No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DARREN GONZALES

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After the Court's decision in *Cuellar v. United States,* does a defendant who merely parrots the language of the concealment money laundering statute satisfy a district court's obligation under Rule 11 to establish "a factual basis for the plea" sufficient to meet the constitutional requirement that a plea must be knowing and voluntary?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner, Darren Gonzales, was a defendant in the district court and was the appellant in the Tenth Circuit. Mr. Gonzales is an individual. Thus, there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Darren Gonzales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals of the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's controlling decision is reported at *United States v. Gonzales*, Appx. 1-13, at 918 F.3d 808 (10th Cir. 2019).

JURISDICTION

The Tenth Circuit issued its decision on March 12, 2019. Appx. 1-13. Mandate was issued in the case on April 3, 2019. This Court has jurisdiction under 28 U.S.C. Sect. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. Sect. 1956(a)(1)(B)(i), in pertinent part, provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts, or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity…knowing that the transaction is designed in whole or in part…to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity…shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

Rule 11 of the Federal Rules of Evidence, in pertinent part, provides:

> (2) Ensuring that a Plea is Voluntary**.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not

result from force, threats or promises (other than promises in a plea agreement).

(3) Determining a Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

The Fifth Amendment to the Constitution, in pertinent part, provides:

> No person shall be…deprived of life, liberty, or property, without due process of law…

STATEMENT OF THE CASE

Petitioner was charged in a fifty-four count superseding indictment, 1 CA App. 30, in the District of Wyoming that alleged eight counts of false statements in an income tax return under 26 U.S.C. Sect. 7206(1), three counts of unlawful distribution of a controlled substance under 21 U.S.C. Sect. 841(a)(1) and (b)(1)(C), forty-one counts of laundering of monetary instruments under 18 U.S.C. 1956(a)(1)(B)(i), and two counts of structuring transactions to evade reporting requirements under 31 U.S.C. Sect. 5324(c) and (d). Petitioner entered into a plea agreement, 2 CA App. 27, where he agreed to plea guilty to seven of the money laundering counts and one each of the income tax, drug distribution and structuring counts. On appeal before the Tenth Circuit Court, he challenged the factual basis given during the plea colloquy on two of the so-called concealment money laundering counts.

During the plea colloquy, Petitioner simply parroted the language of the statute by stating he had "concealed" money, without providing any additional facts. In one instance, he merely accessed a safety-deposit box kept at a bank where his dependent, special needs daughter kept her money. In the second instance, he transferred assets from one account held in that daughter's name but controlled by him to another account in his name controlled by him. Petitioner argued that this Court's decision in *Cuellar v. United States,* 553 U.S. 550 (2008), where illegal drug proceeds concealed behind the dashboard of a car were transported from the United States across the border to Mexico and later delivered to a drug lord, nullified the notion that concealment alone, without further explanation, satisfied the money laundering statute, where an alternative purpose could just as easily explain the concealment. The Petitioner argues that the Tenth Circuit erred in holding that simple recitation of the statutory language alone insured that the plea was knowing and intelligent under the provisions of Rule 11.

STATEMENT OF FACTS

Petitioner was a native of Cheyenne, Wyoming, where he founded a concrete company, which he had operated for eighteen years. In March, 2016, he was charged with distribution of illegal drugs in state court. The case attracted scrutiny by federal authorities. Large cash deposits into his

company accounts caught the attention of the Internal Revenue Service. A formal money laundering investigation by the Drug Enforcement Agency followed. The government later claimed Petitioner deposited over $700,000 of drug proceeds into his concrete company accounts. 2 CA App. 264. A federal indictment was filed against Petitioner that alleged fifty-four counts of income tax evasion, drug distribution, money laundering and structuring. A plea agreement was negotiated, where Petitioner entered pleas to ten of those counts, seven of which were concealment money laundering charges.

The Plea Colloguy

During the plea colloquy, the district court initially asked whether Petitioner had the opportunity to review the plea agreement thoroughly with his attorney, to which Petitioner responded, "Yes." 3 CA App. 101. "Do you feel that you understand the terms and conditions of this plea agreement?" the district court inquired. Petitioner answered, "I do, sir." *Id.* "Will you be pleading guilty of your own free will because you are in fact guilty?" the district court asked. Petitioner answered, "I am accepting responsibility." *Id.*

The plea agreement itself, 2 CA App. 27, alerted Petitioner that he had "the right to plea not guilty, to persist in that plea of not guilty, and with the assistance of counsel to have his case tried before a jury." 2 CA App. 29.

The plea agreement further stated, "The Defendant understands he is waiving these rights and making a complete admission of guilt." *Id.* The plea agreement similarly provided that Petitioner was aware he was "waiving the right to confront and cross-examine witnesses as well as to present a defense on this own behalf…and waiv(ing) the right to remain silent." *Id.* By signing the plea agreement, Petitioner stated he was "pleading guilty freely and voluntarily because he is, in fact, guilty," and that he had not been threatened, coerced or offered any promise or inducement to enter the agreement. *Id.*

The plea colloquy that covered the two challenged counts was sparse. Regarding the count that alleged Petitioner had accessed a safety deposit box, the district court just reread the paragraph in the plea agreement that covered that count.

> "And Count 52 alleges that, 'On or about December 21, 2015, in the District of Wyoming, the Defendant Darren Gonzales knowingly conducted a financial transaction which affected interstate commerce, which involved the proceeds of the specified unlawful activity of distribution of controlled substances in violation of Title 21 United States Code Section 841.' You did so knowing that the financial transaction was designed in part – at least in part to conceal and disguise the nature, source and location of the proceeds of said specified unlawful activity; and knowing that the property involved in that financial transaction represented the proceeds of some form of unlawful activity; specifically, you accessed Safety Deposit Box 42N located in Meridian Trust Federal Credit Union in Cheyenne, Wyoming. You used that safety deposit box to hold cash earned from the unlawful distribution of controlled substance, in violation

> of Title 18 United States Code Section 1956(a)(1)(B)(1) and subparagraph 2." 3 CA App. 122-123.

Petitioner was asked how he wished to plea. "I plead guilty, and I will adopt…" 3 CA App. 123. The district court then interrupted, "…Subparagraph G of the plea agreement?" *Id.* Subsection G did not involve count fifty-two at all, but rather was the factual statement for count 51. Subsection H of Paragraph 7 of the plea agreement dealt with count fifty-two, and it was consistent in all respects to what the district court had read. 2 CA App. 31.

The procedure used by the district court during the plea colloquy for the count where Petitioner had transferred money from one bank account he controlled at one bank to another account he controlled at the same bank was conducted similarly. When the district court reached that count, the judge simply read that portion of the plea agreement that dealt with that count:

> "Count 50, again, is a money laundering count that alleges that on or about February 16, 2016, that you transferred the sum of $79,836 from one Meridian Trust Federal Union account ending in 879 to Meridian Federal Trust Federal Credit Union account ending in 764, which you controlled; you knew that some of the cash – some of the funds that had been wire transferred involved in this financial transaction had been earned from unlawful drug sales; and that you conducted this transaction knowing that the transaction concealed the nature, source, ownership and control of proceeds of unlawful drug sales." 3 CA App. 122.

Petitioner was asked how he wished to plea. "I plead guilty, sir." *Id*. The

district court then asked, "And do you adopt the statement contained at Paragraph 7F of the plea agreement in this matter, factual basis, as yours?" Petitioner responded, "I adopt the statement." *Id*.

The statement in Paragraph 7, subsection F of the plea agreement provided this additional factual information: "On February 17, 2016, the Defendant transferred $79,836 from one Meridian Trust Federal Credit Union account he controlled to another Meridian Trust FCU account he controlled" 2 CA App. 31. In other words, the wire transfer appears to have been not only an intra-bank transfer, but also a transfer from one person to the same person. In addition, as the Tenth Circuit opinion notes, the indictment indicated the account 879 referenced in count 50 was in the name of M. G., which both parties acknowledged during briefing stood for Michelle Gonzales, who was the Petitioner's learning-disabled daughter. App., *infra,* 5.

"Are you entering pleas of guilty to each of these counts of your own free will?" the district court asked. Petitioner responded, "Guilty of my own free will." 3 CA App. 127. The district court found that the pleas were made "knowing and voluntarily" (3 CA App. 128), and that "each of the pleas is supported by an independent basis in fact as found in Paragraph 7 of the plea agreement and adopted by Mr. Gonzales under oath containing each of the

essential elements of each of the charged offenses." 3 CA App. 122-123. The district court set the case for sentencing.

The Tenth Circuit Opinion

The Tenth Circuit Court affirmed these two challenged counts. Initially, the court established the elements for a conviction under the concealment money laundering count. "Section 1956(a)(1)(B)(i) contains the following four elements: (1) defendant 'engaged in a financial transaction;' (2) defendant knew 'the property involved in that transaction represented the proceeds of his unlawful activities;' (3) the property involved was in fact the proceeds of that criminal enterprise;' and (4) defendant knew 'the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of the specified unlawful activities.'" App. 4. The court acknowledged that "the issue in the case was whether the 'conduct admitted or conceded by' Gonzales is sufficient to create a factual basis for each of these four elements as to Count 50 and Count 52." App. 5.

Petitioner noted in his argument before the Tenth Circuit that many circuit courts have held that concealment alone of drug proceeds does not satisfy 18 U.S.C. 1956(a)(1)(B)(i), where an alternative purpose explains use of the tainted funds. *United States v. Ness,* 565 F.3d 73 (2nd Cir. 2009)

(defendant concealed proceeds in an armored car in order to transport them); *United States v. Ramirez,* 954 F.2d 1035 (5th Cir. 1992) (drug proceeds concealed in box in drug dealer's house); *United States v. Malone,* 484 F.3d 916 (7th Cir. 2007) (drug proceeds concealed in speakers); *United States v. Puig-Infante,* 19 F.3d 929 (5th Cir. 1994) (drug proceeds hidden under the dash of a car); *United States v. Heaps,* 39 F.3d 479 (4th Cir. 1994) (drug proceeds wired to drug dealer's girlfriend, who then stored them in a box); *United States v. Bell,* 936 F.2d 337 (7th Cir. 1991) (drug proceeds placed in a safety deposit box); *United States v. Faulkenberry,* 614 F.2d 573, 586 (6th Cir. 2010) (after *Cuellar,* "concealment – even deliberate concealment – as mere facilitation of some *other* purpose, is not enough to convict"). In citing such cases, Petitioner conceded that the definition of a financial transaction under 18 U.S.C. 1956(c)(3) could include the use of a safety deposit box at a financial institution. Petitioner additionally cited two circuit court cases that dealt with instances where a parent controlled assets of his or her minor child and found such control negated the inference that a party charged with money laundering was using the minor's asset to conceal the assets of the parent. *United States v. Sanders,* 929 F.2d 1466 (10th Cir. 1991) (purchase of car for child not money laundering), *United States v. Heid,* 651 F.3d 850

(8th Cir. 2011) (use of son's money to bail him out of jail for alleged illegal distribution of drugs).

Petitioner similarly argued that many circuit courts have held that transfer of funds from one account controlled by one person to another account controlled by that same person, even though also a "financial transaction" as defined by 18 U.S.C. 1956(c)(3), did not imply that the transfer alone constituted concealment of the funds. *United States v. Esterman,* 324 F.3d 565, 569 (7th Cir. 2003) (defendant transferred the funds into a separate account and then spent them in an "open and notorious" way); *United States v. Valdez,* 726 F.3d 684 (5th Cir. 2013) (transfer from defendant's business account to his investment account); *United States v. French,* 748 F.3d 922 (9th Cir. 2014) (transfer from business account to personal checking account, where cars and a boat openly purchased, and to an investment account, where stock openly purchased). See also *United States v. Law,* 528 F.3d 888, 896 (D.C. Cir. 2008) ("The need for evidence that excludes such innocent explanation is especially important in relation to the charge of money laundering…."). In making arguments as to both counts, Petitioner referenced this Court's holding in *Cuellar:* "The Government must show that concealment is an 'intended aim' of the transaction." *Cuellar,* 533 U.S. at 563.

The Tenth Circuit held that such explanations of why the money was concealed were not required in a plea colloquy, so long as a defendant just admitted guilt to the concealment money laundering statute. "Gonzales admitted he made the transfer at least in part to conceal the nature, source, ownership, and control of the drug proceeds," the court held. "This admission satisfies the final element of Sect. 1956(a)(1)(B)(i)." App. 7-8. "This court recognizes that if a defendant goes to trial on a charge of concealment money laundering, the government must present substantial evidence of concealment to support a verdict in its favor." App. 8. "By pleading guilty, however, Gonzales specifically relieved the government of its burden of proving the necessary factual predicate." *Id.* As to all the cases similar to the contested counts cited by Petitioner finding facts insufficient to establish concealment money laundering, the court simply noted that all those cases had arisen from jury verdicts. "Gonzales's admission that he acted with the intent to conceal would be sufficient to support a guilty verdict," the court concluded. App. 9. The court ultimately cited *United States v. O'Hara,* 960 F.2d 11, 13 (2nd Cir. 1992), to support its position: "A reading of the indictment to the defendant coupled with his admission of the acts described in it (provides) a sufficient factual basis for a guilty plea, as long as the charge is uncomplicated, the indictment detailed

and specific, and the admission unequivocal." App. 10. The court concluded Petitioner's appeal "can be easily resolved at the first step of plain error review because his guilty pleas are supported by an adequate factual basis." App. 3.

REASON FOR GRANTING THE WRIT

THE CIRCUIT COURT'S HOLDING THAT THE CONCEALMENT MONEY LAUNDERING PROVISION IS AN 'UNCOMPLICATED' CRIME FOR WHICH ADMISSION OF GUILT IS SUFFICIENT TO SATISFY RULE 11 IS IN CONFLICT WITH AT LEAST TWO CIRCUIT COURTS THAT HAVE FOUND PLAIN ERROR WHEN DISTRICT COURTS FAILED TO CONDUCT A RIGOROUS PLEA COLLOQUY TO INSURE THE CONDUCT COMMITTED FELL WITHIN THE CHARGE

A guilty plea is no mere formality, but "a grave and solemn act." *United States v. Hyde,* 520 U.S. 670, 677, 117 S.Ct. 1630 (1997). Rule 11(b)(3) provides: "Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." This Court has held that Rule 11 is designed "to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States,* 394 U.S. 459, 467, 89 S.Ct. 1166, 1171 (1969) (quoting Fed.R.Crim.P. 11 Notes of Advisory Committee on Criminal Rules). "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant

possesses an understanding of the law in relation to the facts." *Id.,* at 466. A district court must reject a defendant's plea if it lacks a factual basis, even if the plea is knowingly and voluntarily made. *Libretti v. United States,* 516 U.S. 29, 42, 116 S.Ct. 356 (1995).

Circuit courts addressing these requirements have cautioned against the practice sanctioned in this case of merely having a defendant "admit" to the charge contained in an indictment. "The omission to identify and explain the crime" at a plea colloquy is "fundamental error" error. *United States v. Portillo-Cano,* 192 F.3d 1246, 1250 (9th Cir. 1999). The government's indictment may not be "bootstrapped" to provide a factual basis to support a guilty plea. *United States v. Adams,* 448 F.3d 492, 501 (2nd Cir. 2006). It is not enough for a defendant "merely to plead guilty to the elements necessary for conviction." *Id.* A district court's reading of a plea agreement similarly is "no substitute for rigid observance" of a court's duty under Fed.R.Crim.P. 11. *United States v. Kennell,* 15 F.3d 134, 136 (9th Cir. 1994).

At least two of these circuit courts are in conflict with the Tenth Circuit Court's opinion in this case that a defendant's admission that he "concealed" money was sufficient alone to establish commission of the concealment money laundering provision of 18 U.S.C. (a)(1)(B)(i). In *United States v. Garcia,* 587 F.3d 509, 518 (2nd Cir. 2009), the Second Circuit held that "diverse interpretations ascribed to the concealment element" require special

attention by a district court. Similarly, in *United States v. Esterman,* 324 F.3d 565 (7th Cir. 2003), the court held there must be "concrete evidence of intent to disguise or conceal transactions" because "of the importance of maintaining the distinction between money laundering and other related crimes." *Id.,* at 569.

The reason why these circuit courts find such caution is required is illustrated by this Court's decision in *Cuellar.* The case involved defendants who transported drug proceeds concealed in an automobile cross-country from Florida, where the currency was picked up, to Arizona, where it was delivered. Even though the currency was concealed during its interstate transportation, the Court found those facts insufficient to support a conviction for money laundering. Rather, the Court, looking to the meaning of the word "design" in the phrase "knowing that such transportation is designed…to conceal or disguise" concluded that "when an act is 'designed to' do something, the most natural reading is that it has that something as its purpose." *Id.,* 553 U.S. 563-64. The Court held, "It seems far more likely that Congress intended courts to apply the familiar criminal law concepts of purpose and intent than to focus on how a defendant 'structured' the transportation." *Id., at 565.* The Court explained, "(T)here is a difference between concealing something to transport it, and transporting something to conceal it; that is, how one moves the money is distinct from why one moves

the money," and "evidence of the former, standing alone, is not sufficient to prove the later." *Id.,* at 566. Although *Cuellar* dealt with a different section of the money laundering statutes, one addressing transportation, its reasoning easily applies to the concealment laundering statute under 18 U.S. C. 1956(a)(1)(B)(i). Any plea colloquy must necessarily distinguish between the *physical act* of concealing currency from the *purpose* behind the concealment. This is why the statute is not "uncomplicated," as the Tenth Circuit held. The other circuit courts recognize that merely parroting the word "conceal" from the statute in a plea colloquy that bootstraps the language of the indictment and the plea agreement fails to satisfy the demands of Rule 11, and thereby fails the constitutional requirements under the Due Process Clause that a plea be knowing and voluntary.

These concerns are the reasons why the Second Circuit and the Seventh Circuit, unlike the Tenth Circuit in this case, held that the rigorous plain error analysis established by this Court in *Olano v. United States,* 507 U.S. 725, 113 S.Ct. 1770 (1993) had been met under similar circumstances of deficient plea colloquys involving concealment money laundering cases. In *Garcia*, the court found the government failed to prove "the critical element" of showing "that the transaction was designed to conceal a listed attribute of the funds." *Garcia,* 587 F.3d at 518. The court found plain error, because "allowing the error to stand would significantly affect the fairness and

integrity of judicial proceedings." *Id.* Indeed, the court in *Garcia* quoted *Olano,* which held, "(A) court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant." *Id.,* quoting *Olano,* 507 U.S. at 736, 113 S.Ct. 1770. *Esterman* similarly found the lack of "concrete evidence of intent to disguise or conceal transactions"…was plain error because its failure to establish the critical "distinction(s)" between criminal from non-criminal conduct "affects the fairness, integrity and reputation of the proceedings." *Id.,* 324 F.3d at 573.

The plain error analysis conducted in *Garcia* and *Esterman* should have applied in Petitioner's case. Going to a bank and physically looking in a safety deposit box where drug proceeds were kept, as Petitioner did, may have constituted a financial transaction, just because the safety deposit box was at a bank, but the purpose of the transaction was what was important. Did the Petitioner keep the money in the safety deposit box to have funds readily available for his special needs child, or was it exclusively to hide the money from the government or for some other illegal purpose? The vast majority of money laundering transactions admitted by Petitioner had involved commingling of drug proceeds into his concrete business accounts. Transferring drug proceeds from one bank account Petitioner controlled to another bank account he controlled at the same bank, particularly where no

evidence was presented about whether the other bank account similarly held drug proceeds, was no different from taking the illegal drug proceeds in Florida in *Cuellar* and transporting them to the drug lord in Mexico. Even though the transfer unquestionably involved a financial transaction, the financial status of the proceeds appears to have remained the same both before and after the transfer. For these reasons, the concealment money laundering statute is indeed a "complicated" criminal provision that cannot be satisfied by mere repetition of the word "conceal" from an indictment or plea agreement. Other circuit courts such as *Garcia* and *Esterman,* relying on this Court's framework established in *McCarthy,* have recognized that more is required at a plea colloquy in a concealment money laundering case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

William D. Lunn, attorney for Petitioner Darren Gonzales, hereby attests that pursuant to Supreme Court Rule 29, the preceding Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was served on counsel for the Respondent by enclosing a copy of these documents in an envelope, first-class prepaid and addressed to:

Noel J. Francisco
Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Avenue, N.W.
Washington, D.C. 20530

and that the envelope was deposited with the United States Postal Service, Tulsa, Oklahoma 74103, on April 9, 2019, and further attests that all parties required to be served have been served.

_/s/_William D. Lunn_

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Subscribed and sworn to before me this 9th day of April, 2019.

_/s/_____

Notary Public

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AFFIDAVIT OF MAILING

WILLIAM D. LUNN, counsel for Darren Gonzales, and a member of the bar of the State of Oklahoma and the United States Supreme Court bar, attests that he placed the foregoing petition for a writ of certiorari in the

United States mail on April 9, 2019.

_/s/_WILLIAM D. LUNN_

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

This affidavit of mailing subscribed and sworn to before me this April 19, 2019.

_/s/_____

Notary Public