RECORD NO. 17-4573

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MARY MOONEY,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT BEAUFORT

BRIEF OF APPELLANT

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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. BASIS FOR SUBJECT MATTER JURISDICTION IN THE DISTRICT COURT

Appellant Mary Mooney was one of four defendants indicted in the District of South Carolina in a one-count indictment. The indictment alleged a conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. (JA 16).

Pursuant to that federal statute, the United States District Court for the District of South Carolina had proper jurisdiction over this case.

B. BASIS FOR JURISDICTION IN THE COURT OF APPEALS

This Court's jurisdiction over appeals from final decisions of the district courts is authorized by 28 U.S.C. § 1291. A plea of guilty is a final decision of a district court.

The district court entered a final judgment in this case on September 7, 2017. (JA 284) The notice of appeal was entered on September 11, 2017. (JA 293) This was a timely notice of appeal and this Court has proper jurisdiction over this appeal.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. APPELLANT MARY MOONEY SHOULD HAVE BEEN ALLOWED TO WITHDRAW HER GUILTY PLEA, AS THE STATUTE TO WHICH SHE PLED GUILTY DID NOT APPLY TO HER.

2. THE DISTRICT COURT SENTENCED MOONEY BASED ON AN INCORRECT AND UNSUPPORTED LOSS AMOUNT.

3. THE DISTRICT COURT'S RESTITUTION AWARD WAS ERROR, BECAUSE THERE WAS NO LOSS AND NO EVIDENCE IN SUPPORT OF A RESTITUTION AWARD.

III. STATEMENT OF THE CASE

Mary Mooney was indicted on January 21, 2014. (JA 16.) The indictment laid out a complex and ultimately unprovable scheme to commit adoption fraud and child laundering.

Background information.

Mary Mooney was the executive director of International Adoption Guides, Inc. ("IAG"), for about ten years. IAG was a licensed South Carolina adoption services provider that handled international adoptions. IAG was also licensed by Ethiopia to operate within that country.

Local, federal, and international laws all apply to international adoptions. However, before April 1, 2008, state laws primarily regulated adoptions. The South Carolina Department of Social Services (SCDSS) licenses in-state adoption providers. (JA 19).

Federal law is far more complex, especially as it relates to international law. The United States is a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[1] The Intercountry Adoption Act of 2000 ("IAA"), codified at 42 U.S.C. § 14901, implemented the Hague Adoption Convention in the United States on April 1, 2008, for adoption cases between the United States and another country that was also a party to the Convention.

An immigrant visa is required for a foreign child to be adopted by a United States citizen.[2] The intercountry adoption process for adoptions from non-Convention countries starts with an I-600A form submitted to the United States Customs and Immigration Services ("USCIS"). The I-600A

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[1] The Hague Convention governs many aspects of international relations. However, for purposes of this brief, "Hague" or "Convention" is used to refer to the adoption treaty only.

[2] Because not all countries are members of the Hague, the United States' initiation of Hague adoptions did not terminate non-Hague adoptions. International adoptions in the United States can proceed as either Hague or non-Hague adoptions, depending on the country involved. Citizenship and Immigration Services Ombudsman, *Annual Report 2010,* June 30, 2010 (located at https://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf, last accessed January 9, 2018)

All the adoptions in this case were from Kazakhstan or Ethiopia, neither of which are Hague members. The following description concentrates on the non-Hague process.

form requires United States citizenship, fingerprint submission, meeting all state requirements, and a favorable home study.

If the I-600A is approved, USCIS issues a Form 171-H to the prospective adopting parents. At that point, the prospective parent must complete the adoption under the laws of the child's country of residence.

The indictment revolved around adoptions from Ethiopia.[3]

The Indictment.

The Government indicted Mooney and three co-defendants (who are not part of this appeal) on a conspiracy to defraud the United States. In simple terms, the Government claimed Mooney's adoption service was cheating the State Department through bribery and deceit intended to circumvent laws governing adoptions.

The Government's investigation began in 2012. It appears many of the allegations in this case were based on guidelines or regulations from Ethiopia (and eventually Kazakhstan) that were not in effect at the time of the adoptions IAG handled.

There were also allegations related to bribery and counterfeit adoption forms, though Mooney was not directly involved in those allegations.

[3] Ultimately, neither Mooney's conviction nor sentence were founded in any way on the accusations related to Ethiopian adoptions.

As trial approached, the Government filed a notice of evidence it intended to introduce at trial. (DE 126) The notice involved accreditation by the Council on Accreditation ("COA"), a private non-profit tasked by the State Department with accrediting international adoption providers operating in Hague Convention countries.

Specifically, the Government alleged three categories of false statements were made on both the 2006 and the 2011 accreditation applications to the COA. IAG stated on the application no improper payments were made related to adoptions, no incentive or contingency fees were paid for adoptions, and no payments were made to obtain a child. The Government claimed these statements were all false and further supported the case against Mooney.

The Information.

As the case against Mooney evolved, or devolved, the Government offered a plea agreement on the eve of trial. Mooney pled guilty to an Information accusing of her making false and fraudulent statements to influence a decision by the Counsel on Accreditation. (JA 47) The Information contained three alleged false statements: (1) a September 1, 2007 application failing to list an employee; (2) an April 10, 2010 claim IAG was in substantial compliance with Hague standards; and (3) a November

21, 2011 claim Mooney was Executive Director of IAG when the Government claimed co-defendant James Harding was the functional executive in charge of the company at the time the application was completed. (JA 47)

The Government alleged each of these statements violated 42 U.S.C. § 14944(c). January 14, 2015, the same day the information was filed, Mooney entered a written plea agreement with the Government and entered her guilty plea in the district court. (JA 48)

Mooney moves to withdraw her plea.

On March 12, 2015, Mooney moved to withdraw her guilty plea. The motion argued 42 U.S.C. § 14944 did not apply to non-Hague Convention cases prior to July 14, 2014. Mooney and her attorney were given the opportunity to plead guilty to § 14944 just a few hours before jury selection in Mooney's case.

Mooney was given the Information and plea agreement around 9:30 a.m. on January 14, 2015. (JA 76) This was the same day of her jury selection and less than two weeks prior to her actual jury trial. She had very little time to discuss the proposed plea with her attorney.

Mooney argued in the motion to withdraw that she pled guilty to a statute that was not in effect at the time of her plea. As discussed in more detail in the argument section, 14944 is part of the IAA, which came into

effect on April 1, 2008. It did not cover non-Hague adoptions. Because neither Ethiopia nor Kazakhstan were Hague countries, the statute did not apply to Mooney at the time of the acts listed in the Information.[4]

Though the Government claimed the Information also covered adoptions from Kazakhstan, Mooney countered that Kazakhstan was a non-Hague country at the time of the statements. At the plea withdrawal hearing, the Government conceded the first statement in the Information did not apply. (JA 129) The Government claimed the statute applied regardless of the Convention status of the country at issue, so the crime applied despite Mooney handling no Convention adoptions. (JA 128-129) The district court ultimately agreed with this position and denied the motion to withdraw. (JA 148)

Initial pre-sentence report and the Government's request for an upward variance.

On March 28, 2016, the United States Probation Office issued a pre-sentence report for Mooney. The total offense level was an 8, resulting in an advisory guideline range of 0 to 6 months. (JA 300)

[4] It is also questionable whether any of the statements were materially false, which would support Mooney's request to withdraw her plea. That argument is further developed in the argument section of this brief.

The Government objected to the loss amount, arguing Mooney should be held responsible for $44,060 paid for Kazakhstan adoptions and $196,362.85 paid for Ethiopian adoptions. At the heart of the Government objections was relevant conduct. The probation officer found that the false statements in the Information did not affect any of the adoptions, and those adoptions were not relevant conduct for sentencing. (JA 308)

The Government requested an upward variance to the statutory maximum sentence of 5 years. (DE 203) Claiming families had been tricked into paying over $400,000 for adoptions in total, the Government argued this was really a child laundering case.[5] It requested either an increase in the total offense level of Mooney's PSR by 16 levels or an upward variance, either of which would result in nearly 5 years in prison for Mooney.

The district court heard argument from both sides, as well as testimony from the Government's forensic accountant and an alleged victim who had adopted children from Ethiopia. Because of the complexity of the testimony, the district court decided to hear all argument and testimony and issue a written order. The hearing would reconvene after the order for additional argument.

[5] The loss amount has always been at issue, because it has remained a moving target. At various times, the loss has been anywhere from $40,000 to almost $700,000. As discussed in the argument below, there was no loss in this case.

The district court's first sentencing order.

The district court issued a written order addressing various objections to the PSR. (JA 216) The critical portion of the order for this appeal was the relevant conduct decision. (JA 218) Relevant conduct was considered under two theories: (1) whether the conduct was part of a common scheme or plan, and (2) whether the conduct was part of the same course of conduct as the crime of conviction. (JA 219-220)

The district court found none of the adoptions had a common factor with the crime of conviction to make them part of a common scheme or plan. (JA 219-220) On the other hand, the district court found the post-2008 Kazakhstan adoptions were part of the same course of conduct as the false statements to which Mooney had pled guilty. (JA 220) This decision was based on the belief that Kazakhstan required COA accreditation after 2008, so those adoptions were the direct result of the false statements.[6] (JA 220-221)

[6] It is unclear where this belief came from, as it does not appear Kazakhstan required COA accreditation until it joined the Hague in 2012. The State Department website reflects since 2012, there has never been a Hague adoption to the United States from Kazakhstan.

The same website states Kazakhstan became a signatory to the Hague on March 12, 2010 and began processing adoptions pursuant to the Hague on May 10, 2012. (JA 278; https://travel.state.gov/content/travel/en/Intercountry-

The second sentencing hearing.

A final sentencing hearing was held on August 10, 2017. At that hearing, the primary point of dispute was the amount of loss attributable to Mooney.

The Government asked the district court to use Mooney's alleged gain as the loss amount, while the defense argued there was no loss. Not surprisingly, the Government argued extensive bribery led to the adoptions and any money paid for an adoption was an appropriate basis for loss amount. (JA 252-253) Despite this argument, the Government again conceded there was no evidence any adoption was flawed or subject to reversal. (JA 253)

The defense argued a lack of evidence for any loss. There was no proof as to when Kazakhstan began requiring COA accreditation. (JA 244-245) In fact, what little proof was available suggested it was long after Mooney's statements.

No witnesses were called to support the Government's request for loss. Restitution was briefly addressed at the end of the hearing, primarily because

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Adoption/Intercountry-Adoption-Country-Information/Kazakhstan.html, last accessed January 10, 2018)

the defense argued there was no proof of any restitution amounts. (JA 268-269)

The district court overruled Mooney's objection to the loss amount and restitution award. (JA 260-261) It denied the Government's motion for an upward departure and granted Mooney's request for a downward variance. (JA 274) Mooney was sentenced to 18 months and restitution in the amount of $233,946.04 was awarded. (JA 274)

The district court granted an appellate bond, so Mooney has not begun serving her sentence.

IV. SUMMARY OF THE ARGUMENT

Mooney argues three issues on appeal. Her first argument is that she should have been allowed to withdraw her plea agreement. After pleading to an Information, Mooney realized the statute did not apply to her. Mooney pled guilty to a statute that was specifically drafted to apply to Hague Convention adoptions. She never conducted a Hague Convention adoption. Because the statute did not apply to non-Hague adoptions, she could not be guilty of it.

At the same time, Mooney pled guilty to a charge she was not factually guilty of. She had very little time to consider the matter and was faced with a

guilty plea on the eve of a long and complicated trial, for which it did not appear her attorney was prepared.

Mooney also argues the loss amount in this case is improper. There was no loss under this Court's holding in *United States v. Chatterji*. *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995). At best, the false statements to which Mooney pled had a non-material effect on the adoption process. There was never any problem with the adoptions. This Court has been clear there is no loss in such a case.

Finally, Mooney argues the restitution award entered against her is both procedurally and factually flawed. The district court failed to consider Mooney's financial situation, which is fatal to an award under the Victims and Witnesses Protection Act. The district court also awarded restitution to individuals who had suffered no loss, did not ask for restitution, did not appear in court, and did not communicate with the prosecutors.

V. ARGUMENT

1. APPELLANT MARY MOONEY SHOULD HAVE BEEN ALLOWED TO WITHDRAW HER GUILTY PLEA, AS THE STATUTE TO WHICH SHE PLED GUILTY DID NOT APPLY TO HER CONDUCT.

Standard of Review: The denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *United States v. Battle*, 499 F.3d 315, 319 (4th Cir. 2007). A district court abuses its discretion when it: (1) acts

arbitrarily; (2) fails to consider judicially recognized constraints on its power; or (3) decides a matter based on incorrect factual or legal premises. *United States v. McTeague*, 840 F.3d 184, 189 (4th Cir. 2016).

The guilty plea.

Mooney's plea developed just hours before jury selection in her case. Despite the serious allegations in the Indictment against Mooney, the Government allowed her to plead guilty to making false statements to the Council on Accreditation (COA). There were three statements in the Information the Government alleged were false. The first statement clearly took place prior to the effective date of 42 U.S.C. § 14944. The Government appears to concede the first statement in the Information was not a sufficient basis for Mooney's plea. (JA 129).

Two allegedly false statements formed the factual basis for the plea. On April 10, 2010, Mooney signed a COA form stating:

> "...during the past year we have been in substantial compliance ... with all applicable Hague Accreditation Standards in 22 C.F.R. Part 96, Subpart F, and that we continue to be in substantial compliance with all applicable Hague Accreditation standards."

(JA 47). In addition, on November 21, 2011 an accreditation form contained information:

> "Mary Mooney was Executive Director of IAG; failure to disclose that James Harding was the functional executive running the company."

(JA 47).

The nature of Mooney's case had changed drastically just hours before a federal jury selection. After accusations of adoption fraud and child-laundering had been leveled at her for nearly a year, she was offered the opportunity to plead guilty to making minor false statements on an accreditation form.

With just a few hours to consider the deal with her attorney, Mooney made the ill-advised decision to plead guilty to falsely stating the information listed above. Very shortly after that plea, Mooney realized she had likely pled guilty to something that was not a federal crime.

Mooney moves to withdraw her plea.

After realizing the statute to which she pled did not apply to her, Mooney asked her attorney to move to withdraw her guilty plea. This was not a form motion done to placate a difficult client. Mooney's attorney told the district court he had not researched the statute and did not realize it should not have applied to Mooney's accreditation forms at the time they were submitted. (JA 135-136).

The motion was a simple argument related to a complex legal regulatory scheme. The law cited in the Information was a prohibition against making false statements to an accreditation agency about Hague Convention adoptions. Mooney argued she and her adoption agency were never involved in Convention adoptions, so the law would not apply to them.

The Government made two arguments in response. First it argued that while Ethiopia was not a Convention country at the time of the statements, Kazakhstan was. This was incorrect. While it was apparently based on an affidavit from co-defendant James Harding, it was not based on any citation to Kazakhstan law. In fact, as discussed below, information from the United States Department of State suggested exactly the opposite; Kazakhstan was not a Hague country at the time of the statements and there has not been a Hague adoption to the United States from that country. (JA 278)

The Government's second point, while arguably more attractive, is equally as flawed. It also argued the statements were a violation of the law, regardless of whether or not Mooney was handling any Hague adoptions. This argument ignores the wording of the statute.

In any event, evidence submitted to the district court revealed the statements made by Mooney were not false. She has made a credible assertion of both legal and factual innocence.

Does the statute at issue apply to Mooney?

The statute Mooney's plea was based on must be read in two parts. The first part outlaws a "knowingly and willfully violat[ion]" by:

> "Any person who ... makes a false or fraudulent statement, or misrepresentation, with respect to a material fact ... intended to influence or affect in the United States or a foreign country ... a decision by an accrediting agency with respect to the accreditation of an agency or approval of a person under title II."

42 U.S.C. § 14944(a)(2)(A); 42 U.S.C. § 14944(c).

According to the statute's notes, "Title II" refers to 42 U.S.C. § 14921, *et seq*. § 14921 sets out the general application of the law, stating no person may provide adoption services in connection with a Convention adoption unless that person is either accredited or approved "in accordance with this title" or under the supervision of a person or entity who is approved. 42 U.S.C. §§ 14921(a)(1)-(2).

§ 14921 is specifically aimed at Convention adoptions. It has no application to non-Convention adoptions. In order for an adoption to qualify as a Convention adoption, both parties must be signatories to the Hague Convention and the adoption carried out through the Hague adoption process.

§ 14944 specifically applies to "accreditation or approval" in connection with a Hague adoption. Any other construction does not give

effect to the congressional intent to apply the law to Hague adoptions. If Congress had intended this to be a general false statement statute, there would have been no need to add the reference to Title II. That reference specifies the reach of the statute.

Statutes should be defined by their plain and unambiguous language. *United States v. Cone*, 714 F.3d 197, 206 (4th Cir. 2013). Criminal statutes are strictly construed to avoid interpretations not clearly warranted by the text "in the interest of providing fair warning of what the law intends to do if a certain line is passed..." *Id.* (quoting *WEC Carolina Energy Solutions LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012).

There is little question these statutes are intended to apply to Convention adoptions. Because there is a different process for Convention adoptions as opposed to non-Convention adoptions, Congress has added additional penalties for material misstatements affecting those types of adoptions.

The Department of State's interpretation of the statute supports Mooney's interpretation. On February 10, 2015, shortly after Mooney's plea, the Department issued a clarification of the prior rules on accreditation and criminal enforcement. The Department recognized the accreditation rules only applied to Convention cases. 80 F.R. 7321.

That announcement stated the criminal enforcement portion of 42 U.S.C. §§ 14901, *et seq*., which § 14921 and § 14944 are part of, only applied to persons involved in Hague adoptions. The point of this rule announcement was to expand the enforcement of those provisions from persons involved with Hague adoptions to persons involved in non-Hague adoptions. *Id*.

Mooney's construction of the statute is correct. Because the plain language of the statute is unambiguous, there is no need to inquire any further as to its scope. The law only applies to Convention adoptions and persons involved in Convention adoptions.

Even if the Court were to question the unambiguous nature of the statue, Mooney's construction is consistent with the Department of State's construction, the agency responsible for administering the statute. It is well-settled that federal courts defer to the interpretation of law by an agency which administers the law. *People v. United States Dep't of Agric.*, 861 F.3d 502, 506 (4th Cir. 2017) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 Us. 837, 842 (1984)).

Under either manner of statutory interpretation, plain language or *Chevron* deference, Mooney can only be guilty of the Information filed by the Government if she was handling Hague Convention adoptions.

When did Kazakhstan become a Hague Convention partner?

The Government concedes, as it must, that Ethiopia is not a Hague country. Because the record is clear Mooney was only involved in adoptions from Ethiopia and Kazakhstan, Kazakhstan's implementation of the Hague becomes a critical factor in this case.

Co-defendant James Harding claimed COA accreditation was required for adoptions from Kazakhstan beginning in 2008. (JA 105, ¶2). This is contrary to the information published by the Department of State regarding Kazakhstan's implementation of the Hague.

According to the Department of State website, Hague adoptions did not begin from Kazakhstan until May 10, 2012. Interestingly, just a few months later Kazakhstan suspended intercounty adoptions and its does not appear there have been any Hague adoptions from Kazakhstan.[7]

There has never been any information that Kazakhstan was requiring COA accreditation prior to its implementation of the Hague Convention. Adoptions in Kazakhstan cannot form the basis for Mooney's conviction when those adoptions all took place prior to Hague implementation.

[7] JA 278; https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Kazakhstan.html, last accessed January 10, 2018

Were Mooney's false statements even false?

One of the grounds raised in Mooney's motion to withdraw was factual innocence. The April 2010 statement in the Information accused Mooney of falsely stating her agency was in "substantial compliance" with the standard in 22 C.F.R. §§ 96.29, *et seq*.

It is not clear how the agency was out of compliance. At the time of the plea, Mooney was required to admit James Harding was not qualified to run an adoption agency and she was concealing the true executive director of the agency. Neither claim is supported by the law or evidence.

One of the Government's exhibits in opposition to the plea withdrawal hearing lists the 2008 issues with World Partners Adoption, the company Harding ran prior to his involvement with Mooney's company. 22 C.F.R. § 96.37 contains the requirements referenced in the Government's exhibit. That section has a way in which an executive director without the required educational level can be "grandfathered" into compliance:

> "In the case of a social work supervisor who is or was an incumbent at the time the Convention enters into force for the United States, the supervisor has significant skills and experience in intercountry adoption and has regular access for consultation purposes to an individual with the qualifications listed in paragraph (d)(1) or paragraph (d)(2) of this section."

22 C.F.R. § 96.37(d)(3).

The COA investigated IAG and co-defendant Harding's involvement in the company. There was "insufficient evidence" to prove any lack of substantial compliance with COA guidelines. (JA 104) While the Government argued below that this just meant Mooney's misstatements were material and effective, they offered no proof COA's finding was incorrect. If COA is tasked with investigating substantial compliance, and finds substantial compliance, that should have been the end of the inquiry.

Should Mooney have been allowed to withdraw her plea?

When Mooney recognized this legal defense that was overlooked by counsel, she immediately asked him to withdraw her plea. Counsel candidly, and admirably, informed the district court that he was unaware of this legal argument at the time of the plea and had to spend some time researching the matter prior to the filing.

An appropriately done Rule 11 hearing creates a strong presumption a guilty plea is valid and binding. *United States v. Nicholson*, 676 F.3d 376, 384 (4th Cir. 2012). However, the Court can consider circumstantial factors to determine if a fair and just reason has been provided for withdrawing a guilty plea. *Id.*

This Court looks at a non-exclusive list of factors to help determine if a fair and just reason to withdraw a plea exists: (1) whether the defendant

offers credible evidence the plea was not knowing and voluntary; (2) the defendant's credible assertion of legal innocence; (3) any delay in filing the motion to withdraw; (4) whether the defendant was closely assisted by competent counsel; (5) prejudice to the government; and (6) court inconvenience and a waste of judicial resources. *United States v. Moore*, 931 F.2d 245, 248-49 (4th Cir. 1991).

(1) Mooney credibly asserted her plea was not knowing and voluntary.

Mooney's plea was not knowing and voluntary because she lacked a fundamental understanding of the law's application. Reading the "ritualistic litany of the formal legal elements of an offense" is not enough to make a plea knowing and voluntary. *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). A defendant pleading guilty must receive "real notice of the true nature of the charge against him [or her], the first and foremost universally recognized requirement of due process." *Id.* at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

The true nature of the charge against Mooney involved application of a statute that was not in effect for her actions. She was not involved in any Hague adoptions. The statute to which she pled, by both its plain language and agency interpretation, only applied to persons conducting Hague adoptions. Because her lawyer stated on the record he did not advise her of

the effective date of the statute (which he did not know at the time of the plea), she was unaware of the true nature of the charge to which she was pleading.

The lack of knowledge prevents Mooney's plea from being knowing and voluntary.

(2) Mooney credibly asserted she was both factually and legally innocent.

As discussed earlier, there is a very real question as to whether the statute at issue in this case was applicable to Mooney. Its plain language suggests it was not. The Department of State interpretation states it was not.

Mooney could not plead guilty to a retroactive statute. A statute's retroactive effect does not invalidate it based on its application to conduct prior to the enactment. *Chambers v. Reno*, 307 F.3d 284, 289 (4th Cir. 2002). A statute's retroactive effect invalidates it when it attaches new legal consequences to actions taken prior to the statute's enactment. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 270 (1994).

According to the Department of State's rule clarification, the criminal enforcement statute to which Mooney pled guilty was not applicable to non-Hague adoptions prior to the expansion of the statute from Hague adoptions to both Hague and non-Hague adoptions. When the statute only applied to Hague adoptions, Mooney was not handling any Hague adoptions.

In addition to a credible question as to Mooney's legal innocence, the facts discussed above make it highly likely she was never guilty of the charge she pled guilty to, regardless of its application to her.

(3) There was no significant delay in filing the motion to withdraw Mooney's plea.

Mooney's attorney explained to the district court that any delay in filing the motion to withdraw was his fault, as he had to conduct the appropriate research on the statute. (JA 135) In addition, the district court stated it was not concerned with any delay in filing the motion. (JA 135)

This factor weighs in favor of Mooney.

(4) While Mooney was assisted by competent counsel, his admitted failure to research the statute of conviction weighs in favor of her plea withdrawal.

Mooney's attorney at the time of her plea was generally a competent and experienced attorney. However, he admitted in this case he did not conduct crucial research on the statute prior to Mooney's plea.

Mooney's lawyer described his schedule at the time he took her case as being so busy he would not have physically been able to handle the case without the assistance of an investigator who also handled paralegal duties. (JA 136) Mooney's attorney should be commended for his candor to the district court. Many attorneys refuse to admit even the slightest shortcoming in their representation, to their clients' significant detriment.

In Mooney's case, the admission weighs heavily in favor of allowing her to withdraw her plea. The issue at the heart of this case is the scope of the statute to which she pled guilty. Because her attorney agrees he did not know or research that scope, she should be allowed to withdraw her plea.

(5) The withdrawal of Mooney's plea would not have prejudiced the Government.

While the Government claimed at the hearing it would be prejudiced by having to get ready for trial again, it offered no additional details on what prejudice that would cause. (JA 125). Without a stronger and more specific showing of prejudice, this factor does not weigh against the withdrawal of Mooney's plea.

(6) Allowing Mooney to withdraw her plea would neither inconvenience the court or waste judicial resources.

There was no evidence presented to the district court that allowing Mooney to withdraw her plea would put any burden on the court system. There was nothing exceptional about this case that would create such a burden.

Because this factor does not seem notable in this case, it does not weigh against withdrawal of Mooney's plea.

(7) Mooney has presented a fair and just reason to withdraw her plea.

In addition to, and in conjunction with, the six factors discussed above, a defendant should be allowed to withdraw her guilty plea for a "fair and just reason." *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991); Fed. R. Crim. P. R. 11[8]

Any test is not rigidly applied, as the Rule has left the reasons for withdrawal for consideration under an intentionally "conspicuous fuzziness." *United States v. Sparks*, 67 F.3d 1145, 1154 (4th Cir. 1995). The first, second, and fourth *Moore* factors are most useful in determining whether there is a fair and just reason to withdraw Mooney's plea. *Id.* These factors are the strongest factors in favor of Mooney.

Mooney had a valid legal defense to these charges. She presented evidence to the district court on the statute at issue that should inspire belief in a powerful defense to the charges brought against her. *United States v. Thompson-Riviere*, 561 F.3d 345, 353 (4th Cir. 2009). If evidence the defense brought forward defeats the government's *prima facie* case or makes out a successful affirmative defense, a plea should be withdrawn. *Sparks*, 67 F.3d at 1151.

[8] Some of the cases, including *Moore*, attribute this language to Rule 32(d). The rule has been altered and the language regarding withdrawal is now found in Rule 11.

Mooney's evidence, if believed, would establish her innocence of the charges to which she pled guilty. This was enough to grant the motion to withdraw. *Thompson-Riviere*, 561 F.3d at 353-54. Because she has presented credible evidence of her legal innocence in conjunction with the Moore factors weighing in her favor, Mooney should have been allowed to withdraw her guilty plea.

This issue is not barred by the appellate waiver.

Mooney's plea agreement contains a waiver of appellate rights. (JA 52-53). While a defendant is free to waive appellate rights, the mere existence of a waiver is not the end of the question. *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993).

In *Craig*, this Court found that the defendant's allegations in his plea withdrawal motion encompassed ineffective assistance of counsel, which was directly related to the appellate waiver. *Id.* Importantly, there is nothing in the opinion suggesting Craig made a specific challenge to the appellate waiver. Rather, because his challenge involved ineffective assistance of counsel, this Court imputed a challenge to the appellate waiver in his plea agreement.

Mooney made a very similar argument in her motion to withdraw her plea. The attorney in the *Craig* case agreed that the circumstances of the plea

probably did result in some pressure on the defendant to plead guilty. *Id.* at 177. Mooney was faced with similar pressure.

Her affidavit establishes Mooney was presented with a plea agreement less than two hours before jury selection and that she was rushed and did not have time to properly evaluate the plea offer. (JA 77). She also alleged her attorney had not researched the law and relied on the government for the legal interpretation of the laws that applied to the adoptions at the center of this case. (JA 80)

Mooney's attorney agreed with her position at the hearing. He seemed to agree he had a short period of time to get ready for an extremely complex trial. (JA 136) He was unaware of the information related to the effective date of the statute at the time of the plea. (JA 119). In fact, one of the allegedly false statements was made in 2007, prior to the Hague coming into effect for the United States. Mooney's attorney explained that he had not researched the effective dates related to the statute involved in this case until she brought the matter to his attention after the guilty plea. (JA 135)

The waiver of the right to appeal does not survive a claim of constitutionally ineffective counsel; under that circumstance the waiver cannot be knowing and voluntary. *United States v. Johnson*, 410 F.3d 137,

151 (4th Cir. 2005). This Court should decline to enforce the appellate waiver against Mooney.

As an additional ground, Appellant raised the constitutional nature of pleading to a statute that does not apply to her in a response to the Government's motion to dismiss this appeal.

This goes beyond even the class of claims referred to as the *Blackledge-Menna* doctrine, which cannot be waived by a guilty plea.[9] If the statute did not apply to the conduct at issue in this case, any plea to such conduct violates the Ex Post Facto Clause. *Stogner v. California*, 539 U.S. 607, 612 (2003). Such a plea should not stand, regardless of an appellate waiver.

2. THE DISTRICT COURT SENTENCED MOONEY BASED ON AN INCORRECT AND UNSUPPORTED LOSS AMOUNT.

Standard of Review: When reviewing a loss calculation, the district court's factual findings are reviewed for clear error and its legal interpretation of the advisory sentencing guidelines is reviewed de novo.

[9] In *Blackledge v. Perry*, the Supreme Court held a guilty plea could not foreclose a due process claim because the type of claim at issue could not be cured by the Government and went to the very power of the government to bring a defendant to court to answer the charges against him. 417 U.S. 21 (1974). Similarly, the Supreme Court in *Menna v. New York* held that a Double Jeopardy claim was not barred by a plea because the claim would prevent the government from convicting the defendant no matter how strongly his factual guilt was established. 423 U.S. 61 (1975).

United States v. Stone, 866 F.3d 219, 227 (4th Cir. 2017). The reasonableness of a sentence is generally reviewed for abuse of discretion. *Id.*

The progression of the loss amount in this case.

Mooney pled guilty to making false statements to an accreditation agency. The first pre-sentence report (PSR) issued by the United States Probation Office in this case found no loss. (JA 300) The Government objected to the failure to find any loss amount and the district court issued an order on the matter prior to final sentencing.

At the first sentencing hearing, the Government argued two different bases for a loss amount. The first argument was that any person who used IAG only because of the accreditation was Mooney's victim and the amount paid for the adoption should be considered loss. (JA 166). At the same time, the Government argued any adoption conducted in Kazakhstan should be counted. (JA 166).

The Government argued for approximately $218,000 in losses based on the total amount paid for adoptions from Kazakhstan after 2008, when the Government claims Kazakhstan began demanding COA accreditation. (JA 167-168).[10] While it appears the Government had victim statements from

[10] Because the district court later overruled one of the Government's objections and did not allow enhancement of Mooney's sentence based on adoptions from Ethiopia, Appellant only discusses the Kazakhstan losses.

families who had adopted from Ethiopia, it did not present any similar materials from families who adopted from Kazakhstan. (JA 171).

Mooney responded by relying on the Addendum filed by the United States Probation Office, which did not find any relevant conduct to support loss. (JA 173-174) Essentially, the probation officer found there was no loss, because the offense of conviction did not result in any actual loss to the families adopting through Mooney's agency. (JA 308).

Two witnesses testified for the Government at the sentencing hearing. Stanley Svrlinga was presented as an expert forensic accountant. (JA 184). He simply explained that the Government's loss numbers were obtained from a Quickbooks file he had reviewed. Svrlinga summed up the total fees paid for all the adoptions listed in the Quickbooks file. His totals appear to have only related to Ethiopian adoptions. (JA 198).

On cross-examination, the defense pointed out problems with Svrlinga's calculations. He was unable to determine who actually made the payments for adoptions, because he did not look at actual cancelled checks. (JA 200) Svrlinga was also unable to determine whether there were any tax credits received by the family related to the adoptions. (JA 201)

There was also a victim who testified. (JA 208). Her adoption was from Ethiopia. Because of the district court's ultimate ruling on relevant conduct, her testimony is not relevant on appeal.

The district court rules on objections.

After the first sentencing hearing, the district court ruled on the objections argued at the hearing. In the order, the district court considered the Government's argument money paid to IAG by families adopting from Kazakhstan after 2008 and money paid to IAG by families adopting from Ethiopia in reliance in IAG's COA accreditation should be considered as the total loss amount for sentencing enhancement. (JA 217-218).

The district court found the Ethiopian adoptions were not relevant conduct and should be excluded from any loss calculations. (JA 218). The district court did find the Kazakhstan adoptions after 2008 were part of the "same course of conduct" as the statements made to COA. (JA 218-220).

New PSR, new loss amount.

After the judge's ruling, Mooney's advisory sentencing guidelines changed dramatically. Her new PSR found a loss amount of $193,646, which resulted in a 10-point enhancement of her offense level. (JA 324)

Importantly, the loss was not calculated from amounts wrongfully taken from the alleged victims, it was calculated from IAG's alleged gain. (JA

322) Specifically, the probation officer relied on U.S.S.G. § 2B1.1, Application Note 3(B), which allows the district court to "use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it cannot be determined."

No loss, no enhancement.

There was no loss in this case. The district court erred both factually and legally in assessing a loss.

Using gain as a proxy for loss is only appropriate in limited circumstances. This Court has recognized there are cases related to fraud or misstatements that do not involve any loss. *United States v. Chatterji*, 46 F.3d 1336 (4th Cir. 1995).

In *Chatterji*, a defendant fraudulently gained approval for a drug from the Food and Drug Administration (FDA). The defendant reprocessed and submitted doctored batches of a tested drug to avoid delay in the approval process. *Id.* at 1338-39. In the same case, Chatterji made a small change to a drug formula and concealed the change to comply with FDA standards. *Id.* at 1339.

The district court in *Chatterji* found the drugs were worthless to their purchasers and used the amount those purchasers paid as the loss amount. *Id.* at 1340. This Court disagreed, holding there was no measurable loss. *Id.*

at 1341. The critical question for loss calculation in *Chatterji* was whether the product sold was something other than what it claimed to be. *Id.*

Because the product was not anything other than what it claimed to be, this Court reversed the loss enhancement. Gain could not be used as an alternative basis for calculating loss when there was no actual, intended, or probable loss. *Id.* at 1342.

Mooney's case is almost identical to *Chatterji*. There was no formal requirement for Mooney or her agency to seek accreditation from the COA before Kazakhstan joined the Hague. Department of State records reflect Kazakhstan implemented the Hague in May of 2012. The district court even found Mooney never used the accreditation at issue in this case. (JA 148).

In other words, while the district court found that a false statement supported Mooney's plea, it did not find the false statement had any material effect on the adoptions. With no material effect on any adoption, there is no loss in this case. This Court was clear: "…gain is only an alternative measure of some actual, probable, or intended loss; it is not a proxy for loss when there is none." *Chatterji*, 46 F.3d at 1340.

The district court overruled Mooney's loss argument, relying on another case from this Court, *United States v. Marcus*. (JA 281). *Marcus* supports Mooney's argument. *United States v. Marcus*, 82 F.3d 606 (4th Cir.

1996). It neither modified nor overruled *Chatterji*; it simply clarified this Court's bright-line rule in losses resulting from regulatory violation cases.

The distinguishing factor between *Chatterji* and *Marcus* was the nature of the fraudulent act. In *Marcus*, the drug at issue was materially changed, requiring additional testing by the FDA. *Id.* at 610. In other words, the product was materially changed. In *Chatterji*, only the process was "manipulated."

While a false statement that has no effect on the final product results in no loss, a false statement related to an actual change to the final product creates a very different scenario. The difference is critical.

There was no support for a loss in this case. The only way to generate a loss is to identify a material problem with an adoption related to the false statements to which Mooney pled guilty. Absent that, her crime of conviction remains, as in *Chatterji*, related to the process and not the product. There was no loss in this case; no adoption was materially affected by Mooney's statements. In addition, there is no evidence any family thought they were entering a Hague Convention adoption process. Nor could there be.

A Hague adoption begins with an I-800 form from United States Citizenship and Immigration Services. A non-Hague adoption begins with an I-600 form. There was no way for potential clients to believe they were

entering the Hague adoption process instead of a non-Hague adoption, especially in light of the fact it does not appear Kazakhstan has ever allowed any Hague adoptions.

It was error to add a 10-point enhancement to Mooney's sentence for loss amount. The Government presented no evidence of a loss. There was no loss.

This issue is not barred by the appellate waiver.

There are sentencing claims that can be heard despite an appellate waiver; this is one of them. A party who waives her appellate rights does not subject herself to sentencing entirely at the whim of the district court. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). While the *Marin* Court was not concerned with guideline application and procedural rules, Mooney's sentence was far more whimsical.

The district court required no evidence from the Government to support its loss amount. The sentencing went far beyond procedural error; it was simply unsupported by anything. An appellate waiver cannot prevent review of this type of sentence. There is no way Mooney could have reasonably contemplated the sentencing procedure, or lack of procedure, used by the district court in this case and her sentence should be reviewed. *United States v. Blick*, 408 F.3d 162, 172 (4th Cir. 2005).

3. THE DISTRICT COURT'S RESTITUTION AWARD WAS ERROR, BECAUSE THERE WAS NO LOSS AND NO EVIDENCE IN SUPPORT OF A RESTITUTION AWARD.

Standard of Review: Restitution awards are reviewed for abuse of discretion. *United States v. Stone*, 866 F.3d 219, 224 (4th Cir. 2017). A district court abuses its discretion when it: (1) acts arbitrarily; (2) fails to consider judicially recognized constraints on its power; or (3) decides a matter based on incorrect factual or legal premises. *United States v. McTeague*, 840 F.3d 184, 189 (4th Cir. 2016).

The Government's restitution request.

Restitution is available in federal courts under two statutes: the Mandatory Victim Restitution Act ("MVRA") and the Victim Witness Protection Act ("VWPA"). The Government recognized the MVRA did not apply in this case, leaving the VWPA as the proper vehicle for any restitution award. (JA 228) The VWPA provides for restitution "in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3).

Mooney's plea agreement agreed to restitution, as long as the victims were "harmed by her scheme or pattern of criminal activity." (JA 50) The Government asked for $217,976 in restitution based on application fees, dossier fees, agency fees, and foreign fees charged to families who adopted

children from Kazakhstan. (JA 230) The Government argued that any money paid towards a Kazakhstan adoption was subject to repayment by Mooney to the family paying it.

Mooney objected to this request, arguing every family adopting from Kazakhstan received an adopted child. In other words, they got exactly what they intended to get and what they bargained for.

The sentencing hearing and the district court's restitution award.

The district court ordered restitution over Mooney's objection. It found property in a fraud case for restitution purposes was the value of the property the defendant stole, less any property returned to the victim, relying on this Court's opinion in *United States v. Richie*. (JA 282; *United States v. Ritchie*, 858 F.3d 201 (4th Cir. 2017)).

The district court's decision was based on the same premise its loss calculation was based on; that the adoptions in this case were somehow flawed. Because they were not, no restitution was appropriate.

The district court erred in failing to conduct the prima facie analysis of restitution under the VWPA.

The primary difference between the MVRA and the VWPA is the district court's discretion; the MVRA mandates restitution for certain federal crimes, but the VWPA merely authorizes them after an appropriate inquiry. *Ritchie*, 858 F.3d at 207.

Restitution is not an inherent power of the federal courts. It is only available pursuant to statutory authority. *United States v. Freeman*, 741 F.3d 426, 431 (4th Cir. 2014). It is unnecessary to determine which statute was used to order restitution in this case, as the VWPA was the only available source of authority for restitution. (JA 228)

Statutory authority is critical in considering restitution. A restitution order exceeding statutory authority is just as illegal as a prison sentence exceeding the statutory maximum. *United States v. Davis*, 714 F.3d 809, 812 (4th Cir. 2013).

Though an award of restitution is left in the discretion of the district court, that discretion is limited by the "procedural and substantive protections" of the restitution statute. *United States v. Leftwich*, 628 F.3d 665, 667 (4th Cir. 2010). The district court exceeded its authority in this case by failing to make appropriate findings on the record related to restitution.

Restitution awards under the VWPA require a court to consider the financial resources of a defendant, the financial needs and earning ability of a defendant and the defendant's dependents, and other factors the court deems appropriate. *Leftwich*, 628 F.3d at 668; 18 U.S.C. § 3663(a)(1)(B)(i)(II).

The district court must make a specific finding the defendant can comply with a restitution order without causing undue hardship. *United States v. Blake*, 81 F.3d 498, 505 (4th Cir. 1996). A remand is necessary when the district court fails to make these findings. *Id.* While a PSR with sufficient findings could serve as the necessary factual predicate under *Blake*, the PSR in this case would not have supported a restitution order. Mooney had little income and no assets. (JA 327) Based on her financial condition, a court could not order her to pay restitution under VWPA.

The district court ordered restitution to victims who were not victims.

Mooney's plea agreement does expand restitution beyond the limits of her crime of conviction, but not beyond the legal authority that governs restitution orders. The restitution clause in her plea agreement reads as follows:

> "The Defendant agrees to make full restitution under 18 U.S.C. § 3556 in an amount to be determined by the Court at the time of sentencing, which amount is not limited to the count(s) to which the Defendant pled guilty, but will include restitution to each and every identifiable victim who may have been harmed by her scheme or pattern of criminal activity, pursuant to 18 U.S.C. § 3663. The Defendant agrees to cooperate fully with the Government in identifying all victims."

(JA 50). The language is important, because it allows the Government to get around the limits in the plain language of the VWPA. It does not, however, change the facts of this case.

Similar to the argument on loss amount, there are simply no victims in this case. The district court's language is instructive on the errors in both this restitution order and the loss calculations for sentencing purposes. The district court plainly states the restitution loss is based on "the amount the defendant stole." (JA 282).

Mooney never stole any money from these alleged victims. Each person who adopted with her agency received a child in a legal and appropriate manner. The Government was forced to concede at an early hearing there was no information available that any adoption was flawed in any way. (JA 125-126; 144-145)

The defense pointed out at the final sentencing hearing there was simply no support for the idea that Hague accreditation was required for Kazakhstani adoptions before Kazakhstan joined the Hague. (JA 244) In fact, the district court itself recognized the Government's argument that an email between Mooney and a co-defendant suggested Hague accreditation would

be required after September 1, 2008.[11] (JA 243). Again, there was never a single piece of evidence presented by the Government to show that Kazakhstan was requiring Hague accreditation prior to joining the Convention.

It was the United States that joined the Hague in 2008. There is no question Kazakhstan became a member of the Hague after the United States. But all available information from the United States reveals it was not until several years later. None of the adoptions by Mooney required COA accreditation.

Because there was no evidence in the district court that Kazakhstan was requiring COA accreditation prior to the dates the Department of State recognizes, there can be no "victims" of a false statement related to the accreditation. The accreditation was not required.

The Government presented no evidence at sentencing that there was any family who felt mislead or would not have used Mooney for an international adoption if they had known about the accreditation issue. In fact, it appears no family responded to the Government's questionnaire

[11] The district court actually said "September 1, 2009" but the email was written in 2008.

about Kazakhstan adoptions. No family adopting from Kazakhstan requested restitution in this case. (JA 230)

The district court labelled families as victims who had lost no money, asked for no restitution, and never even communicated with the Government.[12] It was error to rule this people were victims and error to award them restitution.

This issue is not barred by the appellate waiver.

Appellate waivers do not apply to restitution orders in excess of the district court's statutory authority. *United States v. Broughton-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995). The district court's restitution order did not comply with the procedures of the VWPA, nor was it a proper exercise of the district court's discretion under that law.

V. CONCLUSION

For the reasons stated above, Appellant Mary Mooney respectfully requests this Honorable Court reverse the district court's denial of her motion to withdraw her guilty plea and remand the matter. In the alternative,

[12] The Government produced an e-mail from one person at sentencing who thought the international adoption may have been overly expensive. The defense included generally available information in its sentencing memo that IAG was charging a fee right in the middle of most international adoption agencies. In any event, there has never been an allegation Mooney's agency was overcharging anyone. (JA 256-257)

Appellant asks this Court to vacate her sentence and restitution order and remand with instructions to impose a sentence without loss enhancement and no award of restitution.

Respectfully submitted,

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Dated: January 11, 2018

/s/ Joshua S. Kendrick
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I hereby certify that on this 11th day of January, 2018, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 11th day of January, 2018, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court and a copy of the Sealed Volume of the Joint Appendix to be served, via UPS Ground Transportation, upon counsel for the Appellee, at the above address.

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