IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

POLLY JO AGUON QUITUGUA,
Defendant-Appellant.

Supreme Court Case No. CRA08-007
Superior Court Case No. CF0192-07

OPINION

Cite as: 2009 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on October 30, 2008
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] Defendant-Appellant Polly Jo Aguon Quitugua was convicted upon her plea of guilty to a charge of theft of property. She was sentenced to five years in prison and, as a separate portion of her sentence, a three-year mandatory parole term. She now appeals, seeking leave to withdraw her plea on the grounds that the court failed to inform her and ensure she understood that her sentence included a "special" parole term, mandated by statute. Quitugua did not preserve the error by objecting in the court below. Although we find, on plain error review, that the trial court erred, we find no miscarriage of justice or threat to the integrity of the judicial process resulted from this forfeited error meriting reversal of the judgment. Accordingly, the judgment is **AFFIRMED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Quitugua pleaded guilty to stealing property from the medical office of Dr. Victor M. Perez over a four-year period from 2002 to 2006. Quitugua had been charged with two counts of theft of property, one count of theft of property held in trust, one count of forgery, and one count of tampering with records to deceive and conceal. In exchange for Quitugua's agreement to plead guilty to one of the two counts of theft of property, the People promised to dismiss the four additional criminal charges. Appellant's Excerpts of Record ("ER") at 21-22 (Plea Agreement, June 4, 2008).

[3] When Quitugua entered her Change of Plea in open court on April 28, 2008, the court addressed her personally. The court inquired, among other things, into whether Quitugua had read the entire plea agreement; whether she understood that she was waiving her constitutional

right to trial by jury and other rights; and whether she was entering the plea agreement voluntarily and of her own free will. When asked to describe in her own words what she had done, Quitugua stated "I stole funds. I hid statements. I forged signatures on checks and --." *Id.* at 16.

[4] The court informed Quitugua that theft as a second degree felony carries a sentence of "not more than five years and a maximum fine of $10,000.00." ER at 14 (Transcript ("Tr."), Change of Plea, Apr. 28, 2008). In Quitugua's presence, the parties discussed what Quitugua's restitution obligations would be during her period of parole or probation. After Dr. Perez stated that the amount of money that had been stolen from his medical office exceeded $169,000, those present debated language in the agreement about the extent of Quitugua's restitution obligation during and after her parole. The court asked the prosecutor whether he had explained to the victim that the statute allows any restitution not fully paid "at the end of any probationary or parole period" to be converted into a judgment. *Id.* at 6. The court further explained that the restitution obligation would continue as the defendant continued with the parole board, "and even beyond the parole board. She won't be before this Court in terms of probation. She will be on parole. All right?" *Id.* at 8.

[5] However, nowhere do the transcripts reveal the court explaining directly to Quitugua that Guam statutory law mandated that she would face a three-year parole term.[1] Although the

[1] Title 9 GCA § 80.70 (2005) provides:

> . . .
>
> (b) A sentence to a fixed term of imprisonment includes, as a separate portion of the sentence, a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender's first conditional release on parole. The term is three (3) years unless the conviction was for a misdemeanor in which case it is one (1) year.

court informed Quitugua during the plea colloquy that the count of theft "carries a sentence of not more than five years and a maximum fine of $10,000.00," the court failed to inform her that the sentence she would face for her theft charge included a mandatory three-year term of parole.[2] *Id.* at 14.

[6] The written plea agreement signed by Quitugua contemplated the possibility of a parole term, but included somewhat ambiguous language. In addition to stating that the theft charge carries a sentence of imprisonment of not more than five (5) years and a fine of ten thousand dollars, the agreement included the following provision:

> 6. The Attorney General and Defendant agree, in consideration for Defendant's plea and full cooperation, to the following:
>
> c. A period of parole/probation of between three (3) years and five (5) years may be argued[.]

ER at 21, 22 (Plea Agreement).

[7] The court accepted Quitugua's guilty plea at a hearing on April 28, 2008. The sentencing hearing occurred on May 23, 2008, at which time the court imposed an undetermined amount of

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> (c) If an offender is recommitted upon revocation of his parole, the term of further imprisonment upon such recommitment and of any subsequent parole or recommitment under the same sentence shall be fixed by the Territorial Parole Board but shall not exceed in length the longer of the unserved balance of:
>
> (1) the parole term provided by Subsection (b); or
>
> (2) the remainder of the original sentence determined from the date of conviction.

[2] Title 9 GCA § 80.70 (2005) provides:

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>
> (b) A sentence to a fixed term of imprisonment includes, as a separate portion of the sentence, a term of parole or of recommitment for violation of the conditions of parole which governs the duration of parole or recommitment after the offender's first conditional release on parole. The term is three (3) years unless the conviction was for a misdemeanor in which case it is one (1) year.
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>
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>
> (2) the remainder of the original sentence determined from the date of conviction.

restitution and a term of imprisonment of five years, the maximum term for the charge. On June 13, 2008, Quitugua's attorney reviewed and signed the judgment, which ordered a sentence of five years, parole upon her release for a period of three years, full restitution to be determined at a later hearing, and dismissal of the other charges pursuant to the plea agreement.

[8] On June 16, 2008, one day before her commitment hearing and two days before the entry of the judgment, Quitugua filed a notice of appeal, asserting that the court's failure to inform her and determine that she understood that her sentence included a special parole term of three years was plain error.

II. JURISDICTION

[9] This court has jurisdiction over this appeal from a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 110-243 (2008)); 7 GCA § 3107(b) (2005); 8 GCA § 130.15(a) (2005) (permitting defendant's appeal from a final judgment of conviction). Quitugua filed the notice of appeal several days prior to the entry of judgment. Such an appeal is timely filed under Rule 4(b)(2) of the Guam Rules of Appellate Procedure, which provides that a notice of appeal filed after the court announces a decision or order but before entry of the judgment is deemed to be filed on the date of and after the entry of judgment. Guam R. App. P. 4(b)(2) (2007).

III. STANDARD OF REVIEW

[10] The parties agree that the issue presented was not raised in the trial court and thus we determine whether to excuse Quitugua's forfeiture of error by applying plain error review. *See People v. Ueki*, 1999 Guam 4 ¶ 17 (citing *United States v. Young*, 470 U.S. 1, 14-16 (1985); 8 GCA § 130.50. Guam's plain error rule provides that plain errors or defects affecting substantial

rights may be noticed although they were not brought to the attention of the court.[3] Because Guam's plain error statute is derived from the former Federal Rule of Criminal Procedure ("FRCP") 52(b), this court adopts as persuasive authority federal decisions construing Rule 52. *People v. Ueki*, 1999 Guam 4 ¶ 18.

[11] Plain error is highly prejudicial error. We will not reverse unless (1) there was an error; (2) the error is clear or obvious under current law; (3) the error affected substantial rights; and (4) reversal is necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *See People v. Campbell*, 2006 Guam 14 ¶ 11; *People v. Jones*, 2006 Guam 13 ¶ 24 (citing *People v. Jung*, 2001 Guam 15 ¶ 50); *People v. Demapan*, 2004 Guam 24 ¶ 5; *People v. Evaristo*, 1999 Guam 22 ¶ 24 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). The appellant bears the burden to demonstrate that reversal is warranted. *People v. Van Bui*, 2008 Guam 8 ¶ 10; *People v. Chung*, 2004 Guam 2 ¶ 9, (citing *United States v. Vonn*, 535 U.S. 55, 63 (2002)).

IV. DISCUSSION

[12] Quitugua contends that the court's failure to inform her that her sentence would include a three-year special parole term when she entered her guilty plea is plain error, meriting vacation of the judgment. The People of Guam, represented by the Office of the Attorney General, contend instead that there was no error, or in the alternative, the error did not affect Quitugua's substantial rights. We will first consider whether the trial court erred, since this is also the first prong of review under the plain error standard.

[3] Title 8 GCA § 130.50 (2005), identical to former Federal Rules of Criminal Procedure Rule ("FRCP") 52, provides the De Minimus and Plain Error rules:

> (a) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

A. Failure to inform a defendant of the mandatory parole term is error

[13] Quitugua asserts that the court erred when it failed to inform her of the "maximum possible penalties provided by law" for her sentence, pursuant to 8 GCA § 60.50(d), by failing to advise her that her sentence would include a "special parole term" of three years. The People do not dispute the fact that the court never informed Quitugua of the three-year mandatory parole term.[4] Instead, they contend the section 60.50(d) requirement that the court inform the defendant of the "maximum possible penalty provided by law" does not implicitly include a requirement that the court inform the defendant of the mandatory parole term.

[14] "Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Olano*, 507 U.S. 725, 732-33 (1993). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error'. . . ." *Id.* at 733. Under 8 GCA § 60.50, the court is prohibited from accepting a plea of guilty without first addressing the defendant personally in open court, informing him of and determining that he understands the nature of the charge, his right to plead not guilty, the fact that pleading guilty waives his right to a jury trial, and:

> (d) the maximum possible penalty provided by law for the offense to which the plea is offered including that possible from the imposition of an extended term pursuant to sections 80.38 and 80.40 of the Criminal and Correctional Code.

8 GCA § 60.50(d) (2005).

[15] The court in *People v. Chung* considered the issue of whether the "maximum possible penalty" advisement mandated by section 60.50(d) included a requirement that a court personally

[4] Although in her brief Quitugua characterizes the parole term imposed on her as a "special parole term," the parole term in Quitugua's case was imposed pursuant to 9 GCA § 80.70, which references merely "a term of parole or of recommitment for violation of the conditions of parole[.]" *See* FN 1. Regardless of the terminology used, section 80.70 establishes a term of supervised release. The distinction between a special parole term and a term of supervised release, for the purposes of this analysis, is stylistic but not substantive. *See FRCP Notes of Advisory Committee on Rules - 2002 Amendment.*

inform a defendant of a special parole term. 2004 Guam 2 ¶ 28. The *Chung* court found that "the lower court, in failing to inform Chung of the mandatory special parole under . . . 9 GCA § 80.37, erred when it failed to comply with . . . 8 GCA § 60.50(d)." *Id.* at ¶ 28. Although the *Chung* court expressly found error, analyzing the error under the third prong of plain error review, it found on the facts of the case that Chung's substantial rights were not affected. *Id.* at ¶ 29.[5]

[16] The People argue *Chung* was incorrect in finding error from a court's failure to advise a defendant of a mandatory special parole term. Specifically, the *Chung* court construed section 60.50 in light of the federal rule of criminal procedure, Rule 11, from which our statute is derived. The People argue that differences between federal law and Guam law should preclude us from considering federal precedent in interpreting section 60.50(d).

[17] The *Chung* court cited to a Ninth Circuit case, *United States v. Sanclemente-Bejarano*, 861 F.2d 206 (9th Cir. 1988), which construed a version of Rule 11 that is not identical to our section 60.50. *Id.* at ¶ 28. Federal Rule 11(c), as construed by the Ninth Circuit in *Sanclemente-Bejarano*, specifically required the court to inform the defendant of any maximum possible penalty, including a term of supervised release. *Sanclemente-Bejarano*, 861 F.2d at 208-11 (per curiam), *overruled on other grounds by United States v. Fuentes-Mendoza*, 56 F.3d 1113 (9th Cir. 1995). In contrast, Guam's provision by its terms only requires the court to explain the maximum possible penalty provided by law, "including that possible from the imposition of an

[5] Technically, the Guam code provision establishing that any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded is titled the "*de minimus*" rule; "harmless error" is the term used by the federal courts in determining that a violation of Rule 11 does not affect substantial rights meriting reversal of the judgment. However, our case law concerning plain error review often describes *de minimus* error as harmless error. Therefore, we will continue to refer to *de minimus* error as harmless error.

extended term pursuant to sections 80.38 and 80.40 of the Criminal and Correctional Code." 8 GCA § 60.50(d).

[18] According to the People, the Guam Legislature only intended to require the court to inform a defendant of an extended term that could be imposed pursuant to sections 80.38 and 80.40. They contend that the express mention of sections 80.38 and 80.40 comprises a "list" by which the Guam Legislature indicated its intent to limit what must be included in advising a defendant of the "maximum possible penalty" to those listed items or similar items. Appellee's Brief at 3 (Sept. 11, 2008).[6]

[19] Essentially, the People ask the court to interpret section 60.50(d) by applying a canon of statutory construction in which we find the legislature's decision to expressly mention the listed items implies that they did not intend to include any others. In this case, however, we find the application of this canon of statutory construction unwarranted, for it relies on the assumption that all omissions in the drafting of this statute are deliberate, an assumption we believe to be erroneous.

[20] The People's suggested "list" does not include the requirement that the court advise a defendant of a sentencing enhancement pursuant to 9 GCA § 80.37, which imposes an additional punishment on those who use a deadly weapon in the commission of a felony. The People conceded at oral argument that the court's duty to advise a defendant of the maximum penalty under § 60.50(d) includes the duty to advise the defendant of such a sentencing enhancement. Furthermore, the "list" described by the People involves only one term, the penalty that would result from imposition of an extended term. In these circumstances, the implication that unlisted items are excluded is weak at best. Instead, the statutory requirement that the court inform a

[6] Title 9 GCA § 80.38 states the circumstances and criteria under which a felony offender may be sentenced to an extended term and 9 GCA § 80.40 states the circumstances and criteria under which a misdemeanor offender may be sentenced to an extended term.

defendant of the maximum penalty, "including" that which would result from an extended term, does not demonstrate an attempt by the legislature to exclude other terms.

[21] The legislative history supports our finding that the Legislature did not intend to exclude unlisted items from the requirement. Section 60.50 is a product of the Guam Law Revision Commission's 1977 codification of Guam's criminal rules of procedure. Guam Pub. L. 13-186 (Sept. 2, 1976). According to the Guam Code Annotated, section 60.50 was based on proposed Rule 11(c) of the Federal Rules of Criminal Procedure and ABA, Project on Minimum Standards for Criminal Justice Pleas of Guilty § 1.4 (Approved draft 1968). *See* 8 GCA 60.50 NOTE.

[22] At the time the ABA drafted its standards, Rule 11 required the court to inform the defendant of the "consequences of the plea." Fed. R. Crim. P. 11(c), as amended Feb. 28, 1966. In 1975, Rule 11(c) was amended to require instead that the court inform the defendant of and determine that he understands the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered.[7] Despite this change in language, courts continued to look to Rule 11 in its original form for guidance in interpreting what was required in informing a defendant of the "maximum possible sentence." *See, e.g. United States v. Watson*, 548 F.2d 1058, 1061 (D.C. Cir. 1977).

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[7] The 1968 Model Standards in fact do not use the word "penalty" but rather require the court to inform defendant of:

> i) the maximum possible sentence on the charge, including that possible from consecutive sentences;
> ii) the mandatory minimum sentence, if any, on the charge; and
> iii) when the offense is charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

Fed. R. Crim. P. 11 and ABA Project on Minimum Standards for Criminal Justice Pleas of Guilty § 1.4 (Approved draft 1968).

[23] For example, in 1977, the D.C. Court of Appeals held, *inter alia*, that Rule 11 required an explanation of the mandatory special parole term as a consequence of the sentence:

> We have no doubt that the authors of Rule 11 in its original form would have considered a mandatory special parole term of three years or more following upon a prison sentence to be a matter of consequence to a defendant proposing to plead guilty. Although the 1975 amendment of Rule 11 dropped the reference to the "consequences" of the plea, we regard its mandate that a defendant be informed of the "maximum possible sentence" as continuing to require that he be informed of the mandatory special parole term.

Id. In *Watson*, the D.C. Court of Appeals considered a version of Rule 11 that did not yet include specific language requiring the court to notify a defendant about a term of supervised release or parole. Nonetheless, the court still found that Rule 11 implicitly included a requirement to inform a defendant of a mandatory special parole term.

[24] In 1981, when Rule 11 was subsequently amended to add the express language (including for the first time the phrase "the effect of any special parole term") by which the People seek to distinguish federal provision from the Guam law, the Advisory Committee to the Judicial Conference Committee on Rules of Practice and Procedure commented this was *not* a change in the law as applied:

> This amendment does not make any change in the law, as the courts are in agreement that such advice is presently required by Rule 11. *See, e.g., Moore v. United States*, 592 F.2d 753 (4th Cir. 1979); *United States v. Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978); *United States v. Del Prete*, 567 F.2d 928 (9th Cir. 1978); *United States v. Watson*, 548 F.2d 1058 (D.C. Cir. 1977); *United States v. Crusco*, 536 F.2d 21 (2d Cir. 1976); *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975). In *United States v. Timmreck*, 441 U.S. 780 (1979), 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

Amendments to the Federal Rules of Criminal Procedure Advisory Committee's note, 93 F.R.D. 255 (1981). The committee went on to explain the purpose of the amendment "is to draw more

specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure." *Id.*

[25] The fact that federal courts construed Rule 11 to require advisement of special parole terms imposing a period of supervised release even when its plain language only required a judge to inform a defendant of the "maximum possible sentence," undercuts the People's argument that the lack of an express reference to a term of special parole in Guam's statute is a reason that federal case law should not be considered by this court.

[26] The People also urge us to reconsider the analysis in *Chung* on the ground that violation of the special parole term under federal law may have more serious consequences than violation of a special or mandatory parole term under the law of Guam. This argument has some merit in the case of Quitugua. The *Sanclemente-Bejarano* special parole term was first imposed by the Comprehensive Drug Abuse and Control Act of 1970 ("Drug Act") as an alternative to making drug offenders ineligible for parole.[8] 21 U.S.C.A. § 841, Pub. L. No. 91-513, 84 Stat. 1236 (1970); *see United States v. Yazbeck*, 524 F.2d 641, 643 n.2 (1st Cir. 1975). The federal special parole term began to run after the regular sentence, including any regular parole, has been served. Revocation of the special parole for violation of its conditions resulted in an additional prison term equal in length to the entire special parole term. The Drug Act's mandatory special parole, if revoked, could greatly expand the defendant's period of incarceration, because the defendant would not be credited for time he has been on release and must serve the remaining

[8] The Act provided that a person convicted of possessing five or more kilograms of cocaine is not eligible for parole at any time during his incarceration. In addition, it mandated a "term of supervised release," formerly known as a "special parole term," of at least five years, to which the defendant will be subject following his incarceration. In *Sanclemente*, defendant claimed the trial court erred by failing to inform him that he would not be eligible for parole at any time during his incarceration, and also that the court erred by failing to explain the nature and effect of the term of supervised release. 861 F.2d 206 at 208-09.

period of his initial sentence plus the period of supervised release. Furthermore, the term of supervised release could be extended, potentially to a life term.

[27] In contrast, the consequences of revocation of the mandatory parole term under Guam law are not as severe. An offender who is recommitted upon revocation of his parole shall serve a term not to exceed the longer of the unserved balance of the parole term *or* the remainder of the original sentence determined from the date of conviction. Nonetheless, the term of parole "may or may not be within the limits of the original prison sentence." 9 GCA 80.70 COMMENT (2005). Thus, the parole term may operate to subject the defendant to a longer time in jail than the defendant would face in the absence of such a term.

[28] This mandatory parole term is a direct, not collateral, consequence of the plea, in that it is explicitly imposed by statute immediately and automatically upon the conviction of theft. The relative gravity of the consequence of violation of a mandatory parole term under Guam law versus federal law may be relevant to our later analysis of whether substantial rights are affected or whether a miscarriage of justice might result from failure to reverse the error. Nonetheless, this difference in severity is not sufficient grounds for us to reconsider the reasoning in *Chung* that section 60.50(d) requires a court to advise a pleading defendant of the maximum possible penalty he will face, and the mandatory parole term imposed by operation of law contributes to and in some cases extends what the maximum possible penalty is. We hold that 8 GCA § 60.50(d) requires a trial court to inform a defendant of and ensure defendant's understanding of a mandatory term of parole or recommitment as imposed by 9 GCA § 80.70(b), and a trial court's failure to do so is error.

B. The error was "clear and obvious" under current law

[29] The second prong of our analysis under plain error review is whether the trial court's

error was "clear and obvious" under current law. *People v. Jones*, 2006 Guam 13 ¶ 24. In *Chung*, the court expressly stated the rule that the trial court, in failing to inform Chung of the mandatory special parole under 9 GCA § 80.37, failed to comply with 8 GCA § 60.50(d). *Chung*, 2004 Guam 2 ¶ 28. Citing to *Sanclemente-Bejarano*, the court noted that the issue was "whether the defendant knew before pleading guilty that he could be sentenced to a term as long as the one he eventually received." *Id.* (quoting 861 F.2d at 210). Applying the same reasoning, the existence of a mandatory parole term imposed by operation of law as a separate portion of a defendant's sentence could affect whether the defendant knew before entering the plea that she could face a sentence to a term as long as the one she eventually received. We conclude that the trial court's error in Quitugua's case was "clear and obvious" under current law.

C. Quitugua's substantial rights were affected

[30] The third prong of the plain error analysis is whether the defendant's substantial rights were affected by the error. *People v. Jones*, 2006 Guam 13 ¶ 24. Quitugua contends that the trial court's failure to inform her of the mandatory special parole term affected her substantial rights. In response, the People point out that Quitugua failed to allege that she would have pleaded differently but for the trial court's error; therefore, Quitugua has only demonstrated a technical violation by the court, insufficient to demonstrate that her substantial rights have been prejudiced.

[31] In *Chung*, the court applied the substantial rights prong of the plain error review to the trial court's failure to inform Chung of a mandatory special parole term. There was no prejudice to Chung's substantial rights where the court found that Chung had been advised of maximum possible penalties totaling fifty-five years, and subsequently received a sentence of forty years imprisonment, plus the five-year supervised release term. Chung's total sentence of forty-five

years was below the fifty-five year maximum of which he had been advised. Therefore, Chung did not experience prejudice from not having been informed of the supervised release term when he entered his plea, the error was harmless and did not affect any substantial rights. *Chung*, 2004 Guam 2 ¶ 29.

[32] Similarly, in *Sanclemente-Bejarano*, the trial court had advised the defendant entering the guilty plea that the maximum possible penalty for his offense was life imprisonment, but had failed to mention the term of supervised release. Defendant was actually sentenced to fifteen years in prison and a five-year term of supervised release. On appeal, the Ninth Circuit held that the prejudice that resulted from not informing him of the supervised release, and the court's error, were harmless. *Sanclemente-Bejarano*, 861 F.2d at 210. Although *Sanclemente-Bejarano* was decided on harmless error review, a finding of harmless error is similar to the court's finding in *Chung* that no substantial rights were affected.

[33] From these cases emerges the rule that when a defendant entering a plea was advised of the possibility of a longer sentence, exclusive of the parole term, than the sentence he ultimately received, inclusive of the parole term, a reviewing court has no reason to presume the defendant's decision would have been different if the judge had directly advised him about the parole term during the plea colloquy. *United States v. Warren*, 338 F.3d 258, 260 at n.1 (3d Cir. 2003); *United States v. Coviello*, 225 F.3d 54, 66-67 (1st Cir. 2000).

[34] On the other hand, where the combined sentence of imprisonment and special parole exceeds the maximum sentence of which the defendant has been advised, a court may find reversible error. *United States v. Del Prete*, 567 F.2d 928, 929-30 (9th Cir. 1978). In *United States v. Del Prete*, the Ninth Circuit held that a defendant who was not personally advised by the judge of a special parole term which would be imposed for at least three years and could be

imposed for as many additional years as the court deemed proper was entitled to withdraw his guilty plea. *Id.* at 929. The court vacated the judgment of conviction, remanding the case for a further hearing at which defendant was permitted to enter a new plea. *Id.* at 930.

[35] *Del Prete* is a 1978 decision in which the Ninth Circuit applied an automatic reversal rule, applying neither harmless error nor plain error review to its analysis of the Rule 11 violation.[9] The court made no determination of whether the defendant's substantial rights were violated. However, *Del Prete* is clear authority for the proposition that failure to inform a defendant of a special parole term is not harmless and does implicate a defendant's substantial rights, where the defendant consequently faces a penalty that exceeds the penalty of which the defendant had been advised in entering his plea. *See United States v. Roberts*, 5 F.3d 365, 369-70 (9th Cir. 1993) (failure to advise the defendant of a possible mandatory supervised release term before the acceptance of a guilty plea is not harmless because the maximum possible penalty exceeded that discussed by the district court).[10]

[36] There are two key differences in the analysis when we apply the plain error review from the analysis under the harmless error review. One difference, as we will discuss in the next section, is that on plain error review, the defendant must additionally show that reversal is

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[9] Review for harmless error or plain error was required by the addition of subsection (h) to Rule 11 in 1983. *See* Fed. R. Crim. P. 11(h) Advisory Committee's note (1983 amendment), discussed in *U.S. v. Jaramillo-Suarez*, 857 F.2d 1368, 1370-73 (9th Cir. 1988).

[10] *See also Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978) (Where petitioner was advised that possible maximum consequence of a guilty plea would be imprisonment for fifteen years followed by a minimum special parole term of three years, but received a sentence of twelve years imprisonment, followed by an eight-year special parole term (so that the possible sentence was two years more than the maximum for which the petitioner had bargained), the petitioner was prejudiced and unfairly compelled to accept the detrimental effects of his bargain without realizing its benefits. Therefore the guilty plea would be vacated unless his term of custody were limited to that for which he had bargained.); *United States v. Crusco*, 536 F.2d 21 (2d Cir. 1976) (the inadvertent failure to inform the defendant that he faced a maximum of seven, not four years of incarceration and a special parole term of not less than three years entitled the defendant to withdraw his guilty plea and to plead anew, even though there was no evidence in the record that the defendant misunderstood that the special parole would be imposed in addition to his jail term, where the record did reveal that the defendant may reasonably have understood the promised maximum sentence of seven years to encompass the three-year special parole term, rather than being in addition thereto).

necessary to avoid a miscarriage of justice. The other difference from the harmless error review is that when a defendant has failed to preserve an error for appeal, the defendant, not the government, bears the burden of showing prejudice; that is, that the defendant's substantial rights have been affected. *People v. Van Bui*, 2008 Guam 8 ¶ 10; *People v. Chung*, 2004 Guam 2 ¶ 9 (citing *United States v. Vonn*, 535 U.S. 55, 58 (2002)). Therefore, in the absence of evidence in the record to show the defendant was prejudiced, the government will prevail. *See also United States v. Olano,* 507 U.S. 725, 734 (1993) ("In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.").

[37] The *Olano* court observed that there may be a "special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Id.* at 735. While the U.S. Supreme Court has not yet issued an opinion identifying such an error, it has never repudiated this statement in *Olano*. One jurisdiction, the state of Illinois, has interpreted its substantially-similar rule to find that an error that may not have affected the outcome must still be remedied if it is "of such gravity that it threatens the very integrity of the judicial process." *People v. Blue*, 724 N.E.2d 920, 941 (Ill. 2000). In the case of such errors, regardless of a showing of prejudice "the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected." *Id.*

[38] We have never identified a class of presumptively prejudicial errors, and we have not been asked to do so here. Quitugua neither contends in her brief nor contends upon questioning at oral argument that the error in her case is presumptively prejudicial. Therefore we consider whether the record demonstrates that the error was prejudicial to Quitugua. Upon a review of the record, we find that there is enough evidence to suggest Quitugua may have been prejudiced.

[39] The People point out that Quitugua has failed to allege in her brief or at oral argument that she was actually unaware of the special parole term, and has failed to argue that she would not have pleaded guilty if she had been properly advised by the trial court. They characterize Quitugua's complaint in these circumstances as merely an allegation of a technical violation of the court's section 60.50 duty. Implicitly, they contend that absent a showing by Quitugua in her brief that she was prejudiced by the court's error, any error is presumed harmless.

[40] While some courts may require a defendant to affirmatively assert in his brief that he would not have entered the plea but for the error, we will not impose such a pleading requirement. Instead, this court determines from our review of the whole record on appeal whether such an inference could be supported. *See United States v. Vonn*, 535 U.S. 55, 57 ("A reviewing court may consult the whole record when considering the effect of any Rule 11 error on substantial rights.").[11] Of course, our task of considering the record is facilitated when counsel for the appellant includes persuasive argument, applying case law to the factual scenario of the case at issue.

[41] Our approach finds support in federal case law. At least one Circuit has taken this approach, inferring from the entire record whether there is a "reasonable probability" that the defendant would have decided differently even where the defendant failed to affirmatively assert that, but for the error, he would not have entered the guilty plea. *See United States v. Sura*, 511 F.3d 654, 661-62 (7th Cir. 2007); *Id.* at 665 (majority's approach expressly articulated by Easterbrook, C.J., dissenting).

[11] On remand, "after considering the full record," the Ninth Circuit found no plain error. *United States v. Vonn*, 294 F.3d 1093, 1094 (9th Cir. 2002). Despite the trial court judge's failure to advise Vonn about his right to trial counsel during the plea colloquy, the appellate court presumed that Vonn recalled at his plea colloquy information concerning his right to trial counsel gained previously during his initial appearance, arraignment, and status conference, and further presumed that Vonn may have been aware of his right to trial counsel due to the fact that Vonn was accompanied by counsel at a status conference. *Id.*

[42] The court has indicated in *Chung* and *Van Bui* that its approach to section 60.50 violations is to consider federal jurisprudence. In *United States v. Dominguez Benitez*, the United States Supreme Court considered the question whether, in order to show that a violation of Rule 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred. *United States v. Dominguez Benitez*, 542 U.S. 74, 80 (2004). The court held that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed Rule 11 plain error, must show a reasonable probability that, but for the error, he would not have entered the plea. *Id.* at 81-82. Specifically, a defendant "must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Id.* (internal citation and quotation omitted).[12] *Id.* at 83.

[43] The reviewing court should consider "record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any Rule 11 error." *Id.* at 84 (citation omitted). The Supreme Court reversed and remanded the case, finding that, in deciding whether a defendant was prejudiced, the Ninth Circuit Court of Appeals had employed a standard that improperly foreclosed consideration of such record evidence. *Id.* The proper inquiry would include "the overall strength of the Government's case and any possible defenses that appear from the record." *Id.* at 85. The court further explained:

> The point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter

[12] In footnote 9, the court held that "the reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." 542 U.S. at 83. Justice Scalia expressly dissented to this on the grounds that creating a standard of proof different from "preponderance of the evidence" created subtle shades of proof that were impracticable to apply. *Id.* at 86.

> that the choice may have been foolish. The point, rather, is to enquire whether the omitted warning would have made the difference required by the standard of reasonable probability . . . .

Id.

[44] We recognize that, unlike the Federal Courts of Appeals applying the federal rules of criminal procedure, this court is at liberty to develop its own test in lieu of the "reasonable probability" standard. *Id.* We believe, however, that the reasonable probability standard is well reasoned and we see no reason to substantially depart from it. In determining whether the defendant has met her burden to show that her substantial rights have been violated, we will consider the entire record to determine whether the probability of a different result is sufficient to undermine our confidence in the outcome of the proceeding. In the context of a claimed section 60.50 violation, this inquiry into whether there is a reasonable probability of a different *result* under the "substantial rights" prong is an inquiry into whether the defendant might have decided not to enter a guilty plea but for the error. Although the burden of proof is on the defendant, our determination is based on the entire record, not solely on the defendant's allegations.

[45] Based on the entire factual circumstances of the record before us, we find there is a reasonable probability, sufficient to undermine our confidence in the outcome of the proceeding, that Quitugua would have pleaded differently if properly advised. This finding is congruent with *Chung* and with federal cases such as *Del Prete* decided under the harmless error standard of review. Quitugua was informed of and received the maximum possible incarceration period for the count to which she pleaded guilty: the court informed her that the theft charge carried a maximum sentence of five years, she pleaded guilty, and she was sentenced to five years, plus the three-year special parole term.

[46] This parole term is not of insignificant duration relative to the zero to five-year prison sentence to which she pleaded guilty. In other words, if a defendant pleaded guilty to a charge with a maximum sentence of seventy years, we might be less likely to find that the failure to admonish the defendant of a three-year special parole term affected the defendant's substantial rights.[13] There is no evidence on the record to suggest that we should presume Quitugua was actually aware of the mandatory, non-discretionary nature of such a term (such as a direct discussion in the hearing transcripts, or a clearer provision in the plea agreement expressly stating that Quitugua would by operation of law face a mandatory three-year special parole term).

[47] On these facts, we find the error did affect Quitugua's substantial rights.

D. Failure to correct the error would not result in a miscarriage of justice or threat to the integrity of the judicial process

[48] This court has stated that its discretion to reverse under plain error review will be employed only "where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *People v. Demapan*, 2004 Guam 24 ¶ 5.[14] The plain error doctrine, as it has developed in Guam, allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances—when necessary to maintain the integrity of the judicial process, or

[13] The Fifth Circuit, reviewing a Rule 11 error for harmless error, has explained that the determination of harmless error is a fact-sensitive inquiry. The court applied a "common sense, logical analysis" to find harmless error where there was no reasonable probability that a defendant willing to enter a guilty plea with the understanding the plea is certain to produce a sentence of not less than 21 years would have changed his decision given the "additional knowledge that there happens to be a one-year mandatory minimum penalty associated with one of the crimes to which he is pleading." *United States v. Johnson*, 1 F.3d 296, 303 (5th Cir. 1993). At the same time, the court noted that "under significantly less imposing facts and circumstances" the court could well find that the same term does affect the defendant's substantial interests and is not harmless error. *Id.* at n.31.

[14] As one federal court has articulated it, "[t]he plain error rule is not a run-of-the-mill remedy. The intention of the rule is to serve the ends of justice; therefore it is invoked only in exceptional circumstances . . . ." *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980) (internal quotes and citations omitted).

when necessary to prevent a miscarriage of justice. These two situations, while they may overlap, are distinct grounds.

[49] This prong of this court's plain error review tracks the fourth prong of the plain error review by federal courts, as articulated in *Olano*. There, the court explained that Rule 52(b) allows a reviewing court to exercise its discretion and notice a forfeited error "'in those circumstances in which a miscarriage of justice would otherwise result'"—that is, where the defendant is actually innocent. 507 U.S. at 736, (*quoting United States v. Young*, 470 U.S. 1, 15 (1985)). But the court acknowledged that plain error is not limited to cases where the putative error causes the conviction of an innocent person; it also applies to cases where the putative error affects the fairness or integrity of the trial. *Id.*

[50] In support of their contention that no miscarriage of justice would result from denying Quitugua's request for vacation of her sentence, the People argue here that Quitugua has only alleged a technical violation of statute, citing to *United States v. Timmreck.* 441 U.S. 780 (1979). In *Timmreck*, the court held that a violation of Rule 11 which requires that a judge inform a criminal defendant of any applicable special parole term before accepting a guilty plea, was not a defect resulting in a complete miscarriage of justice, nor was it "an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at 783.

[51] The U. S. Supreme Court found that the trial court's mere failure to inform the defendant of the three-year minimum mandatory special parole term, upon accepting a guilty plea to a controlled substance charge, could not be attacked on a motion to vacate the sentence. *See Id.* at 784-85. The court observed that the defendant claimed only a technical violation of the rule, which could have been raised on direct appeal, and did not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial court, he would not

have pleaded guilty. *Id.* Under these circumstances, no claim could reasonably be made that the error "resulted in a 'complete miscarriage of justice; or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" *Id.*

[52] *Timmreck* is not dispositive. There, the defendant sought collateral review of a controlled substance conviction via a 28 U.S.C.A. §2255 *habeas corpus* action in federal court. *Id.* at 782. The court included in its holding the fact the defendant could have raised the issue on direct appeal to the state appellate court, but had chosen not to do so. *Id.* at 780. As this court explained previously in *People v. Jones*, 2006 Guam 13 ¶ 48, the case law suggests that the showing of prejudice required by a habeas petition (as in *Timmreck)* is significantly higher than what one must demonstrate under plain error review. *See Murray v. Carrier*, 477 U.S. 478, 493-94 (1986). Thus *Timmreck*, without more, fails to answer the question of whether the omission of the special parole term in the instant case, a direct appeal, merits reversal of the judgment.

[53] However, after an examination of Quitugua's entire case, we are not of the opinion that it is reasonably probable that a result more favorable to Quitugua would have been reached in the absence of the error.

[54] Quitugua does not assert actual innocence. Both in a written plea agreement and in court, Quitugua avowed that she was pleading guilty because she is guilty. In her own words, Quitugua admitted during the plea colloquy that she stole funds, she hid statements, and she forged signatures on checks—an admission that could have supported a finding of guilt on the forgery, theft of property held in trust, and tampering charges. ER at 16 (Hr'g on Change of Plea). This was not an Alford plea or plea of nolo contendere.[15]

[15] Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a criminal defendant is not required to admit his guilt, but may consent to being punished as if he were guilty to avoid the risk of proceeding to trial. Similarly, Guam statute

[55] Although Quitugua need not establish actual innocence to prevail, *see Olano*, 507 U.S. at 736, she still must show that failure to provide relief would cause a miscarriage of justice. *Id.* at 736-37. In her appellate brief, Quitugua does not assert that, had she been informed in open court of the term of supervised release, she would not have pleaded guilty, nor does she assert that she has any plausible defense that she could advance at trial.

[56] The record indicates that Quitugua should have been aware that her plea would result in some form of supervised release in addition to her time in prison. The written plea agreement expressly contemplated the possibility of a period of parole between three and five years. Further, the court and Quitugua's counsel expressly contemplated the existence of some parole during the change of plea hearing when, in Quitugua's presence, they discussed her restitution obligations.

> THE COURT: . . . What I do want; however, in H, I want to modify that because I think it should be, the Defendant shall pay restitution in monthly installments to be arranged by the Adult Probation Office or Parole Services Division, period.
>
> MS. KENNEDY: We could do that, Your Honor. I know that I was not certain she would have a monthly income, so ---

ER at 11-12 (Hr'g on Change of Plea).

[57] In Quitugua's presence, the court asked the prosecutor whether he had explained to the victim that the statute allows any restitution not fully paid "at the end of any probationary or parole period" to be converted into a judgment. *Id.* at 6. The court also explained that the restitution obligation "as she continues with the parole board remains, and even beyond the parole board. She won't be before this Court in terms of probation. She will be on parole. All right?" *Id.* at 8.

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provides that a defendant may, with the consent of the court, enter a plea of *nolo contendere*. 8 GCA § 60.40 (2005).

[58] Quitugua presents no evidence to suggest that she was not actually guilty. Only an acquittal by jury would have permitted her to escape a three-year term of parole. In the absence of any exculpatory evidence on the record before us, we cannot ascertain a reasonable probability that an acquittal would have been the outcome. Without such an assertion, there is no evidence to indicate a reasonable probability that Quitugua could have negotiated a more favorable plea bargain than the one count of theft to which she ultimately pleaded guilty. Because Quitugua does not say either that she was actually ignorant of the term of supervised release omitted from the colloquy or that she would not have pleaded guilty had the colloquy been conducted properly, she cannot demonstrate a miscarriage of justice meriting the exercise of our discretion to correct the forfeited error.

[59] We next consider whether evidence in the record demonstrates that the error seriously affected the integrity of the judicial proceeding. In *United States v. Mastrapa*, the Fourth Circuit found that to allow a district court to accept a guilty plea from a defendant who did not admit to an essential element of guilt under the charge and did not voluntarily choose to enter an *Alford* plea would surely cast doubt upon the integrity of our judicial process, particularly when Rule 11 proceedings were conducted entirely through an interpreter. *United States v. Mastrapa,* 509 F.3d 652, 661 (4th Cir. 2007).

[60] On the other hand, the Ninth Circuit has found no such threat to the integrity of the judicial process from holding a defendant to his guilty plea when the defendant unequivocally admitted in his plea agreement, during his plea colloquy, and at his sentencing hearing that he should be held responsible for drug transactions involving quantities well in excess of those necessary to expose him to a potential life sentence, even where the trial court had erred by failing to inform the defendant during his plea colloquy that the government would be required to prove drug

quantity to the jury beyond a reasonable doubt. *United States v. Minore*, 292 F.3d 1109, 1120 (9th Cir. 2002); *see United States v. Perez*, 270 F.3d 737, 740 (8th Cir. 2001) (failure to advise defendant at plea taking that jury must decide drug quantity did not seriously undermine the fairness, integrity or public reputation of the proceeding where defendant agreed he was responsible for sufficient quantities to subject him to enhanced punishment under § 841(b)(1)(B)).

[61] As discussed above, here Quitugua has unequivocally admitted guilt to the underlying facts in her plea agreement and during her plea colloquy. In asking us to vacate this plea, she has not disputed her actual guilt. The court advised Quitugua of her right to plead not guilty, the right to a jury trial where she would be presumed innocent until proven guilty beyond a reasonable doubt, the People's burden in proving guilt, her right to confront witnesses and call witnesses in her defense, and her right to remain silent. ER at 15 (Hr'g on Change of Plea). The court informed Quitugua of the minimum and maximum term of imprisonment for the charge to which she pleaded guilty. *Id.* at 18. There is no allegation that Quitugua's plea was not entered voluntarily and of her own free will, and Quitugua asserted on the record that the entry of her plea was both voluntary and of her own free will. *Id.* at 15. Quitugua was represented by counsel during all stages of her criminal proceeding and at no time did she assert dissatisfaction with her legal representation.

[62] We further observe that the case at bench is not a case where the court exceeded its discretion in ordering a penalty in excess of the statutory sentencing range. The parole term imposed on Quitugua by operation of law was a term of three years. Under any guilty conviction, whether resulting from a plea agreement or from a trial, the law mandates that, as an invariable incident of her sentence, Quitugua would face a term of parole or recommitment of three years after serving her sentence. *See* 9 GCA 80.70 COMMENT. Furthermore, the statute

confers no discretion on the court to waive the parole term—thus the parties could not have negotiated around the penalty imposed by the parole term even if the defendant would have attempted to do so if apprised of the term.

[63] We see no threat to the integrity of the judicial process from the court's error in Quitugua's case. On these facts, reversal and vacation of Quitugua's plea is not necessary to avoid a threat to the integrity of the judicial process, nor is reversal necessary to avoid a miscarriage of justice.

IV. CONCLUSION

[64] We find that the trial court erred when the court did not personally inform Quitugua upon entry of her guilty plea that she faced a mandatory three-year term of parole in addition to up to five years in jail. A fixed term of parole contributes to the maximum penalty a defendant may face and therefore the court should ensure a defendant is aware of such a term. However, applying the plain error standard of review, upon consideration of the record and evidence before us, we do not find that this error posed a threat to the integrity of the judicial process, nor do we find that our failure to reverse would result in a miscarriage of justice. Accordingly, the judgment of the trial court is **AFFIRMED.**

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice