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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. KE'ANDRE DEWAYNE WILSON, Defendant - Appellant.	No. 23-6150

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:21-CR-00128-R-6)

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Nick Coffey, Assistant United States Attorney (Robert J. Troester, United States Attorney, with him on the brief), Oklahoma City, OK, for Plaintiff-Appellee.

Before **HARTZ**, **PHILLIPS**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

Following a jury trial and a conviction for a methamphetamine conspiracy charge, Ke'Andre Wilson received a ten-year mandatory minimum prison sentence. Wilson had tried to avoid going to trial by

pleading guilty to a drug conspiracy charge that did not carry a mandatory minimum. But at his change of plea hearing, the district court rejected his guilty plea because it found there was not a sufficient factual basis to support it. As a result, the Government withdrew the lesser charge and forced Wilson to proceed to trial facing the original charges, which included a mandatory minimum sentence upon conviction.

At trial, the prosecution entered into evidence, over defense objection, Wilson's guilty plea statements from his plea agreement and plea petition. Even though the district court never made a ruling that Wilson had breached the plea agreement, it permitted the Government to highlight to the jury Wilson's admissions of guilt during his attempted plea in its opening statement, direct examination of the lead case agent, cross-examination of Wilson, and during closing argument.

Wilson's appeal centers on the Government's unilateral declaration of a breach of the plea agreement. He argues the district court erred as a matter of law by allowing the Government to admit into evidence and use his plea agreement and statements of guilt against him without first holding a hearing, developing a factual record, and then making a definitive ruling that Wilson materially breached a specific obligation under the plea agreement. Because the Government fails to show that this error was harmless, he asks us to set aside his conviction.

Exercising jurisdiction over the final judgment under 28 U.S.C. § 1291, we agree with Wilson and reverse and vacate his conviction and remand for a new trial.

I. BACKGROUND

A. Facts and Evidence

On April 28, 2021, Wilson went to Low Life, a local autobody shop in Oklahoma City, to hang out with a childhood friend, Ramon Sanchez, whom he had known since the sixth grade. The body shop was a familiar place to Wilson, who had been there a "handful of times" throughout his childhood with Sanchez. R. III at 362. Wilson was an avid marijuana user and smoked marijuana that day with Sanchez and others.

Unbeknownst to Wilson, a confidential source (CS) of the U.S. Drug Enforcement Administration (DEA) was also present at Low Life that day to arrange a large shipment of methamphetamine to Chicago. The CS was a part of a "buy-bust" operation being run by law enforcement to arrest several individuals under investigation for drug trafficking in Oklahoma City. *Id.* at 155, 174–75. DEA Special Agent Quintin Cooper testified that a buy-bust operation is:

> a law enforcement operation where the confidential source is basically arranging a drug transaction with a member of the organization. Once that transaction is arranged and agreed upon, those individuals then meet at a meeting location. Once the confidential source confirms that the dope is present on

> scene, law enforcement then moves in, seizes the dope, and arrests the individuals that were involved with the drug transaction.

Id. at 164–65.

The first of several DEA-controlled methamphetamine purchases in Oklahoma City was coordinated by the CS in January 2021. The CS, who spoke virtually no English, testified at trial under the alias of "David Martinez" and was assisted by an interpreter. *Id*. at 165, 222. Martinez had been a DEA CS since 2012 and received several benefits in exchange for his cooperation, including repeated dismissals of criminal charges in 2012 and 2015, immigration benefits of a perpetually deferred action of removal, and payments totaling $480,000, including $60,000 for the April 28 buy-bust operation.

To make the buy-bust operation viable, DEA agents directed the CS to first set up several smaller purchases that would culminate in "a bigger transaction of methamphetamine to transport to Chicago" from Oklahoma City on April 28. *Id*. at 165, 167. The DEA arranged with the targets of the operation that they should use a box truck with a hidden compartment to drive several kilograms of methamphetamine to Chicago. After making several drug purchases in the months prior, the CS arranged "a 30-kilogram transaction of methamphetamine" to take place on April 28. *Id*. at 174–75.

The DEA installed a pole camera and other surveillance measures to monitor the outside of Low Life and to capture the day's events on video.

Ultimately, during the buy-bust operation at Low Life, the agents seized a total of 133 kilograms of methamphetamine and made several arrests. Wilson was never a target of this operation or any of the preceding controlled purchasers by the DEA. In fact, government agents first became aware of Wilson when the CS spotted him inside Low Life while the buy-bust operation was already in progress. The CS, who identified Wilson at Low Life that day, admitted he never spoke to Wilson on April 28. Rather, the CS stated that he "just looked at [Wilson] and kind of greeted him, but with my eyes." *Id*. at 268. Before his arrest that day, Wilson was never seen or discussed in any of the prior surveillance or controlled drug buys. The case agent supervising the buy-bust operation admitted being unfamiliar with Wilson until he was observed in Low Life on April 28.

After leaving Low Life by himself on April 28 while driving a white Lincoln car, Wilson was pulled over and arrested. No drugs or contraband were located on Wilson or inside his car. The Government also did not ever identify any text messages, phone calls, or any other evidence connecting Wilson to the methamphetamine conspiracy or its members, other than his childhood friend, Sanchez.

B. The Indictment

In May 2021, a grand jury returned an indictment charging Wilson and seven co-defendants. Wilson was charged in two counts of the indictment: (1) Count One – conspiracy to possess with intent to distribute and to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846; and (2) Count Five – possession with intent to distribute methamphetamine, and aiding and abetting, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2. R. I at 65–70.

C. Guilty Plea

After being charged, Wilson reached an agreement with the Government to resolve his case in exchange for a guilty plea to a lesser charge. He signed and entered into both a plea agreement and a petition to enter a plea of guilty.[1] As part of his plea agreement, Wilson agreed to plead guilty to a drug conspiracy charged by the superseding information, but only to the drug quantities covered by 21 U.S.C. § 841(b)(1)(C), which do not trigger any mandatory minimum prison sentence. Wilson was also eligible for a lower sentence under the safety valve, 18 U.S.C. § 3553(f).

[1] A plea petition is a standard fillable form that can be found on the district court's website for the Western District of Oklahoma. It must be completed and filed by a criminal defendant and counsel prior to the guilty plea hearing.

Wilson's plea petition repeatedly confirmed that he wanted to plead guilty to the superseding information. Under the section "Conclusion/Factual Basis," Wilson acknowledged in writing that he was guilty. *Id*. at 423. In response to a prompt on the form asking him to "[s]tate what you did to commit the offense(s) to which you are now pleading GUILTY," Wilson hand-wrote and signed his name to this statement: "On or about April 28th, 2021, in the Western District of Oklahoma, I conspired with others to distribute a quantity containing a detectable amount of controlled substance in violation of Title 21 U.S.C. 841a(1)." *Id*.

The facts set forth in the plea agreement signed by Wilson also stated in paragraph two that Wilson "must admit, and does admit":

> that on or about April 28, 2021, in the Western District of Oklahoma: (1) he agreed with at least one other person to violate federal drug laws – namely, those prohibiting the possession with intent to distribute and the distribution of controlled substances; (2) he knew the essential objective of the conspiracy; (3) he voluntarily and knowingly involved himself in the conspiracy; (4) there was interdependence among the members of the conspiracy; and (5) the conspiracy involved a quantity of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, and salts of its isomers.

Id. at 402.

Also notable is what was *not* included in the agreement. The agreement did not require Wilson to speak in open court to explain the factual basis for the plea agreement or to supply more facts when

questioned by the district court. Nor did the plea agreement include other facts surrounding the conspiracy that might further inculpate Wilson in the conspiracy to transport multiple kilograms of methamphetamine in a box truck from Oklahoma City to Chicago.

In paragraph 17, the plea agreement also defined the two ways that Wilson would be in breach of the agreement, along with the consequences of a breach:

> 17. The parties also recognize that if the Court determines Defendant has violated any provision of this Plea Agreement or authorizes Defendant to withdraw from Defendant's knowing and voluntary guilty plea entered pursuant to this Plea Agreement:
>
> (a) all written or oral statements made by Defendant to the Court or to federal or other designated law enforcement agents, any testimony given by Defendant before a grand jury or other tribunal, whether before or after the signing of this Plea Agreement, and any leads from those statements or testimony, shall be admissible in evidence in any criminal proceeding brought against Defendant; and
>
> (b) Defendant shall assert no claim under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(f), Federal Rule of Evidence 410, or any other federal rule or law that those statements or any leads from those statements should be suppressed. Defendant knowingly and voluntarily waives Defendant's rights described in this paragraph as of the time Defendant signs this Plea Agreement.

Id. at 409–10.

At the change of plea hearing before the district court, Wilson was sworn and placed under oath prior to answering the court's questions. The

court asked Wilson to describe the factual basis of his guilty plea. It advised him that it "must be satisfied there is a factual basis" for the guilty plea before it could "accept it." *Id*. at 360. In response, Wilson stated: "I guess just me being there and me knowing, like, what was going on, as in, I wasn't really in the loop that it was that drug that was going on there, but I knew something illegal was going on at that place." *Id*. at 361. Wilson further stated that he did not have his driver's license with him on April 28 and had not planned or agreed to drive to Chicago. *Id*. The district judge responded, "[w]ell, that's not enough" and that unless Wilson was at Low Life to "participate" in the methamphetamine conspiracy, simply being present at Low Life and smoking marijuana was not factually sufficient to support the conspiracy count in the plea agreement. *Id*.

The district court then permitted the Government to question Wilson regarding his statements. The Government asked Wilson to affirm that "[o]n or about April 28, 2021, in the Western District of Oklahoma, [Wilson] conspired with others to distribute a quantity containing a detectable amount of controlled substance[.]" *Id*. at 361–62. When asked if he recognized and adopted this statement, Wilson answered "Yes, sir," to both. *Id*. at 362. When next asked by the Government, "And did you later find out that that controlled substance was methamphetamine?", Wilson stated, "Yes, sir. Right after the case started." *Id*.

At this point, the court again voiced its concern with the factual basis underlying the plea agreement and whether Wilson's conduct satisfied the elements of the conspiracy charge. The district judge stated: "I'm still troubled by this. Were you going to play some role in this?" *Id.* Wilson responded that he "honestly ha[d] no even idea," and that "I guess what they said, I was supposed to follow, but I was high out of my mind, and I drove the car. And we were in the -- two different lanes." *Id*. Wilson next stated that it wasn't his intention to transport drugs or drive to Chicago.

After this exchange, the court told Wilson's lawyer, "I think you're going to need to visit with your client. This is not good enough." *Id.* at 363. After Wilson and his lawyer conferred, the court resumed questioning Wilson. Again, Wilson confirmed that he was not aware that he was going to follow another vehicle to Chicago and "assist in the delivery of those drugs." *Id*. This prompted the district judge to say, "Okay. I think we're going to have to go to trial on this." *Id.*

Wilson's lawyer (Mr. Coyle) then stated: "I've tried my hardest to resolve the case. He doesn't believe -- I mean, he was there smoking with them. And they were all talking about, you know, smoking weed. And he knew something illegal was going on. Right?" *Id.* at 364. Wilson responded by challenging his lawyer's statements about Wilson's role and

understanding of the charges against him, causing the court to reject the factual basis for the guilty plea. We note the following colloquy:

> THE DEFENDANT: Yes, sir, I did know something illegal was going on.
>
> MR. COYLE: But, you know - -
>
> THE DEFENDANT: But I was nowhere near the drugs. And then when they pulled me over - -
>
> MR. COYLE: You were right in the room. You walked through the room where the drugs were.
>
> THE COURT: The only way that he can be held responsible for this, if he was going to play a role in that, that he knew he was taking drugs, not himself, but delivering drugs or assisting in delivering drugs. And it doesn't sound like he believed he was.
>
> So I don't know anything other to do than to set this down for trial.

Id.

Although the district court rejected the guilty plea, there was no argument raised by the Government during the change of plea hearing that Wilson had breached any term or condition in the plea agreement. The Government never asked the district court to make factual findings to support a breach of the plea agreement by Wilson, never argued that Wilson was violating the plea agreement by his answers to the district court's questions, and never asked the district court to rule that Wilson had breached any obligation under the agreement. Instead, the parties

concluded the hearing by agreeing that Wilson's trial would occur in August 2023.

D. Pre-Trial Pleadings

Following the change of plea hearing, the Government moved to dismiss the superseding information. It alleged that Wilson had breached the plea agreement, so the superseding information was no longer needed or proper. Three days later, before Wilson's deadline to file a response, the district court granted the motion. The one-page summary order granting the motion did not address Wilson's alleged breach of the plea agreement but said the motion was "granted for the reasons therein stated," referring to the Government's motion. *Id.* at 372.

Leading up to trial, the Government also filed a Motion to Find Breach of Plea Agreement and Motion in Limine to Pre-Admit Plea Agreement and Petition Into Evidence (Breach Motion). The Breach Motion argued that Wilson breached his plea agreement and petition to enter a plea of guilty "by refusing to enter a plea of guilty at his combined plea and sentencing hearing." *Id.* at 385. The Government argued that Wilson "had failed to admit to the elements of the offense as agreed to in the Plea Agreement." *Id.* at 391. And, because of this alleged breach, it asked the district court to rule that Wilson had waived the protections of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(f), which generally safeguard a

defendant from having statements made during plea negotiations or a guilty plea from being used against them at trial. The district court, however, never ruled on the Breach Motion before trial.

E. Trial and the Breach Motion

The Government proceeded to trial against Wilson based on the two counts charged in the indictment. After jury selection, the Government asked the district court to take up its Breach Motion. Once again, the Government did not develop a factual record or secure a ruling on Wilson's alleged breach. *Id.* at 658–62. Instead, the Government persuaded the district court to allow Wilson's guilty plea statements to be admitted into evidence against him while simultaneously not allowing Wilson or his lawyer to explain to the jury that the district court had rejected the factual basis for the plea agreement. *Id.* at 658–60.

Wilson objected and argued, "I don't think it should come in at all," because "the plea agreement itself is [for a different charge] than what he's going to trial for" (because the Government had withdrawn the superseding information), and it would be "highly prejudicial" to admit this evidence against Wilson, especially without informing the jury that the district court rejected the factual basis of the guilty plea. *Id.* at 660. Indeed, Wilson's counsel even suggested that "we can get a transcript of what exactly he said and that should be read that I did not take that plea agreement." *Id.*

The district court acknowledged that it was "concerned" that "the jury is going to be adrift" hearing that Wilson "tried to plead guilty" and would likely wonder "why is he here." *Id.* Indeed, the district court conceded that "I can see it suggests that I might have made a determination in my mind about guilt or innocence. But I think the jury has got to know that the plea was not accepted or was not completed." *Id.* at 662. Nevertheless, it then stated that the Government could ask a case agent whether the guilty plea was "completed" by Wilson, and the case agent should answer "no." *Id.*

In its opening statement, the prosecution told the jury,

> [Y]ou are going to hear how at some point after this case was charged, Mr. Wilson filled out a plea agreement in which he agreed to plead guilty and that he admitted that he conspired with others to distribute methamphetamine and that he also filled out a plea petition in which he admitted under penalty of perjury that he conspired to distribute controlled substances.

R. III at 149.

During direct examination of its case agent, the Government offered into evidence, and the court admitted, the plea agreement as Exhibit 69, over the "standing prejudicial objection" raised by Wilson's lawyer. *Id.* at 189. It then offered, which the court admitted, the petition to plead guilty as Exhibit 70. The Government proceeded to ask its case agent multiple questions about Exhibits 69 and 70 regarding the series of admissions of guilt that Wilson made by signing both documents. The Government later

used the two exhibits during the cross-examination of Wilson and its closing argument.

After deliberations, the jury convicted Wilson of the conspiracy charge (Count One) but acquitted him of the possession with intent to distribute and aiding and abetting charge (Count Five). Following the jury trial, the district court sentenced Wilson to the mandatory minimum of ten years of imprisonment. Wilson timely appeals.

II. DISCUSSION

We must resolve two issues in this appeal: (1) whether it was error to admit into evidence Wilson's guilty plea statements and documents without a clear finding by the district court that Wilson breached the plea agreement; and (2) whether the admission of Wilson's guilty plea statements and documents caused prejudice and merit reversal of Wilson's conviction and sentence. We answer both questions in the affirmative.

A. Plea Statements

Almost a century ago, the Supreme Court established that "withdrawn guilty pleas could not be entered into evidence in a subsequent trial for the same offense." *United States v. Mitchell*, 633 F.3d 997, 1003 (10th Cir. 2011) (citing *Kercheval v. United States*, 274 U.S. 220 (1927)). Two primary rules govern the admissibility of plea statements – one a rule of evidence and the other one of procedure. Federal Rule of Evidence 410

states that "evidence of a guilty plea or statements made in plea negotiations are inadmissible" into evidence. *Mitchell*, 633 F.3d at 1002–03. Federal Rule of Criminal Procedure 11, which is titled "Pleas," refers to Rule 410 and states that the "admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410." Fed. R. Crim. P. 11(f).

However, a criminal defendant may waive the protections of Rule 410 and Rule 11(f). *Mitchell*, 633 F.3d at 998; *see also United States v. Jim*, 786 F.3d 802, 805–06 (10th Cir. 2015). Indeed, it is common in plea agreements that criminal defendants waive this protection as part of their deal and the benefit of the bargain.

Wilson's plea agreement also included this waiver, so when he signed and entered into the plea agreement, he knowingly gave up his right to invoke Rule 410 to suppress his guilty plea statements and plea documents in a subsequent trial. However, by its plain language and consistent with governing precedent, this waiver would only go into effect if the district court determined that Wilson violated or breached any provision of the agreement, which is where we turn next.

B. No Express Findings of a Breach

To determine whether it was an error to admit the guilty plea and plea documents into evidence, we must first review whether Wilson

breached the plea agreement while casting aside the Rule 410 shield that generally renders this evidence inadmissible. Whether a plea agreement has been breached is a question of law that we review de novo. *United States v. Guzman*, 318 F.3d 1191, 1195 (10th Cir. 2003).

Our review of the record for a court-finding of breach is searching because the district court failed to hold a hearing and make express findings that would permit our review to proceed in the normal course. In *Guzman*, we instructed that "a court must hold a hearing and make a finding that the defendant breached the agreement before the government is released from its obligations under the agreement." *Id.* at 1196. The district court, therefore, had a duty to make a finding regarding whether there was a breach because "one requisite safeguard of a defendant's rights is a judicial determination, based on adequate evidence, of a defendant's breach of a plea-bargaining agreement. The question of a defendant's breach is not an issue to be finally determined unilaterally by the government." *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981). As we have admonished, "even if [the defendant] breached the plea agreement, until the district court so ruled, the government" is not free to assume a breach occurred. *United States v. Cudjoe*, 534 F.3d 1349, 1355 (10th Cir. 2008).

As mentioned, the Government filed the Breach Motion and asked the district court to find that Wilson breached the plea agreement and to pre-

admit into evidence the plea documents. By doing so, the Government did its part to "alert the district court to the issue and seek a ruling." *United States v. Cates*, 73 F.4th 795, 809 (10th Cir. 2023) (citing *GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1206 (10th Cir. 2022)).

The district court, however, did not hold a hearing, and a search of the record fails to discover an express court finding that Wilson committed a breach. If the record would have revealed that there was not a dispute on the relevant facts, the district court could have "determine[d] the issue of breach as a matter of law." *Calabrese*, 645 F.2d at 1390. In the Breach Motion, the Government set out seven pages of facts that it argued supported the legal finding of breach. These facts included that Wilson "failed to admit to each of the elements of the charge[.]" R. I at 391. Because what Wilson said (and did not say) at the change of plea hearing is part of the court record via a transcript, we doubt these facts are disputed. However, the district court neither discussed or made findings of a factual basis for a breach (whether disputed or not), nor did it state its legal conclusion as to whether a breach had occurred as a matter of law.

Rather, the court skipped over any express findings of fact and a legal determination as to breach and only discussed on the record its concern that the jury might become confused by this evidence. With this evidentiary win in hand, the Government was content to only discuss the manner of

presentation of this evidence to the jury, but it did not press the district court to make a specific finding of Wilson's breach.[2]

On appeal, the Government points out "the record shows that the court ruled on [the Breach Motion] in chambers," and then "attempted to put its findings from chambers on the record." Resp. Br. at 21. This explanation is wanting. After all, we cannot properly evaluate a ruling that was allegedly made in chambers because what was said and decided, if anything, was not written down and made part of the record.[3]

Even if we suspect the facts are undisputed, the district court's failure to make express findings of fact and a legal determination regarding breach

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[2] In his opening brief, Wilson recognizes that the Government failed to secure a finding of breach from the district court. Op. Br. at 42. However, he does not argue this failure constitutes a forfeiture of the issue below, nor that it has been waived in this appeal.

[3] Invoking Federal Rule of Appellate Procedure 10(e)(1), the Government filed a motion for a limited remand and a motion to supplement the record regarding the alleged ruling by the district court in chambers of Wilson's alleged breach. We deny both motions. Rule 10(e)(1) is meant to settle disputes about what the record truly discloses of what occurred in court, not in chambers. The issue here is that by allegedly ruling in chambers, the district court made no record of its findings. Thereafter and on the record the district court expressly offered the parties the opportunity to put anything that was needed on the record in court during the trial. The Government failed at that time to make a record of the finding it seeks to rely upon in this appeal. We question whether a post hoc record could even be properly made if we ordered a remand. Regardless, we decline the Government's invitation to give it another opportunity to make a record it should have made at the trial.

was error. However, from what the district court *did* say about this evidence and its decision to admit the plea statements and documents into evidence, we can glean that there was at least an *implied* finding of a breach. More critically, our review on appeal as to whether Wilson breached the plea agreement is de novo. Thus, we owe no deference to the district court's legal determinations, whether express or implied. For that reason, we must review the record and determine independently whether Wilson breached the plea agreement.

C. Wilson did not violate the Plea Agreement

In assessing a violation or breach of a plea agreement, we apply a two-step analysis. First, we "examine the nature of the promise" made in the plea agreement; and second, we "evaluate the promise in light of the defendant's reasonable understanding of the promise at the time of the guilty plea." *Guzman*, 318 F.3d at 1195–96. It is only after this inquiry that we can determine whether Wilson's Rule 410 waiver remained in effect.

We start by analyzing the text of what the parties agreed to, using "[g]eneral principles of contract law" to focus on "the express language and construing any ambiguities against the government as the drafter of the agreement." *Id.* at 1195; *see also Cudjoe*, 534 F.3d at 1353–54. Our review is through the lens of the defendant's "reasonable understanding of the plea agreement." *Cudjoe*, 534 F.3d at 1354.

Because we are focusing on a defendant's reasonable understanding, we must also acknowledge that "[t]he analogy to contract law doctrines is not determinative in the area of plea negotiation[.]" *Calabrese*, 645 F.2d at 1390. Unlike a typical arms-length contract between two private parties, a criminal defendant entering a plea agreement to resolve a federal prosecution receives more leeway. In other words, "[b]ecause important due process rights are involved, plea negotiations must accord a defendant requisite fairness and be attended by adequate 'safeguards to insure the defendant what is reasonably due (in) the circumstances.'" *Id*. (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

We conclude that Wilson did not breach the plea agreement. First, we look at the plea agreement to examine the promises that Wilson made or what he agreed to do as part of the deal. Relevant here, paragraph two of the agreement states that Wilson "must admit, and does admit" the five elements and facts that were supplied by the Government and listed in the agreement. R. I at 402. Wilson complied with this obligation by admitting to these facts both in writing and while under oath before the district court.

Second, we consider the promises in light of Wilson's reasonable understanding of what he had to say and do at his change of plea hearing. Wilson's plea agreement did not require him to supply additional facts to form the basis of his guilty plea beyond what was listed in paragraph two

of the agreement and what he wrote in the plea petition. When the court rightfully began to question whether there was a sufficient factual basis to accept the plea, it gave the Government the opportunity to question Wilson about the facts, which it did by reaffirming the facts that it had included in the agreement. Our focus is not whether there was a sufficient factual basis to support a guilty plea but whether Wilson did what he reasonably understood was required of him at the change of plea hearing. On this question, we determine that he did.

The Government could have included additional facts or conditions in the plea agreement that would have bound Wilson to provide more factual detail about his involvement in the conspiracy. For example, it could have required Wilson to admit that he was serving as a lookout at Low Life on April 28, that he planned to drive to Chicago to help transport the methamphetamine, that he was acquainted with the co-conspirators other than simply his childhood friend, or other facts. It also could have included language that required Wilson to explain additional facts to the court in support of the plea agreement. But it included none of this language.

In essence, the Government relied on five generic statements that it drafted and included in the plea agreement. In turn, Wilson would have reasonably understood it was his obligation to admit these facts, which he did, and that this factual basis would be satisfactory to the district court.

Wilson did admit to these statements, but he was not required to admit to anything more. Wilson never wavered from his guilty plea or his agreement to admit the five facts listed by the Government in his plea agreement.

The plea agreement defined the two ways in which Wilson would be in breach: "if *the Court* [1] determines Defendant has violated any provision of this Plea Agreement or [2] authorizes Defendant to withdraw" from the plea agreement. *Id.* at 409 (emphasis added). Neither of these two things happened. Wilson did not walk away from his guilty plea; the district court properly exercised its independent role to ensure there was a factual basis for the guilty plea. Fed. R. Crim. P. 11(b)(3). After determining there were not sufficient facts to support a plea of guilty, it rejected the plea. In stating the basis for the rejection, however, the district court did not make an express finding that Wilson breached the plea agreement. We hold, therefore, that Wilson did not violate or breach the plea agreement.

D. Harmlessness Review

Having concluded that Wilson did not breach the plea agreement both as a matter of law and on the facts, we necessarily conclude it was an error to admit into evidence the guilty plea statements and documents. Again, unless an exception or waiver applies, "evidence of a guilty plea or statements made in plea negotiations are inadmissible." *Mitchell*, 633 F.3d at 1002.

We must next determine the legal significance of this error. The parties agree that we should review this issue as a non-constitutional error, so "the *government* bears the burden of showing harmlessness." *United States v. Tony*, 948 F.3d 1259, 1264 n.4 (10th Cir. 2020); *see also United States v. Harrison*, 743 F.3d 760, 764 (10th Cir. 2014) (explaining that "the government bears the burden of demonstrating . . . that the substantial rights of the defendant were not affected." (quoting *United States v. Keck*, 643 F.3d 789, 798 (10th Cir. 2011))).

We conclude that the Government failed to meet its burden to show the error was harmless. The Government's burden here is steep because the improper admission of a plea agreement against a defendant is "especially damning evidence[.]" *Mitchell*, 633 F.3d at 1003. Here, that is especially true. The mixed verdict against Wilson strongly suggests that the guilty plea evidence almost certainly improperly swayed the jury against Wilson. Its decision to convict Wilson of only the conspiracy charge (Count One) confirms the importance that the guilty plea evidence likely played in the jury's deliberations. The only material difference in the evidence between the conspiracy charge and the aiding and abetting of the possession with intent to distribute charge (Count Five) was the guilty plea statements and documents.

Throughout the trial, the Government continually focused the jury's attention on Wilson's statements of guilt to the conspiracy. The Government hammered the importance of Wilson's guilty plea and admissions of guilt in its opening statement, direct examination of the lead case agent, cross-examination of Wilson and closing argument. To underscore this point, the Government stated the following during its closing argument:

> But Mr. Wilson begs you to ignore that. He begs that you ignore all the evidence that you have seen, and he begs you that you just take him on his word, that you believe him now, but not in May 2022 when he signed the plea agreement. Believe him now when he tells you he smoked marijuana by himself for nearly two hours in a front hallway, but don't believe him in May 2022 when he repeatedly said he was guilty. Don't believe him in May 2022 when he said, under penalty of perjury, that he conspired with others to distribute a quantity containing a detectable amount of controlled substance in violation of the law.

R. III at 419.

The Government emphasized these statements, no doubt, because its evidence against Wilson was thin. In its response brief, the Government claims "there was other overwhelming evidence of guilt." Resp. Br. at 33. But its summary of this evidence is underwhelming and amounts to a recitation of what was observed: Wilson's presence at Low Life for several hours the day of the buy-bust operation and his departure in the white Lincoln at the same time the drug load left in another vehicle.

On the other side of the scale, the DEA agent supervising the buy-bust operation admitted that he had never come across Wilson in any of the prior methamphetamine transactions or surveillance conducted in 2021. Moreover, the CS did not directly implicate Wilson other than surmising that he was there "[k]ind of like a lookout." *Id.* at 270. Finally, when Wilson was pulled over and arrested while driving away from Low Life, he did not have any contraband or drugs on him or in his vehicle.

Thus, in the Government's view, Wilson's guilt is proven by his presence at Low Life on the day of the buy-bust operation. Wilson, however, clearly explained to the jury in his testimony the reason for his presence at Low Life while also not implicating himself in the methamphetamine conspiracy. Indeed, "evidence of mere association or presence" is not sufficient to sustain a conspiracy conviction. *United States v. Summers*, 414 F.3d 1287, 1297 (10th Cir. 2005).

We conclude that the admission of the guilty plea statements and documents into evidence was not harmless error. We also agree with Wilson that his conviction and sentence must be vacated. *See Guzman*, 318 F.3d at 1198 (discussing the proper remedy for the government's improper use of statements of guilt in a plea agreement at sentencing against the defendant).

III. CONCLUSION

Wilson's offer and attempt to plead guilty should not have been admitted into evidence and presented to the jury. The erroneous admission of this evidence was highly prejudicial. The only proper remedy to cure this error is what we hereby order, which is to **REVERSE** Wilson's conviction and sentence and **REMAND** with instructions to the district court to **VACATE** the judgment and conduct a new trial.

23-6150, *United States v. Wilson*

HARTZ, J., dissenting in part

I concur in the judgment; and in the Discussion section of the majority opinion, I join subsections C (holding that Wilson did not breach the plea agreement) and D (holding that admission of the plea agreement was not harmless). I respectfully dissent, however, from the discussion suggesting that the district court did not follow proper procedures in admitting the plea agreement.

To begin with, the discussion of the district court's procedures is unnecessary because we reverse on the ground that the substantive ruling was incorrect. But in any event, the majority opinion errs in imposing procedural requirements contrary to universal practice and not required by our precedent.

I had thought it settled law that when a party offers evidence that the opposing party thinks inadmissible, the opposing party must object to preserve the issue. Further, the objection must raise the particular reason to exclude the evidence. The offering party could then preserve its claim of admissibility by contesting the objection and/or raising an exception to the ground relied on by the opposing party. For example, what should have happened here is that Wilson should have objected to introduction of the plea agreement on the ground that it must be excluded under Fed. R. Crim. P. 11 and Fed. R. Evid. 410 as a statement made in plea negotiations. Then, the government could respond that Wilson waived the protection of those rules by breaching the plea agreement. Ordinarily, the government would have the burden of proving the facts necessary to establish the breach. (For example, the alleged breach may have been the failure to fully

cooperate with law-enforcement investigations or the failure to stop breaking the law.) The court would then need to resolve the factual disputes and rule as a matter of law that the facts it found establish a breach.

That is not what happened here. Wilson never relied on Rule 11 or Rule 410 when at trial the government offered the plea agreement into evidence at trial. As the majority opinion summarizes the matter, Wilson argued only: "I don't think it should come in at all," because "the plea agreement itself is for a different charge than what he's going to trial for," and it would be "highly prejudicial" to admit this evidence without informing the jury that the district court rejected the factual basis of the guilty plea. Maj. Op. at 13–14 (brackets and internal quotation marks omitted). The district court rejected that argument. In this circumstance, I fail to see any obligation on the court to resolve the unraised issue of whether admission violated Rule 11 or Rule 410. (There may well be a question of whether Wilson preserved for appeal a claim of violation of either rule, but the government does not argue the matter.) Absent a defense objection at trial, there was no duty, nor any need, for the court to address the government's motion in limine regarding introduction of the plea agreement into evidence.

Further, even if Wilson had raised an objection under those rules, there was no need for any fact-finding by the district court, since the predicate facts were in the incontestable transcript of the plea hearing in that very case, before the same judge and the same lawyers. Neither party would have any cause to need or request specific findings of fact by the court. As this court stated in *United States v. Calabrese* when discussing how a district court should resolve a claim of breach of a plea agreement, 645

F.2d 1379, 1390 (10th Cir. 1981): "If the pleadings reveal a factual dispute on the issue of breach, the district court must hold a hearing to resolve the factual issues. If the pleadings reveal no disputed factual issues, no hearing is necessary and the court may determine the issue of breach as a matter of law." And on the legal issue that would ultimately determine admissibility of the evidence, the court's statement that the objection was sustained or was overruled would be quite satisfactory as a ruling for appeal since our review of the legal issue would be de novo in either event. I can think of no reason to impose any further procedural requirements on the district court in this context, and I do not read our precedent as imposing any such requirements. Indeed, in this case, despite the district court's not complying with the requirements that the majority opinion would impose, our appellate review has not been hampered in the least.