

NO. _____

In The
Supreme Court of the United States

DEENVAUGHN ROWE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-3010

September Term, 2025

FILED ON: MARCH 31, 2026

UNITED STATES OF AMERICA,
APPELLEE

v.

DEENVAUGHN ROWE, ALSO KNOWN AS DEEN VAUGHN,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cr-00144-1)

Before: MILLETT, WILKINS, and GARCIA, *Circuit Judges*.

J U D G M E N T

The causes came to be heard on the record on appeal from the United States District Court for the District of Columbia and on the briefs and oral arguments of the parties. The panel has accorded these issues full consideration and decided that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is hereby

ORDERED and **ADJUGED** that the judgment of the United States District Court for the District of Columbia be **AFFIRMED**.

* * *

In July 2017, Deenvaughn Rowe was sentenced to 97 months' imprisonment and 48 months' supervised release after being convicted of one count of conspiracy to commit bribery, one count of substantive bribery, and one count of conspiracy to distribute marijuana. Rowe appealed and challenged his conviction, further alleging that his trial counsel had been ineffective. We affirmed the judgment but remanded the case to the District Court to hold an evidentiary hearing on Rowe's "colorable" ineffective assistance of counsel ("IAC") claim. *United States v. Norman*, 926 F.3d 804, 813–814 (D.C. Cir. 2019).

Rowe asserted on remand that his trial counsel was ineffective for failing to investigate and obtain testimony from certain witnesses and review relevant discovery with Rowe. After an evidentiary hearing, the District Court denied all of Rowe's IAC claims. *United States v. Rowe*, No. 16-cr-144-1, 2023 WL 346093 (D.D.C. Jan. 19, 2023). Rowe timely appealed.

Finding no error in the judgment below, we affirm. Rowe has failed to demonstrate that any alleged deficiencies in counsel's performance were prejudicial under *Strickland v. Washington*, 466 U.S. 668 (1984).

I.

A fuller enumeration of the facts can be found in this Court's opinion in *United States v. Norman*; only the most salient facts related to Rowe's IAC claim are set forth below.

In 2017, Rowe was the acting station manager at River Terrace Post Office in Northeast Washington, D.C. Viewing the factual record in the light most favorable to the jury's verdict, Rowe utilized his position to track packages containing contraband from western states, and upon their arrival, he would send two other postal employees to deliver those packages to individuals on the street rather than to the delivery addresses on the packages. 926 F.3d at 807–08. The government presented a plethora of evidence at trial to demonstrate Rowe's guilt. The two most important to Rowe's IAC claims were (1) surveillance-captured queries and searches from Rowe's workstation computer showing that he was monitoring and intercepting mail containing drugs and (2) Rowe's "unexplained wealth"—including the ownership of two luxury cars, 12 cash deposits totaling approximately \$48,000, and three vacations to the Caribbean—which the government argued could not be attributed to Rowe's \$16,000 annual take-home pay. *Id.* at 808.

To help rebut the government's evidence pointing to Rowe tracking and scanning the relevant packages, Rowe provided his trial counsel with a list of four people who he claimed would be able to verify that other employees retained and used Rowe's login information on numerous occasions. While Rowe's counsel spoke with two of these individuals, counsel opted not to interview the other two and subsequently decided not to call any of those witnesses to testify at trial. Instead, to raise doubt about the government's presented evidence on Rowe's computer usage, Rowe's trial counsel utilized the government's own exhibit to demonstrate that multiple people could be logged into Rowe's computer at once. Additionally, counsel attempted to elicit on cross-examination of government witnesses that the computers at the post office were "not secure." J.A. 350.

To rebut the government's evidence of Rowe's "unexplained wealth," Rowe told counsel that he had additional streams of lawful income. One such stream was Rowe's gambling winnings from the racetrack and a football pool. While Rowe and his counsel discussed hiring an investigator to interview individuals at the racetrack regarding Rowe's gambling earnings, counsel summarily decided against this path after discussions with Rowe on this topic went "nowhere." J.A. 325–27. To verify Rowe's football pool winnings, Rowe suggested that counsel should interview an individual named April Crankow. Counsel ultimately did not do so,

but testified at the evidentiary hearing that he spoke to someone about the same topic, though he could not recall whom. Rowe also informed counsel about his second stream of lawful income, a restaurant, and suggested that counsel speak with Rowe's business partner. Counsel interviewed Rowe's business partner, but decided against calling the partner or the witness who could testify to the football pool, noting at the evidentiary hearing that "[w]e could not develop the kind of money we needed." J.A. 327. At trial, Rowe's counsel presented no witnesses to testify to Rowe's lawful streams of income, instead highlighting that the government had presented no physical evidence that any of Rowe's money was illegally obtained.

Rowe was ultimately convicted by the jury. He appealed his convictions and further alleged that his trial counsel was ineffective. The D.C. Circuit affirmed Rowe's convictions, but, consistent with our general practice, remanded the case to the District Court to consider Rowe's "colorable" IAC claims in the first instance. *Norman*, 926 F.3d at 813–814; *see also United States v. Rashad*, 331 F.3d 908, 911–912 (D.C. Cir. 2003) (explaining that we do not normally resolve IAC claims on direct appeal).

II.

On remand, Rowe asserted his counsel was deficient for: (1) failing to hire an investigator to verify Rowe's claimed additional sources of income; (2) failing to investigate and call witnesses who could testify that employees often used Rowe's login or testify to Rowe's lawful streams of income; and (3) neglecting to review relevant discovery with Rowe. As relevant to this last assertion, Rowe and his trial counsel's testimony differed at the evidentiary hearing, with Rowe alleging that he had not seen key pieces of evidence such as text messages between himself and his co-defendants and phones found in Rowe's house and car. Rowe's counsel conceded that he had not shared all the discovery with Rowe but maintained that the only discovery he neglected to review with him was evidence irrelevant to Rowe, such as "empty mail trucks and the pass-offs [between co-defendants and the buyers] in the street." J.A. 351.

The evidentiary hearing was held on October 15, 2021, and only Rowe and his trial counsel testified. Rowe did not submit any additional affidavits or evidence for the District Court's consideration. On January 19, 2023, the District Court issued a memorandum opinion denying all of Rowe's IAC claims. Rowe timely appealed. This Court reviews *de novo* the denial of an IAC claim. *United States v. Henderson*, 108 F.4th 899, 902 (D.C. Cir. 2024).

III.

Under longstanding Supreme Court precedent set forth in *Strickland v. Washington*, when a defendant alleges that his counsel has been ineffective, he must successfully demonstrate two components. Under the first prong, he must show that his counsel made errors that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. Under the second prong, the defendant must demonstrate that counsel's deficiencies were prejudicial, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Courts are not required "to approach the inquiry in the same order or even to address both

components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697.

Here, there is no reason for this Court to analyze whether Rowe’s counsel was deficient, as Rowe has clearly failed to demonstrate that he was prejudiced by any of the alleged deficiencies. *See Henderson*, 108 F.4th at 903 (quoting *Strickland* to highlight that “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed”). Rowe has presented zero evidence—no affidavits, no additional witnesses, no documents—demonstrating that if counsel had interviewed and/or called all four witnesses related to multiple logins, the witnesses would have proffered testimony that would have affected the outcome of the trial, especially since Rowe’s counsel had already elicited on cross-examination testimony about the ease of logging into Rowe’s and other computers within the office. Similarly, Rowe has presented nothing showing that had his counsel interviewed the individual from the football pool and/or called Rowe’s business partner to testify, their proffered testimony would have been favorable. This is plainly not enough to uphold Rowe’s burden under *Strickland*. 466 U.S. at 687 (explaining that the prejudice prong “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial”); *see also United States v. Valencia-Rios*, 639 F. Supp. 2d 98, 107 (D.D.C. 2009), *aff’d*, 391 F. App’x 885 (D.C. Cir. 2010) (finding that the defendant failed to demonstrate prejudice where he did not show what the proffered testimony of the proposed witnesses would be, nor did he show what their impact would have been on the outcome of his case).

Additionally, Rowe has also failed to demonstrate that he was prejudiced by his counsel’s alleged neglect in reviewing certain discovery with Rowe. Even assuming that we credit Rowe’s testimony over his counsel’s—who asserted that he had reviewed all relevant evidence with Rowe—Rowe has not plausibly explained anywhere in the record the significance of the discovery and how it would have impacted trial preparation such that the outcome of his case would have been different had he seen all the discovery that he alleges to have missed. While Rowe suggested that had he known all the evidence he would have considered pleading guilty, *see Appellant Br.* at 21, the record below is clear that there was no plea offer for Rowe to take. J.A. 92. Rowe’s failure to demonstrate prejudice as to any of his IAC claims dooms his appeal.*

* * *

For the foregoing reasons, we affirm the District Court’s ruling denying Rowe’s IAC claims.

* Prior to submitting briefing in this appeal, Rowe also filed a second Motion to Remand, claiming that his remand counsel was ineffective because she had failed to raise prejudice arguments at Rowe’s evidentiary hearing. Motion to Remand, *United States v. Rowe*, No. 23-3010. We ordered Rowe to address his Motion to Remand in his opening brief. Because Rowe did not do so, we hold that the arguments therein have been forfeited, and accordingly, deny the motion. *See Williams v. Romarm, SA*, 756 F.3d 777, 783 (D.C. Cir. 2014) (“Questions not presented and argued by the parties in a sequence affording appropriate consideration are forfeited[.]”); *World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) (“As we have said many times before, a party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief.”).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3070**September Term, 2018**

FILED ON: JUNE 11, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

ALICIA NORMAN,
APPELLANT

Consolidated with 17-3073, 17-3074

Appeals from the United States District Court
for the District of Columbia
(No. 1:16-cr-00144-TSC-3)
(No. 1:16-cr-00144-TSC-2)
(No. 1:16-cr-00144-TSC-1)

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*

J U D G M E N T

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgments of the District Court be affirmed, and that the case be remanded to the District Court for further proceedings as to Rowe's claim of ineffective assistance of counsel, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: June 11, 2019

Opinion for the court filed by Senior Circuit Judge Sentelle.
Opinion concurring in the judgment filed by Circuit Judge Henderson.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 13, 2019

Decided June 11, 2019

No. 17-3070

UNITED STATES OF AMERICA,
APPELLEE

v.

ALICIA NORMAN,
APPELLANT

Consolidated with 17-3073, 17-3074

Appeals from the United States District Court
for the District of Columbia
(No. 1:16-cr-00144-TSC-3)
(No. 1:16-cr-00144-TSC-2)
(No. 1:16-cr-00144-TSC-1)

Deborah A. Persico, appointed by the court, argued the cause for appellant Brantley. *Stephen C. Leckar*, appointed by the court, argued the cause for appellant Rowe. *Charles J. Soschin*, *pro bono*, argued the cause for appellant Norman. With them on the briefs was *Joseph R. Conte*, appointed by the court.

James Pearce, Attorney, U.S. Department of Justice, argued the cause for appellee. On the brief was *Molly Gaston*,

Trial Attorney. *Elizabeth Trosman*, Assistant U.S. Attorney, entered an appearance.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed *Senior Circuit Judge* SENTELLE.

Opinion concurring in the judgment filed by *Circuit Judge* HENDERSON.

SENTELLE, *Senior Circuit Judge*: Appellants Alicia Norman, Kendra Brantley, and Deenvaughn Rowe appeal from judgments of conviction on multiple counts of conspiracy to commit bribery, bribery, and conspiracy to distribute and possess marijuana with the intent to distribute. Rowe and Brantley were convicted on all charges, and Norman on the charges of bribery and conspiracy to commit bribery. Appellants seek reversal of all judgments of conviction on a variety of allegations of error. We hold that none of the allegations of error have merit and affirm the judgments of the district court. Rowe also raises a colorable claim of ineffective assistance of counsel. Obedient to our circuit practice, we are remanding the claim for further proceedings.

BACKGROUND

During the time of the commission of the alleged crimes, all appellants were employees of the United States Postal Service (USPS). Rowe was the acting station manager at the River Terrace Post Office in Northeast Washington, D.C. Brantley and Norman were letter carriers at the Lamond-Riggs Post Office. Prior to entering his position as acting manager at the River Terrace Office, Rowe had worked with his co-defendants at the Lamond-Riggs station.

According to the evidence at trial, Rowe knew of packages being sent through the USPS from California to addresses in the Lamond-Riggs area. Some of the packages had incomplete addresses, others had nonexistent addresses. Rowe used his USPS computer to track the packages from the west coast to the Lamond-Riggs Post Office. When one of the packages he was tracking arrived, Rowe would notify Brantley or Norman. The notified carriers would then deliver the package to individuals on the street rather than to the delivery addresses on the packages.

Federal investigators surveilled the activity of the three postal employees. The evidence at trial, including surveillance tapes, revealed that Rowe would scan the packages, determine that they were the ones in which he was interested, and that the co-defendants would receive cash from the driver of a white Range Rover in exchange for the packages. The evidence also revealed texts between Rowe and the co-defendants providing him with real-time knowledge of their whereabouts and actions.

Between September of 2015 and August of 2016, USPS investigators tracked 131 suspicious packages, all of which originated from California, were tracked from Rowe's computer, and shared similar characteristics. All were similar size and weight and had similar handwriting and addresses. Investigators opened eight of the packages and determined that they contained bulk marijuana. Investigators marked six other packages with markings that would be visible to agents conducting surveillance the following day. Brantley delivered the six marked packages to a man on the street and scanned them as delivered.

Further evidence revealed that during the period of the conspiracy, Rowe obtained considerable otherwise unexplained wealth. For example, he made approximately twelve unexplained cash deposits totaling \$47,960 and another \$7,000

in unexplained cash equivalent deposits. In addition, at the time of the arrest, the agents found \$3,600 in cash in Rowe's Mercedes and \$6,000 in cash in the inner pocket of a jacket in his closet. Rowe also owned a Porsche Panamera sports car and took three vacations to the Caribbean during the time of the conspiracy. His USPS take-home pay, after various deductions and child support, was \$16,000 per year.

The grand jury returned an indictment charging all appellants with conspiracy to commit bribery in violation of 18 U.S.C. § 371; bribery in violation of 18 U.S.C. § 201(b)(2); and conspiracy to distribute, dispense, and possess with the intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846. The indictment also alleged that Rowe's conduct as a member of the conspiracy involved a quantity of 100 kilograms or more of marijuana.

Before trial, Brantley expressed an intention to plead guilty, but eventually pleaded not guilty and proceeded to trial with the other defendants. After a six-day trial, the jury found Rowe and Brantley guilty on all counts, and Norman guilty of bribery and conspiracy to commit bribery. Norman was found not guilty of the distribution and conspiracy charges.

Appellants raise various challenges to their convictions. We find five of the challenges worthy of discussion. As to the other allegations of error, we have given the arguments due consideration and find them without merit.

A. Brantley's Plea

Brantley argues the district court impermissibly interfered with plea negotiations in violation of Rule 11 of the Federal Rules of Criminal Procedure. We disagree.

Before trial, Brantley had expressed an intention to plead guilty in a bargained plea. The court scheduled a hearing to conduct the Rule 11 proceedings, which eventually led to a total of three hearings on that subject. In the first hearing on July 6, 2017, during the plea colloquy, the trial judge asked Brantley if she had read the factual statement associated with her plea agreement. Brantley said she had but asked to review the statement again with her attorney. While they were reviewing the document, the judge heard Brantley say, “I did not,” in reference to the factual statement.

Based on the concern raised by that statement, the judge conducted further questioning of the defendant and determined that there had not been a meeting of the minds between the prosecution and the defense on the terms of the factual statement to be introduced as part of the proceedings on the bargained plea. There was, apparently, disagreement over whether Brantley was admitting that she knew that the packages she delivered contained marijuana. After Brantley’s attorney confirmed that the parties could not agree on the wording of the factual statement, the judge advised that she was willing to consider “anything that the parties [could] agree to” and proposed to schedule a hearing for the next day to allow time for the parties to sort out their differences.

The next day, July 7, the district judge referred the question to a magistrate judge for further proceedings. At that hearing, the magistrate judge asked whether Brantley had discussed with her attorney that by accepting the plea bargain, she would be waiving her right to bring collateral attacks on her sentence. The government advised that the term “collateral attack” was not included in the plea agreement but took the position that the concept was encompassed by the waiver provision contained in the agreement. Again, the court was unable to determine that Brantley was voluntarily agreeing to the bargained plea and, at

the request of the parties, directed that the matter be heard again at a later date.

As planned, a third hearing took place on July 12 before the district judge. At the third hearing, Brantley expressed her intent to plead guilty to two of the counts without the benefit of a plea agreement and go to trial on the third. The judge advised Brantley that she was free to go to trial on all charges or plead guilty to some and go to trial on others. The court further advised Brantley of the risks and benefits associated with trial and with a guilty plea. Brantley elected to go to trial on all counts. Before this court Brantley argues that “the district court . . . interfered in plea negotiations.” Appellants’ Br. 11 (capitalization edited from the original).

At the beginning of our review, we note that Brantley did not raise the current objection before the trial court. We review allegations of error in Rule 11 proceedings raised for the first time on appeal for plain error. *United States v. Davila*, 569 U.S. 597, 608 (2013). Under this standard, “[t]here must be an ‘error’ that is ‘plain’ and that ‘affect[s] substantial rights.’” *United States v. Olano*, 507 U.S. 725, 732 (1993). The “error must be clear or obvious, rather than subject to reasonable dispute,” *United States v. Murray*, 897 F.3d 298, 304 (D.C. Cir. 2018), and must “seriously affect the fairness, integrity or public reputation of judicial proceedings,” *Olano*, 507 U.S. at 736–37 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Federal Rule of Criminal Procedure 11(c)(1) provides that “[t]he court must not participate in [plea agreement] discussions.” Brantley argues that the district court improperly interfered with the plea process during each of her three plea hearings. We disagree. Rule 11 requires a district court to “address the defendant personally in open court . . . and determine that the defendant understands [her rights],”

“determine that the plea is voluntary,” and “determine that there is a factual basis for the plea.” Fed. R. Crim. P. 11(b)(1)–(3). The trial judge appropriately questioned Brantley’s disagreement with the factual statement in the July 6th hearing. Upon hearing Brantley state “I did not,” while discussing the factual statement, the district court had a duty to investigate further.

In the July 7th hearing, the judge appropriately questioned Brantley as to whether she understood she was waiving her right to collaterally attack her sentence. Rule 11 requires a judge, prior to accepting a guilty plea, to “address the defendant personally in open court” and “inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” Fed. R. Crim. P. 11(b)(1). The judge’s line of inquiry directly fulfilled this requirement.

Finally, in the July 12th hearing, much of the discussion that took place during the plea hearing centered on whether it was permissible for Brantley to plead only to the specific acts described by statute, rather than to the acts alleged in the indictment. Despite the trial judge’s initial hesitation, she clarified that she would accept whatever plea the parties agreed to, and that it was entirely up to Brantley whether she pled guilty or went to trial. Brantley argues the trial judge went too far in describing the benefits and risks associated with going to trial and with a guilty plea, but such a discussion falls squarely within the trial judge’s responsibility to ensure any plea is knowing, voluntary, and has factual basis. *See* Fed. R. Crim. P. 11(b)(1)–(3). No statements made in any of the three hearings meet the plain error standard required here for Brantley’s argument to succeed.

Accordingly, we find no error.

B. The Calculation of Guidelines

All defendants allege error in the district court's calculation of guidelines. Appellant Norman claims that the district court erred by applying the drug trafficking guideline instead of the bribery guideline, even though Norman was acquitted of all drug charges by the jury.

Throughout her six-day trial, Norman maintained that she was unaware that the packages she was being bribed to misdeliver contained drugs. She was acquitted of all drug charges by the jury. During sentencing, however, the district court said that Norman "looked like she knew what she was doing" in surveillance video of the transactions, and concluded that her relationship with an uncharged co-conspirator meant that she must have "known what was up."

Under the Sentencing Guidelines, the base offense level for a bribery offense is fourteen. U.S.S.G. § 2C1.1. However, because the sentencing court found that the bribery was part of a conspiracy to distribute marijuana, the court applied the drug trafficking guidelines for Norman's bribery offense, resulting in a base offense level of twenty-four. U.S.S.G. §§ 2D1.1, 2C1.1. The court found that Norman was a minimal participant in the criminal activity and that she had accepted responsibility for her act, and therefore was entitled to a six-point deduction, resulting in an overall offense level of eighteen and a recommended Guidelines sentence of twenty-seven to thirty-three months imprisonment. Citing Norman's "significant family obligations," the court elected to depart downward from that range, sentencing Norman to eighteen months.

Had the district court started from the base offense level from the bribery guidelines and applied the same deductions, Norman would have had an overall offense level of eight,

resulting in a suggested Guidelines sentence of zero to six months. U.S.S.G. ch. 5, pt. A (sentencing table). In theory, the court could have varied upwards and sentenced Norman to eighteen months regardless. *See Gall v. United States*, 552 U.S. 38, 49 (2007). But because the court actually varied *downward* from the Guidelines range, it is difficult to imagine that the use of acquitted conduct and the associated twenty-seven month change to her recommended sentence did not have a significant impact on the amount of time Norman will spend in prison.

This Court has recognized that “long-standing precedents of the Supreme Court and this Court establish that a sentencing judge may consider uncharged or even acquitted conduct in calculating an appropriate sentence.” *See United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008). In choosing to sentence Norman under the drug trafficking guideline, the district court has acted within the bounds provided by precedent.

Judges have expressed concern about basing sentencing on acquitted conduct. *See United States v. Jones*, 744 F.3d 1362, 1369 (D.C. Cir. 2014). “Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.” *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring). Justice Scalia wrote, in a dissent from denial of certiorari joined by Justices Thomas and Ginsburg, that “[t]his has gone on long enough,” and that the Supreme Court should take up the issue “to put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable.” *Jones v. United States*, — U.S. —, 135 S. Ct. 8, 9, 190 L. Ed. 2d 279 (2014) (Scalia, J., dissenting).

The Supreme Court has not yet done what Justice Scalia suggested. Therefore, we continue to recognize that “[w]hatever the merits of Justice Scalia’s argument, it is not the law.” *Jones*, 744 F.3d at 1369. This Court, and other courts of appeals, have reached the conclusion that sentencing based on acquitted conduct is constitutional. *See id.* (collecting cases). We cannot find legal error.

Brantley argues that the district court erred in calculating the quantity of drugs attributed to her. As we have held, the district court makes findings of drug quantities under a preponderance of the evidence standard, and we review those factual findings only for clear error. *See United States v. Burnett*, 827 F.3d 1108, 1120 (D.C. Cir. 2016). The evidence before the district court connected Brantley’s acts to the transportation of a significant quantity of marijuana. After applying a conservative method of calculation, the district court determined that 100 kilograms or more of marijuana was attributable to Brantley. “A base offense level . . . is derived from a defendant’s ‘relevant conduct.’ For drug offenses, ‘relevant conduct’ includes the quantity of drugs involved in the offense.” *Id.* (internal citations omitted). The district court followed this correct understanding of the law in calculating the offense herein.

Rowe contends the district court erred in imposing a four-point organizer-manager enhancement in sentencing him rather than a three-point supervisor’s role. This court reviews a “district court’s fact-specific determination that a defendant was an ‘organizer or leader’ or a ‘manager or supervisor’” under a due deference standard. *United States v. Olejiya*, 754 F.3d 986, 990 (D.C. Cir. 2014) (internal citations omitted). Due deference is “somewhere between *de novo* and ‘clearly erroneous.’” *United States v. Tann*, 532 F.3d 868, 874 (D.C. Cir. 2008) (internal citations omitted).

The Sentencing Guidelines provide that a four-level increase to a defendant's offense level is appropriate "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). In determining whether a four-level increase for an organizer or leader, or a three-level increase for management or supervision is appropriate, the court should consider such factors as "the exercise of decisionmaking authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." *See* U.S.S.G. § 3B1.1(b); U.S.S.G. § 3B1.1 cmt.4.

The district court did precisely what the Guidelines contemplate. The scheme was extensive, involved at least four persons in the east coast and an unknown number of persons involved in the mailing. Rowe recruited, managed-supervised, and took a large share of proceeds. Under the applicable standard of review, or probably any other standard, the district court did not err.

C. Claims of Ineffective Assistance of Counsel

Both Brantley and Rowe allege that their counsel were ineffective at trial. Brantley advances no colorable claim. Each of the arguments she makes for the first time on appeal concerns the failure of her counsel to make some objection as to some alleged error of the court, which we have already dispensed with in the above analysis.

As to Rowe, however, the government concedes that a remand for further inquiry is necessary. Rowe contends, *inter*

alia, that he did not have the opportunity to review discovery or call witnesses who wanted to testify at trial. Under *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984), ineffective assistance occurs when an attorney makes errors that (1) are “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and (2) that deficient performance was prejudicial, *i.e.*, “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Without opining on the validity of Rowe’s claims, we do determine that he has at least made a *colorable* proffer.

We have held that when a defendant makes a colorable claim of assistance for the first time on direct appeal, the proper practice is to remand the claim for an evidentiary hearing unless the record shows that the defendant is not entitled to relief. *See United States v. Rashad*, 331 F.3d 908, 909–10 (D.C. Cir. 2003). Therefore, we remand that single question to the district court for further proceedings.

CONCLUSION

Save for the single question of whether Rowe was prejudiced by ineffective assistance of counsel, we affirm in full the judgments of the district court. We remand that single question for further proceedings.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in the judgment: I write separately to note my reservations regarding the majority's discussion of the Rule 11 issue. Rule 11 requires the district court to ensure the voluntariness and factual basis of a plea without participating in plea discussions. See Fed. R. Crim. P. 11(b)(2) ("Before accepting a plea of guilty . . . , 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)."); *id.* 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *id.* 11(c)(1) ("An attorney for the government and the defendant's attorney . . . may discuss and reach a plea agreement. The court must not participate in these discussions."). A premise of the Rule is that our system works best when each party plays its assigned role—judge and counsel alike. In my view, the district court improperly usurped the role of defense counsel on July 6th and July 12th. On July 6th, the district court interrupted the defendant while she was conferring with her counsel off the record. I disagree with my colleagues' view that the district court's "duty" under Rule 11 extends to interrupting an off the record conversation between a defendant and defense counsel. Maj. Op. 7. Having directed the defendant to discuss the plea with counsel, the district court should have waited for the defendant or her counsel to address the court on the record before inquiring further. More troubling, on July 12th, the defendant could have believed the district court was advising her not to plead guilty to only one of the counts. Indeed, at one point the district court said to defense counsel in the presence of the defendant: "I'm really wondering what's the benefit to your client in doing this instead of just going to trial and putting the government to its test where she may end up with the same thing I'm not sure what she's gaining." I disagree with the majority's view that this statement "falls squarely within the trial judge's responsibility to ensure any plea is knowing, voluntary, and has factual basis." *Id.* 8. Although I understand and appreciate the

district court's impulse to ensure the voluntariness and factual basis of the plea, I believe that impulse led it astray on these two dates. I do not believe the district court's error was "plain," however, and therefore reach the same ultimate outcome as my colleagues. See *United States v. Davila*, 569 U.S. 597, 608 (2013) (applying "plain error" standard of review to claim of Rule 11 violation); *United States v. Olano*, 507 U.S. 725, 734 (1993) ("plain error" must be "clear" or "obvious").

I also distance myself from my colleagues' rather reluctant recognition of precedent upholding the sentencing judge's discretion to factor in acquitted conduct in imposing sentence. Maj. Op. 9–10. I think the precedent is sound for many reasons, including that the burdens of proof differ at trial and sentencing and that the trial judge—who hears the same evidence the jury hears—is permitted to find all manner of facts by a preponderance of the evidence, facts that have not been found by the jury beyond a reasonable doubt. See *United States v. Settles*, 530 F.3d 920, 923 (D.C. Cir. 2008) ("[L]ong-standing precedents of the Supreme Court and this Court establish that a sentencing judge may consider uncharged or even acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction."); *id.* ("[T]he Supreme Court has 'never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.'" (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005))). I also believe that a sentencing judge exercising his broad discretion may consider acquitted conduct in order to address partial jury nullification in an appropriate case.

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA

v.

DEEVAUGHNN ROWE

JUDGMENT IN A CRIMINAL CASE

Case Number: 16-144-1

USM Number: 34969-016

William Brennan, Jr.

Defendant's Attorney

FILED

OCT 13 2017

THE DEFENDANT:

☐ pleaded guilty to count(s) _____☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia☒ was found guilty on count(s) 1, 2 and 5
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:371	Conspiracy to Commit Bribery.		1
18:201(b)(2);	Bribery.		2
21:846 and 841(a)(1);	Attempt and Conspiracy to Distribute Marijuana.		5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

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

10/2/2017

Date of Imposition of Judgment

Signature of Judge

Tanya S. Chutkan

U.S. District Judge

Name and Title of Judge

Date

10/13/2017

DEFENDANT: DEEVAUGHHN ROWE
CASE NUMBER: 16-144-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

SIXTY (60) MONTHS ON COUNT (1), NINETY-SEVEN (97) MONTHS ON COUNT TWO (2) AND NINETY-SEVEN (97) MONTHS ON COUNT 5, ALL COUNTS TO RUN CONCURRENT WITH EACH OTHER.

☐ The court makes the following recommendations to the Bureau of Prisons:

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: DEEVAUGHHN ROWE
CASE NUMBER: 16-144-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

THIRTY SIX (36) MONTHS ON COUNT ONE (1), FORTY-EIGHT (48) MONTHS ON COUNT TWO (2) AND FORTY-EIGHT (48) MONTHS ON COUNT FIVE (5), ALL COUNTS TO RUN CONCURRENT WITH EACH OTHER.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: DEEVAUGHN ROWE
CASE NUMBER: 16-144-1 (TSC)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: DEEVAUGHHN ROWE
CASE NUMBER: 16-144-1

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant shall notify the Clerk of Court for the U.S. District Court for the District of Columbia within thirty (30) days of any change of address until such time as the financial obligation is paid in full.
2. The defendant shall contribute 200 hours of community service, at a rate of no less than 20 hours per month, unless excused from the monthly requirement by the probation office.
3. Pursuant to Rule 32.2(a) of the Fed. Rules of Crim Proc., the defendant agreed to the forfeiture of a money judgment in the amount of \$64,000.

The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the probation office upon the defendant's completion or termination from treatment.

DEFENDANT: DEEVAUGHN ROWE
CASE NUMBER: 16-144-1

SCHEDULE OF PAYMENTS

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

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

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

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
Pursuant to Rule 32.2(a) of the Fed. Rules of Crim. Proc., the defendant agreed to the forfeiture of a money judgment in the amount of \$64,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: DEEVAUGHN ROWE

CASE NUMBER: 16-144-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

DEENVAUGHN ROWE,

Defendant.

Criminal No. 16-cr-144-1 (TSC)

MEMORANDUM OPINION

This matter is before the court on Deenvaughn Rowe’s ineffective assistance of counsel claim. Def’s Notice of Filing of Mem. of Law (“Def.’s Mem.”), ECF No. 141. Rowe claims his trial counsel was ineffective for failing to (i) investigate, (ii) call witnesses, and (iii) review all the discovery with him. Def’s Br. in Supp. of Ineffective Assistance of Counsel Claim (“Def.’s IAC Br.”), ECF No. 186 at 2. Upon consideration of the parties’ filings, the testimony and argument at the evidentiary hearing, as well as the trial record, the court will DENY Rowe’s claim for the reasons stated below.

I. BACKGROUND

On August 16, 2016, Rowe and his two co-worker co-defendants were indicted by a federal grand jury. Indictment, ECF No. 1. Rowe, who worked as a manager at the U.S. Postal Service (“USPS”), was charged with four counts: (i) conspiracy to commit bribery in violation of 18 U.S.C. § 371; (ii) bribery in violation of 18 U.S.C. § 201(b)(2); (iii) and (iv) conspiracy to distribute, dispense, and possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. The trial evidence showed that Rowe would use “his USPS computer to track . . . packages from the west coast” and “would receive cash from the driver of a white Range

Rover in exchange for . . . packages of interest.” *United States v. Norman*, 926 F.3d 804, 808 (D.C. Cir. 2019). During the relevant conspiracy period, “Rowe obtained considerable otherwise unexplained wealth.” *Id.* Even though his net income, “after various deductions and child support, was \$ 16,000 per year,” Rowe had “\$47,960” in “unexplained cash deposits,” “\$7,000 in unexplained cash equivalent deposits,” “3,600 in cash in [his] Mercedes[,] and \$6,000 in cash in the inner pocket of a jacket in his closet.” *Id.* Following a six-day trial, a jury found Rowe guilty of all four counts. On July 21, 2017, this court sentenced him to ninety-seven months of incarceration and forty-eight months of supervised release. Judgment, ECF No. 116 at 2–3.

Rowe appealed his conviction, claiming several errors of law. The D.C. Circuit affirmed his conviction, finding “that none of the allegations of error have merit.” *Norman*, 926 F.3d at 807. The Circuit remanded Defendant’s ineffective assistance claim for further proceedings, *id.*, and the court held an evidentiary hearing on October 15, 2021.

Rowe and his trial counsel William Brennan testified at the evidentiary hearing. Rowe testified that he and Brennan discussed hiring an investigator, but that Brennan ultimately decided not to do so. Evid. Hr’g. Tr., ECF No. 182 at 14:16–23. Rowe said he had expected that an investigator would (i) look into “exactly what facility and location [of] each computer” on which inculpatory evidence was found to show that Rowe was not in control of those computers, and (ii) “go through [his] bank and transactions” to show that Rowe’s outside income was less than the Government alleged. *Id.* at 15:5–22. Rowe also faulted Brennan for not calling five witnesses at trial—Shirley Jackson, Robert Steele, April Crankow, Ebboni Clark, and Angel Saunders (Brennan interviewed Jackson and Clark). *Id.* at 16:21–17:10. Rowe claims Clark could have testified that Rowe won \$20,000 in a football gambling pool, *id.* at 21:2–4, but Rowe did not provide the substance of the other witnesses’ expected testimony. Rowe also testified

that he “reviewed some of [the] discovery against him” but was shown “no smoking gun.” *Id.* at 17:23–18:12. Despite his review of the discovery, Rowe said he was “surprised” at trial when the government introduced evidence of phones found in his house and car, text messages between himself and a co-defendant, handwritten notes found in his car, and certain screenshots. *Id.* at 18:14–19:4.

Brennan, who was retained by Rowe, testified that he has practiced law for forty-five years, mostly as a criminal defense attorney, and has extensive federal criminal trial experience. *Id.* at 22:10–24; Gov’t. Ex. 1. Brennan testified that he “talked at length with [his] client,” “examined the government’s discovery,” and “made decisions” regarding putting on a defense. Evid. Hr’g. Tr. 27:20-22.

Brennan further testified that he considered hiring an investigator to verify Rowe’s claimed gambling winnings but decided against it because Rowe did not provide “any more information” and Brennan concluded that the investigation was not “going to materialize to anything of substance.” *Id.* at 28:9–16, 28:23–29:1. Brennan said Rowe did not provide him with the names of people who could corroborate that he was a “regular” at the racetrack, and he could not provide “IRS payouts”—or “a thing from the IRS”—to show he “w[o]n big” from gambling. *Id.* at 28:9–30:6. Brennan said he “talked to a witness” “about a football pool,” but did not pursue that line of inquiry because it “wasn’t the kind of money that we needed to show, just sort of very minor money.” *Id.* at 30:7–18. To explain Rowe’s outside income, Brennan spoke to a “Mr. Harris”, who was a purported “financial partner” of Rowe’s and involved in “a restaurant called the Pelican Rum.” *Id.* at 30:19–31:16. Brennan ultimately decided not to call Harris as a witness or subpoena him because he “didn’t think [Harris] would be a helpful witness

[given that] he seemed very reluctant to come to court and say” how much money he and Rowe were making through their business ventures. *Id.* at 31:12–24.

Brennan also testified that he interviewed Jackson and Clark regarding whether anyone shared Rowe’s computer passwords and who had access to Rowe’s computer, *id.* at 32:8–13, but decided not to call them as witnesses because neither could establish that anyone had accessed Rowe’s computer. *Id.* at 32:14–33:5.

Brennan testified that he visited Rowe in jail at least twelve times before the trial began to discuss the case and develop a defense. *Id.* 25:25–26:13, 27:12–16.¹ Over the course of his investigation and discussions with Rowe, Brennan concluded that it was too risky to put on a defense because the “government has the burden of proof” and it did not make sense to “try[] to prove something . . . [he] couldn’t probably prove.” *Id.* at 34:20–36:7. Brennan testified that he thought he reached a “consensus” with Rowe not to call any witnesses, that he reiterated this strategy to Rowe at various points throughout the trial, and that Rowe did not “push back” or suggest another approach. *Id.* at 35:13–39:20.

Brennan said he had “all the paper discovery printed out . . . and reviewed it with Mr. Rowe” and he “watched surveillance videos” with Rowe. *Id.* at 41:1–9. However, when the court asked Brennan if “there [was] evidence that [he] believed wasn’t relevant and therefore didn’t show to Mr. Rowe,” Brennan said, “the answer is kinda sorta yes.” *Id.* at 54:1–12. Explaining his answer, Brennan said “I mean there’s a lot of electronic evidence that did not

¹ Brennan also testified that he visited Rowe after trial began, but he did not have access to records showing those visits. *Id.* at 27:11–16.¹

involve Mr. Rowe. I offered to sit with him, but we did not look at empty mail trucks and the pass-offs in the street.”² *Id.* at 54:9–12.

II. DISCUSSION

“Ineffective assistance [of counsel] occurs when an attorney makes errors that (1) are ‘so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment’ and (2) that deficient performance was prejudicial, i.e., ‘that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Norman*, 926 F.3d at 812 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). As to the first prong, courts must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. The second prong “requires the defendant to demonstrate that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *United States v. Eli*, 379 F.3d 1016, 1019 (D.C. Cir. 2004) (quoting *Strickland*, 466 U.S. at 694). Ultimately, a defendant “must establish that ‘counsel’s conduct so undermined the proper functioning of the adversarial process’ that the outcome cannot be relied on as just.” *United States v. Roberts*, 268 F.Supp.3d 105, 113 (D.D.C. 2017) (quoting *Strickland*, 466 U.S. at 686).

First, Rowe argues that Brennan failed to properly investigate the case because he did not (i) investigate Rowe’s gambling habits, Def.’s IAC Br. at 8, or (ii) hire an investigator, Def.’s Mem. at 4. Given Brennan’s testimony that he spoke with Rowe about ways to verify he was a “regular” at the racetrack and that he spoke to at least one witness about the “football pool,”

² At trial, the government offered considerable testimony, and video and photographic evidence relating to the charges against Rowe’s co-defendants, who were responsible for delivering the packages containing the drugs.

Evid. Hr'g. Tr. 28:9–30:18, the court rejects this argument. With regard to hiring an investigator, Brennan testified that he considered hiring an investigator to look into Rowe's gambling income, but he was unable to verify that any winnings were substantial or locate a witness who could corroborate that defense. *Id.* at 28:2–31:24. Assessing Brennan's decisions for "reasonableness" and "applying a heavy measure of deference to [his] judgment," the court cannot conclude that Brennan's performance was deficient because he decided not to hire an investigator. *United States v. Mohammed*, 863 F.3d 885, 890 (D.C. Cir. 2017 (citing *United States v. McDade*, 699 F.3d 499, 506 (D.C. Cir. 2012)); *Cf. Hoover-Hankerson v. United States*, 792 F. Supp. 2d 76, 84 (D.D.C. 2011) (holding that counsel's decision not to hire a handwriting expert "falls well within the range of reasonable professional assistance").

Second, Rowe argues that Brennan's decision to not interview several potential witnesses and not "to present any defense[,] left the [D]efendant defenseless." Def.'s IAC Br. at 8–9 (internal quotation marks omitted). But Brennan testified—and Rowe did not dispute—that he did speak to at least three potential witnesses, that Rowe agreed not to call any witnesses, and that they discussed this decision up until the close of the government's case, Evid. Hr'g. Tr. 35:13–39:20. Brennan's strategic decision not to call any witnesses does not amount to a professional error. *See United States v. Catlett*, 97 F.3d 565, 570 (D.C. Cir. 1996) (quoting *Strickland*, 466 U.S. at 690) ("[S]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."). Furthermore, although Brennan admitted that he did not interview three of the five witnesses Rowe identified as potentially supportive, Evid. Hr'g. Tr. 33:6–19, Rowe did not say how testimony from those witnesses would have led to a different outcome in this case. Consequently, the court cannot

conclude that Brennan's failure to interview the three witnesses were "errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687

Third, Rowe argues that Brennan's failure to review all the discovery with him constitutes *per se* ineffective assistance of counsel. Def.'s IAC Br. at 9. While the Supreme Court has held that a "counsel's failure to conduct any discovery" is "unreasonable" and "contrary to professional norms," *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986), Rowe provides no case law to support his argument that counsel's failure to review all discovery with him amounts to ineffective assistance. Instead, he cites two cases in which courts actually rejected defendants' ineffective assistance arguments because any alleged failure to review discovery with the defendant was not prejudicial, Def.'s Reply, ECF No. 188 at 4–5 (citing *United States v. Shark*, 158 F. Supp. 2d 43, 53 (D.D.C. 2001), *aff'd*, 60 F. App'x 333 (D.C. Cir. 2003) and *United States v. Magruder*, No. CR 19-203 (CKK), 2020 WL 4049919, at *4 (D.D.C. July 20, 2020)). While Rowe testified that he was "surprised" by some of the evidence presented against him at trial, *id.* at 18:14–19:4, he did not specifically identify what discovery Brennan did not review with him. Nor has Rowe demonstrated how his review of all the discovery would have led to a different outcome in his trial. Brennan admitted to not having reviewed "electronic evidence that did not involve Mr. Rowe," including discovery pertaining to his co-defendants. *Id.* at 54:9–12. Rowe's review of that evidence would not have changed the outcome of this case, and Rowe's argument therefore cannot satisfy the second *Strickland* prong.

At trial, the government's evidence against Rowe and his co-defendants was extensive. It included surveillance videotapes, text messages between Rowe and his co-defendants, Rowe's bank statements, audiotape of Rowe's conversations, expert testimony regarding the use of mail to effectuate drug distribution, positive lab tests for marijuana in USPS packaging that Rowe

handled, and surveillance captured queries and searches from Rowe's workstation computer showing that he was monitoring and intercepting mail containing drugs. With such strong evidence against him, and despite Brennan's decision not to hire an investigator or call certain witnesses, Rowe has not demonstrated that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Eli*, 379 F.3d at 1019 (quoting *Strickland*, 466 U.S. at 694). Because Rowe has failed to do so, his ineffective assistance of counsel claim fails.

III. CONCLUSION

For the reasons set forth above, Rowe's ineffective assistance of counsel claim is hereby DENIED.

Dated: January 19, 2023

Tanya S. Chutkan

TANYA S. CHUTKAN
United States District Court Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

DEENVAUGHN ROWE,

Defendant.

)
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) Criminal No. 16-cr-144-1 (TSC)
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ORDER

For the reasons set forth in the accompanying Memorandum Opinion, ECF No. 194, Defendants' Ineffective Assistance of Counsel claim, ECF No. 141, is hereby DENIED.

Dated: January 19, 2023

Tanya S. Chutkan

TANYA S. CHUTKAN
United States District Court Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-3010**September Term, 2025****1:16-cr-00144-TSC-1****Filed On:** April 27, 2026

United States of America,

Appellee

v.

Deenvaughn Rowe, also known as Deen
Vaughn,

Appellant

BEFORE: Srinivasan, Chief Judge, and Henderson, Millett, Pillard, Wilkins,
Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the
absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk