ¶ 158. After that tremendous loss, Rivera became suicidal and was diagnosed with post-traumatic stress disorder. He was hospitalized twice for psychiatric treatment in the year following his parents' death. Rivera, who was approximately 26 years old at the time of the offense that gave rise to this case, spent much of his adult life in and out of shelters, seeking psychiatric care. PSR ¶¶ 162, 168.

In 2022, Rivera pled guilty to one count of one count of Hobbs Act robbery conspiracy pursuant to a plea agreement with the government, in which the parties stipulated to an applicable Guidelines range of 168 to 210 months' imprisonment (the "Stipulated Guidelines Range"). PSR ¶¶ 21-22. At the time the government drafted and executed its plea agreement with Rivera, it was aware of Rivera's decade-old arrests in Puerto Rico (all occurring within about a year of the tragic loss of his parents). The government did not, however, determine the outcome of those arrests or include them in the calculation of the Stipulated Guidelines Range in the plea agreement.[3]

In advance of Rivera's sentencing, the Probation Office did that due diligence and included three additional convictions in its calculation of Rivera's Criminal History Category in the Presentence Report. The additional criminal history points, including one point for a conviction for which Rivera was ordered to pay a $50 fine in 2012, increased Rivera's Criminal History Category from II to V, resulting in a

[3] The government disclosed its decision not to inquire about these arrests for the first time during oral argument on appeal.

substantially higher Guidelines range of 240 months' imprisonment.[4] PSR ¶ 199. Nevertheless, due to Rivera's tragic personal history, the Probation Office recommended a sentence of 160 months' imprisonment—well below the Stipulated Guidelines Range. PSR at 38.

In the government's sentencing submission and at Rivera's sentencing proceeding—and not in response to any inquiry from the District Court—the government asked the District Court to adopt a higher Guidelines range of 235 to 240 months and to sentence Rivera within that higher range. App.26a, 34a–35a. Rivera objected to the government's change in position and improper advocacy at sentencing based on fundamental principles of contract law, including reliance, performance, and fairness. Rivera alerted the District Court to his reliance on the government's representations in the plea agreement and the unfairness inherent in the government's abandonment of the terms of the agreement at sentencing. App. 26a–27a. Specifically, Rivera objected that "we would have no ability to know what that [criminal] history was and were assuming when we entered into these negotiations with the government that they had reviewed a rap sheet." App.26a. Rivera further objected that "when we entered into these plea negotiations, we relied on the fact that it was just his history from New York . . . [and] relied upon the government's representation that that was it." App.27a. In conclusion, Rivera's counsel argued that the government's change in position should not "be held against

[4] The Guidelines range was capped by the statutory maximum term of imprisonment.

my client just for the basic fact that we would not, you know – we assumed when we entered into these plea negotiations that the sentencing guideline range was what the US attorney represented it to be." *Id.*

Responding only that it wasn't "blaming" defense counsel, *id.*, and ignoring the Probation Office's recommendation of a below-Guidelines sentence, the District Court adopted the higher Guidelines range and sentenced Rivera to 235 months' imprisonment. App.27a, 36a, 40a.

On appeal before the Second Circuit, Rivera argued the government had breached the plea agreement by abandoning the Stipulated Guidelines Range and arguing for a significantly higher applicable Guidelines range and a sentence within that higher range based on information that was available at the time of Rivera's plea but not included in the plea agreement. In the plea agreement, the government stated that it had calculated Rivera's Criminal History Category "[b]ased upon the information now available to this Office." App.4a. The parties reserved their right to seek a different Guidelines range only "based upon new information that the defendant's criminal history category is different from that set forth" in the agreement. App.9a–10a. Because neither the word "new" nor "available" was defined in the plea agreement, Rivera argued that those terms must be given their plain meaning and strictly construed against the government. Therefore, because the Puerto Rico convictions were "available" to the government at the time of the plea and were not "new" information, the government had breached the plea agreement by advocating for a higher Guidelines range at sentencing.

B. The Second Circuit's Decision

On August 21, 2024, the Second Circuit affirmed the judgment of the District Court. The Second Circuit found that "the [g]overnment broke its promise to abide by the stipulated Guidelines range at sentencing and therefore breached the plea agreement." App.9a. The court agreed that the facts of Rivera's prior convictions in Puerto Rico had been "available" to the government when the plea agreement was negotiated and therefore did not constitute "new" information. *Id.* Nevertheless, Rivera was denied relief. The Second Circuit found that defense counsel's objections at sentencing were not sufficient to preserve the challenge for appeal, primarily because he "never specifically contended that any provision of the plea agreement was breached." App.8a. In reviewing Rivera's challenge for plain error, the Second Circuit concluded that the breach was not "plain" because it was not "obvious to the trial judge," since the lower court "lacked Circuit guidance on how to read the term 'available' used in Rivera's plea agreement to define the scope of the government's commitments." App.18a.

The Second Circuit denied Rivera's petition for panel rehearing or rehearing *en banc* on November 14, 2024. App.41a.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit Erred in Applying an Improperly Onerous Standard to Preserve a Challenge for Appeal

Rule 51(b) of the Federal Rules of Criminal Procedure provides that "[a] party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the

party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). This Court has held that Rule 51(b) does not require an objecting party to "use any particular language," and a defendant may preserve a challenge for appeal merely by bringing the claimed error "to the court's attention." *Holguin-Hernandez*, 589 U.S. at 173–74. To that end, this Court directed that to preserve a challenge on appeal to the length of his sentence, it was sufficient for a defendant to advocate for a shorter sentence, and nothing more. *Id.*

Here, Rivera brought his reliance on the terms of the plea agreement and the government's improper abandonment of the Stipulated Guidelines Range to the court's attention, as required under *Holguin-Hernandez*. App.26a–27a. He argued that it was unfair for the government to change positions and deprive him of the benefit that he had negotiated and relied upon in the plea agreement. *Id.* The "action" Rivera wished the court to take was clear and sufficient under Rule 51(b): Rivera wanted the District Court to enforce the government's commitment under the plea agreement.

In considering whether Rivera had preserved his claim for appeal, the Second Circuit applied an improperly onerous standard and dismissed Rivera's objections as "general frustration" and "at best, an argument about fairness." App.8a. Noting that Rivera had not "specifically contended that any provision of the plea agreement was breached," the Second Circuit concluded that Rivera's objections "fell short" of what was required to preserve a challenge for appellate review. App.8a.

The Second Circuit's conclusion was wrong in three ways, each of which is sufficiently egregious as to warrant this Court's review. First, an objection to a breach of plea agreement that is based on fairness is sufficient. Fairness, along with reliance and performance, are the keystones of this Court's law governing breach of plea agreements. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). *See also Puckett v. United States*, 556 U.S. 129, 137, 143 (2009) (observing that "[w]hen a defendant agrees to a plea bargain, the Government takes on certain obligations," and "the Government's breach of a plea agreement is a serious matter."). The Second Circuit likewise has acknowledged that plea agreements are "unique contracts," requiring courts to "temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004). *See also Wilson*, 920 F.3d at 162 (The court "do[es] not hesitate to scrutinize the government's conduct to ensure that it comports with the highest standards of fairness."). *See generally* Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 41 (2018) (noting that several courts have found that "defendants may be entitled to relief, even when prosecutors do not violate specific terms of plea agreements, due to general principles of due process and prosecutorial responsibility.").

Second, this Court has been clear that a defendant is not required to "use any particular language" or to object with specificity to a claimed error at sentencing to preserve the challenge for appeal. *Holguin-Hernandez*, 589 U.S. at 173–74. In fact, the Second Circuit itself had previously stated that a defendant need only "object in a manner sufficient to apprise the court and opposing counsel of the nature of [his] claims regarding the impropriety of the Government's change in position." *United States v. Taylor*, 961 F.3d 68, 81 n.12 (2d Cir. 2020). A defendant need not object "on the specific ground that the government breached the plea agreement to preserve such a claim" for appellate review. *Id.* It was, therefore, unimportant that Rivera did not "specifically contend[] that any provision of the plea agreement was breached." App.8a.

Finally, the Second Circuit's decision incorrectly suggests that Rivera's agreement that the upwardly-revised Guidelines range was calculated correctly undermined his objections. App.8a. It did not. In response to the District Court's questioning, Rivera's counsel simultaneously (and correctly) acknowledged that (a) the Guidelines range as calculated by the District Court at sentencing was accurate considering the criminal history information provided by the Probation Office, and (b) the government's change in position by *sua sponte* abandoning the Stipulated Guidelines Range was unfair. In other words, he correctly recognized that both things can be true—the District Court's Guidelines calculation was correct and the government was obligated to adhere to the terms of the plea agreement. Rivera's

objection was to the government's improper advocacy, not to the District Court's independent calculation.

The Second Circuit's conclusion that Rivera's objections "fell short" of what was required to preserve the issue for appellate review, App.8a, contradicts this Court's precedent and adopts an overly restrictive approach to Rule 51(b). Such a restrictive approach violates principles of due process for defendants, like Rivera, who pled guilty in reliance on the representations and stipulations provided by the government.

II. The Second Circuit Failed to Properly Consider Whether the Error was Plain at the Time of Appellate Consideration

Fairness also is at the heart of Rule 52(b) of the Federal Rules of Criminal Procedure, which permits courts to review certain errors even if they were not previously brought to the court's attention. Under the framework that this Court established in *United States v. Olano*, 507 U.S. 725 (1993), appellate courts may notice plain error under Rule 52(b) when four requirements are met: (1) there is an error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.* at 732.

In *Henderson*, this Court instructed that the "plainness" of an error is determined at the time of appellate consideration, not the time of error. 568 U.S. at 269. "[W]hether a legal question was settled or unsettled at the time of trial, it is enough that an error be plain *at the time of appellate consideration* for the second part of the four-part *Olano* test to be satisfied." *Id.* at 279 (emphasis added). In fact,

a court of appeals can find a trial court to have plainly erred even where "perhaps not even clairvoyance could have led [the trial court judge] to hold to the contrary." *Id.* at 277. "[P]lain-error review is not a grading system for trial judges" but instead "has broader purposes, including in part allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity." *Id.* at 278. The rule functions to avoid "unjustifiably different treatment of similarly situated individuals." *Id.* at 274.

In concluding that the government's breach was not "plain" for the purposes of Rule 52(b), the Second Circuit incorrectly looked to whether the error was "obvious to the trial judge," App.18a, as it has continued to do in numerous cases since *Henderson*.[5] Furthermore, the Second Circuit appears to have improperly concluded that the error categorically could not be plain because it involved an extension of precedent. In its decision, the Second Circuit stated that for an error to be "sufficiently clear or obvious as to be plain error," it "must be so plain that the trial judge and prosecutor were derelict in countenancing it, even absent the

[5] *See, e.g.*, *United States v. Esteras*, 102 F.4th 98, 108 (2d Cir. 2024) ("[a]bsent . . . controlling precedent, we will notice plain error only in the 'rare case' where the error was so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object."); *United States v. Al Fawadi*, No. 22-1078, 2024 WL 1364700, *1 (2d Cir. Apr. 1, 2024) (summary order); *United States v. Teman*, No. 21-1920, 2023 WL 3882974, *3 (2d Cir. June 8, 2023) (summary order); *United States v. Ray*, 713 F. App'x 20, 23 (2d Cir. 2017); *United States v. Blackwell*, 651 F. App'x 8, 9 (2d Cir. 2016); *United States v. Roy*, 607 F. App'x 14, 17 (2d Cir. 2015); *United States v. Haynesworth*, 568 F. App'x 57, 60 (2d Cir. 2014); *United States v. Alvarado*, 720 F.3d 153, 159 n.7 (2d Cir. 2013).

defendant's timely assistance in detecting it." App.18a. The Second Circuit concluded that the government's breach could not meet this standard, since the Circuit had not previously provided guidance as to "how to read the term 'available' used in Rivera's plea agreement to define the scope of the government's commitments." App.18a.

The Second Circuit's application of Rule 52(b) was incorrect because (1) new guidance from the Circuit was not required to conclude that the government had breached its agreement, as controlling precedent applied to the interpretation of the plea agreement, and (2) the court need not consider whether the error was obvious to the trial judge, because "it is enough that an error be 'plain' at the time of appellate consideration." *Henderson*, 568 U.S. at 269.

First, determining whether the plea agreement had been breached here required only the application of precedent, not the extension of it. It is well-established in the Second Circuit that the undefined and ambiguous terms in a plea agreement must be resolved in a defendant's favor and "strictly against the Government." *Wilson*, 920 F.3d at 162. *See also United States v. Vaval*, 404 F.3d 144, 153 (2d Cir. 2005); *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002); *United States v. Lawlor*, 168 F.3d 633, 636-37 (2d Cir. 1999). In determining the scope of the government's obligations under the plea agreement, the court must construe ambiguous terms in a manner that affords the defendant the greatest protections. Accordingly, Circuit guidance as to how to read the term "available" in

the plea agreement was not required to decide this case, and the error was plain under controlling precedent.

Second, the Second Circuit's carve-out for issues for which there is no controlling precedent has been rejected by this Court. In *Henderson*, this Court addressed the contention that the purpose of the plainness requirement "is to ensure the integrity of the [trial] proceedings" and to capture only cases where "a competent district judge should be able to avoid [the error] without benefit of objection." 568 U.S. at 277. It found that that "approach runs headlong into *Johnson*" because "[t]he error in *Johnson* was not an error that the District Court should have known about at the time. It was the very opposite[.]" *Id. See Johnson v. United States*, 520 U.S. 461, 468 (1997) (holding that in cases "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal . . . it is enough that an error be 'plain' at the time of appellate consideration"). This Court instructed that plain error is assessed at the time of appellate review, without considering whether the applicable rule would have been obvious *or even knowable* to the trial court judge. *Henderson*, 568 U.S. at 277.

As the Ninth Circuit has held, *Henderson* requires appellate courts to assess "*with the benefit of hindsight*, whether our analysis reveals the question at issue to have a 'plain' answer or whether that analysis confirms that we have instead answered a close and difficult question." *United States v. Irons*, 31 F.4th 702, 713 (9th Cir. 2022) (emphasis in the original). In *Irons*, the Ninth Circuit used dictionaries and other authorities to clarify the meaning of a key term, as the

Second Circuit did in this case. *Id.* at 711–13. But because the Ninth Circuit correctly considered only whether the error was obvious at the time of appellate consideration, it found that the error was plain. *Id.* at 713 (stating that "[w]ith the advantage of that hindsight, we conclude that our textual analysis is sufficiently one-sided, and sufficiently dictates the answer, that the district court's error is 'plain").

Finally, guidance from this Court is needed to resolve the widespread disagreement among the circuits about whether a court of appeals may find plain error when considering an issue that requires an extension of precedent. The Third Circuit explained that "lack of precedent alone will not prevent us from finding plain error," but "novel questions still must be capable of measurement against some other absolutely clear legal norm." *United States v. Jabateh*, 974 F.3d 281, 299 (3d Cir. 2020). Likewise, the Tenth Circuit has "consider[ed] the possibility of an obvious or clear deprivation of due process" in the lower court's decision, even where the issue involves a matter of first impression. *United States v. Faunce*, 66 F.4th 1244, 1253 (10th Cir. 2023) ("Though the issue here involves a matter of first impression, we consider the possibility of an obvious or clear deprivation of due process [in the lower court's decision]."). *See also United States v. Ramirez*, 783 F.3d 687, 695 (7th Cir. 2015) ("We rarely find plain error on a matter of first impression.").

By contrast, the Fifth Circuit has concluded that an error is not "plain" when an issue of first impression is involved or when the asserted error "requires the

extension of precedent." *United States v. Cabello*, 33 F.4th 281, 290-91 (5th Cir. 2022); *United States v. Parra*, 111 F.4th 651, 660 (5th Cir. 2024) ("[Plain error] must be so clear or obvious that the [district] judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it. Unless the result was plainly dictated by relevant laws and decision, the error was not plain."). Similarly, the Sixth Circuit has held that "[f]or an error to be plain, it must be clear and obvious—which it cannot be if it involves a question of first impression in this Circuit—especially one over which the remaining circuits were divided." *United States v. Potts*, 947 F.3d 357, 367 (6th Cir. 2020). *See also, e.g., United States v. Prabhu Ramamoorthy*, 949 F.3d 955, 960 (6th Cir. 2020) ("We may reverse for plain error only in exceptional circumstances and only where the error is so plain that the trial judge was derelict in countenancing it."); *United States v. Underwood*, 859 F.3d 386, 394 (6th Cir. 2017) (same). And the First Circuit held that a plain error "must be indisputable in light of controlling law," suggesting a similarly restrictive position. *United States v. Rabb*, 5 F.4th 95, 101 (1st Cir. 2021).

This Court's intervention is needed to resolve the confusion that remains among the circuits about whether, in conducting plain error review, a court of appeals may (a) rely on whether the error would have been obvious to the trial judge, and (b) categorically preclude any challenge that involves an extension of precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Anna M. Skotko

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APPENDIX

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United States v. Rivera

United States Court of Appeals
For the Second Circuit

August Term 2023
Argued: February 15, 2024
Decided: August 21, 2024

No. 22-2081

UNITED STATES OF AMERICA

Appellee,

v.

VICTOR RIVERA, AKA SEALED DEFENDANT 1,

Defendant-Appellant,

MICHOLS PENA, AKA SEALED DEFENDANT 2,
JOHAN ARAUJO

Defendants.

Appeal from the United States District Court
for the Southern District of New York

No. 20-cr-600, Alvin K. Hellerstein, *Judge*.

Before: Jacobs, Chin, and Nathan, *Circuit Judges*.

Defendant-Appellant Victor Rivera appeals from a judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*) after pleading guilty pursuant to a plea agreement to participating in a Hobbs Act robbery conspiracy. On appeal, Rivera argues (1) that the Government breached the terms of the plea agreement, (2) that his sentence is procedurally and substantively unreasonable, and (3) that this case should be remanded for resentencing in light of an amendment to the Guidelines after his sentencing. We conclude that none of Rivera's challenges prevail.

Notably, although we find that the Government breached the plea agreement when it sought a higher Guidelines range than the one stipulated to in Rivera's plea agreement based on criminal history available to it at the time of the plea, we conclude that this error does not amount to a "plain" error under the applicable standard. Accordingly, we **AFFIRM**.

ANNA MARGARET SKOTKO, Skotko Law PLLC, New York, NY, *for Defendant-Appellant*.

ANDREW K. CHAN (Mathew Andrews, Danielle Renee Sassoon, Thomas John Wright, Alison Moe, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States

Attorney for the Southern District of New York, New York, NY, *for Appellee*.

NATHAN, *Circuit Judge*:

The Supreme Court has long acknowledged the "essential" role that plea bargaining plays in "the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Our Court has also encouraged prosecutors to inform defendants of their likely sentence range under the federal Sentencing Guidelines to enable defendants to more "fully appreciate the consequences of their pleas." *United States v. Pimentel*, 932 F.2d 1029, 1032 (2d Cir. 1991). It is therefore unsurprising that plea agreements today are commonly drafted to include stipulated sentence ranges that the parties agree not to dispute at sentencing. While stipulating to certain sentence ranges in a plea agreement can reduce "claims of unfair surprise" from defendants, *United States v. Wilson*, 920 F.3d 155, 163 (2d Cir. 2019) (quotation marks omitted), this is true only if the government actually keeps its promises.

The question in this appeal is whether the government breaches a plea agreement when it stipulates to a sentence range based on information "available" to it, then advocates for a substantially higher sentence based on criminal history information that it could have readily obtained. We hold that it does, though the error is insufficiently "plain" to warrant resentencing in the present case.

Furthermore, we reject Rivera's claim that the Government

breached his plea agreement by describing him as a leader. We likewise conclude that Rivera's procedural and substantive challenges to his sentence fail. Finally, we reject Rivera's request to remand this case for resentencing due to a recent amendment to the Sentencing Guidelines. Accordingly, we **AFFIRM** the judgment of the district court.

BACKGROUND

Between October 2019 and November 2020, Defendant-Appellant Victor Rivera participated in a robbery crew responsible for over a dozen robberies of jewelers and luxury watch owners. The robbery crew identified their potential victims on social media, before surveilling and ambushing them outside of their homes, often at gunpoint. Rivera was arrested, and a grand jury returned an 18-count indictment.

Pursuant to a plea agreement prepared by the U.S. Attorney's Office for the Southern District of New York, Rivera pled guilty to one count of participating in a Hobbs Act robbery conspiracy in violation of 18 U.S.C. § 1951. Like many other plea agreements executed by the U.S. Attorney's Office, Rivera's agreement contained a stipulated Guidelines range that the parties agreed not to contest at sentencing.

The agreement stated as follows: "Based upon the information now available to this Office (including representations by the defense), the defendant has three criminal history points." App'x at 44. This placed Rivera into Criminal History Category II. The agreement also calculated a total offense level of 34, and as relevant here, imposed no role enhancement under U.S.S.G. § 3B1.1.

Together, these calculations resulted in a "Stipulated Guidelines Range" of 168 to 210 months' imprisonment. *Id*. at 45.

Rivera and the U.S. Attorney's Office agreed that "neither party [would] seek any departure or adjustment," nor "in any way suggest that" the sentencing court consider a departure or adjustment from the stipulated guidelines range, unless permitted by the agreement. *Id*. The parties were permitted to seek an adjustment in certain circumstances—for example, the parties could seek a variance based upon the sentencing factors under 18 U.S.C. § 3553(a), or "based upon new information that the defendant's criminal history category [was] different from that set forth" in the agreement. *Id*.

On April 8, 2022, the Probation Office issued its final Presentence Investigation Report (PSR). The PSR included three convictions Rivera obtained in Puerto Rico during 2012 and 2013 that were not accounted for in the plea agreement. In light of these additional convictions, Probation calculated ten criminal history points, significantly higher than the three criminal history points stipulated to in the plea agreement. This placed Rivera in Criminal History Category V. Probation calculated the applicable Guidelines sentence to be the statutory maximum of 240 months[1] but recommended a sentence of only 160 months.

In its sentencing submission, the Government agreed with the PSR's criminal history calculation and argued for a revised Guidelines range of 235 to 240 months' imprisonment, capped by the

[1] Probation also calculated a higher total offense level of 35 as opposed to the total offense level of 34 calculated in the plea agreement. The government did not, however, rely on this revised total offense level for its sentencing submission.

statutory maximum of 240 months. The Government explained that it was advocating for a higher applicable Guidelines range than the stipulated range of 168 to 210 months because of Rivera's "extensive criminal history in Puerto Rico," which the Government "was unaware of . . . at the time of the plea agreement[.]" App'x at 75.

At sentencing, defense counsel agreed that the applicable Guidelines range was 235 to 240 months. However, he also explained that he had assumed that the Government "reviewed a rap sheet" prior to preparing the plea agreement and thus also "assumed when [Rivera] entered into these plea negotiations that the sentencing guideline range was what the [U.S. Attorney's Office] represented it to be." App'x at 84–85. Despite this, the district court agreed that the applicable Guidelines range was 235 to 240 months.

Rivera requested a 96-month term of imprisonment, arguing that a variance was warranted under the § 3553(a) factors in light of his difficult childhood and history of serious mental illness. The Government advocated for a sentence within the applicable Guidelines range. The district court agreed with the Government and sentenced Rivera to 235 months' imprisonment, to be followed by three years of supervised release.

DISCUSSION

I. Breach of Rivera's Plea Agreement

On appeal, Rivera argues that the Government breached the terms of his plea agreement in two respects. First, he argues that the Government breached the agreement by relying on his Puerto Rico convictions to advocate for a higher Guidelines range at sentencing. Second, he argues that the Government breached the agreement by

describing him as a leader in its sentencing statements. Although we agree that the Government's request for a higher sentence range violated the plea agreement, we nonetheless reject both arguments under the plain error standard.

"We review a plea agreement in accordance with principles of contract law and look to what the parties reasonably understood to be the terms of the agreement to determine whether a breach has occurred." *United States v. Sealed Defendant One*, 49 F.4th 690, 696 (2d Cir. 2022) (quotation marks omitted). "We do so by looking to the precise terms of the plea agreements and to the parties' behavior." *United States v. Helm*, 58 F.4th 75, 83 (2d Cir. 2023) (quotation marks omitted).

Ordinarily, the government enjoys disproportionate bargaining power in plea agreement negotiations. *See United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002). We accordingly "construe plea agreements strictly against the government and do not hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness." *United States v. Wilson*, 920 F.3d 155, 162 (2d Cir. 2019) (quotation marks omitted).

A. New Information

Rivera argues first that the Government breached his plea agreement by relying on his 2012 and 2013 Puerto Rico convictions to advocate for a higher Guidelines range than the range stipulated to in the agreement.

An argument that the government breached a plea agreement is reviewed for plain error if the defendant failed to object in the district court. *United States v. MacPherson*, 590 F.3d 215, 218 (2d Cir.

2009). Rivera maintains that his attorney's objections at sentencing were adequate to preserve this argument. While a defendant need not object "on the specific ground that the government breached the plea agreement to preserve such a claim for appellate review, the defendant must object in a manner sufficient to apprise the court and opposing counsel of the nature of [his] claims regarding the impropriety of the [g]overnment's change in position." *United States v. Taylor*, 961 F.3d 68, 81 n.12 (2d Cir. 2020) (quotation marks omitted).

Rivera's objections fell short of this requirement. Although defense counsel explained at sentencing that Rivera expected only the criminal history contained in his plea agreement to be considered for his sentence calculation, he never specifically contended that any provision of the plea agreement was breached. To the contrary, defense counsel "agree[d] with" the district court in the calculation of the revised Guidelines range. App'x at 84. Rivera's general frustration that the applicable Guidelines range was higher than anticipated was, at best, an argument about fairness. None of his statements made at sentencing indicate he was alleging that the Government's advocacy amounted to a breach of Rivera's plea agreement. Accordingly, these objections were insufficient to apprise the Government and sentencing court of a legal claim for breach of the plea agreement.

We thus review this breach claim for plain error. "To establish plain error, a defendant must demonstrate: (1) error, (2) that is plain, and (3) that affects substantial rights." *Taylor*, 961 F.3d at 81 (quotation marks omitted). If all three requirements are satisfied, then we must also consider whether the error "seriously affects the

fairness, integrity, or public reputation of judicial proceedings." *United States v. Bleau*, 930 F.3d 35, 39 (2d Cir. 2019).

In this case, we conclude that the Government broke its promise to abide by the stipulated Guidelines range at sentencing and therefore breached the plea agreement. Based on the terms of that agreement, Rivera reasonably expected that the Government would not rely on criminal history information "available" to it at the time of the plea to request a higher Guidelines range. However, the Government did exactly that when it relied on unsealed convictions that it was put on notice of and could have readily obtained at the time of the plea. The Government's reliance on this information to advocate for a higher Guidelines range was a violation of Rivera's reasonable expectations.

We start with the relevant terms of the plea agreement. There is no dispute that the plea agreement prohibited the Government from seeking an adjustment from the stipulated range of 168 to 210 months unless permitted by the agreement. Nor is there any dispute that the agreement allowed the Government to advocate for an adjusted Guidelines range based on "new information" about Rivera's criminal history. App'x at 45. The sole dispute here is whether Rivera's 2012 and 2013 Puerto Rico convictions constitute "new information" under the plea agreement.

We look to the "precise terms" of the plea agreement to discern "what the reasonable understanding and expectations of the defendant were as to the sentence for which he had bargained." *Wilson*, 920 F.3d at 163 (cleaned up). Here, the terms of the agreement provided that the parties may "seek an appropriately adjusted

Guidelines range . . . based upon new information that the defendant's criminal history category is different from that set forth" in the agreement. App'x at 45. What counts as "new information," then, depends on what information was already accounted for in calculating the "criminal history category . . . set forth" in the agreement. *Cf. United States v. Palladino*, 347 F.3d 29, 34 (2d Cir. 2003); *Wilson*, 920 F.3d at 164. And the agreement provided that the criminal history category was calculated "[b]ased upon the information *now available*" to the U.S. Attorney's Office. App'x at 44 (emphasis added). Read together, these provisions indicate that any criminal history information "available" to the U.S. Attorney's Office does not count as "new information" within the terms of the plea agreement. In other words, the Government agreed not to advocate for a higher sentence except in reliance on information that was not "available."

Since the plea agreement does not define "available," we look to the ordinary meaning of the term. *See Dish Network Corp. v. Ace Am. Ins. Co.*, 21 F.4th 207, 211 (2d Cir. 2021). As the Supreme Court has explained, "the ordinary meaning of the word 'available' is "'capable of use for the accomplishment of a purpose," and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 578 U.S. 632, 642 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 737–38 (2001)); *see also* Merriam-Webster's Unabridged Dictionary (3d ed. 1993) (defining "available" as "accessible or may be obtained"); Cambridge Dictionary (2d ed. 2008) (defining "available" as "able to be obtained, used, or reached"); The American Heritage Dictionary (5th ed. 2011) (defining "available" as "[c]apable of being gotten; obtainable"). Therefore, the Government may abandon its promise to recommend

the stipulated sentence range based on "new information" about Rivera's criminal history only if such information was not "accessible" and could not have been "obtained" by the Government at the time of the plea.

Our interpretation charts a middle ground between the parties' clashing readings of what counts as "new information." In its briefing, the Government argued that any information that the Government did not *know* about during the plea is "new information." At oral argument, the Government went further and suggested that the "new information" provision was a "carveout" provision broadly authorizing reliance on *any* criminal history information not accounted for in the agreement.

But these readings fail to capture the scope of information "available" to the Government at the time of the plea. Plea agreements are reviewed "in accordance with principles of contract law," *Wilson*, 920 F.3d at 162, which "require that all provisions of a contract be read together as a harmonious whole," *Kinek v. Paramount Commc'ns, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994). As we explained above, the scope of "new information" cannot be defined in isolation. It must be read alongside the provision specifying what information was already accounted for in calculating the stipulated sentencing range. That range was based on information "now available" to the U.S. Attorney's Office, not information "known to" the U.S. Attorney's Office, nor information "existing as of today."

For this reason, the Government's reliance on various cases from our Circuit is unavailing. Those decisions provide only limited guidance as they interpreted plea agreements containing different

language. *United States v. Soto*, for instance, involved a plea agreement containing stipulations based on "information *known* to the government." 706 F. App'x 689, 691 (2d Cir. 2009) (summary order) (emphasis added). Similarly, *United States v. Santana* involved a plea agreement reserving the government's right to modify its position "if it subsequently received previously *unknown* information." 112 F. App'x 787, 789 (2d Cir. 2004) (summary order) (emphasis added).[2] In these cited cases, the government reserved a more expansive right to change its position as compared to what the government bargained for in the present case. As this Court has explained, inclusion of "[t]he words, 'based on information known to the government,'" communicates "the government's freedom to advocate for a higher guideline range when its change of position is based on its *subsequent* acquisition of aggravating information." *United States v. Habbas*, 527 F.3d 266, 272 n.1 (2d Cir. 2008). But here, the Government reserved its right to change its position based only on information not *available* to it at the time of the plea. These terms convey different meanings because, put simply, information can be unknown to the government yet readily available, accessible, and obtainable. *See* Merriam-Webster's Unabridged Dictionary (3d ed. 1993) (defining "know" as "perceive directly" and "have direct unambiguous cognition of").

A hypothetical posed at oral argument illustrates the point:

[2] The government also relies on *United States v. Johnson*, 93 F.4th 605, 617 (2d Cir. 2024). But *Johnson* concerned the government's promise not to prosecute any other offenses not known to it at the time of the plea agreement. Because Rivera's plea agreement does not contain a similar promise, *Johnson* offers little insight on how to interpret the terms disputed by the parties here.

Imagine the U.S. Attorney's Office simply misplaced a page of the rap sheet containing a defendant's past convictions. It proceeds to prepare a plea agreement that fails to account for those convictions. Under these circumstances, the government may have lacked knowledge of the past convictions, but the information at issue was nevertheless clearly *available*. Asked whether the "carveout" provision would apply in such a case, the Government still answered in the affirmative based on the Government's lack of knowledge. But traditional contract principles require us to give the precise terms in a plea agreement their plain and ordinary meaning. *See Dish Network Corp.*, 21 F.4th at 211. Under this principle, we may not read the words "information now available" to mean "information now known."

Nor can we adopt Rivera's preferred reading, which equates "new information" with information that "recently c[a]me into existence." Appellant's Br. at 19. On that interpretation, the plea agreement would suggest that the Government, in reaching the stipulated Guidelines range, has accounted for all criminal history information in existence at the time of the plea. But that reading similarly goes too far and does not comport with a defendant's "reasonable understanding and expectations" based on the ordinary meaning of the agreement terms. *Wilson*, 920 F.3d at 163. That is because there may well be cases in which criminal history information exists but is nevertheless not "available" to the government in the ordinary sense of the term because it may be infeasible for the government to obtain certain information. In a different context, we have explained that something can be "technically available" but

nonetheless not "available" under the plain meaning of the term if it is too confusing or opaque to reasonably pursue. *See Williams v. Corr. Officer Priatno*, 829 F.3d 118, 126 (2d Cir. 2016) (discussing the meaning of "available" administrative remedies under the Prison Litigation Reform Act). Here too, information can be *technically* available yet not considered "available" to the government if it is not reasonably obtainable. For example, a defendant's criminal history information might not be "available" where the government has no notice of its existence or simply lacks the means to obtain it. In those circumstances, a defendant cannot reasonably expect the government to have accounted for such information in calculating a stipulated sentence based on information "available" to it. Accordingly, we conclude that, under the plain terms of the plea agreement, a criminal defendant reasonably expects and understands that the government would not rely on criminal history information available to the U.S. Attorney's Office at the time of the plea as a basis to abandon the stipulated Guidelines range.

Under our reading of the plea agreement, then, the question in this case is whether the Government has shown that the criminal history information justifying an adjustment was previously unavailable (*i.e.*, not reasonably obtainable at the time of the plea). The answer is no. Not only has the Government failed to muster any explanation for its prior inability to account for Rivera's Puerto Rico convictions, but the Government conceded during oral argument that, had it tried, it could have obtained the relevant information. So while the U.S. Attorney's Office did not learn about Rivera's Puerto Rico convictions until it reviewed the PSR, we conclude that such

information was nonetheless "available," because it was reasonably obtainable by the U.S. Attorney's Office at the time of the plea. We reach this conclusion for two related reasons.

First, the Government was reasonably expected to investigate whether Rivera had Puerto Rico convictions because it was put on notice of the possibility of such convictions by Rivera's rap sheet. At oral argument, the Government explained that it used a rap sheet to prepare the plea agreement. This rap sheet contained Rivera's past arrests in Puerto Rico but did not mention whether the arrests led to convictions. The information about these arrests, however, should have prompted further investigation on the Government's part into whether the arrests resulted in convictions. That Probation, presumably relying on the same rap sheet, chose to conduct further due diligence into Rivera's Puerto Rico criminal history in preparing the PSR confirms that the rap sheet signaled the possibility that Rivera had Puerto Rico convictions.

Second, and relatedly, the information at issue was readily obtainable by the Government upon investigation. The Puerto Rico convictions were unsealed and thus available in public records. At oral argument, the Government conceded that it could have obtained this criminal history information by simply contacting the relevant Puerto Rico courthouses. The Government offers no reason for its failure to account for these unsealed convictions in the plea agreement. It is inexplicable, then, why the Government chose not to obtain this information after it was put on notice from the rap sheet of Rivera's prior arrests in Puerto Rico.

Finally, even if whether Rivera's Puerto Rico convictions were

"available" to the government was ambiguous, that would not aid the Government's case because we are obligated to construe all ambiguities strictly against the government. *See Wilson*, 920 F.3d at 162.

We thus conclude that Rivera's 2012 and 2013 Puerto Rico convictions was information "available" to the Government at the time of the plea and that the Government breached the plea agreement by relying on these convictions for its advocacy at sentencing.

In finding breach in today's case, we do not suggest that the Government acted in bad faith. But even if other factors such as high workload could explain the Government's failure to obtain Rivera's readily available relevant criminal history, they cannot excuse it. *Santobello v. New York*, 404 U.S. 257, 260, 262 (1971) ("That the breach of agreement was inadvertent does not lessen its impact."). We have, of course, acknowledged that the government is not immune to mistakes or oversights when preparing plea agreements. *See United States v. Habbas*, 527 F.3d 266, 272 n.1 (2d Cir. 2008). But where the government has chosen to bind itself to advocating for a stipulated Guidelines range, it must hold itself to that promise. A plea agreement, like any contract, binds one party to an obligation in exchange for a benefit. In exchange for the government's promise to abide by the stipulated sentence range, Rivera surrendered his constitutional right to a trial and relieved the government of its burden to prove his guilt beyond a reasonable doubt.

Both parties bound themselves to their respective commitments. Keeping its promise does not prevent the government

from carrying out its responsibilities to the sentencing court, because the government remains free to honestly answer any of the court's inquiries. But the distinction between answering inquiries and affirmative advocacy is one that matters. The government plays an outsized, and sometimes even a decisive, role at sentencing. *See United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999). It is therefore imperative that the government be far more careful in fulfilling its responsibilities where plea agreements are involved.

In short, the goals of plea bargaining are best served when the defendant's criminal history is accurately reflected in the plea agreement. More information about the consequences of pleading guilty translates into a more rational and informed decision about whether to plead guilty at the expense of exercising one's constitutional right to a trial. Following that logic, our Court has repeatedly "recognized the desirability of having each defendant, at the time of tendering a guilty plea, fully cognizant of his likely sentence under the Sentencing Guidelines." *See Pimentel*, 932 F.2d at 1034 (cleaned up). This is especially imperative when over 97% of defendants in federal cases plead guilty. U.S. SENTENCING COMM'N, Annual Report 16 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2023/2023-Annual-Report.pdf [https://perma.cc/8MZG-U5BA]; *see also Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."). In this case, we conclude that the Government's efforts fell short.

Our finding that the Government breached, however, does not

end the analysis. To constitute plain error, a resulting error must also be plain and affect substantial rights. In this case, we ultimately conclude that the Government's breach was not sufficiently "clear" or "obvious" as to be "plain" error. *United States v. Aybar-Peguero*, 72 F.4th 478, 487 (2d Cir. 2023). Such an "error must be so plain that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)). But prior to today, we lacked Circuit guidance on how to read the term "available" used in Rivera's plea agreement to define the scope of the government's commitments. *Cf. Puckett v. United States*, 556 U.S. 129, 143 (2009) ("Plea agreements are not always models of draftsmanship, so the scope of the Government's commitments will on occasion be open to doubt."). It was not obvious to the trial judge, then, that the terms of the plea agreement prohibited the Government's reliance on Rivera's Puerto Rico convictions to advocate for a higher Guidelines range. Absent an objection by the defendant, we do not think the sentencing court had reason to believe that a breach occurred, much less that it was derelict in failing to remedy the breach. Thus, we conclude that any error was not plain.[3]

Therefore, while the Government committed a breach, Rivera does not satisfy the requirements of plain error review.

B. Leadership Role

[3] Because we conclude that the error was not plain, we need not address whether it affected Rivera's substantial rights.

Rivera argues next that the Government breached his plea agreement by describing him as a leader in the conspiracy when the plea agreement contained no Guidelines enhancement for a leadership role under U.S.S.G. § 3B1.1. Because Rivera did not raise this objection below, we review this argument for plain error as well. *See United States v. Sealed Defendant One*, 49 F.4th 690, 696 (2d Cir. 2022).

We conclude that the Government's statement in its sentencing submission regarding Rivera's leadership role in the conspiracy was not error, much less plain error. In using those descriptors, the Government in no way suggested that any role enhancement under U.S.S.G. § 3B1.1 was warranted. Instead, the express terms of Rivera's plea agreement allowed the Government to "present" to the sentencing court "any facts relevant to sentencing." App'x at 45. And among the § 3553(a) sentencing factors are "the nature and circumstances of the offense," along with "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(1), (2)(A). So, even if the facts surrounding Rivera's role in the conspiracy did not warrant a Guidelines enhancement under U.S.S.G. § 3B1.1, those facts remain relevant to the district court's application of the sentencing factors. Accordingly, we find no error.[4]

[4] There is some tension, at least in our summary orders, as to whether the Government may highlight a criminal defendant's leadership role without simultaneously seeking a leadership enhancement under U.S.S.G. § 3B1.1(a). *Compare United States v. Tokhtakhounov*, 607 F. App'x 8, 11 (2d Cir. 2015) (summary

Accordingly, we find Rivera's breach arguments meritless.

II. Sentencing Challenges

Rivera next challenges his sentence as procedurally and substantively unreasonable. It is not.

We begin with Rivera's argument that his sentence was procedurally unreasonable because the district court misunderstood its discretion to apply a sentence below the applicable Guidelines range. Applying a plain error standard of review, because Rivera did not raise this argument below, *see United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008), we disagree.

"A sentence is procedurally unreasonable when: the district court (1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the § 3553(a) factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation." *United States v. Diamreyan*, 684 F.3d 305, 308 (2d Cir. 2012) (quotation marks omitted).

Rivera's procedural unreasonableness challenge rests on his assertion that the record lacks an affirmative indication that the district court understood its authority to depart from the applicable Guidelines range. But in the absence of record evidence suggesting

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order) (finding no breach of the plea agreement when the Government characterized the defendants as "leaders of the criminal enterprise"), *with United States v. Robinson*, 634 F. App'x 47, 50 (2d Cir. 2016) (summary order) (finding a breach of the plea agreement when the Government described the defendant as a "managing member" of the conspiracy). But even if we assume that the Government erred, Rivera cannot prevail under the plain-error standard.

otherwise, we "presume that the district court understands the extent of its sentencing authority." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002). And that is the case here; Rivera has failed to put forth any record evidence suggesting that the sentencing judge misunderstood his authority to impose a below-Guidelines sentence. We thus conclude that Rivera's sentence is procedurally reasonable.

Having found no procedural error, we next consider Rivera's substantive reasonableness challenge. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Even assuming review under an abuse-of-discretion standard, *see United States v. Thavaraja*, 740 F.3d 253, 258 n.4 (2d Cir. 2014), we conclude that Rivera's sentence is substantively reasonable as well.

"A sentence is substantively unreasonable when it cannot be located within the range of permissible decisions, because it is shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Osuba*, 67 F.4th 56, 68 (2d Cir. 2023) (quotation marks omitted). "A sentencing judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime." *United States v. Cavera*, 550 F.3d 180, 188 (2d Cir. 2008) (en banc).

On appeal, Rivera argues that the district court's 235 month-sentence was substantively unreasonable given various mitigating factors, an overstated criminal history, and disparity as compared to the sentence recommended for one of the codefendants. But the record reflects that the district court acknowledged the mitigating factors in its sentencing, expressly taking into account Rivera's mental health history and difficult upbringing. The sentencing judge also

noted that despite his difficult circumstances, Rivera failed to acknowledge the harm caused by his crimes, including the gunshot injury suffered by one victim. And the record explains the disparity in the recommended sentence, as the codefendant had no prior criminal history, had participated in only two of the eleven robberies, had not carried a firearm, and had not injured any victims.

Rivera's disagreement with the district court's weighing of these factors alone does not render his sentence substantively unreasonable. We have explained that "[t]he particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge, with appellate courts seeking to ensure only that a factor can bear the weight assigned it under the totality of circumstances in the case." *United States v. Alcius*, 952 F.3d 83, 89 (2d Cir. 2020) (alternation in original) (quotation marks omitted). And considering the totality of circumstances in this case, we find that Rivera's 235-month sentence—which we note falls at the bottom of the applicable Guidelines range—can surely "be located within the range of permissible decisions." *United States v. Degroate*, 940 F.3d 167, 174 (2d Cir. 2019) (quotation marks omitted).

We accordingly conclude that Rivera's sentence is both procedurally and substantively reasonable.

III. U.S.S.G. § 4A1.1 Amendment

Lastly, we reject Rivera's request to remand this case for resentencing due to a recent amendment to the Sentencing Guidelines, which would reduce the offense level calculation for certain defendants under U.S.S.G. § 4A1.1. Although we may apply

post-sentence Guidelines amendments that "clarify their application," "we may not, in the first instance, apply post-sentence amendments that embody a substantive change to the Guidelines." *United States v. Jesurum*, 819 F.3d 667, 672 (2d Cir. 2016) (quotation marks omitted). Here, however, the § 4A1.1 amendment effects a substantive change to the Guidelines and thus does more than merely clarify the applicability of § 4A1.1. Specifically, the amendment (1) reduces the upward adjustment received by offenders who committed the instant offense while under any criminal sentence and (2) limits this adjustment to defendants with seven or more criminal history points. *See* U.S. Sent'g Comm'n, Sentencing Guidelines, 88 Fed. Reg. 28,254, 28,273 (effective Nov. 1, 2023); U.S.S.G. § 4A1.1(e). Any argument seeking to retroactively reduce Rivera's sentence on this ground, however, must be raised before the district court in the first instance.[5] We therefore deny Rivera's resentencing request.

CONCLUSION

Accordingly, the judgment of the United States District Court for the Southern District of New York is **AFFIRMED**.

[5] Congress has indicated that this Guidelines amendment may be applied retroactively through a sentence reduction motion under 18 U.S.C. § 3582(c)(2). *See* U.S.S.G. 1B1.10.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 20 Cr. 600 (AKH)

VICTOR RIVERA,

Defendant. Sentencing
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New York, N.Y.
September 13, 2022
12:28 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
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MATHEW ANDREWS, ESQ.
Assistant United States Attorney

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BY: LANCE LAZZARO, ESQ.

ALSO PRESENT: GABRIEL MITRE, Interpreter (Spanish)

category V, where the range of custodial punishment is 262 to 327 months. It appears that the probation is correct, and I'm prepared to find that the range of custody is 262 to 327 months.

MR. ANDREWS: Judge, if I might just make a few notes for the record.

THE COURT: Yes, Mr. Andrews.

MR. ANDREWS: What the Court referenced initially, the stipulated guidelines range, the 168 to 200 months' imprisonment, that was pursuant to the parties' plea agreement. However, at the time the parties were not aware of the defendant's more extensive criminal history, which is accounted for in the presentence report, which I think the parties all agree --

THE COURT: You were not aware of it because it was not told to you.

MR. ANDREWS: Correct. Now with regards to the guidelines for the purposes of sentencing, the guidelines range that your Honor just quoted from the presentence report assumes an offense level of 35. However, as the Court discussed, I believe that the proper offense level is actually 34. The initial finding that you made was with regard to the offense level for a particular robbery, at paragraph 99 of the presentence report, so I think for the purposes of sentencing, your Honor, the correct offense level, with an offense level of

34, would be 235 to 293 months' imprisonment. However, because there is a --

THE COURT: 235 to?

MR. ANDREWS: 293 months' imprisonment. However --

THE COURT: But that's based on net offense level?

MR. ANDREWS: 34, your Honor.

THE COURT: And criminal history category V.

MR. ANDREWS: Correct, your Honor. Because there's a 20-year cap, your Honor, that means that the guidelines are 235 to 240 months' imprisonment.

THE COURT: Yes, okay. You agree with that, Mr. Lazzaro?

MR. LAZZARO: I agree with the guideline range of 235 to 240. But I have an issue with, Judge -- and I'm not contesting that he's criminal history category V -- is that we would have no ability to know what that history was and were assuming when we entered into these negotiations with the government that they had reviewed a rap sheet previously. I wasn't the attorney when he was initially detained in Florida or in the Southern District. So when we took this plea negotiation --

THE COURT: How do you compute the criminal history?

MR. LAZZARO: I think what happened here, Judge, your Honor, is that there were two convictions in Puerto Rico in 2012 and I think 2013 that the government was not aware of, so

when we entered into these plea negotiations, we relied on the fact that it was just his history from New York. That being said, I don't think that Mr. -- I never went over with Mr. Rivera his criminal history category. I came in later in the game. I relied upon the government's representation that that was it. At some point probation, when they were doing the presentence report, discovered these two convictions.

But let me say, Judge, I just don't think that should be held against my client just for the basic fact that we would not, you know -- we assumed when we entered into these plea negotiations that the sentencing guideline range was what the US attorney represented it to be.

THE COURT: I'm not blaming you. But I need to find now what is the appropriate net offense level and what is an appropriate criminal history. Do you agree that 34 is the net offense level? I think you said you did. And do you agree that the criminal history category should be V?

MR. LAZZARO: I do agree with that.

THE COURT: All right. So according to the grid in the sentencing guidelines, that yields a range of punishment of 235 to 293. However, the statute does not allow punishment beyond 20 years, so the effective range is 235 to 240. Is that right, Mr. Andrews?

MR. ANDREWS: Yes, your Honor, that's correct.

THE COURT: Right, Mr. Lazzaro?

MR. LAZZARO: Yes.

THE COURT: I so find.

I'm ready to hear you, Mr. Lazzaro. What is a just punishment?

MR. LAZZARO: Judge, I thought long and hard about this case, and I understand that --

THE COURT: Just take off your mask so I can hear you better.

MR. LAZZARO: I've thought long and hard about this case, and I do understand that this is probably one of the more difficult cases for the Court in handing down a sentence, because in one sense, I understand that the nature of the charges are quite serious; in the other sense, you also see somebody before you, Judge, with severe mental illness, and that was identified even by probation in the PSR.

THE COURT: I read about that, but I don't know what relationship that had to the robberies.

MR. LAZZARO: Well, Judge, if you look at his history, at 9 or 10 years old, he grows up in severe economic circumstances, where the family barely has the ability to make, you know, make ends meet. He grows up in very poor economic circumstances, although with a loving mother and father. At some point, when he's 9 or 10 years old, he's diagnosed with depression, bipolar disorder, schizophrenia, and attention deficit disorder. And that occurs when he's 9 or 10 years old.

And you could see that at some point -- it seems like he never got any schooling, or not sufficient schooling, and I don't know if that was the fault of the parents or maybe they just didn't have the ability, based on their economic circumstances, to get him the proper aid. And then at some point, you know, when he's older, when he's 18 or 19, he witnesses his parents dying in a fire. How did they die in that fire? They were suffocated. Why? Because the parents were borrowing electricity from an enjoining home because they didn't have the ability to have electricity in their own home. So he witnesses his parents die at 18 or 19. And you see reports that I've submitted that at that point he starts to become suicidal, and you see that he seeks help there, and that's when he starts getting in trouble afterwards.

So if you look at this, you see somebody, 8 or 9 years old, diagnosed with all these mental disorders, then witnesses his parents suffer --

THE COURT: He went to special schools for that, didn't he?

MR. LAZZARO: He did, but it doesn't look like anything was done to get him on the right path, or at least with medical aid to try and treat him there. And then when his parents die before his eyes at 18 or 19, that's when his criminal history starts occurring afterwards. He just saw his whole support system crumble before his eyes. And you see that

he sees the medical reports right after that, Judge, which diagnose him with suicidal tendencies, he starts hearing voices, and that's when he starts getting in trouble in Puerto Rico. And that's what the criminal history category is referring to when we went from II to V.

But you also see, Judge, that he spends time in jail in Puerto Rico. It's clear to me that he's still not getting treatment for what ails somebody with that type of mental disability. And then he comes here and he's actually seen by somebody at Samaritan Village, which again diagnoses him, you know, with the same disorders, but it doesn't seem like they're treating him for it. They're just giving him more medicine instead of treating it.

So I look at this case, Judge, and I get the fact that the crimes are bad, but I also look at this as a product of when somebody starts out with three or four strikes against you and then you suffer the loss of your parents, he didn't grow up in the household that I grew up in or that your Honor grew up in, or that the US attorneys grew up in. He starts out --

THE COURT: So how should that relate to the sentence I give?

MR. LAZZARO: Well, Judge, you know, probation looked at that, and although it's just a recommendation to your Honor, probation finds out that he's got these convictions in Puerto Rico and they put him at this number over 240 months and above

based on this new criminal history, but they look at these factors under 3553(a) with respect to his circumstances and history and characteristics, and they, despite knowing all the facts of what these alleged acts were, despite knowing what his history is, they come back to your Honor and say, we think you should go below it and sentence him to 160 months, a little over 13 years, which I still think, Judge, your Honor, is too much. If this is somebody who had no strikes against him, he grew up in a normal household, if he didn't have any mental disability, then I wouldn't be arguing to your Honor. I -- this case embodies what I believe is a problem when somebody starts out at a very young age with mental illness, comes from a position where his parents don't have the ability to really take care of him, and then suffers something that none of us have ever experienced. One can almost understand why he ended up where he is today. I'm not saying that he gets a pass here, Judge. But for this Court not to look at how he grew up and what he faced growing up, economically challenged, with a history of mental disease, hearing voices, thoughts of suicide, which have all been documented, Judge, this is I think what you read about in the papers sometimes where, if left untreated, people with mental health end up doing things that end up having severe consequences. So what I'm arguing to this Court, Judge -- and you saw the letter that I submitted from his aunt by marriage, who recognizes that what he did is serious, but

still finds it in her heart to ask this Court to consider, you know, justice. And when I came up with the sentence of eight years, Judge, I didn't take it lightly because for the past two years, or almost two years, he's been staying at the MDC, which is probably one of the most deplorable prisons that one could stay at during COVID. It's just not a good place. And I would argue, Judge, that if you look at his mental disease, it justifies, under 3553(a), a sentence even below what probation recommended to your Honor at 160 months.

THE COURT: How do you deal with the harm done to others? How do you deal with the respect that the community has for someone involved in a planned set of robberies, some of which are violent? How does that impact the punishment?

MR. LAZZARO: Your Honor, if it was a normal circumstance, it does impact, and I'm not saying the Court should take light of it. But if you look at it in the totality of circumstances, and the fact that he started out with five strikes against him at 9 years old, being diagnosed as bipolar, schizophrenic, and suffering from depression, when left untreated, one can almost see that this type of conduct might occur. I'm not saying it's a pass, your Honor, but I don't think eight years in a federal penitentiary is a pass. But I do think, Judge, that this person started out with five strikes against him. He came from poverty. He was not treated for his mental disease. Even when he came to the United States, when

Samaritan Village did an evaluation on him, still, he didn't get the treatment that was needed. And you leave somebody out there on the streets, I'm not saying it to excuse what he did, Judge, but I do believe eight years is a sufficient punishment.

THE COURT: Thank you.

What is the government's position?

MR. ANDREWS: Your Honor, to be frank, when I saw probation's recommendation of 160 months, I was shocked. I have never seen a recommendation that low in a case of this type of widespread, coordinated robbery that left half a dozen victims beaten in one shop.

I want to start with defense counsel's focus on mental health, because I think that the Court is correct that in this context, mental health really doesn't have any bearing on the offense conduct. Because the argument is tenuous at best that the defendant was somehow motivated, compelled to do these crimes as a result of whatever mental health conditions he had. If this was a one-off offense, a one-off robbery, that might be more explainable--the defendant didn't know what he was doing, he was compelled to do so, he was desperate. But when you have a very complex scheme, which I'll describe in one moment, the mental health explanation makes no sense, because a man that is capable of organizing and coordinating a scheme as sophisticated as this is clearly a man who has managed to overcome his mental health challenges, as evidenced by the fact

that he committed this scheme when he was 28 years old, nine years after the death of his parents, well into the age of maturity, when he should be able to understand right and wrong.

THE COURT: With others, and sophistication to know the values of that which he's stealing, and with planning and deception to catch the wearer of these expensive watch pieces unaware, near their homes, and one of them was hurt by gunshot from one of the assailants, and the other at a time when the gun was used but no one got hurt.

MR. ANDREWS: Absolutely, your Honor. You took most of my argument from me, but --

THE COURT: I understand from your point of view your feeling is that the guidelines should be used?

MR. ANDREWS: That's correct, your Honor.

I think it's also important just to measure the instant offense against the defendant's own criminal history, which this is his fifth criminal conviction. He's had periods of detention, lasting about five years at the longest, and those clearly were incapable of deterring him. And the most important and significant trend is that the defendant is becoming more violent the older he gets, and he also committed these crimes while he was on court supervision, which demonstrates that he has no regard for his obligations to abide by the rule of law, abide by the Court's mandates.

And it's within that context, a man who has managed to

organize a sophisticated scheme, who actually showed no deference whatsoever for the authority or importance of the court or law, that we believe that a sentence within the guidelines range of 235 to 240 months' imprisonment --

THE COURT: Seems to be a complete dissociation between the impact of these mental problems and the outward impact of the robberies.

MR. ANDREWS: Absolutely, your Honor.

THE COURT: Which may fit a bipolar disorder. I don't know. That might be.

But it creates a great difficulty, Mr. Lazzaro, in giving full compassion to the personal history. What can we expect? Mr. Rivera is only 31 years old. He has some skills. He knows how to work, right?

MR. LAZZARO: As noted in the PSR, if he comes out, he's going to become a barber or work as a detailer in an auto mechanics --

THE COURT: Remove your mask.

MR. LAZZARO: He wants to, as noted in the PSR, when released from prison, to become a barber or work in a auto mechanic shop in some capacity.

THE COURT: How could people trust him after his history of robbery?

MR. LAZZARO: Judge, I think if he's treated for his mental disorder, if he's put on the proper medication, if he's

Judge, with all due respect to yourself and this Honorable Court.

I want to thank my attorney, first of all; I want to thank you, Judge; I want to thank the prosecutors; to everyone in this courtroom today. As you can see, I don't see family behind me because I have no family here. My family is in Puerto Rico, as I mentioned before. I have been unable to see them for two years, due to the pandemic. The pandemic has been so great that it's causing me great harm emotionally and psychologically. And I've suffered a lot in jail.

That's all I have to say, Judge.

THE COURT: Thank you very much, Mr. Rivera. A moving story, your pain and your difficulties. I note, however, that not once did you mention the pain you caused to at least 11 individuals when you robbed them, you took away a possession that they treasured; or when, in the course of one of these robberies, you, or your colleagues, had a gun and shot the man who was wounded, who could easily have been killed.

I think the government has it right on this one and that I can give you the guideline range, and I do so, 235 months in jail.

Any recommendation where it should be served, Mr. Lazzaro?

MR. LAZZARO: I would say the tristate area.

THE COURT: Does he have family here?

MR. LAZZARO: No, he doesn't, but --

THE COURT: So it seems to me the best thing for him is an area that can give him counseling and psychological services because he's badly in need of them.

MR. LAZZARO: That's fine.

THE COURT: And I so recommend.

Following custody, I sentence the defendant to three years of supervised release, subject to conditions I will discuss below.

The mandatory conditions appearing at page 39 of the presentence investigative report are all adopted. And the drug testing condition is not suspended because you are involved with drugs, or alcohol.

The standard conditions are also adopted. They appear on page 41 of the presentence investigative report.

The special conditions are adopted.

You'll be supervised by the district of your residence, where your residence will be when you're on supervised release.

I fervently hope that the Bureau of Prisons will provide counseling services to the defendant for his mental problems.

In any event, during supervised release, a special condition discussing outpatient treatment programs and outpatient mental health treatment programs and cognitive

behavioral treatment programs are adopted.

The provision for search is adopted.

Since you have a heavy restitution obligation, you must not incur new credit charges or open additional lines of credit without the approval of the probation officer unless you are in compliance with the installment payment schedule. And you must provide the probation officer with access to any requested information.

The government will submit an order of forfeiture. And nothing of value was found; is that right?

THE DEFENDANT: Excuse me. I would like the judge to let me know if I can say something, please.

THE COURT: No. You're finished. Let me finish now.

MR. ANDREWS: Judge, there may have been some small bills that were seized from the defendant at the time of the arrest.

THE COURT: But nothing significant.

MR. ANDREWS: Nothing significant.

THE COURT: I'll submit the order. And in addition there is an order of restitution for those from whom you stole, payable in installments beginning on the 30th day of supervised release in an amount that is at least $150 per month or, if larger, 10 percent of your gross income. I've considered the factors in 18 U.S.C. Section 3664(f)(2) in formulating the payment schedule. Restitution will be joint and several with

the defendants with whom you participated. Do you have their names, Mr. Andrews?

MR. ANDREWS: The defendant's co-defendants on this matter, your Honor, are Johan, J-O-H-A-N, Araujo, A-R-A-U-J-O. The other co-defendant is Michols, M as in Mathew, I-C-H-O-L-S Peña, P-E-N-A.

THE COURT: Joint and several with those individuals.

There's a special assessment of $100 which will be due on the filing of the judgment.

I advise you, Mr. Rivera, that under the Constitution, you have a right to appeal. You should discuss your right of appeal with your counsel.

And Mr. Lazzaro, if asked to appeal, I instruct you to do so on a timely basis.

Mr. Rivera, if you can't afford a lawyer, the government will provide a lawyer free of charge.

Are there open counts?

MR. ANDREWS: Yes, your Honor. We seek their dismissal at this time.

THE COURT: Without objection, they will be dismissed.

Is there anything else?

MR. ANDREWS: Nothing from the government, your Honor.

THE COURT: Is there anything else?

MR. LAZZARO: No.

THE COURT: I think your client wanted to say

something.

THE DEFENDANT: Yes, Judge. I wanted you to know that in the PSI, 160 months were recommended, so I thought that that's what you were going to sentence me to, or to less. But I really don't know what you sentenced me to. I don't know.

THE COURT: I sentenced you to 235 months. I considered that probation recommended 160 months; I considered the government recommended 235 to 240 months; I considered that the guideline range was 235 to 240 months; I heard everything here today. On the basis of what I heard, I considered 235 months a just punishment, and I so order.

Thank you, all.

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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 14th day of November, two thousand twenty-four.

United States of America,

Appellee,

v.

Michols Pena, AKA Sealed Defendant 2, Johan Araujo,

Defendants,

Victor Rivera, AKA Sealed Defendant 1,

Defendant - Appellant.

ORDER

Docket No: 22-2081

Appellant, Victor Rivera, 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