No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN WILSON,

Petitioner

v.

ROSEMARY NDOH, Warden,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a state court's ruling that a criminal defendant's guilty plea was "voluntary" a constitutional question under the Fourteenth Amendment, subject to de novo review on appeal, or is it a "mixed question of law and fact" reviewed under an abuse of discretion standard?

No._____

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John Wilson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief in an unpublished decision. App. 1. [1] The order and judgment of the district court denying petitioner's habeas petition are unreported. App. 2.

The California Court of Appeal affirmed Falcon's conviction and sentence in an unpublished decision. App. 26. The California Supreme Court denied review in an unpublished order. App. 25.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on January 7, 2021. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

A. State Trial Court Proceedings and Post-Conviction Review

On October 14, 2010, a felony complaint was filed in Santa Clara County Superior Court charging Wilson with six counts of committing a lewd and

[1] "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and

lascivious act on a child under 14, by means of force, duress and fear pursuant to California Penal Code § 288(b)(1). 2 ER 151.

On February 14, 2011, the complaint was amended to delete the original charges and add thirteen counts of committing a lewd or lascivious act on a child under 14, pursuant to California Penal Code section 288(a). The amended complaint also included a special sentencing allegation, as to Counts 1-9, that appellant had committed the offenses against more than one victim within the meaning of California Penal Code § 667.61 (b) and (e). *Id*. 2 ER 142.

On July 14, 2011, the prosecutor was permitted to add, by an oral amendment to the charging document, ten additional charges of committing a lewd or lascivious act on a child under 14 (Counts 14-23). 2 ER 114-115. In exchange for the dismissal of the special allegations pursuant to sections 667.61, subdivision (b) and (e), and a determinate term of 48 years, Wilson entered pleas of no contest to twenty-one counts of committing a lewd act against a child under the age of 14 in violation of California Penal Code section 288(a). 2 ER 111. The parties agreed that Count 7 would be tried to the court, and Count 9 would be dismissed. 2 ER 113-115.

The prosecutor filed the final charging document in this case on August 10, 2011, about one month *after* Wilson's no contest pleas to twenty-one of the twenty three charged counts. 2 ER 126. On August 19, 2011, the trial court found Wilson guilty of Count 7 at a bench trial. 3 RT 66.

"CT" refers to the Clerk's Transcript.

On September 7, 2011, Wilson filed a motion to withdraw his no contest pleas because they were involuntary. 2 ER 102; 1 CT 53-60. On September 7, 2011, the trial court denied the motion to withdraw the plea , and sentenced Wilson to 50 years in prison. 1 ER 70.

On December 21, 2012, the California Court of Appeal reversed the judgment of the trial court, and remanded the case for additional proceedings on Wilson's motion to withdraw his no contest pleas.1 ER 56. On May 14, 2013, the trial court held a hearing on Wilson's motion to withdraw his plea. 1 ER 45. The court denied the motion.

On November 17, 2014, the California Court of Appeal affirmed the judgment of the trial court. 1 ER 27. On February 18, 2015, the California Supreme Court denied Wilson's petition for review. 1 ER 26.

Wilson then filed a full round of petitions for a writ of habeas corpus in the state courts, which were denied. 1 ER 15-25. Wilson's final petition for a writ of habeas corpus filed in the California Supreme Court was denied on February 1, 2017. 1 ER 15.

B. Federal Court Proceedings

Wilson timely filed a petition for a writ of habeas corpus in the district court on February 28, 2017. CR 1. On December 5, 2017, respondent filed his answer. CR 12. On January 8, 2018, Wilson filed his traverse. CR 14. On August 8, 2018, the district court judge issued a memorandum decision denying the petition and denying a certificate of appealability. 1 ER 1. On July 19, 2019, the Ninth Circuit

Court of Appeals issued a certificate of appealability and appointed counsel. 2 ER 86. On January 7, 2021 the Ninth Circuit affirmed the judgment of the district court. App 1.

STATEMENT OF FACTS

A. Wilson's No Contest Pleas

The initial criminal complaint in this case alleged that Wilson had committed six counts of lewd acts against a child under 14 committed by way of force, fear or duress (California Penal Code § 288 (b)(1)) against "Eric Doe"committed during an approximately two year period between October 1, 2008 and October 11, 2010. 2 ER 151.

The amended felony complaint, filed about four months later charged several additional counts and deleted the allegation that the offenses involved the use of force, duress or fear. The amended complaint alleged that Wilson committed thirteen counts of lewd and lascivious acts against a child under 14, (Cal. Penal Code § 288(a)) against a total of five children (named in the complaint as Eric, Stephanie, Alex, Adam and Jason "Doe") at various times during an approximately eighteen year period between January 19, 1992 and October 28, 2010. 2 ER 142. The amended complaint also included a new sentencing allegation, that the offenses were committed against multiple victims, which subjected Wilson to a potential life sentence. 2 ER 142.

About five months after the first amended complaint was filed, on July 14, 2011, Wilson was in a courtroom waiting to begin the preliminary hearing on the

thirteen charged counts. At the same time, his attorney was attempting to negotiate a plea agreement with the prosecutor. 2 ER 107, 112.

During a recess just before the preliminary hearing was to begin, defense counsel presented a plea offer to Wilson in which he would plead no contest to twenty-one counts of committing a lewd and lascivious act against a child (Cal. Penal Code § 288(a)). The plea agreement required Wilson to enter pleas of no contest to eleven counts charged in the amended complaint as well as ten new charges, for which he would receive a prison term of 48 years. 2 ER 113-114.

The new charges were ten counts of committing a lewd and lascivious act against a child under 14, Eric Doe, (Cal. Penal Code § 288(a), between October 1, 2008 and October 11, 2010. 2 ER 113-115, 126. Wilson did not receive written notice of the ten new charges against him before entering his no contest pleas. Instead, the complaint was "orally amended" prior to the plea colloquy. 2 ER 113-115.

In consideration for his no contest pleas, Count 9, was to be dismissed as well as the sentencing enhancement allegations for committing the charged offenses against multiple victims. Moreover, the parties agreed that Count 7 would be set for a bench trial and the sentencing allegations for committing the offenses against multiple victims were dismissed. 2 ER 113. [1]

When Wilson was advised of the plea offer, he asked if he could speak to Dr. Donald Wilcox, a therapist who was then employed at the Elmwood County Jail

[1] Wilson was found guilty of Count 7 at a bench trial. He received a two year consecutive sentence for that count, for a total of 50 years in prison.

where Wilson was incarcerated. 2 ER 105-108. Wilson was allowed to speak with Dr. Wilcox for about 15 minutes. 2 ER 108.

The transcript of the plea hearing shows that the judge was initially confused about the plea agreement and the number of counts. 2 ER 113. The judge said that he had to have the plea agreement explained to him twice. 2 ER 114. The judge then conducted a plea colloquy during which Wilson replied "Yes" when asked if his plea was voluntary, and whether he had had enough time to discuss the plea agreement with his counsel. Wilson also responded "yes" when asked if he understood his trial rights and that he was waiving those rights. 2 ER 114-118.

When asked "You have a high school and probably a college graduate (sic) ?" Wilson said "Yes, sir." 2 ER 116. In fact, Wilson had not completed a college class. 2 ER 98.

The plea hearing judge also did not state what charges he was referring to when he asked for Wilson's change of plea. When asked for his plea to "those enumerated charges," Wilson said "no contest." 2 ER 122. According to Wilson, when he answered the judge's questions he was repeating the words his attorney was whispering in his ear during the hearing. 2 ER 100.

Defense counsel said that he was satisfied that Wilson understood his rights. 2 ER 122. Both counsel stipulated that there was a factual basis for the pleas. 2 ER 123. The trial court found that the plea was knowing, voluntary and intelligent. 2 ER 123.

B. The Motion to Withdraw Wilson's Pleas

On September 6, 2011, Wilson made a motion to withdraw his no contest pleas on grounds that they were not knowing, voluntary and intelligent. 2 ER 102. Attached to the motion were Wilson's declaration and the declaration of Dr. Wilcox. 2 ER 104-107.

C. Dr. Wilcox's Declaration

Dr. Wilcox's declaration states that he was a licensed mental health professional who had been working at the Elmwood jail for about thirteen years. He was assigned to the "crisis team" in connection with his work for the Mental Health Department. Dr. Wilcox had been asked to evaluate Wilson on February 3, 2011, due to "concerns about the possibility of Mr. Wilson harming himself." 2 ER 104-105.

After meeting with Wilson, Dr. Wilcox had concluded that Wilson should be checked every 15 minutes for the next 24-72 hours. 2 ER 105.

Thereafter, Dr. Wilcox met with Wilson every week. Dr. Wilcox had met with Wilson more than twenty five times before the change of plea hearing. On the date of the plea colloquy, Dr. Wilcox was present in court and spoke with Wilson "at length" while Wilson was seated in a jury box "contemplating" the proposed plea agreement. 2 ER 105.

According to Dr. Wilcox, the plea agreement had seemed like a "moving target" because of the sudden change in the number of charges and the number of years that Wilson was to serve in prison. 2 ER 105.

Most important, Dr. Wilcox opined that Wilson was in a state of "acute stress reaction or shock" while he was reviewing the proposed plea agreement. Wilson had symptoms of "disorientation" and "poor attention span." He was, at times, "unable to understand or respond to present stimuli" like he was in a "daze." As Dr. Wilcox spoke with Wilson, he noticed that Wilson was confused and detached and his judgment was impaired. 2 ER 105-106. During the plea hearing, Wilson was "physically flushing" and reported a "rapid heartbeat." 2 ER 106.

The day after the plea hearing, Dr. Wilcox met with Wilson who presented symptoms of an "acute stress reaction." Wilson had "partial amnesia" while trying to recall his conversation with Dr. Wilcox the day before and the proceedings in court. 2 ER 106.

Dr. Wilcox concluded:

> In my professional opinion, Mr. Wilson did not have the capacity needed to make a coherent and logical decision, given the stressor of the court room environment, the immediate time constraints, and the psychological trauma of facing 48 years in prison. These stressors were more than enough stimuli to create an acute stress reaction which impaired Mr. Wilson at that time.

2 ER 106.

D. Wilson's Declaration

Wilson's declaration indicates that he had been shocked when he was presented with the sudden addition of ten new charges combined with a surprise plea offer:

> I was overwhelmed by the need to make a decision in such a short period of time and I asked to speak with Dr. Dan Wilcox, a mental

> health worker at the Elmwood jail where I have been incarcerated since my arrest in October, 2010. I was allowed to speak with Mr. Wilcox for perhaps 15 minutes.
>
> That whole morning and afternoon was such a blur to me and I was confused and in shock at the number of years I was asked to accept, and I was not able to think clearly and to comprehend what I was doing at the time.

2 ER 108.

E. The Hearing on Wilson's Motion To Withdraw His Pleas

On September 7, 2011, the trial court held a hearing on Wilson's motion to withdraw his pleas. The plea hearing judge reviewed the declarations by Dr. Wilcox and Wilson. The judge stated that, assuming that the factual allegations in the declarations were true, there was not "clear and convincing" evidence that Wilson did not know what he was doing at the change of plea hearing. 1 ER 75. The trial court denied Wilson's motion to withdraw his pleas. Id.

F. The Court of Appeal Decision in *Wilson I*

The California Court of Appeal reversed the trial court order denying Wilson's motion to withdraw his plea and remanded the case for further proceedings on the motion. The Court of Appeal held that the evidence before the trial court was "clearly contradictory" in that the declarations of Wilson and Dr. Wilcox were contrary to the plea hearing judge's recollection that Wilson had entered his no contest pleas knowingly and voluntarily:

> "In this case, the trial court "assum[ed]" that Dr. Wilcox's and defendant's statements were "true." If the declarations were true, they could have been sufficient to show by clear and convincing evidence that defendant's exercise of free judgment had been overcome, such that

> there was good cause to grant defendant's motion to withdraw his pleas."

I ER 66.

The Court of Appeal acknowledged that the trial judge's impressions conflicted with those of Dr. Wilcox:

> "The record reflects that, in addition to considering the declarations of Dr. Wilcox and defendant, the trial court also considered the court's own recollection of the plea hearing. (See *Ravaux*, *supra*, 142 Cal.App.4th at p. 918 [trial court may consider its own observations of the defendant in ruling on a motion to withdraw a plea].) The court believed that a "very thorough voir dire process" had occurred; that "defendant was fully engaged and given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas"; and that defendant "did know what he was doing.""

1 ER 68.

However, the Court of Appeal held that the trial court's impressions of the plea colloquy were not determinative given Dr. Wilcox's opinion that Wilson's plea was involuntary:

> "The evidence before the trial court was thus clearly contradictory regarding whether defendant's no contest pleas were voluntary … As we have explained, because the declarations could have presented a sufficient basis upon which to grant defendant's motion, the court was required to clearly resolve the factual conflict in order to properly rule on the motion. …
>
> Because it is not clear from the court's comments how the court resolved the factual conflict, we will remand the matter to the trial court for further hearing on defendant's motion, which may include live testimony and cross-examination. We express no opinion as to how the court should resolve the factual conflicts, or as to the outcome of the motion."

1 ER 68-69.

G. The Trial Court Hearing After Remand, Before a Different Judge

By the time Wilson's case was remanded to the trial court, Judge Southard, the original plea hearing judge, had retired. I ER 49. Accordingly, a different judge, Judge Kumli, presided over the remand hearing. 1 ER 45, 49.

The remand hearing judge reviewed all of the pleadings and the Court of Appeal opinion. At the beginning of the hearing, Wilson's appointed counsel offered to bring Dr. Wilcox to court to testify and the court declined:

> The Court: "On behalf of Mr. Wilson, [defense counsel] is there anything further at this time?"
>
> Defense Counsel: "Your honor, the only thing that I would let the court know, if the court needed to hear from the doctor, I believe it's Dr. Wilcox, I would be happy to put this matter over and get him to court if you need further information from him."
>
> . . .
>
> The Court: "The court needs to state, relative to the offer made by Mr. Wilson's attorney, that the court has also reviewed the notice of motion and motion to withdraw the plea and attachments thereto, which include a declaration of Donald A. "Dan" Wilcox in support the defendant's motion to withdraw the plea.
>
> "And so with respect to the court's finding today, the court does not believe that it needs to call as a witness Dr. Wilcox, nor have him make any further statement to the court on the defendant's behalf."

1 ER 47.

Although the remand hearing judge said he did not require any more information from Dr. Wilcox, he criticized Dr. Wilcox's declaration, saying that about one third to half consisted of a summary of Dr. Wilcox's background and experience.

1 ER 48. The judge also criticized the length of Dr. Wilcox's conclusion about Wilson's mental state, on grounds that it "takes up the final five to seven lines." 1 ER 48. The court held that Dr. Wilcox's opinion about his interactions with Wilson was a "minor portion of his declaration." 1 ER 48.

The remand hearing judge found that the judge who conducted the plea colloquy had been "directly engaged in conversation" with Wilson at the time the plea was taken. The court reasoned that the plea hearing judge was presumably more familiar with the legal standard regarding a motion to withdraw a plea than was Dr. Wilcox. I ER 48-49.The court also found that Wilson's plea was "unusually sophisticated and complicated" and that Wilson had been represented by "extraordinarily competent and experienced counsel." 1 ER 49.

The remand hearing judge further found that the plea hearing judge's questioning of Wilson was "exceptionally thorough" and that he had asked Wilson questions that were "not leading." 1 ER 50.

The court reasoned that Wilson had answered in a variety of ways, including "Yes, your honor," "No,""No sir," and "Yes, sir." Also, at the end of the plea when Wilson was asked if he had any questions, he said "No sir, your honor." Finally, both counsel had indicated they were satisfied with the plea colloquy. 1 ER 50-52.

In conclusion, the remand hearing judge found that Dr. Wilcox's declaration was "cursory." He also found that the plea hearing judge's statement that he was assuming the Dr. Wilcox declaration to be true was "incorrect or was a misstatement inadvertently made." 1 ER 52. The court found that Dr. Wilcox's professional opinion

was not sufficient to overcome the plea hearing judge's conclusion that the plea was valid. 1 ER 52. As a result, Wilson's motion to withdraw his plea was denied. *Id*.

H. The Court of Appeal Decision in *Wilson II*

On the second round of direct review, the California Court of Appeal affirmed the judgment. In *Wilson II* the Court of Appeal held that, on remand, the new judge had properly resolved the conflicting evidence when he "evaluated the evidence and decided that Dr. Wilcox's declaration was entitled to less weight on the issue of the voluntariness of defendant's pleas." 1 ER 42-43. Accordingly, the Court of Appeal held that the trial court did not abuse its discretion when it denied Wilson's motion to withdraw his "no contest" pleas as involuntary. 1 ER 43.

REASONS FOR GRANTING THE PETITION

This Court Should Grant Certiorari to Clarify That a Defendant is Entitled to *De Novo* Appellate Review of a Claim That His Guilty Plea Was Involuntary Under the Fourteenth Amendment

It is clearly established that a criminal defendant who contends that a guilty or no contest plea was involuntary must establish the merits of his clam "by a preponderance of the evidence." *Walker v. Johnson*, 312 U.S. 275, 286 (1941). Moreover, this Court has held that the voluntariness of a guilty or no contest plea is a question of federal constitutional law … and not a question of fact." *Marshall v. Lonberger*, 459 U.S. 422, 431 (1983); *Miller v. Fenton*, 474 U.S. 104, 113 (1985).

However, in other contexts, this Court has deemed some voluntariness issues to be questions of fact, such as whether a defendant has "sufficient notice of charges against him to render [his] guilty plea voluntary." *Marshall*, at p. 431. As to such

issues, the decision of the fact finder is entitled to a presumption of correctness. *Id*. Moreover, this Court has not clearly stated whether a *de novo* or deferential standard governs appellate review of a trial court's finding that a contested guilty or no contest plea was "voluntary" under the Fourth. Amendment

In this case, the Ninth Circuit panel emphasized that it was not able to identify a controlling decision of this Court that explains whether the reviewing court must apply a *de novo* or abuse of discretion standard. App. pp. 3-4. Accordingly, the Ninth Circuit panel applied the deferential abuse of discretion standard and denied Wilson's claim. App. p. 4.

In similar contexts, this Court has required independent de novo review of a defendant's constitutional claim. For example, the "voluntariness" of a defendant's extra-judicial confession requires "independent" appellate review. *Miller* at p.113. Moreover, a trial court's finding that a search is supported by "reasonable suspicion" and "probable cause" under the Fourth Amendment also requires independent, *de novo* appellate review. *Ornelas v. United States*, 517 U.S. 690, 697 (1986).

There are several reasons that this Court should hold that the voluntariness of a plea likewise requires *de novo* review. First, deferring to the trial courts would allow different results under similar facts, inconsistent with a unitary system of constitutional law. *See Miller* at p. 114. In *Miller*, this Court emphasized that *de novo* review is appropriate where the relevant legal principle can be given meaning only through its application to the particular facts of a case. *Id*. In such circumstances, the Court has been reluctant to give the trier of fact's conclusions

presumptive force and, thereby, strip a federal appellate court of its primary function. Moreover, *de novo* review provides a means of error correction due to the conscious or unconscious bias of the trier of fact and to remedy unreasonable determinations of fact due to a fact finder's failure to consider or give appropriate weight to important parts of the record. *See Taylor v. Maddox*, 366 F.3d 992 (2004).

The petitioner's plea was entered in a California state court. Because a California trial court's determination of whether a defendant's plea of guilty was "voluntary" generally requires an assessment of the defendant's credibility and conduct at the plea hearing, review of that question in California is not treated as a constitutional issue subject to *de novo* review, but is reviewed under a deferential abuse of discretion standard. *People v. Huricks*, 32 Cal.App.4th 1201, 1208-1209 (1995).

The California rule is contrary to that of The United States Courts of Appeals for the First, Sixth, Eighth, and Tenth Circuits, which conduct an independent examination into whether a defendant's plea was voluntary. *See, Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957) ("We think it is clear that the statements made by the trial court were reasonably calculated to influence the defendants to the point of coercion into entering their pleas of guilty."); *Toler v. Wyrick*, 563 F.2d 372, 374 (8th Cir. 1977) (examining "all the facts surrounding the guilty plea to determine its voluntariness."); *Longval v. Meachum*, 651 F.2d 818, 820 (1st Cir. 1981)(independently reviewing whether the judge's remarks could reasonably have had a chilling effect on the exercise of the defendant's right to trial by jury);*Caudill v. Jago*,747 F.2d 1046,1050 (6th Cir.1984) (assessing the voluntariness of the

defendant's plea in light of all the relevant circumstances.)

As the Ninth Circuit panel pointed out in its decision in this case, the outcome was dependent on the constitutional standard of review, which has not yet been clarified by this Court. App. pp. 3-4. The result in this case, as in many others, depends on whether a "de novo" or an "abuse of discretion" standard applies on appellate review of an allegedly involuntary guilty or no contest plea. This case presents an exceptional opportunity to resolve that question, because Wilson presented substantial evidence that his no contest pleas were involuntary. Because of the recurring nature and importance of this question, certiorari should be granted.

Argument

I. Wilson's Convictions Must Be Vacated Because The Trial Court Violated His Right to Due Process When It Held That His No Contest Pleas Were Knowing, Voluntary and Intelligent

A. The Clearly Established Federal Constitutional Standard for a Valid Guilty or No Contest Plea

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a guilty or no contest plea must be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). The plea must reflect an "intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

The voluntariness of a plea can be determined "only by considering all of the relevant circumstances that surround it." *Brady v. United States*, 397 U.S. 742, 749 (1970); *see also United States v. Kaczynski*. 239 F.3d 1108, 1114 (9th Cir.

2000)(examining voluntariness of plea based on the "totality of the circumstances"). A guilty plea is void if it lacks "the character of a voluntary act." *Machibroda v. United States*, 368 U.S. 487, 493 (1962) *Kaczynski*, 239 F.3d at 1114.

The entire record, not just the plea colloquy, is relevant to determining whether a defendant's guilty plea meets the federal constitutional standard. *See United States v. Vonn*, 535 U.S. 55, 74 (2002)(adequacy of plea not limited strictly to plea proceedings); *Heiser v. Ryan*, 951 F.2d 559, 562-563 (3rd Cir. 1991)(review of petitioner's "yes" and "no" answers in plea colloquy without more was not sufficient to assess his contention that his plea was involuntary). A plea that is not voluntarily and intelligently made violates due process and is void. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Whether a waiver of constitutional rights was made knowingly and voluntarily is a mixed question of law and fact which must be reviewed de novo. *Campbell v. Wood*, 18 F.3d 662, 672 (9th Cir. 1994) (en banc).

B. Review Should Be *De Novo* Because *Wilson II* Failed to Apply The Federal Constitutional Standard When It Decided Wilson's Claim

When a state court unreasonably applies clearly established constitutional law or applies a standard that is contrary to the Supreme Court's constitutional decisions, the federal court must then resolve the petitioner's constitutional claim "without the deference AEDPA otherwise requires." 28 U.S.C. § 2254 (d)(1); *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Deck v. Jenkins*, 768 F.3d 1015, 1024 (9th Cir. 2014).

Under 28 U.S.C. § 2254(d)(1), federal courts must read state court decisions carefully "to determine the rule that *actually* governed the state court's analysis." *Frantz v. Hazey*, 533 F.3d 724, 737 (9th Cir. 2008) (italics in original) *citing Holland v. Jackson*, 542 U.S. 649, 654-55 (2004)(per curiam). When a state court applies an incorrect constitutional rule or legal framework, its decision is not entitled to AEDPA deference and this Court must review the issue de novo. *Franz, supra* at 739.

Here, the last reasoned decision is that of *Wilson II*, which held that the trial court did not abuse its discretion when it found that denied Wilson's motion to withdraw his pleas. The opinion in *Wilson II* did not cite to federal constitutional law when it denied Wilson's claim that his no contest pleas were not knowing, voluntary and intelligent. 1 ER 43.

Wilson II held that a plea is involuntary if it is "done without choice or against one's will." However, it may not be withdrawn "simply because" the defendant changed his mind or the plea was made "reluctantly or unwillingly" citing *People v. Knight*, 194 Cal.App.3d 337, 344 (1987); *People v. Huricks*, 32 Cal.App.4th 1201, 1208-1209 (1995). 1 ER 40. The *Wilson II* opinion does not cite United States Supreme Court cases concerning the constitutional validity of guilty pleas. I ER 39-40.

Under federal law, the constitutional validity of a change of plea is a question of law that is reviewed de novo and not under an abuse of discretion standard. E.g. *Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995). Accordingly, the *Wilson*

II court should have examined the totality of the circumstances and come to a de novo legal conclusion regarding the voluntariness of the plea. *Brady*, at p. 749.

Accordingly, the standard applied by the Court of Appeal in *Wilson II* is contrary to clearly established federal constitutional law, because it applied the wrong standard of review and focused solely on whether the plea was coerced.

In summary, the Court of Appeal in *Wilson II* applied a deferential abuse of discretion standard and failed to examine whether the plea was knowing and intelligent. Accordingly, the Court of Appeal Opinion in *Wilson II* is contrary to and unreasonably applied clearly established United States Supreme Court authority under 28 U.S.C. 2254(d)(1). As a result, review of Wilson's claim must be de novo.

C. Review Should Be De Novo Because *Wilson II* Unreasonably Determined The Facts When It Held That the Trial Court Conducted An Adequate Inquiry Into the Voluntariness of Wilson's Pleas During the Remand Hearing

On habeas corpus review, the deferential AEDPA standard of review does not apply if the state court decision was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(2); *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984, 999–1000 (9th Cir. 2014).

For example, if a state court fact finding process was defective in a material way, such as making important factual findings without giving the petitioner an opportunity to present evidence, the state court made an "unreasonable determination" of the facts in violation of 28 U.S.C. 2254(d)(2). Under these

circumstances, the AEDPA standard does not apply. *Taylor v. Maddox*, *supra*, at p. 1001.

An unreasonable determination of the facts also occurs when the state court makes evidentiary findings that misstate the record, ignore important parts of the record, or misapprehend the evidence presented. *Taylor* at 1001.

1. The Fact Finding Process Was Defective Because The Remand Hearing Judge Failed to Conduct an Adequate Inquiry Into the Conflicting Evidence

The Court of Appeal decision in *Wilson I* clearly directed the trial court on remand to conduct a detailed and thorough inquiry into the voluntariness of Wilson's plea:

> Because it is not clear from the court's comments how the court resolved the factual conflict, we will remand the matter to the trial court for further hearing on defendant's motion, which may include live testimony and cross-examination. We express no opinion as to how the court should resolve the factual conflicts, or as to the outcome of the motion.

I ER 68-69.

Moreover, when a trial court determines the facts on a motion to withdraw a plea, it must give the petitioner a fair opportunity to establish that the statements in the plea colloquy were unreliable. *Blackledge v. Allison*, 431 U.S. 63, 82 n.25 (1977).

Here, because the plea hearing judge was not available to decide the issue on remand, the new judge assigned to the case had no independent basis to evaluate the credibility of Wilson's claim that his plea was invalid. Under these circumstances, the trial court's failure to conduct an evidentiary hearing, with testimony and cross

examination of Dr. Wilcox, was objectively unreasonable. *See Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005).

For example, the trial court should have conducted a more detailed inquiry into whether Wilson had been psychologically overwhelmed by the news that he was being charged with ten new counts of child molesting without notice or a charging document. The court should also have determined how much time that Wilson had been given to consider whether to accept or decline the plea agreement and whether he had been given an opportunity to discuss it, or the ten new charges, at any length with his counsel.

Moreover, the trial court should have conducted a more detailed inquiry into Wilson's mental health and his specific mental condition at the time of the plea. Dr. Wilcox had met with Wilson more than twenty-five times prior to the plea hearing. He should have been questioned about his impressions of Wilson's mental health and any diagnosis that had been made. Moreover, Dr. Wilcox should have been questioned about the details of his conversation with Wilson just prior to the plea hearing.

To the extent that the retired plea hearing judge's impressions differed from those of Dr. Wilcox, the judge could have also been called to testify. Moreover, cross examination of the judge and of Dr. Wilcox was essential to expose the strengths and weaknesses of their opinions about Wilson's mental state.

Wilson II also unreasonably determined the facts when it placed controlling weight on Wilson's "yes" and "no" answers during the plea colloquy. If the trial court

had conducted an adequate inquiry on remand, it would have discovered that Wilson's answers were unreliable.

The plea hearing judge had asked Wilson if he was a college graduate and Wilson said yes. 2 ER 116. Wilson does not in fact have a college degree and at the time of the plea he had never completed a college class. 2 ER 98. Wilson explained that during the plea colloquy, he was repeating the answers his attorney whispered in his ear. 2 ER 100.

Ultimately, an evidentiary hearing was necessary to determine whether Wilson's other responses during the plea colloquy were voluntary and intelligent or simply mechanical "yes" or "no" responses prompted by the plea hearing judge and Wilson's counsel.

Moreover, the remand hearing judge's final conclusion that the original judge had made a misstatement or error when he assumed that Dr. Wilcox's declaration was true was objectively unreasonable without conducting an evidentiary hearing. 2 ER 52. The plea hearing judge did not testify at the remand hearing and so there was no basis for the new judge to conclude that his holding about Dr. Wilcox's declaration was an error. *Taylor v. Maddox, supra*, at pp. 1001-1002.

This case is comparable to *Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005) where the petitioner claimed that a prosecutor had intimidated a defense witness. Without conducting an evidentiary hearing, the state court denied the petition. The district court concluded that the witness's declarations were "inherently untrustworthy and not worthy of belief." *Earp*, 431 F.3d at 1169. This Court

reversed, reasoning that the district court "reached its credibility determination without taking the opportunity to listen to [the witness], test his story, and gauge his demeanor." *Id*.

The remand hearing after *Wilson I* violated these principles because it consisted solely of a review of a plea hearing transcript and the declarations of Wilson and Dr. Wilcox. Defense counsel offered to present the testimony of Dr. Wilcox and the trial court unreasonably declined, depriving Wilson of a fair opportunity to develop the facts in support of his claim. For all of these reasons, the fact finding process that led to the opinion in *Wilson II* was defective. Under 28 U.S.C. 2254(d)(2), the AEDPA standard should not apply.

2. The State Court Decision Also Ignored The Substance of Dr. Wilcox's Declaration and Failed to Consider the Totality of the Circumstances Surrounding the Plea

The *Wilson II* decision also unreasonably determined the facts, when it found that Dr. Wilcox's declaration was "cursory" and when it failed to consider important evidence surrounding Wilson's plea. *Taylor v. Maddox*, *supra*, at p. 1001.

Wilson II concurred with the remand hearing judge, who unreasonably held that the plea hearing judge's opinion carried more weight than that of Dr. Wilcox because the judge was more familiar with the legal standard. That conclusion unreasonably fails to recognize that Wilson's psychological state was an important factor in determining whether his plea was knowing, voluntary and intelligent. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973).

Dr. Wilcox, a mental health professional, had a unique opportunity to observe and come to an informed professional opinion as to Wilson's mental state. *See Taylor v. Maddox, supra*, at 1005-1006 (state court decision unreasonably ignored testimony of defense witness whose testimony corroborated that of petitioner).

During the plea hearing, the judge interacted with Wilson in a formal and limited way, asking standardized "yes or no" questions. By contrast, Dr. Wilcox had met with Wilson one-on-one while Wilson was considering the plea offer and observed him before, during and after the plea hearing. Dr. Wilcox also had a relationship of trust and confidence with Wilson because he had met with Wilson numerous times before the plea hearing.

Wilson II also unreasonably approved the trial court's analysis of Dr. Wilcox's declaration which focuses only on its form, including the space allocated to Dr. Wilcox's qualifications and the number of lines devoted to his conclusions. 1 ER 48. The remand hearing judge acknowledged that Dr. Wilcox's declaration includes a "professional opinion" but does not state what that opinion was. 1 ER 48.

The state courts also failed to acknowledge that Dr. Wilcox's professional opinion was unbiased. Dr. Wilcox was not an expert witness hired by defense counsel. He was employed by the "crisis team" of the Mental Health division at the Elmwood Correctional Facility where Wilson was incarcerated. 2 ER 104-105. Because Dr. Wilcox was a government employee who had no reason to embellish his opinion to assist Wilson, the contents of his declaration should not have been ignored. *Taylor v. Maddox, supra*, at pp. 1005-1006.

3. *Wilson II* Unreasonably Ignored the Rushed And Confusing Process Prior to and During the Plea Colloquy

The state court ignored important facts in the record when it failed to acknowledge that Wilson was rushed into accepting a surprise plea agreement that included ten new charges. Instead of being presented with a charging document that he could review with counsel, the complaint was orally amended just prior to Wilson's no contest plea. 2 ER 114-115.

Dr. Wilcox's declaration points out that the plea proceedings were a confusing "moving target" because of the sudden change in the number of counts and Wilson's sentencing exposure. 2 ER 105. The state court decision unreasonably failed to even acknowledge that the final charging process in this case, which occurred just prior to the plea colloquy, was abrupt and irregular.

The state court's factual finding that the "unusually sophisticated and complicated" nature of the charges and Wilson's plea agreement was evidence of its voluntariness was also objectively unreasonable. The state court reasoned that, because the plea was unusually complex, the plea colloquy was "exceptionally thorough." 1 ER 37.

The plea colloquy in this case was exceptional because it was so difficult to understand. Even the plea hearing judge was confused about the number of counts. 2 ER 113 ["It is too many counts. There is (sic) only six dates. How can we have nine counts? Did I mishear you?"]. The judge also acknowledged he had to have the plea agreement explained to him twice. 2 ER 114. ["It is the second time it has been

explained to me and I believe I understand it."]

The judge asked Wilson if he was ready to enter his pleas to "this amended complaint" even though there was no charging document that contained all of the counts. 2 ER 13.

Finally, when the plea hearing judge asked Wilson the crucial question at the plea hearing, the description of the charges was vague and confusing:

> The Court: So, sir, you're charged as previously stated in Counts 1 through 23 and excepting Count 9 which is taken under submission for dismissal at the time of sentencing, and Count 7 which will be set for court trial, how to you wish to plead to those enumerated charges?
>
> Wilson: "No contest."

2 ER 122.

After obtaining Wilson's no contest pleas, the plea hearing judge asked Wilson whether he had received an opportunity "to review with your attorney the contents of the first amended complaint including the details regarding the time frames and alleged victims." 2 ER 122.

That belated inquiry also misstated the charges to which Wilson was entering his pleas. The first amended complaint had been superceded at the beginning of the plea hearing by an oral amendment. 2 ER 126-155. The plea hearing judge never asked Wilson if he had an opportunity to review with counsel the *ten new counts* that

had been added to the complaint minutes before. *Id*. Under these circumstances, the state court gave undue weight to the quality of the plea colloquy and Wilson's "yes" and "no" statements during the change of plea hearing.

Wilson II reasoned that these answers demonstrated that the plea was voluntary because Wilson's answers were "direct" "succinct" and "correct" and because, at times, they included more than one syllable. 1 ER 38.

It was objectively unreasonable to conclude that Wilson's ability to give answers that contained more than one syllable was conclusive evidence of voluntariness given the totality of the circumstances, including the contrary evidence in Dr. Wilcox's declaration. Moreover, the brevity of Wilson's responses equally supported Dr. Wilcox's opinion that Wilson was impaired.

In summary, Dr. Wilcox unequivocally opined that Wilson was too impaired to make a knowing, voluntary and intelligent change of plea. *Wilson II* failed to give appropriate weight to Dr. Wilcox's opinion, which was objectively unreasonable. Moreover, because the decision in *Wilson II* failed to acknowledge the significance of other important evidence in the record, such as the sudden addition of ten new charges just prior to the plea colloquy, it unreasonably determined the facts under 28 U.S.C § 2254 (d)(2). Accordingly, review of Wilson's claim should be de novo.

D. Wilson's No Contest Pleas Should Be Vacated Because They Were Not Knowing, Voluntary or Intelligent

Even under the demanding AEDPA standard of review, Wilson's pleas should be vacated because they were not knowing, intelligent and voluntary. Wilson had

been under close observation at the jail due to concerns that he might harm himself and he had been seen by Dr. Wilcox of the mental health crisis team about 25 times before his plea hearing. Dr. Wilcox's unbiased opinion that Wilson was unable to make a knowing, voluntary and intelligent decision at the time of the plea hearing was not contradicted by any expert testimony. Moreover, the circumstances of the plea, where Wilson was surprised by ten new charges without any formal notice, substantiate Dr. Wilcox's opinion that Wilson was unable to make a "coherent and logical" decision.

This case is comparable to *Matusiak v. Kelly*, 786 F.2d 536 (2nd Cir. 1986), a pre AEDPA case where the defendant had been on suicide watch prior to his plea hearing. The defendant in *Matusiak*, who had a long history of mental instability, told the trial judge that he was "positive" he wanted to plead guilty. He equivocated during the plea hearing but then reaffirmed his desire to plead guilty. When asked if he understood his rights he gave affirmative responses and also provided a detailed statement regarding the acts that formed the basis for the criminal charge against him. *Matusiak* at pp. 538-541.

On habeas review, the Second Circuit found that the state court's conclusion that the plea was intelligent lacked factual support. It also found that "there was inadequate development of the material facts at the plea hearing as to [petitioner's] competence to enter a plea" and granted a conditional writ. *Matusiak*, at p. 544.

For the same reasons, this Court should find that the state court's conclusion that Wilson's plea was valid lacks factual support. Like the petitioner in *Matusiak*,

Wilson had been a focus of concern due to the possibility that he would engage in self harm and he was undergoing mental health treatment at the time of his plea. Moreover, the therapist who was treating Wilson, met with him during the plea negotiations, and directly observed him during the plea, opined that his plea was not a knowing, voluntary and intelligent choice. The trial court's conclusion that Wilson's "yes" and "no" answers during the plea hearing was sufficient to establish the validity of his plea was objectively unreasonable under these circumstances. Accordingly, this Court should grant a conditional writ.

E. In the Alternative, This Court Should Remand This Case For An Evidentiary Hearing

As set forth in more detail above, 28 U.S.C. 2254(d) does not bar relief in this matter because the state court unreasonably determined the facts and unreasonably applied *Boykin* and *Brady* when it failed to recognize that a plea must be knowing and intelligent and when it applied an abuse of discretion standard to review the voluntariness of Wilson's plea.

In *Cullen v. Pinholster*, 131 S.Ct. 1388, 1401 (2011) the Supreme Court held that a district court may conduct an evidentiary hearing under § 2254(e)(2) when § 2254(d)(1) does not bar habeas relief. Such situations include, at a minimum, when claims were not decided on the merits. However, the opinion does not specify other situations where an evidentiary hearing might be considered. Justice Breyer, concurring and dissenting, explained:

> If the state court rejects the claim, then a federal habeas court may review that rejection on the basis of the materials considered by the state court. If the federal habeas court finds that the state court decision fails (d)'s test (or if (d) does not apply, then an (e) hearing may be needed.

Id at 1412.

Examples include cases where a state court made "a (d) error" with respect to its analysis of a portion of a constitutional claim. If so, then an evidentiary hearing may be ordered on the petitioner's now "unblocked" substantive federal claim. *Id*; *see Stitts v. Wilson,* 713 F.3d 887, 895-97 (7th Cir. 2013)(remanding for evidentiary hearing concerning ineffective assistance of counsel where state court decision unreasonably applied Supreme Court decisions).

As in *Fontaine v. United States*, 411 U.S. 213, 215 (1973), this case should be remanded to the district court for an evidentiary hearing concerning all of the circumstances surrounding Wilson's no contest pleas. In *Fontaine*, the defendant entered a guilty plea to a charge of bank robbery. In accordance with Fed.R.Crim. Proc. 11, the trial court conducted a detailed plea colloquy where the defendant personally affirmed that his plea was knowing, voluntarily and intelligent. However, after the plea and sentencing, the defendant filed a motion seeking to withdraw his plea on grounds that it was "induced by a combination of fear, coercive police tactics and illness, including mental illness." *Fontaine*, at pp. 213-214. The Supreme Court remanded the case for an evidentiary hearing, reasoning that even a properly conducted and thorough plea colloquy may be subject to a bona fide

challenge. *Id*.

Because the AEDPA does not bar habeas relief in this case, this Court may likewise remand this matter for an evidentiary hearing.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari and grant the writ.

Dated:

Respectfully submitted,

_____

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