No. _____

IN THE

Supreme Court of the United States

ARMANDO J. MENA,

Petitioner,

v.

ROSEMARY NDOH, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit misapplied *Henderson v. Morgan*, 426 U.S. 637 (1976), in concluding that a state court could reasonably presume from a silent record that petitioner's trial counsel explained the elements of the offense to him off the record, defeating even a prima facie claim that the plea was not knowing, voluntary, and intelligent.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Armando J. Mena challenges the validity of his guilty plea on the ground that he was not explained the elements of the offense before entering his guilty plea. The record of the plea provides no indication that Mena was explained the elements by either his counsel or the court. The Ninth Circuit's unpublished memorandum disposition misapplied this Court's precedents in concluding that a state court may presume that a defendant's trial counsel explained the elements of the offense to him off the record, foreclosing the defendant from stating a prima facie claim that his plea was not knowing, voluntary, and intelligent. Mena asks that the Court exercise its supervisory authority to reverse and remand for further proceedings consistent with this Court's precedents requiring the record affirmatively show that a guilty plea is knowing, voluntary, and intelligent and prohibiting waiver from a silent record.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the judgment below in an unpublished memorandum disposition. (App. 2-7.) The opinion of the District Court of the Central District of California, adopting the Magistrate Judge's Amended Report & Recommendation, was also unreported (App. 9-14.). The

California Supreme Court summarily denied Mena's state habeas petition. (App. 43.)

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. § 2253 and entered judgment on May 1, 2019. (App. 2.) The Ninth Circuit denied Mena's request for panel rehearing on May 22, 2019. (App. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV, § 1

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. Code § 2254

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In September 2011, Mena was charged by information with eleven felony counts of lewd acts on a minor and a special circumstance allegation of multiple victims. Cal. Penal §§ 288(a), 667.61(b) and (e). (App. 16.)

On the morning of jury selection, the court announced that it received a "plea bargain form." (App. 23.) Pursuant to this agreement, the prosecution orally moved to amend the complaint to add five counts under California Penal Code section 288(b)(1), alleging lewd acts on a minor by "use of force, violence, duress, menace, or fear," and to dismiss the eleven counts under section 288(a). (App. 24.)

The trial court did not ask Mena whether he had been explained the elements of the offense and counsel made no representations that he had done so. (App. 44-59.) The plea form, though listing the correct penal code sections to which Mena was pleading guilty, was silent on the elements of the offense and made no representation that the elements of the offense had been explained to Mena. (App. 60-62.) Trial counsel represented that he was not joining in the plea and did not sign the plea form. (App. 62.)

The plea form erred in listing three, six, or eight years next to each count, a sentence consistent with the original counts under section 288(a), rather than the correct five, eight or ten years, applicable under section 288(b)(1). (App. 60.) During the plea colloquy, the trial court repeated this error, informing Mena that

"[t]he penalty range [under California Penal Code section 288(b)(1)] . . . is up to three years, six years or eight years." (App. 25.) After accepting Mena's guilty plea, the court sentenced Mena to a determinant sentence of 40 years in prison. (App. 25.)

Following Mena's conviction, the trial court issued a certificate of probable cause, certifying whether trial counsel rendered effective assistance at the plea. (App. 16-17.) Despite this certified issue, Mena's appellate counsel submitted a brief under *People v. Wende*, 25 Cal. 3d 436 (1979), representing there were no arguable issues on appeal. (App. 17.) The court of appeal affirmed in an unpublished decision. (*Id.*) The California Supreme Court summarily denied Mena's challenge to the voluntariness of his guilty plea "on the merits." (App. 43). The federal district court concluded this denial was reasonable under this Court's precedents and the Ninth Circuit affirmed in an unpublished decision. (App. 2-8.)

REASONS FOR GRANTING THE WRIT

Rule 10(c) provides that certiorari is appropriate when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c), Rules of the Supreme Court.) In addition, Rule 10(a) provides that certiorari is appropriate on questions that "call for an exercise of this Court's supervisory power."

Under this Court's precedents, a guilty plea is voluntary only if the

defendant has been explained the charges, including the elements of the offense. *Henderson*, 426 U.S. at 654 n.13. If the State lacks "proof that [the defendant] in fact understood the charge, the plea cannot be voluntary." *Id.* The record must "accurately reflect[]" that the defendant was explained "the nature of the charge and the elements of the crime" by counsel or the court. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

The State bears the burden of establishing a valid waiver of fundamental constitutional rights, including the Sixth Amendment right to a jury trial. *See Carnley v. Cochran*, 369 U.S. 506, 516 (1962) ("Presuming waiver [of Sixth Amendment rights] from a silent record is impermissible"); *Boykin v. Albama*, 395 U.S. 238, 242-43 (1969) (applying *Carnley* to jury waiver). For a guilty plea to be knowing, voluntary, and intelligent "[t]he record must show" that the guilty plea was "intelligently and understandingly" made. *Boykin*, 395 U.S. at 242.

In contrast to this Court's precedents, the Ninth Circuit concluded that a state court may reasonably presume that counsel explained the elements of the offense to the defendant *off* the record, allowing the court to deny the claim for failing to state even a prima facie claim for relief. (App. 4.) To reach this conclusion, the Ninth Circuit erroneously relied on dicta in *Henderson*, in which this Court stated that "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the

accused notice of what he is being asked to admit.'" *Id.* (quoting *Henderson*, 426 U.S. at 647).

The Ninth Circuit's reading of *Henderson* would render obsolete the requirements of *Boykin*, *Stumpf*, and related decisions holding that the record of a valid plea must affirmatively show that the defendant has been explained the elements of the offense. *Stumpf*, 545 U.S. at 183; *Boykin*, 395 U.S. at 242. Rather than requiring the record to reflect that a defendant understands the elements of the offense to which he is pleading, the Ninth Circuit's interpretation of *Henderson* permits state courts to accept a guilty plea merely based on the appointment of counsel and an assumption that counsel explained the elements of the offense.

The Ninth Circuit's interpretation is incompatible with *Henderson*, in which the Court observed that both of the defendant's two attorneys had provided "concededly competent" assistance, and it was only through an evidentiary hearing in federal court that Henderson was able to establish he was not explained a critical element of the offense. *Henderson*, 426 U.S. at 639. The dicta in *Henderson* that "it *may* be appropriate" to presume defense counsel has explained the elements of the offense must be read in the context of that decision as applying only once the court has reached a fact-finding stage of the proceeding. Here, the state court denied Mena's petition for failing to state a prima facie claim, and he has been afforded no hearing on the merits in state or federal court.

Mena requests that this Court grant his petition for writ of certiorari, vacate the Ninth Circuit's order affirming judgment, and remand for further proceedings consistent with this Court's precedents.

Respectfully submitted,

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Dated: August 19, 2019

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