No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JULIAN SILVA-AGUILAR

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS Overnight Delivery: July 8, 2020

QUESTIONS PRESENTED

In deciding that the defendant's guilty plea was supported by an adequate factual basis, and was therefore knowing and intelligent and subject to the appeal waiver in the plea agreement, did the Ninth Circuit Court of Appeals establish a far ranging and troubling precedent that is clearly inconsistent with the Supreme Court's holding in *McCarthy v. United States*, 394 U.S. 459 (1969)?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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The Petitioner, Julian Silva-Aguilar ("Silva-Aguilar"), respectfully requests that this petition for a writ of certiorari be granted, the judgment of the Ninth Circuit Court of Appeals be vacated, and the case be remanded for further proceedings consistent with petitioner's positions asserted in this brief.

OPINION BELOW

The underlying conviction and sentence was entered on June 10, 2019. (Appendix A, hereto)

The Ninth Circuit Court of Appeals entered an Order dismissing the appeal on April 10, 2020. (Appendix B, hereto) No petition for panel rehearing or *en banc* hearing was filed. The district court's minutes and orders are unreported.

JURISDICTION

The Order of dismissal of the United States Court of Appeals for the Ninth Circuit was entered on April 10, 2020. That Court had jurisdiction pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

> 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.

Rule 11(b), Federal Rules of Criminal Procedure:

> (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 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.

STATEMENT OF THE CASE

On November 5, 2018, a Complaint was filed in the United States District Court, District of Arizona, charging Silva-Aguilar with one count of Re-Entry of Removed Alien, in violation of 8 U.S.C. §1326(a) (enhanced by 8 U.S.C. §1326(b)(1)). (CR 1; ER VOL. II, p. 111-112) [1]

On December 20, 2018, Silva-Aguilar entered into an unconditional written plea agreement with the government, wherein he pled guilty to an Information containing the same charge as that in the original Complaint.

On June 10, 2019, Silva-Aguilar was sentenced to a prison term of 60 months, to be followed by a three-year term of supervised release. He appealed his conviction and sentence, and the Ninth Circuit Court of Appeals denied relief.

In his appeal, Silva-Aguilar claimed that the Court of Appeals had jurisdiction to consider Silva-Aguilar's appeal, notwithstanding the fact that Silva-Aguilar expressly waived his right to appeal his conviction and sentence through his plea agreement, such waiver being unenforceable where there has been a prejudicial Rule-11 violation by the lower court, or an error that is otherwise considered "structural".

[1] The abbreviation "CR" refers to the (District Court) Clerk's Record, and will be followed by the event number designated in the Clerk's file. The abbreviation "ER" refers to the Excerpts of the Record, and will be followed by the relevant page number referenced in Appellant's Excerpts of Record. The abbreviation "PSR" refers to the Presentence Investigation Report and will be followed by the relevant page and paragraph numbers of that report. "R.T." refers to the Court Reporter's Transcript, and will be followed by the relevant date and page number of the transcript.

He further claimed that the district court erred in accepting Silva-Aguilar's guilty plea unsupported by a complete factual basis. Silva-Aguilar never admitted that he was *knowingly* present in the United States when caught by the authorities. That element of the offense was missing from the factual basis inquiry at the change-of-plea proceeding, and from the factual basis section of the written plea agreement. Moreover, the larger district court record did not clearly support an inference that Silva-Aguilar *knew* he had already crossed into the United States when he was arrested near San Luis, Arizona. He argued that the error was plain, and arguably structural. He asked the Court to exercise its discretion under Rule 52(b), Fed.R.Crim.Proc., and/or carry out its obligation under the Due Process Clause of the United States Constitution, and reverse the judgment and sentence, and remand for further proceedings, notwithstanding the appeal waiver.

On April 10, 2020 the panel granted the government's motion to dismiss the appeal, finding, contrary to Silva-Aguilar's contention, the record showed that there was an adequate factual basis for his guilty plea, and that his guilty plea was knowing and voluntary and therefore subject to the appeal waiver in the plea agreement. (Appendix B, hereto)

CASE HISTORY

On December 20, 2018, Silva-Aguilar entered into an unconditional written plea agreement with the government, wherein he pled guilty to an Information

containing the same charge as that in the original Complaint.

The plea agreement was a modified "Fast Track" United States Sentencing Guidelines ("U.S.S.G.") Section 5K3.1 agreement that provided for a two-level reduction of his adjusted offense level and capped Silva-Aguilar's prison sentence at the high end of the adjusted Sentencing Guidelines range. The agreement included a stipulation that Silva-Aguilar would also receive a three-level reduction of his adjusted offense level for acceptance of responsibility. While the plea agreement did not permit any further downward (Guidelines-based) departures, it did permit Silva-Aguilar to request and obtain a downward variance (under 18 U.S.C. §3553(a)). (CR 16; ER VOL. II, pp. 92-93)

The plea agreement contained the following appeal waiver provisions:

> The defendant waives (1) any and all motions, defenses, probable cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including, but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under 18 U.S.C. § 3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. This waiver shall not be construed to bar an otherwise-preserved claim of

> ineffective assistance of counsel or "prosecutorial misconduct" (as that term is defined by Section II.B of Ariz. Ethics Op. 15-01 (2015)).

(CR 16; ER VOL. II, p. 94)

The relevant § 5K3.1 language in the plea agreement follows:

> b. Stipulated Sentence Under Early Disposition Program. Although the parties understand that the Sentencing Guidelines are only advisory, and just one of the factors the Court will consider under 18 U.S.C. § 3553(a), pursuant to Fed.R.Crim.P. 11(c)(1)(C) the United States and the defendant stipulate and agree that the following is an appropriate disposition of this case:
>
> …
>
> (2) Notwithstanding the foregoing paragraph, if the defendant is in criminal history category VI the defendant shall only receive a two-level departure under U.S.S.G. §5K3.1, and a stipulation that the defendant's sentence shall not exceed the high end of the final adjusted Sentencing Guideline range. If the defendant requests, or if the Court authorizes, any adjustments or departures pursuant to the Sentencing Guidelines, the United States may withdraw from this agreement. However, nothing in this agreement shall preclude the defendant from arguing for, or the Court from granting, a variance under 18 U.S.C. §3553(a) in support of a sentence below the final advisory Sentencing Guideline range. The United States reserves the right to oppose any variance.

(CR 16 ER VOL. II, pp. 92-93)

The plea proceeding was conducted by a Magistrate Judge. (CR 39 R.T. 12/20/18, p. 26)

During the change of plea proceeding, the following colloquy ensued regarding Silva-Aguilar's appeal waiver:

> THE COURT: Both of your written plea agreements provide that you are giving up your right to appeal. You are also giving up your right to collaterally attack the judgment and sentence in your cases. And that means you cannot in the future attack the validity or the correctness of the conviction or the sentences in your cases.
>
> So do you understand that and agree with that, Mr. Silva?
>
> DEFENDANT SILVA-AGUILAR: Yes.

The written plea agreement had the following passage addressing the elements of 8 U.S.C. § 1326(a):

> **ELEMENTS**
>
> **Reentry of Removed Alien**
>
> On or about November 3, 2018, in the District of Arizona:
>
> 1. The defendant was an alien;
> 2. The defendant had been previously denied admission, excluded, deported, or removed from the United States;
> 3. The defendant knowingly and voluntarily reentered or was present after a voluntary entry and found in the United States in the District of Arizona; and
> 4. The defendant did not obtain the express consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States prior to returning to the United States.

(CR 16; ER VOL. II, p. 97)

During the plea proceeding, the Magistrate Judge advised Silva-Aguilar of those elements as follows:

> THE COURT: I'm going to review with both of you the elements of that offense of reentry of removed alien, because there are all of the things which the prosecutor would have to prove at a trial in your case if you were to maintain your right to plead not guilty and proceeded at trial.
>
> And the prosecutor would have to prove each of these elements of the offense beyond a reasonable doubt, and a jury would have to find unanimously that the prosecutor had done so as to each element of the offense in order for you to be found guilty at trial.
>
> And that would be that on or about the date as alleged in the charging document in each of your cases:
>
> That, number 1, that you are in fact an alien, which means you are not a citizen of national of the United States, and;
>
> Number 2, that you have been previously denied admission, excluded, deported, or removed from the United States; and
>
> Number 3, that you knowingly and voluntarily reentered or were present after a voluntary entry and then found in the United States in the District of Arizona; and
>
> Number 4. That you did not obtain the express consent of the Attorney General or the Secretary of Homeland Security to reapply for admission to the United States prior to returning to the United States.
>
> So, Mr. Silva, do you understand that the prosecutor would have to prove all of that in order for you to be

found guilty at a trial in your case?

DEFENDANT SILVA-AGUILAR: Yes.

(CR 39; R.T. 12/20/18, pp. 29-30; ER VOL. I, pp. 54-55)

The "Factual Basis" section of the plea agreement reads as follows:

> I am not a citizen of the United States. I was removed from the United States through San Ysidro, California, on October 5, 2018. I was voluntarily present and found in the United States at or near San Luis, Arizona, on November 3, 2018. I did not obtain the express consent of the United States government to reapply for admission to the United States prior to returning to the United States.
> For sentencing purposes, I admit I was convicted of Possession of a Firearm by a Felon, a felony, on June 14, 2017, in the Superior Court of California, County of Fresno. I was represented by an attorney, and I was sentenced to 3 years prison.

(CR 16; ER VOL. II, p. 98)

The plea proceeding included the following exchange:

> THE COURT: Have you seen the information in your case? And the information is the charge in each of your cases of reentry of removed alien as that charge is signed by the prosecutor in the case.
>
> Mr. Silva, have you seen that in your case?
>
> DEFENDANT SILVA-AGUILAR: Yes.
>
> THE COURT: Was the charge in your case read to you in Spanish?

> Mr. Silva?
>
> DEFENDANT SILVA-AGUILAR: Yes.
>
> THE COURT: Did you discuss this charge in your case with your attorney, Mr Silva, and have him answer any questions that you might have had about the charge in your case?
>
> DEFENDANT SILVA-AGUILAR: Yes.
>
> THE COURT: And do you understand the charge in your case of reentry of removed alien?
>
> Mr. Silva?
>
> DEFENDANT SILVA-AGUILAR: Yes.

(CR 39; R.T. 12/20/18, pp. 30-31; ER VOL. I, pp. 55-56)

During the change of plea colloquy, the Magistrate Judge established the factual basis, as follows:

> THE COURT: There's a section contained within each of your written plea agreements that is entitled "Factual Basis". These are the facts which the government says that they could prove at a trial in your case. They are also facts which you would be admitting are true through your written plea agreements.
>
> So I'm going to read that section to you in its entirety. Please listen carefully, because when I am finished reading it, then I will ask you if these facts are all true and correct in your case.
> Mr. Silva, I'll begin with the factual basis from your written plea agreement. It states: I am not a citizen or a national of the United States.

> I was removed from the United States through San Ysidro, California, on October 5th, 2018.
>
> I was voluntarily present and found in the United States at or near San Luis, Arizona, on November 3rd, 2018. I was not under constant, continuous observation from the time I crossed the border until the time I was found on November 3rd, 2018.
>
> I did not obtain the express consent of the United States prior to returning to the United States.
>
> For sentencing purposes, I admit I was convicted of possession of a firearm by a felon, a felony, on June 14th, 2017, in the Superior Court of California, County of Fresno. I was represented by an attorney, and I was sentenced to three years prison.
>
> Mr. Silva, are all of those facts true and correct in your case?
>
> DEFENDANT SILVA-AGUILAR: Yes.

(CR 39; R.T. 12/20/18, pp. 30-31; ER VOL. I, pp. 55-56)

Silva-Aguilar did not object to any deficiencies in the Rule-11 colloquy during the change of plea proceeding (CR 39; R.T. 12/20/18, pp. 1-35; ER VOL. I, pp. 26-61), or thereafter.

On December 21, 2018, the Magistrate Judge submitted his findings and recommendations to the district court. The Magistrate Judge made the standard Rule 11 findings, including findings that Silva-Aguilar understood the nature of the charge, and that there was a factual basis for the guilty plea. The Magistrate Judge

went on to recommend that the district court accept Silva-Aguilar's guilty plea and plea agreement. (CR 17; ER VOL. I, pp. 23-25)

Silva-Aguilar filed no objections to the Magistrate Judge's findings and recommendations. By minute entry, the district court adopted the findings and recommendations of the Magistrate Judge, and accepted Silva-Aguilar's guilty plea. The court deferred acceptance of Silva-Aguilar's plea agreement. (CR 19)

The Probation Department calculated Silva-Aguilar's Guidelines prison sentencing range to be between 63 to 78 months. The Probation Department further concluded that based on the two-level downward departure proposed in the §5K3.1 plea agreement, the final Guideline prison range was 51 to 63 months. (PSR p. 12)

Neither Silva-Aguilar nor the government filed any objections to the PSR, but both filed sentencing memoranda. (CR 24; ER VOL. II, pp. 80-83) (CR 23; ER VOL. II, pp. 85-88)

On June 10, 2019, the sentencing proceeding was held. On that date, the assigned district court judge accepted the plea agreement, and expressly accepted Silva-Aguilar's guilty plea. (CR 37; R.T. 6/10/19, pp. 8-9; ER VOL. I, pp. 17-18)

At the sentencing proceeding, the government requested a prison sentence of 63 months. Silva-Aguilar argued for a downward variance (from the 51 to 63-month Guidelines range scored by the Probation Department) to 20 to 24 months.

The district court sentenced Silva-Aguilar to a within-Guidelines prison term

of 60 months, to be followed by a three-year term of supervised release. The standard $100.00 special assessment was also imposed. (CR 27; ER VOL. I, pp. 1-4) (CR 37; R.T. 6/10/19, p. 10; ER VOL. I, p. 19)

During the sentencing proceeding, the following colloquy ensued:

> THE COURT: I have had a chance to review all of the documents in your case file, and based on that review, and all of the crimes you have been convicted of in the past, as a very young man, you are only 30, you have been prolific committing crimes.
>
> You are the highest criminal history category that we have in the federal system. Based on all of the crimes you have committed, you're a criminal history category VI, which means your guidelines sentencing range is 63 to 78 months of confinement.
>
> However, pursuant to the stipulation in the plea agreement, and 5K3.1 of the guidelines, I am going to grant a two-level downward departure, which now means your total offense level is a 17. Your criminal history category is still a VI, and your new guideline sentencing range is 51 to 63 months of confinement;
>
> Mr. Silva-Aguilar, do you understand all of that?
>
> THE DEFENDANT: I didn't understand. How much?
>
> THE COURT: Your new guideline sentencing range is 51 to 63 months of confinement; do you understand that?
>
> THE DEFENDANT: Yes.
>
> …

> THE COURT: Thank you. Mr. Romero.
>
> MR. ROMERO: Thank you, Your Honor. So Mr. Silva-Aguilar, as he did indicate, he is one of the youngest siblings, and he's pretty much the only supporter of his mother, and that was his basis and reason for coming back.
>
> One other thing that is of special note, is that this is Silva-Aguilar's first illegal reentry offense. He's never been convicted of illegal entry or illegal reentry, so this is his first immigration-related offense.
>
> And so he, as you can tell, Your Honor, he is very shocked at the amount of time he could be receiving for this immigration-related offense, because of the fact he's never received one before.

(CR 37: R.T. 6/10/19, pp. 4-6; ER VOL. I, pp. 13-15)

The sentencing colloquy also included the following:

> THE COURT: Sir, there's an appellate waiver in your plea agreement, which means you have given up your right to appeal as long as the sentence is consistent with what was negotiated by you, Mr. Romero, and the federal prosecutor, Mr. Uhl, and that the sentence is not illegal or unconstitutional.
>
> Mr. Romero, do you agree, sir, that your client has waived his right to appeal with an exception of an appeal based on ineffective assistance of counsel or prosecutorial misconduct?
>
> MR. ROMERO: Yes, Your Honor.
>
> THE COURT: Sir, if you still believe you have a right to appeal, you need to file the Notice of Appeal in writing with the clerk of this court no more than 14

> days from the date that your judgment is filed.
>
> If you cannot afford the cost of the appeal, or the lawyer to assist you, those costs will be paid on your behalf, do you understand that?
>
> THE DEFENDANT: Yes.

(CR 37; R.T. 6/10/19, p. 11; ER VOL. I, p. 20)

REASONS FOR GRANTING THE WRIT

In deciding that the defendant's guilty plea was supported by a adequate factual basis, and was therefore knowing and intelligent, and subject to the appeal waiver in the plea agreement, the Ninth Circuit Court of Appeals may have established a far ranging and troubling precedent that is clearly inconsistent with the Supreme Court's holding in *McCarthy v. United States*, 394 U.S. 459 (1969). Silva-Aguilar never admitted that he was *knowingly* present in the United States when caught by authorities. That element of the offense was missing from the factual basis inquiry at the change-of-plea proceeding, and from the factual basis section of the written plea agreement. Moreover, the larger district court record did not clearly support an inference that Silva-Aguilar *knew* he had already crossed into the United States when he was arrested near San Luis, Arizona. That error was plain, and arguably structural. The panel's summary dismissal of Silva-Aguilar's appeal could be interpreted to negate the necessity of an adequate inquiry and clear finding, *during Rule 11 proceedings*, of the "knowledge" element of 8 U.S.C. §1326(a).

In *McCarthy v. United States*, this Court held that a plea of guilty must be supported by a complete factual basis *elicited through a dialogue between the judge and the defendant during the Rule 11 proceeding*. Because that did not occur here, the panel has arguably created precedent that such a dialogue is *not* necessary. It should be noted that the panel did not base its decision on an express finding that the "knowledge" element was supported by evidence elsewhere in the record.

ARGUMENT

The Ninth Circuit Court of Appeal's finding that there was an adequate factual basis for Silva-Aguilar's guilty plea, and therefore his guilty plea was knowing and voluntary and subject to the appeal waiver in the plea agreement, is, arguably, inconsistent with the Supreme Court's holding in *McCarthy v. United States*.

Rule 11(b)(3), Fed.R.Crim.Proc., expressly requires that a plea of guilty be supported by a complete factual basis. *McCarthy v. United States*, 394 U.S. 459, 464 (1969). *Id*. at 466. The purpose of that requirement is to ensure that the defendant is not mistaken about whether the conduct he admits to satisfies the elements of the offense charged. *Id.* at 466.

In *McCarthy*, the Supreme Court held, in pertinent part, as follows:

> Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

> Thus, in addition to directing the judge to inquire into the defendant's understanding of the nature of the charge and the consequences of his plea, Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. *Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge*.
>
> To the extent that the district court judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district court judge resorts to 'assumptions' not based upon recorded responses in his inquiries. (emphasis added)

Id. at 466-67 (footnotes and internal quotation marks omitted).

While the procedures embodied in Rule 11 have not been held to be constitutionally mandated, they are designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary, *Id*. at 465, and that the defendant's acts satisfy all of the elements of the crime admitted. *Id*. at 466-67.

Thus, it is not enough for the judge to simply advise a defendant of the elements of the charged offense. The judge, through his questioning of the

defendant, must satisfy himself that *all* of the elements of the offense have been addressed.

A defendant must enter or remain in the United States *knowingly*, as well as voluntarily, to be convicted under the general intent crime of being "found in" the United States under 8 U.S.C. § 1326.While knowledge, like voluntariness, may be inferred from the circumstances surrounding a defendant's arrest for violating § 1326, knowledge of entering the United States is, nevertheless, a separate element of § 1326, and must be established on the record prior to the entry of the judgment of guilt. Rule 11(b)(3), Fed.R.Crim.Proc.

During the change of plea colloquy, Silva-Aguilar admitted that he was "voluntarily present and found back in the United States at or near San Luis, Arizona". He did not admit that he *knowingly* entered or remained in the United States. (CR 39; R.T. 12/20/18, pp. 30-31; ER VOL. I, pp. 55-56) "Knowingly" is not synonymous with "voluntarily" in the context of the general intent requirement of §1326. *United States v. Salazar-Gonzales*, 458 F.3d 851, 856 (9th Cir. 2006). Section 1326 is a general intent crime. *United States v. Pina-Jaime*, 332 F.3d 609, 613 (9th Cir. 2003). However, a general intent *mens rea* also requires that a "defendant possessed knowledge with respect to the *actus reus* of the crime". *Carter v. United States*, 530 U.S. 255, 268 (2000).

The factual basis set forth in the written plea agreement also failed to include the term "knowingly". (CR 16; ER VOL. II, p. 98)

San Luis, Arizona is a small town in the Sonoran Desert immediately north of the United States-Mexico border. The probable cause statement filed with the Complaint strongly suggests that Silva-Aguilar was captured while crossing the desert on foot en route to San Luis, Arizona. (CR 1; ER VOL. II, pp. 111-112). According to his admission, Silva-Aguilar was found "at or near" San Luis, Arizona, allowing for the real possibility that he did not realize he was already in the United States when caught, and that it was not too late to change his mind about whether to enter, unlawfully, the United States. Reentry of Removed Alien is not a strict liability offense. The absence of knowledge is fatal to a conviction under that statute.

During his allocution at the sentencing proceeding, Silva-Aguilar said the following:

> THE COURT: Is there anything that you would like to tell me before I sentence you?
>
> THE DEFENDANT: Yes, I just want to ask you to pardon me for coming in illegally. I just came to help out my mom who is by herself.
>
> I am the only one that helps her out. I am among the youngest siblings. That's why I came back to the United States again, to help her out. But now that I am confronting this, I don't think I will be coming back.

(CR 37; R.T. 6/10/19, p. 5; ER VOL. I, p. 14)

While he admits that he "came back", he did not expressly admit that at the time he was arrested, he knew that he had already entered the United States.

The PSR contains the following passage regarding Silva-Aguilar's acceptance of responsibility:

> The defendant was interviewed by the probation offices and provided a statement wherein he admitted involvement in the offense. Silva-Aguilar stated he illegally returned to the United States because of the poor economy in Mexico. He wanted to seek employment to help care for his mother.

(PSR, p. 4 ¶8)

Again, while Silva-Aguilar appears to have acknowledged that he intended to return to the United States to secure employment, and, in retrospect, was "found in" the United States, he did not expressly admit that he *knew* he had already entered the United States just prior to being arrested. Nor can one necessarily infer from the broader record that he *knew* he was in the United States just prior to his arrest, given his proximity to the international border. That he *later* concluded that he must have been in the United Sates when arrested would not be sufficient to meet the knowledge element of the charge.

Rule 11(b)(3) is meant to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge". *McCarthy v.*

United States, 394 U.S. at 467 (footnote and internal quotation marks omitted). That is precisely the concern here.

In its appeal brief, the government argued that any mistake here was harmless, did not affect Silva-Aguilar's substantial rights, and was not structural. Silva-Aguilar respectfully disagrees.

The district court's failure to comply with Rule 11(b)(3) constituted, at least, plain error. See, e.g., *United States v. Jauregui*, 918, F.3d 1050, 1058 (9th Cir. 2019) (finding of guilt was plain error where defendant did not admit to all elements of crime). Because the record allows for the real possibility that an innocent man unwittingly pled guilty to a crime he did not commit, the Rule 11(b)(3) error "seriously affects the fairness, integrity or public reputation of the judicial proceedings". *United States v. Olano*, 507 U.S. at 725, 732 (1993).

Normally, in order to be entitled to relief from a Rule 11 error under Rule 52(b), Fed.R.Crim.Proc., an appellant must show that the error affected his substantial rights – in other words, he must show a reasonable probability that, but for the error, he would not have entered the guilty plea. *United States v. Dominguez-Benitez*, 542 U.S. 74, 83 (2004). However, when an error is constitutional in nature, and implicates a "structural" right, the error necessarily effects substantial rights. *United States v. Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015), "and undermine[s] the fairness of a criminal proceeding as a whole". *United States v. Davila*, 133 S.Ct.

2139, 219 (2013). Moreover, certain "structural Rule 11 errors have been deemed so fundamental as to undermin[e] the fairness of a criminal proceeding as a whole", and require reversal "without regard to the mistake's effect on the proceeding". *Dominguez-Benitez*, 542 U.S. at 81. Even where the error is *not* "structural", if it impacts a defendant's constitutional rights, it is the government's burden to establish the error was harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 7 (1999) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967). The government has not done so here.

Errors have been found to be structural where the effect of those errors are "necessarily unquantifiable and indeterminate", making a harmless error analysis impossible. *Neder v. United States*, 527 U.S. 1, 11 (1999) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993); see also *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017). Where a defendant fails to admit to a particular element of an offense to which he pled guilty, and the record does not clearly support a reasonable inference that his conduct must have met that element, there is simply no way for an appellate court to undertake a harmless error analysis.

Here, there was simply no way for the appellate panel to evaluate the impact of the Rule 11 error, though it seems highly likely that Silva-Aguilar would *not* have pled guilty if he genuinely did not know he had already entered the United States when apprehended, and was properly advised that his knowledge of being in the

United States had to be contemporaneous with his being "found in" the United States. Because the district court failed to make a *proper* Rule 11(b)(3) finding through the Rule-11 colloquy, there is no way of evaluating whether Silva-Aguilar unwittingly pled guilty to a crime he did not commit. That being so, the error may well be structural, as the error is constitutional in nature, it undermines the fairness of the proceedings, and the effects of the error are simply too hard to measure. *Weaver v. Massachusetts*, 137 S.Ct. at 1908.

For these reasons, the panel should have exercised its discretion under Rule 52(b), or carried out its obligation under the Due Process Clause of the United States Constitution, and reversed the judgment and sentence, and remanded to the district court with instructions, notwithstanding the appeal waiver.

CONCLUSION

The Ninth Circuit Court of Appeals erred in finding there was an adequate factual basis for Silva-Aguilar's guilty plea, and therefore his guilty was knowing and voluntary, and subject to the appeal waiver in the plea agreement.

The district court failed during the Rule 11 proceeding to elicit an admission from Silva-Aguilar that he was "knowingly" in the United States when caught, and the larger record did not conclusively support that element.

Because the Ninth Circuit Court of Appeals has arguably set a potentially far-

ranging and troubling precedent by failing to require the district court to establish, through the change-of-plea colloquy process, a factual basis on *all* of the elements of the crime being admitted, this Court should grant this petition for a writ of certiorari, vacate the judgment of the Ninth Circuit Court of Appeals and order the case remanded to the district court with instructions to vacate Silva-Aguilar's conviction, sentence and guilty plea.

RESPECTFULLY SUBMITTED this 8th day of July, 2020 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnehan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 8th day of July, 2020, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 8th day of July, 2020, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Seth Goertz, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, Julian Silva-Aguilar, Registration No. 05200-508, FCI Victorville Medium I, Federal

Correctional Institute, Post Office Box 3725, Adelanto, California 92301.

EXECUTED this 8th day of July, 2020.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner