04-3913-cr

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3913-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANDRE CLEMONS, also known as Dre, LAWRENCE COLLINS, also known as Chaos, aka Jaboo, aka Boo, WILLIAM KNIGHTON, also known as Six Two, TROY

(for continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

==

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Defendants,

LEROY MCCRORY,

Defendant-Appellant.

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STATEMENT OF JURISDICTION

The district court (Ellen B. Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the defendant's guilty plea and associated waiver of appellate rights remain valid, where they were knowingly and voluntarily made in the light of then-applicable law, regardless of the subsequent change in the law resulting from the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005).

2. Assuming *arguendo* that the defendant is not foreclosed from arguing that *Booker* renders his plea and waiver of appeal rights invalid:

    a. Whether the district court's failure to advise the defendant that he had a right to have a jury determine beyond a reasonable doubt the quantity of drugs for sentencing purposes constitutes plain error, where such advice would have been legally incorrect; and

    b. Whether the district court's failure to advise the defendant that the Sentencing Guidelines could not be mandatorily applied was plain error warranting vacatur of his conviction, where the defendant has not pointed to anything in the record demonstrating that he would not have pled guilty if so advised.

3. Whether the defendant's waiver of his appeal rights forecloses the defendant's request for a limited sentencing remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3913-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

LEROY MCCROREY,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant-appellant Leroy McCrorey was a member of a drug conspiracy known as the "Twenty Love" gang, which sought to control drug trafficking in Manchester, Connecticut. On four separate occasions, the defendant sold crack cocaine to an undercover police officer and a cooperating witness, for which he was

indicted in 1997. On February 10, 2004, after fleeing Connecticut and assuming a false identity for six years, the defendant pled guilty to one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1).

In the plea agreement and at the Rule 11 hearing, the defendant stipulated that he sold 6.46 grams of a mixture or substance containing a detectable amount of cocaine base. The defendant further stipulated that his Sentencing Guidelines range was 70-87 months. In addition, the defendant knowingly and voluntarily waived his right to appeal "the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 87 months." Defendant-Appellant's Appendix ("A") at 20.

In exchange for the defendant's guilty plea and waiver of his appellate rights, the government dismissed four additional counts against the defendant, agreed to recommend a three-level reduction for acceptance of responsibility, and consented to the defendant's request for a two-level downward departure, which the district court ultimately granted.

On May 14, 2004, the district court (Ellen B. Burns, J.) sentenced the defendant to a term of imprisonment of 77 months. Dissatisfied with his sentence, the defendant filed this appeal, claiming: (a) that his conviction should be reversed because his plea and waiver of rights were based upon an incorrect understanding of the applicability of the Sentencing Guidelines; and in the alternative (b) that this case should be remanded to the district court for sentencing purposes in accordance with this Court's

decision in *Crosby*. For the reasons that follow, this Court should reject each these claims and affirm the defendant's conviction and sentence.

Statement of the Case

On January 30, 1997, a federal grand jury returned a twenty-six count indictment against ten co-conspirators, including five counts against the defendant, Leroy McCrorey. The case was assigned to Senior United States District Judge Ellen B. Burns.

On February 10, 2004, the defendant pled guilty to Count Ten of the Indictment, pursuant to a plea agreement. A-63 to A-65.

On May 14, 2004, the district court sentenced the defendant to a term of imprisonment of 77 months, followed by 3 years of supervised release. A-174. On the Government's motion, the district court dismissed the remaining counts against the defendant. A-170 to A-171.

On May 21, 2004, the defendant filed a timely notice of appeal. A-176. The defendant is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Indictment

On January 30, 1997, a federal grand jury returned a twenty-six count Indictment. *See* A-1 to A-16. Count One

of the Indictment charged that between June 1996 and the date of the indictment, the defendant conspired with nine other co-defendants to possess with intent to distribute and to distribute fifty grams or more of a substance containing a detectable amount of cocaine base in violation of 21 U.S.C. § 846. A-1 to A-8. Counts Five, Eight, Nine and Ten of the Indictment charged that on July 11, July 16, July 23, and August 9, 1996, respectively, the defendant possessed with intent to distribute and distributed a substance containing a detectable amount of cocaine base in violation of 21 U.S.C. § 841(a)(1). A-9 to A-11. The other counts of the Indictment charged the other nine co-conspirators with specific acts of possession and distribution of illegal narcotics. A-8 to A-16.

B. The Plea Agreement

On February 10, 2004, the defendant pled guilty -- pursuant to a written plea agreement -- to Count Ten of the Indictment charging him with possession with intent to distribute and distribution of a mixture or substance containing a detectable amount of cocaine base. The written plea agreement set forth the fact that the defendant faced a maximum sentence of twenty years of imprisonment and a $1 million fine, as well as a term of supervised release of 3 years to life. A-17 to A-18.

In connection with the written plea agreement, the government and the defendant agreed to a stipulation of offense conduct which was attached to and made part of the plea agreement. A-19. Specifically, the parties stipulated and agreed that, on August 9, 1996, the defendant sold "an 'eightball,' i.e., one eighth ounce, of

crack cocaine" to an undercover agent and that "[t]he cocaine was later analyzed by a forensic chemist of the Drug Enforcement Agency and determined to be 1.28 grams of cocaine base." A-24. The defendant further stipulated and agreed that on three additional occasions, he "sold a total of approximately 5.18 grams [of] a mixture or substance containing a detectable amount of cocaine base" and "that, for purposes of calculating the defendant's applicable sentencing guidelines range, the total quantity of a mixture or substance containing a detectable amount [of] cocaine base attributable to the defendant is 6.46 grams." *Id.* Finally, the defendant "agree[d] that this stipulation as to the quantity of controlled substance attributable to the defendant results in a base offense level of 26." *Id.*

In the plea agreement, the parties stipulated and agreed that the applicable sentencing guidelines range was between 84 and 105 months of imprisonment, with a fine of $10,000 to $100,000. A-19. The government agreed to recommend that the court reduce the defendant's adjusted offense level by three levels based on the defendant's acceptance of responsibility. A-18 to A-19. In addition, the defendant reserved the right to seek, and the government agreed not to oppose, a two-level downward departure arising from the government's inadvertent destruction of evidence prior to trial and the three-month delay between the defendant's arrest and arraignment. A-19. The parties agreed that if the court granted the three-level reduction and two-level downward departure, "the defendant's adjusted offense will be level 21, and a corresponding guidelines range of 70-87 months." A-19. The plea agreement made clear, however, that the court

was not bound by the parties' agreement as to the guideline range and that the defendant "will not be permitted to withdraw the plea of guilty if the Court imposes a sentence based on a calculation of his offense level or criminal history category that differs from those set forth in this agreement." A-19.

In exchange for this guideline stipulation, the defendant agreed to waive his right to appeal or collaterally attack his conviction or sentence, as long as his sentence was not longer than 87 months. A-20. The relevant portion of the plea agreement provides as follows:

> Waiver of Right to Appeal or Collaterally Attack Sentence
>
> It is specifically agreed that the defendant will not appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 or § 2241, the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 87 months, even if the Court reaches a sentencing range permitting such a sentence by a Guideline analysis different from that specified above. The defendant expressly acknowledges that he is knowingly and intelligently waiving his appellate rights.

A-20.

The written plea agreement further provides that the defendant's guilty plea, if accepted by the court, would

satisfy the defendant's federal criminal liability in the District of Connecticut as to this matter and that the government would move to dismiss Counts One, Five, Eight and Nine of the Indictment. A-22.

C. The Rule 11 Hearing

On February 10, 2004, the defendant appeared before the district court for the purposes of entering his plea of guilty. The court addressed the defendant personally, in open court, and made certain the defendant was aware of and understood the charges against him, his constitutional rights, and the fact that he would be waiving certain rights.

More particularly, the defendant was put under oath, sworn to tell the truth and advised that his answers to the court's questions were subject to the penalties of perjury. A-28 and A-29. The court established that the defendant felt he had an adequate opportunity to discuss his case with his counsel, Norman Pattis, Esq., and that the defendant was satisfied with the representation of his counsel. A-29, A-30, A-33. The defendant testified that Mr. Pattis went over the plea agreement with him and had fully answered all of his questions. A-30 and A-39.

During the plea colloquy, the court advised the defendant of, *inter alia*, the charge against him and the elements of that offense, which the government was required to prove beyond a reasonable doubt. A-33 and A-34. In response to the court's inquiry, the defendant indicated that he had read the charge against him, that he had discussed it with his counsel, who had answered all of his questions regarding the charge, and that he understood

the charge. A-33 and A-34. The defendant further acknowledged that he was "admitting that on [August 9, 1996, he] did, knowingly and willfully, possess cocaine base with the intent to distribute" and that he "had a full and adequate opportunity to discuss this with Mr. Pattis." A-34.

The court reviewed the terms of the written plea agreement with the defendant and made certain that the defendant had read the agreement, understood it, discussed it with Attorney Pattis, and accepted its terms. A-39 to A-55. The court reviewed in detail the parties' guideline stipulation, which anticipated that, if the court accepted the government's recommendation for a three-level reduction for acceptance of responsibility and the defendant's request for a two-level downward departure, the defendant's guideline range would be 70 to 87 months. A-40 to A-44.

The court ensured, however, that the defendant understood that the court was not bound by the parties' agreement as to the guideline range and that the defendant could not withdraw his guilty plea if the court were to impose a sentence based on a calculation that was different from the calculation to which the parties had agreed. A-43 and A-44.

The court spent considerable time ensuring that the defendant fully understood that as long as his sentence was not longer than 87 months, that the defendant was waiving his right to appeal or collaterally attack his conviction or sentence. A-44 to A-47. The colloquy regarding the

defendant's waiver of his appellate rights included the following:

> The Court: Now, there is one very important provision which is set forth on page 4, Mr. McCrorey, and that's paragraph 5. And what you're doing here is saying that as long as I don't sentence you to more than 87 months in prison that you will not take an appeal. Even if you think I made a mistake somewhere along the line, you won't take an appeal. Okay? As long as you don't get more than 87 months. Do you want to talk to Mr. Pattis about that?
>
> Defendant: All right, your Honor. Proceed on.
>
> Mr. Pattis: May we have one additional moment?
>
> Defendant: It's okay. I understand.
>
> The Court: Are you sure you do?
>
> Defendant: Yes.
>
> The Court: Because an appellate right is a very important right.
>
> Defendant: Proceed on, it's all right.
>
> The Court: Did you want to talk to him a little bit more, Mr. Pattis?
>
> Mr. Pattis: May we have just one moment?

The Court: Sure. (Brief recess was taken.)

Defendant: Proceed on.

Mr. Pattis: I'm satisfied, Judge.

The Court: Well, not only are you committing yourself to not take an appeal, but you're also committing yourself not to try to attack your sentence in any other way. Have you ever heard of a writ of habeas corpus?

Defendant: Yes, ma'am.

The Court: You're waiving your right to challenge your conviction by way of a habeas corpus or a Section 2355 [sic] motion. Do you know that, also, sir? As long as your sentence is not more than 87 months. If I gave you a ten-year sentence, or something like that, sir, you could, obviously, either take an appeal or, ultimately, have a habeas, if you felt you had grounds for it. Do you understand that?

Defendant: Yes, ma'am.

The Court: But as long as your sentence is not more than 87 months, you've given up your right to take an appeal, and you've given up your right to bring any kind of challenge to your sentence, either under 2355 [sic] or anything else that you and your attorney might think of. Do you understand that?

Defendant: Yes.

A-44 to A-47.

In addition, the court advised the defendant and made certain the defendant understood that by pleading guilty, he was waiving certain constitutional rights. A-52. The court explained that the Government had the burden to prove the defendant's guilt beyond a reasonable doubt. A-52. The court advised the defendant and made certain the defendant understood that he was waiving his Sixth Amendment rights, including the right to a jury trial, the right to the assistance of counsel, the right to cross-examine the government's witnesses, the right to testify in his own defense, the privilege against self-incrimination and the fact that the Government bore the burden to prove his guilt beyond a reasonable doubt at trial. A-52 and A-53.

The court also made certain that no promises had been made to the defendant in exchange for his plea of guilty, apart from those promises contained in the plea agreement. A-50 to A-52. The court established that the defendant was pleading guilty of his own free will and that no one had coerced or pressured him to plead guilty. A-39. After the court reviewed the essential terms of the plea agreement and the constitutional rights that the defendant would be waiving if he pleaded guilty, the defendant stated in open court that he wanted to enter into the written plea agreement and proceeded to sign the agreement. A-55.

On multiple occasions during the hearing, the defendant admitted that he did in fact sell narcotics. These admissions include the following:

> The Court: Are you standing in front of me, now, and admitting that on that date, you did, knowingly and willfully, possess cocaine base with the intent to distribute.
>
> Defendant: Yes, ma'am. A-34.
>
> * * * *
>
> Defendant: . . . The reason I want you to go on with this plea agreement and due to Mr. Apter -- there's four sales here. I made the sales. Okay. Even if the quantity of the amount or whatever, that's irrelevant right now. I made the sales. I was there. I was present, and I did that. I made the sales. . . . A-64.
>
> * * * *
>
> The Court: As I heard Mr. McCrorey, he does not quarrel with the fact that he actually sold the substance on those occasions, right, sire?
>
> Defendant: Yes, ma'am.
>
> The Court: But what you're saying to me, I think, is that the amount of cocaine base was much less than the Government, apparently, thinks it was,

> because you put some other substances in with it; is that it?
>
> Defendant: Yes. A-74.
>
> * * * *
>
> Defendant: [If the case went to trial] I would have incriminated myself in front of a jury because I would have said that I did it; that I sold it. And that's why he told me -- I would have most definitely told the jury, yes, I sold drugs to feed my habit, but the amount, I didn't have.

A-77.

During the Rule 11 hearing, there was an extensive discussion regarding the quantity of cocaine base sold by the defendant. A-57 to A-80. The defendant and his counsel both acknowledged that the quantity of the substance sold by the defendant was 6.46 grams; they alleged, however, that because of the manner in which the cocaine was cut, the quality of the cocaine was much lower. A-57 to A-67, A-70 to A-74. The defendant stated that the amount of actual cocaine was likely no more than 3.5 grams. A-65. In response, the prosecutor stated that the cocaine sold by the defendant was tested and weighed by the Drug Enforcement Agency ("DEA") and that a DEA-accredited chemist would testify as to the quantity of the substance. A-68 and A-69. At the conclusion of this discussion, the government, Attorney Pattis and the defendant agreed to amend the stipulation of offense conduct to state that the defendant sold 6.46 grams of "a

mixture or substance containing a detectable amount" of cocaine base. A-70 to A-73. After stating to the court that he wanted to sign the amended stipulation of offense conduct, the defendant signed the stipulation. A-78 and A-79.

The court then asked the prosecutor to outline the government's proof if the case went to trial. A-79. The prosecutor stated that the government would offer the testimony of a cooperating witness, several undercover police officers and a DEA forensic chemist, who would testify that, *inter alia*, on August 9, 1996, the defendant sold to an undercover police officer a substance that was later determined by a DEA forensic chemist to be 1.28 grams of 81 percent pure cocaine base. A-79 to A-82. The government's witnesses would further testify that on three additional occasions the defendant sold a substance containing a detectable amount of crack cocaine to an undercover police officer or the cooperating witness, and that the total quantity of the controlled substance sold by the defendant was 6.46 grams. A-82 and A-83. Following the prosecutor's recitation, the defendant and Attorney Pattis both stated that they did not challenge the government's representations. A-83 and A-84.

At the conclusion of the Rule 11 canvass, the defendant again stated that he wished to plead guilty. He also stated that he was satisfied with his counsel's representation, stating that Attorney Pattis has represented him "greatly." A-85 and A-86. The court found that the defendant entered the guilty plea "knowingly, voluntarily, and with full understanding of what the effects of [his] actions will be" and accepted the plea. A-87.

C. The Sentencing Hearing

On May 14, 2004, the court conducted a sentencing hearing. The defendant again was represented by Attorney Pattis. A-102. During the sentencing hearing, like the change of plea hearing, the defendant said that he was satisfied with Attorney Pattis's representation, stating that attorney Pattis "did a great job." A-156.

Similar to the plea hearing, there was extensive discussion regarding the quantity of narcotics sold by the defendant. Despite the parties' stipulation of offense conduct, the defendant and his counsel both maintained that the quantity of cocaine sold by the defendant was less than 6.46 grams. Importantly, both the defendant and his counsel admitted that the defendant sold 3 grams of cocaine. A-113 and A-121.

In response, the government explained that there should not be a dispute as to the quantity of narcotics that the defendant sold. The prosecutor explained that the substance was sold in four separate transactions to undercover police officers and was subsequently weighed, evaluated and tested by a DEA chemist. A-117. The report prepared by the DEA chemist, which demonstrated that the defendant sold approximately 6.5 grams of a substance containing a detectable amount of cocaine base, was turned over to the defendant's counsel. A-117 and A-118.

In addition, the prosecutor explained that the court could sentence the defendant to 77 or 78 months in prison regardless of whether the defendant sold 3 grams or 6.5

grams of cocaine. A-119 and A-120. If the court credited the defendant's claim that he only sold 3 grams and gave the defendant a three-level reduction for acceptance of responsibility, the corresponding sentencing range would be 63 to 78 months. Id. This results in a two-month overlap with the range (*i.e.*, 77 to 96 months) calculated based on a quantity of 6.46 grams of cocaine base.

The parties also addressed the inadvertent destruction of the drugs sold by the defendant. Once again, Attorney Pattis agreed that the destruction of the evidence was "inadvertent," stating that the prosecutor "had an open file policy" and that "I have no reason to believe [that the destruction is] anything other than what [the prosecutor] said, inadvertent." A-129. The prosecutor explained that the drugs were maintained with drugs purchased from nine other co-conspirators who were charged with the defendant in 1997 and that the other nine co-defendants each either pleaded guilty or were convicted at trial. A-118. After the charges against the other nine co-defendants were closed, the DEA inadvertently destroyed the evidence, believing that this entire matter was resolved. *Id*. The prosecutor further explained that, in the government's estimation, the inadvertent destruction was caused primarily by the fact that the defendant fled Connecticut, assumed a false identity and was a fugitive from justice for six years. *Id*.

The defendant's waiver of his appellate rights also was discussed during this hearing. Attorney Pattis again confirmed that he "explained to [the defendant] that under the plea agreement that was entered -- and it was a very thorough canvass -- should this Court sentence [the

defendant] to a period of [less] than 87 months, his right to collaterally attack my performance by way of a writ of habeas corpus will be waived . . . ." A-108. Additionally, the court reminded the defendant that he had waived his right to appeal if the sentence was less than 87 months. A-170. The court further explained to the defendant that "if you or Mr. Pattis feel that notwithstanding that waiver there is a basis for appeal in this case, any notice of appeal must be filed within 10 days." A-169 and A-170.

Attorney Pattis acknowledged that the defendant had received certain benefits in exchange for his guilty plea and his waiver of his appellate rights. Attorney Pattis explained, for example, that the plea agreement "benefits [the defendant] because he's exposed to incarceration for only one count as opposed to multiple counts and the possibility of consecutive sentences." A-108. In addition, the government recommended a three-level reduction for acceptance of responsibility and agreed not to oppose the defendant's request for a two-level downward departure. Moreover, as Attorney Pattis recognized, the government had a strong case against the defendant and the plea agreement provided the defendant with the best opportunity to "get the most he could of the rest of his life back." A-132.

In determining the defendant's sentence, the court first noted that neither Attorney Pattis nor the government disagreed with the probation department's calculation of a 90 to 115 month sentence. A-167. The court then granted the three-level reduction for acceptance of responsibility and the defendant's request for a two-level downward departure, resulting in a sentencing range of 77

to 96 months. A-167 and A-168. The court sentenced the defendant to 77 months of imprisonment. A-168. In response to the government's request for a finding under *United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1998), the court stated that the 77 month sentence would have been imposed under any condition (*i.e.*, a quantity of either 3 grams or 6.46 grams). A-170; *see also* A-124. After the court imposed the sentence, the defendant acknowledged that his sentence "could have been much worse[]." A-172.

SUMMARY OF ARGUMENT

The defendant's argument that *United States v. Booker*, 125 S. Ct. 738 (2005), renders his guilty plea and associated waiver of rights invalid is without merit. The Supreme Court has firmly established that a subsequent change in the law does not render a guilty plea unknowing or involuntary. *See Brady v. United States*, 397 U.S. 742, 757 (1970). This Court should join its sister circuits in holding that *Booker* does not render unknowing a guilty plea and waiver of rights that were entered prior to the issuance of *Booker*. Accordingly, this Court should affirm the defendant's conviction.

Moreover, pursuant to this Court's decision in *United States v. Morgan*, No. 03-1316, 2005 WL 957186, *1-2 (2d Cir. Apr. 27, 2005) the defendant's knowing and voluntary waiver of his appellate rights forecloses his alternative request that this case be remanded for sentencing purposes pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

ARGUMENT

I. THE DEFENDANT'S GUILTY PLEA AND WAIVER OF RIGHTS WERE KNOWING AND VOLUNTARY

A. Relevant Facts

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

B. Governing Law and Standard of Review

1. The Knowing and Voluntary Requirement for Guilty Pleas and Waiver of Appellate Rights

In determining the validity of a guilty plea, "[a]ll that is required to show that a guilty plea is valid is that the plea was 'voluntarily and understandingly entered.'" *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). Likewise, it is well settled that a waiver of appellate rights is enforceable provided the waiver itself is knowing and voluntary. *See United States v. Morgan*, 386 F.3d 376, 379 (2d Cir. 2004) (declining to review merits of a Sixth Amendment challenge to a sentence); *United States v. Djelevic*, 161 F.3d 104, 106 (2d Cir. 1998) (per curiam) (waiver bars claim challenging sentence).

To ensure that a guilty plea is made voluntarily and intelligently, Rule 11 of the Federal Rules of Criminal Procedure requires that the district court inform the defendant on the record of "the nature of the charges

against him and of the consequences of the plea." *United States v. Perdomo*, 927 F.2d 111, 116 (2d Cir. 1991); *see also McCarthy v. United States*, 394 U.S. 459, 464 (1969). Rule 11 further provides that prior to accepting a plea of guilty, the court must determine that the plea is voluntary and not induced by force, threats or promises apart from a plea agreement. *See* Fed. R. Crim. P. 11(b)(2). The court also must ascertain that a factual basis exists for the plea of guilty. *See* Fed. R. Crim. P. 11(b)(3).

Guilty pleas and waivers of appellate rights are valid and enforceable when they are knowingly and voluntarily made under the law applicable at the time that the plea is entered. *See Brady*, 397 U.S. at 757 ("a voluntary plea of guilty intelligently 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"); *see also United States v. Ruiz*, 536 U.S. 622, 630 (2002) ("[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of constitutional rights, despite various forms of misapprehension under which a defendant might labor"; one potential misapprehension is the defendant's "fail[ure] to anticipate a change in the law regarding relevant punishments") (internal citations and quotations omitted); *Morgan,* 2005 WL 957186, *1-2 (change in law arising from *Booker* does not render appellate waiver invalid).

2. The Plain Error Standard of Review

Where, as here, a defendant challenges the validity of his guilty plea for the first time on appeal, this Court reviews the district court's acceptance of the guilty plea only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Dominguez Benitez*, 542 U.S. 74, 123 S. Ct. 2333, 2338 (2004) (citing *United States v. Vonn*, 535 U.S. 55, 63 (2002)) (defendant who seeks reversal of conviction after guilty plea on ground that district court violated Rule 11 must establish plain error); *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (where appellant fails to object to Rule 11 violation, Court reviews for plain error); *United States v. Barnes*, 244 F.3d 331, 333 (2d Cir. 2001) (per curiam) (where defendant "did not argue the point to the district court, we review the trial judge's acceptance of the plea for plain error").

The defendant bears the burden of establishing plain error. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). To establish plain error, the defendant must demonstrate (1) an error, (2) that is plain, and (3) that affects substantial rights.[1] *Vaval*, 404 F.3d at 151 (citing

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[1] Under the third ("substantial rights") prong of the plain error standard, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993). This Court has held that in cases where, as here, the alleged error results from an intervening change in the law, it is the Government's burden to show that the error did not prejudice the defendant. *See United States v. Viola*, 35 F.3d 37 (2d Cir. 1994).

(continued...)

United States v. Olano, 507 U.S. 725, 732 (1993)). "If an error meets these initial tests, the Court engages in a fourth consideration: whether or not to exercise its discretion to correct the error. The plain error should be corrected only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Doe*, 297 F.3d 76, 82 (2d Cir. 2002) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

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[1] (...continued)
Viola's modified plain error standard is, we submit, inconsistent with *Olano's* facially unqualified allocation of the burden of persuasion in all cases involving a forfeited error. *Viola*'s reasoning, moreover, has been effectively superseded by the Supreme Court's later decision in *Johnson v. United States*, 520 U.S. 461 (1997). *Johnson* involved an intervening change in law on appeal, and the Supreme Court emphasized that *Olano*'s standards -- including the requirement that the defendant prove prejudice -- apply in those circumstances. This Court has acknowleged but not yet resolved, the question of whether *Viola's* modified plain error approach "has been implicitly rejected" by the Supreme Court in *Johnson*. *United States v. Williams*, 399 F.3d 450, 458 n.7 (2d Cir. 2005)(citing *United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc)) (assuming, for purposes of pending appeal, that "the burden to show that an error, arising from an intervening change in law, affected substantial rights remains with the defendant"). No other court of appeals has adopted a modified burden-shifting approach before or after *Johnson*.

C. Discussion

1. The *Booker* Decision Does Not Render the Defendant's Guilty Plea and Waiver of Rights Invalid

The defendant argues that the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005) renders his guilty plea and his associated waiver of trial and appellate rights invalid. In *Booker*, the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). *See* 125 S. Ct. at 756. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *Id.* As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), rendering the Guidelines "effectively advisory." *Id.* at 757. The defendant alleges that because his "plea and waiver of trial and appellate rights were based upon a false understanding of the applicability of [the] Sentencing Guidelines, his plea and those waivers were not knowingly made." Defendant-Appellant's Brief ("App. Br.") at 23-24. This argument, however, is foreclosed by the Supreme Court's decision in *Brady v. United States*, 397 U.S. 742, 757 (1970).

In *Brady*, the defendant pleaded guilty to a life sentence, in part to avoid a death sentence under 18 U.S.C. § 1201(a) ("Section 1201(a)"). *See* 397 U.S. at 758. After the Supreme Court ruled that the death penalty provision in Section 1201(a) was unconstitutional, the defendant

claimed that his guilty plea was invalid because Section 1201(a) "operated to coerce his plea." *Id.* at 744.

The Supreme Court rejected the defendant's argument. The Court stated that "a voluntary plea of guilty intelligently 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." *Id.* at 757. The Supreme Court further stated that "[a] plea of guilty . . . is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts . . . hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered." *Id.*

The Supreme Court determined that "[t]he fact that [the defendant] did not anticipate [the change in law] does not impugn the truth or reliability of his plea." *Id.* Additionally, the Court found that "nothing in the record impeaches [the defendant's] plea or suggests that his admissions in open court were anything but the truth." *Id.* at 758. Accordingly, the Supreme Court affirmed that the "plea was voluntarily and intelligently made." *Id.*

Here, as in *Brady*, the defendant seeks to vacate his guilty plea because of a subsequent change in the law. The defendant alleges that the new rule established in *Booker* renders his guilty plea and his associated waiver of rights unknowing. As the Supreme Court stated in *Brady*, however, "[t]he fact that [the defendant] did not anticipate [the change in law] does not impugn the truth or reliability of his plea." *Id.* Indeed, here, as in *Brady*, there is nothing

in the record suggesting that the defendant's plea was anything but knowing and voluntary. *Id.* at 758.

This conclusion accords with this Court's recent decision in *United States v. Morgan,* 2005 WL 957186, *1-2 (2d Cir. Apr. 27, 2005). In *Morgan*, the Court held that a pre-*Booker* waiver of appeal rights in the defendant's plea agreement was enforceable and foreclosed the right to appeal under *Booker*. *Id.* at *1. In reaching this conclusion, the Court relied, in part, on the Supreme Court's determination in *Brady* that "a voluntary plea of guilty intelligently 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." *Id.* In accordance with *Brady*, this Court determined that the fact that the defendant in *Morgan* "did not . . . have knowledge of his rights under *Booker/Fanfan* makes no material difference. His inability to foresee that subsequently decided cases would create new appeal issues does not supply a basis for failing to enforce an appeal waiver." *Id.* The Court further stated that "the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." *Id.*

While the Court in *Morgan* did not directly address this issue, by ruling the appeal waiver enforceable, the Court effectively held that *Booker* did not render the appeal waiver unknowing or involuntary.[2] *See United States v.*

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[2] In *Morgan*, the Court did not substantively address the defendant's claim that his guilty plea was not knowing and (continued...)

Djelevic, 161 F.3d 104, 106 (2d Cir. 1998) (per curiam) (an appeal waiver is enforceable provided it is knowing and voluntary); *United States v. Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir. 1993) (same). As such, the *Morgan* decision effectively forecloses the defendant's argument that *Booker* renders his waiver of his appellate rights unknowing.

Moreover, the legal principles relied on in *Morgan* with respect to a particular element of a plea agreement (there, an appellate waiver) are equally applicable to the defendant's overall guilty plea and waiver of trial rights. The *Morgan* decision addressed "ignorance of future case law." *Morgan,* 2005 WL 957186, at *1, n.2. As the Court recognized, "no one can know or be expected to know the future" (*id.*) and, as such, the fact that the defendant "did not . . . have knowledge of his rights under *Booker/Fanfan* makes no material difference." *Id.* at *1. As this Court concluded with respect to waivers of appellate rights, the defendant's inability to foresee that *Booker* would create new appeal issues does not provide a basis for failing to enforce the plea. Indeed, as this Court

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[2] (...continued)
voluntary, because the defendant "never previously asserted such a claim" and "took [a contrary] position at oral argument" and thus, "the claim was waived." *Morgan*, 2005 WL 957186, at *1 n.1. The Court expressly "limit[ed] [its] consideration to the validity of the appeal waiver in [the] plea agreement." *Id. See also United States v. Sharpley*, 399 F.3d 123, 126 (2d Cir. 2005) (in decision pre-dating *Morgan*, reserving decision on enforceability of appeal waivers).

noted, "the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." *Id.*

Concluding that *Booker* does not render an earlier guilty plea unknowing or involuntary is supported by recent decisions from five other Circuit Courts of Appeals. *See United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) (rejecting as "frivolous" defendant's claim that *Booker* renders his guilty plea involuntary, and rejecting defendant's effort to vacate plea); *United States v. Lockett*, No. 04-2244, 2005 WL 1038937, *4 (3d Cir. May 5, 2005) ("[j]ust as subsequent changes in the law do not undercut the validity of an appellate waiver, they do not render the plea itself invalid"; enforcing appellate waiver to bar defendant's request to be resentenced); *United States v. Bradley*, 400 F.3d 459, 465 (6th Cir. 2005) ("change in law does not suddenly make the plea involuntary or unknowing or otherwise undo its binding nature"; rejecting defendant's request for resentencing); *United States v. Cardenas*, No. 03-10009, 2005 WL 1027036, *2 (9th Cir. May 4, 2005) (rejecting sentencing challenge in light of appellate waiver; "a change in law does not make a plea involuntary and unknowing"); *United States v. Porter*, No. 04-4009, 2005 WL 1023395, *7-8 (10th Cir. May 3, 2005) (rejecting defendant's attempt to invalidate plea agreement containing plea waiver, and to challenge sentence, based on decision in *Booker*).[3]

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[3] A panel of the Eighth Circuit has reached the same conclusion, though that decision has been vacated and rehearing has been granted. *See United States v. Parsons*, 396 (continued...)

The First Circuit in *Sahlin*, for example, rejected as "frivolous" the defendant's claim that his guilty plea was involuntary because it was "based on an understanding of a sentencing scheme rendered erroneous by *Booker*." 399 F.3d at 30-31. The First Circuit reasoned that the defendant "was in fact sentenced under the mandatory scheme that he expected." *Id.* at 31. In addition, relying on *Brady*, the court stated that "the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea." *Id.* (citing *Brady*, 397 U.S. at 757). Accordingly, the *Sahlin* Court held that *Booker* provided "no basis to vacate the entry of a pre-*Booker* guilty plea on grounds of lack of voluntariness." *Id.* at 30-31. The First Circuit further noted that "[w]hile [the defendant] does not specifically argue that *Booker* rendered his plea not knowing, *Brady* also makes clear that a subsequent judicial decision changing the relevant sentencing law does not permit an attack on whether the plea was knowing." *Id.* at 31, n.3 (citing *Brady*, 397 U.S. at 757).

Here, as in *Brady*, the defendant's plea (and his concomitant waiver of rights) was "voluntarily and intelligently made by [a] competent defendant[] with adequate advice of counsel" and "there is nothing to

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[3] (...continued)
F.3d 1015, 1017 (8th Cir. 2005) (per curiam) ("developments in the law announced by *Blakely* and *Booker* subsequent to [defendant's] guilty plea [do not] invalidate guilty plea"; rejecting defendant's claim that he would not have stipulated to loss amount in plea agreement if he had been aware of *Booker*).

question the accuracy and reliability of the defendant['s] admissions that [he] committed the crimes with which [he is] charged." 397 U.S. at 758. The new rule established in *Booker* does nothing to undermine the validity of this plea. *See id; see also Sahlin*, 399 F.3d at 31; *Lockett*, WL 1038937, at *4; *Bradley*, 400 F.3d at 465; *Parsons*, 396 F.3d at 1017; *Cardenas*, 2005 WL 1027036, at *2. As such, the defendant's guilty plea and his waiver of rights are valid and enforceable. The defendant's attempt to vacate his guilty plea should therefore be denied.

2. The Defendant's Argument That He Might Not Have Pled Guilty If He Had Been Informed of His Rights Under *Booker* Is Unavailing

Attempting to justify his appeal, the defendant alleges that if he "had known that he could have challenged the quantity of drugs involved, before a jury implementing its beyond-a-reasonable-doubt standard of proof, he may well have decided not to waive his trial and appellate rights." App. Br. at 22. The defendant further alleges that if he had known that the Sentencing Guidelines were only advisory, "the acceptance-of-responsibility sentence reduction would have been less compelling." *Id.* The defendant argues that because he was misinformed concerning these legal rights, "his plea and those waivers were not knowingly made." *Id.*

As an initial and determinative point, these arguments do not undermine the fact described above in Part I.C.1 that the defendant's guilty plea -- together with his plea agreement and waiver of appellate rights -- is valid and

enforceable irrespective of *Booker*. Even setting this aside, however, these arguments would not come close to justifying vacatur of the defendant's conviction.

a. The Defendant Was Not Entitled to Be Advised That He Had a Right to Have a Jury Determine Beyond a Reasonable Doubt the Quantity of Drugs Involved

The defendant argues that, as a result of the *Booker* decision, he should have been advised that "he could have challenged the quantity of drugs involved, before a jury implementing its beyond-a-reasonable-doubt standard of proof." App. Br. at 22. This is an incorrect statement of the law, because it assumes that the defendant should have been advised only of the Supreme Court's interpretation of the Sixth Amendment in *Booker*, 125 S. Ct. at 756, but not of its remedial decision which invalidated the Guidelines as a mandatory system, *id.* at 764.

In the wake of *Booker*, a defendant does *not* have a right to have a jury determine the quantity of drugs involved in his offense (except to the extent that such a finding increases the maximum statutory penalty provided in 21 U.S.C. § 841, *see United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc)). Instead, district courts will continue to determine the quantity of drugs by a preponderance of the evidence for purposes of calculating a defendant's sentencing guidelines range -- although that

range is now only advisory.[4] The defendant was not misinformed about the identity of the factfinder or the standard of proof at sentencing, and hence these arguments provide no basis for questioning the knowing and voluntary nature of his plea.

b. The Defendant Has Not Demonstrated That If He Had Been Instructed That the Guidelines Were Advisory, He Would Not Have Pled Guilty

Likewise unavailing is the defendant's argument that "if he had known that the Guidelines were not mandatory . . . the acceptance-of-responsibility sentence reduction would have been less compelling." App. Br. at 22.

To the extent that the defendant is claiming that inaccurate statements concerning the applicability of the Sentencing Guidelines constitute a Rule 11 violation,[5] his

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[4] Prior to *Booker*, it was well established that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), did not restrict a district court's authority to make drug quantity determinations in accordance with the Sentencing Guidelines, provided the final sentence imposed pursuant to the Guidelines did not exceed twenty years. *See United States v. Norris*, 281 F.3d 357, 360 (2d Cir. 2002).

[5] Importantly, other than his claim that *Booker* renders his guilty plea invalid, the defendant does not complain that the district court violated Rule 11 in any respect or that his guilty plea was in any way unknowing (continued...)

claim must fail because he has not demonstrated, as he must, "a reasonable probability that but for the [alleged] error[s], he would not have entered the guilty plea." *Dominguez Benitez*, 124 S. Ct. at 2340.

It is well established that the defendant has the burden of proving by a reasonable probability that but for the Rule 11 violation, he would not have pled guilty. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). In addition, the defendant must make this showing based on the record, not on unsupported assertions. *See United States v. Westcott*, 159 F.3d 107, 113 (2d Cir. 1998) (whether an error prejudiced the defendant "must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind") (citation and quotation omitted). In the instant case, the defendant has not met this burden.

The defendant has not identified, as he must, facts in the record indicating that he would not have pled guilty if he had known that the Sentencing Guidelines were only advisory. *See* App. Br. at 22 (citing no pages from transcript of sentencing hearing to support defendant's claim that "he may well have decided not to waive his trial and appellate rights"). If anything, there is ample evidence in the record establishing that the government had a very

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[5] (...continued)
or involuntary. Indeed, the record establishes that the district court scrupulously adhered to Rule 11's procedural requirements, ensuring that the defendant's guilty plea was knowingly and voluntarily made in light of then-applicable law.

strong case and that the defendant and his counsel determined that entering into a plea agreement was the best strategy. *See, e.g.*, A-132. *See also Dominguez Benitez,* 124 S. Ct. at 2341 (in assessing whether defendant would have pled guilty even if he had he known of Rule 11 error, appellate courts may consider the strength of the government's case and any possible defenses that appear from the record). Indeed, the defendant himself stated at his plea that, had he gone to trial, he would have testified and admitted his involvement in the narcotics activity, but simply would have denied the drug quantity involved. A-77.

The record further establishes that the defendant received substantial benefits by entering into the plea agreement. The defendant's counsel, Attorney Pattis, acknowledged, for example, that the plea agreement "benefits [the defendant] because he's exposed to incarceration for only one count as opposed to multiple counts and the possibility of consecutive sentences." A-108. In addition, the government recommended a three-level reduction for acceptance of responsibility and agreed not to oppose the defendant's request for a two-level downward departure. As Attorney Pattis recognized, the plea agreement provided the defendant with the best opportunity to "get the most he could of the rest of his life back." A-132. The district court did, in fact, grant the reduction and departure foreseen in the plea agreement, and the defendant received a sentence that was low enough to trigger his waiver of appellate rights.

In sum, the defendant has not identified any evidence in the record indicating that but for the district court's

inaccurate statements regarding the mandatory nature of the Sentencing Guidelines, he would not have entered the guilty plea. *See Vaval*, 404 F.3d at 151 (quoting *Dominguez Benitez*, 124 S. Ct. at 2340). The defendant's bald *post hoc* allegations do not come close to meeting his burden.[6]

3. The Defendant Is Not Entitled to a *Crosby* Remand

The defendant argues, in the alternative, that pursuant to this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the Court should remand the case to the district court so that the district court can "indicate whether, without mandatory Sentencing Guidelines, [the defendant's] sentence would have been different, and to re-sentence him if appropriate." Under no circumstances, however, is the defendant entitled to a sentencing remand pursuant to *Crosby*.

If this Court concludes, in accordance with *Brady* and its progeny, that the defendant's plea and waiver of appellate rights are valid, then pursuant to *Morgan* the defendant is precluded from seeking a limited remand in

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[6] To hold otherwise would open the door for any criminal defendant who pled guilty prior to *Booker* to obtain vacatur of his guilty plea if he is dissatisfied with his sentence. All a defendant would need to do would be to allege that he would have foregone his acceptance-of-responsibility reduction and gone to trial, had he known that the court would have had more flexibility to be lenient at sentencing.

light of *Crosby*. *See Morgan,* 2005 WL 957186, at *1-2 (holding that a pre-*Booker* waiver of appeal rights in the defendant's plea agreement is enforceable and forecloses right to appeal sentence under *Booker*). If, on the other hand, the Court disagrees and vacates the defendant's plea, then no resentencing would be appropriate and this Court should simply remand the case to the district court for further proceedings. In either event, the defendant is not entitled to a remand pursuant to *Crosby*.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

Dated: May 11, 2005

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 8,562, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes, and this Certification.

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ADDENDUM

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

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

(1) before the court accepts the plea, for any reason or no reason; or

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

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(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.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.