

**THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

UNITED STATES OF AMERICA,  
Plaintiff,

v.

DEFENDANT  
Defendant.

CRIMINAL NO. 00-000

**REQUEST TO WITHDRAW PLEA OF GUILTY**

TO THE HONORABLE SALVADOR CASELLAS  
UNITED STATES DISTRICT JUDGE  
FOR THE DISTRICT OF PUERTO RICO

COMES NOW defendant, the defendant herein, represented by the Federal Public Defender for the District of Puerto Rico, and before this Honorable Court respectfully prays and alleges:

I. Introduction

1. On December 14, 1999, Defendant was indicted of possession with intent to distribute and conspiracy to commit the same. The Federal Public Defender was appointed as his counsel on December 16, 1999.

2. On May 18, 2000, Mr. Defendant pled Guilty, in a straight plea, to the charges presented by the Government.

3. The Sentencing Hearing in this case is currently scheduled for October 19, 2000.

4. At the time the defendant pled Guilty, he was under the impression, and so was the Government, that Mr. Defendant qualified for a sentence below the mandatory minimum, under the provisions of 18 U.S.C. 3553, also know and hereafter referred to as the “safety valve”.

5. It is upon the receipt of the Presentence that the parties have come into the knowledge that he would not qualify for the provision of the safety valve, since he according to the same he possesses more than 1 criminal history point.

6. As will be more fully discussed below, the plea of guilty was entered under false impressions, and the defendant did not understand the consequences of the same. This violates one of the “core concerns” of Rule 11 colloquy, as established in *United States v. Medina-Silverio*, 30 F.3d 1, 3 (1st Cir.1994) , and requires that the plea be set aside.

7. Therefore, under Rule 32(e) of the Rules of Criminal Procedure, defendant Defendant requests this Honorable Court to allow it to withdraw his plea of Guilty.

## II. Argument

8. After Mr. Defendant was indicted, conversations were held with the United States pertaining to plea negotiations.

9. At all times during the negotiations the United States and the defense believed that Mr. Defendant has a no criminal history points. This negotiations considered that Mr. Defendant could be sentenced below the statutory minimum of 60 months.

10. Eventually the defendant entered a straight plea, which by itself does not preclude safety valve considerations.

11. On September 14, 2000, the Presentence Report was received. The same, at page 3, states that four (4) criminal history points are to be awarded to Mr. Defendant, based upon prior adjudications as a minor. The Report does not even specify the priors, due to the confidential nature of minors records.

12. It is at this time that Mr. Defendant, and indeed all the other participants in the case, became aware that Mr. Defendant did not qualify for safety valve considerations.

13. The above being the case, the defendant entered the plea without clear and complete knowledge of the consequences of the same, since at the time of the change of plea hearing he, and the Government, believed that it was possible to sentence him below the statutory minimum if he complied with the safety valve.

14. The First Circuit recently considered similar situation in *U.S. vs Hernandez Wilson*, 186 F. 3d 1 (1 Cir. 1999). The pertinent fact of that case were extremely similar to the instant one, which is to say where the defendant acquired the knowledge that he did not qualify for the safety valve after the change of plea. Due to its pertinence it's quoted *in extenso*. After a brief recital of the procedural history, starting at page 3, the Court stated:

“In fact, as discussed more fully below, at the time of the Rule 11 hearing Hernandez was ineligible for the safety valve. In order to qualify for sentencing under the safety valve, a defendant may “not have more than 1 criminal history point” See 18 U.S.C. 3553(f)(1). .... Therefore, at the time Hernandez negotiated his plea bargain with the government there was no possibility that Hernandez could be sentenced to anything less than 60 months, the statutory mandatory minimum sentence for the crime to which Hernandez was pleading guilty.

....

Rule 11 of the Federal Rules of Criminal Procedure governs the acceptance of guilty pleas to federal criminal violations. Pursuant to Rule 11, in order for a plea of guilty to constitute a valid waiver of the defendant's right to trial, guilty pleas must be knowing and voluntary: "**Rule 11 was intended to ensure that a defendant who pleads guilty does so with an 'understanding of the nature of the charge and the consequences of his plea.'**" *United States v. Cotal-Crespo*, 47 F.3d 1, 4 (1st Cir.1995) (quoting *McCarthy v. United States*, 394 U.S. 459, 467, 89 S. Ct. 1166, 22 L. Ed.2d 418 (1969)). **A breach of Rule 11 that “implicates one of the rule's 'core concerns' mandates that the plea be set aside.”** *United States v. Medina-Silverio*, **30 F.3d 1, 3 (1st Cir.1994) (internal quotations omitted)**. In previous cases we have identified three core concerns: "**1) absence of coercion; 2) understanding of the charges; and 3) knowledge of the consequences of the guilty plea.**" *Cotal-Crespo*, 47 F.3d at 4, (citing *United States v. Allard*, 926 F.2d 1237, 1244-45 (1st Cir.1991)). Rule 11 by its terms excuses harmless errors, see Fed.R.Crim.P. 11(h), and focuses the court's attention instead on “whether any particular defect in the Rule 11 hearing affected the defendant's 'substantial rights.’” *United States v. Marrero-Rivera*, 124 F.3d 342, 348 (1st Cir.1997). In determining whether

defendant's substantial rights were abridged, we consider the totality of the circumstances to determine "what was communicated by the trial court, and what should reasonably have been understood by the defendant." *Cotal-Crespo*, 47 F.3d at 4.

....

Hernandez alleges that he was misled by the prosecutor, the court, and his own counsel at his Rule 11 hearing and thus his guilty plea was not "given voluntarily and intelligently." See *United States v. Gray*, 63 F.3d 57, 60 (1st Cir.1995). On the basis of our review of the Rule 11 hearing transcript, we agree.

The prosecutor, the court and defense counsel believed that Hernandez would be eligible for sentencing under the safety valve, 18 U.S.C. § 3553(f). Indeed, in explaining the terms of the plea to Hernandez, the court at two points affirmatively represented to Hernandez that his criminal history made him eligible for sentencing under the safety valve. Although the court's representations about the availability of the safety valve were phrased conditionally several times, the court assumed that Hernandez's criminal history was not a problem. Instead, the court used conditional language to caution Hernandez that in order to get the benefit of the safety valve, he needed to truthfully and completely describe his involvement in the conspiracy to government agents. The court was thus referring to a condition within Hernandez's control when he told Hernandez that "it is in your best interest to comply [with the conditions of 18 U.S.C. § 3553(f)]." The court specifically pointed out to Hernandez more than once that he would be obligated to de-brief government agents about his involvement in the conspiracy in order to comply with the safety valve. If he did so, the court indicated, he would be eligible for sentencing under the safety valve.

....

A similar result obtains in this case. Hernandez was clearly concerned with the length of his sentence before he pled guilty. He was told that he would be eligible for a lighter sentence for which he was not eligible. This misunderstanding implicates one of Rule 11's core concerns (i.e., the defendant's knowledge of the consequences of his plea). See *Cotal-Crespo*, 47 F.3d at 4. Hernandez's plea was unmistakably induced at least in part by an inaccurate representation by the court about the consequences of his plea, thereby affecting his substantial rights. His guilty plea must therefore be set aside. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed.2d 418 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void."); see also *United States v. Gray*, 63 F.3d 57 (1st Cir.1995); *Correale v. United States*, 479 F.2d 944 (1st Cir.1973).

....

Accordingly, we vacate the judgment of conviction and the sentence, set aside the guilty plea, and remand the case for further proceedings consistent with this opinion.

15. In the present case, as in the *Hernandez* case, when the defendant entered his plea of Guilty he erroneously believed that he was eligible for the benefits of the safety valve. Indeed this was one of the major considerations.

16. Rule 32(f) of the Federal Rules of Criminal Procedure state:

“If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or y motion under 28 U.S.C. 2255.”

17. The above described factual scenario, when considered in conjunction with the *Hernandez Wilson* decision, present a “fair and just reason” for the Court to allow Mr. Defendant to withdraw his plea of Guilty.

**WHEREFORE** it is respectfully requested that this Honorable Court consider the above request and grant the remedy requested.

**RESPECTFULLY SUBMITTED.**

In San Juan, Puerto Rico, October 18, 2000

JOSEPH C. LAWS, JR.  
**Federal Public Defender**

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CERTIFICATE OF SERVICE

On October 18, 2000, I served a copy of the foregoing Motion on counsel for the government, U.S. Attorney Guillermo Gil (Attn: Assistant U.S. Attorney Aixa Maldonado) by delivering it to his office at the Federal Building, Carlos Chardón Avenue, San Juan, Puerto Rico.

Assistant Federal Public Defender