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

AMENDED OPINION ON REHEARING

Cite as: 2009 Guam 10

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

Appearing for Plaintiff-Appellee:
Jeffrey A. Moots, *Esq.*
Assistant Attorney General
Office of the Attorney General
Prosecution Division
287 W O'Brien Dr.
Hagåtña, GU 96910

Appearing for Defendant-Appellant:
Howard Trapp, *Esq.*
Howard Trapp, Inc.
200 Saylor Bldg.
139 E Chalan Santo Papa
Hagåtña, GU 96910

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

CARBULLIDO, J.:

[1] This Amended Opinion supersedes in its entirety the prior opinion of this court, *People v. Quitugua*, 2009 Guam 5. 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 Quitugua has failed to demonstrate a violation of her substantial rights. Furthermore, we identify 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.

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[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]

[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 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.

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[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.
>
> (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.

[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.[2] Because Guam's plain error statute is derived from the former Federal Rule of Criminal Procedure

[2] 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.

("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.

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.[3] 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 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

[3] 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.*

review, it found on the facts of the case that Chung's substantial rights were not affected. *Id.* at ¶ 29.[4]

[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 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

[4] 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.

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).[5]

[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 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

[5] 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.

(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.[6] 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).

[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.

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[6] 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).

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.[7] 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 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

[7] 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.

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. Whether Quitugua has demonstrated a violation of her substantial rights

[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. This raises the question of who bears the burden of proving an error prejudiced the defendant's substantial rights.

[31] 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 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.").[8]

[32] We decline to accept the government's invitation to impose a specific pleading requirement on the defendant, but nonetheless recognize it is the defendant's burden to prove a violation of substantial rights, based on the record. 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, our inquiry will include "the overall strength of the Government's case and any possible defenses that appear from the record." *United States v. Dominguez Benitez*, 542 U.S. 74, 85 (2004). We will consult the whole record when considering the effect of any section 60.50(d) advisement error on substantial rights. *See United States v. Vonn*, 535 U.S. 55, 57; *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). Nonetheless, the defendant's failure to affirmatively assert that he would not have entered a plea but for the error may be one factor we consider.

[33] We considered a section 60.50(d) advisement violation in *People v. Chung*, 2004 Guam 2. In determining whether the trial court's failure to inform Chung of a mandatory special parole term violated his substantial rights, we observed 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

[8] There may be a "special category of forfeited errors that can be corrected regardless of their effect on the outcome." *Olano* at 735. 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.* We have never identified a class of presumptively prejudicial errors, and Quitugua neither contends in her brief nor contends upon questioning at oral argument that the error in her case is presumptively prejudicial. We decline to apply a presumption of prejudice here.

he entered his plea, the error was harmless and did not affect any substantial rights. *Chung*, 2004 Guam 2 ¶ 29. *Accord Sanclemente-Bejarano*, 861 F.2d at 210 (harmless error where the trial court had advised the defendant entering the guilty plea that the maximum possible penalty for his offense was life imprisonment, but failed to inform the defendant of the supervised release provision and failed to ask him if he understood the meaning of the supervised release or its effect, and defendant was actually sentenced to fifteen years in prison and a five-year term of supervised release).

[34] *Quitugua* admittedly presents a closer case than one in which the combined sentence of imprisonment and special parole does not exceed the maximum sentence of which the defendant has been advised. Where the parole term added to the sentence actually received exceeds the maximum penalty of which a defendant had been advised, a court is more likely to find prejudice, particularly when applying harmless error review. *See, e.g. United States v. Del Prete*, 567 F.2d 928, 929-30 (9th Cir. 1978) (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). *See also 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).

[35] On the other hand, failure to advise about special parole has been at times deemed a "technical violation" not cognizable on collateral review. *See, e.g., United States v. Timmreck*, 441 U.S. at 784. Applying plain error review, this court will require a defendant to show more than a mere technical violation to qualify for reversal. The inquiry into whether reversal on

appeal for plain error is justified is necessarily a fact-specific one. As the United States Supreme Court has observed, a "per se approach to plain-error review is flawed." *Young,* 470 U.S. 1 at 16, n. 14 (1985).

[36] The mere omission of a single Rule 11 warning, without a showing of prejudice, is not a structural error, i.e., an "'error that affects substantial rights'" or has "'substantial and injurious effect or influence in determining the . . . verdict.'" *Dominguez Benitez*, 542 U.S. at, 81-82, quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). Rather, to show prejudice, "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83. Defendant must "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.*

[37] Applying this standard, in an unpublished decision, the Eleventh Circuit found no violation of substantial rights where defendant made no affirmative showing that he would not have entered his plea but for the error. *U.S. v. Steele*, 155 Fed. Appx. 455 at 458 (11th Cir. 2005) ("Steele offers no evidence that he would not have pled guilty if he had known that the maximum supervised release term was five years instead of three. Therefore, the district court did not plainly err when it misstated Steele's maximum term of supervised release during his plea colloquy.") (internal citation omitted).

[38] On the other hand, where a defendant entered a plea in exchange for a *specific sentence*, rather than an open plea, courts have sometimes required no additional showing of prejudice by the defendant. *See United States ex rel. Baker v. Finkbeiner*, 551 F.2d 180, 183 (7th Cir. 1977) (". . . [Defendant] did suffer a detriment. He agreed to plead guilty in exchange for the promise

of a specific sentence by the prosecutor, which was then ratified by the trial judge. Yet he was given a more onerous sentence than he had been promised.") *See also Meyer v. U.S.*, 802 F. Supp. 845 (E.D.N.Y., 1992) (granting habeas petition where government and court failed to describe lifelong special parole term because the parole time and eighteen-year imprisonment went beyond the twenty-year imprisonment agreed to by defendant, and defendant claimed he would have chosen an alternative sentencing offer available to him had he been informed about the special parole term). However, Quitugua's is not a case where the plea agreement expressly bargained for a specific sentence, nor has she suggested that she made a choice between two competing plea offers that was influenced by the error.

[39] Other relevant factors that might affect our confidence in the outcome of the proceeding would be if Quitugua asserted she had no actual knowledge of the parole term, or if there was no indication in the record that she had ever been put on notice of the parole term. In *U.S. v. Williams*, a defendant who entered a plea of guilt to a charge of distribution of cocaine argued that the district court erred in failing to inform him of the mandatory minimum term of supervised release that would be imposed upon acceptance of his plea. *U.S. v. Williams*, 899 F.2d 1526 at 1531 (6th Cir. 1990). "From a thorough analysis of the record," the Sixth Circuit found that the trial court indeed did not inform Williams of the mandatory minimum term of supervised release. *Id.* However, this was harmless error. *Id.*

[40] The plea agreement had provided Williams with notice of the supervised release requirement. Further, Williams did not contend he was unaware of the term of supervised release mandated by his plea. "Moreover, Williams does not argue that he would not have pled guilty had the court informed him, in open court," of the term. *Id.* "Given the plea agreement's explicit supervised release requirement, we find that the district court's failure to mention it is

harmless." *Id. See also United States v. Bejarano*, 249 F.3d 1304, 1307 (11th Cir. 2001) (when the plea agreement and the district court both informed the defendant that his sentence included a term of supervised release, but failed to indicate the mandatory minimum term, the defendant's substantial rights were not affected because the defendant's PSI stated the specific minimum term of supervised release); *U.S. v. Carey*, 884 F.2d 547, 549 (11th Cir. 1989) (failure to advise defendant of mandatory term of supervised release before accepting guilty plea was harmless error when defendant was informed of supervised release in presentence report).

[41] The facts of Quitugua's case are similar to *Williams*. Quitugua entered an open plea. The written plea agreement expressly contemplated the possibility of a period of parole between three and five years. On appeal, Quitugua does not argue she was unaware of the term. Further, the transcripts from the change of plea hearing reveal that in Quitugua's presence, the court and Quitugua's counsel expressly contemplated the existence of some parole when 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 (Tr., Change of Plea).

[42] 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.

[43] These circumstances indicate a reasonable probability that Quitugua was in fact aware of the parole term; at any rate, the facts of this case are such that Quitugua has failed to show a reasonable probability that, but for the error, she would not have entered the plea.[9] Quitugua has not challenged the factual basis of the plea, nor denied any element of the crime or made a showing that the government's evidence would be in any way insufficient to lead to a conviction. Nor has Quitugua asserted that she would not have pleaded guilty had she been informed in open court of the term. Therefore, without any evidence in the record to support an allegation of prejudice except the mere fact that the colloquy did not specifically advise Quitugua that by operation of law her sentence would include a parole term, Quitugua has failed to establish a violation of substantial rights.

[44] Moreover, the supervised release term was just one of many factors Quitugua would have weighed in entering a plea. For example, had she not entered a plea, she faced 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 her agreement to plead guilty to one of the two counts of theft of property, the People promised to dismiss the four additional criminal charges. ER at 21-22 (Plea Agreement). *See United States v. Powell*, 269 F.3d 175, 186 (3d Cir. 2001) (harmless error for court to impose five-year supervised release term when it

[9] On plain error review, some courts might choose to grant discretionary reversal in a similar case. *See People v. Kull*, 171 Ill. App. 3d 496 (1988) (plain error occurred because defendant pled guilty in exchange for an agreed 22-year sentence, but was given 22 years plus 3 years mandatory supervised release). However, we are inclined to closely distinguish the defendant's burden on plain error from harmless error review. In harmless error review, the government bears the burden to prove that substantial rights were not violated; in plain error review, the defendant bears the burden to prove substantial rights were violated, and also must show that not reversing would lead to a miscarriage of justice/threat to judicial integrity.

originally stated three years would be maximum, where length of supervised release was just one of "many factors" defendant would have weighed in entering plea). Without an allegation by Quitugua that she would not have entered a plea of guilt had she been informed of the term of supervised release, we conclude that the probability of a different result is not sufficient to undermine our confidence in the outcome of the proceeding.

[45] After an examination of the entire record, 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. Under these facts, Quitugua has failed in her burden to demonstrate a violation of her 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

[46] In addition to our determination that Quitugua failed to demonstrate a violation of her substantial rights, we further find that the error in Quitugua's case does not present exceptional circumstances justifying relief under the fourth prong of plain error review. 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—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.

[47] 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,* 507 U.S. 725 (1993). Reversal for plain error is permissive, not mandatory. *Olano,* 507 U.S. at 735. "If the forfeited error is plain and affects substantial rights, the court of appeals has authority to order correction, but is not required to do so." *Id.* at 735. "It is this distinction between automatic and discretionary reversal that gives

practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level." *Id.* at 744.

[48] The plain error rule 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. *Olano*, 507 U.S. at 736, (*quoting United States v. Young*, 470 U.S. 1, 15 (1985)). But 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.*

[49] 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. 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 could not be attacked on a motion to vacate the sentence, where 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.* at 784-85. 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.*[10] *Accord United States v. Hamilton* 553 F.2d 63 (10th Cir. 1977), *cert. denied*, 434 U.S. 834 (failure to advise of a mandatory parole term may not inherently result in a miscarriage of justice).

[50] On the other hand, in some cases, a Rule 11 error will be found to have seriously affected the fairness, integrity, or public reputation of judicial proceedings. For example, where a court, from evidence in the record, determines it is "reasonably probable" that the defendant would have gone to trial but for the error, and there is evidence that the defendant might have been able to avoid conviction due to a weakness in the government's case, the court might conclude that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *See United States v. Monzon*, 429 F. 3d 1268, 1271-74 (9th Cir. 2005) (finding the Rule 11 error "seriously affects the fairness, integrity or public reputation of the judicial proceedings" because "a review of the record shows a reasonable probability of a different result, 'sufficient to undermine confidence in the outcome of the proceeding,'" where the government conceded that the district court erred by failing to determine that there was a factual basis for defendant's guilty plea; the crime required proof of an element of intent that the defendant had specifically objected to actually having when questioned by the district court; and the government's evidence, if presented at trial, would have failed to demonstrate the intent element of the crime). *But see U.S. v. Monroe*, 353 F.3d 1346 (11th Cir. 2003) (where a plea colloquy has substantially

[10] We recognize *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)* may be higher than what one must demonstrate under plain error review. *See Murray v. Carrier*, 477 U.S. 478, 493-94 (1986). However, *Timmreck* does inform our finding that in Quitugua's case, the mere allegation that the court failed to advise her of the parole term during the colloquy, without more, fails to smack of a miscarriage of justice. *Accord State v. Moeller*, 511 N.W.2d 803, 811 (S.D. 1994) (in collateral challenge to a final judgment, emphasizing that the failure to advise the defendant of the mandatory maximum sentence was "not a constitutional defect, and in and of itself does not smack of a miscarriage of justice"); *Bachner v. U.S.*, 517 F.2d 589, 596 (7th Cir. 1975).

addressed the "core concerns" of Rule 11 and the defendant fails to show prejudice from a Rule 11 error, the error does not seriously affect the fairness, integrity, or public reputation of the defendant's judicial proceedings).

[51] 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. Our decision not to exercise discretion to notice the forfeited error is heavily dependent on the facts of this case. Quitugua pleaded guilty to one of five counts with which she was charged in exchange for dismissal of the other counts. Quitugua does not assert that had she been advised of the parole term in her plea colloquy she would have pleaded differently. The record demonstrates that Quitugua had notice of the parole term via the plea agreement and discussion at the plea hearing; she has not contradicted this evidence on appeal. Finally, there is nothing in the record to indicate that the government would have had difficulty proving her guilt in trial, or that Quitugua had a choice among multiple plea agreements that might have been adversely influenced by the omission in the plea colloquy.

[52] "The 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). On this record "there is no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' Indeed, it would be the reversal of a conviction such as this which would have that effect." *Johnson v. United States*, 520 U.S. 461, 470 (1997).

IV. CONCLUSION

[53] 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 find the defendant failed to demonstrate a violation of her substantial rights. Further, refusing to exercise our discretion to reverse the error will not result in a miscarriage of justice or threat to the fairness, integrity or public reputation of judicial proceedings. 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