No. 03-167

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS DOMINGUEZ BENITEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent provides no sufficient reason to leave either of the court of appeals' principal holdings unreviewed. The court of appeals held that a Rule 11 error affects a defendant's "substantial rights" if the error is neither minor nor technical and the defendant did not understand the right at issue when he entered his plea. The petition demonstrates that that holding is erroneous; is in considerable tension with this Court's holding in *United States* v. *Olano*, 507 U.S. 725, 734 (1993), that an error affects substantial rights if it "affect[s] the outcome of the district court proceedings"; conflicts with decisions of nine courts of appeals specifically holding that a Rule 11 error affects substantial rights if the defendant would not have pleaded guilty but for the error; and involves a question of recurring importance.

The court of appeals also held that, in deciding whether to grant relief for a violation of Rule 11 on plain-error review, a court may not consider a written plea agreement that accurately states the Rule 11 advice omitted by the district court. The petition demonstrates that that holding is

erroneous; misinterprets this Court's holding in *United States* v. *Vonn*, 535 U.S. 55, 59 (2002), that an appellate court addressing a claim of Rule 11 error may consider "the entire record"; conflicts with the decisions of six courts of appeals specifically holding that a court addressing such a claim may consider a plea agreement;[1] and involves a question of recurring importance.

Respondent does not seriously dispute that both of the court of appeals' holdings involve questions of recurring importance to the administration of the criminal justice system. He makes no genuine effort to defend the first holding or to reconcile it with *Olano*, and he is able to defend the second holding, and to reconcile it with *Vonn*, only by recharacterizing it. And his arguments that the holdings do not conflict with decisions of other courts of appeals are entirely without merit.

A. The Ninth Circuit's Standard For Determining Whether A Rule 11 Violation Is Reversible Plain Error Conflicts With Decisions Of Other Courts Of Appeals

Respondent contends that the court of appeals' standard for determining whether a plain error affects substantial rights is not "contrary to decisions in other circuits," and that the decisions cited by the government (Pet. 15) are "distinguishable from this case." Br. in Opp. 15. Respondent is mistaken. The court of appeals' decision squarely conflicts with decisions of nine other courts of appeals, including the First, Second, Third, and Fourth Circuit decisions that respondent singles out for special attention (*id.* at 13-15).

In *United States* v. *Dixon*, 308 F.3d 229 (2002), the Third Circuit held that a Rule 11 error did not affect substantial rights because the court was "not persuaded that but for the

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[1] Since the petition was filed, a seventh court of appeals has so held. See *United States* v. *Edgar*, No. 02-6195, 2003 WL 22457041, at *3-*4 (10th Cir. Oct. 30, 2003).

error * * * , [the defendant's] choice to plead guilty would have been any different." *Id.* at 235. According to respondent, "[i]n *Dixon*, the Third Circuit stated, '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.'" Br. in Opp. 13 (quoting 308 F.3d at 234). The italicized phrase, however, is no part of *Dixon*'s holding. The language quoted by respondent appears in a parenthetical to a case, *United States* v. *Cleary*, 46 F.3d 307 (3d Cir.), cert. denied, 516 U.S. 890 (1995), that is the last of four cited for the proposition that, to demonstrate an effect on substantial rights under the plain-error rule, a defendant "must show that he would have pled not guilty" if the Rule 11 error had not occurred. 308 F.3d at 234. And the only part of the parenthetical that is italicized by the Third Circuit is the last six words: "*he would not have pled guilty*." *Ibid.* *Cleary*, moreover, did not involve either the plain-error or the harmless-error rule.

In *United States* v. *Westcott*, 159 F.3d 107 (1998), cert. denied, 525 U.S. 1084 (1999), the Second Circuit held that a Rule 11 error did not affect substantial rights because "it cannot be said * * * that the * * * error * * * had any effect whatever on [the defendant's] decision to plead guilty." *Id.* at 113 (quoting *United States* v. *Renaud*, 999 F.2d 622, 625 (2d Cir. 1993)). According to respondent, *Westcott* "recognized that a Rule 11 'understanding' inquiry[] 'must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind.'" Br. in Opp. 14 (quoting 159 F.3d at 113). In fact, what the Second Circuit said must be resolved on the basis of the record is whether the Rule 11 error "prejudice[d] the defendant," and in the immediately following sentence, the court made clear that "prejudice," in this context, means that

the defendant "would have acted differently" if the Rule 11 error had not occurred. 159 F.3d at 113.

In *United States* v. *General*, 278 F.3d 389, cert. denied, 536 U.S. 950 (2002), the Fourth Circuit held that "the record does not reflect that any lack of understanding of the [omitted Rule 11 information] affected [the defendant's] decision to enter a guilty plea." *Id.* at 395. Respondent quotes the Fourth Circuit's statement in *General* that the district court must "first ascertain what the defendant actually knows when he pleads guilty." Br. in Opp. 14 (quoting 278 F.3d at 394). But he fails to quote its statement, two sentences later, that the ultimate question is whether providing the omitted Rule 11 advice "would have likely affected the defendant's decision" to plead guilty. 278 F.3d at 394 (quoting *United States* v. *Goins*, 51 F.3d 400, 402 (4th Cir. 1995)).

Finally, in *United States* v. *Noriega-Millán*, 110 F.3d 162 (1997), the First Circuit held that the very Rule 11 error at issue here did not affect substantial rights because it "did not affect [the defendant's] decision to plead guilty." *Id.* at 167. Respondent claims (Br. in Opp. 15) that *Noriega-Millán* is distinguishable because, in that case, there was a Spanish version of the plea agreement (see 110 F.3d at 164 n.2) and the defendant spoke some English (see *id.* at 164). But neither of those facts had anything to do with the First Circuit's holding that the defendant would have pleaded guilty even if there had been no Rule 11 error, and they certainly had nothing to do with its holding that a Rule 11 error does not affect substantial rights if the error had no effect on the defendant's decision to plead guilty. See *id.* at 167.[2]

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[2] The fact that the court in each of these cases found no effect on the defendant's substantial rights despite his lack of knowledge of the information omitted from the Rule 11 colloquy demonstrates that there is a practical difference, not merely a difference in language, between the Ninth Circuit's approach and that of the majority of circuits. See *Dixon*, 308 F.3d at 235 (defendant would have pleaded guilty because he received

As part of his effort to reconcile the Ninth Circuit's decision with decisions of other courts, respondent also contends, without any citation of its opinion, that the court of appeals "recognized" in this case that, after making "a threshold determination on whether or not the defendant understood the omitted advisement," the court would proceed to "an examination of whether the defendant would not have pleaded guilty if not for the Rule 11 error." Br. in Opp. 12. That is incorrect. The court of appeals' decision does not say, or even suggest, that the question whether a defendant would have persisted in his plea of not guilty in the absence of a Rule 11 violation is relevant in deciding whether the violation amounts to reversible plain error. And the decision certainly does not undertake an "examination" of that question. The same is true of *United States* v. *Minore*, 292 F.3d 1109 (9th Cir. 2002), cert. denied, 537 U.S. 1146 (2003), the case on which the court of appeals relied (Pet. App. 5a-6a). See 292 F.3d at 1118-1120.

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substantial benefits in exchange for plea); *General*, 278 F.3d at 395 (defendant would have pleaded guilty even if he had not been aware of omitted Rule 11 information because he received substantial benefit in exchange for plea); *Westcott*, 159 F.3d at 112-113 (defendant would have pleaded guilty because he did not seek to withdraw plea when he learned of Rule 11 error shortly afterwards); *Noriega-Millán*, 110 F.3d 162 (defendant would have pleaded guilty even if he had been advised that district court's refusal to follow government's sentencing recommendation would not enable him to withdraw plea because he was advised that court was not obligated to follow recommendation and recommended sentence was only 11 months shorter than sentence imposed).

B. The Ninth Circuit's Refusal To Consider A Plea Agreement In Deciding Whether A Rule 11 Violation Is Reversible Plain Error Reflects A Misinterpretation Of This Court's Decision In *Vonn* And Conflicts With Decisions Of Other Courts Of Appeals

1. Respondent contends that the Ninth Circuit does not, as a categorical matter, refuse to consider a plea agreement in deciding whether a Rule 11 violation requires vacatur of a plea. Br. in Opp. 17-18. He argues that the court of appeals held only that, "under the particular circumstances of this case" (*id.* at 17), the plea agreement's inclusion of the Rule 11 advice omitted from the plea colloquy does not establish that respondent was aware of the information in question. Respondent is mistaken.

In rejecting the government's argument that the plea agreement demonstrated respondent's awareness of the information omitted from the plea colloquy, the court of appeals (Pet. App. 6a-7a) followed its earlier decision in *United States* v. *Kennell*, 15 F.3d 134 (9th Cir. 1994). Quoting from that decision, the court said that, because of the "marked difference" between "being warned in open court by a district judge" and "reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of [the] plea," the fact that the defendant read the plea agreement "is not a substitute for rigid observance of Rule 11." Pet. App. 6a (quoting 15 F.3d at 136). The court also said that "[t]he *Kennell* court's concern * * * is no less valid after *Vonn*," because, if including the relevant warning in a plea agreement were sufficient, Rule 11 "would have little force." *Id.* at 7a. This reasoning reflects a categorical view that a plea agreement is not part of the record to be considered in a Rule 11 plain-error case.[3]

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[3] Ninth Circuit decisions both before and after the decision in this case also interpret *Kennell* to impose a categorical bar on considering a plea

It is true that the court of appeals went on to say that "[t]he plea agreement was in English and read to [respondent] by an interpreter," and that, "[s]ince [respondent] was unable to read English, he had no opportunity to examine its provisions himself." Pet. App. 7a. But given what the court said about plea agreements generally, there is no reason to believe that it would have reached a different conclusion if respondent had been able to read English. Indeed, the defendant in *Kennell*, whose guilty plea was also vacated despite a plea agreement that included the Rule 11 advice omitted from the plea colloquy, was apparently able to read English. See 15 F.3d at 135, 138.[4]

Even if the Ninth Circuit's rule were limited to cases in which the defendant does not read English, it would still be incorrect and there would still be a circuit conflict. When, as in this case (see Resp. C.A. E.R. Tab 6, at 6, 11-12), a defendant has acknowledged, under oath and in open court, that his plea agreement was read to him in his native language, that he carefully discussed the entire agreement with his attorney, and that he understands it, there is simply no basis for a presumption, much less a conclusive one, that the defendant did not know, or did not understand, what was in the agreement. That would be true in any case, since "[s]olemn declarations in open court carry a strong presump-

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agreement when deciding whether a Rule 11 violation is reversible error. See *United States* v. *Pena*, 314 F.3d 1152, 1157 (2003); *United States* v. *Smith*, 60 F.3d 595, 598-599 (1995).

[4] In support of his contention that the court of appeals' refusal to consider the plea agreement was based on the particular circumstances of this case, respondent relies not only on the fact that he could not read English, but also on the fact that he had limited formal education and the fact that he made complaints about his lawyer. Br. in Opp. 19. But the court of appeals did not mention either of those facts, much less rely upon them, in holding that the plea agreement's inclusion of the omitted Rule 11 advice was irrelevant. See Pet. App. 6a-8a.

tion of verity." *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977). It is particularly true in a plain-error case, like this one, in which it is "the defendant who sat silent at trial" that has "the burden to show that his 'substantial rights' were affected." *Vonn*, 535 U.S. at 63. Indeed, in one of the cases cited in the petition (Pet. 26), the Seventh Circuit explicitly rejected the view that a defendant's "tenuous grasp of the English language" precludes reliance on a plea agreement that includes the Rule 11 advice omitted from the plea colloquy (in that case, the same advice that is at issue here), at least when the defendant "does not claim that he was unable to understand the interpreter or that the interpreter was incompetent." *United States* v. *Diaz-Vargas*, 35 F.3d 1221, 1225 (1994).[5]

2. Respondent also contends that the court of appeals decisions that the government cites for the proposition that a court may consider a plea agreement in deciding whether a Rule 11 violation constitutes reversible error (Pet. 26) are "not in conflict" with the decision in this case, but "merely distinguishable on their facts." Br. in Opp. 18. Respondent is mistaken. The court of appeals' decision squarely conflicts with decisions of seven other courts of appeals, including the First, Eighth, and Eleventh Circuit decisions to which respondent devotes particular attention (*ibid.*).

Respondent suggests that the Eleventh Circuit in *United States* v. *Camacho*, 233 F.3d 1308 (2000), cert. denied, 532 U.S. 951 (2001), and the First Circuit in *United States* v. *Saxena*, 229 F.3d 1 (2000), relied on something other than

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[5] Respondent claims that the government is obligated to "offer [an] assurance that the Spanish translator correctly read the 'no withdrawal of the guilty plea' language." Br. in Opp. 20. This assertion overlooks both the interpreter's representation that he had "accurately translated th[e] entire agreement" (Pet. App. 35a) and the fact that it is respondent who bears the burden of proving that the Rule 11 error warrants reversal.

the plea agreement in finding that a Rule 11 error did not require vacatur of a guilty plea. Br. in Opp. 18. But the court in both cases relied on a number of facts, one of which was that the information omitted from the plea colloquy was included in the plea agreement. See *Camacho*, 233 F.3d at 1320-1322; *Saxena*, 229 F.3d at 8-9. Respondent also suggests that the Eighth Circuit relied on the plea agreement in *United States* v. *McCarthy*, 97 F.3d 1562 (1996), cert. denied, 519 U.S. 1139 and 520 U.S. 1133 (1997), solely because the defendant was a well-educated professional. Br. in Opp. 18-19. But the defendant's sophistication was only one of a number of reasons given by the court for rejecting the possibility that the defendant was "confused about the terms of the plea agreement" (*McCarthy*, 97 F.3d at 1576), and the other reasons—the clarity of the plea agreement and the defendant's acknowledgment, both in the agreement and at the plea colloquy, that he had read and understood it (*ibid.*)—are equally applicable here (see Pet. App. 33a-34a, 35a; Resp. C.A. E.R. Tab 6, at 11-12).

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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