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**In The Court of Appeals For the District of Columbia**

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Clerk of the Court  
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**No. 22-CF-296**

BRYANT WEBSTER

APPELLANT,

v.

UNITED STATES,

APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Honorable Ronna Beck)

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**BRIEF FOR APPELLANT**  
**Bryant Webster**

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## **I. QUESTION PRESENTED**

Should the Court vacate the order denying appellant's motion to withdraw his guilty plea?

## **II. STATEMENT OF THE CASE**

This appeals stems from the improper denial of appellant Bryant Webster's motion to withdraw his July 25, 2019 guilty plea to two counts of first-degree sexual abuse while armed in violation of *District of Columbia Code Sections 22-3002(a)(1) & 4502* and one count of second-degree sexual abuse in violation of *District of Columbia Code Section 22-3003(2)*.

The government alleged that Mr. Webster committed the offenses on three separate occasions between August 13, 2016 and October 1, 2016 against three different individuals referenced in the record as AP, LK and PH. MPD officers arrested Mr. Webster at the scene of the alleged incident involving LK on October 1, 2016.

Mr. Webster was presented on October 3, 2016 charged with first-degree sex abuse while armed against LK and PH. *R.1*. On July 6, 2017 a grand jury indicted Mr. Webster on twenty-eight charges based on the alleged August 28, 2016 incident with AP and the alleged October 1, 2016 incident involving LK. The lead charge for each incident was first-degree sexual abuse while armed (gun). On August 7, 2018 the government obtained a superseding indictment adding three more counts based on the alleged victimization of PH some time between August 13, 2016 and August 15, 2016. *R.39*. Second-degree sex abuse was the lead superseding count as to PH.

Mr. Webster moved to vacate the guilty plea on December 6, 2019. The Honorable Ronna Beck (plea court) denied the motion on March 5, 2020. On December 16, 2021 the Hon. Marisa Demeo (reconsideration court) denied Mr. Webster's motion to reconsider the plea court's order. On April 6, 2022 the reconsideration court sentenced Mr. Webster to thirty-nine years incarceration. *R.111 (Appndx)*. This appeal follows.

### III. STATEMENT OF FACTS

On October 1, 2016 the Metropolitan Police Department arrested Mr. Webster at LK's home and launched an investigation that culminated with Mr. Webster's entering a hasty and pressured last-minute guilty plea under the auspices of *Super Ct. Crim. R. 11(c) (1)(C)* (Rule 11 (c)(1)(C)) where the plea court failed to conduct a proper inquiry pursuant to *Super Ct. Crim. R. 11(b)* (Rule 11(b)). Mr. Webster was subsequently charged as PH's assailant sometime between August 13, 2016 and August 15, 2016 and AP's August 28, 2016 assailant.<sup>1</sup>

The Superior Court appointed Public Defender Service (PDS) attorney Madalyn Harvey, Esquire to represent Mr. Webster at his October 3, 2016 presentment. *R.2*. Mr. Webster fired Ms. Harvey in favor of retained private attorney David Benowitz, Esquire on November 14, 2016. *R.14*. On May 17, 2018 attorney Shawn Sukumar, Esquire entered an appearance as co-counsel.

#### The Alleged August 28, 2016 Armed First-Degree Burglary and First-Degree Sexual Abuse of AP

The government alleged in its May 31, 2019 "Notice of Intent to Admit Evidence of Defendant's Other Crimes" that on August 28, 2016 at approximately 6:00 A.M. AP woke up and saw a man standing in his bedroom doorway holding a gun with a laser sight. *R.47;2-4*. The man allegedly told AP that he was not going to die and to get down on the bed. The man bound AP's hands and feet. The man placed AP face down on the bed and attempted unsuccessfully to penetrate his anus with his penis. The man placed a pillowcase over AP's head at some point, tore open a condom package and performed oral sex on AP. The man then penetrated him with his penis.

The man allegedly told AP several times during the encounter to "shut up if you want to

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<sup>1</sup> The absence of a complainant's live testimony subjected to the rigors of confrontation limits Mr. Webster's factual recitation to the government's written pleadings and allegations, none of which are conceded to be true and accurate because they ultimately rest on untested hearsay and double hearsay. The government's May 31, 2019 notice of intent to admit evidence of defendant's other crimes provides the basis for describing much of the three alleged incidents as a reference point only.

live". AP claimed he heard the assailant rifle through his drawers before leaving.

The police did not see any evidence of forced entry when they responded to AP's home located at 1233 Massachusetts Avenue, S.E., Washington, D.C. AP also told the police that two months earlier a laptop, messenger bag and voice recorder had apparently been taken from his home while he was asleep and that there had been no sign of forced entry at that time.

The Alleged October 1, 2016 Armed First-Degree Burglary and First-Degree Sexual Abuse of LK

The government alleged that on October 1, 2016 various MPD officers responded to LK's 1348 Independence Avenue, S.E., Washington, D.C. home where LK was standing at the front door waving a gun and yelling for help. *R.47* at 4-6. LK reported that the suspect was inside his home. The officers went to LK's bedroom and saw LK's roommate wrestling with Mr. Webster who was naked below the waste. The officers detained Mr. Webster.

LK told the officers that he came home at 12:16 A.M. to a locked house, saw that none of his roommates were home, went to his bedroom and after hearing commotion outside his room, opened the door and saw a stranger. The stranger pulled a gun from his backpack, pointed the gun and asked LK for his wallet and walked LK to the front door to lock the house. The suspect ordered LK to take off his clothes. LK said that he complied and the alleged stranger duct taped his hands and feet and duct taped a shirt in his mouth. The stranger then grabbed some lotion in LK's bedroom that he applied as lubrication to LK's anus and raped him.

The stranger allegedly placed his gun on the bed and LK grabbed it after breaking loose from the restraints. LK stated that he heard one roommate call out to him and another roommate ran to the bedroom and subdued the alleged assailant while LK called the police.

The police took an injured Mr. Webster to the hospital for medical treatment. Mr. Webster told the police that he had been out drinking that night, mistakenly stumbled into the wrong house



and saw a person in the bathroom. Mr. Webster stated that he did not remember much else, including having sex with a male. Mr. Webster further denied owning a gun and stated that he did not know how he got his injuries. R.47;4-6

#### The Alleged Second-Degree Sexual Abuse of PH Between August 13, 2016 and August 15, 2016

The government alleged that Mr. Webster entered PH's home sometime between August 13, 2016 and August 15, 2016 without PH's permission. R.47;7. While inside PH's home Mr. Webster observed PH apparently passed out on the sofa with exposed genitalia. Mr. Webster allegedly performed oral sex on PH and took photos of and videotaped the incident without PH's consent.

#### The Government's Pre-Trial Investigation and Preparation

The police located Mr. Webster's approximately two blocks from LK's residence shortly after his October 1, 2016 arrest. R.23;4. The government recovered one blank check tied to AP's bank account and two blank checks tied to LK's bank account while executing a search warrant for the vehicle. Police also recovered three sets of keys to LK's home.

The government extracted photos and other material from Mr. Webster's cell phone. These materials included photos and a video allegedly documenting Mr. Webster's alleged assault on PH that enabled the government to obtain the superseding indictment adding the charges directed to PH wherein the government joined the three incidents. R.39.

The government disclosed a plethora of materials at various times between Mr. Webster's October 3, 2016 presentment and the scheduled trial date. A considerable number of photographs and other materials extracted from Mr. Webster's cell phone comprised a substantial quantity of discovery provided to attorneys Benowitz and Sukumar.

#### The Defense Trial Preparation

Mr. Webster rejected a plea offer at the outset and remained steadfast in his desire to go to

trial until July 24, 2019 when Messrs. Benowitz and Sukumar realized they had overlooked a critical piece of evidence that the government had disclosed on June 1, 2018. *R.84; 8*. The government had also informed Messrs. Benowitz and Sukumar directly more than one year earlier that it intended to use certain video and photos of Mr. Webster with a penis in his mouth as evidence that he sexually abused PH and referenced the incident in the Notice of Intent to Admit Evidence of Other Crimes. *R.47, 7; TR.18 (March 3, 2020)*. Prior to July 24, 2019 Messrs Sukumar and Benowitz had not been overly concerned about the photos and video pertinent to the alleged assault on PH because they believed the government would be offering photos and video that did not clearly show Mr. Webster's face. *TR.23, 58-59 (March 3, 2020)*.

#### The Defense Team Learns about the Graphic Photo

On July 24, 2019 Mr. Sukumar reviewed AP's grand jury testimony during his last minute trial preparations the day before opening statements and saw a reference to a photograph identified as an exhibit therein. Messrs. Sukumar and Benowitz realized that the referenced photograph was not one of the photographs they believed would be the focus of the prosecution for the alleged crimes against PH. *TR.20-21 (March 3, 2020)*. Messrs. Benowitz and Sukumar immediately called the prosecution team to inquire about the grand jury photo exhibit. *Id.* The prosecutors sent the previously disclosed photograph that depicted Mr. Webster with a penis in his mouth (graphic photo). *Id.*

Messrs. Sukumar described this photo as the nail in the coffin of a very strong government case, *TR.87 (March 3, 2020)*, so he went to the jail to notify Mr. Webster. *TR.24-25 (March 3, 2020)*. Mr. Webster acknowledged that he was the person in the photo. *TR.25 (March 3, 2020)*.

Mr. Sukumar testified that he explained to Mr. Webster that this photo was powerful evidence and that he could not formulate a defense or explanation for it so he sought and obtained

Mr. Webster's authority to ask the government to extend a plea offer. *TR.25-27 (March 3, 2020)*.

Mr. Sukumar further testified that Mr. Webster told him that he would try speak to family members about accepting a plea and Mr Sukumar agreed to return to the jail that night after an anticipated conversation with the prosecutors. *TR.27-30 (March 3, 2020)*.

Mr Sukumar and Mr. Benowitz contacted the prosecution team upon Mr. Sukumar's return from the jail and negotiated a plea with an agreed upon sentencing range of thirty-two to thirty-nine years under the auspices of Rule 11(c)(1)(C), subject to Mr. Webster's approval. *TR.31-35 (March 3, 2020)*. Mr. Sukumar testified that he and Mr. Benowitz went to the jail that night and met Mr. Webster who agreed to the plea per their strong recommendation *TR.40-41,45 March 3, 2020*).

#### Initial Colloquy

Mr. Benowitz recounted his advice to Mr. Webster about sentencing exposure within the Rule 11(c)(1)(C) sentencing agreement parameters. *TR.4 (July 25, 2019)*.<sup>2</sup> Mr. Benowitz stated that he told Mr. Webster that each count of first-degree sex abuse while armed exposed him to life imprisonment without parole with a five-year mandatory minimum term. *TR.4 (July 25, 2019)*. Mr. Benowitz also stated that he told Mr. Webster that second-degree sex abuse carries a maximum sentence of twenty years incarceration. *Id.*

The plea court inquired from Mr. Webster if he 1) understood the plea agreement, 2) had had enough time to consider the plea, and 3) was satisfied with his attorneys. *TR.6 (July 25, 2019)* Mr. Webster answered all three questions in the affirmative. *Id.*

#### The Government's Proffer

The government proffered that

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<sup>2</sup> The July 25, 2019 transcript was not ordered for this appeal. It appears in the Record on Appeal as Attachment 7 to "Government's Response to Defendant's Motion to Withdraw Sworn Guilty Plea" *R.84*, referenced as "*TR. \_\_ (July 25, 2019)*."



“If the case had gone to trial, the government’s evidence would have proved beyond a reasonable doubt, that on August 28, 2016 at approximately 6:00 A.M., Bryant Webster entered the home of complainant AP. at 1233 Massachusetts Avenue, Southeast in Washington, D.C. He pointed a handgun at AP, bound (his) hands and ankles and penetrated AP.’s anus with his penis against his will.

The government’s evidence would have also proven, beyond a reasonable doubt, that on October 1, 2016, at approximately 12:30 a.m., Bryant Webster entered the home of LK at 1348 Independence Avenue, Southeast, Washington, D.C., pointed a handgun at LK, bound LK’s hands and ankles with duct tape and penetrated LK’s anus with his penis.

During the assault, LK was able to remove his hands from the duct tape, take the handgun and subdue Mr. Webster with the assistance of his roommate. LK called the police who arrived and arrested Mr. Webster.

After Mr. Webster’s arrest, the Government executed a search warrant on Mr. Webster’s i-Phone which was found in a white Lexus belonging to Mr. Webster. The search recovered video and photographs of LK’s roommate, PH The photographs of PH show him in his residence, apparently passed out with his pants cut, exposing his genitals and with Mr. Webster’s mouth on his penis.

The government’s evidence would have also proven, beyond, a reasonable doubt, that Mr. Webster entered PH’s home between August 13<sup>th</sup> and August 15<sup>th</sup> of 2016 and photographed PH with his penis in Mr. Webster’s mouth without his consent.”  
*TR.6-8 (July 25, 2019).*

The plea court asked Mr. Webster if he agreed with the proffers involving all three alleged victims. *TR.8 (July 25, 2019).* Mr. Webster responded in the affirmative to each question. *Id.*

#### Post-Proffer Colloquy

Following the proffer the plea court acknowledged that she was deferring the decision to accept the plea and stated “as long as I agree to sentence within the negotiated range, then the plea goes forward.” *TR.9 (July 25, 2019).* The plea court then advised Mr. Webster as follows:

“You have a right to a trial by jury. At that trial, you’d be represented by counsel, you would be presumed innocent, it would be the government’s burden to prove your guilt beyond a reasonable doubt by introducing evidence here in open court.

You and your attorneys wouldn’t have to do anything at the trial. You could just sit back and make the Government try to prove your guilt beyond a reasonable doubt. You would not have to testify if you didn’t want to and if you chose not to, it could not be held

against you because you have an absolute right to remain silent.

Your attorneys could challenge the Government's case. **They could question every witness.** They could object to evidence that the Government sought to introduce. They could file motions on your behalf ...

The defense could present evidence at the trial. With the help of your attorneys, you could require the people to come to court and call them to testify; you could offer other evidence; and if you wanted to testify at your trial, you could.

If you were found guilty, you would have a right to take an appeal to the D.C. Court of Appeals. If you couldn't afford a lawyer, one would be appointed for you.

All those rights are connected to going to trial, but if you plead guilty, there's not going to be a trial. All that's going to be left is for me to sentence you." *TR.10 (July 25, 2019)*

The court asked Mr. Webster if he understood "that." Mr. Webster said "yes". *TR.11-12 (July 25, 2019).*

The plea court did not tell Mr. Webster that he had the right to confront and cross-examine witnesses through his attorneys.

The plea court asked Mr. Webster if anyone had 1) threatened or forced him to plead guilty, 2) made promises other than the promises recited by his attorneys and 3) if he had any questions about the plea agreement or rights being given up. *TR.12 (July 25, 2019).* Mr. Webster answered no to all three questions and yes to the plea court's subsequent single question if he still wished to plead guilty. *TR.12-13 (July 25, 2019).*

The plea court stated that it found Mr. Webster's guilty plea to be knowing, voluntary and that there was a factual basis for it *TR.13 (July 25, 2019).* The plea court concluded the inquiry stating that it would accept the plea contingent on its acceptance of the sentencing agreement. *Id.*

#### The Defense Team Learns about Mr. Webster's Desire to Withdraw the Plea

Mr. Sukumar testified that a family member of Mr. Webster told him less than one month after the plea that Mr. Webster had reservations about the plea. *TR.49 (March 3, 2020).* This



conversation prompted Messrs. Sukumar and Benowitz to research the process for withdrawing a guilty plea. *TR.53 (March 3, 2020)*. Messrs. Benowitz and Sukumar impressed upon Mr. Webster the need to act promptly to withdraw the guilty plea sometime in mid-late September, 2019 and advised that a different attorney prepare any motion to withdraw the plea. *TR.54 (March 3, 2020)*.

Mr. Sukumar testified that Mr. Webster authorized the appointment of independent counsel in mid-October, 2019 with himself and Mr. Benowitz to otherwise remain on the case. *TR.55-56 (March 3, 2020)*. Mr. Sukumar recalled that in mid-October, 2019 he requested the plea court ex parte to appoint independent counsel to advise Mr. Webster about the plea. *TR. 56-57 (March 3, 2020)*. The plea court reappointed Ms. Harvey to serve as independent counsel on October 23, 2019.

#### The Motion to Withdraw The Plea

On December 6, 2019 Ms. Harvey filed a motion to withdraw the plea pursuant to *Rule 11(d)*. *R. 77*.<sup>3</sup> The motion asserted that the Rule 11 colloquy was fatally defective because it elicited Mr. Webster's statements that he was not pressured to plead guilty and had sufficient time to consider his decisions when circumstances precluded him from not feeling extreme pressure to plea with sufficient time for a careful, rational decision. The motion further argued that justice demanded the plea court to allow Mr. Webster to withdraw the guilty plea because 1) Mr. Webster was asserting legal innocence, 2) the motion was filed timely and 3) the government's late disclosure of the photo precluded Mr. Webster from receiving the full benefit of competent counsel.

The government's written opposition presented overwhelming evidence that it disclosed the photo more than one year before the plea and referenced in numerous communications with the defense team, thereby dispelling any argument that it withheld the evidence or buried it with other

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<sup>3</sup> On December 11, 2019 the plea court granted Messrs. Benowitz and Sukumar's motion to withdraw as counsel based on the newly emerged conflict.

material so as to maximize intentionally the likelihood of defense counsel overlooking it. *R.84*. The government also argued that Mr. Webster failed to assert his innocence and the evidence was so overwhelming as to preclude him from doing so. The government further argued that too much time had passed to allow Mr. Webster to withdraw the plea and that the government would be prejudiced because 1) it had expended substantial resources at the time of the plea that it would have to replicate and 2) the alleged victims would have to relive the experience following the assurance that they would not have to testify. The government concluded that Mr. Webster had the full benefit of competent counsel notwithstanding its own assertion that it disclosed the graphic photo more than one year earlier and the defense team overlooked it until the last minute.

#### The Plea Court Denies the Motion

The plea court denied the motion after hearing testimony from Mr. Sukumar and argument from counsel.<sup>4</sup> The plea court rejected Mr. Webster's claim that the Rule 11 inquiry was flawed. *TR.6 (March 5, 2020)*. The plea court found that Mr. Webster did not sufficiently assert legal innocence. *TR.6-7 (March 5, 2020)*. The plea court embraced the government's claim that the evidence precluded any assertion of legal innocence. *TR.6-11 (March 5, 2020)*.

The plea court found the motion untimely because it was filed more than four months after the plea. *TR.13 (March 5, 2020)*. The plea court designated October 23, 2019 as the earliest possible date that the government had notice of the likely plea withdrawal and still found that date untimely because it was more than three weeks after the plea. *TR. 14 (March 5, 2020)*.

The plea court further found that granting the motion would greatly prejudice the

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<sup>4</sup> During the March 3, 2020 hearing, independent counsel limited her inquiry of Mr. Sukumar to the circumstances by which he learned about the compelling photo, its disclosure to Mr. Webster, the frantic circumstances of reopening plea discussions, two visits to Mr. Webster at the jail and the various discussions with Mr Webster and his family that resulted in his and Mr. Benowitz's suggestion to the plea court that she appoint independent counsel. Mr. Webster did not testify.

government and the alleged victims. *Id.* The government would suffer because it had been ready for trial on July 25, 2019 after preparing its witnesses and spending money on travel costs and expert witness fees that it would have to replicate. *TR.14-15 (March 5, 2020)*. The plea court found “more importantly” that the alleged victims would suffer prejudice because they would lose the closure they believed they obtained when Mr. Webster pled guilty and would have to consider reliving the events during the long period before trial given the criminal docket backlog. *TR.15 (March 5, 2020)*.

The plea court found that Mr. Webster received the full benefit of competent counsel. The plea court dispensed with the question of whether defense counsel should have known about the graphic photo sooner by finding the photo underwhelming. The plea court further found that defense counsel were diligent upon learning about the graphic photo by visiting Mr. Webster twice in one day, reaching out to the government for the last-minute plea and spending so much time with him discussing options and the impact of the graphic photo on his trial prospects. *TR.15-18 (March 5, 2020)*. The plea court concluded as follows: “even the most competent counsel cannot prevail in a case where the Government has overwhelming evidence of guilt.” *TR.18 (March 5, 2020)*.

The plea court speculated that Mr. Webster’s concern that trial was finally about to start, not the graphic photo, prompted his decision to plead guilty. *TR.11 (March 5, 2020)*. The plea court further stated that it would not have credited testimony from Mr. Webster regarding the impact of the graphic photo’s disclosure to him on his decision to plead guilty. *TR.12 (March 5, 2020)*.

The plea court further found that the graphic photo’s disclosure prompted a plea designed to avoid the imminent trial hoping the Government would have difficulty putting its case back together following a motion to withdraw the plea. *TR.14 (March 5, 2020)*. The plea court concluded that allowing Mr. Webster “to withdraw the plea would permit him to manipulate and disrupt the trial process to great prejudice to the Government and the victims” *TR.17 (March 5, 2020)*.



### Mr. Webster Seeks Reconsideration of the Plea Court's Order

On October 21, 2021 Mr. Webster filed a motion to reconsider and supplement the prior motion asserting that Messrs. Benowitz and Sukumar pressured him into pleading guilty in response to their seeing the graphic photo for the first time. *R.98*. The motion further asserted that Mr. Webster decided to withdraw the plea just a few days after July 25, 2019 and told people at that time that he had pled guilty because his attorneys pressured him. The motion included a typed August 22, 2019 letter to the plea court seeking to withdraw the plea alleging ineffective assistance of counsel. The motion stated that Mr. Webster did not submit the letter because his former attorneys prevailed upon him to not submit it so they could research the mechanism for withdrawing a guilty plea. The motion requested that the reconsideration court accept the letter for filing nunc pro tunc to August 22, 2019 and hear testimony from Mr. Webster to prove the filing timely. *R.98; 1,5*

The reconsideration court allowed Mr. Webster to offer limited evidence directed to the formulation of the August 22, 2019 letter/pro se motion and communications with Messrs. Benowitz and Sukumar following the plea. Mr. Webster testified that he decided to withdraw the plea two days after entering it and started writing the letter shortly thereafter. *TR.18-19 (December 16, 2021).*<sup>5</sup> Mr. Webster completed the typed letter a few days later at the jail law library but technical problems prevented him from printing it until August 22, 2021. *TR.21-22 (December 16, 2021)*. Mr. Webster prepared the letter because his brother, Maurice Webster, and his friend, Keith Wallace, told him that Messrs. Benowitz and Sukumar might not help him because they owed Mr. Benowitz \$41,000.00 in fees and suggested he prepare the letter himself. *TR.20-21 (December 16, 2021)*.

Mr. Webster nonetheless attempted to contact Mr. Sukumar several times starting

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<sup>5</sup> The reconsideration judge admitted the letter into evidence. *TR 19 (December 16, 2021)*.



approximately two weeks after the plea to state his intent to withdraw the plea, but was able to only leave a message with a secretary. *TR.29-31 (December 16, 2021)*. Mr. Webster thus arranged to make a legal call to Mr. Sukumar on either on August 22, 2019 or the next day to tell him he planned to submit the letter as a pro se motion. *TR.22-23 (December 16, 2021)*. Mr. Sukumar told Mr. Webster not to send the letter to the plea court because he wanted to research the question and explore the need for a different attorney in light of the conflict. *TR.23-24 (December 16, 2021)*.<sup>6</sup>

Mr. Sukumar denied speaking to Mr. Webster about the August 22, 2019 letter or even seeing the letter until shortly before testifying on November 23, 2021. Mr. Sukumar testified that Mr. Webster expressed reservations about the plea in August, 2019 but did not state an unequivocal desire to withdraw the plea until sometime in September or October, 2019.<sup>7</sup>

The reconsideration court found equally credible Mr. Webster's testimony that he prepared the letter and did not send it following his conversation with Mr. Sukumar and Mr. Sukumar's denial. *TR.80 (December 16, 2021)*. The reconsideration court ruled against Mr. Webster regarding the testimonial conflict because he had the burden of proof and testimonial equipoise defaulted to the government's favor as the non-movant. *TR.80-81 (December 16, 2021)*.

The reconsideration court thus decided not to disturb the plea court's designation of October 23, 2019 as the date Mr. Webster expressed his intent to withdraw the plea. *TR.82 (December 16, 2021)*. The reconsideration court further commented that even if Mr. Webster had submitted the August 22, 2019 letter that same date, it would still be untimely. *Id.* The reconsideration court thus found no basis to disturb the plea court's denial of the motion. *TR.82-87 (December 16, 2021)*.

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<sup>6</sup> Webster Bryant and Mr. Wallace corroborated Mr. Bryant's stated desire to withdraw the plea within days after he entered it. *TR.16-17 (November 21, 2021-AM) TR.12-13 (December 16, 2021-PM)*. They also corroborated concern that Messrs. Benowitz and Sukumar would not represent him zealously in any such motion because of the \$21,000.00 legal fee balance.

<sup>7</sup> Mr. Benowitz testified that he did not see the letter before November 23, 2021. *TR.12 (December 16, 2021)*.

## IV. ARGUMENT

The plea court committed three substantial errors that require this Court to reverse the Order denying the motion. This Court has recognized that a defendant can withdraw his guilty plea, following the trial court's acceptance of the plea, but before sentencing, where there is a fatal defect in the plea proceedings. *Tibbs v. United States*, 106 A.3d 1080, 1084 (D.C. 2015); *Gooding v. United States*, 529 A.2d 301, 305 (D.C. 1987). Rule 11(d)(2)(B)) explicitly allows a defendant to withdraw his plea after it has been accepted by showing a fair and just reason exists for requesting the withdrawal. The plea court abused its discretion by denying Mr. Webster's motion to withdraw the guilty plea by finding that 1) there was no fatal defect in the Rule 11 inquiry and 2) Mr. Webster failed to satisfy the justice demands withdrawal criteria. This Court, however, need not even consider the plea court's erroneous findings using those two post plea acceptance criteria because the plea court had not even accepted the plea when it denied Mr. Webster's motion.

### A. The Plea Court did not Apply the Correct Legal Standard to Evaluate the Motion

*Rule 11(d)(1)* governs the circumstances for a defendant's withdrawal of a guilty plea before the court accepts the plea and plainly reads as follows: "A defendant may withdraw a plea of guilty before the court accepts the plea, for any reason or no reason."

*Rule 11(c)(3)(A)* governs generally the process by which a trial judge accepts or rejects a plea agreement or defers that decision pending review of a presentence report. The rule mandates that "If, however, the defendant enters a plea of guilty ... to an offense involving a victim, and the agreement is of the type specified in *Rule 11(c)(1)(C)*, the court must defer that decision until the conditions of (*Super. Ct. Crim. Rule*) *Rule 32(a)* are met." Mr. Webster entered his guilty plea under the auspices of *Rule 11 (c)(1)(C)*.

*Rule 32(a)* requires Superior Court judges to provide victims of crime sufficient time before sentencing to submit victim impact statements. The record does not indicate that all victim impact statements had been provided and that the conditions of *Rule 32 (a)* had been otherwise met when Mr. Webster moved to withdraw his plea. Moreover, even if the conditions of *Rule 32 (a)* had been met by or before December 6, 2019, the plea court had not stated its acceptance of the plea by agreeing to the sentencing range. Any such acceptance necessarily had to wait until the pending sentencing hearing. The plea court thus had not accepted the plea under the plain meaning of *Rule 11(d)(1)* when Mr. Webster filed the motion on December 6, 2019.

The primary, fundamental principle of statutory interpretation is that courts should interpret statutes in accordance with their plain meaning. *Providence Hospital v. District of Columbia Employment Services*, 855 A.2d 1108, 1111 (D.C. 2008). Courts must presume that a legislature “says in a statute what it means and means in a statute what it says there.” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The task of resolving disputes over a statute’s meaning begins and ends with the language of the statute itself and the sole function of the courts is to enforce the statute according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

There can be no dispute that the plain meaning of *Rule 11(d)(1)* yields the inescapable conclusion that the plea court had not accepted Mr. Webster’s guilty plea on or before December 6, 2019. Accordingly, this Court should find that the plea court failed to apply the proper standard that governed Mr. Webster’s motion. This Court should further find that *Rule 11(d)(1)* entitled Mr. Webster as a matter of right to withdraw his plea when he filed the motion. Therefore, this Court should vacate the Order denying Mr. Webster’s motion.



## B. The Rule 11 Inquiry was Fatally Defective

Above and beyond the plea court's failure to apply the correct legal standard that entitled Mr. Webster to withdraw his plea as a matter of right, the plea court conducted a three-fold fatally defective Rule 11 inquiry that further requires reversal.

### 1. The Rule 11 Colloquy did not Advise Mr. Webster that he was Waiving Confrontation Rights

*Rule 11 (b)(1)(E)* provides as follows:

Before the court accepts a plea of guilty ... the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following: ... (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses"

The plea court did not advise Mr. Webster that he had the right to confront and cross-examine adverse witnesses. Instead, the plea court told him that his lawyers "could question every witness".

The government will likely invoke *Rule 11(g)* to argue that the plea court's linguistic substitution is a harmless error that does not affect substantial rights. This Court should reject any assertion excusing the plea court's failure to advise Mr. Webster explicitly that he had the right to confront and cross-examine adverse witnesses. Words matter in this context and it is imperative for the judge to use the precise Rule 11 (b)(1)(E) language to explain confrontation rights.

A guilty plea constitutes a waiver of the opportunity to prevail at trial. The purpose of the inquiry mandated by Rule 11(b)(1) is to ensure that the defendant is indeed knowingly waiving his constitutional rights that ensure a fair trial. It is imperative that the defendant knows exactly what he is waiving. A waiver of the right to confront and cross-examine

government witnesses presenting unfavorable testimony as per the plain language of *Rule 11(b)(1)(E)* is a meaningful waiver.

The defendant's right to confront witnesses appears in the text of the Sixth Amendment. Cross-examination is the preferred mechanism of confrontation. The terms "confrontation" and "cross-examine" are powerful action words that assure a defendant that his attorneys have a constitutionally mandated obligation to challenge directly and vigorously the testimony of all witnesses against him to undermine their credibility to maximize this likelihood of prevailing at trial.

Telling a defendant that his attorneys "could question every witness" is a pathetically meek substitute for the powerful phrase "confront and cross-examine." The term "question" is also sufficiently imprecise as to suggest to a defendant that his attorney can satisfy his Sixth Amendment obligations by engaging a government witness in a passive, friendly, pleasant inquiry that does not undermine the adverse witness' credibility. At the very least, the term "question" cannot instill anything remotely approaching the confidence enjoyed by the defendant who knows his lawyer will "confront and cross-examine" adverse witnesses.

A defendant has no reason to believe he is waiving anything of value in terms of trial rights when a judge tells him his attorneys could question every witness. Advice that his attorneys could question every witness is not a harmless substitute for advice that he has the right to confront and cross-examine adverse witnesses under the Sixth Amendment and *Rule 11(b)(1)(E)*. Therefore, a judge must tell a defendant that he is waiving the right to confront and cross-examine to secure a truly knowing waiver from that defendant.

The plea court did not elicit a knowing waiver of Mr. Webster's right to confront and cross-examine adverse witnesses. The magnitude of this right precludes a valid plea.

Therefore, the plea court erred by finding that the Rule 11 inquiry was not fatally defective.

2. The Government's Proffer Did Not Establish Jurisdiction for the Alleged Offense Against PH

*Rule 11(b)(3)* requires the plea court to determine that a factual basis for the guilty plea exists. It is axiomatic that there can be no factual basis for a plea to a District of Columbia offense if the government fails to establish jurisdiction. *James v. United States*, 478 A.2d 1083, 1086 (D.C. 1984); *United States v. Baisch*, 460 A.2d 38, 40 (D.C. 1983).

The proffer as to PH stated that the second-degree assault occurred inside PH's home some time between August 13, 2016 and August 15, 2016. The proffer did not identify PH's address at the time of the offense within that three-day window. The government thus did not establish in the actual proffer that the alleged second-degree sexual abuse of PH occurred in the District of Columbia. The plea court overlooked that defect. Therefore, the plea proceeding was fatally defective because it failed to satisfy the fundamental jurisdictional question.

The government will likely attempt to cure this fatal defect by directing this Court to language in the proffer sandwiched between the description of the alleged offenses against LK and PH stating that PH and LK were roommates. The language identifying PH and LK as roommates, however, does not state when they were roommates. The proffer suggests that LK and PH were roommates on October 1, 2016 and does not state they were roommates on between August 13, 2016 and August 15, 2016.

This ambiguity may be the result of an oversight. However, this ambiguity does not cure the defect because it resulted in a plea to an offense that only might have occurred in the District of Columbia. Failure to establish jurisdiction in a plea proceeding necessarily invalidates the plea. Therefore, this Court should find the Rule 11 inquiry fatally defective and vacate the plea court's denial of the motion for this additional reason.



### 3. The Proffer for the Alleged Assault on PH was Ambiguous and thus Defective

The government's proffer as to the alleged assault on PH also contained a fatal ambiguity. The statement in the proffer directed to this narrow but insurmountable defect was that Mr. Webster entered PH's home and "photographed PH with his penis in Mr. Webster's mouth without his consent." *TR.7-8 (July 25, 2019)*. Mr. Webster answered affirmative to the plea court's question as to whether he agreed with that proffer. *TR.8 (July 25, 2019)*.

This compound statement inquiry was defective because it did not elicit a statement from Mr. Webster that he unambiguously agreed to a proffer of providing oral sex to PH without PH's consent. It is no less likely that Mr. Webster or any observer would have construed the proffer to mean that PH consented to Mr. Webster's performing oral sex, but did not consent to Mr. Webster's photographing the incident.

Though it is a virtual certainty that the government intended to convey that the oral sex was non-consensual thus constituting second-degree sex abuse, the ambiguity precludes a finding that Mr. Webster understood the proffer to mean he was accepting as true that the oral sex was non-consensual. The plea court's failure to recognize this ambiguity and require the prosecutor to clarify further demonstrates that the Rule 11 inquiry was fatally defective.

### C. The Interests of Justice Require Reversal of the Order

The plea court abused its discretion by finding that the interests of justice did not weight in Mr. Webster's favor. Courts must consider 1) the defendant's assertion of legal innocence, 2) the length of delay between the entry of the plea and the filing of the motion 3) whether the defendant has had the full benefit of competent counsel at all relevant times and 4) any other factors unique to the case at hand that weigh in favor or against the defendant. *Springs v. United States*, 614 A.2d 1, 4 (D.C. 1992); *Gooding, supra*, 529 A.2d at

306-307. No factor is dispositive and the court must consider them cumulatively in the context of the particular case. *Pierce v. United States*, 705 A.2d 1086, 1092 (D.C. 1997); *Gooding, supra.*, 529 A.2d at 306. The plea court did not consider the fourth factor and erroneously weighed the first three factors against Mr. Webster.

#### 1. Mr. Webster Asserted Legal Innocence

Though a bald assertion of innocence without any grounds in support thereof will not provide an absolute right to withdraw a guilty plea, the trial judge must not attempt to decide the merits of any asserted defense. *Tibbs, supra*, 106 A.2d at 1085; *Springs, supra*, 614 A.2d at 5. The plea court abused its discretion by considering the weight of the evidence against Mr. Webster vis-à-vis his reasonable doubt defense to find his assertion of legal innocence an insufficient bald assertion.

This Court has upheld rulings against defendants on the question of legal innocence by finding the assertion vague and unsupported where the defendants have asserted affirmative defenses without providing factual support. Such defenses have included actual innocence based on an outright denial, misidentification and other affirmative defenses. Cf. *Long v. United States Springs*, 169 A.3d 369 (D.C. 2017); *Maske v. United States*, 785 A.2d 687 (D.C. 2001); *Bennett v. United States*, 726 A.2d 156 (D.C. 1999); *Springs, supra*.

Unlike the defendant/appellants in those cases, Mr. Webster did not claim factual innocence or assert an affirmative defense. Mr. Webster's assertion of legal innocence was his steadfast claim that the government would not be able to prove the charges beyond a reasonable doubt. The reasonable doubt defense is a true assertion of legal innocence. It is different in kind from all other defenses. All other defenses are varied assertions of factual innocence or an admission of culpability with a legal explanation. By contrast, the

reasonable doubt defense is a tacit admission of culpability for the alleged conduct with the caveat that the government cannot prove that culpability.

By definition a factual innocence defense is contingent upon the assertion of something more than a declaration of innocence. It thus follows that a defendant withdrawing his plea based on the assertion of factual innocence must provide tangible facts advancing that defense in a plea withdrawal proceeding just as he must do so at trial.

The defendant does not have to present facts at trial to advance a pure reasonable doubt defense at trial, however, and thus should not have to do so in the context of a motion to withdraw his plea. Therefore, the various authorities cited by the plea and reconsideration courts and referenced herein do not apply to the instant case to the extent they contemplate the explicit assertion of a defense in the motion to withdraw the plea.

The plea court discounted Mr. Webster's reasonable doubt defense as an insufficient bald-faced assertion of innocence and made clear that it would not credit any assertion by him. The plea court further found that the government's evidence was overwhelming such that Mr. Webster could not plausibly assert legal innocence. A plea court, however, should not attempt to decide the merits of a defense in the context of evaluating an assertion of innocence in the context of a motion to withdraw the plea. *Tibbs, supra*, 106 A.3d at 1080; *Springs, supra.*, 614 A.2d at 5. Therefore, the plea court abused its discretion by factoring its perception of the strength of the government's evidence and concluding that Mr. Webster had not asserted and could not plausibly assert legal innocence.

## 2. The Timeliness of the Motion Does not Weigh Against Mr. Webster

Though there is no absolute deadline between the entry of the plea and the filing of the motion that disqualifies the motion as untimely, a delay of three weeks is presumptively



untimely because such delay belies any claim that the defendant experienced a swift change of heart indicating that he entered the plea in haste and confusion. *White v. United States*, 863 A.2d 839, 843-844 (D.C. 2004); *Gooding, supra.*, 529 A.2d at 307.<sup>8</sup>

Trial courts consider whether the government will suffer prejudice where the defendant files the motion more than a few days after the plea. We acknowledge that Mr. Webster's failure to file his pro se letter/motion during the two or three-day time-frame when he expressed a change of heart creates a presumption that he must overcome a prejudice claim by the government. The plea court abused its discretion by finding that granting the motion would prejudice the government and alleged victims.

The Government would not have been Prejudiced if the Plea Court Granted the Motion

The government presented no evidence of actual prejudice demonstrating that the delay would adversely impact its ability to present its case. The government did not provide evidence or even argue that an alleged victim had become permanently unavailable for trial during the short period between July 25, 2019 and December 6, 2019 or that it had weakened its case by somehow inadvertently misplace or disposing of crucial physical evidence. The government merely demonstrated that granting the motion would present an inconvenience no more burdensome than preparing for a second trial following a mistrial.

Flying expert witnesses back for trial and conferring with those witnesses once again to prepare for trial will not prejudice the government. The government will suffer inconvenience and a small financial imposition. The government has abundant resources at its disposal. Though the prosecutors will admittedly have to spend considerable time re-

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<sup>8</sup> Motions made promptly expressing "a swift change of heart" are regarded with particular favor. *White, supra*, 863 A.2d at 843-844; *Gooding, supra*, 529 A.2d at 307.

familiarizing themselves with the facts of the case, so too will Mr. Webster's attorneys.

Moreover, the task of preparing for trial a second time falls squarely within the job descriptions of attorneys. If it were otherwise, prosecutors could present a dispositive argument to a judge presiding over a vocally deadlocked jury to instruct the jury repeatedly to keep deliberating until it reached a verdict to prevent the "prejudice" attendant to preparation for the re-trial.

The plea court erred in failing to recognize that trial preparation following a withdrawn plea is no more burdensome than trial preparation following a mistrial. Moreover, the advent of universal virtual testimony since the plea court's March 5, 2020 ruling would likely obviate the need for the government's bearing the travel expenses.<sup>9</sup>

The plea court further abused its discretion by finding that the alleged victims would also suffer prejudice. The "prejudice" articulated by the government and embraced by the plea court was that the alleged victims would have to testify and revisit the experience after receiving an expectation that they would not have to do so. An order granting the motion would not impose a new burden on the alleged victims. It would restore a burden they had carried that had been unexpectedly removed. Restored burdens, however painful, are distinct from additional new burdens. An order granting the motion would have restored a burden, not created a new one. Therefore, the plea court abused its discretion to the extent it relied on the alleged victim's interests to find that the timeliness-prejudice factor weighed so heavily in the government's favor.

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<sup>9</sup> Though trials are conducted in-person, there is little doubt that a trial court on remand could exercise discretion to allow an out-of-town government witness to testify virtually and such trial judge would be inevitably inclined to look unfavorably on any hypothetical objection by Mr. Webster to virtual testimony.

### 3. Mr. Webster did not Receive the Full Benefit of Competent Counsel

Though Messrs. Benowitz and Sukumar appear to have represented Mr. Webster zealously, and diligently throughout most of their tenure as his attorneys, it is inescapable that they overlooked the graphic photo until July 24, 2019. This fact precludes a finding that Mr. Webster received the full benefit of competent counsel. The plea court nonetheless excused counsels' failure to find the graphic photo before July 24, 2019 and instead focused on their diligence in going to the jail twice in one day to advise Mr. Webster about the photo. Tacitly applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to evaluate the quality of counsels' representation, the plea court found the graphic photo's sudden appearance immaterial to Mr. Webster's decision to plead guilty.

*Strickland* holds that a defendant seeking to vacate his conviction based on ineffective assistance of counsel must show that the attorney's performance was deficient because 1) it fell below an objective standard of reasonableness and 2) the deficient performance prejudiced the defendant by depriving him the right to a fair trial. *Id.* at 687. To show prejudice, the defendant must show that there is a reasonable probability of a different outcome but for the defective performance. *Id.* at 694.

This plea court found counsels' failure to discover the photograph not prejudicial because it also found there was no reasonable probability that it impacted Mr. Webster's decision to plead guilty. This finding allowed the plea court to further conclude that it did not have to address the first *Strickland* prong to find that Mr. Webster received the full benefit of competent counsel. These conclusions constituted an abuse of discretion because the plea court's immateriality finding was premised upon its own assessment of Mr. Webster's reasonable doubt defense that it could not properly evaluate. *Tibbs, supra.*, 106 A.3d at 1085; *Springs, supra.*, 614 A.2d at 5.



The plea court further abused its discretion by confining its inquiry to Messrs. Benowitz and Sukumar's performance up to July 25, 2019 and overlooking the post-July 25, 2019 deficiency. This Court's consistent disfavor of plea withdrawal motions made more than a few days after a plea is sufficiently established as to create a duty on criminal defense attorneys to know that a motion to withdraw a guilty plea must be made with a few days after the plea to maximize their client's likelihood of prevailing on the motion. Recognition of this duty is the only way to ensure that the client will be able to prevail in a motion to withdraw the plea without having to overcome an argument that the delay caused the government prejudice.

The imperative for this Court to recognize this duty is especially compelling where the pleading defendant 1) has steadfastly refused to plead guilty until the very eve of trial before experiencing a change of heart and 2) is detained following the plea. Counsel should know that a defendant in that posture likely had reservations about the plea and cannot readily communicate his concerns to counsel given the communication obstacles in jail. Therefore, it is incumbent on the attorneys to visit a detained client promptly after the client pleads guilty to safeguard his ability to withdraw the plea based on a swift change of heart.

This case exemplifies a breach of duty by defense counsel in safeguarding a client's interests. Mr. Webster had been detained for almost thirty-four (34) months when he pled guilty after suddenly confronting a photograph that caused his attorney considerable discomfort and after declining an earlier plea offer. Mr. Webster's detention presented an obstacle to his ability to tell his lawyers that he wanted to withdraw the guilty plea within a few days after entering it. Therefore, Messrs. Benowitz and Sukumar had a duty to appreciate the probability of Mr. Webster changing his mind and thus visit him within three days after the plea.

Counsel's failure to visit Mr. Webster promptly constituted a prejudicial breach of their

professional obligation to him because it subjected his motion to the government's prejudice claim. Therefore, the plea court abused its discretion by finding that Mr. Webster received the full benefit of competent counsel.

Cumulative Analysis of the Relevant Interest of Justice Factors Requires Reversal

All three constant interests of justice factors weigh in Mr. Webster's favor. A unique factor that also weighs in his favor in light of his credible testimony is that technical obstacles and his family's concerns about the willingness of his attorneys to provide assistance given the tremendous outstanding balance encumbered his ability to communicate his change of heart that would have demonstrated his plea was hasty and rushed. These are palpable considerations that weigh in Mr. Webster's favor along with the three constant factors. Therefore, this Court should find that the plea court abused its discretion by finding that Mr. Webster had not met the interests of justice criteria.

**V. CONCLUSION**

The plea court committed multiple substantial errors in evaluating Mr. Webster's motion to withdraw his guilty plea. Each error requires this Court to vacate the Order. Therefore, this Court should reverse the plea judge's decision, vacate the conviction and remand the case with instructions to grant Mr. Webster's motion to withdraw the guilty plea.

Respectfully Submitted,

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July 18

Certificate of Service

I hereby certify that on ~~July 17~~, 2023 a copy of the foregoing was delivered to Assistant United States Attorney Chrisellen Kolb, Esquire via the Court's electronic file and serve system.

/s/Ian A. Williams  
Ian A. Williams



# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a “CF” (criminal felony), “CM” (criminal misdemeanor), “CT” (criminal traffic), and “CO” (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.**

If you are incarcerated, are not represented by an attorney (also called being “pro se”), and not able to redact your brief, please initial the box below at “G” to certify you are unable to file a redacted brief. Once Box “G” is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

- (1) An individual’s social-security number
- (2) Taxpayer-identification number
- (3) Driver’s license or non-driver’s’ license identification card number
- (4) Birth date
- (5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
- (6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

- (a) the acronym "SS#" where the individual's social-security number would have been included;
- (b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
- (c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
- (d) the year of the individual's birth;
- (e) the minor's initials;
- (f) the last four digits of the financial-account number; and
- (g) the city and state of the home address.

- B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
- C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.
- D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
- E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
- F. Any other information required by law to be kept confidential or protected from public disclosure.

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G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

  
Signature

22-CF-296  
Case Number(s)

Ian K. Williams  
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7/15/2023  
Date

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