

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC ALONZO WINDHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

CORRECTED PETITION FOR A WRIT OF CERTIORARI

J.D. Lloyd

Counsel of Record

The Law Office of J.D. Lloyd

2320 Arlington Ave. S.

Birmingham, AL 35205

Office: (205) 538-3340

JDLloyd@JDLloydLaw.com

Alisha McKay

The Law Office of J.D. Lloyd

2320 Arlington Ave. S.

Birmingham, AL 35205

Office: 205-672-6720

Alisha@JDLloydLaw.com

QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit’s plain error review properly considered the full record under *United States v. Davila*, 569 U.S. 597 (2013), or wrongly limited itself to the second plea hearing, when it rejected Mr. Windham’s claim that but for improper judicial participation in plea negotiations, Mr. Windham would have exercised his constitutional right to a trial?

II.

Whether repeated misstatements about safety-valve eligibility rendered Mr. Windham’s plea invalid under *United States v. Dominguez Benitez*, 542 U.S. 74 (2004)?

PARTIES TO THE PROCEEDINGS

The petitioner is Eric Alonzo Windham, the appellant-petitioner below.
Respondent is the United States of America, the appellee-respondent below.

CORPORATE DISCLOSURE

The Petitioner, Eric Alonzo Windham, is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

United States v. Windham, No. 22-11622, 2025 WL 18584 (11th Cir. Jan. 2, 2025)
(unpublished).

TABLE OF CONTENTS

Question Presented.....	ii
Parties to the Proceedings.....	iii
Corporate Disclosure	iii
Statement of Related Proceedings	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Relevant Constitutional Provisions	1
Statement.....	2
A. Factual Background.....	5
1. Overview of the Offense Conduct.....	5
2. The plea proceedings and Mr. Windham’s concern for the safety valve.....	5
B. Procedural Background.....	12
Reasons for Granting the Petition	14
Guidance is necessary from this Court to address the requirement that the reviewing court must consider the entire record when addressing issues involving Rule 11, Ala. R. Crim. P., violations.....	14
A. Review is necessary to ensure that the question of whether Mr. Windham suffered prejudicial error due to judicial intervention in his plea proceedings is answered only after full consideration of the record.....	15
B. Review is necessary to ensure that the question of whether Mr. Windham suffered prejudicial error due to repeated misinformation on safety valve eligibility that rendered his plea unknowing, unintelligent, and involuntary is answered only after full consideration of the record.....	20

Conclusion	24
Appendix A.....	A-1
Appendix B.....	A-23

TABLE OF AUTHORITIES

Cases

<i>McCarthy v. United States</i> , 394 U.S. 459 (1969)	20
<i>United States v. Castro</i> , 736 F.3d 1308 (11th Cir. 2013).....	15
<i>United States v. Davila</i> , 569 U.S. 597 (2013)	ii, 2, 3, 14, 15, 17, 19
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004)	ii, 4, 15
<i>United States v. Harrell</i> , 715 F.3d 1235 (11th Cir. 2014)	16
<i>United States v. Marcus</i> , 560 U.S. 258 (2010)	19
<i>United States v. Windham</i> , No. 22-11622, 2025 WL 18584 (11th Cir. Jan. 2, 2025).....	iii

Statutes

18 U.S.C § 3553(f)	2, 21
21 U.S.C. § 841(a)(1)	2
21 U.S.C. § 846	
28 U.S.C. § 1254(1)	1

Rules

Rule 11(b)(2), Fed. R. Crim. P.	1
Rule 11(c)(1), Fed. R. Crim. P.....	1, 2, 3
Rule 11(h), Fed. R. Crim. P.	1
Rule 52(a), Fed. R. Crim. P.....	1

OPINIONS BELOW

The Eleventh Circuit's decision affirming Mr. Windham's conspiracy to possess with intent to distribute cocaine conviction and 120-month sentence is unpublished, but available at 2025 WL 18584, and attached as App. A-1. The order denying his request for rehearing is attached as App. A-23.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its final judgment on March 18, 2025. App. B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND PROCEDURAL PROVISIONS

Rule 11(b)(2), Fed. R. Crim. P. provides: “*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).”

Rule 11(c)(1), Fed. R. Crim. P. provides, in pertinent part: “*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...”

Rule 11(h), Fed. R. Crim. P. provides: “Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.”

Rule 52(b), Fed. R. Crim. P. provides: “A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.”

STATEMENT

This Petition arises from Mr. Windham's guilty plea and conviction for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846 following his appeal to the Eleventh Circuit. Both questions raised pertain to Mr. Windham being repeatedly misinformed that he could be safety valve eligible, under 18 U.S.C § 3553(f),¹ which informed his ultimate determination to enter a guilty plea. This mis-advisement on potential safety valve eligibility pertained to a claim that the district court improperly intervened in plea negotiations in violation of Rule 11(c)(1), Fed. R. Crim. P. This same misinformation also went to the question of whether Mr. Windham entered a knowing, intelligent, and voluntary plea under Rule 11, Fed. R. Crim. P.

The first question presented is whether the Eleventh Circuit Court of Appeals failed to correctly apply this Court's holding in *United States v. Davila*, 569 U.S. 597 (2013), which requires review of the full record to determine whether but for improper judicial participation in plea negotiations, Mr. Windham would have exercised his constitutional right to a trial.

The second question presented is whether the Eleventh Circuit Court of Appeals erred in rejecting Mr. Windham's Rule 11 assertion that the misinformation on safety valve eligibility rendered his plea invalid due to coercion or because the plea could not have been otherwise knowingly, intelligently, and voluntarily entered.

¹ It cannot be disputed that Mr. Windham was never eligible in his case for safety valve relief due to the possession of a firearm. Doc. 737 at 69-70; *see* 18 U.S.C § 3553(f)(2).

In *United States v. Davila*, 569 U.S. 597 (2013), this Court did away with automatic vacatur of pleas upon a finding of judicial intervention in the plea contrary to Rule 11(c)(1), Fed. R. Crim. P. Instead, this Court held that even if the lower court intervened in plea negotiations, “vacatur of the plea is not in order if the record shows no prejudice to [the defendant’s] decision to plead guilty.” *Id.* at 601. As guidance for meeting this required prejudice showing, this Court asked and determined:

Did that misconduct in itself demand vacatur of Davila's plea, as the Eleventh Circuit held, or, as the Government urges, must a reviewing court **consider all that transpired in the trial court** in order to assess the impact of the error on the defendant's decision to plead guilty? We hold that the latter inquiry is the one the Rules and our precedent require.

Id. at 608 (emphasis added). But this Court emphasized that in determining whether a defendant would have gone to trial despite impermissible judicial intervention in the plea requires that “the Magistrate Judge’s comments should be assessed, not in isolation, but in light of the full record.” *Id.* at 612.

This is where the Eleventh Circuit got it wrong – it failed to consider the full record. Instead, the lower appellate court focused on the second plea hearing asserting that the signed plea agreement and plea colloquy by a different judge meant that “the district court’s comments at Windham’s first plea hearing did not taint his later plea hearing where he actually pleaded guilty.” App. A at 8. But what the Eleventh Circuit failed to consider, which is reflected in the full record, is that the second district court judge continued to misinform Mr. Windham that he could be safety-valve eligible if he, for example, truthfully proffered. Doc. 706 at 10. This perpetuated not just the first judge’s misinformation but failed to cure the first court’s

intervention in the plea negotiations. The Eleventh Circuit also failed to take into consideration the full record in this case, which demonstrates that Mr. Windham repeatedly expressed a desire to plead guilty to specifically benefit from safety valve. Doc. 705 at 14, 18, 19.

The Eleventh Circuit’s analysis of the second issue—whether the misinformation on safety valve resulted in an unknowing, unintelligent, or involuntary plea under Rule 11 suffers from a similar flaw. As this Court held in *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004), the entirety of the record must be reviewed to determine Mr. Windham’s second claim as well:

We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is “sufficient to undermine confidence in the outcome” of the proceeding.

Id.

Although the Eleventh Circuit paid lip service to the requirement to “review[] the record as a whole,” it didn’t follow the above-set-forth requirement from *Dominguez Benitez*. Instead, the Eleventh Circuit held “the record reflects, the Rule 11 colloquy conducted at his second plea hearing and the plea agreement taken together show that his actual guilty plea at his second plea hearing was knowing and voluntary.” App. A at 11. But in fact, the second hearing did nothing to correct the misinformation about safety valve from the first plea hearing.

All in all the Eleventh Circuit's narrow reading of the record in Mr. Windham's case ignored the pervasive misinformation on safety valve eligibility as well as Mr. Windham's repeated statements demonstrating the reasoning for his plea: to obtain safety valve. Therefore, to address this Court's prior decisions instructing that Rule 11 violations require review of the record as a whole, this Court should grant Mr. Windham's petition for a writ of certiorari and answer the questions presented.

A. Factual Background

1. Overview of the Offense Conduct

Mr. Windham pleaded guilty to being part of a drug-distribution conspiracy in and around Mobile, Alabama, which was run by Darrin Southall. Doc. 423. Of particular note, is information contained in the factual addendum to his plea agreement concerning a traffic stop targeting Mr. Windham that occurred during the operation of the conspiracy: "Windham was wearing a gun on his hip, which was determined to be a Sig Sauer P226 pistol, with serial number U184310." Doc. 423 at 13-14.

2. The plea proceedings and Mr. Windham's concern for the safety valve.

On October 22, 2021, the Hon. Kristi K. Dubose held a hearing in which it was expected that Mr. Windham was going to plead guilty. Doc. 705. Mr. Windham, however, objected to the factual resume attached to the plea agreement. *Id.* at 2. Specifically, Mr. Windham rejected the language discussing how one co-conspirator had received "seven or eight kilograms of cocaine" from Mr. Windham at Mr. Windham's residence, and another saying a co-conspirator had delivered cocaine to

Mr. Windham's residence. *Id.* at 2-4; Doc. 423 at 29. Mr. Windham vehemently denied delivering cocaine. Doc. 705 at 6.

In response, the district court told him, "I don't see how you could plead guilty to something you didn't do, then. So—you're going to need to have a trial." Doc. 705 at 7. After the district court noted that Mr. Windham didn't have any criminal history, it asked the United States about evidence of any guns or violence in the offense. *Id.* The United States responded in the negative, explaining, "Not as a result of the government's presentation of evidence in the factual resume. We may elicit evidence of that during the trial...But as of now, we don't have that information in the factual resume." *Id.* at 7-8.

This exchange is key. The factual resume before the district court on October 22nd showed **that a gun was involved**. The factual resume in front of Judge Dubose clearly mentioned that on November 30, 2020, police conducted a traffic stop of Mr. Windham where he "was wearing a gun on his hip, a Sig Sauer P226 pistol, serial number U184310." Doc. 423 at 27. Thus, the United States either negligently or disingenuously represented during the October 22nd hearing that the factual resume of the plea did not include "evidence of guns"—when the factual resume explicitly stated that Mr. Windham possessed a pistol on his hip during the traffic stop from November 30, 2021. Doc. 705 at 7-8. Likewise, this affirmation on October 29th indicates Judge Dubose missed this critical fact contained in the plea documents before her on October 22nd.

Building off this misinformation, Judge Dubose discussed with Mr. Windham the possibility that he might be safety-valve eligible pursuant to § 3553(f) because of his criminal history and because a gun wasn't involved. *Id.* at 8. Judge Dubose explained that Mr. Windham would be "safety valve eligible" if he chose to "tell the government what you know about the case." *Id.* The district court stated that because there was no evidence that he participated in any violence, the safety valve would allow the district court to sentence Mr. Windham below the 10-year mandatory minimum applicable to his conviction. *Id.* The district court warned Mr. Windham that if he went to trial, however, it wouldn't be able to apply the safety-valve.

Mr. Windham asked for clarification, and the following exchange took place:

THE COURT: Because you have no convictions, there is this law. We call it the safety valve. It's for people like you who have no convictions. And if there's no evidence of any violence, like, you participated in any violence or you had a gun at any time during any of these transactions, then I'm not required to give you that ten years.

[Mr. Windham]: Yes, ma'am.

THE COURT: I'm not promising you anything because I don't know anything about you, but I don't have to give you that ten years. If you plead guilty and you tell the government truthfully – truthfully everything you know.

[Mr. Windham]: Yes, ma'am.

THE COURT: Now, if you choose not to do that, which you perfectly have a right to do that. And if you chose to go to trial, which you have a perfect right to do, and you're convicted, you are no longer eligible for safety valve consideration.

[Mr. Windham]: Okay.

THE COURT: In other words, that's off the table. I have no choice but to give you at least ten years.

[Mr. Windham]: Yes, ma'am. But as of right now, I'm eligible for safety valve?

THE COURT: **Right now, according to Ms. Bedwell**, you are, but you haven't debriefed and told the truth about what you know yet.

[Mr. Windham] : Yes, ma'am.

THE COURT: Once you do that and -- I mean, that's a crucial step.

[Mr. Windham]: Yes, ma'am.

Doc. 705 at 9-10 (emphasis added). Mr. Windham acknowledged the district court's explanation and stated, "When you went back over it, I understand about the safety valve. I do meet the safety valve." *Id.* at 11. The district court confirmed, "You do right now...You're eligible for it." *Id.* The district court stressed the importance of Mr. Windham proffering truthfully in order for him to get the benefit of the safety valve. *Id.* at 12.

The parties again went back to the remaining factual dispute about the handling of the drugs. Mr. Windham again balked at pleading guilty where he was required to admit to the conduct described in the two paragraphs that troubled him. *Id.* at 14. When both defense counsel and the district court said that it seemed like Mr. Windham would have to take his case to trial, Mr. Windham countered, "Your Honor, the thing **I want, I want the safety valve. I want the help**, but I never did any drugs. I never handled any drugs." *Id.* (emphasis added). Mr. Windham told the prosecutor to take out those two paragraphs and he's signed it because "**[he] wanted the safety valve.**" *Id.* at 15 (emphasis added).

The United States told the district court that Mr. Windham's position was inconsistent with the evidence they had developed and would likely present at trial.

Id. The United States and the district court pointed out to Mr. Windham the difficult position he would be in with respect to the safety valve if he was required to be truthful to the investigators but also maintained his view that he was never involved with the delivery of the drugs. *Id.* at 17. The district court explained to him:

But the problem with that is if you do that and then you go tell the agent that you didn't and they've got -- developed evidence that you did, well, the government I can tell you right now is going to say he was not truthful. So then you lost your safety valve anyway. It's a catch 22."

Id. at 17-18.

Turning back to safety valve, district court had the following exchange with Mr. Windham:

THE COURT: ... And, by the way, the safety valve does not require you to testify against anybody. That's cooperation. And that's where you get extra time off. The safety valve just requires you to talk to that man back there and tell him the truth on the questions that he asks. Okay? You're not required to testify to get the safety valve. You are required to be truthful. Okay? Do you understand that; the difference?

[Mr. Windham]: **I want the safety valve, Your Honor. And whatever I got to do to get the safety valve, Your Honor, that's what I want to do.**

THE COURT: You have to be truthful.

[Mr. Windham]: I have no problem with that. None whatsoever.

Id. at 18 (emphasis added).

The parties then discussed the possibility of entering a blind plea and the district court reiterated that Mr. Windham could still get the safety valve through such a plea. *Id.* at 19. Again, Mr. Windham again said **"I just want the safety valve. I want to get this over and behind."** *Id.* (emphasis added). The district court again reiterated that it would not be giving him the safety valve "if you are not truthful to

them.” *Id.* at 20. Mr. Windham responded that he understood and knows that being truthful is “the most important thing about getting the safety valve...” *Id.*

Yet again the parties discussed pleading blind versus pleading to the agreement; and, again, the district court had to explain the safety valve to Mr. Windham. The district court again emphasized that Mr. Windham was eligible for the safety valve depending on his stipulation to the investigators:

The safety valve -- you're facing a ten-year mandatory minimum. The safety valve says because you have no convictions, because right now there's no evidence of any violence or participation with a gun, then you are eligible if you are truthful and fully tell the government; that is, the agent, about your participation in the offense.

If the government believes you have not been truthful to them, they will come in and tell me that. And then you are not eligible if I find that that is correct.

Id. at 25. Again, per the district court’s instructions, it all came down to his proffer—not any other factor applicable under § 3553(f).

The district court suspended the hearing, but it resumed again on October 29th with Judge Jeffrey U. Beaverstock presiding. Doc. 706. The district court told the parties that it had reviewed the rough transcript of the October 22nd hearing and asked if anything had changed in the factual resume. *Id.* at 2. Defense counsel stated that the factual resume had not changed. *Id.* During the colloquy, Mr. Windham confirmed that he had reviewed the plea agreement, and the factual resume attached to it. *Id.* at 6.

The district court reiterated that Mr. Windham had discussed the possibility of receiving safety-valve relief with Judge DuBose in the October 22nd hearing and reiterated that he “**appear[s] to be eligible at this time for the safety valve and**

to have that applied to your case.” *Id.* at 10 (emphasis added). The district court reminded him that receiving the relief “depends on a number of things like you telling the full and complete truth when you debrief with the agents.” *Id.* at 10. The district court confirmed that Mr. Windham understood that if the safety valve applied in his case, then Judge Dubose could sentence him below the 10-year mandatory minimum applicable to his sentence. *Id.* at 11. When asked about the factual basis for the plea, the United States explained the case against him, including how “a firearm was recovered from the defendant’s person at that time.” *Id.* at 15. The district court ultimately accepted his plea. *Id.* at 17.

Thus, at both plea hearings (October 22 before Judge DuBose and October 29 before Judge Beaverstock, the court assured Mr. Windham he was “safety-valve eligible” if he “truthfully proffered,” even through his plea agreement disclosed a firearms possession that bars eligibility. So, Mr. Windham long operated under the belief that he was eligible for safety valve relief. It was not until a February 2022, status hearing, after he entered his plea, that Judge Dubose finally realized Mr. Windham wasn’t safety-valve eligible and told him.

At that point, Mr. Windham and his then-attorney experienced difficulties and counsel moved to withdraw. Doc. 515. At a hearing on that motion, the district court facilitated the resolution of that issue, but, at the conclusion of the hearing, Mr. Windham asked the district court, “do I qualify for safety valve, Your Honor?” Doc. 809 at 15. The district court responded:

In order to qualify -- let's see. Let me see his folder again in the front. I need to see if he has a gun issue. In order to qualify, you have to have told the

Government everything you know, not have a criminal history, but also not have any kind of violence or guns involved in your offense. And it appears that when you were stopped in Texas², you had a gun on you. So it's likely that you do not qualify for the safety valve, but that does not mean that you don't qualify for a downward departure. You can do that if you provide substantial assistance to the Government but even ...”

Id. at 15-16. The conversation moves off the record at that point. But Judge Dubose stated on the record something that one of the two judges, the United States, or defense counsel should have made clear before entry of Mr. Windham’s guilty plea: he is ineligible for safety-valve relief because of the gun found on him on November 30, 2020, which was proffered in the plea.

At sentencing the United States presented three witnesses to combat Mr. Windham’s request for safety-valve relief. Scott Fondren, an officer employed by the Department of Homeland Security, testified to impressions from the traffic stop involving Mr. Windham on November 30, 2020, including that Mr. Windham had a gun on his hip. Doc. 737 at 5-20. Two other witnesses purportedly involved in the conspiracy testified to always seeing Mr. Windham with a gun. *Id.* at 46, 56. Thus, Mr. Windham was not eligible for the safety valve. *Id.* at 69-70.

B. Procedural Background

On October 19, 2021, Mr. Windham filed his notice of his intent to plead guilty. Doc. 398. However, a plea hearing held on October 22, 2021, concluded without a plea being entered due to Mr. Windham’s concerns about the stipulations of facts. On October 29, 2021, Mr. Windham entered into a plea agreement. Doc. 423. The district

² This traffic stop took place outside Slidell, Louisiana. *See* Doc. 423 at 13-14.

court accepted that plea on October 29, 2021. *Id.* The district court conducted a sentencing hearing on April 28, 2022, and denied Mr. Windham safety-valve relief pursuant to § 3553(f). Following that hearing, Mr. Windham was sentenced to 120 months' imprisonment followed by 5 years of supervised release. Doc. 653. Mr. Windham appealed.

Among other issues, Mr. Windham argued that two district court judges improperly intervened in his plea discussions, in violation of Rule 11(c)(1), Fed. R. Crim. P., by addressing Mr. Windham's purported eligibility for safety-valve relief. He also asserted that due to the repeated indication that he could receive safety valve if he fully proffered, a statement that is not correct due to his ineligibility, his plea was not knowing, intelligent, and voluntary.

The Eleventh Circuit rejected these arguments holding first that while the first district court judge improperly intervened in the discussions, the second district court did not perpetuate the violation. App. A. at 8. Specifically, while the panel concluded that Judge DuBose's comments "[crossed] the line into the realm of [improper] participation," App. A at 6-7 (internal citations omitted), it still concluded that Mr. Windham "knew that safety valve relief **was not guaranteed.**" *Id.* at 8 (emphasis added). It also concluded that Mr. Windham didn't meet his burden of proving this intervention made a difference in his decision to plea. *Id.* at 9. Moreover, as this issue was reviewed for plain error, the Eleventh Circuit concluded that no error affected the fairness, integrity, or public reputations of judicial proceedings. *Id.*

On whether Mr. Windham could enter a knowing and voluntary plea despite repeated misinformation about his safety valve eligibility, the court below observed that the district court advised that there was no guarantee of the ultimate sentence that the court would impose. *Id.* at 14. Additionally, under plain error review, the court held that Mr. Windham did not show a reasonable probability that but for the misinformation on safety valve he would not have pleaded guilty. *Id.* It further concluded that it “cannot say that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 14-15.

Mr. Windham then sought rehearing en banc, which was denied on March 10, 2025. App. C. Mandate issued on March 18, 2025. App. D.

REASONS FOR GRANTING THE PETITION

Guidance is necessary from this Court to address the requirement that the reviewing court must consider the entire record when addressing issues involving Rule 11, Ala. R. Crim. P., violations.

To fully review claims of Rule 11, Fed. R. Crim. P., violations under this Court’s precedent requires the lower appellate courts to engage in a thorough review of the record as a whole. *Davila*, 569 U.S. at 612; *Dominguez Benitez*, 542 U.S. at 83. This review of the entire record is required both in the context of claims of judicial intervention under Rule 11(c)(1). *Davila*, 569 U.S. at 612. And it is required when addressing claims concerning the intelligent, voluntary, and knowing nature of a guilty plea under Rule 11(b)(2), Fed. R. Crim. P. *Dominguez Benitez*, 542 U.S. at 83. The Eleventh Circuit’s decision affirming Mr. Windham’s conviction and sentence

failed to engage with a full reading of the record in violation of both *Davila* and *Dominguez Benitez*.

A. Review is necessary to ensure that the question of whether Mr. Windham suffered prejudicial error due to judicial intervention in his plea proceedings is answered only after full consideration of the record.

The Eleventh Circuit's decision in this matter cannot be reconciled with current precedent regarding improper judicial intervention with plea negotiations and plain error review of this issue. This precedent requires not just consideration of the second plea hearing or plea agreement, but the improper comments "in light of the full record." *Davila*, 569 U.S. at 612. Application of this holding from *Davila* to the alarming facts of this case should have resulted in plea withdrawal.

Federal law is clear: during plea negotiations, "the court must not participate in the discussions." Rule 11(c)(1), Fed. R. Crim. P.; *see also Davila*, 569 U.S. at 606 (observing that the rule was enacted "out of concern that a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial" and to serve to "facilitate objective assessments of the voluntariness of a defendant's plea").

Violations of the Rule 11(c)(1) are subject to plain error review when there was no objection before the district court. *See Dominguez Benitez*, 542 U.S. at 83; *see also United States v. Castro*, 736 F.3d 1308, 1313 (11th Cir. 2013). There was no objection here. As such, the burden rested with Mr. Windham to demonstrate that "that the district court committed an error, that the error was plain, that the error effected his substantial rights, and that the error seriously affected the fairness, integrity or

public reputation of the judicial proceedings.” *United States v. Harrell*, 715 F.3d 1235, 1236, 1237 (11th Cir. 2014) (cleaned up). Mr. Windham met this burden based on full consideration of the record.

First, the error here is plain. While the Eleventh Circuit agreed that the first district court judge committed plain error, it found that the taint did not carry over to the second hearing. App. A. at 7-8. But that simply isn’t true. The second district court repeated the first district court’s grave error by observing that Mr. Windham “appear[s] to be eligible at this time for the safety valve and to have that applied to your case.” Doc. 706 at 10. He wasn’t. His plea paperwork established that he possessed a firearm, which would (and ultimately did) bar him from safety-valve relief. The United States even mentioned this fact to remove Mr. Windham from safety valve eligibility during their discussion of the factual basis for the plea. *See id.* at 15. Like the first district court judge, the second district court judge was simply wrong about Mr. Windham’s eligibility, misinformed him when it was obvious § 3553(f) couldn’t apply to him, and did to cure the pervasive impact of judicial intervention that took place at the first plea hearing.

That Mr. Windham was unequivocally armed with a firearm is central to the seriousness of the district court judges’ improper intervention. Again, neither district court judge stopped the proceedings and pointed out to Mr. Windham that he was **objectively ineligible** for safety-valve relief because he possessed a firearm during the commission of his offense per his plea agreement. The Eleventh Circuit, while indicating it considered the full record, makes no mention of the importance of the

misinformation communicated to Mr. Windham on safety-valve eligibility that went long uncorrected.

Nor did the United States correct either judge in the two plea hearings. The United States was aware Mr. Windham possessed a gun, that firearm possession disqualified Mr. Windham for the safety valve, and that it would present that evidence at sentencing. Similarly, there is no mention by defense counsel about Mr. Windham's ineligibility. These failures, apparent from a full review of the record, underscore the magnitude of the impact of improper judicial intervention by the two judges.

Had the Eleventh Circuit considered the totality of the circumstances from the entire record, it would have been forced to conclude that there was no objective reason for the second district court to even mention safety-valve eligibility other than to tell Mr. Windham he was ineligible. Accordingly, any determination that the second district court judge didn't commit plain error simply cannot be reconciled with binding precedent on consideration of the entire record alongside the facts of the proceedings.

Second, this error affected Mr. Windham's substantial rights. Under *Davila*, Mr. Windham must show that "it was reasonably probable that, but for the [district court's] exhortations, [Mr. Windham] would have exercised his right to go to trial." *Davila*, 569 U.S. at 612. He would not have pleaded guilty but for this error. The Eleventh Circuit failed to consider all the circumstances from the record, including Mr. Windham's reluctance to plead guilty at all, his disagreement with the United

States' case against him, and his acknowledgement that the safety valve and the potential to get below the 10-year mandatory minimum sentence was his only real consideration in foregoing his right to a trial.

And this is not guesswork. That Mr. Windham's primary reason behind pleading guilty was to obtain safety valve relief is apparent upon full consideration of the record. He repeatedly asked the district court about his eligibility for safety valve during the first plea hearing. Doc. 705 at 9-10, 11. He then repeatedly told the district court, in so many words, "I want the safety valve." *Id.* at 14, 15, 18, 19. At one point Mr. Windham stated, "I want the safety valve, Your Honor. And whatever I got to do to get the safety valve, Your Honor, that's what I want to do." *Id.* at 18.

The safety valve was discussed again at the October 29, 2021, hearing. Doc. 706. There, the district court again informed Mr. Windham he "'appear[s] to be eligible at this time for the safety valve and to have that applied to your case." *Id.* at 10.

Mr. Windham again asked for safety valve after his plea in the February 2022 status hearing and yet again at sentencing. There's no doubt Mr. Windham wanted the safety valve and was persuaded to plead guilty because of what the safety valve could potentially do for him—allow him to be sentenced below the 10-year mandatory minimum sentence. This alone establishes a "reasonable probability" that he wouldn't have pleaded and would have instead gone to trial, thus showing that his substantial rights were violated. The panel's conclusion to the contrary simply doesn't pass muster. The Eleventh Circuit did not consider Mr. Windham's repeated requests about safety valve eligibility in its analysis. Nor did it consider Mr. Windham's

repeated statements along the lines of “I just want the safety valve. I want to get this over and behind.” Doc. 705 at 19.

Instead of looking to the full record in its decision, the Eleventh Circuit read too much into Mr. Windham’s silence. Mr. Windham did not know he was ineligible for the safety valve until the February 2022 hearing at the earliest, but a decision was not made real until sentencing. Given the degree in which two judges assured him he **was** eligible and the sheer magnitude of the focus on the issue throughout the proceedings, the Eleventh Circuit failed to follow established precedent and this Court’s instruction in *Davila* to engage in a full review of the record. *Davila*, 569 U.S. at 612.

Finally, based again on an assessment of the entire record, these violations “seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *E.g. United States v. Marcus*, 560 U.S. 258, 262 (2010). Objectively, two judges involved in Mr. Windham’s plea decision violated Rule 11(c)(1) and did so by providing **objectively incorrect information** on a critical consideration for Mr. Windham—safety valve eligibility. Thus, such an error by two district court judges certainly affects the fairness, integrity, or public reputation of judicial proceedings and warrants review by this Court.

B. Review is necessary to ensure that the question of whether Mr. Windham suffered prejudicial error due to repeated misinformation on safety valve eligibility that rendered his plea unknowing, unintelligent, and involuntary is answered only after full consideration of the record.

In a similar vein, review is necessary here to evaluate the entire record before answering the question of whether Mr. Windham's plea could be knowing, intelligent, and voluntary. Specifically, when reviewed in its entirety as *Dominguez Benitez* instructs, it is clear the district court should not have accepted Mr. Windham's plea because he was coerced into pleading guilty due to the false belief that he was safety-valve eligible. But for this error and the repeated misinformation of safety-valve eligibility, there is a reasonable probability that Mr. Windham would not have entered his plea.

Rule 11 requires that before acceptance of the guilty plea, the trial court must do several things to ensure a defendant's full understanding before acceptance of a guilty plea. Relevant here, this includes Rule 11(b)(2), which requires that a court determine that the plea "did not result from force, threats, or promises (other than promises in a plea agreement)." Under *McCarthy v. United States*, 394 U.S. 459, 471-72 (1969), "prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea."

As to whether the district court met its Rule 11(b) responsibilities, the Eleventh Circuit took a simplified approach looking primarily at the second plea hearing, observing: "the second judge properly went through the Rule 11 colloquy to make sure

that Windham's plea was knowing and voluntary and that Windham knew that safety valve relief was not guaranteed." App. A at 8.

But missing from this analysis is consideration of the entirety of the record, which reveals that the district court failed to accurately inform Mr. Windham of the possible outcomes of his plea, including the applicability of the safety-valve provision of 18 U.S.C. § 3553(f). Put differently, it was not that the court failed to address the minimum or maximum or possible departures, or several other Rule 11(b) requirements, but instead repeatedly misinformed Mr. Windham of safety-valve eligibility.

Both district court judges during the October 22nd and October 29th hearings reiterated to Mr. Windham his purported eligibility for the safety-valve provision. Not only was the information improperly given and incorrect, but it effectively coerced him to plead guilty. But neither recognized that the factual resume attached to the plea agreement contained language about Mr. Windham possessing a gun on November 30, 2020, that would be sufficient to kill his safety-valve eligibility. Simply put, review of the entire record demonstrates that Mr. Windham was repeatedly misinformed that he could be eligible for safety valve when, in fact, he was never eligible due to firearm possession. A knowing, voluntary, and intelligent plea cannot be borne from such misinformation.

Furthermore, the entire record demonstrates that Mr. Windham pleaded guilty because he wanted the safety valve. After reading the transcripts from the two plea hearings, a status hearing held after the plea hearings, and sentencing, one simply

cannot reach another conclusion. But the Eleventh Circuit did not engage in the type of full record review necessary

Further, the United States undoubtedly compounded this problem in two ways. First, during the October 22nd hearing, the United States misrepresented to Judge Dubose whether a gun was involved in Mr. Windham's conspiracy offense. Doc. 705 at 7. The United States told the district court that a gun was not involved in the offense "as a result of the government's presentation of the factual resume." *Id.* But, as pointed out above, this simply wasn't true. The factual resume included the critical detail that police stopped Mr. Windham on November 30, 2020, and found him to be armed with a gun. Doc. 423 at 27. The United States should have answered "yes" and made clear that Mr. Windham was not safety-valve eligible, but it did not.

Second, during the October 29th hearing, the United States informed the court about the gun in Mr. Windham's possession on November 30, 2020. Yet again the United States remained silent about the implications of the gun for the question regarding Mr. Windham's safety-valve eligibility.

But at sentencing, the possession of this gun came to the forefront in the United States' efforts to keep the safety valve from applying. Throughout this plea process, the United States knew unequivocally that a gun was used during the course of Mr. Windham's purported involvement in the conspiracy. But not once did the United States stop the proceedings and make sure the judge was aware that a gun was, in fact, present in the commission of this offense, and that it would be their position that Mr. Windham used the gun in furtherance of the conspiracy. There is no reason the

United States should not have spoken up during these proceedings to make sure the court was aware of this factor critical to Mr. Windham's decision to plead guilty.

Additionally, the record demonstrates that Mr. Windham's own attorney failed to bring up this issue in open court. Counsel presumably had read the factual resume attached to the guilty plea and was presumably aware that Mr. Windham possessed a gun at a time the United States alleged he was traveling out of state to move money for the conspiracy. Yet counsel too stood by and allowed his client to plead guilty without informing Mr. Windham about the consequences of the gun.

Because of the repeated misinformation on safety valve eligibility, the district court failed to ensure that Mr. Windham fully understood the ramifications of his plea as required by Rule 11. Two district court judges misinformed him about his preliminary eligibility for safety-valve relief. Neither the United States nor trial counsel corrected this information. Because the record, taken as a whole, unequivocally establishes that Mr. Windham's interest in pleading guilty focused on his safety-valve eligibility, review is warranted.

CONCLUSION

For these reasons, this Court should grant Mr. Windham's petition for a writ of certiorari to address both questions presented.

Respectfully submitted,

/s J.D. Lloyd
J.D. LLOYD
Counsel of Record
The Law Office of J.D. Lloyd
2320 Arlington Ave. S.
Birmingham, AL 35205
Office: (205) 538-3340
JDLloyd@JDLloydLaw.com

/s Alisha McKay
ALISHA MCKAY
The Law Office of J.D. Lloyd
2320 Arlington Ave. S.
Birmingham, AL 35205
Office: 205-672-6720
Alisha@JDLloydLaw.com