BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 22-CF-296

BRYANT WEBSTER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2016-CF1-16079

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ISSUES PRESENTED

I. Whether Webster's knowing, intelligent, and voluntary waiver of "the right to appeal [his] conviction" as part of his Rule 11 plea agreement bars him from appealing the trial court's denial of his presentence plea-withdrawal motion, as every federal circuit to address the issue has held.

II. Whether—if the appeal is not waived—Webster has demonstrated that the trial court's application of Rule 11 was plainly erroneous when it (1) required him to demonstrate a "fair and just reason" for plea withdrawal; (2) advised him that he was waiving the right to "question every witness" at trial; and (3) found a sufficient factual basis for his guilty plea to the second-degree sexual abuse of P.H.

III. Whether—if the appeal is not waived—the trial court abused its discretion in finding that it would be "extremely unjust" to permit Webster to withdraw his day-of-trial plea where Webster (1) admitted under oath that he sexually abused the three victims and never asserted his innocence; (2) vacillated and delayed months before seeking to withdraw his plea, severely prejudicing the government and the victims; and (3) received the full benefit of competent counsel, who—despite overwhelming evidence of guilt—negotiated a Rule 11(c)(1)(C) agreement on the eve of trial that spared Webster almost certain conviction on 31 counts at trial and a possible life sentence.

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COUNTERSTATEMENT OF THE CASE

On August 7, 2018, a grand jury returned a 31-count superseding indictment charging appellant Bryant Webster with a variety of crimes related to his armed home-invasion rapes of three young men in August and October 2016 (Record (R.) 39). If convicted at trial, Webster faced a potential sentence of life imprisonment without the possibility of release (3/5/20 Transcript (Tr.) 2). On July 25, 2019—the morning of opening statements and with his jury waiting—Webster pleaded guilty to two counts of first-degree sexual abuse while armed and one count of second-degree sexual abuse under a Rule 11(c)(1)(C) plea agreement with an agreed-upon

sentencing range of 32 to 39 years of imprisonment (7/25/19 Tr. 4; R. 71-75). Webster's plea agreement included a waiver of the right to appeal his conviction and sentence (R. 71 at 2-3).

On December 6, 2019—two weeks before sentencing—Webster filed a motion to withdraw his guilty plea under Rule 11(d)(2)(B) (R. 77). On March 5, 2020, the Honorable Ronna L. Beck denied Webster's motion following an evidentiary hearing, finding that it would be "extremely unjust" to permit him to "manipulate and disrupt the trial process" and withdraw his plea (3/5/20 Tr. 17-18).

The pandemic delayed sentencing (R. 91). On October 21, 2021, Webster filed a motion to reconsider the denial of his plea-withdrawal motion (R. 98). The Honorable Marisa Demeo—who had taken over the case from Judge Beck—reopened the evidentiary hearing and denied the motion for reconsideration (12/16/21 Tr. 87).

On April 6, 2022, Judge Demeo sentenced Webster to a total of 39 years of imprisonment, to be followed by a lifetime of supervised release (4/6/22 Tr. 50-51). The court also ordered lifetime sex-offender registration upon release (*id.* 44). Webster timely filed a notice of appeal (R. 112).

Webster's Crimes and the Investigation

Armed Rape of L.K. (October 1, 2016)

In the early morning hours of October 1, 2016, Webster snuck into a Capitol Hill home and found L.K., a recent college graduate, who had just returned alone after a night out with friends (R. 105 at 2). Webster pointed a laser-sighted pistol at L.K., locked the front door, and ordered L.K. to take his clothes off inside his bedroom (*id.* 3). Webster pulled a roll of duct tape from his backpack and bound L.K.'s hands and feet, stuffed a shirt in L.K.'s mouth and taped it closed, then forced L.K. onto the bed (*id.*). Webster grabbed nearby lotion, spread it between L.K.'s buttocks, and took his own pants off (*id.*). L.K. blurted through his gag, "Are you going to rape me?"; Webster responded, "Yes" (*Id.*). Although L.K. did not know Webster, Webster stated that he had been watching L.K., knew he worked out regularly, and questioned L.K. about his girlfriend (*id.*).

Webster got on top of L.K. and penetrated L.K.'s anus with his penis (R. 105 at 3). As Webster was raping L.K., L.K.'s roommate N.M. entered the house (*id.*). Webster immediately locked the door to L.K.'s bedroom and threatened that he would kill L.K. and his roommate (*id.* 3-4). Webster set the gun down on the bed (*id.* 4). L.K., who had loosened the tape on his hands, lunged for the gun (*id.*). While Webster and L.K. fought over the gun, L.K. yelled for help (*id.*). N.M. broke down the bedroom door and came to L.K.'s aid, jumping on Webster's back (*id.*). During

the melee over the gun, L.K. was able to call 911, and screamed to the operator that they had Webster pinned down but he was fighting back (*id.*). L.K. met police at the front door with Webster's gun; officers saw a piece of tape hanging from L.K.'s face (*id.*). Police found Webster, who was naked from the waist down, struggling with N.M. in the bedroom (*id.* 5).[1]

There were no signs of forced entry at L.K.'s house, although L.K.'s keys had gone missing several weeks before the rape (R. 105 at 5). Webster's backpack, which police found in L.K.'s room, contained a pistol bag, an extra loaded magazine for the pistol, duct tape, seven knives, a crowbar, binoculars, four screw drivers, a hammer, flashlight, 11 gloves, condoms, and lubricant (*id.*). Police also found L.K.'s missing keys in Webster's backpack (*id.* 6). A forensic nurse examiner swabbed L.K.'s body; Webster's DNA was found on L.K.'s thighs and genitalia, a used condom in L.K.'s room, and multiple items in Webster's backpack (*id.*).

Police located a Lexus registered to Webster parked on L.K.'s block (R. 105 at 6). Inside Webster's car, police found his iPhone and his wallet, which contained two blank checks from L.K.'s account (*id.* 6, 10).[2] Police also found a blank check

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[1] L.K. described Webster as a black male in his late twenties or early thirties, 5'10"-5'11", 160-170 pounds, with a light beard, wearing a black baseball cap, greyish black hoodie, black pants, black cloth gloves, and dark socks and shoes (R. 59 at 6).

[2] L.K. kept his checks in his home and had not given them to anyone else (*id*. 6).

in Webster's wallet belonging to A.P., the victim of an unsolved rape a block and a half away involving eerily similar facts (*id.* 6-7).

As a result of the struggle with L.K. and his roommate, Webster sustained physical injuries and his face was swollen (R. 59 at 6). Webster waived his *Miranda*[3] rights and told police that he thought he had entered his own home; he denied raping anyone, having sex with a man, owning a gun, or knowing how he received his injuries (R. 105 at 5).

Armed Rape of A.P. (August 28, 2016)

In the early morning of August 28, 2016, Webster entered the Capitol Hill apartment of A.P., another recent college graduate starting his career in Washington, D.C. (R. 105 at 7). Dressed in black and wielding the laser-sighted pistol, Webster woke A.P., forcibly bound his hands and feet with duct tape and belts, forced A.P. to lie down on his stomach, and put a pillowcase over A.P.'s head (*id.* 8). Webster put on a condom and tried to force his penis into A.P.'s anus (*id.*). After applying lubricant, Webster succeeded in fully penetrating A.P.'s anus (*id.*). Webster raped A.P. for approximately 30 minutes (*id.*). During the rape, Webster repeatedly told A.P., "Shut up if you want to live"; he also repeatedly shoved a t-shirt in A.P.'s mouth and eventually secured it with duct tape (*id.*).

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Webster forced A.P. into the shower, still bound and gagged, and washed A.P. to destroy evidence of the rape (R. 105 at 8-9). Webster rifled through drawers, took one of A.P.'s bags, and placed some of A.P.'s belongings in it (*id.* 9). He told A.P. that he knew where A.P. worked and would come back and rape A.P. again if he told anyone what happened (*id.*). Finally, Webster forced A.P. to drink alcohol and told him to wait in the bathroom for 15 minutes while Webster left (*id.*).[4]

A search of Webster's iPhone revealed additional evidence tying Webster to the A.P. rape (R. 84 at 6; R. 105 at 10). Webster's iPhone contained digital photographs of A.P.'s credit card and driver's license, taken in July 2016, and a voicemail to "Brian" rejecting his attempt to use A.P.'s debit card (R. 105 at 10). Cell-site analysis placed Webster's iPhone near A.P.'s apartment minutes before the rape (*id.*).

Sexual Abuse of P.H. (August 13-15, 2016)

Investigators found trophy photos on Webster's phone—with metadata indicating the photos were taken between August 13-15, 2016—showing Webster sexually abusing an unconscious P.H. at the Capitol Hill house where Webster later

[4] A.P. described Webster as a black male, 28-35 years of age, 5'10" tall, approximately 200 pounds, stocky build, beard, wearing a black baseball cap, black t-shirt, black shorts, and black cloth gloves (R. 59 at 1). A.P. also told police that he suspected his assailant had been in his apartment before: A laptop and other items had disappeared from A.P.'s bedroom while he slept in July 2016 (R. 105 at 9).

returned to rape L.K. (R. 105 at 11). The first photos in the series show P.H. sleeping on a couch in shorts and a shirt (*id.*). Additional photos show a large cut made in P.H.'s shorts and boxers, exposing his genitals (*id.*). Other photos capture Webster taking a "selfie" of his face with his mouth on P.H.'s penis, wearing pink gloves and manipulating P.H.'s genitals, and placing his own penis next to P.H.'s face (*id.*).

P.H. learned of the sexual abuse after police discovered the photos on Webster's phone (R. 105 at 11). P.H. remembered waking up one night in the summer with his shorts and boxers cut to expose his genitals but thought his roommates had played a prank on him (*id.*). P.H. recalled that his laptop and several other items had gone missing around the same time (*id.* at 11-12).

Webster's Guilty Plea

The parties selected a jury on July 22, 2019 (R. A at 59). Webster's trial was set to begin on July 25 (*id.*). That morning, with the jury and government witnesses waiting and opening statements imminent, Webster entered a plea agreement with the government and pleaded guilty to two counts of first-degree sexual abuse while armed (L.K. and A.P.), D.C. Code §§ 22-3002, 22-4502, and one count of second-degree sexual abuse (P.H.), D.C. Code § 22-3003 (R. 71; 7/25/19 Tr. 12-13).

Plea Agreement

In exchange for Webster's guilty plea to the three counts above, the parties' written plea agreement specified that the government would dismiss the remaining 28 counts of the indictment at sentencing (R. 71 at 1-2). Under Rule 11(c)(1)(C), Webster and the government agreed that an appropriate sentence would be between 32 and 39 years of imprisonment; Webster would be allowed to withdraw his plea if the court rejected the plea agreement under Rule 11(c)(4) (*id.* 2). The written agreement included a waiver of trial rights, including "the right to confront and cross-examine witnesses" (*id.*).

Webster's plea agreement also included a waiver of appeal rights (R. 71 at 2-3). Webster "agree[d] to waive, insofar as such waiver is permitted by law, the right to appeal the conviction in this case" (*id.*). Webster "also agree[d] to waive the right to appeal the sentence in this case . . . except to the extent the Court sentences [Webster] above the statutory maximum" (*id.* 3). The agreement further stated: "Notwithstanding the above agreement to waive the right to appeal the conviction and sentence, your client retains the right to appeal on the basis of ineffective assistance of counsel, but not to raise on appeal other issues regarding the conviction or sentence" (*id.*).

In addition to the appeal waiver, Webster also "waive[d] any right to file a post-conviction motion seeking to withdraw the plea, or challenge the conviction

entered or sentence imposed, except to the extent that [he] claims ineffective assistance of counsel and/or that the plea was not knowing and voluntary" (R.71 at 3).

Webster signed the plea agreement on July 24, 2019, indicating that he had "read this plea agreement" and had "discussed it with [his] attorney" (R. 71 at 4). Webster further avowed that he "fully underst[oo]d this agreement and agree[d] to it without reservation," "voluntarily and of [his] own free will, intending to be legally bound," and that "no threats ha[d] been made to [him]" (*id.*). He was "not under the influence of anything that could impede [his] ability to understand this agreement fully," and was "pleading guilty because [he] was in fact guilty of the offenses set forth herein" (*id.)*. Webster also affirmed that he was "satisfied with the legal services provided by [his] attorney[s] in connection with this plea agreement and matters related to it" (*id.*). Defense counsel—David Benowitz and Shawn Sukumar—signed the agreement, stating that they had reviewed the entire agreement and "discussed the provisions of the agreement with [their] client, fully" (*id.*).

Webster's plea agreement included a written "proffer of facts":

> Had this case gone to trial, the [g]overnment's evidence would have proven beyond a reasonable doubt that on August 28, 2016, at approximately 6:00am, [Webster] entered the home of complainant A.P. at [street address],[5] Washington DC, pointed a handgun at A.P.,

[5] The proffer included the victims' actual street addresses (R. 75).

> bound his hands and ankles, and penetrated A.P.'s anus with his penis against his will.
>
> The [g]overnment's evidence would have also proven beyond a reasonable doubt that on October 1, 2016, at approximately 12:30am, [Webster] entered the home of complainant L.K. at [street address], Washington DC, pointed a handgun at L.K., bound L.K.'s hands and ankles with duct tape, and penetrated L.K.'s anus with his penis. During the assault, L.K. was able to remove his hands from the duct tape, take the handgun, and subdue [Webster] with the assistance of L.K.'s roommate. L.K. called the police, who arrived and arrested [Webster].
>
> After [Webster's] arrest, the government executed a search warrant on [Webster's] iPhone, which was found in a while Lexus belonging to [Webster]. The search recovered video and photographs of L.K.'s roommate, P.H. The photographs of P.H. show him in his residence, apparently passed out with his pants cut, exposing his genitalia and with [Webster's] mouth on his penis. The [g]overnment's evidence would have also proven beyond a reasonable doubt that [Webster] entered P.H.'s home between August 13 and August 15, 2016, and photographed P.H. with his penis in [Webster's] mouth without P.H.'s consent. (R. 75.)

Webster and his attorneys signed the proffer, indicating Webster's "acknowledgment" that he "ha[d] read and discussed the [g]overnment's [p]roffer of [f]acts with my attorney" and "agree[d] and acknowledge[d] by [his] signature that this [p]roffer of [f]acts is true and correct" (*id.*).

Waiver and Plea Colloquy

On the morning of July 25, 2019, with his jury ready and waiting in the jury room for opening statements, Webster entered his guilty plea (7/25/19 Tr. 2, 15).

First, Webster, his attorney, and a prosecutor signed a written waiver advising Webster of the "important rights" he would "give up" by pleading guilty (R. 72). Among the trial rights Webster waived included "the right to cross-examine the government's witnesses" (*id.*). The waiver also advised Webster that he would "give up the right to appeal [his] conviction to the Court of Appeals" (*id.*). By signing the waiver, Webster acknowledged that he had "reviewed this form with [his] lawyer and [had] decided to plead guilty in this case," and had "decided to give up [his] constitutional right to have a trial and to give up [his] right to appeal" (*id.*).

While under oath during questioning by Judge Beck, Webster stated that he was 35 years old, had completed a bachelor's degree, and was not under the influence of any substance or condition that would interfere with his ability to understand the plea proceedings (7/25/19 Tr. 2-3). After defense counsel recited the terms of the agreement, Webster averred that he understood the agreement, had had enough time to discuss it with counsel, and was "satisfied with the services [counsel] ha[d] provided [him]" (*id.* 4-6). The government then recited the agreement's factual proffer verbatim (*id.* 6-8). Under oath, Webster agreed that the proffer accurately described the criminal conduct with respect to each victim on the dates indicated (*id.* 8). Judge Beck then asked if there was "any part of the proffer" that Webster "disagree[d] about or challenge[d] with respect to any of these events?", and

Webster testified, "No" (*id.* 8-9). Judge Beck described the mechanics of the Rule 11(c)(1)(C) plea agreement, and Webster confirmed his understanding (*id.* 9).

Judge Beck reminded Webster that it was "still an option" "to decide that you've changed your mind and you want to go forward with trial" (7/25/19 Tr. 10). In fact, the court pointed out, "we've already picked the jury, they're actually waiting in the jury room, and we could go forward with trial" (*id.*). However, by pleading guilty, Webster was giving up "the right to a trial by jury," at which "it would be the government's burden to prove your guilt beyond a reasonable doubt by introducing evidence here in open court" (*id.*). At such a trial, the court explained, Webster's "attorneys could challenge the government's case. They could question every witness. They could object to evidence the Government sought to introduce." (*Id.*) Webster's attorneys could also "file motions on your behalf" and "present evidence at trial," including by "requir[ing] people to come to court and . . . testify" (*id.* 11). Webster would have "an absolute right to remain silent," but "if [he] wanted to testify," he could (*id.*). Moreover, if convicted at trial, Webster "would have a right to take an appeal to the D.C. Court of Appeals" (*id.*). Judge Beck emphasized that "[a]ll 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." (*Id.*). Webster confirmed that he understood (*id.* 11-12).

In response to the court's questions, Webster testified that nobody had threatened him or forced him to plead guilty, that no promises had been made to him other than those in the plea agreement, and that he did not have "any questions about the plea agreement or the rights [he was] giving up or about anything else in connection with [the plea] hearing" (7/25/19 Tr. 12). Webster affirmed that he "still want[ed] to plead guilty" (*id.*). After the prosecutor and both defense counsel stated that they did not "know of any reason why [the court] should not accept this plea at this time," Judge Beck asked Webster whether he pled "guilty or not guilty" as to each of the three counts in the agreement (*id.* 12-13). Webster pled guilty as to all three (*id.*). Judge Beck then stated, "I've inquired of [Webster]. I find his plea is knowing and voluntary, that there's a factual basis for the plea. I accept the plea contingent on my acceptance of the sentencing agreement." (*Id.* 13.)

The court set a sentencing date and ordered a presentence investigation (7/25/19 Tr. 13). The September 13, 2019, presentence report (PSR) indicates that an investigator interviewed Webster on August 28 (PSR 3). Webster told the investigator that he "accepted responsibility for the instant offenses and agreed with the [factual] proffer," and that "he was 'very sorry and very remorseful for [his] offenses'" (*id.* 4 (second alteration in original)).

Webster's Plea-Withdrawal Motion

The Parties' Claims

Webster's sentencing was scheduled for December 19, 2019 (R.A at 63). On December 6, 2019, Webster—represented by new counsel, Madalyn Harvey—filed a motion to withdraw his guilty plea (R. 77).[6] Relying on Rule 11(d)(2)(B), Webster argued that it would be "fair and just" to allow him to withdraw his plea (*id.* 2-3). He asserted two rationales (*id.*). First, Webster claimed that there was a "fatal defect" in the plea hearing; specifically, he alleged that the government failed to disclose a photograph showing him with P.H.'s penis in his mouth until the day before opening statements, placing him under "extreme pressure" to plead guilty (*id.* 3-4). Webster also claimed that "justice demands withdrawal in the circumstances of this case" because: (1) "the government w[ould] not be able to establish beyond a reasonable doubt" that he was guilty"; (2) the time period between his plea and "his decision to move to withdraw his plea [was] not lengthy"; and (3) "although [he did] not argue that his attorneys were at fault," it was "impossible" for him to have received "adequate counseling" in connection with his plea (*id.* 4-5).

In its opposition, the government pointed out that it had disclosed all photos on Webster's phone—including the "selfie" he took with the unconscious P.H.'s

[6] Benowitz and Sukumar filed a motion to withdraw as counsel on December 10, 2019 (R. 79). Judge Beck granted their motion the next day (R. 80).

penis in his mouth—on June 1, 2018, more than a year before trial (R. 84 at 7-8). The government also explained that it was Webster who "sought, fashioned, and implored the government to enter into a plea agreement" on the eve of trial, even taking the "unprecedented step of creating the plea paperwork associated with the agreement" (a task ordinarily handled by the prosecutor); the government insisted upon the defense taking responsibility for drafting the plea paperwork "to ensure that [Webster] was indeed serious about" pleading guilty (*id.* 11-12). The government also included a copy of the plea transcript to refute Webster's unfounded suggestion of a Rule 11 error (*id.* 18-19). The government explained that Webster's "conclusory assertion" of innocence did "not even come close to meeting the necessary threshold for the [c]ourt to consider withdrawal," and the evidence of guilt was overwhelming (*id.* 20-24). Furthermore, Webster waited "four and a half months" to move to withdraw his plea, a lengthy delay that was "highly prejudicial" to the government and especially the victims, who would be "force[d] . . . to experience again the straining anxiety of trial preparation" and "endure the public devastation of reliving these terrible events" (*id.* 25-27). Finally, Webster "had the full benefit of competent counsel," and affirmed during the plea colloquy that he was "satisfied" with their services (*id.* 27-28).

In a short reply, Webster stated that he was "not in a position to dispute" that the government provided "full discovery in a timely manner" (R. 85 at 1).

The Evidentiary Hearing

At an evidentiary hearing on March 3, 2020, the government called Webster's former counsel Sukumar as a witness; Webster did not call any witnesses (3/3/20 Tr. 2). Sukumar testified that he and Benowitz began representing Webster in early 2018 (*id.* 7). Prior to the August 28, 2018, superseding indictment with the charges relating to P.H., prosecutors advised Sukumar and Benowitz that they had discovered evidence on Webster's cell phone that would lead to new charges involving a new victim (*id.* 9-10). Sukumar and Benowitz requested discovery related to the new charges (*id.* 10). On July 3, 2018, the prosecutor sent them an e-mail identifying photographs by file name in the "lengthy" phone-extraction report that had already been disclosed on June 1 (*id.* 10-11). The government later provided "some original digital photos and videos that were not merely thumbnails from the phone extraction" (*id.* 12). Sukumar believed that these photos were the same as those referenced in the July 3 e-mail by file name, but he did not seek further clarification (*id.* 13-14). Sukumar also acknowledged that, in a May 31, 2019, motion, the government described evidence found on Webster's iPhone including "photos and video of [Webster] putting his mouth and hands on [P.H.'s] penis" (*id.* 16-17). In a pleading filed June 24, 2029, the government described "a series of images" from the iPhone "showing [Webster] sexually abusing P.H.," including

"images [that] captured [Webster] taking a selfie with [his] mouth on P.H.'s penis" (*id.* 19).

Sukumar further testified that, on July 24, 2019, counsel had completed "final trial preparations, prepping opening statements, going finely through [the] evidence, [and] doing our preparations for cross-examination" (3/3/20 Tr. 20). Sukumar and Benowitz believed that the evidence "was really bad for the defense" and that there was a "strong chance" Webster would be convicted (*id.* 59-60). In reviewing P.H.'s grand jury testimony, Sukumar realized that "there was a photo referenced" in the testimony "that seemed to be described a little bit differently from the photos" that he believed "were the entirety of the photo and video evidence that [he] had" (*id.*). Sukumar e-mailed the prosecutors, requesting and receiving "a copy of that specific grand jury exhibit" (*id.* 20-21). Sukumar testified that "this was the first time that I had actually laid eyes on a photograph that appeared to explicitly show [Webster's] face with his mouth on a penis and actually showed part of his face" (*id.* 21). In Sukumar's assessment, the photo "made an already bad situation worse"—but only "marginally" so (*id.* 86). It was "a nail in the coffin. . . . Coffin is bad; nail in it is worse." (*Id.* 87.)

Sukumar went to the jail "that same day" to speak with Webster about the photograph (3/3/20 Tr. 24-25). Webster "acknowledged that the photo was of him" and "acknowledged that charge" (*id.*). After discussing the photo, Sukumar and

Webster "talked about the possibility of going back to the [g]overnment to rediscuss plea options" (*id.* 26). Sukumar "typically wouldn't go make a request for a plea offer without a client of mine saying okay," so he "asked [Webster] if it was okay" (*id.*). Webster "said [Sukumar] could go ahead and reach out to the [g]overnment for a plea" (*id.* 27). Webster did not ask for additional time to consider the evidence or request that Sukumar seek a trial continuance (*id.*). Sukumar, who described Webster as a "pretty even keeled person," did not "notice a strong change in his demeanor" during their "serious conversation" (*id.* 26, 28-29).

Sukumar and Benowitz negotiated the Rule 11(c)(1)(C) agreement with the government (3/3/20 Tr. 32-35). Based on Sukumar's earlier conversation with Webster at the jail, their "goal was to minimize" the "lowest bottom end" of the sentence range "that [they] could get" (*id.* 36). Since it was the eve of trial, the government "put the onus on" the defense "to make a proffer of what . . . [counsel] believed that [Webster] would accept" and to draft the plea agreement and provide it to the government—not the other way around as is typically the case (*id.* 33-34). After drafting the plea agreement, Sukumar and Benowitz returned to the jail that night for a "full discussion" with Webster, focusing on their "best estimate" of his sentencing exposure at trial compared to the plea agreement (*id.* 40-42). They cautioned him that "there was a very high chance" that he would "do the rest of his life in prison" if convicted at trial (*id.* 61). Counsel explained to Webster that the

agreement "was something that would minimize, to [their] best ability, [Webster's] exposure and be able to have him get released at the earliest available opportunity" (*id.* 43-44). They "definitely" told Webster that "in the end" they would "do what he wants" and "defend him at trial," where "everything was ready to go"; but they also "gave a fairly strong recommendation" that the plea agreement "was in his best interest" (*id.* 44-45). After a "long conversation" that "really focused on the numbers," Webster "agreed to [the plea agreement], signed it" (*id.* 40-42). Sukumar and Benowitz told Webster they would "discuss it again with him the next morning" to "see if anything had changed" (*id.* 46).

On the morning of July 25, 2019, Webster confirmed to Sukumar "that he was going to go forward with" the plea (3/3/20 Tr. 46-47). Sukumar reviewed and signed the trial waiver form (R. 72) with Webster, who expressed no reservations about going forward with his plea (3/3/20 Tr. 49).

Sukumar testified that, within approximately a month of the plea, he heard from members of Webster's family that Webster "had some reservations" about the plea (3/3/20 Tr. 49). Sukumar spoke to Webster, who "agreed" that he was having "reservations" about the plea, and Sukumar stated that he would "research [Webster's] options" and "discuss what the next steps would be" to "address his concerns" (*id.* 50) "[A]t the same time," however, Sukumar and Webster were "still preparing for the presentencing interview and discussing the possibility of

sentencing options" (*id.* 52). Webster "was still considering what he wanted to do" and "hadn't given [counsel] any definitive instruction at that point saying, I want to withdraw[] the plea" (*id.* 53). In "mid-October" 2019, Sukumar and Benowitz requested that the trial court appoint independent counsel to advise Webster on the possibility of plea withdrawal (*id.* 55). Webster agreed that they should request independent counsel, but also wanted them "to stay on the case" to continue preparing for sentencing (*id.* 55-56).

Following Sukumar's testimony, Webster argued that the court "should be generous in allowing him to withdraw this plea" because he was "between a rock and a hard place" in a "high-pressure situation" when he plead guilty (3/3/20 Tr. 92-96). Webster did not fault Sukumar and Benowitz for the "pressure," however, and argued that "[w]hether or not fault lies with his prior counsel in not having discovered the photograph" was "irrelevant" (3/3/20 Tr. 93-94).

Judge Beck's Ruling

Judge Beck was unpersuaded by Webster's arguments and denied his motion (3/5/20 Tr. 18). The court first found that there was "no defect in the Rule 11 proceeding"; the "pressure of an imminent trial" did not render his plea involuntary (*id.* 4-5). The court also found that it would not be "fair and just" to grant withdrawal (*id.* 6). Webster did not assert legal innocence beyond "a bald claim without any support," and the evidence against him was "truly overwhelming" (*id.* 6-10

(describing evidence against Webster)). The photo showing Webster's face was "almost inconsequential given all of the evidence demonstrating [Webster's] guilt," including "other photos on [Webster's] phone showing P.H. being sexually abused" (*id.* 10).

As to delay, Judge Beck found that Webster had not established that he had "actually decided he wanted to withdraw his plea" prior to filing his motion on December 6, 2019 (3/5/20 Tr. 13). Moreover, plea withdrawal "would greatly prejudice the [g]overnment and the complaining witnesses": "The jury had been selected. The [g]overnment was ready to go forward with trial, had flown in its out-of-town witnesses, had prepped its witnesses, had lined up its experts." (*Id.* 14.) The victims "were eager to have closure and put these traumatic events behind them" (*id.*).

The court also found that Webster was "ably represented" by competent counsel, as he "acknowledged under oath" during the plea colloquy and even in his motion (3/5/20 Tr. 15, 18). In "combing through the evidence in their trial preparations," counsel discovered that they were "missing a piece of evidence"; "[a]s soon as they realized they were missing the photo, they got it from the [g]overnment and headed to the jail to show it to" Webster (*id.* 15-16). Judge Beck inferred that Sukumar's discovery of the photo simply "was an opportunity to reopen a discussion about whether [Webster] should again consider a guilty plea in a case that seemed

unwinnable, with or without the photo" (*id.* 11). As the court explained, "it is a delicate matter to continue pressing a defendant about pleading guilty when he has announced an unwillingness to do so, even if counsel believes the defendant is making a bad decision and even if counsel had earlier recommended a guilty plea. At some point defendants grow concerned that their lawyers are unwilling to fight for them at trial. So it's not surprising that defense counsel were not pushing a guilty plea right before trial until they had a new piece of evidence that justified reopening the discussion." (*Id.* 16-17.)

In sum, Judge Beck found that "it would be extremely unjust to permit [Webster] to withdraw his plea at this time," because it would "permit him to manipulate and disrupt the trial process to great prejudice to the [g]overnment and the victims" (3/5/20 Tr. 17).

Webster's Motion for Reconsideration

Sentencing was delayed because of the pandemic (R. 91). On October 21, 2021, Webster—represented by new counsel, Thomas Key—filed a motion for reconsideration of the denial of his plea-withdrawal motion (R. 98). Webster claimed that he "drafted a pro se motion" to withdraw his plea on August 22, 2019, but did not mail to it Judge Beck because "his attorneys told him not to" so "they could do research" (*id.* 4). Judge Demeo—who had taken over the case—reopened the evidentiary hearing on that limited issue (11/12/21 Tr. 9). After hearing testimony

from Webster, his brother, his former boyfriend, Benowitz, and Sukumar, Judge Demeo denied the motion for reconsideration (12/16/21 Tr. 87).[7]

The court found that Webster—as the "proponent of the fact"—had failed to establish by a preponderance of the evidence that Webster told counsel about any draft motion (12/16/21 Tr. 79-82).[8] Judge Demeo also found that, even under "the best-case scenario as presented by the defense," Webster's delay between his plea and decision to seek withdrawal was nearly a month and would still weigh against Webster (*id.* 82). Judge Demeo agreed with Judge Beck that counsel's representation

[7] Webster's former boyfriend, Keith Wallace, testified that Webster told him on July 29, 2019, that he "wanted to take the plea back," and Wallace recommended that Webster "figure out a way . . . to take back the plea without having to go through [his] attorneys" (11/12/21 PM Tr. 13-14). Webster's brother Maurice testified that he also suggested that Webster himself "should draft up a motion to withdraw his plea" (11/12/21 AM Tr. 17). Webster testified that he drafted a letter to the court asking to withdraw his plea and printed it on August 22, 2019 (12/16/21 Tr. 22). Through his case manager, Webster arranged a legal call with Sukumar and spoke to him within a day (*id.* 22-23). According to Webster, Sukumar advised him not to submit the letter and promised to "research and bring in additional counsel to help assist with taking the plea back" (*id.*). Sukumar testified, however, that Webster never showed him the letter or said anything to counsel about wanting to send his own letter to the court (11/23/21 Tr. 29). According to Sukumar, Webster first expressed that he "was interested in [counsel] looking into withdrawing his guilty plea" in "early October" (*id.* 30). Benowitz also testified that Webster never showed him the letter (12/16/21 Tr. 12).

[8] Webster does not challenge this finding on appeal (Webster Brief (Br.) 22 (acknowledging delay "between July 25, 2019 and December 6, 2019")).

did not "f[a]ll outside the scope of what competent attorneys do" and that Sukumar and Benowitz "did everything they could to serve [Webster's] interests" (*id.* 85-86).

SUMMARY OF ARGUMENT

As part of his plea agreement with the government, Webster agreed "to waive the right to appeal [his] conviction." Because Webster knowingly, intelligently, and voluntarily waived his right to appeal his conviction, the waiver is presumptively valid and enforceable. Webster's appeal falls within the scope of that waiver. As every federal circuit to address the issue has found, an appeal challenging the denial of a motion to withdraw a guilty plea is an appeal of a conviction—and thus barred by an appeal waiver. This Court should enforce the waiver and dismiss Webster's appeal.

Even if not waived, Webster's arguments on appeal are meritless. His claims of Rule 11 error are unpreserved and therefore subject to plain-error review. He has not shown error at all, let alone plain error. Supreme Court precedent forecloses his claim that he should have been allowed to withdraw his guilty plea "for any reason or no reason" because the trial court did not accept the Rule 11(c)(1)(C) plea agreement until sentencing. *See United States v. Hyde*, 520 U.S. 670 (1997). There was also no plain error in the plea colloquy. The trial court adequately informed Webster of the rights he was waiving by pleading guilty, and Webster agreed to a factual proffer that included a sufficient factual basis for each count of conviction.

Moreover, even if Webster could demonstrate Rule 11 error that was plain, he has not shown "a reasonable probability that, but for [any such] error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 80 (2004).

Webster also failed to establish "a fair and just reason" for withdrawing his plea. The trial court considered each of the factors identified by this Court as relevant to the discretionary determination of whether to allow Webster to withdraw his plea before sentencing and reasonably found that those factors weigh heavily against him. Webster has not asserted legal innocence. After pleading guilty on the day of trial, he vacillated and waited months before seeking to withdraw the plea, severely prejudicing the government and the victims. Finally, his counsel performed ably in the face of overwhelming evidence against Webster, negotiating a plea agreement that spared Webster from almost certain conviction on 31 counts at trial and a possible life sentence.

ARGUMENT

I. Webster Waived the Right to Appeal His Conviction.

"A knowing, intelligent and voluntary waiver of the right to appeal may generally be enforced." *United States v. Jackson*, 26 F.4th 994, 998 (D.C. Cir. 2022). "An appeal waiver is knowing, intelligent and voluntary if the defendant 'is aware of and understands the risks involved' in waiving the right to appeal." *United States v. Lee*, 888 F.3d 503, 506 (D.C. Cir. 2018) (quoting *United States v. Guillen*, 561

F.3d 527, 529 (D.C. Cir. 2009)). Appellate courts should "ordinarily" enforce "a valid waiver" and dismiss an appeal "falling within [its] scope." *Jackson*, 26 F.4th at 999.

Here, Webster agreed "to waive the right to appeal [his] conviction and sentence" in his plea agreement (R. 71 at 2-3). In "agree[ing] to waive the right to appeal the conviction and sentence," Webster "retain[ed]" only "the right to appeal on the basis of ineffective assistance of counsel, but not to raise other issues regarding the conviction or sentence" (R. 71 at 2-3).[9] That waiver is "presumptively valid" and "enforceable," *Lee*, 888 F.3d at 506, because it was "knowing, intelligent, and voluntary." *Jackson*, 26 F.4th at 998. Webster affirmed in writing that he "fully underst[oo]d" and "discussed . . . with [his] attorney" all aspects of the agreement, including the appeal waiver, and that he was entering the agreement "voluntarily and

[9] Webster "also waive[d] any right to file a post-conviction motion . . . except to the extent that [he] claims ineffective assistance of counsel and/or that the plea was not knowing and voluntary" (R.71 at 3 (emphasis added)). Significantly, the scope of Webster's appeal waiver is narrower than the scope of his waiver of the right to file post-conviction motions. The plea agreement's narrow carve-out of "the right to appeal on the basis of ineffective assistance of counsel" does not permit Webster to appeal from the denial of his presentence plea-withdrawal motion. *See United States v. Mboule*, 23 F.4th 753, 757 (7th Cir. 2022) (where "waiver's only exception was for ineffective-assistance-of-counsel claims," "Mboule's challenges to the district court's denial of his motion to withdraw his guilty plea . . . fall within the scope of the waiver").

of [his] own free will" (R. 71 at 4). Moreover, Webster signed the court's waiver form, acknowledging that he had "decided to give up" the "right to appeal [his] conviction" (R. 72). During the plea colloquy, Webster acknowledged under oath that he was giving up the "right to take an appeal to the D.C. Court of Appeals" by pleading guilty, and he also affirmed that he did not have "any questions about the plea agreement or the rights [he was] giving up" and "still want[ed] to plead guilty" (7/25/19 Tr. 11-12). This Court "view[s] such sworn statements from a defendant at his plea hearing with 'a strong presumption of verity.'" *Maddux v. District of Columbia*, 212 A.3d 827, 839 (D.C. 2019).

Webster's challenge to the trial court's denial of his plea-withdrawal motion "fall[s] within the scope of [his] valid appeal waiver." *Jackson*, 26 F.4th at 999. Webster waived "the right to appeal the conviction in this case" (R. 71 at 2-3). "[A] defendant challenges his conviction when he challenges the [trial] court's denial of his motion to withdraw a plea." *United States v. Alcala*, 678 F.3d 574, 578 (7th Cir. 2012). Therefore, "an appeal of the denial of a motion to withdraw a guilty plea is an attack on the conviction subject to an appeal waiver provision." *United States v. Toth*, 668 F.3d 374, 378 (6th Cir. 2012). Every federal circuit that "ha[s] addressed the issue [has] found that a plea withdrawal constitutes a challenge to the defendant's conviction" and is thus "encompassed by the language of an appellate waiver barring challenges to the conviction and sentence." *United States v. Fonseca*, 49 F.4th 1, 5

n.3 (1st Cir. 2022). *See, e.g., Alcala*, 678 F.3d at 578 ("[W]hen a defendant waives his right to appeal [his conviction] in a plea, he also waives his right to appeal a denial of his motion to withdraw that plea.").[10] Thus, by waiving his right to appeal his conviction, Webster waived his right to appeal the denial of his plea-withdrawal motion.

At the evidentiary hearing before Judge Beck, Webster disclaimed any challenge to his guilty plea based on ineffective assistance of counsel. According to Webster, "whether or not fault l[ay] with [Sukumar and Benowitz] in not having discovered the photo" was "irrelevant" to his plea-withdrawal motion (3/3/20 Tr. 93-94). *See also id.* at 97-98 ("I don't want to imply that what they did was bad."). Although courts generally do not require defendants to establish ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1984), in order to withdraw a plea before sentencing, *see Pettiford v. United States*, 700 A.2d 207, 215-16 (D.C. 1997), Webster *is* required to demonstrate "ineffective assistance of counsel" and satisfy *Strickland* to circumvent his appeal waiver, under which he

[10] *See also Toth*, 668 F.3d 374 (6th Cir. 2012); *United States v. Rahman*, 642 F.3d 1257 (9th Cir. 2011); *United States v. Gray*, 528 F.3d 1099 (8th Cir. 2008); *United States v. White*, 307 F.3d 336 (5th Cir. 2002); *United States v. Elliott*, 264 F.3d 1171 (10th Cir. 2001); *United States v. Plotka*, 2022 WL 13692137 (11th Cir. 2022) (unpublished); *United States v. Deans*, 711 Fed. Appx. 178 (4th Cir. 2018); *United States v. Rodriguez*, 659 Fed. Appx. 671 (2d Cir. 2016); *United States v. Daniels*, 278 Fed. Appx. 161 (3d Cir. 2008).

"retains the right to appeal on the basis of ineffective assistance of counsel" only—"but not to raise on appeal other issues regarding conviction or sentence" (R. 71 at 2-3).[11] Because he has not done so, and his claim falls within the scope of the waiver, the Court should enforce the waiver and dismiss his appeal. *Jackson*, 26 F.4th at 999.

II. Even if Webster's Appeal Is Not Waived, He Has Not Shown Plain Error Under Rule 11 as Required to Withdraw His Plea.

"There are two ways in which an accused may successfully move to withdraw a guilty plea . . . , one of which is to establish a fatal defect in the Rule 11 proceeding at which the guilty plea was entered, the other to show that justice demands withdrawal in the circumstances of the individual case." *Byrd v. United States*, 801 A.2d 28, 31-32 (D.C. 2002) (cleaned up).

Webster claims for the first time on appeal that his plea hearing and plea-withdrawal proceedings did not comply with Rule 11 in several respects (Br. 14-19). Because he did not make these arguments below, they are unpreserved and—even if

[11] The carve-out for "ineffective assistance of counsel" claims is unambiguous and does not cover Webster's challenge to the denial of his presentence plea-withdrawal motion. But even if there were some room for ambiguity, it must be construed against Webster. "Ambiguity in a plea agreement, as in any other type of contract, is construed against the drafter." *Jackson*, 26 F.4th at 1000. Ordinarily, of course, the government would be the drafter. In this case, however, *Webster* drafted the agreement and prepared the relevant paperwork (3/3/20 Tr. 33-34), so any ambiguity must be construed against him.

not waived—subject only to review for plain error. *See United States v. Dominguez Benitez*, 542 U.S. 74, 80 (2004); *United States v. Vonn*, 535 U.S. 55, 63 (2002); *In re Sealed Case*, 670 F.3d 1296, 1302 (D.C. Cir. 2011) ("Where a defendant raises Rule 11 error for the first time on appeal, review is for plain error."). "Under the test for plain error, [Webster] first must show (1) error, (2) that is plain, and (3) that affected [his] substantial rights. Even if all three of these conditions are met, this [C]ourt will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010) (internal quotation marks omitted). Moreover, because Webster "seeks reversal of his conviction after a guilty plea, on the ground that the [trial] court committed plain error under Rule 11," he "must show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83. This Court's review is "informed by the entire record." *Id.*

Webster has not demonstrated error at all, let alone plain error. His first new argument—that he should have been allowed to withdraw his plea "for any reason or no reason" under Rule 11(d)(1) (Br. 14-15)—is foreclosed by Supreme Court precedent. *See United States v. Hyde*, 520 U.S. 670 (1997). In the context of the

federal version of Rule 11, *see* Fed. R. Crim. P. 11,[12] *Hyde* held that a defendant who pleads guilty pursuant to a plea agreement under Rule 11(c)(1)(A) or (C)[13] "may not withdraw his plea [prior to sentencing] unless he shows a 'fair and just' reason," even where the court has "deferred decision on whether to accept the plea agreement" until sentencing. 520 U.S. at 671. As the Supreme Court recognized, "[g]uilty pleas can be accepted while plea agreements are deferred" under Rule 11, "and the acceptance of the two can be separated in time." *Id.* at 674. Under Rule 11(c)(1)(C), the court accepts a defendant's guilty plea but "defer[s] [the] decision" to accept or reject "the agreement" until sentencing. Super. Ct. Crim. R. 11(c)(3)(A). If the court ultimately "rejects [the] plea agreement," it must advise the parties and "give the defendant an opportunity to withdraw the plea." Super. Ct. Crim. R. 11(c)(5)(B). Rule 11(d)(2) therefore provides that "[a] defendant may withdraw" a guilty plea "after the court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5)." Super. Ct. Crim. R. 11(d)(2)(A). If a defendant could withdraw a guilty plea "'for any reason or for no

[12] Superior Court Criminal Rule 11 "is substantially identical to Fed. R. Crim. P. 11" and this Court "often draw[s] from federal caselaw to interpret it." *Gooding v. United States*, 529 A.2d 301, 305 n.6 (D.C. 1987).

[13] Rule 11(c)(1)(A) and (C) require that the court "accept the agreement" in addition to the plea itself or "give the defendant an opportunity to withdraw the plea." See Rule 11(c)(4)-(5).

reason' even if the [trial] court does not reject the plea agreement, but merely defers decision on it," it would "strip[] [Rule 11(c)(5)(B)] of any meaning." *Hyde*, 520 U.S. at 676. But "[t]he necessary implication of [that] provision is that if the court has neither accepted nor rejected the agreement, the defendant is not granted 'the opportunity to then withdraw' his plea." *Id.*

Hyde also rejected Webster's interpretation of Rule 11 because it would "debase[] the judicial proceeding at which a defendant pleads and the court accepts his plea" by allowing a defendant who has entered a solemn plea to withdraw it "simply on a lark," thus "degrad[ing] the otherwise serious act of pleading guilty into something akin to a move in a game of chess." 520 U.S. at 676-77. Following *Hyde*, federal circuits have recognized that "where a [trial] court conducts a Rule 11 plea colloquy and then provisionally or conditionally accepts the defendant's guilty plea pending its review of the [presentence report], the [trial] court has accepted the plea for the purposes of Rule 11." *United States v. Byrum*, 567 F.3d 1255, 1262 (10th Cir. 2009). *See also United States v. Overton*, 24 F.4th 870, 877-78 (2d Cir. 2022); *United States v. Battle*, 499 F.3d 315, 321-22 (4th Cir. 2007); *United States v. Jones*, 472 F.3d 905, 907-09 (D.C. Cir. 2007). In *Overton*, for example, the Second Circuit held that a defendant seeking to withdraw his guilty plea had to satisfy Rule 11(d)(2)(B)'s "fair and just" standard—although the trial court had stated that it "provisionally accepted" his plea pending review of the parties' Rule 11(c)(1)(C)

agreement—because "[c]onsidered in its entirety the record plainly reflects that the court had accepted Overton's plea—but deferred decision on his plea agreement—prior to his motion to withdraw." 24 F.4th at 875. So too here, where Judge Beck stated at the plea hearing that it "accept[ed] [Webster's] plea contingent on [its] acceptance of the sentencing agreement" (7/25/19 Tr. 13), the record reflects that the court accepted Webster's plea while deferring decision on the plea agreement—as Rule 11 clearly authorizes. Webster has not shown error at all—let alone plain error—in the court's application of Rule 11(d)(2)(B)'s "fair and just" standard to his plea-withdrawal motion. *See Hyde*, 520 U.S. at 671.[14]

Webster's other unpreserved claims of Rule 11 error fare no better. He claims that the court failed to advise him during the plea hearing that he would have "the right to confront and cross-examine adverse witnesses at trial" (Br. 16). *See* Super. Ct. Crim. R. 11(b)(1)(E) ("Before the court accepts a plea of guilty . . . the court must inform the defendant of . . . the right at trial to confront and cross-examine

[14] Webster points out (Br. 15) that Superior Court Rule 11(c)(3)(A), unlike its federal analogue, requires that the trial court defer a decision on accepting or rejecting a Rule 11(c)(1)(C) agreement in a case "involving a victim" pending notification, as required by Rule 32(a), of the right to make a victim-impact statement at sentencing. That does not change the foregoing analysis, because it is the decision on "the plea agreement"—not acceptance of the plea—that is being deferred. Under *Hyde* and its progeny, a defendant must satisfy the "fair and just" standard where the court accepts the plea but defers decision on the agreement. *See* 520 U.S. at 674 ("Guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time.").

adverse witnesses . . . ."). But Webster acknowledges that the court informed him—and he confirmed under oath he understood—that at trial his "attorneys . . . could question every witness" (7/25/19 Tr. 11). Moreover, based on "the entire record" of the plea hearing, *id*., there can be no question that Webster understood that he was waiving the right to confront and cross-examine adverse witnesses at trial. By signing the plea agreement, Webster affirmed that he "fully underst[oo]d" after "discuss[ing] it with [his] attorney[s]" that he was "waiving or giving up" his "right to confront and cross-examine witnesses" at trial (R. 71 at 2, 4). By signing the court's waiver form, Webster avowed that he had "reviewed [the] form with [his] lawyer[s]" and had "decided to give up [his] constitutional right to have a trial" where he "would have the right to cross-examine the government's witnesses" (R. 72). Webster affirmed under oath that he both understood the plea agreement and had enough time to discuss it with counsel (7/25/19 Tr. 5-6).

The court did not err, let alone plainly err, in using the phrase "question every witness" to inform Webster about the confrontation rights that he would give up by pleading guilty. Contrary to Webster's suggestion, the "precise Rule 11(b)(1)(E) language" does not have talismanic significance (Br. 16). In applying Rule 11, "matters of reality, and not mere ritual, should be controlling." *McCarthy v. United States*, 394 U.S. 459, 467 n.20 (1969). Thus, Rule 11(b)(1) "does not say that a court's only means of compliance is to read the specified items *in haec verba*."

United States v. Monroe, 353 F.3d 1346, 1351 (11th Cir. 2003). Here, Judge Beck adequately conveyed the substance of the confrontation right that Webster was waiving by virtue of his guilty plea. Furthermore, even if Webster could show that the court's phrasing was plainly erroneous, he would still not be entitled to have his plea vacated because he has not shown "a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83.[15]

Webster also claims for the first time that his guilty plea to the second-degree sexual abuse of P.H. lacked a sufficient factual basis and failed to establish that the crime occurred in the District of Columbia (Br. 18-19). Judge Beck did not err at all—let alone plainly err—in finding a sufficient basis for the plea. Webster's jurisdictional claim plainly lacks merit. Absent evidence to the contrary, a court "will presume that the charged offense was committed within the court's jurisdiction." *Dobyns v. United States*, 30 A.3d 155, 157 (D.C. 2011). Here, Webster acknowledges that he agreed to a proffer stating that he "entered the home of" the victim L.K. at a specific address in Washington, D.C., and sexually abused L.K. there; that P.H. was "L.K.'s roommate"; and that Webster "entered P.H.'s home"

[15] The claim would be meritless even if preserved. A "purely technical" Rule 11 error that "affects no substantial rights in any way" is not a "fatal defect" supporting withdrawal of a plea. *Long v. United States*, 169 A.3d 369, 375 (D.C. 2017). For the reasons discussed above, the plea hearing complied with Rule 11; and even if there was some "technical" variance, Webster's substantial rights were not affected. *Id.*

and sexually abused P.H. "in his residence" (R. 75). Moreover, Webster explicitly "acknowledge[d]" in pretrial briefing "that P.H. and L.K. are roommates and that the assault of each occurred in the same residence" (R. 67 at 5 n.1 (emphasis added)).

Similarly, there was ample factual basis to establish that Webster's oral sex with P.H. was non-consensual. "The factual basis of which [Rule 11] speaks is sufficient evidence from which a reasonable jury could conclude that the defendant committed the crime." *Pringle v. United States*, 825 A.2d 924, 925 (D.C. 2003). The judge "may establish the factual basis for a guilty plea through questioning in open court, documents, or other evidence in the record." *United States v. Carr*, 271 F.3d 172, 179 (4th Cir. 2001). Webster agreed under oath that he "entered P.H.'s home" while P.H. was "apparently passed out" and "photographed P.H. with his penis in [Webster's] mouth without P.H.'s consent" (7/25/19 Tr. 7-9). "[O]rdinarily, qualifying phrases are to be applied to the words or phrase immediately preceding them, and not to others more remote," "unless the context indicates otherwise." *District of Columbia v. Smith*, 329 A.2d 128, 130 (D.C. 1974) (discussing "rule of the last antecedent"). Webster's contention that "without P.H.'s consent" could apply to "photographed P.H." but not to "with his penis in [Webster's mouth" is at odds with common usage—the last-antecedent rule—as well as common sense, because P.H. was "passed out" and could not consent to anything.

III. Even if Webster's Appeal Is Not Waived, He Has Not Shown that Judge Beck Abused Her Discretion in Denying His Plea-Withdrawal Motion Under the "Fair and Just" Standard.

Webster claims that Judge Beck abused her discretion in denying his plea-withdrawal motion under Rule 11(d)(2)(B) (Br. 19-26). Even assuming Webster has not waived his appeal rights, he has not come close to demonstrating abuse of discretion.

"The determination of whether to allow withdrawal of a guilty plea is left to the sound discretion of the trial court and reversal will be required only upon a showing of abuse of discretion." *Springs v. United States*, 614 A.2d 1, 4 (D.C. 1992). "[R]eversal on appeal is 'uncommon.'" *Bennett v. United States*, 726 A.2d 156, 165 (D.C. 1999) (quoting *United States v. Barker*, 514 F.2d 208, 219 (D.C. Cir. 1975)). In evaluating a motion to withdraw a guilty plea under the fair and just standard, the trial court must consider: "(1) whether the defendant has asserted [his] legal innocence; (2) the length of the delay between entry of the guilty plea and the desire to withdraw it; and (3) whether the accused has had the full benefit of competent counsel at all relevant times." *Springs*, 614 A.2d at 4 (cleaned up). "None of these factors is controlling and the trial court must consider them cumulatively in the context of the individual case"; additionally, the "circumstances of the individual case may reveal other factors which will affect the calculation of the fair and just

standard." *Id.* The trial court did not abuse its discretion in finding that each of these relevant factors weighed against Webster (3/5/20 Tr. 6-18, 22).

First, Webster—who affirmed under oath at the plea hearing that he sexually abused A.P., L.K., and P.H., and then admitted his guilt again to the presentence investigator—did not assert his legal innocence when he attempted to withdraw his plea, despite "[a]n assertion of legal innocence" being "a prerequisite to the granting of a motion to withdraw a plea of guilty." *Pierce v. United States*, 705 A.2d 1086, 1092-93 (D.C. 1997). A defendant "seeking to withdraw a guilty plea [must] do more than assert a simple claim of innocence." *Springs*, 614 A.2d at 6. "[T]he movant must set forth some facts, which when accepted as true, make out some legally cognizable defense to the charges, in order to effectively deny culpability." *Id.* at 5. Here, Webster did not even make "[a] bald assertion of innocence"—which would not be enough. *Id.* His plea-withdrawal motion did not assert innocence *at all*; he merely "contend[ed] that the government [would] not be able to establish beyond a reasonable doubt before a jury that he committed the offenses for which he was indicted" (R. 77 at 5). Webster's so-called "reasonable doubt defense" (Br. 20) is not an assertion of legal innocence. *See United States v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007) ("What Curry's argument really amounts to is the claim that, if he went to trial, a jury might not be persuaded that the government had met its burden of proving his guilt beyond a reasonable doubt. We have previously found such a

claim insufficient to satisfy the [assertion-of-legal-innocence] factor."). Nor was Webster "steadfast" in "claim[ing] that the government would not be able to prove the charges beyond a reasonable doubt" (Br. 20). Given the opportunity to put the government to its proof—and with his jury waiting in the next room—he chose to admit guilt under oath rather than begin trial that day. "A defendant appealing the denial of his motion to withdraw a guilty plea, unlike a defendant who has not first pled guilty, must do more than make a general denial in order to put the [g]overnment to its proof; he must affirmatively advance an objectively reasonable argument that he is innocent, for he was waived his right simply to try his luck before a jury." *United States v. Cray*, 47 F.3d 1203, 1209 (D.C. Cir. 1995).[16]

Second, Webster's long delay in seeking to withdraw his plea weighs heavily against him. In evaluating Webster's delay, "[t]he length of time is measured as between the date of the plea and the time the defendant sought to withdraw the plea."

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[16] Webster is wrong to suggest that "[t]he reasonable doubt defense is a true assertion of legal innocence" (Br. 20). An "assertion that there was insufficient evidence to convict" is "not truly . . . an assertion of innocence—either legal or factual—but rather . . . is an entirely different argument and is certainly not a claim of legal innocence. There is a world of difference between saying, on the one hand, 'I did it, but the law says I'm not culpable,' and on the other, 'I may have done it, but you can't prove it." *United States v. James*, 928 F.3d 247, 254-55 (3d Cir. 2019). Webster also completely misses the point when he argues that, because a "defendant does not have to present facts at trial to advance a pure reasonable doubt defense . . . and thus should not have to do so in the context of a motion to withdraw his plea" (Br. 21). Webster has already admitted his guilt under oath and "waived his right simply to try his luck before a jury." *Cray*, 47 F.3d at 1209.

White v. United States, 863 A.2d 839, 844 (D.C. 2004). Delay of three weeks or more weighs against a defendant, because it does not evince the "swift change of heart" that "is itself a strong indication that the plea was entered in haste or confusion." *Id. See also, e.g., Byrd*, 801 A.2d at 33 ("[A] delay of more than three weeks in attempting to withdraw the plea reveals that the plea had not been the product of haste or confusion."); *Bennett*, 726 A.2d at 169 (three-week delay weighs against defendant); *Springs*, 614 A.2d at 7-8 (same). Moreover, a defendant's "vacillation weighs against him in the analysis of the delay factor." *Springs*, 614 A.2d at 8. *See also White*, 863 A.2d at 844.

Webster acknowledges that the length of delay weighs against him (Br. 22). Webster pleaded guilty on July 25, 2019, but he did not file a motion to withdraw his guilty plea until December 6—more than four months later. Webster does not challenge Judge Beck's finding that he failed to establish any earlier date when he "actually decided he wanted to withdraw his plea" (3/5/20 Tr. 13).[17] Webster's lengthy delay "weighed substantially against granting the motion to withdraw the plea." *Pierce*, 705 A.2d at 1094 (11-week delay). By the same token, Webster's

[17] In moving for reconsideration below, Webster attempted to show that he sought to withdraw his plea on August 22, 2019. But Judge Demeo did not find that fact in his favor after a hearing, and refused to disturb Judge Beck's earlier findings. Webster does not challenge Judge Demeo's ruling. And, as Judge Demeo pointed out, even if Webster had sought to withdraw his plea on August 22, the delay of more than three weeks would still weigh against him.

"vacillation" during that period also "weighs against him." *Springs*, 614 A.2d at 8. Although Webster told his counsel Sukumar a month after the plea that he was having "reservations," Webster continued "preparing for the presentence interview and discussing . . . sentencing options," and acknowledged his guilt and expressed "remorse[]" to the presentence investigator on August 28, 2019 (3/3/20 Tr. 49, 52; PSR 3-4). Even after Sukumar and Benowitz requested independent counsel for Webster in mid-October, Webster asked them "to stay on the case" to continue preparing for his sentencing (3/3/20 Tr. 55-56). And, contrary to Webster's suggestion (Br. 22), the delay itself would weigh against him "even in the absence of [any] prejudice to the government." *Bennett*, 726 A.2d at 169. *See also Springs*, 614 A.2d at 7-8.

In any event, Judge Beck did not abuse her discretion in finding that plea withdrawal "would greatly prejudice the [g]overnment and the [victims]," and weighing that prejudice against Webster (3/5/20 Tr. 14). As the court explained, "[t]he [g]overnment was ready to go forward with the trial, had flown in its out-of-town witnesses, had prepped its witnesses, had lined up its experts," and "[g]ranting the motion to withdraw will mean the [g]overnment will have to reassemble its case" (*id.* 14-15). Even "[m]ore importantly" to the court, the three victims "were eager to have closure and put these traumatic events behind them"; if Webster were permitted to withdraw his plea, the victims, "who thought their ordeal was over, [would] have

resolution of this matter delayed by many, many months until the case" could be tried (*id.*). This Court and others have recognized that the government's showing of prejudice to its case and the victims undermines a defendant's claim that plea withdrawal would be "fair and just." *See, e.g., Kyle v. United States*, 759 A.2d 192, 200 (D.C. 2000) (withdrawal of mid-trial plea would prejudice government and victim, because it "would imply a new trial, requiring the [victim] to testify a second time"); *Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (trial judge did not abuse discretion in weighing against defendant "the fact that withdrawal of the plea would prejudice the government because it would mean a lengthy postponement of the trial"); *United States v. Morrison*, 967 F.2d 264, 269 (8th Cir. 1992) ("Morrison had waited until the eve of trial before pleading guilty . . . . Withdrawal of the plea would obviously require the prosecution and its witnesses to endure this emotional process again. . . . [I]t is real prejudice, caused by the timing of Morrison's guilty plea and subsequent attempts to withdraw.").[18]

Third, Judge Beck did not abuse her discretion in finding that Webster received the full benefit of competent counsel at all relevant times. Webster is simply incorrect in asserting that the court "conclude[d] that it did not have to address"

[18] Webster argues that plea withdrawal would "restore" a "painful . . . burden" on the victims, "not impose a new burden" (Br. 23). Webster cannot seriously be arguing that the re-traumatization of the victims is not the sort of prejudice the court could consider. In any event, Judge Beck was not required to adopt his tortured logic.

competence (Br. 24). In fact, Judge Beck explicitly found that "[t]here's nothing in the record that indicates [Webster] was not being ably represented" (3/5/20 Tr. 15). Moreover, on Webster's motion for reconsideration, Judge Demeo independently reviewed the record and reached the same conclusion as Judge Beck, finding that the performance of Benowitz and Sukumar did not "f[a]ll outside the scope of what competent attorneys do" (12/16/21 Tr. 85). To the extent Webster believes the court's findings should have been more fulsome on this point, he has only himself to blame. At Judge Beck pointed out (3/5/20 Tr. 15), Webster affirmed under oath at the plea hearing that he was satisfied with counsel's services (7/25/19 Tr. 6). And given the opportunity in his plea withdrawal motion and evidentiary hearing when represented by new counsel, Webster declined to fault his prior counsel's performance. *See* R. 77 at 5 ("[Webster] does not argue that his attorneys were at fault"); 3/3/20 Tr. 93-94 (arguing that "whether or not fault l[ay] with [Sukumar and Benowitz] in not having discovered the photo" was "irrelevant"); *id.* at 97-98 ("I don't want to imply that what they did was bad.").

The record fully supports the findings of both Judge Beck and Judge Demeo that Webster received the benefit of competent counsel. Here, while preparing for trial, Webster's counsel diligently reviewed the overwhelming evidence against Webster that the government had disclosed in discovery—evidence that Sukumar aptly described as a "coffin" for Webster, who faced a life sentence if convicted at

trial (3/3/20 Tr. 87). In reviewing the evidence, Sukumar realized that he was missing one photo recovered from Webster's phone, although it had previously been disclosed to the defense when the government provided a copy of Webster's phone-extraction report (3/5/20 Tr. 15-16). Judge Beck found that, "[a]s soon as [Sukumar] realized [he] was missing the photo, [he] got it from the [g]overnment and headed to the jail to show it to" Webster—who had taken the photo (*id.*). Sukumar testified that the photo, which showed P.H.'s penis in Webster's mouth, was the proverbial "nail in the coffin" which made "an already bad situation" "marginally" worse (3/3/20 Tr. 86-87). As Judge Beck reasonably inferred after hearing Sukumar's testimony, the government "already had a powerful case showing [Webster] was guilty of all three of these sets of crimes," and the trophy photo "made very little difference" next to the mountain of evidence against Webster (3/5/20 Tr. 16). Rather, the photo merely "offered defense counsel the opportunity to raise again the issue of a guilty plea in a trial that was about to commence that . . . already was virtually certainly unwinnable" (*id.*).

Because the "new piece of evidence justified reopening the discussion" of a plea, Webster's counsel were able to negotiate and secure a plea agreement that capped Webster's exposure at 39 years' imprisonment and included the "lowest bottom end" of the sentence range "that [counsel] could get" (3/3/20 Tr. 36). Judge Beck further found that Webster "discuss[ed] [the plea agreement] for a considerable

amount of time with his lawyers before he actually entered it" (3/5/20 Tr. 18). Webster does not dispute that the evidence against him was overwhelming, the discovery of the trophy photo made things only marginally worse, or that counsel's "fairly strong recommendation" that the plea agreement "was in [Webster's] best interest" was sound professional advice (3/3/20 Tr. 44-45). "If the best professional advice that a lawyer can give is to enter a guilty plea and the accused relies on his lawyer's advice, the accused cannot later successfully urge the plea was involuntary on the basis of counsel coercion." *White*, 863 A.2d at 845).[19]

Webster also asserts that counsel "had a duty" to "visit him within three days after the plea" in case he changed his mind (Br. 25). Webster never asserted such a duty in the trial court, so review is for plain error only. *Dominguez Benitez*, 542 U.S. at 80. Because neither this Court nor the Supreme Court has ever recognized such a duty, the claim fails. *See Walker v. United States*, 201 A.3d 586, 594 (D.C. 2019) ("We cannot say an error is 'plain' when neither this [C]ourt nor the Supreme Court has decided the issue."). Such a "duty" would make no sense in the law, which recognizes that "a guilty plea is no such trifle, but a grave and solemn act which is accepted only with care and discernment." *Hyde*, 520 U.S. at 677 (cleaned up). Nor

[19] Webster identified himself in the photo and "acknowledged" his guilt of the charge related to P.H. because they "weren't able to come up with a defense to it" (3/3/20 Tr. 25-26). Webster does not argue that if counsel had shown him the photo earlier, he would have been able to mount a plausible defense.

would it make sense based on the facts of this case. Webster acknowledged in his testimony before Judge Demeo that he could arrange calls from jail and reach counsel within a day, and that there was nothing stopping him from calling counsel after he pled guilty (12/16/21 Tr. 22, 28). Moreover, even when Sukumar visited Webster in late August—a month after the plea—Webster continued preparing for sentencing and acknowledged guilt again to the presentence investigator. Nothing in the record supports Webster's spurious claim that he would have demonstrated "a swift change of heart" if counsel had "visit[ed] him within three days after the plea" (Br. 25).[20]

The trial court carefully considered and rejected Webster's arguments after a hearing, finding that plea withdrawal would be "extremely unjust" (3/5/20 Tr. 17). Webster pleaded guilty because he was guilty: Faced with overwhelming evidence of his horrific crimes, he looked into the eyes of the jury on his day of reckoning and blinked. This Court should affirm the trial court's considered judgment here.

[20] Webster also suggests in passing that his "tremendous outstanding balance" to his retained counsel affected his guilty plea (Br. 26). But Webster affirmed under oath that he was satisfied with counsel's services and was not being threatened or forced to plead guilty (7/25/19 Tr. 6, 11). And Sukumar testified that he and Benowitz "definitely" told Webster that they would "do what he wants" and "defend him at trial," where "everything was ready to go" if that was his choice (3/3/20 Tr. 44-45).

CONCLUSION

WHEREFORE, the government respectfully submits that Webster's appeal should be dismissed and the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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Court of Appeals

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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.

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

(1) An individual's social-security number
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(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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22-CF-296
Case Number(s)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Ian Williams, Esq., ianwilliamslaw1@gmail.com, on this 19th day of December, 2023.

/s/
MARK HOBEL
Assistant United States Attorney