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Re-examining the Admissive Effect of Guilty Pleas at Sentencing

Scott Moore†

The Bill of Rights protects criminal defendants against self-incrimination, guarantees them a speedy and public jury trial, and allows them to confront their accusers. However, many defendants, hoping either to receive more lenient punishment or to avoid the uncertainty of the trial process, agree to waive their Fifth and Sixth Amendment rights by entering into plea agreements with prosecutors. Because most criminal cases are resolved by plea bargaining, few defendants receive the full procedural protections afforded by jury trials. As a result, the safeguards that protect defendants’ rights in the plea bargaining process are critically important to ensure fairness in the criminal justice system.

Courts agree that a guilty plea admits the substantive criminal offense pled to, and that it acknowledges the defendant’s responsibility for each element of that offense. Courts disagree, however, about whether a plea also admits allegations in the indictment that are not essential to the underlying criminal charge. Under the Federal Sentencing Guidelines, these allegations can be extremely important because, if deemed admitted by a plea, they may substantially increase the severity of punishment a defendant receives. Because nonessential allegations are not subject to the plea bargaining safeguards in Federal Rule of Criminal Procedure 11, a defendant may not know that his guilty

† B.S. 1996, North Carolina State University; J.D. Candidate 1999, University of Chicago.
1 US Const, Amend V.
2 US Const, Amend VI.
3 Id.
5 See note 11 and accompanying text.
6 See Part I C.
7 This Comment uses the terms “charging paper” and “indictment” interchangeably to refer to the document charging the defendant with his crime.
8 See Part II.
9 See, for example, notes 85–92 and accompanying text.
plea would admit them. Nevertheless, a defendant usually cannot contest these admissions at his subsequent sentencing hearing when he realizes their actual effect, even if the underlying allegations have no evidentiary support.

This Comment argues that courts should not treat guilty pleas as admissions of factual allegations unless they are essential to elements of the crime to which the defendant pled guilty. Part I describes the statutory and judicial limits on plea bargaining in federal courts. Part II examines the majority rule, which interprets a plea bargain as admitting all factual allegations in an indictment. Part III illustrates how the majority view interferes with fairness in the plea bargaining process. Finally, Part IV argues that courts should reject the majority rule and require prosecutors to seek explicit admissions of the facts they wish to use at sentencing.

I. PLEA BARGAINING IN THE FEDERAL COURT SYSTEM

To most Americans, the phrase “criminal procedure” evokes images of a jury trial with elaborate safeguards designed to protect the rights of the accused. However, in reality, criminal jury trials are rare, and most criminal cases are resolved through plea bargaining. Therefore, the fairness of the criminal justice system depends largely on the protections imposed on the plea bargaining process.

A. Plea Agreements

In Santobello v New York, the Supreme Court accepted the legitimacy of plea bargaining. However, the terms of plea bargains are limited by Federal Rule of Criminal Procedure 11 ("Rule 11"). Under Rule 11, a prosecutor may encourage the defendant to plead guilty in three ways. First, he may agree to dismiss one or more criminal charges. Second, he may agree to

10 See notes 123–128 and accompanying text.
11 See Robert E. Scott and William J. Stuntz, Plea Bargaining as Contract, 101 Yale L J 1909, 1911 n 7 (trials constitute as little as 2 percent of total dispositions in some jurisdictions).
13 Id at 260 (recognizing that plea bargains are “an essential component” of the criminal process).
14 FRCrP 11.
15 United States v Hyde, 117 S Ct 1630, 1632–33 (1997) (applying Rule 11 and noting that it is the “principal provision in the Federal Rules of Criminal Procedure dealing with the subject of guilty pleas and plea agreements”).
16 FRCrP 11(e)(1)(A).
stipulate to the appropriateness of a specific sentence. Third, he may recommend a specific sentence or agree not to oppose the defendant's sentencing request, with the understanding that this recommendation will not bind the court. In return, the defendant may waive his right to a trial and enter a plea of guilty.

The Supreme Court has recognized that properly administered plea bargaining can have many benefits. For example, plea bargaining can promote rehabilitation of guilty defendants, protect the public from criminals who might otherwise commit crimes on pre-trial release, and reduce the court resources required to dispose of criminal cases. However, plea bargains also require defendants to waive at least three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.

B. Law of Plea Bargaining

The Supreme Court has used principles of contract law to govern the enforceability of plea bargains. Most of the circuit courts have followed the Supreme Court's approach to analyzing plea bargains. However, the contractual requirement that a prosecutor keep his promises does not provide sufficient protection for criminal defendants. Fortunately, the Federal Sentencing Guidelines ("Guidelines"), Rule 11, and the Due Process

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17 FRCrP 11(e)(1)(C).
18 FRCrP 11(e)(1)(B).
19 FRCrP 11(c)(4).
20 FRCrP 11(e)(1).
21 Santobello, 404 US at 261.
22 Id. ("By shortening the time between charge and disposition, plea bargaining enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.").
23 Id.
24 Id at 260 (noting that "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").
26 Santobello v New York, 404 US 257, 262 (1971) (noting that when a prosecutor's promise is "part of the inducement or consideration" for a plea bargain, it must be kept).
27 See, for example, United States v Conway, 81 F3d 15, 17 (1st Cir 1996); United States v Gottesman, 122 F3d 150, 152 (2d Cir 1997); United States v Gilchrist, 1997 US App LEXIS 33876, *8 (3d Cir 1997); Ashe v Styles, 67 F3d 46, 52 (4th Cir 1995); Hentz v Hargett, 71 F3d 1169, 1173 (5th Cir 1996); United States v Allison, 59 F3d 43, 46 (6th Cir 1995); United States v Romunno, 1998 US App LEXIS 119, *25 (7th Cir 1998); United States v Pompey, 121 F3d 381, 381–82 (8th Cir 1997); United States v Schuman, 127 F3d 815, 817–18 (9th Cir 1997); United States v Rockwell International Corp, 124 F3d 1194, 1199 (10th Cir 1997); United States v Jones, 58 F3d 688, 691 (DC Cir 1995).
Clause\textsuperscript{30} provide additional safeguards for criminal defendants. These protections are critical to ensuring that criminal defendants who enter into plea bargains receive fair treatment.

The Guidelines, which govern sentencing in the federal criminal justice system,\textsuperscript{31} protect defendants in several ways. First, the Guidelines provide narrow sentence ranges\textsuperscript{32} for most federal offenses.\textsuperscript{33} These narrow ranges help defendants analyze plea bargains by providing them with a clear indication of the punishment that will result from a guilty plea.\textsuperscript{34} The Federal Sentencing Commission ("Commission") also designed the Guidelines to prevent prosecutors from altering the sentence a defendant receives by manipulating the allegations in his indictment.\textsuperscript{35} However, the Commission recognized that plea bargaining posed a threat to the Guidelines.\textsuperscript{36} In response, it drafted policy statements designed to ensure that plea bargains do not circumvent the established sentencing rules or procedures.\textsuperscript{37}

Rule 11 also mandates procedural safeguards in the plea bargaining process. Before a court accepts a defendant's guilty plea, it must inform him of the nature of the charge his plea will admit, any mandatory minimum penalty, and the maximum possible penalty provided by law.\textsuperscript{36} The court must also notify the defendant that it will consider any applicable Guidelines, and that it may depart from the Guidelines under some circumstances.\textsuperscript{39} In addition, Rule 11 requires that the court satisfy itself that a factual basis for the plea exists,\textsuperscript{40} and that it keep a verbatim record of the plea proceedings.\textsuperscript{41}

Supreme Court precedent mandates additional protections for criminal defendants. The Court has held that constitutional

\textsuperscript{30} See note 38–39 and accompanying text.
\textsuperscript{31} US Const, Amend V. See also notes 42–43 and accompanying text.
\textsuperscript{32} USSG Ch 1 Pt A(1).
\textsuperscript{33} The maximum sentence cannot exceed the minimum by more than 25 percent or six months, whichever is greater. 28 USC § 994(b)(2) (1994).
\textsuperscript{34} The Guidelines apply to more than 90 percent of all felonies and class A misdemeanors in federal courts. USSG Ch 1 Pt A(5).
\textsuperscript{35} USSG Ch 1 Pt A(4)(c).
\textsuperscript{36} USSG Ch 1 Pt A(4)(a).
\textsuperscript{37} USSG Ch 1 Pt A(4)(e) (admitting that plea bargains might provide a loophole "large enough to undo the good that sentencing guidelines would bring").
\textsuperscript{38} Id.
\textsuperscript{39} FRCrP 11(c)(1).
\textsuperscript{40} Id. A court may depart from the guidelines when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken in consideration by the Sentencing Commission in formulating the guidelines." 18 USC § 3553(b) (1994).
\textsuperscript{41} FRCrP 11(f).
due process requirements constrain the enforceability of plea agreements. To satisfy due process, a guilty plea must be an "intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'"

C. Confusion Over the Effect of Plea Agreements

The Supreme Court has examined the effect of guilty pleas on several occasions. The primary effect of a plea is to admit the elements of the formal criminal charge. By pleading guilty, the accused not only admits that he engaged in various acts, but confesses that he committed the specific crime charged against him. However, the Supreme Court has not specifically decided whether a guilty plea also admits allegations in the charging paper not essential to the validity of the conviction.

In United States v Broce, the Supreme Court held that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." The circuit courts have struggled to interpret the meaning of this statement. In United States v Hill, the Tenth Circuit cited it to bolster the proposition that a guilty plea admits all the well-pleaded facts in an indictment. Although the Ninth Circuit reached the same conclusion in United States v Lopez, it found nothing in Broce to support its holding that guilty pleas admit all factual allegations in an indictment. This disagreement has serious implications for the effect of guilty pleas on sentencing.

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42 Mabry v Johnson, 467 US 504, 509 (1984) (defendant not fairly apprised of the consequences of his plea may challenge his conviction under the Due Process Clause); McCarthy v United States, 394 US 459, 466 (1969) (if defendant's guilty plea is not voluntary and knowing, it has been obtained in violation of due process and is therefore void).
44 McCarthy, 394 US at 466.
46 Id at 569.
47 Id at 1151 (10th Cir 1995).
48 Id at 1155.
49 1994 WL 173900, *3-4 (9th Cir 1994) (holding that the district court could rely on surplus language in charging paper to sentence defendant).
50 Id at *4 n 3 (declaring that Broce "neither supports nor rejects the notion that surplusage is established by a guilty plea").
II. THE MAJORITY RULE AND THE NINTH CIRCUIT'S PARTIAL REJECTION

Disputes over whether guilty pleas establish nonessential factual allegations in the charging paper primarily arise in two contexts. First, prosecutors may try to use facts alleged in an indictment at the sentencing hearing for that case ("same case context"). Second, prosecutors may seek to revisit factual allegations in a later criminal case to recharacterize a previous conviction ("subsequent case context"). A majority of courts have held in both contexts that a defendant who pleads guilty admits all factual allegations in the charging paper. Although the Ninth Circuit has followed this rule in the subsequent case context, it recently rejected the majority rule in the same case context.

A. The Effect of Guilty Pleas in the Same Case Context

A majority of courts addressing the effect of pleas in the same case context have held that a guilty plea admits all factual allegations in an indictment, even if they are not elements of the crime to which the defendant has pled guilty. For example, in United States v Tolson, the defendant pled guilty to participating in a drug conspiracy which, according to the indictment, began "during the early part of 1986." He later appealed his sentence, claiming that the District Court had erred in assessing two criminal history points at his sentencing based on his involvement in the conspiracy while on probation for a separate offense in 1986. The Seventh Circuit rejected the defendant’s argument and held that, by pleading guilty, he had admitted all of the factual allegations in his indictment and could not challenge them on appeal.

In United States v Eaves, the Eighth Circuit also found that
a guilty plea admits facts not essential to the validity of a conviction in the same case context. In *Eaves*, the defendant pled guilty to an indictment alleging a conspiracy to commit odometer fraud on approximately 135 automobiles, and the court ordered him to make restitution of $300 per victim. The District Court denied the defendant's motion to reduce the amount of restitution after he claimed he had only defrauded 47 victims. On appeal, the Eighth Circuit affirmed the District Court and held that the defendant's guilty plea admitted the higher number alleged in the indictment.

In *United States v Cazares*, however, the Ninth Circuit rejected the majority position in the same case context. In *Cazares*, the prosecutor attempted to use a factual allegation in an indictment to conclusively establish at sentencing that the defendant possessed a gun while committing his crime. The case involved two defendants, Alvarez-Sanchez and Cazares, who were indicted on and convicted of identical drug conspiracy charges. A jury convicted Cazares, while Alvarez-Sanchez pled guilty.

During Cazares's sentencing, the District Court found that he had "at least constructive possession" of a firearm in connection with his offense. The court then held that Alvarez-Sanchez was, as a co-conspirator, responsible for the actions of Cazares. The District Court gave both defendants a two-point upward adjustment for possessing firearms during their offenses.

The Ninth Circuit overturned the District Court's finding that Cazares had possessed the gun and remanded the case for resentencing. Because the government had not demonstrated that Cazares possessed the firearm, the court also held that "there [was] no basis for imposing the adjustment on Alvarez-
Sanchez on the theory that he was responsible for the foreseeable acts of his co-conspirator.74 The government, however, urged the Ninth Circuit to uphold Alvarez-Sanchez's sentence on the alternative ground, rejected by the trial court, that his guilty plea "conclusively prove[d] all factual allegations of the indictment," including gun possession.75

The Cazares court held that a guilty plea admits only "the facts essential to the validity of the conviction."76 The court specifically found that "allegations not necessary to be proved for a conviction — in this case the gun possession — are not admitted by a plea."77 The court expressly rejected the reasoning of Tolson and Eaves.78 Instead, it applied the rationale of an earlier Ninth Circuit case which equated the effect of a guilty plea to that of a jury conviction based on evidence covering all of the material facts.79 The court concluded that the majority rule was unacceptable because it would allow prosecutors to treat Alvarez-Sanchez's guilty plea more seriously than it could have had he been convicted by a jury.80

B. The Effect of Guilty Pleas in the Subsequent Case Context

In Taylor v United States,81 the Supreme Court held that courts could not look beyond the elements of the charge on which a jury convicted a defendant when considering a sentence enhancement during a subsequent case.82 The Court held that trial courts should "look only to the fact of conviction and the statutory definition of the prior offense" unless "a jury was actually required to find all the elements" of the crime leading to the enhancement.83 However, under the prevailing rule applied by the circuit courts, a guilty plea establishes all factual allegations in the indictment, even those not considered by a judge or a jury.84 By applying the majority rule to the subsequent case context, the

74 121 F3d at 1246.
75 Id.
76 Id at 1248.
77 Id at 1247.
78 121 F3d at 1248.
79 Id at 1246, citing United States v Davis, 452 F2d 577, 578 (9th Cir 1971).
80 Id at 1245.
82 Id at 600.
83 Id at 602.
84 See, for example, United States v Kaplansky, 42 F3d 320, 325 (6th Cir 1994); United States v Lopez, 1994 WL 173900, *3 (9th Cir 1994); United States v Barney, 955 F2d 635, 639 (10th Cir 1992); United States v Hill, 53 F3d 1151, 1155 (10th Cir 1995).
federal appellate courts have ignored the reasoning of Taylor in plea bargaining cases.

For example, in United States v Hill, the Tenth Circuit considered the case of a defendant charged with violating 18 USC § 922(g)(1), which prohibits felons from possessing firearms. At the defendant's sentencing hearing, the government asked the court to consider the defendant's previous plea to second-degree burglary in Oklahoma as admitting a "violent felony" under the Armed Career Criminal Act ("ACCA"). Under Oklahoma state law, second-degree burglary does not require entry into a building or structure. However, burglary must include entry into a building or structure to constitute a violent felony under the ACCA. Therefore, the government sought to use the charging paper from the Oklahoma burglary to establish that the defendant's crime actually involved entry into a building.

The Tenth Circuit held that the defendant's guilty plea to second-degree burglary admitted all facts in the charging paper, even those not necessary to support his conviction. Because the charging paper had alleged entry into a building, the court considered the defendant's previous conviction a violent felony under the ACCA and increased his sentence by 180 months.

In United States v Lopez, the Ninth Circuit considered a similar fact pattern. In Lopez, the federal prosecutor sought to demonstrate that the defendant's previous guilty plea to second-degree burglary in California admitted a "crime of violence," in order to subject him to a sentence enhancement as a career offender under the Guidelines. The Guidelines defined the burglary of a dwelling as a crime of violence, but did not explicitly

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53 F3d 1151 (10th Cir 1995).
56 Id at 1152.
57 Id, citing 18 USC § 924(e)(1).
58 Id at 1153, citing 21 Okla Stat Ann § 1435 (West 1998). Under Oklahoma law, entry into a tent, automobile, or vending machine could be second degree burglary. 21 Okla Stat Ann § 1435.
59 Taylor, 495 US at 598 (creating a generic federal definition of burglary for the purposes of the ACCA, a violent felony requiring at least "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime").
60 53 F3d at 1154.
62 Id at 1153, 1155.
64 "Crime of violence" is a term of art under the Guidelines. Crimes of violence include burglary, arson, extortion, crimes involving explosives, or crimes involving the use, threatened use, or attempted use of physical force. They are punishable by imprisonment for greater than one year. USSG § 4B1.2(1).
65 1994 WL 173900 at *1, citing USSG § 4B1.1.
mention any other types of burglary. In contrast, the relevant sections of the California Penal Code did not require entry into a residence for a second-degree burglary conviction. The court, nevertheless, held that prosecutors could use the conduct described in the California indictment to demonstrate that the defendant’s previous crime involved entry into a dwelling, and therefore could be characterized as a crime of violence.

III. THE MAJORITY RULE UNDERMINES FAIRNESS IN THE PLEA BARGAINING PROCESS

When courts interpret plea agreements at sentencing, they should treat guilty pleas as admissions of only those facts essential to elements of the underlying criminal charge. By giving conclusive weight to surplus language in indictments, courts following the majority rule allow prosecutors to frustrate the protections embodied in the Federal Sentencing Guidelines. The majority rule also undermines the prophylactic effect of Federal Rule of Criminal Procedure 11, raises serious due process concerns, and makes guilty pleas more condemnatory than jury convictions.

A. The Majority Rule Undermines the Procedural Protections in the Federal Sentencing Guidelines

In 1984, Congress created the United States Sentencing Commission (“Commission”) to develop detailed guidelines prescribing appropriate sentences for federal crimes. The Federal Sentencing Guidelines (“Guidelines”) took effect on November 1, 1987, drastically altering the sentencing process in the federal courts. The majority rule allows prosecutors to circumvent the procedural protections the Commission created to ensure the fairness of plea bargaining.

Congress’s basic objective in reforming the sentencing process was to improve the fairness and effectiveness of the criminal sentences. See Sentencing Reform Act of 1984, Pub L No 98-473, 98 Stat 1987 (1984), codified at 28 USC § 3551 et seq (1984); USSG Ch 1 Pt A(1).
justice system. To this end, Congress sought both uniformity and proportionality in sentencing.

In formulating the Guidelines, the Commission had to design a system to achieve both Congressional goals. The Commission's first task was to decide what type of system to use — a charge offense-based sentencing system, or a real offense-based system. Under a charge offense system, a court would sentence a defendant based upon the conduct charged in the indictment. In contrast, under a real offense system, a court would base its sentence on the conduct it determined the defendant had actually engaged in, regardless of the particular charge.

Because the Commission recognized that a charge offense system would have significant drawbacks, including that it might allow prosecutors to influence sentences by manipulating indictments, the Commission strove to develop a real offense system. However, the Commission soon discovered that a pure real offense system would be too complex to work effectively. As a result, the Commission ultimately decided to adopt a hybrid system, which included elements of both types of systems.

To prevent the prosecutorial abuse made possible by charge offense elements, the Commission wrote the Guidelines “with an eye toward eliminating unfair treatment that might flow from count manipulation,” and retained some elements of a real offense system. Therefore, the Guidelines treat attendant circumstances, which might lead to sentence enhancements, as real offense elements that must be proven. However, the majority rule allows prosecutors to manipulate the defendant's punishment by using unproven attendant circumstances in the indictment to seek sentence enhancements. The majority rule thus

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101 USSG Ch 1 Pt A(3).
102 Id.
103 USSG Ch 1 Pt A(4)(a).
104 Id.
105 Id.
106 Id.
107 USSG Ch 1 Pt A(4)(a) (noting the commission's pure real offense-based system “required the use of . . . quadratic roots and other mathematical operations that the Commission considered too complex to be workable”).
108 Id.
109 Id (“For example, the Guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000.”).
110 Id.
111 USSG Ch 1 Pt A(4)(a). Examples of real offense elements include the defendant's role in the offense, whether he possessed a gun during his crime, and the amount of money actually taken in a crime. Id.
frustrates the congressional goals of fairness and uniformity and violates the Commission's clear intent to prevent prosecutors from influencing sentences by manipulating indictments.112

The Commission also expected the Guidelines to promote fairness in plea bargaining by providing defendants with a more definite expectation of the punishment they may receive.113 However, the majority rule has exactly the opposite effect on sentencing — it makes it more difficult for a defendant to predict the punishment he will receive if he pleads guilty. Moreover, because it allows prosecutors to conceal their true intentions until sentencing, the majority rule frustrates the rationalizing effect the Commission envisioned for the Guidelines. Finally, by undermining transparency in the plea bargaining process, the majority rule also increases the probability of errors in plea bargaining.

The Commission recognized that abuse in the plea bargaining process could undermine the goals of the Guidelines.114 To prevent this from happening, the Commission established policy statements designed to ensure that plea bargains do not circumvent the Guidelines.115 These statements recommend, among other things, that prosecutors "disclose to the defendant the facts and circumstances . . . that are relevant to the application of the sentencing guidelines."116 By allowing prosecutors to use facts at sentencing without disclosing their intent to do so, the majority rule encourages prosecutors to avoid the full disclosure necessary to ensure the defendant understands the consequences of his plea.

One final, fundamental protection in the Guidelines is the requirement that prosecutors demonstrate facts leading to sentence enhancements by a preponderance of the evidence.117 The majority rule allows prosecutors to evade this requirement by alleging facts they cannot prove in the charging paper. If the defendant pleads guilty, these allegations are deemed admitted for sentencing purposes. The majority rule allows prosecutors to use these allegations against a defendant at sentencing without meeting their burden of proof, precisely the type of abuse the Commission tried to prevent by treating attendant circumstances

112 Id.
113 USSG Ch 1 Pt A(4)(c).
114 Id.
115 Id.
116 Commentary to USSG § 6B1.2.
117 See, for example, United States v Desimone, 119 F3d 217, 228 (2d Cir 1997); United States v Shugart, 117 F3d 838, 846 (5th Cir 1997); United States v Barnes, 125 F3d 1287, 1290 (9th Cir 1997).
as real offense elements that must be proven. In these ways, the majority rule frustrates the intent behind the Guidelines and the protections they embody.

B. The Majority Rule Undermines Rule 11's Prophylactic Effect

A plea bargain "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."118 Rule 11 ensures that a defendant understands the ramifications of a guilty plea by requiring the judge to engage the defendant in a plea colloquy before accepting his plea.119 As part of this requirement, the judge must "inquire into the defendant's understanding of the nature of the charge and the consequences of his plea . . . [and] satisfy himself that there is a factual basis for the plea."120 Rule 11 also requires the judge to develop this factual basis on the record121 and in open court122 before he may enter judgment on a plea.

Rule 11 does not, however, require the court to examine every factual allegation in the indictment. Rather, a judge must only examine those facts in the indictment necessary to support the elements of the underlying criminal charge.123 Both the Rule 11 Advisory Committee Notes124 and the Supreme Court's opinion in Santobello v New York125 support this interpretation of Rule 11.

Although Rule 11 ensures that each element of the underlying criminal charge has at least some evidentiary support,126 indictments may contain factual allegations not essential to the criminal charge.127 Under the majority rule, courts treat these

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119 FRCrP 11(c),(d).
120 McCarthy, 394 US at 467.
121 Santobello v New York, 404 US 257, 261 (1971) (noting that FRCrP 11 "makes clear that the sentencing judge must develop on the record, the factual basis for the plea").
122 FRCrP 11(c),(d).
123 See, for example, United States v Lopez-Reyes, 933 F Supp 957, 961 (S D Cal 1996) (plea colloquy is sufficient as long as the court is "satisfied that a factual basis exists for each of the elements in the charge"); United States v Owen, 858 F2d 1514, 1517 (11th Cir 1988) (factual support for guilty plea need only be sufficient for a court to reasonably find defendant guilty of crime).
124 FRCrP 11, 1966 Amendment Advisory Committee Notes ("the court should satisfy itself . . . 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").
125 404 US 257, 261 (1971) (judges may satisfy the Rule 11 requirement by "having the accused describe the conduct that gave rise to the charge").
126 See United States v Marks, 38 F3d 1009, 1012 (9th Cir 1994) (courts may satisfy Rule 11 by finding a factual basis for the plea from which the court may reasonably determine that the defendant likely committed the offense).
127 See, for example, United States v Cazares, 121 F3d 1241, 1246 (9th Cir 1997) (in-
non-essential facts as admitted by guilty pleas. The government may use these “admissions” to ask for sentence enhancements and to prevent the defendant from contesting factual allegations at sentencing, even though these allegations may lack any factual basis and the defendant may not have understood that his plea would admit them.

In this way, the majority rule allows prosecutors to circumvent Rule 11. The Ninth Circuit seized upon this inequity in United States v Cazares, holding that the government’s attempt to construe a guilty plea as admitting acts that were not subjected to the required plea colloquy conflicted with Rule 11. Because the majority rule allows the government to forgo proving its allegations, and ignores the defendant’s intent in agreeing to a plea, it brings the voluntary nature of plea bargaining into question, and frustrates the prophylactic purpose of Rule 11.

C. The Majority Rule Violates the Defendant’s Constitutional Right to Due Process

Courts use basic contractual principles to analyze plea bargains. However, because plea bargains can waive important constitutional rights, courts must consider not only contractual principles, but also the defendant’s due process rights.

In Mabry v Johnson, the Supreme Court held that defendants have a due process right to fundamental fairness in the plea bargaining process. This requires that plea bargains be intelligent and voluntary. If both of these conditions are met, then the conviction and the plea generally foreclose collateral attack. However, when a defendant does not understand the consequences of a plea bargain, he may challenge it under the Due Process Clause.

\[\text{dictment alleged gun possession as an overt act even though the applicable conspiracy statute had no overt act requirement).}\]

\[\text{See, for example, } United States v Tolson, 988 F2d 1494, 1499 (7th Cir 1993) (defendant who pled guilty could not contest conspiracy’s starting date alleged in indictment, even though it resulted in a sentence enhancement).}\]

\[\text{Id at 1247 (“To construe the plea as an admission not only of the charge but also of the alleged overt act, when the judge had not had the opportunity to satisfy himself that there was a factual basis for the latter, would be inconsistent with Rule 11.”).}\]

\[\text{See notes 26–27 and accompanying text.}\]

\[467 US 504 (1984).\]

\[\text{Id at 509.}\]

\[\text{Id at 508.}\]

\[United States v Broce, 488 US 563, 569 (1989).\]

\[Mabry, 467 US at 509.\]
When a defendant enters into a plea agreement, he is primarily concerned with the punishment he will receive. For this reason, he probably will not scrutinize the facts alleged in his indictment unless he suspects a particular fact will affect his sentence. Facing the complexity of the Guidelines, the defendant may not recognize every fact that could lead to a sentence enhancement. Because sentencing hearings do not take place until after a defendant pleads guilty, the majority rule requires a defendant to agree to a plea bargain before the government must reveal the punishment it will seek. Thus, defendants must agree to plead guilty with incomplete information, in violation of the Supreme Court's requirement that plea bargains be intelligent and voluntary. Moreover, by permitting prosecutors to conceal the true effects of a plea bargain until sentencing, the majority rule undermines the due process requirement that prosecutors bargain fairly.

A contractual analysis based on the defendant's understanding of the facts in the indictment misses the point. In determining whether a plea bargain satisfies due process, the court should ask not whether the defendant understood the wording of the indictment, but whether he understood the consequences of his plea. When a prosecutor uses the Guidelines to frustrate the defendant's reasonable expectations of punishment, due process requires that the court refrain from enforcing the plea bargain. Nonetheless, the majority rule allows prosecutors to use the Guidelines in precisely this way.

D. The Majority Rule Gives Guilty Pleas Greater Effect than Criminal Convictions

In *United States v Cazares*, the Ninth Circuit recognized that the majority rule would have resulted in a sentence enhancement for one defendant, who pled guilty, but not for the other, who was convicted by a jury, even though the co-defendants were convicted of the same offense. The court rec-

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138 See, for example, *United States v Tolson*, 988 F2d 1494 1500–01 (7th Cir 1993) (defendant received a sentence enhancement because he was on probation on the conspiracy starting date alleged in his indictment).
139 Id (noting that a valid plea bargain requires fairness between the prosecutor and the accused).
140 121 F3d 1241 (9th Cir 1997).
141 Id at 1247. See also notes 64–80 and accompanying text.
ognized the unfairness of giving guilty pleas greater sentencing effect than jury verdicts and rejected the majority rule.\textsuperscript{142}

Defendants who plead guilty are neither more blameworthy nor more likely to be guilty than defendants convicted by juries. In fact, some commentators argue that defendants who plead guilty are more likely to be innocent than those convicted at trial.\textsuperscript{143} Courts should not treat defendants who plead guilty more harshly than those convicted by juries. Because the majority rule does just this, courts should reject it in favor of a more equitable standard.

\section*{IV. Courts Should Adopt the Cazares Rule Because It Protects Defendant Rights Without Undermining Legitimate Prosecutorial Objectives}

The criminal justice system should safeguard the rights of the accused. However, the majority rule undermines this goal by allowing prosecutors to disregard a defendant's rights. In contrast, a Cazares-based rule would protect defendant rights without increasing court costs or unduly hampering prosecutors. Thus, courts should adopt a rule based on the Ninth Circuit's Cazares holding in both the same case and the subsequent case contexts.

In the same case context, courts should apply the Cazares rule without modification, preventing prosecutors from using nonessential facts alleged in the charging paper against a defendant.\textsuperscript{144} If prosecutors want to use any other facts against a defendant, courts should require them either to obtain explicit admissions from the defendant or to prove those facts at sentencing.

In the subsequent case context, the defendant has already been sentenced for a previous crime, and a court may have established additional facts during a previous sentencing hearing. Therefore, courts should also treat as established those facts a court was required to evaluate at the defendant's sentencing for previous convictions. This modification would promote judicial economy by obviating the need for courts to duplicate a previous court's fact-finding. However, this modification should only apply

\textsuperscript{142} Id.
\textsuperscript{143} See Scott and Stuntz, 101 Yale L J at 1948 (cited in note 4) (arguing that innocent defendants are generally more risk averse than guilty defendants and may seek to avoid the risk of a trial by pleading guilty).
\textsuperscript{144} See Cazares, 121 F3d 1241, 1248 (9th Cir 1997) (limiting the effect of a guilty plea "to an admission of the facts essential to the validity of the conviction").
when the prosecution's burden of proof in the prior case was at least as great as its burden in the current case.

The circuit courts have encountered difficulty interpreting Broce's holding that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." However, a Cazares-based rule that deems as established only those facts essential to the defendant's prior conviction or sentence gives guilty pleas precisely the effect described by the Supreme Court in Broce.

In operation, a Cazares-based rule would promote the Commission's goals of fairness and uniformity in sentencing by preventing prosecutors from manipulating an indictment to increase a defendant's sentence — a practice the Guidelines explicitly seek to prevent. It would also remove the incentive for prosecutors to withhold information necessary to insure fairness in plea bargaining. Because a Cazares-based rule would treat as admitted only those facts subjected to a plea colloquy or proven to the court at sentencing, it would prevent prosecutors from circumventing Rule 11's procedural guarantees. Such a rule would also require the government to seek explicit admissions of allegations before treating them as established, giving defendants notice, before they enter into a plea, of which facts prosecutors intend to use against them at sentencing. A Cazares-based rule would therefore help ensure that plea bargains satisfy the fairness requirements of the Due Process Clause.

A Cazares-based rule would achieve these benefits at minimal cost to the criminal justice system. The administrative costs of requiring prosecutors to obtain explicit admissions of certain factual allegations would likely be small. Also, because this rule would reduce the due process concerns arising from plea bargains, it would conserve court resources by reducing the frequency of appeals. In addition, providing the defendant with

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146 See notes 109–112 and accompanying text.
147 See notes 114–116 and accompanying text.
148 See note 131 and accompanying text.
149 Under a Cazares-based rule, prosecutors could still condition plea bargains on admissions. The only additional requirement for prosecutors seeking to use admissions against defendants would be that they obtain an admission in open court. Because prosecutors could obtain these admissions during the already-required Rule 11 plea colloquy, the additional administrative costs imposed by this rule would be small.
150 See notes 132–136 and accompanying text.
full information about the nature of his plea would reduce error
costs by helping him weigh his options more accurately.\textsuperscript{151} Indeed, the only individuals a Cazares-based rule would threaten
are unscrupulous prosecutors who would find it more difficult to
trick a defendant into pleading guilty by concealing their sent-
tencing intentions.

Because a Cazares-based rule could increase the fairness of
plea bargaining without increasing court costs or impeding le-
gitimate prosecutorial interests, courts should reject the majority
rule in favor of the Cazares court's approach.

CONCLUSION

Courts should not permit the government to use guilty pleas
to establish facts not essential to the underlying criminal charge.
The majority rule, which gives conclusive weight to surplus lan-
guage in indictments, allows prosecutors to circumvent the pro-
cedural protections of Rule 11 and the Sentencing Guidelines.
Although Supreme Court precedent requires that a guilty plea be
intelligent and voluntary, this requirement means little if an un-
scrupulous prosecutor can obtain a surprise sentence enhance-
ment by burying a seemingly innocuous allegation within an in-
dictment or by redefining the circumstances surrounding a previ-
ous crime.

Allowing prosecutors to give conclusive effect to surplus lan-
guage in indictments serves no persuasive purpose. If a prosecu-
tor wants to avoid the time and expense of supporting sentence
enhancements with actual evidence, he can obtain the same re-
sult by seeking explicit admissions of allegations he intends to
use at sentencing. This approach would protect the defendant's
due process rights and would satisfy the letter and spirit of Su-
preme Court precedent, the Sentencing Guidelines, and Rule 11.
For these reasons, courts should reject the majority rule and ap-
ply a Cazares-based rule in both the same case and subsequent
case contexts.

\textsuperscript{151} See notes 113–116 and accompanying text. A Cazares-based rule would increase
clarity in plea bargaining because it would prevent prosecutors from concealing their
sentencing intentions during plea bargaining.