No.

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH HARPER,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Petitioner Kenneth Harper's ("Harper") change-of-plea hearing was brimming with error. As the government conceded below, and as Second Circuit concluded, the district court erred by failing to advise Harper of his rights to a jury trial; against compelled self-incrimination; to testify and present evidence; and to compel the attendance of witnesses at trial. The district court also failed to advise Harper of his right to plead not guilty; of possible forfeiture and restitution obligations; of the court's obligation to consider the Sentencing Guidelines range and the sentencing factors identified by 18 U.S.C. § 3553(a); and of possible immigration consequences of conviction.

An exasperated Second Circuit was unable to vacate defendant's convictions, however, because neither the defense attorney nor the prosecutor objected to the omissions at the time, and defendant failed to demonstrate that but for the errors, he would not have pleaded guilty. The question this case presents is:

> Has *United States v. Vonn*, 535 U.S. 55 (2005), and its progeny stripped the Courts of Appeal of the ability to meaningfully supervise the plea colloquy process?

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Petition for Writ of Certiorari to the

United States Court of Appeals for the Second Circuit

Defendant Kenneth Harper ("Harper") petitions this Court for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Second Circuit affirming his convictions and sentence.

Opinion Below

The decision of the Court of Appeals for the Second Circuit, *United States v. Harper*, 737 F. App'x. 17 (June 5, 2018) (summary order), is Appendix A to this petition.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

Statutory Provisions Involved

Federal Rule of Criminal Procedure 11(b)

(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-in-crimination, 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) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

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

(O) that if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(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.

Federal Rule of Criminal Procedure 52

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Statement of the Case

At the change-of-plea hearing, Harper indicated that he intended to plead guilty, pursuant to a plea agreement, to conspiracy to traffic in cocaine base, 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 846, 851, and possession of firearms in furtherance of a drug crime, 18 U.S.C. § 924(c)(1)(A), (2). As part of the plea colloquy, the district court was required by Rule 11(b) of the Federal Rules of Criminal Procedure to inform Harper of, and determine that he understood, the full panoply of rights that he was waiving by pleading guilty. Fed.R.Crim.P. 11(b)(1). Contrary to this requirement, the district court neglected to advise Harper:

- Of his right to plead not guilty, Fed.R.Crim.P. 11(b)(1)(B);
- Of his right to a jury trial, Fed.R.Crim.P. 11(b)(1)(C);
- Of his right to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses, Fed.R.Crim.P. 11(b)(1)(E);
- Of possible forfeiture and restitution obligations, Fed.R.Crim.P. 11(b)(1)(J), (K);
- Of the court's obligation to consider the Sentencing Guidelines range and the sentencing factors identified by 18 U.S.C. § 3553(a), Fed.R.Crim.P. 11(b)(1)(M); and
- Of possible immigration consequences of conviction, Fed.R.Crim.P. 11(b)(1)(O).

The district court simply asked the following:

THE COURT: Mr. Nafus has been representing you on this matter?

[HARPER]: Yes.

THE COURT: Are you satisfied with his representations?

[HARPER]: Yes.

THE COURT: Do you understand that you have a right to counsel throughout these proceedings right through the time of sentencing?

[HARPER]: Yes.

THE COURT: Do you understand that you have a right to go to trial?

[HARPER]: Yes.

THE COURT: Do you understand when you plead guilty you're giving up that right?

[HARPER]: Yes.

THE COURT: Do you understand you're giving up your right to allow your attorney to cross-examine witnesses on your behalf?

[HARPER]: Yes.

> THE COURT: You're giving up your right to have the Government prove this case against you beyond a reasonable doubt?
>
> [HARPER]: Yes.
>
> THE COURT: When you plead guilty it's the same as if you were found guilty?
>
> [HARPER]: Yes.
>
> THE COURT: At this time I'm going to go through this plea agreement. If at any point there's anything you do not understand, take the opportunity to step back and talk to Mr. Nafus.

11/20/15 Tr. 4-6.

The district court accepted Harper's guilty plea. The court commented that Harper "indicated he graduated from high school" and that "[n]obody forced him, coerced him or threatened him to plead guilty." 11/20/15 Tr. 19. Neither defense counsel nor the prosecutor objected.

Several months after the district court accepted Harper's plea, it received the Presentence Investigative Report ("PSR"). The PSR noted that Harper – who was 34 years old at the time of sentencing – had several scrapes with the law when he was a teenager (ages 16 through

23), and was convicted in state court of various offenses stemming from five episodes of criminal activity. PSR ¶¶ 63-67. Harper pleaded guilty each time; he has never taken a case to trial. PSR ¶¶ 63-67.

The PSR also reported that Harper had significant cognitive difficulties. When Harper was nine years old, he was classified as learning disabled and placed in a special classroom setting. PSR ¶ 101. When he was twelve years old, he was diagnosed with ADHD. PSR ¶ 101. In middle school, Harper exhibited "escalating behavioral and academic difficulties," he had a GPA of 0.00, and he was eventually transferred to an Alternative High School. PSR ¶ 101. Harper continued to struggle, and he was placed in home tutoring. PSR ¶ 102. Harper refused "to complete any academic work" and he was not accepted back at the Alternative High School. PSR ¶ 103. Harper "was adamant during his presentence interview that he completed the 12th grade," but the PSR writer could not verify that.[1]

[1] While on pretrial release, Harper attended Monroe Community College and the Everest Institute in Rochester, but the PSR writer was unable to obtain any records of Harper's coursework. PSR ¶ 104. Harper was able, however, to earn his Asbestos license in 2006 and he completed an OSHA course. PSR ¶ 105.

Between the change-of-plea and sentencing hearings, Harper personally wrote a letter to the court. Harper expressed his confusion about the factual basis for his firearms charge, asking why (in his view) a similarly-situated co-defendant was receiving a more lenient sentence; his confusion about the Guidelines sentencing range; and he asserted that the prosecutor "threaten[ed] me into taking this plea deal."

At the sentencing hearing, the district court noted that it had received and reviewed both the PSR and Harper's letter. 3/4/16 Tr. 2. The court's exchange with Harper about his letter is recited below in its entirety:

> [THE COURT]: Mr. Harper, before I ask you to speak, I know you did send a letter to the Court indicating, first of all, you felt that 180 months was too long.
>
> But, secondly, that you felt the guidelines calculation should be 108 to 135 months based on a total offense level 29 and criminal history category of III.
>
> The thing that you missed there was the fact that the Count 1 [sic] is a mandatory minimum of 120 months, so that's why – you're right on the guidelines if it was a guidelines sentence, but it requires a mandatory 10 years, which is 120 months. That's why the range starts there.
>
> Do you understand that now?

[HARPER]: Yes, sir.

3/4/16 Tr. 4.

The district court did not address Harper's claim that the prosecutor threatened him, and it made no attempt to clarify the factual basis for the firearms charge.

Opinion Below

The Second Circuit's frustration with the district court's inadequate plea colloquy and Rule 11(b)(1) violations is palpable in its opinion. So, too, is the Second Circuit's general frustration that, despite numerous admonitions in published and summary opinions, it is effectively powerless to insist on strict compliance with Rule 11(b)(1).

There was no question in this case that the district court erred. The government conceded error and the Second Circuit accepted that concession. *Harper*, 737 F. App'x. at 21. But, the Second Circuit was powerless to correct the error because neither Harper's attorney nor the prosecutor objected during the plea colloquy, and "Harper, who bears the burden, has not shown that, had the district court informed him of these rights, he would not have pleaded guilty." *Id.* at 19, 22.

Nevertheless, the court lamented: "To ensure against such [Rule 11(b)(1)] omissions, we have urged district courts to employ 'a standard script for accepting guilty pleas, which covers all of the required Rule 11 information.'" *Id.* at 21-22 (quoting *United States v. Pattee*, 820 F.3d 496, 503 (2d Cir. 2016)). The court added: "Thus, we find it 'disturbing' that the district court here failed to employ such a mechanism to ensure that Rule 11's 'minimal procedures' were followed." *Id.* at 22 (quoting *Pattee*, 820 F.3d at 504).

The court admonished: "This plea colloquy was far from a model effort to comply with Rule 11. And this is not the first time we have made a similar observation. *See e.g. United States v. Gonzales*, 884 F.3d 457 (2d Cir. 2018) (same district judge); *United States v. Pattee*, 820 F.3d 496 (2d Cir. 2016) (same district judge)."

Reasons for Granting the Writ

A. The problem: the Courts of Appeal routinely see Rule 11(b)(1) errors that they are powerless to correct, and thus, the errors persist. The deficiencies in Harper's plea colloquy are not aberrations. Shortly after the Second Circuit decided Harper's case, it decided *United States v. Lloyd*, 901 F.3d 111 (2d Cir. 2018). In that case, the district court (a

different judge than in Harper's case) erred by failing to personally inform Lloyd of the "nature of each charge" to which he pleaded guilty, in violation of Fed.R.Crim.P. 11(b)(1)(G). *Id.* at 115. Nevertheless, the court was forced to affirm Lloyd's conviction because he failed to demonstrate that he would not have pleaded guilty anyways. *Id.* at 115.

The Second Circuit began its analysis by noting the "solemn" nature of a guilty plea, the importance of Rule 11's "mandated" guilty plea procedure and the significance of strict adherence to the Rule. *Id.* at 118. On that point, the court remarked:

> A district court's Rule 11 obligations, then, while seeming routine, and comprised of exchanges that may appear rote, should not be casually discharged: they are a serious matter. Close and regular adherence to the Rule's demands bears heavily on the legitimacy of the plea-bargaining system as a whole, a system that in recent times has come to resolve the prosecutions of the vast majority of federal defendants.

Id. at 119. The court then remarked that it has "noted with increasing concern the tendency of some courts within our Circuit to stray from rigorous compliance with the Rule, and even to adopt practices at odds

with the Rule's explicit directives." *Id.* at 119 (citing *Pattee*, 820 F.3d at 503; *Gonzales*, 884 F.3d at 462 n. 1).

The frustrated court noted: "Lloyd's appeal presents another such case, and we write this opinion – instead of resolving this matter by unpublished summary order – to underscore for district courts accepting pleas the importance of close adherence to the Rule's requirements." *Id.* at 119. Again, the court implored: "District courts would do well to re-assess their practices in this regard, and compare with those of other colleagues in an effort to conduct a meaningful and rigorous interchange with defendants appearing before them." *Id.* at 119. Later in the opinion, the court repeated again: "We urge the District Court in the strongest possible terms to take steps – by using a checklist, script, or other tool for conducting change-of-plea hearings, and reviewing its current practices – to ensure its regular and rigorous compliance with Rule 11 and to avoid casting unnecessary doubt on the voluntary and knowing nature of the guilty plea it accepts." *Id.* at 121.

The court also explained that in the hope of avoiding Rule 11 errors, it has taken the extraordinary step of declaring compliance with the rule to be a shared responsibility among the district court, defense counsel

and the prosecution, "remind[ing] litigants that Rule 11 failures are not attributable solely to judges: Prosecutors and defense attorneys also have an obligations to make sure that the Rule is followed." *Id.* at 122.

Despite all this – the court's repeated insistence on strict compliance with Rule 11(b)(1), its repeated suggestion that district court judges develop a script or some other mechanism to ensure compliance with Rule 11(b)(1), and its instruction that all of the parties are responsible for ensuring a plea colloquy that conforms with Rule 11(b)(1)'s requirements – the court observed:

> Nevertheless, we frequently see cases presenting Rule 11(b)(1) challenges to plea allocutions. *See United States v. Zea*, 659 F. App'x 32, 34-35 (2d Cir. 2016) (summary order) (noting ease of Rule 11 compliance if court developed change-of-plea script); *United States v. Richards*, 667 F. App'x 336, 338 (2d Cir. 2016) (summary order) (same); *United States v. Coffin*, 713 F. App'x 57, 60 n.2 (2d Cir. 2017) (summary order) (same); *Harper*, [737 F. App'x at 21-22] (summary order) (same).

Id. at 122, n. 7. The Second Circuit had said all the same just a few months before *Lloyd* in *Gonzales*:

> By detailing the court's obligations before accepting a guilty plea, Rule 11 safeguards vital rights of criminal defendants at a crucial moment. *Pattee*, 820 F.3d at 504. And yet, as we have noted with concern elsewhere, failures to comply with Rule 11 have been a "recurring issue" within this Circuit. *Id.* at 503. Such failures are unacceptable. We see no legitimate excuse for noncompliance with Rule 11 absent special circumstances.

884 F.3d at 462, n. 1. And the Second Circuit said all the same two years before *Harper, Lloyd* and *Gonzalez* in *Pattee*:

> Technical [Rule 11(b)(1)] errors can be avoided if a district or magistrate judge has a standard script for accepting guilty pleas, which covers all of the required information. We have repeatedly so advised district courts in previous cases. …. Yet failures to meet those requirements are a recurring issue.

Pattee, 820 F.3d at 503.

The Second Circuit is not alone in this regard. There are legions of cases where district courts have failed to comply with Rule 11(b)(1). As well as appellate opinions expressing frustration with the frequency of Rule 11 violations. *See e.g. United States v. Cassese*, 337 F. App'x. 201,

207 n. 2 (3d Cir. 2009) ("We note that the issues raised here demonstrate once again that faithful adherence to the text of Rule 11 can forestall needless appeals.") (internal citation omitted); *United States v. Stoller*, 827 F.3d 591, 597 (7th Cir. 2016) ("[W]e encourage district judges, prosecutors, and defense lawyers to protect not just the fairness of criminal proceedings, but also the *appearance* of fairness and thoroughness, and to advance judicial economy, by using a checklist for Rule 11 colloquies. We have made this recommendation before.") (emphasis in original); *United States v. Moriarty*, 429 F.3d 1012, 1019, n. 3 (11th Cir. 2005) ("We depend upon both the district court and counsel to avoid confusion over a defendant's plea by ensuring that at the plea colloquy, preferably at the outset, the defendant is asked: '[Are you pleading guilty or not guilty?']. When left unperformed, such tasks necessarily generate issues for appeal that consume the increasingly scarce resources of this Court. This has become a recurring problem in the Eleventh Circuit.").

Why do these errors persist, despite strong admonitions from the Second Circuit and other Courts of Appeal for strict compliance with Rule 11's mandatory requirements? As the Second Circuit strongly suggested

in *Harper*, its inability to correct the errors renders any such admonition hopelessly toothless. Regarding Harper's plea colloquy, the Second Circuit observed:

> This plea colloquy was far from a model effort to comply with Rule 11. And this is not the first time we have made a similar observation. *See e.g. United States v. Gonzales*, 884 F.3d 457 (2d Cir. 2018) (same district judge); *United States v. Pattee*, 820 F.3d 496 (2d Cir. 2016) (same district judge). We affirm nonetheless because Harper has failed to demonstrate that that the extent errors were made, they were plain.
>
> * * * * *
>
> [W]e identify no plain error because Harper, who bears the burden, has not shown that, had the district court informed him of these rights, he would not have pleaded guilty.

Harper, 737 F. App'x. at 20, 22. This left the court with no choice but to affirm Harper's conviction, notwithstanding the district court's *repeated* non-compliance with Rule 11(b)'s mandatory requirements, and the Second Circuit's *repeated* insistence that district court judges develop some mechanism for ensuring against such errors and resulting appeals.

B. This Court should relax the harmless error requirement so that the Courts of Appeal can meaningfully supervise the entry of guilty pleas. This Court's case-law – *United States v. Vonn*, 535 U.S. 55 (2002), and its progeny – have made it so difficult for criminal defendants to demonstrate reversible error that the Courts of Appeal can rarely reverse a conviction based on an inadequate plea colloquy. *See e.g. Lloyd*, 901 F.3d at 119-20 ("[The third prong of the plain-error test…require[s] a defendant to show a reasonable probability that, but for the error, he would not have entered the plea. This is a heavy burden to bear, and its weight tends to reduce the ultimate effect of failures to comply with the Rule's demands.")

As a result, errors persist and the Courts of Appeal are effectively powerless to do anything other than what the Second Circuit and other courts have done: beg district court judges to be more conscientious about Rule 11(b)(1), encourage them to adopt a checklist or script for plea colloquies, and emphasize the importance that adherence with Rule 11(b)(1) plays in ensuring the appearance of fairness and integrity in the criminal justice system. But, clearly, this has not stemmed the tide of

appeals based on Rule 11(b)(1) errors. The message, it seems, frequently falls on deaf ears.

This Court has now had an opportunity to observe *Vonn* and its progeny in practice. It knows that Rule 11(b)(1) errors are rampant. Respectfully, the time has come to change course. It is simply impossible to reconcile the notion that Rule 11(b)(1) requires mandatory compliance, and that a plea colloquy such as Harper's, which omits nearly all of the Rule 11(b)(1) warnings, requires no corrective action by an appellate court.

In *Vonn*, 535 U.S. at 63, this Court announced the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain. In *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004), this Court instructed that "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the court committed plain error under Rule 11, must show a reasonable probability that, but for the error he would not have entered the plea." This Court remarked that this burden "should not be too easy for defendants" to satisfy. *Id.* at 82. This Court has repeatedly

reaffirmed that standard. *See United States v. Davila*, 569 U.S. 597, 607 (2013); *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1343 (2016).

This high standard was adopted, in part, to "enforce the policies that underpin Rule 52(b) generally, namely to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for error." Fed.R.Crim.P. 52(b); *Dominguez Benitez*, 542 U.S. at 81-83; *Molina-Martinez*, 136 S.Ct. at 1350. But, experience suggests that *Vonn et al.* has not conserved judicial resources. Instead, aggrieved defendants will press their appeals, the Courts of Appeal will admonish the district courts to do better, and although some courts will undoubtedly try harder, problems will nonetheless persist. The cycle will repeat.

Respectfully, the time has come for a different approach – one that relaxes the Rule 52(b) requirements, and permits vacatur whenever the appellate court is convinced that, considering the totality of the circumstances, the defendant's plea was not made knowingly.

Ninety-seven percent of federal convictions are the result of guilty pleas. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). The integrity of these pleas, both in terms of their legality and in terms of the public's

perception of our justice system, is directly related to the Rule 11(b) colloquy. *See e.g.* Fed.R.Crim.P. 11 Advisory Committee's Notes (1975 amendments) ("The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.").

In Harper's case, a frustrated Second Circuit was unable to correct the district court's failure to comply with nearly every single requirement of Rule 11(b)(1), and as a result, he pleaded guilty and is serving a 15-year prison sentence, without having been warned that he was relinquishing his fundamental constitutional rights. Because *Harper* is not unique in this regard, this Court should respectfully accept review of this case.

Conclusion

Harper respectfully requests that this Court grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Index to Appendix

737 Fed.Appx. 17
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Kenneth HARPER, AKA Frenchy, AKA Pudge, Defendant-Appellant.

No. 16-754-cr
|
June 5, 2018

Synopsis

Background: Defendant was convicted, upon plea of guilty, in the United States District Court for the Western District of New York, Frank P. Geraci, Jr., Chief Judge, of conspiracy to traffic in cocaine base and possession of firearms in furtherance of that drug crime. Defendant appealed.

Holdings: The Court of Appeals held that:

argument that guilty plea was not knowing and voluntary because it did not comport with procedural rule governing pleas was outside scope of appellate waiver;

there was sufficient factual basis for plea of guilty to conspiracy to possession of firearms in furtherance of drug crime;

defendant's disavowal of firearms possession in pro se letter to District Court did not defeat strong presumption of veracity that law accorded his admission of possession under oath at guilty plea;

District Court adequately found that plea did not result from force, threats, or promises other than promises in plea agreement;

District Court's error in failing to advise defendant in haec verba of his rights to jury trial, against compelled self-incrimination, to testify and present evidence, and to compel attendance of witnesses at trial was not plain; and

counsel's alleged ineffective representation did not support withdrawal of plea.

Affirmed.

Procedural Posture(s): Appellate Review.

***19** Appeal from a judgment of the United States District Court for the Western District of New York (Frank P. Geraci, Jr., *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on March 8, 2016, is AFFIRMED.

Attorneys and Law Firms

APPEARING FOR APPELLANT: PETER J. TOMAO, Law Office of Peter J. Tomao, Garden City, New York.

APPEARING FOR APPELLEE: MARY C. BAUMGARTEN, Assistant United States Attorney (Monica J. Richards, Assistant United States Attorney, on the brief), for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Rochester, New York.

PRESENT: ROBERT D. SACK, REENA RAGGI, Circuit Judges, LEWIS A. KAPLAN, District Judge. *

SUMMARY ORDER

Defendant Kenneth Harper, who stands convicted for conspiracy to traffic in cocaine base, *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 846, 851, and for possession of firearms in furtherance of that drug crime, *see* 18 U.S.C. § 924(c)(1)(A), (2), challenges the guilty plea on which his conviction is based. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

Harper contends that his plea was not knowing and voluntary because it did not comport with Fed. R. Crim. P. 11, a challenge outside the scope of an appellate waiver. *See, e.g.*, *United States v. Roque*, 421 F.3d 118, 121 (2d Cir. 2005) (stating that plea agreement's waiver of appeal rights "does not ... act as a waiver against an appeal on the basis that the plea itself, including the waiver, was not intelligent or voluntary"). Where, as here, a defendant did not raise a Rule 11 challenge in the district court, we review only for plain error. *See United States v. Torrellas*, 455 F.3d 96, 103 (2d Cir. 2006); *see generally* *United States v. Marcus*, 560 U.S. 258, 262, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010) (stating that plain error is (1) error, (2) that is clear or obvious, (3) affecting "substantial rights," and (4) seriously impugning "fairness, integrity, or public reputation of judicial proceedings" (internal quotation marks omitted)). A defendant's substantial rights are affected where there exists a "reasonable probability that, but for the error, he would not have entered the plea." *United States v. Rodriguez*, 725 F.3d 271, 276 (2d Cir. 2013) (internal quotation marks omitted).[1] This ***20** plea colloquy was far from a model effort to comply with Rule 11. And this is not the first time we have made a similar observation. *See, e.g.*, *United States v. Gonzales*, 884 F.3d 457 (2d Cir. 2018) (same district judge); *United States v. Pattee*, 820 F.3d 496 (2d Cir. 2016) (same district judge). We affirm nonetheless because Harper has failed to demonstrate that to the extent errors were made, they were plain.

1. Rule 11(b)(3) Challenge

Harper contends that his guilty plea to the firearms possession count lacked the "factual basis" required by Fed. R. Crim. P. 11(b)(3). Such a basis can be established by the defendant's own representations or by those of government or defense counsel to which the defendant acquiesces. *See United States v. Culbertson*, 670 F.3d 183, 190 (2d Cir. 2012).

At Harper's plea allocution, he did not state in his own words the factual basis for the firearms count. Nor did the government proffer a factual basis. Rather, the district court read the counts as charged in the indictment, explained each element, and, after confirming Harper's understanding of both, discussed with Harper what the Government alleged was his specific involvement in the charged crimes. The court then asked whether it was correct "[t]hat between in or about February 9th, 2015, in the City of Rochester, [Harper] did knowingly and unlawfully possess firearms," to which Harper responded "yes." App'x 114.

This last exchange belies Harper's assertion that he only acknowledged the government's allegations, without admitting his own culpable conduct. Thus, even if the "better practice" would have been to have Harper "state in his own words what he did that makes him believe that he is guilty," *United States v. Hollingshed*, 651 Fed.Appx. 68, 71 (2d Cir. 2016) (summary order), the totality of the exchange between Harper and the district court was sufficient for the latter to "assure itself ... that the conduct to which the defendant admit[ted] [was] in fact an offense under the statutory provision under which he is pleading guilty," *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997). That conclusion is only reinforced by Harper's plea agreement, which he signed at the plea proceedings after acknowledging its contents, wherein he expressly admitted that he "did knowingly and unlawfully possess firearms." App'x 95. Thus, insofar as Harper now maintains that he did not possess a weapon, the assertion is defeated by the totality of the record at his guilty plea.

No different conclusion is warranted by the letter Harper wrote to a co-conspirator stating that "we never showed each other a gun." Confidential App'x 3. First, the

letter predates Harper's sworn admission to firearms possession. Further, in the letter, Harper acknowledges discussing a gun with others in the conspiracy; references a gun that his wife obtained; and, recognizing the significant sentence he faced on the firearms charge, discusses ways that conspirators—including Harper—could challenge knowledge of a gun's presence at the conspirators' headquarters.[2] Thus, even if the letter by itself does not prove Harper's ***21** guilty possession of the charged firearm, it does not support his claim of innocence.

As to Harper's disavowal of firearms possession in a *pro se* letter to the district court approximately three months after his guilty plea and prior to sentencing, this unsworn statement does not defeat the "strong presumption" of veracity that the law accords Harper's admission of possession under oath at his guilty plea. *United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001). Moreover, the Presentence Investigation Report ("PSR"), to which Harper did not object at sentencing, detailed officers' recovery of a firearm at an address from which Harper was seen entering and exiting, and wherein officers found his wallet and passport. The PSR also reported that, in an interview with a probation officer, Harper "admitted involvement in the offense," which included possession of firearms as well as drug trafficking. PSR ¶ 47. Finally, Harper did not disavow firearms possession at the sentencing hearing. Rather, when the district court asked Harper whether he wanted to say anything, Harper responded, "I did what I did." App'x 140.

Under these circumstances, we conclude that the record demonstrates a sufficient factual basis for Harper's guilty plea to firearms possession to preclude any finding of plain Rule 11(b)(3) error. *See* *United States v. Maher*, 108 F.3d at 1529.

2. Rule 11(b)(2) Challenge

Harper argues that his guilty plea was not "voluntary" because the court failed to find that the plea did not result from "force, threats, or promises" other than promises in the plea agreement. Fed. R. Civ. P. 11(b)(2). The argument fails because, at the plea colloquy, the district court asked Harper whether anyone had forced, coerced, or threatened him into pleading guilty, to which Harper replied, "No sir." App'x 107. Further, in the plea agreement signed by Harper before the district court, he stated that "[n]o promises or representations" were made to him other than those in the plea agreement. *Id.* at 102–03. The presumption of veracity attaching to Harper's sworn denials of threats and coercion is not overcome by his subsequent unsworn *pro se* assertion of prosecutorial threats as to sentence. *See* *United States v. Torres*, 129 F.3d 710, 715 (2d Cir. 1997) ("Considering that statements at a plea allocution carry a strong presumption of veracity, and that his unequivocal admissions under oath contradict his unsupported assertions of pressure, the district court did not abuse its discretion in denying [defendant's] motion." (citations omitted)).

To the extent Harper argues that his plea was not "knowing" because the district court failed to "outlin[e] the elements of the offense or ask[ ] either party to summarize the facts," Appellant Br. 37, we have already rejected this contention in addressing Harper's Rule 11(b)(3) challenge, *see supra* at pp. 19–21.

3. Rule 11(b)(1) Deficiencies

Harper asserts—and the government concedes—that the district court erred in failing to advise him *in haec verba* of his rights to a jury trial, against compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses at trial, *see* Fed. R. Crim. P. 11(b)(1)(C), (E), rights to which "a court is required to advise a defendant before accepting a guilty plea," *United States v. Pattee*, 820 F.3d at 502. To ensure against such omissions, we have urged district courts to employ "a standard ***22** script for accepting guilty pleas, which covers all of the required [Rule 11] information." *Id.* at 503. Thus, we find it "disturbing" that the district court here failed to employ such a mechanism to ensure that Rule 11's "minimal procedures" were followed. *Id.* at 504.[3]

Nonetheless, we identify no plain error because Harper, who bears the burden, has not shown that, had the district

court informed him of these rights, he would not have pleaded guilty. *See* *United States v. Rodriguez*, 725 F.3d at 276. Indeed, Harper's arguments to the contrary are foreclosed by our opinion in *United States v. Pattee*, wherein we upheld a guilty plea despite most of the same deficiencies present in this case. *See* 820 F.3d at 502 (setting forth district court's omission, *inter alia*, of rights to jury trial, to be protected from compelled self-incrimination, and to compel attendance of witnesses). As there, Harper "makes little effort to argue that the ... omissions affected his decision to plead guilty." *Id.* at 506. The record shows that Harper was informed of his rights to proceed to trial, to have his attorney cross-examine witnesses, and to have the government prove its case against him beyond a reasonable doubt. Further, he was advised that the result of a guilty plea is the same as a finding of guilty. Harper "does not pretend that he was unaware that the trial to which he had a right would be by jury, nor does he argue that he would have gone to trial had he been told of his right to remain silent at trial (a right closely related to the government's burden of proof, of which he was expressly advised)." *Id.* at 507. Insofar as Harper urges that he could reasonably have believed that other people had information regarding whether weapons were used in connection with this drug trafficking offense, or that a jury could have found him innocent, *see* Appellant Br. 38, he "does not contend that he would not have pled guilty had these rights [to compel witnesses and to be tried by a jury] been explained to him, which ... is the touchstone for deciding whether the failure to comply with [Rule 11] affected substantial rights," *United States v. Pattee*, 820 F.3d at 507. Thus, as in *Pattee*, there is "no basis" in the record "for concluding that [Harper's] decision to plead guilty was the result of [the cited Rule 11] omissions, whether taken singly or together." *Id.*

Indeed, the government argues that this conclusion finds further support in the fact ***23** that Harper had been informed of his Rule 11 rights to a jury trial, against self-incrimination, and to compel evidence in his defense in February 2006, when he entered a guilty plea to an earlier firearms possession charge. Harper moves to strike this record of earlier proceedings, but a court may take judicial notice of facts "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201; *cf.* *Parke v. Raley*, 506 U.S. 20, 37, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) ("We have previously treated evidence of a defendant's prior experience with the criminal justice system as relevant to the question whether he knowingly waived his constitutional rights."). We do not pursue the point because, even without consideration of Harper's prior guilty plea, we conclude that the Rule 11 omissions here, viewed in the context of the entire record in this case, did not affect Harper's substantial rights or so impugn the fairness and integrity of judicial proceedings as to manifest plain error. [4]

4. Guilty Plea Withdrawal

Harper argues that the district court should have construed his *pro se* letter as a motion to withdraw his guilty plea, despite his failure to request such relief. The argument fails because the district court would have acted well within its discretion in denying any such motion. [5] *See* *United States v. Gonzalez*, 420 F.3d 111, 120 (2d Cir. 2005) (applying abuse of discretion review to district court's denial of motion to withdraw guilty plea); *United States v. Smith*, 407 F.2d 33, 35 (2d Cir. 1969) ("[A]lthough appellant fails to set forth any facts upon which the within petition could be construed as a motion to withdraw a guilty plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, a mere allegation of innocence is not sufficient to warrant the granting of such an application, and the district court would have acted well within its discretionary power in denying the application." (internal citations omitted)).

A defendant may withdraw a plea of guilty before sentencing "if ... the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). In applying this standard, a district court properly considers "(1) the amount of time that has elapsed between the plea and the motion; (2) whether the defendant has asserted a claim of legal innocence; and (3) whether the government would be prejudiced by a withdrawal of the plea." *See* *United States v. Doe*, 537 F.3d 204, 210 (2d Cir. 2008).

Here, Harper waited three months before sending his *pro se* letter claiming that he "never possessed" a firearm. App'x 134. For reasons already discussed, the assertion is

unsupported by evidence sufficient to overcome Harper's earlier sworn admission of guilt. *See* *United States v. Hirsch*, 239 F.3d 221, 225 (2d Cir. 2001) (holding that claim of innocence "must be supported by evidence," and "defendant's bald statements that simply contradict what he said at his plea allocution are not sufficient grounds to withdraw the guilty plea"). Nor is Harper's dissatisfaction with the possible sentencing consequences of his guilty plea, as expressed in the *pro se* letter, a ***24** sufficient ground for withdrawal. *See United States v. Schmidt*, 373 F.3d 100, 102 (2d Cir. 2004) ("[R]eevaluation 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." (internal quotation marks omitted)).

Insofar as Harper claims that his counsel's ineffective representation supports withdrawal of his guilty plea, *see generally* *United States v. Arteca*, 411 F.3d 315, 320 (2d Cir. 2005) (recognizing that ineffective assistance can support plea withdrawal if it undermined voluntary and intelligent nature of defendant's decision to plead guilty), the argument lacks support in the record before us because Harper stated under oath at the time he pleaded guilty that he was satisfied with trial counsel's representation, *see* *United States v. Juncal*, 245 F.3d at 171. To the extent Harper thinks that extra-record evidence can demonstrate that his guilty plea is a product of ineffective assistance, that claim is more appropriately raised on collateral review. *See United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004).

We have considered Harper's remaining arguments and conclude that they are without merit. Accordingly, the judgment of the district court is AFFIRMED.

All Citations

737 Fed.Appx. 17

Footnotes

* Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation.

1 Harper argues that "[b]y asserting actual innocence" before the district court, he raised a blanket Rule 11 objection such that only harmless, not plain, error applies. Appellant Br. 33. Harper provides no legal support for this claim, and we find no innocence assertion in this case to constitute an objection to the specific Rule 11 errors urged here. Thus, we review for plain error. *See United States v. Pattee*, 820 F.3d 496, 503 (2d Cir. 2016) ("[T]he Supreme Court has held that when a defendant has failed to object in the district court to a violation of Rule 11, reversal is appropriate only where the error is plain and affects the defendant's substantial rights." (citing *United States v. Vonn*, 535 U.S. 55, 58–59, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002)).

2 The district court concluded that this letter amounted to an obstruction of justice.

3 That concern is heightened here by the court's failure explicitly to inform Harper of his right to plead not guilty, *see* Fed. R. Crim. P. 11(b)(1)(B); to have counsel appointed if indigent, *see id.* 11(b)(1)(D); of possible forfeiture and restitution obligations, *see id.* 11(b)(1)(J), (K); of the court's obligation to consider the Sentencing Guidelines range and the sentencing factors identified by 18 U.S.C. § 3553(a), *see id.* 11(b)(1)(M); and possible immigration consequences of conviction, *see id.* 11(b)(1)(O). Harper does not urge error regarding these omissions, and such a challenge would, in any event, fail under plain error review in the circumstances of this case. *See United States v. Pattee*, 820 F.3d at 506–07 (identifying no error in failure to advise defendant of rights to appointed counsel and to plead not guilty where record reflects defendant's awareness of rights by prior discussion with court and entry of not guilty plea); *United States v. Tulsiram*, 815 F.3d 114, 120 (2d Cir. 2016) (identifying no plain error where defendant was advised of larger potential fines than any expected restitution because "[i]t beggars the imagination to suppose that [defendant] was willing to face these stiff punishments" but not other, smaller, ones); *cf.* *United States v. Gonzales*, 884 F.3d 457 (2d Cir. 2018) (vacating and remanding where district court failed to inform *non-citizen* defendant of immigration consequences of plea). Nonetheless, such omissions should be avoided, which is easily accomplished through use of a script.

4 Accordingly, we dismiss Harper's motion to strike this information as moot.

5 In light of this conclusion, we need not address the government's argument that the district court was under "no obligation" to construe the *pro se* letter as a motion to withdraw in the absence of a formal motion from Harper's counsel. Appellee Br. 23.

End of Document

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA 15-CR-6133(G)

vs.

KENNETH HARPER, Rochester, New York
November 20, 2015
Defendant. 2:36 p.m.

- - - - - - - - - - - - - - - -X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FRANK P. GERACI, JR.
UNITED STATES DISTRICT CHIEF JUDGE

WILLIAM J. HOCHUL, JR., ESQ.
United States Attorney
BY: ROBERT MARANGOLA, ESQ.
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MATTHEW D. NAFUS, ESQ.
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Appearing on behalf of the Defendant

COURT REPORTER: Christi A. Macri, FAPR-CRR
Kenneth B. Keating Federal Building
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Rochester, New York 14614

PROCEEDINGS

* * *

(WHEREUPON, the defendant is present).

THE COURT: Are you Kenneth Harper?

02:36:36PM **THE DEFENDANT:** Yes, sir.

THE COURT: You appear with your attorney Mr. Nafus?

THE DEFENDANT: Yes.

THE COURT: This matter's on for a potential plea today. Is your client ready to proceed?

02:36:43PM **MR. NAFUS:** Yes.

THE COURT: Any changes to the plea agreement that was handed up?

MR. MARANGOLA: Yes, Judge. The sole change is with respect to removing the make, model and serial number of the

02:36:52PM specific firearm that had been alleged. Other than that, the terms of the agreement are the same.

So there was a change in the factual basis and the removal of the forfeiture section as related to the firearm that had previously been specified. Those are the only

02:37:11PM changes.

THE COURT: Did you say the forfeiture section?

MR. MARANGOLA: Yes.

THE COURT: What page is that?

MR. MARANGOLA: It was deleted. The revised plea

02:37:48PM does not have one because the reference of that specific

firearm --

THE COURT: Okay.

MR. MARANGOLA: -- sorry, I didn't know you were looking for it.

02:37:54PM **THE COURT:** That was deleted? That was the other change?

MR. MARANGOLA: Factual basis, it previously specified make, model and serial number of a particular weapon in paragraph 5(c) and the reference to that particular firearm 02:38:07PM has been deleted.

THE COURT: Okay, great. Thank you.

MR. MARANGOLA: Thank you.

THE COURT: Mr. Harper, over the next several minutes I'll be asking you a series of questions. You will be 02:38:19PM placed under oath. It's important you provide truthful answers to the Court's questions. If you fail to do so, you can be charged with a separate crime of perjury.

Do you understand that?

THE DEFENDANT: Yes, sir.

02:38:28PM **THE COURT:** You will be placed under oath.

(**WHEREUPON**, the defendant was sworn).

THE COURT: Mr. Harper, how old are you?

THE DEFENDANT: 34.

THE COURT: How far did you go in school?

02:38:42PM **THE DEFENDANT:** Graduated.

THE COURT: From high school?

THE DEFENDANT: Yes.

THE COURT: Are you currently taking any medications or drugs?

02:38:50PM **THE DEFENDANT:** Medications, sir.

THE COURT: What are they?

THE DEFENDANT: High blood pressure, depression, and anxiety.

THE COURT: Okay. What are you taking for

02:39:00PM depression or anxiety?

THE DEFENDANT: Lexapro and -- excuse me. I don't know how to pronounce the second one.

THE COURT: Well, the point is, are any of these medications affecting your ability to understand anything

02:39:16PM that's occurring today?

THE DEFENDANT: No, sir.

THE COURT: Okay. Do you have any other health or medical condition affecting your ability to understand anything that's occurring today?

02:39:25PM **THE DEFENDANT:** No, sir.

THE COURT: Is anybody forcing you, coercing you or threatening you to enter a plea of guilty?

THE DEFENDANT: No, sir.

THE COURT: Mr. Nafus has been representing you on

02:39:34PM this matter?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his representations?

THE DEFENDANT: Yes.

02:39:37PM **THE COURT:** Do you understand you have a right to counsel throughout these proceedings right through the time of sentencing?

THE DEFENDANT: Yes.

THE COURT: Do you understand you have a right to go

02:39:44PM to trial?

THE DEFENDANT: Yes.

THE COURT: Do you understand when you plead guilty you're giving up that right?

THE DEFENDANT: Yes.

02:39:50PM **THE COURT:** Do you understand you're giving up your right to allow your attorney to cross-examine witnesses on your behalf?

THE DEFENDANT: Yes.

THE COURT: You're giving up your right to have the

02:39:58PM Government prove this case against you beyond a reasonable doubt?

THE DEFENDANT: Yes.

THE COURT: When you plead guilty it's the same as if you were found guilty?

02:40:05PM **THE DEFENDANT:** Yes.

THE COURT: At this time I'm going to go through this plea agreement. If at any point there's anything you do not understand, take the opportunity to step back and talk to Mr. Nafus.

02:40:14PM **THE DEFENDANT:** Okay.

THE COURT: Okay. This indicates you're agreeing to plead guilty to Counts 1 and 2 of the indictment. Count 1 of the indictment charges you with conspiracy to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base.

And that charge carries a mandatory minimum term of imprisonment of 10 years, and a maximum term of imprisonment of life; an $8 million fine; a mandatory $100 special assessment; and a term of supervised release at least eight years up to life.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The second count charges you with possession of firearms in furtherance of a drug trafficking crime, which carries a mandatory minimum term of imprisonment of five years and a maximum term of life; and any term of imprisonment do you understand must be served consecutive or in addition to any other sentence imposed in this case?

THE DEFENDANT: Yes, sir.

02:41:24PM **THE COURT:** It carries a fine up to $250,000; a

mandatory $100 special assessment; and a term of supervised release of five years.

Do you understand all that?

THE DEFENDANT: Yes.

02:41:35PM **THE COURT:** Do you understand the Government has indicated their intent to file an information pursuant to Title 21, United States Code, Section 851, alleging you were previously convicted of a drug felon?

Do you understand that?

02:41:52PM **THE DEFENDANT:** Yes.

THE COURT: And by acknowledging that, do you understand you'll be subject to enhanced penalties?

THE DEFENDANT: Yes, sir.

THE COURT: And specifically that prior felony

02:42:10PM conviction occurred on December 15th, 2000, in Monroe County Court, State of New York, for a charge of criminal possession of a controlled substance in the fifth degree.

Do you understand that?

THE DEFENDANT: Yes, sir.

02:42:27PM **THE COURT:** And do you admit you're the same person convicted on December 15th, 2000, in Monroe County of the charge of criminal possession controlled substance in the fifth degree?

THE DEFENDANT: Yes, sir.

02:42:38PM **THE COURT:** Okay. Do you understand if you're

sentenced to a period of supervised release and you violate the conditions of supervised release, that you could receive a sentence of up to 10 years imprisonment without receiving any credit for the time you had already served on supervised release?

02:42:56PM

THE DEFENDANT: Yes, sir.

THE COURT: Next I'm going to discuss the elements of these two charges. This is what the Government would have to prove beyond a reasonable doubt if the matter were to proceed to trial.

02:43:08PM

First, regarding the first count, the conspiracy to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base, the Government would have to prove beyond a reasonable doubt that an agreement existed between two or more persons to commit a controlled substance felony offense, specifically to manufacture, to possess with intent to distribute and to distribute 28 grams or more of a mixture or substance containing a detectable amount of cocaine base.

02:43:28PM

02:43:47PM

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Secondly, they would have to prove beyond a reasonable doubt that you knew of the existence of the conspiracy.

02:43:56PM

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Third, that you intended to participate in the unlawful agreement.

Do you understand that?

02:44:04PM **THE DEFENDANT:** Yes, sir.

THE COURT: And, fourth, that there were at least 28 grams or more of a mixture or substance containing a detectable amount of cocaine base as reasonably foreseeable as being within the scope of the agreement.

02:44:18PM Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. And on Count 2, the charge of possession of firearms in furtherance of a drug trafficking crime, the elements the Government would have to prove beyond

02:44:34PM a reasonable doubt are, first, that you knowingly possessed firearms.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Secondly, that the firearms were

02:44:42PM possessed in furtherance of a drug trafficking crime for which you could be prosecuted in a court of the United States.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: Next I'm going to discuss with you what

02:44:54PM the Government alleges is your specific involvement in this

criminal activity. Tell me if you agree with this.

This indicates that between in or about October 2014 and February 10th, 2015, in Monroe County, which is within the Western District of New York, that you the 02:45:13PM defendant, Kenneth Harper, did knowingly, willfully and unlawfully conspire and agree with Edward Mighty, Andre Taylor, Seymour Brown, Ricardo Bailey, and others to manufacture to possess with intent to distribute and to distribute 28 grams or more of cocaine base, which is a 02:45:39PM Schedule II controlled substance; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: That your specific involvement included breaking down packaging, cocaine base for distribution, facilitating third-party purchases of cocaine 02:45:55PM base, and direct distribution of cocaine base to others; is that also correct?

THE DEFENDANT: Yes, sir.

THE COURT: It was your understanding that the goal or aim of the conspiracy or agreement that you were involved 02:46:08PM in was to unlawfully sell the controlled substance for profit?

THE DEFENDANT: Yes, sir.

THE COURT: That there were at least 196 grams, but less than 280 grams as the amount involved in your relevant conduct encompassed in this conspiracy; is that also correct?

02:46:27PM **THE DEFENDANT:** Yes, sir.

THE COURT: That between in or about February 9th, 2015, in the City of Rochester, that you did knowingly and unlawfully possess firearms; is that correct?

THE DEFENDANT: Yes, sir.

02:46:39PM **THE COURT:** And the firearms were possessed in furtherance of a drug trafficking crime for which you could be prosecuted in a court of the United States, specifically this conspiracy to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base; is that

02:46:59PM all correct?

THE DEFENDANT: Yes, sir.

THE COURT: Next I'm going to discuss with you the sentencing guidelines. Do you understand that the Court must consider the guidelines, but I'm not bound by those?

02:47:09PM Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that Count 1, the conspiracy charge, carries a base offense level of 28?

THE DEFENDANT: Yes, sir.

02:47:18PM **THE COURT:** There's a two level increase to that base offense based upon your maintaining premises to manufacture or distribute a controlled substance.

THE DEFENDANT: Yes, sir.

THE COURT: There's additionally a two level upward

02:47:32PM adjustment based upon obstruction of justice.

Do you understand that as well?

THE DEFENDANT: Yes.

THE COURT: Can you tell me what the basis for that is?

02:47:38PM **MR. MARANGOLA:** Attempted witness tampering, Judge.

THE COURT: Okay. And it was phone contact or what was that, do you know?

MR. MARANGOLA: It was through correspondence, written correspondence.

02:47:48PM **THE COURT:** Do you understand that, Mr. Harper?

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Based upon that, do you understand for Count 1 the adjusted offense level is 32?

02:48:07PM You would then receive a three level downward adjustment for your acceptance of responsibility through your plea of guilty and your acknowledgment of your involvement in this offense, resulting in a total offense level of 29.

Do you understand that?

02:48:21PM **THE DEFENDANT:** Yes, sir.

THE COURT: The second part of the guideline sentence is to consider one's criminal history. It's my understanding your criminal history category is a level III.

Do you understand that?

02:48:31PM **THE DEFENDANT:** Yes, sir.

THE COURT: When the Court then combines total offense level of 29 with a criminal history category of III, taking into account the statutory minimum penalties, do you understand the sentencing range would be a term of imprisonment between 120 months and 135 months?

02:48:47PM

THE DEFENDANT: Yes, sir.

THE COURT: A fine between $15,000 and $8 million?

THE DEFENDANT: Yes, sir.

THE COURT: And a period of supervised release of eight years?

02:48:57PM

Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: Now, do you understand regarding Count 2, the firearms charge, that that requires that the Court impose a term of imprisonment of not less than five years to be imposed consecutively or in addition to any other sentence of imprisonment?

02:49:08PM

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Therefore, when the Court combines the sentence in Counts 1 and 2, it becomes 180 months to 195 months. That's based upon Count 1, the range being 120 to 135 months; and then a consecutive 60 months, which then results in the range of 180 to 195 months.

02:49:18PM

Do you understand all that?

02:49:44PM

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand as part of this agreement the parties have agreed that there would be a fine of at least $807 imposed in this case?

02:49:59PM **THE DEFENDANT:** Yes.

THE COURT: And that apparently was monies that was recovered by law enforcement at the time of your arrest on February 9th, 2015.

Do you understand that?

02:50:09PM **THE DEFENDANT:** Yes, sir.

THE COURT: And those funds will be applied toward that fine; is that your understanding?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand if for some reason 02:50:21PM this plea was set aside, vacated or withdrawn, that you're giving up what's called the "statute of limitations defense" or the time limit for refiling the charges?

THE DEFENDANT: Yes, sir.

THE COURT: That, in fact, if the plea was 02:50:33PM withdrawn, vacated or set aside, that the original charges will be reinstated.

Do you understand all that?

THE DEFENDANT: Yes.

THE COURT: Okay. Do you understand the Government 02:50:42PM is reserving their right to provide the Court and Probation

with information regarding this offense, as well as information regarding your background, character and involvement in the offense charged?

THE DEFENDANT: Yes, sir.

02:50:55PM **THE COURT:** They can respond at the time of sentencing to any statements you make to Probation or that are made on your behalf?

THE DEFENDANT: Yes, sir.

THE COURT: That they can advocate for a sentence

02:51:04PM consistent with this agreement.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: At the time of sentencing they will move to dismiss the open counts of the indictment?

02:51:14PM **THE DEFENDANT:** Yes, sir.

THE COURT: Okay. Do you understand you're agreeing to provide any financial records or information which in turn could be utilized for the collection of any unpaid financial obligations, including fines, assessments or restitution?

02:51:28PM **THE DEFENDANT:** Yes, sir.

THE COURT: And do you understand you're also limiting your right to appeal the sentence in this case? If, in fact, the Court imposed a sentence within the guidelines that I've previously discussed or less, do you understand

02:51:41PM you're waiving or giving up your right to appeal that

sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Is there anything about this agreement you do not understand? Anything you don't understand about the agreement?

02:51:54PM

THE DEFENDANT: No, sir.

THE COURT: Anything you want to ask Mr. Nafus or the Court?

THE DEFENDANT: No, sir.

02:51:59PM

THE COURT: If you could then sign the agreement acknowledging your understanding of it?

MR. MARANGOLA: While Mr. Harper and his attorney are signing the agreement, Judge, I just wanted the record to reflect that I handed up the signed 851 information for filing

02:52:20PM

at the beginning of the proceedings.

THE COURT: Yes, I do have that.

MR. MARANGOLA: Thank you.

THE COURT: Do you have a copy of the indictment?

MR. MARANGOLA: Yes.

02:52:50PM

THE COURT: Thank you. The Court does have the plea agreement which has been signed by the defendant, his counsel, and also by Mr. Marangola on behalf of the Government.

As Mr. Marangola just stated, Mr. Harper, I've already gone through this, but just to be sure, the Government

02:53:26PM

filed an information pursuant to Title 21, United States Code,

Section 851, which indicates you were previously convicted of a drug felony offense, specifically on December 15th, 2000, in Monroe County Court, State of New York, for a violation of criminal possession of a controlled substance in the fifth degree, intent to sell is a felony.

Do you acknowledge you are the same person convicted of that charge?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by acknowledging that, that you're subjected to enhanced penalties?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Mr. Harper, at this time I'm going to read to you Count 1 and 2 and at the end ask you how you plead to those charges, guilty or not guilty.

Count 1 charges you with narcotics conspiracy, specifically from in or about early 2014 through in and including on or about February 9th, 2015, in the Western District of New York, that you the defendant, Kenneth Harper, did knowingly, willfully and unlawfully combine, conspire confederate and agree with Robert Wilson and others to commit the following offenses, that is, to possess with intent to distribute and to distribute 280 grams or more of a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance -- he's just pleading to that part, right?

MR. MARANGOLA: Pardon?

THE COURT: Just to that part, not the 500 grams?

MR. MARANGOLA: Correct, Judge, just the 28 grams.

THE COURT: Which is a Schedule II controlled substance. I'll ask you how you plead to that charge of narcotics conspiracy, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Count 2 charges you with possession of firearms in furtherance of drug trafficking crimes from in or about early 2014 through and including on or about February 9th, 2015, in the Western District of New York, that you the defendant, Kenneth Harper, in furtherance of a drug trafficking crime for which you may be prosecuted in a court of the United States, that is specifically violation of Title 21, United States Code, Section 846, that you did knowingly and unlawfully possess firearms in furtherance of that crime.

I'll ask you how you plead to possession of firearms in furtherance of that drug trafficking crime, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: The Court has had the opportunity to observe Mr. Harper. He's 34 years of age. He indicated he graduated from high school. He takes medications for various conditions. However, none of the medications are affecting

his ability to understand anything that occurred today. He has no other health or medical conditions affecting his ability to understand anything that occurred today.

Nobody forced him, coerced him or threatened him to enter a plea of guilty.

02:57:06PM

He understands he has a right to go to trial. That by pleading guilty he was giving up that right; giving up his right to allow his attorney to cross-examine witnesses; giving up his right to have the Government prove the case against him beyond a reasonable doubt; and his plea of guilty has the same force and affect as a verdict after trial.

02:57:21PM

That he's satisfied with the representations of his counsel, Mr. Nafus; understands he has a right to counsel throughout these proceedings right through the time of sentencing.

02:57:37PM

That he's agreeing to plead guilty to two counts of the indictment. Count 1 charging him with conspiracy to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base. He understands there was mandatory minimum term of imprisonment of 10 years and a maximum term of life.

02:57:55PM

Count 2 charges possession of firearms in furtherance of a drug trafficking crime for which there was a mandatory minimum term of imprisonment of five years, maximum term of imprisonment of life. Any sentence of imprisonment

02:58:13PM

must be served consecutive or in addition to any other period of imprisonment.

That the defendant did admit the information contained within an information filed pursuant to Title 21, United States Code, Section 851, acknowledging that he was previously convicted of a drug felony offense, specifically on December 15th, 2000, Monroe County Court, State of New York, on a charge of criminal possession of a controlled substance in the fifth degree, intent to sell. That by admitting his previous conviction for that offense, that he would be exposed to enhanced penalties.

He understands if he violates any of the conditions of supervised release, that he could receive a sentence of up to 10 years imprisonment without receiving credit for the time he served on supervised release.

He indicated he understood all the elements of both counts that the Government would have to prove beyond a reasonable doubt if the matter did proceed to trial.

He acknowledged the factual basis for the plea, specifically that between October 2014 and February 10th, 2015, within the Western District of New York, that he did knowingly, willfully and unlawfully conspire and agree with others to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base, a Schedule II controlled substance.

That his specific involvement included breaking down and packaging cocaine base for distribution, facilitating third-party purchases of cocaine base, and direct distribution of cocaine base to others.

03:00:08PM He further understood that the goal and aim of the conspiracy that he was involved in was to unlawfully sell the controlled substances for profit.

That there were at least 196 grams, but less than 280 grams of cocaine base as the amount involved in the 03:00:25PM defendant's relevant conduct encompassed in this conspiracy.

That between in or about February 9th, 2015, within the Western District of New York, that the defendant knowingly and unlawfully possessed firearms; that the firearms were possessed in furtherance of a drug trafficking crime for which 03:00:48PM he may be prosecuted in a court of the United States, specifically the conspiracy to manufacture, possess with intent to distribute and to distribute 28 grams or more of cocaine base.

He understood the calculation of the sentencing 03:01:03PM guidelines. That Count 1 has a base offense level of 28. There's a two level increase for maintaining a premises to manufacture or distribute a controlled substance. An additional two level upward adjustment based upon obstruction of justice, resulting in an adjusted offense level for Count 1 03:01:24PM of 32.

That he would receive credit for his acceptance of responsibility by his plea of guilty, resulting in a three level downward adjustment and a total offense level of 29.

His criminal history category is III. When combined with a total offense level of 29, results -- regarding Count 1 -- in a term of imprisonment under the guidelines of between 120 months and 135 months, a fine between $15,000 and $8 million, and a period of supervised release of eight years.

Regarding the second count, the firearms charge, he understands that there must be a term of imprisonment of not less than five years or 60 months to be imposed consecutively or in addition to any other sentence of imprisonment.

Based upon that, when the Court combines a sentencing range under Count 1 and Count 2, results in a term of imprisonment between 180 months and 195 months.

That there would be imposed in this case a fine of at least $807, which is an amount that was recovered by law enforcement from the defendant on February 9th, 2015, at the time of his arrest, and that amount will be applied toward the fine.

That he understands that if this plea was withdrawn, vacated or set aside, the original charge would be reinstated and the defendant was waiving the statute of limitations defense or the time limit for refiling those

charges.

That the Government has reserved their right to provide the Court and Probation with information regarding this charge, including the defendant's background, character and involvement.

03:03:18PM

They can respond at the time of sentencing to statements made by the defendant or made on his behalf. They can advocate for a sentence consistent with this agreement, and at the time of sentencing they will move to dismiss the open counts of the indictment.

03:03:33PM

The defendant will provide financial records and information for the collection of any unpaid financial obligations, including fines, assessments or penalties, the restitution.

The defendant is limiting his right to appeal the sentence in this case. If, in fact, the Court imposed a sentence consistent with the guidelines or less, then he would be waiving his right to appeal that sentence or collaterally attack that sentence.

03:03:48PM

The defendant indicated he understood the agreement in its entirety and signed such acknowledging that.

03:04:03PM

Based upon all that the Court finds that the plea is in all respects knowing and voluntary and accepts the plea of guilty to Counts 1 and 2 of the indictment.

If we can put the matter on for February 18th, 2

03:04:21PM

p.m. for sentencing?

MR. MARANGOLA: Works for me, Your Honor.

THE COURT: Can we do it at 10 a.m.?

MR. MARANGOLA: Yes.

03:04:42PM **THE COURT:** Kenneth Harper sentencing, February 18th, 10 a.m.

MR. NAFUS: Judge, my client would like me to request on his behalf a furlough. Some of the proceedings we had before Judge Payson there was some evidence brought out about his mother and father, they're in poor health. His father has had a number of surgeries regarding basically circulation. His mother has a number of health issues.

He had been in years past helping his parents quite a bit, helping to take care of them, helping them with some of their needs. That was brought out before Judge Payson.

With the holidays coming up, with him about to receiving a fairly lengthy prison sentence, he requests that you consider furloughing him, especially over the holidays, so he can spend some time with his family before beginning his sentence.

THE COURT: Thank you. Mr. Marangola?

MR. MARANGOLA: Judge, the Government opposes. There was a detention hearing held in front of Judge Payson. She ordered the defendant detained.

And based on the nature of the plea, I think

detention is mandated under the statute. Thank you.

THE COURT: Yes, based upon the previous ruling regarding the defendant's detention, now in addition he has entered a plea of guilty to the very significant sentence, the Court does not find there's any extraordinary circumstances that would allow the Court to release the defendant on a furlough. Therefore, the application is denied.

Thank you.

MR. MARANGOLA: Thank you.

(**WHEREUPON**, the proceedings adjourned at 3:06 p.m.)

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CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Western District of New York before the Honorable Frank P. Geraci, Jr. on November 20th, 2015.

S/ Christi A. Macri

Christi A. Macri, FAPR-CRR
Official Court Reporter