Federal Guilty Pleas Under Rule 11

The Unfilled Promise of the *Post-Boykin* Era

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Rule 11 of the Federal Rules of Criminal Procedure governs perhaps the most essential and common practice in the federal criminal justice system—the guilty plea.[1] Despite the public's focus on the excitement and drama engendered by real and fictional criminal trials, the overwhelming majority of criminal matters reach a negotiated resolution. Indeed, the importance of the guilty plea to the judiciary, prosecutors, and even defense attorneys cannot be overstated. Without guilty pleas, the criminal justice system would malfunction; the system is simply incapable of accommodating the constitutional exer' cise of a defendant's trial right in each instance.

The federal plea process was revised in 1975 when, in response to the 1969 United States Supreme Court decision in *Boykin v. Alabama,*[2] sweeping amendments to Rule 11 were enacted in order to better ensure the entry of intelligent and voluntary guilty pleas. In lieu of the comparatively scant verbiage that characterized the pre-1975 version,[3] the new rule detailed a plea process replete with procedures[4] designed to guide the federal judiciary and protect the due process interests of the defendant.[5] However, twenty-five years after the implementation of the revisions, there is, at a minimum, a considerable question whether the laudable objectives underlying the reforms are being fulfilled. Indeed, this Article posits that Rule 11 has not fulfilled its original promise. Instead of protecting against unintelligent and involuntary pleas, the rule's plain language and its appellate interpretation have produced a plea process that pays little homage to the original *Boykin* ideals.

Though guilty pleas are generally impervious to successful postplea challenges,[6] it is perhaps fitting that on this twenty-fifth anniversary Rule 11 was at the center of a high-profile habeas corpus petition, notable if only for its named claimant. Theodore

[1] *See* Act of July 31, 1975, Pub. L. No. 94-64, § 3(5)-(10), 89 Stat. 370, 372-73. Though enacted in July 1975, the revised procedures did not go into effect until December 1975. *Id.* §2.

[2] 395 U.S. 238, 242 (1969) (holding that "[i]t was error, plain on the face of the record, for [a] trial judge to accept [a defendant's] guilty plea without an affirmative showing that it was intelligent and voluntary").

[3] For discussion of the pre-1975 version of Rule 11, see *infra* notes 50-54 and accompanying text

[4] For discussion of the 1975 version of Rule 11, as well as subsequent amendments, see *infra* notes 55-82 and accompanying text.

[5] For example, the accompanying Advisory Committee's notes to the 1975 amendments to Federal Rules of Criminal Procedure Rule 11 provide, with respect to subdivision (d): "The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea." The Supreme Court had previously stated:

> By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack. . . . Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries.

McCarthy v. United States, 394 U.S. 459, 466 (1969).

[6] *See* United States v. Newson, 46 F.3d 730, 732 (8th Cir. 1995) (holding that review of a district court's denial of a motion to withdraw a guilty plea is made under an abuse of discretion standard); Peter T. Wendel, *The Case Against Plea Bargaining Child Abuse Charges: "Deja Vu All Over Again,"* 64 Mo. L. Rev. 317, 340 n.71 (1999) (stating that after the imposition of sentence, motions seeking the withdrawal of a guilty plea "are granted only to correct a manifest injustice").

Kaczynski (the "Unabomber") entered guilty pleas on January 22, 1998 in the United States District Court for the Eastern District of California to an array of charges pertaining to bombing-related activity that caused three deaths and twenty-three injuries over the course of two decades.[7] In his petition before the Ninth Circuit Court of Appeals, Kaczynski sought a new trial, arguing that his guilty pleas were the coercive product of attorney intransigence over defense strategy. Specifically, Kaczynski asserted "a mental state defense that [he] would have found unendurable" as forging an involuntary decision to concede his guilt.[8] On February 12, 2001, a divided Ninth Circuit denied Kaczynski's petition, finding that there was "no reason [to] not fully [ ] credit Kaczynski's sworn statements in the plea agreement, as well as during the plea colloquy, that he was pleading voluntarily."[9]

While the Kaczynski petition certainly presented an intriguing appellate issue, it is beyond the scope of this Article to critique the merits of his individual claim. Rather, the value of the Kaczynski matter lies in an analysis of its plea colloquy. In contrast to the case's considerable notoriety, which was decidedly atypical, the plea colloquy is remarkably conformist. It proceeds in a manner consonant with Rule 11 mandates, yet is emblematic of the inherent deficiencies associated with the federal plea structure. Accordingly, this Article's forthcoming review of the Kaczynski plea colloquy is not intended as a singular indictment of a particular case, court, or district, but to depict a federal plea process beset with evidential and procedural inconsistencies and an overarching concern for judicial economy.

Our public policy purportedly reflects our societal and/or political values. This Article will demonstrate how Rule 11, and its appellate construction, reflect a contorted value priority; one that unnecessarily devalues individual due process in exchange for a misperceived notion of judicial economy. To that end, this Article commences with a review of the constitutional standards that accompany guilty pleas as well as the historical evolution of Rule 11. Thereafter, Rule 11 will be discussed—with highlighted excerpts from the Kaczynski plea colloquy—in light of certain federal evidence rules, offender characteristic data, and economic and professional incentives that impact indigent representation. This Article will then review the most recent and significant addendums to Rule 11-—-the appellate waiver and harmless error provisions—and demonstrate how these seemingly unexceptional modifications, and their subsequent judicial interpretation, have had a profoundly deleterious impact upon individual due

[7] *See* United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001); *see also A Scandal, an Upset, a Stormy Year,* Star Trib. (Minneapolis-St. Paul), Dec. 31, 1998, at Al 8; Peter Hartlaub, *Courts Reduce Paperwork Blizzard with Web Sites; in* Stayner *Case, Media Requests are a Breeze via Online Document Postings,* S.F. Examiner, Aug. 18,1999, at A-l; Howard Mintz, *Kaczynski's Endgame Raises Many Questions; Legal Experts Find DeathPenalty Plea a Dangerous Precedent,* Denver Post, May 29, 2000, at 19A.

[8] *Kaczynski,* 239 F.3d at 1114.

[9] *Id.* at 1115. Judges Rymer and Brunetti composed the two-person majority. *Id.* at 1108. Judge Reinhardt issued a dissenting opinion. *Id.* at 1119.

process and are flatly inconsistent with Rule Il's purported underlying objectives. Finally, this Article will conclude with a suggested measure of reform. Though temperate, the proffered restructure of Rule 11 will alleviate many of the inequities associated with the current structure and restore die value priority originally contemplated in *Boykin*—one with a paramount concern for individual due process.

I. Constitutional Standards

Prior to the acceptance of a guilty plea, certain constitutional prerequisites must be satisfied. For instance, Fifth Amendment due process requires that a court be satisfied that a defendant is mentally competent to enter a plea.[1] For years, there was a split among the circuits as to which of two competing standards should be employed to ascertain a defendant's competency to plead guilty.[2] One standard—employed to assess a defendant's competency to stand trial— required the court to determine whether a defendant had "a rational and factual understanding of the proceedings and [was] capable of assisting his counsel."[3] The other standard—utilized in the context of counsel waivers—permitted the waiver of constitutional rights "only if [the defendant] ha[d] the capacity for 'reasoned choice' among the alternatives available to him."[4] This divide was settled finally in 1993. In *Godinez v. Moran,* the Supreme Court held that the competency standard for standing trial, entering a guilty plea and waiving counsel were identical—namely, that a defendant was deemed competent under any of these scenarios, so long as he was able to understand the proceedings against him and was able to assist his attorney.[5]

In addition, a trial court may not accept a defendant's plea of guilty unless it was entered voluntarily. To be considered "voluntary," a defendant who enters a guilty plea must do so

fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, [and said plea] must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[6]

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[1] *See, e.g.,* Pate v. Robinson, 383 U.S. 375, 385 (1966) (stating that Robinson was constitutionally entitled to a hearing on the issue of his competency to stand trial).

[2] *See* Godinez v. Moran, 509 U.S. 389, 395-96 (1993) (observing that the Ninth and D.C. Circuits had employed a heightened competency standard that differed from the standard employed by every other circuit that had considered the issue). For additional discussion of *Godinez,* see *infra* notes 134-48 and accompanying text.

[3] Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992).

[4] *Id.* (quoting Harding v. Lewis, 834 F.2d 853, 856 (9th Cir. 1987)).

[5] *See Godinez,* 509 U.S. at 402.

[6] Brady v. United States, 397 U.S. 742, 755 (1970) (citing Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957)); *see also* Wayne R. LaFave et al., Criminal Procedure 994-96 (3d ed. 2000) (describing generally the voluntariness standard).

Satisfaction of this standard, however, does not require the entry of a plea independent of *all* threats, pressures, and promises. After all, plea agreements themselves are promised dispositions, and the criminal trial setting is often ripe with inherent pressures, which can make decisionmaking difficult.[7] For example, it has been held that a guilty plea is voluntary[8] when induced by threats of increased penalties[9] or additional charges,[10] when a defendant's relative is threatened with indictment,[11] or when nongovernmental sources coerce a plea.[12] Rather, more is required before a plea will be voided on voluntariness grounds. Though a somewhat nebulous concept, a plea will be deemed "involuntary" when it is demonstrated that the plea was the product of "actual or threatened physical harm or by mental coercion" that overcame the defendant's will.[13]

Moreover, a plea of guilty may not be accepted unless the court is satisfied that the defendant comprehends several critical items associated with the plea. One such requirement is that the defendant appreciate the nature of the crime to which he is admitting guilt.[14]

,Though it would be preferable if the court were required to ensure that a defendant fully comprehended every element of a subject offense,[15] the Constitution does

[7] *See* 30 Kent B. Smith, Massachusetts Practice § 1236 (2d ed. 1983).

[8] See Aram A. Schvey *8c* Katherine Gates, *Guilty Pleas,* 88 Geo. LJ. 1228,1245-54 (2000) (summarizing legal concepts and providing detailed citations of case law pertaining to the voluntariness of guilty pleas).

[9] *See Brady,* 397 U.S. at 756-57 (holding that defendant who entered guilty plea, perhaps to avoid possible death sentence, did so knowingly and voluntarily).

[10] *See* Grabowski v. Jackson County Pub. Defender's Office, 47 F.3d 1386, 1389 (5th Cir. 1995) (stating that not all pressures on an accused to plead guilty are considered illegal inducements; for example, threatening harsher penalties, including indictment as a habitual offender, are legitimate negotiating tactics).

[11] *See* Bontkowski v. United States, 850 F.2d 306, 313 (7th Cir. 1988) (holding that threats to prosecute a defendant's pregnant wife were not sufficient to render his plea involuntary); United States v. Buckley, 847 F.2d 991, 1000 n.6 (1st Cir. 1988) (stating that a family member threatened with indictment is not sufficient to render a plea involuntary).

[12] *See* Sanchez v. United States, 50 F.3d 1448, 1454-55 (9th Cir. 1995) (holding that the defendant's guilty plea was not involuntary given that the alleged unlawful promises were made by nongovernmental'agents).

[13] *Brady,* 397 U.S. at 750; *see also* Waley v. Johnston, 316 U.S. 101, 104 (1942) (noting that a guilty plea that is the product of coercive law enforcement conduct is inconsistent with due process); United States v. Casallas, 59 F.3d 1173, 1176-78 (11th Cir. 1995) (holding that guilty plea was coerced due to court's participation in plea negotiations).

[14] *See* Smith v. O'Grady, 312 U.S. 329, 334 (1941).

[15] If a defendant is said to possess a true understanding (as opposed to a mere general comprehension) of the nature of the offense, it seems logical that a defendant, when entering a guilty plea, should be aware of all the elements required by law to be proven beyond a reasonable doubt. "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction;

not require such rigidity.[16] Instead, as enunciated in *Henderson v. Morgan,*[17] a demonstrable understanding of only those elements deemed "critical" to a particular offense is essential.[18]

Henderson involved the murder of a woman by a nineteen year-old defendant with "substantially below average intelligence."[19] Though indicted for murder in the first-degree, the defendant ultimately pled guilty to second-degree murder.[20] In a subsequently filed habeas petition, Morgan challenged the voluntariness of his plea, arguing, inter alia, that he was not advised that "intent to cause death was an element of the offense."[21] The Supreme Court agreed, finding that the trial court's failure to inform Morgan of the "critical" element of intent rendered his plea involuntary.[22] To that end, the Court made the following observations:

There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained of second-degree murder was voluntary.

Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. This case is unique because the trial judge found as a fact that the element of intent was not explained to respondent Moreover, respondent's unusually low mental capacity provides a reasonable explanation for counsel's oversight; it also forecloses the conclusion that the error was harmless beyond a reasonable doubt, for it

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nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242 (1968).

[16] *See* LaFave et al., *supra* note 15, at 996-98 (describing generally the nature of the charge requirement).

[17] 426 U.S. 637 (1976).

[18] *Id.* at 647 n.18.

[19] *Id.* at 642. It was noted that the defendant's "functioning I.Q." was "between 68 and 72." *Id.* at 642 n.9.

[20] • *See id.* at 642.

[21] *Id.* at 639.

[22] *Id.* at 647. The Court stated: j

There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required.

Id. at 647 n.18.

lends at least a modicum of credibility to defense counsel's appraisal of the homicide as a manslaughter rather than a murder.[23]

Two notable aspects from *Henderson* thus emerge. First, as noted, a defendant is entitled to notice of only those elements considered "critical" to a particular charge. Second, the Court cited a rather scopic basis upon which this minimal standard might be satisfied. In addition to a defendant's in-court admission, a court may rely upon a host of other circumstantial indicia from which to infer such knowledge. These bases, none of which seemingly require independent defendant affirmation, include defense counsel stipulation to the element, defense counsel representation that the charges had been explained, trial court explication, or, on occasion, mere presumption of defense counsel explanation.

In addition, a defendant must comprehend certain penal consequences associated with a guilty plea. Though a guilty plea invariably produces a myriad of penal consequences, a defendant need only be cognizant of those consequences "directly" associated with the plea.[24] Defined by some courts as an "immediate, and automatic consequence [ ] of the guilty plea,"[25] the concept of a "direct" consequence is, at least in an interpretive sense, imprecise. However, it is fair to say that, at a minimum, a defendant must be informed of the maximum possible penalty as well as the existence of any mandatory minimums.[26] Nevertheless, a court's failure to advise a defendant of a "direct" consequence does not necessarily render a guilty plea infirm.[27]

Given this limitation, a defendant need not understand those penal consequences considered to be merely "collateral" to the plea. For instance, it has been held that a

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[23] *Id.* at 646-47.

[24] *See* Brady v. United States, 397 U.S. 742, 756-57 (1970).

[25] Warren v. Richland County Circuit Court, 223 F.3d 454, 457 (7th Cir. 2000).

[26] This requirement has been adopted in the federal system as well as in many states. *See* Fed. R. Crim. P. 11(c). For additional discussion of the requirements under federal law, see *infra* notes 55-82 and accompanying text; *see also* United States v. Watch, 7 F.3d 422, 428-29 (5th Cir. 1993) (holding that the district court violated Federal Rule of Criminal Procedure Rule 11 by failing to advise defendant of mini

mum mandatory sentence); State v. Coban, 520 So. 2d 40, 42 (Fla. 1988) (finding that

the trial court erred, under Florida law, by failing to advise defendant of minimum mandatory penalty); People v. West, 317 N.W.2d 261j 262 (Mich. Ct App. 1982) (observing that under Michigan law, a trial court must advise a defendant of the maximum sentence and any mandatory minimum); State v. Hendrick, 543 N.W.2d 217,

221 (N.D. 1996) (noting that under North Dakota law, prior to acceptance of a guilty plea, a defendant must be advised of the mandatory minimum penalty, if applicable, and the maximum possible sentence); LaFave et al., *supra* note 15, at 998—99 (providing general discussion of "direct" and "collateral" plea consequences).

[27] *See, e.g.,* United States v. Timmreck, 441 U.S. 780, 783-85 (1979) (holding that the court's failure to inform the respondent of the mandatory special parole term before accepting the guilty plea was merely a formal violation of Rule 11, insufficient to require vacating respondent's sentence). For additional discussion of judicial omissions with respect to Federal Rule of Criminal Procedure Rule 11 requirements, see *infra* notes 79-82, 179-217 and accompanying text.

defendant need not be informed of the possibility of probation revocation,[28] a judge's discretionary authority to impose a consecutive or concurrent sentence,[29] the effect of a guilty plea on good time credits,[30] the loss of civil service employment,[31] the right to vote and unencumbered foreign travel,[32] the possible appearance before a psychiatric panel prior to release on parole,[33] and the possibility of deportation.[34]

Moreover, before a guilty plea can be accepted, the court must be satisfied that the defendant understands the nature of the constitutional rights that he is necessarily waiving.[35] The Supreme Court, in *Boykin v. Alabama,* considered the validity of a guilty plea entered in an Alabama state court, where "[s]o far as the record show[ed], the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court.'*[36] In finding that the petitioner's due process rights were violated, the Court reasoned:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record.[37]

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[28] *See Warren,* 223 F.3d at 457 (holding that trial court was not required to inform defendant of probation revocation possibility).

[29] *See* United States v. Wills, 881 F.2d 823, 827 (9th Cir. 1989) (holding that trial court's discretion to impose either a consecutive or concurrent sentence was not a "direct" consequence of defendant's plea).

[30] fejohnson v. Puckett, 930 F.2d 445, 448 n.2 (5th Cir. 1991) (holding that plea was entered knowingly and voluntarily despite court's failure to inform defendant of the consequences of his plea on his good time credits).

[31] *See* United States v. Crowley, 529 F.2d 1066, 1072 (3d Cir. 1976) (finding that trial court did not abuse its discretion by denying motion to withdraw guilty plea based upon claim that defendant did not foresee, as a consequence of his guilty plea, the loss of his job as a fireman). .

[32] *See* Meaton v. United States, 328 F.2d 379, 380-81 (5th Cir. 1964) (finding that defendant was not entitled to notice of collateral consequences of his plea, such as the loss of civil rights).

[33] See Bargas v. Bums, 179 F.3d 1207, 1216 (9th Cir. 1999) (stating that there is no process violation where the court failed to inform a defendant of collateral consequences of his plea, such as submission to review before a state psychiatric review board to determine parole eligibility).

[34] See United States v. Campbell, 778 F.2d 764, 767 (11th Cir. 1985) (finding that lower court was not required to advise alien defendants of potential deportation).

[35] *See* Boykin v. Alabama, 395 U.S. 238, 243 (1968).

[36] *Id.* at 239. The defendant, who was a twenty-seven-year-old African-American, entered guilty pleas to five counts of robbery. *Id.*

[37] *Id.* at 243 (citations omitted).

In response to *Boykin,* numerous states[38] and the federal government,[39] revised their plea procedures by, inter alia, requiring that courts affirmatively forewarn defendants with respect to such constitutional waivers prior to accepting a guilty plea.[40]

[38] *See, e.g.,* Ind. Code Ann. § 35-35-1-2 (West 1976); La. Code Crim. Proc. Ann. art. 556.1 (West Supp. 2001); Mass. R. Crim. P. 12(c); N.C. Gen. Stat. § 15A-1022 (1999); Or. Rev. Stat. § 135.385 (1999); *see also*LaFave et al., *supranote* 15, at 1000 (noting changes in states' laws).

[39] See Fed. R. Crim. P. 11(c).

[40] Finally, in a limited circumstance, courts are constitutionally required to determine that a factual basis underlies a plea of guilty. In *North Carolina v. Alford,* the Supreme Court held that a trial judge, "[i]n view of the strong factual basis for the plea demonstrated by the State," did not commit constitutional error when it accepted a guilty plea despite the defendant's protestation of his innocence. 400 U.S. 25, 38 (1970).

II. Rule 11 of the Federal Rules of Criminal Procedure

Originally enacted in 1944, Rule 11 of the Federal Rules of Criminal Procedure was rudimentary in context, limited in breadth, and provided little procedural guidance to federal courts with respect to the taking of pleas. It simply provided:

A defendant may plead not guilty, guilty or, with consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.[1]

In 1966, there were a couple of notable, albeit substantively unremarkable, amendments to Rule 11. Presumably implemented with an underlying concern for "fairness" and "equal justice," the contextual vagueness of the addendums arguably undercut its laudable purpose.[2] For example, appended to the rule was a fourth sentence requiring the finding of a factual basis for the plea.[3] Despite the added obligation, however, the courts retained substantial discretion with respect to implementation. The Advisory Committee's notes explain that the court was by no means bound by a defendant's representations as to his criminal conduct:

The court should satisfy itself, by inquiry of the defendant *or the attorney for the government, or by examining the presentence report, or otherwise,* that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g. protect a defendant who is in the position of pleading voluntar-

[1] Fed. R. Crim. P. 11 (1944), *reprinted in* Bender's Federal Practice Manual 539 (Raymond Cannon & Russell E. Newkirk eds., 1948).

[2] See the Federal Rules of Criminal Procedure Rule 11 Advisory Committee's notes (1975 amendments), which provide, in pertinent part:

The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.

Fed R. Crim. P. 11 advisory committee's notes (1975 amendments) (citation omitted).

[3] Amendments to Rules of Criminal Procedure for the U.S. District Courts, 383 U.S. 1095, 1097 (1966 amendments) (providing, in pertinent part, that a "court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea").

ily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.[4]

Thus, a court could find the existence of a factual basis absent any inquiry whatsoever of the defendant with respect to his criminal conduct. In addition, the second sentence of Rule 11 was modified so as to require courts to address defendants personally during the plea colloquy and to ensure the comprehension of a plea's consequences.[5]

The federal response to *Boykin* came in 1975 and "drastically" altered the existing rule.[6] In contrast to the rather general verbiage that characterized the pre-1975 rule, the new version delineated a litany of affirmative judicial obligations designed, primarily, to better ensure the entry of knowing and voluntarily guilty pleas.[7] Now composed of several sections and subsections, perhaps the most notable amendments appeared in subsection (c), which delineated the items and rights that a court was mandated to inform a defendant and to ensure their understanding. It provided:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

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[4] Fed. R. Crim. P. 11 advisory committee's notes (1966 amendments) (emphasis added).

[5] The revised sentence now provided:

> The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Amendments to Rules of Criminal Procedure, 383 U.S. at 1097.

[6] *See* 1A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 171 (3d ed. 1999). For an excellent in-depth discussion of Rule 11, its history, and related issues, see *id.* at §§ 171-178.

[7] The Advisory Committee's notes identify two underlying objectives to the modifications:

> (1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.
>
> (2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejections of a plea agreement

Fed. R. Crim. P. 11 advisory committee's notes (1974 amendments).

that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for pequry or false statement.[8]

The heightened specificity contained in the new rule was seemingly designed to remedy the perceived deficiencies associated with the shortened version.[9] Yet, within the new structure, the courts retained substantial discretion with respect to its implementation. For instance, the Advisory Committee's notes provide that regarding a defendant's comprehension of the nature of the crime:

The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants.[10]

Like the old rule, the 1975 version retained the requirements of personal address by the judiciary and that a plea be deemed voluntary prior to acceptance.[11] The new rule also required that a court be satisfied that the plea was the product of neither force nor threats, and determine whether prior discussions between the government and the defendant and/or his counsel influenced the plea decision.[12]

Subsection (e) was also added, detailing procedures "designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards."[13] Unlike subsection (c), the "safeguards" referenced in subsection (e) were not confined to plea hearing activity, but encompassed pre-plea prosecutorial and judicial conduct. The new subsection, inter alia, recognizes the propriety of plea bargaining[14] and the various plea disposition alternatives (dismissal of charges; non-binding government

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[8] Act ofjuly 31, 1975, Pub. L. No. 94-64, 89 Stat. 370. The amendments added: Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama,* which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Fed. R. Crim. P. 11 advisory committee's notes (1974 amendments) (citation omitted).

[9] *See id.*

[10] *Id.*

[11] *See id.* Subsection (d) currently provides:

Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall- also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

Fed. R. Crim. P. 11(d).

[12] *See id.* .

[13] Fed. R. Crim. P. 11 advisory committee's notes (1974 amendments).

[14] Sa? Fed. R. Crim. P. 11(e)(1).

recommendation for the imposition of a particular sentence; non-binding government agreement not to oppose a defendant's request for a particular sentence; and a binding recommendation that a specific sentence is appropriate);[15] prohibits judicial participation in the negotiation process;[16] requires disclosure by the court, on the record, of the plea agreement in either open court or in camera;[17] authorizes judicial acceptance or rejection of a proffered plea arrangement;[18] and requires a court, if it decides to reject a proffered plea agreement, to notify the defendant in open court or in camera, provide the defendant an opportunity to withdraw his plea, "and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."[19]

The requirement that the trial court satisfy itself that a factual basis exists for the plea was retained under the new version.[20] Like the earlier rule, the court retained the discretion to find a factual basis from a defendant's statements, from those of his attorney or the government attorney, from the presentence report, "or by whatever means is appropriate in a specific case."[21]

Rule 11 underwent additional modification in the 1980s. Though comparatively modest, and sometimes purely technical,[22] there were, nevertheless, some notable reforms. Subsection (c)(1) was altered in 1982[23] by appending "the effect of any special parole term" to the litany of items requiring judicial explication prior to the acceptance

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[15] *See id.*

[16] *See id.*

[17] *See id.* 11(e)(2).

[18] *See id.', see also id.* ll(e)(3)-(4). Subsection (e)(2) further authorized the court to "accept or reject the agreement, or... defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." *Id.* 11(e)(2). This aspect of the rule was amended in 1979 and clarified the court's options with respect to acceptance of the various plea types specified in subsection (e) (1), as well as a defendant's right to withdraw his plea under subsection (e) (1) (B). The amended version provided, in pertinent part:

> If the agreement is of the type specified in subdivision (e) (1) (A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subsection (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.

Id.

[19] *Id.* 11(e)(4).

[20] *See id.* 11(f). Subsection (f) provides: "Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." *Id.*

[21] Fed. R. Crim. P. 11 advisory committee's notes (1974 amendments).

[22] *See id.* (1987 amendments) ("The amendments are purely technical. No substantive change is intended.").

[23] There were also changes to subsection (c)(4) and (c)(5). The subsections were amended to read:

> (4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

of a guilty plea.[24] The phrase "or supervised release" was also added to this list in 1989[25] in response to the promulgation in 1987 of the United States Sentencing Guidelines as part of the 1984 Sentencing Reform Act.[26]

Since a defendant who pleads guilty or nolo contendere necessarily waives his appellate rights with respect to alleged pre-plea constitutional breaches,[27] conditional pleas were added to the list of plea alternatives in subdivision (a) to obviate the necessity of going to trial in order to preserve such appellate claims.[28] Now, a defendant desirous of higher court review, may, under this new subdivision, enter a guilty plea, yet seek appellate relief.[29]

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(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement ...

Fed. R. Crim. P. 11(c)(4)-(5).

[24] *Id.* 11 (c) (1). The Advisory Committee's notes to the amendments explain the purpose underlying the enactment:

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in *Moore v. United States:*

Special parole is a significant penalty... Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

592 F.2d 753, 755 (4th Cir. 1979).

Fed. R. Crim. P. 11 advisory committee's notes (1982 amendments).

[25] Fed. R. Crim. P. 11(c)(1) (1989 amendments).

[26] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211—239, 98 Stat 1837, 1987-2040. The Advisory Committee's notes explain, in pertinent part

The Committee believes that a technical change, adding the words "or supervised release," is necessary to recognize that defendants sentenced under the guideline approach will be concerned about supervised release rather than special parole. The words "special parole" are left in the rule, since the district courts continue to handle pre-guideline cases.

The amendment mandates that the district court inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances. ... By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines.

Fed. R. Crim. P. 11 advisory committee's notes (1989 amendments) (citation omitted).

[27] *See, e.g,,* Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[28] *See* Fed. R. Crim. P. 11 (a) (2).

[29] *See id.* Subsection (a) (2) prorides:

Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in -writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw his plea.

Id.

Also in 1983, an entirely new subsection was added to Rule 11. Enacted to address inadvertent judicial oversight with respect to Rule 11 procedure,[30] subsection (h) allows for certain colloquial omissions to be deemed harmless.[31]

Finally, in response to the "increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights,"[32] subsection (c)(6) was added in 1999 which requires courts to inform a defendant of the "terms of any provision in a plea agreement waiving the right to appeal or to collaterally attack the sentence."[33]

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[30] *See* Fed. R. Crim. P. 11(h) advisory committee's notes (1983 amendments) ("An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.").

[31] The new rule provides:

> (h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.
>
> Fed. R. Crim. P. 11(h).

[32] Fed. R. Crim. P. 11(c)(6) advisory committee's notes (1999 amendments).

[33] Fed. R. Crim. P. 11(c)(6).

III. Theodore Kaczynski's Plea Colloquy

As noted, it is beyond the scope of this Article to critique the merits of the *Kaczynski* petition. However, an examination of the underlying plea colloquy is highly instructive, for it is representative of accepted Rule 11 practice and is, therefore, illustrative of the inadequacies of the current structure. Accordingly, referenced below are selective excerpts.

COURT: I'm informed that you wish to change the plea you have previously entered to a plea of guilty. Is that correct?

KACZYNSKI: Yes, Your Honor.[1]

COURT: Your case in the United States District Court, District of New Jersey, cannot be handled in this court unless you wish to plead guilty or nolo contendere. Do you understand that if you allow that case to be handled in this court, you are agreeing to plea [sic] guilty or nolo contendere, waive proceedings in the United States District Court for the District of New Jersey in which the crimes were allegedly committed, and you're allowing those crimes to be proceeded against you in this court? Do you understand that?

KACZYNSKI: Yes, sir. I understand that.[2]

COURT: Are you entering this plea of guilty voluntarily because it is what you tvant to do?

KACZYNSKI: Yes, Your Honor.

COURT: I'm now going to have the Government explain the terms of your plea agreement with the Government.

LAPHAM [Government attorney]:0Your Honor, the terms of the agreement are as follows: the defendant agrees to plead guilty to all outstanding charges in Sacramento and in New Jersey. There will be a total of 13 counts. In return for a plea of guilty—that is an unconditional plea of guilty.

In return, the Government agrees to withdraw the notice of intent to seek the death penalty. And the defendant understands that under those circumstances, he would be sentenced to a mandatory term of life imprisonment without possibility of release.

[1] Pretrial Transcript, United States v. Kaczynski, No. C-S-96-259GEB, 1998 WL 22017, at *16 (E.D. Cal. Jan. 22, 1998).

[2] *Id.* at *16*- 17.

There are also other conditions regarding payment of restitution. The defendant understands that restitution is required under the relevant statutes, as well as agreements as to the disgorgement of future earnings, if any, that are obtained by the defendant or on his behalf as a result of any writings, interviews, dr access to the defendant in the future.

I think that states the essential terms of the plea agreement.[3]

COURT: Are those the terms of your plea agreement with the Government as you understand them?

KACZYNSKI: Yes, Your Honor.[4]

COURT: Has anyone attempted to any way to force or threaten you to plead guilty in this case?

KACZYNSKI: No, Your Honor.[5]

COURT: If economic loss has been suffered by a victim as a result of this criminal conduct, the Court, in accordance with the Sentencing Reform Act, shall order you to make restitution unless the Court finds that, under the statute, restitution is not appropriate in this case.

You understand that is a consequence of your plea, sir? KACZYNSKI: Yes, Your Honor. I understand that[6]

COURT: Do you understand that parole has been abolished and that if you plead guilty, you will spend the rest of your life in prison and you will never be released or paroled?

KACZYNSKI: I understand that, Your Honor.[7]

COURT: Do you understand that you have a right to plead not guilty to any offense charged against you and to persist in that plea, that you would then have the right to a trial by jury, during which you would also have the right to the assistance of counsel for your defense, the right to assist in the selection of that jury, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to the issuance of subpoenas or compulsory process to compel the attendance of witnesses to testify in your defense, the right to require the Government to prove your guilt beyond a reasonable doubt, the right to appeal this conviction and your sentence and any rulings made by the district court? Do you understand you have all those rights?

KACZYNSKI: I understand that, Your Honor.[8]

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[3] *Id.* at *19.
[4] *Id.* at *19*-20.
[5] *Id.* at *20.
[6] *Id.* at *21.
[7] *Id.* at *22.
[8] *Id.*

COURT: I'm now going to have the Government to state each of the essential elements of the offenses in the indictment so that I can be assured that the defendant understands the charges.

LAPHAM: Your Honor, there are three types of offenses in the two indictments.

There are several counts of transportation of an explosive device with intent to kill or injure. With respect to that charge, the Government would be required to prove, number one, that transportation in interstate commerce; two, of an explosive; three, with the knowledge or intent that it would be used to kill, injure or intimidate any individual.

With respect to the crime of mailing explosive device with intent to kill or injure, the Government would be required to prove, one, that the defendant knowingly deposited for mailing or knowingly caused to be delivered by mail a device or composition that could ignite or explode; and, two, that the defendant acted with the intent to kill or injure another.

And with respect to the third type of offense charged in the two indictments, using a destructive device in relation to a crime of violence, the Government would be required to prove beyond a reasonable doubt that the defendant used or carried a bomb and that he did so during and in relation to a crime of violence, that crime of violence being the use of that bomb.

COURT; Mr. Kaczynski, do you understand those charges?

KACZYNSKI: Yes, Your Honor. I understand them.

COURT: I'm now going to have the Government's attorney to make a representation concerning the facts the Government would be prepared to prove at trial. Again, Mr. Kaczynski, I want you to listen to die factual representation made by the Government's attorney, because after it's made, I will ask you the question, "Do you agree with the factual representation just made by the Government's attorney?" And I want you to be in a position to respond to the question.[9]

Thereafter, the government's attorney provided a detailed factual basis that comprised several transcript pages. In response to periodic inquiry by the court, Kaczynski responded that he agreed with the government's factual representations.[10]

A. Leading Questions, Compound Questions, and the Rule 11 Process

Upon initial examination, it would appear that the *Kaczynski* court fully complied Avith the requirements mandated by Rule 11. Indeed, the court, inter alia, addressed Kaczynski personally in open court, informed him of the nature of the charge, the possible penalties, and the sentencing guideline features, as well as the forfeiture of

[9] *Id.* at *22*-23.

[10] *See id.* at *23*-37.

associated constitutional rights and appellate privileges.[11] Moreover, the court found that the plea was entered voluntarily, was not induced by force or threats, and that there was a supporting factual basis.[12]

Yet, the *Kaczynski* plea colloquy typifies the inadequacies of the Rule 11 statute. It epitomizes a process inundated with evidential and procedural inconsistencies, with a design to enhance judicial economy at the expense of individual due process. To see this, I begin with a review of certain evidentiary principles.

Rule 611(c) of the Federal Rules of Evidence provides:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on crossexamination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.[13]

In a sense, virtually all questions can be considered leading. Questions such as, "What happened next?" or "Where did you go?," if nothing else, lead the witness to the next aspect of the story they are recounting. But only certain types of leading questions are prohibited and only in selective contexts. It is commonly accepted that a question is leading if "it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory."[14] Whether through improper phrasing, an inflective tone, or proscribed nonverbal activity,[15] a question can be deemed leading, and potentially objectionable, if the witness "would get the impression that the questioner desired one answer rather than another."[1617]

As noted earlier, whether leading questions are permitted or proscribed is dependent upon context. Indeed, the restrictive and permissive distinctions identified in Rule 611" are not the byproduct of arbitrary classifications, but stem from sound rationales. With respect to direct examination, concerns about witness susceptibility underlie the general prohibition. The empathy typically existent between the direct examiner and witness necessarily subjects the witness to the leads of the examiner.[18] Their shared litigative interests heighten the risk that a witness, rather than testify of his own accord,

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[11] For discussion of the court colloquy with respect to the waiver of appellate privileges during the *Kaczynski* plea hearing, see *infra* notes 160-78 and accompanying text

[12] Pretrial Transcript, *Kaczynski,* 1998 WL 22017, at *37.

[13] Fed. R. Evid. 611(c).

[14] United States v. Durham, 319 F.2d 590, 592 (4th Cir. 1963).

[15] *See* 1 Michael H. Graham, Handbook of Federal Evidence § 611.8, at 827-28 (4th ed. 1996); 3JackB. Weinstein et al., Weinstein's Evidence 5 611 [05], at 611-77 to -78; *see also* Ellis v. City of Chicago, 667 F.2d 606, 612 (7th Cir. 1981) (noting that restrictions are "designed to guard against the risk of improper suggestion inherent in examining friendly witnesses through the use of leading questions").

[16] McCormick on Evidence § 6 (John W. Strong ed., 5th ed. 1999).

[17] Fed. R. Evid. 611(c) advisory committee's notes.

[18] *See id.*

will simply defer to the leading or suggestive questions posed by the examiner.[19] As noted by Professor Michael H. Graham:

Leading questions are considered harmful for three reasons: First, they may invoke in the witness a "false memory" of events, to the end that his testimony will not reflect what he actually saw or remembers.

Second, they may induce the witness to lessen efforts to relate what he actually remembers, in favor of acquiescence in the examiner's suggested version of events. He might do so because he is ill at ease in the setting of the courtroom (which is to him at once unfamiliar, formal, public, and intimidating), because he is more accustomed to the conventions of polite conversation where imprecision is often inconsequential and not the occasion for correction or dispute, because he does not understand the issues at stake in the suit, or perhaps because he hopes to speed the process along.

Third, they may distract the witness from important detail by directing his attention only to aspects of his story which the questioner considers favorable.[20]

In contrast, the concerns that underlie Rule 611's delimiting language are generally inapplicable to cross-examination.[21] The litigative discord that characterizes most cross-examining relationships renders it unlikely that a witness will be susceptible to the leads of the examiner. Unlike direct examination, the witness during cross-examination regards the examiner as an adversary—as an individual who seeks to impede his litigative interests.[22]

These rules, however, are not inflexibly applied, but are subject to exceptions. According to the Advisory Committee's notes for Rule 611,[23] on direct examination, it is permissible to pose leading questions with respect to uncontested preliminary matters,[24] to either a minor[25] or adult witness "with communication problems,"[26] to "hostile,

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[19] *See id.*

[20] 1 Graham, *supra* note 97, § 611.8, at 827 n.4 (quoting G. Stephen Denroche, *Leading Questions,* 6 Crim. L.Q. 21, 22 (1963-1964)).

[21] *See* David P. Leonard, *Appellate Review of Evidentiary Rulings, "7Q* N.G. L. Rev. 1155, 1183 (1992) (stating that concerns of witness bias in favor of the examiner, witness manipulation by the examiner, and witness assent to the examiner's questions are typically not present during cross examination).

[22] *See* 81 Am. Jur. 2d *Witnesses* § 853 (1992) ("On the one hand, it has been pointed out that the reason for the rule permitting leading questions to an adverse witness on cross-examination is the assumed hostility of such witness to the crossexaminer's cause.").

[23] Fed. R. Evid. 611(c) advisory committee's notes (1972 proposed rules).

[24] *See* United States v. Costa, 691 F.2d 1358, 1363 (11th Cir. 1982) (finding that the district court properly permitted the government to ask witness leading questions since many of the questions concerned preliminary matters).

[25] *See* United States v. Archdale, 229 F.3d 861, 866 (9th Cir. 2000) (holding that leading questions asked of child witness who was haring difficulty testifying in sexual abuse case was proper).

[26] United States v. Stelivan, 125 F.3d 603, 608 (8th Cir. 1997) (finding that district court properly allowed government to ask leading questions of adult witness who was "inarticulate and evasive").

unwilling, or biased" witnesses,[27] and to witnesses with failed memories.[28] Similarly, if a witness on cross-examination is deemed friendly, then leading questions may, in the court's discretion, be disallowed.[29]

Moreover, pursuant to Rule 611 (a), a court is empowered to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time . . . ."[30] Thus, it is within a court's discretion to prohibit modes of examination it deems unacceptable.[31] "Compound questions" are such an example. Defined as a query that poses two or more questions,[32] this mode of interrogation is objectionable on direct and cross-examination given its inherent ambiguity. For example, questions that ask, "Did the defendant approach your teller station and did you get a good look at him?," or "Did the defendant confess and did he do so at the police station?," are compound because they ask more than one question.[33] Moreover, a "yes" or "no" response to such a question is confusing since it will be unclear as to what aspect of the question the answer pertained.[34]

United States v. Watson[35] is illustrative of the problems associated with compound questioning. Talib Watson was convicted in the United States District Court for the District of Columbia of an array of narcotic related offenses arising out of events that occurred on September 27, 1995 in the northeastern quadrant of Washington, D.C.[36] At trial, it was critical for the prosecution to establish a connection between Watson and a large quantity of cocaine base and heroin that was found in a Subaru automobile.[37] Given that he neither owned the vehicle nor was observed therein, the prosecution

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[27] United States v. Olivo, 69 F.3d 1057, 1065 (10th Cir. 1995) (holding that district court did not err by allowing government attorney to ask leading questions of its primary witness who the court deemed to be "hostile").

[28] See United States v. Bodey, 547 F.2d 1383,1385-87 (9th Cir. 1977) (permitting defense counsel to ask leading questions of witness with alleged memory difficulties).

[29] *See* Alpha Display Paging v. Motorola Commun. & Elecs., Inc., 867 F.2d 1168, 1171 (8th Cir. 1989) (holding that district court did not abuse its discretion in allowing Motorola to ask leading questions during its cross-examination of another Motorola employee who had been called to testify by Alpha).

[30] Fed. R. Evid. 611(a).

[31] *See* Robert E. Jones et al., California Practice Guide: Federal Civil Trials & Evidence *j[9:45 (1999) (citing the following as objectionable question types, "including questions that: are leading and suggestive . . .; call for inadmissible opinions or conclusions . . .; are compound ...; call for cumulative testimony ...; [and] call for narrative answers ...").

[32] *See* 1 Graham, *supra* note 97, § 611.16.

[33] *See id.*

[34] *See id.; see also* Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 623-24 (7th Cir. 2000) (stating that a compound question can makef a simple "yes" or "no" answer ambiguous because it remains unclear which statement or statements were answered).

[35] 171 F.3d 695 (D.C. Cir. 1999). For a case comment on Watson, see generally Stephen A. Saltzburg, *The Unusual Harm from a Compound Question,* 14 Crim. Just. 40 (1999).

[36] *See id.*

[37] *Watson,* 171 F.3d at 697.

proffered an inferential connection.[38] According to the prosecution, a search subsequent to Watson's arrest uncovered a key to the Subaru, which they asserted was registered to Tyra Jackson, Watson's alleged girlfriend.[39] In an effort to establish their relationship, the following colloquy occurred during cross-examination between the prosecutor and Raymond Thomas, a defense witness:

Prosecutor: Mr. Thomas, you believe that you know Watson's girlfriend, Tyra Jackson, right?

Thomas: I never testified that I knew her or not.

Prosecutor: You believe that you may have met her once or twice, right?

Thomas: Maybe.[40]

Over defense objection, the government was permitted to argue during summation that the evidence established that Tyra Jackson was Watson's girlfriend.[41] During closing, the prosecutor stated:

We have the registration to the car, the Subaru. I[t] is in the name of Tyra Jackson... The only evidence we have about Tyra Jackson is Thomas's answer, one of the defense witnesses, "Do you think you met Tyra Jackson?" "Well, I think I met her once or twice. I think I've met Watson's girlfriend, Tyra Jackson once or twice." Tyra Jackson's car, the registration to the Subaru.[42] .

On appeal, Watson sought a new trial arguing, inter alia, that "the prosecutor's subsequent misstatement of the evidence during closing argument substantially prejudiced his right to a fair trial."[43] The D,C. Circuit agreed, finding that the government's use of a compound question, coupled with the prosecutor's subsequent misstatements during summation, required reversal.[44] The court noted:

Moreover, the prosecutor's question reflects his understanding that connecting Watson to the drugs in the Subaru was critical to the government's distribution case. Yet at the time he cross-examined Raymond Thomas, the prosecutor had yet to establish that the owner of the Subaru was Watson's girlfriend. The lack of clarity in Raymond Thomas's testimony stemmed directly from the prosecutor's use of a compound question and his assumption of a key fact not in evidence.[45]

As referenced above, the *Kaczynski* court often utilized leading and/or compound questioning during its plea colloquy and based its finding that the plea was entered knowingly and voluntarily on a series of mechanical and sometimes monosyllabic responses. Though the Federal Rules Of Evidence are seemingly inapplicable to federal

[38] *See id.*
[39] *See id.* at 697-99.
[40] *Id.* at 699.
[41] *Id.*
[42] *Id.* at 699.
[43] *Id.* at 698.
[44] *Id.* at 699-702.
[45] *Id.* at 701.

plea hearings,[46] the dangers associated with such questioning modes in this context are just as real. To see this, it is important to recall the rationales underlying the rules.

When a defendant decides to enter into a plea agreement, the defendant has presumably determined that it is in his optimum interest to accept the proffered plea arrangement. In other words, he has reasoned that acceptance of the plea agreement, as he understands it, is preferable to an alternative form of resolution (e.g., seeking dismissal of the case, an alternative plea arrangement, or going to trial). Given that most plea agreements are non-binding,[47] and it is within a court's discretion whether to accept the proffered arrangement,[48] the defendant has every incentive to curry favor with the court. On the one hand, he seeks the court's acceptance of the agreement and the imposition of the negotiated sentencing recommendation. Yet, his position is precarious, subject to an array of external factors (e.g., judicial mood, temperament, and prejudices, legal and factual findings, judicial sentencing philosophy, etc.). Indeed, this vulnerability to judicial influence is reflected in the Advisory Committee's notes to Rule 11(e) (discussing judicial involvement in plea negotiations):

The unequal positions of *the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison,* [at] once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. *His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed* [in the proposed plea agreement] is present whether referred to or not.[49]

Given this susceptibility, a defendant when pleading will display a deferential demeanor. He will seek to placate judicial concerns with respect to his conduct; his overall deportment will be respectful. He will exhibit remorse (whether real or feigned), as well as his positive personal traits (e.g., he has a family, is working, etc.), and his decorum will be polite and courteous. In short, he will seek to positively impress the court in order to attain the hoped-for bargain.

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[46] Federal Rule of Evidence 1101 (b) provides that its provisions are applicable to, inter alia, "criminal cases and proceedings." Fed. R. Evid. 1101(b). However, Federal Rule of Evidence 1101(d) further lists those instances where the rules are inapplicable:

(1) Preliminary questions of fact—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury—Proceedings before grand juries.

(3) Miscellaneous proceedings—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

Id. 1101(d).

[47] *See* Olivia W. Karlin & Carlton F. Gunn, *A Response to the Reno Bluesheet: Prosecutors Should Bargain About Guideline Factors and Use Binding Pleas,* 6 Fed. Sentencing Rep. 315, 316 (1994) (observing the infrequent employment of binding Rule 11(e)(1)(C) plea agreements in their jurisdiction and advocating greater employment of such agreements).

[48] *See* Fed. R. Crim. P. ll(e)(3)-(4); *see also supra* note 67 and accompanying text.

[49] See Fed. R. Crim. P. 11(e) advisory committee's notes (1974 amendments) (emphasis added).

Indeed, the judge-defendant relationship within this context is akin to the direct examiner-witness relationship. Both associations are characterized by "witnesses"[50] who are prone to the leads of their examiners. Neither is motivated to challenge the mode or direction of the question. Nor is there any incentive to contest an examiner's contentions. Instead, the "witnesses" in both instances are deferential to their examiners. Each "witness" positively considers their examiner as a conduit to achieving their litigative objective. As with the direct examination witness, the defendant, rather than viewing the examinerjudge as hostile to his interests, seeks to curry his favor. Such incentive renders him susceptible to the court's leads, without similar impetus to challenge improperly phrased questions.

This runs counter to the impetus of the witness on cross-examination, who is generally disinclined to readily accept his examiner's assertions. The competing interests that characterize most crossexamining relationships are simply not' present in the plea hearing scenario. The defendant, seeking the benefit of the proffered bargain, is dependent upon the court for its achievement. Accordingly, unlike the cross-examination witness whose interests are furthered through confrontation, the defendant's litigative interests are furthered through judicial appeasement.[51]

Illustrative is *Godinez, v. Moran.*[52] At issue was whether the competency standard applicable for standing trial was the same for pleading guilty and waiving one's right to counsel.[53] Having been charged with three counts of capital murder, defendant Richard Moran initially entered a plea of not guilty.[54] Thereafter, Moran was evaluated by psychiatrists who found him competent to stand trial.[55] After the State of Nevada announced its intention to seek a death sentence, and after the passage of approximately two and a half months since the psychiatric evaluations, Moran moved the court to discharge his counsel and to enter a guilty plea.[56] Relying heavily upon prepared psychiatric reports, and after some additional questioning, the trial court

[50] The term "witnesses" in this context is intended to encompass both the defendant in the guilty plea hearing and a witness during direct examination at trial.

[51] Moreover, with respect to compound questioning, there is no reason to presume that such questioning during a plea colloquy are any less confusing or would render any more intelligible responses than in a trial setting. The inherent ambiguity attendant to such queries and their accompanying responses render such questions equally objectionable in this context.

[52] 509 U.S. 389 (1993).

[53] *See id.* at 391. The Court stated that there is no reason for the competency standard for pleading guilty or waiving the right to counsel to be higher than that for standing trial since the decision to plead guilty, though profound, is no more complicated than the sum total of decisions that a defendant may have to make during the course of a trial, such as whether to testify, whether to waive a jury trial, and whether to cross examine witnesses for the prosecution. *See id.* at 398-99.

[54] *Id.*

[55] *See id.*

[56] *See id.* at 391—92.

deemed Moran competent to waive his counsel right and to enter a plea of guilty.[57] Moran's guilty plea was then accepted, and he was later sentenced to death.[58]

After a subsequently submitted habeas petition (challenging his competence to have waived counsel and enter a guilty plea) was denied in federal district court, the Ninth Circuit reversed,[59] finding that the lower court had applied an incorrect standard in determining Moran's competency.[60] In its opinion, the Ninth Circuit made the following pertinent observations:

On the day that Richard Moran discharged his counsel and changed his pleas, he was taking four different kinds of drugs. When the state judge asked Moran if he was taking drugs, he replied that he was on medication. The state judge inquired no further on this issue. *The court accepted Moran's waiver of counsel and pleas of guilty, which Moran communicated in a series of monosyllabic responses to leading questions from the court about his legal rights and the charged offenses.*[61]

In Moran's case, there was substantial evidence available at the time he pled guilty to trigger a good faith doubt about his competency to waive constitutional rights. Moran had attempted suicide only a few months before his plea hearing. In addition, Moran stated at the plea hearing that he wanted to fire his attorney to ensure that no mitigating evidence would be presented on his behalf at sentencing.

The transcript of the plea hearing shows that virtually all of Moran's responses to the. court's questions were monosyllabic.[62]

Though the United States Supreme Court later reversed the Ninth Circuit with respect to the competency standard,[63] Justices Blackmun and Stevens, in their dissent, eloquently, and in considerable depth, expressed the concerns shared by the Ninth Circuit regarding the mechanical nature of Moran's plea colloquy.[64] The dissenters were

[57] *See id.* at 392.

[58] *Id.* at 392-93. The Nevada Supreme Court later affirmed the convictions for two of the murders, but reversed his death sentence for the third murder (his ex-wife) and imposed a sentence of life without the possibility of parole. *See id.* at 393.

[59] *Id.* In his petition before the Ninth Circuit, Moran argued that he was "not legally competent to make a voluntary, knowing, and intelligent waiver of constitutional rights at the time he discharged his counsel and changed his pleas to guilty." Moran v. Godinez, 972 F.2d 263, 264 (9th Cir. 1992).

[60] *See Moran,* 972 F.2d at 266-67. Regarding the applicable standard of competency, the Ninth Circuit held:

> The legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights. A defendant is competent to waive counsel or plead guilty only if he has the capacity for "reasoned choice" among the alternatives available to him. By contrast, a defendant is competent to stand trial if he merely has a rational and factual understanding of the proceedings and is capable of assisting his counsel. Competency to waive constitutional rights requires a higher level of mental functioning than that required to stand trial.

Id. at 266 (citations omitted).

[61] *Id.* at 264 (emphasis added).

[62] *Id.* at 265 (emphasis added) (footnote and citation omitted).

[63] *See Godinez,* 509 U.S. at 397-99 (finding that the competency standard for waiving counsel and pleading guilty was identical to the standard for standing trial).

[64] *See id.* at 409-17.

skeptical that the mode of questioning—which included both leading and compound queries—was truly probative of Moran's competence to stand trial, waive his right to counsel, and enter a guilty plea.[65]

Disregarding the mounting evidence of Moran's disturbed mental state, the trial judge accepted Moran's waiver of counsel and guilty pleas *after posing a series of routine questions regarding his understanding of his legal rights and the offenses, to which Moran gave largely monosyllabic answers. In a string of affirmative responses, Moran purported to acknowledge that he knew the import of waiving his constitutional rights, that he understood the charges against him, and that he was, in fact, guilty of those charges.* One part of this exchange, however, highlights the mechanical character of Moran's answers to the questions. When the trial judge asked him whether he killed his ex-wife "deliberately, with premeditation and malice aforethought," Moran unexpectedly responded: "No. I didn't do it—I mean, I wasn't looking to kill her, but she ended up dead." Instead of probing further, the trial judge simply repeated the questions, inquiring again whether Moran had acted deliberately. Once again, Moran replied: "I don't know. I mean, I don't know what you mean by deliberately. I mean, I pulled the trigger on purpose, but I didn't plan on doing it; you know what I mean?" Ignoring the ambiguity of Moran's responses, the trial judge reframed the question to elicit an affirmative ansiver, stating: "Well, I've previously explained to you what is meant by deliberation and premeditation. Deliberate means that you arrived at or determined as a result of careful thought and weighing the consideration for and against the proposed action. Did you do that?" This time, Moran responded: 'Yes."

> It was only after prodding Moran through the plea colloquy in this manner that the trial judge concluded that he was competent to stand trial and that he voluntarily and intelligently had waived his right to counsel. Accordingly, Moran was allowed to plead guilty . . . .[66]

[65] *See id.* at 409-12.
[66] *Id.* at 411-12 (citations omitted) (emphasis added).

IV. Racial/Ethnic Characteristics and Economic Considerations

The perilousness of the Rule 11 process is even more conspicuous when viewed in light of the racial, ethnic, and educational backgrounds of the offender populace, the frequency that the plea mechanism is invoked, as well as the financial and professional disincentives associated with indigent representation. According to United States Department of Justice statistics, among the federally convicted in 1998, the vast majority of defendants (93%) disposed of their cases

by pleading guilty.[1] In addition, more than half of the defendants that pled guilty in 1991 had appointed counsel,[2] a disproportionate percentage were either African American or Hispanic, and over two- thirds had no more than a high school education.[3] These figures depict more than merely a federal criminal system heavily dependent upon a facile plea structure. It portrays a plea process that compromises individual due process often at the expense of die nation's least fortunate. '

Nor are the inadequacies associated with the Rule 11 process appreciably mitigated by the presence of appointed counsel during plea negotiations.[4] Consider the following. An attorney appointed to represent an indigent defendant in the federal system is authorized to receive up to $75 per hour for time spent on a case, subject to a maximum allowance.[5] This fee arrangement, however, is not only inadequate to cover

[1] *Compendium of FederalJustice Statistics, 1998,* in U.S. Dep't of Justice, Bureau of Justice Statistics 51, 54 (2000) (observing that of the 60,598 defendants that were convicted during 1998, 56,896 pled guilty) [hereinafter *Compendium of Federal Justice Statistics, 1998\.*

[2] Steven K. Smith & Carol J. DeFrances, *Indigent Defense, in* U.S. Dep't of Justice, Bureau of Justice Statistics 3 (1996) (observing that in 1991 76% of defendants in state court had appointed counsel, and 54% had appointed counsel in the federal system). Moreover, among African-American federal inmates, in 1991 33% had retained counsel, while 64% had counsel appointed by the court. *See id.* Comparatively, 49% of white federal defendants retained counsel, while 48% had counsel appointed. *See id.*

[3] In 1998, among cases concluded by United States Attorneys, 67% of all convicted defendants were white, 27.7% were black, and 5.3% had their race classified as "other." *See Compendium of Federal Justice Statistics, 1998, supra* note 149, at 57. With respect to ethnicity, 36.9% of convicted defendants were Hispanic and 63.1% were non-Hispanic. *See id.* Finally, regarding education, 43.3% of convicted offenders had not graduated from high school, 30.7% were high school graduates, 18.7% had some college, and only 7.3% were college graduates. *See id.*

[4] *See* Smith *Sc* DeFrances,- *supra* note 150 and accompanying text (noting the majority of federal convicts, especially African-American defendants, have appointed counsel).

[5] 18 U.S.C. § 3006A(d) (1994). Subsection (d)(2) provides, in pertinent part:

basic expenses generally associated with a given case,[6] but it pales when compared to the financial return typically incurred with retained clients who are tendering a much higher fee. Thus, irrespective of the litigative merits of a particular matter, the full litigation of indigent cases is plainly discouraged by the federal fee structure. Instead, economic considerations encourage the quick settlement of indigent cases in order to expend greater energy upon those cases that yield a greater economic return.[7]

Moreover, reputation incentives do not offset these economic influences. To the extent that premature and/or ill-advised plea decisions adversely impact an attorney's professional reputation, such costs, to the extent they can be measured, are minimal, especially in light of the economic interest conflicts discussed above. As stated by Professor Stephen J. Schulhofer in the context of plea negotiation:

In the market for appointed counsel, there is essentially no searching and thus little to be gained by a reputation for effective plea negotiation. To make matters worse, fees are usually uniform for all attorneys appointed in a given court. Not only does an impressive reputation for tough bargaining fail to promise more appointments, but the appointed attorney's hourly rate is independent of reputation. Indeed, because the fee schedule is uniform, economic theory predicts that the more favorable an attorney's reputation (and hence the higher his free-market earning power), the *less* likely he is to accept court appointments. To the extent that reputations for effective bargaining can be developed and communicated to prospective clients, the effective bargainers will tend to be underrepresented in the pool of attorneys who provide indigent criminal defense.

Positive reputation incentives are never wholly absent, in plea bargaining any more than elsewhere in life. But overall those incentives are much too diluted to offset the immediate financial considerations that create an acute divergence of interest between attorney and client. Reputation incentives are thus bound to operate much less effectively at the margin in plea bargaining that they do at trial, where effort and skill

For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $3,500 for each attorney in a case in which one or more felonies are charged, and $1,000 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney .. . shall not exceed $2,500 for each attorney in each court.

Id. § 3006A(d)(2)

It should be noted that pursuant to subsection (d)(3), these maximum figures may, in the court's discretion, be waived in certain instances. *See id.* § 3006A(d) (3).

[6] *See* Stephen J. Schulhofer, *Criminal justice Discretion as a Regulatory System,* 17 J. Legal Stud. 43, 55-56 (1988) (stating that the inadequate compensation for court- appointed attorneys in the federal system creates dangerous incentives for the lawyer to settle the case).

[7] *See id.* Schulhofer adds that "[t]he economic theory of agency costs provides powerful reasons for predicting that settlements will occur in cases that a reasonably well-counseled defendant would prefer to see tried." *Id.* at 56.

are openly on display and where favorable impressions are crucial to any of the career opportunities that an attorney may aspire to pursue.[8]

While such financial disincentives exist with respect to privately- appointed counsel, these economic influences obviously do not identically impact the federally-employed public defender.[9] Nevertheless, like private sector counsel, public defenders are similarly subjected to conflicting interests that necessarily compromise indigent representation. Case load concerns—attributable, in part, to limited office resources, coupled with individual retentive, promotional, and salary considerations—-will often conflict with the litigative interests of the clients they represent. Accordingly, plea deals will often be pursued in order to promote these organizational and/or individual objectives.[10]

When considering this data and the above-described incentives, it is critical to bear certain things in mind. The plea hearing is the principal oversight mechanism by which to assess an individual's knowledge and voluntariness with respect to a proffered plea arrangement. When the terms and litigative consequences of a proposed plea arrangement are discussed with the client, neither the judge, nor the prosecutor, nor any independent arbiter are present. No other party can, therefore, attest to counsel's proper explication of the agreement's terms, its penal and litigative consequences, or the defendant's comprehension or voluntariness. Instead, reliance is placed almost entirely upon the plea hearing to make these assessments. However, with a plea structure ripe with methodological inconsistencies, and, the various financial and professional disincentives attendant to indigent representation, it is improper to merely assume, without more, that either process adequately protects individual due process. The representative disincentives not only encourage premature case reso-

lutions, but also discourage the full explication of the litany of items and consequences delineated in Rule 11. Simply put, "time is money."[11] The disincentives associated with indigent representation compromise both the full and fair pursuit of just litigative consequences, as well as the time expended explaining the terms and consequences of a proffered plea arrangement. And the Rule 11 mandates serve as an inadequate check upon this explicative process.

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[8] *Id.* at 60.

[9] *See* Smith & DeFrances, *supra* note 150, at 2 ("The Federal justice system provides indigent defense to eligible defendants through the Federal Defender Services, community defender organizations, and private attorneys as established by the Criminal Justice Act of 1964, as amended.").

[10] Professor Stephen J. Schulhofer observes:

> Within his office, defenders interested in peer approval, promotion, salary increases, or simply job retention will need to respect the priority on rapid case disposition by obtaining plea agreements whenever possible. Given limited resources, such attorneys might make rational opportunity cost calculations. Monitoring problems aside, they presumably will direct their effort to cases in which it will do the most good. But even under these assumptions, the guilty plea recommendation they make in a particular case is not necessarily in the individual interest of that client

See Schulhofer, *supra* note 154, at 54.

[11] Benjamin Franklin, *Advice to a Young Tradesman (1748), reprinted in* The Oxford Dictionary of Quotations 218 (3d ed. 1979).

V. Aggravating Circumstances

A. The Waiver of Appellate Bights

The prevalence of appellate waiver provisions in federal plea agreements[1] severely, and unjustly, restricts a defendant's ability to contest plea and/or sentencing determinations.[2] A mere perfunctory oral recitation of this waiver consequence is all that is required by Rule ll.[3] Thus, it is tenable to surmise that most defendants summarily waive their appellate rights[4] with respect to plea and/or sentencing matters without an adequate comprehension of the impact of the waiver. Not atypical is the appellate waiver provision in the Kaczynski plea agreement, which rather summarily provided:

Waiver of Appeal Rights: The defendant agrees to waive all rights to appeal this plea and sentence including any legal rulings made by the district court.[5]

Moreover, during the plea hearing, there was only a cursory dialogue regarding the aforementioned waiver provision:

COURT: Do you understand that by entering into the plea agreement you have entered with the Government, you will have waived or given up your right to appeal all or any part of your plea of guilty and anything else that occurs during this conviction hearing and anything that occurs during your sentencing hearing?

KACZYNSKI: Yes, Your Honor.[6]

COURT: Do you farther understand that if you plead guilty, you will waive right to appeal any legal rulings made by the district court? KACZYNSKI: I understand that, Your Honor.[7]

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[1] *See* John L. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals,* 10 Fed. Sentencing Rep. 209, 209 (1998) (reproducing memorandum, dated October 4, 1995 from Assistant Attorney General John C. Keeney encouraging United States Attorneys to employ appellate waiver language in their plea agreements).

[2] *See* Fed. R. Crim. P. 11(h) ("Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded."); *see also supra* notes 81-82 and accompanying text (observing that due to the prevalence of such provisions in federal plea agreements, subsection (c)(6) was appended to Rule 11, which requires courts to inform defendants of such waiver clauses).

[3] *See* Fed. R. Crim. P. 11(h).

[4] Stejones v. Barnes, 463 U.S. 745, 751 (1983) (affirming that the right to appeal is not constitutionally mandated).

[5] Memorandum of Plea Agreement, United States v. Kaczynski, No. CR-S-96-259GEB, 1998 WL 27872, at *4 (E.D. Cal. Jan. 22, 1998).

[6] *Id.* at *21*-22.

[7] Id. at *22.

Such provisions, however, have been upheld by every circuit that has considered their validity.[8] Though the issue remains unresolved within the District of Columbia Circuit, two District of Columbia district court cases have refused to enforce plea agreements containing appellate waiver provisions.[9] In *United States v. Raynor,* the following waiver provision was at issue:

Your client understands and acknowledges that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed after a plea of guilty or trial. After consultation with counsel, and in exchange for the concessions made by this Office in this plea agreement, your client voluntarily and knowingly waives the right to appeal any sentence within the maximum provided in the statute (s) of conviction, or the manner in which that sentence was determined, on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatever. Your client also voluntarily and knowingly waives your client's right to challenge the sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. Your client further acknowledges and agrees that this agreement does not limit the Government's right to appeal a sentence, as set forth in Title 18, United States Code, Section 3742(b).[10]

In refusing to accept the provision, the court reasoned that a defendant cannot knowingly and intelligently waive his "right to appeal a sentence that has yet to be imposed—a sentence that may ultimately be illegal, unconstitutional or otherwise improper,"[11] that the Department of Justice was attempting to unfairly manipulate the appellate review of district court sentencing decisions,[12] and, most notably, that *the*

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[8] *See* Michael O'Shaughnessy, Abstract, *Appellate Review of Sentences,* 88 Geo. LJ. 1637, 1637-38 & n.2497 (2000) (observing that the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have upheld such provisions).

[9] See United States v. Raynor, 989 F. Supp. 43,49 (D.D.C. 1997); United States v. Johnson, 992 F. Supp. 437,438-39 (D.D.C. 1997). In both cases, the court refused to enforce plea agreements containing appellate waiver provisions requiring defendants to forego challenges to a sentence yet to be imposed.

[10] *Raynor,* 989 F. Supp. at 43.

[11] *Id.* The court added:

• Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing. Until the sentence is imposed, the defendant cannot possibly know what it is he or she is waiving. A plea that requires such a waiver of unknown rights cannot comport with Rule 11 or the Constitution.

Id. at 44 (citations omitted).

[12] *See id.* at 45. The court noted that the waiver provision precluded defendant initiated review of sentencing decisions, yet granted the United States "an unobstructed path to the courts of appeals." *Id.* The court continued:

Now much of the sentencing judgment and policy is within the discretion of the Sentencing Commission. And because of the prosecutor's traditional charging discretion and added leverage in sentence bargaining and charge bargaining in the post-Guidelines world, the discretion to cabin the parameters of the sentence is very much in the control of the prosecutor rather than the court.

... To the extent that the government seeks methods and means of avoiding appellate review of the exercise of prosecutorial power in the sentencing context, effectively circumventing what Congress

waiver language was an inaccurate description of the law.[13] *This fact, as the* Raynor *court observes, has not only been acknowledged by the Department of Justice,* but also by circuit courts which have previously ratified such provisions.[14]

Despite the unforgiving language of the waiver provision, the government acknowledges that such provisions do not in fact waive all rights to appeal. It does not concede, however, that this fact should be spelled out in the agreement or explained to defendants. As the [former Assistant Attorney General John C.] Keeney memorandum states:

A sentencing appeal waiver provision does not waive all claims on appeal. The courts of appeals have held certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he was denied the effective assistance of counsel at sentencing, United States v. Attar [38 F.3d 727 (4th Cir. 1994)]; that he was sentenced on the basis of his race, United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994); or that his sentence exceeded the statutory maximum, United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992), Avill be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.[15]

Thus, the government asks the Court to assume that a defendant who, by the government's own admission, is misinformed about his or her rights and the extent of the waiver in a plea letter and at a plea proceeding nevertheless understands those rights and can knowingly and intelligently waive them by virtue of the language of the proposed paragraph in the plea agreements. . .. [N] either the plea agreement nor the Rule 11 colloquy can assure that a defendant knows what his or her rights are and what is purportedly being waived.[16]

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intended, however, it is plainly the responsibility of the judiciary to uphold and protect the criminal justice process from such manipulation.

. . . For the future, this would mean that every Sentencing Guideline case considered by the court of appeals would be a case brought by the government to correct errors that favor defendants. The appellate courts would never again decide a sentencing case brought by a defendant. Not only is that inherently unfair, but it also eliminates the symmetry Congress intended by Section 3742.

Id. at 45-46. '

[13] *Id.* at 46.

[14] *Id.* at 46-47.

[15] Though only the Second and Fourth Circuits are acknowledged in *Raynor,* other circuits have recognized that certain appellate claims survive a contractual waiver. *See, e.g.,* DeRoo v. United States, 223 F.3d 919, 924 (8th Cir. 2000) (holding that ineffective assistance of counsel claim was properly raised despite plea agreement waiver of right to seek § 2255 post-conviction relief); United States v. Williams, 184 F.3d 666, 668-69 (7th Cir. 1999) (observing that a waiver of appeal provision does not preclude an appeal of a sentence based upon an impermissible factor, such as race, or a sentence in excess of the statutory maximum); United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995) (holding that ineffective assistance of counsel claim survives an appellate waiver).

[16] *Raynor,* 989 F. Supp. at 46-47 (quoting United States Department of Justice Memorandum from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys 2 (Oct 4, 1995)).

To suggest that Rule 11 adequately ensures that a defendant knowingly and voluntarily waives his appellate rights is simply disingenuous. Not only is the waiver of appeal verbiage in most, if not all, federal plea agreements substantively inaccurate, but the brusqueness encouraged by Rule 11 often results in a forfeiture of appellate rights via a single leading and/or compound question.[17] Absent an oral explication of what was understood, or, at a minimum, judicial implementation of an alternative method of discerning defendant comprehension and intent, it is simply fallacious to suppose that current Rule 11 mandates protect individual due process with respect to appellate waivers.[18] Without more, a meaningful discernment of such waiver provisions,

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[17] *See, e.g., Williams,* 184 F.3d at 668-69 (7th Cir. 1999) (relying upon an appellate waiver provision, the Seventh Circuit dismissed a defendant's appeal challenging ' his sentence). The case is notable, however, for the apparent confusion on the part of the district court about the scope of appellate rights being forfeited. During the plea colloquy, the following discourse occurred:

THE COURT: Now I know that in your presentence—or, your plea agreement you've waived your right to appeal, but, I want you to understand that under certain circumstances you might nevertheless be able to appeal and there are certain rights that you may have left I don't know. I want you to know that there is at least the potential there. Do you understand that?

MR. WILLIAMS: Yes, your honor.

Id. at 669. Though the Seventh Circuit dismissed the appeal, finding that the district court was "technically accurate" and that Williams knowingly and voluntarily relinquished his appellate rights, the court acknowledged "that the district court's oral comments regarding the possibility for appeal could have been clearer" and that "the district court's colloquy regarding waiver was not without some minor ambiguity." *Id.* at 669. It is certainly tenable to surmise, however, that the court's lack of clarity ("I don't know," etc.) was attributable to the agreement's inaccurate statement of the law, as well as the court's unawareness about the scope of rights being forfeited.

[18] An additional aggravating factor was noted in *United States v. Johnson,* 992 F. Supp. 437 (D.D.C. 1997). In refusing to accept an appellate waiver provision, the court observed that a significant bargaining power differential existed between the United States and the defendant.

Finally, the Court is unwilling to accept the specific waiver of appeal rights provision offered to the defendant because the same plea agreement does not limit the government's right to appeal a sentence. This glaring inequality strengthens the conclusion that this kind of plea agreement is a contract of adhesion. As a practical matter, *the government has bargaining power utterly superior to that of the average defendant* if only because the precise charge or charges to be brought—and thus the ultimate sentence to be imposed under the guidelines scheme—is up to the prosecution. To vest in the *prosecutor the power to require the waiver of appeal rights* is to add that much more unconstitutional weight to the prosecutor's side of the balance.

Id. at 439-40 (emphasis added) (citations omitted).

The government's superior bargaining advantage, and their arguable ability to impose undesirable plea conditions, has been discussed in academic literature as well. See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation,* 68 Fordham L. Rev. 2011, 2071-72 (2000) ("Some legal scholars have suggested that the overall imbalance in the relative bargaining strengths of the defendant and the government in the plea bargaining process presents 'striking similarities to a contract made under duress.' "); Robert E. Scott & William J. Stuntz, *Plea Bargainingas Contract,* 101 Yale LJ. 1909,1918 (1992) ("A decade ago ... Albert Alschuler argued that [plea bargaining] is contractually deficient in a host of ways: many of the bargains are unconscionable; defendants accept prosecutors' offers under duress; the poor and ignorant suffer disproportionately; the bargains are the product of irrationality and mistake.").

'and, thus, a knowing and voluntary relinquishment of appellate privileges, cannot be blithely presumed.[19]

B. The Harmless Error Doctrine

The harmless error doctrine, appended to Rule 11 in 1983,[20] has served to further aggravate the defendant's precarious plea posture. To appreciate this fully, however, a brief historical review of events leading up to the amendment is necessary. In 1969, the United States Supreme Court in *McCarthy v. United States* considered a defendant's direct appeal challenging the validity of his guilty plea to a single count of attempted tax evasion.[21] Specifically, the petitioner argued that the trial court erred in accepting his plea "without first addressing [him] personally and determining that the plea [was] made voluntarily with understanding of the nature of the charge," and by failing to determine if there was a factual basis.[22] Finding that Rule 11 had been violated, and that the defendant was entided to plead anew, the Court reasoned:

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[19] In addition to the appellate rights waiver, some United States Attorney's Offices also include plea provisions requiring the forfeiture of a defendant's right to challenge the withholding by the prosecution of so-called *Brady* information (material evidence that is favorable to the accused. Brady v. Maryland, 373 U.S. 83, 86-88 (1963)); *see also* David E. Rovella, *Federal Plea Bargains Draw Fire;* "Brady *Waivers" Aim*

To Make Deals Stick, but Defense Lawyers Balk, Nat'l L.J., Jan. 17, 2000, at Al (noting that while the inclusion of *Brady* waiver provisions "has slowly been working its way across the country," such clauses are standard in San Francisco, San Diego, and New York, and has been used sporadically in Florida). Describing the ensuing battle between federal prosecutors and federal public defenders upon the reintroduction of such clauses in the Northern District of California, defense attorneys Larry Kupers and John T. Philipsbom ivrite:

This standoff resulted in ancillary battle nothing short of the surreal. Assistants in the Federal Defender's Office in San Francisco refused to sign the "Defense Counsel Affirmation" attached to the standard plea agreement because with their signatures they "consented" to the defendant's entry into the plea agreement. Given their belief that the Brady waiver was not only adhesive and unconscionable but also unconstitutional and unethical, the

defenders could not consent to their clients' deals. The U.S. Attorney's Office then began to withdraw their plea offers, announcing that their offers were contingent upon not only the defendants' agreement but also the defense counsel's consent to the agreement. For three weeks no guilty pleas pursuant to the plea agreements were consummated in the Northern District of California. Finally, prosecutors removed the "consent" language and guilty pleas were once again heard throughout the kingdom. ⊠

Larry Kupers & John T. Philipsbom, *Mephistophelian Deals: The Newest in Standard Plea Agreements,* The Champion, Aug. 1999, at 18, 70 n.22. Research has failed to uncover any cases that have addressed the validity of such waiver provisions.

[20] See Fed. R. Crim. P. 11(h) advisory committee's notes (1983 amendments); *see also supra* notes 79-80 and accompanying text (discussing the amendment of the harmless error provision to Rule 11).

[21] 394 U.S. 459, 460 (1969) (quoting Fed. R. Crim. P. 11).

[22] *Id.* at 463.

[P]rejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. ... It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.[23]

Though *McCarthy* construed judicial compliance with the pre- 1975 version of Rule ll,[24] and found that reversal was mandated irrespective of any demonstrated prejudice,[25] there was a divide among the circuits regarding whether this automatic reversal position applied to violations of the 1975 version of Rule 11. While some circuit courts employed a harmless error approach when reviewing direct appeals[26] alleging Rule 11 omissions,[27] others mandated strict adherence to the detailed requirements of the new rule.[28] As noted by the Second Circuit in *United States v. Joumet,* employment of a harmless error standard not only frustrates congressional intent underlying Rule 11, but also the import of the guilty plea process:[29]

Since a guilty plea amounts to a conviction which may have most serious consequences for the accused in this case ... the acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless. What is required is "the utmost solicitude of which courts are capable in canvassing the matter with the

[23] *Id.* at 471-72.

[24] *See id.* at 463.

[25] *See id.* at 463-64.

[26] There was a similar split with respect to habeas challenges alleging Rule 11 errors, with some courts employing a harmless error approach. *See, e.g.,* Keel v. United States, 585 F.2d 110, 113 (5th Cir. 1978) (holding that district court's denial of habeas petition was proper; trial court's failure to comply with literal terms of Rule 11 was harmless given the absence of any demonstrated prejudice). Others adhere to a strict *McCarthy* interpretation. *See, e.g.,* Yothers v. United States, 572 F.2d 1326, 1328 (9th Cir. 1978) (vacating district court denial of habeas petition, finding that district court erred, irrespective of any demonstrated prejudice, by failing to advise defendant of certain penal consequences).

[27] *See, e.g,,* United States v. Hamilton, 568 F.2d 1302, 1306 (9th Cir. 1978) (holding that Rule 11 was not violated when prosecutor, not the court, informed defendant of possible penalties); United States v. Coronado, 554 F.2d 166, 172-75 (5th Cir. 1977) (holding that lower court complied with Rule 11, despite trial court's failure to explain the meaning of "conspiracy," when record indicated that defendant understood the term). *See generally* 1A Wright & Miller, *supra* note 55, § 178 (discussing many of the cases cited in footnotes 185-87 and providing a thorough discussion of harmless error in the context of Rule 11).

[28] *See, e.g.,* United States v. Adams, 566 F.2d 962, 966-67 (5th Cir. 1978) (holding, inter alia, that a trial court's failure to personally inform the defendant of certain constitutional rights and the nature of the charge violated Rule 11); United States v. Joumet, 544 F.2d 633, 636-37 (2d Cir. 1976) (holding that Rule 11 violated by trial court's failure to inform defendant of possible life-time parole and of certain constitutional rights forfeited by virtue of his guilty plea); United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976) (holding that defendant entitled to plead anew given trial court's failure to adhere to Rule Il's requirement that a defendant be informed of, inter alia, possible perjury prosecution).

[29] *Joumet,* 544 F.2d at 636.

accused to make sure he has a full understanding of what the plea connotes and of its consequence," *Boykin v. Alabama,* 395 U.S. at 243-44, 89 S.Ct. at 1712. To permit Rule 52(a) to be used as a means of by-passing the specific and detailed procedure prescribed by Rule 11 would be to frustrate and defeat Congress' expressed intention. Although the present appellant may have been more disenchanted by the heavy sentence imposed on him rather than by the court's failure to adhere to Rule 11, Congress' purpose of insuring compliance with Boykin provides the governing principle.[30]

This divide was settled, to some extent, in 1979 by the United States Supreme Court in *United States v. Timmreck.*[31] There, the Court considered a habeas petition that sought to vacate a sentence based upon a district court's failure to inform the defendant of a mandatory special parole term of at least three years.[32] Noting the defendant's failure to aver that he was either unaware of the penal provision or, had such judicial instruction been rendered, that he would have changed his plea decision, the Court held that a mere "technical violation" of Rule II, without more, would not warrant collateral relief.[33] Stressing the importance of "finality," especially in the context of habeas challenges to the Rule 11 process,[34] the Court held that such petitions would be granted only if the omission "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'"[35]

Notably, the Court hinted that a contrary result might have been reached had the petitioner raised his contention on direct appeal.[36] This ostensible distinction between direct and collateral challenges left some circuits, in the wake of *Timmreck,* uncertain as to the breadth of its application.[37] However, any lingering uncertainty dissipated with the 1983 appendage of the harmless error provision to Rule ll.[38] Now all circuits employ a harmless standard when assessing alleged Rule 11 violations.[39]

Thus, beginning with the 1975 revision of Rule 11, and its judicial progeny, there has been a continual erosion of due process protections under the rule. Whereas judicial

[30] *Id.* at 636.

[31] 441 U.S. 780 (1979).

[32] *Id.* at 782. The defendant had entered a guilty plea to a narcotic conspiracy offense. *Id.* at 781.

[33] *See id.* at 784. The Court imposed a sentence of ten years imprisonment, a special parole term of 5 years, and a fine. *Id.* at 782.

[34] *See id.* at 784.

[35] *Id.* (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

[36] The Court stated that "[h]is only claim is of a technical violation of the Rule. That claim could have been raised on direct appeal, but was not And there is no basis for allowing collateral attack 'to do service for an appeal.' "• *Id.* at 784 (citations omitted).

[37] *See, e.g.,* United States v. Carter, 619 F.2d 293, 294 (3d Cir. 1980) ("As an initial matter, we note that the question of whether a harmless error standard is applicable in direct appeals such as this has not yet been settled in this circuit."). The court acknowledged, however, that, pursuant to *Timmreck,* harmless error applies to collateral attacks. *Id.*

[38] *See supra* notes 79-80 and accompanying text (discussing the amendment of the harmless error provision to Rule 11).

[39] *See* Brent E. Newton, *Disarray Among the Federal Circuits: Harmless Error Review of Rule 11 Violations,* 2 J. App. Prac. & Process 143, 150 (2000).

omissions were once considered inherently prejudicial, irrespective of any demonstrated harm, today some circuits place the burden upon the *defendant* to demonstrate prejudice with respect to judicial noncompliance with Rule 11.[40] This burden shift is not only in conflict with the principles enunciated in *Boykin* and *McCarthy* and the Advisory Committee's notes to Rule 11 (h) ,[41] but also with the standards employed by other circuits that properly place the burden of demonstrating harmless error upon the government.[42] Predictably, individual due process has suffered.

Illustrative is *United States v. Cuevas-Andrade.*[43] The defendant, Juan Cuevas-Andrade, had entered a guilty plea to illegally re-entering the United States following deportation.[44] On direct appeal, the defendant sought opportunity to plead anew given the district court's failure to inform him of, inter alia, the nature of the charge,[45] the maximum penalty,[46] the effect of a supervised release term,[47] the application of the sentencing guidelines, the possibility of upward and downward departures,[48] and the waiver of various constitutional rights, "including his rights to plead not guilty, to be tried by a jury, to confront witnesses at trial, to have assistance of counsel, and against compelled self-incrimination."[49] Moreover, he cited the court's failure to ad-

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[40] *See, e.g.,* United States v. Thibodeaux, 811 F.2d 847, 848 (5th Cir. 1987);

United States v. de le Puente, 755 F.2d 313, 315 (3d Cir. 1985).

[41] The Advisory Committee's notes to Rule 11(h), provide, in pertinent part:

[Subdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would *not* be harmless error . . . where, for example, as in *McCarthy,* there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty. . . .

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited ... The second cautionary note is that subdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in McCarthy, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice ...

Fed. R. Crim. P. 11(h) advisory committee's notes (1983 amendment); *see also*

Newton, *supra* note 198, at 156 (urging the Supreme Court, "[i]n accord with the Advisory Committee Notes and the Court's prior guilty plea jurisprudence . . . [to] overrule the minority of circuits that place the burden on the defendant to show that, but for the rule 11 error, he would not have pled guilty").

[42] *See, e.g.,* United States v. DeWalt, 92 F.3d 1209, 1213-14 (D.C. Cir. 1996); United States v. Graibe, 946 F.2d 1428, 1434-35 (9th Cir. 1991); United States v. Theron, 849 F.2d 477, 481 (10th Cir. 1988); *see also* Newton, stz/ranote 198, at 152-56 (citing most of the cases in footnotes 199-201 and thoroughly discussing them within the context of harmless error burdens).

[43] 232 F.3d 440 (5th Cir. 2000).

[44] *Id.* at 442.

[45] *Id.* at 444.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 445.

vise him that he could be prosecuted for peijury or false statement for false responses provided under oath at the plea hearing[50] and to determine that his plea was entered voluntarily.[51]

The Fifth Circuit, having placed the burden upon the defendant to demonstrate prejudice, ultimately dismissed as harmless each of cited omissions.[52] The court largely, and often summarily, relied upon the mere fact that the defendant had signed a plea agreement that purportedly acknowledged his comprehension of these consequences, as well as the defendant's failure to aver, or demonstrate, actual prejudice from these omissions.[53] The court's precipitous acceptance of such glaring and copious Rule 11 omissions, unfortunately, typifies a disturbing trend. The protective ideals evinced by the Supreme Court in *McCarthy* and *Baykin,* and the congressional intent underlying the 1975 revision of Rule 11, have been subjected to an array of erosive appellate interpretations. As a result, in place is a federal plea process that too often devalues individual due process in favor of judicial economy.[54]

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[50] *Id.*

[51] *Id.*

[52] *Id.* at 446.

[53] *Id.* at 444-46.

[54] There are additional inauspicious post-plea consequences that further magnify the harm of the Rule 11 process. A defendant who, for example, seeks to withdraw his plea prior to sentencing may do so, but only upon presentment of a "fair and just" reason. Fed. R. Crim. P. 32(e); *see also* United States v. Gaitan, 954 F.2d 1005, 1011 (5th Cir. 1992) (listing factors employed by the Fifth Circuit when deciding whether withdrawal is appropriate; whether the government would be prejudiced; whether the court would be substantially inconvenienced; whether the defendant delayed in filing the motion; whether the original guilty plea was knowing and voluntary; whether judicial resources would be wasted; whether the defendant has claimed innocence; and whether adequate assistance of counsel was present) (citing United States v. Badger, 925 F.2d 101, 104 (5th Cir. 1991)). In this vein, a "strong presumption" of truthfulness attaches to a defendant's statements made during the plea colloquy, *see* United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994), and a district court's refusal to allow withdrawal will be reversed only for abuse of discretion. *See* United States v. Still, 102 F.3d 118, 123-24 (5th Cir. 1996), holding that there is no absolute right to plea withdrawal and citing the following factors:

> (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the government; (3) whether the defendant delayed in filing the motion, and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether 'withdrawal would waste judicial resources.

Id.

Conclusion

It bears re-emphasis that the problems associated with the current plea structure primarily lie, not with United States district court judges, but with Rule 11 and its appellate construction. Indeed, the plain language of the rule imposes affirmative obligations upon district courts that virtually mandate a methodological procession that necessarily inhibits a true assessment of a defendant's knowledge and a plea's voluntariness. For example, Rule 11(c) requires a district court to "inform the defendant of" the nature of the charge, an array of associated penal consequences, and the forfeiture of several constitutional and statutory rights, including, where applicable, the right to appeal or to collaterally attack the sentence.[1] By virtue of this constriction, district courts understandably resort to leading and compound questions to convey the required information.

The incantation of leading and compound questions and the accompanying monosyllabic responses have become an unfortunate staple of the Rule 11 process. For the circuit courts, these responses are considered a reliable indicator of a plea's voluntariness and the level of a defendant's knowledge. However, for reasons detailed previously, a plea's voluntariness and a defendant's level of comprehension cannot be adequately gleaned through such a process. Instead, a satisfactory assessment can be had, most effectively, by requiring greater defendant participation during the plea acceptance. By deleting the "inform" requirement in Rule 11(c), by prohibiting the use of leading (subject to the delineated exceptions in Federal Rules of Evidence 611(c)) and compound questions, and by requiring defendants to explain their understanding of the charge, plea terms, statutory and constitutional rights, factual basis, and associated penal consequences, a more efficient and equitable plea process can emerge.[2]

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[1] *See supra* notes 55-82 and accompanying text

[2] *See*John L. Breeden, Jr. & Douglas M. Zayicek, *Building a Better Guilty Plea,* S.C. Law., Jan./ Feb. 1997, at 14, 19.

Moreover, a court's factual findings, on either direct or collateral appeal, will be reversed only upon a finding of clear error. For example, a defendant must demonstrate clear error when asserting, inter alia, an insufficient factual basis, *see* United States v. Hall, 110 F.3d 1155, 1157 (5th Cir. 1997) (stating that the clearly erroneous standard applied when reviewing the district court's determination about whether defendant used or carried a firearm in relation to a drug trafficking crime); improper knowledge about sentencing consequences, *see* United States v. Milquette, 214 F.3d 859, 861-62 (7th Cir. 2000) (stating that clearly erroneous standard applied when reviewing the district court's determination about whether defendant understood his sentence exposure pursuant to his plea arrangement); or improper awareness of the nature of the charge, *see* United States v. DePace, 120 F.3d 233, 238 (11th Cir. 1997) (holding that the district court's determination that the appellants were properly ap-

Though, undoubtedly, this approach will substantially elongate the plea in-take process, it will reduce considerably the number of direct appeal and collateral challenges to guilty pleas. The greater surety attendant to such a process will render it less likely that a defendantwill have a legitimate basis upon which to pursue a post-plea challenge, and the resulting appellate efficiency, as well as the enhanced fundamental fairness, will render a more sound guilty plea procedure. Critics will, nevertheless, contend that the proposal is functionally impractical. Specifically, detractors will insist that the proposal inadequately accounts for the colloquial problems inevitably associated with a defendant experiencing communicative or recollection difficulties. This observation, however, overlooks an important aspect of the federal evidence rules. Under this proposal, the court, like the direct examiner, retains the discretion to employ limited leading questions in certain contexts. Pursuant to Federal Rule of Evidence 611(c), the general proscription against leading questions on direct is excepted when confronted with a witness who has trouble communicating or recalling information.[3] Accordingly, this proposal permits a court to employ limited leading questions—consistent with Rule 611(c)— when, in its discretion, it is necessary to assist the defendant during the plea colloquy.

Moreover, the harmless error provision should either be abolished or, at a minimum, narrowly construed by the judiciary. As noted, the courts—most notably after the 1975 revisions of Rule 11— have retreated from the inherent prejudice posture adopted in the years immediately following *McCarthy.*[4] Underlying the inherent prejudice standard was an understanding of the importance of each of the items detailed in the rule, and a belief that a failure to fully adhere to the strictures of the rule was necessarily harmful. Abolition or a narrow construction of the provision would help restore the *McCarthy* principles to the Rule 11 process. It would effectively mandate that the courts, at a minimum, effectuate some colloquial discussion about the listed items or risk reversal for noncompliance, and it would revive the spirit of *McCarthy* to a rule that has lost much of its protective gloss.

Indeed, the post-Boy&m and *McCarthy* promise cannot be realized absent meaningful reform of Rule 11. Strewn with an array of inconsistent applications, the plea

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prised of an aiding and abetting theory of liability was not clearly erroneous). Such unreferenced and unspoken consequences leave the unwitting defendant in a litiga- tive posture strewn with presumptive impediments that effectively hinder his prospects for successful review.

The judge may be able to improve the [guilty plea] process ... by allowing the defendant to play a bigger role in the taking of a plea.

Specifically, the defendant could be asked to recite, in his or her own words, the charges and the corresponding sentences that may be imposed, rather than simply responding to a series of "yes" and "no" questions. A defendant can also supply his or her own factual basis for the plea.

. .. Such an interaction on the record would give the PCR [post-conviction relief] and appellate courts a better indication of the defendant's level of understanding of the charges and possible sentences that may be imposed.

[3] *See supra* notes 95-111 and accompanying text.

[4] *See supra* notes 179-212 and accompanying text.

ritual in the federal system, at its worst, resembles little more than a facile procedure with a seeming design to expedite criminal dispositions at the expense of individual due process. The suggested reforms, however, will free the district courts of the mechanistic ritual largely mandated by Rule 11 and, thus far, sanctioned by the appellate circuits and supplant it with a process that will ensure greater plea surety and restore the promise of the *post-Boykin* and *McCarthy* era.

[Back Matter]

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Federal Guilty Pleas Under Rule 11
The Unfilled Promise of the *Post-Boykin* Era
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