NO.

IN THE
SUPREME COURT OF THE UNITED STATES

MARCELLUS OVERTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), this Court held that when a defendant seeks to withdraw his or her guilty plea based upon an FRCP Rule 11(b)(1) error, a subjective standard applies. That is to say, where a district court fails to advise a defendant of his or her rights under Rule 11(b)(1) of the Federal Rules of Criminal Procedure, such defendant will be permitted to withdraw his or her guilty plea based upon a showing that the individual defendant would not have pled guilty, but-for the error.

In a number of Circuits, however, a *different* rule has developed when a defendant seeks to withdraw his or her plea based upon a purported *Brady* violation. In such cases, the Second, Sixth, Ninth and Tenth Circuits have all held that the fundamental inquiry is an *objective* one. Hence the question is *not* whether the individual defendant would have pled guilty but-for the Government's conduct in withholding exculpatory evidence. Rather, the question is whether "a reasonable defendant" would have proceeded to trial. These circuits have held that if this question is answered in the negative, the withheld evidence is not "materially" exculpatory under *Brady v. Maryland,* 373 U.S. 83 (1963). As a result, such analyses typically focus upon the strength of the Government's evidence and the likelihood of conviction at trial, notwithstanding the exculpatory evidence.

We respectfully submit that these rulings are fundamentally inconsistent with this Court's holding in *Dominguez Benitez*.

Accordingly, this Petition presents the following questions:

1. When a defendant seeks to withdraw his or her guilty plea based upon the Government's failure to timely disclose exculpatory evidence, is the "materiality" of withheld evidence judged by an objective standard or a subjective standard? In other words, should the district court consider whether the *individual* defendant would have proceeded to trial absent the discovery violation, or whether a hypothetical, "reasonable defendant" would have proceeded to trial?

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The decision and order of the United States Court of Appeals for the Second Circuit appears at the Appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 2022. On February 16, 2002, a timely petition for rehearing was filed. The petition for rehearing was denied on March 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1594 and Rule 11 of the Federal Rules of Criminal Procedure are reproduced in the Appendix.

STATEMENT OF THE CASE

I. State Investigation Leads to Petitioner's Arrest and Guilty Plea on State Charges of Promoting Prostitution

A. Initial Investigation

In January of 2013, New York State Police commenced an investigation into prostitution in the Niagara Falls area, which was being promoted through a website called Backpage.com. A subpoena to Backpage.com produced over 200 pages of records associated with several such postings, made from June 2011 through January 2013. However, it was unclear from these records whom, precisely, was running the operation. In each case, the ads were posted by a user with the email address kraftcarol@yahoo.com. In the vast majority of the cases, invoices listed the customer's name as "Victor Johnson"; however, in two cases, the name "Marcellus Overton" was

provided. In other cases, the invoices were directed to "Carol Kraft." *See* Docket 318, ¶¶ 9-10.

On January 18th, NYS Police investigators placed a controlled call to the telephone number listed on one such Backpage.com advertisement. The undercover officer spoke with an unidentified female and proposed meeting at a local motel. The female indicated that she needed to find a ride, but would call back. After two subsequent calls from the same number, a meeting was confirmed. At the appointed time, police watched as a 17-year-old female ("MM") was dropped off by a GMC Envoy, which then left the motel parking lot. *See* Docket 318, ¶ 12.

Police followed the Envoy and stopped it at a nearby Burger King. The driver was determined to be Marcellus Overton. Also in the SUV were two of Overton's minor children and a woman named Tara Deon. Neither Mr. Overton nor Tara Deon were arrested. *See* Docket 318, ¶ 13.

In the meantime, inside the motel, MM met with an undercover officer, offered to have sex in exchange for money, and was placed under arrest. In a post-arrest interview, MM told police that she had recently moved to Niagara Falls and had met some people who suggested that she could make money through prostitution. MM agreed to have her picture posted in an online advertisement and was provided with a phone to make appointments. She generally denied knowing the names of the persons who had assisted her in this regard, and she did not mention Marcellus Overton. *See* Docket 318, ¶ 12.

B. Homeland Security is Approached to Take Over Investigation

Over the ensuing months, New York State Police Investigator Frank Vitko pursued a number of leads relating to the case, reporting his progress to the New York State Attorney General's Office. Among other things, Investigator Vitko learned that Marcellus Overton and Carol Kraft had a romantic relationship. He further learned that in March of 2013, Kraft, Overton, Tara Deon, and MM had traveled together to Atlanta to attend the NCAA tournament, and during the trip, MM had engaged in prostitution.

On November 20, 2013, however, Investigator Vitko was informed that the New York State Attorney General's Office was closing its investigation, as the office was no longer pursuing human trafficking cases. The following month, Investigator Vitko met with officials from Homeland Security Investigations ("HIS") in order to describe his investigation and seek their involvement. HSI expressed its interest in bringing a federal case for the transportation of a minor over state lines. *See* Docket 318, ¶¶ 16-18. As a result, by January of 2014, Special Agent Karen Wisniewski had been assigned to the investigation.

On January 23, 2014, Agent Wisniewski and two other federal agents from HSI accompanied NYSP investigators to arrest Mr. Overton at the barbershop which he operated. *See* Docket 318, ¶ 22 (A 870; *see also* CA 1). Despite the involvement of HSI, and despite the NYAG's disavowal of the investigation, Mr. Overton was initially charged in state court with Promoting Prostitution in the Third Degree and two counts of Endangering the Welfare of a Minor.

C. Carol Kraft Provides Statement to Federal Agent Exculpating Overton

Over the next several months, while the state case was pending, Special Agent Wisniewski continued to interview multiple witnesses concerning Mr. Overton's involvement in prostitution. On January 29th – six days after Mr. Overton's arrest – SA Wisniewski interviewed Carol Kraft at the Niagara County Jail, where she was being held on burglary charges. *See* Docket 318, ¶ 23. The information provided by Ms. Kraft in that interview was unambiguously exculpatory.

Specifically, Ms. Kraft told the agent that Mr. Overton was "not a pimp," but merely an individual who had a sex addiction. Ms. Kraft reported that, during the time they had dated, Mr. Overton had cheated on her by seeing other girls who advertised on Backpage.com – including Tara Deon. She told agents that she had "never worked for Overton," but that she had worked for a pimp named Victor Johnson. Kraft told the agent that Victor Johnson had "lots of girls" and "uses [Backpage.com]." *See* S.A. Wisniewski's Notes and Reports, at CA 6-8.

Ms. Kraft told the agent that Overton had "never organized jobs" and that "girls never gave $ to" him. Her notes reflect "all work done on own;" "own phones;" "own jobs." *Id.* at CA 8. Indeed, Carol Kraft told the Agent that she had "stole his [credit card] to post advertisements on backpage.com." *Id.* at CA 6. Ms. Kraft described going to the Roadway Inn in Amherst, N.Y., where she "worked . . . with other females all the time." She told Agent Wisniewski that she "didn't go with Overton." *Id.* at CA 8.

With respect to the 2013 NCAA tournament, Carol Kraft told Agent Wisniewski that she, Overton, Tara Deon, and MM all traveled to North Carolina and Atlanta. She reported that while there, "Deon posted advertisements." *Id.* at CA 7.

D. Overton Pleads Guilty to State Charges

The Carol Kraft statement was not produced in the state case. In May of 2014, Marcellus Overton accepted a plea agreement in that matter, whereby he agreed to plead to a misdemeanor count of promoting prostitution in the fourth degree (P.L. § 230.20), in connection with the January 18, 2013 arrest of MM. Under New York State Law, a person violates such statute by knowingly "advanc[ing] or profiting from prostitution." On July 24, 2014, Mr. Overton was sentenced to three years' probation. *See* state court transcripts at A 137-147.

II. Homeland Security Brings a Federal Case Against Marcellus Overton

If Mr. Overton believed that the case against him had been resolved by his state-court plea, he was sadly mistaken. Behind the scenes, the same investigators and agents were busy building a federal case, based upon the same conduct to which Mr. Overton had just pled.

A federal grand jury was convened, and multiple witnesses, including MM and Tara Deon, were called and provided inculpatory testimony against Mr. Overton. Carol Kraft was also called as a witness, providing testimony which was contrary to her earlier interview, and which implicated Mr. Overton in sex trafficking.

Hence, on January 13, 2015, Marcellus Overton was indicted in the Western District of New York on one Count of Sex Trafficking, pursuant to 18 U.S.C. § 1591, and one Count of Interstate Transportation of a Minor for Purposes of Prostitution.

III. Defense Counsel Repeatedly Requests Brady Material Relating to Carol Kraft's Independent Promotion of Prostitution

During pretrial proceedings, Marcellus Overton was represented by two different attorneys in the federal case. Throughout pretrial proceedings, those attorneys made repeated and specific demands for exculpatory evidence tending to show that Carol Kraft had promoted prostitution independent of Mr. Overton. No such material was produced.

Hence, on August 8, 2016, Mr. Overton's first trial counsel filed a motion to compel the production of *Brady* material. In that motion, counsel specifically requested evidence that any of the Government's witnesses/victims – including Carol Kraft – were prostituting themselves, or promoting prostitution, independent of Mr. Overton. That demand included the following language:

> 5. . . . Specifically, Defendant requests any information . . . related to . . . promotion of prostitution, and other criminal schemes that may be in the possession of, or attainable by the prosecution, regarding individuals known as Carol Kraft a/k/a Carrie Bradshaw, [MM] a/k/a Khloe the Kardashian, and any other person associated with the actions alleged in the above referenced indictment.
>
> 6. . . . If the government has conducted interviews with these individuals and elicited testimony favorable to the defense, including any testimony indicating that the witnesses were aware of the circumstances regarding the Defendant's trip to Georgia, and any information about Carol Kraft, or any other persons associated with the actions in the above referenced indictment, then the defense must be provided with this information.

Docket 63.

One month later, counsel filed a second such motion, demanding "any information or testimony in [the Government's] control which indicates that Carol Kraft used her credit card to pay for Backpage ads prior to any trip to North Carolina or Georgia." Docket 65. At a status conference on October 12th, defense counsel described the requests that he had been verbally making to prosecutors "regarding Carol Craft [sic] and statements she may have made either in the grand jury or by proffer, which would tend to exculpate Mr. Overton for some of the activities allegedly taking place in Georgia." 10/12/16 Tr. at p. 7.

The Government, while acknowledging such demands, assured the court that it was aware of its *Brady* obligations and suggested that the Petitioner's request for such material should be "denied as premature and unwarranted." Docket 66.

At a February 13, 2017 status conference, counsel pressed the issue. Again, defense counsel made clear that he was seeking information which tended to show that Carol Kraft was independently promoting prostitution – of herself and other girls – through Backpage.com. As counsel told the court, "[w]hile Mr. Overton's name might have been associated with it, she had equal access to it as his girlfriend at the time and she was actively involved in promoting prostitution." 2/13/17 Tr. at p. 3. Counsel specifically requested "interviews with these people" which would substantiate such information. *Id.* at 4. The Government responded it was "unaware of any exculpatory information." *Id.* at 6. The court, accepting the Government's representations, denied such motions. Docket 77.

A third motion was filed on August 28, 2017, at which time defense counsel informed the Government that, upon information and belief, "[o]ne or more of the alleged victim-witnesses had access to the Petitioner's email, credit and/or other relevant information which would have permitted someone other than the Petitioner to place advertisements on Backpage.com." Counsel expressly requested any evidence tending to substantiate such defense. Docket 123.

Again, the Government assured the court that it would "disclose directly exculpatory information as soon as the government becomes aware of it." Any other *Brady* material, the Government averred, would be "disclosed in accordance with the schedule set by the District Court . . ." With respect to Jencks Act materials, the Government represented that it would "disclose such statements to the defendant as directed by the Court's order . . ." Docket 132.

IV. The Government Withholds Notes and Reports of Witness Interviews Conducted by Agent Wisniewski in the Face of Express Demands

On August 15, 2018, the trial court issued a scheduling order, setting jury selection to begin on November 13, 2018. Pursuant to that order, the court ordered the Government to turn over Jencks/3500 materials to Mr. Overton by August 24, 2018. *See* ECF 182. At the Government's request, that deadline was thereafter extended one week. ECF 186, 187.

Hence, on August 31, 2018, the Government produced Jencks Act material for its various trial witness, including the inculpatory grand jury testimony of Carol Kraft. In doing so, however, prosecutors, intentionally withheld the witness

interviews taken by Special Agent Wisniewski – which included the earlier, exculpatory interview of Ms. Kraft.

The Government claimed that it was withholding such material based upon its purported, last-minute decision to remove Agent Wisniewski from the witness list. The prosecutor wrote to defense counsel:

> Attached . . . are Jencks/3500 materials in the above-referenced matter . . . I anticipate that Special Agent Karen Wisniewski will be removed from the government's witness list, and have not included Jencks/3500 materials for Special Agent Wisniewski. I am in the process of identifying handwritten notes that were incorporated into investigative reports, and will make those available to you prior to trial.
>
> Docket 261-2.

Defense counsel responded to the Government's August 31st letter with *yet another* motion to compel *Brady* material – this time specifically asking for any exculpatory notes taken by Agent Wisniewski:

> The cover letter to the 3500 materials noted that the prosecution no longer intends to call Special Agent Karen Wisniewski as a witness and therefore has not provided Jencks/3500 materials. It is requested that those materials be provided to the defense so they can be reviewed to determine whether they contain exculpatory evidence, specifically regarding potential impeachment of other witnesses whom, upon information and belief, S.A. Wieniewski [sic] met with on several occasions during the course of the investigation
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> Docket 192-1, p. 17.

Again, prosecutors stonewalled. On October, 18, 2018, the Government opposed the Petitioner's motion to obtain a complete set of Agent Wisniewski's notes and reports, which it characterized as "a fishing expedition." Docket 197. Instead, on November 8th, the Government produced only a small fraction of Agent

Wisniewski's 41-page file. In particular, the Government turned over: (1) a three-page typed report, summarizing the March 25, 2014 interview of MM, labeled as 3502D; and (2) a three-page typed report, summarizing an April 10, 2014 interview with Tara Deon, labeled as 3505A. 3502D (the MM interview) was expressly labeled "REPORT NO. 3." 3505A (the Tara Deon interview) was expressly labeled "Report No. 4." Both of the produced reports were generally inculpatory.

The Government, however, did not turn over the remaining thirty-five pages of notes and reports in Wisniewski's file – which included, of course, the Carol Kraft interview ("REPORT NO. 2").

At a status conference on November 9, 2018, the court denied the Petitioner's application to review the remaining Wisniewski materials, holding that "Defendant is not entitled to comb through the Government's file for *Brady* materials. The Government is well aware of its *Brady* obligations and the consequences of not meeting them. The request for Wisniewski's materials is therefore denied." 11/9/18 Tr. at p. 11.

V. Marcellus Overton Pleads Guilty on Eve of Trial

One day before the commencement of jury selection, and 17 days after the court's ruling on the Wisniewski material, Marcellus Overton entered into an 11(c)(1)(C) plea agreement with the Government. Pursuant to that agreement, Mr. Overton pled to a superseding information charging him with Conspiracy to Commit Sex Trafficking, in violation of 18 U.S.C. § 1594 (c); the parties agreed that a sentence between 90 and 213 months was appropriate under the circumstances. On November

26, 2018, the district court provisionally accepted Mr. Overton's plea, pending its review of the Presentence Report. *See* 11/26/19 plea transcript at pp. 11, 27, 29.

VI. Post-Plea Brady Disclosures

Despite his guilty plea, the Petitioner remained convinced that the Government had withheld exculpatory information, which became an increasing source of tension between Mr. Overton and his counsel. At conferences held in April and May of 2019, defense counsel informed the trial judge that Mr. Overton wished to address the court regarding his persistent belief that he had been a victim of prosecutorial misconduct and *Brady* violations. Mr. Overton repeatedly expressed frustration with his counsel for failing to bring such misconduct to light. In an effort to address Mr. Overton's concerns, the court appointed a conflict counsel to confer with Mr. Overton and report back to the court.

Over the ensuing months, conflict counsel worked to reassure Mr. Overton that nothing material had been withheld from him by obtaining undisclosed and previously redacted 3500 material. On October 15, 2019, conflict counsel specifically requested, yet again, the Wisniewski 3500 material. Two days later, the Government produced – for the first time – all 41 pages from Agent Wisniewski's file, including the previously undisclosed January 29, 2016 interview of Carol Kraft. *See* Docket 288. Far from assuaging Mr. Overton's concerns, this belated production validated his worst fears.

VII. Motion to Withdraw Plea

In November of 2019, Mr. Overton's counsel appeared before the trial judge to update the court as to the recent disclosure, and informed the court that Mr. Overton was contemplating a motion to withdraw his plea. Thereafter, counsel moved for a hearing to determine the cause and extent of the Government's *Brady* violation. Docket 261. The Government responded that there was no need for a hearing because, it claimed, the material in question was not in the United States Attorney's case file, and because the Petitioner was not, in any event, entitled to receive such materials prior to pleading guilty. Docket 264. The court denied the Petitioner's motion for a hearing in June of 2020. Docket 274.

In the interim, the Petitioner's relationship with his counsel continued to deteriorate, as Mr. Overton blamed his attorneys for their failure to uncover exculpatory material prior to his guilty plea. Ultimately, this break-down in the attorney-client relationship led to the assignment of yet another attorney in July of 2020. Docket 283.

On August 27, 2020, Mr. Overton's new counsel filed a motion to withdraw his guilty plea on the grounds that the Government had withheld *Brady* material. Docket 286. Counsel specifically argued that Mr. Overton would have proceeded to trial if the Kraft material had been timely produced. The Government opposed, arguing that the withheld material was not exculpatory, that it was under no obligation to furnish such material prior to Mr. Overton's plea, that the evidence

against Mr. Overton was otherwise overwhelming, and that no reasonable defendant would proceed to trial under such circumstances. Docket 288.

The court denied Mr. Overton's motion to withdraw his plea in a ruling dated November 25, 2020, holding that the withheld Kraft interview notes were not *materially* exculpatory. Relying on the Second Circuit's decision in *United States v. Avellino*, 136 F.3d 249 (2d Cir. 1998), the court held that, in the context of a pre-plea *Brady* violation, the question of materiality is measured by an objective – as opposed to subjective – standard.[1]

Under this standard, the "materiality" of the withheld evidence does not hinge on whether the specific defendant would have proceeded to trial. Rather, the Second Circuit has held that the determination of materiality "involves an objective inquiry that asks not what a particular defendant would do but rather what is the likely persuasiveness of the withheld information." *United States v. Avellino*, 136 F.3d 249, 256 (2d Cir. 1998). Applying this standard, the district court held that, given the remaining evidence against Mr. Overton – including the Petitioner's state court

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[1] The district court also noted that, in the wake of this Court's holding in *United States v. Ruiz*, 536 U.S. 622 (2002), some courts have questioned whether there is an obligation to supply *Brady* material prior to a defendant's plea. *See Friedman v. Rehal*, 618 F.3d 142, 153-154 (2d Cir. 2010). *Ruiz* held that prosecutors do not have a duty to provide a defendant with *impeachment material* prior to his or her guilty plea; in doing so, however, this Court expressly distinguished such impeachment material from exculpatory evidence.

Ultimately, the district court proceeded under the assumption that the Government *does* have a duty to provide exculpatory evidence pre-plea. Likewise, the Second Circuit addressed the Appellant's arguments on the merits, without holding or suggesting that *Ruiz* applies to materially exculpatory evidence. As such, that question does not appear to be before the Court on the instant appeal.

plea – it was unlikely that the withheld evidence would have changed a reasonable person's calculus as to whether to go to trial. *Id.* at 13.

VIII. Sentencing

Prior to sentencing, Mr. Overton retained new counsel – the fourth on the case – who filed a motion to rescind the plea agreement based on contract principles, as well as a speedy trial motion; both motions were denied. *See* Docket 318; 327. On January 5, 2021, Mr. Overton was sentenced to 90 months' incarceration and five years' supervised release.

IX. Appeal

On Appeal, Petitioner argued that the district court erred in applying an objective materiality standard, given this Court's holding in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). The Circuit affirmed, holding that "[m]ateriality is analyzed through an objective inquiry" and that the lower court properly reviewed the Petitioner's Brady claim utilizing "the objective standard described in *Avellino*."

X. Petition for Rehearing

Following the decision, Petitioner moved for a panel rehearing to correct an isolated factual error contained in footnote two of the circuit's decision. In that footnote, the circuit incorrectly reported that, during her initial interview, Carol Kraft told Agent Wisniewski that "Overton drove other prostitutes for money."

In making this assertion, the circuit was relying upon a series of bullet points from Wisniewski's handwritten notes, which stated:

- never worked for Overton
- worked for Victor Johnson
- drives girls for $ - heard thru other girls while in jail
- he has restraining order against her
- traveled to Atlanta and N.C. in March of 2013

As we noted, the circuit's decision incorrectly assumed that the statement "drives girls for $" related to Overton, when in fact it referred to Kraft's pimp, Victor Johnson. Indeed, in her grand jury testimony (which was not before the circuit), Ms. Kraft expressly explained that she began working for Victor Johnson after learning about him from other girls in jail. Notably, the Government did not object to the Petitioner's application to remove this factually inaccurate line from footnote two of the decision.

Nevertheless, the circuit denied Mr. Overton's petition for rehearing without comment or explanation.

ARGUMENT

I. Certiorari Should be Granted Because The Second Circuit's Objective "Reasonable Person" Standard Cannot Be Reconciled with This Court's Holding in *United States v. Dominguez Benitez*

In the Petitioner's original motion to withdraw his guilty plea, trial counsel argued that the court's analysis should be a subjective one, taking into account Mr. Overton's persistent demands for a trial. *See* Docket 286-1, ¶¶ 18, 54-55. Indeed, throughout the proceedings, Mr. Overton submitted multiple sworn affidavits professing his innocence and claiming that he would not have pled guilty but for the Government's *Brady* violation. *See* Docket Entries 261-3, 269-1, 317. Likewise, Mr. Overton's counsel averred that the Petitioner only relented and agreed to plead guilty

after the Government repeatedly denied the existence of the sought-after *Brady* material:

> Mr. Overton struggled with acquiescing to a plea agreement, in part, because he felt there was significant evidence and information that had been withheld from him. To some extent, I had assured him that even though the Government's refusal to provide Agent Wisniewski's 3500 material seemed suspicious, I believed that based on the Government's representations, it did not appear such Brady evidence actually existed.
>
> I believe that Mr. Overton's decision to accept a plea was based, at least in part, on my advice, and my advice was based an acceptance of the Government's representations regarding the lack of exculpatory evidence within Agent Wisniewski's 3500 material.
>
> Docket 269-3 at ¶¶ 15-16.

The lower court, however, rejected a subjective standard, following instead the Second Circuit's guidance in *Avellino*, which held that the determination of materiality "involves an objective inquiry that asks not what a particular defendant would do but rather what is the likely persuasiveness of the withheld information." Docket 297 at p. 9). In light of this standard, the lower court focused largely upon the perceived strength of the Government's case and the comparably favorable terms of the plea agreement that was extended to the Petitioner. It did not address the Petitioner's sworn averments that he would have proceeded to trial, or the fact that Mr. Overton only relented and pled guilty on the very eve of trial. Essentially, the court asked itself what the hypothetical "reasonable person" would have done under the circumstances. The Sixth, Ninth, and Tenth Circuits have likewise adopted an objective, "reasonable defendant" standard in this context. *See Murr v. Turner*, 1996 U.S. App. LEXIS 30870, *4, Docket 95-4013 (6th Cir. Nov. 22, 1996); *United States v.*

Harshman, 2021 U.S. App. LEXIS 26496, *2, Docket 19-35313 (9th Cir. Sept. 2, 2021); *United States v. Dahl*, 597 Fed. Appx. 489, 2015 U.S. App. LEXIS 107, *5 (10th Cir. Jan. 6, 2015).

We respectfully submit that such an "objective" standard cannot be reconciled with this Court's holding in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). *Dominguez Benitez* involved a defendant's argument – first raised on appeal – that his guilty plea should be vacated based upon the court's failure to provide the requisite Rule 11 warnings. Specifically, the district court had failed to advise Dominguez that he would not be able to withdraw his plea if the court did not accept the Government's sentencing recommendations.

Notably, the standard on appeal was precisely the same one which controls here – whether there was "a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83. At oral argument, the United States Solicitor General emphasized that such test was, in actuality, a *subjective* one:

> QUESTION: Now, is your knowledge of requirement a wholly subjective test? We -- we want to know what this defendant thought. Or is it what a reasonable person would have concluded based on all of the circumstances?
>
> MR. HIMMELFARB: It's a subjective standard, Justice Kennedy. <u>In the context of a guilty plea, when the question is whether the error affected the defendant's decision to plead guilty, the relevant question is whether this particular defendant would have pled</u> -- would have gone to trial.

Transcript of 4/21/04 Oral Argument in *United States v. Dominguez Benitez* (03-167) (emphasis added).[2]

This court adopted such subjective standard in its decision. Indeed, the Court emphasized that the circuit court should have considered the individual defendant's on-the-record statements, which evidenced his state of mind. As this Court explained:

> Relevant evidence that the Court of Appeals thus passed over in this case included Dominguez's statement to the District Court that he did not intend to go to trial, and his counsel's confirmation of that representation, made at the same hearing. The neglected but relevant considerations also included the implications raised by Dominguez's protests at the sentencing hearing. He claimed that when he pleaded guilty he had "never had any knowledge about the points of responsibility, the safety valve, or anything like that." App. 109. These statements, if credited, would show that Dominguez was confused about the law that applied to his sentence, about which the court clearly informed him, but they do not suggest any causal link between his confusion and the particular Rule 11 violation on which he now seeks relief.

United States v. Dominguez Benitez, 542 U.S. 74, 84-85 (2004).

Moreover, this Court emphasized that, while the strength of the prosecution's case was a relevant consideration, the ultimate question was not what a *reasonable person* would do under the circumstances. Rather, the test was what the *individual defendant* would do:

> Other matters that may be relevant but escape notice under the Ninth Circuit's test are the overall strength of the Government's case and any possible defenses that appear from the record, subjects that courts are accustomed to considering in a *Strickland* or *Brady* analysis. When the record made for a guilty plea and sentencing reveals evidence, as this one does, showing both a controlled sale of drugs to an informant and a confession, one can fairly ask a defendant seeking to withdraw his plea

[2] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2003/03-167.pdf

> what he might ever have thought he could gain by going to trial. The point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish.

Id. at 85.

We respectfully submit that the "objective" standard articulated by the Second Circuit in *Avellino*, and likewise utilized by the Sixth, Ninth, and Tenth Circuits, cannot be reconciled with this Court's holding in *Dominguez Benitez*.

The question before this Court in *Dominguez Benitez* was whether the failure to advise the defendant under Rule 11 affected his "substantial rights." As this Court has explained, to satisfy this standard, "the defendant ordinarily must show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). In the context of an error impacting the defendant's decision to plead guilty, this Court held that the answer to that question depends on whether the *individual* defendant would have proceeded to trial, but-for such error. While the strength of the Government's evidence is relevant to an analysis of what the individual defendant would have done, the standard, this Court held, is still a subjective one.

The same "substantial rights" standard applies to purported *Brady* violations. Hence, exculpatory evidence is "material" under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

Given the fact that we are dealing with the *same* "substantial rights" standard, in the *same* context (determining when a defendant should be permitted to withdraw his plea), it is perplexing and frankly inexplicable that two different approaches should apply. Indeed, even though this was the express argument advanced by Petitioner on appeal, the Second Circuit provided *no answer* to this quandary.

Under *Dominguez Benitez*, a defendant demonstrates a violation of their "substantial rights" by establishing that the individual defendant would have proceeded to trial but-for the complained of error. The same subjective standard should apply uniformly to cases such as this, where the complained-of error relates to the Government's failure to produce exculpatory evidence.

CONCLUSION

As set forth above, the Second Circuit Court of Appeals, as well as the Sixth, Ninth, and Tenth Circuits, have decided an important federal question in a manner which conflicts with a decision of this Court. Accordingly, we respectfully submit that there are compelling reasons to grant *certiorari* in this matter.

Respectfully submitted,

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Appendix

United States Court of Appeals
For the Second Circuit

August Term 2021

Argued: January 18, 2022
Decided: February 3, 2022

No. 21-76

UNITED STATES OF AMERICA,

Appellee,

v.

MARCELLUS OVERTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of New York
No. 15-cr-009, William M. Skretny, *Judge*.

Before: KEARSE, WALKER, AND SULLIVAN, *Circuit Judges*.

Marcellus Overton appeals from the judgment of conviction entered by the district court (Skretny, *J.*) on January 6, 2021, following Overton's plea of guilty to one count of conspiracy to commit sex trafficking of a minor, in violation of 18 U.S.C. § 1594(c). On appeal, Overton argues that the district court erred in denying his motion to withdraw his guilty plea, which was entered pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Specifically, Overton asserts that because the court had only "provisionally" accepted his guilty plea, it should have allowed him to unconditionally withdraw that plea under Federal Rule of Criminal

Procedure 11(d)(1) rather than requiring a "fair and just" reason for withdrawal under Rule 11(d)(2); he further argues that, even if the Rule 11(d)(2) standard applies, the court erred in determining that he lacked a "fair and just" reason for withdrawal because his motion to withdraw was based on a *Brady* violation. Overton also asserts that he received ineffective assistance of counsel in connection with his motion to withdraw his plea.

This appeal requires us to answer two related questions: First, what standard of review should we apply in assessing whether a district court has "accepted" a guilty plea? Second, did the district court's "provisional" acceptance of Overton's guilty plea entered pursuant to Rule 11(c)(1)(C) constitute "acceptance" for the purposes of Rule 11? With respect to the first question, we hold that acceptance of a guilty plea must be reviewed de novo. As to the second question, we conclude that although the district court's use of the term "provisional" was imprecise, the totality of the record reflects that the court *did* accept Overton's guilty plea prior to his motion to withdraw that plea. The district court was therefore correct to apply the Rule 11(d)(2) standard in considering Overton's motion to withdraw his plea after determining that he had not established a *Brady* violation, and the court committed no error in denying the motion to withdraw. Finally, we conclude that Overton's ineffective assistance claim – which is based on his counsel's failure to adequately address the issues that Overton now raises on appeal – fails for lack of prejudice. Accordingly, we **AFFIRM** the judgment of the district court.

AFFIRMED.

MATTHEW W. BRISSENDEN, Matthew W. Brissenden, P.C., Garden City, NY, *for Defendant-Appellant* Marcellus Overton.

MONICA J. RICHARDS, Assistant United States Attorney, *for* Trini E. Ross, United States Attorney for the Western District of New York, Buffalo, NY, *for Appellee* United States of America.

RICHARD J. SULLIVAN, *Circuit Judge*:

Marcellus Overton appeals from the judgment of conviction entered by the district court on January 6, 2021, following Overton's plea of guilty to one count of conspiracy to commit sex trafficking of a minor, in violation of 18 U.S.C. § 1594(c). On appeal, Overton argues that the district court erred in denying his motion to withdraw his guilty plea, which was entered pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C). Specifically, Overton asserts that because the court had only "provisionally" accepted his plea, it should have unconditionally allowed him to withdraw that plea under Federal Rule of Criminal Procedure 11(d)(1), rather than requiring a "fair and just" reason for withdrawal under Rule 11(d)(2); he further argues that, even if Rule 11(d)(2) applies, the district court erred in denying his motion to withdraw because that motion was based on a *Brady* violation. Finally, Overton contends that he received ineffective assistance of counsel in connection with his motion to withdraw his guilty plea.

To address Overton's challenges on appeal, we must answer two questions: First, under what standard should we review whether a district court has "accepted" a guilty plea for the purposes of Rule 11? Second, did the district court's "provisional" acceptance of Overton's guilty plea entered pursuant to Rule 11(c)(1)(C) constitute "acceptance" under Rule 11? With respect to the first

question, we hold that de novo review is required. As to the second question, we conclude that although the district court's use of the term "provisional" was imprecise, the totality of the record reflects that the court *did* accept Overton's guilty plea prior to his motion to withdraw that plea. The court was therefore correct to apply Rule 11(d)(2) in considering Overton's motion to withdraw his guilty plea after determining that no *Brady* violation had occurred. We further conclude that the district court committed no error in denying Overton's motion to withdraw his plea under Rule 11(d)(2). Consequently, we find that Overton's ineffective assistance claim – which essentially repackages the arguments that he now makes on appeal – fails for lack of prejudice. We therefore affirm the judgment of the district court.

I. Background

In 2014, Overton pleaded guilty in Cheektowaga Town Court to engaging in the sex trafficking of a seventeen-year-old victim ("Victim 1") on January 18, 2013. Overton had been arrested following an investigation that involved a sting operation in which he drove Victim 1 to a prostitution appointment with an undercover officer. In January 2015, a federal grand jury indicted Overton for trafficking Victim 1 between December 2012 and March 2013, including his

conduct on January 18, 2013.[1]

Following extensive pretrial litigation and two adjournments of his trial date, Overton waived indictment and pleaded guilty pursuant to a plea agreement on November 26, 2018 – the day before his trial was set to start – to a superseding information that charged him with one count of conspiracy to commit sex trafficking of a minor, in violation of 18 U.S.C. § 1594(c). Importantly, Overton pleaded guilty under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, which permits a defendant to plead guilty pursuant to a plea agreement that provides "a specific sentence or sentencing range" that will bind the court once the court accepts the agreement; in the event the court rejects the sentence specified in that agreement, Rule 11(c)(5) requires the court to give the defendant an opportunity to withdraw his guilty plea. According to the plea agreement, Overton and the government stipulated to a sentencing range of 90–213 months' imprisonment.

At his plea colloquy, Overton admitted that between December 2012 and March 2013, he transported Victim 1 from Olean, New York, to Niagara Falls, New

[1] Overton faced a mandatory minimum term of ten years' imprisonment for the charges in that indictment. *See* 18 U.S.C. § 1591(b)(2).

York, and conspired to solicit prostitution appointments for Victim 1 through online advertisements. He further admitted that he had rented or arranged for the rental of hotel rooms and transported or arranged for the transportation of Victim 1 to appointments for prostitution, and that he received a share of Victim 1's earnings from prostitution activities. Overton ultimately entered his guilty plea, and the district court "provisionally accept[ed]" that plea and "adjudge[d]" Overton guilty. App'x at 300. The court then scheduled Overton's sentencing for March 20, 2019.

About five months after entering his guilty plea on November 26, Overton moved to adjourn his sentencing and expressed to the district court that he was contemplating a motion to withdraw his plea because he believed that the government had withheld exculpatory evidence and because he was frustrated with his counsel for failing to uncover this misconduct. The district court appointed conflict counsel to assist Overton in connection with his contemplated motion to withdraw his plea.

After meeting with Overton's conflict counsel, the government agreed to voluntarily produce additional discovery requested by Overton. Included among the materials produced by the government were handwritten notes prepared by a

non-testifying federal agent summarizing her interview of a government witness who had engaged in the prostitution scheme with Overton.[2] Overton then filed a motion to compel additional discovery, which the district court granted in part and denied in part.

After the district court set a date for sentencing, Overton's counsel moved to withdraw as his attorney, so the court pushed back the sentencing date and assigned new counsel. About one month later, Overton moved to withdraw his plea. In support of this motion, Overton asserted that the federal agent's interview notes contained exculpatory information that the government had been obligated to produce under *Brady v. Maryland*, 373 U.S. 83 (1963), and suggested that the government had tricked him into pleading guilty by intentionally withholding those notes.

The district court ultimately denied Overton's motion to withdraw his guilty plea, concluding that Overton had not provided a "fair and just reason" for

[2] These notes indicated that the government witness denied working as a prostitute for Overton and asserted that Overton did not receive payment from the prostitutes; she did, however, suggest that Overton drove other prostitutes for money, and she could not explain why Overton had paid for online ads promoting prostitutes. In her subsequent grand jury testimony, this same witness contradicted many of the statements that she had made in her interview with the federal agent and admitted that Overton had indeed prostituted her. The witness also testified that Overton had contacted her sister and then-boyfriend to discourage her from testifying before the grand jury.

withdrawing his plea because the government had not committed a *Brady* violation or otherwise engaged in prosecutorial misconduct, and no other factors warranted withdrawal of the plea. App'x at 835–47. The court then sentenced Overton to a ninety-month term of imprisonment to be followed by five years of supervised release. This appeal followed.

II. Discussion

Overton argues that the district court should have allowed him to withdraw his plea under Federal Rule of Criminal Procedure 11(d)(1) because the court had only "provisionally" accepted his plea on November 26, 2018, and did not "formally" accept his guilty plea prior to his motion to withdraw. Under Rule 11(d)(1), "[a] defendant may withdraw a plea of guilty . . . before the court accepts the plea, for any reason or no reason." Because Overton did not make this argument below, we review this issue for plain error. *See United States v. Groysman*, 766 F.3d 147, 155 (2d Cir. 2014).

Normally, "[w]e review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion and any findings of fact in connection with that decision for clear error." *United States v. Rivernider*, 828 F.3d 91, 104 (2d Cir. 2016) (citation omitted). Here, however, we must also determine the applicable

standard of review for the "antecedent question" of whether the district court should have considered the motion to withdraw the guilty plea under Rule 11(d)(1) or 11(d)(2) – a question that turns on whether the court had, in fact, accepted the guilty plea before the defendant filed the motion to withdraw. *United States v. Andrews*, 857 F.3d 734, 739 (6th Cir. 2017). Although our analysis may involve a detailed review of the district court record, the "central legal issue" is whether the district court correctly interpreted Rule 11 in determining that it had "accepted" the defendant's guilty plea prior to the motion to withdraw the plea. *United States v. Byrum*, 567 F.3d 1255, 1259 (10th Cir. 2009). We therefore conclude – like multiple circuits to have answered this question before us – that "de novo review is [the] more appropriate standard" for this inquiry. *Id.*; *see also, e.g.*, *Andrews*, 857 F.3d at 739; *United States v. Jones*, 472 F.3d 905, 908–09 (D.C. Cir. 2007) (applying de novo review to determine whether district court accepted defendant's guilty plea).

Considered in its entirety, the record plainly reflects that the court had accepted Overton's plea – but deferred decision on his plea agreement – prior to his motion to withdraw. Throughout the plea colloquy, the court referred to Overton's plea as a "[Rule] 11(c)(1)(C) plea." App'x at 282. As noted above, when

a defendant pleads guilty pursuant to Rule 11(c)(1)(C), a district court may accept the guilty plea while deferring acceptance of the plea agreement and its stipulated sentence until it reviews the defendant's presentence report ("PSR"). *See* Fed. R. Crim. P. 11(c)(3)(A); *United States v. Hyde*, 520 U.S. 670, 674 (1997) ("Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time."). And if the court then rejects the sentencing range provided in the plea agreement, the court must give the defendant an opportunity to withdraw his guilty plea. *See* Fed. R. Crim. P. 11(c)(5).

At Overton's plea hearing on November 26, 2018, the district court explained this process to Overton, informing him that he could withdraw his Rule 11(c)(1)(C) plea only if the court determined that it could not sentence him within the range set out in his plea agreement:

> [W]hat the 11(c)(1)(C) plea does is give you this opportunity, which doesn't take place in the normal plea arrangement, and that is if I determine that I can not sentence you within this range because, for some reason, I don't view it to be a reasonable sentence under the circumstances, you get the opportunity to withdraw your plea of guilty under that circumstance. If I determine this plea agreement, and with that spread, as far as sentencing is concerned, to be reasonable, then what I will do is make the provisional acceptance, and, again, it's an acceptance but it's provisional, and I'll finalize it and then we'll proceed forward and then

> sentencing will be at my discretion within the range stated here.

App'x at 294.

And while the court stated several times that it was "provisionally" accepting Overton's plea, it made clear that the provisional nature of its acceptance was tied to its determination that it could sentence Overton according to the terms of his plea agreement. Indeed, the court told Overton that his plea

> is a different type of plea and it's not the normal plea, it's what is referenced as an 11(c)(1)(C) plea, which [means that] if everything goes according to script, I will be accepting your plea provisionally, which means not with finality because there is one step that has to be entered into and completed before I accept it in its totality. I will accept it, but provisionally, because the provisional part comes with my determining that I can sentence you according to the terms and conditions of the plea agreement.

Id. at 282. Later in the plea colloquy, just before asking Overton for his plea, the court again informed Overton that if he pleaded guilty, the court could "accept [his] plea provisionally until" it obtained his PSR and determined "whether or not the range proposed in [his plea agreement was] reasonable and sufficient, but not greater than necessary." *Id.* at 298. Only then did Overton enter his plea of guilty,

after which the court "provisionally accept[ed]" the plea and "adjudge[d him] guilty, provisionally," of the crime to which he had pleaded. *Id.* at 298–300.

The district court made all of these statements to Overton in the context of a full plea colloquy as required by Rule 11(b). The court placed Overton under oath and confirmed that he knew that he had a right to plead not guilty, and that by pleading guilty he was giving up his right to a jury trial. The court made sure that Overton understood the nature of the offense with which he was charged, and that if he proceeded to trial, the government would be required to prove each element of that crime beyond a reasonable doubt. The district court also confirmed that Overton understood the maximum potential sentence that he faced under the statute to which he was pleading guilty and, more importantly, the stipulated sentencing range under the plea agreement that he entered into with the government pursuant to Rule 11(c)(1)(C). The court explained its obligation to calculate and consider the applicable sentencing range under the United States Sentencing Guidelines, among other sentencing factors, and the fact that the court was obligated to impose a special assessment and a term of supervised release that might include various conditions. The court also advised Overton of his right to counsel for the entirety of his case and further confirmed that Overton was aware

that he was giving up his right to appeal a sentence within or below the sentencing range provided in his plea agreement.[3] *See* Fed. R. Crim. P. 11(b). The court then found that Overton had knowingly and voluntarily entered his plea, and that the information set forth in the factual basis statement would serve as a sufficient basis to conclude that "each of the essential elements comprising" the crime to which Overton pled guilty "has been satisfied by the proof standard beyond a reasonable doubt." App'x at 299–300. Finally, the court "provisionally" accepted Overton's plea and adjudged him guilty before scheduling his sentencing for March 20, 2019. *Id.* at 300.

Overton nevertheless argues that the district court did not actually accept his plea until two years after his plea allocution, in a written order dated November 25, 2020. But the text of that order makes clear that the court had only

[3] It is not clear from the record whether the district court informed Overton of his right to confront and cross-examine adverse witnesses at trial, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses – or the fact that he would waive these rights if the court accepted his guilty plea – as required by Rule 11(b)(1)(E) and (F). We reiterate that "compliance with Rule 11 is not a difficult task, and district courts can easily use a standard script for accepting guilty pleas, which covers all of the required information to ensure their conformity with the Rule." *United States v. Gonzales*, 884 F.3d 457, 462 (2d Cir. 2018) (internal quotation marks). Further, both prosecutors and defense counsel have an obligation to ensure the court's compliance with Rule 11. *Id.* Nevertheless, here Overton does not argue that his plea allocution was deficient for lack of this information; in fact, his briefs do not mention this potential error at all. The only Rule 11 arguments he raises are that the district court did not accept his plea before his motion to withdraw, or – in the alternative – that he provided a fair and just reason to withdraw his plea pursuant to Rule 11(d)(2).

deferred acceptance of Overton's plea *agreement*: in the order, the court clarifies that, "[h]aving fully reviewed the presentence investigation report," it "now *accepts the parties' Rule 11(c)(1)(C) sentencing agreement* pursuant to Rule 11(c)(4) and finds that a sentence within the agreed upon disposition of 90–213 months' imprisonment will constitute a fair, just, and reasonable sentence." App'x at 846 (emphasis added).[4] The record also reflects that the district court made other statements indicating that it had accepted Overton's plea on November 26, 2018. For example, during a post-plea status conference on September 11, 2019, the court stated that Overton's plea had been entered almost ten months ago, and that the plea "was accepted." App'x at 366; *see id.* at 351. In another status conference on

[4] During oral argument, Overton's counsel argued for the first time that the district court's refusal to revoke Overton's bail following the plea proceeding demonstrated that it had not truly accepted Overton's plea. Counsel asserted that the crime of conviction required a mandatory remand following a guilty plea and that even the government expressed a belief at that time that the court would "continue the defendant on his current bond" because of "the provisional nature of the plea and Probation's recommendation." App'x at 301–02. But that misconstrues the record. Although the district court did indeed continue Overton on his bond at the conclusion of the plea hearing, it never stated – or even suggested – that its decision was based on the provisional nature of Overton's plea. Rather, the court indicated that it did not consider remand to be mandatory based on the charged offense. *See id.* at 302 ("[F]or your information, this is a conspiracy charge, it's not a substantive charge. [And 18 U.S.C. §] 1594 is not enumerated as a crime of violence under the statute. . . . I'm considering that as well in terms of what is reasonable and in terms of the danger to the public as well as the risk of flight."); 18 U.S.C. § 3143; *see also id.* §§ 1591(b)(2), 1594(c), 3142(f)(1), 3156(a)(4).

July 29, 2020, the court noted that "[i]t's approaching two years now, since the plea was accepted." *Id.* at 616; *see id.* at 618.

Because the full record reflects that the district court accepted Overton's plea long before he filed his motion to withdraw, it was not error – let alone plain error – for the court to apply the Rule 11(d)(2) standard and require Overton to provide a "fair and just reason" for withdrawing his plea. *See Hyde*, 520 U.S. at 671 (holding – under Federal Rule of Criminal Procedure 32(e), since replaced by Rule 11(d)(2) – that where a defendant pleads guilty pursuant to a plea agreement, and the district court accepts the plea but defers decision on whether to accept the plea agreement, the "defendant may not withdraw his plea unless he shows a 'fair and just reason'"). While we acknowledge that the district court's use of the term "provisional" in connection with the acceptance of Overton's plea was imprecise – and we encourage courts to more clearly indicate acceptance of a guilty plea even when deferring acceptance of the *plea agreement* under Rule 11(c)(3)(A) – we decline to impose a "magic words" requirement that lacks any basis in Rule 11, ignores the context of a full plea colloquy, and focuses exclusively on the court's use of an unnecessary qualifier. *See United States v. Battle*, 499 F.3d 315, 321–22 (4th Cir. 2007) (explaining that "an unambiguous acceptance" of a guilty plea

"prevents confusion" and is permissible even where a district court defers acceptance of the plea agreement). Multiple circuits to have considered similar "provisional" guilty plea acceptances have come to the same conclusion. *See Byrum*, 567 F.3d at 1260–62 (holding that a "district court has accepted [a] plea for the purposes of Rule 11" when it "conducts a Rule 11 plea colloquy and then provisionally or conditionally accepts the defendant's guilty plea pending its review of the PSR"); *Battle*, 499 F.3d at 321 (holding that "provisional[]" acceptance of a guilty plea after a full plea colloquy constituted acceptance under Rule 11 and opining that "[p]lacing too much emphasis on the district court's use of th[at] qualifier . . . would ignore the inherently conditional nature of guilty pleas under Rule 11"); *Jones*, 472 F.3d at 907–09.[5]

[5] While some circuits have held that a plea is not accepted where the district court indicates that it is *deferring* acceptance of a guilty plea, we find those cases to be factually distinguishable from the present circumstances. *See, e.g.*, *Andrews*, 857 F.3d at 740–41 (noting that other circuits have reached a consensus "that the decision to 'provisionally' or 'conditionally' accept a guilty plea pending the court's review of the defendant's PSR is enough to establish acceptance," and "that a proper Rule 11 colloquy creates the presumption that a guilty plea was accepted," but finding no acceptance of a guilty plea where the district court "explicitly deferred its acceptance of the plea" after full plea colloquy); *United States v. Head*, 340 F.3d 628, 630–31 (8th Cir. 2003) (concluding that district court did not accept defendant's guilty plea during plea colloquy because the court never expressly stated such acceptance, told the defendant that he would go to trial if it ultimately rejected the plea agreement at sentencing, and further advised the defendant that the government could withdraw from the plea agreement if he committed any new offense "*before [the court] accept[ed] the guilty plea*" (emphasis in original) (citation omitted)).

Applying the Rule 11(d)(2) standard, we find that Overton did not present a "fair and just" reason for withdrawal of his guilty plea. *See* Fed. R. Crim. P. 11(d)(2)(B). Overton asserts that prior to his plea, the government failed to disclose witness interview notes from a government agent that constituted exculpatory *Brady* material. Overton further contends that the court should have applied a subjective test – consistent with the Rule 11 standard applied in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004) – rather than an objective test in considering whether there was a reasonable probability that Overton would have withdrawn his plea based on the alleged *Brady* violation. He also argues that the court erred by considering the potential prejudice to the government and minimizing the exculpatory nature of the interview notes.

This Court has previously stated that a district court would lack discretion to deny a motion to withdraw a guilty plea where a *Brady* violation has been established. *See United States v. Avellino*, 136 F.3d 249, 261–62 (2d Cir. 1998) (explaining that the "general [Rule 11(d)(2)] framework is not controlling" where a defendant's motion is based solely on an alleged *Brady* violation). The district court was therefore correct to analyze whether a *Brady* violation had indeed taken

place before proceeding to consider Overton's motion to withdraw under Rule 11(d)(2).

Generally, to establish that a *Brady* violation has occurred before a guilty plea, a defendant must show that (1) the government failed to disclose exculpatory evidence, and (2) the evidence was material. *See United States v. Payne*, 63 F.3d 1200, 1208–09 (2d Cir. 1995); *see generally United States v. Ruiz*, 536 U.S. 622, 629 (2002). Materiality is analyzed through an "objective inquiry" which turns, in the plea context, on whether "there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial." *Avellino*, 136 F.3d at 256.

Here, the district court properly reviewed the alleged *Brady* violation under the objective standard described in *Avellino* and correctly determined that the notes at issue were not material. For starters, the notes pertained to only a portion of Overton's charged conduct and derived from an interview with a witness who later contradicted herself, and who was not the sole or main witness regarding the charged conduct. The notes certainly could not have countered the government's strong and direct evidence of Overton's guilt – including (1) law enforcement agents' observation of Overton transporting a minor, Victim 1, to a prostitution

appointment that had been arranged using his contact information, (2) Overton's state-court guilty plea, in which he admitted to prostituting Victim 1 on the same day that he was observed by law enforcement, and (3) the testimony of multiple witnesses regarding Overton's participation in the sex trafficking trade. Further, as the district court noted, Overton would have faced significant sentencing exposure had he forgone his "highly favorable plea," and he "offer[ed] no persuasive explanation for why he would have elected to proceed to trial" had he received the interview notes earlier. App'x at 843. In light of these facts, we conclude that there is no reasonable probability that Overton would have proceeded to trial, and thus there was no *Brady* violation.

In addition to concluding that the government had not committed a *Brady* violation that would warrant withdrawal of Overton's guilty plea, the district court determined that the government's failure to produce the interview notes at issue did not constitute *any* form of prosecutorial misconduct. Indeed, even "Overton's conflict counsel, who brokered much of the post-plea voluntary discovery, share[d]" the court's assessment that the government had acted in good faith. App'x at 836.

Having rejected Overton's assertions of prosecutorial misconduct – and particularly his *Brady* argument, which served as the basis for his motion to withdraw his plea – the district court then analyzed whether Overton had presented any other potential "fair and just reason" for withdrawal of his guilty plea. The court considered general factors that we have previously recognized as relevant in assessing a motion to withdraw a plea, including (1) whether the defendant asserted his legal innocence in his motion to withdraw; (2) the amount of time between the plea and the motion to withdraw; and (3) whether the government would be prejudiced by withdrawal of the plea. *See United States v. Schmidt*, 373 F.3d 100, 102–03 (2d Cir. 2004). It was not error to consider these factors, nor to find that they weighed against Overton.

First, the court properly concluded that Overton's assertion of legal innocence lacked evidentiary support, both because the alleged *Brady* material was not exculpatory as to all of Overton's charged conduct, and because it was further undermined by his two prior guilty pleas – once at his plea colloquy before the district court, and once in state court. "A claim of innocence can be a basis for withdrawing a guilty plea, but the claim must be supported by evidence. A defendant's bald statements that simply contradict what he said at his plea

allocution are not sufficient grounds to withdraw the guilty plea." *United States v. Hirsch*, 239 F.3d 221, 225 (2d Cir. 2001) (internal quotation marks and citation omitted); *see Adames v. United States*, 171 F.3d 728, 732 (2d Cir. 1999) ("A criminal defendant's self-inculpatory statements made under oath at his plea allocution carry a strong presumption of verity and are generally treated as conclusive in the face of the defendant's later attempt to contradict them." (internal citations and quotation marks omitted)).

Second, while the district court attributed only the first five months of delay to Overton when considering the time between his plea allocution in November 2018 and the date when he first raised an issue with his plea in April 2019, this delay was still substantial. *See United States v. Albarran*, 943 F.3d 106, 123 (2d Cir. 2019) (finding that a four-month lapse between a defendant's guilty plea and his motion to withdraw supported the district court's discretionary denial of the motion); *cf. United States v. Doe*, 537 F.3d 204, 213 (2d Cir. 2008) ("Whereas a swift change of heart may indicate a plea made in haste or confusion, the fact that the defendant waited five months to file his motion strongly supports the district court's finding that his plea was entered voluntarily." (internal quotation marks, citations, and alterations omitted)). Third, we also agree with the court's finding

that there would have been prejudice to the government were it to prepare for Overton's trial a third time. *See Albarran*, 943 F.3d at 123. Finding no error in the court's analysis, we conclude that the court did not abuse its discretion in denying Overton's motion to withdraw his guilty plea.

Finally, we consider Overton's ineffective assistance of counsel claim. When addressing an ineffective assistance claim on direct appeal, this Court may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus . . . ; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. DeLaura*, 858 F.3d 738, 743 (2d Cir. 2017). Because Overton's ineffective assistance claim rises and falls with his Rule 11(d) and *Brady* arguments, we will address that claim now, without prejudice to Overton's right to bring a habeas petition on different grounds in the future.

To establish ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel's representation "fell below an objective standard of reasonableness," and (2) this deficient performance caused prejudice to the defendant – that is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Overton contends that his counsel erred when he inadequately argued the purported *Brady* violation and failed to assert in the district court that Overton had a right to unconditionally withdraw his plea under Rule 11(d)(1) – the very arguments that Overton makes on appeal. Because we have already considered and rejected Overton's arguments regarding the applicability of Rule 11(d)(1) and the purported *Brady* violation here, we find that he suffered no prejudice from his counsel's failure to adequately advance these arguments below. Overton's ineffective assistance claim therefore necessarily fails. *See id.* at 697 (noting that "there is no reason for a court deciding an ineffective assistance claim to . . . address both components of the [two-part] inquiry if the defendant makes an insufficient showing on one").

III. Conclusion

For all these reasons, we **AFFIRM** the judgment of the district court.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: February 03, 2022
Docket #: 21-76cr
Short Title: United States of America v. Overton

DC Docket #: 1:15-cr-9-1
DC Court: WDNY (BUFFALO)
DC Judge: Scott
DC Judge: Skretny

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of March, two thousand twenty-two,

Before: Amalya L. Kearse,
John M. Walker, Jr.,
Richard J. Sullivan,

Circuit Judges.

United States of America,

Appellee,

v.

Marcellus Overton,

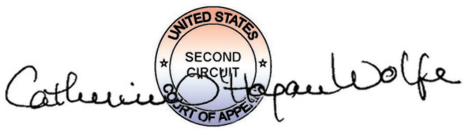
Defendant-Appellant.

ORDER
Docket No. 21-76

Appellant Marcellus Overton having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



18 U.S.C.
United States Code, 2011 Edition
Title 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 77 - PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS
Sec. 1591 - Sex trafficking of children or by force, fraud, or coercion
From the U.S. Government Publishing Office, www.gpo.gov

§1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

(Added Pub. L. 106–386, div. A, §112(a)(2), Oct. 28, 2000, 114 Stat. 1487; amended Pub. L. 108–21, title I, §103(a)(3), Apr. 30, 2003, 117 Stat. 653; Pub. L. 108–193, §5(a), Dec. 19, 2003, 117 Stat. 2879; Pub. L. 109–248, title II, §208, July 27, 2006, 120 Stat. 615; Pub. L. 110–457, title II, §222(b)(5), Dec. 23, 2008, 122 Stat. 5069.)

AMENDMENTS

2008—Subsec. (a). Pub. L. 110–457, §222(b)(5)(A)(ii), substituted ", or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means" for "that force, fraud, or coercion described in subsection (c)(2)" in concluding provisions.

Subsec. (a)(1). Pub. L. 110–457, §222(b)(5)(A)(i), substituted "obtains, or maintains" for "or obtains".

Subsec. (b)(1). Pub. L. 110–457, §222(b)(5)(C), substituted "means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means," for "force, fraud, or coercion".

Subsecs. (c), (d). Pub. L. 110–457, §222(b)(5)(D), added subsecs. (c) and (d). Former subsec. (c) redesignated (e).

Subsec. (e). Pub. L. 110–457, §222(b)(5)(B), (E), redesignated subsec. (c) as (e), added pars. (1) and (4), and redesignated former pars. (1) and (3) as (3) and (5), respectively.

2006—Subsec. (b)(1). Pub. L. 109–248, §208(1), substituted "and imprisonment for any term of years not less than 15 or for life" for "or imprisonment for any term of years or for life, or both".

Subsec. (b)(2). Pub. L. 109–248, §208(2)(B), which directed amendment of subsec. (b)(2) by striking out ", or both", could not be executed because that language did not appear in text subsequent to amendment by Pub. L. 109–248, §208(2)(A). See below.

Pub. L. 109–248, §208(2)(A), substituted "and imprisonment for not less than 10 years or for life" for "or imprisonment for not more than 40 years, or both".

2003—Pub. L. 108–193, §5(a)(1), inserted comma after "fraud" in section catchline.

Subsec. (a)(1). Pub. L. 108–193, §5(a)(2), substituted "in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States" for "in or affecting interstate commerce".

Subsec. (b). Pub. L. 108–193, §5(a)(3), substituted "the person recruited, enticed, harbored, transported, provided, or obtained" for "the person transported" in pars. (1) and (2).

Subsec. (b)(2). Pub. L. 108–21 substituted "40" for "20".

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PART I - CRIMES
CHAPTER 77 - PEONAGE, SLAVERY, AND TRAFFICKING IN PERSONS
Sec. 1594 - General provisions
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§1594. General provisions

(a) Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

(b) Whoever conspires with another to violate section 1581, 1583, 1589, 1590, or 1592 shall be punished in the same manner as a completed violation of such section.

(c) Whoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both.

(d) The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States—

(1) such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and

(2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(e)(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.

(B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

(f) WITNESS PROTECTION.—Any violation of this chapter shall be considered an organized criminal activity or other serious offense for the purposes of application of chapter 224 (relating to witness protection).

(Added Pub. L. 106–386, div. A, §112(a)(2), Oct. 28, 2000, 114 Stat. 1489; amended Pub. L. 110–457, title II, §222(c), Dec. 23, 2008, 122 Stat. 5070.)

AMENDMENTS

2008—Subsecs. (b) to (f). Pub. L. 110–457 added subsecs. (b) and (c) and redesignated former subsecs. (b) to (d) as (d) to (f), respectively.

Rule 11. Pleas

(a) **Entering a Plea**.

(1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) **Considering and Accepting a Guilty or Nolo Contendere Plea**.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the

court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel-and if necessary have the court appoint counsel-at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-in-crimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the

Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea*. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) **Plea Agreement Procedure**.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing

factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement*. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement*.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement*. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement*. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) **Withdrawing a Guilty or Nolo Contendere Plea**. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) **Finality of a Guilty or Nolo Contendere Plea**. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) **Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements**. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) **Recording the Proceedings**. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by

a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) **Harmless Error**. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.