UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Nos. 91-6329 and 91-6333
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL EASTON

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 88 0377 & CR H 90 0214)

(December 8, 1992)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[1]

Easton appeals his conviction following his guilty plea. We affirm.

I.

Michael Easton entered an **Alford** plea of guilty[2] to false statements and false use of a Social Security number and was

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[2] Under **North Carolina v. Alford**, 400 U.S. 25, 37-38 & n.10, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), a defendant may plead guilty while protesting actual innocence.

sentenced to concurrent 36-month terms of supervised probation. Easton appealed pro se on various grounds and this Court affirmed for the most part but remanded for a determination whether the district court participated in plea discussions. On remand, the district court determined in its "findings of fact and conclusions" that the court had not participated in plea discussions. Easton appeals that determination.

II.

Fed. R. Crim P. 11(e)(1)(C) prohibits the district court from taking part in plea bargain agreements. Such a prohibition is "absolute" and its violation constitutes "plain error." **United States v. Adams**, 634 F.2d 830, 836 (5th Cir. 1981). "[A] defendant who has pled guilty after the judge has participated in plea discussions should be allowed to replead, without having to show that actual prejudice has resulted from the participation." **Id.** at 839. While the court itself may not offer a plea bargain, once a plea agreement is made between the government and the defendant, the court has the discretion to accept or reject that agreement. **See id.** at 835.

In accepting any guilty plea, a district court must ensure that Rule 11's "core concerns" are addressed, including whether a defendant understands the nature of the charges brought against him, the consequences of the plea, and its voluntariness. **United States v. Dayton**, 604 F.2d 931, 939 (5th Cir. 1979) (en banc),

cert. denied, 445 U.S. 904 (1980). In addition, the district court may accept an **Alford** guilty plea only where there is a "strong factual basis" supporting the plea, and where the defendant, selecting among his options, has made the guilty plea as a "voluntary and intelligent choice." **Willett v. Georgia**, 608 F.2d 538, 540 (5th Cir. 1979). Easton conceded in open court that the government's evidence would establish a "strong case" that he in fact "knowingly" and "willingly" committed the crimes for which he entered his **Alford** plea. Easton stated "family and personal reasons" as the basis for his decision to plead guilty and added that he desired "to terminate the litigation."

Before trial, Easton initiated plea bargain negotiations with the government. An essential element of conviction for false statements and false use of a Social Security number is that the defendant "knowingly" and "willingly" intend to commit the crimes. **See** 18 U.S.C. § 1001 and 42 U.S.C. § 408(g)(2). When Easton desired to plead guilty without admitting the requisite intent, the district court refused to accept the plea. According to the affidavit of defense counsel, adopted by the district court on remand as its findings of fact, counsel for the parties then discussed the possibility of an **Alford** plea. Counsel for the parties then met with the court in a bench conference that was not recorded to ask whether the judge would

accept an **Alford** plea. The judge then observed that although the court would not accept a plea that would in all probability be reversed for insufficiency of evidence, if Easton waived his right to appeal as to sufficiency of evidence on the record, the court would accept the **Alford** plea. Counsel indicated that he did not think Easton would appeal, but would ask Easton during the plea hearing if he would waive an appeal. The bench conference concluded, and Easton entered an **Alford** plea in open court.

Easton argues that the judge was actually participating in a plea bargain discussion when he informed the attorneys on what terms he would accept the **Alford** plea. However, Easton has mischaracterized the court's attention to Rule 11's core concerns as an act of participation in the plea bargain itself. The counsel for the parties approached the court after having agreed upon a plea bargain. Pursuant to acceptance or rejection of the plea bargain, the court properly addressed Rule 11's core concerns as specially tailored to **Alford** pleas. The **Alford** plea, by its very nature, can be confusing and even "counter-intuitive." **United States v. Punch**, 709 F.2d 889, 895 (5th Cir. 1983). Therefore, the court cannot accept or reject an **Alford** guilty plea unless the court has "inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence ..." **Willett**, 608 F.2d at 540 (citing **Alford**, 400 U.S.

at 38). "The average defendant may have some difficulty reconciling himself to the notion of pleading guilty while maintaining his innocence." **Punch**, 709 F.2d at 895. Therefore, when evaluating **Alford** pleas, the court must "make every effort to ensure that a defendant recognize precisely what his plea entails" and "must take especial care to ensure that the defendant knows what he is doing ..." **Id.** at 895 & n.12. The district court was careful in its open court exchange to satisfy itself that Easton clearly understood what his guilty plea entailed. The court's discussions with counsel during recess reflect the same concern by the court to address Rule 11's core concerns.

Easton argues that the district court grafted a new requirement, the waiver of appeal, onto **Alford**. But Easton has no basis for complaint; he was not actually precluded from appealing.

Easton also suggests that no one really knew what happened in that unrecorded bench conference and contended that the discussion involving the waiver of appeal took place off the record in violation of Rule 11. This court previously remanded for fact findings to determine whether the district court did, in fact, engage in plea discussions. As set forth above, the undisputed facts found by the district court indicate that the discussions with counsel off the record could not be fairly

characterized as part of a plea bargaining process. Because the fact findings reveal that the court was actually addressing Rule 11's core concerns, nothing occurred in that bench conference that was not repeated in open court. For the above reasons, Easton's argument is meritless.

AFFIRMED.