

United States Court of Appeals for the Fifth Circuit

No. 24-10293
Summary Calendar

United States Court of Appeals

Fifth Circuit

FILED

February 20, 2025

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRADLEY J. HARRIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-103-1

Before WIENER, HIGGINSON, and HO, *Circuit Judges.*

PER CURIAM:*

Defendant-appellant Bradley J. Harris, federal prisoner # 55436-177, appeals the district court's denial of his 18 U.S.C. § 3582(c)(2) motion to reduce his 159-month sentence for health care fraud and conspiracy to commit health care fraud. His motion was based on Part B of Amendment 821 to the Sentencing Guidelines. The district court denied the motion based

* This opinion is not designated for publication. *See 5TH CIR. R. 47.5.*

No. 24-10293

on a determination that Harris was not eligible for a decrease of two offense levels as a zero-point offender because he did not satisfy all the criteria under U.S.S.G. § 4C1.1(a).

Harris received a vulnerable victim adjustment under U.S.S.G. § 3A1.1(b)(2), and he is therefore ineligible for an offense level reduction under § 4C1.1(a)(9). On appeal, Harris contends that the vulnerable victim adjustment does not disqualify him from relief and is instead only one factor that the district court could consider in deciding whether to grant relief. His assertion is without merit, as the plain language of § 4C1.1(a) requires that he satisfy all of the criteria listed in that subsection. *See* U.S.S.G. § 4C1.1(a).

Insofar as Harris requests that we remand the case to correct alleged clerical errors in the record pursuant to Federal Rule of Criminal Procedure 36, we decline to do so, without prejudice to his right to seek relief under Rule 36 in the district court. His motion to allow an attachment to his brief is DENIED, and the district court's judgment is AFFIRMED.

APPENDIX B

United States District Court
for the Northern District of Texas
Dallas Division

United States of America
Plaintiff,

v.

Bradley J. Harris
Defendant.

Case No. 3:17-CR-103-M(01)

55436-177

Federal Register Number

**ORDER ON MOTION FOR REDUCTION OF SENTENCE PURSUANT TO
18 U.S.C. § 3582(c)(2) AND AMENDMENTS 821 & 825 TO THE FEDERAL
SENTENCING GUIDELINES**

Upon motion of the defendant pursuant to 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on the amendment found at:

USSG § 4C1.1 Adjustment for Zero-Point Offenders
 USSG § 4A1.1(d) & (e) Criminal History Status Points

and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and considering the policy statement set forth at U.S.S.G. § 1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, and for the reasons detailed in the Statement of Reasons.

IT IS ORDERED that the motion is:

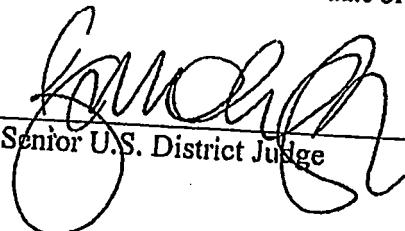
GRANTED, and the defendant's previously imposed sentence of imprisonment of _____ months is reduced to _____ months. Except as otherwise provided, all provisions of the judgment dated _____ shall remain in effect.

If the reduced sentence is less than the amount of time the defendant has already served, the sentence is reduced to the time the defendant has already served in custody (a "Time Served" sentence). Implementation of the "Time Served" sentence is stayed for 10 days from the date of this order.

DENIED.

Date: 3/15/24

Signed:


Senior U.S. District Judge

Effective Date:
(If different from order date)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

BRADLEY HARRIS

No. 3:17-CR-103-M
FILED UNDER SEAL

**GOVERNMENT'S MOTION FOR DOWNWARD DEPARTURE
PURSUANT TO USSG § 5K1.1**

Pursuant to USSG § 5K1.1, the United States of America, by and through the United States Attorney for the Northern District of Texas, hereby files this Motion for Downward Departure and requests that the Court sentence Defendant Bradley Harris to a sentence of imprisonment of no more than 121 months based on the substantial assistance he provided to the government.

I. **Factual Background Justifying Current Motion**

Defendant Harris provided substantial cooperation to the government with respect to the trial of codefendants Mark Gibbs, Laila Hirjee, and Tammie Little. Harris met with the government three times in preparation for trial. Additionally, Harris testified over the course of three days at the trial of the remaining codefendants. Harris provided accurate and truthful testimony as to: (1) Novus' recruitment of medical directors for the purpose of obtaining patient referrals; (2) the procedure by which both Drs. Gibbs and Hirjee pre-signed blank controlled substance prescriptions giving them to Brad Harris and others at Novus to let them prescribe controlled substances without any physician oversight; (3) Harris' ability to request various false forms and fraudulent certifications

Government's Motion for Downward Departure
Pursuant to USSG § 5K1.1 - Page 1 of 4

from Drs. Gibbs and Hirjee based on Harris' need to have documentation to justify Novus' billing of Medicare; (4) Novus' recruitment of patients from Express Medical patients rolls and Little's involvement in the process; (5) Dr. Gibbs' role in the scheme to continue to receive post-suspension Medicare payments through Dependable; and (6) the context and meaning of numerous text message communications between Harris and each of the codefendants. This testimony helped in the government's case against Dr. Gibbs, Dr. Hirjee, and Tammie Little.

II. Motion for Downward Departure

The government moves for a downward departure from Harris' applicable sentencing guideline range pursuant to USSG § 5K1.1. Section 5K1.1 of the Sentencing Guidelines provides that upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court may depart from the guidelines.

As described above, the defendant has provided substantial assistance to the government in the prosecution of other individuals who have committed offenses. The government's recommendation for downward departure is based solely on Harris' cooperation and does not reflect the government's opinion as to his role and culpability in the offense. Based on the nature, extent and significance of Harris' assistance, the government recommends that the Court grant a downward departure of five levels. His current guideline range is 240 months in prison based upon a total offense level of 43, criminal history score of I. However, there is a binding Plea Agreement in this case

pursuant to Rule 11(c)(1)(C) for a sentence of no more than 168 months which falls within the ranges for the effective total offense levels 33, 34, and 35.¹ (Harris Plea Agreement, dkt. 923, at ¶5). A five-level reduction from level 33 results in a range of 78-97 months, from level 34 results in a range of 87-108 months and from level 35 results in a range of 97-121 months. Based on the above ranges, the government requests that the Court sentence Harris to a term of imprisonment of no more than 121 months.

CONCLUSION

The government requests that the Court grant this motion for a reduction in sentence.

Respectfully submitted,

CHAD E. MEACHAM
UNITED STATES ATTORNEY

s/ Donna S. Max

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¹ The period of 168 months is included in each of the offense levels as follows: Level 33 (135-168), Level 34 (151-188), Level 35 (168-210). U.S.S.G. Ch. 5, Pt. A.

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for Harris on or about January 12, 2022. Counsel does not oppose the granting of the motion but reserves the right to argue for a greater departure than that requested by the government.

/s/ Donna Max

Donna Max

APPENDIX D

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

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APPENDIX E

Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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APPENDIX F

Modification of an imposed term of imprisonment

(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) [18 USCS § 3559(c)], for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g) [18 USCS § 3142];

and such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

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APPENDIX G

Part B (Zero-Point Offenders)

Subpart 1 (Adjustment for Certain Zero-Point Offenders)

Chapter Four is amended by inserting at the end the following new Part C:

" PART C - ADJUSTMENT FOR CERTAIN ZERO-POINT OFFENDERS

§4C1.1. *Adjustment for Certain Zero-Point Offenders*

(a) *Adjustment.*—If the defendant meets all of the following criteria:

- (1) the defendant did not receive any criminal history points from Chapter Four, Part A;
- (2) the defendant did not receive an adjustment under §3A1.4 (Terrorism);
- (3) the defendant did not use violence or credible threats of violence in connection with the offense;
- (4) the offense did not result in death or serious bodily injury;
- (5) the instant offense of conviction is not a sex offense;
- (6) the defendant did not personally cause substantial financial hardship;
- (7) the defendant did not possess, receive, purchase, transport, transfer, sell, or otherwise dispose of a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (8) the instant offense of conviction is not covered by §2H1.1 (Offenses Involving Individual Rights);
- (9) the defendant did not receive an adjustment under §3A1.1 (Hate Crime Motivation or Vulnerable Victim) or §3A1.5 (Serious Human Rights Offense); and
- (10) the defendant did not receive an adjustment under §3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848;

decrease the offense level determined under Chapters Two and Three by 2 levels.

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(b) *Definitions and Additional Considerations.*—

- (1) 'Dangerous weapon,' 'firearm,' 'offense,' and 'serious bodily injury' have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).
- (2) 'Sex offense' means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of title 18, not including a recordkeeping offense; (iii) chapter 117 of title 18, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subparagraphs (A)(i) through (iv) of this definition.
- (3) In determining whether the defendant's acts or omissions resulted in 'substantial financial hardship' to a victim, the court shall consider, among other things, the non-exhaustive list of factors provided in Application Note 4(F) of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

Commentary

Application Notes:

1. *Application of Subsection (a)(6).*—The application of subsection (a)(6) is to be determined independently of the application of subsection (b)(2) of §2B1.1 (Theft, Property Destruction, and Fraud).
2. *Upward Departure.*—An upward departure may be warranted if an adjustment under this guideline substantially underrepresents the seriousness of the defendant's criminal history. For example, an upward departure may be warranted if the defendant has a prior conviction or other comparable judicial disposition for an offense that involved violence or credible threats of violence.".

Subpart 2 (Implementation of 28 U.S.C. § 994(j))

The Commentary to §5C1.1 captioned "Application Notes" is amended—

by inserting at the beginning of Note 1 the following new heading: "*Application of Subsection (a).*—";

by inserting at the beginning of Note 2 the following new heading: "*Application of Subsection (b).*—";

by inserting at the beginning of Note 3 the following new heading: "*Application of Subsec-*

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tion (c).—";

by striking Note 4 as follows:

"If the defendant is a nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3). See 28 U.S.C. § 994(j). For purposes of this application note, a 'nonviolent first offender' is a defendant who has no prior convictions or other comparable judicial dispositions of any kind and who did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense of conviction. The phrase 'comparable judicial dispositions of any kind' includes diversionary or deferred dispositions resulting from a finding or admission of guilt or a plea of *nolo contendere* and juvenile adjudications.";

by redesignating Notes 5 through 10 as Notes 4 through 9, respectively;

by inserting at the beginning of Note 4 (as so redesignated) the following new heading: "*Appli- cation of Subsection (d).—";*

by inserting at the beginning of Note 5 (as so redesignated) the following new heading: "*Appli- cation of Subsection (e).—";*

by inserting at the beginning of Note 6 (as so redesignated) the following new heading: "*De- partures Based on Specific Treatment Purpose.—";*

by inserting at the beginning of Note 7 (as so redesignated) the following new heading: "*Use of Substitutes for Imprisonment.—";*

by inserting at the beginning of Note 8 (as so redesignated) the following new heading: "*Resi- dential Treatment Program.—";*

by inserting at the beginning of Note 9 (as so redesignated) the following new heading: "*Appli- cation of Subsection (f).—";*

and by inserting at the end the following new Note 10:

"10. Zero-Point Offenders.—

(A) *Zero-Point Offenders in Zones A and B of the Sentencing Table.*—If the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range is in Zone A or B of the Sentencing Table, a sentence other than a sentence of imprisonment, in accordance with subsection (b) or (c)(3), is generally appropriate. See 28 U.S.C. § 994(j).

(B) *Departure for Cases Where the Applicable Guideline Range Overstates the*

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Gravity of the Offense.—A departure, including a departure to a sentence other than a sentence of imprisonment, may be appropriate if the defendant received an adjustment under §4C1.1 (Adjustment for Certain Zero-Point Offenders) and the defendant's applicable guideline range overstates the gravity of the offense because the offense of conviction is not a crime of violence or an otherwise serious offense. See 28 U.S.C. § 994(j).".

Subpart 3 (Additional Changes)

Chapter One, Part A is amended in Subpart 1(4)(d) (Probation and Split Sentences)— by adding an asterisk after "community confinement or home detention.";
by adding a second asterisk after "through departures.*"; and by striking the following Note:

"*Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)",

and inserting the following Notes:

"*Note: The Commission expanded Zones B and C of the Sentencing Table in 2010 to provide a greater range of sentencing options to courts with respect to certain offenders. (See USSG App. C, amendment 738.) In 2018, the Commission added a new application note to the Commentary to §5C1.1 (Imposition of a Term of Imprisonment), stating that if a defendant is a 'nonviolent first offender and the applicable guideline range is in Zone A or B of the Sentencing Table, the court should consider imposing a sentence other than a sentence of imprisonment.' (See USSG App. C, amendment 801.) In 2023, the Commission added a new Chapter Four guideline, at §4C1.1 (Adjustment for Certain Zero-Point Offenders), providing a decrease of 2 levels from the offense level determined under Chapters Two and Three for 'zero-point' offenders who meet certain criteria. In addition, the Commission further amended the Commentary to §5C1.1 to address the alternatives to incarceration available to 'zero-point' offenders by revising the application note in §5C1.1 that addressed 'nonviolent first offenders' to focus on 'zero-point' offenders. (See USSG App. C, amendment 821.)

"**Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See USSG App. C, amendment 603.)".

Section 4A1.3(b)(2)(A) is amended by striking "A departure" and inserting "Unless otherwise specified, a departure".

The Commentary to §4A1.3 captioned "Application Notes" is amended in Note 3 by striking "due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender

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with the lowest risk of recidivism" and inserting "unless otherwise specified".

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APPENDIX H

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have

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yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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APPENDIX I

Rule 11. Pleas

(a) Entering a Plea.

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

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

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

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

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

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

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

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

(C) the right to a jury trial;

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

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

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

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- (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); and
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
- (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

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

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

(c) Plea Agreement Procedure.

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

- (A) not bring, or will move to dismiss, other charges;
- (B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing

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Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

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

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

(3) *Judicial Consideration of a Plea Agreement.*

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

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

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

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

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

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

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

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

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

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

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- (A) the court rejects a plea agreement under Rule 11(c)(5); or
- (B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

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

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

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

USCSRULE

APPENDIX A