No. 01-30346

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

TONY ALLEN KENNARD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE UNITED STATES AS APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): PAGE

STATUTES:

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STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from a final judgment of the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered its final judgment and commitment order on September 21, 2001 (E.R. 128-133). Defendant filed a timely notice of appeal on September 25, 2001 (E.R. 141). This court has jurisdiction under 28 U.S.C. 1291. Defendant is in federal custody serving a 46- month sentence (E.R. 134). His projected release date is September 12, 2005 (Br. 4).

STATEMENT OF THE ISSUES

Whether defendant, who pleaded guilty and agreed not to appeal his sentence, can now seek a reduction in his sentence on the ground that his plea was not voluntary.

Whether the government's dismissal of charges against his wife rendered defendant's plea involuntary.

STATEMENT OF THE CASE

This appeal arises from defendant Tony Kennard's guilty plea to six counts of visa fraud in violation of 18 U.S.C. 1546(a) and two counts of transportation of minors for illegal purposes in violation of 18 U.S.C. 2423(a) (the Mann Act) (E.R. 20-21). In summary, Kennard, his wife Rachel, and two co-defendants were charged with bringing six young women from Russia to Alaska to dance nude in strip clubs while claiming in their visa applications that the young women were coming to perform native folk dances at cultural festivals (E.R. 2-17). Two of the young women were under 18 years of age. Kennard and his co-defendants pleaded guilty pursuant to separate plea agreements, and charges against Kennard's wife Rachel were dismissed (E.R. 20-21, 72, 124, 126). Pursuant to the plea agreement, the government dismissed thirteen counts of the indictment for conspiracy, kidnaping, and forced labor and recommended that Kennard be sentenced at the low end of the applicable range under the Sentencing Guidelines (E.R. 5-6). As part of his plea agreement, Kennard waived his right to appeal his conviction and sentence (E.R. 21-22).

Kennard received a sentence of 46 months imprisonment, the low end of the applicable range under the Sentencing Guidelines (E.R. 134, 139). Kennard appeals seeking to vacate his sentence and to be resentenced. He argues that the government's stated intention to dismiss the charges against his wife rendered his plea involuntary and invalidates his waiver of the right to appeal.

STATEMENT OF FACTS[1]

A. The Plan

In the fall of 2000, defendant Tony Allen Kennard and his wife Rachel Kennard, both residents of Chugiak, Alaska, began exchanging email with Pavel Agafonov, a naturalized United States citizen of Russian descent living outside Atlanta, Georgia. Agafonov operated a website which advertised "Russian brides" and tours of St. Petersburg with "adult content" (Br. 8).

In October, 2000, Kennard and Agafonov began an extensive email correspondence about their plan to bring young Russian women to Alaska to perform in strip clubs (E.R. 129). Agafonov contacted Victor Virchenko, an acquaintance who lived in Agafonov's home town in Russia, seeking his assistance in recruiting Russian women (PSR 3 ¶ 8). Virchenko is a dance instructor of some renown in his native country who led a well-regarded folk dance

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[1] These facts are drawn from the Presentence Investigation Report's factual descriptions, which were adopted by the district court (E.R. 131). Citations to the Presentence Report are denoted "PSR". Defendant does not identify the source of his "facts," which differ in some respects to those in this brief. Citations to the Excerpted Record are denoted "E.R." Citations to documents in the district court record are denoted "R."

troupe (E.R. 129; PSR 3 ¶ 8). To obtain the necessary visas, the three men agreed to claim the young women were coming to Alaska to perform Russian folk dances in cultural festivals (E.R. 31).

Kennard had discussions with at least two nude dancing clubs in Anchorage (PSR 4-5 ¶ 10, Br. 8). In November 2000, he reached an agreement for the young women to strip at the Crazy Horse Saloon and for the manager to give Kennard the young women's wages and the full amount of their tips (PSR 4-5 ¶ 10).

Virchenko recruited a group of young women and worked with Kennard and Agafonov to get the necessary visas from Russian and American authorities. At Kennard's request, Virchenko sent Agafonov professional photographs of the young women for their approval (E.R. 129). Kennard rejected some of the dark haired women, saying that Alaskan men preferred blondes and blondes would make them more money (E.R. 129). Kennard also insisted to Agafonov that once the dancers were in Alaska, they would answer to him and him alone (E.R. 129). The men ultimately agreed on a group of six young women. Two of the young women were under 18 (E.R. 31).

In Russia, Virchenko told the young women that in addition to performing folk dances, they might also dance in "exhibitions" which could include partial nudity. The young women expected these "exhibitions" to be comparable to the type of dancing done in a Las Vegas show (PSR 6 ¶ 12).

The scheme required an up-front expenditure of more than $2500 per dancer to cover airfare and Virchenko's $1000 fee. (PSR 5 ¶ 11, E.R. 129). Kennard and

Agafonov exchanged several emails about securing visas that would allow the young women to remain in Alaska long enough for the two men to recoup their investment (PSR 4 ¶ 9). Posing as the president of "KEC Inc. Productions," a non-existent corporation, Kennard solicited letters of invitation from the Chugiak Chamber of Commerce and the City of Anchorage. He later altered the Anchorage letter to list several events between December 2000 and January 2001, only one of which was real (Br. 8, PSR 4 ¶ 9). Kennard then submitted the altered Anchorage letter, along with a letter from KEC Inc. Productions listing a false itinerary of nine cultural events, to the United States Embassy in Moscow to support the young women's visa applications (Br. 8, PSR 4 ¶ 9). To make the trip appear less suspicious, Kennard and Virchenko included the names of several other individuals, male and female, on the visa application for the troupe and listed them variously as dancers and musicians (E.R. 95).

Virchenko sent Kennard and Agafonov a list of the troupe's members that included names, birth dates, and titles (E.R. 95, 98-99). The two minors were on this list (E.R. 99, E.R. 63). Kennard removed the column of birth dates from the list and sent it along with the false itinerary to the embassy to support the visa applications (E.R. 63, E.R. 98-99). In mid December, the authorities granted the visas (PSR 4 ¶ 9).

B. The Young Women Arrive In Alaska

On December 20, Virchenko and seven young women flew from Russia to Anchorage (PSR 5 ¶ 11). One of the young women was a friend of Virchenko's;

the other six were the dancers slated to perform in the strip club. Two of the young women dancers were under 18. None spoke English (PSR 5 ¶ 11). Virchenko took the passports, visas, and return plane tickets to Russia from all but one of the young women, who declined to hand over her documents (PSR 5 ¶ 11). These documents were ultimately stored in the Kennard's home (PSR 5 ¶ 11). Kennard and his wife took the young women to their home outside Anchorage (PSR 5 ¶ 11). All of the young women slept together in one room with mattresses on the floor (PSR 5 ¶ 11).

A few days later, Kennard, Rachel Kennard, and Virchenko took the young women to the Crazy Horse Saloon (PSR 5 ¶ 11). Virchenko told the young women they would be dancing nude at the club. The conditions at the Crazy Horse, and the requirement that the young women perform individual and lap dances for customers, were quite different from the "exhibition" Las Vegas-type revue they had expected (PSR 5-6 ¶¶ 11-12). When some of the young women objected, Virchenko became upset and verbally abusive (PSR 5 ¶ 11). He told them they could not return home until they earned enough money dancing to pay for their tickets and other expenses (PSR 5 ¶ 11). The young women had no way to earn such a large sum in Russia, and were barred from working in the United States by the terms of their visas. Within a few days, the young women submitted and began to dance at the Crazy Horse, first topless and eventually fully nude (PSR 5 ¶ 11).

Kennard, Rachel Kennard, and Virchenko kept a close eye on the young women. They were not allowed to speak to customers, especially Russian speaking customers. Their telephone calls were monitored, and they were escorted by

Virchenko or Kennard wherever they needed to go (PSR 5 ¶ 11). Rachel Kennard provided the women with costumes for stripping and kept the accounts of wages and tips (PSR 5 ¶ 11).

C. *The Indictment & Guilty Pleas*

On January 18, 2001, Kennard, Virchenko, and Agafonov were indicted for visa fraud in violation of 18 U.S.C. 1546(a) and conspiracy to commit visa fraud (PSR ¶ 2). On February 22, the grand jury returned a superseding indictment charging the three men and Rachel Kennard. Each of the three men was charged with one count of conspiracy in violation of 18 U.S.C. 371, six counts of visa fraud, six counts of kidnaping in violation of 18 U.S.C. 1201 & 2, two counts of transporting minors for immoral purposes in violation of 18 U.S.C. 2423(a) & 2, and six counts of forced labor in violation of 18 U.S.C. 1589 & 2. Virchenko was charged with an additional two counts of witness intimidation in violation of 18 U.S.C. 1512(b)(3). Rachel Kennard was charged with conspiracy and six counts of forced labor (E.R. 1-17). On May 2, the court denied a motion to dismiss the superseding indictment (R. 246).

On June 13, Agafonov and Virchenko pleaded guilty to all six counts of visa fraud and one count of violating the Mann Act (E.R. 124, 126). Their plea agreements set out specific sentences of 18 and 30 months, respectively.

Kennard pleaded guilty to six counts of visa fraud and two counts of violating the Mann Act (E.R. 20-21). He expressly waived his right to appeal his conviction and his right to appeal his sentence, but preserved the right to attack his

plea on grounds that it was involuntary or that he received ineffective assistance of counsel (E.R. 21-22, 34). In return, the government agreed to drop the conspiracy, kidnaping, and forced labor counts (E.R. 22). Kennard's agreement did not provide for a specific sentence, but the government estimated a sentence of 46 to 57 months (E.R. 26-28) and agreed to recommend the low end of the applicable guideline range determined by the court (E.R. 23).

Kennard's plea agreement stated that "the intention of the government to dismiss as to Rachel Kennard is independent of this plea agreement" and that it had agreed independently of the agreement not to oppose Kennard's request to modify the conditions of his release so that he could have unsupervised visits with his wife while he awaited sentencing (E.R. 23-24, ¶ E). After Kennard signed his plea agreement, the government moved to dismiss the charges against Rachel Kennard (E.R. 71-72).

At the Rule 11 hearing on Kennard's plea, the district court specifically questioned Kennard and his counsel about the dismissal of charges against Rachel Kennard (E.R. 55-57). The court told him that "the important thing, Mr. Kennard, is that you shouldn't plead to something where you're innocent, simply because the Government is going to dismiss charges against your wife." (E.R. 56). The district court also spent a significant amount of time discussing the Mann Act charges with Kennard and his counsel (E.R. 51-65). The court noted Kennard's continued insistence that he had not known that two of the dancers were minors before they came into the country, and stated that whether the government would have

succeeded in proving he had such knowledge in order to convict him of the Mann Act charges was "an open question" presenting a risk to both sides were the case to go to trial (E.R. 65). After this colloquy, the court found that Kennard's plea was knowing and voluntary (E.R. 65). Kennard was sentenced to a term of 46 months, the low end of the applicable guideline range (E.R. 134, 139).

SUMMARY OF THE ARGUMENT

Kennard attempts to cast this appeal as a challenge to the voluntariness of his plea, but it is really just an attempt to have his sentence reduced. When a defendant challenges a guilty plea on the ground that it was not voluntarily made, he seeks to vacate or withdraw the guilty plea. If successful, both the defendant and the government are released from the terms of the agreement. Here, Kennard seeks to free himself from part of the agreement – waiving appeal of his sentence – while holding the government to its part of the bargain. In exchange for the government's agreement not to prosecute him on thirteen other counts of conspiracy, kidnaping, and forced labor and to recommend a sentence at the low end of the Guidelines range, Kennard agreed not to appeal his sentence. Now, having derived benefit from the plea agreement, Kennard asks this Court to rewrite the plea agreement to reduce his sentence. This Court should not entertain that request.

If this Court considers Kennard's argument that his plea was not voluntary, it should find that his plea was voluntary. Although he does not claim to be innocent of the charges against him, Kennard alleges that the government "forced" him to

plead guilty as a condition of dismissing the charges against his wife. As stated in the plea agreement, which he signed, the dismissal of charges against Rachel Kennard was not promised to Kennard in return for his plea.

But, even assuming, for the purposes of argument, that dismissing her charges was conditioned on Kennard's guilty plea, that would not render his plea involuntary. A promise during plea negotiations to dismiss charges against a third party is not impermissible *per se*, but is a factor that must be given careful consideration when reviewing the circumstances surrounding the plea. The district court fulfilled this requirement. At Kennard's change of plea hearing, the court had notice of the government's intention to dismiss his wife's charges, and specifically considered the impact of that dismissal in making its voluntariness determination. The court questioned Kennard and his counsel at length regarding the dismissal and the other factors influencing his plea, and correctly concluded the plea was voluntary. The district court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews *de novo* waiver of the statutory right to appeal. *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). Whether a guilty plea was voluntary is a question of law reviewed *de novo*. The district court's findings are reviewed for clear error. *United States* v. *Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001), petition for cert. filed, 01-7251.

I

KENNARD CANNOT USE A VOLUNTARINESS CHALLENGE TO REWRITE THE TERMS OF HIS PLEA AGREEMENT AND REDUCE HIS SENTENCE

A negotiated plea bargain is a "bargained-for quid pro quo" subject to contract-law standards. *United States* v. *Sandoval-Lopez*, 122 F.3d 797, 800 (9th Cir. 1997). A plea agreement found to be involuntary becomes void or voidable and the proper remedy is to vacate or withdraw the guilty plea and reinstate the dismissed charges. See *id.* at 802; cf. *United States* v. *Barron*, 172 F.3d 1153, 1160 (9th Cir. 1999) (en banc) (distinguishing a collateral challenge to a sentence under 18 U.S.C. 2255 from a challenge to the plea agreement itself). In such cases, neither party retains the benefits or obligations of the bargain.

In consideration for the government's promise to drop the conspiracy, kidnaping, and forced labor charges, and to recommend a sentence at the low end of the Guidelines range, Kennard agreed not to appeal his sentence or his conviction. The conspiracy, kidnaping, and forced labor counts of the indictment were dismissed, the government recommended a sentence at the low end of the range, and Kennard was sentenced at the low end. Having received those benefits of the plea agreement, Kennard now seeks to avoid his part of the bargain. He asks this Court to reduce his sentence while holding the government to its dismissal of the other charges and its recommendation that he receive the lowest sentence in the Guidelines range. This Court cannot grant his one-sided request. Cf. *United States*

v. *Gerard*, 491 F.2d 1300, 1305-1306 (9th Cir. 1974) (prohibition against vindictive prosecution or sentencing should not be broadly applied so as to lock the government into its side of the bargain when the defendant succeeds in withdrawing from his).

II

KENNARD'S PLEA WAS VOLUNTARY

If this Court reaches Kennard's challenge to his plea, the record is sufficient to determine his plea was voluntary. Kennard claims that his appeal waiver is invalid because he was "forced" to accept the plea agreement by the government's promise to dismiss the charges against his wife (Br. at 11-13). This Court has held that it may address a challenge to a plea raised for the first time on appeal if the issues are purely legal and the facts are fully developed on the record. *United States* v. *Hernandez*, 203 F.3d 614, 619 (9th Cir. 2000); *United States* v. *Anderson*, 993 F.2d 1435, 1437 (9th Cir. 1993); *United States* v. *Bruce*, 976 F.2d 552, 554-555 (9th Cir. 1992). An express waiver in a negotiated plea of guilty is valid if knowingly and voluntarily made. *United States* v. *Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991). A guilty plea is involuntary if it is obtained "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). In considering the issue of voluntariness, a reviewing court must examine the totality of the circumstances surrounding the plea. *United States* v. *Anderson*, 993 F.2d 1435, 1437 (9th Cir. 1993). The district court's findings are reviewed for clear error.

United States v. *Kaczynski*, 239 F.3d at 1114.

Kennard asserts that the United States' dismissal of the charges against his wife was conditioned on his agreement to plead guilty and waive appeal (Br. 11-12). The United States maintains that, as expressly stated in the plea agreement, the decision to dismiss the charges against Rachel Kennard was independent of Kennard's plea and was not provided as consideration (E.R. 23 ¶ E).[2] This understanding was confirmed by Kennard's counsel at sentencing (E.R. 56). However, it is not necessary for this Court to resolve this dispute. The district court considered Kennard's statements regarding dismissal of the charges against his wife and concluded that he had acted voluntarily.[3]

Kennard wrongly suggests that merely including a promise to dismiss charges against his wife would have been sufficient to make his plea involuntary. This Court has held that a prosecutor's threat or promise regarding a third party

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[2] Kennard acknowledges, as he must, that the plea agreement states that dismissing the charges against Rachel Kennard is not predicated on the acceptance of his plea. Notwithstanding, he argues that the timing of the dismissal, which occurred after Kennard signed the agreement, suggests it was intended as part of the bargain (Br. 13).

[3] Kennard also alleges his wife's indictment was improper because her "only acts in furtherance of the enterprise [were] to assist in feeding, boarding and transporting the dancers while in Anchorage, and there is no evidence that she was aware of any illegal activity in bringing the dancers to Alaska." (Br. 11). This claim is easily dismissed. Knowledge of the actions taken to bring the young women into the country is not an element of the forced labor counts. 18 U.S.C. 1589. Rachel Kennard was not charged with kidnaping or visa fraud, counts for which such knowledge would have been an element. In addition, she was charged with conspiracy, and if convicted would have been responsible for the acts of her co-conspirators. See *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946).

during plea negotiations is not coercive *per se*. See *United States* v. *Caro*, 997 F.2d 657, 659 (9th Cir. 1993) (package deal plea agreements not *per se* impermissible); *Johnson* v. *Wilson*, 371 F.2d 911, 912 (9th Cir. 1967); *United States* v. *Cortez*, 337 F.2d 699, 701 (9th Cir. 1964), cert. denied, 381 U.S. 953 (1965). This Court has upheld plea agreements following claims that the government's promise to charge or dismiss charges against another party coerced the guilty plea when the court specifically inquired about the third party promise and considered this factor in determining that the plea was voluntary. *Cortez*, 337 F.2d 699 (affirming plea where court specifically examined defendant on his claim government required his plea to drug charges as a condition of allowing his pregnant wife to plead to a lesser tax charge and was aware of dismissal); *United States* v. *Castello*, 724 F.2d 813, 814-815 (9th Cir.) (court did not abuse its discretion in denying motion to withdraw plea where defendant claimed government's threat to charge co-defendant as a "special dangerous offender" exposing him to sentence of 150 years if all defendants did not accept a package plea forced her to plead guilty to a crime she did not commit; court was aware of package deal and conducted a "particularly searching inquiry" at the Rule 11 hearing), cert. denied, 467 U.S. 1254 (1984).

This Court has held that "the trial court should make a more careful examination of the voluntariness of a plea when it is induced by such threats or promises." *Castello*, 724 F.2d at 815. This specific examination addresses the concern that pleas involving "adverse or lenient treatment for some person *other*

than the accused . . . might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n. 8 (1978).

Here, the district court thoroughly examined Kennard and his counsel on the effect of the government's intention to dismiss charges against Rachel Kennard, and was satisfied that his plea was voluntary. There is no reason for this Court to disturb those findings.

Kennard's agreement called for him to plead guilty to six counts of visa fraud and two counts of violating the Mann Act (E.R. 20-21 ¶ A). In return, the government agreed to dismiss the remaining thirteen counts – one count of conspiracy, six counts of kidnaping, and six counts of forced labor (E.R. 22 ¶ A). The maximum penalties for kidnaping and forced labor were life in prison and a $250,000 fine, while the penalty for conspiracy was 5 years and a $250,000 fine (E.R. 24-25 ¶ A). The United States also agreed to recommend a sentence at the low end of the guideline range set by the court, and to acknowledge that Kennard did not and would not have the ability to pay a fine (E.R. 23 ¶¶ C & D). He received a sentence of 46 months, the low end of the guideline range the government estimated – exactly what he bargained for (E.R. 28).

The first mention of the United States intention' to dismiss the charges against Rachel Kennard occurred midway through Kennard's Rule 11 hearing, after the court examined Kennard's competence, satisfaction with his counsel, understanding of the estimated sentence guideline calculations, and the factual

basis for his plea.

Court: Okay. Did anyone try to force you to plead in this case, Mr. Kennard? (Pause) Use any force or violence against you of any kind?

Kennard: Well, other than – well, other than my wife bein' released, but I guess that didn't count.

Court: Well, it could. Let's deal with that for . . .

Kennard: And, also, – I'm sorry to interrupt you, sir. But, also, I – I don't mean to be saying anything I shouldn't, here, so . . .

Court: Well, you're not saying anything you shouldn't. You – the whole purpose of these proceedings is to make sure that all the cards are on the table, and that every consideration that is motivating somebody is disclosed. And . . .
* * *

Court: Okay. Did – before we say anything else though. Did anybody try to force you, in the sense of, use violence against you, a close friend or a relative?

Kennard: No, sir. No, sir.

Court: All right. Did anyone make any promise to you that is not contained in the plea agreement?

Kennard: No. They said they would let my wife go, sir.

Court: Okay. Now, what about that?

(E.R. 54-56). Kennard's counsel then informed the court that the plea agreement stated that "the Government, through a separate intention, is dismissing the case against Rachel Kennard," and that the United States had already filed a motion to dismiss (E.R. 56).

Counsel next stated that he would be moving for a change in the conditions of release to allow Kennard to be with his wife. Following their arrests, Kennard and his wife were released to separate third party custodians. As co-defendants, they were allowed to contact each other only in the presence of their custodians and attorneys (E.R. 67). Counsel noted that the separation of the Kennards from each other and from their two-year-old son had been a lot of pressure on Kennard, and that this was the pressure to which Kennard had referred when asked about force (E.R. 56).

The court continued:

Court: Very well. The important thing, Mr. Kennard, is that you shouldn't plead to something where you're innocent, simply because the Government is going to dismiss the charges against your wife. Are you satisfied in your own mind that you are guilty of these charges?

Kennard: Well, sir, there's things about the Mann Act that I don't feel that way, but I want to – I want to do this for . . .

Court: What is it about Mann Act that – other than the knowledge about the girls' age at the time they came over, is there anything else you feel is untrue or. . .

Kennard: Well, sir, the way it was explained to me, which I can understand, you know, was, my attorney told me, it was kinda like – I guess, like statutory rape. That if you didn't know, it really didn't make any difference, and you were guilty. And I understand that. But I just – when I – when I read that, and I'm not an attorney, you know – but when I read through the statutes of what it says, it just – it paints you out to be a pretty bad kinda guy, and even back then, and I didn't think I was that bad of a guy. But, like I said, I agreed to this, and I – I want my wife off, and this is okay.

(E.R. 56-57).

Counsel for both sides and the court then discussed at length whether knowledge that the two young women were under 18 was an element that the government would have to prove to convict Kennard under the Mann Act (E.R. 57-62). The court noted its view that "the law has been all over the ballpark on that issue, as to whether a reasonable mistake of fact regarding a person's age would be a defense" (E.R. 51-52), while the United States maintained that this Court's decision in *United States* v. *Taylor*, 239 F.2d 994 (9th Cir. 2001), was controlling and held that ignorance of the victim's age was not a defense (E.R. 57-61). The court then addressed Kennard's counsel, stating

> [t]hose are the boundaries of the problem. And, of course, no one can guarantee how this would turn out, if it went all the way to the appellate court. Are you satisfied that you had a chance to discuss the whole thing with Mr. Kennard, and he understands how this applies to him in the context of this case, and the facts that you know, and I don't know, that would probably come out at trial?

(E.R. 62). Counsel replied "Yes, I am." (E.R. 62)

Counsel acknowledged the evidentiary hurdles facing Kennard were he to proceed to trial. He did not dispute that the underage girls had danced at the Crazy Horse, sometimes nude. He also noted that the email in which Kennard deleted the column of ages from the table of troupe members provided a factual basis for arguing that he did know the girls' ages (E.R. 63).

Counsel then explained that Kennard had reached his decision "in light of that mix," and in the context of a plea agreement that dismissed conspiracy, forced labor, and kidnaping while allowing him to admit what he did and ask for mercy

(E.R. 63-64). Given all of those considerations, counsel concluded, Kennard "would like to enter a plea of guilty to this charge, even though he has philosophical problems with way the law is seemingly written" (E.R. 64). The court asked Kennard, "Is that the position that you take, what Mr. Bernitz just indicated, Mr. Kennard? *** [T]hat it's an open question what a jury would find if the case went to trial, as to whether you did or didn't know, what they were?" (E.R. 64-65). Kennard answered "Oh, yes, sir. Yes, sir. Yes, your Honor." (E.R. 65).

The court then made its findings. The court found that Kennard was competent, that he received effective assistance of counsel, and that he understood the charges against him and was able to assist in his defense (E.R. 65). The court also found that Kennard understood his legal rights and knowingly, intelligently, and voluntarily waived them, and that the plea was a knowing, intelligent, and voluntary plea (E.R. 65). The court went on to say that

> I think there is a question as to how *Taylor* applies to this case. I think the parties are aware of that. They are aware of the pros and cons and the benefits and the detriments of entering into a plea agreement and resolving this case on the counts to which Mr. Kennard is pleading, rather than roll the dice and go to trial on all counts. And with that in mind, I think the plea is knowing, intelligent and voluntary.

(E.R. 65-66).

In summary, the court considered the totality of the circumstances, giving specific consideration to the impact of the government's intention to dismiss the charges against Rachel Kennard. The court also considered the other significant

influences on Kennard's decision: the government's agreement to dismiss the charges for conspiracy, forced labor, and kidnaping; Kennard's continued claim that he was not aware the girls were underage before they came to the United States weighed against the contrary evidence; the question of whether lack of knowledge was a defense to the Mann Act charges; and the advice Kennard received from his counsel on all of these matters. Nothing in the record suggests that Kennard was so influenced by the hope that charges would be dismissed against his wife that he "did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Cf. Brady* at 750. Like the defendant in *Brady*, "he had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage." *Id*. at 754. Thus, even if the court found that dismissing charges against his wife was some part of the motivation for his plea, the plea is voluntary considering the totality of the circumstances.

Kennard's plea agreement expressly waived his right to appeal his sentence. Because the plea was voluntary, that waiver is valid and bars consideration of his sentencing claims.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any other related case pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2002, two copies of the foregoing Brief For The United States As Appellee were served by first-class mail, postage prepaid, to the following counsel of record:

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