

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DONATO AMAYA-RIVAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Mr. Amaya-Rivas pled guilty, the court did not inform him of his constitutional rights to trial by jury, to confront and cross-examine adverse witnesses at trial, to be protected from compulsory self-incrimination, to testify and present evidence, to compel the attendance of witnesses, and to be represented by counsel at trial. Nothing in the record affirmatively shows that Mr. Amaya-Rivas knew he had these rights. The questions presented are:

- I. Whether a defendant who raises for the first time on appeal that his plea is unconstitutional because it was entered unknowingly and involuntarily must show a reasonable probability that he would not have pled guilty.
- II. Whether a sentence is unconstitutional when a prior conviction, not admitted by the defendant when he pled guilty, causes the sentence to exceed the otherwise applicable statutory maximum.

LIST OF PARTIES

Petitioner, Donato Amaya-Rivas, was the defendant in the district court and the appellant in the court of appeals. Respondent, the United States of America, was the plaintiff in the district court and the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Donato Amaya-Rivas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION AND ORDER BELOW

The Eleventh Circuit's opinion affirming Mr. Amaya-Rivas conviction and sentence is provided in Appendix A-1. The Eleventh Circuit's order denying rehearing or rehearing en banc is provided in Appendix A-2.

STATEMENT OF JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over Mr. Amaya-Rivas. The Eleventh Circuit issued its opinion on August 7, 2019, and denied rehearing on November 6, 2019. This petition is timely filed under Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 8, United States Code, Section 1326 provides, in relevant part:

(a) In general

Subject to subsection (b), any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned more not more than 10 years, or both[.]

Federal Rule of Criminal Procedure 11(b) provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) **Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant

personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;
- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;
- (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
- (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

- (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 the 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.

Federal Rule of Criminal Procedure 52(b) provides:

- (b) **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

1. Donato Amaya-Rivas pled guilty to an indictment charging him with being an alien who was found voluntarily in the United States without proper permission after previously having been deported, in violation of 8 U.S.C. § 1326(a) and (b)(1). During his plea colloquy, the court did not advise him that, under the United States Constitution, he had the rights to a jury trial, to confront and cross-examine adverse witnesses, to be protected from compulsory self-incrimination, to testify and present evidence, to compel the attendance of witnesses, and to be represented by counsel at every stage of the proceedings, including trial. The court did not advise him of his right to persist in his not-guilty plea. There was no written plea agreement, and nothing in the record showed that Mr. Amaya-Rivas was aware of these rights.¹

The court asked if Mr. Amaya-Rivas had an adequate opportunity to talk with his counsel about “whether or not [he] should enter a guilty plea as well as the consequences of doing so.” Doc. 44 at 5. Mr. Amaya-Rivas responded affirmatively. The court also asked him generally whether he understood that if he entered a guilty plea, he waived “all of [his] rights associated with trial.” Doc. 44 at 8. Mr. Amaya-Rivas responded affirmatively. But the court never told him what “all of [his] rights associated with trial” were.

The court asked Mr. Amaya-Rivas if anyone had done anything that he considered wrong or unfair to pressure him into entering a guilty plea. He replied,

¹ The court canceled arraignment after Mr. Amaya-Rivas waived his personal appearance.

“No.” But the court never asked him explicitly if his guilty plea resulted from force or threats.

2. Mr. Amaya-Rivas did not object to the constitutional validity of his plea. The court sentenced Mr. Amaya-Rivas to 48 months’ imprisonment, an upward variance from the applicable range of imprisonment under the United States Sentencing Guidelines.

3. On appeal, Mr. Amaya-Rivas challenged his plea for the first time as unknowing and involuntary, in violation of due process. *See* Initial Brief of Appellant at 10-25 (filed July 2, 2018); Reply Brief of Appellant at 1-18 (filed October 5, 2018); App. A-1 at 6.

4. Reviewing for plain error, the Court of Appeals for the Eleventh Circuit affirmed Mr. Amaya-Rivas’s conviction because he could not show that any error during the plea colloquy affected his substantial rights. App. A-1 at 2, 6, 10, 11. The Eleventh Circuit applied the legal standard applicable to errors under Federal Rule of Criminal Procedure 11 errors. App. A-1 at 6 (“When a defendant asserts that the district court committed plain error under Rule 11 and seeks reversal of his conviction after pleading guilty, the defendant ‘must show a reasonable probability that, but for the error, he would not have entered the plea.’”). As applied to Mr. Amaya-Rivas, the Eleventh Circuit found that he had “not established that he would not have pled guilty had the court not committed the purported error.” App. A-1 at 11.

The Eleventh Circuit also applied its own “three core principles” test for “evaluating whether a Rule 11 error substantially affected a defendant’s rights.” App. A-1 at 8. Under this test, the Eleventh Circuit examined Rule 11’s three “core principles,” which ensure that: (1) the guilty plea is free of coercion; (2) the defendant understands the nature of the charges against him; and (3) the defendant understands the direct consequences of the guilty plea. App. A-1 at 8. The Eleventh Circuit observed that, under its precedent, a district court’s failure to address a core concern of Rule 11 constitutes plain error. App. A-1 at 8. Furthermore, the Eleventh Circuit stated that it would consider “whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty.” App. A-1 at 8 (quoting *United States v. Lopez*, 907 F.2d 1096, 1100 (11th Cir. 1990)).

The Eleventh Circuit acknowledged that a defendant does not need to point to evidence affirmatively demonstrating ignorance of his rights because a “silent record” will warrant reversal. App. A-1 at 10 (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)). But the Eleventh Circuit further stated that reversal is not required if the record is not silent, that is, if there is *any* evidence showing that the defendant understood his rights. App. A-1 at 10 (emphasis in original). The Eleventh Circuit implied that reversal was not required for Mr. Amaya-Rivas because he “acknowledged that he discussed with his attorney the consequences of pleading guilty and that he understood that by pleading guilty he would be waiving his rights associated with a trial.” App. A-1 at 10.

The Eleventh Circuit concluded:

Thus, our review of the record confirms that any errors or omissions during the Rule 11 colloquy did not affect Amaya-Rivas's substantial rights. Although the magistrate judge did not read the rights contained in Rule 11 verbatim to Amaya-Rivas, the magistrate judge nonetheless ensured that his guilty plea was not coerced, informed him of the charges against him and the elements that the government would have to prove if he proceeded to trial, and informed him of the penalties he would be facing if he was found guilty by a jury. Thus, the district court satisfied the three core principles of Rule 11. See [*United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005)].¹¹

App. A-1 at 11. The Eleventh Circuit affirmed because Mr. Amaya-Rivas had not shown how the error affected his substantial rights because he had not established that he would not have pled guilty had the court not committed the purported error. App. A-1 at 11.

5. On appeal, Mr. Amaya-Rivas also challenged his 48-month sentence as violating the Fifth and Sixth Amendments because it exceeded the statutory maximum based on facts not admitted by him at his guilty plea but found by the judge. In particular, the judge found that he had been deported subsequent to a felony conviction. See App. A-1 at 2; Initial Brief of Appellant at 41-45. Mr. Amaya-Rivas acknowledged that his argument was foreclosed by *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998). The Eleventh Circuit summarily affirmed. App. A-1 at 2.

6. The Eleventh Circuit denied Mr. Amaya-Rivas petition for rehearing or rehearing en banc. App. A-2.

REASONS FOR GRANTING THE WRIT

- I. **This Court should grant review to resolve the conflict between this Court's precedents in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), and *McCarthy v. United States*, 394 U.S. 459, 466 (1969), and the Eleventh Circuit's decision on an important federal question, which is whether a defendant must show a reasonable probability that he would not have pled guilty to prevail on his unpreserved constitutional claim of an unknowing and involuntary plea.**

The Eleventh Circuit departed from the this Court's established precedents in *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), and *McCarthy v. United States*, 394 U.S. 459, 466 (1969), which require that a conviction based on an involuntary plea, absent any evidence in the record that the accused knew of the constitutional rights he waived by entry of the plea, is void and must be reversed. Instead, the Eleventh Circuit applied the test applicable to non-constitutional errors involving Federal Rule of Criminal Procedure 11 and required Mr. Amaya-Rivas to show an effect on his substantial rights by showing a reasonable probability that he would not have pled guilty. See *United States v. Dominguez Benitez*, 124 S. Ct. 2333 (2004). Because courts of appeals continue to misapply the rule in *Dominguez Benitez* to constitutional claims of involuntary pleas, this Court should grant this petition.

- A. **This Court has long held that involuntary pleas are unconstitutional and void and must be reversed.**

The Fifth and Sixth Amendments guarantee those accused of crimes important rights: the rights to a jury trial, to confront and cross-examine adverse witnesses at trial, to be protected from compelled self-incrimination, to testify and present evidence, to compel the attendance of witnesses, and to be represented by counsel at trial. U.S. Const. amend. V, VI. The accused can waive these rights by entering a

plea of guilty, admitting his past conduct and consenting to a judgment of conviction entered without a trial.² See *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin*, 395 U.S. at 242 (“A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.”); *McCarthy*, 394 U.S. at 466. More than 90% of federal defendants choose this route and enter pleas of guilty.³

Because “courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights,” the waiver must be an “intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotations and citations omitted); see also *McCarthy*, 394 U.S. at 466. And there must be an *affirmative showing* that the waiver of constitutional rights was intelligent and voluntary. See *Boykin*, 395 U.S. at 24; see also *Brady*, 397 U.S. at 747 n.4. A waiver of these important federal rights cannot be presumed from a silent record. *Boykin*, 395 U.S. at 243; see also *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (“Presuming waiver from a silent record is impermissible.”). Rather, the record must show that the accused was advised of his rights but intelligently and

² “[T]he plea is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge.” *Brady v. United States*, 397 U.S. 742, 748 (1970).

³ In the 12-month period ending June 30, 2019, 74,358 federal defendants entered pleas of guilty; 1,653 were convicted at trial; 305 were acquitted at trial; and 6,124 saw their cases dismissed. See Statistical Tables for the Federal Judiciary, Table D-4, U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending June 30, 2019.

understandingly rejected the offer; anything less is not a waiver. *See Carnley*, 369 U.S. at 516.

This Court has identified two ways that a defendant's guilty plea may be involuntary in a constitutional sense. First, a plea may be involuntary because the accused does not understand the nature of the constitutional protections that he is waiving. *Henderson v. Morgan*, 426 U.S. 637, 645, n.13 (1976) (citing *Johnson*, 304 U.S. at 464-65). Second, a plea may be involuntary because the accused has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. *Id.* Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. *Id.* (citing *Smith v. O'Grady*, 312 U.S. 329 (1941)); *see also McCarthy*, 394 U.S. at 466-67 (stating that a guilty plea cannot be voluntary unless the accused possesses an understanding of the law in relation to the facts).

An unknowing or involuntary plea renders the conviction void, and it and must be reversed. *Dominguez Benitez*, 124 S. Ct. at 2341 n.10 (“[W]hen the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed.”); *McCarthy*, 394 U.S. at 466 (“if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void”); *Johnson*, 304 U.S. at 467-68 (absent a competent and intelligent waiver of Sixth Amendment right to counsel, the court lacks jurisdiction to convict a defendant and deprive him of his liberty, and the resulting judgment is void). A plea of guilty

“cannot support a judgment of guilt unless it was voluntary in a constitutional sense.” *Henderson*, 426 U.S. at 644-45; *see also Smith*, 312 U.S. at 334 (referring to due process violations that invalidate the judgment upon which the imprisonment rests). This remains true even if the defendant did not object to the constitutional validity of the plea in the court below.

B. Federal Rule of Criminal Procedure 52(b) and *Olano*’s plain error test.

When a federal defendant forfeits a claim of error by failing to raise the argument in the district court, Federal Rule of Criminal Procedure 52(b) and the test outlined in *United States v. Olano*, 507 U.S. 725 (1993), generally apply. *Johnson v. United States*, 520 U.S. 461, 466 (1997); *see Puckett v. United States*, 129 S. Ct. 1423, 1429, 1433 (2009); *United States v. Vonn*, 535 U.S. 55 (2002). Under that test, before the appellate court can correct an error not raised in the court below, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. *Olano*, 507 U.S. at 732. If an appellant satisfies all three conditions, the appellate court may exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

“[I]n most cases[,]” the third requirement—an effect on substantial rights—“means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.” *Olano*, 507 U.S. at 784. When the defendant’s claimed error is a nonconstitutional violation of Rule 11, he demonstrates that the error affected his substantial rights by showing “a reasonable probability that, but for the error, he would not have entered the plea.” *Dominguez Benitez*, 124 S. Ct. at

2340 (claiming that the district court violated Rule 11(c)(3)(B) by failing to warn that the defendant could not withdraw his guilty plea if the court did not accept the government's recommendations in the plea agreement); see *United States v. Davila*, 133 S. Ct. 2139, 2150 (2013) (claiming that the district court violated Rule 11(c)(1) by participating in plea discussions).

C. The intersection of involuntary pleas and plain error

Constitutional questions of whether a defendant's guilty plea was knowing and voluntary differ from nonconstitutional claims of Rule 11 error. *Dominguez Benitez*, 124 S. Ct. at 2341, n.10 (describing "another point of contrast" between Rule 11 error and the constitutional question of whether a defendant's guilty plea was knowing and voluntary).⁴ If a guilty plea is unknowing and involuntary, "for example, . . . when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." *Id.* (citing *Boykin*, 395 U.S. at 243). Even if overwhelming evidence showed that the defendant would have pleaded guilty regardless of the error, the court must vacate the conviction. *Id.*

As such, the standard of review for unpreserved claims of unconstitutional, involuntary pleas is critically different from claims involving mere violations of Rule 11. See *Dominguez Benitez*, 134 S. Ct. at 2341 n.10. Yet this Court has not

⁴ Important to this Court's holding in *Dominguez Benitez* was that the defendant claimed a nonconstitutional violation of Rule 11, not a constitutional due process violation. 124 S. Ct. at 2340 (referring to "the fact, worth repeating, that the violation claimed was of Rule 11, not of due process").

precisely spelled out how appellate courts should review unpreserved claims of unconstitutional, involuntary pleas.

Under one theory, a judgment of conviction resting on an unconstitutional, involuntary plea is void ab initio. The guilty plea is more than a confession and admission of past conduct; it is the accused's waiver of his constitutional rights to jury trial, to confront and cross-examine adverse witnesses at trial, to be protected from compelled self-incrimination, to testify and present evidence, to compel the attendance of witnesses, and to be represented by counsel at trial. *See Brady*, 397 U.S. at 748; *Boykin*, 395 U.S. at 242. The guilty plea is the accused's consent to entry of a judgment of conviction without a trial. *Brady*, 397 U.S. at 748. The absence of a valid, knowing waiver of constitutional rights destroys the consensual character of the plea and impairs its validity. *See Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984) (discussing *Brady*, 397 U.S. at 755); *see also Puckett*, 129 S. Ct. at 1430 n.1 (discussing *Brady*, 397 U.S. at 755 and explaining that guilty pleas induced by misrepresentation *at the time of contracting* may not stand).⁵ Absent a valid, knowing waiver of these important constitutional rights, the conviction based on the

⁵ In *Puckett*, the defendant claimed that the government violated the terms of a plea agreement in violation of Rule 11(c). 129 S. Ct. at 1426. He argued that plain-error review should not apply to his unpreserved claim, in part because the government's breach of the plea agreement retroactively caused his agreement to have been unknowing or involuntary and thus void. *Id.* at 1429-30. This Court rejected his argument because the government's broken promise was like failed consideration in a contract. *Id.* at 1430. Because it did not affect the existence of voluntary bilateral consent at the time of the guilty plea, the plea was not "automatically and utterly void." *Id.* Here, unlike *Puckett*, Mr. Amaya-Rivas claims a true constitutional error occurring at the time of his guilty plea that prevented his consent and formation of a contract, rendering his guilty plea automatically and utterly void. *See id.*

involuntary plea cannot stand. As such, it matters not whether the appellants preserved the error in the district court, and the appellate court need not apply the four-prong *Olano* test where the plea was void ab initio.

Under another theory, the appellate court should still apply Rule 52(b) and review an unpreserved involuntary plea claim for plain error, using the four-part *Olano* test. Assuming the defendant meets his burden of showing error that is plain, the third and fourth prongs should also be easily met, regardless of the doctrinal method used to demonstrate them (or forego demonstration of them).

In *Olano*, this Court refrained from deciding whether the phrase “affecting substantial rights” was “always synonymous with ‘prejudicial.’” 507 U.S. at 735 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)). This Court contemplated that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed.” *Id.* This Court also declined to address “those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice.” *Id.* This Court concluded that “[n]ormally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the ‘affecting substantial rights’ prong of Rule 52(b).” *Id.*

But since *Olano*, this Court has not explained these categories further. Moreover, “[t]his Court has several times declined to resolve whether ‘structural’ errors—those that affect ‘the framework within which the trial proceeds,’ [citation omitted]—automatically satisfy the third prong of the plain-error test.” *Puckett*, 129

S. Ct. at 1432 (citing *Olano*, 507 U.S. at 735; *Johnson*, 520 U.S. at 469; *United States v. Cotton*, 535 U.S. 625, 632 (2002)). This Court has continued to decline to resolve the question. *Id.*; *Davila*, 133 S. Ct. at 2149 (avoiding need to resolve whether structural errors automatically affect substantial rights because the error was not structural); *cf. United States v. Marcus*, 130 S. Ct. 2159, 2164-66 (2010) (same).

Assuming the error of an unconstitutional, involuntary plea is structural, this case presents this Court with the opportunity to decide whether this structural error automatically affects the defendant's substantial rights under the third prong of the *Olano* test.⁶ Even if this error is not labeled "structural," the error falls within a special category of forfeited errors that courts may correct regardless of their effect on the outcome. *See Olano*, 507 U.S. at 735.

If, however, the accused must still show an effect on his substantial rights, it should not be difficult. Depriving an accused of his liberty based on an invalid or void judgment of conviction certainly affects his substantial rights. Furthermore, it seriously affects the fairness, integrity, or public reputation of judicial proceedings, satisfying the fourth prong of the *Olano* test as well.

This case is an excellent vehicle for this Court to address outstanding issues involving unpreserved claims of involuntary pleas and standards of review after

⁶ In *Weaver v. Massachusetts*, this Court explained that the "purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." 137 S. Ct. 1899, 1907 (2017). This Court identified three, non-rigid categories of structural errors. *Id.* at 1908. This Court also addressed the standard for addressing the violation of a structural right where the defendant does not preserve the structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim. *Id.* at 1910-12.

Dominguez Benitez and *Olano*. The facts of the case are straightforward and uncomplicated, but the case presents issues which need further development from this Court to guide the circuit courts of appeals.

D. The decision below is wrong.

The Eleventh Circuit erred by concluding that Mr. Amaya-Rivas could not show that any error during the plea colloquy affected his substantial rights because he had not established that he would not have pled guilty had the court not committed the errors (failing to advise him of his constitutional rights to trial by jury, to confront and cross-examine adverse witnesses, to be protected from compulsory self-incrimination, to testify and present evidence, to compel the attendance of witness, and to be represented by counsel at every stage of the proceedings, including trial). Rather than consider Mr. Amaya-Rivas's claim as a constitutional error and an unknowing, involuntary plea, the Eleventh Circuit treated the issue as a nonconstitutional, Rule 11 omission. As such, the Eleventh Circuit applied the prejudice standard articulated in *Dominguez Benitez* applicable to pure Rule 11 errors rather than the rules requiring reversal of the void plea and conviction identified in footnote 10 of *Dominguez Benitez* and *Boykin*, as well as *Henderson*, *McCarthy*, *Johnson v. Zerbst*, and *Smith*. Indeed, the Eleventh Circuit never cited footnote 10 of *Dominguez Benitez*.

Moreover, the Eleventh Circuit stated that it would consider "whether the trial court was presented with evidence from which it could reasonably find that the defendant was guilty." App. A-1 at 8. But because Mr. Amaya-Rivas claimed a void

conviction based on an unconstitutional, unknowing, and involuntary plea, it did not matter whether there was evidence of Mr. Amaya-Rivas's guilt. *See Dominguez Benitez*, 124 S. Ct. at 2341, n.10 (rejecting that a conviction based on an unknowing and involuntary plea could be saved by overwhelming evidence that the defendant would have pleaded guilty regardless).

Continuing with its erroneous treatment of Mr. Amaya-Rivas's claimed error as a pure Rule 11 error, the Eleventh Circuit used its own "three core principles" test for evaluating whether Rule 11 error substantially affected Mr. Amaya-Rivas's rights. App. A-1 at 8. The Eleventh Circuit found that the district court satisfied the three core principles of Rule 11 because, "[a]lthough the magistrate judge did not read the rights contained in Rule 11 verbatim to Amaya-Rivas, the magistrate judge nonetheless ensured that his guilty plea was not coerced, informed him of the charges against him and the elements that the government would have to prove if he proceeded to trial, and informed him of the penalties he would be facing if he was found guilty by a jury." App. A-1 at 11.

Furthermore, the Eleventh Circuit misinterpreted and misapplied *Boykin*. The Eleventh Circuit stated that reversal under *Boykin* is required only where the record is silent; reversal is not required if there is *any* evidence showing that Mr. Amaya-Rivas understood his rights. The Eleventh Circuit then relied on Mr. Amaya-Rivas's acknowledgement that he discussed with his attorney the consequences of pleading guilty and that he understood that by pleading guilty he would be waiving his "rights associated with a trial." App. A-1 at 10.

That's not what *Boykin* held. "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady*, 397 U.S. at 747, n.4; *see also Boykin*, 395 U.S. at 242 ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."). In *Boykin*, this Court focused on three federal, constitutional rights involved in the waiver that takes place when a defendant enters a guilty plea: the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment, the right to trial by jury, and the right to confront one's accusers. 395 U.S. at 243. This Court refused to "presume a waiver of these three important federal rights from a silent record." *Id.*

Like *Boykin*, the record here is silent as to Mr. Amaya-Rivas's knowledge of these same three constitutional rights—among others—and the Eleventh Circuit erred by presuming a waiver of *known* rights by relying on *any* evidence in the record. The Eleventh Circuit erred by finding Mr. Amaya-Rivas was aware of his rights, when the record did not affirmatively disclose that he knew of the rights he was purportedly waiving. Any waiver would be hollow and invalid because he could not intelligently and constitutionally waive rights when the record did not affirmatively disclose that he knew what the rights were. *See McCarthy*, 394 U.S. at 466 ("For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a *known* right or privilege.'" (quoting *Johnson*, 304 U.S. at 464)).

The court failed to advise Mr. Amaya-Rivas when he pled guilty that he had Fifth and Sixth Amendment constitutional rights that would provide him with a fair alternative to pleading guilty. There was no plea agreement or arraignment hearing which might have satisfied the court that Mr. Amaya-Rivas knew of these important rights. And the rights are not intuitive to a defendant like Mr. Amaya-Rivas, who does not speak English, did not receive any civics education in the United States, and grew up in another country with a different system of criminal justice.

Absent an affirmative showing that Mr. Amaya-Rivas knew of his rights, his purported waiver of them is invalid. The resulting plea is unknowing and involuntary and violates the Due Process Clause of the Constitution. The plea and conviction are void and must be reversed. The Eleventh Circuit erred by affirming based on the wrong standard of review.

II. This Court should grant review to address the constitutionality of increasing a statutory maximum penalty based on a prior conviction, not admitted by the defendant when he pled guilty.

Whether the statutory maximum penalty for the offense of conviction, 8 U.S.C. § 1326, is two or ten years depends on whether the defendant's deportation was after a felony conviction. *See* 8 U.S.C. § 1326(a), (b)(1). This Court has held it is not error to sentence a defendant above the two-year statutory maximum otherwise applicable to his offense of conviction based on the court's finding of a fact of a prior conviction. *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998). However, Mr. Amaya-Rivas submits that *Almendarez-Torres* conflicts with the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United*

States, 570 U.S. 99 (2013), as well as the original meaning of the Fifth and Sixth Amendments. See, e.g., *Apprendi*, 530 U.S. at 489-90 (“it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested”). The prior convictions should be included in the indictment and proved to a jury beyond a reasonable doubt or admitted by the defendant at his guilty plea. This Court should reconsider *Almendarez-Torres*.⁷

In numerous dissents and concurrences, Justice Thomas has criticized the exception for prior convictions recognized in *Almendarez-Torres*. See e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1253 (2018) (Thomas, J., dissenting) (“The exception recognized in *Almendarez-Torres* for prior convictions is an aberration, has been seriously undermined by subsequent precedents, and should be reconsidered.”); *Descamps v. United States*, 133 S. Ct. 2276, 2295 (2013) (Thomas, J., concurring) (stating that *Almendarez-Torres* should be overturned); *James v. United States*, 550 U.S. 192, 231-32 (2007) (Thomas, J., dissenting); *Rangel-Reyes v. United States*, 547 U.S. 1200, 1202-03 (2006) (Thomas, J., dissenting from denial of certiorari); *Shepard v. United States*, 544 U.S. 13, 26-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) (“*Almendarez-Torres* . . . has been eroded by the Supreme

⁷ Pending before this Court is a petition for certiorari raising this same issue. See *Castro Lopez v. United States*, No. 19-5829 (filed Sept. 3, 2019). In that case, this Court requested a response from the United States, which filed a brief in opposition on December 2, 2019. The petitioner replied December 20, 2019. The docket reflects that the petition for certiorari has been distributed for conference on February 21, 2020.

Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"); *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (suggesting that he had succumbed to error in voting with the majority in *Almendarez-Torres*). Other Justices have expressed doubt about whether it was correctly decided. *See Apprendi*, 530 U.S. at 490; *Dretke v. Haley*, 541 U.S. 386, 395-96 (2004) (noting the difficult constitutional questions presented); *Shepard*, 544 U.S. at 26 & n.5 (Souter, J., controlling plurality opinion); *Rangel-Reyes*, 547 U.S. at 1201 (Stevens, J., concurring in denial of certiorari).

This Court's decision in *Alleyne* has effectively washed away any remaining foundations of *Almendarez-Torres*. The holding of *Almendarez-Torres* was based on what we now know to be a false dichotomy between "sentencing factors" and "elements of the offense," created by the Court in *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986). In *Alleyne*, the Supreme Court overturned *Harris v. United States*, 536 U.S. 545 (2002), and necessarily overturned *McMillan*. *See* 133 S. Ct. at 2164 (Sotomayor, J., concurring). As such, Mr. Amaya-Rivas contests the continued viability of *Almendarez-Torres*.

In pleading guilty, Mr. Amaya-Rivas did not admit that his deportation was after a felony conviction. But the judge implicitly found that one or both of Mr. Amaya-Rivas's prior California convictions for possession of controlled substance qualified as a felony. Yet these California offenses are "wobblers," and Mr. Amaya-Rivas's convictions could have been misdemeanors. *See* Initial Brief of Appellant at 27-31, 33-34; Reply Brief of Appellant at 19-22. Nevertheless, the district court sentenced Mr. Amaya-Rivas to four years' imprisonment based on a factual finding

by the judge that he had in fact been deported after a felony conviction. The sentence violates Mr. Amaya-Rivas's Fifth and Sixth Amendment rights. This Court should grant a writ of certiorari to review the continued viability of *Almendarez-Torres*.

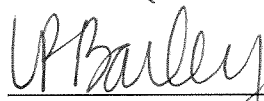
CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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