**No. _____**

# In the Supreme Court of the United States

**October Term, 2018**

ABEL DE LEON, *PETITIONER*,

V.

UNITED STATES OF AMERICA

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether a formal motion to withdraw a guilty plea is required to invoke the protections of Federal Rule of Criminal Procedure 11(d)(1), which provides an absolute right to withdraw a pre-acceptance guilty plea.

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Petitioner, Abel De Leon asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 12, 2019.

## PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

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## OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Abel De Leon*, 915 F.3d 386 (5th Cir. 2019), is attached to this petition as Appendix A.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on February 12, 2019. This petition is filed within 90 days of the opinion. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

## FEDERAL RULE INVOLVED

The text of Federal Rule of Criminal Procedure 11(d)(1) is reproduced in Appendix B.

## STATEMENT

Abel De Leon appeals his conviction for receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2) and (b). He argues the district court plainly erred by failing to recognize his unconditional right to withdraw his guilty plea before the court had accepted it, contrary to Federal Rule of Criminal Procedure 11(d)(1).

**The June 13, 2013 Guilty Plea Hearing**: De Leon and the Government entered into a plea agreement, in which De Leon agreed to plead guilty to one count of receipt of child pornography.

He pleaded guilty before a United States magistrate judge. At the conclusion of the plea hearing, the magistrate judge indicated that he would recommend to the district court judge that the guilty plea be accepted and that the judgment of guilt be entered. At no point between the conclusion of the plea hearing, on June 5, 2013, and the start of the sentencing hearing, on April 22, 2014, did the district court enter an order adopting the magistrate's recommendation that De Leon's guilty plea be accepted, and no judgment of guilt was entered.

**The April 22, 2014 Sentencing Hearing:** Although the district court still had not accepted De Leon's guilty plea or the parties' plea agreement, it convened a sentencing hearing. De Leon addressed the district court. He said he was ashamed and embarrassed to be before the court, accused of downloading child pornography. But he denied having knowingly or intentionally planned to commit the crime. De Leon said he assumed that if the videos had been illegal, law enforcement would have shut down these websites. He said he believed that law enforcement was deliberately allowing these websites to exist to entrap people.

De Leon also said he had deleted all of the pornography on his computer three months before he was arrested. The Government

disagreed with De Leon's statement that he deleted all of the images. De Leon was allowed to respond to the Government's assertion that he had not deleted all of the images, noting that he had deleted everything, but that "ICE" agents brought everything back up. The court explained that De Leon had agreed that DVDs with downloaded child pornography were found at his home, and that he agreed to this factual assertion in his plea agreement. De Leon said the factual assertions in the plea agreement were incorrect and that he only agreed to it because the Government would not allow him to make any corrections.

The district court noted that De Leon had also said he did not commit this offense knowingly and intentionally. De Leon agreed that he said that. The court responded, that De Leon had a choice now—"[t]he choice is, withdraw the plea and go to jury trial" or admit that the factual basis in the plea agreement is true and that he knowingly and intentionally committed the crime. (ROA.537.)

The district court finished by suggesting that De Leon take time to think about what he really wanted to do. (ROA.538.) After consulting with his counsel, De Leon told the district court that he wanted a trial. The court said, that is fine and set the case for a docket call.

**The May 13, 2014 docket Call**: The case was set for a docket call on May 13, 2014. At the docket call, the district court admonished De Leon that no guilty plea would be accepted after that point if he persisted in his request for a trial. De Leon confirmed that he wanted a trial and the defense and the Government announced ready for trial.

**The June 23, 2014, Pretrial Conference**: At the pretrial conference, while a jury panel was waiting for selection, the district court addressed issues related to admissibility of evidence, including the admissibility of De Leon's prior statements made in open court. Defense counsel argued that any statements made in open court were inadmissible under Federal Rule of Evidence 410, which precludes use of statements made during pleas, plea discussions, and related statements when a guilty plea is later withdrawn.

The district court disputed that any statements made by De Leon during the sentencing hearing were part of plea discussions. The court indicated, in fact, that De Leon's plea was still in place and the court noted:

> I've got to say at this point I'm not—I don't know that I'm real inclined to allow him to withdraw his plea.

(ROA.578.) The court said it only "got to that point at sentencing to allow De Leon to present an entrapment defense, which

[was] not going to happen now" because defense counsel had not given pretrial notice of any affirmative defense. (ROA.579.) The court again repeated, "I haven't yet rejected [De Leon's] plea[.]" and the court "was only going to reject to give [De Leon] that opportunity that he is not going to take advantage of." (ROA.579–80.)

The district court questioned defense counsel as to why this case was going to trial. Counsel responded that they intended to put the government to its burden to prove the charges, and that he had discussed this trial strategy with De Leon, but did not think it was appropriate to discuss it in open court. The district court persisted in questioning defense counsel about why the case was going to trial. After a protracted colloquy, defense counsel told De Leon that the court had not rejected his guilty plea and asked De Leon if he wished to continue with the guilty plea. (ROA.593.) De Leon responded that he would like to go to trial, he would like to present an entrapment defense, and he did not believed that he done anything illegal. (ROA.595.)

The district court told De Leon that those would not be admissible defenses and the court continued to press De Leon, himself, to articulate a viable and admissible defense. Ultimately, De Leon, through counsel, announced that he wished to go forward with his guilty plea.

**The June 24, 2014, Sentencing Hearing**: The next day, the district court conducted a sentencing hearing. (ROA.630–818.) After hearing evidence and additional argument, the court found that the Guidelines range increased to 360- to life-imprisonment, factoring in a two-level adjustment for distribution and a five-level adjustment for De Leon engaging in a pattern of exploitation. (ROA.796–97.) The court imposed a sentence of 240 months' imprisonment—the statutory maximum for the offense. (ROA.805.) The court admonished De Leon that he gave up his right to appeal in the plea agreement. (ROA.810.)[1]

**The Written Documents**: The written judgment reflects that De Leon entered a guilty plea before the magistrate judge on June 5, 2013. (ROA.162.) The district court signed the magistrate's "Memorandum and Recommendation," and accepted De Leon's guilty plea on June 24, 2014. (ROA.158–59.)

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[1] The Government opted not to enforce the appeal waiver provision in the plea agreement. *See* Gov't Br. 16; *see also United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) (waiver of appeal is enforceable only if the government invokes it).

**The Appeal**: On appeal, De Leon argued the district court plainly erred by failing to recognize his unconditional right to withdraw his guilty plea before the court had accepted it, contrary to Federal Rule of Criminal Procedure 11(d)(1).[2]

**The Opinion Below**: The Fifth Circuit affirmed De Leon's conviction. *United States v. De Leon*, 915 F.3d 386, 392 (5th Cir. 2019). The court held that De Leon never formally withdrew his guilty plea, the district court's "stray" comments did not violate Rule 11(d)(1), and the court did not restrict De Leon's right to trial. *Id*. at 389–90.

De Leon asks this Court to grant his petition for certiorari to address whether the Fifth Circuit improperly concluded that there could be no Rule 11(d)(1) error, in part, because De Leon never formally withdrew his guilty plea. De Leon manifested his intent to withdraw his guilty plea and had done so, albeit not in a formal motion. Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal court,

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[2] He also argued that the court plainly and improperly interfered with plea discussions after he withdrew his guilty plea, contrary to Rule 11(c)(1).

the court should grant certiorari to address whether a formal motion to withdraw a guilty plea is required to trigger the protections of Rule 11(d)(1), which allows for a pre-acceptance withdrawal of a guilty plea for any reason or no reason.[3]

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[3] In fiscal year 2017, out of 75,163 defendant's whose cases were adjudicated in federal district court, 67,418 were convicted after a plea of guilty. Judicial Facts and Figures, September 30, 2017, United States Courts report, U.S. District court—Criminal, Criminal Defendants Terminated, by Type of Disposition. https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2017 (downloadable PDF).

## REASON FOR GRANTING THE WRIT

### The Court Should Grant Certiorari to Decide Whether a Formal Motion to Withdraw a Guilty Plea Is Required to Trigger the Protections of Rule 11(d)(1), Which Allows for a Pre-acceptance Withdrawal of a Guilty Plea for Any Reason or No Reason.

Under Federal Rule of Criminal Procedure 11, a defendant may withdraw a plea of guilty before the district court accepts the plea. The defendant's right to do so is unconditional: he may withdraw his plea for any reason or no reason. Here, the Government and the Fifth Circuit recognized "that the district court neither explicitly nor implicitly accepted De Leon's guilty plea until the second sentencing hearing in June 2014." *De Leon*, 915 F.3d at 389. Hence, De Leon had an unqualified right to withdraw his plea when he asked the court to set his case for trial and reconfirmed, at docket call, that he wanted a trial. *Id*.

In resolving the Rule 11(d)(1) issue, the Fifth Circuit found that the district "court faithfully upheld De Leon's absolute right to withdraw his guilty plea." 915 F.3d at 389. However, this fails to account for the substance and impact of the court's statements at the pretrial conference in response to defense counsel's argument that De Leon's statements made in the prior hearings should be suppressed because they were made in conjunction with a guilty plea that was later withdrawn. The court responded:

> The only reason we're here is…I was giving [De Leon] the opportunity to present his defense, which is not going to happen in this trial from what I hear now… "I haven't yet rejected this plea… frankly . . . I've got to say at this point I'm not—*I don't know that I'm real inclined to allow him to withdraw his plea.*"

(ROA.577–78.)

There can be no question that De Leon intended to withdraw his guilty plea prior to this point. At the April 22, 2014 hearing, De Leon unequivocally informed the court that he wanted a trial. At the May 13, 2014, docket call—despite admonitions by the court that no guilty plea would be accepted after that point—De Leon was unwavering in his request for a trial. The court's statements indicate it believed it had the power to prevent De Leon from withdrawing his guilty plea. These statements, and the several that followed, show the court did not faithfully up-hold De Leon's absolute right to withdraw his guilty plea. Instead the court burdened it by demanding that the defense provide a reason for the court to allow the withdrawal of the guilty plea.

In concluding that there was no Rule 11(d)(1) error, the Fifth Circuit concluded that De Leon's failure to formally request to withdraw his plea was significant as to whether the district court erred. *See* 915 F.3d at 389–90 ("De Leon never formally requested to withdraw his plea but, instead, continued to waver before ultimately deciding to persist in his original guilty plea. There can be

no error under such circumstances."). The Court's conclusion is unsupported by a plain reading of Rule 11(d)(1), which does not require a formal motion to withdraw, or any specific procedural mechanism, to invoke the protection of Rule 11(d)(1).

The Fifth Circuit, in placing undue significance on De Leon's failure to file a formal motion to withdraw his guilty plea, exalted form over substance. The court's approach is in conflict with that taken by courts, in other Rule 11 contexts, in which formal or talismanic utterances have not been required. For instance, in determining whether district courts have *accepted* a guilty plea, courts have routinely excused the failure to explicitly signal acceptance of the plea or to enter a formal order of guilt. *See*, e.g., *United States v. Byrum*, 567 F.3d 1255, 1261 (10th Cir. 2009) ("Rule 11 does not prescribe any specific language of acceptance, and imposing a requirement on the district court to utter some talismanic words to effect an acceptance is not supported by the Federal Rules of Criminal Procedure or the case law."); *United States v. Battle*, 499 F.3d 315, 321–22 (4th Cir. 2007) ("Given the Rules' silence, we see no reason to require district courts to use some kind of talismanic 'magic words' to effect an acceptance....").

Instead, courts have found that "what matters ultimately is the language of the trial court and the context in which it is used."

*United States v. Tyerman*, 641 F.3d 936, 943 (8th Cir. 2011) (quoting *Byrum*, 567 F.3d at 1261). Applying the same focus on the language and its context leads to the conclusion that De Leon unequivocally withdrew his guilty plea. A confirmed request for a trial is inconsistent with maintaining a guilty plea. Had the Fifth Circuit viewed De Leon's language and its context as the unequivocal withdrawal of his guilty plea, the court would have resolved the Rule 11(d)(1) issue differently.

In resolving the Rule 11(d)(1) issue, the Court concluded that the district court's "stray comments" were excused by "De Leon's chronic indecision." *De Leon*, 915 F.3d at 390. The court's statements indicating it was not inclined to allow De Leon to withdraw his guilty plea were not prompted by De Leon's indecision. Prior to the court's statements, De Leon had not wavered in his desire to go to trial. He had not interjected himself in the pretrial hearing, or expressed any indecision.

In addition, contrary to the Fifth Circuit's conclusions, the district court's statements were not "stray" or isolated. Instead, they were protracted, spanning twenty-two pages of the pretrial hearing transcript. The statements show the court had only contemplated allowing De Leon to withdraw his guilty plea to present a specific defense—a view at odds with Rule 11(d)(1). Had the Fifth

Circuit understood De Leon's language and its context as the equivalent of a formal request to withdraw his guilty plea, it would have placed the district court's pointed colloquy in a different light.

The district court's statements demonstrate a fundamental misunderstanding of the changes made by the 2002 amendment to Rule 11, in which "Rule 11(d) replaced Rule 32(e) as the section governing plea withdrawals." *See United States v. Head*, 340 F.3d 628, 629 (8th Cir. 2003). "Rule 32(e) required a defendant to demonstrate a 'fair and just reason' for the withdrawal of a plea, while Rule 11(d) provides . . . [a] defendant may withdraw a plea of guilty . . . before the court accepts the plea, for any reason or for no reason." *Id.* In De Leon's case, the court questioned why it should allow De Leon to withdraw his guilty plea if the trial was no longer justified by the reason previously identified by the court. De Leon's request for—and confirmation of his desire for—a jury trial should have been seen as the equivalent of a formal request to withdraw his guilty plea. Had the Fifth Circuit seen it as such, the district court's actions in pressing the defense for a reason why it should be allowed to withdraw the guilty plea would have been viewed as a violation of Rule 11(d)(1).

Finally, in resolving the Rule 11(d)(1) issue, the Court found "the only reason that a trial did not occur was that De Leon continued to waffle." *De Leon*, 915 F.3d at 389. However, it was only after the district court's protracted questioning about the defense's strategy—and, as a result of that questioning—that De Leon said he would persist in his guilty plea. The conclusion that De Leon's indecision, alone, prompted him to forgo a jury trial ignores the role the district court played in influencing that decision.

For these reasons, this case present the Court with an important issue of federal law: whether a formal request to withdraw a guilty plea is required to trigger the protections afforded by Federal Rule of Criminal Procedure 11(d)(1). Certiorari should be granted to address this important question and to correct the Fifth Circuit's error.

## CONCLUSION

FOR THESE REASONS, De Leon asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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DATED: May 13, 2019.