

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RUTH DIAZ-BURGOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Richard C. Klugh
40 N.W. 3rd Street, PH 1
Miami, Florida 33128
Tel. 305-536-1191
rklugh@klughlaw.com
Counsel for Petitioner

QUESTION PRESENTED

The district court, in conducting a change of plea hearing, failed to advise Petitioner of her right to be free from compelled self-incrimination before questioning her under oath as to her criminal involvement in two related federal drug violations.

The Eleventh Circuit held that there is no constitutional or rule requirement of advice of Fifth Amendment rights before the district court conducts an interrogation of a defendant about the defendant's offense conduct.

Does Rule 11(b) of the Federal Rules of Criminal Procedure require that an advice of rights under Fifth Amendment's self-incrimination clause be afforded to a defendant before interrogation in a plea colloquy in which the district court seeks to elicit the defendant's admission to conduct constituting a crime?

INTERESTED PARTIES

The caption contains the names of all of the parties interested in the proceedings.

TABLE OF CONTENTS

QUESTION PRESENTED	i
INTERESTED PARTIES	ii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINION	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	12
APPENDIX	
Decision of the Court of Appeals for the Eleventh Circuit, <i>United States v. Diaz-Burgos</i> , No. 20-12841 (July 23, 2021)	App. 1
Decision of the Court of Appeals for the Eleventh Circuit denying petition for rehearing, <i>United States v. Diaz-Burgos</i> , No. 20-12841, (Nov. 8, 2021)	App. 15
Judgment imposing sentence, United States District Court, S.D. Fla., <i>United States v. Diaz-Burgos</i> , No. 20-cr-20046-KMM (June 29, 2020)	App. 16

TABLE OF AUTHORITIES

CASES:

<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	9, 10
<i>Dickerson v. United States</i> , 530 U.S. 428 (2000)	11
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	8
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969)	8, 9, 10
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966)	11
<i>Mitchell v. United States</i> , 526 U.S. 314 (1999)	10
<i>United States v. Nuckols</i> , 606 F.2d 566 (5th Cir. 1979)	9

STATUTORY AND OTHER AUTHORITY:

U.S. Const. amend. V	1, 8, 10, 11, 12
18 U.S.C. § 2	3
21 U.S.C. § 841	3
21 U.S.C. § 846	3
Fed. R. Crim. P. 11	4, 8, 9, 10, 11, 12
Fed. R. Crim. P. 11(b)	6, 7, 11
Fed. R. Crim. P. 11(b)(1)	8, 11
Fed. R. Crim. P. 11(b)(1)(E)	2, 7, 8
Fed. R. Crim. P. 11, Advisory Committee Notes, 1944 Adoption	11

PETITION FOR WRIT OF CERTIORARI

Ruth Diaz-Burgos respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 20-10635 on February 4, 2021.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, unpublished and available at 2021 WL 3118932, is contained in the Appendix (App. 1). A copy of the Eleventh Circuit's denial of the petition for rehearing is also contained in the Appendix (App. 15).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals issued its decision on July 23, 2021 and denied rehearing on November 8, 2021. App. 1, 15. This petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies upon the following constitutional and statutory provisions:
U.S. Const. amend. V (self-incrimination and due process clauses):

No person shall be ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

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

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

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

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;

- (K) the court’s authority to order restitution;
- (L) the court’s obligation to impose a special assessment;
- (M) 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.

STATEMENT OF THE CASE

Petitioner was prosecuted on both substantive and conspiracy charges in a two-count indictment. Count 1 charged Petitioner with conspiring “with others known and unknown to the Grand Jury” to possess with intent to distribute at least 500 grams of methamphetamine in violation of 21 U.S.C. § 846, the conspiracy extending from December 2019 through mid-January 2021. Count 2 charged Petitioner with the substantive offense of possessing or aiding and abetting the possession of at least 500 grams of methamphetamine on January 17, 2020, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841.

The indictment was filed on January 28, 2020, and Petitioner was arraigned and pled not guilty on January 31, 2020. Just over a month later, on March 3, 2020, the district court set Petitioner’s case for a change of plea hearing. On March 10, 2020,

the hearing commenced with the district court, after learning that there was no plea agreement, asking Petitioner, who was not under oath, if she wanted to plead guilty, without specifying any particular count or allegation in the indictment. Plea transcript at 7. Petitioner answered affirmatively. *Id.* The prosecutor then advised the district court that Petitioner was to plead guilty to both counts without benefit of any plea agreement.

Petitioner was then sworn in as a witness, and the district court immediately elicited incriminating statements from Petitioner regarding her possession of methamphetamine and her guilt of conspiracy, without advising her of the constitutional right to remain silent and without providing any other advice required by Federal Rule of Criminal Procedure 11 prior to accepting a guilty plea.

Because Petitioner hesitated when asked if she committed the charged offense, the district court asked if there was something she did not understand. *Id.* Petitioner answered, “Yes.” *Id.* The district court rephrased its inquiry, asking, “But did you agree with someone else to possess with intent to distribute a drug, a controlled substance, methamphetamine? Did you do that?” *Id.* at 8. Again, Petitioner answered, “Yes.” *Id.* She gave the same response when the district court asked, “Is that what you’re pleading guilty to?” *Id.* The district court next told Petitioner that Count 2 alleged that “on January 17..., you knowingly and intentionally possessed

with intent to distribute 500 grams or more of methamphetamine,” and asked, “Did you do that?” *Id.* at 8. Petitioner again answered, “Yes.” *Id.*

The district court then announced it was going to conduct Petitioner’s hearing “in a different order.” *Id.* at 8. It instructed Petitioner to listen carefully to the prosecutor’s description of her conduct before the district court told her “all your rights.” *Id.* at 8. The prosecutor read a factual proffer into the record relating to the transportation of drugs by car from Atlanta to Miami and statements by Petitioner indicating that she knew the drugs were of a high purity and that she had acted as a courier. *Id.* at 8–10.

After the reading of the proffer concluded, the district court asked Petitioner if she agreed with everything said by the prosecutor. *Id.* at 12. Petitioner answered, “Not with everything.” *Id.* The district court said, “Tell me what you disagree with,” and Petitioner responded, “Yes.” *Id.* The district court said it did not understand Petitioner’s response and again asked what she disagreed with. *Id.* Petitioner responded, “I don’t know what to say.” *Id.* The district court implored, “Tell me what you did on January 17, 2020, involving drugs. What did you do? What are you pleading guilty to?” *Id.* Petitioner responded, “About what you had said.” *Id.*

The district court attempted unsuccessfully to have Petitioner identify the facts she disagreed with or to describe her wrongful conduct in her own words. *Id.* at 13–14. The district court elicited further admissions from Petitioner in the form of

assenting to statements the district court made: “Did you participate in a drug conspiracy?...Did you possess drugs?...Did you know they were drugs?” *Id.* at 14. Petitioner answered each of these questions with a single word: “Yes.” *Id.*

Apparently concerned that Petitioner did not understand or agree with the factual proffer, the district court briefly recessed the hearing so the factual proffer could be translated for her by an official court interpreter. *Id.* at 14–16. When the hearing reconvened, defense counsel reported that Petitioner was in full agreement with the factual proffer. *Id.* at 16. The court did not ask Petitioner to confirm this assertion. *Id.* Instead, it asked her if she understood she would be sentenced for doing the things admitted in the factual proffer. Petitioner answered, “Yes.” *Id.*

At that point in the proceedings, the district court advised Petitioner about some of the topics required by Rule 11(b). *Id.* at 16–21. First, the district court addressed the waiver of trial rights. *Id.* at 16–17; *see also id.* at 20–21. The district court asked if Petitioner understood these things, and she answered, “Yes.” *Id.* at 17, 21.

In response to questioning, Petitioner told the district court she had been receiving psychiatric care since childhood and had been diagnosed with four conditions, including bipolar disorder. *Id.* at 23. She was unable to explain the other conditions. *Id.*

When asked if she recently had taken drugs, alcohol or medication, Petitioner reported she had taken medication but did not know the name. *Id.* at 24. The district

court asked Petitioner if the medication made her feel better (she said it did), but not whether it affected her ability to understand or participate in the proceedings. *Id.*

The district court sentenced Petitioner to 90 months of imprisonment.

Petitioner appealed her conviction to the Eleventh Circuit, contending that the district court's violation of her rights in improperly eliciting self-incriminating statements prior to determining whether she intended to plead guilty to the two charges set forth in the indictment and prior to advice of relevant constitutional rights required vacating the plea.

The Eleventh Circuit held that there was no precedential authority for Petitioner's contention that the district court had violated her right to silence by eliciting self-incriminating statements from her prior to affording any advice or rights or even determining from Petitioner exactly what plea or pleas she was choosing to enter. App. 10 (Eleventh Circuit concludes that because "nothing in Rule 11(b) mandates that the court proceed in a particular order" in conducting the colloquy). And although the Eleventh Circuit noted that it would be preferable at the outset "for the court to inquire of the defendant how she is pleading to each count of the indictment," Rule 11(b)(1)(E)'s requirement that the defendant be advised of her right to be protected from compelled self-incrimination offers a defendant no protection from compelled self-incrimination at the outset of the plea hearing. *Id.*

REASONS FOR GRANTING THE PETITION

The circumstances of Petitioner’s case are ideal for resolving whether, before eliciting testimony from the defendant that is self-incriminating, the district court conducting a change of plea hearing must comply with the letter and spirit of Rule 11 of the Federal Rules of Criminal Procedure to assure that the defendant is voluntarily waiving the Fifth Amendment privilege against self-incrimination.

There is no question that the text of Rule 11(b)(1)(E) provides that “[b]efore accepting a plea of guilty,” federal courts must advise accused persons of the privilege against self-incrimination. In *McCarthy v. United States*, 394 U.S. 459, 466 (1969), this Court explained how Rule 11 is meant to assure that the plea, which “simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination[,] … must be ‘an intentional relinquishment or abandonment of a known right or privilege.’” (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Despite the direction given by the Court in *McCarthy*, given the overwhelming number of guilty pleas taken by district courts, it has become standard practice to give the Rule 11(b)(1) warnings as a laundry list only after the plea and confession have been extracted from the defendant. In Petitioner’s case, the district court took it one step farther, by eliciting factual self-incrimination from Petitioner

before she had been given an opportunity to identify the counts or allegations to which she intended to plead guilty.

The Eleventh Circuit, rejecting Petitioner’s contention that the distortion of the rule protections contemplated by *McCarthy* had reached a point where *McCarthy* was not only reduced to a postscript, but was ignored entirely, held that Rule 11 sets forth no *order of proceeding* in the conducting of a plea hearing and that therefore nothing in the Constitution or rules bars the district court from first violating the defendant’s right against compelled self-incrimination and then advising the defendant of that right after the confession is obtained. *See App. 10.*

While courts have previously construed Rule 11 not to require the advice of rights be given at the very outset of the plea colloquy, *see, e.g., United States v. Nuckols*, 606 F.2d 566, 568 (5th Cir. 1979) (“declin[ing] to adopt such a rigid rule” that would amount to “requiring that defendants be advised of the privilege before *any colloquy* with the court takes place”) (emphasis added), no court prior to the Eleventh Circuit’s decision in this case has allowed a court to violate the privilege against self-incrimination before determining from the defendant what plea or pleas the defendant wishes to enter as to what aspects of the federal criminal charges.

When a defendant enters a guilty plea, she waives a panoply of constitutional rights. *See Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969). In order for the

waiver of rights to be valid and the plea effective, the record must reflect that the defendant entered the plea knowingly and voluntarily. *Boykin*, 395 U.S. at 242–43 & n.5. “[I]f a defendant’s guilty plea is not...voluntary and knowing, it has been obtained in violation of due process and is therefore void.”” *Id.* at 243 n.5 (quoting *McCarthy*, 394 U.S. at 466).

“The purpose of a plea colloquy is to protect the defendant from an unintelligent or involuntary plea.” *Mitchell v. United States*, 526 U.S. 314, 322 (1999); *see id.* at 318, 323 (defendant admitted to offense conduct in plea colloquy only *after* being advised of right against compelled self-incrimination as part of Rule 11 colloquy; “Rule 11 directs the district court, before accepting a guilty plea, to ascertain the defendant understands he or she is giving up “the right to be tried by a jury and at that trial ... the right against compelled self-incrimination.” Rule 11(c)(3). The transcript of the plea colloquy in this case discloses that the District Court took care to comply with this and the other provisions of Rule 11. The District Court correctly instructed petitioner” of her rights as to self-incrimination.). The Court in *Mitchell* recognized that a defendant maintains the Fifth Amendment privilege in plea proceedings, even though “by invoking the privilege against self-incrimination at a plea colloquy [a defendant] runs the risk the district court will find the factual basis inadequate.” *Id.* at 324.

Rule 11(b) provides a roadmap for district courts to follow to ensure that a defendant understands essential matters pertaining to her guilty plea. Rule 11(b)(1) provides in relevant part: “Before the court accepts a plea of guilty...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” relevant constitutional rights, including the right to be free from “compelled self-incrimination.” *Id.* When enacted, Rule 11(b) substantially restated existing law that addressed the “duty of [the] court to ascertain that [the] plea of guilty is intelligently and voluntarily made.” Rule 11, Advisory Committee Notes, 1944 Adoption.

The Eleventh Court upheld Petitioner’s guilty pleas exacted only after violation of the guarantee that no person shall be compelled to be a witness against herself.

The Eleventh Circuit’s decision is erroneous and distorts the text and spirit of Rule 11 and the Fifth Amendment. *See Dickerson v. United States*, 530 U.S. 428 (2000) (holding that non-testimonial evidence discovered directly as a result of a custodial interrogation that violated the constitutionally-required Fifth Amendment protections set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), must be suppressed as fruit of the poisonous tree); *see also id.* at 437 (“This Court has supervisory

authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.”).

The Court should grant certiorari to resolve whether the district court’s violation of the Petitioner’s Fifth Amendment rights is permitted under Fed. R. Crim. P. 11.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

RICHARD C. KLUGH, ESQ.
Counsel for Petitioner

Miami, Florida
February 2022

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12841
Non-Argument Calendar

D.C. Docket No. 1:20-cr-20046-KMM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RUTH DIAZ-BURGOS,

Defendant - Appellant.

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

(July 23, 2021)

Before ROSENBAUM, JILL PRYOR, and LUCK, Circuit Judges.

PER CURIAM:

Ruth Diaz-Burgos appeals her convictions for conspiracy to possess with intent to distribute and possession with intent to distribute 500 grams or more of

methamphetamine. She contends that the district court committed plain error during her plea colloquy by eliciting admissions of guilt from her before informing her of her rights and failing to advise her of essential information required by Rule 11(b) of the Federal Rules of Criminal Procedure. After careful review, we affirm.

I.

In January 2020, Diaz-Burgos was indicted for conspiracy to possess with intent to distribute and possession with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), and 846. She pled guilty to both counts without the benefit of a plea agreement at a change-of-plea hearing in March 2020.

At the plea hearing, which was conducted through an interpreter, the district court confirmed Diaz-Burgos's intent to plead guilty and then proceeded directly with questioning her about the nature of the charges. Specifically, the court stated, “Count 1 is that you agreed with others to possess with intent to distribute methamphetamine – Is that what you did? – between December 2019 and January 17, 2020?” Diaz-Burgos replied, “Yes.” The court noticed a hesitation in her response, so it repeated the question and again she answered in the affirmative. The court then asked, “And on January 17, Count 2 says, you knowingly and intentionally possessed with intent to distribute 500 grams or more of

methamphetamine, the same amount as Count 1. Did you do that?” Diaz-Burgos replied, “Yes.”

The district court then had the government read a written factual proffer detailing Diaz-Burgos’s involvement in the offenses. According to the proffer, in January 2020, a narcotics supplier contacted a confidential source regarding the transport of approximately 21 kilograms of methamphetamine from Atlanta to Miami. The supplier then spoke with Diaz-Burgos, who, several days later, drove to the meeting location with a duffel bag containing the methamphetamine. When she arrived, she parked next to the confidential source and an undercover officer. At Diaz-Burgos’s direction, the confidential source removed the duffel bag containing the methamphetamine and placed it in the undercover officer’s car. The undercover officer asked Diaz-Burgos if the methamphetamine was “liquid or crystal,” and she responded that it was crystal and of very good quality. This interaction was caught on video and audio from the undercover officer’s car. The confidential source then gave Diaz-Burgos a duffel bag containing sham money for the methamphetamine. Shortly thereafter, she was arrested and, after waiving her *Miranda* rights, admitted to transporting methamphetamine from Atlanta to Miami.

The district court asked Diaz-Burgos if she agreed with everything in the proffer, and she responded, “Not with everything.” After a brief exchange, the court engaged in the following discussion with Diaz-Burgos:

THE COURT: What did you do that was wrong on January 17 and before that in this conspiracy? What did you do that was wrong? Did you participate in a drug conspiracy?

DEFENDANT: Yes.

THE COURT: Did you possess drugs?

DEFENDANT: Yes.

THE COURT: Did you know they were drugs?

DEFENDANT: Yes.

THE COURT: Why did you do it?

DEFENDANT: Because I needed the money.

Attempting to narrow down her disagreement with the factual proffer, the court briefly recessed the hearing to permit her to go over the factual proffer with the interpreter and underline any facts she disagreed with and to speak with defense counsel. When the hearing resumed, defense counsel represented that Diaz-Burgos was “in full agreement with the Factual Proffer.”

The district court then turned to the consequences of pleading guilty, including the rights Diaz-Burgos would be waiving. The court advised her that

[w]hen you plead guilty, it means there's no trial, no appeal, no witnesses. You're no longer presumed innocent. The prosecutor doesn't have to prove his accusation against you. He doesn't have to prove what's in the Factual Proffer. He would probably present witnesses, but because you're pleading guilty, they will not be questioned. Your lawyer will not cross-examine them. You will not present any witnesses. The case will be over and done with with the sentence.

“In other words,” the court continued, “you give up the right to remain silent, the right to testify, the right to be presumed innocent, [and] the right to require the prosecutor to prove his accusations beyond a reasonable doubt in front of a jury,” as well as additional collateral consequences. Diaz-Burgos stated that she understood these consequences. The court also advised her of the minimum and maximum statutory penalties (10 years and life imprisonment, respectively), that the Sentencing Guidelines were “give or take 15 years’ imprisonment,” and that she may be eligible to be sentenced below the mandatory minimum based on the “safety valve.” Diaz-Burgos said she understood all of that and still wished to plead guilty. The court reiterated that she was giving up “the right to be presumed innocent, the right to require the prosecutor to prove his accusation, the right to testify, the right to remain silent, everything,” and that the only issue left would be her sentence, and she said she understood.

Next, the district court turned to whether Diaz-Burgos was competent to plead guilty and whether she had been coerced in any way. In response to the court’s questions, Diaz-Burgos stated that she had been diagnosed with bipolar disorder and other conditions she was not able to name, that she had received psychiatric treatment and was currently taking medication, but that she understood the proceedings and was there to plead guilty because it was in her own best interest. She further stated that she had sufficient time to speak with her attorney and was

satisfied with his representation, and that she had not been coerced to plead guilty or promised anything for pleading guilty. Defense counsel advised that, in his opinion, Diaz-Burgos was competent to enter the plea and that she did so freely and voluntarily. Satisfied with these responses, the district court accepted the guilty plea.

The district court sentenced Diaz-Burgos to a total of 90 months of imprisonment, below the ordinary statutory minimum of 10 years because of the safety valve, *see* 18 U.S.C. § 3553(f). After sentencing, Diaz-Burgos filed a motion to appoint appellate counsel, which was construed as a notice of appeal. In the motion, she wrote that she still did not understand the process that led to her conviction because her plea counsel had been ineffective, that she had “been accused of a crime that I do not understand” because she was “like a bystander” but had been sentenced as if “I was the one committing the felony,” and that the court failed to take into account her mental illness and medications that impaired her consciousness. After a hearing, the district court appointed substitute counsel for this appeal.

II.

Diaz-Burgos contends that the plea colloquy was fatally defective because the district court “blatantly violated” Rule 11(b)(1) by eliciting admissions of guilt before informing her of her rights and failing to advise her of essential information required by that rule. She maintains that her guilty plea was unknowing and

involuntary as a result, particularly when viewed against other aspects of the record, such as her confusion regarding the factual proffer, her single-word responses, the language barrier between her and her attorney, and her post-sentencing letter alleging ineffective assistance and confusion about the proceedings.

A.

Because Diaz-Burgos raises these arguments for the first time on appeal, we review them for plain error only. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). To establish plain error, a defendant must show (1) an error, (2) that is plain, and (3) that affects substantial rights. *Id.* An error generally is not “plain” unless either “the explicit language of a statute or rule” or “precedent from the Supreme Court or this Court” specifically resolves the issue. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). And to establish that her substantial rights were affected, Diaz-Burgos “must show a reasonable probability that, but for the error, [s]he would not have entered the plea.” *United States v. Bates*, 960 F.3d 1278, 1296 (11th Cir. 2020) (quotation marks omitted).

To ensure that guilty pleas are knowing and voluntary, and therefore constitutionally valid, “Rule 11(b) sets out procedures that district courts must follow when accepting guilty pleas.” *United States v. Presendieu*, 880 F.3d 1228, 1238 (11th Cir. 2018); *see McCarthy v. United States*, 394 U.S. 459, 466 (1969). “These procedures are designed to address the three ‘core objectives’ necessary for

a knowing and voluntary guilty plea: (1) that the defendant enters [her] plea free from coercion, (2) that [s]he understands the nature of the charges, and (3) that [s]he understands the consequences of [her] plea.” *Presendieu*, 880 F.3d at 1238.

Regarding the first core objective, Rule 11(b)(2) provides that the district court must “determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).” Fed. R. Crim. P. 11(b)(2).

Regarding the second core principle, the district court must “inform the defendant of, and determine that the defendant understands,” “the nature of each charge to which the defendant is pleading.” Rule 11(b)(1)(G). There is no exact formula for determining whether the court adequately informed the defendant of the nature of the charges. *Presendieu*, 880 F.3d at 1238. The court is not necessarily required to list out each element of the offense. *Id.* The adequacy of a plea colloquy depends “on the complexity of the charges and the defendant’s intelligence and sophistication.” *Id.*

Regarding the third core principle, the district court must inform the defendant of, and determine that she understands, her right to a jury trial and various trial rights, the waiver of those rights if the court accepts a guilty plea, and various matters related to sentencing and other penalties, including statutory minimums or maximums, the Sentencing Guidelines and the 18 U.S.C. § 3553(a) factors, forfeiture, restitution, and special assessments. *See* Rule 11(b)(1)(B)–(F), (H)–(M).

The defendant's trial rights include the right to be represented by counsel and "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." *See* Rule 11(b)(1)(D)–(E). The district court also must explain that the defendant can be prosecuted for perjury for testifying falsely under oath. *See* Rule 11(b)(1)(A).

Although the requirements of Rule 11 are "mandatory," not "aspirational," our evaluation of the adequacy of a plea colloquy is governed by "matters of substance, not form." *United States v. Monroe*, 353 F.3d 1346, 1351 (11th Cir. 2003). The district court is not required to follow Rule 11 verbatim, *id.*, and we will uphold "plea colloquies that fail to address an item expressly required by Rule 11 so long as the overall plea colloquy adequately addresses the[] three core concerns" outlined above, *id.* at 1354. While complete or near complete failures to address a core concern are reversible error, a "slip up," in which the district court forgets to explicitly cover an item in Rule 11, but otherwise addresses the core concerns, will not be a basis for remand. *See id.* at 1355–56.

B.

Here, the district court did not plainly err in accepting Diaz-Burgos's guilty plea. Our review of the plea colloquy shows that the court, although it did not

comply with all the technical requirements of Rule 11(b), adequately addressed the three core concerns and ensured that her plea was knowing and voluntary.

First, Diaz-Burgos objects that the district court elicited incriminating statements from her before informing her of her rights, such as the right to remain silent. But nothing in Rule 11(b) mandates that the court proceed in a particular order. Rather, the rule simply requires the court to address various matters “[b]efore the court accepts a plea of guilty.” *See* Rule 11(b)(1), (2). Nor does she point to any statute or precedential decision that supports her argument.¹ In fact, in *Moriarty* we suggested that it would be “preferabl[e] at the outset” for the court to inquire of the defendant how she is pleading to each count of the indictment. *Moriarty*, 429 F.3d at 1019. As a result, she cannot establish that any error in the court’s sequencing of the hearing was “plain.” *See Lejarde-Rada*, 319 F.3d at 1291.

Second, the district court ensured that the guilty plea was voluntary and free from coercion. *See Presendieu*, 880 F.3d at 1238. In response to the court’s questions, Diaz-Burgos stated that she had sufficient time to speak with her attorney, that she was satisfied with his representation, and that she had decided to plead guilty because she was in fact guilty and it was in her own best interest, not because of any

¹ Instead, Diaz-Burgos repeatedly references the Benchbook for U.S. District Court Judges published by the Federal Judicial Center. But, as she acknowledges, the Benchbook is merely a “guide” for judges that “incorporates constitutional, statutory, and rule requirements” and “reflects common practice.” *See* Appellant’s Initial Br. at 12 & n.3. It does not independently create legal rules that could be used to establish plain error, even if we agree with her as a practical matter that district courts should hew closely to the Benchbook’s guidance.

promises or coercion. Defense counsel also confirmed that, in his opinion, Diaz-Burgos entered the guilty plea freely and voluntarily.

Third, the district court adequately informed Diaz-Burgos of the nature of the charges. *See id.* While the court did not list the elements of the offense or read directly from the indictment, the crimes were not complex, and the colloquy otherwise shows that Diaz-Burgos well understood the nature of the two charges against her. The court informed her that “Count 1 is that you agreed with others to possess with intent to distribute methamphetamine . . . between December 2019 and January 17, 2020” and that “on January 17, Count 2 says, you knowingly and intentionally possessed with intent to distribute 500 grams or more of methamphetamine, the same amount as Count 1.” She indicated that she understood. The court also specifically asked her if she “participate[d] in a drug conspiracy,” “possess[ed] drugs,” and “kn[ew] they were drugs,” and she said “Yes” to each. And she expressly agreed to a detailed factual proffer that was more than sufficient to prove she conspired to possess with intent to distribute and possessed with intent to distribute more than 500 grams of methamphetamine. *See id.* at 1241 (“[T]he detailed nature of the seven-page factual proffer accompanying Presendieu’s written plea agreement and his express assent to that proffer show that Presendieu well understood the nature of the two charges against him.”).

Moreover, nothing in the record indicates that Diaz-Burgos lacked the intelligence and sophistication necessary to understand her charges. *See id.* at 1238. Despite language barriers between Diaz-Burgos and her attorney and the court, an interpreter was present during the plea colloquy. And while she suffers from mental illnesses, she expressly told the court that she was able to understand the proceedings, and the record confirms as much. For instance, after the government read the factual proffer, she initially stated that she did not agree “with everything” in it, demonstrating her understanding of the specific facts alleged and her engagement with the proceedings. The court then gave her the opportunity to review the factual proffer in detail with an interpreter and to speak with her attorney, after which her attorney stated that she was “in full agreement with the Factual Proffer.”

Fourth, the district court substantially covered the rights Diaz-Burgos would be waiving by pleading guilty and the sentencing consequences of her guilty plea. The court advised her that “[w]hen you plead guilty, it means there’s no trial, no appeal, no witnesses,” and then twice stated that she would be giving up the right to remain silent, the right to testify, the right to be presumed innocent, and the right to require the prosecutor to prove his accusations beyond a reasonable doubt before a jury. Diaz-Burgos stated that she understood and did not express any confusion about these rights. The court also addressed the mandatory minimums and maximums, the possibility of safety-valve relief, and the Sentencing Guidelines.

While the court omitted certain information required by Rule 11² and could have been clearer about the matters it did cover, the court’s violations of Rule 11 did not “result[] in a total or almost total failure to address a Rule 11 core concern.” *Monroe*, 353 F.3d at 1355; *see Moriarty*, 429 F.3d at 1020 n.5 (upholding a plea colloquy where the court “touched on the right to a jury trial, the right to confront and cross-examine witnesses, and the right to compel attendance of witnesses,” and the defendant did not express confusion about his rights during the colloquy).

Finally, Diaz-Burgos has not even attempted to show, and nothing in the records suggests, that “[s]he would not have entered the plea” if the district court had informed her of all the information required by Rule 11. *Bates*, 960 F.3d at 1296. Her arguments in her reply brief, relying on her post-sentencing letter to the court, come too late. *See Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1326 n.15 (11th Cir. 2021) (“[W]e do not consider arguments fairly raised for the first time in reply briefs.”). In any case, her post-sentencing letter primarily asserts ineffective assistance of plea counsel, which is better addressed on collateral review, and her belief that the sentence was unreasonable. And her general assertions of confusion alone are not sufficient to overcome the “strong presumption that the

² In particular, the district court failed to advise Diaz-Burgos of her rights to persist in a plea of not guilty and to be represented by counsel, appointed if necessary, the government’s right to prosecute false statements for perjury, the maximum penalties as they related to a term of supervised release, and the court’s obligation to impose a special assessment.

statements made during the plea colloquy are true,” *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994), particularly her statement that she was pleading guilty because it was in her best interest and her express assent to the detailed factual proffer demonstrating her guilt.

For these reasons, we affirm Diaz-Burgos’s convictions.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12841-CC

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RUTH DIAZ-BURGOS,

Defendant - Appellant.

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

BEFORE: ROSENBAUM, JILL PRYOR, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Ruth Diaz-Burgos is DENIED.

ORD-41

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA
v.
RUTH DIAZ-BURGOS

JUDGMENT IN A CRIMINAL CASE

Case Number: **20-20046-CR-MORENO**
USM Number: **20814-104**

Counsel for Defendant: **Daniel Ecarius, AFPD**
Counsel for The United States: **Frederic Shadley**
Court Reporter: **Gilda Pastor-Hernandez**

The defendant pleaded guilty to Count 1 and 2 of the Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21 U.S.C. § 846	Conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine	01/17/2020	1
21 U.S.C. § 841(a)(1)	Possession with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine	01/17/2020	2

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

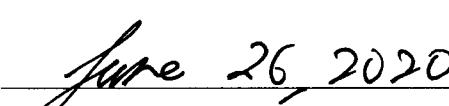
It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **6/24/2020**


Federico A. Moreno
United States District Judge

Date:

App, 16


June 26, 2020

DEFENDANT: RUTH DIAZ-BURGOS
CASE NUMBER: 20-20046-CR-MORENO

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **90 MONTHS (CONCURRENT as to Count 1 and 2)**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

App, 17

FBM

DEFENDANT: RUTH DIAZ-BURGOS
CASE NUMBER: 20-20046-CR-MORENO

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **FIVE (5) years (CONCURRENT)**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RUTH DIAZ-BURGOS
CASE NUMBER: 20-20046-CR-MORENO

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

Mental Health Treatment

DEFENDANT: RUTH DIAZ-BURGOS
CASE NUMBER: 20-20046-CR-MORENO

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third-party payment.

App, 20



DEFENDANT: **RUTH DIAZ-BURGOS**
 CASE NUMBER: **20-20046-CR-MORENO**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	Fine	Restitution
	\$200.00	\$0.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **RUTH DIAZ-BURGOS**
 CASE NUMBER: **20-20046-CR-MORENO**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of \$100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE
 ATTN: FINANCIAL SECTION
 400 NORTH MIAMI AVENUE, ROOM 08N09
 MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>CASE NUMBER</u>	<u>DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL AMOUNT</u>

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.