

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of October, two thousand twenty-six.

PRESENT:

RICHARD J. SULLIVAN,
STEVEN J. MENASHI,
ALISON J. NATHAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee

v.

No. 25-545

MICHAEL RANDALL GRIMM,

Defendant-Appellant.

For Defendant-Appellant: STEVEN Y. YUROWITZ, YurowitzLaw PLLC,
New York, NY.

For Appellee: MONICA J. RICHARDS, Assistant United
States Attorney, *for* Michael DiGiacomo,
United States Attorney for the Western
District of New York, Buffalo, NY.

Appeal from a judgment of the United States District Court for the Western
District of New York (Charles J. Siragusa, *Judge*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED, AND DECREED** that the March 7, 2025 appeal of Michael Randall
Grimm is **DISMISSED**.

Michael Randall Grimm appeals from a judgment of conviction following
his plea of guilty to one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and
2, for which he was sentenced to sixty months' imprisonment and three years'
supervised release. *See* Fed. R. Crim. P. 11(c)(1)(C). On appeal, Grimm argues that
the district court was required to reduce his term of imprisonment by thirteen
months pursuant to United States Sentencing Guidelines ("U.S.S.G" or "the
Guidelines") § 5G1.3(b) to account for the time he had served on a related,
undischarged state sentence. In particular, he contends that *United States v.*

Williams, 260 F.3d 160, 165 (2d Cir. 2001), which held that a sentencing judge was “obligated to apply” section 5G1.3(b) to a Rule 11(c)(1)(C) plea agreement, continues to be controlling authority notwithstanding the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220, 245 (2005), which held that the previously mandatory Guidelines were now merely “advisory.” We assume the parties’ familiarity with the facts, procedural history, and issues on appeal, to which we only refer as necessary to explain our decision.

Although the Second Circuit has yet to resolve the precise legal issue raised on appeal, *see United States v. Lucas*, 745 F.3d 626, 628 n.2 (2d Cir. 2014) (declining to “express[] any view as to the extent to which [section] 5G1.3(b) retains mandatory force after” *Booker*), Grimm declined to advance this argument about the mandatory nature of section 5G1.3(b) at sentencing. The district court had initially expressed uncertainty about whether section 5G1.3(b) is mandatory or advisory and ordered briefing on the question, *see* Sp. App’x at 79–95, but at a subsequent status conference, Grimm stated he would “not contest the fact that the [district] [c]ourt has discretion with respect to” that section, Gov’t App’x at 6–7. Due to this admission, the government contends that Grimm has waived this argument – his only one – on appeal. We agree.

“We have previously explained that a defendant waives [his] challenge on appeal when [he] makes an intentional decision not to assert a right or . . . acts intentionally in pursuing, or not pursuing, a particular course of action.” *United States v. Lewis*, 125 F.4th 69, 74 (2d Cir. 2025) (internal quotation marks omitted). While we have “discretion to correct errors that were *forfeited* because not timely raised in the district court . . ., . . . no such discretion applies when there has been true *waiver*.” *United States v. Williams*, 930 F.3d 44, 64 (2d Cir. 2019) (internal quotation marks omitted). Accordingly, if a party consciously waives an argument, that action “will negate even plain error review.” *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

“Various circumstances can manifest a defendant’s intentional relinquishment of a known right.” *United States v. Spruill*, 808 F.3d 585, 597 (2d Cir. 2015). Waiver may be found “where a party actively solicits or agrees to a course of action that [he] later claims was error,” *Lewis*, 125 F.4th at 74 (internal quotation marks omitted), or where a party “asserts, but subsequently withdraws, an objection in the district court,” *Spruill*, 808 F.3d at 597. In both cases, the record supports “the critical determination that the defendant, through counsel, acted intentionally in pursuing, or not pursuing, a particular course of action.” *Id.*

Here, the record leaves no ambiguity that Grimm “acted intentionally” when he declined to advance his argument that section 5G1.3(b) is mandatory. *Id.* At a February 2025 status conference, Grimm’s counsel stated in unequivocal terms that Grimm “ha[d] indicated to me . . . that he is prepared to not contest the fact that the [district] [c]ourt has discretion with respect to the concurrent and consecutive time issue.” Gov’t App’x at 6–7. Moments later, Grimm himself confirmed this point. *See id.* at 11–12. Each statement manifested both Grimm’s and his counsel’s “active[] . . . agree[ment]” to abstain from contesting whether section 5G1.3(b) is advisory. *Lewis*, 125 F.4th at 74 (internal quotation marks omitted). Because we have no doubt that these statements constituted waiver, Grimm cannot now raise an argument that he expressly invited the district court not to address.

Grimm counters that his decision not to argue that section 5G1.3(b) is mandatory should fall outside the scope of our waiver doctrine because it (i) was predicated on a “mistaken concession” stemming from faulty advice his counsel received from the Sentencing Commission and (ii) did not result in any “tactical advantage.” Reply Br. at 2 (internal quotation marks omitted). For support, he relies on *United States v. White*, 177 F.4th 414, 421 n.3 (2d Cir. 2026), in which this

Court observed that “we have declined to” conclude there is waiver “where there is no evidence that the defendant acted deliberately or gained any tactical advantage by . . . waiving a right.”

But the facts here are readily distinguishable from those in *White*. To begin, unlike in that case, there *is* substantial evidence that Grimm “acted deliberately” by waiving his argument, since, as noted, he stated repeatedly in “open court” his intention to do so. *United States v. Bastian*, 770 F.3d 212, 218 (2d Cir. 2014) (internal quotation marks omitted); *contra White*, 177 F.4th at 421 n.3 (“[T]he record does not include information sufficient to establish whether [defendant’s] concession . . . was deliberate or strategic.”). What is more, Grimm also gained a “tactical advantage” in waiving his right to pursue the section 5G1.3(b) argument. *Id.* By foregoing further briefing and a hearing on the issue, Grimm opted to be “sentence[d] . . . as soon as possible,” which the record reflects was an important consideration for him given the value of promptly commencing his federal sentence concurrent with his state one and thereby reducing the overall time he would spend incarcerated. Gov’t App’x at 10–12 (“The Court: . . . [W]hat he’s asking me to do is to sentence him as soon as possible and sentence him . . . to run concurrent with the remainder of his [state sentence].”). Indeed, as the exchange

between his counsel and the district court makes clear, Grimm’s withdrawal of the argument meant that the district court would terminate “the submission deadlines for the 5G,” which would enable it to sentence Grimm “as soon as” it could. *Id.* at 16. That deliberate, tactical give-and-take is the epitome of an “intentional relinquishment of a known right.” *Spruill*, 808 F.3d at 597.

* * *

We have considered Grimm’s remaining arguments and find them to be without merit. Accordingly, we **DISMISS** this appeal.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court