No. _____

In the
Supreme Court of the United States of America

FRANCISCO CUBERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petition for Writ of Certiorari

Ricardo J. Bascuas
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
r.bascuas@miami.edu

Question Presented

I. During Francisco Cubero's plea hearing, the magistrate judge told him that his supervised-release term could not exceed five years but, at sentencing, the court imposed supervised release for life. The district court denied collateral relief and the Eleventh Circuit, in conflict with other courts of appeals, denied a certificate of appealability. Did the circuit court err in denying Mr. Cubero an appeal given that other courts have decided similar cases on the merits with conflicting results?

II. A collateral challenge to the validity of a guilty plea is generally "procedurally defaulted" unless it was raised on direct appeal unless the plea was unknowing or involuntary. Francisco Cubero argued in his § 2255 motion that his plea was unknowing because the district court misled him about the consequences of pleading guilty. Did the court of appeals err in holding that Mr. Cubero procedurally defaulted his due-process claim by not raising it on direct appeal?

Interested Parties

There are no parties to the proceeding other than those named in the caption of the case.

Table of Contents

Table of Authorities

Cases

Federal Statutes

Other Authorities

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Francisco Cubero respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in United States v. Francisco Cubero, No. 17-13736, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is appended to this Petition.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on DATE. Petitioner timely petitioned the Eleventh Circuit for rehearing en banc. The Eleventh Circuit denied the petition for rehearing on DATE. This petition is timely filed pursuant to Supreme Court Rule 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Provisions of Law Involved

The texts of the provisions of law implicated are appended.

Statement of the Case

Arrest and Indictment

On January 19, 2012, federal agents arrested Francisco Cubero, who was then 30 years old, because they had reason to believe he had images of child pornography on his computer that were accessible over the Internet. Five days later, Mr. Cubero was released on a $100,000 personal surety bond and a $25,000 ten-percent bond.

About two weeks later, he was charged with one count of distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2) and two counts of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). One possession count concerned images stored on Mr. Cubero's computer while the other concerned images stored on a compact disc.

Change-of-Plea Colloquy and Adjudication of Guilt

Around April 2012, Mr. Cubero's counsel advised the district court that Mr. Cubero would plead guilty to the indictment. No plea agreement was negotiated or executed. On May 1, 2012, the district judge referred the case to a magistrate judge so that Mr. Cubero could enter a guilty plea.

On May 10, 2012, the magistrate judge presided over Mr. Cubero's change-of-plea colloquy. Mr. Cubero and his counsel as well as the prosecutor were present. After being told that Mr. Cubero would be pleading guilty to all three charges, the magistrate judge, along with the prosecutor and Mr. Cubero's counsel, misinformed Mr. Cubero of the potential consequences:

> THE COURT: Now, the following penalties are present with regard to your pleas. These pleas are as to all three counts of the indictment?
> MR. GONZALEZ: Yes, your Honor.

THE COURT: All right.

AUSA JOHANNES: Yes.

THE COURT: As to the possible sentence in Count 1, there's a statutory maximum term of imprisonment of up to 20 years and a fine of up to $250,000 and a term of supervised release of up to three years.

Counts 2 and 3 carry statutory maximum terms of — Count 2 carries a statutory maximum term of 20 years' imprisonment, supervised release of up to three years and a fine of $250,000. Count 3 carries a maximum term of imprisonment of 10 years, supervised release of three years and a fine of up to $250,000. There's also a requirement for forfeiture in the indictment.

Yes, sir. Do you want to say —

MR. GONZALEZ: Judge, I think Count 2 carries a maximum of 10.

THE COURT: That's correct. I realize that. That has been corrected.

MR. GONZALEZ: And the supervised release — I'm not sure if I heard right, but I thought it was a maximum up to five.

AUSA JOHANNES: That's correct, your Honor. It's up to five.

THE COURT: Let me just correct this. This was handed to me. It's an error. Count 2 is a maximum of ten years and a fine — supervised release of up to five years. Is that correct?

MR. GONZALEZ: Yes, your Honor.

AUSA JOHANNES: Correct, your Honor. The supervised release term of five years is for all counts.

THE COURT: All right. Fine.

This information was materially incorrect. The maximum possible term of supervised release was a life sentence, not a five-year term. *See* 18 U.S.C. § 3583(k) ("Notwithstanding subsection (b), the authorized term of supervised release ... for any offense under section ... 2252 ... is any term of years not less than 5, or life."). Later in the hearing, the prosecutor interjected to clarify that Count 1 carried a mandatory five-year minimum term of imprisonment. However, no one—not the magistrate judge, not the prosecutor, and not Mr. Cubero's attorney— corrected the mistake regarding the supervised-release term. Moreover, the magistrate judge did not explain what "supervised release" means or entails.

The prosecutor did not read any factual proffer into the record at the time of the change of plea. Instead, the prosecutor simply noted that there was a factual proffer and that

Mr. Cubero had signed it.

On the day of the colloquy, the magistrate judge filed a report and recommendation, repeating and reinforcing the mistakes made in court:

> The defendant was advised that the charges in Count 1 carried a statutory mandatory term of imprisonment of five (5) years and up to twenty (20) years, a fine of up to $250,000.00, and *a term of supervised release of up to five (5) years*; Count 2 carries a statutory maximum term of ten (10) years imprisonment, *supervised release of up to three (3) years*, and a fine of up to $250,000.00; and Count 3 carries a maximum term of imprisonment of ten (10) years, *supervised release of three (3) years*, and a fine of up to $250,000.00.

Appendix at A-41 ¶ 4 (emphases added). The district judge adopted this report and recommendation as an order of the court on June 1, 2012, again reinforcing the misinformation.

The only documents filed between the change-of-plea colloquy and the adjudication of guilt were the factual proffer statement and a notice of unavailability by Mr. Cubero's counsel. Thus, the record shows that Mr. Cubero pled guilty after the magistrate judge, the prosecutor, and his counsel all affirmatively misinformed him as to the consequences of his plea, and that this misinformation was not corrected before he was adjudicated guilty.

Presentence Investigation Report and Sentencing

The original presentence investigation report was available for disclosure on June 28, 2012, and a revised version was made available on July 27, 2012. The PSI does not explain what "supervised release" is. Page 2 of the PSI, which lists the maximum possible penalty for each offense, makes no mention of supervised release whatsoever. The PSI did, however, disclose that a life term of supervised release was possible in another section. Appendix at A-31. Part G lists "recommended special conditions of supervision" but does not make clear that

the "supervision" referred to is "supervised release" or explain how these conditions are enforced or what makes them "special." Appendix at A-32–A-33.

On July 12, 2012, Mr. Cubero objected through counsel to the PSI's offense-level calculation and requested for a downward variance from the recommended guideline range. The filing did not mention supervised release at all. Mr. Cubero's counsel also filed two memoranda in aid of sentencing and expert reports regarding Mr. Cubero.

The United States responded on August 1, 2012, opposing any change to the PSI's offense-level calculation. Supervised release was not mentioned at all in the 27-page filing except on the last page, where the government requested that the court "sentence the Defendant to a term of imprisonment of 151 months followed by a life-time term of supervised release." Thus, the prosecutor at some point became aware of the error made at Mr. Cubero's change-of-plea colloquy, but the record reflects no effort by the prosecution to correct the affirmative misrepresentation made to Mr. Cubero at that time.

Nothing in the record shows that Mr. Cubero knew, at the time of his sentencing, that a supervised release term is a punitive sanction, is part of the sentence, and entails surrendering many valuable constitutional rights. The sentencing proceeding did nothing to correct that deficiency. Due to the assigned judge's illness, a different district judge presided over the sentencing than had been handling the case until that point. At the start of the hearing, the sentencing judge explained that he had reviewed many filings and documents and told Mr. Cubero that he assumed Mr. Cubero had read "it" too:

> THE COURT: Thank you for being here.
>
> Good morning, Mr. Cubero. I have read and reviewed the Presentence Investigation Report, the letters, the objections, the sentencing memorandum,

the first supplement, the second supplement —

AUSA JOHANNES: The Government's response?

THE COURT: — the Government's response. I've paper-clipped things, so I'm very familiar. So I assume that you, of course, have read it as well. Am I right, sir?

MR. CUBERO: Yes, Your Honor.

The pronoun "it" in the sentencing judge's question to Mr. Cubero has no clear antecedent among the documents the judge enumerated. Moreover, the district court did not ascertain that Mr. Cubero understood any of the documents. The court also did not ascertain that Mr. Cubero's counsel had reviewed all or any of the documents with his client.

During the hearing, Mr. Cubero, his attorney, and the court discussed Mr. Cubero's psychological health and his need for treatment. The district court overruled Mr. Cubero's objections and denied his request for a variance. Although Mr. Cubero had no criminal history, the district court imposed a prison term of 12 years and 7 months for Count 1. The court sentenced Mr. Cubero to two concurrent 10-year terms of imprisonment on Counts 2 and 3—the maximum term authorized by statute. In addition, the district court imposed a life term of supervised release, the maximum permitted by law. The court stated that the life term of supervised release was "because you'll need lifetime treatment and you know that."

Direct Appeal

The district court appointed the Federal Public Defender to represent Mr. Cubero on appeal. Mr. Cubero's newly assigned counsel failed to notice that Mr. Cubero was misinformed as to the consequences of pleading guilty. Mr. Cubero's appeal argued only "that his sentence was procedurally and substantively unreasonable." *See United States v. Cubero*, 754 F.3d 888, 890 (CA11 2014). Mr. Cubero's appellate counsel failed to argue that Mr.

Cubero's plea was neither knowing nor voluntary because he was affirmatively misled by the court as to the penal consequences of the plea. This was so despite the fact that the brief contended that the life term of supervised release was unreasonable, often italicizing the words "life" and "lifetime" to emphasize the point. *See* Appellant's Brief, *United States v. Cubero*, No. 12-16337, 2013 WL 3893045, at 32, 34, 38, 40, 61 (June 28, 2013). Given the emphasis on the severity of the supervised-release term, it is evident that appellate counsel failed to notice that the change-of-plea colloquy was constitutionally defective, which afforded a much stronger argument than those actually raised.

The government responded, defending the reasonableness of the life term of supervised release solely on treatment grounds without addressing the significant punitive aspects of it. *See* Appellee's Brief, *United States v. Cubero*, No. 12-16337, 2013 WL 4040928, at 38 (June 28, 2013). Thus, nothing in the record, even through the appellate stage, put Mr. Cubero on notice that supervised release is punitive and entails surrendering numerous fundamental constitutional rights.

The Eleventh Circuit Court of Appeals affirmed the sentence after oral argument, holding in a published opinion that the sentence was procedurally and substantively reasonable. *Cubero*, 754 F.3d at 901. The decision did not examine the validity of the plea. After rehearing was denied, Mr. Cubero's appointed appellate counsel sought review in this Court, which was denied.

Motion to Vacate Conviction

After obtaining new counsel, Mr. Cubero moved to vacate his conviction under 28 U.S.C. § 2255. He brought three independent claims. First, he argued that his guilty plea was

unintelligent and involuntary because he was affirmatively misled by both the prosecution and the court as to the direct consequences of pleading guilty. Second, he charged that his trial counsel was ineffective for failing catch the mistake. Third, he charged that his appellate counsel was ineffective for failing to notice and raise the issue. Additionally, Mr. Cubero argued that he was not, in these particular circumstances, required to demonstrate prejudice to establish his ineffective-assistance claims. Alternatively, he argued that he was prejudiced because he would not have pled guilty had he known a life sentence was possible.

Mr. Cubero's § 2255 motion was accompanied by affidavits from both his trial counsel and his appointed appellate counsel. Bother averred that they had failed to notice that the magistrate judge had misinformed Mr. Cubero as to the maximum possible term of supervised release. Neither became aware of the constitutional violation until after Mr. Cubero's prosecution ended.

Ten months later, the United States responded on its own initiative to Mr. Cubero's § 2255 motion with a 33-page memorandum. The district court had not taken any action on the case in that time. Even after the United States responded, the district court failed to set the matter for hearing or take any action on it whatsoever.

Petition for Writ of Mandamus and Denial of the § 2255 Motion

On April 11, 2017, Mr. Cubero petitioned the Eleventh Circuit for a writ of mandamus in an attempt to get obtain a ruling on his motion, which had been pending for more than two years. Finding that "Mr. Cubero had established undue delay," the court of appeals gave the district court 60 days to rule on the § 2255 motion. Sixty-four days later, the district court denied Mr. Cubero's motion. *See* Appendix at A-17–A-33.

Mr. Cubero was denied the opportunity to appeal the district court's order. The district court refused, without explanation, to grant a certificate of appealability. Appendix at A-16. The court of appeals likewise denied a certificate of appealability. Appendix at A-3–A-15. That court's order reasoned that Mr. Cubero's due-process claim was procedurally defaulted and he could not establish that his counsel were ineffective because the PSI's bare mention of the potential life term of supervised release made it impossible for him to prove prejudice. Appendix at A-13–A-14.

Because the court of appeals misapplied the standard for issuance of a certificate of appealability, Mr. Cubero timely sought reconsideration. The court of appeals denied the motion without explanation on April 4, 2018. Appendix at A-2.

Reasons for Allowance of the Writ

I. The courts of appeals are divided over whether a district court's failure to correctly inform a defendant of the direct consequences of pleading guilty prejudices the defendant.

The courts of appeals are divided over whether a defendant who receives a life term of supervised release, despite having been told by the court at his plea colloquy that his exposure was much less, is prejudiced by that misinformation. The Eleventh Circuit held that it is not even arguable that Mr. Cubero could make that showing. It refused to even entertain his appeal. The First and Fourth Circuits, on the other hand, both vacated convictions obtained in nearly identical circumstances. *See United States v. Waddell*, 622 F. App'x 201, 203–04, No. 14-4286 (CA4 May 22, 2015); *United States v. Rivera-Maldonado*, 560 F.3d 16, 22 (CA1 2009). On similar facts, the Fifth, Eighth and Ninth Circuits concluded that the defendant failed to demonstrate prejudice. *See United States v. Crain*, 877 F.3d 637 (CA5

2017); *United States v. Borowy*, 595 F.3d 1045 (CA9 2010); *United States v. Luken*, 560 F.3d 741, 745 (CA8 2009).

Crain was an appeal from the denial of a § 2255 motion in which, unlike in this case, the defendant was granted a certificate of appealability. *Waddell*, *Rivera-Maldonado*, *Borowy*, and *Luken* were decided on direct appeal but the analysis was the same as in *Crain* and this case. Each court had to decide whether there was a "reasonable probability" that the defendant would not have pleaded guilty had he been correctly informed that he faced a lifetime, rather than a few years, on supervised release. The appellants in *Waddell*, *Rivera-Maldonado*, *Borowy*, and *Luken*, like Mr. Cubero, failed to object in the district court. To obtain relief on plain-error review, they too had to show, as in this case and *Crain*, that they were prejudiced by the district court's misinformation. In both contexts, "prejudice" means the same thing — a "reasonable probability" that the defendant would not have pled guilty had he been correctly informed. *See* Appendix at A-10 (standard for ineffective-assistance claim); *Rivera-Maldonado*, 560 F.3d at 21 (standard for plain-error review). Indeed, the Eleventh Circuit in this case relied heavily on *United States v. Brown*, 586 F.3d 1342, 1344–47 (CA11 2009), a plain-error decision that also conflicts with *Rivera-Maldonado* and *Waddell*.

The government conceded and the courts held in all these cases that misinforming a defendant about his exposure to a lifetime of supervised release constitutes plain error. *See* 18 U.S.C. § 3583(k). The courts disagree over what a defendant must do to establish prejudice. The Eleventh Circuit held in this case that the showing is impossible to make when a PSI alludes to the correct maximum term of supervised release. It denied Mr. Cubero a certificate of appealability on that basis. Appendix at A-13.

It was hardly beyond reasoned debate that Mr. Cubero was in fact prejudiced and other courts have found prejudice in identical circumstances. The difference in the Eleventh Circuit's analysis is that it clings to the legal fiction that a probation officer's presentence investigation report can do the work that the Due Process Clause (as well as Congress) assigns to federal judges. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); Fed. R. Crim. P. 11(b)(1)(H) & (I).

In line with its formalistic view, the Eleventh Circuit held that Mr. Cubero could never prove prejudice because one ambiguous sentence in the PSI supposedly put him on notice that the magistrate judge had gotten the law wrong. The PSI stated only that "[t]he guideline range for a term of supervised release is at least five years but may be up to life ... ." Appendix at A-31. This permissively phrased, ambiguous sentence buried in a technical report would hardly alert someone who has already pleaded guilty that the magistrate judge, prosecutor, and defense lawyer all affirmatively misinformed him during his plea colloquy. It is fundamentally unfair to burden Mr. Cubero with showing that he was prejudiced by an error so fundamental that it rendered the Rule 11 colloquy entirely hollow. Nonetheless, jurists in the Eleventh Circuit so well understand that the PSI's fine print trumps the Constitution's enumerated rights that the district judge attached that page of the PSI to his order denying Mr. Cubero's § 2255 motion. If the law is to be that the PSI matters more than what the judge says, then the PSI needs to be produced in advance of the guilty plea, and the

Rule 11 colloquy should focus on that document. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (stating that an "intelligent" plea is one "done with sufficient awareness of the relevant circumstances and likely consequences.").

Taking a realistic, rather than formalistic, approach, other courts of appeals have found prejudice *despite* the PSI having included the correct maximum term of supervised release. In *Rivera-Maldonado*, a magistrate judge informed the defendant, just before he pleaded guilty to possessing child pornography, that the maximum supervised-release term was three years. 560 F.3d at 18. As in this case, "the PSR correctly stated that the applicable maximum period of supervised release was life." *Id.* at 19. Because the defendant failed to raise the defect in the district court, the First Circuit reviewed his claim under the plain-error standard. *Id.* The government conceded, and the appellate court agreed, that the error was plain. *Id.* at 19–20. The government contended, however, that the appellant had not established that he would not have pled guilty but for the judge's mistake and that his failure to object at sentencing implied that he "chose to go forward with the sentencing even after learning that he had been misinformed about the maximum term of supervised release." *Id.* at 20, 21. The court rejected both contentions. It held that it was enough that there was "a reasonable probability" that the defendant would not have pleaded guilty, especially in light of "the dramatic difference between a three year period of supervised release and a lifetime of supervised release." *Id.* at 21. For the same reason, it concluded that the PSI did not cure the court's grave error: "There is a huge difference between expecting a three year term of supervised release and expecting that one will be subject to such supervision for the rest of one's life." *Id.* at 21. This emphasis on ensuring that the plea is knowing and voluntary—"a

core concern" of the plea colloquy, *id.* at 22—is in sharp contrast to the Eleventh Circuit's approach to treating the PSI as obviating judges' plain constitutional errors.

The Fourth Circuit similarly recognized that a realistic approach requires that a defendant understand when he pleads guilty both the maximum possible term of supervised release and the nature of supervised release. In *Waddell*, as in *Rivero-Maldonado*, the government conceded that a magistrate judge's telling the defendant that he faced three years of supervised release for failure to update his sex-offender registration when he actually faced a life term was obvious error. 622 F. App'x at 203. Following *Rivera-Maldonado*, the court noted that the defendant's failure to "move to withdraw his plea or object in any other form when he later discovered that he was misadvised of the maximum term of supervised release at the Rule 11 hearing serves as some evidence that he would have pled guilty even if the magistrate judge had fully complied with Rule 11." *Id.* However, the court did not give that dispositive weight in light of "the vast disparity between the 3-year term of supervised release Waddell was advised he could receive and the 40-year term the court actually imposed." *Id.* (citation omitted). In contrast, the Eleventh Circuit's quibbling approach to the same constitutional violation gave no weight to "the vast disparity" between the life term of supervised release imposed on Mr. Cubero and the five-year term he was told pleading guilty would expose him to.

Rivera-Maldonado and *Waddell* do not suggest what rule of decision should apply when the disparity is not "vast." In *Luken*, the Eighth Circuit confronted a case in which the defendant was told he could get as many as three years on supervised release but, rather than imposing the maximum of life, the district court imposed the minimum supervised-release

term for child pornography convictions—five years. 560 F.3d at 743. The court of appeals concluded that the defendant's failure to object before or at sentencing "indicate the issue's relative unimportance to Luken's decision to plead guilty ... ." *Id.* at 745.

When the issue reached the Ninth Circuit, the court acknowledged the circuit split citing *Rivera-Maldonado* and *Luken*. *Borowy*, 595 F.3d at 1050. That court concluded that the defendant could not show prejudice because he asked for a lenient prison term in light of the district court's discretion to impose a life term of supervised release. *Id.* In light of this showing that the defendant understood his sentencing exposure yet did not object or seek to withdraw his plea, the court of appeals concluded that there was not a reasonable probability that he would have stood trial had the judge not misinformed him. *Id.*

II. A court's failure to advise a defendant about the punitive nature of supervised release and the maximum term to which pleading guilty will expose him renders the plea unknowing and void.

The correct analysis in cases like this would begin by recognizing that judges have an affirmative legal duty to "spread on the record the prerequisites of a valid waiver" of the right to a jury trial. *Boykin*, 395 U.S. at 242. The least that can be expected of a federal judge is that she correctly inform the defendant of the penal consequences of a conviction before he pleads guilty. Where the judge, as in this case, gets that wrong, prejudice should be presumed even if the defendant's lawyer fails to object. *See Glasser v. United States*, 315 U.S. 60, 75–76 (1942) (superseded on other grounds by the Federal Rules of Evidence). This follows from the fact that the defendant's obligation to show prejudice from his counsel's ineffectiveness is rooted in the idea that "[t]he government is not responsible for, and hence not able to

prevent, attorney errors that will result in reversal of a conviction or sentence." *Washington v. Strickland*, 466 U.S. 668, 693 (1984); *accord Hill v. Lockhart*, 474 U.S. 52, 57–58 (1985). When the judge fails in this most basic of judicial duties, the rationale for burdening the defendant to show prejudice does not apply.

Put another way, unlike *Strickland*, this is not a case where the question is whether "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments," because it was not counsel's strategy that was unsound. Rather, counsel was ineffective in this case for failing to correct the affirmative misinformation that the district court gave the defendant. Nor was this a "technical" violation. The Constitution required the court to communicate information about the consequences of pleading guilty correctly during the colloquy to render Mr. Cubero's guilty plea knowing and voluntary. Being misinformed as to the potential extent of the consequent deprivations of liberty makes the plea unknowing and constitutionally void.

Nor did Mr. Cubero, contrary to what the Eleventh Circuit held in denying him a certificate of appealability, have to show prejudice for failing to raise the due process issue sooner. The "general rule" is

> that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interests in the finality of judgments.

Massaro v. United States, 538 U.S. 500, 504 (2003) (citations omitted). It thus applies to bar claims only under circumstances that "promote these objectives." *Id.* It is absurd for the Eleventh Circuit to have held, as it did in this case, that the courts' own interest in conserving

judicial resources supersedes their duty to correctly inform defendants of the direct consequences of pleading guilty. The courts' *raison d'être* is to safeguard people's rights, not to process and close as many cases as they can. Under circumstances like these, this Court has repeatedly held that the interest in finality must yield to the accused's constitutional rights. *See Blackledge v. Allison*, 431 U.S. 63, 72 (1977) ("Yet arrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees."); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) ("The objective of Fed. Rule Crim. Proc. 11, of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations."); *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them.").

Similar to imprisonment, supervised release is a burdensome punishment; it entails the surrender of many fundamental rights with the threat of re-incarceration constantly looming. However, federal judges do not uniformly view it that way, and this explains why their analyses diverge. Consequently, federal appellate courts are inconsistent in how seriously they take a district court's failure to properly inform a defendant about supervised release. *Waddell* and another Fourth Circuit decision illustrates this. The *Waddell* court found it significant that the magistrate judge in that case failed to explain to the defendant

"that he could be under close supervision for the rest of his life." *Id.* In *United States v. Gooch*, on the other hand, the same court reasoned that a magistrate judge's omitting any mention of the maximum supervised-release term during the plea colloquy was not that prejudicial. 703 F. App'x 159, 160 (CA4 2017). The *Gooch* court concluded that, even though the record did not establish that the defendant knew he could get a life term of supervised release, "Gooch entered his plea knowingly and voluntarily ... ." *Id.*

Other decisions reflect the same disparity of views regarding how serious a punishment supervised release is. The First Circuit noted in *Rivera-Maldonado* that "[s]upervised release is a part of a criminal sentence which is separate and independent from the original incarcerative term." 560 F.3d at 21. The Fifth Circuit's decision in *Crain*, on the other hand, failed to give weight to the defendant's testimony that "if he had known he faced a lifetime computer ban or a lifetime term of supervised release, he would not have pled guilty ... ." 877 F.3d at 642. The district court in this case suggested to Mr. Cubero that supervised release was not punishment but treatment; it told him that the life term of supervised release was imposed "because you'll need lifetime treatment and you know that."

As this case shows, the Eleventh Circuit does not consider a judge's imparting misinformation regarding supervised release to be a serious error. It looks only to see whether there is any argument that the defendant could have obtained accurate information from anything else in the record. In this case, the record is not at all clear as to whether Mr. Cubero read or understood the PSI. The sentencing judge listed the various documents he reviewed to become familiar with the case—"the Presentence Investigation Report, the letters, the objections, the sentencing memorandum, the first supplement, the second

supplement, ... the Government's response"—and then said to Mr. Cubero, "So I assume that you, of course, have read it as well." The pronoun "it" has no clear antecedent among the documents the district court listed. To circumvent this reality, the Eleventh Circuit affirmed the district court's own self-serving determination that "under the best reading of the sentencing transcript, Cubero read all of the documents the sentencing court mentioned, including the PSI." Appendix at A-13. Legal and factual fictions concerning the PSI's significance should not bar defendants' substantial constitutional claims because "'the defendant's knowledge of the consequences of his plea' is a core concern of Rule 11." *Rivera-Maldonado*, 560 F.3d at 22.

Federal Rule of Criminal Procedure 11 indeed specifies that a defendant must understand, among other things, "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed. R. Crim. P. 11(b)(1)(H). However, that requirement predates the Rule and emanates from the Due Process Clause. *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *see also Kercheval v. United States,* 274 U.S. 220, 223 (1927) ("Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.").

This Court has never vitiated its precedents dealing with denials of due process at a change of plea. Before 1975, a district court's failure to conduct a plea colloquy in strict compliance with Rule 11 required vacatur of the conviction. *McCarthy*, 394 U.S. at 463–64. At the time, Rule 11 was a comparatively simple restatement of the law, requiring *inter alia* that the court ascertain that each defendant understood the consequences of his plea. That

requirement existed independently of the language of the rule itself. *See* Fed. R. Crim. P. 11, Advisory Committee Notes, 1966 amendments ("The third change in the second sentence adds the words 'and the consequences of his plea' to state what clearly is the law." (collecting cases)).

In 1975, the Rule was substantially amended, "obliging the judge to give specified advice about the charge, the applicable criminal statute, and even collateral law." *United States v. Vonn*, 535 U.S. 55, 69 (2002). The revised rule required district courts to do more than what the Constitution requires before a guilty plea will support a conviction and also included a harmless-error provision. *Id.* at 66.

Vonn asked whether a defendant who fails to object to an omission from the colloquy of information required by Rule 11—but not by the Constitution—must show, on direct appeal, that the error affected his substantial rights. *Id.* at 58–59 (describing the error as "Rule 11 error"). "The judge advised Vonn of the constitutional rights he would relinquish by pleading guilty, but skipped the required advice that if Vonn were tried he would have 'the right to the assistance of counsel.'" *Id.* at 60. The court held that the plain-error standard applied, reasoning that, were the rule otherwise, defendants would have no incentive to raise objections to the Rule 11 colloquy before sentencing. *Id.*

Vonn reaffirmed that the reasoning underlying *McCarthy* was to avoid speculative, additional litigation about what a defendant thought at the time he pled guilty. *See id.* at 68. *Vonn*'s rationale, thus, did not overrule *McCarthy*, which involves a plain violation of the Due Process Clause, rather than mere "Rule 11 error." As in *McCarthy*, the due process violation in this case is evident from the record. Moreover, it is one thing to require, as *Vonn* did, a

defendant to object to omissions. *See id.* at 73–73 (reasoning that applying the plain-error standard would provide incentive for defendants to object to "a judge's plain lapse under Rule 11" but saying nothing about official affirmative misrepresentations). *Vonn*'s reasoning does not require a defendant to object to affirmative misinformation given him by the presiding magistrate judge and the prosecutor in open court for good reason: In Mr. Cubero's position, even a defendant who *thought* he understood the consequences of pleading guilty would almost certainly conclude he was mistaken. He would assume the magistrate judge must know the maximum penalties.

Two years after *Vonn*, this Court considered whether a defendant was entitled to withdraw his guilty plea because the district judge failed to warn him, as required by Rule 11(c)(3)(B), that he could not withdraw his plea if the court ultimately declined to accept the prosecution's sentencing recommendation. *United States v. Dominguez Benitez*, 542 U.S. 74, 78 (2004). Ultimately, this Court held "that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83.

Here, of course, the error was more egregious than a mere omission regarding something tangential to the plea itself. In this case, the magistrate judge affirmatively misstated the penalties that Mr. Cubero faced by pleading guilty. He was therefore not required to show prejudice to avoid procedural default. On the contrary, *Dominguez Benitez* emphasized that, like *Vonn*, its holding was predicated on "the fact, worth repeating, that the violation claimed was of Rule 11, not of due process." *Id.* at 83. The decision further

emphasized that its decision had nothing to do with "whether a defendant's guilty plea was knowing and voluntary. ... We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." *Id.* at 84 n.10 (reaffirming *Boykin*).

Unlike in *Vonn* and *Dominguez Benitez*, the error in this case was of constitutional magnitude. First, there is no doubt that the defendant was affirmatively misled about the consequences of pleading guilty. Second, it was a magistrate judge who told him he would be on supervised release for, at most, five years. Third, the official misinformation came at the most crucial moment—during Mr. Cubero's change-of-plea colloquy. Fourth, the district court reinforced the misinformation in writing. Fifth, the sentencing judge imposed the maximum possible term of supervised release—life.

Because supervised release is a constitutionally significant deprivation of liberty and fundamental rights, Mr. Cubero had an absolute right, protected by the Due Process Clause, to accurate information about it at the time of his plea. The basic human rights that Mr. Cubero forfeited after having been misled by the court and the prosecutor illustrates how egregious a violation of due process this was:

First, as someone on supervised release, Mr. Cubero, who is now 36 years old, will be denied basic due-process protections for the rest of his life. He is enjoined from violating any federal, state, or local laws. This means that, if any law enforcement agent—local, state, or federal—accuses Mr. Cubero of violating a law, he can be punished based on a judicial finding of that the allegation was proven by a preponderance of the evidence. *See* 18 U.S.C. § 3583(e)(3). The government is relieved of having to prove the allegation beyond a reasonable

doubt, and Mr. Cubero will have no right to a jury's determination of his guilt. *See* 18 U.S.C. § 3583(e). Also, because Mr. Cubero was convicted of violating three "Class C" felonies, *see* 18 U.S.C. § 3559(a)(3), he can be incarcerated for up to two years each time he violates the conditions of release, *see* 18 U.S.C. § 3583(e)(3).

Second, unlike people not on supervised release, Mr. Cubero can be reimprisoned based on evidence of legally dubious relevance and reliability. The Federal Rules of Evidence will not apply at a revocation proceeding, and the Sixth Amendment Confrontation Clause has only limited application. The life term of supervised release thus exposes Mr. Cubero to an indefinite number of two-year terms of imprisonment based on revocation proceedings that afford only scant procedural safeguards.

Third, Mr. Cubero has been stripped for life of *all* the protections that the Fourth Amendment guarantees. All of his belongings—including his home and his personal papers—are subject to search by law enforcement or probation officers. In addition, Mr. Cubero will be subject to drug testing for life.

Fourth, in this case, the district court imposed several special conditions that infringe Mr. Cubero's freedom of speech. Mr. Cubero cannot "possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment."

Fifth, Mr. Cubero's First Amendment freedom of association is restricted. He must avoid minors at all times for the rest of his life. This unqualified condition would seemingly forbid Mr. Cubero to associate with relatives and even to raise his own children. Also, he cannot "associate with any person convicted of a felony, unless granted permission to do so

by the probation officer." A staggeringly large number of people are felons in today's United States. According to a paper published by a group of sociologists, as of 2010, 14% of Florida's population have a felony conviction. *See* Shannon, Uggen, Thompson, et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948–2010* at 9–10 (presented at Population Association of America 2011 Annual Meeting).

Sixth, Mr. Cubero can never leave South Florida without permission, which means his right to travel is diminished.

Seventh, Mr. Cubero's life will be subject to micro-management by a probation officer under vague prohibitions that invite arbitrary enforcement in abrogation of the Due Process Clause. The vague directives include requiring that Mr. Cubero "follow the instructions of the probation officer," "support his ... dependents and meet other family responsibilities," "refrain from the excessive use of alcohol," and not "frequent places where controlled substances are illegally ... used."

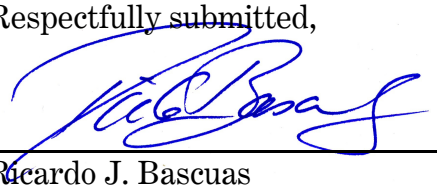
In sum, the innocuous-sounding phrase "supervised release" masks a harsh regime of near-totalitarian, bureaucratic control that strips away fundamental human rights. The rights to have a jury determine guilt of new accusations, to have the government prove new charges beyond a reasonable doubt, to confront witnesses, to be free from unreasonable searches and seizures, to send and receive information, to associate with other human beings, to raise children, to travel, and to not be subjected to the arbitrary caprices of a government agent are all basic and fundamental to human dignity.

Given the grave deprivations entailed in a life term of supervised release, the court's failure to explain to Mr. Cubero that by pleading guilty he was potentially forfeiting all these

fundamental rights for life is presumptively prejudicial. Not only did the magistrate judge fail to explain what "supervised release" is, but the magistrate judge misled Mr. Cubero as to the maximum time he could be subjected to it.

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit to clarify that a court's failure to correctly inform a defendant of the direct consequences of pleading guilty is presumptively prejudicial and, therefore, can not be procedurally defaulted. Alternatively, the Court should issue the writ, vacate the Eleventh Circuit's order, and remand the case with instructions that the court of appeals issue a certificate of appealability and entertain Mr. Cubero's appeal on the merits.

Respectfully submitted,



Ricardo J. Bascuas
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
r.bascuas@miami.edu