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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 ,
15 Defendant.
16

NO. CR 03-0000

MEMORANDUM OF POINTS
AND AUTHORITIES RE: GUILTY
PLEA AND SENTENCING JURY

17
18 Defendant, , by and through his attorney of record, Deputy
19 Federal Public Defender, Liliana Coronado, hereby submits his Memorandum of
20 Points and Authorities Re: Guilty Plea and Sentencing Jury.

21 This Memorandum is based on all files and records in this case, and any further
22 evidence that may be adduced at the hearing on this matter.

23 Respectfully submitted,

24 MARIA E. STRATTON
Federal Public Defender

25
26 DATED: August __, 2004

By _____
LILIANA CORONADO
Deputy Federal Public Defender

27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION AND RELEVANT FACTS**

4
5 On December 12, 2003, Mr. _____ was indicted for violating 17 U.S.C. §
6 506(a)(1) and 18 U.S.C. § 2319(b)(1): Criminal Copyright Infringement. The
7 government alleged that Mr. _____ reproduced copyrighted works,
8 specifically DVDs of particular movies, without authorization, for commercial
9 advantage and private financial gain.

10 On June 24, 2004, the U.S. Supreme Court decided Blakely v. Washington, 124
11 S. Ct. 2531 (2004), which held that “the statutory maximum” for Apprendi
12 (referring to Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)) purposes is the
13 maximum sentence a judge may impose solely on the basis of the facts reflected in the
14 jury verdict or admitted by the defendant.” 124 S. Ct. 2531, 2537 (2004). In response
15 to Blakely, the government filed a First Superseding Indictment (“Superseding
16 Indictment”) against Mr. _____ on July 20, 2004. The Superseding Indictment
17 alleges not only elements of the offense, but also includes allegations that trigger
18 sentencing enhancements under the U.S. Sentencing Guidelines. Specifically, the
19 Superseding Indictment alleges the approximate number of copyrighted works that
20 Mr. _____ reproduced, the total retail value of the works, and that Mr.

21 _____ manufactured the works. It states that Mr. _____ “manufactur[ed]
22 approximately 776 copies of DVD movies encompassing approximately twenty-one
23 (21) copyrighted movie titles . . . with a total retail value of approximately \$19,280[.]”

24 This Memorandum is submitted to provide notice to the Court and the
25 government that Mr. _____ intends to plead guilty to the elements of
26 the offense for which he is charged and will not stipulate to the enhancements alleged
27 in the Superseding Indictment because they are not part of the offense conduct
28 charged.

1 It is permissible for Mr. _____ to do so under United States v. Thomas, 355
2 F.3d 1191 (9th Cir. 2004). This memorandum is filed to make that clear.

3
4 **II.**
5 **DISCUSSION**

6
7 **A. A Defendant has the Right to Plead Guilty if There is a Sufficient Factual**
8 **Basis and the Plea is Both Knowing and Voluntary.**

9
10 1. The Language of Rule 11

11
12 Federal Rule of Criminal Procedure 11(a)(1) provides that “a defendant may
13 plead not guilty, guilty, or (with the court’s consent) nolo contendere.” Fed. R. Crim.
14 Proc. 11(a)(1) (2004). Rule 11(b)(1) through (3) delineate the procedures that a trial
15 judge is to follow before accepting a guilty plea. See Fed. R. Crim. Proc. 11(b). The
16 plea must be voluntary, knowing and have a factual basis. If these three requirements
17 are met, the court should accept the defendant’s plea. See United States v.
18 Washington, 969 F.2d 1073, 1078 (D.C. Cir. 1992) (“At oral argument, the
19 Government conceded that it has no power to block a defendant from pleading guilty,
20 so long as the requirements of Rule 11 have been met. We agree.”); accord United
21 States v. Davis, 516 F.2d 574, 578 (7th Cir. 1975) (“But ordinarily when there is
22 strong evidence of guilt and the defendant, with an understanding of the charge and
23 the consequences of his plea and with the advice of competent counsel, wants to plead
24 guilty . . . he is entitled to plead guilty.”).

25 Rule 11(b)(1)(3) set forth the only requirements necessary for a valid guilty
26 plea. Each provision starts with the same phrase, “[b]efore the court accepts a plea of
27 guilty[.]” Nothing in the language of the rule gives the district court the discretion to
28 reject the guilty plea. Further, the language “before the court accepts” indicates that if

1 the requirements are met, a guilty plea should be accepted. If Rule 11 authorized a
2 judge to reject a plea despite the plea being knowing, voluntary and having a factual
3 basis, this would mean that the judge, and not the defendant, has the final decision as
4 to whether the defendant can plead guilty, which contravenes the spirit of the
5 precedents which remark upon the importance of the defendant’s decision whether to
6 plead guilty. See, e.g., United States v. Andrades, 169 F.3d 131, 132 (2d Cir. 1999)
7 (stating that a guilty plea comprehends “perhaps the law’s most significant waiver of
8 constitutional rights.”); McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct.
9 1166, 1171 (1969) (for such a waiver to comport with due process, it “must be ‘an
10 intentional relinquishment or abandonment of a known right or privilege.’” (quoting
11 Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938))).

12 The provisions of Rule 11 governing nolo contendere and conditional guilty
13 pleas contain unambiguous language indicating that the district court must consent to
14 a defendant pleading guilty in those situations. See Fed. R. Crim. Proc. 11(a)(2),¹
15 (3).² In contrast, there is no language in Rule 11(b)³ requiring a district court’s
16 consent before a defendant pleads guilty. Had Congress desired the court’s consent to
17 all guilty pleas, Rule 11(a)(2) and (3) reveal that it knew how to include that
18 requirement and could have done so. Congress’ failure to include consent language
19 ///

20
21 ¹ Rule 11(a)(2) reads, in relevant part, as follows: “Conditional Plea. With the
22 consent of the court and the government, a defendant may enter a conditional plea of
guilty or nolo contendere” Fed. R. Crim. Proc. 11(a)(2).

23 ²n Rule 11(a)(3) reads, in relevant part, as follows: “Nolo Contedere Plea.
Before accepting a plea of nolo contendere” Fed. R. Crim. Proc. 11(a)(3).

24 ³ Rule 11(b) reads, in relevant part, as follows:

25 (b) Considering and Accepting a Guilty or Nolo Contendere Plea (1)
26 Advising and Questioning the Defendant. Before the court accepts a plea
of guilty or nolo contendere, the defendant may be placed under oath, and
27 the court must address the defendant personally in open court. During
this address, the court must inform the defendant of, and determine that
28 the defendant understands, the following:

Fed. R. Crim. Proc. 11(b)(1).

1 in Rule 11(b) is further evidence that the district court's consent is not required for a
2 guilty plea that is knowing, voluntary and has a factual basis.

3
4 2. History of Rule 11

5
6 In 1975, Rule 11 was amended. The former version of Rule 11 read in
7 pertinent part as follows:

8 A defendant may plead not guilty, guilty, . . . The court may refuse to accept a
9 plea of guilty, and shall not accept the plea without first determining that the
plea is made voluntarily with understanding of the nature of the charge.

10 Overholser v. Lynch, 288 F.2d 388, 391 (D.C. Cir. 1960), rev'd 369 U.S. 705 (1962).

11 Rule 11 was amended in 1975 and the statutory language giving the trial judge
12 the explicit discretion to refuse a guilty plea was taken out of the rule. See United
13 States v. Vonn, 535 U.S. 55, 67 n.7 (2002).

14 The courts have declared that the mere fact that the legislature enacts an
15 amendment indicates that it thereby intended to change the original act
16 by creating a new right or withdrawing an existing one. Therefore, any
17 material change in the language of the original act is presumed to
indicate a change in legal rights. It has been held that it can be presumed
that Congress was aware of the prior construction of the terms in
question in the original act and deliberately limited the scope of the new
act.

18 Singer, N., Statutes and Statutory Construction, §22.30 (2002); Hiivala v. Wood, 195
19 F.3d 1103 (9th Cir. 1999).

20
21 **B. Mr. _____ Need Only Provide a Factual Basis for the**
22 **Elements of the Charged Offense.**

23
24 Mr. _____ is charged with violating 17 U.S.C. § 506(a)(1) and
25 18 U.S.C. § 2319(b)(1), Criminal Copyright Infringement. The United States Code
26 defines this crime as follows:

27 17 U.S.C. § 506. Criminal offenses--(a) Criminal infringement. Any
28 person who infringes a copyright willfully either--(1) for purposes of
commercial advantage or private financial gain . . . shall be punished as

1 provided under section 2319 of title 18, United States Code. For purposes
2 of this subsection, evidence of reproduction or distribution of a
3 copyrighted work, by itself, shall not be sufficient to establish willful
4 infringement.

5 17 U.S.C. § 506 (2004).

6 18 U.S.C. § 2319. Criminal infringement of a copyright--Whoever
7 violates section 506(a) (relating to criminal offenses) of title 17 shall be
8 punished as provided in subsections (b) and (c) of this section and such
9 penalties shall be in addition to any other provisions of title 17 or any
10 other law. (b) Any person who commits an offense under section
11 506(a)(1) of title 17--(1) shall be imprisoned not more than 5 years, or
12 fined in the amount set forth in this title, or both, if the offense consists
13 of the reproduction or distribution, including by electronic means, during
14 any 180-day period, of at least 10 copies or phonorecords, of 1 or more
15 copyrighted works, which have a total retail value of more than
16 \$ 2,500[.]

17 18 U.S.C. § 2319 (2004).

18 At trial, the government would be required to convince a jury beyond a
19 reasonable doubt that Mr. (1) willfully; (2) infringed; (3) at least
20 one copyrighted work; (4) by reproducing or distributing; (5) for commercial
21 advantage or private financial gain; (6) during a 180-day period; (7) at least ten copies
22 or phonorecords; (8) with a retail value of more than \$2,500. The only requirement
23 for Mr. to be convicted of the offense with which he is
24 charged is that he admit the elements of the crime, which provides a factual basis for
25 the plea. See United States v. Thomas, F.3d 1191, 1194-95 (9th Cir. 2004).

26 Federal Rule of Criminal Procedure 11(b)(3) allows the court to reject a guilty
27 plea for lack of a factual basis. Thomas makes clear that the proper “factual basis”
28 refers only to facts supporting the elements of the charged offense. Neither the
manufacturing allegation, specific number of copies over ten, nor their valuation in
excess of \$2,500 are elements of the offense Mr. is accused of
violating. Rather, these are sentencing enhancements for which a factual basis is not
required for a guilty plea.

Mr. may plead guilty to the elements of the offense without
admitting the enhancements. In Thomas, 355 F.3d at 1198, the Ninth Circuit

1 addressed the question of “whether the requirement of due process that drug quantity
2 be pleaded in the indictment, submitted to a jury, and proved beyond a reasonable
3 doubt transforms drug quantity into an element of the offense that a defendant
4 necessarily admits when pleading guilty.” The Thomas Court’s answer to that
5 question was a resounding “no.” Id. at 1199.

6 At issue in Thomas was the quantity of drugs that the defendant possessed. Id.
7 at 1194-95. The district court in that case sentenced the defendant based on a finding
8 that the defendant possessed more than fifty grams of cocaine. Id. at 1194.
9 However, the defendant never admitted to a particular quantity of drugs during the
10 plea colloquy. Id. Nevertheless, the government argued and the district court found
11 that the defendant’s admission to the elements of the offense were an admission to the
12 quantity of drugs alleged in the indictment. Id. In reversing the district court, the
13 Ninth Circuit Court of Appeals held that “even where due process requires that a drug
14 quantity allegation be pleaded in the indictment and proved to a jury beyond a
15 reasonable doubt, a defendant can plead guilty to the elements of the offense without
16 admitting the drug quantity allegation.” Id. at 1198. In other words, a sentencing
17 enhancement, even a critical one such as drug quantity, is not a substantive element
18 of the offense and a defendant does not admit the enhancement when he pleads to the
19 elements of the underlying crime.

20 The Court’s decision in Thomas has two important points. First, the Thomas
21 Court cited United States v. Buckland, 289 F.3d 558 (9th Cir. 2002) (en banc), which
22 held that the enhancement at issue—drug quantity—was not an element of the
23 offense, but rather is a material fact. Thomas, 355 F.3d at 1196. This is so even if
24 due process *requires* that the enhancements be included in the indictment, as was the
25 case in Thomas. Id. at 1198. Next, the court summarized the existing case law
26 regarding precisely what a defendant admits when he pleads guilty. Even before
27 Thomas, in United States v. Cazares, 121 F.3d 1241 (9th Cir. 1997), the Ninth Circuit
28 held that “allegations not necessary to be proved for a conviction . . . are not admitted

1 by a plea.” Id. at 1247. In Cazares, the government argued that when Cazares pled
2 guilty to conspiracy, he admitted all of the factual allegations of the indictment. Id. at
3 1246. However, the Cazares Court rejected this argument, reasoning that to adopt the
4 government’s argument would violate existing case law which holds that a guilty plea
5 is an admission of the facts constituting the elements of the charge. Id. In other
6 words, defendants would be admitting allegations not necessary to be proved for a
7 conviction, which it found to be inconsistent with Rule 11, as well as beyond what
8 would have been found by a jury if the case had proceeded to trial instead of pleading.
9 Id. at 1247.

10 It follows from Cazares and Thomas that a defendant who is pleading guilty
11 cannot be required to admit allegations that are not necessary for a conviction.
12 Accordingly, Mr. need not admit the allegations contained in the
13 Superseding Indictment which go beyond the elements of the crime for which he is
14 being charged. That includes in particular the various sentencing enhancements that
15 follow the charge, to wit, the allegation that Mr. “manufactur[ed]
16 approximately 776 copies of DVD movies encompassing approximately twenty-one
17 (21) copyrighted movie titles . . . with a total retail value of approximately \$19,280[.]”

18 The fact that the sentencing enhancements take on heightened significance in
19 light of the recent decisions in Blakely and United States v. Ameline, No. 02-30326,
20 2004 WL 1635808 (9th Cir. July 21, 2004) does not change the above analysis. A
21 similar argument was made in Thomas in light of the new rights the Apprendi
22 decision conferred upon criminal defendants regarding drug quantity and the
23 argument was rejected by the Court. The government argued that since due process
24 required that defendants be adequately informed of allegations that could increase
25 their sentence beyond the statutory maximum and to have those allegations submitted
26 to a jury upon proof beyond a reasonable doubt, a guilty plea necessarily encompasses
27 these allegations. Thomas, 355 F.3d at 1198. In rejecting that argument, the Court
28 stated that “a defendant’s due process *right* to be advised of the burden of proof for

1 drug quantity does not translate into an *admission* of drug quantity when pleading
2 guilty.” *Id.* (citing United States v. Toliver, 351 F.3d 423, 430 (9th Cir. 2003)). The
3 Thomas Court invoked Toliver when it noted that “‘while we may label a fact as the
4 ‘functional equivalent of an element’ for purposes of Apprendi, that does not
5 transform the fact into an ‘element’ for purposes of Winship.’” 355 F.3d at 1197-98
6 (quoting Toliver, 351 F.3d at 430). Whether a factual allegation is termed the
7 “functional equivalent of a critical element,” see United States v. Minore, 292 F.3d
8 1109, 1117 (9th Cir. 2000), a sentencing enhancement, an aggravating factor, a
9 “statutorily enumerated ground for departure,” see Blakely, 124 S. Ct. at 2535, or
10 anything else, the simple fact remains that if it is not required for a conviction, it need
11 not be admitted by the defendant in a guilty plea.

12 As in Thomas, the factual allegations that the government has made in the
13 Superseding Indictment to ensure the application of the sentencing enhancements are
14 not elements of the crime. 355 F.3d at 1196. Under Thomas, the defendant’s right to
15 have the enhancements proved beyond a reasonable doubt, either pursuant to
16 Apprendi, Blakely or Ameline, do not convert them into elements of the crime. *Id.* at
17 1198. Mr. _____ does not admit the enhancements if he
18 pleads guilty simply because they are contained in the indictment, nor can he be
19 required to admit the enhancements simply because they are alleged in the indictment.
20 This is confirmed by the fact that the validity of Thomas’ conviction was never
21 disputed, as evidenced by the fact that the Ninth Circuit remanded the case “with
22 instructions to resentence Thomas based on an unspecified quantity of cocaine base”
23 because he had not challenged his conviction. *Id.* at 1202. In other words, Thomas’
24 conviction was not defective because he failed to admit the drug quantity, nor was
25 that admission necessary for Thomas to be convicted of 21 U.S.C. § 841. The Ninth
26 Circuit’s recent opinion in Ameline also recognized this principle when it noted that
27 because Ameline vigorously disputed the amount of methamphetamine at issue in the
28 case, “Ameline’s guilty plea did not constitute an admission of the amount proffered

1 by the government.” Ameline, 2004 WL 1635808, at *17 n.9 (citing Thomas, id. at
2 1198). As in Thomas, the Ameline decision did not cast any doubt upon the
3 conviction itself, despite the defendant’s refusal to admit an allegation necessary for
4 an enhancement. Id.

5
6 **C. Ameline Allows the Government to Seek a Sentencing Jury But the**
7 **Defense Contends that Ameline Is Wrongly Decided In that Respect.**

8
9 Because Mr. _____ intends to plead guilty only to the
10 elements of the crime, it is anticipated that the government will argue that if Mr.
11 _____ does not admit the enhancements, the Court should empanel
12 a sentencing jury to make factual findings to determine whether the enhancements
13 apply. In other words, the government will ask this Court to use a jury to decide
14 aggravating facts that support offense level increases. The Ninth Circuit’s opinion in
15 Ameline appears to contemplate such a scheme, and this Court is bound by that
16 decision. See id. at *10-13.

17 While this Court is bound by Ameline, the defense nonetheless challenges the
18 validity of any jury findings. The Supreme Court could decide the question
19 differently, for two reasons. First, severing the statutory provisions that provide for
20 findings by the judge is not all that must be done; the additional affirmative step of
21 creating a jury trial procedure must be substituted and that arguably constitutes an
22 affirmative rewriting of the statute that courts cannot undertake without violating the
23 Separation of Powers doctrine. See Heckler v. Mathews, 465 U.S. 728, 741 (1984).

24 Second, the severability analysis is not as simple as just the presumption in
25 favor of severability that the Ameline opinion notes, see id. at *11; there must be
26 weighed against that presumption the absence of a severability clause in the
27 Sentencing Reform Act, see Gubiensio-Ortiz v. Kanahale, 857 F.2d 1245, 1267 (9th
28 Cir. 1988), vacated on other grounds sub nom. United States v. Chavez-Sanchez, 488

1 U.S. 1036 (1989), which “does suggest an intent to have all components ‘operate
2 together or not all,” Matter of Reyes, 910 F.2d 611, 613 (9th Cir. 1990) (quoting
3 Gubiensio-Ortiz, 857 F.2d at 1267).

4 The more basic question to be asked when considering severability is whether it
5 is evident that valid provisions would have been enacted without the others. Alaska
6 Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). As to that, it is far from clear that
7 Congress and/or the Sentencing Commission would have chosen to delegate all the
8 Guidelines specific offense characteristics, cross references, adjustments, and upward
9 departure facts to a jury, at least in their present form. See
10 Blakely v. Washington, 124 S. Ct. at 2555 (Breyer, J., dissenting) (describing
11 complex new “offense” which would be created if jury had to make findings
12 regarding all possible Guidelines enhancements and pointing out prejudice of
13 including aggravating facts in indictments and requiring parties to argue inconsistent
14 “sentencing defenses” simultaneously with substantive defenses). Perhaps Congress
15 would choose this path, but that is far from certain.

16 This Court will presumably reject the above argument and follow Ameline.
17 Assuming it does so, Mr. requests that the trial on the
18 sentencing factors be held on the current trial date, August 24, 2004.

19
20 **III.**

21 **CONCLUSION**

22
23 Mr. intends to plead guilty to the crime he is
24 charged with in the Superseding Indictment without admitting the factual allegations
25 that trigger the sentencing enhancements. He has a right to do so under Ninth Circuit
26 precedent. The defense believes the sentencing enhancements cannot be found by a
27 judge or submitted to a jury, but Ameline appears to allow the latter. Assuming the
28 Court follows Ameline, the defense requests the sentencing factors trial be held on

1 August 24, 2004.

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Respectfully submitted,

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MARIA E. STRATTON
Federal Public Defender

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7 DATED: August __, 2004

By _____
LILIANA CORONADO
Deputy Federal Public Defender

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