08-0581-cr

To be Argued By:
WILLIAM M. BROWN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0581-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RONNIE JAMES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. On January 22, 2008, the district court issued its order on remand from this Court; that order was entered on the docket January 24, 2008. On January 31, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. In this appeal from a remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), whether the law of the case doctrine precludes the defendant from litigating issues that he could have raised in his initial appeal.

II. Whether the defendant was entitled to a jury trial on his request for a downward departure in light of *United States v. Booker*, 543 U.S. 220 (2005).

III. Whether the district court properly refused to permit the defendant to withdraw his guilty plea where the defendant raised the claim for the first time in the context of a *Crosby* remand and the district court decided not to resentence the defendant.

IV. Whether the district court properly rejected the defendant's claim that the 120-month mandatory minimum penalty imposed pursuant to 21 U.S.C. § 841 is unconstitutional.

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Preliminary Statement

In 2005, this Court affirmed the defendant's conviction and sentence, but remanded the case to the district court for further proceedings pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On remand, the district court declined to resentence the defendant, finding that even under an advisory guidelines regime, it would have imposed the same sentence, a mandatory minimum term of 120 months.

In this appeal from the district court's decision on remand, the defendant raises three arguments: (1) that he was entitled to a jury trial on his request for a downward departure for substantial assistance; (2) that he should have been permitted to withdraw his guilty plea; and (3) that his mandatory minimum sentence was unconstitutional. All of these arguments could have been – but were not – raised in his first appeal, and accordingly, the law of the case doctrine precludes the defendant from raising them now. In any event, for the reasons described below, those claims are meritless. This Court should affirm the judgment below.

Statement of the Case

On June 18, 2002, a federal grand jury in Connecticut returned a one-count indictment charging the defendant, Ronnie James, with possession with intent to distribute five grams or more of cocaine base (crack). Appendix ("A") 27.

The case was assigned to United States District Judge Stefan R. Underhill, and on October 9, 2002, the defendant pleaded guilty to the indictment pursuant to a plea agreement. A6, A20-26. On September 29, 2003, the district court sentenced the defendant to a term of 120 months of imprisonment. Judgment entered on October 1, 2003. A9-10, A30.

The defendant appealed, and on August 24, 2004, this Court affirmed the district court's judgment by summary order. *United States v. James*, 106 Fed. Appx. 752 (2d Cir.

2004). On May 3, 2005, this Court remanded the case to the district court for proceedings under *Crosby*. A31-35.

On January 22, 2008, the Honorable Stefan R. Underhill ruled, *inter alia*, that he would not have sentenced the defendant differently had the guidelines been advisory at the time of sentencing. The court's decision was "based upon the fact that James received the mandatory minimum sentence called for by the statute and based upon his stipulation in the plea agreement that he 'knowingly and intentionally possessed with the intent to distribute approximately 5.4 grams (net) of crack cocaine.'" A78-79. The court also denied the defendant's request to withdraw his guilty plea, rejected the defendant's argument that the mandatory minimum penalties for narcotics offenses are unconstitutional, and declined to consider the defendant's arguments with respect to his downward departure. A79.

The district court's order entered on the docket on January 24, 2008, A13; the defendant filed a timely notice of appeal from that ruling on January 31, 2008, A13.

The defendant is currently serving the sentence imposed by the district court.

Statement of Facts

A. The indictment, plea and sentencing

On June 18, 2002, a federal grand jury returned a one-count indictment against the defendant, charging him with possession with intent to distribute more than five grams of crack cocaine. A27. On October 9, 2002, the defendant and the government entered into a plea agreement, by which the defendant agreed to plead guilty to the June 18 indictment. A20-26. In the stipulation of offense conduct, James admitted that he "knowingly and intentionally possessed with the intent to distribute approximately 5.4 grams (net) of crack cocaine." A26.

On September 29, 2003, the district court held an *in camera* proceeding to consider the defendant's motion for a hearing and a downward departure under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 on the basis of the defendant's claimed "substantial assistance." Confidential Appendix ("CA") CA32-82. Ultimately, the district court denied that motion, holding the defendant had not provided substantial assistance, and that there was no basis for finding that the government's decision not to file a motion for downward departure was based on an unconstitutional motive, bad faith, or misconduct. CA79-80.

After resolving this motion, the district court moved directly into the sentencing proceeding. The court confirmed that there were no factual disputes with the findings in the Pre-Sentence Report ("PSR"), and thereafter adopted those findings as the findings of the

court. CA85-86. Furthermore, the court confirmed that neither party objected to the guidelines calculation set forth in the PSR and adopted that calculation. CA87. As set forth in the PSR, the defendant had a total offense level of 29, and was in criminal history category II. PSR ¶¶ 14-21, 24; CA87-88. Although these values produced a range of 97 to 121 months in the Sentencing Table, the defendant's guidelines range was 120 to 121 months because he was subject to a 120-month mandatory minimum term of imprisonment. PSR ¶ 62; CA88; U.S.S.G. § 5G1.1(c). The court heard arguments on the appropriate sentence, and ultimately sentenced the defendant to the 120-month mandatory minimum term of imprisonment. CA95; A30.

B. The initial appeal and remand

The defendant appealed, arguing solely that the district court abused its discretion by refusing to grant his motion for downward departure on the basis of substantial assistance. On August 24, 2004, this Court affirmed the judgment of the district court, finding "no error" in the decision to deny the defendant's application for a U.S.S.G. § 5K1.1 downward departure. *James*, 106 Fed. Appx. at 753.

On May 3, 2005, this Court remanded the case to the district court under *Crosby*, "so that the District Court may consider whether to re-sentence defendant, in conformity with the currently applicable statutory requirements explicated in the *Crosby* opinion." A34.

On remand before the district court, the defendant asked to withdraw his guilty plea, claimed that he was entitled to a jury trial on his request for a substantial assistance downward departure, and argued that his 120-month mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B) was unconstitutional. A38-50.

On January 22, 2008, the district court determined that it "would not have sentenced James to a different sentence had the Sentencing Guidelines been advisory at the time of his initial sentencing." A78. "My decision is based upon the fact that James received the mandatory minimum sentence called for by the statute and based upon his stipulation in the plea agreement that he 'knowingly and intentionally possessed with intent to distribute approximately 5.4 grams (net) of crack cocaine.'" A78-79. The district court noted that "[t]he fact that the Sentencing Guidelines are now advisory does not affect the applicability of the statutory mandatory minimum sentence in this case. *See United States v. Sharpley*, 399 F. 3d 123, 127 (2d Cir. 2005)." A79 (quotation omitted).

The court also noted that the denial of the substantial assistance downward departure had previously been affirmed by this Court and the remand was for the "limited purpose" of determining whether to re-sentence the defendant. Therefore, the defendant's claim for a jury trial as to the "substantial assistance issues" was not properly raised on remand. A79.

Further, the district court found that the defendant's request to withdraw his guilty plea was precluded by Federal Rule of Criminal Procedure 11(e) as the

defendant's sentence had been "imposed and not vacated." A79. Finally, the district court found that the statutory mandatory minimum penalties for narcotics offenses were not unconstitutional citing this Court's holding in *United States v. Pineda*, 847 F. 2d 64, 65 (2d Cir. 1998) (per curiam). *Id.*

The district court's order entered on the docket on January 24, 2008, and on January 31, 2008, the defendant filed a timely notice of appeal. A13.

Summary of Argument

I. The law of the case doctrine precludes the defendant from litigating issues now that could have been presented, but were not, in his initial appeal. At the time of his initial appeal, he could have argued that he was entitled to a jury trial on his downward departure, that he should be allowed to withdraw his guilty plea, and that his mandatory minimum sentence was unconstitutional, but he did not. This Court affirmed his sentence, and remanded for the *limited* purpose of allowing the district court to determine whether it would have imposed a materially different sentence under an advisory guidelines regime. Accordingly, none of the defendant's claims are properly before this Court.

II. The defendant affirmatively waived any challenge to the 10-year mandatory minimum applicable to his conviction by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty. Such a waiver forecloses an appellate challenge to the statutory minimum sentence.

Alternatively, the Sixth Amendment did not require judicial factfinding to determine the defendant's eligibility for a substantial assistance departure under 18 U.S.C. § 3553(e). In this case, there was no Sixth Amendment problem because there was no factfinding; the defendant was ineligible for a substantial assistance departure because the government had not filed a substantial assistance motion, not because of judicial factfinding. In any event, the Sixth Amendment would not have precluded judicial factfinding. The defendant's minimum sentence was set by statute and fully authorized based on facts that he admitted when he pleaded guilty.

Furthermore, the defendant's suggestion that his "maximum" sentence was the maximum of his guidelines range reflects a misunderstanding of both fact and law. The defendant's maximum guidelines sentence was 121 months, a sentence *above* the actual sentence imposed. Accordingly, even if the guidelines range were of some Sixth Amendment significance, there would be no Sixth Amendment problem here because the defendant was sentenced within that range. More significantly for purposes of the Sixth Amendment, however, the defendant's maximum sentence of life imprisonment was set by statute and his 10-year sentence was well within that range.

III. The district court properly denied the defendant's request to withdraw his guilty plea. Federal Rule of Criminal Procedure 11(d)(2)(B) permits a defendant to withdraw a guilty plea under limited circumstances, but only when the defendant does so *before* imposition of sentence. Here, the defendant was sentenced in 2003, and

his sentence was upheld on direct appeal. His request to withdraw his plea came only after this Court remanded for further proceedings under *Crosby*, long after sentencing. The proceedings on *Crosby* remand did not amount to a full re-sentencing, but rather were proceedings designed solely to allow the district court to decide *whether* to resentence.

IV. The defendant waived any constitutional challenge to his mandatory minimum sentence by entering into a plea agreement that acknowledged his acceptance of that sentence.

Alternatively, the district court properly rejected the defendant's constitutional challenges to his mandatory minimum sentence. All of the defendant's constitutional claims rest on his assertion that the mandatory minimum sentence applicable in his case (10 years) was significantly longer than his guidelines range of 41-51 months. These arguments fail at the first step because the defendant's guidelines range was 120-121 months, not 41-51 months. The defendant's failure to acknowledge that he agreed to the district court's guidelines calculation and that under the guidelines, his statutory mandatory minimum sentence set his range at 120-121 months undermines all of his constitutional claims.

Putting aside the lack of a factual basis for the defendant's constitutional claims, this Court has previously rejected the same arguments raised by the defendant here. Specifically, this Court has rejected due process, equal protection and Eighth Amendment challenges to the mandatory minimum sentences in 21

U.S.C. § 841. Although the defendant does not cite those decisions, they control the resolution of his claims.

Argument

I. The law of the case doctrine precludes the defendant from raising issues now that he raised – or could have raised – in his initial appeal.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts above.

B. Governing law

The law of the case doctrine "requires a trial court to follow an appellate court's previous ruling on an issue in the same case. This is the so-called 'mandate rule.'" *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (citation omitted). "The mandate rule 'compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (quoting *United States v. Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting, in turn, *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993))) (emphasis deleted).[1]

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[1] Not at issue here is a related branch of the law-of-the-case doctrine. "The second and more flexible branch is implicated when a court reconsiders its own ruling on an issue (continued...)

C. Discussion

In the context of *Crosby* remands, this Court has held that "the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by this Court – or that could have been adjudicated by us had the defendant made them – during the initial appeal that led to the *Crosby* remand." *United States v. Williams*, 475 F.3d 468, 475 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 881

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[1] (...continued)
in the absence of an intervening ruling on the issue by a higher court. It holds 'that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case,' unless 'cogent' and 'compelling' reasons militate otherwise.'" *Quintieri*, 306 F.3d at 1225 (quoting *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991), and *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)) (citations omitted) (emphasis added). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Tenzer*, 213 F.3d at 39 (citations and internal quotation marks omitted). "[T]his branch of the doctrine, while it informs the court's discretion, 'does not limit the tribunal's power.'" *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). A court may therefore revisit an earlier, unreviewed, decision of its own so long as it has a valid reason for doing so, and provides the opposing party "sufficient notice and an opportunity to be heard." *Uccio*, 940 F.2d at 759 (finding that district court's realization that it had relied on faulty legal interpretation of a sentencing guideline was valid reason for revisiting earlier ruling).

(2008). *See also United States v. Negron*, 524 F.3d 358, 360 (2d Cir.) (on appeal from *Crosby* remand, holding that a defendant cannot raise argument that was adjudicated on direct appeal), *cert. denied*, __ U.S. __, No. 08-5348 (U.S. Oct. 6, 2008); *United States v. Frias*, 521 F.3d 229, 234-35 (2d Cir.) (holding that in appeal after remand for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005), the defendant could not raise claims that he could have considered in the first appeal), *cert. denied*, __ U.S. __, No. 08-5572 (U.S. Oct. 6, 2008).

The reason why further reconsideration of questions challenging the defendant's sentence, as previously affirmed by this Court, would be inappropriate, the government submits, lies with the concept of finality, which is the core concept animating the law of the case doctrine. As this Court has explained:

> Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case.

United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977). The *Cirami* Court went on to find that the systemic interest in finality in the case at hand was outweighed by one party's presentation of compelling, newly available evidence – a traditional exception to the mandate rule.

The point here is that issues should not be defaulted initially at sentencing before a district court and on appeal, and yet still remain open to relitigation on a limited remand. At his initial sentencing, the defendant did not argue that he was entitled to a jury trial on his request for a downward departure, nor argue that he should be allowed to withdraw his guilty plea or that his mandatory minimum sentence was unconstitutional. Likewise, in his original appeal, the defendant did not claim error as to any of these issues, but merely argued that he had provided substantial assistance and so was entitled to a downward departure on that ground. This Court rejected that argument, but issued a limited remand under *Crosby*. In his *Crosby* remand proceedings, he raised for the first time the challenges he presents in this appeal. Because he could have raised these issues earlier, but chose not to do so, the law of the case doctrine precludes him from raising them now. *See Williams*, 475 F. 3d at 475-76 (noting that party may not relitigate issue that "was ripe for review at the time of an initial appeal") (internal quotation marks omitted); *Frias*, 521 F.3d at 235 (declining to consider issues that the defendant could have raised, but did not, in his first appeal).

Even if the law of the case did not preclude the defendant from raising the issues he presents here, those claims would still fail. For the reasons that follow, the district court properly rejected the defendant's arguments (1) that he was entitled to a jury trial on his substantial assistance departure request; (2) that he be allowed to withdrawal his guilty plea; and (3) that the mandatory minimum sentence he was subject to was unconstitutional.

II. The defendant is not entitled to a jury trial on his request for a downward departure for substantial assistance.

A. Relevant facts

As determined at the defendant's sentencing hearing in 2003, he had a total offense level of 29, and was in criminal history category II. PSR ¶¶ 14-21, 24; CA87-88. These calculations yield a sentencing range of 97 to 121 months in the Sentencing Table, but because the defendant faced a mandatory minimum term of 120 months' imprisonment, his guidelines range was 120 to 121 months. PSR ¶ 62; CA88; U.S.S.G. § 5G1.1(c). At sentencing, defense counsel confirmed that he had no objections to this guidelines calculation. CA87.

After the district court imposed the mandatory minimum term of imprisonment, the defendant appealed claiming that he was entitled to a downward departure for substantial assistance under U.S.S.G. § 5K1.1 even though the government had not moved for such a departure. This Court rejected that argument, and thus affirmed his sentence. A32. On May 3, 2005, this Court remanded for proceedings under *Crosby*. A34.

On remand, the defendant argued, *inter alia*, that he was entitled to a jury trial on his request for a substantial assistance downward departure. A41-42. The district court rejected this argument finding that the question was not properly before the court on remand. According to the district court, the Court of Appeals had "affirmed the denial of a downward departure pursuant to U.S.S.G.

§ 5K1.1, and the remand of this matter from the Court of Appeals was for the limited purpose of permitting me to determine whether or not to resentence [the defendant]." A79.

B. Governing law and standard of review

1. Departures for substantial assistance

A district court has only limited authority to impose a sentence below a statutorily mandated minimum term of imprisonment. *See United States v. Medley*, 313 F.3d 745, 749 (2d Cir. 2002) (district court may depart below a statutory mandatory minimum only if authorized by 18 U.S.C. §§ 3553(e) or 3553(f)); *United States v. Santiago*, 201 F.3d 185, 187-88 (3rd Cir. 1999) (same). As relevant here, a district court may impose a sentence below a statutory mandatory minimum if the government has filed a motion under 18 U.S.C. § 3553(e) asserting that the defendant has provided substantial assistance in the investigation or prosecution of another individual. Specifically, that section provides as follows:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

This Court recently explained that "[i]n the wake of *Booker*, the second sentence of the foregoing provision must be read to require application of the Sentencing Guidelines in an advisory, rather than in a mandatory, capacity." *United States v. Richardson*, 521 F.3d 149, 157 (2d Cir. 2008). *See also United States v. Castillo*, 460 F.3d 337, 353-54 (2d Cir. 2006) (holding that in application of § 3553(f), the "safety valve" permitting departure from mandatory minimum sentence for certain defendants, guideline sentence need not be imposed, but rather court should apply advisory guidelines regime), *abrogated on other grounds*, *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

An analogous provision of the guidelines, § 5K1.1, authorizes the district court to depart below the otherwise applicable guidelines range, again based on a government motion, to account for a defendant's substantial assistance. In relevant part, that section provides as follows: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." U.S.S.G. § 5K1.1. In *Richardson*, this Court described the difference between motions under § 3553(e) and § 5K1.1 as follows: "'A motion under § 5K1.1 authorizes the sentencing court to depart below the applicable advisory guideline range in determining the advisory guideline sentence, and a § 3553(e) motion permits the court to sentence below a statutory minimum.'" 521 F.3d at 158 (quoting *United States v. Williams*, 474 F.3d 1130, 1131 (8th Cir. 2007) (quoting *Melendez v. United States*, 518 U.S. 120, 128-29 (1996))).

Where, as here, the statutory mandatory minimum sentence is within the calculated guidelines range, the guidelines sentence may not be lower than the statutory mandatory minimum. *See* § 5G1.1(c). As this Court recently explained, when "the statutory minimum sentence becomes the Guidelines sentence, and in the absence of any other motions for upward or downward departure, a government motion to depart below the Guidelines pursuant to U.S.S.G. § 5K1.1 is, as a practical matter, superfluous." *Richardson*, 521 F.3d at 159.

2. Standard of review

This Court ordinarily engages in *de novo* review of "challenges to the meaning and constitutionality of statutes . . . ." *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007). A different standard, however, applies where a defendant has procedurally defaulted a claim of error before the district court.

On the one hand, a defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). "For there to be 'plain error,' there must be (1) an error that (2) is 'plain' and (3) 'affect[s] substantial rights'; if these elements are satisfied, then the court may correct the error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Miller*, 263 F.3d 1, 4 (2d Cir. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)); *see also United*

States v. Cotton, 535 U.S. 625, 631-32 (2002) (outlining "plain error" factors).

On the other hand, a defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005); *United States v. Nelson*, 277 F.3d 164, 204 (2d Cir. 2002); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

C. Discussion

1. The defendant affirmatively waived any challenge to the 10-year mandatory minimum by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty.

The Eighth Circuit has had occasion to hold that "a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal." *United States v. Womack*, 985 F.2d 395, 400 (8th Cir. 1993) (internal quotation marks omitted). For example, in *United States v. Cook*, 447 F.3d 1127, 1128 (8th Cir. 2006), a defendant who had pled guilty to a violation of 21 U.S.C. § 841(b)(1)(A) challenged – for the first time on appeal – the applicability of the 20-year

mandatory minimum penalty. The Eighth Circuit held that the defendant had waived his "right to contest his sentence on the basis of the § 841(b)(1)(A) enhancement" by freely entering into a plea agreement that called for that penalty. *Id.* ("At the time of the plea, Cook did not object to the prior crime but stated he understood the plea agreement and was entering his plea freely and voluntarily with the knowledge his mandatory minimum sentence would be twenty years."); *see also United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995) (same); *United States v. Durham*, 963 F.2d 185, 187 (8th Cir. 1992) ("[Defendant] waived any objection to the twenty-five-year sentence by agreeing that it was the minimum sentence mandated by the statutes, and by accepting the benefit of the plea agreement.").

As in *Cook*, the defendant here knowingly entered into a written plea agreement that called for a 10-year mandatory minimum penalty. A20. Through counsel, the defendant acknowledged that he faced a 10-year minimum sentence at sentencing, CA86-88. Having "explicitly and voluntarily expose[d] himself" to a 10-year minimum sentence, the defendant should not now be permitted to challenge that sentence. *Cook*, 447 F.3d at 1128.

The Eighth Circuit's approach is consistent with this Court's enforcement of plea agreements more generally. The Court has "noted the dangers of piecemeal non-enforcement of plea agreements," in the contexts of enforcing factual stipulations as well as appellate waivers. *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004). Both defendants and the government benefit from the enforceability of plea agreements. "If defendants are not

held to their factual stipulations, therefore, the government has no reason to make concessions in exchange for them." *Id.* at 412-13. To ignore the defendant's concession about the applicability of the mandatory minimum sentence would be to ignore the "mutuality of plea agreements." *Granik*, 386 F.3d at 412; *see also United States v. Brumer*, 528 F.3d 157, 159 (2d Cir. 2008) (per curiam) (holding that when defendant breaches plea agreement, government is entitled to choose between specific performance or being relieved of its obligations under agreement); *United States v. Bradbury*, 189 F.3d 200, 208 n.4 (2d Cir. 1999) (rejecting defendant's claim that his base offense level under the guidelines should be calculated as if his conspiracy involved no drugs at all, where defendant had signed plea agreement acknowledging that conspiracy involved 378 pounds of marijuana); *United States v. Delgado*, 288 F.3d 49, 56-57 (1st Cir. 2002) (holding that defendant's concession in plea agreement that there was no basis for downward departure constituted waiver of this claim on appeal); *cf. United States v. Martinez*, 122 F.3d 421, 422-23 (7th Cir. 1997) (holding that factual stipulations in plea agreement are binding unless defendant validly withdraws from agreement).[2]

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[2] The defendant's plea agreement contained no appeal waiver, and so the government does not rely on the line of cases that enforce such provisions. Nevertheless, as explained in the text, a defendant can waive a claim (without specifying a forum) by stipulating to a result in a plea agreement, just as he can waive a forum (without specifying particular claims) by entering into an appellate waiver.

Even if the defendant had not waived his right to challenge the 120-month mandatory minimum sentence, his claims on that score would still fail. For the reasons that follow, the defendant's challenge to the denial of his request for jury findings on his eligibility for a substantial assistance departure is meritless.

2. Alternatively, the Sixth Amendment does not mandate jury findings on the defendant's request for a substantial assistance downward departure under 18 U.S.C. § 3553(e) or § 5K1.1.

The defendant argues that under the Sixth Amendment, he is not subject to a mandatory minimum term of imprisonment unless and until a jury makes factual findings that he is not entitled to a downward departure for substantial assistance. Defendant's Brief at 13.

As a preliminary matter, the defendant's ineligibility for a substantial assistance departure below the mandatory minimum term did not turn on judicial factfinding, but rather on the absence of a government motion under § 3553(e) requesting such a departure. Without a government motion under § 3553(e), there is no need for factfinding on the defendant's efforts at assistance because the district court is not authorized to impose a sentence below the mandatory minimum. *See United States v. Bruno*, 383 F.3d 65, 92 (2d Cir. 2004); *see also Richardson*, 521 F.3d at 157-59 (discussing requirement of government motion for relief under § 3553(e)).

Although the defendant argues that the "government motion" requirement is no longer mandatory because the guidelines are advisory after *United States v. Booker*, 543 U.S. 220 (2005), *see* Defendant's Brief at 13-14, this argument overlooks that the motion requirement is embodied in *statute*, as well as in the guidelines. Section 3553(e) provides that a district court may not depart below a *statutory* mandatory minimum – as was applicable here – in the absence of a government motion. *Richardson*, 521 F.3d at 158 ("A motion under § 5K1.1 authorizes the sentencing court to depart below the applicable advisory guideline range in determining the advisory guideline sentence, and a § 3553(e) motion permits the court to sentence below a statutory minimum.") (quotations omitted). Because the government motion requirement is mandated by statute, even if there were some argument that *Booker* eliminated the motion requirement in § 5K1.1 (and there is not), the motion requirement in § 3553(e) is unaffected by *Booker*'s holding that the guidelines are advisory.

But even if there were factfinding necessary to determine the defendant's eligibility for a substantial assistance departure under § 3553(e), there would have been no Sixth Amendment problem with judicial factfinding on his eligibility for the departure.[3] The

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[3] In an analogous context, this Court has held that judicial factfinding on a defendant's eligibility for safety valve relief from mandatory minimum sentences under § 3553(f) does not violate the Sixth Amendment. *See, e.g.*, *United States v. Jimenez*, 451 F.3d 97, 102 -104 (2d Cir. 2006); *United States* (continued...)

Supreme Court has squarely held that judicial factfinding is only a constitutional stumbling block under the Sixth Amendment when it increases the maximum sentence to which a defendant is subjected. *See Booker*, 543 U.S. at 231-32. Judicial factfinding by a preponderance of the evidence is entirely permissible when used to set the minimum sentence to which a defendant will be subject. *Harris v. United States*, 536 U.S. 545, 560 (2002); *see also United States v. Sharpley*, 399 F.3d 123, 126-27 (2d Cir. 2005) (holding that sentencing under mandatory guidelines regime is harmless where defendant receives mandatory minimum sentence). If judges may make findings that establish a sentencing floor, then *a fortiori* they may make findings that drop a defendant's sentence below that floor as with a substantial assistance departure.

The defendant's argument – that he was not subject to a mandatory minimum sentence "unless a factual finding is made that [his] efforts do not qualify for the requested departure," Defendant's Brief at 13 – is an attempt to turn the § 3553(e) substantial assistance departure provision on its head. In other words, he attempts to convert the eligibility criteria for a sentence reduction into elements of the offense which increase his maximum sentence and hence which must be found beyond a reasonable doubt by a jury. This argument fails.

First, the defendant is simply incorrect in asserting that he is not subject to a mandatory minimum sentence unless it is first determined that he is ineligible for a substantial

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[3] (...continued)
v. Holguin, 436 F.3d 111, 117-19 (2d Cir. 2006).

assistance departure. The statute does not require a district court to make affirmative findings on substantial assistance before applying the mandatory minimum sentences listed in narcotics statutes. To the contrary, the minimum sentence is authorized solely by the terms of § 841(b)(1)(B), upon (A) the defendant's admission or a jury finding of four elements: (1) that the defendant possessed a quantity of cocaine base; (2) that he knew he possessed a quantity of a controlled substance; (3) that he possessed the cocaine base with the intent to distribute it; and (4) that the quantity involved was 5 grams or more; and (B) the filing of an information under 21 U.S.C. § 851 establishing the defendant's prior conviction for a felony drug offense. *See United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc) (holding that drug quantity is element of offense to be submitted to grand jury and trial jury, to the extent that court seeks to impose sentence in excess of ten-year maximum established by § 841(b)(1)(C)).

In addition, the defendant's argument that his guidelines range was applicable in the absence of further factfinding in essence assumes that his guidelines range – as calculated by the defendant to be 41-51 months – was the lawful maximum sentence in his case. This assumption is flawed both factually and legally. Factually, as set forth above, the defendant's guidelines range was not 41-51 months, but rather 120-121 months.[4] Accordingly, even

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[4] Although the defendant lodged no objection to the 120-121 month guideline calculation at sentencing, CA87-88, he now uses a range of 41-51 months throughout his brief. He (continued...)

under the defendant's theory, there is no Sixth Amendment problem because he was sentenced within his guidelines range.

But even if the defendant's guidelines range were lower than the statutory mandatory minimum in this case (and as explained above, it was not), there would be no problem here. The flaw in the defendant's argument is that it misidentifies the appropriate "lawful maximum" sentence as the upper end of the guidelines sentencing

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[4] (...continued)
appears to reach this range through the following steps: (1) starting with the base offense level for 5 grams of crack (26); (2) subtracting 3 levels for acceptance of responsibility; and (3) subtracting 2 levels for the recent amendments to the crack cocaine sentencing guidelines. These steps produce a guidelines range of 41-51 months in the Sentencing Table. Putting aside the defendant's previous agreement that 120-121 months was his guidelines range, his analysis is flawed. First, it ignores that the PSR (and the court) found that he was responsible for between 50 and 150 grams of cocaine base, thus increasing his base offense level to 32. PSR ¶ 14; CA87-88. Second, the analysis ignores that the defendant was subject to a statutory mandatory minimum term of imprisonment and thus even if his calculated guidelines range were lower than the statutory minimum, under § 5G1.1, his guidelines sentence would be set at the mandatory minimum. And finally, the defendant's analysis rests on the assumption that the defendant would be entitled to a sentence reduction under the new crack guidelines, but because he was sentenced at a statutory mandatory minimum, he would not be entitled to any relief under the new crack guidelines. *See, e.g.*, *United States v. Jones*, 523 F.3d 881, 882 (8th Cir. 2008) (per curiam).

range, rather than the life imprisonment maximum pursuant to 21 U.S.C. § 841(b)(1)(B). Once the guidelines are viewed as advisory, the relevant statutory maximum to which the defendant is now subject is the life term established by his statute of conviction, irrespective of whether he is entitled to a substantial assistance departure. Because the sentence he received is less than this statutory maximum, and because it was the lowest possible sentence permissible under § 841(b)(1)(B), any *Booker* error was harmless beyond any doubt. *See Sharpley*, 399 F.3d at 126-27. Put another way, if this Court were to turn back the clock and ask what the sentencing court should have done, had it known of *Booker*, the answer is clear: It should have imposed nothing less than the ten-year mandatory minimum sentence which it ordered in this case.

III. Federal Rule of Criminal Procedure 11 precludes the defendant's request to withdrawal his guilty plea.

A. Relevant facts

The defendant was sentenced on September 29, 2003. A9-10. His sentence was affirmed by summary order on August 24, 2004. *United States v. James*, 106 Fed. Appx. 752 (2d Cir. 2004). On May 3, 2005, this Court remanded the case to the district court for proceedings under *Crosby*. A31-35.

In the proceedings before the district court on remand, the defendant argued, for the first time, that he should be allowed to withdrawal his guilty plea. A43-45. The district

court denied this request noting that Rule 11 prohibits withdrawal of a plea after sentencing. A79.

B. Governing law and standard of review

Federal Rule of Criminal Procedure 11(d)(2)(B) provides that

> [a] defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal.

"While 'this standard implies that motions to withdraw prior to sentence should be liberally granted, a defendant who seeks to withdraw his plea bears the burden of satisfying the trial judge that there are valid grounds for withdrawal.'" *United States v. Doe*, 537 F.3d 204, 210 (2d Cir. 2008) (quoting *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992) (citation and internal quotation marks omitted)).

Rule 11(e) further states that "[a]fter the court imposes sentence, the defendant may not withdraw a plea of guilty . . . and the plea may be set aside only on direct appeal or collateral attack."

This Court reviews for abuse of discretion a district court's decision denying a motion to withdraw a guilty plea. *Doe*, 537 F.3d at 211.

C. Discussion

The district court properly denied the defendant's request to withdraw his guilty plea because that request was made *after* sentencing. Although Rule 11(d)(2)(B) allows a defendant to move to withdraw his guilty plea under certain circumstances, this rule is expressly limited to motions filed *before* the court imposes sentence. Fed. R. Crim. P. 11(d)(2)(B). Further, Rule 11(e) confirms that "[a]fter the court imposes sentence, the defendant *may not withdraw* a plea of guilty . . . ." (emphasis added). *See United States v. Pimentel*, 539 F.3d 26, 31 (1st Cir. 2008) (refusing to consider argument where defendant had not filed motion to withdrawal guilty plea before sentencing).

The defendant does not dispute this reading of Rule 11, but argues that the "effect of the [*Crosby*] remand was that it was as though [he] had not yet been sentenced." Defendant's Brief at 16. This argument rests on a misunderstanding of *Crosby*. In *Crosby*, this Court held that in any case in which a defendant appeals a sentence imposed prior to the Supreme Court's decision in *Booker*, the district court committed "error" if it imposed a sentence in conformity with the then-binding view that the sentencing guidelines were mandatory. 397 F.3d at 114-15. In such cases, this Court held that if a defendant has not preserved an objection to his sentence and plain error review is therefore applicable, a remand is appropriate for the "limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime . . . ." *Id.* at 117. By contrast, in cases in which the defendant preserved an objection to the sentencing guidelines, this Court remands for a full

resentencing. *See, e.g.*, *United States v. Fagans*, 406 F.3d 138, 140-41 (2d Cir. 2005); *United States v. Lake*, 419 F.3d 111, 113 (2d Cir. 2005).

The defendant here did not preserve an objection to the sentencing guidelines and hence he received a *Crosby*, not a *Fagans*, remand. A *Crosby* remand is not a remand for resentencing, but rather a remand to allow the district court to determine *whether* to resentence. Because the defendant's sentence was imposed in 2003, and has never been vacated, his motion to withdraw his guilty plea was properly denied under Rule 11(d)(2)(B).

IV. The defendant waived any challenge to the 10-year minimum sentence, or in the alternative, the district court properly held that the mandatory minimum sentence was not unconstitutional.

A. Governing law and standard of review

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amend. VIII.

The Fifth Amendment to the Constitution provides, in relevant part, that no person "shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const., Amend. V. Although the Fifth Amendment does not contain an Equal Protection Clause, there is "a well-established equal protection component to the Fifth Amendment Due Process Clause applicable to the federal

government." *Skelly v. INS*, 168 F.3d 88, 91 (2d Cir. 1999).

For the standard of review, see Part II.B.2., *supra*.

B. Discussion

As described above, *supra* at Part II.C.1., the defendant affirmatively waived any challenge to the 10-year mandatory minimum sentence applicable to his conviction by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty.

But even if the defendant had not waived any challenge to his mandatory minimum sentence, the district court properly rejected the defendant's multiple constitutional challenges to his sentence. The defendant argues that the mandatory minimum sentence applied in his case violates due process and equal protection, and constitutes cruel and unusual punishment. All of these arguments are without merit.

1. The defendant's mandatory minimum sentence does not violate due process.

The defendant argues that his mandatory minimum sentence violates due process because the imposition of a sentence that is three times as long as the sentence recommended by the expert Sentencing Commission (*i.e.*, his guidelines sentence) is arbitrary and capricious. Defendant's Brief at 17-28.

This argument (as with his other constitutional arguments) rests on a comparison between the applicable mandatory minimum sentence, 120 months, and the defendant's assertion that his sentencing guidelines range was 41-51 months. *See, e.g.*, Defendant's Brief at 19, 30. But, as described above, *supra* at 24-25 & n.4, this was not the defendant's guidelines range. At sentencing, the district court adopted the PSR's guidelines calculation that the defendant had a total offense level of 29, and was in criminal history category II. CA87-88. Although this translates into a range of 97-121 months in the Sentencing Table, because of the operation of the mandatory minimum sentence, the final sentencing guidelines range was 120-121 months. CA88. *See* U.S.S.G. § 5G1.1(c)(2). At sentencing, defense counsel confirmed that he had no objection to these calculations. CA87-88.

Putting aside the defendant's mis-statement of his calculated guidelines range, his constitutional argument – premised, as it is, on the comparison between a "guidelines" range and the mandatory minimum sentence – ignores the operation of § 5G1.1 of the guidelines. In other words, even if the defendant's total offense level and criminal history score intersected to produce a range of 41-51 months in the Sentencing Table (which they did not), that would not be his guidelines range. Section 5G1.1(b) of the guidelines, as promulgated by the expert Sentencing Commission, expressly provides that when a "statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." Thus, an applicable guideline range of 41-51 months here would become a guidelines range of 120 months. Accordingly,

there is no factual basis for the defendant's argument that his mandatory minimum sentence was three times as long as his guidelines sentence.

In the absence of any distinction between his guidelines range – set by the Sentencing Commission to be bounded by his statutory mandatory minimum sentence – and his mandatory minimum sentence, the defendant's due process argument fails. Moreover, this Court has repeatedly rejected due process challenges to the mandatory minimum sentences set forth in 21 U.S.C. § 841, noting that Congress created the enhanced penalties in that statute with the "clear and rational" purpose of deterring "particularly insidious drug transactions." *See United States v. Pineda*, 847 F.2d 64, 65 (2d Cir. 1988) (per curiam) (quoting *United States v. Collado-Gomez*, 834 F.2d 280, 280-81 (2d Cir. 1987)). *See also United States v. Proyect*, 989 F.2d 84, 88 (2d Cir. 1993) ("To sustain a federal sentencing statute against a due process or equal protection challenge, courts need only find that 'Congress had a rational basis for its choice of penalties.'") (quoting *Chapman v. United States*, 500 U.S. 453, 465 (1991)).[5] In light of these cases, it can hardly be said that the mandatory minimum sentences established by Congress are arbitrary or lacking in a rational basis.

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[5] The defendant argues that his due process claim should be evaluated under a reasonableness standard instead of under "rational basis" review. Defendant's Brief at 26-27. The defendant cites no authority for this proposition, relying instead on concurring and dissenting opinions. More significantly, he fails to explain how this standard would change the result in this case.

2. The defendant's mandatory minimum sentence does not violate equal protection.

The defendant argues that the mandatory minimum sentences in § 841 violate equal protection because they "create[] a class of individuals for whom the United States Sentencing Guidelines effectively do not apply." Defendant's Brief at 28. Again, this argument rests on the false premise that the defendant's guidelines range was lower than his mandatory minimum sentence. But as described above, his guidelines range – as calculated according to the sentencing guidelines promulgated by the Sentencing Commission – was 120-121 months. The guidelines apply to all defendants and hence there is no equal protection problem. In any event, this Court has previously rejected an equal protection challenge to the mandatory minimum terms in § 841. *See, e.g.*, *Pineda*, 847 F.2d at 65.

3. The defendant's mandatory minimum sentence does not amount to cruel and unusual punishment.

Finally, the defendant argues that his 120-month mandatory minimum sentence violates the Eighth Amendment because it is excessive when compared to his 41-51 month guidelines range. Defendant's Brief at 29-31. As with his other constitutional arguments, this argument fails at the first step because the defendant's mandatory minimum sentence was within his guidelines range. *See*, *supra*.

And again, as with his other constitutional arguments, this Court has previously rejected similar challenges to the mandatory minimum sentences in § 841. "The Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime." *United States v. Snype*, 441 F.3d 119, 152 (2d Cir. 2006) (quotations omitted). And "[a]s the Supreme Court has itself observed, 'outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.'" *Id.* (quoting *Ewing v. California*, 538 U.S. 11, 21 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))).

Applying these principles, this Court has held that the mandatory minimum sentences required by 21 U.S.C. § 841 do not constitute cruel and unusual punishment under the Eighth Amendment. *See United States v. Jackson*, 59 F.3d 1421, 1424 (2d Cir. 1995) (per curiam). In *Jackson*, the defendant argued that the mandatory minimum penalties in § 841 violated the Eighth Amendment because the penalties for cocaine base offenses were arbitrary and capricious and because they did not allow the district judge any discretion to consider mitigating factors. This Court rejected these arguments noting first that it had previously held that the sentencing scheme in § 841 (including the mandatory minimum penalties) was "'rationally related to the legitimate governmental purpose of protecting the public against the greater dangers of crack cocaine.'" *Jackson*, 59 F.3d at 1424 (quoting *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994)). Further, the *Jackson* Court held that "mandatory sentences of life imprisonment without the

possibility of parole do not violate the Eighth Amendment simply because they are mandatory." *Id.*

Here, as in *Jackson*, the defendant argues that the mandatory minimum sentences in § 841 are arbitrary because they are disproportionate to the crime committed. *Jackson* rejected this argument, and that decision therefore controls this case.

* * *

As described above, the defendant's constitutional arguments are not properly before this Court at this time. They are precluded by the law of the case doctrine, and in any event were waived by the defendant when he entered into a plea agreement acknowledging the validity of the mandatory minimum sentence he now challenges. Finally, all of his constitutional claims have been rejected in prior decisions of this Court. And as this Court has frequently held, "a prior decision of a panel of this court binds all subsequent panels 'absent a change in law by higher authority or by way of an in banc proceeding' . . . ." *Mendez v. Mukasey*, 525 F.3d 216, 221 (2d Cir. 2008) (quoting *United States v. Snow*, 462 F.3d 55, 65 n.11 (2d Cir. 2006) (quoting, in turn, *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002)), *cert. denied*, 127 S. Ct. 1022 (2007)); *see also Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (recognizing authority to revisit prior panel's decision only if "there has been an intervening Supreme Court decision that casts doubt on our controlling precedent," such as a decision that overrules a different, but similar, circuit precedent). These precedents therefore

dictate that the defendant's claims be rejected on the merits.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 6, 2008

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,685 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

18 U.S.C. § 3553(e) Limited authority to impose a sentence below a statutory minimum.

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

5G1.1. Sentencing on a Single Count of Conviction

(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

(b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

(c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence--

> (1) is not greater than the statutorily authorized maximum sentence, and

(2) is not less than any statutorily required minimum sentence.

5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Rule 11. Pleas

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere . .

(2) after the court accepts the plea, but before it imposes sentence if . . .

> (B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use, without just compensation.

Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.