04-2023-cr

To be Argued By:
ROBERT M. SPECTOR

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-2023-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RONALD MILEY, a/k/a "Ron Boy"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

==========

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

ROBERT M. SPECTOR
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Stefan R. Underhill, J.) after the defendant pleaded guilty to unlawful possession of ammunition. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the judgment of conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

Was the defendant's guilty plea voluntary and knowing and entered with the aid of effective assistance of counsel?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 04-2023-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RONALD MILEY, a/k/a "Ron Boy,"
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On May 17, 2002, at approximately 7:30 p.m., Bridgeport Police Officers Gabor Meszaros and Brian Dickerson approached and attempted to stop the defendant, who was driving a blue Oldsmobile Delta 88 in the vicinity of the Marina Village Housing Project in Bridgeport, Connecticut. The defendant sped away and engaged the police in a lengthy, high speed pursuit which spanned several city blocks. The defendant eventually lost control of his vehicle and crashed into a metal guide wire attached to an electrical pole at the end of a highway off-ramp. He and his unidentified passenger fled on foot.

Moments after the crash, Bridgeport police officers searched the suspect vehicle and found a stolen Sig Sauer .380 caliber handgun perched on the dashboard directly in front of the steering wheel and a spare magazine containing seven .380 caliber, hollow-point bullets under the driver's seat. Despite efforts to locate the suspects that night using two different canine units, the police were unable to do so.

The defendant was subsequently arrested and charged with a state firearms offense and with violating a term of state probation. Because of his history of firearms-related convictions, the defendant's state firearms charge was dismissed, and he was charged in federal court with unlawful possession of a firearm and ammunition by a convicted felon. On October 2, 2002, he was sentenced to three years in state custody for the state probation violation. On January 5, 2004, the first day of his trial in federal court, he changed his plea to guilty on the ammunition count. On March 25, 2004, he was sentenced to 41 months' incarceration for the federal conviction, to be served concurrent to the remainder of his three-year term of imprisonment for his state violation of probation.

In this appeal, the defendant challenges his conviction on the ground that his guilty plea was not voluntary and knowing. Specifically, he claims that he pleaded guilty based on his attorney's misinterpretation of a chambers conference in which his attorney incorrectly assumed that he would receive credit toward his federal sentence for time already served on a state probation violation. This claim has no merit. As the transcript of the plea canvass indicates, the defendant pleaded guilty with a full

understanding of the consequences of his decision, of the potential sentence which could be imposed by the district court, and of the fact that any advice he may have received from his attorney as to the potential sentence was not binding on the court. He also pleaded guilty knowing that he would be unable to withdraw his plea or challenge his conviction on appeal if he was unhappy with his sentence for any reason or if it differed from his attorney's prediction. For these reasons, the judgment of the district court should be affirmed.

STATEMENT OF THE CASE

On June 4, 2002, the defendant-appellant, Ronald Miley, was arrested in Bridgeport, Connecticut on state charges in connection with the facts which underlie this case. A25.[1] On October 2, 2002, as a result of these charges, the defendant was found in violation of a term of state probation he had been serving from a 1999 state conviction for carrying a pistol without a permit, and sentenced to a term of 36 months' incarceration. A28-A29. He is currently in state custody serving that sentence, and his projected release date is July 18, 2005. A29.

On January 21, 2003, a federal grand jury in Connecticut returned a two-count indictment charging the defendant with unlawful possession of a firearm and ammunition by a convicted felon, in violation of

---

[1] Citations to the defendant's appendix will be referred to by "A" and the page number. Citations to the Government's appendix will be referred to by "GA" and the page number.

18 U.S.C. §§ 922(g)(1) and 924(a)(2). A9-A10. On December 11, 2003, a jury was selected, and on January 5, 2004, trial was set to commence. A6-A7. Instead, on that same date, the defendant changed his plea to guilty on the unlawful possession of ammunition count. A7, A89. On March 25, 2004, the district court (Stefan R. Underhill, J.) sentenced the defendant to 41 months' imprisonment and three years' supervised release. A190. The court ordered that the sentence be served concurrently to the three-year term of state incarceration that the defendant had been serving on a state probation violation, but refused to depart downward so that the defendant could receive credit for time already served in state custody. A190.

On March 30, 2004, the defendant filed a timely notice of appeal. A7. On that same date, the defendant filed a motion to vacate his guilty plea with the district court. GA1. On September 13, 2004, the district court issued a written ruling denying the defendant's motion to vacate his guilty plea. GA4. The defendant has been incarcerated in state custody since his initial arrest, and, since his March 25, 2004 sentencing in the federal case, has also been serving his federal sentence. A190.

STATEMENT OF FACTS

A. FACTUAL BASIS

The defendant decided to change his plea to guilty on the first day of trial. A69-A88. Had this case gone to trial, the Government would have presented the following facts, which were set forth, almost verbatim, in the Government's March 24, 2004, sentencing memorandum (A161-A167) and the Pre-Sentence Report (A21-A25):

From March 2002 through May 2002, Bridgeport Police Officers Gabor Meszaros and Brian Dickerson, both of whom were assigned to the police department's housing unit, conducted surveillance in the Marina Village housing project. In particular, they were looking for signs of organized criminal activity. Both officers knew the defendant, Ronald Miley, because they had often seen him on the street in Marina Village and had spoken to him on occasion.

On March 14, 2002, these two officers stopped a blue 1990 Oldsmobile Delta 88 bearing CT registration 672-ROC in Marina Village, after observing the rear passenger, Travis Bush, throw garbage out of the rear window. In the course of the stop, they identified the other individuals in the car. Stefan Winston, the registered owner of the car, was the driver. The front passenger was Darnell Bush, and the other rear passenger was the defendant. At the time, the officers knew that Darnell Bush had an extensive criminal history, and they suspected that he was a "key player" in narcotics trafficking activities in Marina Village. Based on their own observations, reports from

other officers and information from anonymous sources, the officers believed that Bush's associates in his drug operation were the defendant, Winston, and two individuals named Richard Daniels and Richard Gee, Jr.

On April 30, 2002, at approximately 3:53 p.m., Bridgeport police dispatch received a call for shots fired in the Greene Homes housing project. When officers arrived at the scene, they spoke with Ses Oliveira, a United Parcel Service employee who had witnessed the shooting. According to Oliveira, while parked in front of Building Three of Greene Homes, he observed a light blue vehicle, possibly a Buick, parked near the exit of the Building Three parking lot. A black male exited the vehicle and fired what sounded like an automatic weapon six times in the direction of Building Three. Oliveira took cover until the shooting stopped. When he looked up, he saw the suspect vehicle fleeing the scene. He thought there were two black males in the car, but could not give any specific description of either individual. A subsequent search of the area revealed three .380 caliber shell casings manufactured by Speer. Ballistics testing revealed that all three were fired from the same gun.

The police determined that one possible vehicle matching the general description of the vehicle involved in the Greene Homes shooting was the blue 1990 Oldsmobile Delta 88 bearing CT registration 672-ROC, which was owned by Stefan Winston. In addition to the other information known about the vehicle, the police also knew that it had bullet holes in its door from a prior shooting. Winston had been incarcerated since April 3, 2002, and remained incarcerated through 2003. The police listed

Gee, Daniels and the defendant as potential occupants of the vehicle.

In the evening of April 30, the police went to Marina Village to search for the suspect vehicle. They located it there that night and watched it for some period of time. At some point, an unidentified individual got into the car and began to drive away. The police stopped the vehicle, noted the presence of two bullet holes in the right-side, rear-door area, identified the driver as a Deron Johnson, and told him that he had been stopped because the vehicle matched the description of a vehicle involved in an earlier incident. Johnson insisted that his friend "Ron Boy" had asked him to move the car to a different parking place. The police searched the car, found no contraband and allowed Johnson to depart in the vehicle.

Johnson and the defendant were acquaintances, but not good friends. On April 30, Johnson and the defendant had been at a mutual friend's house watching a sporting event on television when the defendant had approached Johnson and asked him to move his car for him because he did not have his driver's license. The defendant had taken Johnson outside, pointed the car out to him and handed him the keys. After Johnson was stopped, he returned to the apartment and confronted the defendant. The defendant told him that the police had been looking for the car, that the car was "hot," and that he had considered painting it to avoid detection.

On May 7, 2002, Winston's girlfriend, Shavon Smith, reported the 1990 Oldsmobile Delta 88 with CT registration 672-ROC as stolen. She filled out a

Connecticut Department of Motor Vehicles ("DMV") stolen vehicle report. The car appeared on the Bridgeport Police's stolen vehicle list for the week of May 8, 2002. On May 16, 2002, officers Mezsaros and Dickerson spotted the vehicle parked near Building 35 of Marina Village, but it did not have the same license plate. It had been re-registered with a new Connecticut plate: 219-RRW. A subsequent review of the paperwork inside the car and on file with DMV verified the defendant had re-registered the car on May 11, 2002 and received a new plate and plate number. A May 11, 2002 "Registration Affidavit" on file with DMV lists "Ronald Miley" as the co-owner of the car and displays Ronald Miley's signature.

On May 17, 2002, at approximately 7:30 p.m., officers Meszaros and Dickerson observed the blue Oldsmobile Delta 88 parked on Ridge Avenue. They observed the defendant standing outside the vehicle and saw him get into the driver's seat. It was still light out, and both officers had a good view of the defendant's face. They were sure it was the defendant and were able to select his picture from a photo array several days after the incident. They observed another individual step into the front passenger seat, but did not get a view of his face and were unable to identify him. The officers decided to stop the car because it had been reported stolen. They activated their lights and siren, but the defendant did not stop. He immediately accelerated and tried to escape. Officer Meszaros called into dispatch, indicated his location and stated that he was attempting to stop a vehicle driven by "Ronald Miley." He described the car and the direction of travel.

The car chase proceeded through several city streets. The defendant exceeded 80 miles per hour, ignored several traffic signals and came very close to striking several other vehicles. The chase proceeded to the northbound lanes of interstate 95. It was still rush hour at the time. The police supervisor on duty concluded that the defendant was creating a substantial risk of injury to other drivers and ordered the officers to break off their pursuit. Officers Meszaros and Dickerson exited the highway at exit 28 and observed the defendant continue along the highway, possibly moving toward exit 29.

By this time, several other units had responded and were in the vicinity. Approximately two minutes later, Sergeant Kevin Gilleran, who had been driving on I-95 northbound, got off the highway at exit 29 and observed the suspect vehicle crashed into a metal guide wire attached to an electrical pole at the end of the exit ramp. The suspects had already fled, and were not in view by the time Sergeant Gilleran had arrived. He waited for backup units and did not get close to the car for fear of interfering with the scent that canine units might use to track the suspects.

Immediately thereafter, backups officers arrived at the scene, including two different canine units. Several officers observed a handgun perched on the dashboard directly in front of the steering wheel of the car. Both canine units tracked a scent from the car for approximately .5 mile to a nearby, three-story house at 127-129 Eagle Street. Bridgeport officers responded to the house, were permitted access to two of the three floors of the house,

and did not find either suspect. When the defendant was subsequently arrested, he gave his address as "245 Eagle Street," which is one-half block from 127-129 Eagle Street address. The other suspect was never identified.

The gun on the dashboard of the abandoned car was identified as a Sig Sauer .380 caliber handgun bearing serial number S179322 and loaded with seven Speer, .380 caliber, bullets. The gun had been manufactured in Germany, and the bullets had been manufactured in Idaho. A computer check using the gun's serial number revealed that it had been reported stolen out of Stratford, Connecticut in July 2000. Ballistics testing using test fired shell casings from the gun confirmed that it was the same gun used to fire the three shell casings found at the scene of the April 30 Greene Homes shooting. A second magazine loaded with seven Speer, .380 caliber, hollow-point bullets was found under the driver's seat. The gun, magazines, and bullets were tested for fingerprints, but no identifiable latent prints were found.

Prior to May 17, 2002, the defendant had been convicted of two prior felonies in Connecticut, one for weapon in a motor vehicle and the other for carrying a pistol without a permit.

B. GUILTY PLEA

On January 5, 2004, the defendant agreed to plead guilty to Count Two of the Indictment, which charged him with knowing possession of ammunition by a previously convicted felon. The written plea agreement executed by

both parties included the following stipulation of offense conduct:

> On May 17, 2002, at approximately 7:30 p.m., the defendant, Ronald Miley, while in a blue 1990 Oldsmobile Delta 88 bearing Connecticut Registration 219-RRW, knowingly possessed one spare firearms magazine containing seven rounds of Speer, .380 caliber, hollow-point bullets. Prior to May 17, 2002, the defendant had been convicted of multiple felony offenses in the state of Connecticut, including weapon in a motor vehicle, on January 4, 1999, and possession of a pistol without a permit, on October 29, 1998. Also prior to May 17, 2002, the subject ammunition had been transported in or affected interstate commerce.

A14.

The plea agreement set forth the maximum penalties for the offense of conviction, which included a maximum term of ten years' incarceration, and contained a "Guideline Stipulation" section, which provided, in pertinent part:

> The Government and the defendant stipulate the defendant's applicable Sentencing Guidelines to be at a range of 33-41 months' imprisonment, and a fine range of $4,000 to $40,000. The base offense level under U.S.S.G. § 2K2.1(a)(6) is 14. Two levels are added under U.S.S.G. § 3C1.2 for reckless endangerment during flight. The defendant expressly agrees and stipulates that he

> recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from law enforcement officers on May 17, 2002. Two levels are subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, as noted above, resulting in a total offense level of 14. Based on the information available at this time, the defendant is in a criminal history category V. A total offense level of 14 with a criminal history category V results in a guideline range of 33-41 months' imprisonment (sentencing table) and a fine range of $4,000 to $40,000 (U.S.S.G. § 5E1.2(c)(3)). The parties reserve their rights to argue for and against any downward or upward departure from this guideline range.

A12-A13, A15. Notably, the Government recognized that the defendant was not willing to take responsibility for the firearm charged in Count One and did not seek a two-level enhancement under U.S.S.G. § 2K2.1(b)(4) as a result of the fact that the firearm had been previously reported stolen. A15, A136, A183.

In exchange for this guideline stipulation, the defendant agreed to waive his right to appeal or collaterally attack the sentence imposed by the Court. The relevant portion of the plea agreement provides as follows:

> The defendant acknowledges that under certain circumstances he is entitled to appeal his conviction and sentence. 18 U.S.C. § 3742. It is specifically agreed that the defendant will not appeal or collaterally attack in any proceeding,

> including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 41 months, even if the Court reaches a sentencing range permitting such a sentence by a Guideline analysis different from that specified above. The defendant expressly acknowledges that he is knowingly and intelligently waiving his appellate rights.

A15.

Finally, in the written plea agreement, the defendant acknowledged that he was entering his plea "without reliance" upon any promises not contained in the letter, with a full understanding of the potential resulting penalties and with "complete satisfaction with the representation and advice received from his undersigned attorney." A17. He specifically recognized that he had "no right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated." A13.

Prior to accepting the defendant's guilty plea, the district court addressed him personally, in open court, and canvassed him in accordance with Fed. R. Crim. P. 11(c). A89. At the outset, the court advised the defendant that he had the right to remain silent, asked him if he was willing to answer questions under oath, directed the clerk to place the defendant under oath, and advised him of the consequences of lying during the plea canvass. A90. The court then ascertained that the defendant was competent to plead guilty and had been able to discuss the decision with his attorney. A92.

Next, the court instructed the Government to explain the nature of the charges against the defendant and to set forth the maximum penalties flowing from such charges. A93-A94. The Government did so, and the defendant indicated that he understood the maximum penalties he faced if convicted. A94. The court also explained the various constitutional rights the defendant would be surrendering by pleading guilty, including his right to a jury trial with the assistance of counsel, his right to require the Government to sustain its burden of proof beyond a reasonable doubt, his right to confront and cross examine adverse witnesses, his right to object to evidence, his right to subpoena his own witnesses to testify and his right to testify or remain silent. A94-A97. The court specifically told the defendant, "[Y]ou will have no right to appeal your conviction regardless of what your sentence is." A97. The defendant specifically indicated that he understood, and had no questions about the rights being surrendered. A97. The court again advised him, "I just want to make sure you understand the limitations on your right to appeal, both by statute and by the plea agreement. If you plead guilty today, that's going to be the end of the question of whether you're guilty or innocent; you can't appeal, no matter what. A98. In response, the defendant again indicated that he understood, and his attorney indicated that he believed the defendant understood the limitation on his appellate rights.[2] A98.

---

[2] The Court also canvassed the defendant on the appellate waiver contained in the plea agreement and made sure that he understood the extent and applicability of that waiver. A97-
(continued...)

As to the written plea agreement, the Government reviewed all of its provisions in open court, and the defendant indicated that they were correct. A100-A104. The court reviewed specific provisions of the agreement with the defendant, including the forfeiture, acceptance of responsibility, stipulation of criminal conduct, and guideline stipulation sections. A104-A108. As to both the stipulation of criminal conduct and guideline stipulation sections, the court confirmed that the stipulated factual statements contained therein about the defendant's criminal conduct were accurate, and the defendant indicated that they were. A107-A108. Also, as to the guideline stipulation, the court twice indicated, "I want to make sure you understand that the agreement is between yourself and the government and that I'm not agreeing to this." A107. On this point, the court twice advised the defendant that, at sentencing it would be able to consider a whole host of information in determining the appropriate sentence, including the "seriousness of your offense, seriousness of your past criminal behavior, [and] your convictions . . . ." A107, A110.

Finally, as to the agreement, the court confirmed with the defendant that "no one's made any promises to you that did not find their way into this letter" and that prior discussions between defense counsel and the Government "don't count for anything unless they are in this letter . . .

---

[2] (...continued)
A98. In light of the ineffective assistance of counsel claim being asserted here, however, the Government is not relying on that waiver provision to seek dismissal of this appeal.

." A108-A109. The court also confirmed that the defendant was pleading guilty of his own free will, without any threats, promises or coercion, with adequate time to reflect on the decision and speak with his attorney and with full knowledge that he was indeed guilty. A109.

Next, the defendant heard, for a third time, an explanation of the maximum penalties he would face as a result of a guilty plea. A110. Once again, the court advised the defendant, "I may reach a sentence that's different than that contemplated in the plea agreement[,]" and "should you receive a sentence that's higher than you think is fair, or if you think I made a mistake in your sentence, that you can't come back and withdraw your guilty plea, . . . and all you can do at that point is challenge your sentence if it exceeds 41 months," and the defendant indicated that he understood. A110-A111. The court also confirmed with the defendant and defense counsel that the attorney had given the defendant "some estimate of how the sentencing guidelines should apply in [the] case[,]" and that "I'm not bound by that [guideline] stipulation or any advice or recommendation or argument that [defense counsel] might make about how you ought to be sentenced . . . ." A111-A112.

The court reviewed the elements of the offense of conviction and had the Government set forth the factual basis for its proof on these elements. A114-A121. After hearing the factual basis, the defendant indicated that everything said was accurate and that he had done what the Government had alleged he had done. A120-A121. The court canvassed him on each element of the offense, and he acknowledged his guilt as to each element. A120-A121. At that point, the court accepted the defendant's

guilty plea, concluded that the plea was supported by a factual basis and found that the defendant was "fully competent" to enter the plea, was aware "of the nature of the charge and the consequences of the plea," and was entering into the plea knowingly and voluntarily. A122.

C. SENTENCING PROCEEDING

The Pre-Sentence Report ("PSR") was first disclosed to the parties on February 19, 2004. A20. It calculated the defendant's base offense level as 14 under U.S.S.G. § 2K2.1(a)(6), added two levels for reckless endangerment in the course of flight from the police under U.S.S.G. § 3C1.2, and subtracted two levels for acceptance of responsibility under U.S.S.G. § 3E1.1(a). A26. The PSR did not recommend a third point for acceptance because the defendant decided to plead guilty on the first day of trial, and recommended an additional two-level enhancement under U.S.S.G. § 2K2.1(b)(4) because "the offense involved a stolen firearm." A26-A27. The PSR attributed twelve criminal history points to the defendant and, consequently, placed him in Criminal History Category V. A31. Without the stolen firearm enhancement, the resulting guideline range was 33 to 41 months' incarceration; with the enhancement, the resulting range was 41 to 51 months' incarceration. A27, A37.

On March 4, 2004, the defendant filed a sentencing memorandum which essentially asserted two grounds for a downward departure: (1) the defendant suffered from a diminished capacity, as provided for by U.S.S.G. § 5K2.13, and (2) the defendant should receive credit for time already served in state custody, as provided for by

U.S.S.G. § 5G1.3. A179-A180. In addition, the defendant asserted that his federal sentence should be ordered concurrent to his pre-existing state sentence. A180.

On March 24, 2004, the Government filed a sentencing memorandum which objected to the two grounds put forth by the defendant for a downward departure. A160. As to the second ground, the Government argued that the defendant was not entitled to credit for time served on the state violation of probation because, under 18 U.S.C. § 3585(b), a defendant only gets credit for time served "that has not been credited toward another sentence." A173. The Government also relied on the commentary to U.S.S.G. § 5G1.3, which states that a sentence for a substantive offense committed while a defendant is on probation or supervised release should be imposed to run consecutively to any term ordered on the probation or supervised release violation. A173-A174. As to the consecutive/concurrent issue, the Government deferred to the Court's determination on the issue, clarified that its argument was solely directed at whether the defendant should receive credit for time already served in state custody, and noted that it had informed the defendant prior to the entry of the plea that it would object to any request that he receive credit for time served. A174. Finally, the Government sought an upward departure from the guideline range under U.S.S.G. § 4A1.3 because the defendant's criminal history category did not adequately reflect the seriousness of his criminal past. A174.

At the sentencing hearing, the court confirmed that the parties did not have substantive objections to the factual statements contained in the PSR and, after making minor

corrections, adopted these factual statements. A131-A132. The court also reviewed with the defendant the maximum penalties he faced as a result of his conviction. A132.

As to the guideline calculation, the court asked the parties to address the two-level, stolen-firearm enhancement under U.S.S.G. § 2K2.1(b)(4). A133. The Government indicated that, at the time of the guilty plea, the defendant had been unwilling to take responsibility for the gun on the dashboard, but willing to take responsibility for the ammunition under his seat. A133. As a result, the parties had agreed that the reckless endangerment enhancement was appropriate, but that the stolen firearm enhancement was not. The Government indicated it would stand by the plea agreement and leave it to the court's discretion as to whether to adopt the PSR's recommendation. A133. After additional discussion on the issue, the court recognized that the "argument could be made that the two level enhancement ought to apply," but decided not to do so "in light of . . . the stipulation of the parties [and] in the absence of any direct link . . . between the defendant and the gun . . . ." A136-A137. At that point, the court found that the adjusted offense level was 14, the Criminal History Category was V and the guideline range was 33-41 months. A137.

At that point, the court considered the various arguments for departures from the range. A138. The defendant first argued in support of his diminished capacity departure, A139-A140, and next in support of his departure for time served. A140-A141. He specifically asked that the court depart to an incarceration term of 18 months, which would be served concurrent to the time

remaining on his state sentence. A141. The court pressed the defendant on the consecutive/concurrent issue in light of the commentary to the guidelines, which seemed to indicate that supervised release violations should be served consecutive to sentences for the underlying crime. A141. In response, the defendant indicated that the Government was not objecting to a concurrent sentence, and this position had been "the deciding factor . . . in Mr. Miley entering his guilty plea. . . . He's certainly willing to serve some additional time but to put him in that position where he is going to be facing significantly more time, that just, that's going to destroy him." A141-A142. Here, no mention was made regarding whether the defendant would get credit for time already served on the state sentence.

The Government responded by making it clear that it was deferring to the court's discretion as to the consecutive/concurrent issue, but was objecting to a departure or any similar "finding that the defendant should receive credit towards the federal sentence for time already spent on a state sentence." A146. As it did in its written memorandum, the Government relied on 18 U.S.C. § 3585(b) and the commentary to U.S.S.G. § 5G1.3. A146-A147. Despite a general invitation by the court, the defendant offered no additional argument on this issue. A149.

The court acknowledged that it had the discretion to depart, but refused to do so on either of the grounds articulated by the defendant. A151. As to the departure for credit for time served in state custody, the court stated, "[T]he guideline application notes that I quoted before regarding the recommendation of consecutive sentences

counsel strongly against a downward departure simply on the basis that the probation was revoked based on the same conduct underlying this offense . . . ." A152. The court also declined to depart upward under U.S.S.G. § 4A1.3 and indicated that it would consider the Government's arguments on this issue when it decided where within the guideline range to sentence the defendant. A153. The court ultimately outlined a potential sentence of 41 months' incarceration, to be served concurrent to the time remaining on the defendant's state sentence. A155. When asked, neither party gave any reason why this sentence could not be imposed, and the court imposed it as its final sentence. A157.

SUMMARY OF ARGUMENT

The defendant's guilty plea was knowing and voluntary. As demonstrated by the district court's Rule 11 plea canvass and the defendant's sworn answers during the plea proceeding, he entered into his guilty plea with full awareness of the possible penalties he would face as a result of his conviction. To the extent that his counsel misinformed him as to whether the district court would depart downward to give him credit for the time he had already served in state custody, this error would not have impacted his willingness to plead guilty. The defendant understood very well, because the court explained it to him more than once, that any predictions or estimates his attorney may have given him as to his possible sentence were not binding on the court. Indeed, the court explained more than once, and the defendant knew, that, if the court

did not sentence him as his attorney predicted, he would not be able to withdraw his plea or appeal his conviction.

ARGUMENT

I. THE DEFENDANT'S GUILTY PLEA WAS KNOWING AND VOLUNTARY AND ENTERED WITH EFFECTIVE ASSISTANCE OF COUNSEL

The defendant claims that he pleaded guilty to Count Two of the Indictment based on the mistaken impression that he would be receiving credit toward his federal sentence for time already served on his state sentence for the October 2, 2002 violation of probation. He alleges that the district court, in an unrecorded chambers conference, led defense counsel to believe that it would "not only run the [f]ederal sentence concurrent with the [s]tate sentence, but would depart downward in order to effectuate a sentence which would add only several months to the [s]tate sentence rather than several years, as was the result of the sentence." Def.'s Brief at 7. More specifically, he states that one of two things occurred prior to the plea proceeding: either the court did, in fact, agree to depart downward to give him credit for time served and subsequently breached this agreement by failing to do so, or defense counsel misinterpreted the court's comments during the chambers conference and, thereby, misadvised

the defendant as to his likely sentence.[3] Def.'s Brief at 7-8.

The district court most certainly did not indicate a willingness to depart downward or make any other sentencing decision prior to the plea hearing or prior to the sentencing. Any impression to the contrary was, at best, a misinterpretation by defense counsel. To the extent, however, that this misinterpretation led defense counsel to misinform the defendant as to the potential sentence he would receive, this error was insignificant and would not have changed the defendant's decision to plead guilty. The defendant's sworn answers during his plea canvass show that he was fully aware of the sentencing consequences awaiting him as a result of his conviction and, most significantly, of the fact that any prediction his counsel may have given him regarding his sentence would not bind the court and would not allow him to appeal his conviction should the court not sentence him in accordance with this prediction.

---

[3] A defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within acceptable standards. The issue is not the merits of these independent claims as such, but rather whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." *United States v. Coffin*, 76 F.3d 494, 497-98 (2d Cir. 1996) (internal brackets, quotation marks and citation omitted).

A. Relevant Facts

On March 30, 2004, the defendant moved in the district court for an order vacating his sentence and permitting him leave to withdraw his guilty plea. GA1. In that motion, he set forth substantially the same argument as he puts forth here on appeal. GA1-GA3. On April 8, 2004, the Government filed a memorandum which argued that the motion should be denied both on its merits and on procedural grounds for lack of jurisdiction. A182-A189.

On September 13, 2004, the district court issued a written ruling denying the motion. GA4. The court gave "the motion the most favorable reading possible" and determined that it had jurisdiction to consider its merits because the motion appeared to correct a perceived clear error under Fed. R. Crim. P. 35(a). GA7-GA8.

The court construed the underlying claim as an allegation that "the court violated Rule 11 of the Federal Rules of Criminal Procedure by participating in plea negotiations and then reneging on representations made during those negotiations." GA8. The court found that the allegation had no merit because "the conduct [the defendant] suggests occurred never did." GA9. Specifically, the court found the following facts with respect to the off-the-record, chambers conference:

> That conference was extremely brief - indeed, everyone remained standing throughout - and was not on the record. Counsel reported that they were close to reaching an agreement, but that the

> defendant was concerned about whether his federal sentence would run consecutively or concurrently with his state sentence. The AUSA reported that the government would defer to the court on that issue. Defense counsel questioned whether the government would also agree that [the defendant] should receive credit toward his federal sentence for time served on his state sentence. The AUSA expressed reluctance to agree that [the defendant] should receive such credit. *In what I believe was the only statement I made during the conference, I noted that I had in a prior case departed downward in order to reach a fair sentence when similar issues had arisen and that I would be open to doing so if the circumstances warranted.* The AUSA stated that the government would oppose any downward departure. Counsel left chambers and soon thereafter reported that the defendant had agreed to plead guilty pursuant to a written plea agreement.

GA4-GA5 (emphasis added).

The court subsequently ruled as follows as to the defendant's specific arguments:

> [The defendant's] motion mistakenly recounts what both the AUSA and I said. First, when the issue of concurrent or consecutive sentences initially came up in open court, the AUSA did not reply "that he would be agreeable to the sentence running concurrently[.]" . . . Rather, the AUSA stated that "at the end of the day it would be at the

> court's discretion and I don't know that the government could agree one way or the other." . . . At sentencing, the government did not deviate from its representation made on the record; it did defer to the court on the issue of consecutive or concurrent sentences.
>
> Second, [the defendant's] assertion that I said I would be "inclined to depart downward at sentencing is also mistaken. I am very much aware that Rule 11(c)(1) prohibits the court from becoming involved in plea discussions and I have never violated either the letter or the spirit of that rule. As the government correctly put it, "the Court never indicated, either before or after the entry of the guilty plea, that it would depart from the guideline range to give the defendant credit for time already served." . . . Indeed, I did not ever urge the parties to resolve this case, did not comment in any way on the evidence or the strength of the government's case, did not discuss with counsel in this case the terms and conditions of the plea agreement prior to the canvass in open court, and did not make any suggestions or representations about what the sentence the defendant would receive in this case should he plead guilty or should he go to trial and be convicted.

GA9-GA10. The court went on to conclude that the defendant's argument that he pleaded guilty based on his counsel's misinterpretation of the chamber's conference was belied by his answers during the plea canvass and,

specifically, his failure to mention during the plea or at sentencing any supposed promises made to him by the court to get him to plead guilty. GA10.

B. GOVERNING LAW AND STANDARD OF REVIEW

To ensure that a guilty plea "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant," *Panuccio v. Kelly*, 927 F.2d 106, 110 (2d Cir. 1991), Fed. R. Crim. P. 11(c) requires that the district court inform the defendant on the record of "'the nature of the charges against him and of the consequences of the plea.'" *United States v. Perdomo*, 927 F.2d 111, 116 (2d Cir. 1991) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). *See United States v. Blackwell*, 199 F.3d 623, 625 (2d Cir. 1999). In addition, Fed. R. Crim. P. 11(d) provides, in relevant part, that prior to accepting a plea of guilty the court must determine that the plea is voluntary and not induced by force or threats or promises apart from a plea agreement.

"To evaluate a claim that a guilty plea was involuntary or unknowing due to ineffective assistance of counsel, [courts] use the familiar framework established in *Strickland v. Washington*, 466 U.S. 668 (1984)." *United States v. Hernandez*, 242 F.3d 110, 112 (2d Cir. 2001) (parallel citations omitted). "A defendant must first establish that 'counsel's representation fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). The inquiry into the objective reasonableness of counsel's actions is guided, though not dictated, by "[p]revailing norms of practice as reflected in American Bar Association standards and the

like." *Strickland*, 466 U.S. at 688. With respect to guilty pleas, the Second Circuit has held that the ABA guidelines simply require "[a] defense lawyer in a criminal case . . . to advise his client fully on whether a particular plea to a charge appears to be desirable." *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996) (quoting Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992)) (emphasis deleted). "[C]ounsel must communicate to the defendant the terms of the plea offer and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed." *Purdy v. United States*, 208 F.3d 41, 44 (2d Cir. 2000) (citations omitted). While counsel is required to provide his client with an informed opinion on the merits of an offered plea, the "decision must ultimately be left to the client's wishes." *Boria*, 99 F.3d at 497 (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases (1988)). Not every mistake or omission of defense counsel amounts to a violation of the Sixth Amendment right to counsel. Rather, the defendant bears the burden to rebut the strong presumption that an attorney's performance falls within the "'wide range of reasonable professional assistance.'" *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 688). The presumption in favor of counsel's effectiveness is especially strong in the context of guilty pleas where, as here, the petitioner has openly admitted his guilt before the Court. *See Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

"Second, the defendant must show that 'there is a reasonable probability that, but for counsel's errors, he

would not have pleaded guilty and would have insisted on going to trial.'" *Hernandez*, 242 F.3d at 112 (quoting *Lockhart*, 474 U.S. at 59); *cf. United States v. Dominguez-Benitez*, 124 S. Ct. 2333, 2339 (2004) (adopting same standard for evaluating prejudice as to claimed Rule 11 violations). "This second, or 'prejudice,' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Lockhart*, 474 U.S. at 59.

This Court reviews *de novo* a claim of ineffective assistance of counsel. *See United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001); *United States v. Blau*, 159 F.3d 68, 74 (2d Cir. 1998). "[W]hen faced with . . . a claim for ineffective assistance on direct appeal, [this Court] may do one of three things: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent § 2255 petition; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before [it]." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000); *see United States v. Doe*, 365 F.3d 150, 152 (2d Cir. 2004) (reaffirming *Leone*). With respect to a district court's denial of a motion to withdraw a plea of guilty, such a decision is reviewed for abuse of discretion. *See United States v. Couto*, 311 F.3d 179, 185 (2d Cir. 2002). "A district court abuses its discretion if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact." *Id.* (internal quotation marks and citation omitted).

C. Discussion

"Ineffective assistance of counsel claims are not generally entertained on direct appeal." *United States v. Headley*, 923 F.2d 1079, 1083 (2d Cir. 1991). This Court may, however, entertain such a claim where the record is sufficient on direct appeal to allow a determination of the issue. *See id.*; *see also Doe*, 365 F.3d at 152. In this case, the Court can address the defendant's claim on the present record. Although the defendant is represented by the same counsel on appeal as in the trial court, counsel himself has raised these claims of ineffectiveness in the district court. The district court has specifically addressed the defendant's claims in its Rule 35 ruling, including his claim that he pleaded guilty based on counsel's supposed misinterpretation of the chambers conference. Because these claims have been fully aired and resolved on a developed factual record, there is no need to remand for further proceedings or to defer consideration of these issues to a § 2255 proceeding. *Cf. United States v. Levy*, 377 F.3d 259, 264 (2d Cir. 2004) (remanding ineffective assistance claim only because "unique circumstances" required "additional factfinding").

The defendant's claim that the district court breached its agreement to depart downward to give him credit for time served in state custody is directly rebutted by the district court's factual findings in its ruling denying the defendant's motion for leave to withdraw his guilty plea. The court specifically found that defense counsel had misrepresented what was stated during the brief chambers conference. The court further found that it had never advised defense counsel that it was "inclined to depart" to

give him credit for time served; it simply had notified the parties that a downward departure was *possible* in this scenario. Indeed, at the mere mention of such a possibility, the Government immediately indicated that it would object to any such departure and did so in response to the defendant's subsequent motion. Moreover, despite having been given every opportunity to do so, the defendant never claimed during the plea or sentencing proceeding that he had pleaded guilty in reliance on the court's promise to depart downward to give him credit for time served on his state violation of probation. In fact, during the sentencing hearing, defense counsel explicitly stated that one of the primary reasons that the defendant had pleaded guilty was *the Government's promise* to defer to the court on the concurrent/consecutive issue and not to argue that the federal sentence should be consecutive. *See Couto*, 311 F.3d at 185 (district court's factual findings will be upheld unless clearly erroneous).

The defendant's argument on appeal, therefore, by necessity, is limited to a claim that he pleaded guilty in reliance on his counsel's misinterpretation of, and advice regarding, the district court's comments as to the downward departure issue. This argument is directly rebutted by the defendant's answers during the plea colloquy and the explicit provisions of the plea agreement.

At least three times during the plea canvass, the defendant was advised of the maximum penalties he faced as a result of his plea. A94, A101, A110. These penalties and a stipulated guideline range were also set forth in the plea agreement. A12-A13. The court specifically explained to the defendant that it was not bound by either

side's recommendation as to the appropriate guideline range or sentence. A110-A111. The court made sure that the defendant was pleading guilty solely based on the promises set forth in the plea agreement and not based on any other promises. A108-A109. The court twice advised the defendant that the determination of the sentence was entirely within its discretion and would be made based on a whole host of information about the defendant and the offense of conviction. A107, A110. Finally, the court acknowledged that defense counsel might have given the defendant an estimate of his potential sentence, but warned that such an estimate was not binding and that the defendant would not be able to withdraw his plea or appeal his conviction if he was unhappy with his sentence or if it differed from his counsel's predictions. A110-A112; *see United States v. Fernandez*, 877 F.2d 1138, 1143 (2d Cir. 1989) (stating that a discussion of the range of punishment a defendant faces and the fact that his sentence will be imposed pursuant to federal guidelines constitutes informing him of the consequences of his plea).

For his part, the defendant indicated in his plea agreement and under oath in open court that he understood the limitations on his right to appeal his conviction and, specifically, the fact that he could not withdraw his plea simply because the court sentenced him to a higher term of incarceration than he wanted or than his attorney had advised him he would likely receive. A97-A98, A107, A110-A112. He also indicated that he was pleading guilty solely based on the promises and representations set forth in the plea agreement and was relying on nothing else not specifically stated in that document. A108-A109. At no time during the plea proceeding or the sentencing hearing

did he make reference to the district court's alleged promise to depart downward or to his attorney's advice regarding this alleged promise.

"Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). A defendant's statements made under oath during a plea colloquy should be regarded as conclusive. *See United States v. Gonzalez*, 970 F.2d 1095, 1100-01 (2d Cir. 1992). As this Court held in *Hernandez*, "the district court was entitled to rely upon the defendant's sworn statements, made in open court . . . , that he understood the consequences of his plea, had discussed the plea with his attorney, knew that he could not withdraw the plea, understood that he was waiving his right to appeal a sentence below 120 months, and had been made no promises except those contained in the plea agreement." *Hernandez*, 242 F.3d at 112-13; *cf. Dominguez-Benitez*, 124 S. Ct. at 2342 (applying same "reasonable probability" standard and holding that undisputed fact that defendant had been "specifically warned that he could not withdraw his plea if the court refused to accept the Government's recommendations" regarding sentencing, "tends to show that the Rule 11 error made no difference to the outcome").

In *United States v. Sweeney*, 878 F.2d 68 (2d Cir. 1989) (per curiam), this Court held that an attorney's erroneous sentencing guideline prediction did not render the defendant's guilty plea involuntary, or support a claim of ineffective assistance of counsel. *See id.* at 70. The Court noted that the defendant had been informed of the parameters of the potential sentence under the count of

conviction, was informed that the sentence ultimately to be imposed was within the sentencing court's sole discretion, and was told that if the sentence ultimately imposed was more severe than expected, he would be bound by his plea. *See id.* at 69-70. The Court then rejected the defendant's claim that his counsel was ineffective for erroneously predicting the sentencing guideline range and observed that, prior to the advent of the guidelines, the law in the Circuit was clear that a defendant could not withdraw his plea because his counsel erroneously predicted his sentence. *See id.* at 70.

Sweeney appears to govern the result in this case. Just as a defense counsel's incorrect estimate of a defendant's guideline range will not undermine the voluntariness of his plea, neither will a defense counsel's incorrect estimate of whether a defendant will receive credit for time already served toward a different sentence. "Defendants may not plead guilty in order to test whether they will get an acceptably lenient sentence." *Sweeney*, 878 F.2d at 70. "Society has a strong interest in the finality of guilty pleas, and allowing withdrawal of pleas 'undermines confidence in the integrity of our judicial procedures . . . , increases the volume of judicial work, and delays and impairs the orderly administration of justice." *See id.* (internal brackets omitted); *see also United States v. Horton*, 334 F.2d 153, 154-55 (2d Cir. 1964) (rejecting claim that defendant's plea was induced by defense counsel's mistaken statement as to prosecutor's supposed recommendation regarding the ultimate sentence and finding that such a claim "would afford an all too easy avenue for the invalidating of convictions on pleas of guilty"). From the record, it appears that the defendant is

doing exactly what he was told during his plea canvass that he would be unable to do; he is attempting to withdraw his guilty plea because he is unhappy with the court's ultimate sentence.[4]

To the extent that the defendant relies on this Court's decision in *Couto*, this reliance is misplaced. In *Couto*, this Court found that defense counsel had been ineffective because he had affirmatively misrepresented to the defendant the deportation consequences of her guilty plea. *See id.*, 311 F.3d at 187-188. The Court reversed the defendant's conviction because she had established that there was a "reasonable probability" that, had she "learned the deportation consequences of her plea," she would not have pleaded guilty in the first place. *See id.* at 188 n.9. As the Court noted, however, the district court in *Couto* did not canvass the defendant regarding the deportation consequences of his guilty plea and, consequently, did not have the opportunity to address defense counsel's affirmative misrepresentations. *See id.* at 190-191.

---

[4] In his plea agreement, the defendant waived his right to appeal or collaterally attack his conviction and sentence in this case if he received a term of incarceration of 41 months or less. The district court canvassed him on this waiver during the plea colloquy. This waiver, however, does not appear to require dismissal of this appeal. The defendant is challenging the effectiveness of his trial counsel and, in doing so, calling into question "the constitutionality of the process by which he waived those rights." *Hernandez*, 242 F.3d at 113-14. "If the constitutionality of that process passes muster, the plea agreement's waiver would bar any consideration by the appellate court of issues that fall within the scope of that waiver." *Id.*

Here, in conducting the Rule 11 canvass, the district court questioned the defendant as to his understanding of the sentencing consequences of his decision to plead guilty and advised him that whatever predictions his counsel might have made regarding his sentence were irrelevant and not binding on the court in any way. In other words, unlike in *Couto*, where defense counsel's alleged misrepresentations were not corrected by the court, here, the court's detailed Rule 11 canvass provided the defendant with the correct information regarding his potential sentence. The holding in *Sweeney*, therefore, is far more relevant and persuasive precedent.

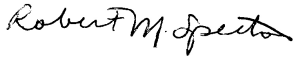
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 24, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9346 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

GOVERNMENT'S APPENDIX

ADDENDUM OF STATUTES

18 U.S.C. § 922(g)(1)

(g) It shall be unlawful for any person–

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
to . . . possess in or affecting commerce, any firearm or ammunition . . . .