No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

2. Whether, in deciding whether a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a court of appeals may consider the terms of a written plea agreement.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 310 F.3d 1221. A prior opinion of the court of appeals (App., *infra*, 21a-23a) that was withdrawn and then partially reinstated is unpublished but is reported at 30 Fed. Appx. 706.

JURISDICTION

The initial judgment of the court of appeals was entered on January 29, 2002. The judgment of the court of appeals of which review is sought was entered on November 25, 2002. A petition for rehearing was

denied on May 6, 2003. App., *infra*, 24a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. At the time respondent pleaded guilty, Rule 11(e) of the Federal Rules of Criminal Procedure (1989), titled "Plea Agreement Procedure," provided, in relevant part, as follows:

> **(1) In General.** The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do * * * the following:
>
> * * * *
>
> **(B)** make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court[.]
>
> * * * *
>
> **(2) Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. * * * If the agreement is of the type specified in subdivision (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 the plea.[1]

2. At the time the court of appeals issued its decision, Rule 52(b) of the Federal Rules of Criminal Procedure (1944), titled "Plain Error," provided as follows: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."[2]

STATEMENT

Following a guilty plea, respondent was convicted in the United States District Court for the Central District of California of conspiracy to possess with intent to distribute at least 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). He was sentenced to 120 months' imprisonment, to be followed by five years of supervised release. The court of appeals reversed respondent's conviction and remanded for further proceedings.

1. Acting on information that respondent was distributing methamphetamine, a confidential informant (CI) working for law enforcement agents contacted respondent and negotiated a purchase of several pounds of methamphetamine. On May 13, 1999, respondent, accompanied by two co-defendants, drove to a restaurant in Anaheim, California, where the drugs were to be delivered to the CI. Respondent got out of the car with a co-defendant, who was carrying a plastic shop-

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[1] The current versions of these provisions, which are substantively identical in relevant respects, are set forth in Fed. R. Crim. P. 11(c)(1)(B), (c)(2), and (c)(3)(B).

[2] Six days after the court of appeals' November 25, 2002, decision, an amendment to Rule 52(b) took effect. The change is "stylistic only." Fed. R. Crim. P. 52 advisory committee note (2002 Amendments).

ping bag, and the two men then got into the CI's car. Minutes later, agents conducting surveillance responded to the CI's signal and arrested respondent and his co-defendants. When the agents searched the shopping bag, they found a plastic bag and a shoe box, each of which contained methamphetamine. During a post-arrest interview, respondent admitted his participation in the crime. PSR ¶¶ 15-41.

2. On May 28, 1999, a federal grand jury returned an indictment charging respondent and his co-defendants with conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1), and possession with intent to distribute 1,391 grams of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841(a)(1). Resp. C.A. E.R. Tab 3. A conviction for an offense involving at least 500 grams of a mixture or substance containing methamphetamine is punishable by a minimum prison term of 10 years and a maximum prison term of life. See 21 U.S.C. 841(b)(1)(A)(viii), 846.

3. On September 8, 1999, approximately six weeks before trial was scheduled to begin, respondent sent the district court a letter requesting new counsel. Resp. C.A. E.R. Tab 4, at 2; Resp. C.A. E.R. Tab 7, at 2. The asserted basis for the request was that respondent's court-appointed lawyer had been encouraging him to accept a plea offer that he did "not feel [was] appropriate." Resp. C.A. E.R. Tab 7, at 2. At a status conference on October 7, 1999, respondent advised the district court that "[t]he only thing I'm looking for is * * * a better deal"; acknowledged that he was seeking "a disposition of [his] case other than trial"; and added that "[a]t no time have I decided to go to any trial." Resp. C.A. E.R. Tab 5, at 7. At the same conference,

respondent's counsel confirmed that his client "doesn't want a trial." *Id.* at 12. The district court denied respondent's request for new counsel. *Id.* at 14.

4. On October 12, 1999, respondent executed a written, "type B," plea agreement. App., *infra*, 26a-36a. In a type B agreement, the government "agrees to recommend (or not oppose the defendant's request for) a particular sentence." *United States* v. *Hyde*, 520 U.S. 670, 675 (1997).[3] The agreement contained a number of stipulations, including the stipulation that respondent should receive a two-level reduction in his offense level under the "safety valve" provisions of the Sentencing Guidelines. App., *infra*, 29a.[4] The parties, however, agreed only that respondent satisfied three of the five safety-valve criteria—no violence or possession of a weapon during the offense, no death or serious bodily

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[3] At the time of respondent's plea, this type of agreement was described in Fed. R. Crim. P. 11(e)(1)(B). It is now described in Fed. R. Crim. P. 11(c)(1)(B).

[4] Under the Guidelines' safety-valve provisions, the defendant is entitled to a two-level reduction under Section 2D1.1(b)(6) if the criteria set forth in Section 5C1.2(a) are met. Section 5C1.2(a), in turn, provides that a defendant convicted of certain drug offenses, including conspiracy under 21 U.S.C. 846, is to be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5)." Those criteria are that (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense did not result in death or serious bodily injury; (4) the defendant did not occupy an organizational, leadership, managerial, or supervisory role in the offense and was not engaged in a continuing criminal enterprise (CCE); and (5) the defendant truthfully provided complete information concerning the offense before sentencing.

injury from the offense, and no aggravating role or participation in a CCE—and specifically stated that there was "no agreement as to [respondent's] criminal history or criminal history category." *Id.* at 30a. The agreement also stated that, "[a]bsent a determination by the Court that [respondent's] case satisfies the [safety-valve] criteria * * * , the statutory mandatory minimum sentence that the Court must impose * * * is ten years[']imprisonment." *Id.* at 27a. If respondent had received all the sentencing reductions outlined in the agreement, including the safety-valve reduction, his guidelines range, based on an offense level of 27 and a criminal history category of I, would have been 70 to 87 months' imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

In the plea agreement, the parties acknowledged that the stipulations "do not bind * * * the Court," App., *infra*, 30a, which is "not a party to th[e] agreement and need not accept any of the [government's] sentencing recommendations or the parties' stipulations," *id.* at 33a. Paragraph 19 of the agreement included an expanded statement of the advice that was then required by Fed. R. Crim. P. 11(e)(2): that "the defendant * * * has no right to withdraw the plea" if "the court does not accept the recommendation or request" for a particular sentence.[5] Paragraph 19 stated that, "[e]ven if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute," respondent "cannot, for that reason, withdraw [his] guilty plea, and [he] will remain

[5] In the current version of Rule 11, this required advice is found in subsection (c)(3)(B). It is identical in substance to the provision in effect at the time of respondent's plea.

bound to fulfill all [his] obligations under this agreement." App., *infra*, 33a-34a.

The agreement was signed by respondent, a Spanish translator, respondent's counsel, and the prosecutor. App., *infra*, 34a-36a. In signing the agreement, respondent acknowledged that it had been read to him in Spanish, that he had "carefully discussed every part of it with [his] attorney," and that he "underst[oo]d" and "voluntarily agree[d]" to its terms. *Id.* at 35a. The signature of respondent's counsel was preceded by an acknowledgment that he had "carefully discussed every part of th[e] agreement with [respondent]." *Id.* at 35a.

5. On October 13, 1999, respondent appeared for a change-of-plea hearing, Resp. C.A. E.R. Tab 6, at which the district court conducted the colloquy required by Fed. R. Crim. P. 11. A substantial portion of the colloquy was a review of the plea agreement, Resp. C.A. E.R. Tab 6, at 10-26, which was filed and thereby made part of the record, Resp. C.A. E.R. Tab 14, at 10. Before reviewing the agreement, however, the court emphasized that it "is not a party to th[e] plea agreement" and that "at this time no one has promised [respondent] or figured out what [his] sentence should be." Resp. C.A. E.R. Tab 6, at 10. The court then asked, "As you stand here now, has anybody promised you what the actual sentence will be in your case?" *Ibid.* Respondent answered "[n]o." *Ibid.*

The district court then confirmed that the signature on the agreement was respondent's, that respondent had signed the agreement the day before, and that the acknowledgment preceding respondent's signature was accurate. Resp. C.A. E.R. Tab 6, at 10-12. After addressing the nature of the charge to which respondent was pleading guilty, *id.* at 12-13, the court turned to the section of the plea agreement that covered potential

penalties, *id.* at 13-15. During the ensuing portion of the colloquy, the following exchange took place:

> THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face.
>
> You are reminded that absent a determination by the Court that your case satisfies the * * * safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.
>
> Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4 [of the agreement]?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?
>
> THE DEFENDANT: No.
>
> THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided by law?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Knowing that, do you still want to go forward with your guilty plea?
>
> THE DEFENDANT: Yes.

Id. at 13-14.

After addressing the factual basis for the plea, Resp. C.A. E.R. Tab 6, at 15-16, and the constitutional rights

that respondent was waiving by pleading guilty, *id.* at 16-18, the district court turned to the section of the plea agreement that covered Sentencing Guidelines factors, *id.* at 18-20. During the portion of the colloquy that followed, the court referred to the safety valve as a "possibility," *id.* at 19, and asked respondent whether he understood that the "predictions" in the plea agreement were "not going to be binding on * * * the Court," *ibid.* Respondent answered "[y]es." *Ibid.* The court then noted that the parties had stipulated that three of the five safety-valve criteria were satisfied, *ibid.*, and again asked respondent whether he understood that "these stipulations are not binding on the Court," *id.* at 20. Respondent said "I do." *Ibid.*

Later in the hearing, the district court informed respondent that paragraph 19 of the plea agreement outlined "the circumstances under which you may or may not be allowed to withdraw your guilty plea." Resp. C.A. E.R. Tab 6, at 26. The court did not review that provision "word by word," however, *ibid.*, and made no further mention of the circumstances under which respondent would be able to withdraw his plea. In particular, the court did not comply with Rule 11(e)(2)'s requirement that the defendant be advised that he could not withdraw his plea if the court did not accept the parties' sentencing recommendations. Respondent did not object to the omission. See *ibid.*

At the conclusion of the hearing, the district court accepted respondent's guilty plea. Resp. C.A. E.R. Tab 6, at 28. It found that respondent "understands the terms of the plea agreement which we have reviewed at some length," and that he "understands that the plea agreement is not binding upon the Court when it comes time for sentencing." *Ibid.* The court also found that respondent "understands each and all of his consti-

tutional rights," that he "knowingly, intelligently, and voluntarily waived those rights," and that he "made his guilty plea freely and voluntarily." *Id.* at 30.

6. In the Presentence Report, the Probation Office concluded, contrary to the expectations of counsel, that respondent had three prior convictions and five criminal history points. PSR ¶¶ 70-92. The discrepancy between the Probation Office's conclusion and counsel's expectations was attributable to the fact that, when they negotiated the plea agreement, neither the prosecutor nor respondent's attorney was aware that respondent had two convictions under other names. Resp. C.A. E.R. Tab 13, at 14-18. Because respondent had more than one criminal history point, he was not eligible for the safety valve. See Sentencing Guidelines § 5C1.2(a)(1). With an offense level of 29 and a criminal history category of III, respondent was subject to a guidelines imprisonment range of 108 to 135 months. See *id.* Ch. 5, Pt. A. The statutory minimum prison term of 120 months, however, effectively became the low end of the range. See *id.* § 5G1.1(c)(2).

At his March 13, 2000, sentencing hearing, respondent complained about his attorney's representation, Resp. C.A. E.R. Tab 13, at 9-15, but repeatedly stated that he accepted responsibility for his criminal conduct, *id.* at 9-12. After denying his request for the appointment of new counsel, *id.* at 9-20, the district court sentenced respondent to 120 months' imprisonment, *id.* at 20-23; Resp. C.A. E.R. Tab 2, at 1. Respondent never filed a motion to withdraw his plea in the district court. See Resp. C.A. E.R. Tab 14.

7. On appeal, respondent contended that the district court had abused its discretion in denying his request for substitute counsel and that his attorney had provided ineffective assistance. Resp. C.A. Br. 21-37. He

also claimed, for the first time, that the district court had violated Rule 11(e)(2) by failing to advise him at his change-of-plea hearing that he could not withdraw his plea if the parties' sentencing recommendations were rejected. *Id.* at 17-21. The government conceded that the court had not complied with Rule 11(e)(2), Gov't C.A. Br. 17, and acknowledged that, under then-existing Ninth Circuit precedent, the error was subject to harmless-error review under Fed. R. Crim. P. 11(h), *ibid.*[6] Noting this Court's recent grant of certiorari in *United States* v. *Vonn*, 531 U.S. 1189 (2001), the government took the position that plain-error review under Rule 52(b) (rather than harmless-error review under Rule 11(h)) should apply to forfeited claims of Rule 11 error, Gov't C.A. Br. 17 n.2, but argued that respondent was not entitled to relief even under the harmless-error standard, because, among other things, he had been made aware by paragraph 19 of the plea agreement that he could not withdraw his plea if the court rejected the parties' sentencing recommendations, *id.* at 18-21.

On January 29, 2002, the court of appeals issued an unpublished decision in which it affirmed the denial of respondent's motion for substitute counsel and declined to address his ineffective-assistance claim, but agreed

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[6] At the time of appeal, Rule 11(h) provided that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Subsection (h) was added to Rule 11 to "make[] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments). At the time of appeal, Rule 52(a) provided that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The current versions of Rules 11(h) and 52(a) are identical in substance to the earlier versions.

that the district court had violated Rule 11(e)(2) and found that the error was not harmless. App., *infra*, 21a-23a. Although it concluded that respondent's guilty plea should be vacated and the case remanded to permit respondent to enter a new plea, *id.* at 22a, the court, on its own motion, stayed issuance of its mandate pending this Court's decision in *Vonn*, *id.* at 21a.

On March 4, 2002, this Court issued its decision in *Vonn*, 535 U.S. 55, which included two holdings. The first was that forfeited claims of Rule 11 error are reviewed under the plain-error standard of Rule 52(b), rather than the harmless-error standard of Rule 11(h). *Id.* at 62-74. The second holding was that, in determining whether a district court's violation of Rule 11 is reversible error, a reviewing court is not limited to the plea transcript, but may consider other portions of the record (in that case, transcripts of two earlier proceedings). *Id.* at 74-76. The court of appeals subsequently withdrew its decision and directed the parties to file supplemental briefs addressing the effect of *Vonn*. See Gov't Supp. C.A. Br. 1.

8. On November 25, 2002, the court of appeals, this time by a divided vote, again vacated respondent's conviction based on the Rule 11 violation and remanded for further proceedings.[7]

a. Applying the plain-error standard mandated by *Vonn*, App., *infra*, 4a-5a, the majority determined that the district court's failure to comply with Rule 11(e)(2) was an "error" that was "plain," *id.* at 5a. Citing *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert.

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[7] In a contemporaneous unpublished decision, the court of appeals unanimously reinstated, verbatim, that portion of its prior unpublished decision that addressed respondent's substitution and ineffective-assistance claims. App., *infra*, 19a-20a.

denied, 123 S. Ct. 948 (2003), the majority then held that a plain error affects "substantial rights" if the defendant shows that "the court's error was not minor or technical" and that "he did not understand the rights at issue when he entered his guilty plea." App., *infra*, 5a. The majority found that respondent had made both showings. It concluded that the error was not "minor or technical" because respondent's sentence "was substantially higher than the one for which [he] bargained." *Id.* at 6a. And it concluded that he did not understand his right to withdraw his plea despite paragraph 19 of the plea agreement. Quoting *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), the majority relied on what that decision had characterized as the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," and held that "the reading of [a] plea agreement is not a substitute for rigid observance of Rule 11." App., *infra*, 6a. The majority deemed "unpersuasive" the government's argument that *Vonn* had undermined *Kennell*, reasoning that, although *Vonn* authorizes appellate courts to consider warnings given to the defendant at an earlier stage of the case, it does not address the issue of plea agreements. *Id.* at 7a. The majority then concluded that it would exercise its discretion to remedy the Rule 11 error, in order to prevent the "miscarriage of justice" that would result if respondent were required to serve a sentence that exceeded the one he expected. *Id.* at 10a.

b. Judge Tallman dissented. App., *infra*, 10a-18a. In his view, the "cumulative effect of [respondent's] signed plea agreement *and* the questions posed to [him] during the plea colloquy," *id.* at 11a, conclusively demonstrated

that he "understood the binding nature of his guilty plea," *id.* at 12a, and thus that "no plain error attends his conviction and sentence," *id.* at 11a. The dissent criticized the majority for "elevat[ing] form over substance by looking only to see if the 'magic words' were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole." *Id.* at 12a. In the dissenting judge's view, a plea agreement is as much a part of the record as a transcript of a prior proceeding, and there is no justification for failing to apply *Vonn* to a plea agreement. *Id.* at 11a-12a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that a Rule 11 error affects a defendant's "substantial rights" if the error is neither minor nor technical and the defendant did not understand the right at issue when he entered his plea. It also held that, in deciding whether the defendant understood his rights, a court of appeals may not consider a written plea agreement that fully and accurately states the Rule 11 advice omitted by the district court. Each of these holdings is erroneous. Each perpetuates a circuit conflict. Each is in considerable tension with a principle of plain-error review established by this Court. And each has recurring importance to the federal criminal justice system because of its potential effect on the large number of appeals of convictions obtained by guilty plea in the largest circuit in the country. This Court should grant certiorari to review both aspects of the court of appeals' decision.

A. The Ninth Circuit's Standard For Determining Whether A Rule 11 Violation Is Reversible Plain Error Is Incorrect And Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals' standard for determining whether a violation of Rule 11 affected substantial rights under Rule 52(b) is inconsistent with the position of every other court of appeals to consider the question. It is also incorrect.

1. Applying the general principle that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings," *United States* v. *Olano*, 507 U.S. 725, 734 (1993), nine circuits—the D.C., First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Tenth—have concluded that a Rule 11 error affects substantial rights if the defendant would not have pleaded guilty had the error not occurred. See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322 (D.C. Cir. 1995); *United States* v. *Noriega-Millan*, 110 F.3d 162, 167 (1st Cir. 1997); *United States* v. *Westcott*, 159 F.3d 107, 112-113 (2d Cir. 1998), cert. denied, 525 U.S. 1084 (1999); *United States* v. *Dixon*, 308 F.3d 229, 234 (3d Cir. 2002); *United States* v. *Martinez*, 277 F.3d 517, 532 (4th Cir.), cert. denied, 123 S. Ct. 200 (2002); *United States* v. *Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc); *United States* v. *Martinez*, 289 F.3d 1023, 1029 (7th Cir. 2002); *United States* v. *Prado*, 204 F.3d 843, 846 (8th Cir.), cert. denied, 531 U.S. 1042 (2000); *United States* v. *Vaughn*, 7 F.3d 1533, 1535 (10th Cir. 1993), cert. denied, 511 U.S. 1036 (1994).[8] The Eleventh Cir-

[8] While some of these cases applied the plain-error standard of Rule 52(b), others applied the harmless-error standard of Rule 11(h). Each permits reversal only when the error affected substantial rights. (Insofar as the "substantial rights" component is

cuit, in contrast, has held that a Rule 11 error affects substantial rights when it implicates one of the rule's three "core" concerns or objectives: absence of coercion, understanding of the charges, and knowledge of the consequences of the plea. See, *e.g.*, *United States* v. *Camacho*, 233 F.3d 1308, 1314 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001). The Ninth Circuit has also rejected the majority view. It has held, as it did in this case, App., *infra*, 5a, that, "for purposes of plain error review, a defendant's substantial rights are affected by Rule 11 error where the defendant proves that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." *United States* v. *Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002), cert. denied, 123 S. Ct. 948 (2003). There is thus a clear circuit conflict on the standard for determining when a forfeited claim of Rule 11 error constitutes reversible plain error, a conflict that was explicitly recognized in the opinion dissenting from the denial of panel rehearing in the case in which the Ninth Circuit's standard was adopted. See *United States* v. *Minore*, 302 F.3d 1065, 1066-1067 (9th Cir. 2002) (Schwarzer, J., dissenting).[9]

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concerned, the only difference between the plain-error rule and the harmless-error rule is that the former places the burden of persuasion on the defendant while the latter places it on the government. See *Vonn*, 535 U.S. at 62-63; *Olano*, 507 U.S. at 734.) The cases that have applied the harmless-error standard to a Rule 11 error have done so either because the objection was preserved or because the case was decided before *Vonn*, when some courts of appeals employed harmless-error analysis even for forfeited claims of Rule 11 error.

[9] The Ninth Circuit has occasionally deviated from the standard it adopted in *Minore*. In one subsequent case, a panel applied the standard employed by the majority of circuits and held that a

2. Under Rule 52(b), a court of appeals must reject a forfeited claim unless there was (1) an error that is (2) plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Olano*, 507 U.S. at 732-737. A defendant who raises a claim of Rule 11 error for the first time on appeal, but cannot show that he would not have pleaded guilty if he had received the advice omitted by the district court, cannot satisfy either the third or the fourth requirement of the plain-error rule. The Ninth Circuit's contrary conclusion is erroneous.

Rule 11 violation did not constitute reversible plain error because the defendant could not show that "he would not have pled guilty" but for the violation. *United States* v. *Luna-Orozco*, 321 F.3d 857, 860 (2003). See also *United States* v. *Villalobos*, 333 F.3d 1070, 1075 (9th Cir. 2003) (holding that Rule 11 error was not harmless because government "cannot show that [the defendant] 'would still have pleaded guilty absent the Rule 11 error'"); *United States* v. *Littlejohn*, 224 F.3d 960, 970 (9th Cir. 2000) (holding that Rule 11 error was harmless because it "does not appear to have affected the outcome of the proceedings below—that is, [the defendant's] decision to plead guilty"). In another post-*Minore* case, a panel of the Ninth Circuit applied the Eleventh Circuit's standard and held that a Rule 11 violation was reversible plain error because it entailed a "failure to satisfy a core concern of Rule 11" (in that case, advising the defendant of the nature of the charges). *United States* v. *Pena*, 314 F.3d 1152, 1157 (2003). But Ninth Circuit panels applied the *Minore* standard both in this case and in *United States* v. *Jimenez-Dominguez*, 296 F.3d 863, 867-869 (2002), cert. denied, 123 S. Ct. 984 (2003), thus demonstrating that the standard has continuing vitality. It does not appear likely that the Ninth Circuit will ultimately settle on a different standard, because the en banc court rejected the government's request to abandon the *Minore* standard and replace it with the one employed by the majority of circuits. See App., *infra*, 24a-25a.

a. In *Minore*, the plain-error decision on which it relied in this case, see App., *infra*, 5a, the Ninth Circuit adopted the definition of "affecting substantial rights" that it had adopted in a Rule 11 harmless-error case, *United States* v. *Graibe*, 946 F.2d 1428, 1433-1434 (1991). See *Minore*, 292 F.3d at 1118. *Graibe*, however, antedated this Court's decision in *Olano*, which established the general test for whether a forfeited claim of error "affect[ed] substantial rights" under Rule 52(b). The standard adopted by the Ninth Circuit in *Graibe* is not consistent with the standard adopted by this Court in *Olano*.

In most cases, *Olano* made clear, an effect on substantial rights has the same meaning in the plain-error context that it has in the harmless-error context. 507 U.S. at 734. It "means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings." *Ibid.* This Court has applied that principle to various types of judicial proceedings, in both plain-error and harmless-error cases. An error in a grand jury proceeding is prejudicial if it "had an effect on the grand jury's decision to indict," *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 263 (1988); an error at a detention hearing is prejudicial if it had an effect on the court's decision to order the defendant detained, see *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 722 (1990); an error at a trial is prejudicial if it "influenced the verdict," *Olano*, 507 U.S. at 740; accord *Neder* v. *United States*, 527 U.S. 1, 17 (1999) (trial error is not prejudicial if "the jury verdict would have been the same absent the error"); and an error at a sentencing hearing is prejudicial if it affected the sentence imposed, see *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999); see also *Williams* v. *United States*, 503 U.S. 193, 203 (1992) (sentencing error is not

prejudicial if "the error did not affect the district court's selection of the sentence").

The same principle should apply when the judicial proceeding is a change-of-plea hearing. As the majority of circuits have held, a Rule 11 error should be deemed prejudicial, and therefore to have affected substantial rights, only if it affected the defendant's decision to plead guilty. There is nothing in either the holding or the logic of *Olano* that suggests that a plea proceeding is not one of the "proceedings" whose outcome must have been affected for there to have been an effect on substantial rights. See 507 U.S. at 734-735. And the Advisory Committee Note accompanying Rule 11's harmless-error provision—which directs appellate courts to disregard errors that do not "affect substantial rights," Fed. R. Crim. P. 11(h)—approvingly cites cases that applied harmless-error analysis when the error "could not have had any impact on the defendant's decision to plead." Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments).[10]

The inquiry into whether the defendant would have pleaded guilty in the absence of the Rule 11 error is broader than the inquiry undertaken by the Ninth Circuit, which is whether the defendant was otherwise aware of the information omitted by the district court during the Rule 11 colloquy. If the defendant *was* otherwise aware of the information—because, for example, as in *Vonn*, he received the information at an

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[10] Rule 11 errors do not fall within the "special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Olano*, 507 U.S. at 735. See *Johnson*, 520 U.S. at 468-469 (listing "very limited class of cases" involving "structural" error). The Eleventh Circuit's rule —that certain types of Rule 11 error always affect substantial rights—is therefore incorrect as well.

earlier stage of the case—but nonetheless pleaded guilty, it will usually follow that the district court's failure to provide him with the same information during the plea colloquy did not affect his decision to plead guilty. But while awareness of the omitted advice is ordinarily a sufficient basis for finding that a Rule 11 error did not affect substantial rights, it is not necessary. There are circumstances in which a court could conclude that the defendant was determined enough to plead guilty that he would have done so despite not being otherwise aware of the information omitted from the Rule 11 colloquy. One such circumstance, for example, is where the defendant received a significantly reduced sentence in exchange for his plea. See, *e.g.*, *Dixon*, 308 F.3d at 235; *Martinez*, 277 F.3d at 532-533.[11]

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[11] There are also cases in which a court could conclude that a Rule 11 error had no effect on the outcome of the proceedings, and thus had no effect on the defendant's substantial rights, even without a retrospective assessment of whether the defendant would have pleaded guilty had there been no error. See, *e.g.*, *United States* v. *Morris*, 286 F.3d 1291, 1293-1295 (11th Cir. 2002) (district court's failure to mention possibility of restitution during Rule 11 colloquy was harmless error, since defendant had notice that he might be required to pay fine of greater amount than amount of restitution that was ordered); *United States* v. *Chan*, 97 F.3d 1582, 1583-1584 (9th Cir. 1996) (district court's failure to advise defendant that he could not withdraw plea if court did not accept non-binding sentencing recommendation was harmless error, since court accepted recommendation); *United States* v. *Raineri*, 42 F.3d 36, 40-42 (1st Cir. 1994) (district court's erroneous advice about maximum sentence was harmless when court imposed sentence below maximum identified during Rule 11 colloquy and there was no reason to believe that defendant expected lesser penalty), cert. denied, 515 U.S. 1126 (1995).

b. Even if the question whether a defendant would have pleaded guilty in the absence of a Rule 11 error has no bearing on the third component of the plain-error rule—whether the error affected the defendant's substantial rights—it is certainly relevant to the fourth component—whether the error seriously affected the fairness, integrity, or public reputation of the proceedings. The advice of rights required by Rule 11 is not constitutionally required, but is intended to ensure that a defendant's guilty plea conforms to constitutional standards—*i.e.*, that it is intelligent and voluntary. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). If a defendant acted knowingly and voluntarily in pleading guilty and was sufficiently determined to plead guilty that the advice the district court failed to give would have been insignificant to the plea decision, it cannot be said that the omission affected the fairness, integrity, or public reputation of the plea proceeding. A court of appeals should not exercise its discretion to notice a forfeited Rule 11 error, therefore, unless the defendant shows that he would not have pleaded guilty in the absence of the error. A rule, like the Ninth Circuit's, that permits a defendant to enter, without objection, a solemn plea of guilty that conforms to constitutional standards, and then, only after sentence and entry of judgment, escape the effect of his plea because of an error that was of no consequence to his decision to plead guilty, would elevate minor flaws over substantial justice and would not command public confidence.

This view is consistent with the approach employed in *Johnson* v. *United States*, 520 U.S. 461 (1997), and *United States* v. *Cotton*, 535 U.S. 625 (2002), where the Court assumed, without deciding, that the failure to charge an element of the offense in the indictment

(*Cotton*) or submit it to the jury (*Johnson*) satisfied the third requirement of the plain-error rule, but concluded that the error did not satisfy the fourth requirement, because the evidence supporting the omitted element was "overwhelming" and "essentially uncontroverted." 535 U.S. at 633; 520 U.S. at 470. The Court concluded, in other words, that the omission did not seriously affect the fairness, integrity, or public reputation of the grand jury proceeding (*Cotton*) or trial (*Johnson*) because there was no doubt about what the outcome of the proceeding would have been if there had been no error.

3. The court of appeals rejected the government's argument that respondent had to show that he would not have pleaded guilty if the district court had provided the omitted Rule 11 advice, see Gov't Supp. C.A. Br. 9-10, and it clearly applied a different standard, App., *infra*, 5a-9a. Under the correct standard, respondent cannot establish reversible plain error, because he cannot show that, but for the Rule 11 error, he would not have pleaded guilty.

As an initial matter, the advice omitted by the district court was fully and accurately set forth in the plea agreement that the district court explicitly found the defendant understood. Resp. C.A. E.R. Tab 6, at 28. As explained below, see pp. 23-26, *infra*, the court of appeals should have considered the agreement in deciding whether the Rule 11 violation was reversible plain error. Since respondent was aware of the omitted advice, the district court's failure to mention it during the plea colloquy could not have influenced his decision to plead guilty.

But respondent would be unable to show that the Rule 11 error affected that decision even if the plea agreement were disregarded. First, before he pleaded

guilty, respondent clearly stated that he was not interested in going to trial and was concerned only with obtaining the most favorable possible plea bargain. Resp. C.A. E.R. Tab 5, at 7. Even after he became aware that he would not receive the safety-valve reduction, respondent repeatedly stated that he accepted responsibility for his crime. Resp. C.A. E.R. Tab 13, at 12. Second, at the change-of-plea hearing, the district court took care to ensure that respondent understood that the safety-valve reduction was a contingency, not a guarantee, and that no one could promise him a particular sentence. See Resp. C.A. E.R. Tab 6, at 10-28. Third, respondent had a substantial incentive to plead guilty even without the two-level safety-valve reduction, because a conviction after trial would have precluded the stipulated three-level reduction for acceptance of responsibility, see App., *infra*, 29a, and would have subjected him to a guidelines sentence of at least 151 to 188 months' imprisonment. See Sentencing Guidelines Ch. 5, Pt. A.

B. The Ninth Circuit's Refusal To Consider A Plea Agreement In Deciding Whether A Rule 11 Violation Is Reversible Plain Error Is Incorrect And Conflicts With Decisions Of Other Courts Of Appeals

The court of appeals held that, in determining whether a Rule 11 violation constitutes reversible plain error, an appellate court may not consider the contents of a written plea agreement. That holding is erroneous. It also conflicts with the decisions of all the other courts of appeals to have considered the question.

1. In the decision that this Court reviewed in *Vonn*, the Ninth Circuit applied its longstanding rule that, when a court decides whether a Rule 11 error affected

the defendant's substantial rights, the record that it reviews is limited to the plea proceeding. *United States* v. *Vonn*, 224 F.3d 1152, 1155 (2000), vacated, 535 U.S. 55 (2002). For that proposition, the court of appeals cited a number of cases, including *United States* v. *Graibe*, 946 F.2d 1428, 1434-1435 (9th Cir. 1991). See 224 F.3d at 1155. This Court rejected that view. It held that a reviewing court is permitted to look "outside the four corners of the transcript of the plea hearing and Rule 11 colloquy"; that "there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceeding"; and that the defendant's initial appearance and arraignment were "relevant" parts of the record to be "considered" in deciding whether a violation of Rule 11 was reversible error. 535 U.S. at 75.

In this case, the Ninth Circuit applied its long-standing rule that, when a court decides whether a Rule 11 error affected the defendant's substantial rights, the record that it reviews does not include the plea agreement. App., *infra*, 6a-9a. For that proposition, the court relied principally on *United States* v. *Kennell*, 15 F.3d 134, 136 (9th Cir. 1994), see App., *infra*, 6a, which in turn had cited *Graibe* for the principle that appellate courts "are limited to the contents of the record of the plea proceeding," 15 F.3d at 138. Despite the fact that this Court explicitly rejected that principle in *Vonn*, see *United States* v. *Vonn*, 294 F.3d 1093, 1093-1094 (9th Cir. 2002) (noting, on remand, that *Vonn* "overruled" Ninth Circuit precedent "confining [the court's] review to the record of the defendant's plea proceeding"), the court of appeals adhered to *Kennell*. Effectively limiting *Vonn* to its precise facts, the court of appeals found that "[t]he *Kennell* court's concern with respect to the difference between a de-

fendant reading boiler-plate language in an agreement and being advised of a fact in open court is no less valid after *Vonn*." App., *infra*, 7a.

The court of appeals erred in concluding that *Kennell* survives *Vonn*. As framed by this Court, the question presented in *Vonn* was whether an appellate court addressing a claim of Rule 11 error "is limited to examining the record of the colloquy * * * when the guilty plea was entered, or may look to the entire record begun at the defendant's first appearance in the matter leading to his eventual plea." 535 U.S. at 59. In holding that an appellate court may consider "the entire record," *ibid.*, this Court relied principally on the Advisory Committee's statement that the prejudicial effect of a Rule 11 error is to be resolved on the basis of both "the Rule 11 transcript" and "the other portions * * * of the limited record made in such cases," *id.* at 74 (quoting Fed. R. Crim. P. 11(h) advisory committee note (1983 Amendments)) (internal quotation marks omitted). A filed plea agreement is no less a "portion" of the "entire record" leading up to the plea than a transcript of the initial appearance or arraignment. Neither the Advisory Committee, in the note accompanying Rule 11(h), nor this Court, in *Vonn*, drew any distinction among types of record evidence. Nor did the Committee or this Court draw a distinction between a judge's statement to a defendant in open court and a written plea agreement that a defendant acknowledges having read, discussed with counsel, and understood. Indeed, it is difficult to conceive of a justification for permitting consideration of proceedings that, as in *Vonn*, see 535 U.S. at 59-60, occurred months before the guilty plea, while categorically prohibiting consideration of a plea agreement that, as in this case, was read,

reviewed with counsel, and executed only a day before the plea.

2. By reaffirming the holding of *Kennell*, the court of appeals' decision not only misinterpreted *Vonn* but perpetuated a conflict with pre-*Vonn* decisions of six other courts of appeals holding that a written plea agreement may be considered in determining whether a Rule 11 violation affected substantial rights (either on harmless-error or on plain-error review). See, *e.g.*, *United States* v. *General*, 278 F.3d 389, 394-395 (4th Cir.), cert. denied, 536 U.S. 950 (2002); *United States* v. *Camacho*, 233 F.3d 1308, 1321 (11th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *United States* v. *Saxena*, 229 F.3d 1, 9 (1st Cir. 2000); *United States* v. *McCarthy*, 97 F.3d 1562, 1576 (8th Cir. 1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997); *United States* v. *Diaz-Vargas*, 35 F.3d 1221, 1225-1226 (7th Cir. 1994); *United States* v. *Williams*, 899 F.2d 1526, 1531 (6th Cir. 1990). In several of those cases, the Rule 11 violation was the very one at issue here: the failure to advise the defendant that he would not be able to withdraw his plea if the district court did not follow the parties' sentencing recommendations. See *Camacho*, 233 F.3d at 1319-1322; *Saxena*, 229 F.3d at 8-9; *McCarthy*, 97 F.3d at 1574-1576; *Diaz-Vargas*, 35 F.3d at 1224-1226. This clear circuit conflict has been explicitly recognized by other courts of appeals. See *United States* v. *Jones*, 143 F.3d 1417, 1419 (11th Cir. 1998); *McCarthy*, 97 F.3d at 1576.

3. If this Court were to reject the Ninth Circuit's cramped reading of *Vonn* and hold that a plea agreement may be considered in deciding whether a Rule 11 violation is reversible plain error, there is no question that respondent would be unable to obtain reversal of his conviction. In his plea agreement, respondent ex-

pressly acknowledged that he could not withdraw his plea if the district court declined to accept the parties' sentencing recommendations. App., *infra*, 33a-34a. Respondent signed an acknowledgment that he understood the agreement and that he had "carefully discussed every part" of it with his attorney. *Id.* at 35a. During the plea colloquy the next day, respondent reaffirmed his signed acknowledgment and, after explicitly acknowledging that he might not receive the safety-valve reduction, stated that he nevertheless wished to go forward with the plea. Resp. C.A. E.R. Tab 6, at 10-20. Thus, if a plea agreement is held to be part of the record considered by an appellate court conducting plain-error review of a claim of Rule 11 error, respondent will not be able to show that he would not have pleaded guilty if the district court had provided the omitted information, because the plea agreement demonstrates that respondent was aware of it. For the same reason, respondent will not be able to satisfy the Ninth Circuit's standard, which requires a showing that "he did not understand the rights at issue when he entered his guilty plea." App., *infra*, 5a.

C. The Questions Presented In This Case Have Recurring Importance To The Administration Of The Criminal Justice System

As this Court has recognized, the criminal justice system depends on guilty pleas in general and plea bargaining in particular. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 632 (2002) (Government places "heavy reliance upon plea bargaining in a vast number * * * of federal criminal cases"); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."); *Santobello* v.

New York, 404 U.S. 257, 260 (1971) (plea bargaining is "an essential component of the administration of justice"). In the 12-month period ending September 30, 2002, for example, more than 95% of the nearly 71,000 convictions in federal court were obtained by guilty plea, and more than 85% of the nearly 79,000 criminal defendants in the federal system had their cases resolved through guilty pleas. Administrative Office of the U.S. Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* 221-224 (Table D-7). A plurality of those cases arose in the Ninth Circuit, where 22% of federal criminal defendants were prosecuted and 22% of defendants who pleaded guilty entered their pleas. *Ibid.* A substantial proportion of guilty pleas in federal criminal cases, moreover, are entered pursuant to written plea agreements.

Rule 11 applies in every case in which a defendant pleads guilty in federal court. The enactment of that rule, and its evolution over the years from "general scheme to detailed plan," *Vonn*, 535 U.S. at 62, represent important steps towards standardizing the plea process and ensuring that guilty pleas satisfy constitutional standards. It is regrettably the case, however, that district courts sometimes neglect to provide all of the advice required by Rule 11. It is also the case that defense counsel often fail to object to a district court's omission. There are a great many cases, therefore, in which a claim of Rule 11 error can potentially be raised for the first time on appeal, and a large proportion of such cases arise in the Ninth Circuit. The holdings at issue here, one of which permits an appellate court to overturn a guilty plea based on a forfeited claim of Rule 11 error even when the defendant would have pleaded guilty had there been no error, and the other of which prohibits the court from considering a plea agreement

that fully and accurately states the omitted Rule 11 advice in determining whether the defendant was aware of it, will likely affect the outcome in a substantial number of these cases. The court of appeals' holdings warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-50181

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Argued and Submitted: Dec. 5, 2001
Filed: Nov. 25, 2002

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

JAMES R. BROWNING, Circuit Judge.

Appellant Carlos Dominguez Benitez ("Benitez") appeals his conviction, entered upon a plea of guilty, and his 120 month sentence for conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. § 846. Benitez contends his conviction must be reversed because the district court failed to comply with Fed. R. Crim. P. 11(e)(2) by not informing him he could not withdraw his guilty plea if the court did not accept the sentencing recommendation set forth in the plea agreement. We agree and reverse.

I.

On May 28, 1999, Benitez was charged with conspiracy to possess with intent to distribute and possession with intent to distribute more than 500 grams of methamphetamine in violation of 21 U.S.C. §§ 846 and 841(a)(1). Benitez entered into a written type (B) plea agreement with the government in which he agreed to plead guilty to the charge of conspiracy to possess with intent to distribute. This charge carried a base offense level of 32. However, the government stipulated to a two-level downward adjustment for the safety valve provision[1] and a three-level downward adjustment for acceptance of responsibility, resulting in an offense level of 27 and a Guideline range of 87 to 108 months.[2] The parties expected Benitez to qualify for the safety valve provision.[3] The plea agreement stated that

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[1] The safety valve provision states a court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory mandatory minimum if the defendant meets five criteria: (1) the defendant does not have more than one criminal history point; (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon; (3) the offense did not result in death or serious bodily injury; (4) the defendant was not the organizer, leader, manager or supervisor of others and was not engaged in a continuing criminal enterprise; and (5) the defendant has truthfully provided the government all information the defendant has concerning the offense(s) that were part of the same course of conduct. *See* U.S.S.G. § 5C1.2 (1998).

[2] The government also agreed to recommend a sentence at the low-end of the Guideline range provided the court calculated Benitez's offense level as 27 or higher.

[3] In the plea agreement, the parties stipulated that Benitez satisfied safety valve provision criteria two through four as set forth in Sentencing Guideline § 5C1.2. Because the presentence report had not been completed, the parties had no agreement

Benitez could not withdraw his guilty plea if the district court did not accept the recommended sentence.

At the change of plea hearing, Benitez testified that the agreement had been read to him in Spanish, his native language, that he discussed the agreement with his counsel, and that he understood the agreement. The record, however, reveals that Benitez complained to the court that he lacked communication with his counsel before the change of plea hearing and that he renewed his complaint several times before sentencing. Additionally, Benitez told the court at sentencing that he did not understand the applicable sentencing guidelines or safety valve provision.

At the change of plea hearing, the district court advised Benitez that the court was not a party to the plea agreement, that the plea agreement was not binding on the court, and that Benitez would be sentenced to the mandatory minimum, 120 months, if he was ineligible for the safety valve provision. However, the court failed to inform Benitez he could not withdraw his guilty plea if the court did not accept the recommendation set forth in the plea agreement. The court questioned Benitez's counsel and the prosecutor regarding Benitez's eligibility for the safety valve provision and both said they believed Benitez would qualify.

The presentence report was issued January 31, 2000. The report stated Benitez had a criminal history category of III, rather than I, because he had two prior criminal convictions obtained under aliases. As a result, Benitez did not satisfy criteria one of the safety valve

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regarding criteria one, Benitez's criminal history category. The parties believe Benitez's criminal history category was I, which would qualify him for the safety valve provision.

provision and the court was required to impose the mandatory minimum sentence. The report recommended an offense level of 29, which corresponded to a Guideline range of 108 to 135 months. The mandatory minimum sentence was 120 months.

At the sentencing hearing, the prosecutor informed the court that "the government stands behind [the] plea agreement and its recommendations in every way, except we are precluded from going below [the mandatory minimum] because of the safety valve." Both parties recommended the court sentence Benitez to the mandatory minimum. The court accordingly sentenced Benitez to 120 months.

II.

Of the three types of plea agreements governed by Rule 11, only "type (B)" agreements prohibit the defendant from withdrawing his guilty plea if he fails to receive the sentence for which he bargained. For this reason, Fed. R. Crim. P. 11(e)(2) expressly requires that if a defendant enters into a type (B) agreement, 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 the plea." Because type (B) agreements embody such a high degree of risk to the defendant, the advisement required by Rule 11(e)(2) is of critical importance. In this case, it is undisputed that Benitez entered into a type (B) plea agreement, and that the district court in receivership to give the warning required by Rule 11(e)(2).

Because Benitez did not object to the district court's error at the change of plea hearing, we review for plain error. *United States v. Vonn*, 535 U.S. 55, 122 S. Ct.

1043, 1046, 152 L. Ed. 2d 90 (2002). We may reverse Benitez's guilty plea conviction if: (1) the district court erred, (2) the error was "plain," and (3) the error affected Benitez's "substantial rights." *See United States v. Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Even if these three conditions are met, we retain discretion and should not employ it to correct the district court's plain error unless it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

III.

There is no question that the district court erred. The district court's error was also plain. "Plain" error is error that is "clear" or "obvious." *Id.* at 734, 113 S. Ct. 1770. At the time of Benitez's change of plea hearing, our precedent clearly required courts to comply with Rule 11(e)(2). See, e.g., *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994); *United States v. Graibe*, 946 F.2d 1428, 1435 (9th Cir. 1991).

To show the district court's plain error affected his substantial rights, Benitez must prove that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea. *United States v. Minore*, 292 F.3d 1109, 1118 (9th Cir. 2002). Benitez must satisfy both elements to meet his burden. *Id.*

Benitez has satisfied the first element. We have stated, "[t]he warning required by Rule 11(e)(2) provides an 'important safeguard' designed to ensure that the plea is 'intelligent' and 'knowing,' and the omission of such warning is neither 'minor' nor 'technical.'" *Graibe*, 946 F.2d at 1433.

We have since qualified this statement by concluding that if a court imposes the recommended sentence, its Rule 11 error is "merely technical" and does not require the sentence be set aside. *United States v. Chan*, 97 F.3d 1582, 1584 (9th Cir. 1996). We based this conclusion on the underlying principle that a defendant's substantial rights are not compromised if he receives the sentence for which he bargained. *Id.* In this case, although the district court imposed the sentence urged by both parties at the sentencing hearing, the sentence was substantially higher than the one for which Benitez bargained. The district court's error, therefore, was neither "minor" nor "technical."

In order to satisfy the second element, Benitez must show he did not understand his rights when he entered his plea. *Minore*, 292 F.3d at 1118. The government argues Benitez cannot meet this burden because the written plea agreement included the Rule 11(e)(2) "warning." In support of its position, the government cites Benitez's testimony at the change of plea hearing that the agreement had been read to him in Spanish, he had discussed it with his attorney, and he understood it.

In *Kennell*, we rejected the same argument. We explained:

> Because there is a marked difference between being warned in open court by a district judge and reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of plea and arraignments, the reading of the plea agreement is not a substitute for rigid observance of Rule 11.

Kennell, 15 F.3d at 136; *see also United States v. Smith*, 60 F.3d 595, 598-599 (9th Cir. 1995).

The government's argument that the Supreme Court's decision in *Vonn* undercut this rule is unpersuasive. *Vonn* held that unless the defendant objects at the plea hearing, he must bear the burden of proving a Rule 11 error affected his substantial rights. 122 S. Ct. at 1046. *Vonn* also held that in assessing the effect of a Rule 11 error on a defendant's substantial rights, reviewing courts may consider the entire record, not just the change of plea transcript. *Id.* These rules need not inevitably lead to the conclusion that a defendant understood he could not withdraw his plea whenever the Rule 11(e)(2) "warning" is included in the written agreement. The *Kennell* court's concern with respect to the difference between a defendant reading boilerplate language in an agreement and being advised of a fact in open court is no less valid after *Vonn.* If including the "warning" in the plea agreement were sufficient to inform a defendant he could not withdraw his guilty plea, Rule 11(e)(2) would have little force. *See United States v. Livorsi*, 180 F.3d 76, 81 (2d Cir. 1999) ("As the existence of Rule 11(e)(2) itself indicates, the best way to ensure that a defendant is fully aware of the implications of his decision to plead guilty is, after all, for the district judge to give the proper warning in open court").

In this case, the fact that the written plea agreement included the Rule 11(e)(2) "warning" does not establish that Benitez understood he could not withdraw his plea if the court did not sentence him according to its terms. The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine its provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for

the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the agreement.

The government also argues Benitez cannot show that he did not understand his rights because "the clear import" of statements made by the court show Benitez must have understood that he could not withdraw his guilty plea. The government points out that the court told Benitez he would receive a ten year sentence if he was ineligible for the safety valve provision, that the court was not a party to the plea agreement, and that there were no promises regarding the sentence he would receive, his criminal history category, or his eligibility for the safety valve provision.

We rejected a similar argument in *Graibe*. There we concluded that informing a defendant that a judge is not bound by the government's recommendation and has the discretion to impose a higher sentence "is simply not enough." *Graibe*, 946 F.2d at 1435. We stated:

> The proposition that the court is not bound by the Government's recommendations is distinct from the proposition that the defendant is bound if the court chooses not to follow the recommendation. Informing the defendant of the former does not relieve the court of its responsibility to inform him of the latter.

Id. at 1434 (*quoting United States v. Theron*, 849 F.2d 477, 481 (10th Cir. 1988)). *See also United States v. DeBusk*, 976 F.2d 300, 307 (6th Cir. 1992); *United States v. Iaquinta*, 719 F.2d 83, 85 (4th Cir. 1983).

Our recent decision in *Vonn* is clearly distinguishable from this case. In *Vonn*, although the district court failed to comply with Fed. R. Crim. P. 11(c) by not informing the defendant of his right to counsel during

the plea colloquy, the defendant was informed of the right both at his initial appearance and at his arraignment. *See United States v. Vonn*, 294 F.3d 1093, 1094 (9th Cir. 2002). *See also United States v. Siu Kuen Ma*, 290 F.3d 1002, 1005 (9th Cir. 2002) (finding no "plain error" where the district court violated Fed. R. Civ. P. 11(c)(6) by not informing the defendant of a provision in agreement waiving his right to appeal but the prosecutor summarized the terms of the plea, including the waiver provision, in open court). In this case, Benitez was never informed in open court that he could not withdraw his guilty plea if he failed to receive the benefit of his bargain and nothing in the record aside from the written plea agreement suggests he understood this fact.[4]

Benitez has met his burden of establishing that the district court's error was not merely technical and that he did not understand he could not withdraw his guilty plea if the court did not accept the sentencing recommendation in the plea agreement. Accordingly, the district court's failure to give the Rule 11(e)(2) "warning" affected Benitez's "substantial rights."

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[4] For the same reason, our recent decision in *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir.2002) is inapposite to this case. In *Morales-Robles*, the defendant was not informed of his right to persist in his not guilty plea, but he was informed of his rights to a speedy and public trial and to call witnesses on his behalf. Because the right to plead not guilty is subsumed in the right to have a trial, we held that the failure to state specifically that the defendant was entitled to persist in his not guilty plea did not adversely affect his substantial rights. Here, by contrast, the court advised Benitez that it *was not bound* by the plea agreement, but never informed him that *he himself was bound.*

We should exercise our discretion to correct the error if a "miscarriage of justice would otherwise result." *United States v. Sayetsitty*, 107 F.3d 1405, 1413 (9th Cir. 1997). Benitez pled guilty with the expectation that the safety valve provision would apply and he would serve a sentence 12 to 33 months shorter than the sentence he received. The parties so stipulated in the written plea and Benitez's counsel and the prosecutor reinforced that expectation at the change of plea hearing. Although the court advised Benitez that it was not bound by the plea agreement, it failed to inform him he could not withdraw his guilty plea if he failed to receive the benefit of his bargain. Holding Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice. *See Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) ("A plea of guilty is voluntary only if it is entered by one fully aware of the direct consequences of his plea").

IV.

Because the district court's failure to comply with Fed. R. Crim. P. 11(e)(2) constituted plain error which affected Benitez's substantial rights, and failure to correct the error would result in a miscarriage of justice, we reverse Benitez's conviction and remand to the district court for further proceedings consistent with this opinion and the accompanying memorandum disposition.

REVERSED and REMANDED.

TALLMAN, Circuit Judge, dissenting:

I respectfully disagree with the Court's analysis of the Rule 11(e)(2) issue now that the Supreme Court has decided *United States v. Vonn*, 535 U.S. 55, 122 S. Ct.

1043, 152 L. Ed. 2d 90 (2002). *Vonn* holds that when a defendant fails to object to a possible Rule 11 violation, the reviewing court must apply the plain error standard of review. Furthermore, *Vonn* instructs us to examine the record as a whole when conducting this review. Considering the cumulative effect of Benitez's signed plea agreement *and* the questions posed to Benitez during the plea colloquy, no plain error attends his conviction and sentence. We should affirm.

Vonn overrules prior Ninth Circuit cases like *United States v. Graibe*, 946 F.2d 1428 (9th Cir. 1991), which required us to find a Rule 11 violation if the transcript of the plea colloquy, when viewed by itself, did not provide proof that the defendant understood his fundamental rights that were waived by the plea agreement. *Graibe*, 946 F.2d at 1434. *Graibe* and its progeny, to which the Court's opinion tenaciously clings, held that a district court's failure to inform a defendant that he could not withdraw his guilty plea, even if the court later rejected the sentencing recommendation, was not harmless error where nothing in the plea proceeding suggested that the defendant understood the binding nature of his plea. *Id.* at 1434-35. *Graibe* prohibited our consideration of the contents of the written plea agreement when evaluating compliance with Rule 11. *Vonn* rejects this narrow and overly technical approach by placing the burden on the defendant to establish plain error, and by making it clear that our review is not limited to only the transcript of the plea proceedings. 122 S. Ct. at 1054-55.

In light of *Vonn*, I see no reason why we must cast a blind eye to the contents of the written plea agreement when determining whether Benitez had actual knowledge of the binding nature of his plea, especially where

the district judge orally reviewed the bulk of the plea agreement with Benitez during the plea colloquy. Benitez admitted to Judge Stotler that the agreement had been translated into Spanish and explained to him by his lawyer the day before he appeared in court to formally enter his plea. This was no hastily prepared document thrust upon the defendant moments before his court appearance.

After studying the transcript of the change-of-plea proceeding in its entirety, including the written plea agreement specifically reviewed by Judge Stotler with Benitez in the courtroom, I am satisfied that the district court's thorough and repeated warnings (coupled with Benitez's written acknowledgment after careful consultation with his lawyer) regarding his potential ten-year sentence provided adequate notice of the binding nature of his plea. The majority elevates form over substance by looking only to see if the "magic words" were spoken in the colloquy, while the Supreme Court tells us to apply the plain error rule to the record as a whole. This embodies a more reasonable approach in evaluating the cumulative effect of all of the warnings —written and oral—given to Benitez in connection with his plea. Together they conclusively show that Benitez understood the binding nature of his guilty plea.

In this case the district court made it abundantly clear to Benitez that he would receive a mandatory minimum sentence of ten years if he did not qualify for the safety valve exception. Benitez assured the court he understood that decision was the judge's alone. His written plea agreement acknowledges he was bound by the plea even if the probation officer's investigation later revealed that he could not qualify for a safety valve reduction because of his criminal past. His

statements in open court only have meaning if Benitez is understood to admit he knew he was bound by his plea. On the complete record, considered as a whole as *Vonn* dictates, I find no plain error and would affirm the sentence imposed.

Vonn holds "that a silent defendant [like Benitez] has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights." 122 S. Ct. at 1046. *Vonn* rejected the Ninth Circuit's overzealous standard which *Graibe*, *United States v. Kennell*, 15 F.3d 134 (9th Cir. 1994), and *United States v. Odedo*, 154 F.3d 937 (9th Cir. 1998), established. *Vonn*, 122 S. Ct. at 1047-48. The Supreme Court made clear that a defendant who remains silent shoulders "the burden to show that his 'substantial rights' were affected." *Id.* at 1048. Our Court once again falls into the same trap for which the Supreme Court criticized us in *Vonn*; the majority's approach is "more zealous than the policy behind [Rule 11] demands." *Id.* at 1054.

The majority's failure to follow binding precedent is not limited to just Supreme Court case law. *United States v. Morales-Robles*, 309 F.3d 609 (9th Cir. 2002), also controls the case before us. At issue in *Morales-Robles* was whether the district court violated Morales-Robles's substantial rights by failing to verbally advise him during his plea colloquy that he had a right to persist in his plea of not guilty. *Id.* at 610. We held that because "the district court informed [Morales-Robles] of the rights *associated* with his right to go to trial," such as his rights to a speedy trial, to call witnesses, and against self-incrimination, "the district court's failure to *specifically indicate* that he had the right to

persist in his plea of not guilty is not reversible under the plain error standard because it did not affect his substantial rights." *Id.* (emphasis added). In other words, the court's verbal statements on other topics necessarily implied the substance of the statement the district court failed to give. Similarly, while the district court here did not specifically indicate that Benitez could not withdraw his guilty plea, as shown below, it did make statements that necessarily imply the binding nature of his plea. The majority's holding today cannot be squared with *Morales-Robles*.

The majority assumes that Benitez's plea agreement was entered in haste just prior to the district judge assuming the bench to take his plea. The record shows otherwise. The ten-page plea agreement was the culmination of prior negotiations that led to the signing of an earlier version of the plea agreement on October 12, 1999. That document contained interlineations agreed between the parties, and initialed by Benitez, which were subsequently filed with the court on October 13 as an amended plea agreement. The defendant certified on the signature page:

> This agreement has been read to me in Spanish, the language I understand best, and I have carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement.

Unless the sentencing judge found that Benitez was eligible for a statutory safety valve reduction, para-

graph 4 of the plea agreement states that Benitez faced a mandatory minimum sentence of ten years:

> Absent a determination by the Court that defendant's case satisfies the criteria set forth in 18 U.S.C. § 3553(f) and United States Sentencing Guideline § 5C1.2, the statutory mandatory minimum sentence that the Court must impose for a violation of Title 21, United States Code, Section 846, is ten years imprisonment followed by a five-year period of supervised release.

Additionally, paragraph 12 of the plea agreement reads:

> The stipulations in this agreement do not bind either the United States Probation Office or the Court. The Court will determine the facts and calculations relevant to sentencing.

Finally, paragraph 19 states:

> The Court is not a party to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' stipulations. *Even if the Court ignores any sentencing recommendations, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea,* and defendant will remain bound to fulfill all defendant's obligations under this agreement. No one—not the prosecutor, defendant's attorney, or the Court—can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

(Emphasis added).

At the plea colloquy, the district judge reviewed the provisions of the written plea agreement, including discussing the substance of its provisions set forth above. She then inquired of the defendant:

> THE COURT: You are reminded that absent a determination by the Court that your case satisfies the criteria, which apparently would be a safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release.
>
> Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?
>
> THE DEFENDANT: No.
>
> THE COURT: *So you realize the Court may give you a ten-year sentence or more, as provided for by law?*
>
> THE DEFENDANT: *Yes.*
>
> THE COURT: *Knowing that, do you still want to go forward with your guilty plea?*
>
> THE DEFENDANT: *Yes.*

THE COURT: You must realize that the statutory maximum sentence provided for by law is actually as much as life imprisonment, a fine of up to $4 million, and a mandatory special assessment which is required, and that is in the sum of $100.

Do you understand the maximum penalties provided for by law?

THE DEFENDANT: Yes.

THE COURT: And knowing those consequences, do you still wish to go to forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: Mr. Wilke [defense counsel], is there some reason to believe that this defendant will in fact qualify for the safety valve calculation?

MR. WILKE: Yes, your Honor, there is.

THE COURT: *But you've told him that is still subject to the Court's determination?*

MR. WILKE: *Yes, your Honor.*

THE COURT: All right.

(Emphasis added).

The record shows that Judge Stotler spent substantial time insuring that Benitez entered into the plea knowingly and voluntarily, which satisfies the purpose of Rule 11. She specifically reminded him that any predictions as to whether or not he might be eligible for adjustments, including a safety valve reduction, were predictions regarding Benitez's sentence that were not

binding on the probation officer or the sentencing court when it came time to fix a proper sentence. She explained to him, "[T]hese stipulations are not binding on the Court. Do you understand that?" Benitez replied, "I do." Finally, Judge Stotler confirmed that defense counsel, Mr. Wilke, had discussed the Sentencing Guidelines with Benitez "very carefully."

The Court's conclusion that plain error invalidates this conviction ignores the role of conscientious defense counsel in negotiating pleas, and disregards the extensive supporting record before us by myopically focusing on a few missing words actually contained in writing but omitted orally in court. This approach places semantics over substance, and defies the Supreme Court. Because the Court's opinion disregards the analysis we now must follow under *Vonn* as well as our holding in *Morales-Robles*, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted: Dec. 5, 2001
Pasadena, California
Filed: Nov. 25, 2002

MEMORANDUM[1]

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

The district court did not abuse its discretion by denying Appellant Carlos Dominguez Benitez's ("Benitez's") motions for substitute counsel. We consider three factors: (1) adequacy of the court's inquiry into

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

the complaint; (2) whether the conflict between the defendant and his attorney was so great that it resulted in total lack of communication preventing an adequate defense; and (3) the timeliness of the request. *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990).

The district court made an adequate inquiry into Benitez's complaint. It held a hearing, allowed Benitez to address the issue at the hearing and again at sentencing, and questioned his attorney, Wilke. The conflict between Benitez and Wilke did not lead to a complete breakdown in communication nor did it prevent Benitez from presenting an adequate defense. Although Benitez refused to speak to Wilke at one meeting, he did not continue to refuse to communicate. In his letters and statements to the court, Benitez never alleged Wilke was failing to investigate an entrapment defense. Benitez's last three "motions" were untimely since the issue left when they filed was his position regarding sentencing.

This court will not consider Benitez's claim of ineffective assistance of counsel on direct appeal because the record is not sufficiently developed to consider the issue. Benitez may petition for a writ of habeas corpus if there is evidence outside the record that would support his claim.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

Argued and Submitted: Dec. 5, 2001
Decided: Jan. 29, 2002

Before BROWNING, REINHARDT, and RICHARD C. TALLMAN, Circuit Judges.

ORDER

Mandate shall be stayed pending the United States Supreme Court's decision in *United States v. Vonn*, 224 F.3d 1152 (9th Cir. 2000), *cert. granted*, 531 U.S. 1189, 121 S. Ct. 1185, 149 L. Ed. 2d 102 (Feb. 26, 2001) (No. 00-973).

MEMORANDUM[1]

The district court violated Federal Rule of Criminal Procedure 11(e)(2) by accepting Benitez's guilty plea without informing him he could not withdraw his plea if the court rejected the sentencing recommendation in the plea agreement. The dispositive issue is whether the district court's error was harmless.

A failure to comply strictly with Rule 11(e)(2) may be harmless if the record shows the defendant actually knew he would be bound by his plea regardless of the length of the sentence the court decided to impose. *United States v. Graibe*, 946 F.2d 1428, 1433 (9th Cir. 1991). However, even if a written plea agreement states the defendant cannot withdraw his plea, "the reading of the plea agreement is no substitute for the rigid observance of Rule 11." *United States v. Kennell*, 15 F.3d 134, 136 (9th Cir. 1994). Inclusion in the plea agreement of a statement that Benitez could not withdraw his plea does not establish Benitez's actual knowledge of that fact.

Nothing in the record of the plea proceeding suggests Benitez actually knew he could not withdraw his guilty plea. Since the district court imposed a sentence in excess of that recommended in the plea agreement, we hold the district court's failure to comply with Rule 11(e)(2) was not harmless error and Benitez's guilty plea must be vacated and the case remanded to district court to allow Benitez to enter a new plea.

The district court did not abuse its discretion by denying Benitez's motions for substitute counsel. We

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

consider three factors: (1) adequacy of the court's inquiry into the complaint; (2) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense; and (3) the timeliness of the request. *United States v. Walker*, 915 F.2d 480, 482 (9th Cir. 1990).

The district court made an adequate inquiry into Benitez's complaint. It held a hearing, allowed Benitez to address the issue at the hearing and again at sentencing, and questioned Wilke. The conflict between Benitez and Wilke did not lead to a complete breakdown in communication nor did it prevent Benitez from presenting an adequate defense. Although Benitez refused to speak to Wilke at one meeting, he did not continue to refuse to communicate. In his letters and statements to the court, Benitez never alleged Wilke was failing to investigate an entrapment defense. Benitez's last three "motions" were untimely since the only issue left when they were filed was his position regarding sentencing.

This court will not consider Benitez's claim of ineffective assistance of counsel on direct appeal because the record is not sufficiently developed for the court to examine the issue. Benitez may petition for a writ of habeas corpus if there is evidence outside the record that would support his claim.

REVERSED IN PART, AFFIRMED IN PART AND REMANDED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-50181
D.C. No. CR-99-00067-AHS-01

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

CARLOS DOMINGUEZ BENITEZ AKA
CARLOS DOMINGUEZ, DEFENDANT-APPELLANT

May 6, 2003

ORDER

Before: BROWNING, REINHARDT, and TALLMAN, Circuit Judges.

Judge Browning and Judge Reinhardt have voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc and Judge Browning so recommends. Judge Tallman has voted to grant the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. SA CR 99-67-AHS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CARLOS DOMINGUEZ, DEFENDANT

PLEA AGREEMENT FOR DEFENDANT DOMINGUEZ

1. This constitutes the plea agreement between Carlos Domiguez ("defendant") and the United States Attorney's Office for the Central District of California ("the USAO") in the above-captioned case. This agreement is limited to the USAO and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities.

PLEA

2. Defendant agrees to plead guilty to count one of the indictment in *United States v. Carlos Domiguez*, No. SA CR 99-67-AHS.

NATURE OF THE OFFENSE

3. In order for defendant to be guilty of count one, which charges a violation of Title 21, United States Code, Section 846, the following must be true: There was an agreement between two or more persons to posses with intent to distribute more than 500 grams of

a substance containing a detectable amount of methamphetamine and defendant became a member of the conspiracy knowing that its object was to posses methamphetamine with intent to distribute and intending to help accomplish that purpose. Defendant admits that defendant is, in fact, guilty of this offense as described in count one of the indictment.

PENALTIES

4. Absent a determination by the Court that defendant's case satisfies the criteria set forth in 18 U.S.C. § 3553(f) and United States Sentencing Guideline § 5C1.2, the statutory mandatory minimum sentence that the Court must impose for a violation of Title 21, United States Code, Section 846, is ten years imprisonment followed by a five-year period of supervised release. The statutory maximum sentence that the Court can impose for a violation of Title 21, United States Code, Section 846 is: life imprisonment; a fine of $4 million or twice the gross gain or gross loss resulting from the offense, whichever is greatest; and a mandatory special assessment of $ 100.

5. Supervised release is a period of time following imprisonment during which defendant will be subject to various restrictions and requirements. Defendant understands that if defendant violates one or more of the conditions of any supervised release imposed, defendant may be returned to prison for all or part of the term of supervised release, which could result in defendant serving a total term of imprisonment greater than the statutory maximum stated above.

FACTUAL BASIS

6. Defendant and the USAO agree and stipulate to the following statement of facts:

Defendant agreed to sell to a confidential informant methamphetamine for $5,800 per pound. Defendant obtained the methamphetamine from co-defendant Marcelino Gomez Benitez. On May 3, 1999, defendant, accompanied by Gomez Benitez and Esteban Barrera Martinez, met with the confidential informant and delivered to the informant approximately 1.3 kilograms of a substance containing methamphetamine. Defendant was to receive $200 for every pound of methamphetamine he sold to the informant. At the time of this transaction, defendant knew that he was selling methamphetamine and that methamphetamine is a controlled substance.

WAIVER OF CONSTITUTIONAL RIGHTS

7. By pleading guilty, defendant gives up the following rights:

a) The right to persist in a plea of not guilty.

b) The right to a speedy and public trial by jury.

c) The right to the assistance of counsel at trial, including, if defendant could not afford an attorney, the right to have the Court appoint one for defendant.

d) The right to presumed innocent and to have the burden of proof placed on the government to prove defendant guilty beyond a reasonable doubt.

e) The right to confront and cross-examine witnesses against defendant.

f) The right, if defendant wished, to testify on defendant's own behalf and present evidence in opposition to the charges, including the right to call witnesses and to subpoena those witnesses to testify.

g) The right not to be compelled to testify, and, if defendant chose not to testify or present evidence, to have that choice not be against defendant.

By pleading guilty, defendant also gives up any and all rights to pursue any affirmative defense, Fourth Amendment or Fifth Amendment claims, and other pretrial motions that have been filed or could be filed.

SENTENCING FACTORS

8. Defendant understands that the Court is required to consider and apply the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") but may depart from those guidelines under some circumstances.

9. Defendant and the USAO agree and stipulate to the following applicable sentencing guidelines factors:

Base Offense Level	:	32 [U.S.S.G. § 2D1.1(a)]
Specific Offense Characteristics (Safety Valve)	:	-2 [U.S.S.G. § 2D1.1(b)(6)]
Adjustments (Acceptance of Responsibility)	:	-3 [U.S.S.G. § 3E1.1(a)(b)]

The USAO will agree to a downward adjustment for acceptance of responsibility only if the conditions set forth in paragraph 14 are met. The parties agree that no additional specific offense characteristics, adjustments, or departures apply. If, however, after signing this agreement but prior to sentencing, defendant were to commit an act, or the USAO were to discover a previously undiscovered act committed by defendant prior to signing this agreement, which act, in the judgment of the USAO, constituted obstruction of justice within the meaning of U.S.S.G. § 3C1.1, the USAO would be free to seek the enhancement set forth in that section.

10. The parties agree that:

a) Defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense charged in Count One.

b) The offense charged in Count One did not result in death or serious bodily injury to any person; and

c) Defendant was not an organizer, leader, manager, or supervisor of others in the offense charged in Count One and was not engaged in a continuing criminal enterprise.

11. There is no agreement as to defendant's criminal history or criminal history category.

12. The stipulation in this agreement do not bind either the United States Probation Office or the Court. The Court will determine the facts and calculations relevant to sentencing. Both defendant and the USAO are free to: (a) supplement the facts stipulated to in this agreement by supplying relevant information to the

United States Probation Office and the Court, (b) correct any and all factual misstatements relating to the calculation of the sentence, and (c) argue on appeal and collateral review that the Court's sentencing calculations are not error, although each party agrees to maintain its view that the calculations in paragraph 9 are consistent with the facts of this case.

DEFENDANT'S OBLIGATIONS

13. Defendant agrees:

a) To plead guilty as set forth in this agreement.

b) To abide by all sentencing stipulations contained in this agreement.

c) To appear as ordered for all court appearances, to surrender as ordered for service of sentence, to obey all conditions of any bond, and to obey all other court orders.

d) Not commit any crime.

e) To be truthful at all times with Pretrial Service, the U.S. Probation Office , and the Court.

f) To pay the applicable special assessment at or before the time of sentencing unless defendant lacks the ability to pay.

THE USAO'S OBLIGATIONS

14. If defendant complies fully with all defendant's obligations under this agreement, the USAO agrees:

a) To abide by all sentencing stipulations contained in this agreement.

b) At time of sentencing to move to dismiss the remaining counts of the indictment as against defendant. Defendant agrees, however, that at the time of

sentencing the Court may consider the dismissed count in determining the applicable Sentencing Guidelines range, where the sentence should fall within that range, and the propriety and extent of any departure from that range.

c) At the time of sentencing, provided that defendant demonstrates an acceptance of responsibility for the offense up to and including the time of sentencing, to recommend a two-level reduction in the applicable sentencing guideline offense level, pursuant to U.S.S.G. § 3E1.1, and an additional one-level reduction if available under that section.

d) To recommend that defendant be sentenced at the low end of the applicable Sentencing Guidelines range provided that the range as calculated by the Court is 27 or higher and provided that the Court does not depart downward in offense level or criminal history category.

BREACH OF AGREEMENT

15. If defendant, at any time between the execution of this agreement and defendant's surrender for service of defendant's sentence, knowingly violates or fails to perform any of defendant's obligations under this agreement, the USAO may declare this agreement breached. If the USAO declares this agreement breached, and the Court finds such a breach to have occurred, defendant will not be able to withdraw defendant's guilty plea, and the USAO will be relieved of all of its obligations under this agreement.

16. Following a breach of this agreement by defendant, should the USAO elect to pursue any charge that was either dismissed or not filed as a result of this agreement, then:

a) Defendant agrees that any prosecution not time-barred by the applicable statue of limitations as of the date of defendant's signing of this agreement may be initiated against defendant notwithstanding the expiration of the statute of limitations between the signing of this agreement and the commencement of any such prosecution.

b) Defendant gives up all defenses based on the statute of limitations, any claim of pre-indictment delay, or any speedy trial claim with respect to any such prosecution.

LIMITED MUTUAL WAIVER OF APPEAL

17. Defendant gives up the right to appeal any sentence imposed by the Court, and the manner in which the sentence is determined, provided that (a) the sentence is within the statutory maximum specified above, (b) the Court does not depart upward in offense level or criminal history category, and (c) the Court determines that the total offense level is 27 or below.

18. The USAO gives up its right to appeal the Court's Sentencing Guidelines calculations, provided that (a) the Court does not depart downward in offense level or criminal history category and (b) the Court determines, that the total offense level is 27 or above.

SCOPE OF AGREEMENT

19. The Court is not a party to this agreement and need not accept any of the USAO's sentencing recommendations or the parties' stipulations. Even if the Court ignores any sentencing recommendation, finds facts or reaches conclusions different from any stipulation, and/or imposes any sentence up to the

maximum established by statute, defendant cannot, for that reason, withdraw defendant's guilty plea, and defendant will remain bound to fulfill all defendant's obligations under this agreement. No one—not the prosecutor, defendant's attorney, or the Court—can make a binding prediction or promise regarding the sentence defendant will receive, except that it will be within the statutory maximum.

20. This agreement applies only to crimes committed by defendant, has no effect on any proceeding against defendant not expressly mentioned herein, and shall not preclude any past, present, or future forfeiture actions.

NO ADDITIONAL AGREEMENTS

21. Except as set forth herein, there are no promises, understandings or agreements between the USAO and defendant or defendant's counsel. Nor may any additional agreement, understanding or condition be entered into unless in a writing signed by all parties or on the record in court.

This agreement is effective upon signature by defendant and an Assistant United States Attorney.

AGREED AND ACCEPTED

UNITED STATES ATTORNEY'S OFFICE
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ALEJANDRO N. MAYORKAS
United States Attorney

[Signature illegible] 10/12/99
CARMEN R. LUEGE Date
Assistant United States Attorney

This agreement has been read to me in Spanish, the language I understand best, and I have carefully discussed every part of it with my attorney. I understand the terms of this agreement, and I voluntarily agree to those terms. My attorney has advised me of my rights, of possible defenses, of the Sentencing Guideline provisions, and of the consequences of entering into this agreement. No promises or inducements have been made to me other than those contained in this agreement. No one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter.

[Signature illegible] 10-12-99
CARLOS DOMINGUEZ Date
Defendant

I, Joe Hernandez, am fluent in written and spoken English and Spanish languages. I accurately translated this entire agreement from English into Spanish to defendant Carlos Dominguez on this date.

/s/ JOE HERNANDEZ 10-12-99
JOE HERNANDEZ DATE
Interpreter

I am Carlos Dominguez's attorney. I carefully discussed every part of this agreement with my client. Further, I have fully advised my client of his/her rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this

agreement. To my knowledge, my client's decision to enter into this agreement is an informed and voluntary one.

/s/ CRAIG WILKE — 10-12-99
CRAIG WILKE — Date
Counsel for Defendant
Carlos Domiguez

APPENDIX F

1. Fed R. Crim. P. 11 (1989):

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty

(2) 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 the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(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 the defendant of, and determine that the defendant understands, the following:

(1) 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, including the effect of any special parole or supervised release term, the fact that the

court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

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

(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.

(d) 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.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(**C**) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. 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 subdivision (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 the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a 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.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) 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.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

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

2. Fed. R. Crim. P. 52 (1944):

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3. Fed. R. Crim. P. 11 (2002):

Rule 11. Pleas

(a) Entering a Plea.

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

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

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

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization

fails to appear, the court must enter a plea of not guilty.

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

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

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

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

(C) the right to a jury trial;

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

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

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

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

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

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

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea

agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

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

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

(3) Judicial Consideration of a Plea Agreement.

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

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

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

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

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

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

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

(d) Withdrawing a Guilty or Nolo Contendere Plea.

A defendant may withdraw a plea of guilty or nolo contendere:

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

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

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

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

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

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

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

4. Fed. R. Crm. P. 52 (2002):

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.