

## **APPENDIX**

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# APPENDIX A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 18-11218

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D.C. Docket No. 6:17-cr-00285-PGB-GJK-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DONATO AMAYA-RIVAS,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida

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(August 7, 2019)

Before JORDAN, GRANT, and DUBINA, Circuit Judges.

PER CURIAM:

Appellant Donato Amaya-Rivas (“Amaya-Rivas”) appeals his conviction for illegally re-entering the United States after having been removed, in violation of 8 U.S.C. § 1326(a), (b)(1), as well as his above-guideline sentence of 48 months’ imprisonment. Amaya-Rivas contends that he did not enter his guilty plea knowingly and voluntarily because the district court failed to advise him of the consequences of his guilty plea pursuant to Federal Rule of Criminal Procedure 11, and there was not a factual basis to support the guilty plea. He argues that his sentence is both procedurally and substantively unreasonable and that his sentence violates the Fifth and Sixth Amendments because the district court imposed a sentence above the statutory maximum based on facts not proven to a jury beyond a reasonable doubt or admitted by him.

Our review of the record reveals no error by the district court in sentencing Amaya-Rivas to the above-guideline sentence of 48 months, and we summarily affirm his sentence. Although the government’s brief argued waiver, it later filed a 28(j) letter conceding that “Amaya-Rivas has not waived his right to challenge [the] district court’s order based on the magistrate judge’s findings and recommendations.” May 29, 2019 Ltr., Dkt. 40, No. 18-11218. We also agree with the government that Amaya-Rivas cannot show that any error during the Rule 11 plea colloquy affected his substantial rights; therefore, we affirm his conviction.

## **I. BACKGROUND**

In October 2017, Border Patrol agents encountered Amaya-Rivas at a gas station in Florida. After the agents checked his record and fingerprints, they discovered that he had an alien file, was born in and was a citizen of Mexico, was not a citizen of the United States, and had previously been ordered removed from the United States in 1999, 2004, 2005, and 2014. His criminal record showed that he had felony convictions in 1999 and 2014 for possession of controlled substances. Moreover, he admitted to law enforcement officers that he was a citizen of Mexico, that he had been previously deported, and that he did not have any status in the United States.

In 2017, a federal grand jury charged Amaya-Rivas with illegally re-entering the United States after having been removed, in violation of 8 U.S.C. § 1326(a), (b)(1). The government filed its factual basis enumerating the elements of the offense. In its filing, the government stated that the maximum possible penalty was 10 years' imprisonment. The day after the government filed its factual basis, a magistrate judge conducted a change of plea hearing. The judge asked Amaya-Rivas if he understood what the government must prove beyond a reasonable doubt in order to establish his guilt of the charge and if the government's notice of the possible maximum sentence was provided to and translated for him. Amaya-Rivas

answered in the affirmative. (R. Doc. 44, p. 4.) The judge read the elements contained in the government's factual basis to him and asked if he understood it and whether he had any questions. Amaya-Rivas responded that he understood and had no questions. The judge asked if anyone had pressured him into pleading guilty, and Amaya-Rivas responded no and that he had discussed the consequences of pleading guilty with his attorney. The judge discussed the penalties that Amaya-Rivas could receive if he pled guilty, and the judge asked him if he understood that if he pled guilty, he was waiving all his rights associated with a trial. Amaya-Rivas responded in the affirmative.

After these questions, the colloquy continued:

THE COURT: Ms. Guzman, have you and your client reviewed the factual basis and the notice for accuracy?

MS. GUZMAN: Yes, Your Honor, we have. The factual basis, of course, is on pages two, three, and four of the Notice of Essential Elements. We have reviewed it in Spanish, and we have no objection.

THE COURT: All right. Let me address that with your client then. Sir, have you reviewed the factual basis attached that is in the notice at pages two, three, and four for accuracy?

AMAYA-RIVAS: Yes.

THE COURT: Do you believe that that factual basis is true and accurate?

AMAYA-RIVAS: Yes.

THE COURT: Sir, do you want to plead guilty to the charge you're facing because you are guilty, or is there some other reason?

AMAYA-RIVAS: No. I am guilty.

THE COURT: All right. You admit that you did re-enter the United States this last time voluntarily. Is that correct?

AMAYA-RIVAS: Yes.

THE COURT: And prior to your re-entry into the United States, you had not requested the consent of any U.S. authorities for you to apply for re-admission. Is that correct?

AMAYA-RIVAS: Correct.

...

THE COURT: All right. Counsel for the parties, are there any additional matters you do want the Court to address? Furthermore, are you aware of any legal reason why the Court should not accept the defendant's desire to plead guilty?

Both the government's attorney and Amaya-Rivas's attorney answered "No." When asked by the judge how he pled, Amaya-Rivas answered "Guilty." (*Id.* at 8–10.) Following the guilty plea hearing, the magistrate judge issued an R & R recommending that the district court accept Amaya-Rivas's plea of guilty. (R. Doc. 28.) Amaya-Rivas filed a motion expressing no objections to the R & R. The district court accepted his plea of guilty, adjudged him guilty, and later sentenced him to 48 months' imprisonment. (R. Doc. 48 at 15.)

## II. DISCUSSION

Amaya-Rivas contends that his conviction is unconstitutional because his guilty plea was not made knowingly and voluntarily. He acknowledges that he did not object to the R & R that recommended the district court accept his guilty plea. Therefore, we review his contentions for plain error. *See United States v. Brown*, 586 F.3d 1342, 1345 (11th Cir. 2009) (“Because [defendant] did not object to the Rule 11 colloquy in district court, we review for plain error.”). To establish plain error, Amaya-Rivas must show that there was an error, that was plain, and that affected his substantial rights. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). When a defendant asserts that the district court committed plain error under Rule 11 and seeks reversal of his conviction after pleading guilty, the defendant “must show a reasonable probability that, but for the error, he would not have entered the plea.” *Id.* at 1020 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S. Ct. 2333, 2340 (2004)). Even if a defendant establishes clear, prejudicial error, the error must still “seriously affect[] the fairness, integrity, or public reputation of judicial proceedings” in order for the court to remedy the error. *United States v. Ternus*, 598 F.3d 1251, 1254 (11th Cir. 2010) (quoting *Brown*, 586 F.3d at 1346). The burden is on the defendant to show that there was an error and that it did affect his substantial rights. *United States v. Margarita Garcia*, 906 F.3d 1255, 1266–67 (11th Cir. 2018) (explaining the difference

between harmless error and plain error review), *cert. denied*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2027 (2019). The reviewing court may consider the entire record to determine whether an error affected the defendant's substantial rights. *Id.* at 1350. Moreover, statements made under oath by a defendant during a plea colloquy receive a strong presumption of truthfulness. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994).

In pertinent part, Rule 11 lists the following rights that the court must review with a defendant pleading guilty and must determine that a defendant understands:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere.

Fed. R. Crim. P. 11(b)(1)(A)-(F). Although the district court is obliged to inform the defendant in words or in substance about these rights, we have noted that the rule does not say that a court's only means of compliance is to read the specified items verbatim. *Monroe*, 353 F.3d at 1351. "Instead, in Rule 11 proceedings, matters of substance, not form, are controlling." *Id.*

In evaluating whether a Rule 11 error substantially affected a defendant's rights, we examine Rule 11's three "core principles," which ensure that: (1) the guilty plea is free of coercion; (2) the defendant understands the nature of the charges against him; and (3) the defendant understands the direct consequences of the guilty plea. *Moriarty*, 429 F.3d at 1019. "A district court's failure to address a core concern of Rule 11 constitutes plain error." *United States v. Hernandez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000). Furthermore, we will consider "whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty." *United States v. Lopez*, 907 F.2d 1096, 1100 (11th Cir. 1990).

Amaya-Rivas relies on our prior decision in *United States v. Hernandez-Fraire*, to support his claim that he did not enter his guilty plea knowingly and voluntarily and that his conviction should be reversed. In that case, we found that the district court violated Rule 11(c)(3) by not explicitly informing the defendant

of his right to plead not guilty, his right to confront and cross-examine adverse witnesses at trial, his right against compelled self-incrimination, and his right to the assistance of counsel at trial. *Hernandez-Fraire*, 208 F.3d at 950. Acknowledging that the district court failed to ask all the questions contemplated by Rule 11, the government insisted that the district court nonetheless addressed the core concerns underlying Rule 11. *Id.* The government also posited that the defendant's extensive criminal history familiarized him with the criminal justice system and the rights inherent in the right to a jury trial and because of this familiarity, he understood the consequences of pleading guilty. *Id.*

In rejecting the government's assertions, we held "that where the district court fails to inform the defendant of his Rule 11(c)(3) rights and nothing in the record indicates that the defendant is aware of these rights, the government cannot rely on the defendant's past criminal background to prove that he knows and understands these rights." *Id.* at 951. Our examination of the plea colloquy revealed that Hernandez-Fraire did not understand his rights. Specifically, when the court asked if anyone had threatened him to plead guilty, Hernandez-Fraire answered "I really don't know about this plea, because I don't know what my rights are." *Id.* This response should have prompted the district court to ensure that Hernandez-Fraire was aware of his rights, but it did not. Thus, we held that

the district court committed plain error by failing to address a core concern of Rule 11. *Id.*

Our review of the record shows a material difference between Amaya-Rivas's responses during his Rule 11 colloquy and Hernandez-Fraire's comments and answers during his Rule 11 colloquy. Unlike Hernandez-Fraire, Amaya-Rivas never informed the magistrate judge that he did not know or understand his rights. Rather, Amaya-Rivas acknowledged that he discussed with his attorney the consequences of pleading guilty and that he understood that by pleading guilty he would be waiving his rights associated with a trial. Thus, unlike Hernandez-Fraire, there is evidence in the record indicating that Amaya-Rivas was "aware of these rights." *Id.* at 951. The fact that a defendant cannot point to evidence affirmatively demonstrating ignorance of his rights does not necessarily end the matter. A "silent record" will warrant reversal, so a defendant need not point to evidence of ignorance. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). Rather, the question is whether there is *any* evidence showing that the defendant understood his rights, and, if there is, the record is not silent, and reversal is not required.

Thus, our review of the record confirms that any errors or omissions during the Rule 11 colloquy did not affect Amaya-Rivas's substantial rights. Although

the magistrate judge did not read the rights contained in Rule 11 verbatim to Amaya-Rivas, the magistrate judge nonetheless ensured that his guilty plea was not coerced, informed him of the charges against him and the elements that the government would have to prove if he proceeded to trial, and informed him of the penalties he would be facing if he was found guilty by a jury. Thus, the district court satisfied the three core principles of Rule 11. *See Moriarty*, 429 F.3d at 1019.<sup>1</sup>

Assuming *arguendo* there was error, Amaya-Rivas has not shown how the error affected his substantial rights. He has not established that he would not have pled guilty had the court not committed the purported error. Moreover, he agreed to the factual basis that the government would have to prove if he proceeded to trial. Accordingly, we affirm Amaya-Rivas's conviction of being unlawfully in the United States after having been previously deported, in violation of 8 U.S.C. § 1326.

AFFIRMED.

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<sup>1</sup> Although our court has stated that the district court does not have to follow the Rule 11 colloquy verbatim, we encourage the district courts to utilize the Rule 11 "script" when conducting guilty plea hearings. A district court should never be reversed for a Rule 11 violation. Moreover, the government attorney and defense attorney have an obligation to notify a district court if it mistakenly omits a core concern from the Rule 11 colloquy. The Rule 11 "script" exists for a reason, and the district courts should follow it closely to avoid any errors. *See* Federal Judicial Center, *Benchbook for U.S. District Court Judges* (March 1, 2013), [https://www.fjc.gov/content/bench book-us-district-court-judges-sixth-edition-0](https://www.fjc.gov/content/bench-book-us-district-court-judges-sixth-edition-0).

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

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August 07, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-11218-CC  
Case Style: USA v. Donato Amaya-Rivas  
District Court Docket No: 6:17-cr-00285-PGB-GJK-1

**This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.** Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or [cja\\_evoucher@ca11.uscourts.gov](mailto:cja_evoucher@ca11.uscourts.gov) for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Carol R. Lewis, CC at (404) 335-6179.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna H. Clark  
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

## **2.01 Taking pleas of guilty or nolo contendere**

Fed. R. Crim. P. 11

### **Introduction**

This section is intended to serve as a guide to district judges, and to magistrate judges who are authorized to conduct change of plea hearings by consent,<sup>1</sup> when they conduct the formal plea taking, whether it occurs before or after review of the presentence report. It is important to emphasize that, while the plea of guilty is entered at the Rule 11 proceeding, the court may defer deciding whether to accept the terms of a plea agreement until after review of the presentence report.<sup>2</sup> If after review of the report the district court rejects an agreement made pursuant to Rule 11(c)(1)(A) or (C), the court shall give the defendant the option to withdraw the plea. In either event, the judge's goal in taking the plea must be to establish that the defendant is competent, that the plea is free and voluntary, that the defendant understands the charges and penalties, and that there is a factual basis for the plea.

This section is not intended to be all-inclusive. Circumstances may require that additional matters be established of record. In some cases, moreover, the court may find it necessary to resolve disputes about the presentence report before determining whether a plea agreement is acceptable. See *infra* section 4.01: Sentencing procedure.

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures. See 28 U.S.C. § 1827 regarding use of certified interpreters.

Some courts have developed Application for Permission to Enter Plea of Guilty forms and Written Plea Agreement forms. If used, such forms do not obviate the need for complete oral proceedings in open court that meet the requirements of Fed. R. Crim. P. 11.

### **Outline**

**[Note: Before proceeding with the hearing, the court may want to ask the prosecutor if there are any victims of the offense and, if so, whether the government has fulfilled its duty to notify them of the hearing and their right to**

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1. If the defendant consents to entering a plea of guilty before a magistrate judge, it is recommended that the consent be in writing and expressly waive the defendant's right to enter the plea before an Article III judge.

2. Fed. R. Crim. P. 11(c)(3)(A); U.S.S.G. § 6B1.1(c), p.s.

***Section 2.01: Taking pleas of guilty or nolo contendere***

attend, and whether any victims want to be "reasonably heard." 18 U.S.C. § 3771(a)(2)–(4).<sup>3</sup>

- A. Determine, on the record, the purpose of the defendant's appearance, that is, obtain a statement from defense counsel<sup>4</sup> that the defendant wishes to enter a plea of guilty (or nolo contendere).
- B. If it has not previously been established, determine whether the plea is being made pursuant to a plea agreement of any kind. If so, require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(c)(2).
- C. Have the clerk administer the oath to the defendant.<sup>5</sup>

[Note: If you have any doubts about the defendant's ability to speak and understand English, consider appointing a certified interpreter in accordance with 28 U.S.C. § 1827.]

- D. Ask the defendant:

1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement?

[See Fed. R. Crim. P. 11(b)(1)(A)]

2. What is your full name?

3. Where were you born?

[If the answer is not the United States or one of its territories, ask if the defendant is a United States citizen.]

4. How old are you?

5. How far did you go in school?

6. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

[Note: If the answer to this question is yes, pursue the subject with the defendant and with counsel in order to determine whether the defendant is currently competent to plead.]

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3. If there are many victims who want to be heard, the court may need to "fashion a reasonable procedure to give effect to [their right to be heard] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

4. If the defendant lacks counsel, you must advise the defendant of the right to an attorney. See *supra* section 1.02: Assignment of counsel or pro se representation; Fed. R. Crim. P. 11(b)(1)(D).

5. An oath (or affirmation) is not required by Fed. R. Crim. P. 11, but is strongly recommended to avoid any subsequent contention in a proceeding under 28 U.S.C. § 2255 that the defendant did not answer truthfully at the taking of the plea because he or she was not sworn.

*Section 2.01: Taking pleas of guilty or nolo contendere*

7. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

[Note: Again, if the answer is yes, pursue the subject with the defendant and with counsel to determine whether the defendant is currently competent to plead.]

8. Have you received a copy of the indictment (information)<sup>6</sup> pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. \_\_\_\_\_ as your counsel?
9. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. \_\_\_\_\_?

E. If there is a plea agreement of any kind, ask the defendant:

1. [If the agreement is written:]

Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

2. Does the plea agreement represent in its entirety any understanding you have with the government?
3. Do you understand the terms of the plea agreement?
4. Has anyone made any promise or assurance that is not in the plea agreement to persuade you to accept this agreement? Has anyone threatened you in any way to persuade you to accept this agreement?
5. [If the terms of the plea agreement are nonbinding recommendations pursuant to Rule 11(c)(1)(B):<sup>7</sup>]

Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of

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6. If the case involves a felony offense being prosecuted by information rather than indictment, and if a waiver of indictment has not previously been obtained in open court (see Fed. R. Crim. P. 7(b)), refer to *supra* section 1.06: Waiver of Indictment.

7. Note that a plea agreement may contain factual stipulations which, unless part of a Rule 11(c)(1)(C) agreement, are not binding under the Rules or the Guidelines. However, some cases have held that a factual stipulation that directly affected the severity of the sentence should have been construed as a Rule 11(e)(1)(C) agreement, or that the stipulation was otherwise relied on by the parties so that it should have been followed or the defendant allowed to withdraw the plea. See, e.g., *United States v. Bohn*, 959 F.2d 389 (2d Cir. 1992); *United States v. Torres*, 926 F.2d 321 (3d Cir. 1991); *United States v. Kemper*, 908 F.2d 33 (6th Cir. 1990); *United States v. Jeffries*, 908 F.2d 1520 (11th Cir. 1990); *United States v. Mandell*, 905 F.2d 970 (6th Cir. 1990). See also *Guideline Sentencing: An Outline of Appellate Case Law* § IX.A.4 (Federal Judicial Center 2002). Courts are advised to discuss any such stipulations before accepting the plea and to warn the defendant that the court might not follow them and that the defendant will not be allowed to withdraw the plea.

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guilty and impose a sentence that is more severe than you may anticipate?

6. [If any or all of the terms of the plea agreement are pursuant to Rule 11(c)(1)(A) or (C):]

Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms], I will give you the opportunity to withdraw your plea of guilty, and that if you choose not to withdraw your plea, I may impose a more severe sentence, without being bound by the plea agreement [or the specific terms rejected by the court]?

7. [Inquire of defense counsel] Were all formal plea offers by the government conveyed to the defendant? [If the answer is no, take a recess to allow time for counsel to consult with the defendant.]<sup>8</sup>

F. If there is no formal plea agreement, ask the attorneys whether the prosecutor made any formal plea agreement offers and, if so, whether those offers were conveyed to the defendant. [If offers have not been conveyed, take a recess to allow time for counsel to consult with the defendant].<sup>9</sup>

G. Whether or not there is a plea agreement, ask the defendant:

Has anyone attempted in any way to force you to plead guilty (nolo contendere) or otherwise threatened you? Has anyone made any promises or assurances of any kind to get you to plead guilty (other than those that are in the plea agreement)? Are you pleading guilty of your own free will because you are guilty?

[See Fed. R. Crim. P. 11(b)(2)].

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8. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper*, 132 S. Ct. 1376, 1383-86 (2012) ("when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome," defendant had claim for ineffective assistance of counsel). See also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"). If a more favorable plea offer has lapsed, or defense counsel's advice to reject an offer will lead to "a less favorable outcome," defendants may "show prejudice from ineffective assistance of counsel . . . [by] demonstrat[ing] a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it . . . To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 132 S. Ct. at 1409.

9. See *supra* note 8 and accompanying text.

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**H. If the plea relates to a felony offense, consider asking the defendant:**

**Do you understand that the offense to which you are pleading guilty (nolo contendere) is a felony offense, that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?**

[If the defendant is not a citizen of the United States, ask:]

- 1. Have you discussed the possible immigration consequences of a guilty plea with your attorney?**
- 2. Do you understand that if you are not a citizen of the United States, in addition to the other possible penalties you are facing, a plea of guilty may subject you to deportation, exclusion, or voluntary departure, and prevent you from obtaining U.S. citizenship?<sup>10</sup>**

[If the defendant is accused of a sex offense, ask:]

**Do you understand that a conviction for this offense will likely result in substantial future restrictions on where you may live or work, and with whom you may associate?<sup>11</sup>**

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10. In *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010), the Supreme Court held that a defense attorney has the duty to advise a defendant of the possible immigration consequences of a guilty plea. Although *Padilla* is directed at advice given by counsel, the Judicial Conference of the United States has approved an amendment to Rule 11(b)(1) to add new subsection (O), which would require a court to warn 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." This amendment would take effect on Dec. 1, 2013, if not changed or rejected by the Supreme Court or the U.S. Congress. Cf. *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) (district court's "general and equivocal admonishment [was] insufficient to correct counsel's affirmative misadvice that Akinsade's crime was not categorically a deportable offense. More importantly, the admonishment did not 'properly inform' Akinsade of the consequence he faced by pleading guilty: mandatory deportation.... Here, the district court did not elicit a direct response to the deportation admonishment, but instead asked if Akinsade understood a list of generalized warnings of which deportation was a part."); *United States v. Bonilla*, 637 F.3d 980, 983-86 (9th Cir. 2011) (citing *Padilla*, the court held defense counsel's failure to warn defendant that he faced deportation by pleading guilty until after defendant had done so was a "fair and just reason" under Rule 11(d)(2)(B) that would allow defendant to withdraw plea).

11. In addition to various state and local laws that may place restrictions on convicted sex offenders, the Adam Walsh Child Protection and Safety Act of 2006 ("The Act"), Pub. L. No. 109-248, 120 Stat. 587, established a national sex offender registration system that requires certain sex offenders to register in their jurisdiction of residence after release from prison (or after sentencing if not incarcerated). See 42 U.S.C. §§ 16901-16902 & 16911-16929 (the Sex Offender Registration and Notification Act). Failure to register or update registration can result in fines or imprisonment under 18 U.S.C. § 2250. The Act also provided for the possibility that, rather than being released at the conclusion of their sentence, some con-

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**I. Inform the defendant of the following:**

1. The maximum possible penalty provided by law, and any mandatory minimum penalty:
  - (a) *For drug offenses:* Determine whether the drug quantity involved or other aggravating factors will trigger application of a mandatory minimum sentence. Because this may not be known at the time the plea is taken, the court is advised to warn the defendant of any *possible* maximum and mandatory minimum sentences that may be imposed after a final determination of quantity and other aggravating factors.
  - (b) Determine whether the defendant faces a mandatory minimum sentence or an increase in the statutory maximum sentence because of one or more prior firearms offenses, violent felonies, or drug offenses. If this is not known at the time of the plea, advise the defendant of the *possible* maximum sentence.
  - (c) Include the duration of any authorized or mandatory term of supervised release, and ask the defendant:

Do you understand that if you violate the conditions of supervised release, you can be given additional time in prison?
  - (d) *If the offense carries a maximum sentence of twenty-five years or more, or the statute specifically prohibits probation,* include a reference to the unavailability of a probation sentence under 18 U.S.C. § 3561(a)(1) or (2).
  - (e) Inform the defendant of the maximum possible fine, if any.
2. *If applicable*, that the court may also order, or may be required to order under the Mandatory Victims Restitution Act, that the defendant make restitution to any victim of the offense. See 18 U.S.C. § 3663A. See also 18 U.S.C. § 3771(a)(6) (giving victims the right "to full and timely restitution as provided in law").

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victed sex offenders could be subject to civil commitment as a "sexually dangerous person" under 18 U.S.C. § 4248.

Although not required to do so by Rule 11, in light of *Padilla*, courts should consider providing some warning to defendants of the possible collateral consequences of a conviction for a sexual offense. See, e.g., *United States v. Youngs*, 687 F.3d 56, 61–63 & n.6 (2d Cir. 2012) (although due process and Rule 11 do not require warning defendants about the possibility of civil commitment as a sexually dangerous person, "it is a potential consequence that could affect defendants' assessment of the costs and benefits of a guilty plea, and alerting defendants to it on the record could forestall later claims by defendants that they were misadvised by counsel concerning the relative costs and benefits of the plea."). Cf. *Bauder v. Dept. of Corrections, State of Fla.*, 619 F.3d 1272, 1274–75 (11th Cir. 2010) (citing *Padilla* in holding that defense counsel's affirmative misrepresentation that defendant would not be exposed to state's civil commitment law after his sentence ended was ineffective assistance of counsel that warranted postconviction relief).

*Section 2.01: Taking pleas of guilty or nolo contendere*

3. *If applicable*, that the court may require the defendant to forfeit certain property to the government.
4. *If the offense involved fraud or other intentionally deceptive practices*, that the court may order the defendant to provide notice of the conviction to victims of the offense. See 18 U.S.C. § 3555.
5. That for each offense, the defendant must pay a special assessment of \$100 (\$25 for a Class A misdemeanor, \$10 for Class B, \$5 for Class C or infraction) required by 18 U.S.C. § 3013.

Fed. R. Crim. P. 11(b)(1).

**J. Ask the defendant:**

Do you understand those possible consequences of your plea that I have just gone over with you?

K. Inform the defendant that his or her sentence will be determined by a combination of advisory Sentencing Guidelines, possible authorized departures from those guidelines, and other statutory sentencing factors. Fed. R. Crim. P. 11(b)(1)(M).

**L. Ask the defendant:**

1. Have you and your attorney talked about how these advisory Sentencing Guidelines might apply to your case?

*[Note: If there is a plea agreement that a specific sentence will be imposed (Fed. R. Crim. P. 11(c)(1)(C)), skip to question 4.]*

2. Do you understand that the court will not be able to determine the advisory guideline range for your case until after the presentence report has been completed and you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence ultimately imposed may be different from any estimate your attorney may have given you?
3. Do you also understand that, after your initial advisory guideline range has been determined, the court has the authority in some circumstances to depart upward or downward from that range, and will also examine other statutory sentencing factors, under 18 U.S.C. § 3553(a), that may result in the imposition of a sentence that is either greater or lesser than the advisory guideline sentence?
4. Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

**M. Ask the defendant:**

1. Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?

**Section 2.01: Taking pleas of guilty or nolo contendere**

*[If the plea agreement involves a waiver of the right to appeal the sentence, ask the defendant:]*

2. Do you understand that by entering into this plea agreement and entering a plea of guilty, you will have waived, or given up, your right to appeal or collaterally attack all or part of this sentence?

(The court should discuss the specific terms of the waiver with the defendant to ensure that the waiver is knowingly and voluntarily entered into and that the defendant understands the consequences. Fed. R. Crim. P 11(b)(1)(N).<sup>12</sup>)

**N. Ask the defendant:**

1. Do you understand

- (a) that you have a right to plead not guilty to any offense charged against you and to persist in that plea;
- (b) that you would then have the right to a trial by jury;
- (c) that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt;
- (d) that you would have the right to the assistance of counsel for your defense—appointed by the court if necessary—at trial and every other stage of the proceeding, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to compel the attendance of witnesses to testify in your defense?<sup>13</sup>

Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

2. Do you further understand that by entering a plea of guilty (nolo contendere), if that plea is accepted by the court, there will be no trial and you will have waived, or given up, your right to a trial as well as those other rights associated with a trial as I just described them?

See Fed. R. Crim. P. 11(b)(1)(B) to (F).

**O. Inform the defendant of the nature of the charge(s) to which he or she is pleading guilty (nolo contendere) by reading or summarizing the indictment (information). Then**

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12. Note that the waiver may not be enforceable if the sentence is not in accordance with the terms of the plea agreement.

13. Although it is not required as part of the Rule 11 colloquy, the court may inform the defendant of the right under Rule 17(c)(1) to compel the production of documents from witnesses by subpoena.

*Section 2.01: Taking pleas of guilty or nolo contendere*

1. further explain the essential elements of the offense, i.e., what the government would be required to prove at trial;<sup>14</sup> and/or (except in pleas of nolo contendere)
  2. have the defendant explain and assent to the facts constituting the crime(s) charged.

See Fed. R. Crim. P. 11(b)(1)(G).

P. *In the case of a plea of guilty (including an Alford plea<sup>15</sup>), have the government counsel make a representation concerning the facts the government would be prepared to prove at trial (to establish an independent factual basis for the plea). See Fed. R. Crim. P. 11(b)(3)).*

*If the defendant's plea is nolo contendere, he or she is neither admitting nor denying guilt.<sup>16</sup> Fed. R. Crim. P. 11(b)(3) is therefore not applicable. The court may wish to consider having the government make a representation concerning the facts of the case.*

Q. If there is a plea agreement involving dismissal of other charges, or an agreement that a specific sentence will be imposed, and if consideration of the agreement is to be deferred, ask the defendant:

*Do you understand that if you plead guilty, a presentence report will be prepared, and I will then consider whether to accept the plea agreement, and that if I decide to reject the plea agreement, you will then have an opportunity to withdraw your plea and change it to not guilty?*

R. Ask the defendant:

**How do you now plead to the charge: guilty or not guilty?**

S. Before accepting the defendant's plea, if there are victims of the offense present, allow them the opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).

T. If you are satisfied with the responses given during the hearing, make the following finding on the record:

**It is the finding of the court in the case of United States v. \_\_\_\_\_ that the defendant is fully competent and capable of entering an**

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14. Reference may be made to the standard or pattern jury instructions normally used in your court.

15. *North Carolina v. Alford*, 400 U.S. 25 (1970). *See also United States v. Tunning*, 69 F.3d 107, 110-14 (6th Cir. 1995) (discussing establishment of factual basis for *Alford* plea and difference between *Alford* plea and plea of nolo contendere).

16. The plea of nolo contendere is never entertained as a matter of course. Fed. R. Crim. P. 11(a)(1) provides that the plea may be entered "with the court's consent." Rule 11(a)(3) provides further that before accepting the plea "the court must consider the parties' views and the public interest in the effective administration of justice." In general, courts accept a plea of nolo contendere only in certain types of cases involving nonviolent crimes where civil implications may arise from a guilty plea.

***Section 2.01: Taking pleas of guilty or nolo contendere***

informed plea, that the defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty [nolo contendere] is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

- U. If a presentence report has been reviewed before plea taking or is not required (see Fed. R. Crim. P. 32(c)(1)(A)), proceed to disposition. (See *infra* section 4.01: Sentencing procedure.) Otherwise, inform the defendant
  1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
  2. that the defendant will be asked to give information for the report, and that his or her attorney may be present if the defendant wishes;
  3. that the court shall permit the defendant and counsel to read the presentence report and file any objections to the report before the sentencing hearing (Fed. R. Crim. P. 32(e)(2) and (f));
  4. that the defendant and his or her counsel shall have an opportunity to speak on behalf of the defendant at the sentencing hearing (Fed. R. Crim. P. 32(i)(4)(A)); and
  5. that, if there are any victims of the offense, the victims shall be afforded an opportunity to be heard at the sentencing hearing. 18 U.S.C. § 3771(a)(4).
- V. Refer the defendant to the probation officer for a presentence investigation and report (pursuant to Fed. R. Crim. P. 32(c)(1)), set the disposition date for sentencing, and determine bail or conditions of release pending sentencing. See *infra* section 2.11: Release or detention pending sentence or appeal.
  1. If the defendant has been at liberty on bond or personal recognizance, invite defense counsel to argue for release pending sentencing. See 18 U.S.C. § 3143(a). Give the U.S. attorney an opportunity to respond. If any victims of the offense are present, allow them an opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).
  2. If the defendant is to be released pending sentencing, advise the defendant
    - (a) when and where he or she is required to appear for sentencing;
    - (b) that failure to appear as required is a criminal offense for which he or she could be sentenced to imprisonment;
    - (c) that all the conditions on which he or she was released up to now continue to apply; and
    - (d) that the penalties for violating those conditions can be severe.

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W. If appropriate, enter a preliminary order of forfeiture under Fed. R. Crim. P. 32.2(b). The preliminary order must be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Fed. R. Crim. P. 32.2(b)(2)(B). Note that the defendant must be provided notice and a reasonable opportunity to be heard on the timing and form of the order.

# **APPENDIX A-2**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

For rules and forms visit  
[www.ca11.uscourts.gov](http://www.ca11.uscourts.gov)

November 06, 2019

**MEMORANDUM TO COUNSEL OR PARTIES**

Appeal Number: 18-11218-CC  
Case Style: USA v. Donato Amaya-Rivas  
District Court Docket No: 6:17-cr-00285-PGB-GJK-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Carol R. Lewis, CC/It  
Phone #: (404) 335-6179

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT.

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No. 18-11218-CC

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DONATO AMAYA-RIVAS,

Defendant - Appellant.

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Appeal from the United States District Court  
for the Middle District of Florida

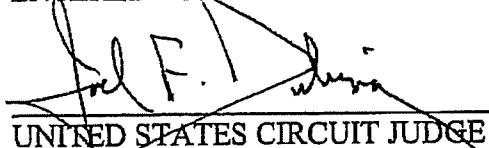
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BEFORE: JORDAN, GRANT and DUBINA, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Donato Amaya-Rivas is DENIED.

ENTERED FOR THE COURT:

  
UNITED STATES CIRCUIT JUDGE

ORD-41