Nos. 00-10131, 00-10133, 00-10134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SOON OH KWON, MO YOUNG KWON, AND YING YU MENG,

Defendants-Appellants.

---

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN MARIANA ISLANDS

---

# BRIEF FOR THE UNITED STATES AS APPELLEE

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**TABLE OF CONTENTS**

**PAGE**

**TABLE OF CONTENTS (continued)** **PAGE**



## TABLE OF AUTHORITIES

**CASES:**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**



**STATUTES**:

**STATUTES:** **PAGE**



**RULES:**



**SENTENCING GUIDELINES:**

**SENTENCING GUIDELINES (continued):** **PAGE**

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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## STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from a final judgment by the district court in a criminal case. The district court had jurisdiction under 48 U.S.C. 1822(a) and 18 U.S.C. 3231. Defendants Soon Oh Kwon, Mo Young Kwon, and Ying Yu Meng were sentenced on February 18, 2000, and the district court entered final judgments and commitment orders on February 22, 2000 (R. 166, 168, 170/SOK ER 22; MYK ER 29; YYM ER 97).[1] Soon Oh Kwon and Ying Yu Meng filed a timely Notice Of

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[1] "R. __" refers to the entries on the district court docket sheet. "ER __"
(continued...)

Appeal on February 28, 2000 (YYM ER 104). Mo Young Kwon filed a timely Notice Of Appeal on February 23, 2000 (ER 36). This Court has jurisdiction pursuant to 28 U.S.C. 1291. All three defendants are incarcerated.

## STATEMENT OF THE ISSUE

Whether each defendant's waiver of the right to appeal his or her sentence bars this Court's review of the merits of their respective appeals.

## STATEMENT OF THE CASE

1. On November 20, 1998, a federal grand jury indicted defendants Soon Oh Kwon; Mo Young Kwon, his son; and Ying Yu Meng, his wife, on 29 counts alleging violations of 18 U.S.C. 241 (Conspiracy Against Rights), 371 (Conspiracy to Violate Laws), 894 (Extortionate Collection of an Extension of Credit), 1584 (Involuntary Servitude), and 2421 (Transportation for Illegal Sexual Activity). A motion to dismiss and join counts, and for substitution of a revised indictment was

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[1](...continued)
refers to the page of each appellants' Excerpts of the Record. "SER __" refers to the page of the United States' Supplemental Excerpts of the Record. "Br. __" refers to appellant's opening brief. "PA Par. __" refers to the paragraph of the respective Plea Agreement. "P. Tr. __" refers to the page of the transcript of the defendant's change of plea hearing. "S. Tr. __" refers to the page of the transcript of the sentencing hearing held February 18, 2000. Where not clear from the context, the initials for each appellant are included to distinguish the transcripts or Plea Agreements. Where appropriate, joint citations are made to the pleadings or transcripts and ER or SER, separated by a front-slash (/).

filed on June 30, 1999, and was granted on July 7, 1999 (R. 60, 67). A motion to substitute a second revised indictment was filed on September 21, 1999, and granted on September 22, 1999 (R.82, 83/MYK ER 1-5). In summary, the second revised indictment charged the defendants with luring women from China to the Commonwealth of the Northern Mariana Islands with promises of employment, but instead holding women in servitude and forcing them to work as prostitutes (MYK ER 6-16).

2. After extensive negotiations and the execution of separate plea agreements, all three defendants pled guilty on October 5, 1999. Soon Oh Kwon pled guilty to Count 1 of the original indictment, conspiracy to violate rights in violation of 18 U.S.C. 241 (PA Par. 1/ER 12-13). Mo Young Kwon pled guilty to Count 21 of the second revised indictment, interstate transportation and aiding and abetting the transport of Ms. JXR from China to Saipan, Northern Mariana Islands, for illegal sexual activity in violation of 18 U.S.C. 2 and 2421 (PA Par. 1/ER 17-18). Ying Yu Meng pled guilty to Count 1 of the second revised indictment, conspiracy to violate laws of the United States, 18 U.S.C. 371, that prohibit involuntary servitude, collection of extensions of credit by extortionate means, and

transportation for immoral purposes, 18 U.S.C. 1584, 894, and 2421, respectively (PA Par. 1/ ER 17-18).

While various provisions of the Plea Agreements differ, they are identical with respect to three key provisions: (1) the joint recommendation by each defendant and the United States that the district court should apply the vulnerable victim enhancement of the U.S. Sentencing Commission, *Guidelines Manual* (U.S.S.G. or Guideline) 3A1.1; (2) the defendants' waiver of rights on appeal; and (3) the defendants' affirmation of his or her understanding of rights and the waiver of those rights by voluntarily executing the Plea Agreement. All three Plea Agreements specifically state:

> Sentencing Guideline Recommendations
>
> The United States and the defendant agree that, although not binding on the probation office or the court, they will jointly recommend that the court make the following findings and conclusions as to the sentence to be imposed:
>
> * * *
>
> Vulnerability of Victims: That the defendant should receive a two-level increase for the vulnerability of the victims, pursuant to Section 3A1.1 of the Sentencing Guidelines.

(SOK PA Par. 4c/ER 15; MYK PA Par. 4d/ER 21; YYM PA Par. 4c/ER 21).[2]

With respect to the waiver of rights on appeal, the three Agreements state:

> Waiver of Appeal and Rights of Action
>
> The defendant is aware that Title 18, United State [sic] Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Title 18, United States Code, Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which that sentence was determined, unless (1) the sentence exceeds the maximum permitted by statute, (2) the sentence is the result of an upward departure from the guideline range the court establishes at sentencing, and/or (3) the court decides not to follow one or more of the sentencing guidelines recommendations made pursuant to paragraph Four (4) above. * * * The defendant understands that, although the defendant will be sentenced in conformity with the Sentencing Guidelines, by this agreement the defendant waives the right to appeal the sentence on the basis that the sentence is the result of an incorrect application of the Sentencing Guidelines, if the court has sentenced in accordance with Paragraph 4, above [Sentencing Guideline recommendations]. * * *

(SOK PA Par. 10/ER 19; MYK PA Par. 10/ER 24; YYM PA Par. 10/ER 24).[3]

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[2] The term "victim" is plural in the Plea Agreements for Soon Oh Kwon and Ying Yu Meng, and singular in the Plea Agreement for Mo Young Kwon.

[3] The term "guideline" in the phrase following "(3)," and the last phrase of the last quoted sentence, "if the Court has sentenced in accordance with Paragraph 4, above," is only included in Mo Young Kwon's Plea Agreement, and not in the other two defendants' Agreements. This text does not materially change the meaning of this waiver.

3. On October 5, 1999, the district court held hearings pursuant to Fed. R. Crim. P. 11. The district court engaged in an extensive colloquy with each defendant regarding, among other things, his or her mental competence; the voluntariness of his or her plea; his or her understanding of the Agreement's terms; the potential maximum sentence; his or her constitutional rights and waiver of those rights; and the extent of his or her criminal conduct (SOK P. Tr. 3-19/SER 3-19; MYK P. Tr. 3-32/SER 31-60; YYM P. Tr. 3-17/ER 29-43). The district court accepted each defendants' plea as voluntary, knowing, and intelligent (SOK P. Tr. 19/SER 19; MYK P. Tr. 31/SER 59; YYM P. Tr. 17/ER 43).

4. The defendants were sentenced on February 18, 2000, and judgments were entered on February 22, 2000 (R. 166, 168, 170/SOK ER 22; MYK ER 29; YYM ER 97).[4] Each defendant's total offense level included an enhancement for vulnerable victim status. The Presentence Report for each defendant summarily addressed the victim's economic dependence on the defendants. All ten victims

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[4] Sentencing was delayed because on January 20, 2000, the defendants collectively filed a Motion To Withdraw Pleas And Withdraw Counsel. On January 27, 2000, the district court held a hearing and denied the motion from the bench, concluding that defendants had not presented a "fair and just reason" to warrant withdrawal of their guilty pleas as required by Fed. R. Crim. P. 32(e). No defendant has challenged the district court's denial of the withdrawal of the guilty plea on appeal.

submitted letters to the district court that addressed, among other things, their limited means in China before coming to the Mariana Islands and their cultural isolation in Saipan. At the conclusion of sentencing, the district court informed each defendant that he or she had the right to appeal, and that this notice must be filed within 10 days.

Soon Oh Kwon was sentenced to 108 months of imprisonment and, if not deported, three years of supervised release (S. Tr. 127/ER 64). Mo Young Kwon was sentenced to 30 months of imprisonment and, if not deported, three years of supervised release (S. Tr. 158-159/ER 58-59). Ying Yu Meng was sentenced to 57 months of imprisonment and, if not deported, three years of supervised release (S. Tr. 198-199/ER 92-93). Soon Oh Kwon and Ying Yu Meng filed a Notice Of Appeal on February 28, 2000. Mo Young Kwon filed a Notice Of Appeal on February 23, 2000.

6. By Order dated April 20, 2001, in response to an unopposed motion by the United States, this Court consolidated these three cases for briefing.[5]

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[5] Briefing had been delayed repeatedly because defendants' original counsel on appeal failed to file a brief on their behalf, despite several orders of this Court. In addition, between November 2000, and April 2001, each defendant sought new, court-appointed counsel. Other motions filed by the defendants after the April 2001 Order further delayed briefing.

## STATEMENT OF THE FACTS

Soon Oh Kwon was president of Kwon Enterprises, Inc., which owned and operated several businesses, including K's Hideaway Karaoke, a bar and club, in Saipan, Commonwealth of the Northern Mariana Islands (SOK PA Par. 3a/ER 13). His son, Mo Young Kwon, was an officer of Kwon Enterprises who worked at the karaoke club from 1996 - January, 1998 (SOK PA Par. 3a/ER 13-14; MYK PA Par. 3a-3b/ER 18-19). Soon Oh Kwon's wife, Ying Yu Meng, worked in another Kwon establishment, the Highway Restaurant, and she had general oversight over the women employed by Kwon Enterprises (SOK PA Par. 3a/ER 14; YYM PA Par. 3a/ER 19).

In 1996 and 1997, Kwon Enterprises, in collaboration with Meng's mother, Cheng Zhi Guo, recruited women from China with promises of employment and brought them to Saipan to work at Kwon Enterprises at the karaoke club as prostitutes (SOK PA Par. 3b-3c/ER 14; MYK PA Par. 3b-3c/ER 19; YYM PA Par. 3b-3c/ER 19). Guo was living in China (YYM PA Par. 3c/ER 19). The defendants were fully aware that the women brought to Saipan from China were to be used as prostitutes at the karaoke club (SOK PA 3b-3c/ER 14; MYK PA Par. 3b, 3d/ER 19; YYM PA Par. 3b-3c/ER 19). Meng communicated with her mother to facilitate the

victim's transportation to Saipan (YYM PA Par. 3b-3c/ER 19). Mo Young Kwon assisted in the transport of a 25 year old Chinese woman, JXR, by meeting her at Saipan International Airport and bringing her to an apartment in Saipan where the women who worked at the karaoke club were required to live (MYK PA Par. 3d/ER 19).

Once in Saipan, the women were employed as "bar girls" and forced to sit with customers at the karaoke club and entertain them (SOK PA Par. 3c/ER 14; MYK PA Par. 3c/ER 19). At various times, these women were required to submit to touching of a sexual nature by the club's customers and engage in prostitution (SOK PA Par. 3c/ER 14; MYK PA Par. 3c/ER 19; YYM PA Par. 3c/ER 19). Mo Young Kwon made arrangements for the customers to receive sexual favors from the women and ordered the women to go with the customers (MYK PA Par. 3c/ER 19). Some customers paid Mo Young Kwon for the sexual services performed by the women, including JXR (SOK PA Par. 3c/ER 14; MYK PA Par. 3c, 3e/ER 19; YYM PA Par. 3c/ER 19).

These women incurred substantial debt to Cheng Zhi Guo and the Kwon family for the cost of traveling from China to Saipan, and this debt was to be paid over time while working for Kwon Enterprises (SOK PA Par. 3d/ER 14; YYM Par.

3b/ER 19). It was understood among the defendants that the women were not allowed to stop working for Kwon Enterprises until they paid their debt (SOK PA Par. 3d/ER 14; YYM PA Par. 3d/ER 19 ).

In addition, the women were verbally and physically threatened not to leave Kwon's employ without permission, or to report the conditions of their employment to the Commonwealth of the Northern Mariana Islands Department of Labor and Immigration (SOK PA Par. 3d-3e/ER 14-15; MYK PA Par. 3e-3f/ER 19-20; YYM PA Par. 3d/ER 19-20). For example, the women were verbally threatened that local Chamorro people would physically abuse them, or that they would be sent back to China and their family members and Chinese authorities would be told that they worked as prostitutes in Saipan (SOK PA Par. 3d/ER 14; YYM PA Par. 3d/ER 19-20). When JXR refused to go with a customer, Mo Young Kwon threatened that his step-mother would inform her family in China that she was a prostitute (MYK PA Par. 3e/ER 19-20). On one occasion, after becoming angry that three women left his employment without permission, Soon Oh Kwon displayed a starter pistol as a warning to the women who remained that they should not leave (SOK PA Par. 3e/ER 14-15). The pistol was a non-operative, semi-automatic that fired blanks (SOK PA Par. 3e/ER 14). In sum, the three

defendants used coercion and threats of coercion to prevent the women, forced to work as prostitutes, from leaving their employment without permission (SOK PA Par. 3c-3e/ER 14-15; MYK PA Par. 3e-3f/ER 19-20; YYM PA Par. 3d/ER 19-20).

## SUMMARY OF ARGUMENT

The defendants assert that this Court's opinion in *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), which was issued post-sentence and reviewed the evidence supporting a vulnerable victim enhancement for a conviction of violating the Mann Act, 18 U.S.C. 2421, mandates the elimination of the vulnerable victim enhancement included in each sentence. This Court should dismiss these appeals because each defendant recommended that the vulnerable victim enhancement be applied to the sentence, and each defendant executed a valid waiver of the right to appeal his or her sentence. These waivers encompass any claim that *Castaneda* inures to their benefit. See *United States* v. *Johnson*, 67 F.3d 200 (9th Cir. 1995); *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992). A valid waiver encompasses claims that a defendant did not fully appreciate or realize at the time of waiver, including issues that arise post-plea. See *ibid*.

The general principle that a defendant benefits from a change in the law while on direct appeal has no applicability when the defendant has waived his right to appeal. The distinction between rights that are waived and, therefore, are not noticed on appeal, as opposed to rights that are merely forfeited and reviewed for plain error, is well established. See *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). In addition, the detailed discussion of waiver during the Rule 11 hearing and the multiple, explicit terms of the Plea Agreements, wherein each defendant not only waived the right to appeal but also recommended the very enhancement now challenged, should be enforced, notwithstanding the district court's erroneous comment at sentencing about appeal rights.

Even if this Court addresses the merits, *Castaneda* does not warrant an automatic reduction or reassessment of defendants' sentences since its holding is case-specific. Moreover, defendants cannot show that failure to conduct an analysis consistent with *Castaneda* constitutes "plain error." Cf. *Olano*, 507 U.S. at 732-733. If *Castaneda* is considered applicable, a limited remand to assess victim vulnerability is warranted.

## STANDARD OF REVIEW

This court reviews the validity of a waiver of rights to appeal *de novo*. See *United States* v. *Portillo-Cano*, 192 F.3d 1246, 1249 (9th Cir. 1999); *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992). On the merits, this Court "reviews a district court's construction, interpretation, and application of the Sentencing Guidelines *de novo*." *United States* v. *Castaneda*, 239 F.3d 978, 980 (9th Cir. 2001).

## ARGUMENT

### I

### THIS COURT SHOULD DISMISS DEFENDANTS' APPEALS BECAUSE EACH DEFENDANT RECOMMENDED THE VULNERABLE VICTIM ENHANCEMENT AND KNOWINGLY AND INTELLIGENTLY WAIVED RIGHTS TO APPEAL BY PLEA AGREEMENT

Each defendants' Plea Agreement includes an explicit waiver of the right to appeal his or her sentence, with specific exceptions that are not applicable here. These waivers are valid and enforceable. See *United States* v. *Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992). In addition, each Plea Agreement includes the defendant's and United States' joint recommendation that the district court apply the vulnerable victim enhancement in calculating each sentence. To address the merits of defendants' claim that this

enhancement should be eliminated based on this Court's post-sentencing decision in *United States* v. C*astaneda*, 239 F.2d 978 (9th Cir. 2001), would render the terms of these Agreements meaningless and defeat a primary purpose of a plea; finality.

This Court repeatedly has held that a defendant may knowingly and intelligently waive his right to appeal even if he was not fully aware of the existence, scope, or strength of all of his defenses at the time of waiver. See, *e.g.*, *United States* v. *Littlefield*, 105 F.3d 527, 528 (9th Cir.) ("although [the defendant * * *] did not waive his limitations claim expressly, 'conscious waiver is [not] necessary with respect to each potential defense relinquished by a plea of guilty'" (citing *United States* v. *Broce*, 488 U.S. 563, 572-573 (1989)), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996) (compliance with Rule 11 and conclusion that waiver is knowing and intelligent precludes direct appeal, despite assertion that defendant did not know of affirmative defense at time of plea), cert. denied, 520 U.S. 1132 (1997); *Navarro-Botello*, 912 F.2d at 320.

In *Navarro-Botello*, *ibid*., this Court rejected the defendant's assertion that his plea was not knowing and intelligent because he was waiving issues that he

would not know may exist until *after* the plea and sentencing. This Court held that a waiver of unknown rights is valid; "*[h]e knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be.*" *Ibid.* (emphasis added); see also *United States* v. *Rutan*, 956 F.2d 827, 830 (8th Cir. 1992) (assertion that defendant cannot waive unknown right is "baseless").

Moreover, a change in the law or new knowledge of evidence post-plea that would affect a sentence or the underlying decision to enter a plea does not provide the defendant a basis to challenge his waiver. See *United States* v. *Silva*, 247 F.3d 1051, 1059-1060 (9th Cir. 2001); *United States* v. *Johnson*, 67 F.3d 200 (9th Cir. 1995); *United States* v. *Abarca*, 985 F.2d 1012, 1013 (9th Cir.), cert. denied, 508 U.S. 979 (1993); cf. *United States* v. *Brady*, 397 U.S. 742, 757 (1970) (an intelligent and voluntary plea "made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise," including when "the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions"); see also *Broce*, 488 U.S. at 572 (citing *Brady*).[6]

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[6] In *Brady*, 397 U.S. at 756, the Court rejected Brady's collateral attack on an order denying his motion to withdraw his guilty plea despite the Court's ruling in another case, issued post-conviction, that the sentencing portion of the statute

(continued...)

In *Johnson*, 67 F.3d at 201, the defendant pled guilty and waived his right to appeal "any sentence imposed by the district judge." His direct appeal and challenge under 18 U.S.C. 2255 were dismissed. See *ibid.* This Court held that the broad terms of his waiver barred his challenge to his sentence, which was based on a law enacted post-plea, and that Johnson can (and did) knowingly and voluntarily waive his right to appeal on the basis of this new law, even if he did not know or foresee this issue. See *id.* at 202-203; see also *Silva*, 247 F.3d at 1060 (due, in part, to waiver of right to appeal in plea agreement, defendants "cannot now claim that their sentences are inconsistent with the principle announced in *Apprendi* [v. *New Jersey*, 530 U.S. 466 (2000)], " which was issued post-sentence); *United States* v. *Oliveros-Orosco*, 942 F.2d 644, 645-646 (9th Cir. 1991) (no abuse of discretion to deny withdrawal of plea when this Court's post-plea change in interpretation of Guideline imposed more harsh sentence). In addition, in *Abarca*, 985 F.2d at 1013-1014, this Court held that defendant's waiver of appeal of "any sentencing issue" foreclosed an appeal based on assertions that newly discovered evidence challenged the factual basis of the sentencing decision.

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[6](...continued)
underlying Brady's conviction was deemed unconstitutional.

Here, as part of each Plea Agreement, the defendants and the United States jointly recommended that the district court apply the vulnerable victim enhancement in the calculation of his or her sentence (SOK PA Par. 4c/ER 15; MYK PA Par. 4d/ER 21; YYM PA Par. 4c/ER 21). Moreover, each defendant unambiguously waived all rights to appeal "any sentence imposed * * * or * * * the manner in which that sentence was determined," except in limited, specified circumstances. The defendants may only appeal a sentence that exceeded the maximum permitted by statute, was the result of an upward departure, or if the court did *not* follow a sentencing recommendation included in the Agreement (SOK PA Par. 10/ER 19; MYK PA Par. 10/ER 24; YYM PA Par. 10/ER 24). The intentions of the parties are clear; the terms of the Agreements limit the opportunity to appeal to the express exceptions and waive any other basis to challenge a sentence. Cf. *Johnson*, 67 F.3d at 201.

To allow defendants an opportunity to modify their respective Agreement based on their asserted claim that a subsequent change in the law inures to their benefit would defeat the finality of the Agreements, which is a fundamental purpose of a guilty plea. See *Navarro-Botello*, 912 F.2d at 322; cf. *United States* v. *Hyde*, 520 U.S. 670, 676-677 (1997) (allowing withdrawal of a plea at defendant's

will would render the plea no more than a temporary, token gesture); see also *United States* v. *Shetty*, 130 F.3d 1324, 1329 (9th Cir. 1997) (rejecting speedy trial act claim on appeal when defendant stipulated to extensions in district court), cert. denied, 523 U.S. 1078 (1998). In effect, the defendants are asking this Court to nullify the explicit recommendation to include the vulnerable victim enhancement as part of the sentence (PA Par. 4) and the waiver of the right to appeal (PA Par. 10), and other terms of their Plea Agreement that acknowledge these Agreements were entered into voluntarily and with full knowledge of all of the consequences (PA Par. 11). This Court's decision in C*astaneda*, 239 F.2d 978, issued during the pendency of defendants' appeals, does not change the scope or validity of defendants' waivers. See *Johnson*, 67 F.3d at 202-203; *Navarro-Botello*, 912 F.2d at 322. The defendants have voluntarily, knowingly, and intelligently waived their right to appeal their sentence, including claims that *Castaneda* warrants a reduced sentence.[7] Cf. *Johnson*, 67 F.3d at 202-203; *Navarro-Botello*, 912 F.2d at 322.

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[7] The defendants have not asserted, nor could they successfully establish, that their guilty pleas, including a waiver of right to appeal, were anything but knowing, intelligent, and voluntary. This Court reviews the terms of an agreement and the "facts and circumstances surrounding the signing and entry of the plea agreement, including compliance with Federal Rule of Criminal Procedure 11" to assess whether a waiver was knowing and voluntary. *United States* v. *Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000); see *Baramdyka*, 95 F.3d at 843. The Agreements

(continued...)

Accordingly, these appeals should be dismissed.

II

THE DISTRICT COURT'S COMMENTS DO NOT NULLIFY THE WRITTEN TERMS OF YING YU MENG'S WAIVER OF THE RIGHT TO APPEAL

After the district court imposed the sentence, the court mistakenly said Ying Yu Meng had a general right to appeal her sentence (S. Tr. 201/YYM ER 95). Given the multiple, specific terms of the Agreement that address Meng's sentence and her waiver of appeal, and the specific discussion of her waiver of the right to appeal at her plea hearing, the district court's one misstatement to Meng should not nullify the negotiated waiver. Compare *United States* v. *Littlefield*, 105 F.3d 527, 528-530 (9th Cir.) (written waiver upheld despite the district court's

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[7](...continued)
reflect each defendants' memorialization of his or her voluntary and knowing acceptance not only of the Agreement's terms and conditions, but also the right to appeal that they each were waiving by executing an Agreement. See SOK PA Par. 11/ER 20; MYK PA Par. 11/ER 25; YYM PA Par. 11/ER 24-25; cf. *Nguyen*, 235 F.3d at 1182. Moreover, each defendant's Rule 11 hearing was extensive and in full compliance with that Rule. The district court methodically reviewed, among other things, the defendant's understanding and voluntary acceptance of the terms of the Agreement, each defendant's constitutional rights that were waived by virtue of the plea agreement, and defendant's concession of guilt for the crimes pled (SOK P. Tr. 5-6, 9-10, 13-18/SER 5-6, 9-10, 13-18; MYK P. Tr. 6, 14-19, 26-30/SER 34, 42-47, 54-58; YYM P. Tr. 5-17/ER 31-43). If the plea and waiver are valid, that is, voluntary, knowing, and intelligent, an appeal will be dismissed. See *Baramdyka*, 95 F.3d at 843.

pronouncement, over prosecution's objection, that the district would not accept the plea agreement's waiver of right to appeal; Hall, J., concurring), cert. denied, 520 U.S. 1258 (1997), and *United States* v. *Schuman*, 127 F.3d 815, 817 (9th Cir. 1997) (prosecutor's objection and court's ambivalent comment as to scope of defendant's waiver does not void waiver provisions of plea agreement; per curiam); *United States* v. *Buchanan*, 59 F.3d 914, 918-919 (9th Cir.), cert. denied, 516 U.S. 970 (1995).[8]

In *Buchanan*, 59 F.3d at 917, this Court held that the district court's two unequivocal statements of the defendant's right to appeal his sentence at two hearings, in the absence of objection by the United States, nullified the waiver included in the written plea agreement because the oral statements created a "reasonable expectation" of defendant's right to appeal. In *Buchanan*, *ibid*., the district court's first advisement of the right to appeal was made when the defendant

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[8] Any effort by the other defendants to assert this argument as part of their reply brief should be rejected; they failed to preserve this matter and issues raised for the first time in a reply brief are deemed waived. See *All Pacific Trading, Inc.* v. *Vessel M/V Hanjin Hosu*, 7 F.3d 1427, 1430 (9th Cir. 1993), cert. denied, 510 U.S. 1194 (1994). Even if considered on the merits, the other defendants' claims should be rejected for the same reasons as Meng; the court engaged in an exhaustive discussion with each defendant pursuant to Rule 11, and that discussion, in conjunction with the several explicit terms of the Agreements that address sentencing and waiver of the right to appeal, should prevail over a single comment to the contrary. Cf. *Littlefield*, 105 F.3d at 529.

asserted that he intended to raise a claim of ineffective assistance of counsel.[9] The district court made the second comment on the day following Buchanan's modification of his plea agreement. See *id*. at 916. In concluding that Buchanan retained his right to appeal, this Court also concluded that Buchanan did not fully understand the elements of his plea agreement. See *id*. at 918.

This Court has limited *Buchanan* and upheld written waivers when the court's subsequent oral statements reflect ambiguity or doubt as to the existence or scope of a defendant's right to appeal. See *United States* v. *Martinez*, 143 F.3d 1266, 1272 (9th Cir.) (written waiver remains in force when court's oral comments reflect doubt on existence of right to appeal and defendant is informed of procedures), cert. denied, 525 U.S. 911 (1998); *Schuman*, 127 F.3d at 817; see also *United States* v. *Floyd*, 108 F.3d 202, 203 (9th Cir. 1997) (counsel's statement at sentencing of appeal on suppression issue and court's "ambiguous" reply ("Surely"), three months after entry of unconditional guilty plea, does not override

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[9] Despite any waiver of the right to appeal, a defendant retains his right to raise a claim of ineffective assistance of counsel under 28 U.S.C. 2255. See *United States* v. *Baramdyka*, 95 F.3d 840, 844 (9th Cir. 1996). Here, while Meng and the other defendants sought to withdraw their plea and retain new counsel, that motion was denied several weeks before sentencing, and the defendants chose to continue to work with original trial counsel (Tr., Motion To Withdraw Guilty Pleas And Motion To Withdraw As Counsel, Jan. 27, 2000, 23-26/SER 65-68).

plea; no jurisdiction for appellate court to hear direct appeal). These cases reflect this Court's review of all of the circumstances to assess whether, on balance of equities and expectations, a defendant's knowing waiver and the explicit terms of a plea agreement are overridden by a court's subsequent oral statements.

Here, in her Plea Agreement, Meng recommended to the district court that her sentence include a vulnerable victim enhancement (the very issue now challenged on the merits) (PA Par. 4c/ER 21), she expressly waived her right to appeal except for a few, narrow exceptions not applicable here (PA Par. 10/ER 24), and she separately affirmed in the Agreement that she was voluntarily waiving certain rights (PA Par. 11/ER 24-25). Moreover, during Meng's plea hearing, the district court explicitly discussed the scope of the Agreement's waiver of the right to appeal and ensured that Meng understood the waiver (P. Tr. 7-8/ ER 33-34). Meng also acknowledged that she discussed "every aspect" of her Agreement with counsel and that she was satisfied fully with the manner and scope of representation from counsel (P. Tr. 5-6/ER 31-32).

This simply is not the same situation as *Buchanan*, 59 F.3d at 916-918. Unlike this Court's conclusion that Buchanan did not understand the terms of his plea agreement, *id*. at 918, there is no challenge or any doubt that, at the time she

pled guilty, Meng fully understood all of the terms of her Plea Agreement, including the waiver of her right to appeal her sentence (P. Tr. 7-8, 17/ER 33-34, 43). In addition, unlike *Buchanan*, *id.* at 916, over four months passed between Meng's plea (October 5, 1999) and her sentencing (February 22, 2000), when the district court made the misstatement. Thus, the extraordinary relief granted *Buchanan* is not warranted here; the multiple, specific terms of Meng's Plea Agreement that address her sentence and waiver of right to appeal, and Meng's oral affirmation of her waiver at the Rule 11 proceeding, should remain in force. Cf. *Littlefield*, 105 F.3d at 529; *Martinez*, 143 F.3d at 1272; *Floyd*, 108 F.3d at 204.

Even if this Court believed that the district court's oral statement revived Meng's general right to appeal, that statement does not nullify the entire Plea Agreement, but only the provision that waived the right to appeal a sentence. As stated above, Meng not only waived her right to appeal her sentence generally, but she also waived her right to challenge an enhancement for victim vulnerability given her joint recommendation with the United States that the district court should apply that enhancement (PA Par. 4c/ER 21). Nothing in *Buchanan* suggests that all terms of a plea agreement become unenforceable based on a court's incorrect statement on a right to appeal. Even if a general right to appeal may be restored,

other provisions of a plea agreement remain in force. Accordingly, Meng's recommendation with the United States that the district court should apply a vulnerable victim enhancement waives her right to challenge this aspect of her sentence, and this Court should dismiss her appeal.

## III

## THE RETROACTIVITY PRINCIPLE OF *GRIFFITH* V. *KENTUCKY* DOES NOT APPLY HERE

### *A. Waiver Bars Retroactive Application Of An Alleged 'New Rule' On Direct Appeal*

Defendant Mo Young Kwon's reliance (Br. 5-6) on *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987), to assert that the 'rule' of *United States* v. *Castaneda,* 239 F.3d 978 (2001), applies to his pending appeal is misplaced. The Supreme Court held in *Griffith*, 479 U.S. at 328, that "a new [constitutional] rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct appeal or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." The Court concluded that retroactivity is appropriate because "the integrity of judicial review requires that we apply" the same principles "to *similarly situated* defendants" who have a case pending on direct appeal. *Id*. at 323 (emphasis added).

This general rule of retroactivity on direct appeal does not apply here because defendant Mo Young Kwon waived his right to appeal his sentence and seek relief based on an asserted, post-plea change in the law. A defendant who has waived his right to appeal is not similarly situated to defendants who have retained statutory appeal rights and whose claims are pending on direct appeal. Cf. *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993) (distinction between rights that are forfeited and waived). The "integrity of judicial review" would be undermined, rather than advanced, if this Court ignored the fundamental difference between Mo Young Kwon, who intentionally relinquished his right to appeal, and other defendants who have retained and pursued a right to appeal. *Griffith*, 479 U.S. at 323.

In addition, nothing in *Griffith*, *id*. at 323-328, suggests that the principle of retroactive application of new rules to pending appeals negates principles of waiver. Cf. *Teague* v. *Lane*, 489 U.S. 288, 305-310 (1988) (different retroactivity rules apply to cases on collateral review and direct review) (O'Connor, J.). To apply *Griffith* here would ignore the well established distinction between rights that have been waived and those that have been forfeited. See *Olano*, 507 U.S. at 733; *United States* v. *Uchimura*, 125 F.3d 1282 (9th Cir. 1997), cert. denied, 525 U.S.

863 (1998). If a right is waived, that is, affirmatively relinquished, any asserted error is not recognized or considered on the merits. See *Olano*, 507 U.S. at 733. In contrast, an alleged error based on a right that is forfeited is reviewed under a plain error standard. See *id*. at 732-733; *Uchimura*, 125 F.3d at 1286-1287. In *Uchimura*, *id*. at 1287, this Court stated:

> [the defendant] failed to object because he was 'unaware of a right that [was] being violated,' and the present error therefore constitutes a 'forfeiture.' *Had he instead intentionally relinquished or abandoned a known right, his failure to object would constitute a 'waiver' and we would lack discretion to notice it [alleged error].*

(citing *United States* v. *Perez*, 116 F.3d 840, 846 (9th Cir. 1997) (emphasis added); right forfeited by failure to object; plain error standard applied). A right is considered "forfeited" when no objection is raised, including when an objection would be futile because existing law rejects the basis for the objection. See *Uchimura*, 125 F.3d at 1286-1287.

Castaneda opposed the Court's two-level enhancement under U.S.S.G. 3A1.1. *Castaneda*, 239 F.3d at 979-980. In contrast, Mo Young Kwon (and the other defendants) *recommended* that the district court apply the vulnerable victim enhancement in calculating their respective sentences (SOK PA Par. 4c/ER 15; MYK PA Par. 4d/ER 21; YYM PA Par. 4c/ER 21). Moreover, trial counsel for Mo

Young Kwon reaffirmed at sentencing that the women were vulnerable victims, and that this enhancement was warranted (S. Tr. 155-156/ER 55-56). This recommendation, and the broad relinquishment of the right to appeal, were intentional, voluntary, and intelligent waivers and, therefore, there is no basis for this Court to "notice" this appeal.

*B. Castaneda's Fact-Specific Analysis Is Not A "Rule Of Criminal Procedure" That Triggers Retroactive Application To Cases Pending On Appeal*

Even if Mo Young Kwon could raise a new rule of criminal procedure on appeal, *Castaneda* does not create such a rule. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989); see *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). All three defendants erroneously assert (SOK Br. 9, 14; MYK Br. 4-6; YYM Br. 10, 14-15) that *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), holds, as a matter of law, that a sentence for conviction under the Mann Act, 18 U.S.C. 2421, may never include a vulnerable victim enhancement, and that *Castaneda* mandates the elimination of this enhancement for their respective sentences.[10] The defendants grossly exaggerate the holding and scope of

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[10] While all defendants advance the same erroneous interpretation of *Castaneda*, only Mo Young Kwon asserts that the retroactivity principles set forth

(continued...)

the *Castaneda* decision. *Castaneda* is not a new rule but an application of the vulnerable victim status provision of the United States Sentencing Commission, *Guidelines Manual* (U.S.S.G. or Guidelines) 3A1.1(b) in conjunction with a conviction for violating the Mann Act.

In *Castaneda*, 239 F.3d at 979, the defendant pled guilty to violating the Mann Act for bringing women from the Phillippines to the Northern Mariana Islands on false pretenses of employment and forcing them to engage in sexual acts. Castaneda's sentence included a two-level enhancement for victim vulnerability under U.S.S.G. 3A1.1(b), despite her objections. See *id*. at 979-980. U.S.S.G. 3A1.1(b)(1) (1998) requires that a sentence be enhanced by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." A "vulnerable victim" includes an individual "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. 3A1.1, cmt. n.2 (1998).[11]

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[10](...continued)
in *Griffith* require a sentence reduction pursuant to *Castaneda* and thus, by implication, he asserts that *Castaneda* establishes a "new rule."

[11] This provision "codifies judicial discretion to impose harsher sentences on (continued...)

After reviewing the history of the Mann Act and the class of victims Congress intended to protect, this Court reversed. This Court held that the "economic vulnerability" of *Castaneda's* victims – "indebtedness, low income," and lack of resources to support themselves or return to their home country – are "typically associated" with Mann Act violations and, thus, there was insufficient evidence that these victims were vulnerable under Guideline 3A1.1(b). *Castaneda*, 239 F.3d at 982-983.

The panel in *Castaneda* limited its holding by stating that Guideline 3A1.1 "does not, however, require that the victims be more vulnerable than the typical victims of the particular *scheme* or type of *scheme* that is utilized." *Id*. at 981 n.4 (emphasis in original). Discussing an example of vulnerability given in the Guidelines' Commentary, this Court explained that "cancer patients, as a group, [are] unusually vulnerable vis a vis the general public to snake oil salesman

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[11](...continued)
defendants who commit similar crimes, but whose choice of victim identifies them as deserving greater punishment" because the "conduct against the particular victim or group of victims is more blameworthy." *United States* v. *Castaneda*, 239 F.3d 978, 980 (9th Cir. 2001) (citation omitted); see *United States* v. *Hershkowitz*, 968 F.2d 1503, 1505 (2d Cir. 1992) (vulnerable victim enhancement under U.S.S.G. 3A1.1 "reflect[s] the public interest in more severely punishing those whose choice of victim demonstrates an 'extra measure of criminal depravity'" (citation omitted); victim's status as a prisoner in custody warranted enhancement for violation of 18 U.S.C. 242).

promising cancer cures," and thus a vulnerability enhancement would apply for the *"offense* of medical insurance fraud," but the enhancement would not apply if the offense were "marketing cancer cures." *Ibid*.

Since the panel in *Castaneda*, 239 F.3d at 983, concluded only that the "*economic vulnerabilities*" of the victims in that case did not warrant an enhancement under U.S.S.G. 3A1.1, there may be other circumstances that establish a different degree of "economic vulnerability" or some other type of victim vulnerability to warrant this enhancement with a conviction for violating the Mann Act. And there can be no question that *Castaneda* did not address victim vulnerability for a conviction of involuntary servitude under 18 U.S.C. 1584. *Castaneda* is consistent with this Court's view that enhancement must be decided on a case-by-case basis. See*, e.g.*, *United States* v. *Johnson*, 132 F.3d 1279, 1285 (9th Cir. 1997).[12] Accordingly, nothing in *Castaneda* establishes a new rule of law.

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[12] This Court has advised district courts to consider "the characteristics of the * * * victim, the victim's reaction to the criminal conduct, and the circumstances surrounding the criminal act'" to assess whether any victims are vulnerable under U.S.S.G. 3A1.1. *Johnson*, 132 F.3d at 1285 (citing *United States* v. *Peters*, 962 F.2d 1410, 1417 (9th Cir. 1992)); see *United States* v. *Weischedel*, 201 F.3d 1250, 1254-1255 (9th Cir.), cert. denied, 530 U.S. 1236 (2000). In addition, both before and after *Castaneda*, this Court has held that many factors that may be present in a Mann Act or involuntary servitude case – the nationality of a victim, lack of familiarity with United States' customs and laws, dependence on

(continued...)

Cf. *Teague*, 489 U.S. at 301; *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (requiring a jury, and not a court, to assess materiality as part of a perjury charge is a 'new rule').[13]

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[12](...continued)
the perpetrator, and the absence of a supportive network to challenge an abusive relationship – support a vulnerable victim assessment. See *e.g.*, *United States* v. *Medrano*, 241 F.3d 740, 745 (9th Cir.) (victims' illiteracy, lack of familiarity with United States' banking laws, and history as migrant workers from an impoverished area of Mexico collectively establish their status as vulnerable victims of a Hispanic bank officer's embezzlement scheme), cert. denied, 121 S. Ct. 2622 (2001); *United States* v. *Matsumaru*, 244 F.3d 1092, 1098, 1107-1108 (9th Cir. 2001) (targeting by nationality, victims' unfamiliarity with U.S. immigration laws, and the especial cultural trust placed in defendant's professional status as a lawyer established victim vulnerability for visa fraud); *Johnson*, 132 F.3d at 1285 (foreign exchange student's isolation, cultural ignorance, and sexual abuse by host parent shortly after arrival supported enhancement of victim vulnerability for violation of 18 U.S.C. 2423).

[13] The United States emphatically denies any allegations of unethical conduct as charged by counsel for Mo Young Kwon (Br. 7-10). His assertions are simply baseless. Counsel complains because the United States rejected his settlement offer and opposed his Motion For Summary Remand. As noted in this Court's Order of denial and reflected in the multiple issues addressed herein, the "questions raised by this appeal are not so insubstantial as not to require further argument" (July 24, 2001, Order). The United States was not obliged to state its legal position prior to submission of its brief. Moreover, counsel's failure in both his Motion For Summary Remand or opening brief to advise the Court of the fact that his client had entered into a Plea Agreement waiving his right to appeal and recommending a vulnerable victim enhancement is disturbing. A reference to pleading guilty (Br. 2-3) and one citation, without identification of the Plea Agreement, is not befitting of full disclosure, particularly when waiver is a central issue on appeal.

IV

DEFENDANTS CANNOT SHOW PLAIN ERROR
TO WARRANT A RE-EVALUATION UNDER *CASTANEDA*

Even if this Court determines that any of the defendants has retained a right to appeal his or her sentence, and even if this Court concludes that *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), establishes a new rule, a defendant cannot receive a re-evaluation of his or her respective sentence under *Castaneda* unless the defendant can show that the failure to apply *Castaneda* amounts to plain error. See *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993); *United States* v. *Keys*, 133 F.3d 1282 (9th Cir.), opinion amended by 143 F.3d 479 (9th Cir.) and 153 F.3d 925 (9th Cir.), cert. denied, 525 U.S. 891 (1998). Thus, a defendant must show (1) an error occurred; (2) the error was plain, that is, "obvious" or "clear"; and (3) the error affected substantial rights, including affecting the outcome of the proceedings. *Olano*, 507 U.S. at 732-736. If these three conditions are met, this Court also must conclude, in its discretion, that the "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" to warrant reversal. *Id*. at 736 (internal quotations omitted).

No defendant has asserted, nor can one show, that the inclusion of a vulnerable victim enhancement is either "error" or "plain."[14] Cf. *Olano*, 507 U.S. 734, 737. *Castaneda*'s assessment of those victims' vulnerability was in conjunction with a conviction under the Mann Act, 18 U.S.C. 2421. 239 F.3d at 980-983. Since *Castaneda*'s conclusion is not only specific to the evidence presented but to the crime committed, it does not control the sentencing for defendants Ying Yu Meng and Soon Oh Kwon because these defendants pled guilty to crimes other than violations of the Mann Act. Thus, it is not "plain" or "obvious" that *Castaneda* applies in this instance, or that the district court's enhancement for victim vulnerability is erroneous. Cf. *Olano*, 507 U.S. at 734.[15]

In *Castaneda*, 239 F.3d at 981, this Court noted the rule that a vulnerable victim enhancement should not be applied when that element of vulnerability is already incorporated in an *offense guideline*. While citing its earlier opinion in

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[14] Soon Oh Kwon (Br. 9-14) and Meng (Br. 10-14) have presented identical interpretations of *Castaneda* and arguments on how *Castaneda* bars a vulnerable victim enhancement for their respective sentence (See *infra*, pages 32-38, Sections IV and V). Soon Oh Kwon, however, has not asserted any basis on which this Court should consider the merits of his claim given his waiver of the right to appeal. Accordingly, this Court should not consider the merits of this claim with respect to Soon Oh Kwon.

[15] In addition, a district court cannot commit "clear" or "obvious" error in a finding of fact that has been stipulated to by the parties. *Olano*, 507 U.S. at 733.

*United States* v. *Wetchie*, 207 F.3d 632, 634 n.4 (9th Cir.), cert. denied, 531 U.S. 854 (2000), that rule is stated in the Application Notes to Guideline 3A1.1:

> [d]o not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.[16]

Meng's assertion (Br. 12-13) that a victim's vulnerability is already incorporated in a conviction for involuntary servitude, and thus bars an enhancement under U.S.S.G. 3A1.1 because it is part of another offense guideline, is incorrect.[17] Meng's underlying premise is in error and her reliance on *United States* v. *Kozminski*, 487 U.S. 931 (1988), and *United States* v. *Alzanki*, 54 F.3d

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[16] See *United States* v. *Archdale*, 229 F.3d 861, 869-870 & n.5 (9th Cir. 2000) (because a victim's age is considered in the offense level calculated pursuant to U.S.S.G. 2A3.1(b)(2), age could not be considered for an enhancement under U.S.S.G. 3A1.1, although a victim's other vulnerabilities could be considered). Thus, the Commission has explicitly identified the narrow exceptions to applying a vulnerable victim enhancement. See U.S.S.G. 3A1.1(c) (vulnerable victim enhancement under 3A1.1(a), which generally covers hate crimes, should not apply when U.S.S.G. 2H1.1(b)(1) applies, which enhances sentences associated with certain civil rights statutes for action under color of law or by a public official); U.S.S.G. 3A1.1 cmt. n.2 (1998). This Court should not create an exception that is not supported by the text of the Guideline.

[17] Since, as set forth herein, pages 34-37, a victim's vulnerability is not an element of the crime of involuntary servitude or part of the calculation under U.S.S.G. 2H1.4, Meng also incorrectly asserts (Br. 13) that an enhancement for victim vulnerability under 3A1.1 is an improper, "additional" enhancement.

994, 1002, 1005-1006 (1st Cir. 1995), cert. denied, 516 U.S. 1111 (1996), is misplaced. The defendant fails to distinguish between elements required to prove a violation (*e.g.*, coercion or threats of coercion) and facts that are "relevant" (*e.g.*, "special vulnerabilities") and can assist in proving a separate fact that is an element of the crime. *Kozminski*, 487 U.S. at 948.

The Supreme Court held that "compulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude." *Kozminski*, 487 U.S. at 953. There are multiple means by which the government can prove coercion or threats of coercion for this crime. For example, the repeated use of force or continuous physical restraint of the victim by handcuffs or the presence of armed guards may prove that a victim had no available alternative but to remain and work as ordered, or be subject to imprisonment or worse. In other circumstances, if a defendant relies heavily on threats of violence or harm rather than actual force, evidence of a victim's vulnerabilities may be relevant to determine if the defendant created a condition of involuntary servitude. See *id*. at 948, 952; *Alzanki*, 54 F.3d at 1000-1001, 1004-1005. As the Court explained, whether the victim is an adult or child is relevant to assessing whether the alleged threats "plausibly * * * compel the victim to serve."

*Kozminski*, 487 U.S. at 952; see *Alzanki*, 54 F.3d at 1004-1005 (victim's isolation, lack of familiarity with U.S. immigration and police procedures, and past history as house staff in Kuwait subject to extreme conditions were relevant to assessing whether threats of coercion created involuntary servitude).[18]

There are multiple factors and circumstances that can establish a victim's vulnerability in the involuntary servitude context, including, but not limited to, physical disabilities, mental disabilities, ignorance of United States customs and laws, and a victim's nationality and that nation's customs and practices. In fact, defendant Meng concedes (Br. 12), as she must, that "[t]he factor of vulnerability, whichever fact that may be, is not associated with every victim of involuntary servitude." Accordingly, a victim's vulnerability may be, and should be,

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[18] After reviewing the history of the precursor statutes to 18 U.S.C. 1584, including the persons Congress originally intend to protect and the scope of unlawful conduct that created a condition of involuntary servitude, the Court stated that 18 U.S.C. 1584 did not expand the range of unlawful conduct (coercion and threats of coercion), and it "eliminated any special distinction among, or protection of, special classes of victims." *Kozminski*, 487 U.S. at 946-948. Meng asserts (Br. 12 n.3) that this elimination "only suggest[s] that the statute has taken into account any vulnerability that a victim may have." By prohibiting involuntary servitude with respect to any victim, the statute has *not* addressed any particular vulnerability of a certain class of victims. Accordingly, given the Guidelines' objective of imposing more harsh sentences on crimes that reflect a greater sense of depravity among defendants, an enhancement under U.S.S.G. 3A1.1 for victim vulnerability in cases of involuntary servitude is appropriate. Cf. *United States* v. *Castaneda*, 239 F.3d 978, 980 (9th Cir. 2001).

considered pursuant to U.S.S.G. 3A1.1 to enhance a base level offense for involuntary servitude.

## V

## IF THERE IS PLAIN ERROR BECAUSE *CASTANEDA* APPLIES, A REMAND TO ASSESS THE VULNERABILITY OF THE VICTIMS IS WARRANTED

Defendants Ying Yu Meng (Br. 14-15) and Soon Oh Kwon (Br 12-14; see n.13, *infra*) assert that the district court erred in not making any specific findings on victim vulnerability and, therefore, this Court should instruct the lower court to resentence without the enhancement.

The district court adopted the findings set forth in the Presentence Reports (S. Tr. 17/SOK ER 46; S. Tr. 148-149/MYK ER 48-49; S. Tr. 189/YYM ER 83). The victims' letters to the district court provide some additional evidence of the victims' vulnerability. Given the joint recommendation on vulnerable victim status, there was no reason for the United States to present, or the district court to consider, additional evidence of vulnerability.

If this Court concludes that any defendant retained a right to appeal and has shown plain error to warrant a re-evaluation of his or her sentence in light of *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), the United States urges

this Court to order a limited remand to the district court with instructions to address the evidence on vulnerable victim status and make appropriate findings.

## CONCLUSION

The defendants' sentences should be affirmed. If the sentence is vacated for lack of findings on victim vulnerability, there should be a limited remand to the district court for such findings.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Apart from the three related cases cited in the caption of this brief, the United States is not aware of any other related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 8,969 words.

October 4, 2001

Jennifer Levin

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the Brief For The United States As Appellee and one copy of United States' Supplemental Excerpts Of The Record by first class mail, postage prepaid, on each counsel identified below this 4th day of October, 2001:

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