No. _____

In the
Supreme Court of the United States of America

HECTOR GUAGUA-ALARCON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a 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

I. The parties to a case cannot manufacture federal subject-matter jurisdiction by stipulation. Nonetheless, the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq.*, purports to give the Executive Branch the power to "conclusively" determine that federal jurisdiction exists based on assumed, rather than established, facts. Does the MDLEA violate Article III and the Sixth Amendment by giving dispositive weight to the Executive Branch's assertion that jurisdiction exists?

II. The government argued to the jury, over objection, that the defendants' silence at arrest was evidence of their guilt. The circuit courts are divided over whether the Fifth Amendment bars the government from relying on a defendant's custodial silence, but they do not consider this Court's evidentiary holding barring such silence from federal trials. Did the Eleventh Circuit err in allowing evidence of custodial silence?

III. Rather than applying this Court's precedents, the Eleventh Circuit held that its "prior panel rule" precluded it from reaching appellant's arguments. Unlike the Seventh Circuit, which follows *stare decisis*, the Eleventh Circuit deems its panel decisions unassailable, even by arguments never before considered. Does Article III give federal judges the power to decree that panel decisions are binding and preclusive?

IV. This Court has held that it is "patently unconstitutional" to impose a longer prison sentence on a defendant solely because he exercised his trial right. The district court denied a downward variance solely because the accused refused to plead guilty. Did the sentence violate the Fifth and Sixth Amendments?

Interested Parties

These parties were co-defendants in Hector Guagua-Alarcon's prosecution:

Adalberto Palacios-Solis

Trinity Cabezas-Montano

Related Procedings

Pending before this Court is co-defendant Adalberto Palacios-Solis' petition for a writ of certiorari to review the same Eleventh Circuit opinion for which certiorari is sought through this Petition. *See Palacios-Solis v. United States*, No. 19-1195 (March 31, 2020).

Table of Contents

Table of Authorities

Cases

Federal Statutes

Other

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

Hector Guagua-Alarcon respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in *United States v. Hector Guagua-Alarcon*, No. 17-14294 (docketed with primary case *United States v. Trinity Cabezas-Montano*, No. 17-14320), which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

Opinion Below

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, published at 949 F.3d 567, is appended to this Petition.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the Court of Appeals for the Eleventh Circuit was entered on January 30, 2020. This petition is timely filed pursuant to Supreme Court Rule 13.1 and the Court's order of March 19, 2020, extending the usual deadline for such petitions. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Statement of the Case

On October 25, 2016, Hector Guagua-Alarcon, an Ecuadoran national, was on board the *Virgen del Carmen* in international waters 215 nautical miles southwest of the border between El Salvador and Guatemala. *Virgen del Carmen* was a small boat with twin 75-horse-power outboard engines, incapable of reaching the United States or any of its territories from her position. The vessel was traveling north, presumably toward Guatemala when she was intercepted by the U.S. Coast Guard cutter *Hamilton*.

The Coast Guard reported that the *Virgen del Carmen*'s crew dumped "packages" overboard while the *Hamilton* demanded to board *Virgen del Carmen* and fired warning shots. *Virgen del Carmen* was overtaken by a rigid-hulled inflatable boat launched from *Hamilton* and boarded. The *Virgen del Carmen*'s crew claimed Ecuadorian nationality for themselves and their vessel. The government of Ecuador was unable to immediately confirm that information. The Coast Guard decided to treat the *Virgen del Carmen* as stateless and seized her crew for violating the United States' Maritime Drug Law Enforcement Act. It destroyed the *Virgen del Carmen* and sunk her into the Pacific Ocean.

The closest U.S. port was in California, where the MDLEA applies only to drug trafficking with a jurisdictional nexus to the United States. Rather than taking its prisoners there, the Coast Guard took Guagua-Alarcon and his shipmates on a costly, grueling, needlessly protracted voyage through the Panama Canal and across the Caribbean Sea to Florida, where the MDLEA applies to drug trafficking having no provable connection whatsoever to the United States.

Forty-nine days after being seized by the Coast Guard in international waters in the Pacific Ocean, Guagua-Alarcon was brought before a federal court in Key West, Florida, on December 13, 2016. He and his co-defendants were charged with conspiring to possess cocaine intending to distribute it in violation of the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq.* Their first trial ended in a hung jury.

Before the second trial, the defendants jointly moved to dismiss the charges against them for lack of subject-matter jurisdiction, noting the circuit split over whether a nexus to the United States is an element of an MDLEA violation. For purposes of the motion, Guagua-Alarcon stipulated that, if the prosecution called a Coast Guard witness, "he would testify that the interdiction of the boat upon which the Defendants were found was in international waters and upon the high seas." The magistrate judge's report recommending denying the motion, which the district court adopted, specifically found that there would be no federal jurisdiction under Ninth Circuit law, which requires proof of a nexus to the United States, but that there was jurisdiction under Eleventh Circuit law, which does not require such proof.

Guagua-Alarcon and one of his co-defendants also moved to exclude any mention of their custodial, pre-*Miranda* silence. The district court denied that motion as well.

Guagua-Alarcon and his co-defendants were convicted following a four-day trial during which the government relied on the defendants' custodial silence as proof of their guilt. The government introduced no evidence that the *Virgen del Carmen* was a "covered vessel" under the MDLEA, and the jury was not asked to find that it was.

At the close of the government's case all three defendants moved for a judgment of acquittal on the ground that the jurisdictional element was never established. The motion was renewed at the close of the defense case. The district court denied it both times.

The jury convicted Guagua-Alarcon and his co-defendants. Guagua-Alarcon sought a variance from the recommended sentence, but the district court denied any variance on the ground that Guagua-Alarcon refused to plead guilty and exercised his right to a trial. Specifically, the district court held that a defendant who exercises his trial right must get a sentence higher than the mandatory minimum or else every defendant would want a trial:

> [W]hat I'm hearing from you and others in these types of cases is that the guideline amount of time is just a lot of time; so why not just give us the mandatory-minimum every time. So let us have two bites at the apple: Let us go to trial and maybe we'll be acquitted, we can all go home. ...
>
> But if we don't get acquitted, then at least give us the minimum-mandatory with a downward departure so that we can kind of hedge our bets. We want our cake and eat it. We don't want to have to face the guideline sentence. We want to go to trial and hopefully get acquitted. But if we do go to trial and we get convicted, then we want the mandatory-minimum. You know, if we start setting up that precedent, then everybody is going to want to roll the dice with one hand tied behind their back.

The district court sentenced him to a 20-year prison term.

On appeal, Guagua-Alardon raised three arguments. He argued that the government plainly violated his clearly established Fourth Amendment right to be brought before a federal judge within 48 hours of his arrest. He argued that the government failed to prove that the *Virgen del Carmen* was a "covered vessel" under the MDLEA, an essential element of the crimes charged under this Court's precedent. Finally, he argued that the district court unconstitutionally denied him a variance from the recommended guidelines sentence to punish him for exercising the right to trial.

The government did not contest that it violated the Fourth Amendment but argued that, under Eleventh Circuit precedent, the court of appeals was powerless to afford any remedy. It also admitted that it did not prove that the *Virgen del Carmen* was a "covered vessel" because this was not an element of the crime under Eleventh Circuit precedent. Finally, it claimed that the district court was entitled to impose a higher sentence because Guagua-Alarcon refused to plead guilty.

Reasons for Allowance of the Writ

I. This Court should resolve the circuit split over the constitutionality of the MDLEA's jurisdictional provision to prevent the unconstitutionally prolonged detention and flagrant, costly forum shopping that occurred in this case.

The circuit courts of appeals are split over whether proof of facts necessary to establish jurisdiction under the MDLEA is an element of the offense. The MDLEA, as revised in 1996, requires courts to accept the Executive Branch's assertion that subject-matter jurisdiction exists, even when the record belies that determination. It further provides that determination of such facts cannot be put to a jury.

This split is important because it encourages costly forum shopping. In this case, rather than taking a short trip to California, the Coast Guard took Guagua-Alarcon on a seven-week-long journey to Florida, where convictions are easier to get. *See* Appendix at A-90–A-91 (concurring opinion).

This question is also important enough to merit this Court's attention because the MDLEA, as interpreted in most circuits, undermines the Rule of Law and the adversary system. The *raison d'être* of any legitimate judiciary is to determine, as well as can be, what the true facts are in each case. Only illegitimate courts ratify the lawless acts of a sovereign's

executive department, regardless of the true facts. In our system, truth is discovered through adversarial testing: "'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *United States v. Cronic*, 466 U.S. 648, 656 (1984). This Court has repeatedly reaffirmed the cruciality of adversarial methods and has resisted permitting resort to expedient but unreliable and unfair inquisitorial methods. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296, 311–12 (2004); *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

Even though an MDLEA conviction requires proof that "a covered vessel" was used in the crime, most circuits, including the Eleventh, hold this is not an element of the offense because the statute asserts as much. *See* 46 U.S.C. § 70504 ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."). The MDLEA's jurisdictional provisions, enacted in 1996, plainly conflict with this Court's later, repeated holdings that any fact (other than a prior conviction) necessary to a conviction is an element. *See Booker v. United States*, 543 U.S. 220, 244 (2005) (holding that any fact, other than a prior conviction, necessary to support the sentence is an element of the crime); *Blakely v. Washington*, 542 U.S. 296, 305–08 (2004) (rejecting legislative labels subjective test for identifying elements).

The constitutional defects in the statute were introduced in 1996 for the specific purpose of ending jurisdictional challenges to MDLEA prosecutions. *See* President Clinton's

Statement on Coast Guard Authorization Act of 1996, 1996 WL 600505 at *1 ("In particular, the Act makes clear that persons arrested in international waters will not be able to challenge the arrest on the ground that the vessel was of foreign registry unless such claim was affirmatively and unequivocally verified by the nation of registry when the vessel was targeted for boarding."). It was then that Congress added the provision that jurisdiction "is not an element" of an MDLEA crime, but rather a "preliminary question of law to be determined solely by the trial judge," whose decision is dictated by the Executive Branch. 46 U.S.C. § 70504.

Judge Torruella of the First Circuit recently identified a number of constitutional and other legal defects with the MDLEA's authorizing "the United States to unilaterally [determine jurisdiction] in a conclusive manner with the scarcity of information available to it at the time of interception and arrest." *United States v. Trinidad*, 839 F.3d 112, 122 (CA1 2016) (Torruella, J., dissenting). He noted that it often takes a foreign nation "up to five days to provide a definitive response" regarding a vessel's registry. 839 F.3d at 124. Thus, the MDLEA purports to allow the exercise of federal jurisdiction on the basis of supposed, rather than proven, facts.

That is what occurred in this case. Guagua-Alarcon was convicted of violating 46 U.S.C. § 70506(b), which makes it a crime to attempt or conspire to violate 46 U.S.C. § 70503. By its own terms, that statute applies only to a defendant who is "on board a covered vessel." 46 U.S.C. § 70503(a). The statute defines a "covered vessel" as "(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or (2) any other vessel if the individual is a citizen of the United States or a resident alien of the United States." 46 U.S.C.

§ 70503(e). In turn, § 70502(b) defines "vessel of the United States" and "vessel subject to the jurisdiction of the United States." The latter term includes (1) a stateless vessel in international waters, (2) a flagged vessel whose nation consents to U.S. law enforcement, and (3) any vessel in another country's waters if that country consents to U.S. law enforcement. *See* 46 U.S.C. § 70502(c)(1). In this case, the Coast Guard simply assumed the vessel to be stateless and treated it as such, and the district court accepted that conclusion. *See* Appendix at A-36–A-37; A-104.

A. The circuit courts are divided over whether proof that a vessel is a "covered vessel" under the MDLEA is an element of an MDLEA offense.

The MDLEA violates the Sixth Amendment right to a jury trial by labeling an element a "preliminary question." There is a circuit split over whether a jury must determine that jurisdiction exists under the MDLEA. The Ninth Circuit has persuasively explained that MDLEA jurisdictional facts, such as where the subject vessel was interdicted and whether it was registered to any nation, must be decided by a jury. *United States v. Perlaza*, 439 F.3d 1149, 1166–67 (CA9 2006). The D.C. Circuit seems to agree with the Ninth Circuit; it affirmed an MDLEA conviction only after reviewing the defendants' admitted facts and finding detailed admissions based on first-hand knowledge that established their vessels' statelessness. *See United States v. Miranda*, 780 F.3d 1185, 1197 (CADC 2015). The First, Second, and Eleventh Circuits, on the other hand, hold that proof of a "covered vessel" is not an MDLEA element. *See United States v. van der End*, 943 F.3d 98, 102 (CA2 2019); *United States v. Vilches-Navarrete*, 523 U.S. 1, 12 (CA1 2008); *United States v. Tinoco*, 304 F.3d 1088, 1108–09 (CA11 2002).

Tinoco held that the MDLEA's jurisdictional requirement "does not constitute a traditional element of an offense given that it has nothing to do with the 'concurrence of an evil-meaning mind with an evil-doing hand' as reflected in the common law." 304 F.3d at 1108, 1109. This Court's decision in *Apprendi*, of course, rejected that very rationale, holding "that it does not matter whether the required finding is characterized as one of intent or of motive, because labels do not afford an acceptable answer." 530 U.S. at 494. *Apprendi*'s progeny repeatedly reaffirmed that there is one test for determining which facts are elements of a crime: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. Proof that the defendant was aboard a "covered vessel" is a fact necessary to proving any MDLEA violation. Yet, the Eleventh Circuit maintains that no jury should ever decide whether that fact has been established.

Tinoco also purported to rely on the earlier case of *Ford v. United States*, 273 U.S. 593 (1927), which it claimed held that similar jurisdictional facts could be determined without a jury. *Ford*, however, did not hold that juries do not decide jurisdictional facts and is entirely consistent with *Apprendi*. In *Ford*, the defendants were charged with violating the National Prohibition Act by importing liquor into San Francisco Bay. "There was a preliminary motion to exclude and suppress the evidence of the ship and cargo" on the ground that the ship was "not within the zone of the high seas" in which the NPA applied. 273 U.S. at 604–05. This Court held only that the judge could decide the *motion to suppress* without a jury: "*So far as the objection relates to the admission of evidence*, it has already been settled by this court

that the question is for the court and not for the jury." 273 U.S. at 605 (emphasis added). *Ford* went on to discuss *personal*, as opposed to subject-matter, jurisdiction and held that any objection to personal jurisdiction had been waived. 273 U.S. at 606–07.

B. The MDLEA violates Article III by requiring courts to accept the prosecution's finding that the defendant was aboard a "covered vessel."

Immediately before the 1996 revision, the Eleventh Circuit had determined that the prior version of the MDLEA was constitutional only because it was phrased permissively. *United States v. Rojas*, 53 F.3d 1212, 1214 (CA11 1995). In *Rojas*, the Coast Guard boarded a Panamanian vessel laden with drugs, arrested the crew, and brought them to Miami for trial. *Id.* at 1213. The district court found that it had jurisdiction because the Secretary of State's designee, a Coast Guard officer, certified that Panama consented to the United States' jurisdiction over the boat. *Id.* at 1214. The appellants argued that the MDLEA violated the constitutional separation of powers because it "unconstitutionally delegates the ability to determine jurisdiction, 'a traditional, if not vital, function of the Judiciary,' to the Executive Branch." *Id.* at 1214. Analyzing the appellants' argument, the court held that, if the MDLEA did that, it would indeed be unconstitutional: "Thus, separation of powers would be implicated when the actions of another Branch threaten an Article III court's independence and impartiality in the execution of its decisionmaking function." *Id.* at 1214 (collecting authorities). Nonetheless, the Court of Appeals reasoned, the permissive phrasing of the statute left sufficient room for judicial decisionmaking. *Id.* at 1214–15.

When the revised MDLEA was challenged in *United States v. Lopez Hernandez*, 864 F.3d 1291 (CA11 2017), the Eleventh Circuit held that the Secretary of State could

manufacture jurisdiction. The petitioner argued that he was not aboard "'a vessel without nationality' because the boat was properly registered in Guatemala ... ." *Id.* at 1297. The Eleventh Circuit expressly acknowledged that, when the Coast Guard boarded the *Cristiano Ronaldo*, a member of the crew asserted that she "was registered in Guatemala—and claimed so truthfully as it turned out." *Id.* at 1296. Even though the record showed that the *Cristiano Ronaldo* was not in fact a "covered vessel," the appellate court nonetheless held that the district court had jurisdiction because the Executive Branch said so. *Id.* at 1297.

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872)), establish that the revised MDLEA intrudes on judicial authority. In *Klein*, the plaintiff sued the United States, as administrator of the estate of V.F. Wilson, for compensation for cotton seized from Wilson during the Civil War. Though he had aided the rebellion, Wilson availed himself of an amnesty by taking an oath of allegiance to the United States in 1864. He thereby received a presidential pardon. This Court had earlier ruled that the property of a pardoned rebel was purged of its owner's crimes. *See United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870). Accordingly, the Court of Claims awarded Wilson's estate $125,300. While the government's appeal was pending, Congress enacted a statute similar to the MDLEA. It provided (1) that no presidential pardon or amnesty was admissible in evidence against the United States in the Court of Claims, (2) that any such pardon or amnesty in fact constituted "conclusive evidence in the Court of Claims, and on appeal, that such person did take part in, and gave aid to the rebellion," and (3) that "on proof of such pardon ... the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed." 80 U.S. at 143–44. This Court held that the statute

exceeded Congress' authority because it stripped courts of the ability to decide cases and dictated the effect of certain evidence: "[T]he court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary. We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. The MDLEA suffers from the same defect.

Northern Pipeline reaffirmed that Congress cannot delegate deciding cases, including making factual findings, to an entity that is not an Article III court. That case held that the Bankruptcy Act of 1978 violated Article III by requiring certain lawsuits to be decided, even over objection, by bankruptcy courts rather than district courts. 458 U.S. at 87 (plurality), 91 (concurrence). The Court understood that, if Congress could assign the duty of deciding cases or controversies to a non-Article III entity, it could end impartial adjudication and, hence, the Rule of Law itself: "The Federal Judiciary was ... designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." *Id.* at 58.

The MDLEA is a more egregious violation of Article III than allowing bankruptcy judges, who do "not enjoy the protections constitutionally afforded to Art. III judges," to decide cases. 458 U.S. at 60. The MDLEA assigns the power to find jurisdictional facts to *a party* in a criminal case. While the Bankrupt Act created a mere risk of partiality, the MDLEA guarantees it. Even worse, the Eleventh Circuit has at least twice held that courts must accept the prosecution's assertion even when there is proof that the boat in question is

not a "covered vessel." "MDLEA statelessness does not turn on actual statelessness, but rather on the response of the foreign government. Arguing actual registry against the certification therefore misses the mark." *Lopez Hernandez*, 864 F.3d at 1299; *accord United States v. Cardales-Luna*, 632 F.3d 731, 737 (CA1 2011). This violates the well-established Article III corollary that the parties cannot create jurisdiction. *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court."); *People's Bank v. Calhoun*, 12 Otto (102 U.S.) 256, 260–61 (1880) ("[T]he mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.").

The revised MDLEA is an unconstitutional usurpation of judicial power by the political branches with no limiting principle. If the holding below is correct, nothing stops Congress from passing a statute that says, "Jurisdiction is conclusively established in the federal courts whenever any federal prosecutor certifies that there is jurisdiction." This destroys the judiciary's ability to function as a check on executive power, which depends on its ability to find the facts—the truth—in each case.

II. This Court should resolve a long-standing circuit split by reaffirming that custodial silence is never admissible against a defendant in federal court.

The circuit courts of appeals are divided over whether prosecutors can establish guilt in their case-in-chief using a defendant's post-custodial, pre-*Miranda* silence. The First, Second, Seventh, Ninth, Tenth, and D.C. circuits hold that the Constitution forbids this, while the Fourth, Fifth, Eighth and Eleventh circuits disagree and allow the government to prove guilt by reference to a defendant's silence prior to the reading of *Miranda* warnings. *See*

United States v. Salinas, 480 F.3d 750, 758 (CA4 2007) (acknowledging circuit split and collecting cases); *United States v. Frazier*, 408 F.3d 1102, 1110–11 (CA8 2005); *United States v. Whitehead*, 200 F.3d 634, 638–39 (CA9 2000) (acknowledging circuit split and collecting cases); *United States v. Moore*, 104 F.3d 377, 386 (CADC 1997); *United States v. Zanabria*, 74 F.3d 590, 593 (CA5 1996); *United States v. Rivera*, 944 F.2d 1563, 1568 (CA11 1991); *United States v. Caro*, 637 F.2d 869, 874–77 (CA2 1981). All of the circuits allow custodial silence for impeachment.

The circuits have overlooked the federal evidentiary rule established by *United States v. Hale*, 422 U.S. 171 (1975), which forbids using at trial for *any* purpose a defendant's silence while in custody. *Hale* squarely held that the government may not comment on a defendant's silence while in custody, regardless of whether that silence comes before or after *Miranda* warnings are read:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

422 U.S. at 180. Significantly, this holding was not predicated upon the defendant's *Miranda* rights having been read. Rather, the opinion emphasized that silence in *any* custodial situation "is so ambiguous that it is of little probative force." *Id.* at 176.

Because of the overwhelming amount of confusion among the circuits with regard to the use of custodial silence at trial, this Court should grant certiorari for the purpose of reaffirming *Hale*. The former Fifth Circuit previously followed *Hale* and did not allow the

government to comment upon a defendant's custodial silence regardless of whether *Miranda* rights had been read. In *United States v. Impson*, for example, that court rejected the distinction made in this case between pre-*Miranda* and post-*Miranda* custodial silence:

> This argument conflicts with the whole purpose and policy of *Miranda* by rewarding the police for failure to inform an accused person promptly upon his arrest of his right to remain silent. Silence is the right of the innocent as well as the guilty. . . . We discern no merit in the appellee's argument that silence in the absence of Miranda warnings raises a greater inference of guilt than silence following such warnings.

531 F.2d 274, 277–78 (CA5 1976); *see* Appendix at A-49. The panel decided this issue by mechanically applying its own precedent, *Rivera*, *supra*, without regard to the arguments made or acknowledgment of the circuit split on the question. *See* Appendix at A-49.

Rivera is wrongly decided because it read the holdings of *Fletcher v. Weir*, 455 U.S. 603 (1982) (*per curiam*), and *Jenkins v. Anderson*, 447 U.S. 231 (1980), more broadly than those opinions allow. Those were habeas actions reviewing state court decisions that expressly disavowed application to federal criminal cases. Yet, in *Rivera*, the Eleventh Circuit held without qualification:

> The [federal] government may comment on a defendant's silence if it occurred prior to the time that he was arrested and given his *Miranda* warnings.[10] . . . In addition, the government may comment on a defendant's silence when it occurs after arrest, but before *Miranda* warnings are given.[11]

[10] *See Jenkins v. Anderson*, 447 U.S. 231 (1980).
[11] *See Fletcher v. Weir*, 455 U.S. 603 (1982).

944 F.2d at 1568. This holding was wrong because *Jenkins* and *Fletcher* both explicitly say that they *do not alter* the long-standing rule forbidding federal prosecutors from commenting upon *any* custodial silence.

Jenkins was a habeas action challenging a Michigan state court conviction for manslaughter. At trial, the state impeached the defendant's claim of self-defense with the fact that he did not report the stabbing or surrender himself until two weeks had passed. The Court held that the *state* could constitutionally comment on this pre-arrest silence. The Court, however, made it expressly clear that, under *Hale*, a *federal* prosecutor could not make such comments:

> Each jurisdiction may formulate its own rules of evidence to determine when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative. For example, this Court has exercised its supervisory powers over federal courts to hold that prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result. *See United States v. Hale*, 422 U.S. 171 (1975); *Stewart v. United States*, 366 U.S. 1 (1961); *Grunewald v. United States*, 353 U.S. [391,] 424 [(1957)].[5]
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> [5]. . . In this case, this is a question of state evidentiary law. In federal criminal proceedings the relevance of such silence, of course, would be a matter of federal law. *See United States v. Hale*, *supra*, 422 U.S., at 181.

Jenkins, 447 U.S. at 239 & n.5.

Fletcher was a habeas action challenging a Kentucky state court murder conviction. The Court held that the *state* could allow cross-examination on post-arrest silence where *Miranda* warnings had not been given. The Court again expressly noted that, despite the holding, *Hale* holds that *federal* prosecutors cannot impeach in that way:

> [In *Hale*], we held in the exercise of our supervisory power over the federal courts that silence following the giving of *Miranda* warnings was ordinarily so ambiguous as to have little probative value. ...
>
> The principles which evolved on the basis of decisional law dealing with appeals within the federal court system are not, of course, necessarily based on any constitutional principle. Where they are not, the States are free to follow or to disregard them so long as the state procedure as a whole remains consistent with due process of law.

Fletcher, 455 U.S. at 604–05.

Fletcher and *Jenkins* offer no support for *Rivera*'s holding. Rather, both *Rivera* and the opinion in this case conflict with *Hale*, which is plainly sound. Because custodial silence is not highly probative but is both insolubly ambiguous and unfairly prejudicial, the government should not be allowed to use it. The circuit courts of appeal have forgotten and abandoned *Hale*, sowing deep confusion and conflicting rules into this crucial area of law. Where, as in this case and many cases, the principle issue at trial is the defendant's intent, that intent should not be established solely by the defendant's silence while in custody.

III. This Court should resolve a circuit split by holding that circuit courts that declare their decisions binding or issue-preclusive exceed Article III power and deny litigants due process and equal protection.

The Eleventh, Fifth, and Sixth Circuits not only give their panel judgments binding effect, they also give them preclusive effect. Consequently, no panel entertains any argument, even a novel and persuasive one, that contradicts an earlier panel's resolution of an issue. *See Linebery v. United States*, 512 F.2d 510, 510 (CA5 1975) ("The decision in *Vest* being dispositive of all issues presented on this appeal, it is unnecessary for us to reconsider the merits of that holding."). For example, the Eleventh Circuit refused to consider Guagua-Alarcon's argument, never before addressed in the circuit, that the MDLEA's jurisdictional provision is inconsistent with *Apprendi* and its progeny. *See* Part I, *supra*. Indeed, it swept the argument aside without pausing even to acknowledge, much less analyze, the circuit split on the issue: "As the defendants concede, each of these constitutional arguments is foreclosed by our binding precedent." Appendix at A-31–A-33.

Giving any court decision issue-preclusive force generally throughout an entire jurisdiction is so extraordinary as to be practically unheard of, as Justice Sotomayor recently noted with regard to the Eleventh Circuit's similar treatment of orders rejecting successive habeas petitions. *See St. Hubert v. United States*, 140 S.Ct. 1727, 1730 (2020) (Sotomayor, J., dissenting from denial of a writ of certiorari). In both criminal and civil cases, "the doctrine serves to 'avoid multiple suits on identical entitlements or obligations *between the same parties*.'" *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 357 (2016) (emphasis added); *see also Cromwell v. Sac County*, 94 U.S. 351, 354 (1876) ("[T]he determination of a question directly involved in one action is conclusive as to that question in a second suit *between the same parties* ... ."). This not only gives court decisions force and effect beyond the facts and arguments considered in the case, it gives them the effect of statutes, calcifying the law unless and until the circuit grants *en banc* review or this Court takes up the issue.

With the exception of the Seventh Circuit, which applies its precedent through traditional *stare decisis* analysis, all the circuits have some "prior panel rule" that violates the Constitution. *See United States v. Eason*, 829 F.3d 633, 641 (CA8 2016) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."); *Volpicelli v. United States*, 777 F.3d 1042, 1043 (CA9 Cir. 2015) ("As a three-judge panel, we are bound by those decisions unless they're 'clearly irreconcilable' with intervening higher authority."); *Deckers Corp. v. United States*, 752 F.3d 949, 959 (CAF 2014) ("In this Circuit, a later panel is bound by the determinations of a prior panel .. ."); *United States v. Wilkerson*, 361 F.3d 717, 732 (CA2 2004) ("Indeed, were we the first panel to rule on this type of sufficiency-of-the-evidence challenge, we might well reach a different conclusion."); *United States v. Ruhe*, 191 F.3d 376,

388 (CA4 1999) ("In any event, as a simple panel, we are bound by prior precedent from other panels in this circuit ... ."); *United States v. Brooks*, 161 F.3d 1240, 1247 (CA10 1998) ("This panel is bound by the cases set out above absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court."); *Gersman v. Group Health Association*, 975 F.2d 886, 897 (CADC 1992) ("Whatever the clean-slate merits of the government's construction, we as a panel are not at liberty to adopt it: circuit precedent demands a categorical approach ... and one panel cannot overrule another.").

A purportedly binding and preclusive "prior panel rule" means that issues are decided based on the first arguments to reach the court, whether formulated by a seasoned or inexperienced lawyer in a complicated or simple case with stakes that are high or low. These rules foster an arbitrary, nonsensical, and unprincipled jurisprudence, all to obviate having to revisit an issue once decided. *See, e.g.*, *Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234 (CA11 2006) ("Tippitt's argument that we should not be bound by *Levinson* because this point was not really argued in that case runs afoul of our decisions that a prior panel precedent cannot be circumvented or ignored on the basis of arguments not made to or considered by the prior panel."); *Davis v. Estelle*, 529 F.2d 437, 441 (CA5 1976) ("One panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent.").

A. Article III does not confer any power to "declare" a precedent binding, much less preclusive.

The Eleventh Circuit's "prior panel rule" purports to require Article III judges to suspend their own independent judgment, ignore the arguments raised in the case before

them, and defer to other judges, even when they are convinced that those judges erred. This conflicts with the well established fact that "[j]udicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting and collecting authorities). That idea, in turn, follows from the party presentation principle, which *requires* courts to consider the arguments the parties present and decide cases based only on those arguments. *See United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020) ("[A]s a general rule, our system 'is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.'").

The "prior panel rule" rejects the party presentation principle for the admitted purpose of freezing the law's development by precluding consideration of new arguments a future litigant may raise. The Eleventh Circuit adopted the former Fifth Circuit's "prior panel rule" in a run-of-the-mill prison lawsuit that did not require such a sweeping ruling. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (CA11 1981) (*en banc*). The court openly confessed that enshrining the rule in an opinion was necessary to ensure that newly appointed judges felt bound by the decisions of the court's then-members: "An informal consensus [among individual judges] not given the imprimatur of judicial decision could be upset by changes in the composition of the court." *Id.* at 1210. In other words, the point of the "prior panel rule" is to keep new judges from fulfilling their Article III obligation to decide cases independently, based on the law as declared by the "one Supreme Court." *See, e.g.*, *United States v. Golden*, 854 F.3d 1256, 1257 (CA11 2017) ("[S]ome members of our court have

questioned the continuing validity of *Turner* in light of cases like *Descamps v. United States*, 570 U.S. 254 (2013). But even if *Turner* is flawed, that does not give us, as a later panel, the authority to disregard it.").

Article III confers no power on judges to "declare" a precedent binding. Whether precedent is binding is a functional inquiry. A trial judge doing his work oblivious to his reviewing court's holdings will find himself inundated by remanded cases. This practical reality of the common law system, together with the need to foster predictability in the law, is what makes a reviewing court's decisions binding on lower courts, regardless of how persuasive they are. Thus, no federal district court binds any other because district courts do not hear appeals from other courts. *See Dhalluin v. McKibben*, 682 F. Supp. 1096, 1097 (DNV 1988) ("The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction."). Likewise, the Eleventh Circuit's decisions bind district courts in Florida, Georgia, and Alabama, but not Colorado, Connecticut, or California, because an appeal to the Eleventh Circuit lies only from the three Southern states. The Eleventh Circuit can no more bind its own judges by fiat than it can the judges of the District of Connecticut.

Not surprisingly, the "prior panel rule" has no legal pedigree or source of authority, despite its ubiquity in federal reports. No federal court decision explains how Article III gives circuit judges (though not district judges) the power to bind one another either by stipulation or decree. Earlier decisions suggested that power in fact does not exist by calling this supposed "rule" a mere "policy" or "practice." *See, e.g.*, *Puckett v. Commissioner of Internal*

Revenue, 522 F.2d 1385, 1385 (CA5 1975) ("We understand the policy and practice of this Court to be that a rule of law announced by one panel, will not be overruled or set aside by another panel ... ."); *Manning v. M/V Sea Road*, 417 F.2d 603, 610 n.10 (CA5 1969) ("It is this Court's firm practice that one panel cannot overrule another panel's decision."). Whether practice or rule, its unconstitutional purpose has always been to neuter judges who might otherwise apply their independent judgment to the arguments raised:

> [T]he prior panel precedent rule is not dependent upon a subsequent panel's appraisal of the initial decision's correctness. Nor is the operation of the rule dependent upon the skill of the attorneys or wisdom of the judges involved with the prior decision—upon what was argued or considered. Unless and until the holding of a prior decision is overruled by the Supreme Court or by the *en banc* court, that holding is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first.

Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (CA11 2000).

Judges who defer because they believe the "prior panel rule" to have legal effect abdicate their Article III jurisdiction. "Jurisdiction is power to decide the case either way, *as the merits may require*." *Erickson v. United States*, 264 U.S. 246, 249 (1924) (emphasis added). It is the "power to declare the law." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). That power belongs not only to federal courts but to individual federal judges: "[T]he guarantee of independence runs to individual judges as well as to the judicial branch." *Hastings v. Judicial Conference*, 770 F.2d 1093, 1106–07 (CADC 1985) (Edwards, J., concurring); *see also Chandler v. Judicial Council*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting) ("Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge. He commonly works with other federal judges who are

likewise sovereign."); *In re McBryde*, 117 F.3d 208, 223 (CA5 1997) (holding that every Article III judge has a constitutional interest "in deciding [his or her assigned] cases free from the specter of interference, except by the ordinary process of appellate review ... .").

Appellate panels have *three* judges to get three independently considered views on how the case should be decided. Each circuit judge has a duty to independently *decide*—not merely to rule on—cases that litigants present. *See Plaut v. Spendthrift Farm*, 514 U.S. 211, 218–19 (1995). Circuit judges cannot avoid deciding legal issues for the sake of collegiality or anything else. No federal judge has any discretion to thwart another judge's exercise of judgment or to withhold his own judgment in deference to another's. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. ... Questions may occur which we would gladly avoid; but we cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821); *see also Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.").

B. The Eleventh Circuit's extreme version of the "prior panel rule" denies litigants due process and equal protection on appeal.

Under the extreme version of the "prior panel rule" observed in the Fifth, Sixth, and Eleventh Circuits, an earlier panel decision controls even if it is plainly wrong. This deprives litigants of a meaningful appeal because their arguments are disregarded. *See Spaho v. United States Attorney General*, 837 F.3d 1172, 1181 (CA11 2016) ("Under our prior panel precedent rule, it is irrelevant to us whether *Donawa* is correct, or whether the panel in *Donawa* actually considered all possible issues, theories, and arguments. What matters to us

is what *Donawa* decided."). That happened in this case when the Eleventh Circuit refused to consider Guagua-Alarcon's argument that circuit MDLEA precedent could not be squared with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. *See* Part I, *supra*. The government even *admitted* that Eleventh Circuit precedent was irreconcilable with the *Apprendi* line of cases but the Eleventh Circuit applied its "prior panel rule" anyway, ignoring this Court's landmark, authoritative interpretation of the Sixth Amendment.

The rule denies litigants equal protection of the law because cases are decided based on precedent—even if that precedent obviously conflicts with this Supreme Court's decisions. *See Thompson v. Dallas City Attorney's Office*, 913 F.3d 464, 468 (CA5 2019) ("To be clear, a panel's interpretation of a Supreme Court decision is binding on a subsequent panel even if the later panel disagrees with the earlier panel's interpretation."); *United States v. Fritts*, 841 F.3d 937, 942 (CA11 2016) ("Under this Court's prior panel precedent rule, there is never an exception carved out for overlooked or misinterpreted Supreme Court precedent."); *Central Pines Land Co. v. United States*, 274 F.3d 881, 893 (CA5 2001) ("[O]ur panel opinion in *Little Lake* binds us on the issue of Act 315's alleged discrimination against the United States, despite its reversal by the Supreme Court."); *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (CA6 2001) ("Whether this was a proper reading of [Supreme Court precedent] is not our place to say, for 'a panel of this Court cannot overrule the decision of another panel.'"); *see also United States v. Archer*, 531 F.3d 1347, 1352 (CA11 2008) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.").

The "prior panel rule" distorts and calcifies the law and by making plainly erroneous circuit court rulings impervious to persuasive, logical arguments. In addition to ousting Article III circuit judges of their authority and duty to decide cases using independent judgment, it denies litigants due process on appeal by purporting to authorize judges to ignore their arguments. It also denies them equal protection of the law, including the Constitution. There is no legal justification for this or any "rule" that sanctions deciding cases arbitrarily and in disregard of this Court's constitutional holdings.

C. The Seventh Circuit avoids the practical and constitutional problems of a "prior panel rule" by analyzing its precedent using traditional *stare decisis* principles.

The Seventh Circuit shows that a "prior panel rule" is not at all necessary by adhering, as this Court does, to traditional principles of *stare decisis*: "While we are not absolutely bound by the holdings in our prior decisions and must give fair consideration to any substantial argument that a litigant makes for overruling a previous decision, we are obliged to give considerable weight to [our prior] decisions ... ." *United States v. Walton*, 255 F.3d 437, 443 (CA7 2001); *accord Santos v. United States*, 461 F.3d 886, 891 (CA7 2006); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (CA7 1987). This is the only constitutional approach because it confines judges to their Article III function of deciding only the arguments the parties present. *See v. Sineneng-Smith*, 140 S.Ct. at 1579 ("'[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'"). Federal Rule of Appellate Procedure 35 supports this by providing that *en banc* review exists "to secure or maintain uniformity of the court's decisions," which would be superfluous if the first panel to consider an issue bound all subsequent panels.

The Seventh Circuit's successful reliance on *stare decisis* exposes that there is no truth to the rationalization that the "prior precedent rule ... is essential to maintaining stability in the law." *Walker v. Mortham*, 158 F.3d 1177, 1188 (CA11 1998). It does little, if anything, to prevent intra-circuit conflicts. *See, e.g., id.* ("In deciding which line of precedent to follow, we are, ironically, faced with two conflicting lines of precedent."). It does not achieve "stability" so much as ossification, and, as the Seventh Circuit proves, the rule is not essential.

While *stare decisis* entails rational, principled analysis, the "prior panel rule" abandons both logic and justice, sacrificing due process and equal protection in the process. Time-honored *stare decisis* principles foster a more predictable, fairer jurisprudence than one built on mistakes propagating unchecked.

IV. This Court should end conditioning the right to trial on exposure to a significantly harsher prison sentence and hold that a defendant's decision to stand trial is irrelevant to his sentence in our retributive system.

The district court in this case violated the Fifth and Sixth Amendments by imposing a higher sentence than it would have if Guagua-Alarcon had pleaded guilty rather than exercised his right to trial. This Court has held that it is "patently unconstitutional" to "chill the assertion" of trial rights "by penalizing those who choose to exercise them." *United States v. Jackson*, 390 U.S. 570, 581 (1968). *Jackson* invalidated, on Fifth and Sixth Amendment grounds, a provision of a federal statute authorizing the execution of kidnappers convicted by a jury but not those convicted by bench trial or guilty plea. *Id.* at 572, 581. *Jackson* reasoned that "the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *Id.* at 583 (emphases original).

The record here shows that the district court considered Guagua-Alarcon's decision to stand trial in denying his motion for a downward variance. *See* Appendix at A-84. The panel did not disagree that punishing a defendant's exercise of the right to trial would be unconstitutional. It conceded that the district judge said during the sentencing hearing that "if we start setting up that precedent" of giving the mandatory-minimum sentence to people who go to trial, "then everybody is going to want to roll the dice … ." Appendix at A-84–A-85. Nonetheless, the panel determined that the downward variance was denied for *other* reasons. *See id.* Even if that characterization of the record were plausible, the issue, which the panel avoided, is whether the decision to stand trial can be considered *at all*.

Though conviction by plea rather than trial was traditionally disfavored, this Court came to accept imposing a lower sentence on a defendant who pleaded guilty—but only under conditions that the Federal Sentencing Guidelines destroyed. *Brady v. United States* held that a guilty plea entered in the expectation that the government would drop some charges or in the hope that the judge would be more lenient was not unconstitutionally coerced. 397 U.S. 742, 751 (1970). That holding, however, depended entirely on there existing a "mutuality of advantage" that a guilty plea offers the prosecution, whose resources are conserved, and "a defendant who sees slight possibility of acquittal." *Id.* at 752; *accord Alabama v. Smith*, 490 U.S. 794, 802–03 (1989) (stating that plea bargaining is premised on the parties' "mutual interests"); *Bodenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (stating that the prosecutor and defendant each has "his own reasons for wanting to avoid trial" and that both "'arguably possess relatively equal bargaining power'"). *Brady* expressly noted that it did not address "the situation where the prosecutor or judge, or both, deliberately employ their charging and

sentencing powers to induce a particular defendant to tender a plea of guilty." *Id.* at 751 n.8. A year after *Brady*, *Santobello v. New York*, reaffirmed that the justifications for plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor." 404 U.S. 257, 261 (1971).

The Sentencing Guidelines abrogated the conditions that made guilty pleas acceptable by ensuring a longer sentence for those who exercise their trial rights. This encourages defendants to agree with the government's allegations by punishing them if they do not "accept responsibility" for their supposed crimes. U.S.S.G. § 3E1.1. From the beginning, the unconstitutional purpose of this provision has been to encourage defendants to forego trial and plead guilty. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1988). Since 1991, the euphemistically "acceptance-of-responsibility" reduction has been expressly available only to a defendant who does not put "the government to its burden of proof at trial" or "falsely denies, or frivolously contests" any conduct that the Guidelines deem relevant to sentencing. U.S.S.G. § 3E1.1 & cmt., nn.1(a) & 2.

Under the Guidelines, guilty pleas are no longer the result of the "mutuality of advantage" between the parties (which *Brady* condoned) but rather of the guarantee of a harsher sentence—a *much* harsher sentence—for insisting on a trial (which *Jackson* condemned). *See* Ricardo Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1 (2010). The Guidelines made the right to trial too costly for all but those who are highly confident that the government cannot prove its case and those whose crimes are so heinous that the penalty will not significantly vary.

The Guidelines were in fact *designed* to encourage self-incrimination, and not only from a defendant who "sees slight possibility of acquittal." *Brady*, 397 U.S. at 752. For more than 20 years before 1991, the percentage of federal guilty pleas stayed around 80% and never reached 85%, but since 1991 it has steadily climbed to nearly 99% today—meaning that the Guidelines prod some innocent people to declare themselves guilty. *See* Bascuas, *supra*, at 44–45; NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 3 (2018).

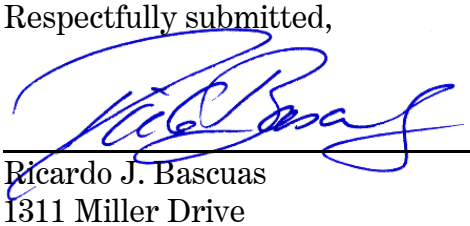
Before the guidelines, the *only* reason a defendant who pleaded guilty could get a reduced sentence was that one denying guilt was thought to need more rehabilitation than one who acknowledged it. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 247 (1949) ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."); *United States v. Grayson*, 438 U.S. 41, 51 (1977) ("'Impressions about the individual being sentenced—the likelihood that he will transgress no more, the hope that he may better respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society—are, for better or worse, central factors to be appraised under our theory of "individualized" sentencing.'").

The Federal Sentencing Guidelines, however, create a retributive system. Courts cannot consider a defendant's prospects for rehabilitation in deciding what, if any, prison term to impose. 18 U.S.C. § 3582(a); *Tapia v. United States*, 564 U.S. 319, 328 (2011). In such a system, there is no justification whatsoever for a defendant to receive a higher sentence

solely for exercising constitutional rights. The record shows that is exactly what happened to Guagua-Alarcon.

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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