IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

NEIL TIMOTHY AHO,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Issue 1: Whether the appellate court erred in not finding that the district court abused its discretion by denying Petitioner's motion to withdraw his guilty plea made prior to sentencing based upon an incomplete understanding of the sentencing guidelines, failure to retain a forensic computer expert and a change in the sentencing guidelines.

Issue 2: Whether the appellate court erred in not finding that district court erred in sentencing Petitioner including a +2 level guideline adjustment for obstruction of justice based upon his testimony during a hearing on his motion to vacate his guilty plea that he did not fully understand his sentencing guideline exposure and the discovery based upon his attorney-client conferences.

- Prefix-

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The Petitioner, NEIL TIMOTHY AHO, respectfully prays that a writ of certiorari issue to review the judgment-order of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 2019, Case No. 18-12455-D; Southern District of Florida Case Number 15-cr-60225-KAM.

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OPINION BELOW

On June 27, 2019, the Eleventh Circuit Court of Appeals entered its opinion-order affirming Petitioner's convictions and sentence, Case No. 18-12455-D. A copy of the opinion-order is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has been deprived of his liberty without due process of law as guaranteed by the Sixth and Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was the Defendant in the District Court and will be referred to by name or as the petitioner. The respondent, the Untied States of America will be referred to as the government. The record will be noted by reference to the volume number, docket entry number of the Record on Appeal as prescribed by the rules of this Court. References to the transcripts will be referred to by the docket entry number and the page of the transcript.

The petitioner is incarcerated and is serving his sentence in the Bureau of Prisons at the time of this writing.

Course of the Proceedings and Disposition in the Court Below

Petitioner was originally arrested in the Northern District of California on the date August 25, 2015 pursuant to an arrest warrant issued by the Untied States District Court for the Southern District of Florida on August 20, 2015 (DE 5-2). The warrant was predicated upon a complaint also filed in the District Court on August 20, 2015 alleging violations of Title 18 U.S.C. §2252(a)(2), Distribution and Receipt of Child Pornography; and, 18 U.S.C. §2252(a)(4)(B) Possession of Child Pornography (DE

3). Petitioner appeared in the United States District Court in the Northern District of California and waived his right to an identity hearing and a detention hearing and stipulated to the transfer of the proceedings to the Southern District of Florida on August 25, 2015 (DE 5-4). On September 10, 2015 an indictment was returned in the Southern District of Florida alleging in Count One thereof that: between in or about February, 2012, and August 25, 2015, in Broward County, in the Southern District of Florida, and elsewhere, the defendant, did knowingly distribute any visual depiction, using any means and facility of interstate and foreign commerce, and that has been shipped and transported in and affecting interstate and foreign commerce by any means. Including by computer, and the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, as defined in Title 18, United States Code, Section §2256(2), and such visual depiction is of such conduct, in violation of Title 18, United States Codes Sections §2252(2) and (b)(1). Pursuant to Title 18, United States Code, §2252(b)(2). It was further alleged that this violation involved a visual depiction of a prepubescent minor or a minor who had not attained twelve (12) years of age. Count Two of the indictment alleged that between in or about

February, 2012, and August 25, 2015, in Broward County, in the Southern District of Florida, and elsewhere, the defendant, did knowingly receive any visual depiction, using any means and facility of interstate and foreign commerce, and that has been shipped and transported in and affecting interstate and foreign commerce, by any means, including by computer, and the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, as defined in Title 18, U.S.C. §2256(2), and such visual depiction is of such conduct, in violation of Title 18, U.S.C. §2252(a)(2) and (b)(1). Pursuant to Title 18, U.S.C. §2252(b)(2), it was further alleged that this violation involved a visual depiction of a prepubescent minor or a minor who had not attained twelve (12) years of age. Count Three of the indictment alleged that on or about February 3, 2012, in Broward County, in the Southern District of Florida, the defendant, did knowingly possess certain materials specifically, one (1) Toshiba Qosmio laptop computer, one (1) Dell Optiplex desktop computer, and a Seagate Barracuda hard drive, one (1) Seagate Free agent external hard drive, that contained any visual depiction that had been shipped using a means of interstate and foreign commerce, and the production of such visual depiction having involved the use of a minor engaged

in sexually explicit conduct, as defined in Title 18, U.S.C. § 2256(2), and such visual depiction was of such conduct, in violation of Title 1 8, U.S.C. §2252(a)(4)(B) (DE 8).

On September 16, 2015, petitioner made his first appearance in the Southern District of Florida and entered pleas of not guilty at his arraignment hearing (DE 10). On September 22, 2015, petitioner appeared at his detention hearing and was ordered detained without bail (DE 18). On September 25, 2015, Attorney Michael Salnick, filed his notice of appearance as trial counsel for petitioner (DE 19). On September 29, 2015 the Federal Public Defender was terminated as counsel for petitioner (DE 23). On September 29, 2015, the Government served notice of response to the standing discovery order (DE 24). On October 15, 2015, the original jury trial was ordered continued and rescheduled for February 22, 2016 (DE 26). On February 11, 2016, Petitioner appeared before the Magistrate Court and entered a plea of guilty to Count One of the indictment (DE 29). The guilty plea was entered pursuant to a written Plea Agreement (DE 30) and Stipulated Factual Basis (DE 31) both filed on February 21, 2016. The terms of the plea agreement included in paragraph 2 thereof a dismissal of Counts Two and Three of the indictment after

sentencing; a conditional provision for recommendation of acceptance of responsibility in paragraph 7 thereof, and a waiver of certain appellate rights in paragraph 9 thereof, a forfeiture provision in paragraph 10 thereof, and a sex offender registration provision in paragraphs 11 and 12 thereof (DE 30).

On February 29, 2016, 18 days after his guilty plea was entered, Petitioner hand wrote, signed and filed his letter motion to change his guilty plea back to his original plea of not guilty, which motion alleged that he was threatened by the Government that additional charges would be filed if he did not plead guilty (DE 34).

On March 1, 2016, the District Court denied petitioner's letter motion without prejudice, citing the pertinent local rule of procedure requiring a counseled litigant to file all motions through his counsel of record (at that time Salnick) (DE 35).

On March 3, 2016, petitioner filed a second motion to withdraw his guilty plea (DE 37).

On March 14, 2016, petitioner filed a third motion to withdraw his guilty plea (DE 38).

On March 14, 2016, petitioner filed a motion to dismiss his counsel of record Michael Salnick (DE 39).

On March 15, 2016, the District Court scheduled a hearing on petitioner's motions for March 30, 2016.

On March 17, 2016, 18 days after petitioner's first motion to withdraw his guilty plea, petitioner's Presentence Investigation Report was filed and served (DE 42).

On March 21, 2016, a transcript of petitioner's change of plea hearing was filed (DE 43).

On March 30, 2016, the District Court heard petitioner's motions and granted attorney Michael Salnick's motion to withdraw as counsel (DE 44).

On March 31, 2016, the Federal Public Defender was again appointed as counsel for petitioner (DE 46). On April 4, 2016 petitioner filed his motion to continue sentencing hearing (DE 47).

On April 15, 2016, petitioner's sentencing hearing was continued and rescheduled for July 15, 2016 (DE 48).

On April 25, 2016, petitioner, through the Assistant Federal Public Defender, filed his fourth motion to withdraw his guilty plea, asserting that: It is Defendant's position that counsel did not adequately review the Sentencing Guidelines with him prior to the plea, and did not explain the nature of the enhancements found at U.S.S.G. § 2G2.2, or how those enhancements would be

applied to the facts of his case. In fact, Defendant did not learn how the Guidelines would be apply to his case until after he plead guilty and arrived at FDC Miami, where he read the book "Busted by the Feds." Had he been fully informed of his probable sentencing range, Defendant would have proceeded to trial. Because Defendant's plea was not knowingly, intelligently and voluntarily entered into, he should be allowed to withdraw his guilty plea (quotation from paragraphs 2 and 3 of Petitioner's motion) (DE 51-1-2). On May 4, 2016, the Government filed a response to the Motion to Withdraw Guilty Plea, objecting thereto and further alleging that attorney Salnick would testify to facts contrary to those set forth in petitioner's motion (DE 56-8). On May 6, 2016, petitioner filed his letter motion to dismiss the Federal Public Defender as his counsel (DE 58). On May 9, 2016, the District Court convened a hearing on petitioner's request and thereafter, discharged the Federal Public defender and appointed attorney James Scott Benjamin as trial counsel for Petitioner pursuant to the Criminal Justice Act (DE 59 and DE 60). On June 16, 2016, the District Court entered an order granting petitioner's motion for funds to retain a mental health expert to assist the defense (DE 63).

On May 31, 2018, the District Court entered a written order denying petitioner's Motion to Withdraw Guilty Plea (DE 110). On June 1, 2018, the District Court held petitioner's sentencing hearing and thereafter imposed a sentence of 204 months as to Count One followed by supervised release for a term of life (DE 117). On June 9, 2018, petitioner timely filed his notice of appeal (DE 120).

Statement of the Facts

The facts on appeal arise from the record of the motions and responses to motions filed, the PSI report and the objections to the PSI report, and the transcripts of the change of plea, hearings on petitioner's motion to withdraw guilty plea, and sentencing proceedings. The specific evidence of the offense to which petitioner pleaded guilty was as follows, quoted from the Stipulated Factual Basis filed on February 11, 2016 and referenced during petitioner's guilty plea hearing:

"In 2012, the South Florida Internet Crimes Against Children (ICAC) Task Force began an investigation into the defendant's on-line activities. In February 2012, a task force detective with the Coral Springs Police Department was searching a law enforcement database that logs IP

addresses that are advertising child pornography tiles for download via Peer to Peer technology. Between the dates of November 2009 and December 2011, it was determined that a specific AT&T IP address was advertising over 150 unique images suspected of depicting child pornography. These devices were forensically examined by Broward Sheriff s Office (BSO) Computer Forensic Technicians (CFT's). The lead discovered "Anti-Forensic'' programs known as "Advantageclean'' and "TrueCrypt'' on a Seagate Barracuda hard drive. The CFT also recovered artifacts of the "Shareaza"' file sharing program on the Barracuda hard drive. The Shareaza program maintains several folders for data, one of which is for incomplete file downloads that were initiated by the user. According to the CFT'S forensic report, a Shareaza "incomplete'' file found on the defendant's Barracuda hard drive contained a partial file download that the CFT was able to play, This file was found to depict a prepubescent child engaged in sexual activity. The CFT also recovered search terms that the defendant had entered into Shareaza. One of the recovered search terms was "PTHC,'' which stands for pre-teen hard core. On the same Barracuda hard drive, the CFT located a zipped container which was encrypted and password protected. While unable to break the encryption at the time, the CFT was

able to see that a large number of files that had names indicative of child pornography were inside the container. In October 2012, Homeland Security Investigations (HS1) coordinated an international border search of the defendant upon his re-entry into the United States at John F. Kennedy International Airport in New York from Tokyo, Japan. A subsequent forensic search of the Toshiba Qosmio Laptop computer the defendant was carrying revealed that it was both password protected and the contents of the hard drive were encrypted using the TrueCrypt program. As with the Barracuda hard drive seized from the defendant's residence in February 2012, a forensic examination of the Toshiba laptop computer revealed evidence of the Shareaza file sharing program. The examination indicated that the defendant would place any downloaded files directly into an encrypted container that examiners were unable to access at the time. In March, 2015, law enforcement once again came across the defendant during an investigation into the trading of child pornography on the internet. Between the dates of March 14, 2015 and June 21 2015, law enforcement observed a Comcast IP address offering to share child pornography files via the Shareaza program. Subpoena results from Comcast identified the residence associated with that IP address as being located in Menlo Park,

California. On June 27, 2015, law enforcement was able to establish a connection to the Defendant's computer. Thereafter, law enforcement was able to download two complete child pornography files and several partial child pornography tiles from the defendant's computer. Each of the files contained videos of female children, who appear to be under the age of twelve (12), engaging in sexually explicit conduct with adult males.

In July 2015, the BSO CFT, working from mirror images of the Defendant's computer devices seized in 2012, was able to successfully circumvent the encryption software and access the material contained inside four of the encrypted containers. A large number of child pornography videos and images were recovered from inside the containers found on several of the computer devices belonging to the defendant. This includes: On August 25. 2015, a federal search warrant was executed at the defendant's Menlo Park. CA residence. During a forensic preview of the defendant's laptop computer conducted on that date, law enforcement recovered evidence of active installations of peer to peer software program s, specifically. Shareaza, as well as anti-forensic software, including Truecrypt and CC Cleaner. The foregoing events occurred in Broward County in the Southern District of Florida and elsewhere" (DE 31-1-6).

REASONS FOR GRANTING THE WRIT

Issue 1: Whether the appellate court erred in not finding that the district court abused its discretion by denying Petitioner's motion to withdraw his guilty plea made prior to sentencing based upon an incomplete understanding of the sentencing guidelines, failure to retain a forensic computer expert and a change in the sentencing guidelines.

Petitioner seeks certiorari review the appellate court's order declining to reverse the district court's refusal to allow him to withdraw his guilty plea.

A guilty plea operates as a waiver of constitutional rights, including the rights to a jury trial and against self-incrimination, and it is therefore valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005) citing, Brady v. United States, 397 U.S. 742, 748 (1970).

The 11th Circuit Court of Appeals precedent holds that Rule 11 imposes upon the district court the obligation and responsibility to conduct an inquiry into whether the defendant makes a knowing and voluntary guilty plea. United States v. Hernandez-Fraire, 208 F.3d 945, 949 (11th Cir. 2000). This inquiry "must address three core concerns

underlying Fed.R.Crim.P. 11 : (1) (hereinafter Rule 11) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea." Id. Failure to address any of these three core concerns, such that a defendant's substantial rights are affected, requires automatic reversal of the conviction and the opportunity to enter a plea anew. United States v. Siegel, 102 F.3d 477, 481 (11th Cir. 1996).

Under Rule 11, the district court had an affirmative duty to inform the accused of any possible maximum penalty and any mandatory minimum penalty he will be subjected to by pleading guilty, and further, must ensure that the defendant understands the sentencing range faced by virtue of the guilty plea. Fed. R. Crim. P. 11(b)(1)(H)-(I).

Although the United States Sentencing Guidelines are considered and applied in an advisory manner subsequent to the decision of this Court in United States v. Booker, 543 U.S. 220 (2005), district court is still required by statute to "consider" the advisory guidelines at sentencing, 18 U.S.C. § 3553(a)(4). This Court has interpreted this requirement as a direction that "district courts should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall v.

United States, 552 U.S. 38, 49 (2007). This Court holds that "A plea of guilty is more than an admission of conduct; it is a conviction." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Further, it is "a grave and solemn act to be accepted only with care and discernment." Brady v. United States, 397 U.S. 742, 748 (1970), and, "it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969).

These holdings direct the appellate and district court's consideration of the voluntariness of petitioner's guilty plea which is being analyzed within this appeal. A review of petitioner's guilty plea colloquy disclosed no apparent or overt suggestion that Petitioner was entering into a guilty plea and agreeing to receive the maximum 20 year (240 month) prison sentence. As computed based upon the Presentence Investigation Report determinations, Petitioner faced a total guideline offense level of 39, criminal history category I which translates to a range of 262-327 months imprisonment, the low end of which would be 22 months higher than his statutory maximum sentence of 20 years for the offense of conviction. During the change of plea hearing, the magistrate court, acting for the district

court, did query petitioner as to his understanding of the sentencing guidelines. This colloquy was as follows: "THE COURT: Now, your sentence will be determined by a combination of advisory sentencing guidelines, possible authorized departures from those guidelines, and other statutory sentencing factors. Have you and your attorney talked about how these advisory sentencing guidelines might apply to your case? THE DEFENDANT: Cursorily, yes.
THE COURT: You have?
THE DEFENDANT: Yes. (DE 43-15)."

Following the response using the term "cursorily", the magistrate court did not follow up or seek to explore in detail what Petitioner had meant when he described his consultations with his then counsel regarding the sentencing guidelines or express any concerns with petitioner's testimony that he had only discussed how the sentencing guidelines might apply to his case as on only a "cursorily" level. Where the low end of the ultimate advisory guideline range is 22 months in excess of the statutory maximum penalty of 20 years, most respectfully, a cursory attorney-client consultation cannot satisfy the requirements of this Court's decisions cited above. Under these circumstances, there would be no practical or logical reason for petitioner to enter into a plea agreement, sign

a stipulated factual proffer, waive his jury trial rights, and then plead guilty to the maximum available term of imprisonment, where he would have everything to gain and nothing to loose by proceeding to a jury trial instead. During his guilty plea colloquy with the court, petitioner and the court discussed the range of penalties on the record as follows:

"Q. Now, specifically in paragraph four of your plea agreement, it discusses the maximum and minimum terms. Paragraph four states as follows: The defendant also understands and acknowledges that, as to count one, the court must impose a minimum term of imprisonment of at least five years and may impose a statutory maximum term of imprisonment of up to 20 years; a mandatory minimum term of supervised release of at least five years up to a maximum term of life; a fine of up to $250,000 and an order of restitution. Do you understand that?

A. I do.

Q. So do you understand that you are facing a 20-year maximum prison sentence?

A. I do.

Q. And do you understand that you are facing a mandatory minimum term of imprisonment of at least five years?

A. Yes.

DE 43-11-12"

During the hearing on petitioner's motion with withdraw his guilty plea, the record testimony does not reflect any mention or consideration by petitioner or either his counsel or counsel for the government, or the witnesses, that he would be entering a plea to a guideline range in excess of the maximum penalty of 20 years in federal prison.

Petitioner's mother testified as follows:

"Q. During that time (the timeframe of the plea negotiations with the government), did Mr. Salnick communicate to you that that advisory guideline range would have been upwards in the 200-month range at the bottom of the guidelines?

A. I don't believe he did.

Q. How did he characterize the -- what his thoughts were as to what Neil was facing on a plea?

A. What he told me was as soon as he got the plea deal arranged with the prosecutor, he told me that it was -- he got the three charges reduced to one charge. He didn't say which charge. And when he said that he could -- thought he could get Neil under ten years, I immediately thought it was a possession

charge. I didn't realize it was distribution until he sent me the plea transcript. (DE 13)."

Petitioner's mothers testimony reflects that neither petitioner nor his family were advised of any realistic appraisal as to what to expect in relation to the application of the sentencing guidelines to petitioners sentence. Counsel advised her that his expectation was of a prison sentence below 10 years. She was never advised that Petitioners guideline range would exceed the 20 year maximum sentence. Additionally, as a result of this mistaken advice, she and her terminally-ill husband, pressured Petitioner to accept counsels advice and move forward by waiving his rights and pleading guilty.

Petitioner testified at the motion to vacate guilty plea hearing to the facts regarding the advice given to him by his counsel as follows:

"Q. And while you were at FDC, he brought it down there, and did you read every one of the four or 500 pages or how did it -- how did that examination in discovery go, could you explain to the Judge?

A. Okay. So I started flipping through the notebook. Gregory not really having -- not really having been active in the case, sat back and let me review it. He said, "Do you have any questions?" And I said, "Let me continue

reading." He started asking questions like just kind of having nothing to do with the case, things like, you know. He asked how is Thailand. He asked -- I asked him about supervised release and registration, just basic things; and his response

was, "The Government is going to be on you the rest of your life." That's it.

Q. About how long was he there with you, if you can recall? And try to be accurate.

A. I would say 15 minutes, maybe 20 tops.

Q. Did he leave you these four or 500 pages?

A. No.

Q. So you saw them, and then he left with them? (DE-132-34-35)

Q. So you have described the conversation as that he told you that he had an agreement with the Government to where you would plead to one count.

A. Right.

Q. Anything specific as to the guideline ranges or the guidelines that would be applicable to the plea in which he had verbally received from the Government?

A. None. (DE-132-44)

Q. I'm sorry. My question was -- I think you did answer it,

and it was unartful. So you are saying that the things we discussed about

possible defenses, you never even broached that subject matter with Mr. Salnick?

A. Right.

Q. Is that correct?

A. That's correct. (DE-132-47)

Q. Getting back to the discussions you did have with him, try to articulate, as best you can, what was said to you about taking a plea and the guideline impact of taking a plea before you actually went into Judge Matthewman and changed your plea.

A. There was nothing said about guideline impact. There was only mandatory minimum and maximum, which -- that's it.

Q. Did you ever get a possible guideline calculation score sheet that you discussed with Mr. Salnick?

A. No. (DE-132-48)

Q. Okay. In your plea colloquy with Judge Matthewman when asked about whether you went over the guidelines with Mr. Salnick, you used the word "cursorily." What did you mean with that?

A. "Cursorily" means a quick review, which, in my mind, was, well, we went over the mandatory minimums and

maximums, that was it. You know, it was quick; you know, it was quick, that was one and done.

Q. I'm sure Judge Marra is going to see the transcript of the colloquy before Judge Matthewman, but did Judge Matthewman ask you, "Well, what do you mean? Tell me exactly what you went over," or ask you any details to explain when you responded "cursorily"?

A. No. (DE-132 -51)

Q. Okay. Did Michael Salnick bring the 400 or three or 400 pages of discovery back to a facility where you were being housed and go over those with you personally after Greg had shown you those in those -- in that short time he was with you?

Q. All right. What is the significance of you reading some book at FDC about "gotten by the feds" or something else that was a book written about people incarcerated in federal custody?

A. So this occurred, I want to say, a week and a half after the -- a week and a half, two weeks after the plea colloquy where I was transferred down to Miami FDC. This book summarizes the enhancements, guidelines. It was also the first

time I had seen a sentencing table. So all of that was kind of all in one package, and that's -- that's right about the

time I was trying to, you know, communicate, get a hold of Michael.

Q. So you never saw the guideline book or the enhancements or the guideline table before you took a plea in this case?

A. No.

A. No.

"Q. Did you since learn, after the change of plea hearing took place, that there have been some changes in either case law or in the guidelines with regard to the distribution counts that you plead guilty to?

A. I have. (DE-132-58)"

"Q. Up until the time of the change of plea hearing, when you did change your plea, up until that time and before, was it ever discussed with you and Mr. Salnick or anybody from his office that the guideline range in this case could be up to and including 210 to 262 months?

A. No, except for the maximum 20, which I thought was a guideline at the time. (DE-132-58)"

At the continuation of the hearing the government called Michael Salnick, Petitioner's trial counsel when Petitioner entered his guilty plea who testified regarding the guideline consultation as follows:

"Q. Let me stop you for one second because maybe I didn't address that and I wanted to make sure I address that.

Going back to your initial discussions with the Defendant before you entered into this trial, this other trial, did you discuss the guidelines with the Defendant?

A. Absolutely. I told him that the guidelines are what govern the sentence in the sense that the guidelines are advisory, I told him clearly that the guidelines in pornography cases are high, they're excessive, I didn't agree with how high they were, and that you get points for a variety of different things under the guidelines, and that when the score finally comes out, it's going to come out a lot higher than the five-year mandatory minimum. I had made a distinction, and made sure that Mr. Aho understood, that in the best case scenario here, he was going to get five years. In the worst case scenario, he ought to assume he's going to get the top of the statutory sentence, which was 20 years. I never give a client an exact guideline number because that's inappropriate. Most judges ask did your lawyer do that you know, I think Judge Lock says if your lawyer did it,

that's a guess. So he knew that there was a five-year mandatory minimum and he knew that the guidelines would jack that up, because what I said to him was, we're going to file a motion for a variance, and I suggested to him that as a first offender, I thought that he was in front of

a very fair judge who would consider his background and hopefully we could be on the lower end, but, you know, never giving a number. (DE-114-49)

Q. And specifically, and I know you stated you went through these specific guidelines with him, and that's sort of where I drew you back, you actually, in your chron, note the different things you talked about with him, and these include these very specific guideline enhancements, correct?

A. Yes. You've got to remember, Mr. Aho was a very intelligent, knowledgeable guy, and he asked very specific questions, and as a result of those very specific questions I wanted to make sure that he got very specific answers. You couldn't say to Mr. Aho, well, your guidelines are going to be high, and he wouldn't accept that. I would assume he wouldn't accept that. So I explained to him that he could get certain enhancements, that he could get the enhancements that are normally consistent with cases like this and that's why they're written down here. You know, I said, hey, this is child pornography, you're going to get prepubescent minor, you're going to get use of a computer, you're going to get, you know, masochistic/sadistic, and I was very, very clear

in telling him that you will get points for that. You start with a certain level, you know, I told him
the first number you get, we know it as the base offense level, but I told him you get a number, and then from that number, you get more points added for all of these enhancements for the various things that are done when one uses a computer in a child pornography case, and I kept saying to him assume it's going be to be high, assume it's 20 years if you want to assume that, but assume it's going to be high, and our job is going to be to ask the judge to get as close to five years as possible. (DE-114- 48)"

The testimony of petitioner and Salnick was consistent regarding the absence of any general understanding regarding petitioner's guideline exposure. Salnick testified as follows:

"Q. As the change of plea time, you know, the Government pointed out where, when Judge Matthewman said, "Your sentence will be determined by a combination of advisory sentencing guidelines, possible authorized departures from those guidelines, and other statutory sentencing factors. Have you and your attorney talked about how these advisory sentencing guidelines might apply to your case?" and as the Government pointed out, he said, "Cursorily, yes." Correct?
A. That's what he said.

Q. And you were standing right next to him, right?

A. Right.

Q. Did you say at that time, either to Judge Matthewman or to Mr. Aho, your client, wait a second, what do you mean by cursorily? Do you need more time to talk about this? Judge, we need to talk about how long I may have spent with him, or any questions addressing his under oath response to Judge Matthewman, where he said cursorily?

A. No. (DE-114-89)"

Attorney Salnick testified as follows regarding the decision not to hire a forensic expert:

"Q. Okay, well, that's very complicated, isn't it, child pornography?

A. I'm not going to argue with you. He told me he committed the crime. Therefore, I wasn't going to hire an expert to bolster the State's case.

Q. Okay. Now, wouldn't an expert, though, analyze the software and go over those things and give you a report as to how it was so that there may be defenses there that you don't know about because you're not an expert in how Shareaza works?

A. That sounds good in a vacuum, but when you have the conversations with the client, and the client tells you certain things, you've got to make a decision as to whether

hiring an expert is going to help or hurt, and I made a strategic decision that based upon what he told me, an expert would not help. (DE-91-92)"

Regarding the change in the sentencing guidelines, Salnick testified as follows:

"Q. Did you have a -- did you have any advance notice that the following November, in November of 2016, that the guidelines with regard to distribution and the mens rea element of the distribution when it comes to the guidelines was going to change in November, on November 1st of 2016, that was first promulgated in the amendments publication by the Sentencing Commission on April 28th 2016? Obviously not, it was three months later.

A. Yeah, there was no way.

Q. So, in fact, when he asked you something about sentencing in August, are you just kind of associating that with this guidelines change that happened later on in your preparation for this hearing and don't specifically remember what sentencing issue he was talking about?

A. I wouldn't do that, no.

Q. Well, how do you remember that that had to do with this when this -- if I could approach, please, this is Defense Exhibit B, and this is the guidelines publication of -- of

April, 2000 and -- and -- two months after the plea. I mean, specifically, on page 10 and 11, it talks about this mens rea change that was going to occur the following November, way after the change of plea. How can you sit there today and say that the -- that little entry that he said about August sentencing had to do with this particular issue?

A. Well, I don't know if it had to do with this particular issue. (DE-94-95)"

Petitioner urged the district court to allow him to withdraw his guilty plea based upon these three grounds: first, a material change in the sentencing guidelines, second, the need to retain a computer expert in order to explore potential defenses to the offenses charged alleged to have been committed using the internet and sophisticated technology, and third, a failure by counsel to adequately explain the sentencing guidelines to Petitioner.

Rule 11 imposes upon a district court the obligation and responsibility to conduct an inquiry into whether the defendant makes a knowing and voluntary guilty plea." United States v. Hernandez-Fraire, 208 F.3d 945, 949 (11th Cir. 2000). That inquiry "must address three core concerns underlying Rule 11: (1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of

the charges; and (3) the defendant must know and understand the consequences of his guilty plea." Id. The failure to address any of these three core concerns, such that a defendant's substantial rights are affected, requires automatic reversal of the conviction and the opportunity to plead anew. United States v. Siegel, 102 F.3d 477, 481 (11th Cir. 1996).

As required by Rule 11, the district court must inform the defendant of any possible maximum penalty and any mandatory minimum penalty he will be subjected to by pleading guilty, and the district court must ensure that the defendant understands the sentencing range. Fed. R. Crim. P. 11(b)(1)(H)-(I). A defendant seeking to withdraw a guilty plea after its acceptance but prior to sentencing must show that there is a "fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). This court liberally construes the requirement of a fair and just reason for a defendant's pre-sentence motion to withdraw, but "there is no absolute right to withdraw a guilty plea" prior to sentencing. United States v. Buckles, 843 F.2d 469, 471 (11th Cir. 1988). Instead, the decision to allow withdrawal is left to the sound discretion of the trial court. Id.

In determining whether a defendant has met his burden to show a "fair and just reason" to withdraw a guilty plea, a district court may consider the totality of the circumstances, including: (1) availability of the close assistance of counsel; (2) knowing and voluntary plea; (3) conservation of judicial resources; and (4) potential for prejudice to the government upon withdrawal of the plea. Id. at 471-72-72. If an petitioner does not satisfy the first two factors of this analysis, we need not thoroughly analyze the remaining factors. United States v. Gonzalez-Mercado, 808 F.2d 796, 801 (11th Cir. 1987). Statements made under oath by a defendant during a plea colloquy receive a strong presumption of truthfulness. United States v. Medlock, 12 F.3d185, 187 (11th Cir. 1994).

The required analysis of the sentencing guideline computations require more than a cursory type discussion. In fact, there are federal felony offenses where a cursory discussion might be acceptable, such as, for example, a single large drug transaction with no weapons, where counsel must determine the type and weight of the drugs involved and the computation is complete. In this case, the sentencing guidelines contemplated 5 separate layers of enhancement in addition to the base offense level computation of Level 22. In this case a comprehensive

explanation of the sentencing guidelines would be indispensible in order to acquaint Petitioner with his potential prison sentencing exposure which travels from a Level 22 (41-51 months) up to a Level 39 (262-327 months) based upon the five enhancements actually applied.

The appellate and district courts both erred by failing to determine whether or not, under the circumstances, Petitioner's waiver of his rights was knowing and intelligent, with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 748 (1970). Accordingly, under the totality of the circumstances surrounding Petitioner's guilty plea, this Court should order that the appellate and district courts abused their collective discretion by denying petitioner's motion to withdraw his guilty plea following his presentation of fair and just reason to support his motion. United States v. Brehm, 442 F.3d 1291, 1298 (11th Cir. 2006).

The same rationale applies to petitioner's motion to vacate guilty plea claims regarding the change in the sentencing guidelines and the failure to retain an expert witness to examine the technical computer evidence.

The change in the guideline application requiring that a distribution act need to be proved to have been committed

willfully would directly impact whether or not petitioner possessed a sufficient awareness of the relevant circumstances and likely consequences of his plea. The federal sentencing guidelines are changed annually in a continuous process, which had the potential to directly affect Petitioner's guidelines and ultimate sentence.

The charges against petitioner outlined above involve technical, complex facts which to be proved beyond a reasonable doubt require evidence grounded on technical expertise involving computers, the internet and the peer to peer software programs employed. Counsel explained that because Petitioner told him in confidence that he admitted committing the offense, that he had no further duty to investigate any technical defenses or retain a computer expert in order to test the government's evidence in the case. Petitioner always retains the right to contest and challenge the evidence in his case. Petitioner, his mother and counsel all testified that an expert witness was contemplated at the inception of the case, which is standard procedure in cases involving computer-internet related offenses. Without the timely retention of an expert, it is doubtful that any defendant could adequately understand the strength of the government's case sufficient to enter and informed plea.

Accordingly, petitioner respectfully requests this court to vacate Petitioner's conviction and sentence and remand this case with directions to the District Court that petitioner be permitted to withdraw his guilty plea.
Issue 2: Whether the appellate court erred in not finding that the district court erred in sentencing Appellant including a +2 level guideline adjustment for obstruction of justice based upon his testimony during a hearing on his motion to vacate his guilty plea that he did not fully understand his sentencing guideline exposure and the discovery based upon his attorney-client conferences.

Pursuant to U.S.S.G. § 3C1.1, a Defendant's offense level will be increased by two levels 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 (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense . U.S.S.G. § 3C1.1. The enhancement may apply to conduct that occurred prior to the start of the investigation for the prosecuted offense only if the conduct was "purposefully calculated, and likely, to thwart

the investigation or prosecution of the offense of conviction." Id. cmt. (n.1). "Section 3C1.1 contains a clear mens rea requirement of willfully obstructing or attempting to obstruct the administration of justice." United States v. Burton, 933 F.2d 916, 918 (11th Cir. 1991). Generally, the appellate courts require an explanation by the district court as to why it has applied the obstruction of justice enhancement in order to permit meaningful appellate review, when a district court applies the obstruction enhancement because a defendant made false statements, not under oath, to law enforcement officers, it must find that the statements were false and material. It must also explain how the statements significantly obstructed or impeded the investigation or prosecution of the offense. United States v. Alpert, 28 F.3d 1104, 1107 (11th Cir. 1994) (en banc); United States v. Banks, 347 F.3d 1266, 1269 (11th Cir. 2003) holds explaining that, "if the district court chooses to apply the § 3C1.1 enhancement, 'it should note specifically what each defendant did, why that conduct warrants the enhancement, and, if applicable, how that conduct actually hindered the investigation or prosecution of the offense'". Nevertheless, if the record clearly reflects the basis for the enhancement and supports it, then individualized

findings regarding the obstruction of justice enhancement are not necessary. United States v. Taylor, 88 F.3d 938, 944 (11th Cir. 1996).

In this case, during the sentencing hearing the district court made the following findings regarding the obstruction enhancement:

"THE COURT: Okay. In view of my findings on the, in the order relating to the defendant's motion to withdraw his plea, where I found that the defendant made false statements relating to his having consulted with Mr. Salnick, or his claim that he did not consult with Mr. Salnick regarding the guidelines, his statement that Mr. Salnick never reviewed the discovery with him, those were materially false statements that were made with the sole purpose of attempting to affect my decision on the motion to withdraw his plea and were material relative to that motion and my decision, and therefore I believe that he did obstruct justice, and that the two-level enhancement for obstruction of justice is appropriate. So I'm going to overrule the objection. (DE-126-18-19)."

There was attorney client consultation regarding the guidelines, however the consultation was limited or incomplete, or cursory as testified to by petitioner at the

change of plea hearing. Further, there was attorney-client consultation regarding the discovery which was limited and incomplete. Petitioner submits that the basis for the Court's findings, petitioner's testimony that he did not discuss the discovery and the guidelines with his counsel is fully supported by his testimony at his change of plea hearing wherein he made is clear that his discussions with counsel were cursory and thus incomplete as reflected during the testimony during the change of plea hearing. Furthermore, there was no record evidence to support any other conclusion that Appellant was misadvised as to his potential guideline exposure which exceeded the statutory maximum. Had the court inquired at the time of the change of plea as to the cursory nature of the discussions, in the presence of petitioner, his counsel and counsel for the Government, the specific representations made by all counsels and the level at which any discussions were understood by petitioner could have been threshed out on the record, which is the functional purpose of the plea colloquy. Petitioner's testimony related exclusively to this procedural, collateral issue and can in no way be construed as an attempt to escape or thwart justice as were the court to grant his motion, the Government would be free to negotiate anew with Appellant or proceed to a trial to

trial with a jury. Petitioner's testimony cannot support an obstruction of justice enhancement as the Government's prosecution options were never and are not now in jeopardy. Petitioner's case involved the application of sentencing guidelines which when all tolled exceeded the statutory maximum sentence. His attorney testified that there was a discussion of the sentencing guidelines however no actual numbers were mentioned only that the guidelines would be high and the sentence would be at least 5 years and no more than 20 years. Petitioner filed his first motion to vacate his guilty plea less than three weeks after his plea was entered and before he received his PSI report. Because the district court rejected Petitioner's testimony regarding his understanding of the sentencing guidelines and the discovery, Petitioner's motion to vacate his plea was denied. The fact that there was no direct, precise conflict between Petitioner and counsel's testimony establishes that there was no attempted or actual obstruction of justice. Without any conflict or difference in the testimony to resolve, the court would not even have reason to hold a hearing on the motion to vacate. The court heard the testimony, weighed the evidence, ruled against petitioner and denied him any relief on his motion,

which supports no basis for an obstruction enhancement against petitioner in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED this 23rd day of September, 2019.

Respectfully submitted,

/s/ A. Wallace

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