19-3806(L),

19-3944(CON), 19-3945(XAP), 19-3964(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee/Cross-Appellant,
v.

MATTHEW W. CONNOLLY, GAVIN CAMPBELL BLACK
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, D.C. NO. 1:16-CR-370 (MCMAHON, C.J.)

REPLY BRIEF FOR APPELLEE/CROSS-APPELLANT
UNITED STATES OF AMERICA

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ARGUMENT

The government argued in our opening brief in this cross-appeal that the district court committed plain procedural error in sentencing Black to nine months' home confinement in the United Kingdom without resolving its stated doubts on the feasibility and appropriateness of such a sentence. We argued that, because foreign home confinement was a central feature of Black's sentence and the district court tethered Connolly's sentence to Black's sentence, the clear or obvious error also satisfied the third and fourth prongs of plain-error review and warranted vacatur of both sentences and a remand for resentencing.

In response, Black contends that the government did not merely forfeit but waived its challenge to the foreign home confinement sentence. Waiver, however, requires the intentional relinquishment of a known right. The government's failure to address the possibility of foreign home confinement in response to the court's inquiry about available types of foreign sentences or in opposition to Black's request for foreign home confinement confirms that the government forfeited its current challenge, but does not demonstrate the kind of affirmative, intentional, or tactical conduct needed to constitute waiver.

On the merits, Black fails to persuasively counter the government's arguments. Although Black asserts that the district court "considered the feasibility of foreign home confinement before imposing it," Black Resp. Br. 45, the record demonstrates merely that the court acknowledged concerns about the feasibility and appropriateness of the

sentence but then imposed the sentence without resolving its doubts. And, contrary to Black's argument, the government did not need to rely on binding precedent to demonstrate that the district court's error was clear or obvious, where the district court's error was, as here, contrary to fundamental principles, including as provided in the Sentencing Guidelines. Black also fails to persuasively rebut the government's argument that the serious possibility that an integral component of Black's sentence cannot be effectuated satisfies the third and fourth prongs of plain-error review.

Connolly primarily argues, in opposing remand of his sentence, that the government's demonstration of a plain error impacting Black's sentence does not justify disturbing his sentence. But this Court regularly remands sentences of codefendants where the district court linked its consideration of the sentences. Because the district court here explicitly tethered its decision-making regarding Connolly's sentence to the sentence it imposed on Black, a remand of Connolly's sentence is appropriate as well.

I. The Government Did Not Waive the Sentencing Challenge.

In our opening brief on cross-appeal, the government acknowledged that it forfeited its sentencing challenge by failing to raise its arguments below, thereby subjecting the challenge to plain-error review under Fed. R. Crim. P. 52(b). Gov. Br. 96. Black contends that the government's conduct constitutes waiver rather than forfeiture, thereby precluding any review by this Court. That is incorrect.

"Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). "Forfeiture occurs when a [party], in most instances due to mistake or oversight,

fails to assert an objection in the district court." *United States v. Spruill*, 808 F.3d 585, 596 (2d Cir. 2015). "By contrast, waiver can result only from a [party's] intentional decision not to assert a right." *Id.* at 597; *see Olano*, 507 U.S. at 733 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"). This Court has found waiver in "[v]arious circumstances," for example "where a party actively solicits or agrees to a course of action that he later claims was error," *Spruill*, 808 F.3d at 597 (citing, *e.g.*, *United States v. Quinones*, 511 F.3d 289, 320-22 (2d Cir. 2007); *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991)); "where a party asserts, but subsequently withdraws, an objection in the district court," *ibid.* (citing, *e.g.*, *United States v. Weiss*, 930 F.2d 185, 198 (2d Cir. 1991)); and "where a party makes a 'tactical decision' not to raise an objection," *ibid.* (citing *United States v. Yu-Leung*, 51 F.3d 1116, 1122-23 (2d Cir. 1995), and *Quinones*, 511 F.3d at 321).

On the other hand, plain-error review broadly applies to all types of forfeiture. Thus, in *Davis v. United States*, the Supreme Court recently overturned the Fifth Circuit's prior rule that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." 140 S. Ct. 1060, 1061 (2020) (per curiam) (quoting *United States v. Davis*, 769 F. App'x 129, 130 (5th Cir. 2019) (per curiam) (unpublished)). As the Supreme Court stated, its caselaw "do[es] not purport to shield any category of errors from plain-error review." *Ibid.*

The government's actions here amount to forfeiture, not waiver. As we acknowledged in our opening brief, the government did not address foreign home confinement in response to the district court's general inquiry about the sentences that Black could serve abroad or after Black requested foreign home confinement. But the government's failure to object to the foreign home confinement sentence (including the procedures the court employed in imposing it) is classic neglect, mistake, or oversight, not the intentional conduct required to find true waiver. *See United States v. Ferguson*, 676 F.3d 260, 282 (2d Cir. 2011) (failure to raise argument below was "not waiver but forfeiture," even though "the district court requested substantive briefing and argument on the issue, but was not taken up" and "a factual record . . . could have been made" if the arguments had been presented to the trial court). The government did not take any of the actions that would typically demonstrate intentional relinquishment. It did not actively solicit a foreign home confinement sentence, nor make but withdraw an objection to foreign home confinement, or obtain a tactical advantage from withholding the challenge below. Given the absence of record facts "support[ing] the critical determination" that the government "acted intentionally in pursuing, or not pursuing, a particular course of action," a finding of waiver is not justified in this case. *Spruill*, 808 F.3d at 597.

In arguing that waiver is established, Black notes that "the District Court provided the Government with every opportunity to object to the feasibility of foreign home confinement," in light of the court's inquiry asking the parties to address "'any

sentence of any sort'" that could be served in the United Kingdom and Black's resulting proposals. Black Resp. Br. 50. But that sort of notice and opportunity to object provides the grounds for classic forfeiture that justifies the application of normal plain-error review to sentencing challenges, not waiver.

In circumstances where a party *lacked* notice or an opportunity to object, this Court has sometimes applied a "less rigorous[]" plain-error review for sentencing issues. *United States v. Gordon*, 291 F.3d 181, 190-91 (2d Cir. 2002). Thus, in *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002), the Court stated that, "[b]oth because the alleged error relates only to sentencing and because Sofsky lacked prior notice, we will entertain [Sofsky's] challenge without insisting on strict compliance with the rigorous standards of Rule 52(b)." *Id.* at 125-26; *see United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007) ("[W]ith respect to sentencing issues in general, we have been more likely to avoid the full rigors of plain error analysis when the sentence was imposed without giving the appellant—whether the government or the defendant—prior notice of the aspect of the sentence challenged on appeal."); *see also United States v. Green*, 618 F.3d 120, 122 (2d Cir. 2010) (per curiam). The Court rested its reasoning in part on the "relative ease of correcting sentencing errors (requiring only resentencing) as opposed to trial errors (requiring a new trial)." *Gordon*, 291 F.3d at 190-91.

But that does not mean that, where a party had notice and opportunity to object, the issue is waived. Rather, in those circumstances, this Court applies normal plain-error principles, rather than a more relaxed standard. *See Ferguson*, 676 F.3d at 282.

Thus, in *Gordon*, involving a government cross-appeal based on a Guidelines challenge, the Court noted that the government "had, and took, the opportunity to discuss and challenge the court's decision to group" certain of the offenses, "had access to the provision it now asserts could have correctly grouped the charges," yet "did not attempt to explore alternative, more favorable, ways to group the counts until this appeal." 291 F.3d at 191. The Court held: "We find that as the government had both the notice and opportunity necessary to raise its objection to the use of [a particular Guidelines provision] before the district court, … our consideration of the government's cross-appeal must be executed with the full rigor of traditional plain error review." *Ibid.*

The government acknowledges that the record here establishes that it was on notice that the court might consider imposing a foreign home confinement sentence and that it had the opportunity to raise the challenge it now brings before this Court as to the procedures the district court employed in imposing the sentence. And, because of the government's failure to raise an objection below, the district court was deprived of the opportunity to make a more complete record. Accordingly, the more relaxed plain-error standard does not apply. *Gordon*, 291 F.3d at 191. But those same record facts also demonstrate only that the government failed to preserve its challenge below, not that the government intentionally relinquished the right to challenge the foreign home confinement sentence. *See, e.g.*, *United States v. Brown*, 352 F.3d 654, 665 (2d Cir. 2003) (applying plain-error review "[w]here failure to object below resulted in an

incomplete record or inadequate findings"). Rather than waiver, the record supports application of "traditional plain error review." *Gordon*, 291 F.3d at 191.

Black's observation (Black Resp. Br. 51) that "an identifiable tactical benefit is not a 'prerequisite to identifying waiver,'" *United States v. Williams*, 930 F.3d 44, 65 (2d Cir. 2019), *petition for cert. filed*, No. 20-6551 (U.S. Dec. 7, 2020) (quoting *Spruill*, 808 F.3d at 599), is beside the point. To constitute waiver, the record must nonetheless demonstrate "intentional action." *Ibid.* (quotation marks omitted). In *Williams*, the defendant raised a general objection when the government moved to admit certain evidence at trial, but then, in response to the court's specific inquiry, agreed "not once, but twice" that the basis for his objection was not '"relevance"' "or 'anything like that'" but a different ground related to government delay. *Id.* at 64-65. In those circumstances, the Court found waiver because "[t]he totality of the circumstances . . . convincingly show[ed] that [the defendant] acted intentionally in declining to object on any grounds other than the government's alleged undue delay." *Id.* at 65. The totality of the circumstances in this case, however, does not demonstrate that the government intentionally failed to challenge the foreign home confinement sentence. The district court's pre-sentencing inquiry about the availability of sentencing options to be served in the United Kingdom did not specifically direct the government's attention to foreign home confinement. Nor did the Probation Office in its discussion of sentencing options in Black's PSR prepared prior to sentencing identify foreign home confinement

as a possible sentence under consideration.[1] Although Black advocated for foreign home confinement in his sentencing submissions, the government did not expressly decline to advance an objection to foreign home confinement in response to an inquiry from the court or Black. Thus, *Williams* and similar cases finding waiver are inapposite. *See, e.g.*, *United States v. Batista*, 684 F.3d 333, 340 n.12 (2d Cir. 2012) ("defense counsel clearly waived, rather than forfeited, its objections to the District Court's handling of the sleeping juror," where he "declined the government's suggestion that he request the juror's removal" twice and affirmatively asserted that the juror "'seemed fine'").

Finally, Black contends that the government's sentencing challenge is waived because "it is clear that the Government's decision was the product of a tactical decision to advocate only for a substantial term of imprisonment and to give no ground on any foreign sentencing alternatives." Black Resp. Br. 51. That argument falls flat. The ostensible availability of foreign home confinement allowed the district court additional options in lieu of the imprisonment term for which the government was advocating. If the district court had found that foreign home confinement was not an available option, the government could have argued more convincingly that other sentencing options, including a short term of imprisonment in the United States or an increased fine, were warranted to provide a just and appropriate sentence. Thus, the arguments that the

[1] That version of the PSR was filed in September 2019, prior to Black's October 2019 sentencing submissions discussing foreign home confinement. Although Black's counsel stated at sentencing that the defense had discussed the issue with the Probation Office, he did not indicate when that conversation occurred. GSA.693.

government forfeited below on the infeasibility or inappropriateness of foreign home confinement would have strengthened its case for a more punitive sentence, not detracted from it, and therefore cannot reasonably be considered a tactical decision. The record below demonstrates forfeiture through mistake, oversight, or neglect—not waiver—and therefore plain-error review applies.

II. The District Court's Procedural Plain Error in Sentencing Black to Foreign Home Confinement Requires a Remand of Both Defendants' Sentences.

A. Black's counter-arguments are unconvincing.

1. We argued in our opening brief on cross-appeal (Gov. Br. 96-104) that the district court plainly erred in imposing the foreign home confinement sentence without determining the feasibility of the Probation Office's administering home confinement in a foreign country, the appropriateness of allowing Black to use his wealth to fund monitoring by a private contractor as an alternative, or the foreign policy implications of a United States court's order that a British citizen be confined to a certain location on British soil enforced through surveillance. We pointed out that various statutes and Guidelines provisions require a United States probation officer to supervise the terms and conditions of probation and supervised release, including home confinement, and that "appropriate means of surveillance" is a required component of a home confinement sentence, U.S.S.G. § 5F1.2, comment. (n.1). The government argued that, even if it is not clear or obvious that there are no circumstances under which a foreign home confinement sentence could be implemented, it is clear or obvious that the

Probation Office's ability to carry out the sentence is not certain, and therefore the district court should not have imposed such a sentence without resolving its stated doubts that such a sentence was feasible or appropriate.

Black first contends that the government failed to establish any error because "the record refutes the Government's assertion that the court did not consider the feasibility of administering Black's home confinement sentence or 'had serious doubts whether a home confinement sentence to be served in a foreign country can be effectuated.'" Black Resp. Br. 53 (quoting Gov. Br. 96-97). In support of his claim, however, Black merely points to evidence that in the district court he raised some suggested processes for implementing a foreign home confinement sentence, such as the possibility of his paying for a private contractor to provide 24-hour/7-day-a-week surveillance or the suggestion that he would voluntarily comply with "'any special conditions of supervised release . . . , including home confinement and reporting.'" Black Resp. Br. 53-54 (quoting GSA.167). That shows no more than that the district court was aware that a party was advocating the use of such processes. As to Black's suggestion that he would comply voluntarily, as we pointed out in our opening brief (Gov. Br. 103), the district court did not adopt that suggestion. Rather, the district court contemplated supervision, but at the same time acknowledged that monitoring by a private contractor might be "inappropriate" and that monitoring by the Probation Office might not be "electronically feasible." GSA.707. As we argued, imposing the sentence anyway, without resolving those uncertainties, was plain error. Although

Black emphasizes (Black Resp. Br. 57) that the court's stated doubt about monitoring by the Probation Office concerned whether that was electronically feasible, the court's statement demonstrates that electronic monitoring is what it contemplated as appropriate, yet it failed to resolve whether it was feasible or whether another form of surveillance was appropriate under the circumstances. *See* GSA.707.

Black contends that "the court was familiar with and considered" the problems of monitoring a foreign home confinement sentence because both Chief Judge McMahon and Judge Rakoff had previously allowed other LIBOR manipulators to serve supervised release terms (without home confinement) in a foreign country. Black Resp. Br. 54; Gov. Br. 102-04. Black's argument, however, ignores the fact that home confinement "is a 'unique' condition of release," *United States v. Lopez-Pastrana*, 889 F.3d 13, 18-19 (1st Cir. 2018), one that is qualitatively more restrictive than other supervised release conditions and therefore implicates different and more weighty concerns, including the problems of appropriate monitoring and the foreign policy ramifications associated with a United States court's ordering a British citizen on United Kingdom soil to remain confined within a certain physical location. The district court acknowledged doubts about the ability to implement appropriate monitoring, either through a private contractor or the Probation Office from abroad, yet imposed the sentence anyway. And Black makes no argument that the district court considered the foreign policy implications of a foreign home confinement sentence, nor is there any record evidence the district court did so.

Citing a 2018 amendment to the home confinement guideline, U.S.S.G. § 5F1.2, Black additionally asserts that the district court did not procedurally err because there is no requirement that it "determine Probation's ability to electronically monitor Black" before imposing a home confinement sentence. Black Resp. Br. 54. That argument is a strawman. The government did not claim plain procedural error on that basis, and at no time relied on the prior version of Section 5F1.2 discussed by Black. Black Resp. Br. 55. As set forth in the government's opening brief, the current Guidelines require that home confinement be "enforced by appropriate means of surveillance by the probation office." U.S.S.G. § 5F1.2, comment. (n.1). Moreover, while "alternative means of surveillance may be used if appropriate," *ibid.*, the court should be "confident" before ordering home detention without electronic monitoring "that an alternative form of surveillance is appropriate considering the facts and circumstances of the defendant's case," *id.* at § 5F1.2, comment (backg'd). The district court here contemplated surveillance—by either a private contractor or by the Probation Office—but failed to resolve its own stated doubts about whether surveillance was appropriate or feasible, let alone assure itself with confidence that an adequate alternative to electronic monitoring was appropriate.

United States v. Verkhoglyad, 516 F.3d 122 (2d Cir. 2008), does not help Black. *See* Black Resp. Br. 53. That case simply stands for the proposition that, "in the absence of record evidence suggesting otherwise, [this Court] presume[s] that a sentencing judge has faithfully discharged her duty to consider the statutory factors" outlined in 18 U.S.C.

§ 3553(a), including consideration of the Guidelines. *Verkhoglyad*, 516 F.3d at 129 (quotation marks omitted). But here, the district court's own statements confirm its failure to fully consider and resolve the feasibility and appropriateness of the foreign home confinement sentence it sought to impose, including whether the sentence would be enforced by "appropriate means of surveillance," as required by the Guidelines.

Black additionally contends that the government failed to establish that any error in the imposition of the foreign home confinement sentence was plain because the government has not cited binding precedent in support. Black Resp. Br. 56-58 (citing *United States v. Napout*, 963 F.3d 163, 183 (2d Cir. 2020)). As this Court has recognized, however, "[p]lain error review is considerably more flexible" and "it is not always necessary for the party alleging plain error to cite a circuit or Supreme Court precedent precisely on point." *Brown*, 352 F.3d at 664. Rather, "the 'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *Ibid.* (emphasis in original). As set forth in our opening brief, numerous legal principles demonstrate the plainness of the district court's error in imposing foreign home confinement without resolving its stated doubts about the feasibility and appropriateness of its sentence, including the statutes and Guidelines provisions requiring appropriate supervision by a United States probation officer; the recognition in *United States v. Porat*, 17 F.3d 660, 671 (3d Cir. 1994), *judgment vacated on other grounds*, 515 U.S. 1154 (1995), of the many impediments to the implementation of a foreign

home confinement sentence[2]; this Court's caution in *United States v. Boustani*, 932 F.3d 79, 82 (2d Cir. 2019), of the inequities that might result when district courts permit wealthy defendants to privately fund sentencing options not available to similarly situated defendants without means; the international law principles granting the United Kingdom sovereignty over its territory; and the district court's responsibility to impose conditions of supervised release that do not "demand the impossible," *United States v. Johnson*, 446 F.3d 272, 281 (2d Cir. 2006). *See* Gov. Br. 96-104.[3] The clear and obvious nature of the challenged error is not obviated merely because the scenario here is so rare that binding precedent does not govern the precise circumstances at issue.

Black also contends that the government failed to demonstrate plain error because it "has made no showing that Probation will not be able to implement Black's

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[2] Black contends (Black Resp. Br. 57) that *Porat* is "inapposite" because the Third Circuit was applying the mandatory version of the Sentencing Guidelines to ensure that Porat served his minimum term of imprisonment, rather than considering appropriate conditions of supervised release. We did not, however, rely on *Porat* to argue that a foreign home confinement sentence is per se error, but in support of our argument that serious concerns about the ability to effectuate a foreign home confinement sentence through appropriate monitoring supported the conclusion that the district court plainly erred in imposing such a sentence without resolving its own stated doubts. That aspect of *Porat* is not affected by the fact that it was decided when the Guidelines were mandatory.

[3] To the extent that Black argues (Black Resp. Br. 56) that a court's failure to make sufficient findings of fact can never constitute plain error, that contention is belied by *Davis*'s recognition that the Supreme Court has not "shield[ed] any category of errors from plain-error review." 140 S. Ct. at 1061. Moreover, Black's reliance (Black Resp. Br. 56) on this Court's decision in *United States v. Savastio*, 777 F. App'x 4 (2d Cir. 2019) (unpublished), is misplaced. That case did not establish a general rule, but only found a lack of plain error on its specific facts. *Id.* at 7-8.

sentence through electronic monitoring . . ., for example, telephone contact and videoconferencing." Black Resp. Br. 58. But as we stated in our opening brief, *e.g.*, Gov. Br. 104, the government is not claiming that it is clear or obvious that there is no set of circumstances under which the foreign home confinement sentence could be implemented. Rather, the plain procedural error is the district court's failure to resolve its own doubts about whether the sentence it intended to impose could be effectuated in a feasible and appropriate manner, leaving it instead for the Probation Office to "explore," GSA.707.

2. As the government has shown (Gov. Br. 105-07), the district court's clear or obvious error in failing to resolve its stated doubts about the implementation of the foreign home confinement sentence both affected substantial rights because Black's sentence "might have been substantially different but for the error," *United States v. Burden*, 860 F.3d 45, 57 (2d Cir. 2017) (per curiam), and also "seriously affected the fairness, integrity or public reputation of judicial proceedings," *id.* at 53 (quotation marks omitted), because the error could prevent the effectuation of a significant component of Black's already extremely lenient sentence.

Black contends that the government has made no showing that the Probation Office will not be able to implement the foreign home confinement sentence, stating that "it appears that the Government has made no effort to determine the Probation Department's plan for supervising the home confinement portion of Black's sentence." Black Resp. Br. 59. However, any post-sentencing communications that the

government has had with the Probation Office on this issue are not set forth in the government's briefing because such information is outside the record on appeal. A remand is necessary so that the feasibility and appropriateness of a foreign home confinement sentence in this case can be explored and resolved, including through an on-the-record presentation of the views of the Probation Office.

Black additionally contends (Black Resp. Br. 59) that the government has made no showing that the district court will impose a short term of imprisonment on Black if the case is remanded for resentencing, given that the court at the October 2019 sentencing hearing stated that it could not "bring [it]self" to impose an imprisonment term in the United States on Black. GSA.704. But the district court made that statement in the context of the sentencing options it believed were available at the time, including home confinement, which the court expressed was a substantial punishment. GSA.707-08. It is reasonable to find a significant possibility that the court may weigh its options differently if, on remand, it determines that foreign home confinement is inappropriate or infeasible.

Moreover, the government need not conclusively demonstrate that the district court would impose imprisonment on remand to satisfy its burden of showing an effect on substantial rights. The district court believed that home confinement was a substantial punishment. Gov Br. 105-06. If the Probation Office determines that it cannot implement a home confinement sentence in a foreign country, Black's sentence would contain no restrictions on his freedom, which substantially changes the

punishment that the district court believed Black merited and also makes it less onerous than Connolly's, even though the district court believed that Black was more culpable. *Ibid.*; GSA.702. On remand, in addition to the possibility of an imprisonment term, the Court could make other alterations to Black's sentence if it determines that foreign home confinement is infeasible or inappropriate, such as imposing other conditions of supervised release or increasing the fine amount.

Finally, Black incorrectly contends (Black Resp. Br. 59-60) that the government did not satisfy the fourth prong of plain-error review, which requires a showing that this Court should exercise its discretion to correct an error that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Burden*, 860 F.3d at 53 (quotation marks omitted). Despite committing a "serious and not victimless" crime, GSA.698, defendants received extremely lenient sentences that included no prison time. In the district court's view, the foreign home confinement portion of Black's sentence was a key punitive feature, GSA.707-08, yet the court failed to assure itself it could be effectuated despite stated doubts. Those circumstances, demonstrating that a central feature of Black's sentence might be infeasible or inappropriate, require a remand because the error in failing to resolve the doubts affects the fairness, integrity, and public reputation of the sentencing proceedings, particularly given this Court's recognition that a sentencing remand is not particularly burdensome, *see Gordon*, 291 F.3d at 191, which accentuates the potential unfairness in not ensuring that Black

receives an overall sentence that is commensurate with the level of punishment that the district court intended to impose.

B. This Court should vacate and remand Connolly's sentence for reconsideration because it was linked to Black's sentence.

If the Court vacates and remands Black's sentence because of the district court's plain error in imposing the foreign home confinement sentence, it should likewise vacate and remand Connolly's sentence because the district court linked its consideration of the two sentences. *See* Gov. Br. 105-07. Where this Court finds error in one defendant's sentence warranting vacatur and remand, it is not unusual for the Court to likewise remand a codefendant's sentence where the sentences were linked, even if there is no other error in the codefendant's sentence. Thus, in *United States v. Oluigbo*, 375 F. App'x 61, 66-67 (2d Cir. 2010) (unpublished), this Court explained:

> Although we find no error in the District Court's determination that Oluigbo was not entitled to a minor-role adjustment, we nonetheless vacate Olguibo's sentence and remand the matter for resentencing. During the sentencing proceeding, the District Court stated that Oluigbo's sentence should be "placed in context" with the sentence imposed on his co-defendant. "[I]nasmuch as the interrelationship among the sentences of the co-defendants is a principal consideration as to a proper sentence . . . , the district court should have the ability . . . to resentence [Oluigbo] as well." *United States v. Stewart*, 590 F.3d 93, 152 (2d Cir. 2009).

Similar reasoning warrants vacatur and remand of Connolly's sentence here.

Connolly contends that this Court should not vacate and remand his sentence because the district court "independently determined that a sentence of six months' home confinement was appropriate" for him. Connolly Resp. Br. 58. The record,

however, demonstrates that the district court linked the sentences of Black and Connolly. After considering a number of sentencing factors, the district court stated: "All other beings being equal, I would sentence Mr. Black to a modest, short term of imprisonment, probably quite in line with probation Officer Kim's recommendation," GSA.702—which was a five-month prison term for each defendant, Gov. Br. 91—"and I would sentence Mr. Connolly to a lesser sentence because these two men are not equivalent in the great LIBOR scheme of things." GSA.702. Although Connolly states that the court's reference to a "lesser sentence" did not expressly refer to an imprisonment term, in context that is the reasonable implication, and regardless, the statement demonstrates that the district court's determination as to the appropriate sentence for Black influenced the overall sentence for Connolly, which includes a fine and other supervised release terms that the court could choose to modify if Black's sentence is altered on remand.

Connolly's reliance on various statements that the district court made minimizing Connolly's role in the offense is unavailing. *See* Connolly Resp. Br. 58-59 (quoting GSA.655, 673). Connolly's calculated Guidelines range was 46-57 months' imprisonment. GSA.669-70. Because the district court was considering a term of imprisonment shorter than five months for Connolly, it had an obligation to explain the basis for the extent of such a large variance. *Gall v. United States*, 552 U.S. 38, 50 (2007). Although the court also at one point stated that, "given what has happened to everybody else in this case, and what has not happened to a lot of people who aren't in

this case—and aren't in other cases—it would be a travesty to sentence Matt Connolly to a term of incarceration," GSA.704, it did so only after it had determined that it would not impose a prison sentence on Black. Therefore, the reference to "what has happened to everybody else in this case" reasonably encompasses Black, and in its next sentence the court again explicitly linked its non-imprisonment sentence for Connolly to its non-imprisonment sentence for Black. GSA.704-05 ("And certainly, if I'm not going to sentence Mr. Black to [a prison sentence] . . . , I can't mete out a sentence of imprisonment on Mr. Connolly . . . ."). Moreover, aside from an imprisonment term, the district court could decide to alter Connolly's fine amount or other conditions of supervised release based on any modifications it makes to Black's sentence on remand. Because the district court tethered Connolly's sentence to Black's, a remand of Black's sentence should be accompanied by a remand of Connolly's sentence. *See Stewart*, 590 F.3d at 152; *Oluigbo*, 375 F. App'x at 66-67.

CONCLUSION

For the foregoing reasons and the reasons stated in our principal brief, this Court should affirm defendants' convictions, but vacate defendants' sentences and remand for resentencing.

Respectfully submitted,

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January 8, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel of record certifies that the foregoing Reply Brief for Appellee/Cross-Appellant United States of America complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), inasmuch as the brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,294 words. This certification is based on the word count of the word-processing system used in preparing the government's brief: Microsoft Word 2007.

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