04-3603-cr

To be Argued By:
ALEX HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-3603-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANK ESTRADA, a/k/a "Frankie Estrada," a/k/a "The Terminator," a/k/a "Big Dog," a/k/a "Mustard"; EDWARD ESTRADA, a/k/a "French Fry," a/k/a "Fry";

(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,

ISAIAS SOLER, a/k/a "Eso," a/k/a "Dog",

Defendant-Appellant.

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, 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 pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

I. Did the district court abuse its discretion in denying the defendant's motion to withdraw his guilty plea when it found, based on the defendant's own statements during the plea colloquy, that the defendant knowingly and voluntarily entered into the plea?

II. Should the defendant be permitted to withdraw his guilty plea because of ineffective assistance of counsel when he cannot show that, but for his lawyer's alleged error, he would not have pleaded guilty?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-3603-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ISAIAS SOLER,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

After a thorough plea colloquy before the district court, defendant Isaias Soler pleaded guilty to nine counts of an indictment -- including one count with a mandatory term of life imprisonment -- for his role in a multi-million dollar drug trafficking conspiracy. More than eighteen months later, the defendant moved to withdraw his guilty plea, claiming that both the court and his lawyer had failed to

ensure that he understood the consequences of his plea. The district court denied this motion, noting that the record was abundantly clear that the defendant fully understood the consequences of his guilty plea, including the mandatory term of life imprisonment. The defendant now appeals that decision.

Because the record demonstrates that the defendant understood the nature of the charges and penalties he faced, including the fact that he was facing a mandatory term of life imprisonment, the district court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea. Moreover, although the defendant now claims that his lawyer provided ineffective assistance of counsel by allowing him to plead guilty without a written cooperation agreement, the defendant cannot show that, but for this alleged ineffective assistance, he would have elected to go to trial instead of pleading guilty. Accordingly, this Court should affirm.

Statement of the Case

On June 20, 2001, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants involved in a drug trafficking enterprise which operated in Bridgeport, New Haven, and Meriden, Connecticut. Defendant-appellant Isaias Soler was charged in nine counts of the indictment as follows: Count One, Racketeer Influenced Corrupt Organization ("RICO"), in violation of 18 U.S.C. § 1961(1); Count Two, RICO Conspiracy, in violation of 18 U.S.C. § 1962(d); Count Three, Violent Crime in Aid of Racketeering ("VCAR") Murder, in violation of 18 U.S.C.

§ 1959(a)(1); Count Five, Use of a Firearm During a Crime of Violence (Murder), in violation of 18 U.S.C. § 924(c)(1); Counts Six and Seven, Witness Tampering, in violation of 18 U.S.C. §§1512(b)(3) and 2; Count Eight, Conspiracy to Engage in Witness Tampering, in violation of 18 U.S.C. §§ 1512(b)(3), 2 and 371; Counts Twelve and Thirteen, Conspiracy to Possess with Intent to Distribute Heroin and Cocaine Base or "Crack" Cocaine, respectively, in violation of 21 U.S.C. §§ 841(a)(1) and 846. *See* Joint Appendix ("JA") 31-59.

The defendant's trial commenced on January 7, 2002, but after two full days of testimony, the defendant entered a guilty plea to all nine counts of the indictment against him.

On July 14, 2003, represented by new counsel, the defendant filed a motion to vacate his guilty plea, claiming that the district court violated Rule 11 and that he received ineffective assistance of counsel in connection with his plea. JA 200-205. By way of a written decision and order dated October 30, 2003, the district court (Stefan R. Underhill, J.) denied the defendant's motion. JA 224-35.

On June 7, 2004, the district court sentenced the defendant principally to five lifetime terms of imprisonment, three ten-year terms of imprisonment, all to run concurrently, and one ten-year term of imprisonment to run consecutive to the others. JA 242. The defendant filed a timely Notice of Appeal on June 17, 2004. JA 262.

The defendant is presently serving the federal term of imprisonment imposed by the district court.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

1. The Offense Conduct

Defendant Soler pleaded guilty after two days of trial. The following summary of the offense conduct is drawn from the Presentence Investigation Report ("PSR"), which the district court adopted as its findings of fact at sentencing. JA 246. The government has filed a copy of the PSR separately under seal.

a. The Gonzalez and Estrada Narcotics-Trafficking Organization

Defendant Isaias Soler was employed as a lieutenant in a multi-million dollar heroin and crack cocaine trafficking enterprise headed by co-defendants Frank Estrada, a.k.a. "The Terminator," a.k.a. "Mustard," a.k.a. "Big Dog," and Hector Gonzalez, a.k.a. "June Bug." The enterprise operated primarily in the P.T. Barnum Housing complex in Bridgeport, Connecticut, but it also supplied narcotics to narcotics traffickers in New Haven and Meriden, Connecticut. PSR ¶¶ 7, 8, 12.

In the mid-1990s, Estrada and Gonzalez were established narcotics dealers in the P.T. Barnum complex when they decided to merge operations. Gonzalez and Estrada split the profit for their narcotics sales 50/50. The narcotics trafficking activities of the merged organizations flourished as Gonzalez concentrated on the distribution of

cocaine and crack cocaine while Estrada concentrated on the sale of heroin. *Id.* ¶ 12.

Through Gonzalez's contacts with New York suppliers, the organization was able to obtain multiple kilograms of cocaine at a time and redistribute it in Bridgeport, Connecticut. Out of every five kilograms of cocaine purchased, they would sell the majority of it in powder form and keep one to two kilograms which they cooked into cocaine base for distribution to customers. At one point it is estimated that Estrada and Gonzalez each had approximately $500,000 to $600,000 on hand in cash, notwithstanding any accounts outstanding or inventory. The Estrada organization sold approximately one and a half to two kilograms of heroin per month and grossed between $60,000 and $70,000 per week. *Id.*

When Gonzalez and Estrada combined forces, defendant-appellant Soler was a member of Gonzalez's organization. *Id.* ¶ 10. As a lieutenant in the merged organization, Soler often supervised "bagging sessions," secret operations during which heroin was packaged for street-level distribution. *Id.* ¶ 21. These sessions were held at different apartments within the P.T. Barnum Housing complex, as well as in other parts of Bridgeport, and would last 8 to 14 hours. *Id.* A typical bagging session involved at least 10 people who would grind, weigh, cut, spoon, package, tape, and stack the product. Participants were not allowed to leave the apartment after they arrived until the bagging was completed. Sessions were held one to two times per week, and approximately one kilogram of heroin was packaged at each session. *Id.* ¶ 22. Firearms were frequently present at the bagging

sessions and were usually carried by Frank Estrada and lieutenants such as the defendant Isaias Soler. *Id.* ¶ 25.

In addition to his responsibility for supervising bagging sessions, defendant Soler, as a lieutenant, was also responsible for supervising numerous street sellers for the organization. *Id.* ¶ 28. Street workers would receive a "brick" or "G-Pack" of heroin, which contained 100 bags that sold for $10 a bag. Each bag contained approximately 0.05 grams of heroin. The street seller would generate $1,000 in gross sales per brick, keep $200 and return $800 to the lieutenant. Any "shorts" or volume discounts would be absorbed by the street seller, thus ensuring the lieutenant always received the proper percentage. *Id.* ¶ 27.

Violence was a hallmark of the Estrada organization. One particularly violent member of the organization, William Rodriguez, was known to threaten workers at gunpoint, and on one occasion, reportedly shot a worker in the buttocks for being short on drug proceeds. Rodriguez was also known to brag about having committed murders for Estrada. *Id.* ¶ 29.

This violence extended outside the organization as well. For example, the organization engaged in shootouts with rival drug gangs who were competing with it to sell heroin in the projects. *Id.* And on one occasion, Rodriguez pistol-whipped a rival drug dealer in the face -- in front of the rival's six-year old son -- because the rival would not agree to stop selling heroin in the P.T. Barnum complex. *Id.* ¶ 30. On another occasion, three members of the organization, all carrying firearms, were observed chasing a person described as a "young kid" out of P.T.

Barnum. Later, the three returned to P.T. Barnum laughing about how they had chased and shot at the person. *Id.* ¶ 31.

b. Defendant Soler's Commission of a VCAR Murder and Subsequent Obstruction of Justice

Rafael Garcia, a.k.a. "Crooked-Eye June," was disliked by Estrada for selling somebody else's heroin inside the Marina Village Housing Project. Garcia was at a diner with his friend, Jeffrey Thomas, when they got into an argument with Edwin Sanchez, another drug dealer. Isaias Soler, who was with Sanchez, became involved in the argument, and was subsequently shot in the leg by Thomas. *Id.* ¶ 32.

In the early morning hours of Sunday, August 23, 1998, Rafael Garcia and at least two women were riding in a 1998 Ford Explorer. *See generally United States v. Cotto*, 347 F.3d 441 (2d Cir. 2003). The car stopped because another car had stopped in the middle of the road, blocking their way. According to a statement by Carmen Cotto, a witness to the event, Rafael Garcia began yelling "Jet, jet!" while reaching for his gun. The women exited the car and ran, while several shots were fired at Garcia, killing him. Bridgeport police arrived on the scene and recovered a Sturm Ruger 9 mm firearm from the body of the deceased. The female occupants of the car were interviewed and each occupant claimed to have no information helpful to the investigation. PSR ¶ 33; JA 245-46.

Information obtained from cooperators and witnesses established that Garcia was shot and killed by Isaias Soler. PSR ¶ 34. After the shooting, Cotto and Estrada concocted a story for use by persons involved in Estrada's organization whom they expected to be questioned by law enforcement authorities regarding the Garcia homicide. They planned to frame the murder on an individual who had witnessed the murder, but who had been recently arrested and was suspected by Estrada to be cooperating with authorities. *Id.* On August 25, 1998, Estrada, along with defendant Isaias Soler and Kelvin Vereen, picked up this individual, and took him to Estrada's nightclub. Soler accompanied this individual to the basement of the club, and attempted to intimidate him, thereby persuading him to not cooperate with police in their investigation. *Id.*

On September 17, 1998, Cotto and Soler met with a witness who had information about the murder, and attempted to persuade this witness to go along with a false story about who committed the murder, and to repeat that story if questioned by police. *Id.* ¶ 35.

2. The Guilty Plea Hearing

On January 9, 2002, after two full days of trial testimony, Isaias Soler pled guilty to all of the counts in the indictment including count three which charged him with the VCAR Murder of Garcia, a charge which carries a statutorily mandated and guidelines term of life imprisonment. *See* 18 U.S.C. § 1959(a)(1); U.S.S.G. §§ 2E1.3(a)(2), 2A1.1(a).

The district court engaged in a lengthy discussion with the defendant to ensure that his guilty pleas to each of the offenses was made knowingly and voluntarily. As set forth below, the plea colloquy complied strictly with Rule 11 of the Federal Rules of Criminal Procedure.

The district court explained to the defendant that he would be placed under oath during his guilty plea. JA 117; *see* Fed. R. Crim. P. 11(c)(5).[1] The defendant was advised that he had the right to persist in a plea of not guilty. JA 115, 125; *see* Fed. R. Crim. P. 11(c)(3). Defendant Soler was advised that if he persisted in a plea of not guilty, he was entitled to a trial by jury. JA 126; *see* Fed. R. Crim. P. 11(c)(3).

The defendant was advised that he had the right to be represented by counsel. JA 117; *see* Fed. R. Crim. P. 11(c)(3). The defendant was advised that if he proceeded to trial, he had a right "to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination." Fed. R. Crim. P. 11(c)(3); *see* JA 126-27. The district court explained that he would be waiving all of these rights if the defendant persisted in his guilty plea and if the court accepted his guilty plea. JA 130; *see* Fed R. Crim. P. 11(c)(4).

Further, the defendant was advised of the following information: the nature of each of the charges to which he was pleading guilty, JA 120-123; the maximum possible

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[1] Citations are to the version of Rule 11 in effect at the time of the plea.

penalties of imprisonment, fines and supervised release for each of the offenses to which he was pleading guilty, JA 120-24; the statutorily mandated term of life imprisonment applicable to count three, JA 121, 124; any applicable forfeiture provisions, JA 120-124; the court's authority to order restitution, JA 144; the court's obligation to impose a special assessment, JA 144; the court's obligation to apply the sentencing guidelines, and the court's discretion to depart from those guidelines under some circumstances, JA 145-49; and the fact that according to the terms of the plea agreement, he was waiving his right to appeal or to collaterally attack the conviction, JA 131.

With respect to count three, the district court specifically confirmed that the defendant understood that that count carried a mandatory term of life imprisonment. JA 124. Furthermore, the court reviewed the plea agreement -- which advised the defendant of the mandatory life sentence -- during the colloquy and confirmed that the defendant had read and understood the terms of that agreement before he signed it. JA 64, 133-35.

Shortly after the court first warned the defendant that he faced a mandatory term of life imprisonment, the defendant requested a recess which the court granted. After a 15 minute break, the defendant and his attorney, Mr. Truebner, indicated that they were ready to continue:

> MR. TRUEBNER: I think everyone in the courtroom can appreciate how difficult it is for a 22 year old man to plead guilty to a charge carrying a mandatory life sentence, particularly

> when he believes there are some defenses to that charge, and suddenly he just saw the doors closing on him forever and had some second thoughts about his decision, but I think he's had an opportunity to reconsider and is prepared to continue.
>
> THE COURT: All right. Mr. Soler, is that correct?
>
> THE DEFENDANT: Yes.

JA 129.

After the government outlined the contents of the plea agreement, defense counsel explained on the record that he and his client hoped to avoid the mandatory life sentence by entering into a cooperation agreement with the government:

> MR. TRUEBNER: If your Honor please, the defendant through me has had conversations with the government about possible cooperation and how that cooperation, or at least the opportunity to cooperate may be the basis of getting away from the mandatory life sentence. There have been no specific promises, no guarantees or anything else, but I think just so the record is clear, the defendant is certainly aware of that opportunity and intends to pursue it. Whether or not it amounts to anything or helps him at the end of the day, no one can say and no one's made any promises.

JA 138-39. In light of counsel's remarks, the district court explained to the defendant that the government was not making any promises that it would in fact enter into a cooperation agreement with the defendant, and that the decision of whether to do so was entirely within the government's discretion.

> THE COURT: On that point, Mr. Soler, I want to just make sure you understand a couple of things. One is that there is no agreement that you be permitted to cooperate in any way and even if at some point in the future an agreement does develop that is put down in writing and signed, typically I think, perhaps always, it is the government's decision whether any information you provide to them is sufficient to cause them to want to make a motion that would give you the relief that you're seeking. And they can always decide not to make the motion and your lawyer can't require them to make the motion and I can't require them to make the motion. That's their decision. Do you understand that?
>
> THE DEFENDANT: Yes.

JA 139. The court then reminded the defendant, that regardless of what happened with a potential cooperation agreement, the defendant would not be allowed to withdraw his guilty plea.

> THE COURT: And if you're unhappy, even if all of this comes to pass and you're unhappy

> at the end of the day with the sentence that you receive, you're not going to be able to go back and withdraw your guilty plea, and you're not going to have any right to appeal your conviction, do you understand that?
>
> THE DEFENDANT: Yes.

JA 140.

Having reviewed the plea agreement, the district court reviewed the penalties facing the defendant, JA 143-45, and questioned him about his understanding of the sentencing process, JA 145-46. When the defendant indicated that he was not familiar with the sentencing guidelines, JA 146, the district court explained in detail how the guidelines operate, stopping after each point to confirm that the defendant understood his explanation, JA 146-49. With respect to count three's mandatory life sentence, the court explained that the statutory life term would trump any other guideline calculation:

> THE COURT: [Y]ou're going to be facing for example on count three, mandatory life, it doesn't matter if you have a mandatory life sentence, it doesn't matter what the guideline range says because that statute is going to be more important. It's going to apply rather than the guidelines, do you understand that?

THE DEFENDANT: Yes.

JA 147-48.

After complying with Rule 11 and assuring itself that the defendant understood all of the consequences of pleading guilty, the district court found that the defendant's guilty plea was knowing and voluntary and accepted his guilty pleas to the offenses charged in the indictment. JA 178-80.

After the defendant entered his guilty pleas, Special Agents of the FBI and government counsel met with the defendant on a number of occasions. Eventually, the government informed counsel for the defendant that the government would not be extending a cooperation agreement to the defendant. JA 216.

3. The Defendant's Motion

New counsel was appointed to represent the defendant on November 15, 2002. On July 14, 2003, over 18 months after pleading guilty, the defendant filed a motion to vacate his guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure.[2] The defendant's claims

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[2] The general standard governing the withdrawal of guilty pleas was contained in Fed. R. Crim. P. 32(e) until 2002, when that provision was moved, with minor language changes, to Rule 11(d)(2)(B). *See United States v. Nostratis*, 321 F.3d 1206, 1208 n.1 (9th Cir. 2003) (standard remains (continued...)

were two-fold. First, he asserted that the district court violated Rule 11 of the Federal Rules of Criminal Procedure when, he claimed, it failed to assure itself that the defendant understood fully the sentencing guidelines and the maximum term of imprisonment applicable to the offenses of conviction. JA 203-4. Second, he claimed that before he pleaded guilty, his attorney failed to explain to him that the guidelines prescribed a lifetime term of imprisonment for count three which charged him with VCAR Murder. As a consequence, he asserted, he did not receive effective assistance of counsel at the time of his guilty plea, and if he "had . . . been aware of the Guidelines he would not have agreed to plead guilty." JA 204.

4. The District Court's Ruling

On October 30, 2003, by way of written decision and order, the district court denied the defendant's motion. JA 224-35.

The district court observed that the critical issue on both questions presented was the same. With respect to the defendant's claim that he received ineffective assistance of counsel because his lawyer failed to advise him of the mandatory life sentence on count three, the central question was "whether, at the time of his change of plea, 'the defendant was aware of the actual sentencing possibilities, and, if not, whether accurate information

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[2] (...continued)
same under new version of rule).

would have made any difference in his decision to enter a plea.'" JA 232 (quoting *Ventura v. Meachum*, 957 F.2d 1048, 1058 (2d Cir. 1992)). And on his Rule 11 claim, the question was whether the court properly determined that the defendant understood the maximum penalties associated with his plea. JA 233. Thus, the district court determined, "[t]he critical issue in deciding both of these claims is whether, at the time of the allocution, Soler was aware that he faced a life sentence if he pled guilty to the VCAR murder claim." JA 233-34.

Turning to the record of the guilty plea, the district court found that,

> Throughout the allocution, the court went to great lengths to inquire into the defendant's understanding that he faced a term of life imprisonment by pleading guilty to Count three. Soler repeatedly assured the court that he understood the consequences of pleading guilty, and in particular, that he faced a term of life imprisonment for Count three. A review of the record demonstrates that, at the time of the plea allocution, Soler was unequivocally aware that the Sentencing Guidelines mandated a life term of imprisonment for Count three. Accordingly, in the absence of any credible evidence to the contrary, the court is permitted to rely upon the defendant's sworn statements, made in open court, that: his plea was knowing and voluntary, he understood that Count three required a mandatory term of life imprisonment, he had discussed the plea with his attorney, he knew

> that he could not withdraw the plea, he knew that no promises had been made except those contained in the plea agreement, and he was satisfied with the advice of counsel.

JA 234.

Accordingly, the district court denied the defendant's claims. Because Soler was aware that the guidelines mandated a life term for count three, he could not show "a reasonable probability that, but for the alleged ineffectiveness, he would have decided to continue with the trial." JA 234-35. And because the court had repeatedly inquired into Soler's understanding of the nature and penalties associated with the charged crimes, and specifically confirmed -- repeatedly -- that Soler understood that he was facing a term of life imprisonment, Soler's Rule 11 claim was fully without merit. JA 235.

On June 7, 2004, the district court sentenced the defendant to five lifetime terms of imprisonment, three ten-year terms of imprisonment, all to run concurrently, and one ten-year term of imprisonment to run consecutive to the others. JA 242. This appeal followed.

SUMMARY OF ARGUMENT

I. The district court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea. The defendant claims that his plea was not knowing because he did not understand the sentencing process or the consequences of his plea, including the fact that he was

pleading guilty to a charge with a mandatory term of life imprisonment, but these claims are belied by even a cursory review of the record.

The district court conducted a plea colloquy in scrupulous adherence to Rule 11 of the Federal Rules of Criminal Procedure. On at least six occasions during the colloquy, the defendant was informed that he was facing a mandatory life sentence, and the defendant specifically confirmed that he was aware of this penalty. Moreover, when the defendant stated that he did not understand the sentencing process, the district court explained that process in detail and confirmed that the defendant understood that process before continuing with the colloquy. Thus, the district court did not abuse its discretion when it denied the defendant's motion to withdraw his guilty plea.

II. The defendant should not be permitted to withdraw his guilty plea for alleged ineffective assistance of counsel. The defendant argued below that his counsel was ineffective for failing to explain the sentencing process and the consequences of his plea. He has effectively abandoned that argument on appeal, but it is meritless in any event. A review of the plea colloquy demonstrates that the defendant fully understood the sentencing process and the consequences of his plea, and thus the defendant cannot show that he was prejudiced by his counsel's alleged error to fully explain these issues to him.

On appeal, the defendant now claims that counsel was *per se* ineffective for failing to secure a cooperation agreement with the government before allowing him to

plead guilty to count three. Although this claim has not been presented to the district court, this Court should review the claim because the resolution of the Sixth Amendment issue is clear: the defendant cannot succeed on his claim.

A review of the guilty plea transcript reveals that the defendant would have entered a guilty plea with or without securing a cooperation agreement from the government. Even though the defendant had not secured a cooperation agreement, the district court questioned him to ensure that he understood the potential impact of such an agreement. Under this questioning, the defendant acknowledged that he understood that a cooperation agreement offered him no assurances that he could avoid a mandatory life sentence. Thus, the defendant stated that he had considered the impact of an agreement, and he still wished to plead guilty. Under these circumstances, the defendant cannot show that he was prejudiced by his counsel's alleged unprofessional errors.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA FOR ALLEGED VIOLATIONS OF RULE 11

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

Federal Rule of Criminal Procedure 11(d)(2)(B) provides that, "[a] defendant may withdraw a plea of guilty or nolo contedere . . . 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. Couto*, 311 F.3d 179, 185 (2d Cir. 2002) (quotation marks and citations omitted). "A defendant does not enjoy an unfettered right to withdraw his guilty plea." *United States v. Fernandez-Antonia*, 278 F.3d 150, 155 (2d Cir. 2002).

"Society has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas not only undermines confidence in the integrity of our judicial procedures, but also increases the volume of judicial work, and delays and impairs the orderly administration of justice." *United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997) (citation, internal quotation marks, and alteration omitted).

In evaluating whether the defendant has shown a "fair and just reason" for withdrawal of the plea, the "fact that a defendant has a change of heart prompted by his reevaluation of either the Government's case against him or the penalty that might be imposed is not a sufficient reason to permit withdrawal of a plea." *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992).

The district court has broad discretion in deciding whether or not to grant a motion to vacate a guilty plea. In reviewing the district court's decision, this Court may only overturn findings of fact made by the lower court that were clearly erroneous, and reverse its decision only if denial of the motion was an abuse of discretion. *United States v. Juncal*, 245 F.3d 166, 170-71 (2d Cir. 2001); *United States v. Schmidt*, 373 F.3d 100, 102 (2d Cir. 2004).

A district court does not abuse its discretion by relying on a defendant's sworn statements during a plea colloquy and "discrediting later self-serving and contradictory testimony as to whether a plea was knowingly and intelligently made." *Juncal*, 245 F.3d at 171 (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) (holding that sworn statements made during allocution are

presumptively valid)); *Maher*, 108 F.3d at 1529 (same); *Gonzalez*, 970 F.2d at 1100-01. *See also United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999) ("Entry of a plea is not some empty ceremony, and statements made to a federal judge in open court are not trifles that defendants may elect to disregard. A defendant has no legal entitlement to benefit by contradicting himself under oath. Thus when the judge credits the defendant's statements in open court, the game is over.").

C. Discussion

The district court did not abuse its discretion in declining to permit the defendant to withdraw his guilty plea. The defendant contends that, in violation of Rule 11, his plea was not knowing and voluntary because he did not understand the consequences of his plea or the sentencing guidelines.

The defendant's argument that he did not understand the consequences of his plea is belied by the record. During the plea colloquy, the district court scrupulously complied with Rule 11 of the Federal Rules of Criminal Procedure. JA 114-86; *see also supra* at 8-14. The defendant was fully advised of the maximum penalties associated with each of the charges against him, including the statutorily mandated term of life imprisonment applicable to count three. JA 120-24. Indeed, on at least six separate occasions during the plea colloquy, the defendant was notified that his plea to count three carried a mandatory term of life imprisonment. *See* JA 121, 124, 133, 137, 143, and 147. And when the district court asked the defendant whether he understood that he faced life

imprisonment for count three, the defendant answered, "Yes." JA 124. Moreover, the plea agreement, which the defendant confirmed that he had read, understood, and signed, specifically advised the defendant of the mandatory life sentence for count three. JA 64, 133-35. In short, on this record, any suggestion that the defendant did not understand the consequences of his plea to count three is completely meritless.

The defendant's claim that he did not understand the sentencing guidelines is similarly foreclosed by the record. Although the defendant identifies one point in the plea colloquy where he stated that he did not understand the sentencing process, he fails to quote, or even acknowledge, the subsequent portions of the colloquy that dispelled his confusion. When the defendant stated that he did not understand the sentencing process, the district court explained that process in intricate detail, stopping after each point to confirm that the defendant understood his explanation. JA 146-49. Thus, even if the defendant was confused about the sentencing process when he began the plea colloquy, after hearing the district court's careful and accurate explanation, he affirmatively represented that he understood the process. *Id.*

Faced with the defendant's uncontroverted statements during the plea colloquy that he understood the sentencing process and the consequences of his guilty plea, the district court was well within its discretion to credit this evidence in concluding that the defendant entered a knowing guilty plea. Under the circumstances, the district court properly rejected the defendant's later, self-serving and contradictory claim that his plea was not knowingly and

intelligently made. *See Juncal*, 245 F.3d at 171; *Stewart*, 198 F.3d at 987.

This Court should affirm the decision and order of the district court denying the defendant's Rule 11 challenge to the guilty plea.

II. THE DEFENDANT SHOULD NOT BE PERMITTED TO WITHDRAW HIS PLEA BASED ON ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

In the district court, the defendant's motion to withdraw his guilty plea asserted that trial counsel failed adequately to explain the fact that count three carried a mandatory lifetime term of imprisonment and failed adequately to explain the sentencing guidelines and their effect on the defendant's sentence. JA 200. The defendant has effectively abandoned this argument on appeal, and for good reason. As described above, the defendant fully understood the consequences of his plea and the sentencing process, *see supra* at 21-23, and thus, even if he could establish that his lawyer had failed to explain these issues to him, he would not be able to establish any prejudice from the error. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (to establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that there is a reasonable probability that but for the errors, the result would have been different). *See, e.g.*, *United States v. Hernandez*, 242 F.3d 110, 112-13 (2d Cir. 2001) (per curiam) (affirming district court's denial of motion to

withdraw plea when defendant's claim -- that his lawyer mislead him about the consequences of his plea -- was directly contradicted by his sworn statements at the plea colloquy). Thus, the district court did not abuse its discretion to deny the defendant's motion on this ground.

In this Court, the defendant presents a new theory of ineffective assistance of counsel. Now, according to the defendant, his original attorney provided ineffective assistance by allowing him to plead guilty to a charge with a mandatory life sentence without first securing a written cooperation agreement. Br. of Def. at 9-12. Even though the defendant failed to preserve this issue for appellate review by presenting it to the district court, this Court should review this claim and reject it. As described below, it is completely without merit.

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

As described more completely above, Rule 11 permits the withdrawal of a guilty plea if "the defendant can show a fair and just reason for requesting the withdrawal." Rule 11(d)(2)(B). This Court reviews a district court's denial of such a motion for abuse of discretion. *See supra* at 20-21. When a defendant asserts a right to withdraw his plea based on alleged ineffective assistance of counsel, this Court reviews that claim under the well-established

framework announced in *Strickland*:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish both (1) that "counsel's representation fell below an objective standard of reasonableness . . . . under prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052.

United States v. Monzon, 359 F.3d 110, 119 (2d Cir. 2004); *see also United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004); *Hernandez*, 242 F.3d at 112.

In applying the *Strickland* test, this Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound legal strategy.'" *Gaskin*, 364 F.3d at 468 (quoting *Strickland*, 466 U.S. at 689).

This Court has expressed its reluctance to decide ineffective assistance of counsel claims on direct review, but it has also held, however, that "direct appellate review is not foreclosed." *Gaskin*, 364 F.3d at 467-68. This Court continues to recognize that,

> When a criminal defendant on direct appeal asserts trial counsel's ineffective assistance to the defendant, . . . we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000).

United States v. Doe, 365 F.3d 150, 152 (2d Cir.), *cert. denied*, 73 USLW 3273 (U.S. Nov. 1, 2004).

In choosing among these options, this Court has been mindful of the Supreme Court's direction that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," *Massaro v. United States*, 538 U.S. 500, 504 (2003). *See Gaskin*, 364 F.3d at 467-68. But this direction, as interpreted by this Court, is not an injunction against reviewing new ineffective assistance claims on direct appeal, but rather an expression of the Supreme Court's view that "the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Doe*, 365 F.3d at 153 (quoting *Massaro*, 538 U.S. at 505).

For this reason, this Court may resolve ineffective assistance claims on direct appeal "when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting

United States v. Khedr, 343 F.3d 96, 100 (2d Cir. 2003)). *See also United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980) ("Despite the general rule of forebearance, however, 'certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'") (quoting *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)).

C. Discussion

While the defendant failed to proffer to the district court his present claim that counsel was *per se* ineffective for failing to secure a cooperation agreement with the government, this case presents "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . ." *Aulet*, 618 F.2d at 186. Further, *Massaro* should be read as preferring that defendants bring new ineffective assistance of counsel claims in the form of a Section 2255 motion, rather than serving as an injunction against doing so. Because the rationale behind *Massaro* reflects the Supreme Court's view that "the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial," *Doe*, 365 F.3d at 153 (quoting *Massaro*, 538 U.S. at 505), where, as here, the record has already been fully developed before the district court, and where the resolution of the Sixth Amendment claim is "beyond any doubt," there is no need to remand for further findings of fact.

Nor is there any reason to dismiss the defendant's present claim and force him to raise it in a Section 2255 motion to the district court. Notably, the defendant does not request a remand for further development of the record. In the interest of judicial economy, therefore, the government respectfully requests that this Court exercise its discretion and address the defendant's present ineffective assistance of counsel claim.

Here, the defendant's ineffective assistance claim fails because he cannot show that he was prejudiced by the alleged unprofessional error. Specifically, the defendant cannot show that the presence of a written cooperation agreement would have had any impact on his decision to plead guilty. Indeed the district court specifically addressed this issue when the possibility of a cooperation agreement arose during the plea colloquy.

When the defendant's lawyer stated the defendant was pursuing the possibility of a cooperation agreement with the government to avoid the mandatory life sentence, the district court explored the defendant's understanding of that issue. JA 138-40. The court emphasized to the defendant that there was no cooperation agreement in place, but then, in light of the possibility of a future cooperation agreement, probed the defendant's understanding of the impact on his sentence of any such agreement. Specifically, the court warned that even if the defendant signed a cooperation agreement, it would be solely within the government's discretion as to whether to ask the court for a downward departure based on his cooperation. JA 139. The defendant confirmed that he understood this. *Id.* Further, the court explained that even

if the government evaluated his cooperation and elected to move for a downward departure on his behalf, the court might not grant the motion, and even if the court were to grant the motion, any impact on his sentence was unpredictable. JA 139-40. Again, the defendant confirmed his understanding. JA 140.

In other words, even though the defendant had not signed a cooperation agreement with the government, the district court questioned him *as if* an agreement existed. From this questioning during the plea colloquy, the defendant fully understood that the potential for a cooperation agreement offered no assurances that he could avoid the mandatory life sentence. With a full understanding of what a cooperation agreement would offer should he enter into one -- the *possibility* that, if the government evaluated his information and decided to use it, the government *might* move for a downward departure, which *might* be granted by the court, and which *might* then have some impact on his sentence -- the defendant confirmed that he still wanted to plead guilty. Under these circumstances, the defendant can hardly show that the absence of a written cooperation agreement had any impact on his decision to plead guilty.

CONCLUSION

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

Dated: November 15, 2004

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 7,011 words, exclusive of the Table of Contents, the Table of Authorities, this Certification, and the Addendum of Statutes and Rules.

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Addendum

Rules of Criminal Procedure

(The following version of Rule 11 was in effect on January 9, 2002, the date of the defendant's guilty plea.)

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead guilty, not guilty, or nolo contendere. If a defendant refuses to plead, or if a defendant organization, as defined in 18 U.S.C. § 18, fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of

any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement; and

(6) the terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence.

(d) Insuring That the Plea Is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

* * *

(Following is the current version of Rule 11(d)(2) governing the withdrawal of guilty pleas.)

* * *

(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.