NO. _____

In The Supreme Court of the United States

ABDUL KARIM BANGURA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI
ABDUL KARIM BANGURA

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QUESTIONS PRESENTED

I. **THE 4th CIRCUIT ERRED WHEN IT DID NOT OVERTURN THE DISTRICT COURT'S DENIAL OF BANGURA's MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE MOTION WAS FILED PRIOR TO SENTENCING FOR A "FAIR AND JUST" REASON.**

II. **THE 4TH CIRCUIT ERRED IN NOT FINDING BANGURA'S TRIAL COUNSELS, INDEPENDENTLY, PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.**

III. **THE 4TH CIRCUIT BY NOT FINDING THAT THE DISTRICT COURT'S ADDING OF A 2-LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE VIOLATED A CONSTITUTIONAL RIGHT.**

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PETITION FOR WRIT OF CERTIORARI

ABDUL KARIM BANGURA, JR., a/k/a AJ, (hereinafter ""BANGURA."") respectfully petitions for a writ of certiorari to review judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported and is reproduced in the Appendix and was issued on April 5, 2019.

JURISDICTION

This is an appeal from the Fourth Circuit Court of Appeals ruling on the decision of the United States District Court for the Eastern District of Virginia, at Alexandria. Submitted on November 13, 2018 and decided on April 5, 2019 by the Fourth Circuit Court of Appeals. BANGURA's appeal was denied by an unpublished per curium opinion.

In this case, Petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit for the matters that were denied. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

STATUTES & RULES

18 U.S.C. § 1591(a)

18 U.S.C. § 1591 (a)(1)

18 U.S.C. § 1591(b)(2

18 U.S.C. § 1591(c)

18 U.S.C. § 1594(c)

18 U.S.C. § 2251(a)

18 U.S.C. § 2423(a)

28 U.S.C. § 1291

28 U.S.C. § 3231 (2012)

Fed. R. App. P. 4(b)

Fed.R.Crim P. 11(c)(1)

Fed.R.Crim.P. 11(d)(2)(B)

Fed.R.Crim.P. 11(e)

CONSTITUTIONAL AMENDMENTS

U.S. Const. amend. VI

STATEMENT OF THE CASE

In the District Court, BANGURA was sentenced to 186 month sentence imposed after his straight up guilty plea to a four (4) count Superseding Indictment charging Conspiracy to Commit Sex Trafficking of a Minor, 18 U.S.C. §§ 1594 (c) & 1591 (a); Sex Trafficking of a Minor, 18 U.S.C. § 1591 (a)(1), (b)(2), and (c); Interstate Transportation of a Minor for Purposes of Prostitution, 18 U.S.C. § 2423(a); and Production of Child Pornography, 18 U.S.C. § 2251(a). (J.A.61).

Prior to the instant offenses, BANGURA had a relatively small criminal record. While BANGURA's criminal history category was II, (J.A.327), those points came from offenses of petit larceny when BANGURA was a child and the offenses occurred within one month of the other. (J.A.328). Additionally, as a

child, the defendant was diagnosed as having schizophrenia as well as bi-polar disorder. (J.A.330).

Facts as to Withdrawal of Guilty Plea

On October 6, 2017, BANGURA's second trial counsel moved the court for a competency evaluation. (J.A.222).

BANGURA was detained at the Alexandria Adult Detention Center, where he was reportedly prescribed the antidepressant **Remeron**.[1] (J.A.338). He reported the medication helped him sleep and he did well in jail. However, according to a motion on September 15, 2017, staff with the Alexandria Sheriff's Office reportedly observed BANGURA "eating and smearing his own feces around his jail cell." (J.A.223). When mental health staff attempted to interview him, BANGURA refused. (J.A.223).

On October 19, 2017, the court entered an order of evaluation and BANGURA was committed to custody for a competency evaluation to occur. (J.A.235). On March 19, 2018 a competency evaluation was returned to the court as well as counsel for both parties; the court ordered a status conference hearing for March 23. 2018. (J.A.333). The court made no specific findings as to the defendant's competency. However, the court set the matter for sentencing on July 20, 2018 as well as set a motion's hearing on May 25, 2018; furthermore, the court directed BANGURA to file any motion to withdraw his guilty plea by May 7, 2018. (J.A.243).

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[1] Remeron is an antidepressant used to treat **major depressive disorder**. https://www.drugs.com/remeron.html

During the FMC physiological, the evaluator indicated that she talked with BANGURA's mother. (J.A.334). His mother stated that BANGURA's grades were "not very good," which she attributed problems understanding information presented to him. (J.A.336). According to school records, the majority of Mr. BANGURA's grades from 2008 to 2010 were Fs. (J.A.336). His mother reported he received special education services in school and had an Individualized Education Plan (IEP). (J.A.336). BANGURA has not obtained his diploma or GED. (J.A.321). According to a letter dated October 12, 2017, BANGURA was enrolled in the Latin America Youth Center Youth Build Public Charter School from August 22 to October 31, 2016, at which time he withdrew. (J.A.336). The Youth Build school is described as an alternative high school serving students from age 16 to age 24. (J.A.336). BANGURA also reported that an incident at age four when an "oven" reportedly fell on him and possibly resulted in a head injury. (J.A.336).

BANGURA reported he "started hearing screams" at age four. (J.A.337). He reported he had never participated in counseling but was prescribed an unidentified psychotropic medication at some later point. (J.A.337). BANGURA reported he later be experiencing auditory hallucinations, which he described as "A man's voice and a worn s voice." (J.A.337). He stated the voices gave him "tips" and also said derogatory things about him, like calling him an "asshole." BANGURA reported he was hospitalized at age eight after having a fight with his mother and was diagnosed with "schizophrenia." (J.A.337).

BANGURA reported he began experiencing a visual hallucination of an individual he referred to as "Thomas" at age 15. He described "Thomas" *as,* "5'11" with a buzz cut and he never ages, always the same." (J.A.337). He reported he both sees and hears Thomas daily. (J.A.337). He denied any adult psychiatric hospitalizations or suicide attempts. (J.A.337). In contrast, when in reviewed for the PSR in April 2017, the defendant reported he was diagnosed with "bipolar' at age eight and was prescribed medication for sleep at age twelve. (J.A.337). He reported no subsequent history of treatment with psychotropic medication. (J.A.337).

His mother did not report the defendant began experiencing hearing "screams" at age four. (J.A.337). As described above, she stated he was in counseling at age eight while they were living in a homeless shelter and reported his brother had been molesting him. (J.A.337). This incident reportedly led to his hospitalization. (J.A.337). She stated he was in the hospital for one to two weeks and then returned to live with her. She believed he might have been on medication following the hospitalization but could not recall for certain. (J.A.337). At some point as a teenager, he was prescribed medication for engaging in behavior like "talking to himself" and "knocking things down." (J.A.337). She stated the doctor he was seeing at the time diagnosed BANGURA with both "bipolar and schizophrenia." (J.A.337). She reported BANGURA was calmer and slept better after starting the medication. (J.A.337). By age 15, however, he had stopped taking medication and started self-medicating with street drugs. (J.A.337). She stated she was unaware of any other history of mental health treatment. (J.A.337).

During the evaluation, reviewed records indicated BANGURA was admitted to Dominion Hospital in Falls Church, Virginia, on September 21, 2006 (age 10), after hitting his teacher in class and being taken to the hospital by police. (J.A.337). He was noted to also have a history of hitting his brother and his mother. (J.A.337). At the time of admission, he was prescribed only Concerta a stimulant medication used to treat Attention Deficit/Hyperactivity Disorder (ADHD). (J.A.337). BANGURA reported to hospital staff he had been "hearing scary voices" which talked to him in a "different language." (J.A.337). During his hospitalization, he was prescribed only Benadryl, an over the counter antihistamine, for sleep problems. (J.A.337). He was discharged on September 26, 2006. BANGURA's mother came to visit the defendant and became upset stating she was not "comfortable with the rules" and then took BANGURA out of the hospital against medical advice. (J.A.337). At the time of his discharge, he was diagnosed with Bipolar Disorder, Unspecified, and ADHD, Non-hyperactive Type. (J.A.337).

Collateral records reviewed indicated in 2008 (age 12), BANGURA was being treated by Dr. Robert Hunt at Capital Mental Health Associates in Lanham, Maryland. (J.A.338). Dr. Hunt wrote two letters in February 2008 indicating BANGURA was "not yet stable" and would be unable to "attend his regularly scheduled school classes." (J.A.338). In March 2008, Hunt wrote a letter indicating Mr. BANGURA was still not "stable enough" to return to school but had the "emotional stability and cognitive capacity to participate in homebound education."

(J.A.338). When interviewed, Ms. Hood-BANGURA reported Dr. Hunt prescribed BANGURA medication. (J.A.338).

While BANGURA was at FMC Devens, he stated he had trouble sleeping. (J.A.339). While he did not appear to be experiencing auditory hallucinations, he stated he had recently heard voices which he described as "tiny screams." (J.A.339). He also reported having a "friend named Thomas that no one ever sees." (J.A.339). The defend expressed feelings of paranoia that "someone will bother him." (J.A.339). BANGURA reported he had been prescribed Remeron in June 2017, which he continued to take at the time of admission. (J.A.339).

At FMC Devens, he was placed on the semi-locked mental health unit and his medication was changed. (J.A.339). He was seen by his treating psychiatrist on November 9, 2017, at which time he was prescribed the antipsychotic medication **Risperdal** based on his self-report of auditory hallucinations. (J.A.339). He was prescribed **hydroxyzine** for medication side-effects. (J.A.339).

The change of medication appeared to have a positive effect on him. When seen for psychological testing on November 14, 2017, he was appropriately groomed and oriented to his circumstances and surroundings. (J.A.339). His speech was logical, coherent, and of a normal rate. (J.A.339). He did not appear to be hallucinating and he displayed no overt signs of delusional ideation. (J.A.339). His observed affect calm and stable. He transferred to an open unit on November 16, 2017. (J.A.339).

When the report was provided to the court, despite a life-long history of mental illness, BANGURA was declared to be malingering. (J.A.342).

REASON FOR GRANTING THE PETITION

QUESTION I

I. THE 4th CIRCUIT ERRED WHEN IT DID NOT OVERTURN THE DISTRICT COURT'S DENIAL OF BANGURA's MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE THE MOTION WAS FILED PRIOR TO SENTENCING FOR A "FAIR AND JUST" REASON.

SUMMARY OF ARGUMENT

After entry of BANGURA's *Guilty Plea* on the first day of a jury trial (J.A.245), but prior to sentencing BANGURA's second trial counsel moved to withdraw BANGURA's guilty plea, following a court order to do so, (J.A.243), due to his inability to broach the subject of BANGURA's culpability, his significant mental illness history, and the ineffective assistance of BANGURA's prior trial counsel. (J.A.245).

ARGUMENT

The 4th Circuit erred when it focused on the Rule 11 hearing by saying BANGURA was cooperative and gave responsive answers to the questions posed by the court. Most people with a mental health issue can appear competent at a short specific moment in time. The 4th Circuit stated Bangura represented to the court that he was not under the influence of any drug or medication that affected his ability to understand the charges or the nature of the proceedings and that he was receiving care for a mental health condition that did not affect his ability to understand the charges or the nature of the proceedings. The 4th Circuit glossed

over BANGURA's argument that the district court should have further pursued this issue by asking him to identify the mental condition for which he was receiving treatment and whether there were medicines he was supposed to be taking and whether he was properly medicated in jail. This is where the 4th Circuit erred as for any given short point of time, even the most mentally ill individuals can appear normal or will follow suggestions presented to them as in a Rule 11 Hearing.

A court may permit a defendant to withdraw a guilty plea *before* sentencing if "the defendant can show a 'fair and just' reason for requesting the withdrawal." *Fed.R.Crim.P.* 11(d)(2)(B). After sentencing a "plea may be set aside only on direct appeal or collateral attack." *Fed.R.Crim.P.* 11(e).

The 4th Circuit has held a defendant has no absolute right to withdraw a guilty plea, but rather must meet the burden of demonstrating a "fair and just" reason for withdrawal. *Ubakanma,* 215 F.3d at 424; *Moore,* 931 F.2d at 248, (Hereinafter "*the Plea Factors*"). *Ubakanma,* 215 F.3d at 424; *Moore,* 931 F.2d at 248; *See U.S. v Dyess*, 478 F.3d 224 (4th Cir. 2007).

In the instant matter, the district court never addressed the factors individually or at all in its ruling on May 25, 2018. (J.A.266) and the 4th Circuit erred in not finding so. The district court merely stated it in court, it had read the motions filed by the parties and at the hearing, the counsels stated they had no further argument aside from their motions. (J.A.266). In its order, the court merely held that: "Upon consideration of the motion, the memoranda in support thereof

and in opposition thereto, and for the reasons stated in open court at the May 25, 2018 hearing, it is hereby ORDERED that the Motion is, DENIED." (J.A.271). BANGURA's second trial counsel offered no witnesses or medical records concerning the state of BANGURA's mental health beyond his motion. Even though his medical history had been known since his motion and since the probation officers pretrial report. (J.A.330).

BANGURA argued and proffered a reason for withdrawal that did not exist at the time of his straight up plea namely that he suffered from a lifelong mental health condition which his first trial counsel did not investigate, nor ask about, nor request an evaluation prior to the plea.

He also suffered from ineffective assistance of counsel when his second trial counsel provided no evidence through witnesses or medical records addressing the mental health status of BANGURA at the plea withdrawal hearing.

1

Knowing and Voluntary Entry of the Plea

The Constitution "insists" a plea must be "voluntary' and the defendant must make related waivers 'knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *U.S v. Bartram*, 407 F.3d 307, 314 (4th Cir. 2005).

This Court has emphasized a defendant who enters a guilty plea forgoes "not only a fair trial, but also other accompanying constitutional guarantees." *U.S. v. Ruiz*, 536 U.S. 622, 628-29 (2002) (quoting *Brady v. U.S.*, 397 U.S. 742, 748 (1970)). A defendant enters a guilty plea intelligently when he is "advised by competent

counsel . . . made aware of the nature of the charge against him, and there was nothing to indicate he was incompetent or otherwise not in control of his mental faculties." *Brady*, 397 U.S. at 756. A guilty plea is voluntary if "entered by one fully aware of the direct consequences" of the plea. *Brady*, 397 U.S. at 755. (quoting *Shelton v. U.S.*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev'd on confession of error on other grounds, 356 U.S. 26 (1958)).

Before accepting a guilty plea, the court must inform the defendant of, and determine he understands, the nature of the charge(s) to which the plea is offered, any mandatory minimum penalty and the maximum possible penalty and various rights as set forth by Fed.R.Crim P. 11(c)(1). *Id.* In this matter, the court held a Rule 11 colloquy with BANGURA and asked BANGURA about medications and his mental state.

What the court did not ask during or following this interaction between BANGURA and his counsel is staggering in its absence. The court should have known about the schizophrenia and bipolar diagnosis from the age of 12 contained in the pretrial report. (J.A.330).

The court never inquired about what mental health illness BANGURA was being treated for, what mental illness he had, what medical professionals he was seeing, how long had he had these mental issues, what medications he was supposed to take, what medications he was not taking, or whether he was being properly medicated in jail. All of these questions are critical to the evaluation of a

mental illness and the status of a defendant and his ability to make a decision or give a knowingly and voluntarily plea.

Furthermore, any side effects of medication should have been inquired into by the court particularity since schizophrenia and bipolar disorder medication affect cognitive ability.

This Court has held that when a criminal defendant informs the district court at a Rule 11 hearing that he is under the influence of medication, the district court should "inquire about what effect, if any [the defendant's] medication ha[s] on his ability to make a voluntary plea and to understand the consequences." *U.S. v. Damon*, 191 F.3d 561, at 565 (4th Cir. 1999); *see also U.S. v. Nicholson*, 676 F.3d 376, (4th Cir. 2012).

In the instant matter, as in Damon, the court merely took Mr. Crawley at his word in basically "Yup he's good," and proceeded to accept the plea. It's important to note that this counsel withdrew from his case while the case was still progressing.

On October 1, 2017, BANGURA's new counsel, who filed the motion to withdraw the guilty plea, met with the defendant to discuss his case. In his motion, second trial counsel stated that: "It became apparently clear to counsel that within minutes of speaking with the defendant that he did not understand the nature of the proceedings against him and cannot meaningfully assist counsel with his defense." (J.A.223).

People with the cognitive symptoms of schizophrenia often struggle to remember things, organize their thoughts or complete tasks. Commonly, people

with schizophrenia have **anosognosia** or "lack of insight."[2] This means the person is unaware that he has the illness, which can make treating or working with him much more challenging.[3]

Anosognosia is when someone rejects a diagnosis of mental illness, it's tempting to say that he's "in denial." But someone with acute mental illness may not be thinking clearly enough to consciously choose denial. They may instead be experiencing "lack of insight" or "lack of awareness."[4]

BANGURA could have been suffering from Anosognosia because he told the court he was fine and did not have any mental conditions despite the fact he stated he was under the care of a mental health professional.

What's also critical to this case is what the court ordered about BANGURA's competency. It asked for his current competency months after the plea. (J.A. 235). Anosognosia is relative. Self-awareness can vary over time, allowing a person to acknowledge their illness at times and making such knowledge impossible at other times. When insight shifts back and forth over time, we might think people are denying their condition out of fear or stubbornness, but variations in awareness are typical of Anosognosia.[5] BANGURA stating he was fine could have been a form of Anosognosia particularly since he also denied medical help when he was eating his own feces.

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

2

Credible Assertion of Innocence

Upon appointment, BANGURA's second trial counsel stated he could not address whether a claim of legal innocence could be presented because due to BANGURA's mental infirmities, he could not broach the subject of culpability with BANGURA.

Neither can a guilty plea be knowingly and voluntarily given when a mental illness exists and has not been explored.

This Court has outlined the following standard as to the voluntariness of guilty pleas:

A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). Brady v. United States, 397 U.S. at 755 (quotation and quotation marks omitted). IT is not apparent on the record that BANGURA understood the ramifications of his plea.

Months after the plea, BANGURA was referred to the Federal Medical Center (FMC), Devens, Massachusetts. The court order requested an evaluation of the defendant for competence to stand trial. Specifically, the Court has requested an opinion on whether Mr. BANGURA **is presently** suffering from a mental disease or defect rendering him mentally incompetent to the extent he is unable to understand

the nature and consequences of the proceedings against him or to assist properly in his defense. There was nothing in the order to address his past competency or his status on the day he plead guilty-nearly 5 months prior to the order therefore BANGURA's competency at the time of the plea is unknown.

BANGURA was in fact medicated on the day of his plea because the Jail stated he was on Remeron, a drug for major depression. The court did not *voir dire* BANGURA with any questions that could have given a picture of his mental state and status. BANGURA does not tell the court that he is on Remeron at the time of the plea or that it was prescribed upon his arrest and detention. Just two weeks after his plea, his jailers said he had been eating feces and smearing feces on the wall. Not a sign of a sane person but that of a severely ill person considering that he has eaten feces at other times in his life when he was not medicated or in crisis. (J.A.223,224,230,246).

3

Delay Between Entering the Plea and Filing the Motion to Withdraw it.

According to BANGURA's first trial attorney's motion to withdraw he met with BANGURA on September 10, 2017 to discuss their scheduled meeting with Probation to conduct a pre-sentence investigation interview. (J.A.201). First trial counsel stated during the meeting BANGURA agreed to proceed with the meeting scheduled for September 13, 2017. (J.A.201). On the assigned date, the BANGURA refused to meet with his attorney and probation officer. Furthermore, BANGURA informed counsel that he was fired and that he was desirous of new counsel. (J.A.201).

Two weeks later, on September 29, 2017 the court entered an order granting counsel's motion to withdraw and appointed the second trial counsel. (J.A.221). The second trial counsel met with BANGURA the next day and stated he knew something was terribly wrong and asked for a competency evaluation. On October 6, BANGURA's second trial counsel filed a motion for a competency evaluation. (J.A.222).

Also, within two weeks of the guilty plea, BANGURA was participating in behavior that clearly showed a mental deficiency by eating feces and would not cooperate with his first trial counsel and could not talk with his second trial counsel.

The time from the plea to the motion for the competency was only 59 days. The only delay that occurred after that was the time it took for the forensic interview to be completed by FMC Devens. It was completed February 12, 2018. This time should not count against the defendant for the withdrawal of his plea because it was the time required for the evaluation to take place.

Considering the lifelong mental health issues faced by BANGURA, 59 days is not a significant delay.

4

Whether Defendant Had Close Assistance of Competent Counsel

BANGURA advised the court in the plea colloquy that he was satisfied with the first trial attorney assistance of counsel. (J.A.176). However, from the record, it appears that BANGURA was let down by both counsels. The ineffectiveness of both counsels is discussed in **Question II** incorporating arguments and facts stated in this Question.

5

Whether the Government is Prejudiced if BANGURA's Plea is Withdrawn

Allowing BANGURA to withdraw his guilty plea would not prejudice the Government. While the plea had come on the day of trial, the witnesses for the trial were used against the co-defendant. Sentencing had not occurred. Since multiple cases have been reversed and remanded that have involved many more legal proceeding and government action than the instant case there is no prejudice to the Government.

In United States v. Barker, the court observed the "most common form of prejudice is the Government's difficulty in reassembling far-flung witnesses in a complex case, but prejudice also occurs where a defendant's guilty plea removed him from an ongoing trial of co-defendants, who were then found guilty." *U.S v. Barker*, 168 U.S. App. D.C. 312, (1975). These factors were present in this matter, however, the unabashed questions about BANGURA's mental state at the time of the plea case serious doubts about the constitutionality of the claim. For this alone, BANGURA's constitutional rights trump the government's inconvenience.

6

Whether Allowing Withdrawal of Plea
Will Inconvenience the Court and Cause a Waste of Judicial Resources.

The ninth circuit has held a defendant has the burden of demonstrating a "fair and just" reason for withdrawal of a plea; however, the standard is applied liberally. *U.S. v. Garcia,* 401 F.3d 1008 (9th Cir. 2005); *U.S. v. Ortega-Ascanio,* 376 F.3d 879 (9th Cir. 2004); *U.S. v. Nagra,* 147 F.3d 875, 880 (9th Cir.1998); *See also U.S. v. Signori,* 844 F.2d 635, 637 (9th Cir.1988) (stating a motion to withdraw a plea pre-sentence should be "freely allowed"). "Fair and just" reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, *or any other reason for withdrawing the plea that did not exist when the defendant entered his plea.*" *U.S. v. Davis,* 410 F.3d 1122 (Fed. 9th Cir., 2005) citing *Ortega-Ascanio,* 376 F.3d at 883 (emphasis added).

There is no higher "fair and just" reason than a violation of important constitutional rights involving the mental competence of the defendant and his ability to make knowing and intelligent decisions, to work with his counsel and to be competent to stand trial.

The standard for determining a defendant's competence to enter a guilty plea is the same as the standard for determining competency to stand trial.[6] The defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual

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[6] *Godinez v. Moran,* 509 U.S. 389, 1993

understanding of the proceedings against him."[7] (quoting *Dusky v. U.S.*, 362 U.S. 402, 402, (1960)); *U.S. v. Johnson*, 490 Fed Appx. 566, 567 (4th Cir. 2012).

QUESTION I CONCLUSION

The 4th Circuit erred when it did not protect Bangura's constitutional rights. The protection of BANGURA's constitutional rights and adherence to the rule of law, and an inadequate Rule 11 hearing, prescribed by this Court is a "fair and just" reason to allow him to seek withdrawal of his plea.

QUESTION II

I. THE 4TH CIRCUIT ERRED IN NOT FINDING BANGURA'S TRIAL COUNSELS, INDEPENDENTLY, PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

SUMMARY OF ARGUMENT

Both trial counsels were ineffective at different parts of the criminal process. First trial counsel up to and including the plea. The 4th circuit focused on Bangura's Rule 11 Hearing where he said he was satisfied with counsel. The 4th Circuit failed to include the glaring lack of evidence presented by both counsels about Bangura's mental health history.

ARGUMENT

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," U.S. Const. amend. VI, and that such assistance be effective, see *Strickland,* 466 U.S. at 686.

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[7] *Id.* at 396

In Kimmelman v. Morrison, the Supreme Court applied the Strickland v. Washington test in a case where the defendant based his ineffective assistance claim on his attorney's failure to litigate a Fourth Amendment claim competently. *Kimmelman v. Morrison*, 477 U.S. 365 (1986). The Court made clear "[i]n order to establish ineffective assistance, the defendant must prove both incompetence and prejudice." *Kimmelman*, 477 U.S. at 381. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are [the] cornerstones of [the] effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978).

BANGURA suffered from a lifetime of mental illness that was never investigated by either of his counsel. While the second counsel asked for an evaluation, he did little more than show up for court by not seeking further documents, subpoenaing witnesses or challenging the evaluation completed by the FMC Devens.

The failure of both trial attorneys to fully investigate BANGURA's mental health involved the failure of the first trial counsel to identify and or ask for and obtain an expert to investigate his mental health, the second trial counsel's failure to ask for a second opinion to the FMC report.

BANGURA Mental Illness History and Lack of Counsel action

Condition	**Source**	**Medication**	**Subpoena by Defense?**
Defendant suffered a **lifetime of cognitive disabilities**. (J.A.223)	Mother	Unknown	**NO.** was at sentencing but not called as a witness.
Aberrant behavior while growing up to include: constantly eating his own feces and urinating in water bottles and stacking them up in his room; so that he could drink his own urine from time to time. (J.A.246)	Mother	Unknown	**NO.** was at sentencing but not called as a witness.
Hearing screams" at age four. (J.A.337)	BANGURA	Unknown	Not available
Incident at age four when an "oven" reportedly fell on him and possibly resulted in a **head injury** (J.A.336)	Mother and BANGURA	Unknown	**NO.** Medical Records not subpoenaed. No witnesses developed. **NO:** Mother was at sentencing but

			was not called to testify.
Hospitalized at age eight after having a fight with his mother and was diagnosed with **"schizophrenia."** (J.A.223, 246, 274, 276, 281, 282, 285, 300, 330, 337, 341)	Mother and BANGURA	Unknown	**NO.** Mother could have been subpoenaed and was not by either counsel **NO.** Medical records from Identified hospitals were not subpoenaed by either counsel.
As a child began experiencing a visual hallucination of an individual he referred to as "Thomas" at age 15. Described "Thomas" *as,* "5'11" with a buzz cut (J.A.274, 282, 337, 339, 341, 342)	BANGURA	Unknown	Not Available
Records indicate admitted to Dominion Hospital in Falls Church, Virginia, on September 21, 2006 (age 10), after hitting teacher in class and being taken to the hospital by police. BANGURA reported	Records	Concerta and Benadryl	**NO.** Medical Records not subpoenaed. No witnesses developed. **NO:** Side effects of medication not explored by either counsel.

to hospital staff he had been "hearing scary voices" which talked to him in a "different language." During his hospitalization, he was prescribed only Benadryl, an over the counter antihistamine, for sleep problems. (J.A.337)	BANGURA		
Capital Mental Health Associates in Lanham, Maryland. Dr. Hunt wrote two letters in February 2008 indicating the defendant was "not yet stable" and would be unable to "attend his regularly scheduled school classes." (J.A.338)	Medical Records	Unknown	**NO.** Medical Records not subpoenaed. No witnesses developed.
As a teenager, he was prescribed medication for engaging in behavior like "talking to himself" and "knocking things down."	BANGURA and Mother	Unknown	**NO.** Medical Records not subpoenaed. No witnesses developed. **NO.** Mother

He was seeing a doctor diagnosed BANGURA with both **"bipolar and schizophrenia."** (J.A.337)			was at sentencing but was not called to testify.
BANGURA's grades were "not very good," which she attributed problems understanding information presented to him (J.A.336)	Mother	Unknown	**NO.** School records could have been subpoenaed and they were not by either counsel
Did not complete a high school education and while matriculating through school he was under an IEP plan. (J.A.336)	Mother	Unknown	**NO:** IEP and school records could have been subpoenaed and was not by either counsel
According to school records, the majority of Mr. BANGURA's grades from 2008 to 2010 were Fs. (J.A.336)	Mother	Unknown	**NO.** Mother was at sentencing but was not called to testify.
He reported he had never participated in counseling but was prescribed an unidentified **psychotropic**	BANGURA	Unknown. The phrase "**psychotropic**	Unavailable

medication at some later point. (J.A.337)		**drugs**" is a technical term for psychiatric medicines that alter chemical levels in the brain which impact mood and behavior.[8]	
Defendant was diagnosed with **schizophrenia and bi-polar disorder** when he was twelve years old. He had not been prescribed medication since the age of fourteen. (J.A.330)	Pretrial Report		**NO.** First counsel did not bring up this information prior to trial. At the Plea hearing or investigate any of it.
By age 15, however, he had stopped taking medication and "started using street drugs." (J.A.337)	Mother	Unknown, self-medicating	**NO.** Mother was at sentencing but was not called to testify. **NO:** first trial counsel did not talk to mother.
According to a letter dated October 12, 2017, the defendant was enrolled in the Latin America Youth	Letter to evaluating doctor	Unknown	**NO.** School records could have been subpoenaed.

[8] https://abcnews.go.com/blogs/health/2011/12/02/what-you-need-to-know-about-psychotropic-drugs

Center Youth Build Public Charter School from August 22 to October 31, 2016, at which time he withdrew. The Youth Build school is described as an alternative high school serving students from age 16 to age 24 (J.A.336)			
Has not obtained his diploma or GED (J.A.321)	Mother		**NO.** was at sentencing but was not called to testify. First trial counsel did not talk to mother
Experiencing auditory hallucinations, which he described as "A man's voice and a woman's voice." He stated the voices gave him "tips" and also said derogatory things about him, like calling him an "asshole." (J.A.337)	BANGURA	Unknown	**NO.** Mother could have been subpoenaed and was not by either counsel
The defendant was **previously under**	Mother	Unknown	**NO.** Could have explored with

the care of a physician who prescribed medications to control the defendant's conditions, however, the defendant **has not been under the care of a physician for the last five (5) to (6) years and** accordingly was **not medicated during the relevant time periods pertaining to this case** (J.A.223)		Not being medicated	mother to get doctors and hospitals.
The defendant is also **on social security disability due to mental health diagnoses and cognitive disabilities** (J.A.223)	Mother	Unknown	**NO.** Could have been subpoenaed and was not by either counsel
However, according to a motion dated October 16, 2017, on September 15, 2017, staff with the Alexandria Sheriff's Office reportedly observed the defendant "eating and smearing his own	Mother/Jail Sheriff	**Prescribed Remeron** in June 2017	**NO.** Could have been subpoenaed and was not by either counsel **NO:** Side effects of medication not explored by

feces around his jail cell." When mental health staff attempted to interview him, the defendant refused. (J.A.230)			either counsel NO: witnesses subpoenaed
While BANGURA was at FMC Devens Massachusetts, he stated he had trouble sleeping. While he did not appear to be experiencing auditory hallucinations, he stated he had recently heard voices which he described as "tiny screams." He also reported having a "friend named Thomas that no one ever sees." The defend expressed feelings of paranoia that "someone will bother him." BANGURA reported he had been prescribed **Remeron** in June 2017, which he continued to take at the time of admission. (J.A.339)	Psychological report		**NO.** Could have been subpoenaed and was not by either counsel **NO.** Did not subpoena evaluator **NO.** Did not ask for 2nd Opinion or evaluation.

The defendant was placed on the semi-locked mental health unit and his medication was changed. He was seen by his treating psychiatrist on November 9, 2017, at which time he was prescribed the antipsychotic medication **Risperdal** based on his self-report of auditory hallucinations. He was prescribed hydroxyzine for medication side-effects. (J.A.339)	Psychological report	**Risperdal** Risperdal (**risperidone**) is an **antipsychotic medicine** that works by changing the effects of chemicals in the brain. It is used to treat **schizophrenia** in adults and children who are at least 13 It is also used to treat symptoms of **bipolar disorder** (manic depression) in adults and children who are at least 10 years old.	**NO.** Could have been subpoenaed and was not by either counsel **NO.** Did not subpoena evaluator **NO.** Did not ask for 2nd Opinion or evaluation. NO: did not explore behavior at FMC through other treating individuals, nurses, tech. **NO:** Side effects of medication not explored by either counsel. **NO:** medication given at evaluation hospital not explored by either counsel.

In *Martin v. Barrett*, 619 S.E.2d 656 (Ga. 2005). Counsel was ineffective when counsel failed to seek to obtain the records or to request the assistance of an expert despite counsel's knowledge that the defendant had been hospitalized for treatment of mental illness.

In *Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986) Counsel was ineffective for failure to present any evidence from a mental health expert as to the defendant's mitigation was "professionally unreasonable" and "prejudicial." *Id.* at 1103. In *Richards v. Quarterman*, 566 F.3d 553, (5th Cir. Apr. 27, 2009) Counsel was ineffective failing to put into evidence the defendant's VA medical records to establish the defendant's physical inability to commit the charged acts. Finally, counsel was ineffective in failing to interview important witnesses prior to trial. "There is no excuse for [counsel's] failure to interview in advance of trial the important witnesses." In *Miller v. Dretke*, 420 F.3d 356 (5th Cir. 2005). Counsel was ineffective because he was aware of the defendant's mental and emotional problems but did not investigated further and made no effort to call the defendant's doctors as witnesses. In *Profitt v. Waldron*, 831 F.2d 1245 (5th Cir. 1987) Counsel was ineffective for failing to investigate the mental health history of the defendant who counsel knew had escaped from a mental health institution in Idaho. In *Bouillon v. Collins*, 907 F.2d 589 (5th Cir. 1990), Counsel was ineffective for failing to investigate his incompetency and insanity. Counsel's lack of investigation including asking for a defense evaluation "fell below reason-able professional standards." *Id.*

In *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). Counsel failed to

conduct a thorough investigation concerning mental health. "Even though [the defendant] refused to speak to his counsel, [counsel] still had an independent duty to investigate the facts of his case and possible mitigation evidence." In *Deutscher v. Whitley*, 884 F.2d 1152 (9th Cir. 1989) Counsel ineffective because he failed to present psychiatric testimony about his client's mental impairment in mitigation. Counsel knew his client had a history of mental difficulties, but he did not conduct any investigation of them when there was a substantial mental illness history.

In *Jacobs v. Horn*, 395 F.3d 92 (3rd Cir. 2005). Counsel was ineffective for failing to adequately investigate, prepare, and present mental health evidence in support of his diminished capacity defense during the trial. "Counsel did not question any of [the defendant's] family members or friends regarding his childhood, background, or mental health history, or obtain any medical records demonstrating mental deficiencies."

In *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991) Counsel was ineffective because for not presenting any evidence of Brewer's mental history at the capital penalty phase. *Id.* at 857 quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989).

In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) Counsel was ineffective for failing to investigate Blanco's mental history, presented no mitigation, and watched their client be sentenced to death. Counsel did not procure a psychiatric evaluation of the defendant; instead, counsel informed the trial judge "after a brief discussion with Blanco that no mental health mitigation evidence

existed." *Id.* at 1503. In *Cunningham v. Zant*, 928 F.2d 1006, 1017-18 (11th Cir. 1991) Counsel ineffective for failing to introduce evidence into the capital penalty phase as to his client's mild mental retardation, his medical records, headaches from a surgically implanted plate in Cunningham's head.

In *State v. Davis*, 85 P.3d 1164 (Kan. 2004). Counsel ineffective *for failing to seek a competence evaluation and failing to understand and adequately present a mental state defense.* The defendant suffers from schizophrenia and had been committed to psychiatric hospitals 31 times since age 13.

Neither of BANGURA's counsels investigated his mental state. Additionally, second trial counsel could have countered the FMC report by cross examination or asking for a second review of the raw data. None of which he did.

QUESTION II CONCLUSION

The 4th Circuit erred when it failed to find both Trial counsels were ineffective for failing to investigate witnesses, seek records or request psychological evaluation for BANGURA in violation of BANGURA's Sixth Amendment right to effective assistance of counsel.

QUESTION III

I. THE 4TH CIRCUIT BY NOT FINDING THAT ADDING A 2-LEVEL ENHANCEMENT FOR OBSTRUCTION OF JUSTICE VIOLATED A CONSTITUTIONAL RIGHT.

SUMMARY OF ARGUMENT

The 4th Circuit erred when it did not overturn the obstruction by stating BANGURA feigned incompetency despite a lifetime of mental health illness. As the

court sentenced BANGURA on a variant sentence below the guidelines, BANGURA asks the court only to rule on the court's application of a 2-level enhancement for *Obstruction of Justice* based on the facts of this matter.

ARGUMENT

At sentencing, BANGURA's counsel objected to an upward adjustment for *Obstruction of Justice*. (J.A.280). BANGURA's counsel found the other adjustments assessed in his offense level were properly assessed except for the adjustment for obstruction of justice pursuant to USSG § 3C1.1. Second trial counsel specifically argued that the PSR assessed that BANGURA's obstructed justice due to the results of a competency evaluation. (J.A.280). According to the PSR BANGURA obstructed the sentencing phase because he was adjudged to be malingering symptoms of mental illness in an effort to manipulate the outcome of his case. (J.A.281).

The PSR opined that BANGURA is not suffering from a mental illness rendering him incompetent. (J.A.273). Furthermore Dr. Channell stated that BANGURA was likely misdiagnosed as being bi-polar and having schizophrenia years before by other doctors and professionals. (J.A.274). However, the defendant was previously diagnosed as being bi-polar and reported hearing voices in a foreign language in as early as 2006. (J.A.274). These findings were by medical personnel and were unrelated to any legal or criminal jeopardy. Moreover, the decision to seek a mental competency evaluation was not the defendant's decision but second trial counsels. (J.A.274).

At the sentencing hearing, BANGURA's second trial counsel stated to the court that BANGURA had not been able to help him in this matter due to his mental state. The district court found that with respect to the 2-point proposed enhancement for the willful obstruction of justice, that enhancement applies to the entire process of prosecution from not only the actual investigation of prosecution but also the sentencing and concluded the 2-level enhancement was appropriate. (J.A.285). The court did state it would consider the evidence and the information it has with respect to the long history of mental health issues that Mr. BANGURA has experienced. (J.A.285). *(BANGURA's second trial counsel put on no evidence at sentencing and this was ineffective assistance as argued in Question II.)*

The district court erred when it placed this enhancement on BANGURA. According to the federal sentencing guidelines manual discussing §3C1.1, this enhancement is limited and cannot be applied globally.[9] This provision is not intended to punish a defendant for the exercise of a constitutional right and determining competency is a constitutionally protected right.

A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. BANGURA was punished for "faking" a mental illness and obstructing by not talking to the probation officer with his first counsel. [10]

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[9] https://www.ussc.gov/guidelines/2018-guidelines-manual §3C1.1
[10] *Id.*

It was error for the court to add the obstruction of justice enhancement in this matter based on these facts and asks this Court to reduce the sentencing level 2-levels from the variant imposed offense level of 34 to an offense level of 32. Thereby reducing BANGURA's sentence to criminal category II with an offense level of 32 for a sentence within 135-168 months.

QUESTION III CONCLUSION

BANGURA states that the 4th Circuit erred and asks that his case be dismissed and or remanded based on the arguments in **QUESTION I and II**. In the alternative, BANGURA asks for a review of a narrow issue and a reduction in his sentence. As the court sentenced BANGURA on a variant sentence below the guidelines, BANGURA asks the court only to rule on the court's application of a 2-level enhancement for *Obstruction of Justice* based on the facts of this matter. BANGURA contends its application was violation of a constitutional right as the court based the enhancement on BANGURA not talking to the probation officer and on his filing of the motion to withdraw the guilty plea.

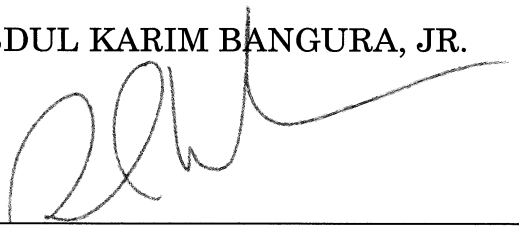
PETITION CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted on the issues stated above.

Dated: April 30, 2019

Respectfully submitted,

ABDUL KARIM BANGURA, JR.



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Attorney of Record for the
ABDUL KARIM BANGURA, JR

NO. _____

In The
Supreme Court of the United States

ABDUL KARIM BANGURA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
ABDUL KARIM BANGURA

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A

In The U.S. Court of Appeals for the Fourth Circuit

No. 18-4514 *U.S. v. Abdul Karim Bangura, Jr.*

Unpublished Opinion

Decided April 5, 2019

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4514

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ABDUL KARIM BANGURA, a/k/a AJ,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cr-00080-AJT-2)

Submitted: March 28, 2019 Decided: April 5, 2019

Before GREGORY, Chief Judge, and THACKER and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Rebecca Sue Colaw, REBECCA S. COLAW, PC, Suffolk, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Maureen C. Cain, Assistant United States Attorney, Kyle P. Reynolds, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

In June 2017, a federal grand jury returned a superseding indictment charging Abdul Karim Bangura with four counts stemming from his sexual exploitation of a 15-year-old girl: conspiracy to engage in sex trafficking of a minor, in violation of 18 U.S.C. § 1594(c) (2012) (Count 1); sex trafficking of a minor, in violation of 18 U.S.C. §§ 1591(a)(1), (b)(2), (c) & 2 (2012) (Count 2); transportation of a minor with intent to engage in prostitution, in violation of 18 U.S.C. § 2423(a) (2012) (Count 3); and production of child pornography, in violation of 18 U.S.C. § 2251(a) (2012) (Count 4). After jury selection on the day the trial was set to commence, Bangura entered a guilty plea, without a plea agreement, to all four counts. Five weeks later, Bangura fired his court-appointed attorney, and prison guards saw him engaging in bizarre behavior.

The district court granted counsel's motion to withdraw and appointed new counsel who filed a successful motion for a competency evaluation. After a months-long evaluation at the Federal Medical Center in Devens, Massachusetts ("FMC Devens"), Dr. Shawn E. Channell, a forensic psychologist, diagnosed Bangura with malingering and antisocial personality disorder. Dr. Channell concluded that Bangura "deliberately malingered symptoms of mental illness in order to manipulate the outcome of his legal case." (J.A. 345).[1] He further determined that Bangura was "not suffering from a mental illness rendering him mentally incompetent to the extent he is unable to understand the nature and consequences of the proceedings against him or to assist in his defense." (J.A.

[1] Citations to the "J.A." refer to the joint appendix submitted by the parties.

345). Therefore, Dr. Channell concluded that Bangura was competent for purposes of the legal proceedings.

The district court set the case for sentencing. Bangura then moved to withdraw his guilty plea on the ground that he was not competent and hence could not have knowingly and voluntarily pled guilty. Following a hearing, the district court denied the withdrawal motion. The court subsequently sentenced Bangura to 186 months' imprisonment, a significant downward variance from his Sentencing Guidelines range of life in prison. Bangura timely appealed.

On appeal, Bangura first argues that the district court erred in denying his motion to withdraw his guilty plea. Second, he claims that he was denied effective assistance of counsel. Finally, Bangura contends that the district court erred in applying a two-level enhancement for obstruction of justice. For the reasons that follow, we affirm.

I.

Bangura asserts that the district court erred in denying his motion to withdraw his guilty plea, arguing that, based on Bangura's mental health history—which his first trial counsel failed to investigate—his guilty plea was not knowing and voluntary. We review for abuse of discretion the denial of a motion to withdraw a guilty plea. *United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012). To withdraw a guilty plea prior to sentencing, a defendant must "show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "The defendant bears the burden of demonstrating that withdrawal should be granted." *United States v. Thompson-Riviere*, 561 F.3d 345, 348 (4th Cir. 2009) (alteration and internal quotation marks omitted).

In deciding whether to grant a motion to withdraw a guilty plea, the district court typically considers the following six factors announced in *United States v. Moore*, 931 F.2d 245 (4th Cir. 1991) (the "*Moore* factors"):

> (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between the entering of the plea and the filing of the motion to withdraw the plea; (4) whether the defendant had the close assistance of competent counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether it will inconvenience the court and waste judicial resources.

Nicholson, 676 F.3d at 388 (citing *Moore*, 931 F.2d at 248). Although the district court did not discernibly step through all of the *Moore* factors, we conclude that it did not abuse its discretion in determining that Bangura failed to establish grounds for withdrawing his guilty plea.

With regard to the first *Moore* factor, we closely scrutinize the plea colloquy and, if the Fed. R. Crim. P. 11 proceeding was adequate, attach a strong presumption that the plea is final and binding. *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) (en banc). Here, the district court substantially complied with Rule 11 in accepting Bangura's guilty plea, creating a strong presumption that his plea was final and binding.

Bangura challenges the adequacy of the district court's inquiry into his medications and mental health. Prior to accepting a defendant's guilty plea, it is the responsibility of the court to determine that the defendant is competent to enter the plea. *United States v. Damon*, 191 F.3d 561, 564 (4th Cir. 1999). The standard for competence to plead guilty "is the same as that for competence to stand trial: whether the defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of

rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *United States v. Moussaoui*, 591 F.3d 263, 291 (4th Cir. 2010) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam)). Rule 11 requires the court to personally inform the defendant of, and ensure he understands, the possible consequences of pleading guilty and the nature of the charges he is facing. *Damon*, 191 F.3d at 564. Thus, when an answer given by the defendant during a plea colloquy "raises questions about the defendant's state of mind, the court must broaden its inquiry to satisfy itself that the plea is being made knowingly and voluntarily." *Id.* at 565.

Throughout the Rule 11 hearing, Bangura was cooperative and gave responsive answers to the questions posed by the court. Bangura represented to the court that he was not under the influence of any drug or medication that affected his ability to understand the charges or the nature of the proceedings and that he was receiving care for a mental health condition that did not affect his ability to understand the charges or the nature of the proceedings. Bangura contends on appeal that the court should have further pursued this issue by asking him to identify the mental condition for which he was receiving treatment and whether there were medicines he was supposed to be taking and whether he was properly medicated in jail.

As far as medications, Bangura had already informed the court that he was not taking any drugs or medicine that affected his ability to understand the proceedings. The court followed up Bangura's affirmation that he was under medical care for a mental health condition by asking Bangura whether that condition affected his ability to

understand the proceedings, and Bangura answered that it did not. The court then asked counsel if Bangura was competent to enter his plea, which counsel answered that he was. No more was required of the court, and we conclude that Bangura has not offered credible evidence that his plea was not knowing and voluntary.

With respect to the second *Moore* factor, to credibly assert legal innocence, a defendant must "present evidence that (1) has the quality or power of inspiring belief, and (2) tends to defeat the elements in the government's prima facie case or to make out a successful affirmative defense." *Thompson-Riviere*, 561 F.3d at 353 (citations and internal quotation marks omitted). In this case, there was overwhelming evidence of Bangura's guilt of all charges, including Bangura's own *Mirandized*[2] confession and the victim's statement, which was corroborated by independent evidence such as text messages and a video recording of sex acts Bangura engaged in with the victim. Bangura argues that, in seeking to withdraw his guilty plea, his second attorney could not determine whether a claim of legal innocence could be presented to the court because of Bangura's "mental infirmities." However, Bangura's competency evaluation indicated that he was malingering the symptoms of mental illness. Bangura did not credibly assert legal innocence.

Turning to the third *Moore* factor, delay, Bangura pled guilty on August 8, 2017, but did not move to withdraw his guilty plea until May 7, 2018, nine months after entering his plea. Bangura's appellate counsel asserts that the delay was only 59 days,

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

arguing that the time between the filing of the motion for a competency hearing and the completion of the competency evaluation should be excluded. Because Bangura was found to be malingering his symptoms of mental illness, we conclude that this time is not excludable. In any event, we have found that delays of as little as six weeks—less time than the delay conceded by Bangura in this case—are long enough to militate against the granting of a defendant's motion to withdraw. *Moore*, 931 F.2d at 248.

As to the fourth *Moore* factor, Bangura claims that he did not receive the close assistance of competent counsel during the plea process.

> [A] defendant seeking to establish that he is entitled to withdraw his plea because he did not receive close assistance of counsel must demonstrate that counsel performed deficiently and that, but for counsel's errors, the defendant would not have pled guilty and would instead have insisted on proceeding to trial.

United States v. Faris, 388 F.3d 452, 459 (4th Cir. 2004).

At his Rule 11 hearing, Bangura expressed satisfaction, under oath, with the services of the attorney who represented him through the guilty plea stage of the proceedings. *See Christian v. Ballard*, 792 F.3d 427, 444 (4th Cir. 2015) (recognizing that "solemn declarations in open court carry a strong presumption of verity" (alterations and internal quotation marks omitted)). On appeal, Bangura contends that counsel performed deficiently by failing to fully investigate his mental health history. However, the record on appeal reveals no basis for counsel to question his client's competency through the guilty plea stage of the proceedings. Bangura also alleges counsel's performance was deficient because he failed to interview witnesses prior to the entry of the guilty plea, but the only witness Bangura identifies is his mother. Although

Bangura's mother could have provided information about her son's mental health, Bangura's conduct gave counsel no reason to question her about Bangura's competency. We conclude that Bangura failed to credibly assert that he was deprived close assistance of competent counsel.

Finally, the fifth and sixth *Moore* factors also supported the denial of Bangura's motion to withdraw his guilty plea. Prejudice to the Government and a waste of judicial resources are inherent in allowing the withdrawal of a guilty plea, *see United States v. Sparks*, 67 F.3d 1145, 1154 n.5 (4th Cir. 1995) (noting that withdrawal of plea "almost invariably" results in judicial waste and prejudice to Government), and are apparent here, where Bangura waited until the day of trial to enter his guilty plea. Accordingly, we conclude that the district court did not abuse its discretion in denying Bangura's motion to withdraw his guilty plea.

II.

Next, Bangura argues that both of his trial attorneys provided ineffective assistance of counsel. He alleges both attorneys were ineffective for failing to fully investigate his mental health history and that the attorney who was appointed after Bangura pled guilty and represented him through sentencing was ineffective for failing to (1) get a second opinion concerning the competency evaluation performed at FMC Devens; and (2) cross-examine the forensic psychologist who prepared the report.

To succeed on a claim of ineffective assistance, Bangura must show that trial counsel's performance was constitutionally deficient and that such deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the

performance prong, Bangura must demonstrate that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. With regard to the prejudice prong, Bangura must demonstrate "that there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Claims of ineffective assistance generally are not cognizable on direct appeal. *United States v. Maynes*, 880 F.3d 110, 113 n.1 (4th Cir. 2018). To allow for adequate development of the record, a defendant must bring his ineffective assistance claims in a 28 U.S.C. § 2255 (2012) motion. *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997). An exception exists, however, where "the record conclusively shows ineffective assistance." *Id.*

We conclude that it does not conclusively appear on the face of the record that Bangura was denied effective assistance of trial counsel. Accordingly, Bangura should pursue these claims, if at all, in a § 2255 motion.

III.

Finally, Bangura challenges the district court's application of an obstruction of justice enhancement in calculating his Sentencing Guidelines range. "In assessing whether a sentencing court has properly applied the Guidelines, we review factual findings for clear error and legal conclusions de novo." *United States v. Thompson*, 874 F.3d 412, 414 (4th Cir. 2017) (internal quotation marks omitted), *cert. denied*, 138 S. Ct. 1179 (2018); *see United States v. Andrews*, 808 F.3d 964, 970 (4th Cir. 2015) (applying

clear error standard in reviewing district court's imposition of obstruction of justice enhancement). "Under the clearly erroneous standard, a district court's determination should be affirmed unless the [c]ourt is left with the definite and firm conviction that a mistake has been committed." *Padilla v. Troxell*, 850 F.3d 168, 174 (4th Cir. 2017) (internal quotation marks omitted).

The Guidelines provide for a two-level enhancement:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to . . . the defendant's offense of conviction and any relevant conduct.

U.S. Sentencing Guidelines Manual § 3C1.1 (2016). Here, the court applied the enhancement on the ground that Bangura malingered symptoms of mental illness throughout the sentencing phase of the proceedings.

Bangura argues that the enhancement was improper because it was his attorney, rather than Bangura himself, who requested the competency hearing. But this argument neglects to consider that counsel requested the competency evaluation only because of Bangura's behavior, and the forensic report following Bangura's competency evaluation determined that Bangura deliberately malingered his symptoms of mental illness to try to manipulate the outcome of his case. On this record, we conclude that the district court did not clearly err in applying the obstruction of justice enhancement. *See United States v. Wilbourn*, 778 F.3d 682, 684 (7th Cir. 2015) (rejecting defendant's argument that the obstruction enhancement should not apply because counsel—not defendant—requested

the evaluation; court found that if defendant had not lied to the psychologist, the psychologist could have quickly determined that defendant was competent).

Bangura also contends that the obstruction of justice enhancement is not intended to punish a defendant for exercising his constitutional right to a competency hearing. However:

> [A]pplying the obstruction enhancement to defendants who willfully feign incompetency in order to avoid trial and punishment does not unconstitutionally chill a defendant's right to seek a competency hearing. While a criminal defendant possesses a constitutional right to competency hearing if a bona fide doubt exists as to his competency, he surely does not have the right to create a doubt as to his competency or to increase the chances that he will be found incompetent by feigning mental illness.

United States v. Patti, 337 F.3d 1317, 1325 (11th Cir. 2003) (quoting *United States v. Greer*, 158 F.3d 229, 237-38 (5th Cir. 1998)). Under the facts of this case, there was no constitutional violation concerning the obstruction of justice enhancement.

Accordingly, we affirm the criminal judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

In The U.S. Court of Appeals for the Fourth Circuit

No. 18-4514 *U.S. v. Abdul Karim Bangura, Jr.*

Unpublished Opinion

Decided April 5, 2019

FILED: April 5, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4514
(1:17-cr-00080-AJT-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ABDUL KARIM BANGURA, a/k/a AJ

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix C

In The U.S. District Court for the Eastern District of Virginia

No. 1:17-CR-00080-002 *U.S. v. Abdul Karim Bangura, Jr.*

Judgment in a Criminal Case

Filed July 20, 2018

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA
v.

Case Number: 1:17-CR-00080-002

Abdul Karim Bangura, Jr.
a/k/a AJ
Defendant.

USM Number: 90995-083
Defendant's Attorney: Donald Harris, Esquire

JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Counts 1s, 2s, 3s and 4s of the Superseding Indictment.

Accordingly, the defendant is adjudicated guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. §1594(c)	Conspiracy to Commit Sex Trafficking of a Minor	Felony	2-23-2017	1s
18 U.S.C. §§§§1591(a)(1), (b)(2), (c) and 2	Sex Trafficking of a Minor	Felony	2-23-2017	2s
18 U.S.C. §2423(a)	Transportation of a Minor With Intent to Engage in Prostitution	Felony	2-21-2017	3s
18 U.S.C. §2251(a)	Production of Child Pornography	Felony	4-14-2017	4s

As pronounced on July 20th, 2018, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signed this 20th day of July, 2018.

/s/
Anthony J. Trenga
United States District Judge

Defendant's Name: **Bangura, Jr., Abdul Karim**
Case Number: **1:17-CR-00080-002**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ONE HUNDRED EIGHTY-SIX (186) MONTHS, with credit for time served. This term of imprisonment consists of a term of ONE HUNDRED TWENTY (120) MONTHS on Count 1s, a term ONE HUNDRED TWENTY (120) MONTHS on Count 2s, a term of ONE HUNDRED TWENTY (120) MONTHS on Count 3s, and a term of ONE HUNDRED EIGHTY-SIX (186) MONTHS on Count 4s, all to be served concurrently

The Court makes the following recommendations to the Bureau of Prisons:

1) that the defendant be designated to FCC Petersburg, Virginia, if available and appropriate.
2) that the defendant be evaluated and if appropriate, participate in the BOP 500 Hour Residential Drug Abuse Treatment Program (RDAP).

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

RETURN

I have executed this judgment as follows: _____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Defendant's Name: **Bangura, Jr., Abdul Karim**
Case Number: **1:17-CR-00080-002**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of TEN (10) YEARS. This term consists of a term of TEN (10) YEARS on Count 1s, a term of TEN (10) YEARS on Count 2s, a term of TEN (1) YEARS on Count 3s, and a term of TEN (10) YEARS on Count 4s, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of Supervised Release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant's Name: **Bangura, Jr., Abdul Karim**
Case Number: **1:17-CR-00080-002**

SPECIAL CONDITIONS OF SUPERVISION

While on Supervised Release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1. The defendant shall participate in a program approved by the United States Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with partial cost to be paid by the defendant, all as directed by the Probation Officer.

2. The defendant shall participate in a program approved by the United States Probation Office for mental health treatment, to include anger management. The costs of these programs are to be paid by the defendant, as directed by the probation officer. The defendant shall waive all rights of confidentiality regarding mental health treatment to allow the release of information to the United States Probation Office and authorize communication between the probation officer and the treatment provider.

3. The defendant shall have no contact with minors unless supervised by a competent, informed adult, approved in advance by the probation officer.

4. The defendant shall not accept any paid or volunteer positions involving children.

5. The defendant shall comply with the requirements of the computer monitoring program as administered by the probation office. The defendant shall consent to the installation of computer monitoring software on any computer to which the defendant has access. Installation shall be performed by the probation officer. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. The defendant shall also notify others of the existence of the monitoring software. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent the software. The costs of the monitoring shall be paid by the defendant.

6. Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, according to Federal and State law and as directed by the probation officer.

7. The defendant shall pay restitution to be determined by the Court at a rate of no less than $50 per month, to begin 60 days upon release from imprisonment.

Defendant's Name: **Bangura, Jr., Abdul Karim**
Case Number: **1:17-CR-00080-002**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	Count	Assessment	Fine	Restitution
	1s	$100.00	$0.00	$0.00
	2s	$100.00	$0.00	$700.00
	3s	$100.00	$0.00	$0.00
	4s	$100.00	$0.00	$0.00
TOTALS:		**$400.00**	**$0.00**	**$700.00**

FINES

No fines have been imposed in this case.

RESTITUTION

See attached Restitution Judgment filed on July 20th, 2018

Defendant's Name: **Bangura, Jr., Abdul Karim**
Case Number: **1:17-CR-00080-002**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The special assessment and restitution shall be due in full immediately.

Interest on the restitution is waived. On any unpaid balance, the defendant shall pay to the Clerk at least $50.00 per month beginning 60 days upon release from imprisonment. The court reserves the option to alter this amount, depending upon defendant's financial circumstances at the time of supervised release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.