

THE SUPREME COURT HOLDS THAT RULE 11(C)(1) ERRORS DO NOT REQUIRE AUTOMATIC VACATUR OF GUILTY PLEAS

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ABSTRACT

In U.S. v. Davila, the Supreme Court ruled that a violation of Rule 11(c)(1) of the Federal Rules of Criminal Procedure, which instructs that “[t]he court must not participate in [plea] discussions,” does not require automatic vacatur of a defendant’s guilty plea. The Court held that Rule 11(h), which states, “A variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights,” is controlling. Rule 52(a), which covers trial court errors in general, provides that “Any error . . . that does not affect substantial rights must be disregarded.” The Court held that “to affect substantial rights” requires a showing of prejudice regarding the defendant’s decision to plead guilty; thus the court must review the entire record and determine whether it was reasonably probable that but for the Rule 11(c)(1) violation, the defendant would have exercised his right to go to trial. The Court’s holding is equally applicable to Rule 52(b), which states, “A plain error that affects substantial rights may be considered even though it was not brought to the trial court’s attention.” The Court reasoned that nothing in the text of Rule 11(c)(1) requires automatic vacatur of the plea without regard to the specific circumstances of the case. Also, Rule 11(h) was enacted to stop automatic vacatur and requires across-the-board application of the harmless error prescription or plain error rule. In addition, Rule 11(c)(1) was not adopted due to any constitutional requirement. Davila has application in all types of federal criminal proceedings.

INTRODUCTION

Plea bargaining has long been a part of the federal criminal judicial system as a means of securing justice and ameliorating the burden imposed on the system by the overwhelming volume of cases. Generally, the prosecution and the defendant’s attorney or the defendant acting *pro se* enter into plea discussions and negotiations whereby the defendant agrees to plead guilty to a lesser crime or fewer counts in exchange for probation, a lighter prison sentence and/or a fine.

Congress enacted the Federal Rules of Criminal Procedure (Rule), which govern the federal criminal justice system. Rule 11 governs guilty pleas. Responding to the fact that judicial participation in plea negotiations had become “common practice,” as part of the 1974 Amendment to the Rule, Congress enacted Rule 11(c)(1), which prohibits judicial involvement in plea discussions. *See*, Advisory Committee’s 1974 Note on Subd. (e)(1) of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1420 (1976 ed.) (hereinafter Advisory Committee’s 1974 Note). Rule 11(c)(1) was enacted based on a concern that judicial involvement potentially could coerce a defendant to plead guilty, impair the trial court’s impartiality, and adversely impact the integrity

of the judicial process as the judge may no longer be viewed as a neutral arbiter but rather an advocate for a particular bargain or even as a second prosecutor. It should be noted that prior to the 2002 revisions to the Rule, Rule 11(e)(1) contained the prohibition against judicial participation in plea discussions, which is now contained in Rule 11(c)(1). Hereinafter reference will be made to Rule 11(c)(1), even though a particular lower court decision may have been addressing Rule 11(e)(1), as both contain the same provision.

Rule 52(a), which governs trial court errors generally, states that “any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.” This is known as the harmless error rule. In order to clarify that the Supreme Court’s decision in *McCarthy v. U.S.*, 394 U.S. 459 (1969) (*McCarthy*) could not be read to preclude application of the harmless error rule with respect to Rule 11 violations, as part of the 1983 Amendment to the Rule, Rule 11(h) was added which provides that “a variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights.” In addition, Rule 52(b) states, “A plain error that affects substantial rights may be considered even though it was not brought to the [trial] court’s attention.” This is known as the plain error rule and it is applicable when the defendant fails to object to the error in the trial court and generally raises it at the appellate level.

The Supreme Court in *U.S. v. Davila*, 133 S.Ct. 2139 (2013) (*Davila*), resolved a split among the circuit courts over whether a Rule 11(c)(1) violation requires automatic vacatur of a defendant’s conviction or whether the court must undertake a review to determine whether the violation is harmless error or affected the defendant’s substantial rights, i.e., the record shows the defendant’s decision to plead guilty was prejudiced by the court’s participation in the plea discussions. In *United States v. Bradley*, 455 F.3d 453 (CA-4, 2006); *United States v. Pagan-Ortega*, 372 F.3d 22 (CA-1, 2004) (*Pagan-Ortega*); *United States v. Ebel*, 299 F.3d 187 (CA-3, 2002); *United States v. Kraus*, 137 F.3d 447 (CA-7, 1998) (*Kraus*); and *United States v. Miles*, 10 F.3d 1135 (CA-5, 1993), the Fourth, First, Third, Seventh, and Fifth Circuits, respectively, held that a harmless error review is necessary. Conversely, in *U.S. v. Davila*, 664 F.3d 1355 (CA-11, 2011) (*Davila I*), *rev’d* 133 S.Ct. 2139 (2013); *United States v. Anderson*, 993 F.2d 1435 (CA-9, 1993); and *United States v. Barrett*, 982 F.2d 193 (CA-6, 1992), the Eleventh, Ninth, and Sixth Circuits, respectively, held that automatic vacatur is required.

In *Davila*, the Supreme Court unanimously ruled that Rule 11(h) is controlling; thus, the court must perform a review to determine if the Rule 11(c)(1) violation is a harmless error, as it does not affect the defendant’s substantial rights. In order to determine whether the defendant’s substantial rights were affected, the court must view the full record and determine whether it was reasonably probable that the defendant would have exercised his right to go to trial but for the Rule 11(c)(1) violation. In *Davila*, the Court ruled on a situation involving Rule 52(b); thus, it is clear by virtue of the statutory scheme of the Rule and *Davila* that the review standard applies whether the defendant raises the error at the trial court or the appellate level.

While pleas bargain are utilized extensively in the court system in a wide range of criminal proceedings as disparate as murder, kidnapping, drug violations, illegal use of firearms, mail fraud, and so on, *Davila* involved a defendant charged with filing over 125 falsified tax returns who plea bargained the original thirty-four count indictment down to a single count of conspiracy

to defraud the United States by obtaining false tax returns. Accordingly, while tax practitioners and business professionals and their clients are generally aware of the civil penalties in the Internal Revenue Code of 1986, as amended (Code) and to a lesser extent the criminal provisions in the Code, *Davila* is of primary importance in criminal proceedings where plea bargaining is utilized.

In *Davila*, the Rule 11(c) violation was clear-cut and stipulated to by the government. Thus, the Court did not have to address whether the court's involvement in the plea negotiations constituted permissible judicial involvement in plea negotiations. Sometimes, courts must address such an issue, as in situations where the court merely indicates it "wants" a plea or what its sentence will be during plea negotiations. Sometimes the issue involves situations where the court's action is made either in open court or before judicial proceedings begin, such as during a status conference. It is beyond the scope of this paper to discuss what constitutes impermissible judicial involvement in plea negotiations, as it was not an issue in *Davila*. Before discussing *Davila*, a review of the relevant provisions of the Rule is necessary.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11 of the Federal Rules of Criminal Procedure governs guilty pleas. Rule 11(c) governs the plea agreement procedure. Rule 11(c)(1) prohibits the court's involvement in plea negotiations. Further, Rule 11(c)(1)(A) – (C) describes permissible types of plea agreements and Rule 11(c)(3) – (5) address a court's consideration, acceptance, or rejection of a proffered agreement. Specifically relevant to *Davila*, Rule 11(c)(1) provides, in pertinent part:

(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* (emphasis added).

As part of the 1974 amendment to the Rule, the prohibition of a court's participation in discussions to reach a plea agreement was added. In *Kraus*, referring to the Advisory Committee's 1974 Note, and various judicial decisions, the court succinctly summarized the underlying reasons for Rule 11(c)(1) as follows:

Underlying the rule is a recognition that the judge, by virtue of her office, can never engage in plea negotiations as a co-equal participant:

'The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.'

Fed. R. Crim. P. 11 advisory committee's note (1974 amendment), quoting *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y.

1966) ... Excluding the judge from the plea discussions thus serves three purposes: it minimizes the risk that the defendant will be judicially coerced into pleading guilty, it preserves the impartiality of the court, and it avoids any appearance of impropriety. ...

Of course, once the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted but expected that the court will take an active role in evaluating the agreement. ... Rule 11 advisory committee's note (1974 amendment) ('It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court.'). Preeminently, the court must make sure that the defendant's plea is both voluntary and knowing. ... Indeed, it is exactly because the court plays such a vital role in assessing the validity of the plea that it must remain removed from the discussions culminating in that plea, lest its objectivity and impartiality be compromised. *Kraus*, 157 F.3d at 452-453.

Accordingly, Rule 11(c)(1) serves to preserve a defendant's fundamental constitutional right to not be coerced to plead guilty. It preserves the court's impartiality both during and after plea negotiations and avoids the danger that a judge's neutrality might be compromised, particularly as the judge may become personally involved and resent a defendant's rejection of his suggested plea advice. Furthermore, it preserves the impression that the court is a neutral arbiter, which preserves public confidence in the criminal justice system.

Rule 11(h) provides "Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights." It was added as part of the 1983 Amendment to the Rule to make clear that Rule 11 errors are not excepted from Rule 52(a), which governs trial court errors generally, and states that, "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *See*, Advisory Committee's 1983 Note 749.

Rule 11(h) became necessary as, in *McCarthy*, the Supreme Court ruled that a guilty plea accepted absent the court's inquiry as to whether or not the defendant understood the nature of the charge required vacatur of the guilty plea. Some lower courts read *McCarthy* to demand automatic vacatur due to Rule 11(c)(1) violations. The Advisory Committee, in its Advisory Note (Advisory Committee's 1983 Note) regarding Rule 11(h), provided that it "rejects the extreme sanction of automatic reversal" for Rule 11 violations and clarified that plea errors are subject to the harmless error inquiry provided for by Rule 52(a). *See*, Advisory Committee's 1983 Note on Subd. (h) of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., pp. 749, (1988 ed.). The Advisory Committee, in the Advisory Committee's 1983 Note at 751, indicated that Rule 11(h) would prevent applying *McCarthy* "as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings."

In addition to the harmless error rule in Rule 52(a), Rule 52(b) provides, "A plain error that affects substantial rights may be considered even though it was not brought to the [trial] court's attention." Thus, a defendant may raise the Rule 11(c)(1) violation as a basis for vacatur of a conviction and withdrawal of a plea at the appellate level. Of crucial importance, the

prosecution bears the burden of showing harmlessness when Rule 52(a) applies. However, the defendant must show that an error affects substantial rights when Rule 52(b) applies. *See, United States v. Vonn*, 535 U.S. 55 (2002) and *United States v. Dominguez Benitez*, 542 U.S. 74 (2004). Often the outcome of a judicial proceeding is determined by which party has the burden of proof and whether or not that burden has been satisfied.

In a nutshell, Rule 11(c)(1) provides that courts are not to participate in plea discussions. If Rule 11(c)(1) is violated, Rule 11(h) requires that an inquiry be made to determine if the violation affects the defendant's substantial rights. If it does not, it is harmless error and, pursuant to the harmless error rule in Rule 52(a), it is disregarded. Thus, the conviction is not automatically vacated. The prosecution has the burden to show that the violation does not affect substantial rights when Rule 52(a) applies. If the defendant does not object to the error in the trial court, the plain error rule contained in Rule 52(b) applies, and the defendant has the burden to show that the error affects substantial rights in order to have the conviction vacated and the plea withdrawn.

U.S. v. Davila

In *Davila*, the Supreme Court reversed the Eleventh Circuit's decision in *Davila I*, which held that a Rule 11(c)(1) violation demands automatic vacatur. Noting that the case involved the Rule 52(b) plain error rule and citing Eleventh Circuit precedent, the court in *Davila I* stated, "Rule 11(c)(1) states a 'bright line rule': it prohibits 'the participation of the judge in plea negotiations under any circumstances . . . [and] admits of no exceptions.' *United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996) (quotation omitted). Thus, '[j]udicial participation is plain error, and the defendant need not show actual prejudice.' *United States v. Corbitt*, 996 F.2d 1132, 1135 (11th Cir. 1993) (emphasis added). Notably, while other circuits recognize harmless error in the context of judicial participation, we do not." *Davila I*, 604 F.3d at 1358.

Rejecting the reasoning in *Davila I*, the Supreme Court in *Davila* opined that Rule 11(h) applied and it is clear that Rule 11(c)(1) violations do not mandate automatic vacatur. Instead, the court must view the entire record and inquire whether the violation affected the defendant's substantial rights, which requires vacatur of the conviction and withdrawal of the plea, or whether it was harmless error, in which case it should be disregarded. The Rule 11(c)(1) violation must have prejudiced the defendant's decision to plead guilty for it to have affected substantial rights. The standard or test set forth by the Court to determine if there was prejudice is to review the entire record and determine whether it was reasonably probable that, but for the Rule 11(c)(1) violation, a defendant would have exercised his right to go to trial.

The facts in *Davila* are not complex, but they are interesting. In May, 2009, a thirty-four count indictment was returned by a grand jury against Anthony Davila, charging that he filed over 120 falsified tax returns and collected over \$423,000 from the U.S. Treasury due to his fraudulent scheme. Davila was not happy with his court-appointed attorney and during a February, 2010, hearing before a magistrate judge, Davila requested his discharge, as counsel had not offered a defensive strategy but simply advised him to plead guilty. During the *in camera* hearing, Davila and his attorney appeared, but no representative of the U.S. The magistrate judge informed Davila at the start of the hearing that he could act *pro se*, but he would not be appointed another court-appointed attorney. The magistrate judge told Davila that "there may not be viable defenses to

these charges,” and that sometimes pleading guilty is the best advice. The judge stated, “In view of whatever the Government’s evidence in a case might be, it might be a good idea for the Defendant to accept responsibility for his criminal conduct[,] to plead guilty[,] and go to sentencing with the best arguments . . . still available [without] wasting the Court’s time, [and] causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case.” *Davila*, 133 S.Ct. at 2144.

Urging Davila to cooperate as a means to obtain a downward departure from the sentence he faced in the Federal Sentencing Guidelines, the judge stated, “[T]ry to understand the Government, they have all of the marbles in this situation and they can file that . . . motion for [a] downward departure from the guidelines if they want to, you know, and the rules are constructed so that nobody can force them to file that [motion] for you. The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you’ve got to go to the cross. You’ve got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.” *Davila*, 133 S.Ct. at 2144.

Furthermore, as the hearing concluded, the judge cautioned Davila, “[T]hat two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn’t know what was going on. . . . You’ve got to go [to the cross] and you’ve got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the [D]istrict [J]udge and he will say, you know, that Davila guy, he’s got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction.” *Davila*, 133 S.Ct. at 2144.

More than three months after the hearing before the magistrate judge, in May, 2010, Davila entered a guilty plea before the district court in accordance with a plea bargain agreement whereby he agreed to plead guilty to a charge of conspiracy to defraud the United States by obtaining false tax refunds in exchange for dismissal of the other thirty-three counts in the indictment. In accordance with Rule 11, Davila stated under oath that he was not forced or pressured to plead guilty. He did not mention the *in camera* hearing and nothing in the record indicates that the district judge was aware of the *in camera* hearing. Before he was sentenced on November 15, 2010, to 115 months’ imprisonment, Davila moved to vacate his plea and dismiss the indictment, asserting that his plea was strategic; namely, to force the Government to acknowledge time frame errors in the indictment and to reveal the prosecution’s vindictiveness. The district judge denied Davila’s motion, observing Davila’s affirmation that he was not forced or pressured to plead guilty and that the guilty plea was knowing and voluntary. Neither Davila nor the court mentioned the *in camera* hearing.

Davila’s court-appointed attorney sought leave to withdraw on appeal, which was denied. However, the Eleventh Circuit performed an independent review of the record, noted the statements made by the magistrate judge during the *in camera* hearing, and requested that

Davila's counsel address whether the "irregularity in the statements" of the magistrate judge were a Rule 11(c)(1) error. In response, Davila's counsel filed a brief seeking the setting aside of Davila's plea and that his conviction be vacated due to the Rule 11(c)(1) violation, arguing that the judge's comments constituted improper participation as he addressed the weight of the evidence against Davila and suggested a more favorable sentence would result if he pled guilty; thus, substantial rights were violated and the integrity of the proceedings was undermined. The Government conceded that the magistrate judge's comments violated Rule 11(c)(1); however, it argued it was harmless error as there was no adverse effect on Davila's substantial rights since there was a three-month gap between the *in camera* hearing and Davila's guilty plea and a different judge presided over the plea and sentencing hearings.

In ruling that a violation of Rule 11(c)(1) does not demand automatic vacatur, the Court rejected Davila's argument that plea-colloquy omissions in violation of Rule 11, such as failure to inform a defendant of the right to counsel if he proceeds to trial, or that he would not be permitted to withdraw his guilty plea even if the court did not accept the sentence recommendation set forth in the plea bargain, should be treated differently than pre-plea exhortations to plead guilty. The Court did not view violations of Rule 11 pre-colloquy instructions as merely procedural, thus assessed under the Rule 11(h) harmless error provision, but Rule 11(c)(1) violations as demanding automatic vacatur. The Court was not convinced by Davila's argument that Rule 11(c)(1) becomes operative before a defendant has decided whether to plead guilty or proceed to trial; thus, a violation is more than a procedural technicality and undermines the judicial proceeding and impartiality of the judge thereby meriting Rule (c)(1)'s bright line prohibition on judicial involvement in plea discussions and meriting automatic vacatur. Rather, the Court stated,

"Nothing in Rule 11's text, however, indicates that the ban on judicial involvement in plea discussions, if dishonored, demands automatic vacatur of the plea without regard to case-specific circumstances ... In recommending the disallowance of judicial participation in plea negotiations now contained in subsection (c)(1), the Advisory Committee stressed that a defendant might be induced to plead guilty to avoid antagonizing the judge who would preside at trial. ... But the Committee nowhere suggested that violation of Rule 11(c)(1) is necessarily an error graver than, for example, the error in *Dominguez Benitez*, i.e., the failure to tell a defendant that the plea would bind him even if the sentence imposed significantly exceeded in length the term of years stated in the plea bargain. As earlier noted ...the Committee pointed to commentary describing judicial engagement in plea bargaining as a once 'common practice,' ... and it observed that, in particular cases, questions may arise '[a]s to what . . . constitute[s] 'participation.' ... In short, neither Rule 11 itself, nor the Advisory Committee's commentary on the Rule singles out any instruction as more basic than others. And Rule 11(h), specifically designed to stop automatic vacatur, calls for across-the-board application of the harmless error prescription (or, absent prompt objection, the plain error rule)." *Davila*, 133 S.Ct. at 2148-2149.

The Court did not mandate automatic vacatur due to the Rule 11(c)(1) violation on constitutional grounds. Rather than view Rule 11(c)(1) violations as undermining the fairness of the criminal

proceeding, it viewed Rule 11(c)(1) as serving to protect the proceedings with regard to the purposes underlying the adoption of Rule 11(c)(1). The Court stated,

“Rule 11(c)(1) was adopted as a prophylactic measure, ... not one impelled by the Due Process Clause or any other constitutional requirement. ... We have characterized as ‘structural’ ‘a very limited class of errors’ that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. *United States v. Marcus*, 560 U. S. 258, ___, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) (slip op., at 4-5) (internal quotation marks omitted). Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt. See, e.g., *United States v. Gonzalez-Lopez*, 548 U. S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (ranking “deprivation of the right to counsel of choice” as “structural error”). Rule 11(c)(1) error does not belong in that highly exceptional category. See *Neder v. United States*, 527 U. S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (structural errors are ‘fundamental constitutional errors that “defy analysis by ‘harmless error’ standards” (quoting *Arizona v. Fulminante*, 499 U. S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).” *Davila*, 133 S.Ct. at 2149.

The Court noted that its essential point is that the particular facts and circumstances of a case matter and that the case may not have even reached the Court had not three months lapsed between the *in camera* hearing and Davila’s appearance before the District Judge who accepted his guilty plea and sentenced him. The Court referred to the transcripts of the oral arguments before the Supreme Court and cited the fact that Counsel for the Government acknowledged if there is a serious Rule 11(c) violation and the defendant pleads guilty right after that, the violation would likely qualify as prejudicial; thus affecting the defendant’s substantial rights. Referring to the facts of the case, the Court reasoned that the record does not indicate that the District Judge knew of the *in camera* hearing and conducted an exemplary Rule 11 colloquy whereby Davila indicated that no one forced or pressured him to plead guilty. Accordingly, at the time of the plea hearing, the judicial and prosecutorial functions were not blended whereby the District Judge became more than a neutral arbiter and thus, in effect, a second prosecutor.

The Court noted that Davila did not raise the Rule 11(c)(1) violations at the plea hearing and later called his decision “strategic.” The Court then set forth the standard whereby the Rule 11(c)(1) violation should be measured to determine if a conviction should be vacated. The Court stated, “Rather than automatically vacating Davila’s guilty plea because of the Rule 11(c)(1) violation, the Court of Appeals should have considered whether it was reasonably probable that, but for the Magistrate Judge’s exhortations, Davila would have exercised his right to go to trial. In answering that question, the Magistrate Judge’s comments should be assessed, not in isolation, but in light of the full record.”

Since the Eleventh Circuit viewed Rule 11(c)(1) as a “bright line rule” with no exceptions and judicial participation as plain error, it did not require Davila to show actual prejudice and did not recognize the harmless error rule as operative. It automatically vacated the conviction without engaging in the full-record assessment required by the Court. Hence, the Eleventh Circuit did not

address the case-specific arguments raised by the Government in *Davila*, such as the Government's contention that Davila was not prejudiced and Davila's contention that Rule 52(a)'s harmless error standard should apply, as opposed to the plain error standard of Rule 52(b), due to the extraordinary circumstances in the case. Accordingly, the Court vacated the Eleventh Circuit's judgment and remanded the case for further proceedings consistent with its opinion.

Interestingly, in a brief concurrence, Justice Scalia, joined by Justice Thomas, stated, "I agree with the Court that a defendant must be prejudiced by a Rule 11(c)(1) error to obtain relief. That is because the text of Federal Rule of Criminal Procedure 11(h) says exactly that, in words whose meaning is crystal clear: 'Harmless error. A variance from the requirements of *this rule* is harmless error if it does not affect substantial rights.' (Emphasis added.) As the Court recognizes, this rule 'calls for across-the-board application of the harmless error prescription (or, absent prompt objection, the plain error rule).' *Ante*, at 12. That is the beginning and the end of this case. We should not rely on the notes of the Advisory Committee to unearth Rule 11's alleged design, for '[t]he Committee's view is not authoritative' and the text of the Rule conclusively resolves the question before us." *Davila*, 133 S.Ct. at 2150.

CONCLUSION

In *Davila*, the Supreme Court ruled that judicial participation in plea discussions in violation of Rule 11(c)(1) are controlled by Rule 11(h), which states that "[a] variance from the requirements of this rule is harmless error if it does not affect substantial rights." Pursuant to the inquiry that Rule 11(h) mandates as to whether the Rule 11(c)(1) violation affects substantial rights, vacatur of a plea is not automatic and is not in order if the record shows there is no prejudice to the defendant's decision to plead guilty rather than go to trial. In accord with the harmless error rule contained in Rule 52(a), the Rule 11(c) violation must be disregarded if it does not affect substantial rights. Similarly, the plain error rule in Rule 52(b), applicable when a defendant fails to object to the error in the trial court, provides that a plain error that affects substantial rights may be considered. Rather than automatically vacating a guilty plea due to a Rule 11(c)(1) violation, a court must consider whether it was reasonably probable that, but for the Rule 11(c)(1) violation, the defendant would have exercised his right to go to trial. The court must view the Rule 11(c)(1) violation in light of the full record, as opposed to in isolation.

While the Supreme Court has mandated a review to determine if a Rule 11(c)(1) violation was harmless error, historically courts generally have been loathe to categorize judicial involvement in plea discussions as harmless error. This is so as courts are extremely sensitive to maintain the integrity of the criminal judicial system, avoid even the appearance of impropriety, remain neutral arbiters, and assure the voluntary nature of the pleas are free of any pressure on or coercion of the defendant. Thus, even though a judicial review is necessary, there likely will be judicial proclivity to find Rule 11(c)(1) violations are more than harmless error and substantially affect the defendant's rights, resulting in vacatur of convictions and withdrawal of pleas.

The concurrence's view that the text of Rule 11(h) is determinative as it is "crystal clear" and calls for across-the-board application of the harmless error rule or the plain error rule when Rule 52(b) applies succinctly captures the intent of Congress with regard to Rule 11(c)(1) violations.

Clearly, as the Court stated, the particular facts and circumstances will be determinative in any given case. Hence, factual distinctions such as the time elapsed between the Rule 11(c)(1) violation and the guilty plea; whether it is the same judge who violated Rule 11(c)(1) and who presided at the plea hearing; whether the judge presiding at the plea hearing was aware of the Rule 11(c)(1) violation; the content and context of what a judge said; a defendant's history in criminal court and their knowledge of the system; and a myriad of other factors are to be weighed in determining whether there was a blending of judicial and prosecutorial functions resulting in the defendant's substantial rights being affected.

Many are familiar with the expression, "An ounce of prevention is worth a pound of cure." When it comes to Rule 11(c)(1) violations, as stated in *Pagan-Ortega*, "An ounce of trial-restraint is worth a pound of appellate deliberation."

REFERENCES

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