DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 23-CM-991

DWAYNE T. HAWKINS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the
District of Columbia – Domestic Violence Division
2023 DVM 224

OPENING BRIEF FOR APPELLANT

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D.C. App. R. 28(a)(2)(A) Statement

Appellant Dwayne Hawkins and appellee the United States were the parties in the trial court. Adrian E. Madsen, Esq., represented Mr. Hawkins in the Superior Court. Assistant United States Attorneys Elizabeth Ginsburg, Esq., Julia White, Esq., Emily Harake, Esq., and Wilfred Beaye, Esq., represented the United States in the Superior Court. Adrian E. Madsen, Esq. represents Mr. Hawkins before this court. Assistant United States Attorney Chrisellen Kolb, Esq., represents the United States before this court. There are no interveners or amici curiae. No other provisions of D.C. App. R. 28(a)(2)(A) apply.

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3. Whether the trial court erred by merging the *Gooding* factors of the length of the delay between entering a plea and seeking to withdraw it and whether the accused has asserted his or her legal innocence.
4. Whether the trial court erred by declining to engage in an assessment of whether Mr. Hawkins presented facts that, taken as true, "made out some legally cognizable defense to the charge."
5. Whether the trial court abused its discretion by failing to consider the lack of any identified prejudice to the government from permitting Mr. Hawkins to withdraw his guilty plea.

STATEMENT OF THE CASE

Mr. Hawkins was charged by information with one count of simple assault in violation of D.C. Code § 22-404, one count of obstruction of justice in violation of D.C. Code § 22-722(a)(3)(B),[1] and one count of malicious destruction of property in violation of D.C. Code § 22-303 following his arrest on February 27, 2023. R. 1.[2]

On April 4, 2023, Mr. Hawkins pled guilty pursuant to a nine-month deferred sentencing agreement ("DSA"). R. 16-17. Counts Two and Three of the information were dismissed when Mr. Hawkins pled guilty. R. A at 1-2. On July 25, 2023, after a representative of the Court Services and Offender Supervision Agency ("CSOSA") reported that Mr. Hawkins had not yet begun Domestic Violence Intervention Program ("DVIP") classes, the United States sought to revoke the agreement. 7/25 Tr. Mr. Hawkins orally objected, first orally and then in writing, and requested that the trial court order specific performance of the agreement both because Mr. Hawkins had not breached any condition of the agreement and because the United

[1] Obstruction of justice under D.C. Code § 22-722(a)(3)(B), a Class A felony punishable by up to 30 years in prison, may not be charged by information (absent consent of the accused), and instead must be charged by indictment. *See, e.g. Tann v. United States*, 127 A.3d 400, 481 (D.C. 2015) (quoting U.S. CONST. amend. V.). For strategic reasons, Mr. Hawkins did not raise this defect in the trial court. Because Count Two of the information, purporting to charge Mr. Hawkins with obstruction of justice, was dismissed at the time Mr. Hawkins entered a plea agreement in this matter, this court need not consider this defect.

[2] "R." refers to the record on appeal. "Tr." refers to transcript by date of proceeding, all occurring in 2023.

States seeking to revoke the agreement breached the agreement.[3] 7/25 Tr. 3-8; R. 19. After opposition from the United States[4] and argument at a September 5, 2023 hearing, the trial court denied Mr. Hawkins' motion for specific performance, leading Mr. Hawkins to move to withdraw his guilty plea. 9/5 Tr.

Following written filings from both parties,[5] the trial court denied Mr. Hawkins' motion to withdraw his guilty plea on October 23, 2023, without hearing testimony. 10/23 Tr. On November 9, 2023, the trial court sentenced Mr. Hawkins to 90 days' incarceration, all suspended in favor of twelve months of probation, with special conditions to complete DVIP, comply with drug and alcohol testing and treatment as deemed necessary by CSOSA, and not harass, assault, threaten, or stalk the complainant. R. 23-24. This timely appeal followed. R. 25.

[3] Mr. Hawkins indicated that he would seek to withdraw his guilty plea if the trial court denied his motion for specific performance.
[4] R. 20.
[5] R. 22-23.

STATEMENT OF FACTS

Mr. Hawkins was charged by information with one count of simple assault in violation of D.C. Code § 22-404, one count of obstruction of justice in violation of D.C. Code § 22-722(a)(3)(B), and one count of malicious destruction of property in violation of D.C. Code § 22-303, all alleged to have occurred on or about February 27, 2023. R. 1. Following Mr. Hawkins' conditional release pursuant to D.C. Code § 23-1321, the parties appeared for an initial status hearing before the Honorable Kimberly Knowles on March 20, 2023. 3/20 Tr. Without opposition from the United States, a further status hearing was set to give Mr. Hawkins additional time to consider a diversion offer extended by the United States, a "deferred sentencing agreement." 3/20 Tr.

When the parties appeared for a further status hearing on March 30, 2023,[6] Mr. Hawkins, through counsel, indicated that he wished to reject the United States' plea offer and proceed to trial. 3/30 Tr. 2. The United States then placed the plea offer on the record:

> If the defendant pleads guilty to simple assault, then the Government will agree to dismiss the obstructing justice

[6] Both Mr. Hawkins and the undersigned appeared on March 27, 2023. When the trial court was not able to call Mr. Hawkins' case at 10:00 am, the trial court later provided notice to Mr. Hawkins to return on March 30, 2023, as the undersigned was representing a client in a non-jury trial when the trial court was prepared to call Mr. Hawkins' case.

> and destruction of property charges and enter into a nine-month deferred sentencing agreement with the defendant. Pursuant to the DSA, the government will require the defendant to complete drug and alcohol testing and treatment as deemed necessary by CSOSA, complete the Domestic Violence Intervention Program, stay away and have no contact with [the complainant] and the 3500 block of Hayes St. NE in Washington, D.C. If the defendant successfully completes the above requirements over nine months deferred sentencing period, the Government will not oppose the withdrawal of defendant's guilty plea and the Government will dismiss the case.

3/30 Tr. 3 (2-15).

After placing Mr. Hawkins under oath, the trial court then engaged in a colloquy with Mr. Hawkins, regarding whether he had sufficient time to confer with his attorney about the plea offer and whether he wished to reject it. 3/30 Tr. 3-5. Perceiving "hesitation" by Mr. Hawkins, the trial court asked whether Mr. Hawkins needed additional time to consider whether he wished to accept the plea offer or proceed to trial, with Mr. Hawkins ultimately indicating that he needed additional time to make that decision.

> THE COURT: Okay. And just understand this, I'm not trying to force you into anything, but I want to make sure that you are comfortable with your decision and that you've had enough time to think about it and so your hesitation is making me -- giving me the impression that you need a little bit more time to either talk about it, think about it, and if that's -- if you need a little bit more time, just ask for it and I can give you more time.
> THE WITNESS: Yes.
> THE COURT: Would you like a little bit more time to think about it?

THE WITNESS: Yes.

3/30 Tr. 4-5 (25-11).

A further status hearing was set for April 4, 2023. 3/30 Tr. at 5-7.

On April 4, 2023, the parties appeared for a further status hearing, at which Mr. Hawkins entered a guilty plea pursuant to a DSA. 4/4 Tr.; R. 15-17. The United States characterized the DSA as follows:

> The Government and the defendant agree to a disposition of this matter in accordance with the following terms and conditions: the defendant agrees to enter a plea of guilty to the following count of simple assault. The Government will not seek to have the defendant detained pending sentencing. The Government reserves the right to allocute at the defendant's sentencing. The Government waives its right to file any enhancement papers that may apply. The Government and the defendant agree to continue sentencing for nine months. The defendant agrees to abide by the following conditions while waiting to be sentenced.
> …
> A Deferred Sentencing Agreement for nine months. Pursuant to the DSA the Government will require the defendant to complete the Drug and Alcohol Testing and Treatment Program as deemed necessary by CSOSA, complete the Domestic Violence Intervention Program, not harass, assault, threaten, or stalk [the complainant]. If the defendant successfully completes the above requirements over a nine-month deferred sentencing period, the Government will not oppose the withdrawal of defendant's guilty plea, and the Government will dismiss the case.

4/4 Tr. 3-4 (22-8, 13-23).[7]

[7] Upon Mr. Hawkins' prompting, the United States agreed that the agreement also provided that the United States would dismiss Counts Two and Three of the information. 4/4 Tr. 5 (1-7).

When reviewing the nature of the agreement with Mr. Hawkins, the trial court confirmed Mr. Hawkins' understanding of the counts to be dismissed, the United States' position on stepback, the United States' waiver of enhancements, the United States' reservation of allocution, his ability to withdraw his guilty plea upon successful completion of the agreement, the consequences of violating the agreement, the maximum penalties if the case were to proceed to sentencing, and the conditions of the agreement. 4/4 Tr. 5-8. The trial court stated the following conditions: 1) not to harass, assault, threaten, or stalk the complainant, 2) to "enroll in the Domestic Violence Intervention Program that CSOSA will get you hooked up in those classes," 3) "to engage in drug and alcohol abuse treatment as deemed appropriate by CSOSA," and 4) "to call CSOSA within 48 hours of today to be able to get hooked up into those classes." 4/4 Tr. 6-7. After the government read the proffer below, Mr. Hawkins answered "yes" when the trial court asked him whether what the prosecutor "told me" was "accurate."

> If 2023 DVM 224 had proceeded to trial, the Government would have admitted evidence proving beyond a reasonable doubt that on or about February 27, 2023, in the District of Columbia, the Defendant Dwayne Hawkins assaulted [the complainant] by hitting her in the head.
>
> Ms. Anderson found the defendant's actions offensive, a reasonable person would have found the actions offensive, and defendant knew his actions would cause offense. The defendant acted purposefully, voluntarily, and without legal justification.

4/4 Tr. 8.

After conducting a colloquy with Mr. Hawkins, the trial court "f[ou]nd that Mr. Hawkins [wa]s making a knowing and intelligent waiver of his rights and that there [wa]s a factual basis for the plea, and so… accept[ed] his plea." 4/4 Tr. 11 (10-12). Although the written DSA contained a provision stating that "[t]he determination of whether the defendant has violated any above conditions rests exclusively with the United States," neither the trial court nor the government recited this provision. 4/4 Tr. The trial court set a "review date" and a sentencing date. 4/4 Tr. 11-13.

On July 25, 2023, the parties appeared for the previously scheduled "review date." A representative from the Court Services and Offender Supervision Agency ("CSOSA") asserted that Mr. Hawkins "failed to comply with the conditions set forth in the DSA" by "never report[ing] for orientation." 7/25 Tr. 2 (16-21). The CSOSA representative, Ms. Boone, also asserted that she "had given [Mr. Hawkins] all the information that he needed reporting for his orientation" and that "[e]fforts to contact Mr. Hawkins were made in an attempt to figure out what was going on, but they all went unnoticed." 7/25 Tr. 2 (19-23). Mr. Hawkins, through counsel,[8] indicated that he had contacted CSOSA and gone to CSOSA in person (and had

[8] Mr. Hawkins personally stated "I never got—" after hearing CSOSA's representations before being admonished by the trial court that he "d[id]n't get to just talk out." 7/25 Tr. 3 (5-9).

called his counsel while doing so), understood that CSOSA would contact him about when to begin DVIP classes, and would happily begin DVIP classes upon receiving instruction to do so. 7/25 Tr. 3-4. Ms. Boone then stated that "Mr. Hawkins was provided with the email link to start the classes. So he and I had a conversation prior to that and he was provided with the information, but later just did not show, did not log in." 7/25 Tr. 4 (4-9).

After the United States indicated that it "w[ould] be revoking the deferred sentencing agreement," Mr. Hawkins factually disputed that he received any email regarding how to access the (virtual) DVIP classes, requested that the DSA not be revoked, and indicated his wish and willingness to participate in the DVIP classes, a request the trial court considered "addressed to the [g]overnment." 7/25 Tr. 5 (3-12). After the government indicated that it was nonetheless revoking the DSA and the trial court stated "DSA is revoked," Mr. Hawkins requested the opportunity to submit a written filing and expressed his belief that revocation of the agreement by the government would in fact breach the agreement because Mr. Hawkins had not violated any condition of the DSA. 7/25 Tr. 5-6.

When the trial court then asked, "Does it also not say that they can revoke whenever? Doesn't it?," Mr. Hawkins responded that such a reading "would render it illusory, Your [H]onor." 7/25 Tr. 6 (10-14). The trial court then inquired why counsel signed the DSA, Mr. Hawkins' counsel repeatedly responded that the

decision of whether to enter into a plea agreement or plead guilty is one left to Mr. Hawkins:

> THE COURT: Then why'd you sign it?
> MR. MADSEN: Well, Your Honor, that—that's not a decision that's up to me.
> THE COURT: Excuse me?
> MR. MADSEN: Yes, Your Honor. The decision of whether to accept the plea is up to Mr. Hawkins.
> THE COURT: You signed it.
> MR. MADSEN: I did, Your Honor. Again, that's a decision that's left to Mr. Hawkins.

7/25 Tr. 6 (15-23).

Mr. Hawkins then asked the trial court whether he (personally) could speak, to which the trial court replied, "no,"[9] before setting a sentencing date for August 24, 2023, and setting deadlines for any filings challenging the revocation or the DSA or otherwise arguing that the case should not proceed to sentencing. 7/25 Tr. 7-8.

Mr. Hawkins then moved in writing for specific performance of the DSA,[10] arguing that he had not violated any condition of the DSA and that a provision of the DSA purporting to invest in the United States the "exclusive[]" authority to determine whether Mr. Hawkins had violated the DSA was unenforceable as an illusory promise. R. 19.

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[9] Mr. Hawkins was present via WebEx audio, rather than in the courtroom, with his counsel present by WebEx video. 7/25 Tr. 2 (8-9).

[10] Mr. Hawkins indicated that, should the trial court not order specific performance, he reserved the right to seek alternative remedies, including seeking to withdraw his guilty plea. R. 19 at 3 n.1

The United States opposed the motion, arguing that Mr. Hawkins violated the DSA because he did not "'provide written proof of attendance' to the [DVIP] and 'Drug and Alcohol Abuse Treatment (as indicated by CSOSA)' on the scheduled review date(s)," that Mr. Hawkins' asserted "failure to report for DVIP orientation" violated a provision of the DSA requiring Mr. Hawkins to "abide by all conditions imposed by the Court Services and Offender Supervision Agency," that it did not breach the DSA by revoking it because Mr. Hawkins agreed to the terms of the DSA, and that Mr. Hawkins' argument that the "exclusive determination" provision was unenforceable was "legally incorrect." R. 20.

On September 5, 2023,[11] the parties appeared for a hearing on Mr. Hawkins' motion for specific performance. Mr. Hawkins reiterated his position that he had not violated any provision of the DSA and thus requested that the trial court order specific performance. 9/5 Tr. 4-5. Mr. Hawkins also argued that a provision of the DSA "providing that the [g]overnment has sole discretion to determine whether any of the conditions [of the DSA] have been violated" was unenforceable as an illusory promise. 9/5 Tr. 5-6. If the trial court interpreted the agreement otherwise and declined to order specific performance, Mr. Hawkins again advised, he would seek to withdraw his guilty plea. 9/5 Tr. 5.

[11] On August 24, 2023, the trial court continued the matter until September 5, 2023, stating that it needed additional time to review the written filings. 8/24 Tr.

When the trial court inquired why, if the "rests exclusively with the United States" provision rendered the agreement unenforceable, the parties were not "just setting a trial date," Mr. Hawkins reiterated: 1) his position that the *provision* in question was unenforceable, and 2) his alternative request that, if the court did not order specific performance, he wished to withdraw his guilty plea. 9/5 Tr. 6-7.

The United States argued that "all of [the DSA's] terms [wer]e enforceable," seemingly because "it was presented to both [Mr. Hawkins] and Mr. Madsen and possessed it for a month" and because "[t]his agreement was entered into in front of a Court under the Court's authority." 9/5 Tr. 8 (7-14). The United States again asserted its position that Mr. Hawkins violated the DSA by "not follow[ing] [CSOSA's] instructions to begin DVIP orientation, and then show[ing] up on his DSA review without any evidence or record of his having attended any DVIP classes." 9/5 Tr. 8 (16-19). The United States also cited to *Green v. United States*, 377 A.2d 1132 (D.C. 1977), arguing that this supported its position regarding the enforceability of the provision. 9/5 Tr. 9-10.

When the trial court then asked whether Mr. Hawkins would have been able to complete the DVIP classes by January 4, 2024, the previously scheduled sentencing date, Mr. Hawkins stated that it "would be close." 9/5 Tr. 10-11. When the trial court asked a modified hypothetical assuming that Mr. Hawkins would not be permitted to enter DVIP as of July 25, 2023, the prior review date, and was not

allowed to complete more than one class per week, Mr. Hawkins agreed that the period in question, beginning later, would be less than twenty-two weeks. 9/5 Tr. 11. Mr. Hawkins argued, however, that the potential inability to later perform was not a valid basis on which to revoke the DSA. 9/5 Tr. 11-13. Mr. Hawkins also reiterated that there was no representation from CSOSA, or anyone other than the trial court itself, that Mr. Hawkins would not be permitted to complete more than one DVIP class per week, to which the trial court replied, "[f]acts are facts" and "[t]he classes are once a week[;] [y]ou can't double up." 9/5 Tr. 12-13.

After the trial court made statements about its general practices at sentencing, the United States argued that Mr. Hawkins violated a provision of the DSA providing that Mr. Hawkins "shall abide by all conditions imposed by the Court Services and Offender Supervising Agency, hereafter CSOSA, on probation" by not reporting for DVIP orientation. 9/5 Tr. 14-17. In response, Mr. Hawkins argued that, under principles of contract or statutory interpretation, specific terms control over general terms, and that where the DSA included several terms related to DVIP, terms which did not require Mr. Hawkins to report for DVIP orientation on a particular day, he had not violated the terms of the DSA. When Mr. Hawkins reiterated that he also factually disputed the assertion that he had not attempted to enroll in DVIP classes, the trial court expressed unawareness of that fact.

> MR. MADSEN: Again, Your Honor, there is a factual dispute. And so Mr. Hawkins calls CSOSA, and again,

> physically went to CSOSA, and called me while he was there. So we do have a factual dispute about whether he attempted to enroll in the classes.
> THE COURT: I'm sorry. I don't know that I knew that particular fact.
> MR. MADSEN: Sorry. I said that when we were here on the 24th --
> THE COURT: Okay.
> MR. MADSEN: -- but there is a factual dispute about that. That is, there is not a factual dispute that Mr. Hawkins did not later go to CSOSA after the date, but he called the number that is indicated in the DSA, and he physically went to CSOSA.

9/5 Tr. 18 (11-25).

When the government then asserted, inter alia, that "CSOSA instructed [Mr. Hawkins] to start [DVIP] orientation," Mr. Hawkins reiterated that "there [wa]s a factual dispute"; i.e. that "Mr. Hawkins says that he did not receive further instructions from CSOSA after going in person." 9/5 Tr. 17 (2-3); 20 (5-7).

The trial court then declined to order specific performance, stating that it "d[id] not find that the [g]overnment… [wa]s acting in bad faith by revoking the agreement." 9/5 Tr. 21 (14-16). The trial court did not resolve factual disputes regarding Mr. Hawkins reporting to CSOSA and whether he received further instruction from CSOSA after doing so, stating that because, as of July 25, 2023, Mr. Hawkins "had not reported," "under what I know of the Domestic Violence Intervention Program, at that point he could not have completed the 22 weeks of Domestic Violence Intervention Program after July 24th when he had not reported."

9/5 Tr. 21.[12] Regarding Mr. Hawkins' argument that a provision purporting to give the United States "exclusive" authority to determine whether Mr. Hawkins violated the agreement was unenforceable, the trial court stated only that "I also don't find in the alternative that this contract is void ab initio." 9/5 Tr. 21-22 (25-1).

After Mr. Hawkins then orally moved to withdraw his guilty plea, which the government orally opposed, the trial court set a briefing schedule and further hearings. 9/5 Tr. 23-28.

Mr. Hawkins then supplemented his oral motion in writing, arguing that under the "fair and just" standard articulated in *Gooding v. United States*, 529 A.2d 301, 306 (D.C. 1987), he should be permitted to withdraw his presentencing guilty plea to count one where less than four months passed between the plea and expressed desire to withdraw it, where the government identified no prejudice from permitting Mr. Hawkins to withdraw his plea, and where Mr. Hawkins asserted legal innocence—self-defense. R. 22.[13] Mr. Hawkins noted that "where the accused seeks to withdraw his [or her] plea of guilty before sentencing on the ground that he [or

[12] The undersigned inadvertently stated the date of a review hearing as July 24, rather than July 25, contributing to the trial court to repeat the same. 9/5 Tr. 21 (8). The difference between the two dates has no bearing on this appeal or the trial court's findings.

[13] Mr. Hawkins did not allege an alternative cognizable ground for withdrawal of a guilty plea—a fatal defect in the Rule 11 inquiry—or rely on the third enumerated *Gooding* factor—whether the accused at all times had the benefit of competent counsel.

she] has a defense to the charge, the…[c]ourt should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant."

> First, withdrawal of Mr. Hawkins' guilty plea will not result in any prejudice to the government where the alleged events occurred in late February 2023; i.e., the case has not become stale. *See, e.g.*, *Edwards v. United States*, No. 17-CF-1282, slip op. at 21 (D.C. June 8, 2023) ("[P]rejudice to the government is the main consideration in assessing delay."). Second, Mr. Hawkins asserts his legal innocence in this case. Mr. Hawkins informed responding officers that the complainant had punched him and pulled his hair and would be able assert5 self-defense at trial and thus could still be legally innocent of simple assault even if he were proven to have struck the complainant. Finally, Mr. Hawkins, who has a very minimal criminal history, was under significant stress at the time he entered a plea of guilty, having been ordered to stay away from and have no contact with the complainant, with whom Mr. Hawkins remains close.

R. 22 at 4.

In its written opposition, the government stated that "the government's decision to oppose" Mr. Hawkins' motion to withdraw his guilty plea "[wa]s all but fatal here." R. 23 at 1. The government argued that each of the three enumerated "fair and just" factors weighed against Mr. Hawkins, but did not identify any specific prejudice that would flow from permitting Mr. Hawkins to withdraw his guilty plea.

On October 23, 2023, the parties appeared for a hearing on Mr. Hawkins' motion to withdraw his guilty plea. Rather than hearing from Mr. Hawkins (or any other witness), the trial court made findings without hearing testimony. 10/23 Tr. 3-

7. The trial court found that the first date Mr. Hawkins expressed a desire to withdraw his guilty plea was July 25, the date of the "review hearing," and that "there was no claim of innocence before that time," before again connecting the claim of innocence with the time at which it was raised: "[h]is motion to withdraw guilty plea, the circumstances under which is when the Government is ready to revoke or indicate revocation of the deferred sentencing agreement and noncompliance by Mr. Hawkins, is when the claim of innocence occurred." 10/23 Tr. 4-5.

After finding that there was no indication Mr. Hawkins did not have competent counsel throughout the proceedings, the trial court stated the following, before denying the motion.

> The claim of innocence -- the delay before seeking to withdraw his guilty plea was months and anecdotally, it was also after the Government indicated that he was not in compliance with his deferred sentencing agreement. He had competent counsel throughout the proceeding. And the claim of innocence occurred after, again, the Government's indication that there would be -- that he was not in compliance with his deferred sentencing agreement.
> …
> For the record, also, of course, there was no claim of innocence at the time I took the plea. Otherwise, I wouldn't have accepted the plea.
>
> And the factual proffer that was signed by defense counsel and Mr. Hawkins on April 4th, 2023, Mr. Hawkins, indicated that he knew his actions would cause offense, that he acted "purposefully, voluntarily, and without legal justification," which indicates no self-defense. That's my interpretation. And his signature appears on the factual proffer.

> And so I do not believe that under this lenient standard, he is permitted to withdraw his guilty plea. So the motion to withdraw guilty plea -- those factors weigh against Mr. Hawkins. Claim of innocence came very late, there was a time delay, and he's had the benefit of competent counsel. So the motion to withdraw guilty plea is denied.

10/23 Tr. 6-7.

On November 9, 2023, the trial court sentenced Mr. Hawkins to 90 days' incarceration, suspended in favor of 12 months of probation with special conditions. R. 23-24. This timely appeal followed. R. 25.

SUMMARY OF THE ARGUMENT

The government is held to "a strict standard of compliance" with plea agreements,[14] which are interpreted as contracts.[15] The trial court erred by denying Mr. Hawkins' motion for specific performance, the preferred remedy for breach of a plea agreement,[16] of the DSA pursuant to which he pled guilty because he had not violated any condition of the DSA when the United States acted to revoke it. More specifically, the trial court erred by finding that a provision of the DSA gave the United States unfettered discretion to determine whether Mr. Hawkins breached the agreement because valid consideration to support an agreement requires good faith[17] and illusory promises are not valid consideration.[18] Nor could the United States anticipatorily revoke the agreement where Mr. Hawkins indicated his intent to perform,[19] because "for repudiation of a contract by one party to be sufficient to give

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[14] *Johnson v. United States*, 30 A.3d 783, 787 (D.C. 2011) (quoting *White v. United States*, 425 A.2d 616, 618 (D.C. 1980)).
[15] *See, e.g.*, *In re Robertson*, 19 A.3d 751, 761 (D.C. 2011).
[16] *Roye v. United States*, 772 A.2d 837, 840 (D.C. 2001) ("When specific performance can be accomplished, it is preferred to other remedies for breach of the plea agreement because '[o]nce that is done, a defendant' will obtain all he says he was promised and can then have no right to withdraw the plea.'") (quoting *United States v. Kurkculer*, 918 F.2d 295, 300 (1st Cir. 1990)).
[17] *See, e.g.*, *United States v. Kilcrease*, 665 F.3d 924, 928-29 (7th Cir. 2012).
[18] *See, e.g.*, *Little v. Barry*, 417 A.2d 966, 967 n.2 (D.C. 1980) (per curiam ("[I]f one party never promises, or if his promise is illusory, there is a failure of consideration and no contract ever arises.") (citing *R.A. Weaver & Assoc., Inc. v. Asphalt Construction, Inc.*, 587 F.2d 1315, 1318 (D.C. Cir. 1978)).
[19] 7/25 Tr. 3-4; R. 19; 9/5 Tr. 4-5.

the other party the right to… breach, the repudiating party must have communicated, by words or conduct, unequivocally and positively its intention not to perform." *Eastbanc v. Georgetown Park Associates*, 940 A.2d 996, 1005 (D.C. 2008).

In the absence of specific performance, the trial court erred by denying Mr. Hawkins' motion to withdraw his guilty plea, a decision this court reviews for abuse of discretion. *Edwards v. United States*, 295 A.3d 1125, 1131 (D.C. 2023). "[I]t is an abuse of that discretion 'if the trial judge rests his or her conclusions on incorrect legal standards.'" *Id.* (quoting *Jones v. United States*, 17 A.3d 628, 631 (D.C. 2011)). Under the "more lenient"[20] standard applicable to presentence motions to withdraw guilty pleas, courts should "freely allow" allow withdrawal if "for any reason the granting of the privilege seems fair and just." *Gooding v. United States,* 529 A.2d 301, 306 & 310 (D.C. 1987) (quoting *Kercheval v. United States*, 274 U.S. 220, 224 (1927)). Factors relevant to the decision include "whether the defendant has asserted his or her legal innocence," "the length of the delay between the entry of the guilty plea and the desire to withdraw it," and "whether the accused has had the full benefit of competent counsel at all relevant times." *Edwards*, 295 A.3d at 1131 (quoting *Springs v. United States*, 614 A.2d 1, 4 (D.C. 1991)). "[P]rejudice to the government is the main consideration in assessing delay." *Id.* (citing *Gooding*, 529 A.3d at 307). Regarding "legal innocence," "[w]hile the defendant must make more than a 'bald

[20] *Binion v. United States*, 658 A.2d 187, 191 (D.C. 1995).

assertion of innocence,' 'where the accused seeks to withdraw his plea of guilty before sentencing on the ground that he has a defense to the charge,' the court 'should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant.'" *Id.* at 1131 n.7 (quoting *Gearhart v. United States*, 272 F.2d 499, 502 (D.C. Cir. 1959)) (internal alterations and citations omitted).

In the instant case, where the government did not identify any way in which permitting withdrawal would prejudice its "legitimate interests,"[21] the trial court abused its discretion, both by interpreting this factor to examine solely the length of the delay in absolute terms and by finding that the length of the delay weighed against permitting withdrawal. The trial court likewise abused its discretion when examining "whether [Mr. Hawkins] ha[d] asserted his… legal innocence," both by "declining to engage in an assessment of whether Mr. [Hawkins] had presented facts that, taken as true, 'made out some legally cognizable defense to the charge[],'"[22] and by repeatedly construing this factor to consider the timing of the assertion of legal innocence, collapsing the first and second *Gooding* factors into one. Assuming, *arguendo*, that this court does not remand with instructions to grant specific performance, these errors require reversing the denial of Mr. Hawkins' motion for

[21] *Gooding*, 529 A.2d at 311; R. 23; 10/23 Tr.
[22] *Edwards*, 295 A.3d at 1132 (quoting *Springs*, 614 A.2d at 5).

withdrawal of his guilty plea,[23] or at minimum, remand for additional factfinding after an evidentiary hearing.[24]

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING MR. HAWKINS' MOTION FOR SPECIFIC PERFORMANCE OF THE AGREEMENT, THE PREFERRED REMEDY FOR THE BREACH OF A PLEA AGREEMENT, BECAUSE MR. HAWKINS HAD NOT VIOLATED ANY CONDITION OF THE AGREEMENT.

a. Standard of Review.

This court reviews the terms of a plea agreement de novo. *Perrow v. United States*, 947 A.2d 54, 55 (D.C. 2008). As this court recognized in *Perrow*, its decisions conflict regarding the standard under which this court reviews findings regarding alleged breaches of plea agreements—abuse of discretion or clear error. *Id.*[25] "Either test — clear error or abuse of discretion — accords some recognition to the fact that the trial judge is 'in the best position to determine whether the government presented an argument that, perhaps subtly, exceeded the bounds of the agreement.'" *Id.* at 56

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[23] *See, e.g.*, *Gooding*, 529 A.2d at 311-12.
[24] *See, e.g.*, *White v. United States*, 146 A.3d 101, 103 (D.C. 2016).
[25] ("In *Louis v. United States*, 862 A.2d 925 (D.C. 2004), we adopted the standard of review employed by the District of Columbia Circuit in this context, whereby the appellate court "interprets the terms of the plea agreement de novo and… reviews the [trial court's] factual findings regarding alleged breaches of the plea agreement for clear error." *Id.* at 928 (quoting *United States v. Gary*, 291 F.3d 30, 33 (D.C. Cir. 2002)). Yet in a later decision, *Abbott v. United States*, 871 A.2d 514 (D.C. 2005), we appeared to reject a "clear error" test in favor of the abuse of discretion standard followed generally in reviewing the denial of such post-sentence motions. *See id.* at 519 & n. 8. We do not have to resolve the tension between these two holdings here.").

(quoting *United States v. Pollard*, 959 F.2d 1011, 1023 (1992)). The determination of the appropriate remedy in the event of a breach is often left to the trial court's discretion,[26] but is at times dictated by this court. *See, e.g.*, *Roye v. United States*, 772 A.2d 837, 841 (D.C. 2001) ("If the promise cannot be fulfilled, and the deviation is material, the waiver of constitutional rights that a guilty plea represents is invalidated and cannot be enforced. Roye is entitled to withdraw his plea if that is what he wishes to do.").

b. Plea Agreements Are Interpreted as Contracts, With the Government Held to a "Strict Standard of Compliance."

Because "a plea agreement is a contract… courts will look to principles of contract law to determine whether the plea agreement has been breached." *Robertson*, 19 A.3d at 761 (quoting *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995)). The government is held to "a strict standard of compliance" with plea agreements. *Johnson*, 30 A.3d at 787 (quoting *White*, 425 A.2d at 618). This court has found the United States to have breached plea agreements in a variety of circumstances, including where "the government presented an argument that,

[26] *See, e.g.*, *Byrd v. United States*, 801 A.2d 28, 35 (D.C. 2002) ("[A]ppellant may withdraw his guilty plea unless the trial court, after hearing from the parties on the question, chooses on its own to impose a sentence that is no greater than what the parties agreed to request. In making this ruling, we are not directing a specific sentence or intruding on the trial court's prerogatives. We simply are affording the trial court a way to remedy the government's breach of its plea bargain that is an adequate alternative to allowing appellant to withdraw his plea. The choice is up to the trial court.").

perhaps subtly, exceeded the bounds of the agreement." *Perrow*, 947 A.2d at 56 (quoting *Pollard*, 959 F.2d at 1023).

For example, in *Byrd*, this court found that the government breached an agreement under which it promised to allocute "for an aggregate sentence of forty-five years to life" by stating, without mentioning the sentence it agreed to recommend, that while "[w]e understand that although we've made the plea offer to . . . Mr. Byrd and we are bound by our agreement, the court is not bound by that and ultimately it is the court that makes the final decision with regard to Mr. Byrd and what appropriate sentence should be fashioned in this particular ease[,] [s]o the Government is asking that the court impose a sentence that reflects the seriousness of this particular offense," remanding for the trial court to permit Mr. Byrd to withdraw his plea unless the trial court imposed the government and defendant agreed to recommend under the agreement. 801 A.2d at 30-31, 35.

In *Roye*, this court similarly found that the government breached a provision of an agreement to recommend that "execution of [a] sentence… be suspended as to 'all but time served'" by "ask[ing] the court to require him to remain incarcerated" before later beginning a split sentence. 772 A.2d at 839.

In *White v. United States*, 425 A.2d 616, 617 (D.C. 1980), this court found that the government breached its "promise not to oppose 'a substantial suspended sentence in lieu of incarceration' and 'a residential drug program'" by stating that it

did "not oppose this drug rehabilitation program, if the Court so decided at sentence," but "the Government is concerned with what the Court said, that he has [gone] through so many programs," before withdrawing the statement. Even though the prosecutor quickly withdrew the statement upon defense objection, "that perfunctory gesture alone could not cure the breach," and this court found that although "the government did not directly violate its promise 'not to oppose' a recommendation of 'a substantial suspended sentence' and the placement of appellant in 'a residential drug program,'" the prosecutor's offending "statement implied that, but for the plea agreement, the government would be recommending a period of incarceration," and that "[s]uch hardhitting allocution, without limitation to the proper length of a suspended sentence, was contrary to appellant's reasonable expectation that the government had promised not to undercut his effort for a suspended sentence and probation.").

In *Abbott*, by contrast, this court found that the government did not breach its promise to cap its allocution at four years' incarceration by "summariz[ing] the charges against him and recommend[ing] 'a significant period of incarceration.'" 871 A.2d at 516.

> *White* is distinguishable from the present case, however, because the prosecutor in this case never stated or implied that the court should impose a harsher sentence than the one that the government had already agreed to recommend.

> The prosecutor recommended four years of total prison time, which was precisely what was called for under the plea agreement. Her remarks concerning the charges against appellant and "a significant period of incarceration" simply explained that recommendation to the court. Indeed, the court recognized this, as it stated in its order denying appellant's motion to withdraw his guilty plea: "The government's statements that summarized the number of offenses to which the defendant pleaded guilty and defendant's role in the overall operation served to explain the government's allocution cap of four years of incarceration."

Id. at 520-21.

In *Roberston*, this court found no plain error in permitting Robertson's prosecution for contempt based on violating a civil protection order ("CPO") upon motion of the District based on June 26, 1999 contact between Robertson and the CPO petitioner where the plea agreement between the United States and Roberston provided that "the United States… would 'not pursue any charges concerning an incident on June 26, [19]99,'" finding that "[i]t [wa]s not obvious that a plea agreement or a contract between Mr. Robertson and the United States Attorney c[ould] preclude the Superior Court from vindicating its authority." 19 A.3d at 760 & 756.

> The abbreviated word "gov't" clearly referred only to the United States, and hence, only the United States and Mr. Robertson were bound by the agreement.
>
> While Mr. Robertson may have expected that his plea agreement with the government would prevent him from being charged with anything else related to his actions on

> June 26, 1999, "[a] defendant's subjective expectations as to how a plea agreement will redound to his benefit are enforceable, if at all, only to the extent that they are objectively reasonable." *United States v. Garcia*, 954 F.2d 12, 17 (1st Cir.1992) (citations omitted). It is not objectively reasonable for a violator of a CPO to expect that his plea agreement with the United States would shield him by taking away the inherent power and authority of the Superior Court to enforce its CPOs through the sanction of criminal contempt. Nor is it "obvious" that Mr. Robertson's plea agreement bargained away the inherent authority of a Superior Court judge to sanction him for criminal contempt.

Id. at 761.

As discussed, *infra*, the trial court erred by finding that Mr. Hawkins had violated any condition of the DSA when the United States purported to revoke it and by finding that the United States did not breach the DSA by acting to revoke it when Mr. Hawkins had not violated any condition. Accordingly, the trial court erred by denying Mr. Hawkins' motion for specific performance, which would have given Mr. Hawkins "all he says he was promised and c[ould] then have [had] no right to withdraw the plea.'" *Roye*, 772 A.2d at 840 (quoting *Kurkculer,* 918 F.2d at 300).

c. Mr. Hawkins Had Not Violated Any Term of the Agreement When the United States Purported to Revoke It, Making the United States' Revocation a Breach of the Agreement, and Entitling Mr. Hawkins to Specific Performance.

i. The Terms of the Agreement.

The agreement between Mr. Hawkins and the United States, a DSA, contained terms requiring Mr. Hawkins to perform certain acts and refrain from

performing others. The conditions requiring affirmative acts from Mr. Hawkins were as follows:

1. "The defendant agrees to enter a plea of guilty to the following count(s): Simple Assault."
2. The defendant agrees to abide by the following conditions while waiting to be sentenced:
    a. If the defendant is arrested, the defendant must report that fact to the Court.
    b. The defendant shall abide by all conditions imposed by the Court Services and Offender Supervision Agency (hereafter 'CSOSA' or 'probation').
    c. The defendant agrees to successfully complete the following counseling program(s), and agrees to contact CSOSA to initiate enrollment within 72 hours at 202-585-7233:
        i. Domestic Violence Intervention Program
        ii. Drug and Alcohol Abuse Treatment (as indicated by CSOSA)
    d. The defendant agrees to provide written proof of attendance on the scheduled review date(s). The defendant agrees to provide written proof of completion of the indicated programs on the scheduled sentencing date. It is the responsibility of the defendant to obtain written proof of attendance from CSOSA (probation) and/or the counseling/intervention/treatment program.
    e. Within 48 hours of entering this DSA, the defendant must call CSOSA at 202-585-7233 to check in with a supervision officer.
    f. The defendant must personally appear for review hearings as well as at the sentencing hearing and *bring proof of compliance for all of the programming and/or terms of the DSA to which they have agreed to satisfy.*[27]

R. 17.

The conditions requiring Mr. Hawkins to refrain from certain acts were:

1. The defendant agrees to abide by the following conditions while waiting to be sentenced:

[27] For ease of organization, these conditions have been renumbered from the DSA. R. 17.

a. The defendant must not violate any law. The defendant must not be rearrested on probable cause.
b. The defendant must not violate any Court Order, including any Civil Protection Order.
c. The defendant must not engage in any assaultive, threatening, harassing, or stalking behavior against any person, including [the complainant].

For its part, the United States made the following promises:

1. The government will not seek to have the defendant detained pending sentencing. The government reserves the right to allocute at the defendant's sentencing.
2. The government waives its right to file any enhancement papers that might apply.
3. The government and the defendant agree to continue sentencing for 9 months.

"If [Mr. Hawkins] abide[d] by all of the conditions set forth in this agreement, after a period of 9 months, the United States" agreed that it "w[ould] not oppose [his] motion to withdraw the plea and w[ould] enter a *nolle prosequi* in the above-captioned case." Said another way:

> If the Defendant pleads guilty to Simple Assault, then the Government will agree to dismiss Obstruction of Justice and Destruction of Property and enter into a 9-month Deferred Sentencing Agreement (DSA) with the Defendant. Pursuant to the DSA, the Government will require the Defendant to:
> • Complete drug and alcohol testing and treatment as deemed necessary by CSOSA;
> • Complete the Domestic Violence Intervention Program;
> • Not harass, assault, threaten, or stalk [the complainant].
>
> If the Defendant successfully completes the above requirements over a 9-month deferred sentencing period, the Government will not oppose the withdrawal of

> Defendant's guilty plea and the Government will dismiss the case.

R. 15 at 2.

If Mr. Hawkins violated the agreement, the government would "[o]ppose the defendant's withdrawal of the guilty plea, [n]ot enter a *nolle prosequi* in this case[,] and [m]ove the Court to proceed to sentencing immediately." R. 17 at 4.

ii. The Trial Court Abused Its Discretion by Finding That Mr. Hawkins Could Not Have Completed the DVIP Within the Nine-Month Period of the Agreement Because More Than Twenty-Two Weeks Remained Within the Nine-Month DSA Period and Because It Lacked a Firm Factual Foundation For Finding That Mr. Hawkins Could Not Have Participated in More Than One Class Per Week Without Any Such Representation From CSOSA.

There was no allegation, and the trial court did not find, that Mr. Hawkins violated any provision of the agreement requiring him to refrain from certain conduct; i.e., engage in defined conduct against the complainant, violate any law, violate any court order, or be rearrested on probable cause; and thus no allegation that Mr. Hawkins failed to report any (non-existent) arrest to the Court.

The only way[28] in which the trial court appeared to find that Mr. Hawkins violated the agreement was through a finding that Mr. Hawkins could not have

[28] As discussed, *infra*, the trial court appeared to make a different determination than this court, reviewing de novo, would make, and did not itself find a violation of the agreement, but rather that "the revocation of the [DSA] was done in good faith, not arbitrary diversion." 9/5 Tr. 22 (14-16). Said another way, the court appeared to find that the government did not act in bad faith by revoking the agreement, 9/5 Tr. 21,

completed the DVIP within the nine-month period of the DSA when he had not begun the program as of July 25, 2023. Said another way, the trial court appeared to find that the government could have found without acting "arbitrarily" that Mr. Hawkins *would have* violated the agreement because he could not have completed DVIP within the nine-month period where he had not begun the program by July 25, 2023[29]; i.e., while not mentioning the doctrine by name, the trial court appeared to conclude, that the government, without acting "arbitrarily," could rely on the

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rather than ruling on the meaning of the terms of the agreement and itself finding that Mr. Hawkins violated the agreement.

[29]

> At that point the representations from CSOSA was that there was -- that the defendant, Mr. Hawkins, had not reported. And at that point, under what I know of the Domestic Violence Intervention Program, at that point he could not have completed the 22 weeks of Domestic Violence Intervention Program after July 24th when he had not reported.
>
> Understanding that there's a factual dispute, I don't find that -- I also don't find in the alternative that this contract is void ab initio. So the Court upholds and agrees with the Government's request to revoke the Deferred Sentencing Agreement. It is within their – it's a contract that was signed by both sides after Mr. Hawkins -- after consulting with an attorney.
> …
> So I am not -- so the Court finds that the revocation of the Deferred Sentencing Agreement was done in good faith, not arbitrary diversion.

9/5 Tr. 21-22.

doctrine of "anticipatory repudiation" to treat Mr. Hawkins' failure to begin the DVIP by July 25 as a "sufficient[] manifest[ation of] an intent not to perform"[30] the condition requiring him to complete the DVIP within nine months of entering the agreement and preemptively revoke the agreement.

This was error for at least four reasons: 1) the period between July 25, 2023, and January 4, 2024, the end of the nine-month period under the DSA, was longer than 22 weeks, 2) the trial court lacked a firm factual foundation for believing—without any such representation from CSOSA—that Mr. Hawkins would not be permitted to complete more than one DVIP session per week, the basis of its finding that Mr. Hawkins could not complete the DVIP within the nine-month period, 3) "for repudiation of a contract by one party to be sufficient to give the other party the right to… breach, the repudiating party must have communicated, by words or conduct, *unequivocally and positively* its intention not to perform,"[31] and Mr. Hawkins had repeatedly expressed his willingness *to* perform,[32] and 4) as discussed, *infra*, the trial court erred by giving effect to an unenforceable provision purporting to invest in the United States discretion to determine whether Mr. Hawkins had violated the DSA, and thus failed to interpret the meaning of the agreement for itself in the first instance.

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[30] *Eastbanc*, 940 A.2d at 1005.
[31] *Id.*
[32] 7/25 Tr. 3-4; R. 19; 9/5 Tr. 4-5.

As noted, *supra*, this court reviews findings underlying alleged breaches of plea agreements for either abuse of discretion or clear error, not having resolved its conflicting decisions in *Louis* and *Abbott*. "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Johnson v. United States*, 232 A.3d 156, 167 (D.C. 2020) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948)). "A court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *In re Penning*, 930 A.2d 144, 155 (D.C. 2007) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). Under either standard, even assuming that CSOSA would only allow Mr. Hawkins to complete one DVIP session per week, the trial court's finding that Mr. Hawkins could not have completed the DVIP, which the trial court found was "twenty-two weeks,"[33] within the nine-month period specified in the DSA and the agreement because the period between July 25, 2023 and January 4, 2024, was more than twenty-two weeks.

The trial court also found, without any such representations from CSOSA, that Mr. Hawkins would not have been able to participate in more than one DVIP session

[33] 9/5 Tr. 10 (12-23); 21 (19-23).

per week[34] and that he would not have been able to begin DVIP for "a couple of weeks, four to six weeks,"[35] findings on which it relied when denying Mr. Hawkins' motion for specific performance. A trial court's "determination must 'be based upon and drawn from a firm factual foundation,'" and "'[i]t is an abuse of discretion if the stated reasons do not rest upon a sufficient factual predicate.'" *In re K.C.*, 200 A.3d 1216, 1233 (D.C. 2019) (quoting *In re Ko.W.*, 774 A.2d 296, 303 (D.C. 2001)). A firm factual foundation requires that "the record reveal sufficient facts upon which the trial court's determination was based." *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979) (emphasis omitted). Where CSOSA, despite being present at the July 25, 2023 hearing did not make either such representation,[36] and where the trial court stated only that "[it] usually is a couple of weeks, four to six weeks at least to get in"[37] and that "the classes are once a week" based on its anecdotal experience,[38] the trial court lacked a firm factual foundation for such findings, and thus abused its discretion.

Third, because "a plea agreement is a contract… courts will look to principles of contract law to determine whether the plea agreement has been breached." *Robertson*, 19 A.3d at 761 (quoting *Jones*, 58 F.3d at 691). One such principle is

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[34] 9/5 Tr. 12-13.
[35] 9/5 Tr. 12 (4-6).
[36] 7/25 Tr.
[37] 9/5 Tr. 12.
[38] 9/5 Tr. 13.

that of "anticipatory repudiation," on which the trial court appeared to rely without naming the doctrine. Even independent of the trial court's mathematical error and lack of firm factual foundation, the trial court's application of this doctrine render erroneous its decision finding no error in revocation of the DSA. "A contract is breached if a party fails to perform when performance is due," and "[u]nder modern contract principles, an aggrieved party also may be entitled to sue prior to breach if the other party has anticipatorily repudiated the contract." *Eastbanc*, 940 A.2d at 1004 (internal citations omitted). "The forcefulness of a repudiation does not transform it into a breach. Rather, the force and clarity of the repudiation affects whether the non-repudiating party is entitled to bring suit before an actual breach occurs—whether the repudiating party's words and conduct sufficiently manifest an intention not to perform when it is required to do so." *Id.* at 1005. In order to sufficiently manifest an intention not to perform to permit invocation of the doctrine, "the repudiating party must have communicated, by word or conduct, *unequivocally and positively* its intention not to perform." *Id.* (quoting *Order of AHEPA v. Travel Consultants, Inc.*, 367 A.2d 119, 125 (D.C. 1976)) (emphasis added). Nor is anticipatory repudiation "to be lightly inferred in the rugged give-and-take of the marketplace." *Reiman v. International Hospitality Group, Ltd.*, 614 A.2d 925, 929 (D.C. 1992). This court has found the following sufficient to constitute "unequivocal and positive intention not to perform": "present[ing] an all-or-nothing, 'take-it-or-

leave-it' markedly modified proposal to a commercial seller," including demanding "the purchase price… be… reduced by $350,000" and adding as a condition precedent "a lease with the University of the District of Columbia"[39]; a fraternal organization writing a letter to a travel agency with whom the organization had a contract directing the travel agency "not to act on behalf of the [fraternal organization] until further notice" and "subsequently bargain[ing] for changes in the contract," both in value and length[40]; and, one of two dentists, contrary to a prior agreement, writing to the other that he was freezing the other's ability to buy into a practice until a date certain, and that before such date, the purchase price and interest rate would both be increased. *Ingber v. Ross*, 479 A.2d 1256, 1262-63 (D.C. 1984). Here, by contrast, Mr. Hawkins, unlike the facts of *Ingber*, *Order of AHEPA*, and *Reiman*, never communicated an intent not to perform, let alone "positively and unequivocally" so. To the contrary, Mr. Hawkins repeatedly expressed his .willingness to perform. While this did not in some ways perform earlier due to a miscommunication, about which the trial court eventually recognized there was a factual dispute, the trial court erred by finding that Mr. Hawkins had sufficiently repudiated the DSA to permit the United States to properly revoke the agreement,

[39] *Id.* at 928-29 (""It was 'more in the statement of a mandate: This is the new deal; only if the deal goes down this way can it conclude.'").
[40] *Order of AHEPA*, 367 A.2d at 125.

such that the United States' revocation was itself a breach of the agreement and by relying on this error to decline to order specific performance.

Finally, as discussed, *infra*, the trial court erred by giving effect to an unenforceable provision purporting to invest in the United States discretion to determine whether Mr. Hawkins had violated the DSA, and thus failed to interpret the meaning of the agreement for itself in the first instance, instead finding that "revocation of the [DSA] was done in good faith, not arbitrary diversion" or that the United States was not "acting in bad faith by revoking the" DSA. 9/5 Tr. 21-22.

iii. Read Together, the Agreement Required Mr. Hawkins to Complete the DVIP Within Nine Months of Plead Guilty and Did Not Require Him to Complete Any Sessions by a "Review Date."

Even if this court looked beyond the one provision of the DSA[41] which the trial court concluded the United States could, without acting "in bad faith" or "arbitrarily," find Mr. Hawkins to have violated, something this court is loathe to do,[42] because Mr. Hawkins had not violated any other provision of the agreement, the terms of which this court reviews de novo,[43] there would be no basis in the record

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[41] R. 17 at 2 ("The defendant agrees to successfully complete the following counseling program[], and agrees to contact CSOSA to initiate enrollment within 72 hours at 202-585-7233: Domestic Violence Intervention Program."); 9/5 Tr. 21-22.
[42] *V.C.B. v. United States*, 37 A.3d 286, 291 (D.C. 2012) ("It is incumbent upon us, in this case as in any other, to eschew appellate fact-finding.") (quoting *Brown v. United States*, 590 A.2d 1008, 1020 (D.C. 1991)).
[43] *Perrow*, 947 A.2d at 55.

to conclude that Mr. Hawkins violated any such provisions. Where the United States agreed, inter alia, that it would not oppose Mr. Hawkins' withdrawal of his guilty plea and would dismiss the case if he performed and did not otherwise violate the agreement during a nine-month period, the United States' revocation of the DSA itself breached the plea agreement between the parties, and the trial court thus erred by denying Mr. Hawkins' motion for specific performance.

More specifically, the United States pointed to and the trial court discussed two other provisions of the agreement[44]: 1) "Defendant shall abide by all conditions imposed by the Court Services and Offender Supervising Agency, hereafter CSOSA, or probation,"[45] and 2) "[t]he defendant agrees to provide written proof of attendance on the scheduled review date(s)." R. 17 at 2; 9/5 Tr. 8, 17-18.

When construing contracts, this court "appl[ies] a familiar principle of contract interpretation, that 'specific terms and exact terms are given greater weight than general language.'" *Abdelrhman v. Ackerman*, 76 A.3d 883 (D.C. 2013) (quoting *Washington Auto. Co. v. 1828 L St. Assocs.*, 906 A.2d 869, 880 (D.C. 2006)). The DSA—one part of the contract between the parties—contained three

[44] There did not appear to be any dispute that Mr. Hawkins "contact[ed] CSOSA to initiate enrollment within 72 hours at 202-585-7233," R. 17 at 2, and "[w]ithin 48 hours of entering th[e] DSA,… call[ed] CSOSA at 202-585-7233 to check in with a supervision officer." R. 17 at 3. *See* 7/25 Tr. at 2 ("He and I had spoken during the onset of the DSA."); *id.* at 4 ("So he and I had a conversation prior to that and he was provided with the information, but later just did not show, did not log in.").
[45] 9/5 Tr. 17.

specific provisions related to the DVIP: 1) "The defendant agrees to successfully complete the following counseling program(s), and agrees to contact CSOSA to initiate enrollment within 72 hours at 202-585-7233,"[46] 2) "The defendant agrees to provide written proof of attendance on the scheduled review date(s),"[47] and 3) "The defendant agrees to provide written proof of completion of the indicated programs on the scheduled sentencing date." *Id.*[48] The "plea agreement attachment" likewise contains terms specifically addressing the DVIP: "Pursuant to the DSA, the Government will require the Defendant to… complete the Domestic Violence Intervention Program." R. 15 at 2. "lf the Defendant successfully completes the above requirements *over a 9-month deferred sentencing period*, the Government will not oppose the withdrawal of Defendant's guilty plea and the Government will dismiss the case." *Id.* (emphasis added).

Where the DSA and plea agreement attachment contain several specific provisions relating to the DVIP, a trial court—which the trial court did not ultimately do—could not have found that Mr. Hawkins violated a general provision requiring Mr. Hawkins to "abide by all conditions imposed by… [CSOSA]" by failing to

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[46] R. 17 at 2. This provision imposes two requirements. As discussed, *supra*, there does not appear to be (and could not reasonably be) any dispute that Mr. Hawkins complied with the former, and the time for performance for the latter—by the end of the 9-month period ending January 4, 2024—was not yet due.

[47] *Id.*

[48] The DSA restates two of these provisions in paragraph (g), which could apply to the DVIP or any other required programs. R. 17 at 3.

attend a DVIP orientation, where the DSA—which contains specific timing provisions, including relating to the DVIP—does not require Mr. Hawkins to complete DVIP orientation within any specific period of time, but only that he complete DVIP within nine months, as reinforced by the "plea agreement attachment."

The provisions of the DSA regarding bringing "proof of attendance" did not specify that Mr. Hawkins must have completed any specific number of DVIP sessions prior to a "review date," instead only requiring him to bring proof of completion for any sessions he had completed by that time. R. 17 at 2-3; R. 15 at 2. Thus, a trial court could not have found—which the trial court did not do—that Mr. Hawkins violated this provision by failing to begin DVIP prior to a "review date." Moreover, where "any ambiguity as to [a] contract's meaning will be construed strongly against the drafter,"[49] here the United States.

iv. The Trial Court Erred by Finding That a Provision of the DSA Gave the United States Unfettered Discretion to Determine Whether Mr. Hawkins Breached the Agreement.

All contracts—including plea agreements, one type of contract[50]—must be supported by valid consideration. *See, e.g.*, *Interdonato v. Interdonato*, 521 A.2d 1124, 1134 (D.C. 1987). "[I]f one party never promises, or if his promise is illusory,

[49] *Dyer v. Bilaal*, 983 A.2d 349 (D.C. 2009) (quoting *Capital City Mortgage Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 567 (D.C. 2000)).
[50] *See, e.g.*, *Santobello v. New York*, 404 U.S. 257, 262-63 (1971).

there is a failure of consideration and no contract ever arises." *Little*, 417 A.2d at 967 n.2 (citing *R.A. Weaver & Assoc., Inc.*, 587 F.2d at 1318). "It is hornbook law… that a route of complete escape vitiates any other consideration furnished and is incompatible with the existence of a contract." *District of Columbia v. Ofegro*, 700 A.2d 185, 200 (D.C. 1997) (quoting *Torncello v. United States*, 681 F.2d 756, 769 (Fed. Cir. 1982)). "It is a settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless." *Retail Clerks Intern. Ass'n Local No. 455, AFL-CIO v. N.L.R.B.*, 510 F.2d 802 n. 15 (D.C. Cir. 1975) (citing *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1131 (3d Cir. 1969)).

A provision of the DSA purported to invest in the United States sole discretion to determine whether Mr. Hawkins had violated any condition of the agreement, stating, "[t]he determination of whether the defendant has violated any of the above conditions rests exclusively with the United States." R. 17 at 4. The United States argued that it and it alone—without oversight from the court—could determine whether Mr. Hawkins violated the agreement and revoke the agreement accordingly. 9/5 Tr. 19-20. The trial court appeared to agree:

> THE COURT: Does it also not say that they can revoke whenever? Doesn't it?
> MR. MADSEN: Again, that would render it illusory, Your honor. If the -- if the Government could --
> THE COURT: Then why'd you sign it?

> MR. MADSEN: Well, Your Honor, that – that's not a decision that's up to me.
> THE COURT: Excuse me?
> MR. MADSEN: Yes, Your Honor. The decision of whether to accept the plea is up to Mr. Hawkins.
> THE COURT: You signed it.
> MR. MADSEN: I did, Your Honor. Again, that's a decision that's left to Mr. Hawkins.
> THE DEFENDANT: I wouldn't now, maybe.
> MR. MADSEN: Mr. Hawkins, please let me.
> THE COURT: All right. I'm going to go back to the question, which I said, which was a sentencing date.
> MR. MADSEN: Brief indulgence, Your Honor. Mr. Hawkins, are you available on August 24th?
> THE DEFENDANT: Yes, but I can't speak, Your Honor?
> THE COURT: No.
> THE DEFENDANT: I started the --
> MR. MADSEN: Your Honor -- and Mr. Hawkins, if there's anything you need to say, we can discuss that and we can represent that later.
> THE DEFENDANT: All right.
> THE COURT: August 24th for sentencing. Just let me -- I have something on that date. Hold on. That's fine. We'll set sentencing at 10:00 a.m. *DSA is revoked at this time*, and sentencing date August 24th. If you wish to file something, please don't file it August 23rd. In fact, let me give you a date.

7/25 Tr. 6-7 (emphasis added).

This was error.

Federal courts interpreting plea agreements including provisions permitting the government to evaluate "whether and how to reward a defendant's cooperation does not, *by itself*, render a plea agreement invalid." *Kilcrease*, 665 F.3d at 928 (collecting cases) (emphasis added). Instead, many such courts have found "that a

promise to evaluate in good faith whether a defendant's cooperation warranted a § 3553(e) motion provided sufficient consideration for his guilty plea." *Id.* (citing *United States v. Isaac,* 141 F.3d 477, 483 (3d Cir. 1998)).

The offending provision of the DSA however, said nothing of good faith, and was therefore illusory. Where the DSA was nonetheless supported by other, valid consideration, the appropriate remedy, as Mr. Hawkins argued below, was to excise the offending clause,[51] because "[i]t is a settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless." *Retail Clerks Intern. Ass'n*, 510 F.2d at 806 n. 15.

In *Green*, on which the government relied below,[52] this court reviewed the denial of a motion for specific performance or in the alternative to withdraw a guilty plea entered under a pretrial diversion agreement. 377 A.2d at 1132. In relevant part, the agreement provided that Green, after "six months of successful participation in" a substance abuse program, "without having been rearrested,… could move to withdraw the guilty plea without government opposition," and "[a]fter ten months of successful participation… [,] provided he had not been rearrested, the government would enter a *nolle prosequi* in the case." *Id.* at 1133. The agreement also contained a provision providing for a termination hearing at which the prosecutor would

[51] 9/5 Tr. 7.
[52] R. 23 at 1, 5.

determine, in the event of a rearrest, whether there was probable cause to support the arrest, and if so, permit revocation of the agreement. But Green did not raise and this court did not address any argument that the provision in question was unenforceable as illusory, and "*stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the precise question." *In re Q.B.*, 116 A.3d 450, 455 (D.C. 2015) (quoting *United States v. Debruhl*, 38 A.3d 293, 298 (D.C. 2012)). Moreover, whereas the provision in *Green* vested discretion in the government regarding one decision—whether an arrest was supported by probable cause—the provision advanced by the United States purports to allow the United States to determine whether an accused has violated *any* condition of the agreement.

While the trial court ultimately stated that it did not find that the government "[wa]s acting in bad faith by revoking the [DSA],"[53] suggesting some level of review, it nonetheless employed its own deferential "standard of review" to that decision, rather than considering whether Mr. Hawkins or the government had breached the agreement. Under the "strict standard of compliance" to which the government is held, where Mr. Hawkins had not violated the agreement, the trial court erred in two ways by permitting the government to revoke the agreement: 1) by finding that Mr. Hawkins had repudiated the agreement, permitting the

[53] 9/5 Tr. 21 (15-17).

government to revoke the agreement under a theory of anticipatory repudiation, and 2) by employing its own deferential standard of review to the government's decision to revoke the DSA, rather than determining de novo whether Mr. Hawkins had violated the agreement. Instead, the trial court—with Mr. Hawkins not having violated the agreement—was required to order specific performance.

II. IN THE ABSENCE OF SPECIFIC PERFORMANCE, THE TRIAL COURT ERRED IN DENYING MR. HAWKINS' MOTION TO WITHDRAW HIS GUILTY PLEA.

a. Standard of Review.

This court reviews the denial of a motion to withdraw his guilty plea for abuse of discretion, subject to the qualification that it reviews legal standards governing such a decision de novo, and that "it is an abuse of… discretion 'if the trial judge rests his or her conclusions on incorrect legal standards.'" *Edwards*, 295 A.3d at 1131 (quoting *Jones*, 17 A.3d at 631).

b. Under the "More Lenient" Standard Applicable to a Presentence Motion to Withdraw a Guilty Plea, Courts Should "Freely Allow" Withdrawal if "For Any Reason the Granting of the Privilege Seems Fair and Just."

When a motion to withdraw a guilty plea is made prior to sentencing, courts, under the "more lenient" standard, should "freely allow" allow withdrawal if "for any reason the granting of the privilege seems fair and just." *Gooding,* 529 A.2d at 306 & 310 (quoting *Kercheval*, 274 U.S. at 224). Factors relevant to the decision include "whether the defendant has asserted his or her legal innocence," "the length

of the delay between the entry of the guilty plea and the desire to withdraw it," and "whether the accused has had the full benefit of competent counsel at all relevant times." *Edwards*, 295 A.3d at 1131 (quoting *Springs*, 614 A.2d at 4). "While the defendant must make more than a 'bald assertion of innocence,' '[w]here the accused seeks to withdraw his plea of guilty before sentencing[ ] on the ground that he has a defense to the charge,' the court 'should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant.'" *Id.* (quoting *Gearhart*, 272 F.2d at 502). "[P]rejudice to the government is the main consideration in assessing delay." *Id.* at 1136.

c. The Trial Court Abused Its Discretion by Failing to Consider the Lack of Any Specific, Identified Prejudice to the Government When Considering the "Length of the Delay."

When considering the "length of the delay between the entry of the guilty plea and [Mr. Hawkins'] desire to withdraw it," which the trial court found to be less than four months,[54] the trial court did not consider the lack of any specific, identified prejudice to the government (or base its decision on any perceived prejudice to the government),[55] instead considering only the length of the delay in absolute terms. 10/23 Tr. 5-7. Where the trial court "rest[ed]… her conclusions on incorrect legal standards," the trial court abused its discretion. *Edwards*, 293 A.3d at 1131 (quoting

[54] 10/23 Tr. 4-5.

[55] The government stated only that "the memories of witnesses (including police officers) do not improve over time." R. 23 at 8.

Jones, 17 A.3d at 631); *see also Tiger Steel Eng'g, LLC v. Symbion Power, LLC*, 195 A.3d 793, 803 (D.C. 2018) ("[W]e have held that a trial court abuses its discretion by: (1) failing to consider a relevant factor…") (quoting *In re Estate of McDaniel*, 953 A.2d 1021, 1023–24 (D.C. 2008)).[56]

d. The Trial Court Abused Its Discretion by "Declining to Engage in an Assessment of Whether Mr. [Hawkins] Had Presented Facts That, Taken as True, "Made Out Some Legally Cognizable Defense to the Charge[]" and by Collapsing the First and Second *Gooding* Factors Into One.

In his written motion to withdraw his guilty plea, Mr. Hawkins asserted legal innocence—self-defense—and pointed to documentary evidence that would support such a defense, in the form of body-worn camera footage in which Mr. Hawkins "informed responding officers that the complainant had punched him and pulled his hair." R. 22 at 4. The proffer in this case provided only:

> If 2023 DVM 224 had proceeded to trial, the Government would have admitted evidence proving beyond a reasonable doubt that on or about February 27, 2023, in the District of Columbia, the defendant, Dwayne Hawkins, assaulted [the complainant] by hitting her in the head. [The complainant] found the defendant's actions offensive, a reasonable person would have found the defendant's actions offensive, and the defendant knew his actions would cause offense. The defendant acted purposely, voluntarily, and without legal justification.

[56] Moreover, where this court found no basis for concluding that an eight-week delay in *Edwards*, which came some ten months after Edwards was presented, "would have prejudiced the government sufficiently to warrant denying a presentence motion to withdraw a plea," it is difficult to see how a total delay between alleged offense and desire to withdraw a plea would prejudice the government sufficiently to do so.

R. 15.

When considering this factor, the trial court abused its discretion in two ways. First, the trial court did not—with or without testimony—consider whether Mr. Hawkins had put forward facts, which accepted as true, would make out a legally cognizable defense to the charge, instead concluding that this factor weighed against Mr. Hawkins because had earlier agreed to a proffer including a statement that he acted without legal justification. 10/23 Tr. 6-7. This rationale would require weighing this factor against virtually all movants, contrary to the principle that a motion to withdraw a guilty plea prior to sentencing is to be "freely allowed." Said another way, the trial court abused its discretion by "declining to engage in an assessment of whether Mr. [Hawkins] had presented facts that, taken as true, 'made out some legally cognizable defense to the charge[].'" *Edwards*, 295 A.3d at 1132 (quoting *Springs*, 614 A.2d at 5). Second, the trial court repeatedly connected the assertion of legal innocence to the "length of the delay," impermissibly combining the two factors and abusing its discretion in the process. 10/23 Tr. 5 (15-22) ("So in terms of claim of innocence, he is now claiming innocence. His motion to withdraw guilty plea, the circumstances under which is when the Government is ready to revoke or indicate revocation of the deferred sentencing agreement and noncompliance by Mr. Hawkins, is when the claim of innocence occurred. And the time frame is months after entering the plea.").

Conclusion

The trial court erred by denying Mr. Hawkins' motion for specific performance of the DSA pursuant to which Mr. Hawkins pled guilty, a decision the trial court rested on the erroneous findings that Mr. Hawkins had repudiated the agreement such that the United States' revocation did not itself constitute a breach of the agreement. Accordingly, this court should remand with instructions to order specific performance.[57] In the absence of specific performance, the trial court abused its discretion by denying Mr. Hawkins' motion to withdraw his guilty plea by misinterpreting the meaning of the first and second *Gooding* factors, failing to consider the lack of any specific prejudice to the government and considering the length of the delay only in absolute terms, "declining to engage in an assessment of whether [Mr. Hawkins] had presented facts that, taken as true, made out some legally cognizable defense to the charge," and collapsing the first and second factors into one. These errors require reversing the denial of Mr. Hawkins' motion for withdrawal of his guilty plea,[58] or at minimum, remand for additional factfinding after an evidentiary hearing.[59]

[57] The trial court ordered completion of the DVIP as a condition of probation. R. 23.
[58] *See, e.g.*, *Gooding*, 529 A.2d at 311-12.
[59] *See, e.g.*, *White*, 146 A.3d at 103.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was electronically served upon the United States Attorney's Office for the District of Columbia, this 29th day of April, 2024.[60]

/s/ Adrian E. Madsen
Adrian E. Madsen

[60] Mr. Hawkins filed this brief at approximately 12:01 am on April 27, 2024, leading to this filing be rejected because of the date in the certificate of service. Mr. Hawkins refiles this brief with a corrected certificate of service.

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.

Adrian E. Madsen, Esq.
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23-CM-991
Case Number(s)

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