

2.01 Taking pleas of guilty or nolo contendere

Fed. R. Crim. P. 11

[*Note:* Effective December 1, 2002, amendments to Rule 11 significantly changed the numbering of the rule's paragraphs. For this edition of the *Benchbook*, the former paragraph numbers appear in brackets following the current designations.]

Introduction

This section is intended to serve as a guide to district judges, and to magistrate judges who are authorized to conduct change of plea hearings by consent,¹ when they conduct the formal plea taking, whether it occurs before or after review of the presentence report. It is important to emphasize that, while the plea of guilty is entered at the Rule 11 proceeding, the court may defer deciding whether to accept the terms of a plea agreement until after review of the presentence report.² If after review of the report the district court rejects an agreement made pursuant to Rule 11(c)(1)(A) or (C) [formerly 11(e)(1)(A) or (C)], the court shall give the defendant the option to withdraw the plea. In either event, the judge's goal in taking the plea must be to establish that the defendant is competent, that the plea is free and voluntary, that the defendant understands the charges and penalties, and that there is a factual basis for the plea.

This section is not intended to be all-inclusive. Circumstances may require that additional matters be established of record. In some cases, moreover, the court may find it necessary to resolve disputes about the presentence report before determining whether a plea agreement is acceptable. See *infra* section 4.01: Sentencing procedure.

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to

1. If the defendant consents to entering a plea of guilty before a magistrate judge, it is recommended that the consent be in writing and expressly waive the defendant's right to enter the plea before an Article III judge.

2. Fed. R. Crim. P. 11(c)(3)(A) [formerly 11(e)(2)]; U.S.S.G. § 6B1.1(c), p.s.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

testify and the right to question witnesses, which may not be familiar to persons from different cultures. See 28 U.S.C. § 1827 regarding use of certified interpreters.

Some courts have developed Application for Permission to Enter Plea of Guilty forms and Written Plea Agreement forms. If used, such forms do not obviate the need for complete oral proceedings in open court that meet the requirements of Fed. R. Crim. P. 11.

Outline

[*Note:* Before proceeding with the hearing, the court may want to ask the prosecutor if there are any victims of the offense and, if so, whether the government has fulfilled its duty to notify them of the hearing and their right to attend, and whether any victims want to be “reasonably heard.” 18 U.S.C. § 3771(a)(2)–(4).³]

- A. Determine, on the record, the purpose of the defendant’s appearance, that is, obtain a statement from defense counsel⁴ that the defendant wishes to enter a plea of guilty (or nolo contendere).
- B. If it has not previously been established, determine whether the plea is being made pursuant to a plea agreement of any kind. If so, require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(c)(2) [formerly 11(e)(2)].
- C. Have the clerk administer the oath to the defendant.⁵

[*Note:* If you have any doubts about the defendant’s ability to speak and understand English, consider appointing a certified interpreter in accordance with 28 U.S.C. § 1827.]

3. If there are many victims who want to be heard, the court may need to “fashion a reasonable procedure to give effect to [their right to be heard] that does not unduly complicate or prolong the proceedings.” 18 U.S.C. § 3771(d)(2).

4. If the defendant lacks counsel, you must advise the defendant of the right to an attorney. See *supra* section 1.02: Assignment of counsel or pro se representation; Fed. R. Crim. P. 11(b)(1)(D) [formerly 11(c)(2)].

5. An oath (or affirmation) is not required by Fed. R. Crim. P. 11, but is strongly recommended to avoid any subsequent contention in a proceeding under 28 U.S.C. § 2255 that the defendant did not answer truthfully at the taking of the plea because he or she was not sworn.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

D. Ask the defendant:

1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement?

[See Fed. R. Crim. P. 11(b)(1)(A) [formerly 11(c)(5).]]

2. What is your full name?
3. How old are you?
4. How far did you go in school?
5. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

[*Note:* If the answer to this question is yes, pursue the subject with the defendant and with counsel in order to determine that the defendant is currently competent to plead.]

6. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

[*Note:* Again, if the answer is yes, pursue the subject with the defendant and with counsel to determine that the defendant is currently competent to plead.]

7. Have you received a copy of the indictment (information)⁶ pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. _____ as your counsel?
8. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. _____?

E. *If there is a plea agreement of any kind*, ask the defendant:

1. [If the agreement is written:]

Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

6. If the case involves a felony offense being prosecuted by information rather than indictment, and if a waiver of indictment has not previously been obtained in open court (see Fed. R. Crim. P. 7(b)), refer to *supra* section 1.06: Waiver of indictment.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

2. Does the plea agreement represent in its entirety any understanding you have with the government?
3. Do you understand the terms of the plea agreement?
4. Has anyone made any promise or assurance that is not in the plea agreement to persuade you to accept this agreement? Has anyone threatened you in any way to persuade you to accept this agreement?
5. [If the terms of the plea agreement are nonbinding recommendations pursuant to Rule 11(c)(1)(B) [formerly 11(e)(1)(B)]:⁷]

Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of guilty and impose a sentence that is more severe than you may anticipate?

6. [If any or all of the terms of the plea agreement are pursuant to Rule 11(c)(1)(A) or (C) [formerly 11(e)(1)(A) or (C)]:]

Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms], I will give you the opportunity to withdraw your plea of guilty, and that if you choose not to withdraw your plea, I may impose a more severe sentence, without being bound by the plea agreement [or the specific terms rejected by the court]?

F. Whether or not there is a plea agreement, ask the defendant:

7. Note that a plea agreement may contain factual stipulations which, unless part of a Rule 11(c)(1)(C) [formerly 11(e)(1)(C)] agreement, are not binding under the Rules or the Guidelines. However, some cases have held that a factual stipulation that directly affected the severity of the sentence should have been construed as a Rule 11(e)(1)(C) agreement, or that the stipulation was otherwise relied on by the parties so that it should have been followed or the defendant allowed to withdraw the plea. *See, e.g.,* United States v. Bohn, 959 F.2d 389 (2d Cir. 1992); United States v. Torres, 926 F.2d 321 (3d Cir. 1991); United States v. Kemper, 908 F.2d 33 (6th Cir. 1990); United States v. Jeffries, 908 F.2d 1520 (11th Cir. 1990); United States v. Mandell, 905 F.2d 970 (6th Cir. 1990). *See also* Guide-line Sentencing: An Outline of Appellate Case Law § IX.A.4 (Federal Judicial Center 2002). Courts are advised to discuss any such stipulations before accepting the plea and to warn the defendant that the court might not follow them and that the defendant will not be allowed to withdraw the plea.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

Has anyone attempted in any way to force you to plead guilty (nolo contendere) or otherwise threatened you? Has anyone made any promises or assurances of any kind to get you to plead guilty (other than those that are in the plea agreement)? Are you pleading guilty of your own free will because you are guilty?

[See Fed. R. Crim. P. 11(b)(2) [formerly 11(d)].

- G. *If the plea relates to a felony offense*, consider asking the defendant:

Do you understand that the offense to which you are pleading guilty (nolo contendere) is a felony offense, that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication *may* deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?

[If the defendant is not a citizen of the United States, ask:

Do you understand that your plea of guilty may affect your residency or your status with the immigration authorities?]

- H. Inform the defendant of the following:

1. The maximum possible penalty provided by law, and any mandatory minimum penalty:
 - (a) *For drug offenses*: Determine whether the drug quantity involved or other aggravating factors will trigger application of a mandatory minimum sentence. Because this may not be known at the time the plea is taken, the court is advised to warn the defendant of any *possible* maximum and mandatory minimum sentences that may be imposed after a final determination of quantity and other aggravating factors.
 - (b) Determine whether the defendant faces a mandatory minimum sentence or an increase in the statutory maximum sentence because of one or more prior firearms offenses, violent felonies, or drug offenses. If this is not known at the time of the plea, advise the defendant of the *possible* maximum sentence.
 - (c) Include the duration of any authorized or mandatory term of supervised release, and ask the defendant:

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

Do you understand that if you violate the conditions of supervised release, you can be given additional time in prison?

- (d) *If the offense carries a maximum sentence of twenty-five years or more, or the statute specifically prohibits probation, include a reference to the unavailability of a probation sentence under 18 U.S.C. § 3561(a)(1) or (2).*
- (e) Inform the defendant of the maximum possible fine, if any.
- 2. *If applicable, that the court may also order, or may be required to order under the Mandatory Victims Restitution Act, that the defendant make restitution to any victim of the offense. See 18 U.S.C. § 3663A. See also 18 U.S.C. § 3771(a)(6) (giving victims the right “to full and timely restitution as provided in law”).*
- 3. *If applicable, that the court may require the defendant to forfeit certain property to the government.*
- 4. *If the offense involved fraud or other intentionally deceptive practices, that the court may order the defendant to provide notice of the conviction to victims of the offense. See 18 U.S.C. § 3555.*
- 5. That for each offense, the defendant must pay a special assessment of \$100 (\$25 for a Class A misdemeanor, \$10 for Class B, \$5 for Class C or infraction) required by 18 U.S.C. § 3013.

Fed. R. Crim. P. 11(b)(1) [formerly 11(c)].

I. Ask the defendant:

Do you understand those possible consequences of your plea?

J. Inform the defendant that his or her sentence will be determined by a combination of advisory Sentencing Guidelines, possible authorized departures from those guidelines, and other statutory sentencing factors.⁸

8. Effective December 1, 2007, Fed. R. Crim. P. 11(b)(1) states that “the court must inform the defendant of, and determine that the defendant understands, . . . (M) in determining a sentence, the court’s obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a).”

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

K. Ask the defendant:

1. Have you and your attorney talked about how these advisory Sentencing Guidelines might apply to your case?

[Note: If there is a plea agreement that a specific sentence will be imposed (Fed. R. Crim. P. 11(c)(1)(C) [formerly 11(e)(1)(C)]), skip to question 4.]

2. Do you understand that the court will not be able to determine the advisory guideline range for your case until after the presentence report has been completed and you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence ultimately imposed may be different from any estimate your attorney may have given you?
3. Do you also understand that, after your initial advisory guideline range has been determined, the court has the authority in some circumstances to depart upward or downward from that range, and will also examine other statutory sentencing factors, under 18 U.S.C. § 3553(a), that may result in the imposition of a sentence that is either greater or lesser than the advisory guideline sentence?
4. Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

L. Ask the defendant:

1. Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?

[If the plea agreement involves a waiver of the right to appeal the sentence, ask the defendant:]

2. Do you understand that by entering into this plea agreement and entering a plea of guilty, you will have waived, or given up, your right to appeal or collaterally attack all or part of this sentence?

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

[The court should discuss the specific terms of the waiver with the defendant to ensure that the waiver is knowingly and voluntarily entered into and that the defendant understands the consequences. Fed. R. Crim. P. 11(b)(1)(N).⁹]

M. Ask the defendant:

1. Do you understand

- (a) that you have a right to plead not guilty to any offense charged against you and to persist in that plea;
- (b) that you would then have the right to a trial by jury;
- (c) that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt;
- (d) that you would have the right to the assistance of counsel for your defense—appointed by the court if necessary—at trial and every other stage of the proceeding, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to compel the attendance of witnesses to testify in your defense?

Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

- #### 2. Do you further understand that by entering a plea of guilty (nolo contendere), if that plea is accepted by the court, there will be no trial and you will have waived, or given up, your right to a trial as well as those other rights associated with a trial as I just described them?

See Fed. R. Crim. P. 11(b)(1)(B) to (F) [formerly 11(c)(3) and (4)].

9. Note that the waiver may not be enforceable if the sentence is not in accordance with the terms of the plea agreement.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

- N. Inform the defendant of the nature of the charge(s) to which he or she is pleading guilty (nolo contendere) by reading or summarizing the indictment (information). Then
1. further explain the essential elements of the offense, i.e., what the government would be required to prove at trial;¹⁰ and/or (except in pleas of nolo contendere)
 2. have the defendant explain and assent to the facts constituting the crime(s) charged.

See Fed. R. Crim. P. 11(b)(1)(G) [formerly 11(c)(1)].

- O. *In the case of a plea of guilty (including an Alford plea¹¹),* have the government counsel make a representation concerning the facts the government would be prepared to prove at trial (to establish an independent factual basis for the plea). See Fed. R. Crim. P. 11(b)(3) [formerly 11(f)].

If the defendant's plea is nolo contendere, he or she is neither admitting nor denying guilt.¹² Fed. R. Crim. P. 11(b)(3) [formerly 11(f)] is therefore not applicable. The court may wish to consider having the government make a representation concerning the facts of the case.

- P. If there is a plea agreement involving dismissal of other charges, or an agreement that a specific sentence will be imposed, and if consideration of the agreement is to be deferred, ask the defendant:

Do you understand that if you plead guilty, a presentence report will be prepared, and I will then consider whether or not to accept the plea agreement, and that if I decide to reject the plea agreement, you will

10. Reference may be made to the standard or pattern jury instructions normally used in your court.

11. *North Carolina v. Alford*, 400 U.S. 25 (1970). See also *United States v. Tunning*, 69 F.3d 107, 110–14 (6th Cir. 1995) (discussing establishment of factual basis for *Alford* plea and difference between *Alford* plea and plea of nolo contendere).

12. The plea of nolo contendere is never entertained as a matter of course. Fed. R. Crim. P. 11(a)(1) [formerly 11(b)] provides that the plea may be entered “with the consent of the court.” Rule 11(a)(3) provides further that before accepting the plea “the court must consider the parties’ views and the public interest in the effective administration of justice.” In general, courts accept a plea of nolo contendere only in certain types of cases involving nonviolent crimes where civil implications may arise from a guilty plea.

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

then have an opportunity to withdraw your plea and change it to not guilty?

Q. Ask the defendant:

How do you now plead to the charge: guilty or not guilty?

R. Before accepting the defendant's plea, if there are victims of the offense present, allow them the opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).

S. If you are satisfied with the responses given during the hearing, make the following finding on the record:

It is the finding of the court in the case of United States v. _____ that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty (nolo contendere) is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

T. If a presentence report has been reviewed before plea taking or is not required (see Fed. R. Crim. P. 32(c)(1)(A) [formerly 32(b)(1)]), proceed to disposition. (See *infra* section 4.01: Sentencing procedure.) Otherwise, inform the defendant

1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
2. that the defendant will be asked to give information for the report, and that his or her attorney may be present if the defendant wishes;
3. that the court shall permit the defendant and counsel to read the presentence report and file any objections to the report before the sentencing hearing (Fed. R. Crim. P. 32(e)(2) and (f) [formerly 32(b)(6)]);
4. that the defendant and his or her counsel shall have an opportunity to speak on behalf of the defendant at the sentencing hearing (Fed. R. Crim. P. 32(i)(4)(A) [formerly 32(c)(1)]); and
5. that, if there are any victims of the offense, the victims shall be afforded an opportunity to be heard at the sen-

visited 7/29/2009

Section 2.01: Taking pleas of guilty or nolo contendere

tencing hearing. 18 U.S.C. § 3771(a)(4).

- U. Refer the defendant to the probation officer for a presentence investigation and report (pursuant to Fed. R. Crim. P. 32(c)(1) [formerly 32(b)(1)]), set the disposition date for sentencing, and determine bail or conditions of release pending sentencing. See *infra* section 2.11: Release or detention pending sentence or appeal.
 - 1. If the defendant has been at liberty on bond or personal recognizance, invite defense counsel to argue for release pending sentencing. See 18 U.S.C. § 3143(a). Give the U.S. attorney an opportunity to respond. If any victims of the offense are present, allow them an opportunity “to be reasonably heard.” 18 U.S.C. § 3771(a)(4).
 - 2. If the defendant is to be released pending sentencing, advise the defendant
 - (a) when and where he or she is required to appear for sentencing;
 - (b) that failure to appear as required is a criminal offense for which he or she could be sentenced to imprisonment;
 - (c) that all the conditions on which he or she was released up to now continue to apply; and
 - (d) that the penalties for violating those conditions can be severe.
- V. If appropriate, enter a preliminary order of forfeiture under Fed. R. Crim. P. 32(k)(2) [formerly 32(d)(2)] and 32.2(b). Note that the defendant must be provided notice and a reasonable opportunity to be heard on the timing and form of the order.