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### Guilty Pleas

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## GUILTY PLEAS

*Plea Bargaining.* There is no constitutional right to plea bargain.<sup>1309</sup> Nevertheless, the Supreme Court recognizes plea bargaining as an essential component of the criminal justice system<sup>1310</sup> and the Constitution requires a prosecutor to comply with equal protection requirements in conducting plea bargaining.<sup>1311</sup>

Rule 11(e) of the *Federal Rules of Criminal Procedure* governs the conduct of the government and the defendant<sup>1312</sup> during plea negotiations.<sup>1313</sup> Rule

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1309. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *see also Russell v. Collins*, 998 F.2d 1287, 1294 (5th Cir. 1993) (prosecutor has discretion to enter plea bargains with some defendants and not others), *petition for cert. filed*, Dec. 7, 1993; *Coleman v. Risley*, 839 F.2d 434, 450-51 (9th Cir. 1988) (state not obligated to accept defendant's offer to plea bargain), *cert. denied*, 493 U.S. 944 (1989). *Cf. Mabry v. Johnson*, 467 U.S. 504, 507-08 (1984) (plea bargain merely contract; only guilty plea and subsequent deprivation implicate Constitution); *U.S. v. Gonzalez*, 918 F.2d 1129, 1134 (3d Cir. 1990) (prosecutor may condition plea bargain on codefendants accepting guilty plea package without violating due process when defendant retained right to jury trial because prosecutor under no duty to bargain), *cert. denied*, 499 U.S. 982 (1991).

1310. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

1311. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (prosecutor's decision to offer plea bargain may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))). *Cf. U.S. v. Bernal-Rojas*, 933 F.2d 97, 99 (1st Cir. 1991) (although evidence of systematic failure of U.S. Attorney to plea bargain with Colombian nationals may establish prima facie equal protection claim, defendant's meager, unsubstantiated claim "woefully" short of demonstrating constitutional violation). *Compare U.S. v. Sustaita*, 1 F.3d 950, 952 (9th Cir. 1993) (defendant failed to sustain claim of impermissibly selective prosecution when he could not demonstrate he was selected for prosecution rather than plea arrangement on the basis of an impermissible ground such as race, religion, or exercise of constitutional rights) with *U.S. v. Redondo-Lemos*, 955 F.2d 1296, 1301-03 (9th Cir. 1992) (where prima facie evidence shows that prosecutor's plea bargaining had discriminatory impact and court determines prosecutor motivated by discriminatory purpose, giving defendant benefit of bargain she would have received absent discrimination is appropriate remedy).

1312. The court is prohibited from participating in plea negotiations. FED. R. CRIM. P. 11(e)(1); *see U.S. v. Adams*, 634 F.2d 830, 835-42 (5th Cir. 1981) (judge's impermissible intervention entitled defendant to resentencing by different judge because judicial participation in plea negotiations so inherently dangerous that appellate court will raise issue sua sponte and order appropriate remedy); *U.S. v. Barrett*, 982 F.2d 193, 195 (6th Cir. 1992) (judge impermissibly intervened when he stated it was his opinion that defendant had no case and that he was unsurprised the investigator had not located any alibi witnesses); *U.S. v. Anderson*, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (judge impermissibly intervened when he threatened to forbid government to accept plea to fewer than all 30 counts; rule 11 proscribes any court participation in plea bargaining discussions regardless of whether prejudice shown); *U.S. v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (*per curiam*) (judge impermissibly intervened by stating during plea negotiations that defendant and codefendants would receive "fairly high" sentence if they went to trial and were found guilty). Nevertheless, this prohibition may not be absolute. *See U.S. v. Olesen*, 920 F.2d 538, 541 (8th Cir. 1990) (absent showing of fraud, district court prohibited from modifying plea agreement after unconditionally accepting it).

1313. FED. R. CRIM. P. 11(e). Once negotiations end and a plea contract is formed, rule 11 safeguards no longer apply. *U.S. v. Knight*, 867 F.2d 1285, 1288 (11th Cir.), *cert. denied*, 493 U.S. 846 (1989). When discussions do not constitute plea bargaining, rule 11 does not apply. *See U.S. v. Sebetich*, 776 F.2d 412, 421 (3d Cir. 1985) (statements made to person defendant could not have reasonably believed authorized to plea bargain not inadmissible under rule 11(e)), *cert. denied*, 484 U.S. 1017 (1988); *U.S. v. Jorgensen*, 871 F.2d 725, 730 (8th Cir. 1989) (statements made to officers at FBI offices when defendant not in custody not part of plea bargaining and thus not inadmissible under rule 11(e)).

11(e)(1) authorizes plea agreements under which a defendant pleads guilty to the charged offense or to a lesser or related offense.<sup>1314</sup> In such an agreement, the prosecutor may move for dismissal of other charges,<sup>1315</sup> make a non-binding sentencing recommendation to the court,<sup>1316</sup> agree not to oppose the defendant's request for a particular sentence,<sup>1317</sup> or agree that a specific sentence is appropriate for the disposition of the case.<sup>1318</sup> Typically, the government is required only to abide by the specific terms of the agreement; it need not "enthusiastically" defend its sentencing recommendations.<sup>1319</sup> Al-

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1314. FED. R. CRIM. P. 11(e)(1).

1315. FED. R. CRIM. P. 11(e)(1)(A).

1316. FED. R. CRIM. P. 11(e)(1)(B).

1317. *Id.*

1318. FED. R. CRIM. P. 11(e)(1)(C).

1319. *U.S. v. Benchimol*, 471 U.S. 453, 455-56 (1985) (per curiam). Compare *U.S. v. Ramos*, 810 F.2d 308, 313-14 (1st Cir. 1987) (government's promise to recommend light sentence not breached by prosecutor's negative comments on sentencing report because no obligation to advocate recommended sentence enthusiastically); *U.S. v. Miller*, 993 F.2d 16, 19 (2d Cir. 1993) (government's promise not to oppose defendant's motion for downward departure from sentencing guidelines did not bar government from making a motion to depart upward); *U.S. v. Huddleston*, 929 F.2d 1030, 1032 (5th Cir. 1991) (government's promise to recommend particular sentence not breached when prosecutor made recommendation but also discussed dangerousness of defendant's activities) and *U.S. v. Jimenez*, 928 F.2d 356, 363-64 (10th Cir.) (government's promise to recommend specific sentence not breached when prosecutor made recommendation but discussed defendant's dissemination of grand jury materials), *cert. denied*, 112 S. Ct. 164 (1991) with *U.S. v. Canada*, 960 F.2d 263, 269-71 (1st Cir. 1992) (government's promise to recommend specific sentence breached when prosecutor paid "lip service" to plea agreement but recommended "lengthy" sentence instead of affirmatively recommending sentence specified in plea agreement). Cf. *Raulerson v. U.S.*, 901 F.2d 1009, 1012 (11th Cir. 1990) (plea agreement which required government to tell other federal courts of defendant's cooperation did not preclude government from opposing sentences proposed in those other courts).

In cases in which the government agrees not to recommend a specific sentence, courts generally do not preclude the government from making additional recommendations for punishment as long as the government does not recommend a specific sentence. Compare *U.S. v. Weinberg*, 852 F.2d 681, 687-88 (2d Cir. 1988) (government did not breach agreement not to make specific sentence recommendation at sentencing hearing by vividly describing offenses); *U.S. v. Moore*, 931 F.2d 245, 250 (4th Cir. 1991) (government did not breach agreement to refrain from recommending specific sentence by making remarks calculated to induce court to issue severe sentence), *cert. denied*, 112 S. Ct. 171 (1991); *U.S. v. Brummett*, 786 F.2d 720, 722-23 (6th Cir. 1986) (government did not breach agreement not to recommend particular sentence by recommending "lengthy" sentence); *U.S. v. White*, 724 F.2d 714, 717 (8th Cir. 1984) (per curiam) (government did not breach agreement not to recommend sentence by opposing defendant's motion to reduce sentence); *U.S. v. Clark*, 781 F.2d 730, 731-33 (9th Cir. 1986) (government did not breach agreement not to recommend particular sentence by recommending that defendant serve longest possible sentence) and *U.S. v. Carrazana*, 921 F.2d 1557, 1569 (11th Cir.) (government did not breach agreement not to recommend particular sentence by referring to defendant as drug "kingpin" in response to defense counsel's sentencing recommendation), *cert. denied*, 112 S. Ct. 191 (1991) with *U.S. v. Moscahlaidis*, 868 F.2d 1357, 1361-63 (3d Cir. 1989) (government breached agreement not to take position regarding imposition of custodial sentence by offering opinions and drawing conclusions about defendant's character in sentencing memorandum); *Brunelle v. U.S.*, 864 F.2d 64, 65 (8th Cir. 1988) (per curiam) (government breached agreement to recommend only unspecified period of incarceration by recommending maximum sentence) and *U.S. v. Rewis*, 969 F.2d 985, 988 (11th Cir. 1992) (government breached agreement through its memorandum to sentencing court emphasizing defendant's refusal to cooperate and his past involvement with criminals, thereby suggesting harsh sentence, when in agreement government

though plea agreements entered into by one are generally not binding on other jurisdictions in state prosecutions,<sup>1320</sup> a plea entered into by a federal prosecutor is binding in all federal districts.<sup>1321</sup>

A plea agreement is usually treated as a contract,<sup>1322</sup> thus, it may be

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explicitly acknowledged defendant did not have to cooperate and agreed not to recommend any sentence other than downward departure).

1320. See *Heath v. Alabama*, 474 U.S. 82, 87 (1985) (plea agreement limiting sentence to life in prison in one state did not preclude other state from imposing death penalty).

Generally, a plea agreement does not bind governmental bodies in the same jurisdiction if they are not parties to the agreement. See *U.S. v. Williamsburg Check Cashing Corp.*, 905 F.2d 25, 28 (2d Cir. 1990) (plea agreement not to recommend sentence did not preclude all government sources from giving probation department factual evidence on defendants); *Augustine v. Brewer*, 821 F.2d 365, 368-69 (7th Cir. 1987) (plea agreement did not preclude parole commission from considering counts in indictment dropped by prosecution); *Merki v. Sullivan*, 853 F.2d 599, 601 (8th Cir. 1988) (plea agreement to specify to parole commission only crimes in which defendant had personal role did not preclude parole commission from independently considering defendant's association with paramilitary organization); *U.S. v. Fitzhugh*, 801 F.2d 1432, 1434-35 (D.C. Cir. 1986) (plea agreement not to seek revocation of certain licenses held by defendant physician did not preclude DEA from revoking license).

The federal government is not bound by plea agreements made by state prosecutors. See *U.S. v. Sandate*, 630 F.2d 326, 328 (5th Cir. 1980) (plea agreement with state government did not preclude federal government from prosecuting), *cert. denied*, 450 U.S. 922 (1981); *Meagher v. Clark*, 943 F.2d 1277, 1281 (11th Cir. 1991) (plea agreement with state prosecutor for concurrent sentences not binding on federal prosecutors because dual sovereignty prevents court from providing defendant with relief).

1321. *U.S. v. Harvey*, 791 F.2d 294, 302-03 (4th Cir. 1986) (promise by federal prosecutor to bring no further charges binding on all federal courts).

1322. *U.S. v. Robison*, 924 F.2d 612, 613-14 (6th Cir. 1991) (plea agreements contractual in nature, interpreted and enforced pursuant to traditional contract law principles); *U.S. v. Ingram*, 979 F.2d 1179, 1184 (7th Cir. 1992) (plea agreements are contracts; their content and meaning are determined according to standard contract principles), *cert. denied*, 113 S. Ct. 1616 (1993); *U.S. v. Lewis*, 979 F.2d 1372, 1375 (9th Cir. 1992) (plea bargain is governed by contract principles (citing *U.S. v. Keller*, 902 F.2d 1391, 1393 (9th Cir. 1990))); see *Santobello*, 404 U.S. at 262 (because promise by prosecutor part of "consideration" for guilty plea, government must fulfill agreement); *U.S. v. Atwood*, 963 F.2d 476, 479 (1st Cir. 1992) (because agreement required defendant to request that prosecutor tell court about cooperation, no remedy when defendant failed to make necessary request); *U.S. v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908, 914 (2d Cir.) (because defendant failed to record alleged government promise not to forfeit currency, promise was not enforceable), *cert. denied*, 495 U.S. 958 (1990); *U.S. v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) (because written plea agreement serves as "complete and exclusive" statement of terms of agreement, when agreement did not establish limits on prosecutor's recommendation of sanction, no breach when prosecutor recommended restitution and consecutive sentences); *Warner v. U.S.* 975 F.2d 1207, 1212-13 (6th Cir. 1992) (because would violate established contract law standards, defendant cannot be allowed to try to prove by affidavit that plea agreement is other than it appears, unambiguously), *cert. denied*, 113 S. Ct. 1314 (1993); *U.S. v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992) (because court had not yet approved of plea agreement, neither government nor defendant bound by terms; there may be an exception where defendant relies to his detriment on unapproved plea deal), *cert. denied*, 113 S. Ct. 1613 (1993); *U.S. v. Gamble*, 917 F.2d 1280, 1282 (10th Cir. 1990) (clear and unambiguous plea agreement leaving sentencing to judge's discretion under Sentencing Guidelines negated defendant's unsupported claim of prosecutor's promise of no more than four-year sentence). *But see U.S. v. Johnson*, 979 F.2d 396, 399 (6th Cir. 1992) (although plea agreements are contractual in nature, defendant's underlying right to contract is constitutional and therefore implicates concerns additional to those raised by commercial contracts between private parties (citing *U.S. v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986))); *U.S. v. Olesen*, 920 F.2d 538, 542 (8th Cir. 1990) (although plea agreements are like contracts, court was not allowed to "revisit" original plea agreement

breached.<sup>1323</sup> If the defendant breaches a plea agreement, the government is

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because of a mutual mistake); *U.S. v. Partida-Parra*, 859 F.2d 629, 634 (9th Cir. 1988) (although plea agreement treated as contract, agreement/contract analogy does not extend so far as to allow district court to revisit accepted plea to reconsider whether "contract" formed; court not empowered to consider contract defense other than breach); *U.S. v. Jefferies*, 908 F.2d 1520, 1523-24 (11th Cir. 1990) (although plea agreement written, should not be read to contradict parties' oral understanding).

The Eleventh Circuit has indicated that the government is not bound by an agreement between a defendant and a federal agent if the agent lacks authority to bind the government. *U.S. v. Kettering*, 861 F.2d 675, 679-80 (11th Cir. 1988). Nevertheless, the defendant may attempt to enforce such agreement if she can demonstrate detrimental reliance on promises in that agreement. *Id.* (no detrimental reliance when defendant fully aware at time of entering plea that government refused to enforce proposal and when prosecution could not, and did not, use information obtained from defendant). However, a defendant can only attempt to enforce something that is part of the actual plea agreement. See *U.S. v. Romero*, 967 F.2d 63, 67-68 (2d Cir. 1992) (plea agreement did not prevent government from indicting defendant for other preplea activities not covered by agreement).

Similarly, the Sixth Circuit has held that the government is not bound by an agreement between a defendant and an FBI agent when the defendant did not rely on the agreement to his detriment. *U.S. v. Streebing*, 987 F.2d 368, 372-73 (6th Cir.), *cert. denied*, 113 S. Ct. 2933 (1993).

1323. The specific facts of each case determine what constitutes a breach. Compare *U.S. v. Mercedes-Amparo*, 980 F.2d 17, 18 (1st Cir. 1992) (government breached plea agreement obligation to recommend sentence within sentencing guidelines range by failing to recommend a sentence); *U.S. v. Badaracco*, 954 F.2d 928, 940 (3d Cir. 1992) (government breached agreement when parties stipulated that crime involved minimal planning and prosecutor later argued that defendant took "affirmative step indicating that he was concealing something"); *U.S. v. West*, 2 F.3d 66, 69-70 (4th Cir. 1993) (defendant breached plea agreement by unjustifiably failing to respond to government's repeated requests for his plea; the breach relieved the government of its obligations under the agreement, even though defendant relied on agreement to his substantial detriment); *U.S. v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993) (government breached agreement stating that U.S. stipulated that defendant had accepted responsibility when prosecutor commented at resentencing that defendant should not be entitled to credit for accepting responsibility); *U.S. v. Mandell*, 905 F.2d 970, 972 (6th Cir. 1990) (government breached agreement that defendant would be sentenced at offense level of 20 kilograms of marijuana when court imposed sentence based on offense level of 27, although sentence imposed within range appropriate for offense level of 20); *U.S. v. Ataya*, 864 F.2d 1324, 1335 (7th Cir. 1988) (defendant breached unambiguous agreement to cooperate with government by not testifying at codefendant's retrial); *U.S. v. Van Horn*, 976 F.2d 1180, 1183 (8th Cir. 1992) (government breached plea agreement stipulating that it would not seek upward departure from offense level calculated by U.S. Probation Office when it recommended an upward departure after the district court rejected the offense level recommendations in the presentence report); *U.S. v. Fagan*, 996 F.2d 1009, 1013 (9th Cir. 1993) (government breached plea agreement by failing to offer agreement to judge in second case when agreement stipulated defendant would plead guilty in two cases) and *U.S. v. Boatner*, 966 F.2d 1575, 1578-79 (11th Cir. 1992) (government breached plea agreement to stipulate that offense involved two ounces of cocaine when prosecutor referred to three kilograms of cocaine at sentencing) with *U.S. v. Oyegbola*, 961 F.2d 11, 14-15 (1st Cir.) (no breach of government's agreement to recommend sentence at lowest range of applicable sentencing guidelines when prosecutor miscalculated estimate of appropriate sentencing range), *petition for cert. filed*, (U.S. June 25, 1992) (No. 92-5047); *U.S. v. Lovaglia*, 954 F.2d 811, 817-18 (2d Cir. 1992) (no breach of government's agreement to provide court only with certain information about defendant's crime when government presented court with memo detailing overt acts other than those admitted by defendant); *U.S. v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir.) (no breach of government's agreement to move for special assistance when defendant failed to provide requisite level of assistance), *cert. denied*, 112 S. Ct. 420 (1991); *U.S. v. Hoster*, 988 F.2d 1374, 1378 (5th Cir. 1993) (no breach of government's agreement not to prosecute for additional offenses when district court included chemical used in drug transaction as relevant conduct for purposes

free to re prosecute the defendant,<sup>1324</sup> and may bring more serious charges.<sup>1325</sup>

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of sentencing defendant for possession of amphetamine); *U.S. v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) (no breach of government's agreement not to prosecute defendant in certain jurisdictions when it prosecuted him in a jurisdiction not mentioned as one in which it would not prosecute him), *cert. denied sub. nom.*, *Murr v. U.S.*, 1994 U.S. Lexis 1540 (U.S. Feb. 22, 1994); *U.S. v. Daniels*, 902 F.2d 1238, 1243 (7th Cir.) (no breach of government's agreement for leniency when defendant sentenced to 50 years because maximum sentence life without parole), *cert. denied*, 498 U.S. 981 (1990); *White v. U.S.*, 998 F.2d 572, 575 (8th Cir. 1993) (no breach of government's agreement when government characterized defendant's assistance as limited and less valuable than expected when agreement gave government sole discretion to determine whether defendant had provided substantial assistance); *U.S. v. Gerace*, 997 F.2d 1293, 1294-95 (9th Cir. 1993) (no breach of government's agreement when it promised to "stand silent at sentencing" but later argued against leniency at subsequent probation revocation hearing); *U.S. v. Walling*, 982 F.2d 447, 449 (10th Cir. 1992) (no breach of government's agreement not to request upward departure from sentencing guideline range when it presented evidence in support of probation officer's recommended upward adjustment because departures differ from adjustments) *and* *Shades Ridge Holding Co. v. U.S.*, 888 F.2d 725, 730 (11th Cir. 1989) (no breach of government's agreement to absolve holding company from liability for tax evasion when government instituted action to collect taxes owed by defendant from assets of holding company because agreement pertained only to defendant's criminal liability), *cert. denied*, 494 U.S. 1027 (1990).

In assessing an alleged breach, the court must first determine the parties' reasonable understanding of the terms of the plea agreement. *U.S. v. Casamento*, 887 F.2d 1141, 1181 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990). *See Marx v. U.S.*, 930 F.2d 1246, 1249-50 (7th Cir. 1991) (government did not breach promise to deliver cattle to defendant's family as part of plea agreement by failing to satisfy encumbrances on cattle because defendant's expectations objectively unreasonable), *cert. denied*, 112 S. Ct. 1480 (1992). In addition, contract principles require that the party claiming breach must prove the breach by a preponderance of the evidence. *See U.S. v. Verrusio*, 803 F.2d 885, 890-91 (7th Cir. 1986) (due process does not require proof of breach of plea agreement beyond a reasonable doubt; preponderance of the evidence sufficient).

Due process requires that any ambiguity be construed against the government and in accordance with the defendant's reasonable understanding of the agreement. *U.S. v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) (in determining government's breach, court looks at provisions and construes ambiguous terms against government); *U.S. v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990) (same). *Compare Innes v. Dalsheim*, 864 F.2d 974, 979-80 (2d Cir. 1988) (when plea agreement or court did not clearly inform defendant that breach could result in inability to withdraw plea and imposition of more severe sentence without trial, denial of motion to withdraw plea denied due process), *cert. denied*, 493 U.S. 809 (1989); *U.S. v. Harvey*, 791 F.2d 294, 303 (4th Cir. 1986) (when agreement barring further prosecution did not specify that promise limited to specific district and government could show no extrinsic evidence supporting contrary view, prosecution barred in all districts); *U.S. v. Melton*, 930 F.2d 1096, 1097-98 (5th Cir. 1991) (when plea agreement did not discuss downward departure, request for downward departure required when prosecutor's transmittal letter indicated that departure would be sought) *and* *U.S. v. Greenwood*, 812 F.2d 632, 635-36 (10th Cir. 1987) (when defendant reasonably understood prosecutor's promise not to suggest incarceration to mean prosecution would not disparage defendant at hearing, government breached by suggesting example be made of defendant) *with* *U.S. v. Giorgi*, 840 F.2d 1022, 1028-29 (1st Cir. 1988) (agreement not to prosecute crimes "related to" theft of vans did not bar prosecution on charges of insurance fraud and arson involving goods taken from stolen vans because no party could reasonably understand agreement to extend to those charges) *and* *U.S. v. Burrell*, 963 F.2d 976, 985 (7th Cir.) (agreement allowing prosecutor to seek downward departure based on defendant's assistance did not require departure because agreement left decision solely within discretion of government), *cert. denied*, 113 S. Ct. 357 (1992).

1324. *See Ricketts v. Adamson*, 483 U.S. 1, 9-12 (1987) (agreement void and government allowed to reinstate original charges when defendant fulfilled promise to testify at trial of codefendants but refused to testify at retrial, even though defendant later volunteered to testify after losing appeal), *cert. denied*, 112 S. Ct. 3015 (1992); *U.S. v. Ataya*, 864 F.2d 1324, 1338 (7th

In *Ricketts v. Adamson*,<sup>1326</sup> the Supreme Court held that the government may revoke a plea agreement<sup>1327</sup> for a defendant's breach even after the defendant was sentenced and began serving the sentence.<sup>1328</sup> The Court reasoned that double jeopardy did not bar prosecution on the original charges because the agreement provided that it would be rendered void upon defendant's breach.<sup>1329</sup>

A defendant who alleges that the government breached a plea agreement is entitled to an evidentiary hearing or, in the court's discretion, discovery or expansion of the record.<sup>1330</sup> If a breach by the government is demonstrated, the court has discretion to cure it by allowing withdrawal of the plea, altering the sentence, or ordering specific performance of the agreement.<sup>1331</sup> Specific

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Cir. 1988) (agreement void and government free to reindict on same charge when defendant refused to testify at codefendant's retrial). *Cf.* U.S. v. Alexander, 869 F.2d 91, 94-95 (2d Cir. 1989) (like defendant, government entitled either to withdrawal or specific performance if determined appropriate; however, government waived right to rescind agreement and only specific performance remained when government proceeded with sentencing). *But cf.* U.S. v. Vogt, 901 F.2d 100, 102 (8th Cir. 1990) (government waived right to complain of defendant's breach when delayed 10 weeks before acting on breach and continued to accept benefits of agreement).

1325. *Bordenkircher*, 434 U.S. at 364. In *Bordenkircher*, the Supreme Court held that the prosecutor did not violate the defendant's right to due process when he carried out a threat made during plea negotiations to reindict the accused on more serious charges if the defendant did not plead guilty to the offense with which he was originally charged. *Id.* at 365.

1326. 483 U.S. 1 (1987).

1327. *See* U.S. v. Savage, 978 F.2d 1136, 1137-38 (9th Cir. 1992) (government allowed to withdraw plea agreement prior to court acceptance when defendant assaulted deputy U.S. marshal and attempted to escape from courtroom and when defendant did not detrimentally rely on the agreement), *cert. denied*, 113 S. Ct. 1613 (1993).

1328. *Ricketts*, 483 U.S. at 9-12. The agreement in *Ricketts* called for the defendant to testify at the trial of his codefendants, which he did. *Id.* at 4. When the codefendants' convictions were later vacated, however, the defendant refused to testify at their retrial. *Id.* The prosecution considered the defendant's assertion that his obligation had ended when he was sentenced a breach and reinstated charges against the defendant. *Id.*

1329. *Id.* at 12.

1330. *Blackledge v. Allison*, 431 U.S. 63, 75-76, 80-82 (1977). A court may dispense with a hearing if the defendant's allegations are "palpably incredible" or "patently frivolous or false." *Id.* at 76. *Compare* *McKenzie v. Wainwright*, 632 F.2d 649, 651-52 (5th Cir. 1980) (defendant not entitled to hearing when failed to corroborate allegations, did not allege breach for three years, and small difference between actual sentence and sentence allegedly promised); U.S. v. Osborne, 931 F.2d 1139, 1168 (7th Cir. 1991) (defendant not entitled to evidentiary hearing following unsupported allegation that agreement had been breached); *Watts v. U.S.*, 841 F.2d 275, 277-78 (9th Cir. 1988) (defendant not entitled to evidentiary hearing on alleged government breach of secret agreement when defendant never mentioned agreement after sentencing at rule 35 hearing or in postsentence letter to judge) and U.S. v. Winfield, 960 F.2d 970, 972 (11th Cir. 1992) (*per curiam*) (defendant not entitled to hearing based on allegation that government misrepresented defendant's level of cooperation when defendant failed to present facts which, if proven, would establish illegality of sentence or gross abuse of discretion) with U.S. v. Yesil, 991 F.2d 1527, 1532-33 (11th Cir. 1992) (defendant entitled to evidentiary hearing when plea agreement obligated prosecutors to inform trial court of the nature and extent of defendants' assistance).

1331. *See* U.S. v. U.S. Currency in the Amount of \$228,536, 895 F.2d 908, 914 (2d Cir.) (defendant not entitled to specific performance of agreement that defendant would not have to pay forfeiture when bargain did not contain term that government not seek forfeiture and defendant told court no other promises made), *cert. denied*, 495 U.S. 958 (1990); U.S. v. Hayes, 946 F.2d 230, 236 (3d Cir. 1991) (defendant entitled to remand for court to determine remedy when government breached agreement not to make sentencing recommendation); U.S. v. Ring-

performance is generally ordered only if the defendant can show prejudice from the breach.<sup>1332</sup> If a federal court finds that state prosecutors have breached a plea agreement, it should remand the case so that a state court can devise the proper remedy.<sup>1333</sup>

To foster open discussions during plea negotiations, the *Federal Rules of Criminal Procedure* and the *Federal Rules of Evidence* provide that evidence of withdrawn guilty pleas, statements made in the course of proceedings under FED. R. CRIM. P. 11, and statements made in the course of plea negotiations that do not result in a guilty plea or that result in a guilty plea that is later withdrawn, are inadmissible at trial against the defendant who made the plea or participated in the plea discussions.<sup>1334</sup> Statements made to government agents who are not attorneys are not subject to this evidentiary bar and may be

ling, 988 F.2d 504, 506 (4th Cir. 1993) (defendant entitled to withdraw plea when government's failure to question defendant prior to sentencing, and its resultant inability to comment as to the value of defendant's cooperation, breached plea agreement upon which defendant relied in which government agreed to make nature and extent of defendant's cooperation known); U.S. v. Mandell, 905 F.2d 970, 973 (6th Cir. 1990) (defendant entitled to withdraw plea because agreement specified withdrawal as remedy after breach, making withdrawal and specific performance equivalent, when judge sentenced at offense level greater than that specified in agreement); U.S. v. Norgaard, 959 F.2d 136, 138 (9th Cir. 1992) (defendant entitled to remand for sentencing when government breached plea agreement by attempting to impose previously suspended sentence despite agreement that any sentence must run concurrently with separate drug conviction where drug sentence fully served).

1332. Compare U.S. v. Watson, 988 F.2d 544, 552 (5th Cir. 1993) (defendant obtained specific performance of plea agreement conditioned on his substantial assistance when government bargained away its discretion not to submit a § 5K1.1 motion), *cert. denied*, 114 S. Ct. 698 (1994) and U.S. v. Nelson, 837 F.2d 1519, 1523, 1525 (11th Cir.) (defendant granted specific performance when prejudiced by allegations in presentence report beyond those facts stipulated to in agreement), *cert. denied*, 488 U.S. 829 (1988) with U.S. v. Holman, 728 F.2d 809, 813 (6th Cir.) (defendant not entitled to specific performance even when prejudice found because defendant accepted new plea bargain after breach), *cert. denied*, 469 U.S. 983 (1984); U.S. v. Benson, 836 F.2d 1133, 1136 (8th Cir. 1988) (defendant not entitled to specific performance of agreement to have FBI agents testify to defendant's cooperation when prejudice to defendant cured by letter from Assistant U.S. Attorney to judge regarding defendant's cooperation with FBI agent) and U.S. v. Kettering, 861 F.2d 675, 680 (11th Cir. 1988) (defendant not entitled to specific performance of nonbinding plea agreement when failed to demonstrate detrimental reliance on agreement).

1333. *Santobello*, 404 U.S. at 262-63. Although the federal court may not decide on an initial remedy, it may enforce constitutional guarantees. See *Hayes v. Maggio*, 699 F.2d 198, 204 (5th Cir. 1983) (writ of habeas corpus to be issued in 90 days, unless state either assures eligibility for parole in compliance with plea agreement or vacates plea and initiates trial procedures when state breached agreement that defendant receive sentence with parole eligibility in 10 years).

1334. FED. R. CRIM. P. 11(e)(6) & advisory committee's note (1980); FED. R. EVID. 410. Cf. U.S. v. McLain, 823 F.2d 1457, 1465-66 (11th Cir. 1987) (no error to admit codefendants' plea agreements when redacted versions of such agreements added nothing to evidence already admitted). *But cf.* U.S. v. Escamilla, 975 F.2d 568, 569 (9th Cir. 1992) (confession obtained in plea agreement which government subsequently revoked could not be admitted for use against defendant); U.S. v. Mezzanatto, 998 F.2d 1452, 1454 (9th Cir. 1993) (not harmless error to introduce contradictory impeachment evidence in violation of 11(e)(6)).

In addition, a statement covered by rule 11(e)(6) may be admissible if another statement, made in the course of the same plea or plea discussions, is introduced into evidence and fairness requires contemporaneous consideration. FED. R. CRIM. P. 11(e)(6)(D); FED. R. EVID. 410. Such statements are also admissible in criminal proceedings for perjury or false statements if the

admissible.<sup>1335</sup> Evidence of a witness's prior plea agreement is admissible when introduced to demonstrate or attack her credibility.<sup>1336</sup>

*Consequences of Entering a Guilty Plea.* A defendant is permitted to enter a plea of guilty.<sup>1337</sup> A defendant admits all of the elements of the charged crime

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statements are made by the defendant under oath, on the record, and in the presence of counsel. FED. R. CRIM. P. 11(e)(6)(D)(ii); FED. R. EVID. 410.

The protection of rule 11(e)(6) cannot be waived because it is a guaranty of fair procedure. *Mezzanatto*, 998 F.2d at 1452, 1454.

1335. FED. R. CRIM. P. 11(e)(6) advisory committee's note; FED. R. EVID. 410. The advisory committee stressed, however, that statements made to nonattorney government agents, "especially when the agents purport to have authority to bargain," are not inevitably admissible. FED. R. CRIM. P. 11(e)(6) advisory committee's note. The admissibility of such statements should be governed by the ordinary rules of evidence, in particular "that body of law dealing with police interrogations." *Id.*; see *Rachlin v. U.S.*, 723 F.2d 1373, 1377 (8th Cir. 1983) (rule 11(e)(6)(D) inapplicable to statements defendant made to Secret Service agents with no authority to bargain when defendant initiated conversation and defendant not in custody at time of confession).

In *U.S. v. Robertson*, 582 F.2d 1356 (5th Cir. 1978) (en banc), the Fifth Circuit articulated a two-part test to govern the admissibility of a defendant's statements to nonattorney government agents. First, the court must determine whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, whether the expectation was reasonable. *Id.* at 1366; see also *U.S. v. Brooks*, 670 F.2d 625, 627-28 (5th Cir. 1982) (defendant's statements to agents admissible because not part of plea negotiations; defendant could not have reasonably believed agent had negotiating authority); *U.S. v. O'Brien*, 618 F.2d 1234, 1240-41 (7th Cir.) (recorded conversation between defendant and FBI informant about possibility of plea bargain admissible because defendant had no subjective expectation of negotiating plea), *cert. denied*, 449 U.S. 858 (1980); *U.S. v. Guerrero*, 847 F.2d 1363, 1367-68 (9th Cir. 1988) (defendant's statements to FBI agents admissible when defendant did not claim he subjectively believed he was engaged in plea discussions when he made the incriminating statements). *But see* *U.S. v. Fant*, 974 F.2d 559, 564 (4th Cir. 1992) (when plea agreement contained immunity provisions which prohibited government from using any information provided by defendant for sentencing purposes, court erred in allowing use in presentencing report of postplea incriminating statements made to probation officer).

1336. See *U.S. v. Dennis*, 786 F.2d 1029, 1047 (11th Cir. 1986) (admission of related plea agreement and accurate comment thereon not reversible error when used to bolster witness's credibility), *cert. denied*, 481 U.S. 1037 (1987).

1337. FED. R. CRIM. P. 11(a). The court must enter a plea of not guilty if a defendant refuses to plead. *Id.*

Rule 11 also permits a defendant to plead not guilty or *nolo contendere*. *Id.* By pleading *nolo contendere*, a defendant does not admit her guilt to the charged offense, but the plea has the same effect at sentencing as a guilty plea. *Hudson v. U.S.*, 272 U.S. 451, 457 (1926) (*nolo contendere* plea authorizes court to sentence defendant as if guilty). Like a guilty plea, a *nolo contendere* plea waives several constitutional rights and, therefore, must be made knowingly and voluntarily. *Manley v. U.S.*, 588 F.2d 79, 81 n.3 (4th Cir. 1978). A plea of *nolo contendere* may be entered only with the consent of the court. FED. R. CRIM. P. 11(b). In consenting, the court must consider the views of the parties and the interests of the public in the administration of criminal justice. *Id.*

A stipulation of facts may serve as the functional equivalent of a guilty plea; thus, courts must insure that agreements to such stipulations are made knowingly and voluntarily. See *U.S. v. Stalder*, 696 F.2d 59, 62 (8th Cir. 1982) (stipulation made knowingly when district judge specifically asked defendant if he understood right to jury trial waived). *But cf.* *U.S. v. Lawson*, 682 F.2d 1012, 1015 (D.C. Cir. 1982) (no need to determine whether plea knowing and voluntary when defendant stipulated only to what witnesses would have said, not to their veracity). The court, however, need not conduct an on-the-record inquiry to determine whether the stipulation is voluntary. See *Stamps v. Rees*, 834 F.2d 1269, 1275-76 (6th Cir. 1987) (when defense counsel in habitual offender proceeding stipulated only to previously proven convictions, stipulation not de facto guilty plea and court not required to hold on-record voluntariness inquiry), *cert. denied*, 485

when she enters a guilty plea.<sup>1338</sup> Because a defendant waives many constitutional rights by pleading guilty, the plea must be entered into knowingly and voluntarily<sup>1339</sup> with the advice of competent counsel.<sup>1340</sup>

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U.S. 980 (1988). Stipulations to incriminating facts differ from guilty and *nolo contendere* pleas because a defendant who enters a stipulation retains the right to confront witnesses, challenge nonjurisdictional matters on appeal, and present defenses. See *U.S. v. Robertson*, 698 F.2d 703, 710 (5th Cir. 1983) (defendant's plea of not guilty coupled with inculpatory stipulation was equivalent to plea of not guilty; without evidence of prosecutorial overreaching, defendant not entitled to rule 11 safeguards, but still entitled to confront witnesses and to challenge nonjurisdictional defects).

1338. *U.S. v. Broce*, 488 U.S. 563, 570 (1989); *McCarthy v. U.S.*, 394 U.S. 459, 466 (1969). See *U.S. v. Parker*, 874 F.2d 174, 177-78 (3d Cir. 1989) (entry of guilty plea constituted admission to stealing insured parcels and established number and value of parcels taken for sentencing purposes); *U.S. v. Willis*, 992 F.2d 489, 490 (4th Cir.) (entry of guilty plea foreclosed defendant from contesting adequacy of merits), *cert. denied*, 114 S. Ct. 167 (1993); *Mack v. U.S.*, 853 F.2d 585, 586 (8th Cir. 1988) (per curiam) (entry of guilty plea established all elements for commission of bank robbery); *U.S. v. Kidder*, 869 F.2d 1328, 1332-33 (9th Cir. 1989) (entry of guilty plea to possession of cocaine with intent to distribute constituted admission of each element of crime and precluded defendant from claiming actions involuntary); *Blohm v. Comm'r of Internal Revenue*, 994 F.2d 1542, 1554 (11th Cir. 1993) (entry of guilty plea to tax evasion collaterally estopped defendant from denying fraud in subsequent civil proceeding); *cf. Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983) (guilty plea to tax evasion collaterally estopped defendant from litigating fraud element of civil tax fraud charge), *cert. denied*, 466 U.S. 927 (1984). *But cf. Thompson v. Blackburn*, 776 F.2d 118, 121-22 (5th Cir. 1985) (although defendant pleaded guilty to charge that crime committed at some time during three-year period specified in charges, defendant not precluded in habeas corpus proceeding from challenging state's new stricter sentencing law as *ex post facto* by alleging crime not committed after enactment of new law).

1339. *Parke v. Raley*, 113 S. Ct. 517, 523 (1992) (a guilty plea must be both knowing and voluntary). Compare *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) (guilty plea unconstitutional because no record of whether plea made knowingly and voluntarily); *McCarthy*, 394 U.S. at 467 (guilty plea invalid under rule 11 because defendant not addressed individually by judge to determine voluntariness); *Valencia v. U.S.*, 923 F.2d 917, 921-22 (1st Cir. 1991) (guilty plea invalid because not knowing and voluntary when defendant who possessed minimal formal education and little familiarity with American legal system not adequately informed on essential elements of charge) and *U.S. v. Cortez*, 973 F.2d 764, 768-69 (9th Cir. 1992) (guilty plea involuntary when defendant under mistaken belief, fostered by misrepresentations of defense counsel, court, and government, that plea would not hinder ability to assert selective prosecution motion on appeal and in actuality plea waived right to assert such motion on appeal) with *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (guilty plea not unknowing merely because attorney erroneously concluded that confessions admissible); *Brady v. U.S.*, 397 U.S. 742, 749-50 (1970) (guilty plea not involuntary merely because failure to plead guilty would entail risk of death sentence); *U.S. v. Zorrilla*, 982 F.2d 28, 30 (1st Cir. 1992) (guilty plea not involuntary when district court judge gave thorough explanation of charges, asked defendant several questions to ensure he understood charges and maximum possible sentence which could be imposed), *cert. denied*, 113 S. Ct. 1665 (1993); *U.S. v. Yearwood*, 863 F.2d 6, 8 (4th Cir. 1988) (guilty plea not involuntary or violation of due process when counsel failed to mention deportation consequences); *Spinelli v. Collins*, 992 F.2d 559, 561 (5th Cir. 1993) (guilty plea not involuntary when defendant's mistaken belief as to parole eligibility was not based on any promises made by defense attorney, prosecutor or court); *Garcia v. Johnson*, 991 F.2d 324, 327 (6th Cir. 1993) (guilty plea not involuntary even though defendant only spoke Spanish when petitioner had experienced Spanish-speaking attorney and court provided interpreter); *U.S. v. Ataya*, 864 F.2d 1324, 1332 (7th Cir. 1988) (guilty plea not involuntary when defendant had aid of effective counsel, squarely questioned by court if understood and accepted terms, and stated under oath that bound by agreement); *U.S. v. Dalman*, 994 F.2d 537, 539 (8th Cir. 1993) (guilty plea not involuntary when no showing that medications affected defendant at time of plea hearing so as to

The court must also ensure that the defendant is competent to enter a guilty plea.<sup>1341</sup> The Supreme Court held, in *Godinez v. Moran*,<sup>1342</sup> that the standard of competency for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial.<sup>1343</sup> In making this determination, a court must consider: (1) whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding;” and (2) “whether he has a rational as well as factual understanding of the proceedings against him.”<sup>1344</sup>

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make him incapable of knowingly and intelligently entering his guilty plea) *and* *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993) (guilty plea not involuntary when made only to avoid death penalty even if possibility that death penalty unconstitutional).

Parental consent is not required for a minor to plead guilty knowingly and voluntarily. *Ford v. Lockhart*, 904 F.2d 458, 463 (8th Cir. 1990).

When the government and a group of defendants have entered into an all-or-nothing plea agreement under which each of the defendants must plead guilty in order for any of them to get the benefits of the deal, the court must make a more careful determination of whether there were pressures among codefendants which might render pleas involuntary. *U.S. v. Caro*, 997 F.2d 657, 660 (9th Cir. 1993).

1340. *Tollett v. Henderson*, 411 U.S. 258, 263 (1973) (citing *Brady v. U.S.*, 397 U.S. 742, 758 (1970)). *But cf.* *U.S. v. Pregler*, 925 F.2d 268, 269 (8th Cir. 1991) (defendant’s lack of counsel when entering plea agreement not grounds for setting aside knowing and voluntary plea of guilty because agreement alone has no constitutional significance until embodied in guilty plea before court); *Risher v. U.S.*, 992 F.2d 982, 983 (9th Cir. 1993) (failure of counsel to warn defendant before he entered his guilty plea that there was risk he would be sentenced as career offender fell below required level of professional competence); *Wilson v. U.S.*, 962 F.2d 996, 997 (11th Cir. 1992) (per curiam) (defendant’s guilty plea waived ineffective assistance of counsel claims concerning preplea issues).

1341. In order to be competent to plead guilty, a defendant must necessarily be competent to stand trial. *Dusky v. U.S.*, 362 U.S. 402 (1960) (per curiam). For further discussion of this issue, see COMPETENCY TO STAND TRIAL in this Part.

1342. 113 S. Ct. 2680 (1993).

1343. *Id.*, at 2685-86.

1344. *Id.*; see *Hernandez-Hernandez v. U.S.*, 904 F.2d 758, 760-61 (1st Cir. 1990) (defendant competent to enter guilty plea and no “reasonable cause” to hold sua sponte hearing on competency when defendant gave coherent answers during plea hearing, despite evidence of defendant’s drug use and psychiatric treatment); *Chichakly v. U.S.*, 926 F.2d 624, 631-33 (7th Cir. 1991) (defendant competent to enter guilty plea when trial court questioned defendant about habits of taking medications and observed competency at time of plea, despite defendant’s ingestion of prescription medications); *Treadwell v. Lockhart*, 948 F.2d 453, 454 (8th Cir. 1991) (defendant competent and not entitled to competency hearing prior to entering guilty plea when psychiatrist sympathetic to defendant could find no mental abnormalities); *U.S. v. Lewis*, 991 F.2d 524, 528 (9th Cir.) (defendant competent when did not bring evidence of diminished mental capacity to the attention of the judges, and did not suggest that his behavior was irrational), *cert. denied*, 114 S. Ct. 216 (1993). *But cf.* *U.S. v. Parra-Ibanez*, 936 F.2d 588, 596 (1st Cir. 1991) (court’s guilty plea colloquy insufficient to insure defendant’s competency when defendant acknowledged use of three prescription drugs within 24 hours of plea hearing).

The Second and Ninth Circuits have held that trial courts should exercise greater care in determining competency to plead guilty than in determining competency to stand trial because a guilty plea actively waives several constitutional rights. See *Matusiak v. Kelly*, 786 F.2d 536, 542-43 (2d Cir.) (higher standard of competency required for valid guilty plea than for competency to stand trial; series of contradictory statements to court, views of two of three experts, and history of institutionalization indicated defendant not competent to plead guilty), *cert. dismissed*, 479 U.S. 805 (1986); *Chavez v. U.S.*, 656 F.2d 512, 519 n.3 (9th Cir. 1981) (defendant competent to stand trial but not necessarily competent to plead guilty; evidence including outburst in open

A guilty plea waives nonjurisdictional constitutional rights<sup>1345</sup> such as the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.<sup>1346</sup> A guilty plea may also waive claims of illegal search and seizure,<sup>1347</sup> coerced confession,<sup>1348</sup> improper grand jury selection,<sup>1349</sup> denial of a speedy trial,<sup>1350</sup> as well as the entrapment defense<sup>1351</sup> and

court, psychiatric findings, and history of mental illness raised doubt of sufficient competence to plead guilty).

1345. *Tollett*, 411 U.S. at 267 ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."); see *U.S. v. Easton*, 937 F.2d 160, 162 (5th Cir. 1991) (guilty plea waived right to challenge validity of unsigned indictment because rule requiring signature nonjurisdictional), *cert. denied*, 112 S. Ct. 906 (1992); *U.S. v. Seybold*, 979 F.2d 582, 585 (7th Cir. 1992) (a knowingly and voluntarily entered guilty plea waives jurisdictional challenges to the constitutionality of the conviction), *cert. denied*, 113 S. Ct. 2980 (1993).

1346. *Boykin*, 395 U.S. at 243; *McCarthy*, 394 U.S. at 466. See *Smith v. U.S.*, 876 F.2d 655, 657 (8th Cir.) (per curiam) (guilty plea waived privilege against self-incrimination challenge when plea voluntary), *cert. denied*, 493 U.S. 869 (1989); *U.S. v. Hickok*, 907 F.2d 983, 985-86 (10th Cir. 1990) (guilty plea waived right to jury trial).

If state law permits a defendant who pleads guilty to appeal issues after the plea has been entered, a federal court may review those claims on habeas corpus review. *Lefkowitz v. Newsome*, 420 U.S. 283, 292-93 (1975); see also *Gibson v. Klevenhagen*, 777 F.2d 1056, 1058-59 (5th Cir. 1985) (speedy trial claim not forfeited by guilty plea because Texas law permitted defendant to plead guilty without forfeiting right to judicial review of constitutional claims raised by written motion at trial).

1347. See *Gioiosa v. U.S.*, 684 F.2d 176, 180 (1st Cir. 1982) (defendant precluded from challenging on appeal evidence obtained from illegal search and seizure unless plea coerced or rendered involuntary because of fact that evidence illegally seized); *U.S. v. Arango*, 966 F.2d 64, 66 (2d Cir. 1992) (defendant precluded from challenging legality of search and seizure after guilty plea); *U.S. v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir.) (defendant precluded from challenging on appeal that evidence considered in sentencing illegally seized when motion to suppress denied prior to entrance of guilty plea), *cert. denied*, 111 S. Ct. 2870 (1991); *Smith v. U.S.*, 876 F.2d 655, 657 (8th Cir.) (per curiam) (defendant precluded from challenging legality of search and seizure when guilty plea voluntary), *cert. denied*, 493 U.S. 869 (1989).

1348. *McMann*, 397 U.S. at 768-69, 771; see also *U.S. v. Wright*, 873 F.2d 437, 442 (1st Cir. 1989) (guilty plea waived right to challenge voluntariness of confession); *U.S. v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989) (guilty plea waived right to challenge voluntariness of oral and written inculpatory statements made prior to entry of plea); *Rogers v. Maggio*, 714 F.2d 35, 38 (5th Cir. 1983) (guilty plea waived right to appeal denial of challenge to voluntariness of confession). *But cf.* *Key v. U.S.*, 806 F.2d 133, 136-37 (7th Cir. 1986) (guilty plea will not forever bind defendant to responses to court's questions on entry of guilty plea if defendant presents new specific allegations as to voluntariness in collateral proceedings).

1349. See *Tollett*, 411 U.S. at 266-67 (guilty plea foreclosed inquiry into claim of discrimination in grand jury selection).

1350. See *Acha v. U.S.*, 910 F.2d 28, 32 (1st Cir. 1990) (per curiam) (right to challenge violation of Speedy Trial Act nonjurisdictional and waived by guilty plea); *Lebowitz v. U.S.*, 877 F.2d 207, 209 (2d Cir. 1989) (same); *U.S. v. Gines*, 964 F.2d 972, 977 (10th Cir. 1992) (same), *cert. denied*, 113 S. Ct. 1023 (1993); *Tiemens v. U.S.*, 724 F.2d 928, 929 (11th Cir.) (per curiam) (constitutional right to speedy trial nonjurisdictional and waived by guilty plea), *cert. denied*, 469 U.S. 837 (1984).

1351. See *U.S. v. Riles*, 928 F.2d 339, 342 (10th Cir. 1991) (defendant who knowingly and voluntarily pleaded guilty could not argue entrapment at sentencing because defendant admitted predisposition to commit offense by pleading guilty).

other prosecutorial defects.<sup>1352</sup> A guilty plea does not foreclose a subsequent claim by the defendant under 42 U.S.C. § 1983 because such issues are not “necessarily” determined in a criminal proceeding.<sup>1353</sup>

A guilty plea does not waive jurisdictional challenges to conviction<sup>1354</sup> such as failure of the indictment to charge an offense,<sup>1355</sup> lack of subject matter

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1352. See *Valencia v. U.S.*, 923 F.2d 917, 920-21 (1st Cir. 1991) (guilty plea waived challenge to factual or legal foundations of indictment); *Smith v. McCotter*, 786 F.2d 697, 702 (5th Cir. 1986) (guilty plea waived claim that indictment not served on defendant in accordance with state law); *U.S. v. Scherl*, 923 F.2d 64, 66 (7th Cir.) (guilty plea waived challenge to “multiplicitous” indictment), *cert. denied*, 111 S. Ct. 2272 (1991); *U.S. v. Fletcher*, 731 F.2d 581, 582 (8th Cir.) (per curiam) (guilty plea waived challenge to errors in prosecution’s revocation of plea agreement), *cert. denied*, 469 U.S. 845 (1984).

A guilty plea may also waive claims of prosecutorial vindictiveness. See *U.S. v. Taylor*, 814 F.2d 172, 174 (5th Cir.) (guilty plea waived claim of prosecutorial vindictiveness through alleged breach of pretrial agreement), *cert. denied*, 484 U.S. 865 (1987); *U.S. v. Montilla*, 870 F.2d 549, 552-53 (9th Cir. 1989) (guilty plea waived claim that “outrageous government conduct” violated due process even though record at time judge accepted plea contained allegations of unconstitutional behavior, but establishing truth of allegations required further proceedings). *But cf.* *Blackledge v. Perry*, 417 U.S. 21, 28-31 (1974) (defendant allowed to appeal felony conviction based on guilty plea when prosecutor obtained felony indictment in apparent retaliation for defendant’s appeal of prior misdemeanor conviction); *Adamson v. Ricketts*, 865 F.2d 1011, 1019-20 (9th Cir. 1988) (presumption of vindictiveness raised when prosecutor sought death penalty after guilty plea; defendant entitled to evidentiary hearing on matter when state did not rebut presumption), *cert. denied*, 497 U.S. 1031 (1990).

Finally, a valid guilty plea may waive a number of statutory claims. See *Acevedo-Ramos v. U.S.*, 961 F.2d 305, 308-09 (1st Cir.) (guilty plea waived right to challenge based on statute of limitations), *cert. denied*, 113 S. Ct. 299 (1992); *Baxter v. U.S.*, 966 F.2d 387, 389 (8th Cir. 1992) (per curiam) (guilty plea waived right to assert violations of Interstate Agreement on Detainers Act).

1353. *Haring v. Prorise*, 462 U.S. 306, 316-17 (1983). Section 1983 claims are discussed in PROCEDURAL MEANS OF ENFORCEMENT UNDER 42 U.S.C. § 1983 in Part VI.

1354. In *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), the Supreme Court noted that because a guilty plea is an admission of the facts alleged, it removes the issue of factual guilt from the case and “simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.” *Id.* at 62-63 n.2. Jurisdictional issues, therefore, are rights which are justified as protecting something other than the truthseeking process. See *id.* at 62-63 (guilty plea cannot waive double jeopardy claim because government may not prosecute defendant regardless of factual guilt); *U.S. v. Harper*, 901 F.2d 471, 472-73 (5th Cir. 1990) (guilty plea does not bar habeas corpus petition on indictment because plea does not waive jurisdictional defects); *U.S. v. Kaiser*, 893 F.2d 1300, 1302-03 (11th Cir. 1990) (guilty plea does not bar challenge that state may not prosecute for offense and its lesser included offense and therefore plea did not waive double jeopardy rights).

1355. Compare *U.S. v. Morales-Rosales*, 838 F.2d 1359, 1361-62 (5th Cir. 1988) (guilty plea no bar to claim that information failed to allege willful transport of illegal alien, essential element of offense involving violation of immigration laws) and *U.S. v. Di Fonzo*, 603 F.2d 1260, 1263 (7th Cir. 1979) (guilty plea no bar to claim that indictment failed on its face to charge offense of falsifying documents), *cert. denied*, 444 U.S. 1018 (1980) with *U.S. v. Rivera*, 879 F.2d 1247, 1251-52 (5th Cir.) (although guilty plea no bar to challenging indictment, indictment not so defective as to warrant vacatur because language “knowingly transport” and statutory citation in indictment set forth necessary elements of crime of transporting undocumented alien), *cert. denied*, 493 U.S. 998 (1989) and *O’Leary v. U.S.*, 856 F.2d 1142, 1143 (8th Cir. 1988) (per curiam) (guilty plea bar to challenging sufficiency of indictment which clearly specified that “using mail to deposit corporate funds into subsidiary account was necessary part of defendant’s scheme”).

jurisdiction,<sup>1356</sup> or the claim that the sentencing judge lacked impartiality.<sup>1357</sup> In some circumstances, a guilty plea does not waive the right to challenge the constitutionality of the statute defining the charged offense.<sup>1358</sup>

Entry of a guilty plea does not normally foreclose a double jeopardy challenge;<sup>1359</sup> however, the Supreme Court has held that a guilty plea does waive a double jeopardy challenge to the crimes admitted in the plea agreement.<sup>1360</sup>

In federal court, with the approval of the court<sup>1361</sup> and the consent of the government,<sup>1362</sup> a defendant may enter a conditional plea of guilty, reserving in writing the right to appeal specified pretrial motions.<sup>1363</sup> A defendant who

1356. *Hayle v. U.S.*, 815 F.2d 879, 881-82 (2d Cir. 1987) (to sustain challenge to court's jurisdiction, defendant who pleaded guilty must show that indictment contained charges to which he pleaded that are not federal offenses). *Cf. Mack v. U.S.*, 853 F.2d 585, 586 (8th Cir. 1988) (per curiam) (defendant's challenge to jurisdiction denied because indictment charged all requisite parts of federal offense and plea admitted those factual allegations); *U.S. v. Mathews*, 833 F.2d 161, 164 (9th Cir. 1987) (defendant's challenge to jurisdiction denied because guilty plea admitted factual allegations in indictment that formed predicate for federal jurisdiction).

1357. *See U.S. v. Troxell*, 887 F.2d 830, 833-34 (7th Cir. 1989) (defendant, by pleading guilty, did not waive challenge of judge's actual bias); *U.S. v. Gipson*, 835 F.2d 1323, 1324-25 (10th Cir.) (defendant, by pleading guilty, did not waive right to appeal trial court's denial of recusal motion under 28 U.S.C. § 455(b)(3) when judge had been U.S. Attorney at time defendant prosecuted on other charges), *cert. denied*, 486 U.S. 1044 (1988).

1358. *See U.S. v. Gaertner*, 583 F.2d 308, 311-12 (7th Cir. 1978) (per curiam) (guilty plea no bar to challenging constitutionality of statute forbidding possession of marijuana), *cert. denied*, 440 U.S. 918 (1979); *U.S. v. Broncheau*, 597 F.2d 1260, 1262 & n.1 (9th Cir.) (guilty plea no bar to challenging constitutionality of statute prohibiting assault of non-Indian within Indian reservation), *cert. denied*, 444 U.S. 859 (1979). *Cf. U.S. v. Sturgis*, 869 F.2d 54, 56 (2d Cir. 1989) (guilty plea no bar to challenging constitutionality of Sentencing Reform Act). The defendant may not challenge the statute, however, if the facts admitted by the guilty plea render the statute's alleged unconstitutionality moot as to the defendant. *See Brady*, 397 U.S. at 748 (guilty plea waived defendant's right to challenge constitutionality of federal kidnapping statute with potential death penalty); *Baxter v. Estelle*, 614 F.2d 1030, 1036 (5th Cir. 1980) (guilty plea waived defendant's right to challenge statute's allegedly unconstitutional presumption of intent when defendant admitted intent in guilty plea and state never utilized presumption), *cert. denied*, 449 U.S. 1085 (1981); *U.S. v. Burke*, 694 F.2d 632, 633-34 (9th Cir. 1982) (guilty plea waived defendant's right to challenge statute prohibiting commodity transactions because plea established all elements of crime).

1359. *Menna*, 423 U.S. at 62 n.2; *see U.S. v. Baugh*, 787 F.2d 1131, 1132 (7th Cir. 1986) (per curiam) (guilty plea did not waive claim that information or indictment alleging seven counts of receiving firearms, on its face, violated double jeopardy); *U.S. v. Blocker*, 802 F.2d 1102, 1103-04 (9th Cir. 1986) (guilty plea did not waive claim that punishment imposed under two separate statutes violated double jeopardy when prosecution arose from single act of defendant).

1360. *Broce*, 488 U.S. at 571-73 (defendant waived double jeopardy challenge by admitting to two distinct crimes of conspiracy in guilty plea). *See also*, DOUBLE JEOPARDY in this Part.

1361. *FED. R. CRIM. P.* 11(a)(2); *see U.S. v. Muldoon*, 931 F.2d 282, 288 (4th Cir. 1991) (court not required to accept conditional plea and not required to give effect to unaccepted sentencing proposal); *U.S. v. Davis*, 900 F.2d 1524, 1527-28 (10th Cir.) (no abuse of discretion in refusing to admit conditional plea because trial court has absolute discretion), *cert. denied*, 498 U.S. 856 (1990). In *U.S. v. Henriquez*, 731 F.2d 131 (2d Cir. 1984), the Second Circuit stated that courts should exercise caution in accepting conditional guilty pleas because such pleas undercut the finality of judgments and create unnecessary appellate litigation. *Id.* at 133 n.1.

1362. *FED. R. CRIM. P.* 11(a)(2).

1363. *Id.*; *cf. U.S. v. Simmons*, 763 F.2d 529, 533 (2d Cir. 1985) (claim of prosecutorial misconduct waived when not reserved in conditional guilty plea); *U.S. v. Yater*, 756 F.2d 1058, 1063-65 (5th Cir.) (claim of entrapment and governmental overreaching waived when not re-

prevails on appeal of those specified motions is allowed to withdraw the conditional plea.<sup>1364</sup>

*Requirements for Entering the Plea.* Rule 11 requires the disclosure of the terms of a plea bargain in open court when the agreement is reached or, upon a showing of good cause, *in camera* at the time the plea is offered.<sup>1365</sup> If the agreement calls for the prosecutor to move for dismissal of other charges or to agree that a specific sentence is appropriate, the court may accept or reject the agreement at its discretion,<sup>1366</sup> or defer decision until it has considered the presentence report.<sup>1367</sup> If the court rejects an agreement,<sup>1368</sup> it must advise the

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served in conditional guilty plea), *cert. denied*, 474 U.S. 901 (1985); *U.S. v. Echegoyen*, 799 F.2d 1271, 1275-76 (9th Cir. 1986) (claim of illegal search of residence waived when not reserved in writing in conditional guilty plea, even if record showed understanding between defense and prosecution that issues preserved).

At least one circuit has held that it is not necessary to inform the defendant about the conditional plea alternative. *U.S. v. Daniel*, 866 F.2d 749, 751 (5th Cir. 1989) (failure of trial court to inform defendant of conditional plea possibility not error because rule allowing court and government to approve conditional plea does not entitle defendant to enter conditional plea).

1364. FED. R. CRIM. P. 11(a)(2).

1365. FED. R. CRIM. P. 11(e)(2); *see U.S. v. Daniels*, 821 F.2d 76, 79-80 (1st Cir. 1987) (rule 11 violated by government's failure to disclose to court that codefendants' pleas depended on defendant's plea; district court should have allowed defendant to withdraw plea); *U.S. v. Blackner*, 721 F.2d 703, 708 (10th Cir. 1983) (rule 11 violated by failure to disclose to judge agreement that government would not recommend specific sentence). *Cf. U.S. v. White*, 583 F.2d 819, 824 n.1 (6th Cir. 1978) (plea must be disclosed on record and disclosure under rule 11 should take place at time plea entered). *But cf. U.S. v. Moore*, 931 F.2d 245, 249-50 (4th Cir.) (government's agreement to make limited oral and written statements of facts to court not material term of plea agreement, and thus did not need to be disclosed to court when guilty plea entered), *cert. denied*, 112 S. Ct. 171 (1991).

1366. FED. R. CRIM. P. 11(e)(3); *see U.S. v. Severino*, 800 F.2d 42, 46 (2d Cir. 1986) (within court's discretion to reasonably reject plea contrary to "sound administration of justice"), *cert. denied*, 479 U.S. 1056 (1987); *U.S. v. Greener*, 979 F.2d 517, 520 (7th Cir. 1992) (within court's discretion to reject first two plea agreements between defendant and government when it determined that the agreements did not adequately present defendant's criminal conduct and would therefore undermine the sentencing guidelines); *U.S. v. LeMay*, 952 F.2d 995, 997 (8th Cir. 1991) (*per curiam*) (within court's discretion to reject plea agreement because agreement provided for lenient sentence); *U.S. v. Carrigan*, 778 F.2d 1454, 1461-62 (10th Cir. 1985) (within court's discretion to reject plea agreement as too lenient when government agreed both to recommend specific sentence and dismiss charge); *cf. U.S. v. Lewis*, 979 F.2d 1372, 1375 (9th Cir. 1992) (Although plea bargain is governed by contract principles, the court is not a party to the agreement and may reject it).

It is unclear whether rule 11 requires a trial court to state specific reasons for rejecting a guilty plea. *Compare U.S. v. Moore*, 916 F.2d 1131, 1135-36 (6th Cir. 1990) (although court has broad discretion in deciding whether to accept plea agreement, it must articulate its reasons for rejecting plea; court did not adequately articulate reasons with mere expression of displeasure that agreement not filed until day of trial) *and U.S. v. Miller*, 722 F.2d 562, 566 (9th Cir. 1983) (judge must consider each case individually and delineate reasons in record for rejecting plea) *with U.S. v. Severino*, 800 F.2d 42, 45 (2d Cir. 1986) (rule 11 does not establish criteria for acceptance or rejection of pleas), *cert. denied*, 479 U.S. 1056 (1987) *and U.S. v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981) (*per curiam*) (rule 11 does not require court to explain reasons for rejecting plea agreements).

1367. FED. R. CRIM. P. 11(e)(2); *see U.S. v. Ewing*, 957 F.2d 115, 118-19 (4th Cir.) (court may accept plea and defer accepting agreement until after reviewing presentencing report), *cert.*

defendant that she may then withdraw the plea,<sup>1369</sup> and that if the plea is not withdrawn, a less favorable sentence than that contemplated in the plea agreement may be imposed.<sup>1370</sup> If the agreement calls for the prosecutor to recommend, or not to oppose the defendant's request for, a particular sentence, the recommendation is not binding on the court.<sup>1371</sup> The court must explain to the defendant that the court is not bound by the sentencing recommendation and that the defendant has no right to withdraw the plea if the court chooses not to accept the recommendation.<sup>1372</sup>

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*denied*, 112 S. Ct. 3008 (1992); *U.S. v. Kemper*, 908 F.2d 33, 36-37 (6th Cir. 1990) (judge's initial acceptance contingent upon presentence report and therefore within court's discretion later to reject plea when presentence report revealed incorrect stipulation concerning drug quantity on which plea based); *cf. U.S. v. Cruz*, 709 F.2d 111, 114-15 (1st Cir. 1983) (court could not reject plea on basis of presentence report after unconditional acceptance of plea); *U.S. v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993) (when district court fails to indicate status of plea agreement as required by rule 11(e)(2), acceptance of guilty plea operates as acceptance of the agreement); *U.S. v. Salva*, 902 F.2d 483, 488 (7th Cir. 1990) (court shall defer decision to accept or reject until consideration of presentence report unless report not required under Sentencing Guidelines).

1368. *See U.S. v. Muzika*, 986 F.2d 1050, 1054 (7th Cir. 1993) (court cannot both reject agreement and hold government to its promise within agreement to dismiss remaining counts against defendant).

1369. FED. R. CRIM. P. 11(e)(4); *see U.S. v. Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986) (if court rejects plea, rule 11(e)(4) guarantees defendant right to withdraw plea), *cert. denied*, 479 U.S. 1038 (1987); *U.S. v. Walker*, 927 F.2d 389, 391 (8th Cir. 1991) (if court rejects initial plea agreement, it may allow defendant to withdraw guilty plea and enter new plea agreement); *U.S. v. Fernandez*, 960 F.2d 771 (9th Cir. 1992) (*per curiam*) (court erred by failing either to accept plea agreement as submitted or reject agreement and allow defendant to withdraw plea); *cf. U.S. v. Babineau*, 795 F.2d 518, 520 (5th Cir. 1986) (when plea agreement requires government to recommend particular sentence, failure of court to follow such recommendation does not constitute rejection of plea and rule 11(e)(4) inapplicable); *U.S. v. Otte*, 729 F.2d 1207, 1208 (9th Cir. 1984) (when defendant knew court not required to accept sentence agreed upon by state as appropriate, court's failure to admonish defendant mere technical violation of rule 11).

1370. FED. R. CRIM. P. 11(e)(4).

1371. FED. R. CRIM. P. 11(e)(2); *see U.S. v. Bennett*, 990 F.2d 998, 1002 (7th Cir. 1993) (defendant not permitted to withdraw guilty plea when court properly complied with requirement of Rule 11(e)(2) by informing defendant that sentencing recommendations were not binding on the court and that defendant could not withdraw his guilty plea under any circumstances).

1372. FED. R. CRIM. P. 11(e)(1)(B), (e)(2); *see U.S. v. Ferrara*, 954 F.2d 103, 106-08 (2d Cir. 1992) (reversible error when trial court failed to tell defendant he could not withdraw guilty plea if court rejected prosecutor's sentencing recommendation); *U.S. v. Iaquina*, 719 F.2d 83, 85 (4th Cir. 1983) (same); *U.S. v. Theron*, 849 F.2d 477, 480-81 (10th Cir. 1988) (same); *U.S. v. Zickert*, 955 F.2d 665, 668 (11th Cir. 1992) (same).

The failure of the court to inform a defendant of her inability to withdraw a plea if the prosecutor's recommendation is rejected can amount to harmless error. *See U.S. v. de la Puente*, 755 F.2d 313, 314-15 (3d Cir.) (harmless error when court failed to inform defendant he had no right to withdraw plea if court rejected prosecutor's recommendation because no likelihood that defendant labored under misapprehension that plea could be withdrawn), *cert. denied*, 474 U.S. 1005 (1985); *U.S. v. Thibodeaux*, 811 F.2d 847, 847-48 (5th Cir.) (harmless error when judge failed to inform defendant that court did not have to abide by sentence recommendation in plea agreement because judge essentially conveyed idea), *cert. denied*, 483 U.S. 1008 (1987); *U.S. v. DeCicco*, 899 F.2d 1531, 1534-35 (7th Cir. 1990) (no reversible error when judge failed to inform defendant he could not withdraw plea because plea agreement clearly stated court not bound by sentence recommendation, defendant could not withdraw plea, and defendant capable of reading and understanding agreement) *and Lilly v. U.S.*, 792 F.2d 1541, 1544-45 (11th Cir. 1986) (harmless error when court failed to warn defendant he would not be able to withdraw plea even

Rule 11 establishes the guidelines federal courts must follow to ensure that a guilty plea is made knowingly and voluntarily.<sup>1373</sup> Pursuant to rule 11, the judge must address the defendant in open court<sup>1374</sup> before accepting a guilty plea.<sup>1375</sup> Rule 11 also requires the judge to inform the defendant of and to

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though form of guilty plea suggested plea could be withdrawn because no actual prejudice shown) *with* U.S. v. DeBusk, 976 F.2d 300, 306 (6th Cir. 1992) (not harmless error when district court failed to explain to defendant pursuant to Rule 11(e)(2) that he would have no right to withdraw his plea if court rejected the government's sentencing recommendations). Furthermore, when the government has not agreed to either recommend a specific sentence or refrain from opposing the defendant's request for a particular sentence, the court is not required to warn the defendant that she cannot withdraw her plea. U.S. v. Lambey, 974 F.2d 1389, 1396 (4th Cir. 1992) (court not required to inform defendant that he could not withdraw plea after pleading guilty).

When circumstances require, courts have some discretion in permitting the withdrawal of a guilty plea. *See* U.S. v. Torres, 926 F.2d 321, 326-27 (3d Cir. 1991) (court permitted defendant to withdraw guilty plea when unexpected legal issue arose and sentence reflected that unexpected change).

Failure to comply with Rule 11(e)(2) will not merit collateral relief under § 2255 except under exceptional circumstances. *See* Rogers v. U.S., 1 F.3d 697, 700 (8th Cir. 1993) (trial court's error in failing to advise defendant that sentencing guideline not binding on the court and that defendant would have no right to withdraw plea in any case did not entitle defendant to § 2255 relief). For further discussion of this issue, see HABEAS RELIEF FOR FEDERAL PRISONERS in Part V.

1373. FED. R. CRIM. P. 11(c),(d). Rule 11 is not constitutionally mandated. *McCarthy v. U.S.*, 394 U.S. 459, 464-65 (1969). Nevertheless, the Supreme Court exercises its supervisory powers over the federal courts to enforce the rule because it assists trial courts in making the constitutionally required determination of voluntariness. FED. R. CRIM. P. 11, thus has become the standard by which most federal courts evaluate voluntariness. *See* Marquis v. U.S., 698 F.2d 13, 16 (1st Cir. 1983) (collateral attack on plea as involuntary not sustained when requirements of rule 11 satisfied). The government has the burden of proving compliance with rule 11 when the defendant challenges a plea unless the record of the plea hearing clearly reflects that the guidelines were followed. U.S. v. Goodheim, 651 F.2d 1294, 1298-99 (9th Cir. 1981). Similar concerns can be raised in a federal challenge to state court proceedings. *See* Heiser v. Ryan, 951 F.2d 559, 562-63 (3d Cir. 1991) (federal hearing necessary to determine whether plea voluntary or due process violated after long delay in state court).

The defendant should consult with an attorney before a judge allows the defendant to plead guilty. *See* U.S. v. Loughery, 908 F.2d 1014, 1017 (D.C. Cir. 1990) (decision to plead must be made only after consulting with attorney). *But cf.* U.S. v. Pregler, 925 F.2d 268, 269 (8th Cir. 1991) (mere lack of counsel when defendant entered plea agreement not grounds for setting aside knowing and voluntary plea).

1374. FED. R. CRIM. P. 11(c). *Compare* U.S. v. Scully, 798 F.2d 411, 413 (10th Cir. 1986) (per curiam) (guilty plea invalid when trial judge relied solely on personal recollection to establish that plea made voluntarily and nothing in record indicated that judge addressed defendant) *with* U.S. v. Samuels, 726 F.2d 389, 389-90 (8th Cir. 1984) (per curiam) (guilty plea valid because mere technical violation when court at plea hearing allowed prosecutor and defense attorney to question defendant about understanding of charges because they did adequate job of ensuring voluntariness, defendant well-educated, and judge addressed her before accepting plea) *and* U.S. v. Cooper, 725 F.2d 756, 758-59 (D.C. Cir. 1984) (per curiam) (guilty plea valid when court relied on attorney to enumerate rights waived by defendant and record reflected defendant understood).

1375. The trial court may reject a guilty plea and direct that a plea of not guilty be entered. *See* U.S. v. Severino, 800 F.2d 42, 46-47 (2d Cir. 1986) (guilty plea properly rejected when court believed defendant untruthful), *cert. denied*, 479 U.S. 1056 (1987); *cf.* McKenzie v. Risley, 842 F.2d 1525, 1536-37 n.25 (9th Cir. 1988) (defendant's guilty plea to lesser crime rejected by prosecutor and court because kidnapping and murder victim's family opposed such plea bargaining), *cert. denied*, 488 U.S. 901 (1988).

ensure the defendant understands: (1) the nature of the charge;<sup>1376</sup> (2) the mandatory minimum and maximum sentences for the charge,<sup>1377</sup> including

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1376. FED. R. CRIM. P. 11(c)(1). When explaining the charge to the defendant, the court must consider both the complexity of the charge and the sophistication of the defendant. *Compare* Panuccio v. Kelly, 927 F.2d 106, 110-11 (2d Cir. 1991) (plea valid and defendant not entitled to relief when defendant informed of nature of charges and elements of crimes, although defendant not informed of affirmative defense); U.S. v. Green, 882 F.2d 999, 1005-06 (5th Cir. 1989) (plea valid and defendant not entitled to relief when no showing he would have changed plea upon more precise explanation of charge); U.S. v. Stephens, 906 F.2d 251, 253-54 (6th Cir. 1990) (plea valid when defendant adequately informed of charge and plea results even if defendant unaware of specific Guidelines range at time pleaded); U.S. v. Lumpkins, 845 F.2d 1444, 1449 (7th Cir. 1988) (plea valid when court engaged in painstakingly detailed colloquy with poorly educated, inarticulate defendant regarding his alleged mailing of threatening letters); Moore v. Armont-rout, 928 F.2d 288, 291-92 (8th Cir. 1991) (plea valid when defendant informed of elements of crime although defendant did not have necessary penetration required for rape conviction) and Dismuke v. U.S., 864 F.2d 106, 107 (11th Cir. 1989) (per curiam) (plea valid despite failure to inform defendant that he could raise good faith exception; nothing in rule 11 requires trial judge to inform defendant of every possible defense) with Valencia v. U.S., 923 F.2d 917, 921-23 (1st Cir. 1991) (plea invalid when defendant had minimal formal education, little familiarity with American legal system, and requested, but did not receive, explanation of complicated jurisdiction issue); U.S. v. Shacklett, 921 F.2d 580, 583 (5th Cir. 1991) (per curiam) (plea invalid when court entirely failed to inquire whether defendant understood nature of charges even though defendant received copy of information and stated had ample time to review it); U.S. v. Syal, 963 F.2d 900, 903-06 (6th Cir. 1992) (plea invalid when court failed to advise defendant of elements of offense or terms of supervised release); Nevarez-Diaz v. U.S., 870 F.2d 417, 422 (7th Cir. 1989) (plea invalid when court failed to ensure defendant understood both nature of crime and that mere presence at scene of crime insufficient to establish guilt) and U.S. v. Kamer, 781 F.2d 1380, 1384-85 (9th Cir.) (plea invalid when court failed to make thorough inquiry into defendant's understanding of complex charges, despite defendant's above-average intelligence), *cert. denied*, 479 U.S. 819 (1986).

A defendant is not entitled to relief if there is no showing that she would have changed her plea upon a more precise explanation of the charge. U.S. v. Green, 882 F.2d 999, 1005-06 (5th Cir. 1989); *see also* U.S. v. Daniel, 866 F.2d 749, 751 (5th Cir. 1989) (failure to advise defendant as to nature of conspiracy charge did not violate rule 11 when defendant did not plead guilty to that charge); U.S. v. Del Rosario, 902 F.2d 55, 59-60 (D.C. Cir.) (failure to inform defendant of special parole terms and minor omission in explaining elements of charge did not affect validity of plea), *cert. denied*, 498 U.S. 942 (1990).

1377. FED. R. CRIM. P. 11(c)(1). This requirement is constitutionally based. *Boykin v. Alabama*, 395 U.S. 238, 244 n.7 (1969) (defendant constitutionally entitled to know range of sentences); *see* U.S. v. Johnson, 983 F.2d 33, 35 (5th Cir.) (court's failure to advise defendant of mandatory minimum sentence was failure to address rule 11 core concern, mandating that plea be set aside); U.S. v. Elmendorf, 945 F.2d 989, 992-94 (7th Cir. 1991) (court required to inform defendant of minimum and maximum sentencing possibilities but not required to inform defendant of likely sentence), *cert. denied*, 112 S. Ct. 990 (1992); U.S. v. Hourihan, 936 F.2d 508, 509-11 (11th Cir. 1991) (per curiam) (court's failure to inform defendant of mandatory five-year minimum sentence until after plea hearing entitled defendant to withdraw plea when agreement reflected that defendant and government contemplated considerably shorter sentence). *But cf.* U.S. v. Saenz, 969 F.2d 294, 295-98 (7th Cir. 1992) (court's error in warning defendant about mandatory minimum sentence did not permit defendant to withdraw guilty plea); U.S. v. Young, 927 F.2d 1060, 1061-63 (8th Cir.) (failure of district court to advise defendant of statutory maximum and minimum sentences harmless error when evidence indicated defendant knew of possible sentence range), *cert. denied*, 112 S. Ct. 384 (1991); U.S. v. Johnson, 973 F.2d 857, 859-61 (10th Cir. 1992) (government failure before plea agreement to inform defendant of its intention to seek mandatory minimum sentence based on his three previous felonies did not violate due process or equal protection rights when government did not know sentence enhancement would

special parole term or supervised release terms<sup>1378</sup> and the possibility of restitution to victims;<sup>1379</sup> (3) the various constitutional waivers associated with

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apply until presentence report reflected prior felonies, and defendant was given opportunity to withdraw plea).

The courts apply a flexible approach in determining what information a defendant must receive about sentencing possibilities under the Sentencing Guidelines. *See* U.S. v. Perdomo, 927 F.2d 111, 115-16 (2d Cir. 1991) (court must tell defendant about maximum possible sentence and that Sentencing Guidelines apply, but need not explain how Guidelines apply); U.S. v. Henry, 893 F.2d 46, 48-49 (3d Cir. 1990) (court not required under rule 11 to advise defendant of bottom end of Sentencing Guidelines range for offenses); U.S. v. DeFusco, 949 F.2d 114, 117-19 (4th Cir. 1991) (court not required to inform defendant of Sentencing Guidelines range before defendant pleaded guilty), *cert. denied*, 112 S. Ct. 1703 (1992); U.S. v. Tuangmaneeratmun, 925 F.2d 797, 804-05 (5th Cir. 1991) (court not required to calculate and explain Sentencing Guidelines sentence prior to accepting guilty plea); U.S. v. Thomas, 894 F.2d 996, 997 (8th Cir.) (per curiam) (court not required under rule 11 to inform defendant of Sentencing Guidelines range or actual sentence when accepting plea), *cert. denied*, 495 U.S. 909 (1990); U.S. v. Selfa, 918 F.2d 749, 752 (9th Cir.) (court not required under rule 11 to inform defendant of Sentencing Guidelines career offender provision when accepting plan), *cert. denied*, 498 U.S. 986 (1990); U.S. v. Wright, 930 F.2d 808, 810 (10th Cir. 1991) (court required under rule 11 to inform defendant of "possible penalty," which includes both length of incarceration and amount of fine including potential alternative fines, but failure to inform defendant of potential alternative fines harmless error when defendant failed to show such knowledge would have changed decision to plead). A plea is invalid if a defendant relies on the judge's materially inaccurate statement about the Sentencing Guidelines. U.S. v. Story, 891 F.2d 988, 996-97 (2d Cir. 1989); *see* Rodriguera v. U.S., 954 F.2d 1465, 1468-69 (9th Cir. 1992) (plea vacated because defendant could have been given longer sentence than court advised him).

1378. FED. R. CRIM. P. 11(c)(1). A violation of this rule, like any violation of rule 11 not affecting substantial rights, may amount to harmless error. *Compare* U.S. v. Gracia, 983 F.2d 625, 628 (5th Cir. 1993) (harmless error when court understated by one year the minimum potential term of supervised release) *and* U.S. v. Clay, 925 F.2d 299, 302-04 (9th Cir. 1991) (harmless error when court failed to inform defendant of possibility of supervised release term because combination of sentence and supervised release less than maximum possible sentence of which defendant informed at plea hearing) *with* U.S. v. Hekimain, 975 F.2d 1098, 1104 (5th Cir. 1992) (not harmless error when court both gave erroneous advice regarding effect of violations of supervised release and failed to advise defendant the court had ability to make upward departure from sentencing guidelines range); U.S. v. Syal, 963 F.2d 900, 903-06 (6th Cir. 1992) (court's failure to notify defendant about supervised release term not harmless error when defendant faced possible restraints on liberty beyond advised maximum penalty) *and* Rodriguera v. U.S., 954 F.2d 1465, 1468-69 (9th Cir. 1992) (same).

1379. FED. R. CRIM. P. 11(c)(1). *Compare* U.S. v. Khan, 857 F.2d 85, 87-88 (2d Cir. 1988) (court's failure to inform defendant of possibility of \$266,000 restitution it later ordered not harmless when maximum actually \$1,000 and not cured by earlier statement that maximum \$250,000), *cert. denied*, 498 U.S. 1028 (1991); U.S. v. Corn, 836 F.2d 889, 895-96 (5th Cir. 1988) (court's failure to mention \$6 million restitution it later ordered not harmless error even though court told defendant it could impose any sentence short of death; court must either accept withdrawal of guilty plea or resentence defendant without restitution penalty) *and* U.S. v. Pogue, 865 F.2d 226, 228-30 (10th Cir. 1989) (per curiam) (court's failure to mention possibility of \$1,758,091.14 fine not harmless error even though court mentioned possibility of \$2,000 fine; court must either resentence without restitution, vacate conviction and allow defendant to withdraw plea, or conduct further hearings to determine when defendant made aware of possibility and if understood could withdraw plea at that time) *with* U.S. v. Fentress, 792 F.2d 461, 465-66 (4th Cir. 1986) (failure to inform defendant of possibility of restitution harmless error because maximum fine approximately same amount as possible restitution and defendant informed of serious financial repercussions) *and* U.S. v. Peden, 872 F.2d 1303, 1307-10 (7th Cir. 1989) (failure to inform defendant of possibility of restitution harmless error when record revealed defendant aware of such possibility).

a guilty plea;<sup>1380</sup> and (4) that answers to the court's questions may be used against her in a subsequent proceeding if under oath, on the record, and in the presence of defendant's counsel.<sup>1381</sup> The court need not, however, inform the defendant of any collateral consequences of the plea.<sup>1382</sup>

Rule 11(d) further requires the court to ensure the guilty plea is not the result of force, threats,<sup>1383</sup> or promises apart from the plea agreement.<sup>1384</sup>

1380. FED. R. CRIM. P. 11(c)(3)-(4). A violation of this rule may amount to harmless error. *See* U.S. v. Stead, 746 F.2d 355, 356-57 (6th Cir. 1984) (failure of court to advise defendant of privilege against self-incrimination and right to confrontation harmless error when court made meticulous effort to ensure defendant understood consequences of plea), *cert. denied*, 470 U.S. 1030 (1985); U.S. v. Lovett, 844 F.2d 487, 491 (7th Cir. 1988) (failure of court to advise defendant of right to plead not guilty not reversible error when court discussed jury trial and attached rights that guilty plea would foreclose); U.S. v. Gomez-Cuevas, 917 F.2d 1521, 1525-26 (10th Cir. 1990) (failure of court to advise defendant of right to confront and cross-examine witnesses harmless error when defendant's plea voluntary and defendant understood nature of charges against him).

1381. FED. R. CRIM. P. 11(c)(5); *see* FED. R. EVID. 801(d)(2)(a) (prior statements of party not hearsay when used against that party in proceeding). A violation of FED. R. CRIM. P. 11(c)(5) can be harmless error. *See* U.S. v. Gomez-Cuevas, 917 F.2d 1521, 1526 (10th Cir. 1990) (failure to warn defendant at plea hearing that statements could be used in perjury trial harmless error when defendant did not face prosecution for perjury and did not demonstrate other prejudice might result); U.S. v. Pinto, 838 F.2d 1566, 1569 (11th Cir. 1988) (*per curiam*) (failure to warn defendant at plea hearing that statements could be used in perjury trial not basis for attack of plea absent threat of perjury prosecution or showing of prejudice).

1382. *See* U.S. v. Campusano, 947 F.2d 1, 4-5 (1st Cir. 1991) (no need to inform defendant that guilty plea in state prosecution could be used against him in subsequent federal prosecution); U.S. v. Olvera, 954 F.2d 788, 793-94 (2d Cir.) (no need to inform defendant of possible deportation because collateral consequence of guilty plea; judge's invalid deportation order constituted harmless error), *cert. denied*, 112 S. Ct. 3011 (1992); U.S. v. Romero-Vilca, 850 F.2d 177, 179 (3d Cir. 1988) (no need to inform defendant of potential deportation because collateral consequence unrelated to length or nature of sentence); U.S. v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988) (no need to inform defendant that guilty plea would lead to deportation); Johnson v. Puckett, 930 F.2d 445, 448 n.2 (5th Cir.) (no need to inform defendant that guilty plea would affect his "good time" credits), *cert. denied*, 112 S. Ct. 252 (1991); U.S. v. Jordan, 870 F.2d 1310, 1317-18 (7th Cir.) (no need to inform defendant of possibility of federal prosecution because not direct consequence of state guilty plea or one over which state's attorney had control), *cert. denied*, 493 U.S. 831 (1989); George v. Black, 732 F.2d 108, 110-11 (8th Cir. 1984) (no need in state court to inform defendant of mandatory mental health commitment proceedings after release from prison when commitment not automatic, definite, or immediate); Varela v. Kaiser, 976 F.2d 1357, 1357 (10th Cir. 1992) (no need for defense counsel to warn his alien client that he will likely be deported if pleads guilty), *cert. denied*, 113 S. Ct. 1869 (1993); Holmes v. U.S., 876 F.2d 1545, 1548-50 (11th Cir. 1989) (no need to inform defendant of ineligibility for parole under CCE statute because collateral rather than direct consequence of guilty plea); U.S. v. Del Rosario, 902 F.2d 55, 59-60 (D.C. Cir.) (no need to inform defendant of possible deportation because no effect on validity of plea), *cert. denied*, 111 S. Ct. 352 (1990); *cf.* Wellman v. Maine, 962 F.2d 70, 72-73 (1st Cir. 1992) (plea voluntary despite retraction of previously awarded credit against sentence); Brown v. Perini, 718 F.2d 784, 787-88 (6th Cir. 1983) (plea voluntary even though defendant misinformed as to parole eligibility because collateral consequence of which defendant need not be informed at all).

1383. FED. R. CRIM. P. 11(d). *See* Brady v. U.S., 397 U.S. 742, 750 (1970) (*dictum*). *But see* U.S. v. Prince, 868 F.2d 1379, 1385 (5th Cir.) (plea voluntary despite threats to charge defendant with other offenses to induce guilty plea), *cert. denied*, 493 U.S. 932 (1989); U.S. v. Daniels, 902 F.2d 1238, 1243 (7th Cir.) (plea voluntary despite fact prisoner released from solitary confinement shortly after pleading guilty), *cert. denied*, 498 U.S. 981 (1990); U.S. v. Dalman, 994 F.2d 537, 539 (8th Cir. 1993) (plea voluntary when court informed defendant of fact that pleading not guilty would necessitate continued detention for the weekend).

Prosecutorial misconduct may render a defendant's resulting plea void for involuntariness.<sup>1385</sup> To prove involuntariness, the defendant must show that fear of the possible consequences of not pleading guilty destroyed her ability to balance the risks and benefits of going to trial.<sup>1386</sup> In *Bordenkircher v. Hayes*,<sup>1387</sup> the Supreme Court held that a prosecutor's threats to reindict the defendant on more severe charges if the defendant refused to plead guilty to the original indictment did not render the defendant's plea involuntary.<sup>1388</sup>

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Although plea bargains that provide help to family members and friends impose special responsibility on the court to determine voluntariness, it is not necessarily unlawful coercion for the prosecution to threaten to indict or prosecute a relative of the defendant if such relative could be or has been properly indicted. See *U.S. v. Buckley*, 847 F.2d 991, 1000 & n.6 (1st Cir. 1988) (threatened prosecution of defendant's brother did not render defendant's plea involuntary as matter of law), *cert. denied*, 488 U.S. 1015 (1989); *U.S. v. Contractor*, 926 F.2d 128, 133 (2d Cir.) (threat that codefendant "would suffer" unless defendant pleaded guilty did not render plea involuntary), *cert. denied*, 112 S. Ct. 123 (1991); *U.S. v. Diaz*, 733 F.2d 371, 374-79 (5th Cir. 1984) (threatened prosecution of defendant's brother and sister-in-law did not render plea involuntary when probable cause to bring such charges); *Bontkowski v. U.S.*, 850 F.2d 306, 313 (7th Cir. 1988) (threatened prosecution of defendant's pregnant wife to fullest extent of law when wife already indicted could not support claim that plea coerced); *Martin v. Kemp*, 760 F.2d 1244, 1247-48 (11th Cir. 1985) (threatened prosecution of defendant's wife did not render plea involuntary when probable cause to indict wife).

1384. FED. R. CRIM. P. 11(d).

1385. Compare *Miller v. Angliker*, 848 F.2d 1312, 1321-22 (2d Cir.) (murder defendant allowed to challenge guilty plea when prosecution withheld exculpatory, material evidence that another man seen near victims and arrested for assault), *cert. denied*, 488 U.S. 890 (1988) with *U.S. v. Jordan*, 870 F.2d 1310, 1316 (7th Cir.) (defendant not allowed to challenge guilty plea when prosecution failed to alert defendant to possible federal prosecution because not prosecutorial misconduct), *cert. denied*, 493 U.S. 831 (1989); *White v. U.S.*, 858 F.2d 416, 420-24 (8th Cir. 1988) (defendant not allowed to challenge guilty plea when prosecutor failed to reveal key witness's inconsistent deposition testimony and that government investigator intended to use witness's burglary arrest to influence cooperation; such failure not prosecutorial misconduct and did not render plea involuntary when court found that defendant knew of witness's lack of credibility and that such information would not have altered decision to plead guilty), *cert. denied*, 489 U.S. 1029 (1989) and *U.S. v. Vargas*, 925 F.2d 1260, 1265-66 (10th Cir. 1991) (defendant not allowed to challenge guilty plea when government failed to move for downward departure because unable to prove sufficient government bad faith).

1386. *Brady*, 397 U.S. at 750-51 (guilty plea not coerced by fear of death penalty under kidnapping statute, even though Supreme Court subsequently ruled death penalty provision of statute unconstitutional); see *Jones v. Estelle*, 584 F.2d 687, 690 (5th Cir. 1978) (guilty plea not coerced by attorney's impatience or fear of greater punishment); *U.S. v. Daniels*, 902 F.2d 1238, 1243 (7th Cir.) (guilty plea not coerced by judge's statements reflecting leniency toward defendants who admit guilt when no extravagant promise made regarding leniency), *cert. denied*, 498 U.S. 981 (1990); *Hale v. Lockhart*, 903 F.2d 545, 550-51 (8th Cir. 1990) (guilty plea not coerced even if entered into to avoid death penalty when court determined plea made voluntarily and intelligently); *Gano v. U.S.*, 705 F.2d 1136, 1137-38 (9th Cir. 1983) (guilty plea not coerced by judge's remark that defendant would likely be found guilty on 20 counts); *Bailey v. Cowley*, 914 F.2d 1438, 1441 (10th Cir. 1990) (per curiam) (guilty plea not coerced by fear of prosecution using prior conviction against defendant).

1387. 434 U.S. 357 (1978).

1388. *Id.* at 360-63. In *Hayes*, the prosecutor threatened to indict the defendant under the recidivist statute which would result in a life sentence if he did not plead guilty. *Id.* at 358-59. The defendant pleaded not guilty and was convicted and sentenced to life imprisonment. *Id.* at 359. In holding that a prosecutor may bring more severe charges than originally contemplated when a defendant refuses to accept a plea bargain, the Court reasoned that the defendant was fully informed of the prosecutor's intention and made a knowing and voluntary decision to reject the

A defendant may also challenge a guilty plea on the ground that ineffective assistance of counsel at trial prevented the defendant from entering a knowing and voluntary plea.<sup>1389</sup> In *Hill v. Lockhart*<sup>1390</sup> the Supreme Court held that, to set aside a guilty plea based on ineffective assistance of counsel, a defendant must show: (1) her counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases";<sup>1391</sup> and (2) a reasonable probability that she would not have pleaded guilty with competent counsel.<sup>1392</sup>

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plea bargain. *Id.* at 360-63; see *U.S. v. Prince*, 868 F.2d 1379, 1385 (5th Cir.) (no due process violation despite threats to charge defendant with other offenses to induce him to enter guilty plea), *cert. denied*, 493 U.S. 932 (1989); *cf. U.S. v. Jones*, 973 F.2d 928, 934 (D.C. Cir. 1992) (defendant's right to jury trial not unconstitutionally burdened by district court's addition of six months to defendant's sentence, imposed solely because defendant went to trial instead of pleading guilty in the face of overwhelming evidence of guilt), *vacated in part*, 980 F.2d 746, *reh'g granted*, 997 F.2d 1475 (1993), *cert. denied*, 114 S. Ct. 741 (1994).

Several earlier Supreme Court cases similarly failed to find involuntariness. See *Parker v. North Carolina*, 397 U.S. 790, 792, 794-95 (1970) (plea voluntary although induced by statute providing that defendants pleading guilty to capital crimes would not be subject to death penalty); *McMann v. Richardson*, 397 U.S. 759, 771-72 (1970) (plea voluntary although induced by earlier coerced confession); *Brady*, 397 U.S. at 750 (plea voluntary even if motivated by desire to accept certain sentence rather than face wide range of possibilities).

Coercion by private sources usually does not invalidate the voluntariness of a guilty plea unless such private conduct is attributable to or sanctioned by the prosecution. See *LoConte v. Dugger*, 847 F.2d 745, 753 (11th Cir.) (pressure from friends to plead guilty did not invalidate plea because prosecution neither knew of nor sanctioned their behavior), *cert. denied*, 488 U.S. 958 (1988); *cf. U.S. v. Pinto*, 838 F.2d 1566, 1568 (11th Cir. 1988) (reliance on advice of civil attorney in criminal case did not invalidate plea; defendant cannot challenge plea simply because followed advice of someone other than criminal attorney). *But see Iaea v. Sunn*, 800 F.2d 861, 866-67 (9th Cir. 1986) (attorney's threat to withdraw from case and brother's threat to take away bail rendered guilty plea involuntary despite lack of government coercion).

1389. *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973). See *Lopez-Nieves v. U.S.*, 917 F.2d 645, 650 (1st Cir. 1990) (plea not involuntary despite counsel's failure to request psychiatric evaluation to determine defendant's competency to plead because defendant's sworn statement confirmed defendant not under influence of drugs at plea hearing); *Panuccio v. Kelly*, 927 F.2d 106, 108-09 (2d Cir. 1991) (plea not involuntary despite counsel's failure to inform defendant of possible intoxication defense because defense not likely to be successful); *Chichakly v. U.S.*, 926 F.2d 624, 630-31 (7th Cir. 1991) (plea not involuntary despite counsel's misprediction of 90-day sentence although sentence four years); *Wiles v. Jones*, 960 F.2d 751, 753 (8th Cir.) (plea not involuntary for ineffective assistance of counsel when defendant pleaded guilty because attorney warned him of likelihood of death penalty), *cert. denied*, 113 S. Ct. 423 (1992); *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993) (plea not involuntary despite counsel's failure to appeal interlocutory ruling allowing state to pursue death penalty when defendant failed to demonstrate prejudice); *Jones v. White*, 992 F.2d 1548, 1557 (11th Cir.) (plea not involuntary when counsel acted in good faith in advising defendant to plead guilty because counsel did not feel he could provide believable defense given lack of alibi and numerous eyewitness identifications), *cert. denied*, 114 S. Ct. 448 (1993).

1390. 474 U.S. 52 (1985).

1391. *Id.* at 56 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). See *Brady*, 397 U.S. at 757-58 (guilty plea voluntary and intelligent when defendant received competent advice from counsel as to possibility of receiving death penalty if convicted at trial).

1392. *Lockhart*, 474 U.S. at 59. Compare *U.S. v. Craig*, 985 F.2d 175, 179 (4th Cir. 1993) (plea not involuntary when counsel failed to advise defendant of constitutional right to indictment when failure was not "but-for" cause of defendant's guilty plea); *Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir. 1991) (guilty plea voluntary and not coerced even though attorneys strongly encouraged defendant to plead guilty against his will), *cert. denied*, 112 S. Ct. 3002 (1992) and *Long v. U.S.*, 883 F.2d 966, 969 (11th Cir. 1989) (guilty plea voluntary despite attorney's

A defendant claiming ineffective assistance must overcome a strong presumption of reliability of her in-court statements, made when the plea was entered, concerning the voluntariness of the plea and her satisfaction with her attorney's performance.<sup>1393</sup>

Finally, rule 11 requires a federal court to ensure there is a factual basis for a guilty plea.<sup>1394</sup> The court should make such inquiries as are necessary to verify that the act to which the defendant admits is the offense with which she is charged.<sup>1395</sup> If the court finds an insufficient factual basis for the guilty plea,

overstatement of prison term because no evidence defendant would have changed plea if prediction of sentence proper) *with* Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir.) (en banc) (guilty plea involuntary because defense counsel's erroneous parole eligibility advice dispositive of defendant's decision to plead), *cert. denied*, 497 U.S. 1011 (1990). Ineffective assistance of counsel and attorney conflict of interest are discussed in RIGHT TO COUNSEL in Part III.

1393. See Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); U.S. v. Mims, 928 F.2d 310, 313 (9th Cir. 1991) (substantial weight attached to contemporaneous statements on record in assessing voluntariness of pleas).

1394. FED. R. CRIM. P. 11(f). A judge should independently assess the factual basis for a plea. U.S. v. Terzado-Madruga, 897 F.2d 1099, 1125 (11th Cir. 1990).

1395. FED. R. CRIM. P. 11(f). The factual basis requirement protects a defendant from pleading voluntarily without realizing that her conduct is not actually within the charge. *McCarthy*, 394 U.S. at 467. The government need not present uncontroverted evidence of guilt, but rather evidence from which a court could reasonably find that the defendant is guilty. *Compare* Tate v. Wood, 963 F.2d 20, 23 (2d Cir. 1992) (adequate factual basis to accept plea because defendant's indication that stabbing occurred during fight did not require court inquiry into possible self defense claim); U.S. v. Guichard, 779 F.2d 1139, 1146 (5th Cir.) (adequate factual basis to accept plea when defendant agreed to and signed recitation of events), *cert. denied*, 475 U.S. 1127 (1986); U.S. v. Alvarez-Quiroga, 901 F.2d 1433, 1438-39 (7th Cir.) (adequate factual basis to accept plea even though defendant did not acknowledge truth of all facts essential to proving guilt at trial), *cert. denied*, 111 S. Ct. 203 (1990); Neal v. Grammer, 975 F.2d 463, 466 (8th Cir. 1992) (adequate factual basis to accept defendant's guilty plea notwithstanding defendant's hesitancy and confusion in deciding whether to enter the plea); U.S. v. Reyes-Alvarado, 963 F.2d 1184, 1189 (9th Cir.) (adequate factual basis to accept guilty plea when evidence supported inference that defendant guilty), *cert. denied*, 113 S. Ct. 258 (1992) and U.S. v. Lopez, 907 F.2d 1096, 1100-01 (11th Cir. 1990) (adequate factual basis to accept plea in facts asserted in government's opening statement, testimony of government witnesses, and information disclosed in plea hearing) *with* U.S. v. Goldberg, 862 F.2d 101, 106 (6th Cir. 1988) (no adequate factual basis when government could not prove fourth element of misprision of felony); *Montgomery v. U.S.*, 853 F.2d 83, 85 (7th Cir. 1988) (no adequate factual basis when conspiracy essential element of crime charged and defendant's admissions and evidence pointed only to plans to sell drugs to unknown individual purchasers); U.S. v. Bigman, 906 F.2d 392, 394-95 (9th Cir. 1990) (no adequate factual basis when trial court failed to establish on record defendant's understanding of intent element of crime to which plea entered) and U.S. v. Keiswetter, 860 F.2d 992, 996-98 (10th Cir. 1989) (en banc) (no adequate factual basis when record failed to reflect clearly evidence upon which trial court relied to find defendant possessed requisite intent for crime of conversion).

The trial court exercises wide discretion in determining whether a factual basis exists. See U.S. v. Lumpkins, 845 F.2d 1444, 1451 (7th Cir. 1988) (within court's discretion to determine whether letters written by defendant within statute of limitations period and could form factual basis of plea); U.S. v. Lopez, 907 F.2d 1096, 1100-01 (11th Cir. 1990) (within court's discretion to consider facts in government statement and from government's witnesses along with facts from plea hearing sufficient to form factual basis for plea to RICO charge). *But cf.* U.S. v. Keiswetter, 866 F.2d 1301, 1301-02 (10th Cir. 1989) (not within trial court's discretion to order remand to clarify court's reasons for factual basis if not clear from record; instead, plea should be vacated).

a plea of not guilty will be entered.<sup>1396</sup> If the defendant enters a plea of guilty while continuing to assert her innocence, the plea will be accepted if there is strong evidence of guilt.<sup>1397</sup> The court must keep a verbatim record of the plea proceedings<sup>1398</sup> containing the court's advice to the defendant, the voluntariness inquiry, the details of the plea agreement, and the factual accuracy inquiry.<sup>1399</sup>

To set aside a guilty plea, a defendant must show that a violation of rule 11 led to actual prejudice; procedural deviations from the rule that constitute harmless error will not provide a basis for relief.<sup>1400</sup>

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Even without an adequate factual basis, a guilty plea may still be upheld. *U.S. v. Adams*, 961 F.2d 505, 510-12 (5th Cir. 1992) (per curiam) (trial court accepted guilty plea without adequate factual basis, but error harmless).

1396. See FED. R. CRIM. P. 11(f) advisory committee's note (1966 amendment).

1397. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (plea accepted when defendant pleaded guilty to second-degree murder on advice of counsel despite protestations of innocence; court found "overwhelming evidence" of guilt). Although rule 11 does not directly address the issue of an *Alford* plea, such pleas are treated similar to the *nolo contendere* plea and accepted only if acceptance is in the interest of effective administration of justice. FED. R. CRIM. P. 11(f) advisory committee's note (1974 amendment). See *U.S. v. Morrow*, 914 F.2d 608, 611-12 (4th Cir. 1990) (strong factual basis required to accept *Alford* plea; satisfied in context of RICO conspiracy action by showing that defendant possessed knowledge of essential nature of conspiracy); *U.S. v. Punch*, 709 F.2d 889, 895-97 (5th Cir. 1983) (essential that court accepting *Alford* plea ensure defendant understands consequences; *Alford* plea involuntary when defendant not properly informed of charge and maintained innocence throughout proceedings).

1398. FED. R. CRIM. P. 11(g).

1399. *Id. Compare Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (knowing and voluntary waiver of constitutional right not presumed from silent record) and *U.S. v. Rosillo*, 853 F.2d 1062, 1066-67 (2d Cir. 1988) (failure to make on-record determination of voluntariness, given defendant's admitted use of medication, constituted reversible error) with *U.S. v. Alvarez-Quiroga*, 901 F.2d 1433, 1437 (7th Cir.) (involuntariness not shown when court held full and careful hearing), *cert. denied*, 111 S. Ct. 203 (1990).

This record is used in the event of a subsequent attack on the plea. FED. R. CRIM. P. 11(g) advisory committee's note (1974 amendment). See *U.S. v. Kamer*, 781 F.2d 1380, 1383-84 (9th Cir.) (appellate court looks only to record of plea hearing to determine validity of plea, not to entire proceeding), *cert. denied*, 479 U.S. 819 (1986). The loss of the verbatim transcript, however, does not necessitate a finding of involuntariness at a subsequent challenge to the plea. For example, in a subsequent prosecution for recidivism, the Court has held that a state may apply a presumption that the guilty plea was entered into knowingly and voluntarily even though the record of the original plea proceeding is not available. *Parke v. Raley*, 113 S. Ct. 517 (1992).

1400. FED. R. CRIM. P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."). Rule 11(h) abrogates the portion of *McCarthy v. U.S.*, 394 U.S. 459 (1969), that held a failure to adhere fully to the requirements of rule 11 mandates the plea be set aside. FED. R. CRIM. P. 11(h) advisory committee's note. See *U.S. v. Timmreck*, 441 U.S. 780, 785 (1979) (formal or technical violations of rule 11 do not warrant collateral relief if defendant does not show he would have pled guilty if violations had not occurred); *U.S. v. Japa*, 994 F.2d 899, 904 (1st Cir. 1993) (substantial rights not affected when court failed to ask defendant whether he intended to distribute cocaine within 1000 feet of a school and only asked if he possessed cocaine, and when prosecutor failed to include reference to a school in statement of proof).

The 1983 advisory committee's note to rule 11 indicate there are two caveats to the harmless error doctrine. First, "[the rule] should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important rule 11 safeguards." FED. R. CRIM. P. 11(h) advisory committee's note. Second, "[the rule] should not be read as an invitation to the trial court to take a more casual approach to rule 11 proceedings." *Id.*

*Withdrawing the Plea.* Once a plea has been accepted, the *Federal Rules of Criminal Procedure* allow a defendant to withdraw the plea only with the court's permission.<sup>1401</sup> A motion to withdraw a guilty plea or a plea of *nolo contendere* entered prior to sentencing will be granted on a showing of a fair and just reason.<sup>1402</sup> A motion to withdraw a plea between tentative and final

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1401. FED. R. CRIM. P. 32(d); *see* U.S. v. Marquez, 909 F.2d 738, 740 (2d Cir. 1990) (defendant has burden of proving valid grounds exist for withdrawing plea), *cert. denied*, 498 U.S. 1084 (1991); U.S. v. Rojas, 898 F.2d 40, 42-43 (5th Cir. 1990) (withdrawal of guilty plea left to trial court's discretion); U.S. v. Savage, 891 F.2d 145, 151 (7th Cir. 1989) (same); U.S. v. Casey, 951 F.2d 892, 894-95 (8th Cir. 1991) (no evidentiary hearing necessary on motion to withdraw guilty plea when allegations in motion unreliable, not supported by specific facts, or insufficient for withdrawal even if true), *cert. denied*, 112 S. Ct. 2284 (1992); Robtoy v. Kincheloe, 871 F.2d 1478, 1481-82 (9th Cir. 1989) (no federally guaranteed right to have court accept guilty plea; court's refusal to allow defendant to alter guilty plea not violation of due process), *cert. denied*, 494 U.S. 1061 (1990); U.S. v. Lake, 709 F.2d 43, 44-45 (11th Cir. 1983) (no abuse of discretion to deny withdrawal of plea when defendant belatedly discovered possible psychiatric defense to conspiracy charge); U.S. v. Loughery, 908 F.2d 1014, 1017 (D.C. Cir. 1990) (plea may not be withdrawn as matter of right, although withdrawal will be liberally granted before sentencing; no abuse to deny withdrawal when defendant waited until after codefendant's sentence); *cf.* U.S. v. Thompson, 906 F.2d 1292, 1298 (8th Cir.) ("plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of same" (quoting U.S. v. Woosley, 440 F.2d 1280, 1281 (8th Cir. 1971))), *cert. denied*, 498 U.S. 989 (1990).

1402. FED. R. CRIM. P. 32(d); U.S. v. Moore, 931 F.2d 245, 248 (4th Cir.) (defendant does not have absolute right to withdraw guilty plea even before sentencing; withdrawal need only be granted upon showing of fair and just reason), *cert. denied*, 112 S. Ct. 171 (1991); U.S. v. Wade, 940 F.2d 1375, 1377 (10th Cir. 1991) (defendant has burden of demonstrating fair and just reason for withdrawal of guilty plea). *Compare* U.S. v. Doyle, 981 F.2d 591, 594-95 (1st Cir. 1992) (defendant not entitled to withdraw plea despite court's failure to comply with secrecy order when order came after court had accepted guilty plea and defendant's desire to go to trial appeared to be based on growing awareness of likely sentence rather than articulated reasons); U.S. v. Clements, 992 F.2d 417, 419-20 (2d Cir.) (defendant not entitled to withdraw plea despite government's failure to tell trial court during rule 11 colloquy that plea bargain offered to four defendants was conditional on all accepting and pleading guilty), *cert. denied*, 114 S. Ct. 316 (1993); U.S. v. Jones, 979 F.2d 317, 318 (3d Cir. 1992) (defendant not entitled to withdraw plea solely because he feared punishment); U.S. v. Lambey, 974 F.2d 1389, 1394-96 (4th Cir. 1992) (defendant not entitled to withdraw plea despite counsel's underestimation of possible sentence when court clearly and correctly indicated that defendant could receive life sentence, and court advised defendant not to rely on counsel's estimates); U.S. v. Young, 981 F.2d 180, 184 (5th Cir. 1992) (defendant not entitled to withdraw based on his claims that prosecutor misled him as to sentence length when defendant fully aware that sentence guideline range could not be predicted and was directly related to amount of controlled substance involved), *cert. denied*, 113 S. Ct. 2983 (1993); U.S. v. Head, 927 F.2d 1361, 1375-76 (6th Cir.) (defendant not entitled to withdraw plea after government gave notice it did not intend to seek downward departure), *cert. denied*, 112 S. Ct. 144 (1991); U.S. v. Savage, 891 F.2d 145, 151 (7th Cir. 1989) (defendant not entitled to withdraw plea due to dissatisfaction with application of Sentencing Guidelines); U.S. v. Nichols, 986 F.2d 1199, 1203 (8th Cir. 1993) (defendant not entitled to withdraw plea when he relied on mistaken judgment of counsel that government had strong case against him); U.S. v. Myers, 993 F.2d 713, 715 (9th Cir. 1993) (defendant not entitled to withdraw when defendant failed to produce evidence to support his claim he was incompetent when he made his plea); U.S. v. Hickok, 907 F.2d 983, 985-86 (10th Cir. 1990) (defendant not entitled to withdraw plea based on his desire for jury trial) *and* U.S. v. Abreu, 964 F.2d 16, 19-20 (D.C. Cir. 1992) (*per curiam*) (defendant not entitled to withdraw plea based on his tactical reevaluation of strength of government's case) *with* U.S. v. Schwartz, 785 F.2d 673, 678 (9th Cir.) (defendant entitled to withdraw plea when codefendants acquitted of same conspiracy charge due to lack of evidence), *cert. denied*, 479 U.S. 890 (1986) *and* U.S. v. Ford, 993 F.2d 249, 251-52 (D.C. Cir. 1993)

(defendant entitled to withdraw plea when defendant asserted his legal innocence and his plea was entered after a substantially defective Rule 11 colloquy where court failed to explain to defendant nature of charges against him and failed to establish the factual basis of the charges to which he pled guilty).

Suggested considerations in determining whether a fair and just reason to grant the motion exists include: (1) whether there has been an assertion of legal innocence or an *Alford* plea; (2) the amount of time between the plea and motion (the shorter the interval, the more likely it will be that the defendant has a fair and just reason for withdrawing his plea); and (3) whether the government would be prejudiced by a withdrawal of the plea (if, for example, the government discarded physical evidence, dismissed the witnesses, or already tried the codefendant). FED. R. CRIM. P. 32(d) advisory committee's note; see *U.S. v. Tilley*, 964 F.2d 66, 72 (1st Cir. 1992) (factors include timing of defendant's change of heart, force and plausibility of reason, whether defendant had asserted legal innocence, whether parties had reached (or breached) plea agreement, and whether defendant's plea can still be regarded as voluntary, intelligent, and otherwise in conformity with rule 11); *U.S. v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989) (factors include whether defendant asserted innocence, whether government would be prejudiced, and strength of defendant's reasons for moving to withdraw); *U.S. v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991) (factors include whether defendant asserted innocence, whether withdrawal would prejudice government, whether and why defendant delayed filing motion, whether withdrawal substantially inconvenienced court, whether adequate assistance of counsel available to defendant, whether plea knowing and voluntary, and whether withdrawal would waste judicial resources); *U.S. v. Goldberg*, 862 F.2d 101, 103-04 (6th Cir. 1988) (factors include whether movant asserted defense or maintained innocence, length of time between entry of plea and motion to withdraw, why grounds for withdrawal not presented previously, circumstances underlying entry of plea, *i.e.*, background of defendant and whether admitted guilt, and prejudice to government); *U.S. v. Boone*, 869 F.2d 1089, 1091-92 (8th Cir.) (factors include whether defendant asserted legal innocence, length of time between guilty plea and motion to withdraw, and whether government would be prejudiced), *cert. denied*, 493 U.S. 822 (1989); *U.S. v. Elias*, 937 F.2d 1514, 1520 (10th Cir. 1991) (factors include whether defendant asserted innocence, whether withdrawal would prejudice government, whether and why defendant delayed filing motion, whether withdrawal substantially inconvenienced court, whether adequate assistance of counsel available to defendant, whether plea knowing and voluntary, and whether withdrawal would waste judicial resources); *U.S. v. Buckles*, 843 F.2d 469, 471-72 (11th Cir. 1988) (factors include whether close assistance of counsel available, whether plea knowing and voluntary, whether judicial resources would be conserved, and whether government would be prejudiced), *cert. denied*, 490 U.S. 1099 (1989).

If the defendant succeeds in showing a fair and just reason for withdrawing her plea, the burden shifts to the government to show that it would be prejudiced by the withdrawal. See *U.S. v. Saft*, 558 F.2d 1073, 1083 (2d Cir. 1977) (government not required to show prejudice until defendant shows sufficient grounds for withdrawal of guilty plea); *U.S. v. Pitino*, 887 F.2d 42, 46 (4th Cir. 1989) (*per curiam*) (same); *U.S. v. Triplett*, 828 F.2d 1195, 1198 (6th Cir. 1987) (same). At least one court has held that any desire to withdraw is fair as long as the government fails to show that it would be prejudiced. *U.S. v. Savage*, 561 F.2d 554, 556-57 (4th Cir. 1977) (remand for defendant to withdraw plea when government cannot show prejudice), *cert. denied*, 459 U.S. 1108 (1982). The advisory committee, however, rejected the decision in *Savage* and suggested that rule 32(d) be interpreted according to the approach taken in *Saft*, requiring the defendant to first show a "fair and just" reason for withdrawal before the government is required to show prejudice. FED. R. CRIM. P. 32(d) advisory committee's note; see *U.S. v. Martinez*, 785 F.2d 111, 114 (3d Cir. 1986) (no abuse of discretion to deny motion to withdraw plea despite lack of government prejudice, because mere fact government officials spoke to defendant against request of defense counsel not "fair and just" reason for withdrawal); *U.S. v. Haley*, 784 F.2d 1218, 1219 (4th Cir. 1986) (no abuse of discretion to deny motion despite lack of prejudice to government when defendant did not show fair and just reason); *U.S. v. Benavides*, 793 F.2d 612, 616-18 (5th Cir.) (no abuse of discretion to deny motion when defendant made unsubstantiated claim of paranoia and intimidation and offered evidence of impairment but did not profess innocence, even though government not prejudiced), *cert. denied*, 479 U.S. 868 (1986); *U.S. v. Thompson*, 680 F.2d 1145, 1150 (7th Cir. 1982) (withdrawal of plea not automatic even if government cannot

sentencing is also judged under this standard.<sup>1403</sup> There is a presumption against a postsentencing motion to withdraw a plea;<sup>1404</sup> such a motion will be granted only to correct manifest injustice.<sup>1405</sup> The denial of a motion to withdraw a plea is generally reviewed under an abuse of discretion standard.<sup>1406</sup>

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show prejudice), *cert. denied*, 459 U.S. 1089 (1983); *cf.* U.S. v. Campbell, 778 F.2d 764, 767-68 (11th Cir. 1985) (no abuse of discretion to deny motion to withdraw plea when defendant did not profess innocence and government would have been prejudiced).

1403. FED. R. CRIM. P. 32(d) advisory committee's note.

1404. FED. R. CRIM. P. 32(d); *see* U.S. v. Teller, 762 F.2d 569, 574 (7th Cir. 1985) (rule 32(d) imposes "near-presumption" against withdrawal after sentencing).

1405. FED. R. CRIM. P. 32(d) advisory committee's note. *See* U.S. v. Allard, 926 F.2d 1237, 1242-43 (1st Cir. 1991) (no reason to withdraw plea after sentencing when factual allegations, even if true, no defense and other violations merely technical); U.S. v. Hoskins, 910 F.2d 309, 311 (5th Cir. 1990) (defendant seeking withdrawal of plea after sentencing must show "fundamental defect which inherently results in a complete miscarriage of justice" or "omission inconsistent with the rudimentary demands of fair procedure") (quoting Hill v. U.S., 368 U.S. 424, 428 (1962))).

Rule 32(d) was amended in 1983 to state that all postsentence motions to withdraw guilty pleas should be made pursuant to a 28 U.S.C. § 2255 motion. Many courts have treated the § 2255 standard of "miscarriage of justice" as identical to the preamendment rule 32(d) standard of "manifest injustice." U.S. v. Teller, 762 F.2d 569, 574 (7th Cir. 1985). A defendant who seeks to withdraw her guilty plea after sentencing under rule 32(d) bears the burden of proving the necessity of such action to correct manifest injustice. *Compare* U.S. v. O'Hara, 960 F.2d 11, 14 (2d Cir. 1992) (acquittal of coconspirators did not justify withdrawal of guilty plea); U.S. v. Davis, 954 F.2d 182, 184-85 (4th Cir. 1992) (no miscarriage of justice to justify withdrawal of plea despite defendant's assertion that plea invalid at inception because trial court's nonappealable ruling precluded effective defense); U.S. v. Todaro, 982 F.2d 1025, 1030 (6th Cir.) (per curiam) (no miscarriage of justice to justify withdrawal of plea when defendant's only witness could not competently testify that alleged promise by counsel that defendant would only receive probation had actually been made), *cert. denied*, 113 S. Ct. 2424 (1993); U.S. v. Hoyos, 892 F.2d 1387, 1399-1400 (9th Cir. 1989) (per curiam) (no manifest injustice from denial of motion when court found that defendant not truthful person and discredited testimony (citing U.S. v. Kay, 537 F.2d 1077, 1078 (9th Cir. 1976))), *cert. denied*, 498 U.S. 825 (1990) and U.S. v. Pollard, 959 F.2d 1011, 1026-28 (D.C. Cir.) (no manifest injustice even if government allocution violated plea agreement by going beyond facts and circumstance of crime), *cert. denied*, 113 S. Ct. 322 (1992) *with* U.S. v. Anderson, 993 F.2d 1435, 1438-39 (9th Cir. 1993) (defendant allowed to withdraw plea after sentencing when district judge imposed unreasonable constraints on defendant such as giving a short deadline for defendant to decide what to plea, denying new defense counsel additional preparation time, and threatening to forbid government to accept plea to fewer than all 30 counts).

1406. U.S. v. Zweber, 913 F.2d 705, 710 (9th Cir. 1990); *see* U.S. v. Huff, 873 F.2d 709, 712 (3d Cir. 1989) (no abuse of discretion to deny motion to withdraw guilty plea because judge made independent inquiry as to factual basis, photos depicted defendant with object similar to gun and defendant rejected offer to plead not guilty after denying possession of gun); U.S. v. Lambert, 994 F.2d 1088, 1093 (4th Cir. 1993) (no abuse of discretion in refusing to permit withdrawal of plea when court decided to apply much harsher sentencing guideline than government, defendant, or probation officer had thought applicable, but defendant had testified he understood the length of sentence he might receive); U.S. v. Clark, 931 F.2d 292, 295 (5th Cir. 1991) (no abuse of discretion in refusing to permit withdrawal of plea when over two years had passed and government would be prejudiced even though defendant's counsel made no independent investigation before advising defendant to accept plea); U.S. v. Knorr, 942 F.2d 1217, 1220 (7th Cir. 1991) (no abuse of discretion in refusing to permit withdrawal of plea even though defendant did not understand he might be subject to increased sentence because of leadership in drug organiza-

If a guilty plea is withdrawn, the court, at the subsequent trial, may impose a more severe sentence on the defendant.<sup>1407</sup> In *Alabama v. Smith*,<sup>1408</sup> the Supreme Court held that a presumption of vindictiveness does not automatically arise when a sentence imposed after trial is greater than that previously imposed under the guilty plea.<sup>1409</sup>

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tion); *U.S. v. Capito*, 992 F.2d 218, 220 (8th Cir. 1993) (no abuse of discretion in refusing to permit withdrawal of plea when defendant's argument that state civil rights restoration statutes applied to him were without merit); *U.S. v. Stitzer*, 785 F.2d 1506, 1514 (11th Cir.) (no abuse of discretion to deny presentence motion to withdraw guilty plea because no showing by defendant of fair and just reason; factors in determining abuse of discretion are: (1) whether close assistance of counsel existed; (2) whether original plea knowing and voluntary; and (3) whether judicial resources conserved), *cert. denied*, 479 U.S. 823 (1986). *But see* *U.S. v. Quinones*, 906 F.2d 924, 928 (2d Cir. 1990) (reviewing court will overturn decision as to withdrawal of plea only if "clearly erroneous"), *cert. denied*, 498 U.S. 1069 (1991); *U.S. v. Groll*, 992 F.2d 755, 760 (7th Cir. 1993) (court abused its discretion in not allowing defendant to withdraw plea presentencing without first identifying how, as it claimed, un rebutted evidence in presentence report did not support her entrapment defense).

1407. *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

1408. 490 U.S. 794 (1989).

1409. *Id.* at 801. The Court reasoned that "the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge [because] . . . the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Id.* (no presumption of vindictiveness when judge imposed concurrent terms of life imprisonment for two counts and consecutive term of 150 years for third count after guilty plea vacated despite previous sentence under guilty plea of three concurrent terms of 30 years); *see* *U.S. v. Perez*, 904 F.2d 142, 146 (2d Cir.) (unless court finds "realistic motive for vindictive sentencing," *Pearce* presumption of vindictive sentencing after successful appeal inapplicable (quoting *Texas v. McCullough*, 475 U.S. 134, 139 (1986))), *cert. denied*, 498 U.S. 905 (1990); *U.S. v. Vontsteen*, 950 F.2d 1086, 1093 (5th Cir.) (en banc) (defendant who received 10 years imprisonment based on 21 counts and five years probation based on twenty-second count and later resentenced to 10 years with no probation based on twenty-second count after other counts dismissed not entitled to *Pearce* presumption of vindictive sentencing when defendant failed to preserve error on appeal and resentencing "not obviously more severe" than original sentence), *cert. denied*, 112 S. Ct. 3039 (1992).