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## Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process

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# FEDERAL GUILTY PLEAS: INEQUITIES, INDIGENCE, AND THE RULE 11 PROCESS

JULIAN A. COOK, III

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# FEDERAL GUILTY PLEAS: INEQUITIES, INDIGENCE, AND THE RULE 11 PROCESS

JULIAN A. COOK, III\*

**Abstract:** Although there has been substantial academic focus on the subject of plea bargaining, the guilty-plea hearing has received considerably less notice and criticism. It is this hearing where a defendant formally changes his plea from “not guilty” to “guilty,” and where judges are tasked with the responsibility of ensuring that defendants are making this decision voluntarily and with sufficient awareness of an array of critical attendant consequences. Yet, all too frequently, courts hastily perform this task, and accept a defendant’s change of plea decision without sufficient examination. These problems were on display in two recent Supreme Court cases, *Lee v. United States* and *Class v. United States*. In each case, the district courts accepted the defendant’s guilty plea without adequately ensuring the defendant’s comprehension of a key matter central to their decision-making. The Supreme Court in *Brady v. United States* stated that the decision to enter a guilty plea “is a grave and solemn act to be accepted only with care and discernment.” However, this “care and discernment” expectancy is commonly unfulfilled. This Article will analyze the federal guilty-plea-hearing process, explain why expediency and facial compliance with Rule 11 (as opposed to searching inquiries regarding a defendant’s knowledge and coercive influences) characterize federal-court procedure, discuss how these shortfalls affect federal defendants generally, and the indigent and minorities in particular, and propose a pathway to reform.

## INTRODUCTION

In 2017 and 2018, the Supreme Court issued two little-noticed decisions, *Lee v. United States* and *Class v. United States*.<sup>1</sup> *Lee* assessed a criminal de-

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<sup>1</sup> *Class v. United States*, 138 S. Ct. 798 (2018); *Lee v. United States*, 137 S. Ct. 1958 (2017).

fendant's ineffective-assistance-of-counsel claim that alleged that his decision to forgo a federal jury trial and enter a plea of guilty was based on his counsel's erroneous advice regarding the possibility of deportation.<sup>2</sup> *Class* addressed whether a criminal defendant who entered a non-conditional guilty plea inherently waived his right to pursue an appeal that challenged the constitutionality of his statute of conviction.<sup>3</sup>

Although neither case captured the attention of the national media nor generated meaningful academic commentary, both cases are well deserving of critical examination—less so for the issues presented to the Court, though they are meaningful. But they deserve review because of a consequential shared fact. This fact is representative of a commonplace, yet largely overlooked, federal-court practice that routinely disadvantages the indigent (and disproportionately minority populations), and compromises the integrity of arguably the most consequential component of the federal criminal justice process. In each case, the district courts accepted the defendant's guilty plea pursuant to Rule 11 of the Federal Rules of Criminal Procedure<sup>4</sup> without ensuring their guilty pleas were entered with sufficient awareness of certain critical consequences attendant to their change of plea decision.<sup>5</sup>

In the end, the Supreme Court rectified the alleged wrongs in *Lee* and *Class*. The Court in *Lee* found that Jae Lee sustained prejudice by virtue of his counsel's faulty advice regarding the possibility of deportation.<sup>6</sup> The Court reasoned that there was a reasonable probability that Lee would have rejected the plea offer and gone to trial to avoid this outcome.<sup>7</sup> Similarly, the Court in *Class* concluded that Rodney Class's claims challenging the constitutionality of his statute of conviction were preserved despite his guilty plea, given that the claims questioned the very authority of the government to obtain an indictment for his underlying conduct.<sup>8</sup>

But the Court's savior acts mask a more pressing concern: why were these issues allowed to advance to the Supreme Court in the first place? In each case, the guilty pleas were accepted by the district court as knowing and voluntary when, in *Lee* it was not, and in *Class* it was certainly a debat-

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<sup>2</sup> *Lee*, 137 S. Ct. at 1962.

<sup>3</sup> Petition for a Writ of Certiorari at i, *Class*, 138 S. Ct. 798 (No. 16-424) (defining the issue as whether a defendant's plea of guilty inherently waives his right to pursue an appeal challenging the constitutionality of his statute of conviction).

<sup>4</sup> FED. R. CRIM. P. 11.

<sup>5</sup> See *Class*, 138 S. Ct. at 807; *Lee*, 137 S. Ct. at 1968.

<sup>6</sup> *Lee*, 137 S. Ct. at 1969.

<sup>7</sup> *Id.* at 1968–69.

<sup>8</sup> *Class*, 138 S. Ct. at 805 (“In sum, the claims at issue here . . . challenge the Government's power to criminalize Class' (admitted) conduct. They thereby call into question the Government's power to 'constitutionally prosecute' him.”).

able question. In *Lee*, the U.S. District Court for the Western District of Tennessee had an opportunity to assess whether the defendant fully appreciated the possibility of deportation as an accompaniment to his decision to plead guilty.<sup>9</sup> Similarly, the U.S. District Court for the District of Columbia in *Class* had an opportunity to assess the defendant's appreciation of the scope of his appellate rights.<sup>10</sup>

The core function of a guilty-plea hearing is to ensure that a defendant's decision to change his plea is sufficiently informed and voluntary.<sup>11</sup> It is a decision that is often highly consequential. As stated by the Supreme Court in 1970 in *Brady v. United States*, it "is a grave and solemn act to be accepted only with care and discernment," and represents the "defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge."<sup>12</sup> And it is an election that the overwhelming majority of criminal defendants,<sup>13</sup> including the indigent and minority populaces who comprise a disproportionate percentage of this class,<sup>14</sup> routinely make.

Nevertheless, customary federal-court change-of-plea practice does not comport with the "care and discernment" expectancy.<sup>15</sup> Expediency and facial compliance with the governing rules (as opposed to searching inquiries regarding a defendant's knowledge and coercive influences) characterize federal-court procedure. Defendants are routinely adjudicated guilty without a meaningful judicial inquiry testing a defendant's comprehension of the critical attendant consequences or the voluntariness of his decision. And given the absence of meaningful academic discussion and national or local

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<sup>9</sup> See *Lee*, 137 S. Ct. at 1968.

<sup>10</sup> See Joint Appendix at 60–67, *Class*, 138 S. Ct. 798 (No. 16-424).

<sup>11</sup> See FED. R. CRIM. P. 11(b). Rule 11(b) provides that before a court can accept a guilty plea, the defendant must comprehend an array of attendant consequences, the plea must be entered into voluntarily, and there must be a supporting factual basis. *Id.* Rule 11(b)(1) delineates the constitutional, sentencing, and other matters defendants must understand. *Id.* Rules 11(b)(2) and (3) describe the voluntariness and factual basis requirements respectively. *Id.*

<sup>12</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>13</sup> See THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), <https://bjs.gov/content/pub/pdf/fdluc06.pdf> [<https://perma.cc/E7C7-YJL6>] (stating that in excess of ninety-five percent of criminal cases are resolved via a guilty plea); LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/BYV7-8NVW>].

<sup>14</sup> See GLENN R. SCHMITT & CASSANDRA SYCKES, U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2017, at 4 (2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf) [<https://perma.cc/3NAF-X33S>] (stating that nearly seventy-five percent of federal criminal offenders are minorities).

<sup>15</sup> FED. R. CRIM. P. 11 advisory committee's note to 1983 amendment.

efforts at reform, there is every reason to believe that the inadequacies of the guilty-plea-hearing process will persist for the foreseeable future.

Plea bargaining is the typical precursor to the guilty-plea hearing and, over the course of several decades, has generated an impressive body of academic scholarship.<sup>16</sup> But scant academic scholarship has been devoted to the natural outgrowth of the plea-bargaining process, the guilty-plea hearing.<sup>17</sup> It is the guilty-plea hearing, not the jury-trial process, that is vastly

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<sup>16</sup> Some scholars have expressed considerable reservations regarding the practice. *See, e.g.*, Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 940 (2015) (noting how plea “bargaining almost certainly multiplies the number of wrongful convictions”); Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983) (noting a host of problems with the plea bargaining system and offering reforms); Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1425 (2003) [hereinafter Bibas, *Bringing Moral Values*] (stating that plea bargaining is a “flawed substitute[] for full-fledged jury trials”); Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS PUB. L. REV. 79, 79–84 (2011) (discussing an array of issues that inhibit informed decisions during the plea bargaining process); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1037–38 (1984) (arguing that plea bargaining is not inevitable, but should be replaced with a bench-trial model based upon one used in Philadelphia, Pennsylvania); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (“[A]bolition is necessary to avoid egregious injuries that the American plea bargaining system currently inflicts on both innocent defendants and the law-abiding public as a whole.”); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventative Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1519 (2016) (arguing that plea bargaining has produced “flagrant assaults on [the criminal justice system’s] substantive and procedural underpinnings because efficiency has become king”). Others have been more measured in their critiques. *See* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) (“Plea bargains are compromises. Autonomy and efficiency support them. ‘Imperfections’ in bargaining reflect the imperfections of an anticipated trial. To improve plea bargaining, improve the process for deciding cases on the merits.”); Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 397 (2016) (discussing “why the carefully tailored involvement of judges in plea negotiations has the potential to contribute far more than increased efficiency to contemporary criminal justice”); Colin Miller, *Anchor Away: Why the Anchoring Effect Suggests that Judges Should be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1724–25 (2013) (arguing judicial participation in plea bargaining would produce fairer plea-bargaining results); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2650 (2013) (discussing why *Frye*, *Lafler* and *Padilla* “strongly support a right to effective plea bargaining counsel”); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2015 (1992) (arguing that plea bargaining is essentially a fair process); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910–11 (1992) (analyzing plea bargaining through contractual lenses and proposing reforms).

<sup>17</sup> *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 140 (2004) (arguing, among other things, that guilty-plea hearings are “dry recitations of rights and facts” that produce “perfunctory, scripted statements [that] are far from full apologies”); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 U. COLO. L. REV. 863, 868 (2004) (arguing that Rule 11 is ineffectual in ensuring that defendants who enter guilty pleas are doing so

more impactful upon the lives of the accused. It is the guilty-plea hearing, more so than plea negotiations, that ultimately determines a defendant's fate. The dearth of academic commentary upon the guilty-plea hearing is rather surprising, particularly since the problems associated with the change of plea process are so pronounced.

This article will help fill this void. It will analyze the federal guilty-plea-hearing process, examine its most critical problem areas, discuss how these shortfalls affect federal defendants generally, and the indigent class in particular, and propose a pathway to reform. It will proceed in four parts. Part I is foundational.<sup>18</sup> It will detail the pertinent constitutional and statutory principles that guide the federal guilty-plea process. The highlight of this Part will be an in-depth discussion of Rule 11 of the Federal Rules of Criminal Procedure, which delineates the specific processes that district courts must follow when conducting a guilty-plea hearing. Part II will review the *Lee* and *Class* cases.<sup>19</sup> It will commence with a discussion of the facts of each case, as well as a review of the Court's holding and rationales. However, the Part's primary emphasis will be on the *Lee* and *Class* guilty-plea colloquies, which will illuminate the critical and consequential problems that are commonplace during Rule 11 hearings. Part III will explain how commonly employed modes of judicial inquiry (leading and compound questions) purportedly aimed at assessing defendant knowledge and voluntariness in effect promote judicial interests in efficiency at the expense of meaningful exploration.<sup>20</sup> Finally, the conclusion will outline a proposal for reform. Specifically, it sets forth general guidelines, including a recommended alignment of judicial questioning modes with the federal evidence rules, that should be adopted if the guilty-plea process is to become more effective.

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knowingly and voluntarily); Julian A. Cook, III, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post-Boykin Era*, 77 NOTRE DAME L. REV. 597, 615–24 (2002) (demonstrating how judicial employment of leading and compound questioning during the Rule 11 hearing inadequately ensures that defendants have entered their guilty pleas knowingly and voluntarily); Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195, 236–42 (1991) (advocating reforms for plea hearing practice in military courts); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301, 345–50 (1987) (arguing that victims should be permitted to express to the court whether a proposed plea bargain should be accepted); Prentice L. White, *The Judge Made Me Do It: Evaluating How Judicial Expression in Plea Negotiations May Contribute to Wrongful Convictions*, 54 WILLAMETTE L. REV. 137, 143–47 (2017) (discussing how judicial expressions impact a defendant's change of plea decision).

<sup>18</sup> See *infra* notes 21–103 and accompanying text.

<sup>19</sup> See *infra* notes 104–170 and accompanying text.

<sup>20</sup> See *infra* notes 171–258 and accompanying text.

## I. VALID GUILTY PLEAS: CONSTITUTIONAL AND STATUTORY STANDARDS

This Part will first explain the relevant Fifth Amendment due process principles and their application to the federal guilty-plea process.<sup>21</sup> It will then explain the historical development of Rule 11, which governs the guilty-plea process. Further, it will detail the processes for the entering of a guilty plea that must be followed today.<sup>22</sup>

### A. Fifth Amendment Due Process

To enter a valid guilty plea, the Fifth Amendment Due Process Clause requires that a defendant be competent. In 1993 in *Godinez v. Moran*, the Supreme Court enunciated the governing standard: a defendant is competent to enter a guilty plea so long as he has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and has “a rational as well as factual understanding of the proceedings against him.”<sup>23</sup> This standard is identical to that required to stand trial<sup>24</sup> and to waive one’s right to trial counsel.<sup>25</sup>

Due process also requires that guilty pleas be entered voluntarily (free of undue coercive influences) and “be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>26</sup> As for the voluntariness requirement, it is settled law that a guilty plea induced by the threat of a harsher penalty,<sup>27</sup> by threat of additional criminal

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<sup>21</sup> See *infra* notes 23–39 and accompanying text.

<sup>22</sup> See *infra* notes 40–103 and accompanying text.

<sup>23</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960) (quoting *Godinez v. Moran*, 509 U.S. 389, 396 (1993)).

<sup>24</sup> *Id.* (defining the standard for competence to stand trial as “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him”); see also *Godinez*, 509 U.S. at 398 (“[W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.”).

<sup>25</sup> *Faretta v. California*, 422 U.S. 806, 835–36 (1975) (holding that a defendant has a right to waive his right to an attorney and represent himself but must do so “knowingly and intelligently”).

<sup>26</sup> *Brady*, 397 U.S. at 748 (1970).

<sup>27</sup> See, e.g., *United States v. Goodwin*, 457 U.S. 368, 382–83 (1982) (concluding that the government did not act vindictively when the prosecutor charged the defendant with felonies after plea negotiations failed based on an earlier misdemeanor charge); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (holding that the government did not violate the defendant’s due process rights when the prosecutor re-indicted him on heftier charges); *Brady*, 397 U.S. at 747 (holding that guilty pleas motivated by a desire to avoid the death penalty are not involuntary); *Parker v. North Carolina*, 397 U.S. 790, 795 (1970) (“[A]n otherwise valid plea is not involuntary because induced by the defendant’s desire to limit the possible maximum penalty to less than that authorized if there is a jury trial.”); *United States v. Kent*, 649 F.3d 906, 914 (9th Cir. 2011) (“[A] prose-



charges,<sup>28</sup> or to avoid the indictment of family members<sup>29</sup> is not unduly coercive. Courts recognize that pressures are an inherent part of the criminal-adjudicative process and that the voluntariness requirement does not envision a decision-making process free of such influences.<sup>30</sup> Instead, a guilty plea will be deemed involuntary when it is “induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).”<sup>31</sup> Government pressure that amounts to “actual or threat-

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tor who, in the plea negotiation context, threatens enhanced charges . . . may carry out that threat if the defendant declines to cooperate . . .”).

<sup>28</sup> See, e.g., *Goodwin*, 457 U.S. at 380 (“[A] prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.”); *Bordenkircher*, 434 U.S. at 363 (recognizing that a guilty plea may result from promises of leniency at sentencing or fear of greater penalties following a conviction at trial); *United States v. Yeje-Cabrera*, 430 F.3d 1, 24 (1st Cir. 2005) (“[I]f the [plea] negotiations are not successful, due process is not violated if the prosecutor carries out threats made during the negotiations that the defendant will be reindicted on a more serious charge which will bring higher penalties.”); *United States v. London*, No. 2:09CR105, 2014 WL 12690892, at \*2 (W.D. Pa. Nov. 6, 2014) (holding that the government did not violate due process when it filed a superseding indictment exposing the defendant to more time after plea negotiations failed).

<sup>29</sup> See, e.g., *United States v. Brechner*, 99 F.3d 96, 97–98 (2d Cir. 1996) (noting that the defendant’s agreement contained a promise on behalf of the government not to prosecute the defendant’s son or wife); *Politte v. United States*, 852 F.2d 924, 929–31 (7th Cir. 1988) (noting that the defendant’s plea agreement contained a provision requiring a reduced sentence for his wife); *Mosier v. Murphy*, 790 F.2d 62, 66 (10th Cir. 1986) (finding that a provision in the defendant’s plea agreement required that charges against his wife and mother-in-law be dismissed); *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983) (concluding that the defendant’s guilty plea was not coerced when defendant was required to plead guilty in order for his wife to get a reduced term); *Harman v. Mohn*, 683 F.2d 834, 836–38 (4th Cir. 1982) (holding that the defendant’s guilty plea was not coerced when the government agreed not to prosecute the defendant’s wife in exchange for a plea).

<sup>30</sup> See *Bordenkircher*, 434 U.S. at 363 (“[A]cceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”); *Jones v. Smith*, No. 2:10-CV-11600, 2012 WL 4088872, at \*9 (E.D. Mich. Sept. 17, 2012) (“A defendant’s decision to enter into an agreement that will result in his incarceration is only made because he or she views it as the lesser of two evils. Anyone making such a decision, on some level, can say that the choice was not voluntary but was forced upon them by the prospect of receiving of harsher punishment if convicted after a trial. This type of pressure, inherent in any plea bargain, does not render a plea constitutionally involuntary.”); *Gatto v. United States*, 997 F. Supp. 620, 627 (E.D. Pa. 1997) (“Invariably, almost any criminal defendant will feel some pressure when having to weigh the benefits of pleading guilty and the risks of proceeding to trial. If such inherent pressure which results from the offer of a plea bargain constituted improper coercion, virtually any guilty plea pursuant to a plea agreement could be upset at the whim of the defendant.”).

<sup>31</sup> *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d on other grounds*, 356 U.S. 26 (1958)).

ened physical harm” or amounts to “mental coercion [that] overbear[s] the will of the defendant” violates due process.<sup>32</sup>

As noted, due process demands that a defendant have sufficient awareness of various repercussions attendant to a plea of guilty. For example, in 1976 in *Henderson v. Morgan*, the Supreme Court held that a defendant must understand the nature of the charges against him.<sup>33</sup> However, he need not comprehend every element of the charged offense(s),<sup>34</sup> but only those elements considered “critical.”<sup>35</sup> Satisfaction of this standard is rather lax and can be satisfied by a defendant’s admission regarding his comprehension or evidence suggesting that the elements had been explained to him by his counsel.<sup>36</sup>

In addition, due process requires that a defendant comprehend certain constitutional rights, including the right to a jury trial, the right to confront one’s accusers, and the privilege against self-incrimination,<sup>37</sup> that he will forgo by virtue of a guilty plea.<sup>38</sup> Due process further mandates comprehen-

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<sup>32</sup> *Id.* at 750.

<sup>33</sup> *Henderson v. Morgan*, 426 U.S. 637, 647 (1976); *Brady*, 397 U.S. at 748.

<sup>34</sup> *See Henderson*, 426 U.S. at 647 & n.18 (stating that due process required real notice regarding the nature of the charges and the intent element). *But see Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (“Where a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.”).

<sup>35</sup> *Henderson*, 426 U.S. at 647 n.18 (holding that the defendant’s guilty plea was invalid when he was not informed of the intent element to a second-degree murder charge); *Hicks v. Franklin*, 546 F.3d 1279, 1284 (10th Cir. 2008) (stating that to demonstrate that a guilty plea was involuntary, it must be shown that intent is a critical element of the charge); *see United States v. Villalobos*, 333 F.3d 1070, 1074 (9th Cir. 2003) (holding that “when drug quantity exposes a defendant to a higher statutory maximum sentence than he would otherwise face, drug quantity is a critical element of which the defendant must be adequately informed before a plea is accepted”).

<sup>36</sup> *Henderson*, 426 U.S. at 647 (“Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.”); *Desrosier v. Bissonnette*, 502 F.3d 38, 42 (1st Cir. 2007) (holding that the lower court’s finding that the defendant’s guilty plea was valid since the defense counsel had informed his client of the elements of the offense was not unreasonable); *Fletcher v. Wolfe*, No. TDC-15-0051, 2018 WL 1211535, at \*3 (D. Md. Mar. 8, 2018) (noting that there is a presumption that the defense attorneys have explained the elements of an offense to their clients).

<sup>37</sup> *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (stating that a guilty plea involves the waiver of several constitutional rights—the privilege against self-incrimination, the right to a jury trial, and the right to confront one’s accusers); *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (same). Federal Rule of Criminal Procedure 11 requires that a defendant be informed of, and understand, several constitutional rights prior to the acceptance of a guilty plea. *See* FED. R. CRIM. P. 11(b)(1)(C)–(E).

<sup>38</sup> *Brady*, 397 U.S. at 748 (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and

sion of certain penal consequences associated with a guilty plea, including the statutory maximum penalty.<sup>39</sup>

### *B. Rule 11 of the Federal Rules of Criminal Procedure*

Rule 11 of the Federal Rules of Criminal Procedure governs the federal change-of-plea process and adds flesh to the constitutional requirements discussed above.<sup>40</sup> However, the current formulation of the rule differs noticeably from the original version of the rule, which was enacted in 1944. At that time the rule was merely three sentences in length. It provided:

A defendant may plead not guilty, guilty or, with consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.<sup>41</sup>

Approximately twenty years later, there were two noteworthy rule changes. One was the inclusion of a fourth sentence, which required that courts find the existence of an underlying factual basis for the plea.<sup>42</sup> The second change amended the original three-sentence rule to require that

likely consequences.”); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (finding that due process demands that a waiver of constitutional rights be “an intentional relinquishment or abandonment of a known right or privilege”).

<sup>39</sup> *Burdick v. Quarterman*, 504 F.3d 545, 547 (5th Cir. 2007) (observing that due process requires a defendant’s understanding of the maximum prison term and fine); *Trueblood v. Davis*, 301 F.3d 784, 786 (7th Cir. 2002) (“Due process as interpreted by the Supreme Court requires that a defendant be advised of the consequences of pleading guilty. Not necessarily *all* the consequences, such as loss of the right to vote or of the right to own a gun, or the effect on future sentences, but certainly the maximum punishment that he faces if he is convicted in the case at hand.” (citations omitted)); *United States v. Salmon*, 944 F.2d 1106, 1130 (3d Cir.1991) (“Due process requires that a guilty plea be voluntary, that is, that a defendant be advised of and understand the *direct* consequences of a plea. The only consequences considered direct are the maximum prison term and fine for the offense charged.” (citation omitted)).

<sup>40</sup> See FED. R. CRIM. P. 11.

<sup>41</sup> FED. R. CRIM. P. 11, 327 U.S. 842 (1946) (amended 1966). The rule was enacted in 1944 and went into effect in 1946. See Lester B. Orfield, *Amending the Federal Rules of Criminal Procedure*, 24 NOTRE DAME L. REV. 315, 315 (1949) (explaining the history of the enactment of the rules).

<sup>42</sup> FED. R. CRIM. P. 11, 383 U.S. 1097 (1965) (amended 1975) (providing that a “court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea”).

courts personally address each defendant<sup>43</sup> and ensure her understanding of the consequences associated with her change of plea.<sup>44</sup>

Thus, the earlier versions of Rule 11 only required that guilty pleas be entered voluntarily, with a comprehension of the nature of the charge and the consequences associated with the guilty plea, and with a supporting factual basis.<sup>45</sup> However, the rule was silent as to the methodology a court should employ to fulfill these mandates. For example, the Advisory Committee's notes to the 1966 amendment on the factual-basis determination explicitly state that courts were not limited to only considering a defendant's admissions of his alleged criminal conduct, but courts could instead rely on a number of different sources.<sup>46</sup>

*Boykin v. Alabama*, decided by the Supreme Court in 1969, marked a pivotal moment in the evolution of the federal guilty plea.<sup>47</sup> In *Boykin*, a defendant entered a guilty plea in Alabama state court to five separate indictments for robbery.<sup>48</sup> The record was devoid of any verbal interchange between the defendant and the judge who accepted his guilty pleas, and a jury sentenced him to death.<sup>49</sup> On appeal before the Alabama Supreme Court, the court "on [its] own motion" considered whether the process by which the trial court accepted the defendant's guilty pleas was constitutionally satisfactory.<sup>50</sup> Though the court affirmed the trial court's acceptance of the plea, three judges dissented, arguing that the record was insufficient to ascertain whether the defendant's plea was entered knowingly and voluntarily.<sup>51</sup>

The Supreme Court agreed with the dissenters and reversed the Alabama Supreme Court, finding that it was error to conclude that a guilty plea is validly entered when the record is silent as to a defendant's knowledge

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<sup>43</sup> *Id.* ("The court . . . shall not accept [a] plea . . . without first addressing the defendant personally . . .").

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*; FED. R. CRIM. P. 11, 327 U.S. 842 (1946) (amended 1966).

<sup>46</sup> The Committee notes state:

The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

FED. R. CRIM. P. 11 advisory committee's note to 1966 amendment.

<sup>47</sup> *Boykin*, 395 U.S. at 244.

<sup>48</sup> *Id.* at 239.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 240.

<sup>51</sup> *Id.* at 240–41.

and voluntariness.<sup>52</sup> The Court emphasized that a guilty plea “is more than an admission of conduct; it is a conviction.”<sup>53</sup> It also noted that several constitutional rights are implicated when a defendant enters a guilty plea: the privilege against self-incrimination, the right to trial by jury, and the right to confront the defendant’s accusers.<sup>54</sup> When a defendant, such as Boykin, faces imprisonment, or even death, the Court declared that the process of accepting a guilty plea “demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.”<sup>55</sup>

Five years after *Boykin*, Rule 11 was substantially revised and much of the rule’s current formulation emanates from this amendment. Rule 11(a)(1) notes the various plea options available to a defendant: not guilty, guilty, *nolo contendere*, and a conditional plea.<sup>56</sup> The conditional plea, which was added in 1983,<sup>57</sup> is worthy of a brief discussion given its relationship to *Class v. United States*. Rule 11(a)(2) provides:

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.<sup>58</sup>

As a general matter, when a defendant enters a plea of guilty, he necessarily waives his right to appeal certain non-jurisdictional, non-constitutional, and constitutional claims that could have been raised pretrial.<sup>59</sup> Neverthe-

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<sup>52</sup> *Id.* at 244.

<sup>53</sup> *Id.* at 242.

<sup>54</sup> *Id.* at 243.

<sup>55</sup> *Id.* at 243–44.

<sup>56</sup> FED. R. CRIM. P. 11(a)(1) (2013).

<sup>57</sup> *Id.* R. 11(a)(2); see FED. R. CRIM. P. 11(a)(2), 461 U.S. 1123 (1983) (amended 1985) (“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. If the defendant prevails on appeal, he shall be allowed to withdraw the plea.”) (instituting conditional pleas under Rule 11).

<sup>58</sup> FED. R. CRIM. P. 11(a)(2) (2013).

<sup>59</sup> See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (“When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea . . . .”); *United States v. Glinsey*, 209 F.3d 386, 392 (5th Cir. 2000) (“A voluntary guilty plea waives all nonjurisdictional defects in the proceedings against the defendant.”); *United States v. Tomeny*, 144 F.3d 749, 751 (11th Cir. 1998) (“Although an unconditional guilty plea does waive non-jurisdictional defects in the proceedings against a defendant, . . . it

less, there are some issues (even if raised pretrial) that are not waived, including claims of double jeopardy<sup>60</sup> and vindictive prosecution.<sup>61</sup> Such claims are jurisdictional in that they address the authority of the government to bring criminal charges.<sup>62</sup> Class contended that his claims, which challenged the constitutionality of the underlying criminal statute, fell within this framework.<sup>63</sup> On the other hand, the government argued that Class failed to preserve his claims for appeal since his plea agreement was not conditional<sup>64</sup> and because his claims were non-jurisdictional.<sup>65</sup> As noted, the

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does not waive jurisdictional defects. . . . Whether a claim is ‘jurisdictional’ depends on ‘whether the claim can be resolved by examining the face of the indictment or the record at the time of the plea without requiring further proceedings.’” (citations omitted)); *United States v. Cordero*, 42 F.3d 697, 699 (1st Cir. 1994) (“We have assiduously followed the letter and spirit of *Tollett*, holding with monotonous regularity that an unconditional guilty plea effectuates a waiver of any and all independent non-jurisdictional lapses that may have marred the case’s progress to that point, thereby absolving any errors in the trial court’s antecedent rulings (other than errors that implicate the court’s jurisdiction.)”); *United States v. Nash*, 29 F.3d 1195, 1201 (7th Cir. 1994) (“It is well settled in this circuit that a plea of guilty waives any defense that might have been offered at trial. . . . A defendant’s plea of guilty admits, in legal effect, the facts charged and waives all non-jurisdictional defenses including those constitutional violations not logically inconsistent with the valid establishment of factual guilt.”); see also FED. R. CRIM. P. 11 advisory committee’s note to 1983 amendment (“[S]hould the defendant thereafter plead guilty or nolo contendere, this will usually foreclose later appeal with respect to denial of the pretrial motion. ‘When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’” (quoting *Tollett*, 411 U.S. at 267)).

<sup>60</sup> See, e.g., *Menna v. New York*, 423 U.S. 61, 62–63 n.2 (1975) (“A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.”); *Osborn v. Schillinger*, 997 F.2d 1324, 1327 (10th Cir. 1993) (stating that “a double jeopardy challenge to the trial court’s power to hale him into court . . . can be raised collaterally notwithstanding his guilty plea”).

<sup>61</sup> See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 30–31 (1974) (concluding that a vindictive-prosecution claim is akin to a double-jeopardy claim and, therefore, the defendant was not precluded by virtue of his guilty plea from pursuing his habeas-corpus claim); *United States v. Brown*, 875 F.3d 1235, 1238–39 (9th Cir. 2017) (holding that unconditional guilty pleas do not waive jurisdictional claims, such as claims alleging vindictive prosecution); *United States v. Doe*, 698 F.3d 1284, 1289–91 (10th Cir. 2012) (noting the preclusive effect of guilty pleas and the *Blackledge* and *Menna* exceptions for vindictive prosecution and double jeopardy claims).

<sup>62</sup> See *Menna*, 423 U.S. at 62 (“Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.”); *Blackledge*, 417 U.S. at 30–31 (“[T]he right that [the defendant] asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him . . . operated to deny him due process of law.”).

<sup>63</sup> Petition for a Writ of Certiorari, *Class*, *supra* note 3, at 3–4.

<sup>64</sup> *Class*, 138 S. Ct. at 806 (“The Government and the dissent argue that Rule 11(a)(2) means that ‘a defendant who pleads guilty cannot challenge his conviction on appeal on a forfeitable or

Supreme Court disagreed with the government and found that Class's guilty plea did not inherently waive his constitutional claims.<sup>66</sup>

The amended rule also imposes affirmative obligations upon the district courts. To ensure that a proffered guilty plea is voluntary and sufficiently informed, the rule requires that courts inform and ensure defendants' understanding of an array of critical consequences that accompany their decision.<sup>67</sup> Frequently, at or near the outset of the hearing, defendants are informed that any statements they make under oath can be used against them in a subsequent perjury prosecution.<sup>68</sup> The rule further requires that defendants be advised of, and comprehend, an array of constitutional protections<sup>69</sup> that they will forfeit if they change their plea to guilty.<sup>70</sup> These protections include the right to plead not guilty;<sup>71</sup> the right to a jury trial;<sup>72</sup> the right to have counsel throughout the pretrial litigation process, including at trial;<sup>73</sup> the right against being compelled to be a witness against themselves;<sup>74</sup> the right to confront and cross-examine the government's witnesses;<sup>75</sup> and the right to present evidence and compel witnesses to testify on the defendant's behalf.<sup>76</sup>

Defendants must also be informed of and comprehend the nature of the underlying charge(s).<sup>77</sup> As noted, satisfaction of this requirement does not necessitate a defendant's comprehension of every element, but only those

waivable ground that he either failed to present to the district court or failed to reserve in writing' . . . . In particular, the dissent points to the suggestion that an unconditional guilty plea constitutes a waiver of 'nonjurisdictional defects,' while the Government points to the drafters' statement that they intended the Rule's 'conditional plea procedure . . . to conserve prosecutorial and judicial resources and advance speedy trial objectives,' while ensuring 'much needed uniformity in the federal system on this matter' . . . . And, the argument goes, just as defendants must use Rule 11(a)(2)'s procedures to preserve, for instance, Fourth Amendment unlawful search-and-seizure claims, so must they use it to preserve the constitutional claims at issue here." (citations omitted).

<sup>65</sup> Brief for the United States at 10, *Class*, 138 S. Ct. 798 (No. 16-424) ("Contrary to petitioner's contention, neither *Blackledge v. Perry* nor *Menna v. New York* allows a defendant automatically to challenge his statute of conviction on appeal, irrespective of any forfeiture, admission, or waiver." (citations omitted)).

<sup>66</sup> See *supra* note 8 and accompanying text.

<sup>67</sup> See FED. R. CRIM. P. 11(b)(1) ("[T]he 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 [multiple constitutional rights and certain penal consequences].").

<sup>68</sup> See *id.* R. 11(b)(1)(A).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* R. 11(b)(1)(F).

<sup>71</sup> *Id.* R. 11(b)(1)(B).

<sup>72</sup> *Id.* R. 11(b)(1)(C).

<sup>73</sup> *Id.* R. 11(b)(1)(D).

<sup>74</sup> *Id.* R. 11(b)(1)(E).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* R. 11(b)(1)(G).

deemed to be “critical.”<sup>78</sup> In *Henderson v. Morgan*, the Court held that the defendant’s guilty plea to an aggravated murder charge was infirm due to the court’s failure to inform him of a critical element; namely, the specific intent to commit the homicide.<sup>79</sup> However, the judicial burden imposed by Rule 11(b)(1) was eased by the Supreme Court in *Bradshaw v. Stumpf*. In *Bradshaw*, the defendant (Stumpf) asserted that his guilty plea was infirm because the trial court did not advise him of the intent element of the charged crime.<sup>80</sup> It was undisputed that the court failed to provide the requisite admonishment.<sup>81</sup> Nevertheless, the Court rejected Stumpf’s claim, finding that he was properly informed because “his attorneys represented on the record that they had explained to their client the elements of the aggravated murder charge” and because “Stumpf himself . . . confirmed that this representation was true.”<sup>82</sup>

Sentencing consequences are also among the items that a defendant must comprehend before a guilty plea may be accepted. Rule 11 requires that a defendant be informed of and understand the statutory maximum and any mandatory minimum penalties,<sup>83</sup> the possible payment of restitution,<sup>84</sup> the applicability of the federal sentencing guidelines as a sentencing factor,<sup>85</sup> and any possible fines, forfeitures, and special assessments associated with a guilty plea.<sup>86</sup>

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<sup>78</sup> See *Bradshaw*, 545 U.S. at 182–83 (noting the defendant’s guilty plea would have been “invalid if he had not been aware of the nature of the charges against him, including the elements of the . . . charge to which he pleaded guilty”); *Bousley v. United States*, 523 U.S. 614, 618–19 (1998) (acknowledging that if defendant was misinformed about the elements of the offense, the plea would be constitutionally invalid); *Henderson*, 426 U.S. at 647 n.18 (“There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not.”).

<sup>79</sup> *Henderson*, 426 U.S. at 647 & n.18 (“[I]ntent is such a critical element of the offense of second-degree murder that notice of that element is required.”).

<sup>80</sup> *Bradshaw*, 545 U.S. at 182–83.

<sup>81</sup> See *id.* at 183 (noting that it has not been held that it is the judge’s responsibility to explain each element of a charge to the defendant).

<sup>82</sup> *Id.* (“Rather, the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel. . . . Where a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.”).

<sup>83</sup> FED. R. CRIM. P. 11(b)(1)(H)–(I).

<sup>84</sup> *Id.* R. 11(b)(1)(K); FED. R. CRIM. P. 11 advisory committee’s notes to the 1985 amendment (explaining that new federal legislation authorizing restitution to victims of certain crimes requires that the defendant be made aware of this possibility).

<sup>85</sup> FED. R. CRIM. P. 11(b)(1)(M); FED. R. CRIM. P. 11 advisory committee’s notes to the 1989 amendment (“This requirement assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted.”). After *United States v. Booker*, this rule was amended again to reflect that the sentencing guidelines are no longer mandatory, but merely advisory. 543 U.S. 220, 245–46 (2005); see FED. R. CRIM. P. 11 advisory committee’s



In 2013, the rule was amended to require that defendants be informed of and comprehend the possibility of deportation.<sup>87</sup> This requirement was enacted in response to *Padilla v. Kentucky*,<sup>88</sup> decided in 2010, in which the Supreme Court held that a defendant's Sixth Amendment right to the effective assistance of counsel is violated when his attorney fails to provide sufficient advice regarding the possibility of deportation.<sup>89</sup> The court must provide a general admonishment to every defendant, irrespective of a particular defendant's deportation risk.<sup>90</sup>

Rule 11 also requires that courts ensure a defendant's comprehension of any appellate-waiver provisions in their plea agreements.<sup>91</sup> This requirement, implemented in 1999, was the outgrowth of a practice by federal prosecutors who were including appellate-waiver provisions in their plea agreements. These provisions generally require that defendants forgo their right to appeal sentencing matters and other post-conviction remedies.<sup>92</sup> As

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notes to the 2007 amendment (explaining that the amendment conforms the Rules to the Supreme Court's holding in *Booker*).

<sup>86</sup> FED. R. CRIM. P. 11 (b)(1)(H)–(L).

<sup>87</sup> *Id.* (b)(1)(O) (2013) (providing “that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future”).

<sup>88</sup> 130 S. Ct. 1473, 1474 (2010).

<sup>89</sup> *Id.* at 1483 (holding that the defense counsel must give correct advice when the immigration consequences are clear, but in instances where the consequences are uncertain, the attorney should “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences”).

<sup>90</sup> FED. R. CRIM. P. 11 advisory committee's notes to the 2013 amendment (stating that the “amendment mandates a generic warning, not specific advice concerning the defendant's individual situation,” and that “the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship”).

<sup>91</sup> FED. R. CRIM. P. 11(b)(1)(N).

<sup>92</sup> FED. R. CRIM. P. 11 advisory committee's notes to the 1999 amendment (“[A]mended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to ensure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant.”). A number of federal plea agreements contain appellate-waiver language. *See, e.g.,* *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001) (“The Defendant is aware that 18 U.S.C. § 3742(a) affords a defendant the right to appeal the sentence imposed. Knowing that, in exchange for the Government's concessions made herein, the Defendant waives to the full extent of the law any right to appeal . . . the conviction and sentence, or the manner in which it was determined . . . .”); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001) (“It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 2255, any sentence within or below the stipulated Guidelines range of 120–135 months and (ii) that the Government will not appeal any sentence within or above the stipulated Guidelines range or [sic] 120–135 months. This provision is binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein.

noted, when defendants change their plea to guilty they necessarily waive a host of non-jurisdictional, constitutional, and non-constitutional challenges that could have been raised pretrial.<sup>93</sup> The emergence of appellate-waiver provisions was primarily targeted at those remaining areas of appeal that a defendant traditionally retained after the entry of a guilty plea.<sup>94</sup> These ex-

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Furthermore, it is agreed that *any appeal as to the defendant's sentence* that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.”); *United States v. Jemison*, 237 F.3d 911, 914–15 (7th Cir. 2001) (“Defendant understands that by pleading guilty she is waiving all the rights set forth in the prior paragraph. Defendant’s attorney has explained those rights to her and the consequences of waiving all appellate issues that might have been available if she had exercised her right to trial. The defendant is also aware that Title 18, United States Code, Section 3742 affords defendant a right to appeal the sentence imposed. Acknowledging all of this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute of conviction (or manner in which that sentence was determined) on the grounds set forth in section 3742 or on any other ground whatsoever, in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives her right to challenge her sentence or the manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, United States Code, Section 2255.”); *United States v. Brown*, 232 F.3d 399, 401 (4th Cir. 2000) (“To waive knowingly and expressly the right to appeal whatever sentence is imposed on any ground, including any appeal pursuant to 18 U.S.C. § 3742, and further to waive any right to contest the conviction or the sentence in any post-conviction proceeding, including any proceeding under 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant’s guilty plea.”); *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995) (“Defendant agrees not to appeal or otherwise challenge the constitutionality or legality of the Sentencing Guidelines. Defendant agrees not to appeal the accuracy of any factor stipulated to by the parties in the attached worksheets.”); *United States v. Bolinger*, 940 F.2d 478, 479 (9th Cir. 1991) (“Defendant hereby waives any right to raise and/or appeal any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the court’s entry of judgment against defendant and imposition of sentence under Title 18, United States Code, section 3742 (sentence appeals).”).

<sup>93</sup> See *supra* notes 67–70 and accompanying text.

<sup>94</sup> Courts have held that, despite such appellate-waiver provisions, defendants retain the right to challenge illegal sentences, ineffective assistance of counsel claims, and sentences imposed pursuant to an impermissible factor, such as race. See, e.g., *United States v. Atkinson*, 354 F. App’x 250, 252 (6th Cir. 2009) (“A waiver of appeal rights may be challenged on the grounds that it was not knowing and voluntary, was not taken in compliance with Fed. R. Crim. P. 11, or was the product of ineffective assistance of counsel. . . . Although not at issue here, we have also held that an appellate waiver does not preclude an appeal asserting that the statutory maximum has been exceeded.”); *United States v. Andis*, 333 F.3d 886, 891–92 (8th Cir. 2003) (“[W]e reaffirm that in this Circuit a defendant has the right to appeal an illegal sentence, even though there exists an otherwise valid waiver.”); *Hernandez*, 242 F.3d at 113–14 (“Even if the plain language of the plea agreement barred this appeal, we would not enforce such a waiver of appellate rights in this case because the defendant is challenging the constitutionality of the process by which he waived those rights. We have suggested that a plea agreement containing a waiver of the right to appeal is not enforceable where the defendant claims that the plea agreement was entered into without effective assistance of counsel.”); *Brown*, 232 F.3d at 403 (holding that “with two exceptions, a defendant may not appeal his sentence if his plea agreement contains an express and unqualified waiver of the right to appeal, unless that waiver was unknowing or involuntary. An express know-

explicit waiver provisions have withstood constitutional challenges across every Circuit Court of Appeals that has considered the issue.<sup>95</sup>

As noted, Rule 11 instructs courts not to accept a guilty plea unless it finds that the defendant's decision to change his plea was a voluntary choice.<sup>96</sup> A plea is voluntary when it is "a voluntary and intelligent choice among the alternative courses of action open to the defendant,"<sup>97</sup> and it is assessed pursuant to a standard that assesses the totality of the defendant's circumstances.<sup>98</sup> Given the inherent pressures that characterize the criminal-adjudicative process,<sup>99</sup> government plea offers that encourage guilty pleas are not impermissible per se.<sup>100</sup>

In addition, Rule 11 requires that a court ensure that a defendant's guilty plea is supported by an adequate factual foundation.<sup>101</sup> Courts assess the factual basis supporting a guilty plea to ensure defendants have pled knowingly and voluntarily, and to guard against the entry of guilty pleas to

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ing waiver will not bar appeal of a sentence when the sentence was (1) imposed in excess of the maximum penalty provided by law or (2) based on a constitutionally impermissible factor such as race.").

<sup>95</sup> See *Teeter*, 257 F.3d at 27 (1st Cir.) (allowing the defendant to proceed with an appeal, despite the appellate-waiver provision, when the lower court failed to sufficiently advise the defendant of the appellate-waiver provision); *Jemison*, 237 F.3d at 918 (7th Cir.) (dismissing the defendant's appeal given that the waiver terms in the plea agreement were clear and unambiguous and the defendant knowingly and voluntarily agreed to its terms); *Brown*, 232 F.3d at 406 (4th Cir.) (denying defendant right to pursue appeal "[g]iven the explicit nature of the waiver in the plea agreement, its specific mention of § 3742, and the thorough plea colloquy conducted by the district court"); *Bolinger*, 940 F.2d at 480 (9th Cir.) (holding that the defendant waived his appellate rights given that his plea agreement authorized an appeal only if his sentence exceeded thirty-six months, and the defendant was sentenced to a term less than thirty-six months).

<sup>96</sup> FED. R. CRIM. P. 11(b)(2) ("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).").

<sup>97</sup> *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

<sup>98</sup> See *Brady*, 397 U.S. at 749 ("The voluntariness of [the defendant's] plea can be determined only by considering all of the relevant circumstances surrounding it.").

<sup>99</sup> See *United States v. Mezzanatto*, 513 U.S. 196, 209–10 (1995) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights . . ."); *Bordenkircher*, 434 U.S. at 363 ("[I]n the give-and-take of plea bargaining, there is no such element of punishment nor retaliation so long as the accused is free to accept or reject the prosecution's offer.").

<sup>100</sup> See *supra* notes 26–32 and accompanying text; see also *Corbett v. New Jersey*, 439 U.S. 212, 218–19 (1978) ("[T]here is no *per se* rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea."); *Bordenkircher*, 434 U.S. at 364–65 (holding that the prosecution did not violate defendant's due process protections when the prosecution re-indicted the defendant on more significant charges following failed plea negotiations).

<sup>101</sup> FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

charges in the absence of supporting facts.<sup>102</sup> A court's determination of the underlying facts can derive from a host of sources, including statements from the defendant and the government prosecutor.<sup>103</sup>

## II. CASE REVIEW

This Part will first explain and analyze *Lee v. United States*, decided by the Supreme Court in 2017, with a particular focus on the guilty-plea colloquy that took place during the guilty-plea hearing.<sup>104</sup> It will then go on to discuss the facts, holding, and rationale of *Class v. United States*, decided by the Supreme Court in 2018, again focusing on the guilty-plea colloquy.<sup>105</sup> This Part will then conclude by discussing and comparing the use of leading and compound questions as methods of judicial inquiry during trial<sup>106</sup> and during the guilty-plea process.<sup>107</sup>

### A. *Lee v. United States*

In *Lee*, defendant Jae Lee immigrated to the United States from South Korea in 1982 when he was thirteen years old.<sup>108</sup> At the time of his indictment, Lee owned two restaurants but was not an American citizen, choosing instead to live as a lawful permanent resident.<sup>109</sup> In 2008, an informant told

<sup>102</sup> See *McCarthy*, 394 U.S. at 467 (“Requiring this examination of the relation between the law and the facts the defendant admits having committed is designed to ‘protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.’” (quoting FED. R. CRIM. P. 11 advisory committee’s notes to the 1966 amendment)); *United States v. Adams*, 448 F.3d 492, 502 (2d Cir. 2006) (“A lack of a factual basis for a plea is a substantial defect calling into question the validity of the plea. ‘Such defects are not technical, but are so fundamental as to cast serious doubt on the voluntariness of the plea . . . .’” (citation omitted)); *United States v. Goldberg*, 862 F.2d 101, 106 (6th Cir. 1988) (“While the exact method of producing a factual basis on the record is subject to a flexible standard of review, the need to have some factual basis will continue to be a rule subject to no exceptions.”).

<sup>103</sup> FED. R. CRIM. P. 11 advisory committee’s note to 1966 amendment (“The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise . . . .”); *Adams*, 448 F.3d at 499 (“We need not rely solely on defendant’s allocation, however, to support the plea, rather any facts on the record at the time of the plea proceeding may be used.”); *Goldberg*, 862 F.2d at 105 (“[A] district court may determine the existence of the Rule 11(f) factual basis from a number of sources, including a statement on the record from the government prosecutors as well as a statement from the defendant.”); *United States v. Stanford*, 990 F. Supp. 402, 411 (D. Md. 1997) (“[T]he Court may consider anything of record in determining whether a factual basis exists.”).

<sup>104</sup> See *infra* notes 108–128 and accompanying text.

<sup>105</sup> See *infra* notes 129–170 and accompanying text.

<sup>106</sup> See *infra* notes 171–204 and accompanying text.

<sup>107</sup> See *infra* notes 205–258 and accompanying text.

<sup>108</sup> *Lee v. United States*, 137 S. Ct. 1958, 1962 (2017).

<sup>109</sup> *Id.* at 1963.

law enforcement that he had purchased ecstasy and marijuana from Lee over the course of several years.<sup>110</sup> A search warrant executed upon Lee's premises uncovered ecstasy pills, over \$30,000 in cash, and a loaded rifle.<sup>111</sup> In 2009, Lee pled guilty to possession of ecstasy with the intent to distribute and received a reduced sentence in exchange.<sup>112</sup>

During the pendency of his litigation, Lee "repeatedly" expressed his concern regarding deportation,<sup>113</sup> and each time his attorney incorrectly assured him that deportation was not a possibility.<sup>114</sup> And, of particular note for this Article, Lee's concern regarding deportation manifested itself during his change of plea hearing:

Q. [Court:] And are you a U.S. citizen?

A. [Lee:] No, Your Honor.

Q. Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen. If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.

Does that at all affect your decision about whether you want to plead guilty or not?

A. Yes, Your Honor.

Q. Okay. How does it affect your decision?

A. I don't understand. [After this statement Lee consults with his counsel.]

Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?

A. Yes, Your Honor.<sup>115</sup>

During this exchange with the court, Lee plainly expressed his hesitation to proceed with the plea when informed about the possibility of deportation. However, after Lee consulted with his counsel and was assured that the court's remarks were merely a "standard warning," Lee elected to pro-

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1967–68 ("Lee asked his attorney repeatedly whether there was any risk of deportation from the proceedings, and both Lee and his attorney testified at the evidentiary hearing below that Lee would have gone to trial if he had known about the deportation consequences."); *see also* *United States v. Lee*, Civ. No. 10-02698-JTF-dkv, 2013 WL8116841, at \*5 (W.D. Tenn. Aug. 6, 2013), *rev'd*, 137 S. Ct. 1958 (2017) (noting "the undisputed fact that had Lee at all been aware that deportation was possible as a result of his guilty plea, he would not have pled guilty").

<sup>114</sup> *Lee*, 137 S. Ct. at 1967–68.

<sup>115</sup> Joint Appendix at 103–04, *Lee*, 137 S. Ct. 1958 (No. 16-327).

ceed with his change of plea.<sup>116</sup> Thereafter, the court made no additional inquiries regarding Lee's comprehension of the possibility of deportation.<sup>117</sup>

Contrary to his counsel's understanding, the Immigration and Nationality Act classified Lee's crime as an "aggravated felony,"<sup>118</sup> meaning that because he was not a United States citizen he was subject to deportation following this conviction.<sup>119</sup> When Lee learned he would be deported after the completion of his sentence, he filed an ineffective-assistance-of-counsel motion pursuant to 28 U.S.C. § 2255.<sup>120</sup> Lee was denied relief by the district court, which found that his counsel's performance was deficient, but that Lee did not suffer prejudice as a result of this deficiency in light of the strong likelihood of conviction at trial and a lengthier sentence.<sup>121</sup> The U.S. Court of Appeals for the Sixth Circuit affirmed, concluding that Lee failed to satisfy the prejudice prong because "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence."<sup>122</sup>

The Supreme Court, however, reversed.<sup>123</sup> The parties stipulated to the deficient-performance element. At issue was whether Lee sustained prejudice.<sup>124</sup> The Court stated that when a defendant argues that his decision to plead guilty is the product of his counsel's deficient performance, the principal inquiry is whether the defendant has shown prejudice by demonstrating that there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."<sup>125</sup>

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<sup>116</sup> *Lee*, 137 S. Ct. at 1968 ("Only when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty.").

<sup>117</sup> *See id.*

<sup>118</sup> *See* 8 U.S.C. § 1101(a)(43)(B) (2012) (defining "aggravated felony" for immigration purposes).

<sup>119</sup> *See id.* § 1227(a)(2)(A) (delineating deportable criminal offenses).

<sup>120</sup> Lee cited two bases for his ineffective-assistance claim. First, he argued that his counsel's performance was deficient in that counsel provided incorrect advice regarding the possibility of deportation. Second, he claimed that he was prejudiced because he would not have entered into a plea agreement and changed his plea to guilty but for his counsel's advice. *See* Petition for a Writ of Certiorari at 6–25, *Lee*, 137 S. Ct. 1958 (No. 16-327).

<sup>121</sup> *Lee v. United States*, No. 2:10-cv-02698-JTF-dkv, 2014 WL 1260388, at \*15 (W.D. Tenn. Mar. 20, 2014), *aff'd*, 825 F.3d 311 (6th Cir. 2016), *rev'd*, 137 S. Ct. 1958 (2017) ("The proper focus under an objective standard is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty. In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation.").

<sup>122</sup> *Lee v. United States*, 825 F.3d 311, 314 (6th Cir. 2016).

<sup>123</sup> *Lee*, 137 S. Ct. at 1969.

<sup>124</sup> *Id.* at 1962 ("Everyone agrees that Lee received objectively unreasonable representation. The question presented is whether he can show he was prejudiced as a result.").

<sup>125</sup> *Id.* at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Ultimately, the Court agreed with Lee.<sup>126</sup> In doing so, the Court rejected the government's contention that it should adopt a per se rule that prejudice can never be established in the absence of a viable defense to the charge.<sup>127</sup> According to the majority, "common sense" dictated this result, for it was clear that deportation, not the potential severity of the sentence, was central to Lee's decision to forgo his jury trial right.<sup>128</sup>

### B. *Class v. United States*

In *Class v. United States*, Rodney Class was a resident of North Carolina who had a valid concealed gun permit issued by that state, but was arrested in Washington, D.C., when he parked his car in a public parking lot not far from the U.S. Capitol building.<sup>129</sup> It is a federal crime to possess weapons on Capitol grounds, and this parking lot fell within this restricted space.<sup>130</sup> Class was arrested when he returned to his car and a subsequent search of his vehicle by law enforcement uncovered the firearms.<sup>131</sup> He was charged in federal court in the District of Columbia with violating 40 U.S.C. § 5104(e), "Possession of a Firearm on U.S. Capitol Grounds."<sup>132</sup>

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<sup>126</sup> *Id.* at 1968–69.

<sup>127</sup> *Id.* at 1966–67 (noting that the Sixth Circuit applied the per se rule suggested by the government in undertaking its *Strickland* analysis and finding against Lee; however, the Supreme Court rejected this approach).

<sup>128</sup> *Id.* at 1966. In reaching its conclusion, the Court explained why a defendant with a predominant interest in avoiding deportation might opt for a jury trial (and its near certainty of deportation) as opposed to a plea agreement (and its absolute certainty of deportation):

But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

*Id.* at 1968–69.

<sup>129</sup> *Class v. United States*, 138 S. Ct. 798, 802 (2018); Joint Appendix, *Class*, *supra* note 10, at 56.

<sup>130</sup> 40 U.S.C. § 5104(e)(1) (2012) ("An individual . . . may not carry . . . on the Grounds or in any of the Capitol Buildings a firearm . . ."); *Class*, 138 S. Ct. at 802.

<sup>131</sup> Joint Appendix, *Class*, *supra* note 10, at 56.

<sup>132</sup> *Class*, 138 S. Ct. at 802; *United States v. Class*, 38 F. Supp. 3d 19, 22 (D.D.C. 2014).

Class challenged his conviction before the district court on Second Amendment and due process grounds.<sup>133</sup> The district court orally addressed and denied his Second Amendment claim, and implicitly denied his due process claim, although it failed to specifically address that issue.<sup>134</sup> Class later entered a guilty plea to the possession charge.<sup>135</sup> The plea agreement contained an appellate-waiver provision which primarily restricted Class's ability to appeal sentencing matters and to present collateral attacks under 28 U.S.C. § 2255.<sup>136</sup> Notably, the plea agreement did not specifically reserve Class's right to appeal the Second Amendment and due process issues raised before the district court.<sup>137</sup>

At his change-of-plea hearing, the Rule 11 colloquy was devoid of any discussion that specifically addressed Class's right to pursue on appeal his constitutional challenges to his statute of conviction. However, there was ample discussion regarding the general scope of the defendant's appellate rights.<sup>138</sup>

THE COURT: If you went to trial and you were convicted, you would have a right to appeal your conviction to the Court of Ap-

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<sup>133</sup> *Class*, 138 S. Ct. at 802. Class's due process claim alleged that he had inadequate notice that it was illegal to possess firearms on Capitol Grounds. Petition for a Writ of Certiorari, *Class*, *supra* note 3, at 6.

<sup>134</sup> See *Class*, 138 S. Ct. at 802; *Class*, 38 F. Supp. 3d at 27.

<sup>135</sup> *Class*, 138 S. Ct. at 802.

<sup>136</sup> Verdict, Agreement, and Settlement at 6–7, *United States v. Class*, 38 F. Supp. 3d 19 (D.D.C. 2014) (Crim. No. 13-253(GK)), 2014 WL 12698681. The Court summarized the rights agreed upon in the plea agreement regarding the appellate rights retained and waived by Class:

A written plea agreement set forth the terms of Class' guilty plea, including several categories of rights that he expressly agreed to waive. Those express waivers included: (1) all defenses based upon the statute of limitations; (2) several specified trial rights; (3) the right to appeal a sentence at or below the judicially determined, maximum sentencing guideline range; (4) most collateral attacks on the conviction and sentence; and (5) various rights to request or receive information concerning the investigation and prosecution of his criminal case. (citation omitted). At the same time, the plea agreement expressly enumerated categories of claims that Class could raise on appeal, including claims based upon (1) newly discovered evidence; (2) ineffective assistance of counsel; and (3) certain statutes providing for sentence reductions. (citation omitted). Finally, the plea agreement stated under the heading "Complete Agreement": "No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein, nor will any such agreements . . . be made unless committed to writing and signed . . . ."

*Class*, 138 S. Ct. at 802 (citation omitted).

<sup>137</sup> *Class*, 138 S. Ct. at 802. ("The agreement said nothing about the right to raise a claim on direct appeal that the statute of conviction was unconstitutional.")

<sup>138</sup> See Joint Appendix, *Class*, *supra* note 10, at 63–64.



peals and to have a lawyer help you prepare your appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you know what I mean by your right to appeal?

THE DEFENDANT: Yeah. Take it to the next court up.

THE COURT: All right. Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, there are exceptions to that. You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings.

You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?

THE DEFENDANT: Yeah. Pretty much.

THE COURT: Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the . . . rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, I mentioned that you may also have a right to appeal your sentence if you think the sentence is illegal. You may also have a right to appeal that sentence if it exceeds the Sentencing Guideline Range.

You could also challenge your conviction or sentence based on newly discovered evidence or a claim of ineffective assistance of counsel. Do you understand those things?

THE DEFENDANT: Yes, sir.

. . .

THE COURT: Do you want to give up most of your rights to an appeal as well?

THE DEFENDANT: Other than what you mentioned, yes.<sup>139</sup>

During the judicial colloquy, Class acknowledged that he understood his right to appeal,<sup>140</sup> that he forfeited some appellate rights,<sup>141</sup> and that

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<sup>139</sup> *Id.* at 63–66.

<sup>140</sup> *Id.* at 63 (“THE COURT: Do you know what I mean by your right to appeal? THE DEFENDANT: Yeah. Take it to the next court up.”).

there were exceptions to the general ban on appeals.<sup>142</sup> However, when the court identified certain specific exceptions to the general ban and inquired whether Class comprehended those exceptions his response reflected an understanding that was less than complete.<sup>143</sup> Despite evidence that Class did not fully understand the instructions, the court made, at best, little additional inquiry regarding the scope of his understanding. Class also hinted during the colloquy that an appeal might be forthcoming when he informed the court that he wished to retain some of his appellate rights.<sup>144</sup>

Following the court's acceptance of his plea, and his later sentencing, Class filed an appeal with the U.S. Court of Appeals for the D.C. Circuit challenging the constitutionality of his conviction.<sup>145</sup> The D.C. Circuit, however, denied his appeal, holding that his guilty plea inherently waived his right to pursue his appeal.<sup>146</sup> Before the Supreme Court, Class argued that the D.C. Circuit erred in denying his appeal.<sup>147</sup> The Supreme Court agreed with Class and reversed, finding that the terms of his plea agreement did not prohibit his appeal.<sup>148</sup> The Court also found that his appellate challenges were not inherently waived because they challenged the authority of the government to prosecute him.<sup>149</sup>

The Court reasoned that Class's challenges fell within the framework of two Supreme Court precedents, *Blackledge v. Perry* and *Menna v. New*

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<sup>141</sup> *Id.* (“THE COURT: All right. Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that? THE DEFENDANT: Yes.”).

<sup>142</sup> *Id.* (THE COURT: Now, there are exceptions to that. You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings. You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things? THE DEFENDANT: Yeah. Pretty much.”).

<sup>143</sup> *See id.* (reflecting the defendant's response of “[p]retty much,” which indicates something less than complete understanding).

<sup>144</sup> *See id.* at 63, 66 (“THE COURT: Do you want to give up most of your rights to an appeal as well? THE DEFENDANT: Other than what you mentioned, yes.”).

<sup>145</sup> *Class*, 138 S. Ct. at 802; *United States v. Class*, No. 15-3015, 2016 WL 10950032, at \*1 (D.C. Cir. July 5, 2016) (per curiam), *rev'd*, 138 S. Ct. 798 (2018).

<sup>146</sup> *Class*, 138 S. Ct. at 802–03; *Class*, 2016 WL 10950032, at \*2 (“Appellant apparently believes that the lack of an explicit waiver permits him to proceed in the present appeal. He is in error.”).

<sup>147</sup> *Class*, 138 S. Ct. at 803 (noting that Class' petition sought the Court's review regarding whether a criminal defendant's guilty plea inherently waives an appeal “challenging the constitutionality of his statute of conviction”); Petition for a Writ of Certiorari, *Class*, *supra* note 3, at 4 (“The D.C. Circuit's ruling was directly contrary to this Court's holding in *Menna* that guilty pleas do *not* “inevitably ‘waive’ all antecedent constitutional violations” and that a defendant can still raise claims that ‘stand in the way of conviction [even] if factual guilt is validly established.’”).

<sup>148</sup> *Class*, 138 S. Ct. at 803–05.

<sup>149</sup> *Id.*

York.<sup>150</sup> In *Blackledge*, defendant Perry had been convicted of misdemeanor assault before appealing his conviction.<sup>151</sup> Thereafter, he was re-indicted on a felony assault charge, to which he later pled guilty.<sup>152</sup> In a subsequently filed habeas petition, Perry argued that his conviction should be overturned on account of vindictive prosecution and deprivation of due process.<sup>153</sup> The government countered that Perry's appeal was barred by virtue of his guilty plea.<sup>154</sup> The Court agreed with Perry, recognizing that a guilty plea waives a host of appellate matters.<sup>155</sup> However, it reasoned that the nature of the constitutional claim presented by Perry fell within the group of claims that are not waivable since a vindictive prosecution claim challenges "the very power of the State" to charge him with an offense.<sup>156</sup>

*Menna* involved a defendant (Menna) who entered a guilty plea but later filed an appeal arguing that the Fifth Amendment double jeopardy clause barred his prosecution.<sup>157</sup> The Supreme Court agreed with Menna, finding, in part, that his appeal constituted a claim that the government was devoid of authority to prosecute him.<sup>158</sup> As stated by the Court, "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute."<sup>159</sup>

As will be detailed, *Lee* and *Class* exemplify standard Rule 11 practice and the shortcomings commonly associated with the federal change-of-plea process. In each instance, the defendants entered pleas of guilty that passed Rule 11 muster in the eyes of the respective district courts.<sup>160</sup> Each court concluded, among other things, that the defendants changed their pleas with sufficient awareness of the critical consequences attendant to their decision.<sup>161</sup> Yet, in each instance the defendants raised issues on appeal that challenged, if only indirectly, these conclusions.

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<sup>150</sup> *Id.* at 803–04; *Menna v. New York*, 423 U.S. 61 (1975); *Blackledge v. Perry*, 417 U.S. 21 (1974).

<sup>151</sup> *Blackledge*, 417 U.S. at 22.

<sup>152</sup> *Id.* at 23.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 29–30.

<sup>155</sup> *Id.* at 29–30 ("[W]hen a criminal defendant enters a guilty plea, 'he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'").

<sup>156</sup> *Id.* at 30.

<sup>157</sup> *Menna*, 423 U.S. at 61–62.

<sup>158</sup> *Id.* at 62.

<sup>159</sup> *Id.* at 62–63 n.2.

<sup>160</sup> *Class*, 138 S. Ct. at 802; *Lee*, 137 S. Ct. at 1963.

<sup>161</sup> *See Class*, 138 S. Ct. at 802; *Lee*, 137 S. Ct. at 1963.

*Lee* involved a claim of ineffective assistance of counsel.<sup>162</sup> But underlying *Lee*'s contention was the depth of his understanding regarding the possibility of deportation, an issue that Federal Rule of Criminal Procedure 11(b)(1)(O) specifically requires that courts ensure defendants comprehend before a guilty plea is accepted.<sup>163</sup> At issue in *Class* was whether the defendant waived his right to pursue his constitutional claims challenging the statutes underlying his convictions by pleading guilty.<sup>164</sup> Yet, as in *Lee*, the heart of *Class*'s claims involved his comprehension of a matter—in this instance, the scope of his appellate rights.<sup>165</sup> Rule 11(B)(1)(N) imposes upon district courts an obligation to ensure that a defendant comprehends “the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.”<sup>166</sup>

*Lee* is admittedly a more egregious example of the infirmities that routinely characterize Rule 11 processes. In *Lee*, the district court and *Lee* had a brief, direct exchange about *Lee*'s understanding regarding the possibility of deportation.<sup>167</sup> In contrast, in *Class* there was no interaction between *Class* and the court that specifically addressed *Class*'s core concern—whether his guilty plea waived his right to pursue his appellate constitutionality challenge.<sup>168</sup> In defense of the district court, it is arguable that Rule 11 does not demand the specific inquiry at issue in *Class*. Nevertheless, the colloquy in *Class* reveals that the court broached the subject of appellate waivers during the Rule 11 hearing, and the discussion extended to the issue of inherently retained and forfeited appellate issues.<sup>169</sup> In addition, there were indications that *Class*'s comprehension regarding the scope of his post-plea appellate rights was less than clear.<sup>170</sup>

Despite these distinctions between *Lee* and *Class*, the respective colloquies also reveal certain notable commonalities—similarities that help explain not only the inquisitorial infirmities in their respective cases, but also those in federal courts more generally. To appreciate these similarities, a review of certain evidentiary principles is in order.

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<sup>162</sup> 137 S. Ct. at 1962.

<sup>163</sup> FED. R. CRIM. P. 11(b)(1)(O) (2013); *Lee*, 137 S. Ct. at 1962–63.

<sup>164</sup> 138 S. Ct. at 801–02.

<sup>165</sup> *See id.* at 802–03 (noting that “the agreement said nothing about the right to raise on direct appeal a claim that the statute of conviction was unconstitutional”).

<sup>166</sup> FED. R. CRIM. P. 11(b)(1)(N).

<sup>167</sup> *Lee*, 2013 WL 8116841, at \*2–3.

<sup>168</sup> *See Class*, 138 S. Ct. at 801–02.

<sup>169</sup> *See* Joint Appendix, *Class*, *supra* note 10, at 63, 66.

<sup>170</sup> *See id.* at 63–66 (indicating that *Class* may not have understood which rights he was forfeiting, as he stated “[o]ther than what you mentioned” when the judge asked “[d]o you want to give up most of your rights to an appeal as well?”).

## III. CRITICAL ANALYSIS

*A. Leading and Compound Questions in the Trial Context*

In the sphere of criminal trial practice, a well-established tenet in regards to witness examination is delineated in Federal Rule of Evidence 611(c). The rule addresses the concept of leading questions, and provides that such questions are ordinarily disallowed on direct examination but ordinarily permitted during cross-examination.<sup>171</sup> The rule states, in pertinent part, that “[l]eading questions should not be used on direct examination except as necessary to develop the witness’s testimony,” and “ordinarily” leading questions are allowed “on cross-examination,” as well as when “a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.”<sup>172</sup>

A leading question is an inquiry made of a witness that is suggestive of the response sought by the examiner.<sup>173</sup> Leading-question objections can be sustained on various grounds, including improper phraseology, inappropriate tone, excessive detail, undue emphasis on certain words, and nonverbal conduct.<sup>174</sup> McCormick on Evidence adds that a question’s detail can be “the most important consideration” in ascertaining whether a question is leading.<sup>175</sup> The treatise notes, for example, that if a “question describes an incident in detail and asks if the incident happened, the natural inference is

<sup>171</sup> FED. R. EVID. 611(c) (2012).

<sup>172</sup> *Id.*

<sup>173</sup> *United States v. Ferris*, 704 F. App’x 225, 235 (4th Cir. 2017); *United States v. Durham*, 319 F.2d 590, 592 (4th Cir. 1963) (“The essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory.”).

<sup>174</sup> 5 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 611:8, 232, 233–34 (8th ed. 2016) (“Rule 611(c) provides that leading questions should not be employed on direct examination of a witness, except (1) as may be necessary to develop his testimony Rule 611(c), or (2) where a hostile witness, an adverse party, or a witness identified with an adverse party is called to testify, Rule 611(c)(2). The rule is phrased in suggestive (‘should not’) rather than mandatory terms. The test of a leading question is whether it suggests the answer desired by the examiner; the vice lies in substituting the suggestions of counsel for the actual testimony of the witness. A question may be leading because of its form, for example, ‘Didn’t he \* \* \*?’; its detail, or be made suggestive by reason of the examiner’s emphasis on certain words, the tone used by the examiner in asking the question as a whole, or by the examiner’s nonverbal conduct. While not always the case, questions which may be answered either ‘Yes’ or ‘No’ are considered leading. Merely using the term “whether or not” or other form of alternative does not of itself keep a question from being leading. On the other hand, a witness can scarcely be examined without calling attention to the subject matter on which his testimony is sought, and a question so doing is not considered leading.”); 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL § 2.02[4], Lexis (database updated 2018) (“A question is leading ‘if phrased in such a way as to hint at the answer the witness should give.’ The essential test of a leading question is whether it so suggests to the witness the specific tenor of the reply desired by counsel that such a reply is likely to be given irrespective of an actual memory.”).

<sup>175</sup> KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 6, at 17 (7th ed. 2014).

that the questioner expects an affirmative answer.”<sup>176</sup> Thus, in a bank robbery prosecution, if a prosecutor asks the victim bank teller if the defendant demanded that he put money in a bag, the question is leading because it is suggestive of the desired response. The question and its accompanying detail arguably suggest that the examiner expects an affirmative response. This point has particular resonance in the guilty-plea context, which will be discussed later in this Section.

The rationale underlying the leading-question rule is to guard against witness susceptibility to the examiner’s suggestions. It is the witness, not the examiner, who is under oath and provides testimony. Thus, it is desirable that the witness provide testimony that is truthful and not unduly influenced by the person posing the question. It is on direct examination where this danger is particularly prevalent.<sup>177</sup> Direct examiners and their witnesses often have shared interests in litigation.<sup>178</sup> This empathy makes them susceptible to the leads of their examiners. As stated by Professor Michael Graham, among the dangers of leading susceptible witnesses is that a “‘false memory’ of events” might be induced, witnesses might “lessen ef-

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<sup>176</sup> *Id.*

<sup>177</sup> Though leading questions are generally prohibited on direct examination, several exceptions to this rule have been recognized. These exceptions include questions regarding uncontested preliminary matters. *See* United States v. Garcia-Gastelum, 650 F. App’x 470, 470 (9th Cir. 2016) (per curiam) (“Courts have recognized the appropriateness of allowing leading questions on direct examination to establish ‘undisputed preliminary matters’ . . . .”); United States v. Londondio, 420 F.3d 777, 789 (8th Cir. 2005) (“[T]he District Court permitted the prosecutor to ask leading questions when eliciting information on preliminary matters. Leading questions used for this purpose generally are not proscribed by Rule 611(c) of the Federal Rules of Evidence.”); United States v. Bryant, 461 F.2d 912, 916 (6th Cir. 1972). Leading questions are often posed to minors and adults who have communicative issues. *See, e.g.,* United States v. Farlee, 757 F.3d 810, 822 (8th Cir. 2014) (finding that the district court properly allowed the government attorney to ask leading questions of witness who was hesitant when responding to direct examination questions); United States v. Wright, 540 F.3d 833, 844 (8th Cir. 2008) (“We generally allow leading questions during the examination of children who are reluctant to testify.”); United States v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003) (“We have repeatedly upheld the use of leading questions to develop the testimony of sexual assault victims, particularly children.”). Courts have also allowed leading questions with hostile witnesses. *See, e.g.,* United States v. Meza-Urtado, 351 F.3d 301, 303 (7th Cir. 2003) (approving of leading questions in context of hostile witness who became “conveniently ‘forgetful’”); United States v. Mora-Higuera, 269 F.3d 905, 912 (8th Cir. 2001) (recognizing that interrogation by leading questions is permissible when a witness is deemed hostile). Leading questions are also permitted when there are witnesses with memory difficulties. *See, e.g.,* United States v. Cisneros-Gutierrez, 517 F.3d 751, 761–63 (5th Cir. 2008) (finding that a witness’s memory problems and hostility justified the use of leading questions).

<sup>178</sup> *Ellis v. City of Chicago*, 667 F.2d 606, 612 (7th Cir. 1981) (noting that restrictions are “designed to guard against the risk of improper suggestion inherent in examining friendly witnesses through the use of leading questions”); *SEC v. Goldstone*, 317 F.R.D. 147, 163 (D.N.M. 2016) (citing *Ellis*, 667 F.2d at 612); 1 WEINSTEIN & BERGER, *supra* note 174, § 2.02[4] (“The evil to be avoided is that of supplying a false memory for the witness.”).

forts to” testify to their actual recollections and instead simply “acquies[e] [to] the examiner’s suggested version of events,” and “important detail” may be omitted.<sup>179</sup>

*Waddington North American, Inc. v. Sabert Corp.*, decided in 2011 by the United States District Court for the District of New Jersey, is instructive.<sup>180</sup> *Waddington* was a patent-infringement case in which the jury found that defendant Sabert did not infringe plaintiff Waddington North American’s patent “involving metalized plastic cutlery.”<sup>181</sup> Waddington filed a motion for judgment notwithstanding the verdict and a motion for a new trial, arguing, in part, that relief was warranted given several instances of misconduct by Sabert’s attorney during the course of trial.<sup>182</sup> In granting Waddington’s motion for a new trial, the court cited Sabert’s counsel’s “constant and repeated” misconduct, and concluded that there was a “reasonable probability that the jury was influenced” by the improper actions of Sabert’s counsel.<sup>183</sup>

Among the instances of conduct referenced by the court was Sabert’s counsel’s “persistent” and improper use of leading questions directed to “friendly” witnesses called on direct examination.<sup>184</sup> The court found that counsel’s “continuous” and inappropriate employment of leading questions ultimately inhibited the jury’s ability to ascertain the credibility of Sabert’s

<sup>179</sup> GRAHAM, *supra* note 174, at 233 n.4 (“Leading questions are considered harmful for three reasons: First, they may invoke in the witness a ‘false memory’ of events, to the end that his testimony will not reflect what he actually saw or remembers. Second, they may induce the witness to lessen efforts to relate what he actually remembers, in favor of acquiescence in the examiner’s suggested version of events. He might do so because he is ill at ease in the setting of the courtroom (which is to him at once unfamiliar, formal, public, and intimidating), because he is more accustomed to the conventions of polite conversation where imprecision is often inconsequential and not the occasion for correction or dispute, because he does not understand the issues at stake in the suit, or perhaps because he hopes to speed the process along. Third, they may distract the witness from important detail by directing his attention only to aspects of his story which the questioner considers favorable.”); accord G. Stephen Denroche, *Leading Questions*, 6 CRIM. L.Q. 21, 22 (1963) (“[F]irst, that the witness is presumed to have a bias in favour of the party calling him; secondly, that the party calling a witness, knowing what that witness may prove, might by leading bring out only that portion of the witness’ story favourable to his own case; and thirdly, that a witness, intending to be entirely fair and honest, might assent to a leading question which did not express his real meaning . . . .”); see also *United States v. Hansen*, 434 F.3d 92, 105 (1st Cir. 2006) (“The evil of leading a friendly witness is that the information conveyed in the questions may supply a false memory.”) (citing *United States v. McGovern*, 499 F.2d 1140, 1142 (1st Cir. 1974)).

<sup>180</sup> *Waddington N. Am., Inc. v. Sabert Corp.*, Civ. No. 09-4883, 2011 WL 3444150 (D.N.J. Aug. 5, 2011).

<sup>181</sup> *Id.* at \*1.

<sup>182</sup> *Id.* at \*1, 3–4.

<sup>183</sup> *Id.* at \*4–5.

<sup>184</sup> *Id.* at \*16–17. The court stated that defense counsel “put on the majority of Sabert’s case using leading questions.” *Id.* at \*3.

witnesses.<sup>185</sup> The court acknowledged that improper leading questions invariably occur in criminal and civil trials.<sup>186</sup> However, the court warned, the *repetitious* asking of such questions is what produces prejudice.<sup>187</sup> As the court explained:

[L]eading questions have the effect of preventing the jury from making a proper credibility determination. If a witness cannot recall the events and has difficulty answering an open-ended question, a jury is entitled to find that testimony not credible. Leading questions rob the jury of the ability to make that determination. Repeated leading questions cause witnesses to become “relatively unnecessary except as sounding boards.” The effect is that the attorney testifies and the jury is unable to assess the credibility of the witness.<sup>188</sup>

In contrast to direct examination, the dangers of witness susceptibility are not generally present on cross-examination, where witness interests and those of their cross-examiners tend to be divergent.<sup>189</sup> Unlike the typical witness on direct examination, the witness on cross-examination does not consider his or her examiner a conduit to a shared end. Instead, the relationship is adversarial. Given such contrasting interests, the witness on cross-examination is motivated to correct misstatements, challenge false suggestions, and to include important detail where necessary to further his or her interest.<sup>190</sup>

In addition to the restrictions on leading questions, district courts are also empowered to prohibit the use of compound questions.<sup>191</sup> Defined as an inquiry that seeks more than one response, compound questioning is prohibited on direct and cross-examination. It is objectionable given the

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<sup>185</sup> *Id.* at \*16.

<sup>186</sup> *Id.* at \*18.

<sup>187</sup> *Id.* (“While the occasional improper leading question occurs in every case, repeatedly asking leading questions of a party’s own witnesses is prejudicial.”).

<sup>188</sup> *Id.* (citation omitted).

<sup>189</sup> See David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1183 (1992) (stating that concerns of witness bias, witness manipulation, and witness assent are generally not present during cross-examination).

<sup>190</sup> See 28 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 6168, at 458–59 (2d ed. 2012) [hereinafter WRIGHT & MILLER] (“[T]he risks of suggestion are reduced where the witness has an interest in promoting a version of the facts contrary to that suggested. As a consequence, Rule 611(c) generally permits leading questions on cross-examination, where the witness usually is interested in defending his direct-examination testimony.”).

<sup>191</sup> Federal Rules of Evidence 611(a) authorizes a court to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence” to promote the determination of truth, to enhance efficiency, and to guard against the “harassment or undue embarrassment” of witnesses. FED. R. EVID. 611(a).



confusing nature of what is being asked. Such a “question may be ambiguous because of its multiple facets and complexity . . . [and] any answer[s] may be confusing because of uncertainty as to which part of the compound question the witness intended to address.”<sup>192</sup>

The case of *United States v. Abair* from the United States Court of Appeals for the Seventh Circuit in 2014 is illustrative of this problem.<sup>193</sup> In *Abair*, Yulia Abair was convicted in federal court of the crime of structuring transactions to evade reporting requirements.<sup>194</sup> Her conviction stemmed from a house purchase in Indiana.<sup>195</sup> Abair had intended to secure the funds needed for purchase from a Russian bank.<sup>196</sup> However, after learning that the bank would not wire the necessary funds to her bank in Indiana, Abair “made eight deposits at her local bank in amounts ranging from \$6,400 to \$9,800— all below the \$10,000 limit at which the currency reporting requirements kick in.”<sup>197</sup> The crux of her appeal was her contention that the government improperly questioned her on cross-examination about certain previous financial filings.<sup>198</sup>

Of particular note is the Seventh Circuit’s critical assessment of the government’s mode of inquiry during its cross-examination of Abair. When questioning Abair about a certain financial document (a Free Application for Federal Student Aid form), the court observed that:

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<sup>192</sup> 28 WRIGHT & MILLER, *supra* note 190, § 6164, at 388.

<sup>193</sup> 746 F.3d 260 (7th Cir. 2014).

<sup>194</sup> *Id.* at 261. Abair’s statute of conviction, 31 U.S.C. § 5324, provides in pertinent part:

(a) Domestic coin and currency transactions involving financial institutions.—No person shall, for the purpose of evading the reporting requirements of section 5313(a) or 5325 or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508—

...

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324 (2012).

<sup>195</sup> *Abair*, 746 F.3d at 261.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 263. The Seventh Circuit agreed with Abair, finding that at the time the questions were posed the government did not have a good-faith basis to believe that she lied on the financial documents. *Id.* at 264–65. As the court stated, “there simply was no reason—at least, none that the government has offered—to believe the filings had any material bearing on Abair’s truthfulness. *Id.* at 264. As we have explained, ‘a prosecutorial hunch’ that the defendant engaged in dishonesty is not enough.” *Id.* The court further found that because Abair’s credibility was critical to the outcome of the case, the government’s repeated suggestions that she made misrepresentations on these financial documents could not be deemed harmless. *Id.* at 265–67.

[T]he prosecutor used a vague and confusing compound (triple) question to attack: “And on that form they ask you to state your family income; they ask you to state how much you earn from working and they ask you to state your assets; isn’t that true?” Abair answered (correctly) “Not exactly.”<sup>199</sup>

After she later denied (in response to a question by the prosecution) having been asked about “the value of [her] assets” when she was completing her student aid documents,<sup>200</sup> the court noted that:

[The prosecutor] continued with the following highly improper compound question (at least twelve distinct factual assertions are built into it) that was just an accusatory speech: “In fact, you were asked what your assets were and you put in zero for the value of your assets in 2009, 2010, 2011. You did that in 2009 despite the fact that you owned a condominium and you held bank accounts and held assets in the United States. You did that in 2010 despite the fact that in the first part of 2010 you owned a condominium and in the second part of 2010 you had proceeds of more than \$130,000. Isn’t that correct?” (In addition to the compound question problem, which took things to an extreme, the confusing negative in the wrap-up, “Isn’t that correct?” meant that a yes or no answer would have been ambiguous.)<sup>201</sup>

The compound questioning in *Abair* was characterized by the Seventh Circuit as “vague,” “confusing,” “highly improper,” and “an accusatory speech” that rendered any “yes or no” responses as “ambiguous.”<sup>202</sup> Compound questions are always inappropriate, irrespective of their trial context. However, the extent of prejudice associated with such questioning can vary. *Abair* is illustrative of a context where the associated dangers are quite significant. In *Abair*, the prosecutor’s compound questioning was directed not to an ordinary witness, but to a criminal defendant, an indicted individual faced with the prospect of a felony conviction and a term of imprisonment. Such questioning, especially when it occurs serially and is accusatory, necessarily exacerbates the prospect of jury confusion and unfairly inhibits a criminal defendant’s ability to adequately respond and convey his version of events.

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<sup>199</sup> *Id.* at 266.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

Nevertheless, it bears emphasizing that trial jurors, such as those in *Abair*, are routinely instructed that examiner questions are not evidence.<sup>203</sup> It is ultimately within the prerogative of the jury to decide which facts to credit and discredit.<sup>204</sup> Undeniably, government abuses of these evidentiary restrictions inhibit a jury's ability to carry out this function properly. But the potential for acquittal remains. Jurors always retain the freedom to acquit, no matter how flagrant the government violation. Consider these realities as this Part next addresses judicial modes of examination in the guilty-plea context.

### *B. Leading and Compound Questions in the Guilty-Plea-Hearing Context*

As noted, Federal Rule of Criminal Procedure 11(b)(1) admonishes district courts "to inform the defendant of, and determine that the defendant understands," an array of consequences (constitutional, penal, etc.) associated with a change of plea decision.<sup>205</sup> Though the rule imposes upon district courts these affirmative obligations, it provides little, if any, guidance as to methodology. Moreover, given that Rule 11 plea hearings are seemingly exempt from the Federal Rules of Evidence,<sup>206</sup> district courts enjoy wide latitude regarding their Rule 11 practices.

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<sup>203</sup> See, e.g., *United States v. Munyenyezi*, 781 F.3d 532, 540 (1st Cir. 2015) ("Kicking off the trial, the judge cautioned the jury that a lawyer's 'questions are not evidence.'"); *United States v. Cudlitz*, 72 F.3d 992, 999 (1st Cir. 1996) (observing that the jury was informed that a "lawyer's questions [were] not evidence"); *United States v. Buchannon*, 878 F.2d 1065, 1067 n.2 (8th Cir. 1989) (noting that the court gave the jury cautionary instructions that questions asked of witnesses are not evidence); *Salazar v. Lewis*, No. 11-cv-01189-JST, 2013 WL 5228034, at \*8 (N.D. Cal. Sept. 16, 2013) (noting that the jury was instructed "multiple times" by the court that attorney questions are not evidence).

<sup>204</sup> *United States v. Atlas*, No. 3:03-cr-66WS, 2007 WL 781842 at \*7 (S.D. Miss. Mar. 13, 2007) (observing that the jury determines whether a defendant has been proven guilty beyond a reasonable doubt and that it can base its determination on facts not considered by the grand jury); *Sepulveda v. Morgan*, No. C05-5548RBL, 2006 WL 1009223, at \*5 (W.D. Wash. Apr. 17, 2006) ("The jury finds facts and it does not determine punishment.").

<sup>205</sup> FED. R. CRIM. P. 11(b)(1).

<sup>206</sup> Rule 1101(b) of the Federal Rules of Evidence provides that the Federal Rules of Evidence apply to, among other things, "criminal cases and proceedings." FED. R. EVID. 1101(b). However, section (d) of the rule explicitly exempts its provisions from various proceedings, such as sentencing hearings, as well as the following:

- (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
- (2) grand-jury proceedings; and
- (3) miscellaneous proceedings such as:
  - extradition or rendition;
  - issuing an arrest warrant, criminal summons, or search warrant;
  - a preliminary examination in a criminal case;
  - sentencing;
  - granting or revoking probation or supervised release; and

The mandate to inform necessarily obligates district courts to ensure discussion of the various Rule 11 line items. Thus, the rule's plain language arguably encourages, or, at the very least, strongly tempts, district courts to resort to leading and compound questioning to satisfy their expanding host of Rule 11 obligations. The advantages of employing such question modes is clear, especially for those judges with crowded dockets; they facilitate compliance with the Rule 11 mandates, invite monosyllabic responses, and expedite the change of plea process.

*Lee* is illustrative. In an attempt to gauge Lee's comprehension of his constitutional rights, the court posed the following multi-layered compound question.

Q. [Court:] Mr. Lee, you have an absolute right to plead not guilty and have your case tried before a jury on your not guilty. If you were to plead not guilty and demand a trial, we would bring in a pool of people from which a [twelve]-person jury would be impaneled to hear proof in this case. You would have the right to have your attorney represent you at every stage of the process. The burden will be on the government to prove you guilty of this charge by proof beyond a reasonable doubt as to each and every element of the offense.

You could not be called to the witness stand against your will to testify. You could not be required to present proof. If you chose not to testify or not to present proof, I would tell the jury that they could not hold that against you, that they couldn't even consider it in the process of their deliberations.

Now, if you wanted to have witnesses subpoenaed, you would have the right to have compulsory subpoenas issued to compel your witnesses to come in and testify even though they may not volunteer to do so.

And if I didn't say it already, your attorney would have an opportunity to vigorously cross examine each and every witness brought by the government to prove the government's case.

If you plead guilty today, you are giving up those trial rights. There will not be a trial. You will be adjudged guilty based upon your admission of guilt if you choose to go forward and plead guilty.

Do you understand that?

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considering whether to release on bail or otherwise.

A. [Lee:] Yes, Your Honor.<sup>207</sup>

And the court employed several leading questions to assess the voluntariness of the defendant's decision to plead guilty.

Q. [Court:] Are you pleading guilty in an effort to try and coverup or protect someone else?

A. [Lee:] No, Your Honor.

Q. Are you pleading guilty out of a sense of fear, duress or coercion?

A. Oh, no, Your Honor.

Q. Then you are pleading guilty because you are, in fact, guilty of this offense?

A. Yes, Your Honor.<sup>208</sup>

*Class* is also illustrative of these practices. Consider the following select excerpts, which are representative of the court's repeated attempts through leading and compound questions to gauge *Class*'s understanding of his constitutional rights.

THE COURT: All right. And you have the right to have a jury trial in this case, and that means that [twelve] citizens of the District of Columbia would sit in a courtroom and determine whether you are guilty or not guilty based upon the evidence presented in a courtroom.

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<sup>207</sup> Joint Appendix, *Lee, supra* note 115, at 107–08. Compound questioning was also employed to assess *Lee*'s comprehension of the nature of the charge and some of the attendant sentencing ramifications:

Q. [Court:] Okay. You are [here] today charged in a one count indictment which reads as follows:

On or about January 7, 2009, in the Western District of Tennessee the defendant Jae Lee, also known as Jae Williams, did unlawfully, knowingly and intentionally possess with the intent to distribute a mixture and substance containing a detectable amount of controlled 3,4-methyl-something or other, known as ecstasy—. . .

In violation of Title 21, United States Code, Section 841(a)(1).

A conviction of that offense carries a maximum penalty of 20 years, plus a maximum fine of one million dollars, plus three years supervised release or, after a prior drug felony conviction, not more than 30 years, plus a \$2,000,000 fine maximum, plus six years of supervised release, together with a mandatory special assessment of \$100.

Are you aware that that's what you are charged with and that those are the statutory maximum penalties?

A. [Lee:] Yes, Your Honor.

*Id.* at 102–03.

<sup>208</sup> *Id.* at 110.

Do you understand your right to a jury trial?

THE DEFENDANT: Yes.

...

THE COURT: At a trial, you would have the right to confront or have your lawyer confront and cross-examine any witnesses who testified against you. Do you understand that?

THE DEFENDANT: Yeah.

THE COURT: You would have the right to present your own witnesses at a trial if you wanted one, and you would have the right to subpoena them to require them to testify in your defense. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: At a trial, you would have the right to testify and to present evidence on your behalf if you wanted to, but you would not be required to testify or to present any evidence if you did not want to. That's because you cannot be forced to incriminate yourself. That means you cannot be forced to present evidence of your own guilt.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you chose not to testify or to put on any evidence, those choices could not be used against you. Do you understand that?

THE DEFENDANT: Yep.<sup>209</sup>

The excerpts from *Lee* and *Class* are not outliers, but, instead, are reflective of a commonplace yet deeply problematic Rule 11 practice. To appreciate this fact, however, it is essential to understand why the rationales that underlie the leading and compound question rules of direct and cross-examination are equally applicable in the guilty-plea-hearing context.

Generally, indicted individuals must make a critical calculation: namely, whether a trial or a negotiated settlement is likely to yield a more optimal outcome. It is a risk assessment that is often stressful, for it typically requires a choice between unpleasant, life altering alternatives. When a defendant elects to settle his case, he has concluded (rightly or wrongly) that a negotiated agreement offered the best potential outcome. Accordingly, criminal defendants, particularly those firmly convinced of the benefits of their negotiated bargains, enter their Rule 11 hearings as motivated actors.

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<sup>209</sup> See Joint Appendix, *Class*, *supra* note 10, at 61–62.

It is important to remember that plea agreements have no force absent acceptance by the court,<sup>210</sup> and most plea agreements are non-binding.<sup>211</sup> In other words, even if a court elects to accept a proposed plea agreement, the court generally retains the freedom to impose a sentence irrespective of the preferences of any of the parties. And, as noted by the Honorable Robert J. Conrad, United States District Judge for the Western District of North Carolina, this reality, coupled with the dimmer prospects that often accompany a decision to go to trial, motivate the defendant to reach a settlement with the government.<sup>212</sup>

Thus, when defendants appear at their Rule 11 hearing, they understand that the judge is the power player who will ultimately decide their fate. They further understand that the negotiated resolution with the government is nothing more than a proffered agreement that is lifeless without the court's assent. Accordingly, defendants who elect to change their plea to guilty will attempt to placate the court. They will attempt to alleviate any judicial concerns. They will appear remorseful and will be accepting of their responsibilities per the plea agreement. They will be cooperative, respectful, and disinclined to act or express themselves in a way that will divert from the goal of implementing the agreed upon terms of the settlement.

Put another way, defendants in these circumstances are akin to the witness on direct examination. Neither the direct examination witness nor the Rule 11 defendant is motivated to correct or contradict her examiners. Rather, each views her examiners as a means to an end to litigation. Accord-

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<sup>210</sup> See FED. R. CRIM. P. 11(c)(3)–(5).

<sup>211</sup> E.g., Carol A. Brook et al., *A Comparative Look at Plea Bargaining in Australia, Canada, England, New Zealand, and the United States*, 57 WM. & MARY L. REV. 1147, 1166 (2016) (noting that “most plea agreements . . . allow courts to impose sentences other than what is recommended in the agreement”); Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 126 (2018). Defendants who believe that the submitted plea agreement will likely be accepted and that the trial court will likely adopt the sentencing recommendations submitted by the parties might be further motivated to forgo a criminal trial in favor of a plea arrangement. See Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL’Y REV. 61, 66 (2015) (commenting that courts “essentially rubberstamp most plea agreements and sentence the defendants according to the parties’ agreement”).

<sup>212</sup> Conrad, *supra* note 211, at 126 (“While most plea agreements provide for nonbinding sentencing recommendations, which the court is free to accept or reject, they shift the playing field substantially in favor of defendants. . . . [P]rosecutors are in much different positions advocating for the plea result than they are in advocating for a specific sentence after trial. The adjustment of the adversarial relationship, at least psychologically, is a strong motivator to resolve the case without trial. A plea deal that takes months, perhaps even years, off the sentence defendants might receive if convicted at trial can seem too appealing to refuse. Couple this with the reality that the federal conviction rate is currently around eighty-eight percent in criminal jury trials, and even the most daring and adept litigators would pause before urging their clients to exercise their Sixth Amendment jury trial right.”).

ingly, they are inclined to follow the leads of their examiners, to provide answers when necessary to facilitate their objectives, and not to vigorously challenge arguably disagreeable statements and questions.

Again, *Lee* is particularly illustrative on this point. “There is no question,” the Supreme Court found in *Lee*, “that ‘deportation was the determinative issue in Lee’s decision whether to accept the plea deal.’”<sup>213</sup> When the district court raised the prospect of deportation during its Rule 11 colloquy, Lee unequivocally informed the court that such a possibility would impact his willingness to change his plea.<sup>214</sup> When asked by the court to explain his response, Lee engaged in an off-the-record discussion with his attorney, who reassured him that he was not subject to deportation.<sup>215</sup> After this consultation, and despite his expressed reluctance, Lee persisted with his change of plea and the court made no further inquiries on the issue.<sup>216</sup>

When informed by the court about the possibility of deportation, an outcome inconsistent with his principal hope and expectation, Lee did not forcefully push back. Certainly, the advice of his counsel tempered his reluctance, and this influence should not be overlooked. Yet, it is equally telling that during the Rule 11 hearing—a hearing where, in contrast to a jury trial, he was on the precipice of being adjudicated guilty of a felony and subjecting himself to punishment, including possible deportation—his behavior was remarkably consistent with that of a direct-examination witness. Put another way, it hardly resembled that of a witness who, on cross-examination, is presented with facts that run counter to his personal and litigation-related preferences. On cross-examination, leading questions are permissible given the contrasting interests that typify the relationship between the examiner and the witness.<sup>217</sup> As stated in *United States v.*

<sup>213</sup> *Lee*, 137 S. Ct. at 1967.

<sup>214</sup> *Id.*; Joint Appendix, *Lee*, *supra* note 115, at 103–04.

<sup>215</sup> *Lee*, 137 S. Ct. at 1968.

<sup>216</sup> The Supreme Court summarized the exchange as follows:

When the judge warned him that a conviction “could result in your being deported,” and asked “[d]oes that at all affect your decision about whether you want to plead guilty or not,” Lee answered “Yes, Your Honor.” When the judge inquired “[h]ow does it affect your decision,” Lee responded “I don’t understand,” and turned to his attorney for advice. Only when Lee’s counsel assured him that the judge’s statement was a “standard warning” was Lee willing to proceed to plead guilty.

*Id.* (citations omitted).

<sup>217</sup> *Goldstone*, 317 F.R.D. at 163 (“The rule reflects the more general principle that ‘leading questions are usually permissible on cross-examination and impermissible on direct examination.’”) (citing VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE § 6168, Westlaw (2d ed., database updated 2018)); *Gell v. Aulander*, 252 F.R.D. 297, 307 (E.D.N.C. 2008) (“Generally, when a witness identified with an adverse party is called, the roles of the parties are reversed. Leading questions would be appropriate on direct examination but not on cross-examination.”);



*McLaughlin*, decided in 1998 in the United States District Court for the Eastern District of Pennsylvania, “leading questions are permitted on cross-examination because the witness is often reluctant and resistant to respond directly,” given his “presumable bias . . . for the opponent’s cause, [and] his sense of reluctance to become the instrument of his own discrediting.”<sup>218</sup> Had Lee’s relationship with the court been akin to that in the typical cross-examination relationship, it is fair to assume that there is a far greater likelihood that Lee would have pressed his concerns regarding deportation with greater vigor.

Equally problematic is the lack of engagement by the court. Consistent with the mandates of Rule 11, the court initiated conversation regarding deportation. However, Lee’s expressed hesitation threatened to derail the hearing. When it became clear (rather quickly) that Lee was prepared to proceed, the court glossed over this hiccup, continued with the hearing, and ultimately accepted Lee’s guilty plea. Akin to the motives of a direct examiner, the court asked a question regarding deportation, and obtained the desired response, which enabled the hearing to proceed to the anticipated conclusion.

As noted, the array of Rule 11 obligations coupled with its affirmative mandates<sup>219</sup> certainly tempt courts to employ leading and compound questioning during their colloquies. As reflected in the *Lee* and *Class* colloquies, the employment of these question modes typically generate monosyllabic responses, which in the Rule 11 context are often unsubstantial indicators of a defendant’s knowledge base and voluntariness. Certainly, “yes” and “no” responses are not per se indicators of a defendant’s lack of comprehension. And this is particularly true when a defendant has been sufficiently educated by his counsel prior to his Rule 11 hearing. However, at the time of their change-of-plea hearing, defendants are not frequently well versed in either the particulars of a plea deal or the various nuances of criminal procedure.<sup>220</sup> Former professor, now federal appeals judge, Stephanos Bibas, has forcefully argued this point. He contends that by the time of the Rule 11 hearing defendants are often at an informational disadvantage. He argues that defendants often have

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see also 28 WRIGHT & MILLER, *supra* note 190, § 6168, at 459 n.6 (noting that this limitation was “designed to guard against the risk of improper suggestion inherent in examining friendly witnesses” through the use of leading questions).

<sup>218</sup> United States v. *McLaughlin*, No. CRIM.A. 95-CR-113, 1998 WL 966014, at \*2 (E.D. Pa. Nov. 19, 1998).

<sup>219</sup> See *supra* notes 67–103 and accompanying text.

<sup>220</sup> See Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1072 (2016) (noting that “[d]efendants who consider pleading guilty are often poorly informed”).

difficulty comprehending the intricacies (certain “technical” aspects)<sup>221</sup> of the rules of criminal procedure, that they suffer from information overload, and that the “laundry list of procedural rights at plea colloquies” provided by district court judges produces “a near-monologue interrupted only by the defendant’s perfunctory ‘Yes’ to each question.”<sup>222</sup> These plea-hearing realisms are illuminated when considering factors relevant to defense-counsel representation and the indigent population.

### C. Relevant Indigence and Racial/Ethnic Demographic Data

Certain defendants are particularly susceptible to these problems in Rule 11 hearings. In particular, poor, uneducated, minority, and non-English

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<sup>221</sup> Indeed, the difficulties of understanding “technical” doctrines was on display in *Class*. See Joint Appendix, *Class*, *supra* note 10, at 63; *Bibas*, *supra* note 220, at 1080 (explaining the need for lawyers to translate “technical legalese” for clients). Rule 11 mandates that district courts address the terms of appellate-waiver provisions in their plea agreements with defendants. FED. R. CRIM. P. 11(b)(1)(N). During its colloquy, the district court reviewed these provisions with *Class*, but also extended its discussion of appellate waivers beyond the four corners of the plea agreement. See Joint Appendix, *Class*, *supra* note 10, at 63 (illustrating the appellate-waiver discussion during the plea colloquy). For example, the court inquired whether *Class* was aware that if he went to trial he would have the right to appeal his conviction with the assistance of an attorney, whether he understood what the term “right to appeal” meant, and whether he knew that by changing his plea to guilty he would “generally” be forfeiting his rights to appeal. *Id.* To all of these inquires *Class* affirmed his understanding. *Id.* However, when the court inquired about his understanding of those appellate rights that he retained in the event he changed his plea to guilty, *Class*’s response reflected an imperfect comprehension. *Id.* at 63, 66. Additionally, he hinted that an appeal might be forthcoming when he stated that he did not want to relinquish all of his appellate rights. *Id.* At the time of *Class*’s plea hearing, whether *Class* was entitled to pursue his appeal post-plea was an open question. It was a debatable issue that ultimately divided the Supreme Court by a 6-to-3 margin. *Class*, 138 S. Ct. at 801, 807; see also *id.* at 816 (Alito, J., dissenting) (noting the split between the majority and dissent). With this backdrop, it is unfortunate that the court employed leading and compound questioning to ascertain *Class*’s understanding of the scope of his appellate rights. And despite *Class*’s statement that he “[p]retty much” understood the exceptions referenced by the court, there were no meaningful follow-up questions designed to clarify his comprehension, including whether his constitutional challenges to his conviction fell within this umbrella. See Joint Appendix, *Class*, *supra* note 10, at 63.

<sup>222</sup> *Bibas*, *supra* note 220, at 1074–75 (“Not only are defendants often in the dark about the evidence for and against them, but they also have difficulty understanding and evaluating plea deals and the likely consequences. . . . Rules of criminal procedure require judges to provide defendants with a laundry list of procedural rights at plea colloquies, resulting in a near-monologue interrupted only by the defendant’s perfunctory ‘Yes’ to each question. This information comes too late in the process to make a difference; by the time of the plea colloquy, the plea is a *fait accompli*. Moreover, defendants are probably overloaded with information during a plea colloquy. . . . Having just endured this laundry list of procedural irrelevancies, defendants have difficulty understanding and focusing on the substantive merits of the deal. . . . [D]efendants may find it hard to understand technical doctrines (such as mens rea and accomplice liability) and evaluate the proof needed for each one. . . . And usually the colloquy does not cover so-called collateral consequences because they are nominally civil, such as deportation, sex-offender registration, or restrictions on residency or employment.”).

speaking populations are the most disadvantaged by these tendencies. Criminal defense attorneys are ethically required to provide competent representation.<sup>223</sup> This responsibility necessarily requires that an attorney act with “reasonable diligence and promptness.”<sup>224</sup> This expectation further envisions an attorney who maintains a reasonable workload.<sup>225</sup> To that end, lawyers are expected to decline accepting new cases or, when reasonably possible, withdraw from a case if such representation will violate this mandate.<sup>226</sup>

However, in the federal system the fulfillment of these ethical obligations, particularly in the context of indigent representation, is often tested. In 2014, approximately 78% of federal defendants were deemed indigent and were represented by a public defender or an attorney appointed pursuant to

<sup>223</sup> MODEL RULES OF PROF’L CONDUCT r. 1.1 (AM. BAR ASS’N 2018) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

<sup>224</sup> *Id.* r. 1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

<sup>225</sup> *Id.* r. 1.3 cmt. 2 (“A lawyer’s work load must be controlled so that each matter can be handled competently.”); Peter A. Joy & Kevin C. McMunigal, *Does the Lawyer Make a Difference? Public Defender v. Appointed Counsel*, 27 CRIM. JUST. 46, 47 (2012) (“The Rand study’s findings have significant ethical implications. First and foremost is the failure to fulfill what is perhaps the most fundamental of all ethical duties, the duty to provide competent representation, set forth in Model Rule 1.1. Lack of adequate compensation and resources also put at risk the lawyer’s duty to keep a client informed about key aspects of the case as required by Model Rule 1.4. The Rand study noted that public defenders tend to spend more time communicating with clients than appointed lawyers. Taking on more cases than a lawyer can handle due to financial pressure is contrary to Comment [1] to Model Rule 1.16, stating that a lawyer ‘should not accept representation in a matter unless it can be performed competently, promptly, . . . and to completion.’”).

<sup>226</sup> Model Rule of Professional Conduct rule 1.16 provides in pertinent part:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

...

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

the Criminal Justice Act Panel (CJA).<sup>227</sup> Public defenders and CJA lawyers represented 38% and 39% of indigent defendants, respectively.<sup>228</sup> Though public defender caseloads are comparatively more burdensome at the state level,<sup>229</sup> many federal public defender offices experience similar hardships.<sup>230</sup> Unlike public defenders who are salaried employees, CJA attorneys bill the government for their services. However, their fees are subject to statutorily-imposed ceilings and are less generous than the fees earned through retained clients.<sup>231</sup> Currently, CJA lawyers are paid a maximum rate of \$140/hour in non-capital felony cases, with a cap fee of \$10,900 for non-capital felonies,

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<sup>227</sup> MARK MOTIVANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS 2013–2014, at 1, 28 (2017), <https://www.bjs.gov/content/pub/pdf/fjs1314.pdf> [<https://perma.cc/94FZ-4BA4>] [hereinafter FEDERAL JUSTICE STATISTICS 2013–2014]; Adam Liptak, *Gap Seen Between Court-Appointed Lawyers and Public Defenders*, N.Y. TIMES (July 13, 2007), <https://www.nytimes.com/2007/07/13/us/13cnd-defenders.html> [<https://perma.cc/HH5G-GYYM>] (“Roughly three quarters of all federal defendants rely on lawyers paid for by the government, about evenly divided between salaried public defenders and appointed lawyers paid by the hour.”).

<sup>228</sup> FEDERAL JUSTICE STATISTICS 2013–2014, *supra* note 227, at 29.

<sup>229</sup> Bibas, *supra* note 220, at 1075–76 (“Defense lawyers . . . may not have enough time to counsel their clients and weigh options, and may even ‘meet ’em and plead ’em’ at the initial appearance. They may be consciously or unconsciously biased by their workloads and incentives to close cases. They may also sometimes find it difficult to build mutual trust and get their clients to understand the pros and cons of various options.”); Andrew Cohen, *Eric Holder: A ‘State of Crisis’ for the Right to Counsel*, THE ATLANTIC (Mar. 15, 2013), <https://www.theatlantic.com/national/archive/2013/03/eric-holder-a-state-of-crisis-for-the-right-to-counsel/274074/> [<https://perma.cc/CGC6-ZX3B>] (noting that then-Attorney General Eric Holder declared that the indigent defense system was in a crisis and that “far too many children and adults routinely enter our juvenile and criminal justice systems with little understanding of the rights to which they’re entitled, the charges against them, or the potential sentences they may face”); Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, THE GUARDIAN (June 17, 2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/GG54-37NE>] (noting that in excess of eighty percent of individuals charged with felonies are indigent, that large public defender caseloads contribute to increased reliance on plea bargaining, “and result in a ‘meet ’em and plead ’em’ system of justice, in which clients have little more than a brief conversation in the courtroom with a harried public defender before pleading guilty”); Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, HUFFINGTON POST (Nov. 21, 2017), [https://www.huffingtonpost.com/entry/public-defenders-fight-back-against-budget-cuts-growing\\_us\\_5a1440d3e4b08b00ba67341f](https://www.huffingtonpost.com/entry/public-defenders-fight-back-against-budget-cuts-growing_us_5a1440d3e4b08b00ba67341f) [<https://perma.cc/MSA2-Q96D>] (noting that the restricted budgets and large caseloads of public defenders have produced a host of problems, including defendants often pleading guilty to crimes “even if they’re not guilty, just so they can get out of jail and get on with their lives, often not fully understanding the consequences”).

<sup>230</sup> *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016) (“As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards. And as one *amicus* points out, “[m]any federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources.” (citations omitted)).

<sup>231</sup> *Defender Services*, U.S. COURTS, <http://www.uscourts.gov/services-forms/defender-services> [<https://perma.cc/7L7Q-DLJV>] (describing the basic structure of federal indigent defense representation).

and \$3,100 for misdemeanors.<sup>232</sup> Though the indigent are spared the financial costs associated with their legal defense, they often sustain other meaningful non-monetary costs. One study found that in comparison with public defenders, appointed counsel “tend to be quite young,” graduate from less prestigious law schools, have smaller practices, are “less qualified,” and “tend to do less well in plea negotiations.”<sup>233</sup> That same study also found that defendants represented by court-appointed counsel “received substantially longer sentences,” and that appointed counsel “are less adept at assessing which cases to pursue through trial and at negotiating with prosecutors.”<sup>234</sup>

According to data compiled by the Bureau of Justice Statistics, the indigent population is diverse, with approximately 65% of African-American, 57% of white, and 56% of Hispanic defendants having been assigned federal counsel in 1998.<sup>235</sup> Moreover, the indigent population consists disproportionately of minorities,<sup>236</sup> and generally less educated people, with 70.2% of

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<sup>232</sup> 7 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY §§ 230.16, 230.23. 20, <https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf> [<https://perma.cc/2JLB-LCC9>].

<sup>233</sup> Liptak, *supra* note 227. Another study compared plea rates between defendants with retained attorneys and those with appointed counsel. David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 YALE L.J. 2578, 2585 (2013) (“The Allen Report found two statistics—the high rate of guilty pleas and the disparity in plea rates between those with retained counsel and those with assigned counsel—particularly telling evidence of the damage to the adversarial system from the lack of adequate counsel. In the districts that they studied, researchers found the following guilty plea rates for defendants with retained counsel versus defendants with assigned counsel: in the Northern District of California, San Francisco, the guilty plea rate was 68% for retained, 81% for assigned; in the Northern District of California, Sacramento, 60% for retained, 82% for assigned; in the Northern District of Illinois, 47% for retained, 87% for assigned; and in the District of Connecticut, 56% for retained, 71% for assigned.”).

<sup>234</sup> Adam Liptak, *supra* note 227.

<sup>235</sup> CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 9 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/RBN5-XDSR>].

<sup>236</sup> ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 47 (2009), [https://www.opensocietyfoundations.org/sites/default/files/misdemeanor\\_20090401.pdf](https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf) [<https://perma.cc/S45Q-DTXR>] (“Although actual statistics are rare, public defenders across the county report that their clients are almost entirely Black or Hispanic.” Citing higher instances of arrests and poverty as contributing explanations.); Peter A. Joy, *Unequal Assistance of Counsel*, 24 KAN. J.L. & PUB. POL’Y 518, 519 (2015) (“If one does not have the financial means to hire effective counsel, or is poor and not lucky enough to have a well-funded, effective public defender or appointed counsel, the defendant’s right to counsel is unequal. This disparity is driven largely by the wealth of the accused and falls most harshly on people of color, who are twice as likely as whites to live in poverty and are accused of crimes at rates much higher than their proportion of the population.”); Patton, *supra* note 233, at 2591 (“[T]he Federal Defenders of New York, is the public defender office for the Eastern and Southern Districts of New York. Those two districts cover all of New York City, Long Island, and several counties north of the city. Roughly seventy percent of the federal defendants in the districts are black or Hispanic, nearly double the percentage of the general population. About eighty percent of the districts’ defendants require assigned counsel.”).

indigent inmates having less than a high school education.<sup>237</sup> Notably, there has been a marked increase in recent years in the demand for interpreters. In 2002, interpreters used in federal-court proceedings totaled 174,405.<sup>238</sup> However, in 2016 and 2017 the numbers significantly increased, totaling 265,888 and 239,912, respectively.<sup>239</sup> And given President Trump’s “zero tolerance” immigration policies, few will be surprised if future statistical compilations demonstrate a noticeable increase in these figures.<sup>240</sup>

Well-trained and properly employed interpreters can certainly mitigate the problems that inevitably accompany language barriers in the criminal courtroom. Yet, the heightened priority of immigration prosecutions has produced such a spike in demand for interpreters that “filling the need has not been easy.”<sup>241</sup> It has “led to logistical problems in court,” has “frustrat[ed] . . . defense attorneys” as they “struggle to communicate basic legal concepts to their clients,” and has the defense community “concern[ed] . . . that due process is being skirted.”<sup>242</sup> In addition, the steep increase in immigration prosecutions “ha[s] swelled the dockets of the courts,” and “strain[ed] the time and resources of judges, clerks, prosecutors, [and] public defenders.”<sup>243</sup> In McAllen, Texas, “the epicenter of zero tolerance,” illegal-entry prosecutions increased over 300% in the past year.<sup>244</sup> As a result, the eighteen federal public defenders in McAllen typically consult with clients for “only a few minutes, just long enough to prepare people to plead guilty.”<sup>245</sup>

Thus, it is the poor, the uneducated, minorities, and non-English speaking defendants who are most disadvantaged by the federal courts’ Rule 11 proclivities. It is these individuals who are most vulnerable to the question-

<sup>237</sup> HARLOW, *supra* note 235, at 9.

<sup>238</sup> LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 23 (2002), [https://www.uscourts.gov/sites/default/files/annual\\_report\\_2002.pdf](https://www.uscourts.gov/sites/default/files/annual_report_2002.pdf) [<https://perma.cc/24DG-SL9X>].

<sup>239</sup> *Court Operations and Case Management Annual Report 2017*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/statistics-reports/court-operations-and-case-management-annual-report-2017> [<https://perma.cc/CR48-566S>].

<sup>240</sup> In 2018, President Donald Trump introduced a policy to criminally prosecute anyone who crossed the border illegally. Kristina Davis, *As Courtrooms Grow More Diverse Under ‘Zero Tolerance,’ Difficulty Finding Interpreters Leads to Frustration*, SAN DIEGO TRIB. (Sept. 2, 2018), <http://www.sandiegouniontribune.com/news/courts/sd-me-court-interpreters-20180902-story.html> [<https://perma.cc/8YGQ-KQVZ>]. This came to be known as his “zero tolerance” policy. *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Julia Preston, *Zero Tolerance Lives On*, THE MARSHALL PROJECT (Sept. 14, 2018), <https://www.themarshallproject.org/2018/09/14/zero-tolerance-lives-on?ref=hp-4-122> [<https://perma.cc/BZ9R-GJQ6>].

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

able modes of inquiry commonly employed by federal district court judges. During direct examination in a trial setting, monosyllabic utterances in response to improper leading and compound questions would not be credited as particularly probative. The primary rationale underlying the leading-question prohibition is “to prevent the substitution of the attorney’s language for the thoughts of the witness as to material facts in dispute.”<sup>246</sup> And the inherent confusion associated with compound questions renders such queries improper regardless of their trial context.<sup>247</sup> Just as witness responses to such questions in the trial setting are, and should be, properly discounted, there is no sound reason to routinely credit such responses in the Rule 11 setting.

Yet, this is *precisely what happens* when appellate petitions are filed, challenging the modes of judicial questioning during their Rule 11 hearings. Such challenges are routinely rejected by the circuit courts.<sup>248</sup> Illustrative is the 2005 case from the U.S. Court of Appeals for the Sixth Circuit, *United States v. Gardner*.<sup>249</sup> There, the defendant (Gardner) sought to have his guilty plea to narcotics and weapons charges set aside because there was no written plea agreement and no “meaningful interaction” between the court and the defendant during their Rule 11 colloquy.<sup>250</sup> He asserted that the “plea colloquy did not satisfy the ‘core concerns’ of Rule 11,” and that the court neglected to “thorough[ly] review . . . the oral plea agreement.”<sup>251</sup> In

<sup>246</sup> 81 AM. JUR. 2D *Witnesses* § 659 (2019); see also 98 C.J.S. *Witnesses* § 472 (2018) (“Leading questions are generally not permitted on direct examination, especially if the witness is friendly and willing. This restriction is intended to prevent the substitution of the language of the attorney for the thoughts of the witness as to material facts in dispute and to prevent shaping and creating evidence—whether inadvertently or intentionally—that conforms to the interrogator’s version of the facts.”).

<sup>247</sup> See 28 WRIGHT & MILLER, *supra* note 192, § 6164, at 388.

<sup>248</sup> *United States v. Vargas*, 291 F. App’x 450, 452 (2d Cir. 2008) (rejecting defendant’s claim that his guilty plea was involuntary, finding that his monosyllabic responses did not demonstrate ineffectiveness); *United States v. Torrellas*, 455 F.3d 96, 103 (2d Cir. 2006) (concluding that “monosyllabic ‘Yes’ and ‘No’ responses” to judicial inquiries did not render guilty plea invalid); *United States v. Rodríguez-León*, 402 F.3d 17, 25 & n.8 (1st Cir. 2005) (finding that single-word responses during plea colloquy were insufficient to establish that defendant did not comprehend the nature of the charges); *Spikes v. Graham*, No. 9:07-CV-1129, 2010 WL 4005044, at \*7 (N.D.N.Y. July 14, 2010) (rejecting defendant’s “claim[] that his monosyllabic responses and the fact that he did not provide details of the crime indicate that he did not have a rational and factual understanding of the plea proceedings”); *Flores v. Cockrell*, No. CIV. SA-98-CA-1169OG, 2003 WL 1957131, at \*12 (W.D. Tex. Mar. 31, 2003) (rejecting the claim that the defendant’s guilty plea was invalid due to being in a “frozen state,” and the court held that monosyllabic responses during the plea hearing failed to establish defendant’s claim).

<sup>249</sup> *United States v. Gardner*, 417 F.3d 541 (6th Cir. 2005).

<sup>250</sup> *Id.* at 544.

<sup>251</sup> *Id.* (“Gardner contends that his plea colloquy did not satisfy the ‘core concerns’ of Rule 11 as articulated in *United States v. DeBusk*; namely, ‘Was the plea coerced? Does the accused un-

support, he specifically cited the mode of inquiry employed by the court during the Rule 11 hearing, noting that it “required only a yes-or-no answer” to most questions.<sup>252</sup> However, the Sixth Circuit briskly dismissed Gardner’s claim.<sup>253</sup> Finding that his guilty plea was entered knowingly and voluntarily, the court reasoned, in part, that the nature of the charges “were read aloud,” and that the sentencing consequences “for each offense were explained to Gardner.”<sup>254</sup> It added that the court “addressed” with Gardner his various constitutional rights as well as the burden placed upon the government.<sup>255</sup> Further, it noted that Gardner indicated that he understood the nature of the offense, the various rights he was forgoing, the consequences attendant to this guilty plea, and that he acknowledged his guilt.<sup>256</sup>

Of particular note is the Sixth Circuit’s specific address of Gardner’s monosyllabic claim that was at the heart of his appeal. In a single sentence, the court abruptly concluded that such one-word responses were valid indicators of a defendant’s knowledge and voluntariness.<sup>257</sup>

[T]here is no requirement that in order to rely on a defendant’s answer in a guilty-plea colloquy to conclude that the defendant pleaded guilty knowingly and voluntarily, those answers must be lengthy and all-encompassing; a straightforward and simple “Yes, your Honor” is sufficient to bind a defendant to its consequences.<sup>258</sup>

The Sixth Circuit is correct in stating that neither the plain language of Rule 11 nor its appellate-court construction requires that defendants’ answers be “lengthy and all-encompassing.” However, this reality underscores the problem. Rule 11 is silent as to methodology, the district courts have routinely employed leading and compound questioning to comply with its mandates, and the courts of appeals have sanctioned the process. Though

derstand the nature of the charges? And does the accused understand the consequences of the plea?’ Specifically, he claims that the district court failed ‘to provide a thorough review of the oral plea agreement.’” (citations omitted).

<sup>252</sup> *Id.* (noting Gardner’s claim that the court’s mode of inquiry which generated mostly single-word responses “render[ed] their exchange meaningless”).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* (emphases added) (“At Gardner’s plea hearing, the district court carefully reviewed with him the provisions of the plea agreement and the rights that he was waiving as a result of pleading guilty. The charges in the indictment were read aloud, and the penalties for each offense were explained to Gardner.”).

<sup>255</sup> *Id.* (noting that the district court “addressed Gardner’s right to a trial by jury, his right not to testify, the presumption of innocence, and the government’s burden of proof”).

<sup>256</sup> *Id.* (“Before his plea was entered, Gardner stated that he understood the nature of the offenses and acknowledged his guilt. He also said that he understood the consequences of his plea and the rights that he was waiving by pleading guilty.”).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*



monosyllabic responses are not per se indicators of insufficient comprehension and involuntariness, in the context of Rule 11 hearings the all-encompassing view expressed by the Sixth Circuit is far too sweeping. It flatly ignores the underlying dynamics of the judge-defendant relationship that too often renders monosyllabic responses insufficient indicators of defendant comprehension and voluntariness. It is also suggestive of an unfortunate value priority; one that is misplaced or is the product of misinformation. It is a perspective that plainly exalts judicial economy and expediency above probing inquiries and genuine concern for truth. And it is a view that unambiguously communicates to district courts that facial compliance with the rule is acceptable judicial practice.

### CONCLUSION

It is difficult to envision a leading or compound question during a trial that can be as forceful and as dangerous as one asked during a Rule 11 hearing. At a trial, the trier of fact possesses the authority to decide which facts to believe and which not to believe. It decides how much weight, if any, a particular piece of evidence should be credited. Accordingly, in a trial setting, a trier of fact may choose to disregard or discredit the significance of testimony that stems from the most blatant and objectionable leading and/or compound questions. However, in the Rule 11 context the defendant makes a decision to change her plea to guilty. There is no trier of fact attempting to ascertain guilt or innocence. Rather, the judge's role is to ascertain whether the defendant is entering a plea voluntarily and with sufficient comprehension of certain attendant consequences. Rule 11 specifies the process that courts must follow when performing this function, but it also entices courts to ascertain knowledge and voluntariness by probing defendants through leading and compound questions. As this Article demonstrates, this deeply flawed process of inquiry effectively glides too many defendants into guilt admissions without a true and meaningful judicial inquiry.

This practice—all too common in the federal courts—can be mitigated by amending Rule 11 to require a substantial uptick in the defendant's role during the change of plea process. Specifically, Rule 11 should be amended to require that courts seek elaborative defendant statements that reflect their knowledge of the various consequences (constitutional, penal, appellate, etc.) that accompany a change of plea, the voluntariness of their plea, the factual basis underlying their plea, and their understanding of the nature of the charges. The rule should strongly discourage the employment of leading

questions,<sup>259</sup> and flatly prohibit compound questions, when conducting this inquiry. Instead, the judicial colloquy should be conducted in such a manner that encourages elaborative, explanatory statements from the defendants. Undoubtedly, there will be plentiful instances where defendants exhibit traits, such as insufficient comprehension, inarticulateness, or extreme nervousness, that inhibit a seamless Rule 11 hearing. When confronted with such scenarios, the proposed rule changes will not meaningfully curtail judicial freedom to address these scenarios. Courts can still employ a variety of strategies to address such situations, including, but hardly limited to, permitting attorney consultation, granting recesses, rescheduling hearings, and, if necessary, asking limited leading questions.

Critics will correctly argue that this proposal will greatly elongate the Rule 11-hearing process. However, the current change-of-plea structure is far too streamlined and expedient, and is an inappropriate yardstick by which to assess the efficiency of this proposed reform. The proposed Rule 11 reform will produce a Rule 11 process that is elongated but truer to its purported purpose: to accurately gauge defendant knowledge and voluntariness. And the greater attendant accuracy will result in fewer appellate challenges alleging Rule 11 errors, or related claims such as those litigated in the Supreme Court cases of *Class* and *Lee*.

Approximately ninety-seven percent of federal cases and ninety-four percent of felony convictions at the state level are obtained by virtue of plea bargaining.<sup>260</sup> Such heavy reliance upon guilty pleas to resolve criminal cases necessitates a corresponding Rule 11 process that respects this value choice. It requires a process that places less value upon haste and more upon effectiveness. As the *Class* and *Lee* cases illustrate, a more careful Rule 11 process

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<sup>259</sup> Leading questions should be allowed in limited circumstances, such as when there is sufficient indication that the defendant has difficulty expressing himself. See 3 CRIMINAL PRACTICE MANUAL, REPORT, AND GUIDE § 77:6, Westlaw (database updated 2019) (“To simplify the process of extracting information from witnesses with limited understanding, whether due to mental capacity, immaturity, extreme nervousness, fear, inexperience, or other impediments, the court may permit leading questions. . . . Leading questions on direct examination are permissible in questioning certain witnesses, including a child sexual abuse victim, a foreign witness testifying through a translator, an unusually soft-spoken and frightened witness, and a mentally retarded adult who was the victim of sexual abuse and do not violate a defendant’s Sixth Amendment right to confrontation.”).

<sup>260</sup> Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/7EET-3WN3>] (“The vast majority of felony convictions are now the result of plea bargains—some 94% at the state level, and some 97% at the federal level. Estimates for misdemeanor convictions run even higher. These are astonishing statistics, and they reveal a stark new truth about the American criminal-justice system: Very few cases go to trial.”); see Gaby Del Valle, *Most Cases End in Plea Bargains, Not Trials*, THE OUTLINE (Aug. 7, 2017), <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials?zd=1&zi=uraey74x> [<https://perma.cc/NJQ7-RVRB>].

might have produced more optimal and efficient outcomes for the respective litigants, and possibly avoided the appellate litigation that made their way to the Supreme Court. The recommended proposal is an important corrective step in making the Rule 11 process more effective and just.