
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EMINIANO REODICA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

December 11, 2018

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

EMINIANO REODICA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
Attorney at Law
975 East Green Street
Pasadena, California 91106

Attorney for the Petitioner

QUESTIONS PRESENTED

Whether Federal Rule of Criminal Procedure 11(d) governing motions to withdraw a guilty plea establishes a liberal standard which precludes the district court from resolving factual disputes without an evidentiary hearing.

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

Eminiano Reodica petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is included in the appendix as Appendix 1. The district court order denying a motion to withdraw Petitioner's guilty plea is included in the appendix as Appendix 2.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 3, 2018. *See* App. A001-05. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

Rule 11(d) of the Federal Rules of Criminal Procedure provides:

> **(d) Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or nolo contendere:
>
> **(1)** before the court accepts the plea, for any reason or no reason; or
>
> **(2)** after the court accepts the plea, but before it imposes sentence if:
>
> **(A)** the court rejects a plea agreement under Rule 11(c)(5); or
>
> **(B)** the defendant can show a fair and just reason for requesting the withdrawal.

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED.

1. District Court Proceedings.

Petitioner was charged with multiple forms of fraud in credit agreements

between several financial institutions and Petitioner's car dealership and related finance companies. *See* App. A186-87, A220, A224. As trial approached, Petitioner became dissatisfied with his attorney. He expressed this dissatisfaction at a pretrial motions hearing the Friday before trial, during which he, first, requested new counsel, and then, when that request was denied, asked to represent himself. *See* App. A069-70, A105-06. The court did not immediately conduct the required colloquy about self-representation, *see United States v. Hayes*, 231 F.3d 1132, 1136 (9th Cir. 2000) (describing required colloquy), but told Petitioner it would address the question more fully the following Monday and that he should carefully consider his decision in the meantime. *See* App. A069-70, A105-06.

The prosecutor then received an email from Petitioner's attorney over the weekend, which stated:

> It appears that the client is willing to resolve this matter. In addition to agreeing to the length of the sentence, his main request is that he be allowed to serve his time in Australia.

App. A060. The prosecutor responded that the government was no longer willing to enter into a plea agreement and that Petitioner would have to plead "straight up" to all counts if he did not want to go to trial. App. A062.

When Petitioner appeared the following Monday, he indicated he was withdrawing the self-representation request, and his attorney indicated he wished to plead guilty to all counts. *See* App. A114-15. The court took Petitioner's guilty pleas later that day. Among the questions the court asked in taking the pleas were questions about what, if any, medication Petitioner had taken, *see* App. A126-27, and, "Do you have any condition, any physical condition, mental condition or emotional condition, that could in any way

affect your understanding of the proceedings today?," App. A128. Petitioner indicated he had the flu and was taking antibiotics, *see* App. A126-27, but answered, "No, Your Honor," to the question about whether any physical, mental, or emotional condition was affecting his understanding of the proceedings, App. A128.

At the end of the colloquy, Petitioner formally offered guilty pleas, and the court accepted them and made findings. *See* App. A156-69. It addressed Petitioner's physical and emotional condition as follows:

> The Court has had the opportunity to observe Mr. Reodica throughout the taking of his pleas. The Court is satisfied that he has been fully alert and understands everything that has occurred in court today. The Court has taken into consideration the fact that he has – is being treated for the flu, and the Court is fully satisfied that has not affected his ability to understand any of the matters that have been conducted this afternoon.

App. A169.

Seven months later, Petitioner lodged, under counsel's cover sheet, a "Declaration in Support of Petition to Withdraw Guilty Plea," that was dated two months earlier. *See* App. A012-17. It described motions Petitioner wished to file, described further access to discovery and bankruptcy court records he felt he needed, and stated that, at the time of the pleas, he was both ill himself and in emotional distress because his father had become seriously ill. *See* App. A013-15. He stated he "was not in a stable condition to fully appreciate the events which transpired" at the time of his pleas. App. A015. He had intended to withdraw the pleas when the United States Marshal's Office brought him back to the courthouse the next day, but could not do so because the scheduled court proceeding had been canceled. App. A015. He

had then "continued expressing his instructions to withdraw his guilty plea to the legal counsel, which led to today's filing." App. A016.

In response to the pro se petition, the district court appointed independent counsel to litigate the petition. App. A018-19. She filed a supplemental motion, in which she pointed to, inter alia, Petitioner's physical and emotional condition and hesitation in answering several basic questions during the plea colloquy. *See* App. A029-32. The government filed an opposition to the motion, *see* App. A038-56, and Petitioner's new attorney filed a reply, *see* App. A175-84.

In addition to the legal arguments made in the briefs, there were multiple exhibits filed. One was a copy of the email exchange between the defense attorney and the prosecutor over the weekend before the pleas, in which the defense attorney stated it "appear[ed]" Petitioner was willing to resolve the case but the prosecutor rejected further plea negotiations. *See supra* p. 3. Another exhibit was a medical record documenting that Petitioner was taking antibiotics for the flu at the time of the pleas. *See* App. A037. There were also transcripts of the hearing at which Petitioner entered his pleas and the Friday pretrial motions hearing preceding the plea hearing, filed with the government's opposition. *See* App. A064-110, A112-74. Finally, there was an email dated December 4, 2015 – just two months after the pleas and five months before the motion to withdraw was actually filed – documenting Petitioner's efforts to get his attorney to help him withdraw his pleas, in which he stated: "Please consider this my instruction for you to prepare and submit a Motion to Withdraw my Guilty Pleas during the Oct 5-6, 2015 court dates in the Court of Hon Judge S. James Otero." App. A186.

The district court initially set the motion for a hearing, *see* App. A006, A019, but vacated the hearing after all the briefs had been filed, *see* App. A006. The court then issued a written order denying the motion. *See* App. A006-11. As to the effect of Petitioner's physical and emotional condition, the court concluded, after summarizing the transcript of the guilty plea proceeding:

> The circumstances surrounding Defendant's health on October 5, 2015 were known and discussed by the parties and the Court, and Defendant expressed that he was capable and willing to enter his plea. All things considered, the Court was satisfied that Defendant was competent to enter his plea. On the grounds of his physical, mental, or emotional health, Defendant presents no fair and just reason for his Motion.

App. A009-10. As to Petitioner's readiness to enter his pleas, the court pointed to both the defense attorney's statement in court on the morning of the pleas that "[i]t is Petitioner's desire, as he expressed it to me this morning, to plead straight up to the remaining charges," and the attorney's weekend email. App. A010. The court then relied on "the five-month delay between the October 5 Hearing and Defendant's Petition to withdraw his plea," stating that this also "weakens a finding of a fair and just reason to withdraw his plea." App. A011. Completely ignoring the corroborating December 4, 2015 email, the court summarily rejected Petitioner's assertion he had tried to file a motion earlier.

> Defendant's self-serving statement that he "voice[d] his concerns to both family, and to [the defense attorney], for several months, until he personally wrote a Petition to Withdraw Guilty Plea on February 28, 2016," (Mot. 5), is unsupported. Other than pointing to the vacating of the October 6, 2015 trial date – which is itself an inadequate reason for not filing the Petition sooner – Defendant does not justify the five-month delay.

App. A011.

2. The Appeal.

Petitioner appealed after being sentenced. In addition to several challenges to the sentence, he challenged the district court's denial of his motion to withdraw the pleas. *See* App. A214-21. He argued both that the district court applied an incorrect legal standard in denying the motion and that the district court erred in relying on disputed facts without holding an evidentiary hearing. *See* App. A215-21. He noted the liberal standard for granting an evidentiary hearing and pointed to several disputed facts and/or factual inferences. *See* App. A215-19.

The government argued the district court was not required to hold the hearing. Its argument was that a hearing was not required because the grounds Petitioner proffered were contradicted by the record of the plea proceeding. *See* App. A265-68. It cited case law suggesting a hearing is not required when there is such contradiction. *See* App. A265-66 (citing *United States v. Erlenborn*, 483 F.2d 165, 167 (9th Cir. 1973); *United States v. Crooker*, 729 F.2d 889, 890-91 (1st Cir. 1984); *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992); and *United States v. McHenry*, 849 F.3d 699, 706-07 (8th Cir. 2017)).

In an unpublished memorandum opinion, a Ninth Circuit panel affirmed the district court's denial of the motion to withdraw the pleas. *See* App. A002-

03.[1] It first rejected Petitioner's claim that the district court had applied an incorrect legal standard and then rejected the claim the court had erred by not giving Petitioner an evidentiary hearing. It held: "An evidentiary hearing was not warranted because any factual disputes raised by Reodica were resolved by the underlying record." App. A003.

V.

ARGUMENT

A. THE COURT SHOULD GRANT THE PETITION BECAUSE THERE IS CONFUSION IN THE COURT OF APPEALS OPINIONS ABOUT WHEN DISTRICT COURTS MUST HOLD EVIDENTIARY HEARINGS ON A MOTION TO WITHDRAW A PLEA AND THE STRICTER OPINIONS CONFLICT WITH THIS COURT'S CASE LAW.

The standard for withdrawal of a guilty plea prior to sentencing is a liberal one; withdrawal is allowed for any "fair and just" reason. Fed. R. Crim. Pro. 11(d)(2)(B). *See also Kercheval v. United States*, 274 U.S. 220, 224 (1927) ("The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just."). Consistent with the logic that the threshold for simply holding a hearing should be even lower, the courts of appeals have recognized that evidentiary hearings on motions to withdraw

[1] The panel did vacate a restitution order and remand for application of a correct restitution standard. *See* App. A005.

pleas should be "liberally" or "freely" – even "routinely" – granted. *United States v. Redig*, 27 F.3d 277, 280 (7th Cir. 1994); *United States v. Fountain*, 777 F.2d 351, 358 & n.3 (7th Cir. 1985) (citing *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)). This means there is a liberal approach – to the first step of holding an evidentiary hearing – layered on top of another liberal approach – the liberal consideration of relief. *See United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992) (recognizing that "the standard to be applied in granting a hearing is less rigorous than the standard for granting the motion").

Where the court of appeals opinions diverge is in their implementation of this liberal standard. An opinion written by then Judge, now Justice, Breyer, in *United States v. Crooker*, 729 F.2d 889, 890-91 (1st Cir. 1984), suggests a district court cannot make findings about factual allegations without holding an evidentiary hearing. The defendant in *Crooker* filed an affidavit making detailed factual allegations which the district court simply did not believe. *See id.* at 890. Then Judge Breyer, writing for a First Circuit panel, held this was not enough.

> Of course, the trial judge did not believe [the defendant's] affidavit told the truth. [A police chief] provided an affidavit that denies every essential fact alleged. (Citation omitted.) We have held that a defendant's allegations need not be taken as true to the extent that they are "contradicted by the record or are inherently incredible and to the extent that they are merely conclusions rather than statements of fact." *Otero-Rivera v. United States*, 494 F.2d 900, 902 (1st Cir. 1974); *Domenica v. United States*, 292 F.2d 483, 484 (1st Cir. 1961). But, we believe that, in this instance, these exceptions do not apply; and [*United States v.*] *Fournier*[, 594 F.2d 276 (1st Cir. 1979),] does not allow the district court to resolve this type of factual dispute without a hearing.

Crooker, 729 F.2d at 890-91.

Other court of appeals opinions have been much more stingy in requiring such hearings, however. They have justified their stinginess by latching onto the vague statement in the prior opinions quoted in *Crooker*, about allegations that are "contradicted by the record or are inherently incredible and . . . that . . . are merely conclusions rather than statements of fact." Opinions in multiple other circuits – and even later First Circuit opinions – have upheld district courts' denial of evidentiary hearings based on the assertion – itself rather conclusory – that the defendant's allegations are (1) "contradicted by the record," *e.g., United States v. Pulido*, 566 F.3d 52, 57 (1st Cir. 2009) (quoting *Crooker*, 729 F.2d at 890, and *Otero-Rivera*, 494 F.2d at 902); *United States v. Gonzalez*, 970 F.2d at 1100; (2) "inherently incredible" or "inherently unreliable," *e.g., United States v. McHenry*, 849 F.3d 699, 706-07 (8th Cir. 2017); *United States v. Thompson*, 906 F.2d 1292, 1299 (8th Cir. 1990); *United States v. Fountain*, 777 F.2d at 358; and/or (3) "mere conclusions" or "conclusory," *Gonzalez*, 970 F.2d at 1100; *Fountain*, 777 F.2d at 358. The D.C. Circuit has gone even further and declined to give even lip service to the liberal standard for granting a hearing, holding that "[a] district court need hold an evidentiary hearing only where the defendant offers 'substantial evidence that impugns the validity of the plea.'" *United States v. Robinson*, 587 F.3d 1122, 1132 (D.C. Cir. 2009) (quoting *United States v. West*, 392 F.3d 450, 457 n.4 (D.C. Cir. 2004), and *United States v. Redig*, 27 F.3d 277, 280 (7th Cir. 1994)).

This more demanding implementation of what is supposed to be a liberal standard also conflicts with this Court's decision in *Fontaine v. United*

States, 411 U.S. 213 (1973). *Fontaine* did acknowledge the weight district courts should ordinarily give to the prior statements a defendant has made during a guilty plea proceeding, stating that it "need not take issue with the Government's generalization that when a defendant expressly represents in open court, without counsel, that his plea is voluntary and that he waived counsel voluntarily, he 'may not ordinarily' repudiate his statements to the sentencing judge." *Id.* at 215. But a district court still must resolve whether the case before it is one of the "ordinary" ones or instead one that is not "ordinary." And a hearing is the mechanism by which the court does that. As *Fontaine* went on to recognize: "The objective of Fed. R. 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." *Id.* (footnote omitted).

Granting this petition will allow the Court to, first, reiterate what it indicated in *Fontaine*, and, second, correct the court of appeals' overly conservative limitation of the liberal standard for holding an evidentiary hearing.

B. THE PETITION SHOULD BE GRANTED BECAUSE PETITIONER'S SHOWING IS A GOOD EXAMPLE OF A SHOWING WHICH SHOULD REQUIRE AN EVIDENTIARY HEARING.

A second reason to grant the petition is that Petitioner's showing is a good example of a showing which should require an evidentiary hearing. To

begin, Petitioner's allegations did more than merely contradict the record, they were not inherently incredible, and they were not simply conclusory. First, the defense reply to the government's opposition to the motion to withdraw the pleas challenged the meaning of some of the facts presented by the government. As one important example, the reply questioned the inference which could or should be drawn from the defense attorney's email the Sunday before the trial date.

> First, in the attached email, Mr. Callahan [the defense attorney] wrote it *appears* that the client is willing to resolve the matter which indicates ambiguity on the client's part and not a readiness to plead guilty the next day. [Citing App. A062.] Second, the government's argument assumes, without any additional evidence, that Mr. Callahan and Mr. Reodica had a conversation about pleading guilty the same day as the email was sent. Third, the government's argument assumes, without any additional evidence, that Mr. Callahan was able to speak to Mr. Reodica, before Court the next morning, to convey that he would be proceeding with the change of plea hearing. Notably, this email exchange was sent over the weekend, on Sunday, October 4, 2015.
>
> The details and circumstances surrounding this email from October 4, 2015, are simply unknown and cannot, and should not, be inferred from the email exchange. As such, the government's argument that Mr. Reodica knew/was ready for a change of plea hearing on the morning of October 5, 2015, is based on speculation, and assumption, and should not be given weight.

App. A181 (emphasis in original).

Second, Petitioner's petition to withdraw his pleas was essentially an affidavit or declaration – which he later supplemented with two additions and a declaration under oath, *see* App. A035 – that made numerous factual allegations impugning the pleas. Those included:

- That Petitioner came to the hearing on October 2, 2015 unprepared because of illness, inability to secure medication and a

misunderstanding about the schedule. App. A015.

- That over the weekend, Petitioner was sick with the flu, for which he had to take antibiotics, and that his father became seriously ill due to a lingering lung problem. App. A015, A035.
- That Petitioner was emotionally and physically distraught when he attended the court hearing on October 5, 2015. App. A016.
- That Petitioner was not in a stable condition allowing him to fully appreciate what transpired at the time of his pleas. App. A016.
- That the United States Marshal's Service picked Petitioner up at 4:00 a.m. the next day and brought him back to the courthouse, and that Petitioner was determined to withdraw his guilty pleas but found the scheduled court hearing had been canceled. App. A016.
- That Petitioner thereafter continually instructed his attorney to withdraw his guilty pleas. App. A017.

At least some of these allegations were supported by documentary evidence, moreover. The allegation Petitioner was taking antibiotics for flu was supported by a jail medical record. *See* App. A037. The allegation he had raised the issue of withdrawing his pleas much earlier with his attorney was documented by a copy of an email he had sent to his attorney. *See* App. A186. These detailed factual claims make Petitioner's case similar to the *Crooker* case where the First Circuit held the defendant's detailed affidavit required an evidentiary hearing.

In addition, the district court's error in not holding an evidentiary hearing was prejudicial, because the district court relied on at least some of the

disputed facts. First, it rejected Petitioner's claim that his illness and emotional state affected his ability to make a considered, reasoned decision. *See* App. A009-10. While the rejection of the physical illness as a factor was arguably justified by Petitioner's express statement at the time of the pleas that his illness was not preventing him from understanding, *see United States v. Yamashiro*, 788 F.3d 1231, 1237 (9th Cir. 2015) (noting defendant's testimony during plea hearing directly contradicted claim he did not enter his plea voluntarily), there was no such express statement or discussion of the emotional impact of his father's grave illness.

Second, the district court treated the defense attorney's email stating that Petitioner "appeared" to be ready to plead guilty as establishing "Defendant's intent to plead guilty," App. A010, with no factual inquiry at all into the ambiguity of the word "appears." Third, the district court completely ignored both Petitioner's factual claim in the affidavit that he told his attorney much earlier that he wanted to withdraw his pleas – *and* unrefuted documentary evidence in the form of the email attached to the defense reply brief, which directly stated: "Please consider this my instruction for you to prepare and submit a Motion to Withdraw my Guilty Pleas during the Oct 5-6, 2015 court dates in the Court of Hon Judge S. James Otero." App. A186.

C. THE PETITION SHOULD BE GRANTED BECAUSE IT AFFECTS APPLICATION OF AN IMPORTANT PROVISION OF THE FEDERAL RULES.

A final reason to grant the petition is that the issue presented is one that

has a significant impact on application of important provisions of the Federal Rules. Rule 11 is important because it governs the guilty pleas which dispose of the vast majority of federal criminal cases, *see Missouri v. Frye*, 566 U.S. 134, 143 (2012) (noting 97% of federal convictions based on guilty pleas). And the provision governing withdrawal of pleas is important because many defendants seek to withdraw pleas, even if most do not. There are thus a number of cases affected.

The issue is also important because the courts of appeals give district courts broad discretion in applying the rule. *See, e.g., United States v. McHenry*, 849 F.3d at 707 ("The district court did not abuse its discretion in denying the motion to withdraw and request for reconsideration without a hearing."); *United States v. Robinson*, 587 F.3d at 1132-33 ("Therefore, the district court did not abuse its discretion in denying [the appellants] an evidentiary hearing."); *United States v. Erlenborn*, 483 F.2d at 168 (noting that "this is a matter within the discretion of the trial court, and we will not disturb the trial court's ruling denying such motions unless an abuse of discretion has been shown"). This means there will be relatively few court of appeals reversals to guide the district courts. That makes guidance through an opinion from this Court all the more important.

* * *

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: December 11, 2018

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

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CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 11th day of December, 2018, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

December 11, 2018

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law