No._____

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR CLAYTON,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari from the United States Court of Appeals for the Third Circuit at Appeal Number 22-2908

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the district court err in denying defendant's motion to dismiss pursuant to federal Rule of Criminal Procedure 12 (b)(3) counts One and Two of the Indictment charging sex trafficking of a minor for failure to state an offense? That is because the facts presented by the government in the defendant's case, as applied, make out a wholly domestic offense that congress never intended to address when it enacted 18 U.S.C. § 1591 and is unconstitutional as applied to the defendant.

2. Did the district court err in denying defendant's motion to withdraw his guilty plea because the government breached the plea agreement by including unconstitutional terms in the agreement?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

VICTOR CLAYTON,
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OPINIONS BELOW

The petitioner respectfully prays for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit. The Third Circuit's Non-Precedential Opinion is attached hereto to as Appendix A. (App.1a)

JURISDICTION

This litigation began as a criminal prosecution against VICTOR CLAYTON, Petitioner, for violations of laws of the United States. On November 16, 2021, the defendant appeared before the Honorable R. Barclay Surrick and pleaded guilty to Counts 1 and 2 of his Indictment. The plea was entered pursuant to Federal rule of Criminal Procedure 11(c)(1)(C), with an agreed upon sentence range of 180 months to be followed by ten years of supervised release. The defendant was sentenced to 180 months to be followed by ten years of supervised release by judgement entered

on September 29, 2022. Notice of appeal was filed October 12, 2022. The Court of Appeals for the Third Circuit affirmed the defendant's judgement of conviction On October 2, 2024. This Court has Jurisdiction under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment, The Treaty Power at art. II, § 2, cl 2, and the Necessary and Proper Clause at art I, § 8, cl. 18 of the United States Constitution as applied to the defendant in Title 18 U.S.C §1591(a)(1). The plea agreement by including unconstitutional terms in the agreement that stated that the defendant was subjected to 18 U.S.C. § 3583(k). The text of these provisions is:

The Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article II § 2

He [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise

provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Necessary and Proper Clause at Article I, § 8, cl. 18

[The Congress shall have Power . . .] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Title 18 U.S.C §1591(a)(1)

(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, advertises, maintains, patronizes, or solicits by any means a person; or

18 U.S.C. § 3583(k)

(k)

Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under

section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

STATEMENT OF THE CASE

1. *Factual background*

On November 15, 2018, a grand jury in the Eastern District of Pennsylvania returned a two-count Indictment charging Victor Clayton with sex trafficking of a minor and attempt, in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(a) [Counts 1 and 2]. On November 16, 2021, the defendant appeared before the Honorable R. Barclay Surrick and pleaded guilty to Counts 1 and 2 of the Indictment. The plea was entered pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), with an agreed upon sentence range of 180 months to be followed by ten years of supervised release.

Count One of the defendants indictment charges that on or about February 1, 2018

and on or about March 15, 2018, in Philadelphia in the Eastern District of Pennsylvania, the Eastern District of North Carolina, and elsewhere, Victor Clayton in and affecting interstate commerce knowingly recruited, enticed, harbored, transported, provided, obtained, and maintained Minor 1, whose identity is known to the Grand Jury, and attempted to do so, knowing and in reckless disregard of the fact that Minor 1 was under the age of 18 and would be caused to engage in a commercial sex act, and having had the reasonable opportunity to observe Minor 1. Count Two alleges the same acts with regard to Minor 2, between on or about March 12, 2018, and on or about March 15, 2018. The defendant is appealing the district court's order and opinion denying the motion to dismiss counts one and two that was entered on November 9, 2021. (App.10a)

2. Factual overview of issue one

The defendant at his plea hearing acknowledges that the Government would prove that between on or about February 1, 2018, and on or about March 15, 2018, the defendant recruited, enticed, harbored, transported, provided, obtained, and maintained minor one, in or affecting interstate commerce, knowing or recklessly disregarding the fact that she had not attained the age of 18 and would be caused to engage in a commercial sex act, and had the reasonable opportunity to observe her.

The defendant at his plea acknowledged that the Government would prove that

he was involved in posting Backpage advertisements for minor one, including taking 23 photographs of her for advertisements; that he transported her, including in interstate commerce; that he harbored her and maintained her at various hotels in Philadelphia, including the Days Inn, the Motel 6, the Hub Motor Lodge, and the North American Motor Inn, including paying for those hotels in cash knowing that she would be caused to engage in commercial sex acts.

The defendant agreed that the Government would also prove that between on or about March 12, 2018, and on or about March 15, 2018, the defendant knowingly recruited, enticed, harbored, transported, provided, obtained, or maintained minor two, in and affecting interstate commerce; knowing or recklessly disregarding the fact that she had not attained the age of 18 and would be caused to engage in a commercial sex act; and that he had the reasonable opportunity to observe her and that he attempted to do so.

The defendant agreed that as to minor two the government would prove that on or about March 12, 2018, along with minor one, he drove in a rented vehicle to upper Chichester, Pennsylvania where he picked up minor two, and he and minor one discussed Backpage advertisements with minor two, and discussed with her engaging in commercial sex acts, and how she would be part of the team. The defendant brought both of those minors to sleep overnight at his mother's house in Philadelphia. Then on

approximately March 13, 2018, he drove both minors to North Carolina; minor one being age 16, minor two being age 15. The defendant then rented a room at the Baymont Inn and Suites in Dunn, North Carolina, in cash, knowing that both minors would be caused to engage in commercial sex acts.

Defendant's conduct was entirely domestic and had no transnational component. The defendant asserts that Congress does not have the power, nor did it intend in its enactment of Title 18 U.S.C §1591(a)(1) to infringe on wholly domestic criminal activity as born out by the specific facts in the defendants case.

3. Factual overview of issue two

On November 16, 2021, the defendant entered a conditional plea, which preserved his right to appeal from the denial of his motion to dismiss counts one and two of the Indictment. Among other provisions, the guilty plea contained the following language:

> The defendant further understands that supervised release may be revoked if its terms and conditions are violated. When supervised release is revoked, the original term of imprisonment may be increased by up to five years per count of conviction. Thus, a violation of supervised release increases the possible period of incarceration and makes it possible that the defendant will have to serve the original sentence, plus a substantial additional period, without credit for time already spent on supervised release. If the defendant violates supervised release by committing one or more specified child exploitation offenses, the court will revoke supervised release and require the defendant to serve an additional term of imprisonment of at least 5 years pursuant to 18 U.S.C. § 3583(k). (App.28a)

18 U.S.C. 3583 (k) was struck down by the Supreme Court on June 26, 2019, in the *United States v. Hammond*, 139 S. Ct. 2369; 204 L.Ed.2d897(2019) and should not have been included in the defendant's plea agreement. The defendant asserts that the district court and the government advised the defendant that he was subjected to 18 U.S.C. § 3583 (k), which mandates a mandatory minimum sentence of (5) five years, if the defendant violates supervised release, per count. This material mistake constituted a breach of the defendant's plea agreement, and he should be permitted to withdraw his plea.

REASONS FOR GRANTING PETITION

Argument One

> The district court erred in denying defendant's motion to dismiss, pursuant to Federal Rule of Criminal Procedure 12 (b)(3), counts One and Two of the Indictment charging sex trafficking of a minor for failure to state an offense. That is because the facts presented by the government in the defendant's case, make out a wholly domestic offense, that congress never intended to address when it enacted 18 U.S.C. § 1591(a)(1) and is unconstitutional as applied to the defendant.

DISCUSSION

I. THE COURT ERRED IN DENYING DEFENDANTS MOTION TO DISMISS COUNTS ONE AND TWO CHARGING 18 U.S.C. § 1591.

The crux of the defendant's appeal is that both counts of his Indictment are

unconstitutional as applied to him. The defendant asserts that Congress does not have the power, nor did it intend in its enactment of Title 18 U.S.C §1591(a)(1) to infringe on wholly domestic criminal activity. To do so would be in violation of the Tenth Amendment, The Treaty Power and the Necessary and Proper Clause of the United States Constitution.

The Tenth Amendment provides in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to any States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Treaty Power permits the President, "by and with the advice of the Senate to make treaties, provided two thirds of the Senators present concur…" *Id* at art. II, § 2, cl 2. It is the Necessary and Proper Clause that gives Congress the Power "[t]o make all laws which shall be necessary and proper for carrying into Execution the forgoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Id at art I, § 8, cl. 18.

To enact a piece of legislation, the government must be able to point to an enumerated power in the Constitution that authorizes congress to enact it. It is beyond doubt that "lacking police power", congress cannot punish felonies generally. For example, a criminal act committed wholly within a state cannot be made an offense against the United States, unless it has some relation to the

execution of a power of Congress, or some matter within the Jurisdiction of the United States. See Bond v United States 572 U.S. 134 S. Ct. 2077, 2086 (2014) (quoting Cohen v. Virginia 19 U.S. 264, 428 (1821)).

The question presented here is not whether Congress has the authority under the Necessary and Proper Clause to make laws, but whether Congress has the authority under the Necessary and Proper Clause to expand the scope of a treaty intentionally or as applied. The Necessary and Proper Clause is the Source of Congress' power to enact implementing legislation as it relates to a self-executing treaty generally, and its outer bounds limit Congress' authority to pass such legislation. The Necessary and Proper Clause allows Congress to construct laws that are rationally related to the implementation of another constitutionally enumerated power, including the Presidents' power to make and execute treaties. See *United States v. Comstock* 560 U.S. 126, 134, 130 S. Ct. 1949 (2010) (citing Sabri v. United Sates 541 U.S. 600, 605 124 S. Ct. 1941 (2004) A statute is necessary to the implementation of a treaty if it is plainly adapted to the treaty, and the statute is a proper means of doing so if it is both not prohibited by the Constitution and consistent with the letter and spirit of the Constitution.

On October 28, 2000, Congress enacted the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA"). Pub. L. 106-386, 114 Stat. 1464 (2000).

Division A of this Act was known as the Trafficking Victims Protection Act ("TVPA"). The TVPA implements the United Nations Protocol to Prevent, Suppress and Punish Trafficking in persons. ("UNTOC"). The United States has adopted the Protocols as a signatory State pursuant to the presidents Treaty Power. Among its many provisions, the TVPA created criminal penalties for sex trafficking of children or by force, fraud, or coercion. Pub. L. 106-386, § 112(a), *codified at* 18 U.S.C. § 1591 (2000).

The TVPA sought to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. § 7101(a). In support of the TVPA, Congress made a number of findings relating to the "modern form of slavery" of trafficking in persons. *Id*. § 7101(b). The "Purposes and Findings" section of the TVPA, includes, among other things, references to the "international sex trade," 22 U.S.C. § 7101(b)(2), a "growing transnational crime," § 7101(b)(3), the transportation of victims "from their home communities to unfamiliar destinations, including foreign countries … ," § 7101(b)(5), "organized criminal enterprises worldwide," § 7101(b)(8), that "[t]rafficking in persons is a transnational crime," § 7101(b)(24), and numerous references to the victims of trafficking often being immigrants illegally brought to

the country where they are exploited, §§ 7101(b)(5), (17), (20). The reason for these transnational references is because the TVPA is the implementing legislation Necessary and Proper to implement the UNTOC agreement.

The legislative record around the original bill provides important insight. The record of the original passage of the TVPA makes a myriad of references to trafficking across international borders, but none to domestic or purely local conduct. The House Judiciary's report on the bill showed measured constraint, viewing congress's jurisdiction over the bill as limited to the immigration provisions and the criminal penalty provisions. H.R. Rep. 106-487, pt. II, at 17 (Apr. 13, 2000).

Senator Brownback of Kansas, who assisted in developing the TVPA, made it clear that the bill addressed the evils of international sex trafficking. 146 Cong. Rec. S10,164-67 (Oct. 11, 2000) (statements of Sen. Brownback). Senator Brownback began his statement by invoking the story of Irina, who answered a "vague ad" in a Ukrainian newspaper and traveled to Israel to make money stripping. Instead, she was driven to a brothel, her passport was burned, she was designated as "property," and she was threatened with arrest and deportation. *Id*. The victims of sex trafficking "are enslaved into a devastating brutality against their will, with no hope for release or justice." *Id*. Senator Wellstone emphasized similarly egregious accounts of coercion and violence. *Id*. at S10,168.

The international focus of the law is further reflected in the original Act's structure, where eight out of thirteen sections were expressly focused on combatting international trafficking. 114 Stat. 1464, Pub. L. 106-386, §§ 104-111 (Oct. 28, 2000). All of this is strong evidence that Congress did not intend to regulate purely domestic conduct and instead desired to leave such regulation for the states.

Congress does not exercise a general "police power;" that belongs to the States. *Bond v. United States*, 572 U.S. 844 (2014). In *Bond*, a jilted wife engaged in an "amateur attempt" to injure her husband's lover by spreading toxic chemicals on the lover's car, mailbox, and doorknob. *Bond* at 851. The victim sustained only minor chemical burns. *Id*. Nevertheless, the federal government charged the defendant with possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a). 18 U.S.C. § 229(a) is implementing legislation of an international treaty regarding the proliferation of chemical weapons.

The Court reversed the conviction, relying on principles of federalism "inherent in our constitutional structure." *Id*. at 856 (majority opinion). Though the government's applicability of the facts to the law was simple (and matched Justice Scalia's commonsense view), the Court rejected that interpretation because it threatened to "dramatically intrude upon traditional state criminal jurisdiction," and the Court avoids reading statutes in such a way in the absence of a "clear indication"

that they do. *Id*. The background principle the Court relied upon was "grounded in the relationship between the Federal Government and the States under our Constitution." *Id*.

The Supreme Court has interpreted the Necessary and Proper Clause to permit Congress to implement an existing, non-self-executing treaty, as negotiated by the President. U.S. Const. Art. II. §2, cl. 2. It would violate the structure and spirit of the Constitution for Congress to pass implementation legislation that causes a treaty to take on a shape that contradicts the Constitution, either by causing the treaty to reach a topic on which the President himself could not have negotiated or by allowing Congress to reserve for itself power to expand the treaty's scope beyond what the President negotiated on the country's behalf as a signatory.

The Supreme Court has intimated that the Treaty Power reaches only "proper subjects of negotiation between our government and other nations". See *Asakura v. City of Seattle*, 265 U.S. 332, 341, 44 S. Ct. 515, 68 L. Ed. 1041 (1924); see Bond, 134 S. Ct. 2077 at 2102-11 (Thomas, J., concurring)(joined by Justices Scalia and Alito); In re Ross, 140 U.S. 453, 463, 11 S. Ct. 897, 35 L. Ed. 581 (1891); Geofroy v. Riggs, 133 U.S. 258, 266, 10 S. Ct. 295, 33 L. Ed. 642 (1890). In particular, no court has ever said that The Treaty Power can be exercised without limit to affect matters which are a purely domestic concern and do not pertain to our relations with

other nations.

Under Rule 12 of the Federal Rules of Criminal Procedure, the defendant in a criminal matter may Challenge his or her Indictment at any point prior to trial. See Fed. R. Crim P. 12(b)(3). Victor Clayton did so in his case. To Succeed on an as applied challenge, the defendant need only show that the [Statute] is "an unconstitutional exercise of congressional power" as applied to the conduct set forth in the indictment. See *United States v Sullivan*, 451 F 3d. 884, 887, 371 U.S. App. D.C. 3639 (DC Cir. 2006).

Federal courts should decline to read federal law as intruding upon the responsibility for states to regulate local criminal activity, "unless Congress has clearly indicated that the law should have such reach." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "To interpret the Treaty Power as extending to every conceivable domestic subject matter-even matters without any nexus to foreign relations-would destroy the basic constitutional distinction between domestic and foreign powers." see Bond, 134 S. Ct. 2077 at 2104 (Thomas, J., concurring) (joined by Justices Scalia and Alito) (Citing United States v. Curtiss-Wright Export Corp 229 U.S. 304, 319, 57 S. Ct. 216, 81 L. Ed 255 (1936).

In order to stem the tide of federalization of local crime, 18 U.S.C. § 1591 must be construed narrowly with an eye to the concerns of international sex

trafficking by violence and subjugation that led to its enactment as necessary and proper. The rule enunciated by the Supreme Court in *Bond* mandates that courts should construe federal criminal statutes that infringe upon a traditional area of state authority narrowly. Accordingly, Counts One and Two of the Indictment against Victor must be dismissed pursuant to Fed. R. Crim P. 12(b)(3) as unconstitutional as applied.

Argument Two

The district court erred in denying the defendant's motion to withdraw his guilty plea because the government breached the plea agreement by including unconstitutional terms in the agreement.

The defendant asserts that the district court and the government, erroneously advised the defendant that he was subjected to 18 U.S.C. § 3583 (k), which mandates a mandatory minimum sentence of (5) five years, if the defendant violates supervised release, per count. However, this provision in the plea agreement is unconstitutional as 18 U.S.C. 3583 (k) was struck down by the Supreme Court on June 26, 2019, in the *United States v. Hammond*, 139 S. Ct. 2369; 204 L.Ed.2d897(2019). Because the defendant was misled and misinformed regarding this sentencing provision in the plea agreement, the defendant did not enter into the plea knowingly, intelligently, and voluntarily. The government induced the defendant's plea by including

unconstitutional terms in its plea negotiations. Because the government knowingly or negligently included these invalid terms the plea agreement has been breached.

At the outset the defendant notes that although he signed an appellate waiver, an appellate waiver is not enforceable if the government breaches its own obligations under the plea agreement. See *United States v. Moscahlaidis*, 868 F. 2d 1357, 1360 (3d Cir. 1989). What renders the plea null, and void is found in paragraph five of the plea agreement, which provides that the defendant is subjected to 18 USC 3583(k), mandatory five-year sentence for certain violations while on supervised release. This sentencing provision, as conceded by the government and the district court, is unenforceable and has been struck down as unconstitutional by the Supreme Court. However, the district court alluded to this provision during the defendant's Rule 11 plea colloquy. This terms inclusion constitutes a breach of the plea agreement.

The Supreme Court in *Santobello v New York* 404 U.S. 257, (1971), established that when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Id at 262. *Santobello,* focused on the duties of the prosecutor in relation to promises made in plea negotiations. The plea agreement in and of itself is part of the inducement. The fact that the error is possibly harmless or inadvertent does not obviate the need for appropriate relief. A

plea induced by an unfulfillable promise is no less subject to challenge than one induced by a valid promise which the government simply fails to fulfill. See *Brady v. United States* 397 U.S. 742, 755 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970).

Plea agreements are contractual and therefore analyzed under Contract Law Standards. See *Unites States v. Moscahlaids*, 868 F.2d 1357, 1361 (3d Cir. 1989) "In determining whether a plea agreement has been broken courts look to what was reasonably understood by [the defendant] when he entered his plea of guilty". *United States v. Crusco*, 536 F.2d 21, 27 (3d Cir.1976). Plea agreements are mutually agreed upon understandings between the parties or a quid pro quo. See *United States v. Partida-Parra*, 859 F2.d 629, 633 (9th Cir.1988). Where the plea is the product of a "material misrepresentation" relied on by the defendant the error cannot be harmless. ("Error, plain on the face of the record"…) Boykin v. Alabama, 395 US 238, 242, 89 S. Ct. 1709, 23 L. Ed 2d 274 (1969). A plea of guilty under the influence of unintentionally erroneous advice by the government agent… [the prosecutor, court, and attorney's].. cannot be regarded as having been made on the necessary basis of informed, self-determined choice. See *Von Moltke v. Gillies* (1948) 332 US 708, 92 L. Ed 309, 68 S. Ct. 316 concurring opinion of Justice Frankfurter and Justice Jackson.

When the court has determined that a material aspect of the plea agreement is

invalid, the proper remedy is to allow the defendant to withdraw the guilty plea and either negotiate a new "agreement" or proceed to trial. United States v. Fotiades-Alexander, 331 F. Supp 2d 350 (E.D.Pa.2004) ("It is well-settled that supervised release constitutes punishment) See *United States v. Gilchrist*, (1997) 130 F. 3d 1131 (relying on *United States V. Dozier*, 119 F.3d 239, 1997 WL 401318 (3d Cir. (N.J.)).

The government argues that the defendant should be tethered to the plea agreement regardless of the "error" in the "Plea Agreement" sentencing penalty provision, which the government concedes is unconstitutional and invalid. In general terms of the plea agreement are "contractual in nature". "[P]lea agreements… are unique contracts in which special Due Process concerns for fairness and adequacy of procedural safeguards obtain", United States v. Carnine, 974 F. 2d 924, 928 (7th Cir. 1992). Thus, courts construe plea agreements strictly against the government. This is done for a variety of reasons, including the fact that the government is usually the party that drafts the agreement, and the fact that the government ordinarily has certain awesome advantages in bargaining power". *United States v. Mergen*, 764 F.3d 199, 208 (2d Cir.2014) (quoting *United States v. Ready*, 82 F.3d 551, 559 (2d Ciur. 1996), superseded on other grounds as stated in *United States v. Cook*, 722 F. 3d 477, 481 (2d Cir. 2013). For these reasons, courts should hold the government to a "greater degree of responsibility than the defendant… for imprecisions or

ambiguities in … plea agreements". *United States v. Wells*, 211 F. 3d 988, 955 (6th Cir. 2000).

The government argues that the error is harmless and not prejudicial to the defendant. The government is wrong. Due process of Law is absolute. See *Carey v. Piphus*, 98 S. Ct. 1042, 55 L. Ed 2d 252,435 45 247 (1978). The government's position is that the defendant should not be afforded the opportunity to object to an unconstitutional sentencing provision in the plea agreement which in any event is unenforceable, rendering it completely impotent and non-prejudicial.

The fact of whether the provision is enforceable or not is beside the point. What matters is what rights would have been readily available to the defendant at the time of the entry of his plea. Particularly, when the sentencing provision had been invalidated by the Supreme Court two years prior to the defendant's plea. Moreover, the knowledge of these potentially onerous supervised release consequences likely plaid a role in accepting the plea with more favorable sentencing terms. "If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of Due Process and therefore, is void". *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct 1166 22 L. Ed 2d 418 (1969).

In the situation before us, the defendant would have had the right under Due Process of Law to make an informed, intelligent, and knowing decision as to what

rights were available to him moving forward in the proceedings. The government's position would effectively strip away those rights and constitutional protections and safeguards because of an error made on the part of the government who had a legal obligation to know what the law was. A matter affecting substantial rights means "error" with a prejudicial effect on the outcome of a judicial proceeding. Had the court been aware of the sentencing error at the time of the plea entry, there can be no dispute that the court under its authority and duty would have addressed the error and the outcome of the proceedings would have had a different result. Moreover, because of the defendant's mistrust of the government, as indicated in his desire to go to trial, such an error on the government's part would have given the defendant pause not to move forward with a plea. Denial of Due Process of Law "procedural or substantive, violates the Due Process Clause and amounts to a miscarriage of justice.

The court cannot "reject" certain provisions of the plea agreement and still accept the plea agreement. See, *United States v. Yednak*, 187 F.Supp.2d 419 (3d Cir. 2002) (holding the court may only accept or reject the plea agreement in its entirety. It does not have the authority simply to reject those portions of the agreement with which it finds fault. See *United States v. Mukai*, 26 F. 3d 953, 956 (9th Cir.1994)(starting that "if the court did not find the terms of [one paragraph of the plea agreement] appropriate, its only option was to reject the agreement in its

entirety")' *United States v. Cunavelis*, 969 F.2d 1419, 1422 (2d Cir. 1992)("The district court may accept or reject a []… plea [agreement], but may not modify it."). see e.g., *United States v. Self*, 596 F.3d 245, 249 (5th Cir. 2010) (holding that the courts rejection of the stipulated sentence in the plea agreement constituted a rejection of the entire plea agreement); See also *In Re Morgan*, 506 F.3d 705, 709, (9th Cir. 2007) (noting that the court cannot accept a plea agreement on a piecemeal basis). In this case the court has no choice but to reject the plea agreement and remand the case for further proceedings.

A guilty plea induced by misrepresentation including unfulfillable or unfulfilled promises cannot stand and is contractually in breach. If the provisions of a plea agreement are accepted by a court, but later found to be invalid, the proper remedy is not to impose a sentence that modifies or violates the plea agreement. The remedy is to allow the defendant to withdraw his guilty plea and either negotiate a new plea agreement or proceed to trial. See *United States v. Bernard*, 373 F.3d. 339, 345, 46 V.I. 657 (3d Cir. 2004).

The government negotiated a plea with onerous terms that had long been invalidated. These terms were surely a safety net for future harsh punishment should the defendant violate his supervised release. The government negotiated a plea that on its face was generous by offering a well below guidelines sentencing carrot at the

front end with a significant five-year mandatory sentence supervised release violation stick. The defendant entered into a plea agreement contract with terms that were wholly unconstitutional. The remedy is to remand the defendant's case and permit him to withdraw his guilty plea and either negotiate a new plea agreement or proceed to trial.

Conclusion

WHEREFORE, for the foregoing reasons, Petitioner prays that a writ of certiorari be granted, and the United States Supreme Court reviews the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Date: December 30, 2024

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