No. 03-167

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
CARLOS DOMINGUEZ BENITEZ,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR CARLOS DOMINGUEZ BENITEZ

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QUESTION PRESENTED

Whether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred.

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STATEMENT OF THE CASE

On May 13, 1999 Benitez and two co-defendants were arrested for taking part in a conspiracy to sell meth-amphetamine to a confidential informant (CI). PSR 4. The CI, who was working with law enforcement authorities, contacted the respondent to initiate the sale. PSR16-27. At the time of his arrest, the respondent was in a state diversion program. PSR 13. He claimed that his involvement in the drug conspiracy was "prompted by despair" due to the fact that his wife had just given birth and "I hadn't paid for the rent and other food expenditures and bills." J.A 86.

On May 28, 1999, Benitez and his co-defendants were charged with two counts of conspiracy to possess with intent to distribute, and possession with intent to distribute, more than 500 grams of methamphetamine, in violation of 21 U.S.C. sections 846, and 841(a)(1), respectively. J.A. 35. Trial was initially set for July 20, 1999; per stipulation of the parties, the court continued the trial until October 19, 1999. J.A. 6.

On September 10, 1999, Benitez sent the district court a letter requesting the appointment of new counsel and expressing his dissatisfaction with the pressure he was under to sign a plea agreement. J.A. 41. This letter prompted the district court to hold a substitution of counsel hearing on October 7, 1999. At that hearing, the respondent explained to the court, through a Spanish interpreter, that he was not "familiar with the Articles of the Constitution" and believed he was being treated "unfairly". J.A. 46. The court noted that there was no communication or interaction between the respondent and his counsel. J.A. 48. The government, too, characterized the case as being "paralyzed". J.A. 49. Nevertheless, the court concluded that the respondent had competent counsel and did not see any grounds to remove his attorney. J.A. 52. The court then asked both parties about their trial readiness. Upon receiving affirmative responses, a trial date was set for October 19, 1999. J.A. 50-53.

On October 13, 1999, Benitez pleaded guilty pursuant to a negotiated plea agreement signed and filed the previous day. J.A. 74. The district court addressed him about the signatures in the plea agreement and asked in general terms if he understood the agreement that he had just signed. The court ascertained that there was a factual basis for the plea and cautioned the respondent regarding constitutional rights that he would be giving up if he persisted in his plea of guilty.

J.A. 66-68. The district court then explained the relevant sentencing factors and prospects of the respondent:

> THE COURT: This is based upon [defense counsel and the Assistant United States Attorney] study of the law and prediction about where your base offense level would come out, minus some credits for safety valve considerations, *which remains a possibility, apparently a strong one*, as well as acceptance of responsibility on account of your early guilty plea. J.A. 69.

(emphasis added).

Amendments to the plea agreement were made just before the change of plea hearing and clarification of these changes were discussed during the course of the hearing itself. J.A 71-75. While talking about the plea agreement alterations, the district court questioned the government on its position relevant to the safety valve. The government affirmed, "I think it's possible that he may qualify." J.A. 72.

Almost immediately after discussing the modifications in the plea agreement, the district court gave an incomplete Rule 11 (e)(2) warning. The court failed to mention that Benitez could not withdraw his guilty plea if the court did not follow the recommendations in the plea agreement:

> THE COURT: Now then, in the next section of your plea agreement, there is a discussion about who is and is not a party to the plea agreement and the circumstances under which you may or may not be allowed to withdraw your guilty plea. I won't review that word by word, but I will go to paragraph 21.

J.A. 75.

Nevertheless, the district court accepted the respondent's guilty plea. The court concluded that it was a "knowing", "intelligent" and "voluntarily" made plea. J.A. 77-79.

On January 31, 2000, Benitez appeared before the court for sentencing. The respondent indicated that he was not prepared for sentencing, that he felt "railroaded" into taking a plea, that he was still dissatisfied with his court appointed counsel, and that he had prepared a second letter for the court. The court suggested that the respondent have his counsel file the letter with the court. Respondent answered, "I want this letter to go to the Court, to the Court only, because I tried to send the letter to the Court through . . . my attorney, and he did not deliver it". J.A 94. In the second letter, the respondent stated, "I wanted to ask you for a new lawyer and when I had the chance to in court my lawyer whispered in my ear that I was not allowed to say anything to you or to speak openly with you" and "with me [sic] having a langue [sic] barrier I could not ask you if this were true". J.A. 98.

On March 3, 2000, Benitez filed a third request for new counsel with the court, stating that he never had proper legal representation; that he could not interact or communicate with his attorney; and that his attorney made him "get into a state of depression". In the third letter, the respondent stated that in regards to the underlying crime, "I never looked for anyone they came looking for me." J. A 102.

At the March 13, 2003 sentencing hearing, he once again expressed his dissatisfaction with his counsel, stating that he never had any knowledge or understanding about the points of responsibility, the safety valve or the laws, that he never hid anything from his attorney, and that "every time [my attorney] came to see me he treated me if I was the worst of the criminals". Respondent also stated, "really the crime that I committed, somebody sought me, I didn't look for the crime". J.A. 109-110.

At sentencing, the district court asked Benitez what counsel should have done differently in his case. The respondent replied: "[H]e could have explained to me from the beginning what is meant by the points, by the safety

valve, by everything. . . . I never knew about that." J.A. 112. The district court confirmed that the respondent had disclosed his criminal history to his counsel before entering his guilty plea but was nonetheless advised that he would qualify for the safety valve adjustment. J.A. 111. The court adopted the guideline calculations set forth in its previous tentative ruling and the PSR. J.A. 119. The respondent was sentenced to a 120-month term of incarceration, followed by five years of supervised release.

On appeal, the respondent raised a Rule 11(e)(2) error. He claimed that at the change of plea hearing the district court failed to give the proper Rule 11 warning that he could not withdraw his guilty plea if the sentencing recommendations set forth in his plea agreement were not adopted. In addition, the respondent raised a claim of ineffective assistance of counsel and challenged the district court's failure to substitute counsel. Resp. CA. Br. 21-37.

The government conceded that there had been a Rule 11(e)(2) error at the change of plea hearing and agreed that under Ninth Circuit precedent the harmless error standard set forth in Fed. R. Crim. P. 11(h) prevailed. Nevertheless, the government noted that this Court had granted certiorari in *United States v. Vonn*, 531 U.S. 1189 (2001) on a, "decidedly" similar issue which argued for a plain error standard of review. Gov't. C.A. Br. 17 n.2. The government argued that the respondent could not prevail under "plain error" scrutiny due to the signed plea agreement. It reasoned that the respondent had been on Rule 11(e)(2) notice that he could not withdraw his guilty plea if the court did not adhere to the sentencing recommendations because the warning was contained in the written plea agreement. Thus, argued the government, the respondent's substantial rights were not violated and plain error did not occur even though the court failed to warn him of this consequence in open court.

On January 29, 2002, the Ninth Circuit issued an unpublished memorandum holding that the district court had violated Rule 11(e)(2) and that the error was not harmless. Although Benitez's guilty plea was vacated and the case remanded to the district court to allow him to plead anew, acting *sua sponte*, the court of appeals agreed to stay the issuance of its mandate until this Court had decided *Vonn*. In the same memorandum, the court of appeals affirmed the lower court's denial to substitute counsel and declined to review the claim of ineffective assistance of counsel. Pet. App. 21-23 (a).

On March 20, 2002, the court of appeals issued an order withdrawing its previous decision and required both parties to file supplemental briefs on the impact of *United States v. Vonn*, 535 U.S. 55, which was decided on March 4, 2002. Pet. App. 19a.

On November 25, 2002, a divided Ninth Circuit panel issued its decision in a published opinion, *United States v. Benitez*, 310 F.3d 1221 (9th Cir. 2002), and once again vacated the respondent's guilty plea based on a Rule 11(e)(2) violation. Pet. App. 1a. The panel majority recognized that *Vonn* required a reviewing court to comply with Fed. R. Crim. P. Rule 52 "plain error" analysis when a Rule 11 argument is raised for the first time on appeal, and that the entire record became available for "consideration" to aid in that review. Pet. App. 7a.

The *Benitez* panel acknowledged that of the three types of plea agreements, the one the respondent entered into—a type B plea agreement—accorded such a "high degree of risk to the defendant" that the required Rule 11(e)(2) warning was of "critical importance". Pet. App. 4a. Citing this Court's plain error test in *United States v. Olano*, 507 U.S. 725, 732 (1993), the appeals court found that "there was no question that the district court erred" and that that error was "plain". Pet. App. 5a. Proceeding to the "substantial rights" prong of the *Olano*

test, the Ninth Circuit determined that the error was "not minor or technical' and that the respondent "did not understand the rights at issue when he entered his guilty plea". Pet. App. 5a.

The Ninth Circuit reiterated the constitutional principles underlying Rule 11(e)(2) as an "important safeguard designed to ensure that the plea is intelligent and knowing". Pet. App. 5a. The court of appeals determined that when a defendant obtains the sentence he bargained for then the Rule 11 error was "merely technical" and would not be "set aside". Since the respondent received a substantially higher sentence than the one he bargained for, the panel majority concluded that the district court's error was "neither minor nor technical". Pet. App. 6a.

The panel majority carefully considered whether respondents signed plea agreement might evidence an understanding of an omitted Rule 11 warning. However, the court of appeals ultimately rejected the government's argument that inclusion of the omitted warning in Benitez's plea agreement *conclusively* showed that he was aware of Rule 11(e)(2). In addition, the *Benitez* majority refused to rely on speculation as to whether the respondent understood the provision in the plea agreement:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

The panel majority distinguished the respondent's case from that of the defendant in *Vonn*, who had been twice

informed of the omitted Rule 11 warnings in open court—at his initial appearance and at his arraignment. However, Benitez's situation was decidedly distinct in that he was *never* informed in open court of the omitted warning. Pet. App. 9a.

In this case, the court of appeals found that the written plea agreement did not "establish" that the respondent understood that he could not withdraw his guilty plea if he did not get the sentence that was recommended. *Id*. at 7(a). The court of appeals explained that reading "boiler plate language" in a plea agreement "during the hurried and hectic moments before court opens for taking a plea and arraignments is not a substitute for the rigid observance of Rule 11". Pet. App. 6a. The Ninth Circuit panel also emphasized the importance of the open court requirement embodied in the Rule 11 colloquy.

Furthermore, the court of appeals was not persuaded by the government's reasoning that the omitted Rule 11(e)(2) language was somehow inextricably intertwined in the colloquy statement that a sentencing court was not bound by the parties' recommendations in a plea agreement

Enforcing the constitutional prerequisites for a knowing and voluntary plea, the Ninth Circuit panel majority concluded that the respondent did not understand the consequences of his guilty plea due to not having received the Rule 11(e)(2) warning. The court of appeals recognized that because of the written plea agreement and the conduct of the prosecutor and defense counsel at the plea hearing, the respondent had the expectation of receiving the safety valve and a 12 to 33 month shorter sentence. Pet. App. 10a. The Ninth Circuit held that to hold the respondent to his plea would be a "miscarriage of injustice", since a plea is not truly voluntary unless "it is entered by one fully aware of the direct consequences of his plea." Pet. App. 10a.

Judge Tallman was the dissenting voice on the Ninth Circuit panel. Pet. App. 10a. It was his opinion that the signed

plea agreement, plus, the district court's colloquy proved that the respondent understood the omitted Rule 11 warning. The dissent focused exclusively on the state of the relevant record rather than on whether the respondent would have pleaded guilty if not for the omitted warning. Pet. App. 10a-18a.

On January 23, 2003, the government filed its petition for rehearing en banc. In the petition, the government asked the on the very same question that is before this Court. Government's Petition for Rehearing En Banc. On May 6, 2003, the Ninth Circuit issued its order denying the petition for rehearing en banc. Pet. App. 24a.

SUMMARY OF THE ARGUMENTS

Driven, apparently, by dissatisfaction with the outcome it achieved below, the government has invoked the jurisdiction of this Court under the guise of resolving a circuit conflict regarding the plain error standard in Rule 11 cases. Though the Ninth Circuit applied this Court's prevailing plain error standard to find that the respondent was prejudiced by the district court's serious Rule 11 error and that failure to correct the error would result in a fundamental miscarriage of justice, the government insists that the Ninth Circuit must be reversed because it failed to follow the government's preferred test for showing prejudice. In so doing, the government not only mischaracterizes the Ninth Circuit's holding below and elevates form over substance; it also ignores long settled Constitutional principles and contradicts the history and language of Rule 11.

The Ninth Circuit neither adopted a new plain error standard below nor deviated from this Court's precedent or the holdings of other circuit courts. Instead, the *Benitez* Panel applied the familiar three-prong plain error standard of *United States v. Olano*, 507 U.S. 725 (1993), requiring the respondent to establish (1) that there was error, (2) the error was plain, and (3) the error affected his substantial rights.

Respondent successfully demonstrated that the district court failed to advise him that he could not withdraw his guilty plea if he received a higher sentence than bargained for, that nothing in the record adequately cured that plain and undisputed error, and that he was prejudiced by receiving a significantly harsher sentence. The court of appeals found that these circumstances warranted the exercise of its remedial discretion to avoid a miscarriage of justice. This is the classic *Olano* analysis.

The government's insistence on a single-minded bright line test for establishing prejudice—that the *only* acceptable method for demonstrating prejudice under *Olano*'s "affects substantial rights" prong is to prove that "but for" the Rule 11 error the defendant would not have pled guilty—is contradicted by *Olano* and unsupported by the case law. *Olano* never required or endorsed any particular test for establishing prejudice and even noted that a showing of prejudice may not be required at all under some circumstances. *Id.* at 734-36. The Court's *Olano* opinion makes clear that it was not suggesting a bright line test applicable to every case, but was providing general guidelines for making prejudice determinations in those cases where a showing of prejudice was required. The closest the Court came to suggesting a standard of prejudice in *Olano* was its observation that, "in most cases," establishing prejudice will require showing that an error "affected the outcome of the district court proceedings." *Id.* Again, the Court was far from unequivocal on that point and certainly never endorsed the government's proffered "but for" test or suggested any particular method for showing that an error "affected the outcome."

Here, there is no doubt that the district court's Rule 11 error did affect the outcome of the respondent's case—he was sentenced to 12-33 more months than he bargained for without being forewarned by the district court that he could

not withdraw his guilty plea if he were sentenced to more than he bargained for. It would have been pointless for the Ninth Circuit under these circumstances to engage in a mechanical or protracted discussion about whether the outcome was affected. Instead, the Ninth Circuit held that the respondent could show his substantial rights were affected by showing "that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." Pet. App. at 5a. This approach is a perfectly acceptable method of satisfying *Olano*'s third prong, particularly where, as here, the prejudice is so abundantly obvious that it merits little or no discussion. The Ninth Circuit's approach is also consistent with *Olano*'s implicit recognition that courts have the flexibility to determine what degree of prejudice, if any, will be required in a given case. Finally, the Ninth Circuit's analysis is in keeping with fundamental constitutional safeguards and the underlying purpose of Rule 11 to ensure a defendant's guilty plea is made knowingly and voluntarily and with a full awareness of the consequences of that plea. The government's approach encroaches on bedrock constitutional safeguards by emasculating the "knowing" plea requirement. Also, consistent with Rule 11's and the Supreme Court's emphasis on the defendant's actual awareness and on correcting obvious errors that nullify important Rule 11 safeguards, the bright line prejudice test urged by the government would negatively impact the judicial process by virtually removing Rule 11 error claims from direct appellate review and banish them to the realm of collateral attack. This is because the government's prejudice test is almost impossible to meet.

Relegating Rule 11 claims to the dominion of a habeas proceeding would result in protracted evidentiary hearings for those defendants lucky enough to have one granted. How can defendants ever met this burden when the government totally ignores all indices that the defendant was unaware of the omitted Rule 11 warning? The government's efforts to

transfer serious Rule 11 challenges to the collateral proceeding area squarely conflicts with the Supreme Court holdings emphasizing the such claims are best addressed on direct appeal.

ARGUMENT

THE FAILURE TO FULLY ADVISE RESPONDENT THAT THE COURT WAS NOT BOUND BY THE RECOMMENDATIONS IN HIS PLEA AGREEMENT AND THAT HE COULD NOT WITHDRAW HIS PLEA IF HE DID NOT RECEIVE THE SENTENCE HE BARGAINED FOR, AS REQUIRED BY RULE 11(e)(2), RENDERS RESPONDENT'S GUILTY PLEA UNINTELLIGENT AND INVOLUNTARY AND ENTITLES HIM TO HAVE HIS PLEA VACATED

It is uncontested that the district court failed to advise Benitez at any time that he could not withdraw his plea if he did not get the sentence he bargained for. The government concedes that this failure violated Rule 11 of the Federal Rules of Criminal Procedure. The question raised by the government in this case is whether the *only* acceptable method for satisfying the plain error standard in Rule 11 cases is by proving that but for the Rule 11 error the defendant would not have pled guilty. The answer to that question is clearly no. As correctly demonstrated by the court of appeals below, the plain error standard may also be deemed satisfied where, as here, the record clearly shows that the outcome was seriously affected by Rule 11 error or that the defendant's guilty plea was not knowing and voluntary as required by the Constitution. The government's assertion that its speculative "but for" test is the only way one may establish reversible

plain error is contradicted by the history and language of Rule 11 and this Court's guilty plea jurisprudence.[1]

I. THE NINTH CIRCUIT'S PLAIN ERROR REVIEW OF A RULE 11 VIOLATION IS CORRECT BECAUSE THE RESPONDENT MUST SHOW THAT THE GUILTY PLEA PROCEEDING DEPRIVED HIM OF A CONSTITUTIONALLY VALID PLEA.

Because no objection was made by defense counsel to the Rule 11 violation that occurred during the plea colloquy, that Rule 11 error is deemed forfeited. Therefore the violation is reviewed under the plain error standard of Fed. R. Crim. P. 52(b), rather than under the Rule 11(h) harmless error provision. *See United States v. Vonn*, 535 U.S. 55 (2002). Applying Rule 52(b)'s authorization for reversible error, *United States v. Olano*, 507 U.S. 725, 733-734 (1993) established a three-prong test in which 1) there must be an error, 2) it must be plain, and 3) it must affect the defendant's substantial rights. If a substantial rights violation is found, a court of appeals may correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings".

According to *Olano*, an error affecting substantial rights means the same thing under Rule 52(a)'s harmless error or 52(b)'s plain error provision, "and in most cases it means that the error must have been prejudicial: it must have affected the outcome of the district court proceedings". The only difference between the two inquiries is who bears the burden of persuasion: under a harmless error analysis it is the

[1] Counsel would like to acknowledge Monica Knox, Esq. for her assistance in the formulation of the respondent's merits brief.

government, while under plain error it is the defendant. *Id.* at p.734-735.

The extent to which a plain error analysis requires a showing of prejudice is a question *Olano* expressly reserved:

> We need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." *See* generally *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (constitutional error may not be found harmless if the error deprives defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair'") (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.

507 U.S. at 734-35.

In *Vonn*, this Court did not specifically articulate a substantial rights methodology but pursued an awareness analysis. V*onn* held that although the defendant was not provided the required warning at the change of plea hearing, he was informed of the omitted Rule 11 advisement at two prior proceedings. *Vonn* determined that subsection (h)'s harmless error provision was inapplicable for a Rule 11 violation raised for the first time on appeal. Instead, *Vonn* held that Rule 52(b)'s plain error analysis was more appropriate.

Citing *Olano*, this Court in *Vonn* held that:

> When an appellate court considers an error that qualifies as plain, the tables are turned on demonstrating the substantiality of any effect on a defendant's rights: the defendant who sat silent at trial has the burden to show that his "substantial rights" were affected. And because relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings. (Internal citations omitted).

Id at p. 62-63

With regard to the issue of the relevant record, *Vonn* held that under either a plain error or a harmless error analysis,"[a] reviewing court may consult the whole record when considering the effect of any Rule 11 error on substantial rights." *Id* .at 59 In *Vonn*, the district court failed to fully comply with the 11(c) requirement to inform the defendant of his right to counsel. Under a plain error analysis of the entire record, this Court concluded that Vonn's substantial rights were not violated because he was twice informed of this right in open court—at his initial appearance and at his arraignment.

Benitez's "awareness" analysis is consistent with this Court's decision in both *Olano* and *Vonn*. The Ninth Circuit held "[t]o show the district court's plain error affected his substantial rights; Benitez must prove that the court's error was not minor or technical, and that he did not understand the rights at issue when he entered his guilty plea." The Ninth Circuit found that the respondent had satisfied both of these elements and recognized that the omitted Rule 11 warning was of "critical importance" because it afforded "such a high degree of risk" to the defendant. "The warning required by Rule 11(e)(2) provides an 'important safeguard' designed to ensure that the plea is 'intelligent' and 'knowing,' and the omission of such warning is neither 'minor' nor 'technical.'

Since Benitez received a substantially higher sentence than the one he bargained for, the court's error was neither minor nor technical.

Regarding the second element, the Ninth Circuit rejected the government's argument that merely because the omitted warning was contained in the written plea agreement Benitez was aware of the right before entering a guilty plea. Instead, the court of appeals found that under the circumstances of this case, the plea agreement was not a sufficient substitute for the district court's obligation to satisfy the "open court" requirement of Rule 11. The court of appeals rejected the notion that a written plea agreement necessarily and conclusively cures Rule 11 errors. "If including the 'warning' in the plea agreement were sufficient to inform a defendant he could not withdraw his guilty plea, Rule 11(e)(2) would have little force". [2] This is especially true since Benitez could not read the warning. The court of appeals noted that he "had little incentive to do so" given that the government and counsel reinforced the expectation that Benitez would receive a lower sentence. Under these circumstances, the Ninth Circuit deemed it proper to exercise its discretion to correct the error:

> To hold Benitez to his guilty plea when he was not fully aware of the consequences of the plea would constitute a miscarriage of justice. *See Torrey v. Estelle*, 842 F.2d 234, 235 (9th Cir. 1988) ("A plea of guilty is voluntary

[2] *See United States v. Noriega Millan*, 110 F. 3d 162 (1st. Cir. 1997) (The Supreme Court has stressed the importance in Rule 11 proceedings of direct interrogation of the defendant by the district court in order to facilitate the determination of the voluntariness of a defendant's guilty plea. *McCarthy v. United States*, 394 U.S. 459, 467 (1969). In addition, this court has repeatedly stated that the defendant's acknowledgement of a signed plea agreement or other written document will not substitute for Rule 11'srequirement of personal examination by the district court.

> only if it is entered by one fully aware of the direct consequences of his plea").

Pet. App. 10a.

Contrary to the government's contention, the decision in *Benitez* is clearly consistent with the constitutional principles imbedded in Rule 11 and the jurisprudence of this Court. To determine the applicability of the petitioner's plain error analysis to a legally infirm guilty plea it is necessary to consider both the fundamental principles inherent in a constitutionally valid guilty plea and the evolution of Rule 11.

A. Fundamental Constitutional Principles Are Embodied In A Valid Guilty Plea Proceeding

In *Kerchaval v. United States*, 274 U.S. 220, 224 (1927), this Court recognized the characteristics that distinguish a guilty plea proceeding. "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." If the government's statistics are correct, 95% of modern federal criminal convictions resulted from guilty pleas. That means that in the overwhelming majority of criminal cases the primary responsibility of district courts is to conduct the kind of plea hearing that is mandated by the Constitution and facilitated by Rule 11

Given the modern prevalence of guilty pleas, the U.S. criminal justice system has been reshaped and redefined. A judicial decree of "guilty" obtained through the protracted process of a jury trial is no longer a reality for most people convicted of federal crimes in the United States. This transformation to a predominantly plea-based system, by necessity elevates the constitutional demands and safeguards

placed upon plea proceedings.[3] *See Godinez v. Moran*, 509 U.S. 389, 400, 113 S. Ct. 2680 (1993) (noting that "there is a 'heightened' standard for pleading guilty"). A natural consequence is that district court judges become the guardians of constitutionally sound guilty plea proceedings. *See Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S. Ct. 1019 (1938) ("This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.").

Before there is any discussion on whether the defendant would not have pleaded guilty but for the Rule 11 error, a reviewing court must make a threshold determination on whether or not the defendant entered into a constitutionally valid plea.

1. *Rule 11 Is A Proceeding Designed To Ensure That The District Court Generates Constitutionally Valid Guilty Pleas*

The importance of the role of the guilty plea in American jurisprudence inspired Congress to enact special, specific procedural rules for the taking of individualized pleas. Rule 11 went into effect in 1944 and has evolved into an exact proceeding designed to ensure that a guilty plea is a constitutionally valid one. The Advisory Committee Notes to Rule 11 (1966 Amendments) made clear that under a Rule 11 proceeding the court must determine that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

In *McCarthy v United States*, 394 U.S. 459, 465 (1969), this Court articulated the fundamental principals essential for

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[3] Stephanos Bilbas, Judicial Fact-finding and Sentencing Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097 *(May 2001)

a valid guilty plea: "[A]lthough the procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy* also made clear that a defendant's plea would be vacated if it were accepted by the district court "without fully adhering to the procedure provided for in Rule 11." *Id*. at 463-464. This Court has since watered *McCarthy* down, and has rejected a per se approach.

That same year, this Court decided another key guilty plea case, *Boykin v. Alabama*, 395 U.S. 238 (1969). *Boykin* is a state-based case, not specifically relate to a violation of Rule 11. This Court held there must be an "affirmative showing that the plea was both voluntary and intelligent". *Id*. at p. 241-242. Because Boykin addressed the validity of a state court guilty plea and thus did not involve Rule 11, it reaffirms that the source of the knowing and voluntary requirement for guilty pleas is the U.S. Constitution, not Rule 11. In addition, *Boykin* focused on whether a defendant was aware of the constitutional rights that he was waiving by pleading guilty: the right to a trial by jury, the right to confront one's accusers and the privilege against self incrimination. *Id*. 243-44.

Boykin held that a guilty plea is only constitutionally valid if the defendant, "has a full understanding of what the plea connotes and of its consequence." *Id*. at 244. Therefore, a constitutionally knowledgeable guilty plea is one that is made with a complete comprehension of the alternatives that are available. *Boykin* recognized that a defendant makes a valid decision to plead guilty only with full understanding, and by weighting the choices confronting him. "Ignorance, incomeprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" *Id*. at 243.

The following year, in *Brady v. United States*, 397 U.S. 742, 748 (1970), this Court confirmed "that a guilty plea is a

grave and solemn act to be accepted only with care and discernment". *Brady* articulated a distinction between a voluntary plea and a knowingly, intelligently made plea and required both prerequisites be met. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 748. A voluntary plea is made by a defendant who is fully aware of the consequences of his guilty plea, and with an understanding of the "actual value of any commitments made to him by the court, prosecutor, or his own counsel[.]" *Id*. at 755.

Most recently, this Court, citing *Brady,* reaffirmed that a waiver of the right to counsel at the guilty plea proceeding stage must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances". *Iowa v. Tovar*, 2004 U.S. Lexis 1837, 1839 (March 8, 2004). The issue in *Iowa v. Tovar* was "the extent to which a trial judge, before accepting a guilty plea from an uncounseled defendant, must elaborate on the right to representation." *Id*. at 32 To determine whether the defendant would garner anything meaningful from the proffered advisement, the Court utilized an "enlightenment" inquiry but did not articulate a *per se* standard and noted that the states are free to accept any legal or legislative "guide" that may deem "useful". *Ibid.* This is contrary to what the government is urging this Court to adopt in a Rule 11 plain error prejudice test context.

In *Henderson v. Morgan*, 426 U.S. 637 (1976), this Court addressed the notion that the intelligence requirement for a valid guilty plea is an aspect of voluntariness. For example, a plea may be "involuntary" either because the accused does not understand the nature of the constitutional protection he is waiving or he has an incomplete understanding of the nature of the charges. *Id.* at p. 645 & n13.

The reasoning of *Kurcheval*, *McCarthy*, *Boykin*. *Brady*, and *Henderson*, plus the legislative fiats, make it apparent that Rule 11 is designed to aid the court in generating constitutionally valid guilty pleas. The holding in *Benitez* is consistent with this premise. The government's position, which postulates a standard whereby "any kind of guilty plea will do" as long as there is a motivated pleader, is contrary to the well reasoned precedents cited.

It is true that Rule 11's historical development has rendered the proceeding more complex than when *Kurcheval* was decided. This is due, in part, to the launching of plea agreements into judicial proceedings. The Advisory Committee Notes to Rule 11 (1974 Amendments) recognized the emerging significance of the plea bargaining system and its companion trend of using plea agreements as a viable defense to longer, harsher sentences, or having to defend against multiple charges.

Although in *United States v. Hyde*, 520 U. S. 670, 673 (1997), this Court examined Rule 32(e), the holding was based on an analysis of Rule 11 as the "principle provision in the Federal Rules of Criminal Procedure dealing with the subject of guilty pleas and plea agreements." The nature of plea agreements caused Congress to enact precise and detailed requirements for the introduction of these types of contracts into the criminal justice system. Plea agreements are contractual by nature and are measured by contract law standards. *See United States v. Franco-Lopes*, 312 F. 984, 989 (9th Cir. 2002)

Generally, in the orderly nature of the plea taking process, a guilty plea is entered pursuant to Rule 11 subsection (a). Before accepting the plea, subsection (c) specifies certain essential questions that the court must ask in open court. Under subsection (d), the court must address the defendant personally in open court and determine that the plea is

voluntary and not the "result from force, threats, or promises (other than promises in a plea agreement)".

> The prerequisites to accepting a guilty plea are set out in sections (c) and (d) of Rule 11. . . The opening words of these two sections are important: together, they speak of steps a district court must take "before accepting a plea of guilty," and without which it "shall not accept a plea of guilty." Based on this language, we conclude that once the court has taken these steps, it may, in its discretion, accept a defendant's guilty plea.

United States v. Hyde, 520 U.S. at p. 674

Next are the procedures governing plea agreements. A desire that the same constitutional principles be joined with plea agreements inspired Congress to create a particularized colloquy in the 1974 Amendments. The Advisory Committee Notes (1974 Amendments) identified the two principal objectives of a Rule 11 colloquy as: (1) ensuring the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into open court and setting forth the methodology for accepting the plea agreement. An amended Rule 11(e)(2) established three types of plea agreements and expressly required the court to inform the defendant of the consequences of entering into a particular type of plea agreement. Thus, the new provision necessitated an additional step in the colloquy procedure.

Most importantly for our purposes, is the type B plea agreement. Specifically, the court must advise the defendant that the recommendations in the plea agreement do not bind the court; and that the defendant will remain bound to his guilty plea if his sentence is not what was bargained for. Consequently, in a guilty plea proceeding coupled with a type B plea agreement, a district court judge is required to tell the

defendant not to ultimately rely on the plea agreement or any posturing, predictions or promises by his attorney or the prosecutor. By legislative enactment, the defendant is entitled to hear this advisement from the district court judge to facilitate the making of a knowing choice between alternatives and to prevent the kind of "coercion, inducement and threats" this Court warned about in *Boykin*.

The practical impact is that an open court warning allows the defendant to garner the information necessary to make a knowing choice between alternatives available to him. The verbal warning allows the defendant a moment to pause within the proceeding itself and reconsider his commitment to plead guilty—that grave and solemn act. Nothing in Rule 11 provides for or suggests that anyone other than the defendant may dictate or interfere with this choice. Unfortunately, defendants plead guilty for all kinds of reasons, only one of which is because they committed the crime charged.[4]

After hearing the Rule 11(e)(2) advisement, it becomes the defendant's *choice* whether to: i) stand by his plea and face a possible sentence at the highest end of the applicable guidelines range; or ii) withdraw his plea and attempt to renegotiate a different deal; or iii) withdraw his plea and take his chances at trial.[5] Having no opportunity to meaningfully assess the alternatives before a guilty plea is accepted places a

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[4] *See* Steven A. Drizin & Richard A. Leo, Police Induced Confessions in the Post-DNA Age, 82 N.C. L. Rev. (March 2004); Andrew Hessick and Reshman Saujani, Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge,1 BYU J. Pub. L. 189, 191 (2002); Richard A. Leo and Richard J. Ofshe , The Consequences Of False Confessions: Deprivations Of Liberty And Miscarriages Of Justice In The Age Of Psychological Interrogation, 88 J. Crim. L. & Criminology 429(1998).

[5] *See Ellis v. United States Dist. Court* (*In re Ellis*), 294 F.3d 1094, (9th Cir. Wash., 2002) en banc docket 01-70724.

defendant under a distinct procedural hardship. In order to withdraw a guilty plea after it is accepted but prior to sentencing a defendant must present a "just and fair reason", pursuant to Fed. R. Crim. P. Rule 32. This is a higher burden. The defendant must file a motion requesting permission to withdraw the guilty plea and then prove to the court there are sufficient grounds for granting that request.[6]

In 1975 several amendments were made to Rule 11 to insure that the voluntary and intelligent nature of guilty pleas were still of primary consideration. Most importantly, the 1983 Amendments to Rule 11 saw the inclusion of a harmless error provision derived from Rule 52(a). Subsection (h) states "any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." The Advisory Committee Notes maintain that the change was necessary to eliminate appellate court's hypertechnical reading of *McCarthy's* automatic reversal for any Rule 11 error no matter how trivial or harmless the error may be. The provision does not attempt to define what is meant by "harmless error" as that is "left to the case law." The committee notes give an example of when an error is not harmless, as when "the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976).

The 1983 Amendments further caution that subdivision (h) makes no substantial changes to the role or "responsibilities" of a district court judge and "should not be read as supporting

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[6] The 2002 Amendments to Rule 11 (d) specifically states that a defendant may withdraw a plea of guilty before the court accepts the plea, "for any reason or no reason".

extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards." In addition, Rule 11 should "not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings."

The 1999 Amendments clarified the type B plea agreement. The Advisory Committee Notes state that this type of plea agreement is, "clearly of a different order than the other two" and the notes speaks to the magnitude of the Rule 11(e)(2) warning. The 2002 Amendments to Rule 11 were primarily stylistic.

The proceeding historical analysis confirms that Rule 11 was meant to ensure that a defendant's guilty plea was knowing and voluntary. This Rule 11 requirement facilitates the district court's determination that a guilty plea is constitutionally sound and emphasizes the critical importance of establishing a clear record.

B. Plain Error Review Of A Guilty Plea When Coupled With A Negotiated Plea Agreement

1. *The record.*

In *Boykin*, this Court recognized that due process requires an adequate record to demonstrate that a defendant's guilty plea was "intelligent and voluntary". 395 U.S. at p. 243. *Boykin* held that the record must affirmatively show that a defendant who pleads guilty "has a full understanding of what the plea connotes and of its consequences". *Ibid. McCarthy* elucidated the reason for a record, "Rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding in this highly subjective area. The Rule contemplates that disputes as to the understanding of the defendant and the voluntariness of his action are to be eliminated at the outset. 394 U.S. at p.470

In 1974, Congress specifically addressed the procedural requirements for a Rule 11 record. The Advisory Committee

Notes (1974 Amendment) to subsection (g) required a "verbatim record" be kept of the proceeding which included, "without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea".

Generally, under a harmless error inquiry the relevant record was thought to be limited to the guilty plea proceeding itself. In *Vonn*, *supra*, this Court had determined that the whole record was available for consideration in determining if a defendant's substantial rights were violated, under either a harmless error or plain error analysis. In that case, the Court found no reversible plain error because the defendant had been given the omitted warning several times in the course of the proceeding, including, most importantly, two times in open court. This Court recognized that *Vonn* had an opportunity to hear and read the warning. "The record shows that four times either *Vonn* or his counsel affirmed that *Vonn* had heard or read a statement of his rights and understood what they were". *Id.* at 75.

The *Vonn* decision thus did not address the circumstances presented here, when a defendant is never warned on the record or in open court of the important Rule 11 safeguards. *Vonn* does not expressly include a signed writing, standing alone without proof in a transcript, as a means of verifying what a defendant understood. Under a plain error review, *Vonn* is consistent with the legislative mandate for an "open court" recitation of the relevant warnings. *Vonn* does not say that a signed writing not supported by a transcript containing the advisement is sufficient.

The situation in the present case is decidedly distinct from that in *Vonn*. Benitez was never informed in open court regarding the omitted warning and *Vonn* was presented with

a document that he could actually read, whereas Benitez was not:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

As previously stated, plea agreements are governed by contract law standards. This is not to say that federal criminal plea agreements are subject to state civil contract laws, but such contract standards are illustrative of how to understand the plea agreement. In Respondent's case, he entered into a negotiated contract in Los Angeles, California. California Civil Code section 1632 requires that "any person in the trade or business who negotiates in the Spanish language, either orally or in writing, in the course of entering into a contract or agreement. a loan or extension of credit . . . a lease, sublease, rental contract or agreement . . . shall, deliver to the party to the contract or agreement and prior to the execution thereof, an unexecuted Spanish-language translation of the contract or agreement" (California Civil Code, Part 2 Contract: Title 2: sections 1619-1633).[7] A party is exempt from the foreign language requirements if the consumer is accompanied by

[7] Commencing on July 1, 2004, California Civil Code section 1632 will require that consumer lenders and retail businesses that negotiate specified transactions in a foreign language (primarily in Spanish, Chinese Tagalog, Vietnamese or Korean) must provide a copy of the contract translated into the respective language.

his own translator *who participates in negotiating* the transaction. *Ibid*.

Benitez was presented with a plea agreement written in a language he could not read or speak. His translator did not participate in negotiating in his plea agreement. In the context of a contract, therefore, the respondent's plea agreement would be declared legally invalid. Yet, it is the government's position that the plea agreement shows the respondent was aware of the omitted Rule 11 warning. The serious rights at stake and the consequences of a guilty plea demand more careful safeguards than a mere civil contract.

II. THE GOVERNMENT'S ANALYSIS IS INCONSISTENT WITH CONSTITUTIONAL PRINCIPLES

In *United States v. Timmreck*, 441 U.S. 780 (1979), the Rule 11 violation, at issue in that case was a failure to advise the defendant about the mandatory parole term. The Court addressed whether a collateral attack was the appropriate avenue for a Rule 11 violation raised for the first time. This Court held that a conviction based on a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11. Such a violation is neither constitutional nor jurisdictional. The Court went on to explain that Rule 11 claims are best suited for direct appeal:

> Respondent could have raised his claim on direct appeal but did not, and there is no basis here for allowing collateral attack to do service for an appeal. . . . For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

Id. at 784

Here, the government argues that the interest in finality justifies treating "forfeited" Rule 11 errors as not being

cognizable on direct appeal. Pet. Merits Br. 17-18; 32. This position is contrary to the holding in *Timmreck*, which actually encourages direct appellate review for these types of errors. More importantly, for our purposes, the petitioner's interpretation of *Timmreck's* prejudice test is incorrect. The government cites *Timmreck* for the proposition that it supports a singular prejudice test constituent with the proffered standard. *Timmreck* actually articulated a dual substantial rights analysis for a Rule 11 violation, rather than the single prejudice standard quoted by the government. This further supports the argument that the "affects substantial rights" test is not as restrictive as the one presented by the government. The Court noted in *Timmreck*, that "Respondent does not argue that he was *actually unaware* of the special parole term *or* that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Ibid.* (emphasis added).

The government's position that a defendant can ***ONLY*** show "plain error" prejudice by proving that if not for the Rule 11 error he would have pled not guilty is also based on an incorrect interpretation of *United States v. Olano*. Moreover, to uphold what the petitioner is suggesting appears inconsistent with the holdings of *Kerchaval*, *McCarthy*, *Boykin*, *Brady*, and *Vonn.* Following the logic of those cases, a prejudicial effect on the outcome of a guilty plea proceeding occurs when there is a failure to generate a constitutionally valid guilty plea—a knowing and voluntary plea. The holding in *Benitez* is consistent with that rational.

The petitioner cites *Hill v. Lockhart* 474 U.S. 52 (1985), to support its vision of a defendant burdened with a plain error standard of proof. *Hill* concerned a claim of ineffective counsel when applied to a guilty plea proceeding. *Hill* held that under the prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show

that but for the erroneous advice of incompetent counsel he would have preferred to go to trial. The government "borrows" a line from *Strickland* and misapplies it to a Rule 11 violation. "Certainly our justifications for imposing the "prejudice" requirement in *Strickland v. Washington* are also relevant in the context of guilty pleas: The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence". *Hill v. Lockhart*, 474 U.S. at. 57

Any comparison between a Rule 11 violation to a claim that incompetent counsel advised a defendant to plead guilty is misplaced. These two different jurisprudential matters concern dissimilar interests. A prosecutor may not become involved in a guilty plea discussion involving an attorney and his client, however, prosecutors are fully capable of informing the district court that a portion of the Rule 11 colloquy has been overlooked. Indeed, they have perhaps the greatest incentive of all participants to do so. The advice to plead guilty is obviously distinct from the court's advisements about the guilty plea itself. Therefore, the resulting focus of inquiry should not be the same and the government's comparison to the *Strickland* standard is unhelpful at best. Certainly, Rule 11 imposes procedural safeguards even when a defendant is hampered with incompetent counsel. This is achieved by placing the Rule 11 constitutional requirements squarely on the shoulders of the district court judge.

Endorsing the misguided prejudice methodology offered by the government is tantamount to concluding that any guilty plea will do and unconstitutional pleas will suffice if a defendant is too ignorant (or yoked with incompetent counsel) to object to the Rule 11 errors at the plea hearing. According to the government, a probe into a defendant's awareness is not necessary. Appellate courts need only divine the mind and will of the defendant, presume he would have

chosen to plead guilty anyway, offer a reasonable rational assessment of the case and then summarily deny relief. The petitioner claims that avoidance of an actual subjective awareness inquiry is justified: as long as the defendant was motivated enough to plead guilty [8] or the defendant failed to file a motion to withdraw his plea in district court[9] or where there is overwhelming evidence of guilt, it is not essential to inquire if he was aware of the omitted advisement or the consequences of his guilty plea. Pet. Merits Br. at 26-27.

The notion that evidence of guilt will permit a disregard for an awareness inquiry was addressed by this Court in *Henderson v. Morgan*, *supra.* There, the court held that even if the prosecutor had overwhelming evidence of guilt and the defendant acted under the advice of competent counsel to plead guilty "a plea cannot support the judgment of guilty unless it was voluntary in the constitutional sense". 426 U.S. at 643-645. *United States v. Cotton,* 535 U.S. 625 (2002), is distinguishable on this point, as well. *Cotton* involved a jury trial that produced an extensive record in order to evaluate the evidence of guilt. This is nothing like the situation in *Benitez.*

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[8] As one state court observed nearly a century ago, '(r)easons other than the fact that he is guilty may induce a defendant to so plead, . . . (and) (h)e must be permitted to judge for himself in this respect.'" *North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160 (1970) (quoting *State v. Kaufman*, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879).)

[9] *See United States v. Santo*, 225 F.3d 92, 97 (1st. Cir. 2000), "we note that Santo did not request to withdraw his guilty plea in the district court. This omission, however, is not necessarily fatal where a fundamental mistake in Rule 11 procedure is asserted. . . We have said, and reiterate, that a defendant who has not sought relief below "faces a high hurdle" on appeal, and must show that there was "a substantial defect in the Rule 11 proceeding itself." The First Circuit reversed the lower court's holding that the decision controverts the purpose behind Rule 11"to ensure that the defendant is not induced to change his plea because of a totally unrealistic expectation as to how mild a sentence he might receive."

The Advisory Committee Notes (1983 Amendments) warn against utilizing speculation aimed at "nullifying important Rule 11 safeguards". Nevertheless, decisions based on speculation are exactly what the petitioner postulates as providing good law or, rather, good enough law. The government prefers that the constitutional requirements for a valid guilty plea not mandate an awareness inquiry, and is asking this Court to adopt a singular and unconstitutional prejudice test.

In the present case, the government overlooks substantial evidence to the contrary to conclude that the respondent's plea was constitutionally valid. The *Benitez* Panel acknowledged that because the respondent was not aware of the omitted warning he could not communicate or interact with his attorney. The appeals court further found:

> The plea agreement was in English and read to Benitez by an interpreter. Since Benitez was unable to read English, he had no opportunity to examine the Rule 11(e)(2) provisions himself. Because his counsel and the prosecutor advised him he would in any event probably qualify for the safety valve provision and serve less than the mandatory minimum, Benitez had little incentive to attempt to ascertain the details of the [plea] agreement.

Pet. App. 7a-8a.

All of the above factors were omitted from the government's version of the case. Other than the signed plea agreement that contained the omitted Rule 11 (e)(2) warning, there is nothing in the record to support the government's position that the respondent's plea was constitutionally valid. Now, despite the fact that the Ninth Circuit expressly rejected its position on the ability of the written plea agreement to cure the district court's critical Rule 11 error, and despite the fact that this Court also rejected the government's request to

disturb the Benitez panel's decision on this point, the government persists in arguing that Respondent's guilty plea was knowing and voluntary *because of the written plea agreement!*

The petitioner also cites remarks made by the respondent that he wanted a "better deal" or that "at no time have I decided to go to trial" as proof that he never intended to go to jury trial. Those comments do nothing to cure the involuntary and unknowing nature of his plea. Nor do they establish Respondent's mind set at the time of the plea hearing. The government neglects to point out that defense counsel declared he was ready for trial and the respondent did not object or voice any opposition to establishing a trial date. J. A. 5-53.

Also, Respondent's remarks cited by the petitioner were all made prior to entering into a Rule 11(e)(2) type plea agreement. The record fails to show that when Benitez made the statements cited by the government he was aware of the consequences of the type of plea agreement he would eventually sign more than one month later. Therefore, the respondent's remarks about not deciding to go to trial are a red herring to draw the Court's attention away from the constitutionally infirm guilty plea.

A. The Government Misrepresents a Split in the Circuits

The petitioner substantiates its prejudice analysis by presenting it as the definitive standard of review prevailing in all but two the eleven sister-circuits. However, this is far from the truth. Not only does the Eleventh Circuit[10] require a

[10] *See United States v. Hernandez-Fraire*, 208 F. 3d 945 (11th Cir. 2000) outlining the Eleventh Circuit's Rule 11 substantial rights analysis, which was based on deciding whether the three core concerns where violated; *United States v. Pierre*, 120 F.3d 1153, 1156 (11th Cir. 1997)("If

showing that one of the Rule 11 "core concerns" were violated to qualify for reversal, but the First [11] and the Seventh [12] follow the same reasoning. The three core concerns can be articulated as: 1) the guilty plea must be free of coercion; 2) the defendant must know and understand the nature of the charges; and 3) the defendant must know and understand the consequences of his guilty plea.

The petitioner characterizes those circuits relying on a "core concern" standard as "erroneous" and "inconsistent with this Court's decision" in *Olano*, Per. Merits Br. at 22-23. The inconsistency arises not from a conflict with *Olano*, but from the improperly limited and narrow interpretation the government associates with the third prong of *Olano's* "plain error" test. When the three core concerns are semantically dissected, one arrives at the constitutional principles for a knowing and voluntary plea, as articulated in *Kerchaval*,

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one of the core concerns is not satisfied, then the plea is invalid".); *United States v. DePace*, 120 F.3d 233, 236 (11th Cir. 1997)("A 'court's failure to address any one of these three core concerns requires automatic reversal.'"); *United States v. Quinones*, 97 F.3d 473, 475 (11th Cir. 1996) ("Failure to satisfy any of the core objectives violates the defendant's substantial rights.'").

[11] *See United States v. Castro-Gomez*, 233 F. 3d 684, 687 (1st Cir. 200) ("The complete failure of the district court to address one or more of the three concerns would warrant reversal."); *United States v. Marrero-Rivera*, 124 F.3d 342, 348 (1st Cir. 1997) ("A total failure to address any 'core concern' mandates that the guilty plea be set aside.")

[12] *See United States v. Kraus*, 137 F.3d 447, 458 (7th cir. 1998) ("Judicial participation in plea negotiations implicates one of the core concerns of Rule 11. . . and vacating a plea and sentence that may have been affected by such participation best serves the prophylactic purpose of the rule."); *United States v. Padilla*, 23 F.3d 1220, 1222 (7th Cir. 1994) (explaining that ignorance about the mandatory minimum penalties, a core concern, "strikes us an informational lack so serious that unless strong indications to the contrary are apparent from the record a court should presume it influenced a defendant's decision to plead guilty.")

McCarthy, Boykin, Brady and *Vonn* and a myriad of other federal decisions.

Contrary to the government's argument, the Second [13] and Third Circuit [14]do not exclusively follow the government's proffered substantial rights analysis either. The Third Circuit recognizes a dual standard of review consistent with this Court's holding in *Timmreck* where "the defendant must show that he was prejudiced by the error, i.e. that he did not understand the consequences of his plea *or* that, if he had been properly advised about the effect of the special parole, he would not have pled guilty." (emphasis added). The petitioner totally ignores the "understanding" reference in the quote. Pet. Merits Br. at 33.

B. Practical Impact Of The Government's Analysis.

Rule 11 instructs us that a primary function of the district court's colloquy is to develop a record showing that the constitutional principles for a knowing and voluntary guilty plea were met. However, as that colloquy formula stands today, it does nothing to show whether a defendant would prefer to go to trial due to a Rule 11 error. The result is an inadequate record. Therefore, the practical impact of the petitioner's plain error substantial rights analysis is twofold. The first impact is that it virtually removes Rule 11 issues from direct appellate review. In so doing, it relegates these types of claims to collateral attack where such claims are doomed under *Timmreck.*

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[13] *See United States v. Livorsi*, 180 F.3d 76, 81 (2d Cir. 1999) ("As the existence of Rule 11(e)(2) itself indicates, the best way to ensure that a defendant is fully aware of the implications of his decision to plead guilty is, after all, for the district judge to give the proper warning in open court").

[14] *See United States v .Cleary*, 46 F.3d 307 (3rd Cir. 2001).

Burdening criminal defendant's with the practically impossible task of proving that they would have proceeded to trial if not for the Rule 11 error will result in protracted evidentiary hearings in a habeas proceeding where the standard is higher and witnesses' memories are faulty. The government's analogy to claims of ineffective counsel is exactly on point. *Strickland* is a collateral review case based on a conviction by way of a guilty plea. In *Strickland*, the defendant was granted an evidentiary hearing for the specific purpose of expanding the existing record. Although the district court denied the defendant's petition for habeas corpus, nevertheless, a sufficient record was developed for the court of appeals to reverse, and for this Court to reverse the court of appeals stating:

> Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. *The record makes it possible to do so. Id*. at 698 (emphasis added)

Similarly, *Boykin*, *Brady*, and *Timmreck* are collateral review cases where the defendants pled guilty and then challenged the validity of their respective plea proceedings. Therefore, the jurisprudential realm of petitions for habeas corpus will be the ultimate fate for most Rule 11error claims, if this Court adopts the standard proffered by the government. Surely such venerable and inviolate principles of constitutional law as a knowing and voluntary guilty plea are deserving of a nobler fate.

The second impact of adopting the petitioner's standard is that speculation replaces certainty. Speculation is tolerated when the legislative enactment for creating an adequate plea colloquy in the first instance has not been established. Simply speaking, as Rule 11 appears today, district courts are not equipped to even ask the right questions to enable the development of the kind of record the government says would

be needed to satisfy it prejudice test. Indeed, an inquiry of this sort is not a part of any judicial proceeding. Given that Rule 11 is a procedural tool, it has not been legislatively honed to generate a colloquy sensitive enough to allow most defendants to meet this standard without an evidentiary hearing. The right of direct appeal does not offer relief in the form of an evidentiary hearing but collateral review does.

There is a structural disconnect between what is inherent in the current guilty plea proceeding and the proof required to meet the government's standard. In order to bridge the gap, the petitioner contends that an awareness analysis is not necessary. This contention encourages speculation. The justification for not pursuing a "knowing" analysis is that a defendant was motivated enough to plead guilty, despite a Rule 11 error. This scenario does not take into account that defendants who falsely confess and plead guilty are motivated pleaders.[15]

III. BENITEZ WOULD HAVE PREVAILED EVEN UNDER THE GOVERNMENT'S PREJUDICE STANDARD AND HIS GUILTY PLEA MUST BE VACATED

The respondent was not required to establish that absent the Rule 11 violation he would not have pleaded guilty. Nevertheless, he would have prevailed in the court of appeals under the prejudice standard proffered by the government. First, the record shows that Benitez was ready to go to trial; he felt "railroaded" into signing his plea agreement; he expressed confusion about the consequences of his guilty plea due to the lack of information provided to him; and he moved to withdraw his plea through the direct appeal process.

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[15] *See* the false confession articles by leading experts*:* Steven A. Drizin & Richard A. Leo, supra*;* Richard A. Leo and Richard J. Ofshe, *supra;* and Andrew Hessick and Reshman Saujani, supra. at footnote 4.

Second, the *Benitez* record is adequate due to the individualized, *pro se* actions of the respondent. He explained that he was not familiar with the United States Constitution; he wrote letters and had them delivered directly to the district court judge. The respondent's own initiative is the only reason why there is a sufficient record in this case. The problem is that other defendants may not be as courageous as the respondent is.

Third, in *Henderson v. Morgan*, *supra*, this Court briefly addressed a guilty plea situation where the record also suggested a possible defense. The issue in *Henderson* was "whether a defendant may enter a voluntary plea of guilty to a charge of second-degree murder without being informed that intent to cause the death of his victim was an element of the offense". *Id*. at 638. Under a harmless error analysis, the defendant's guilty plea was found to be involuntary. Although, the Court "assume[d] that the defendant would have "probably plead guilty anyway" if he had been properly advised about the intent element, "[s]uch an assumption is, however, an insufficient predicate for a conviction of second-degree murder. *Id* at 644 n.12. Furthermore, the Court cautioned that because of the defendant's "unusually low mental capacity" there might have been a defense to the murder charge. *Id.* at 647. In this case, the Ninth Circuit did not dispute that Benitez might have had a defense but that, "[i]n his letters and statements to the court, Benitez never alleged [defense counsel] was failing to investigate an entrapment defense." Pet.App. at 23a.

Plainly speaking, when a court exercises caution and fails to exercise in assumptions or speculation, a fair and just result is achieved. A result produces trust when a citizen can say of the law, "first, the law was properly enacted, second, I can understand it and third, it was properly applied". Benitez takes issue with both the second and third prong—he did not understand the law, and the law was not properly applied in

his case. The Congress has made an explicit protocol for Rule 11 information transmittal, with the express purpose of making sure a defendant's plea is voluntary and he knows the consequences of pleading guilty. Here, that machinery broke down, the government does not deny the district court judge made an error and the Ninth Circuit declared the error to be of constitutional proportions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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