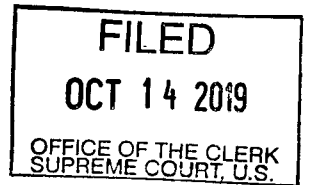


No. 19-6471

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Diego Alonso Lozano-Perez

(Your Name) — PETITIONER

vs.

United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Diego Alonso Lozano-Perez

(Your Name)

FCI Beaumont (Low)

(Address)

P.O. Box 26020, Beaumont, Texas 77720
(City, State, Zip Code)

N/A

(Phone Number)

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTION(S) PRESENTED

Whether the Court made the Constitutionally required determination that the guilty plea was truly voluntary, whereas it failed to comply with the rigid observance of Rule 11 of Federal Rules of Criminal Procedure, by merely making vague references to the record.

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 27, 2019.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 USC § 841(a)(1)

§ 841 Prohibited Acts

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance

STATEMENT OF THE CASE

A. Proceedings

On January 12, 2017, petitioner was charged in a one count indictment for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1).

On September 13, 2017, petitioner was arraigned on the charges to which he pled not guilty.

On March 12, 2018, petitioner changed his plea pursuant to a nonbinding plea agreement (11(c)(1)(A) & 11(c)(1)(B)).

On September 24, 2018, petitioner was sentenced to 188 months of incarceration and 48 months supervision.

On October 2, 2018, notice of appeal was timely filed.

On August 27, 2019, United States Court of Appeals for the Ninth Circuit Affirmed.

B. Statement of Relevant Facts

On January 12, 2017, petitioner was charged in a one count indictment for possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1).

Facts are derived from the Presentence Report (PSR). When explaining the "work", he told agents that he "normally" received a phone call, was asked to make a delivery, and then drove his vehicle to the Indio / Coachella area." PSR ¶14. He would park his car, leave it unlocked, and would "take a walk." PSR ¶14. When he would return to his car, Perez indicated that someone would have placed a bag in his car, for delivery. PSR ¶14.

He would then receive another call, telling him where to go, normally somewhere in the Bakersfield area. PSR ¶14. Once at the instructed destination, he would park and leave his car. PSR ¶14. When he returned, the bag would be gone and a payment of \$2000. would have been left in his car. PSR ¶14. He claimed he had never seen any of the individuals who accessed his car to deliver or retrieve the bags or to leave the payment. PSR ¶14. On this particular occasion, he denied knowing exactly what had been in the bag containing the methamphetamine in his car, but he admitted believing it was likely cocaine or methamphetamine, because he believed it was drugs and could see the bag's contents where white. PSR ¶15. He stated again that he was paid \$2000. per trip. PSR ¶15.

REASONS FOR GRANTING WRIT

Petitioner argues, the district court failed to comply with Fed.R.Crim.P.11, by failing to allow petitioner to state in his own words how he is guilty of the charged offense, and by failing to determine that there is a factual basis for the plea.

Fed.R.Crim.P.11(b)(1)(G), requires the trial court to engage in a colloquy with the defendant to confirm that the defendant understands among other things "the nature of each charge to which the defendant is pleading."

In the instant case, the court merely recited the indictment and asked defendant how he pled to the charges. Neither counsel for the defendant nor the government proffered the factual basis.

See (Change of Plea Transcript, 03/12/2018,P.6). Furthermore, the colloquy did not comply with Rule 11 because the district court never explained the nature of the charges. Merely asking defendant if he agreed to the elements of the offense is insufficient requisite of Rule 11. See (Change of Plea Transcript, 03/12/2018),

BY THE COURT: I think I have your plea agreement in my hand and I think that I am seeing on Pg.8 and then on the attachment, your signature on two of those pages. Do you recognize those signatures?

BY THE DEFENDANT: Yes, your Honor.

BY THE COURT: Those signatures to me mean that you have had a chance to review both of these--excuse me--the entire plea agreement. And that if you had questions, you asked your lawyer, and your lawyer answered to your satisfaction, and that you have no more questions about the plea agreement. Is that what the plea agreement means to you?

BY THE DEFENDANT: Yes.

BY THE COURT: When you went through the document, did you understand the elements of the crime?

BY THE DEFENDANT: Yes.

BY THE COURT? And did you understand the facts?

BY THE DEFENDANT: Yes.

Merely naming the charge was inadequate because it did not inform defendant of the nature (as opposed to the faromal legal description) of the charges. United States v. Victoriano de Jesus Pena, 314 F.3d 1152 (9th Cir. 2003).

"A statement by the defendant and his attorney that they discussed the nature of the charge is ... insufficient to satisfy Rule 11(c), because vague references to discussions of 'the charges does not provide a complete record showing compliance with Rule 11(c). United States v. Portillo Cano, 192 Fed.3d 1246, 1251 (9th Cir. 1999)(quoting United States v. Smith, 60 F.3d 595, 598 (9th Cir. 1995)).

An attorney's representation that he explained a charge the defendant is not enough to demonstrate that the defendant understands the nature of that charge. McCarthy v. United States, 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1166 (1969).

Federal Rules of Criminal Procedure 11(b)(3), before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

In the 'Change of Plea Hearing' the court did not ask defendant to state in his own words how he was guilty of the offense. Yet on the record, defendant conceded to transporting a controlled substance, but denied knowing what had been in the bag containing the methamphetamine in his car, [but] he admitted believing it was likely cocaine or methamphetamine because he believed it was drugs and could see the bag's contents were white." See (PSR Pg.15).

United States v. Galloway, 199 F.3d 623 (2nd Cir. 1999) (the court did not ask the defendant to describe his participation in the offense, and the defendant therefore did not provide the court with sufficient information to establish that he understood the meaning of his plea.

The plea colloquy further failed to inform defendant that he had a right to make the government prove drug quantity to a jury beyond a reasonable doubt. The court simply read the special allegation of the charge. See (Change of Plea, Pg.7, Ln's. 1-5).

United States v. Minroe, 292 F.3d 1109, 1115 (9th Cir.2002). (concluding that the defendant's substantial rights were affected

by the district courts failure to inform him that he had a right to make the government prove drug quantity beyond a reasonable doubt).

United States v. Camacho, 233 F.3d 1308, 1314 (11th Cir. 2000) (stating that "a district court's failure to satisfy any of the core objectives of Rule 11 affects a defendant's substantial rights and thus can constitute plain error).

United States v. Culbertson, 670 F.3d 183, 190-192 (2012) (when defendant insisted that he had conspired to transport only three, not five kilograms of cocaine, his plea to more serious charge should not have been accepted). Petitioner never denied that he knew he was transporting a controlled substance. But he did make it clear that he did not know the type of drug or quantity.

CONCLUSION

Circuits hold conflicting Opinions with regards to accepting guilty pleas. While several circuits permit vague references to the record, others require strict adherence to the law.

Petitioner contends that the district court's vague reference to the record makes defendant's plea a not knowing plea. Therefore, this Honorable Court should grant this motion.

Respectfully submitted this 14th day of October, 2019.

Diego Lozano

DIEGO ALONSO LOZANO-PEREZ
(Pro se) Petitioner