No.

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**IN THE**

# *SUPREME COURT OF THE UNITED STATES*

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Roberto Martínez-Rivera,
Petitioner,
v.
United States of America,
Respondent

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

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## QUESTION PRESENTED

Whether a defendant who enters a plea of guilty, but moves to withdraw such plea prior to sentencing, while at the same time properly articulating a proper claim for actual innocence, has established a fair and just reason as such term is conceived in Rule 11(d)(2), Federal Rules of Criminal Procedure.

Whether this High Court, as a question of first impression, should adopt a straightforward approach to the evaluation of a defendant's request to withdraw his/her plea of guilty under Rule 11(d)(2), Federal Rules of Criminal Procedure different to the current multi-factor analysis favored by courts which privileges the convenience of guilty pleas over defendant's constitutional right to a presumption of innocence and a right to jury trial.

## PARTIES TO THE PROCEEDING

Roberto Martínez-Rivera, petitioner on review, was the movant/appellant below.

The United States of America, respondent on review, was the respondent/appellee below.

## RELATED PROCEEDINGS

There are no related proceedings

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## PETITION FOR A WRIT OF CERTIORARI

Roberto Martínez-Rivera respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit which denied his direct appeal of judgment imposed by the United States District Court for the District of Puerto Rico

## OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the First Circuit affirming the conviction and sentence of the Petitioner was handed down on August 6, 2021. The opinion is unpublished but can be found at *United States v. Martínez-Rivera*, 2021 WL 3918875 and is attached as **Appendix A**. Mr. Martinez-Rivera filed a petition for rehearing and/or rehearing *en banc*, on September 3, 2021. The petition was denied by the United States Court of Appeals for the First Circuit on October 14, 2021.

## JURISDICTION

Petitioner requests review of the judgment of the United States Court of Appeals for the First Circuit entered on August 6, 2021. Petitioner sought and obtained an enlargement of time up to and

including September 3, 2021, to file a request for rehearing and/or rehearing *en banc*. Such request was filed by Petitioner on September 3, 2021. The United States Court of Appeals for the First Circuit denied Petitioner's timely motion for rehearing and/or rehearing *en banc* on October 14, 2021. Accordingly, the Petition is timely filed within 90 days as required by Rule 13, Rules of the Supreme Court.

This Court has statutory jurisdiction under 28 U.S.C. Sec. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. Amend. V, provides "[n]o person shall…be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment, U.S. Const. Amend. VI provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by and impartial jury of the State and district wherein the crime shall have been committed…"

This petition concerns the interpretation of relevant portions of Rule 11, Federal Rules of Criminal Procedure. The relevant portion of the rule are attached as **Appendix B**.

## STATEMENT OF THE CASE

This Petition seeks review of the United States First Circuit Court of Appeals holding that rejected Mr. Martínez-Rivera repeated pleas to have his guilty plea withdrawn prior to his sentencing on account of his innocence. Notwithstanding his strong proclamation of innocence before the United States District Court for the District of Puerto Rico and the request to be allowed to present evidence in support of such claim, his claims were denied by the District Court and then rejected on appeal by the United States First Circuit Court of Appeals without any significant consideration or explanation. The result of the lower courts' reliance on expediency over truth, is that an innocent man continues to be imprisoned for a crime he did not commit.

### A. Mr. Martínez-Rivera is Indicted.

Mr. Martínez-Rivera was, along with forty-nine (49) other defendants, the subject of a four (4) count indictment rendered by a Grand Jury on May 9, 2016. (**Ddkt. 3**). The Indictment, in essence, charged Mr. Martínez-Rivera from participating in a prison gang related RICO Conspiracy that occurred within various correctional facilities in Puerto Rico between the years 2005 and 2016. The indictment included two (2) separate murders in aid of racketeering pursuant to 18 U.S.C. §1956(a)(1). Mr. Martínez-Rivera was charged with participating in the

murder of Mario Montañez-Gómez aka "Emme" that occurred on August 27, 2014, within a prison facility in Puerto Rico.

**B. Mr. Martinez prepares for trial, continues to affirm his innocence, and rejects numerous plea offers.**

During pretrial proceedings, Mr. Martínez-Rivera, a 30-year-old man, with 4 years of college training and an electrician at trade, rejected multiple plea offers made by the government. Accordingly, he prepared for trial including the filing of numerous pretrial motions. (**See: Ddkt. 2202, 2203, 2206, 2207, 2208, and 2209**).

On January 14, 2019, a *Missouri v. Frye*, 566 U.S. 134 (2012) hearing was held. At the hearing Mr. Martínez-Rivera advised the Court that he was rejecting the government's offer and that he would proceed to trial. (**Ddkt. 2270**). Accordingly, a new trial date for Mr. Martínez-Rivera was set for March 26, 2019. (**Ddkt. 2274**). Immediately, thereafter Mr. Martínez-Rivera recommenced trial preparations. He filed a request for subpoenas and orders to obtain documents and inspect the location of the murder. (**Ddkt. 2348, 2352 and 2383**). A request for individual *voir dire* and a request for exculpatory or materially beneficial information was also filed in anticipation of trial. (**Ddkt. 2400, 2401**).

On March 15, 2019, the government made a last effort to obtain a plea by improving the government's plea recommendation from 25 to 20 years of imprisonment. Mr. Martínez-Rivera again rejected the government's plea offer and

the fact was informed to the Government.

**C. Trial Counsel Requests the holding of a Change of Plea Hearing on account of the new plea offer made and *Missouri v. Frye.* Mr. Martínez-Rivera is then provided 15 minutes to discuss plea offer with his attorney and decides to accept a plea he had rejected numerous times.**

While Mr. Martínez-Rivera had repeatedly rejected the plea offers presented to him by the Government, his trial counsel1, requested the setting of a new change of plea hearing to ensure compliance with ethical obligations pursuant to *Strickland v. Washington*, 466 U.S. 668, 686 (1984) and *Lafler v. Cooper*, 566 U.S. 156 (2012) and to afford Mr. Martínez-Rivera a last opportunity to consider the government's final offer. (**Ddkt. 2475**).

The Change of Plea hearing was set for March 25, 2019, the date before jury selection was set to start in the case. (**Ddkt. 2476**). That day, trial counsel was only allowed to consult with Mr. Martínez-Rivera at most for 15-20 minutes prior to the case being called for the change of plea. (**See: motion at Ddkt. 2742**). During the 15 minutes that he was able to meet, trial counsel had to explain the improved plea, the risks involved if trial occurred and explain other plea related matters. As described in the motion, Mr. Martínez-Rivera was indecisive and doubtful, but he eventually signed the plea. (**Id**.).

During the hearing colloquy his indecisiveness was further manifested when

1 Who continues to be counsel for him before this Honorable Court.

the District Court inquired as to whether Mr. Martínez-Rivera had sufficient time to consult with counsel before this afternoon. When Mr. Martínez-Rivera failed to respond in the affirmative and complained of the short time he had to consult with counsel, the District Court, instead of inquiring about the lack of sufficient time to evaluate the plea offer, made a compound question to muddle the change of plea record.

The District Court asked Mr. Martínez-Rivera: "But the question is, do you think that's enough time, and are you satisfied with his services up to now?" A "yes" response was elicited but the record is not clear whether the "yes" answer addresses the latter or former portion of the compound question. No further inquiry was made by the District Court.

**D. Mr. Martínez-Rivera moves to withdraw his plea forty-two (42) days after the hearing proclaiming his innocence.**

Only 42 days after entering a plea of guilty and before the issuance of the PSR or being sentenced, Mr. Martínez-Rivera filed a *Pro-Se"* motion requesting leave to withdraw the plea. (**Ddkt. 2639**). The trial court rejected this motion and ordered it stricken from the record. Thereafter, trial counsel meets with Mr. Martinez-Rivera and after discussing the matter, filed a properly supported motion requesting withdrawal of the plea agreement. (**Ddkt. 2742**).

In essence, Mr. Martínez-Rivera's request to withdraw his plea is based on the

involuntary and unintelligent waiver of rights at the change of plea hearing, the lack of opportunity to properly consult with his attorney and his actual innocence.

In the motion Mr. Martínez-Rivera explained his actual innocence proclamation based on the repeated instructions he gave to his attorney to prepare for trial, his repeated rejections of plea offers and his clear position articulated in the *Missouri v. Frye, supra,* hearing held by Honorable Magistrate Judge Marshal D. Morgan on January 14, 2019, the day his trial was set to start for the first time but got continued due to a last-minute government request. (**Ddkt. 2270**).

As to his proclamation of innocence Mr. Martínez-Rivera noted to the District Court that there was no direct evidence, scientific or documentary evidence linking him to drug trafficking within the Bayamón Correctional Facility or the Ñetas in the discovery materials. Likewise, the government's case to charge him of murder was solely based on the testimony of a cooperating witness who admittedly never watched the murder take place and his claim to Mr. Martínez-Rivera's participation was based on his speculation of events he was not able to watch.

This last issue is very important as if the trial court would had held an evidentiary hearing, it could have received evidence that would have established that the government's evidence against Mr. Martínez-Rivera for his alleged participation in a murder was very weak or inexistent and should had moved the District Court to

give a different consideration to his motion to withdraw his guilty plea.

**E. The Government fails to address the proclamation of innocence made by Mr. Martínez-Rivera, the Court summarily rejects the motion without the holding of an evidentiary hearing or any inquiry as to Mr. Martínez-Rivera's proclamation of innocence and then sentences Petitioner.**

The Government opposed Mr. Martínez-Rivera's motion, on June 24, 2019, but never addressed his proclamation of innocence. (**Ddkt. 2748)**. Not a single paragraph of the motion was directed at confronting Mr. Martinez-Rivera's proclamation of innocence and even less to discuss the weight of the evidence it presented at trial concerning his participation in the RICO Conspiracy and/or murder. The District Court then, without further consideration, denied the motion. (**Ddkt. 3085**).

Having rejected Mr. Martinez-Rivera's motion for withdrawal of the plea, the case proceeded to sentencing. Accordingly, on February 4, 2020, Mr. Martinez-Rivera was sentenced by the United States District Court for the District of Puerto Rico, Judge Juan M Pérez-Giménez, presiding, in case 16-282 to serve a sentence of imprisonment of Two Hundred and Forty months (240). **(Ddkt. 3114)**.

**F. Mr. Martínez-Rivera appeals.**

While such sentence was the one contemplated in the plea agreement entered by the parties on March 25, 2019, **(Ddkt. 248),** Mr. Martínez-Rivera filed an appeal

to contest the district court's rejection of his request to withdraw the plea agreement. In his appeal Mr. Martínez-Rivera claimed that his conviction and sentence was erroneous as the trial court should have allowed him to withdraw his plea of guilty. Furthermore, he claimed that at the very least the trial court should have further inquired as to his claim of actual innocence contained in the motion to withdraw the plea of guilty that was entered.

To support his claim for withdrawal of the plea of guilty, in addition to his proclamation of innocence, Mr. Martínez-Rivera explained that he was blindsided by the last-minute change of plea hearing and had insufficient time to properly discuss with his counsel and consider the new plea offer.

The First Circuit Court of Appeals summarily denied Mr. Martínez-Rivera request for relief, without providing any significant discussion of the multi-factor test that it adopted for consideration of such type of motions.2 Furthermore, the First Circuit Court of Appeals rejected Mr. Martínez-Rivera's request that an evidentiary hearing be held prior to the denial of his request, ruling that he had "failed to demonstrate an abuse of discretion as to the district court's decision to deny the motion to withdraw without first holding an evidentiary hearing." (See: Opinion at Appendix A to this Petition).

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2 The First Circuit summarily dismissed the appeal of Mr. Martínez-Rivera citing Local Rule 27.0(c) that allows for summary disposition of an appeal "if it shall clearly

## REASONS FOR GRANTING THE WRIT

This petition presents the opportunity for the Court to examine and provide guidance to lower courts on an important and recurring question regarding the proper evidentiary requirements for a defendant to establish the fair and just reason, as such term is conceived in Rule 11(d)(2), Federal Rules of Criminal Procedure, to allow his withdrawal of a plea of guilty prior to sentencing. Particularly, when the defendant has presented a colorable claim of actual innocence and when such proclamation of innocence must be considered a "fair and just reason" under the aforementioned rule.

Likewise, this Petition provides the opportunity for this High Court to examine when it is desirable and/or required to hold an evidentiary hearing to satisfy Due Process requirements in light of a proclamation of innocence included in a timely motion to withdraw a plea of guilt under Rule 11(d)(2), Federal Rules of Criminal Procedure.

### A. The text of Rule 11(d)(2) Federal Rules of Criminal Procedure should allow for withdrawal of a plea of guilty where the defendant presents a proclamation of innocence in good faith as such proclamation must be understood to be a "fair and just reason" for requesting such withdrawal.

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appear that no substantial question is presented.

**B. As this Court has not issued any guidance as to the meaning of the terms "fair and just reason" this case provides a viable vehicle to provide clear guidance to lower courts in the interpretation and application of Rule 11(d)(2) Federal Rules of Criminal Procedure.**

Rule 11(d)(2) Federal Rules of Criminal Procedure reads as follows:

> "(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:
>
> (1) .....or
>
> (2) after the court accepts the plea, but before it imposes sentence if:
>
> (A) the court rejects a plea agreement under 11(c)(5); or
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

This language has never been the subject of any nuanced analysis by this High Court in the context of a requests for the withdrawal of a plea of guilt prior to sentencing. In fact, this Court has not produced any opinion containing any analysis on what "fair and just" means either prior or after the significant changes implemented to Rule 11 of Criminal Procedure by way of the 2002 amendments to such rule.

As part of such changes, Rules 11(c)(3) to (5) was amended to address the consideration, acceptance, and rejection of a plea agreement by courts, while at the same time clearly spelling out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea, citing *United States v. Hyde*, 520 U.S. 670 (1997). (See: Committee Notes on Rules 2002 Amendment).

The 2002 Amendments made clear that it is not possible for a defendant to withdraw a plea after sentence is imposed, but basically left without changes the "fair and just reason" language that was taken from then current Rule 32(e).

Prior Federal Rule of Criminal Procedure Rule 32(e) read:

> "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255"

The drafters of the Federal Rule of Criminal Procedure acknowledged the inherent problem with the "fair and just reason standard" noting that "the terms 'fair and just' lack any pretense of

scientific exactness." (See: Fed. R. Crim. P. 32(e) advisory committee's note).

This High Court had an opportunity to explore the lack of clarity in Rule 11 in the 1973 case of *Neely v. Pennsylvania*, 411 U.S. 954 (1973). This Honorable Court rejected Neely's certiorari petition, without opinion. Justice Douglas, however, filed an opinion with whom Justice Stewart and Justice Marshall concurred, dissenting.

In his dissenting opinion Justice Douglas explained that the Court had never undertaken the question of "under what circumstances a defendant, prior to sentencing, may withdraw a guilty plea." Mr. Harold Neely, after being indicted on a charge of murder, on the advice of counsel, plead guilty to a lesser included offense of voluntary manslaughter. It appears that his plea colloquy followed all essential requirements and prior to sentencing Mr. Neely moved to withdraw his plea claiming that he had sufficient evidence, with his testimony and other evidence in his possession to litigate his innocence at trial. *Id at pages 955-956.*

The trial judge rejected Mr. Neely's petition without any explanation only asserting that the reasons for withdrawing the guilty

plea were without merit and that the court was not aware of any unusual circumstances being present whereby justice will be best served by submitting the case to a jury. *Id. at page. 956.* The Supreme Court of Pennsylvania affirmed, and Mr. Neelly sought review before this High Court.

While on Certiorari this Court denied the petition, Justice Douglas would had issued the Certiorari and would have held that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment." *Id. at 957.*

Justice Douglas further forcefully posited in vindication of a defendant's constitutional right to jury trial:

> "I start with the premise that under our system of criminal justice a defendant is presumed innocent until proven guilty. Moreover, due process of law requires that a person convicted by proof beyond all reasonable doubt. A guilty plea, if it is to be consistent with these principles, should not be allowed to stand if the defendant upon reflection or additional developments seeks in *good faith* to exercise his right to trial. I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the government will not suffer substantial prejudice in restoring those rights. The criminal process is not a contest

> where the government's success is necessarily measured by the number of convictions it obtains regardless of the methods used. A conviction after trial accords with due process only if it is based upon the full and fair representation of all the relevant evidence which bears upon the guilt of the defendant. Similarly, a guilty plea should not be a trap for the unwary or unwilling. We should not countenance the 'easy way out' for the State merely because it has induced a guilty plea through a plea bargain." (Cites omitted, italics in original). *Id. at 958*

Sadly, after Justice Douglas spirited call to action in Neely, this High Court has not accepted the invitation and no analysis has been undertaken of this important subject. Without this Honorable Court's guidance lower courts for decades have grappled with what "fair and just" means in the context of a request to withdraw a guilty plea.

In 1975 the United States Court of Appeals, District of Columbia Circuit, in *United States v. Barker*, 514 F.2d 208, 220 (D.C. Cir. 1975) recognized that "precise 'meaning' of the "fair and just" standard lies buried in the unreported actions of federal trial judges". The circuit court explained that notwithstanding the obscurity of the standard some "rough guidelines" had emerged.

Such "rough guidelines centered on whether a defendant had asserted his legal innocence, explaining that "if the movant's factual

contentions, when accepted as true, make out no legally cognizable defense to the charges, he has not effectively denied his culpability, and his withdrawal motion need not be granted. On the other hand, where the motion does assert legal innocence, presentence withdrawal should be rather freely allowed". *Id.*

The *Barker* opinion, however, goes on to expand why the mere assertion of a innocence is not enough, as it would effectively become an automatic right, "reversible at the defendant's whim", *Id. at 221,* explaining and incorporating the "timing" element which required the district court to consider "not only whether the defendant asserted his innocence, but also the reasons why the defense now presented were not put forward at the time of the original pleading. *Id.* citing multiple cases including *United States v. Needles*, 472 F.2d 652 (2d. Cir. 1973); *United States v. Webster*, 468 F.2d 769, 771 (9th Cir. 1972).

Lastly the "prejudice" prong is also explained as requiring the movant to meet "high standards where the delay between the plea and the withdrawal motion has substantially prejudiced the Government's ability to prosecute the case." *Id.* citing multiple cases including *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973); *United States v.*

*Harvey*, 463 F. 2d 1022 (4th Cir. 1972); *United States v. Lombardozzi*, 436 F.2d 878 (2d. Cir. 1971) and *United States v. Stayton*, 408 F.2d 559, 561 (3rd. Cir. 1969).

A review of the development of law from early 1970's to the present, surrounding the interpretation and application of the "fair and just reason standard" shows that most courts adopted a four-part balancing test: (1) whether defendant established a fair and just reason to withdraw the plea; (2) whether defendant asserts his legal innocence of the charge; (3) the length of time between the guilty plea and the motion to withdraw; and (4) if the defendant established a fair and just reason for withdrawal, whether the government would be prejudiced. Kirk D. Weaver, A *Change of Heart or a Change of Law -- Withdrawing a Guilty Plea Under Federal Rule of Criminal Procedure 32 (e)*, 92 J. Crim. L. & Criminology 271, 274-275 (2001-2002).

As the this scholarly article recognized, not all courts applied a four-part test. Some courts also required considering "the circumstanced underlying the entry of the guilty plea; the defendant's nature and background, the degree to which the defendant has had prior experience with the criminal justice system and other factors. *Id. at foot note 4.* For

example, the article recognizes that the Sixth Circuit applies five (5) or more factors, citing *United States v.* Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994) and *United States v. Riascos-Suarez*, 73 F.3d 616, 621 (6th Cir. 1996). Likewise, the Tenth and Fifth Circuit applied a seven-factor test. *Id.* citing *United States v. Hickok*, 907 F.2d 983, 986 (10th Cir. 1990) and *United States v. Carr*, 740 F. 2d 339, 343 (5th Cir. 1984).

It seems evident from the aforementioned discussion that courts have implemented different tests to analyze a request for withdrawal of a guilty plea that include judicially created factors that were never included in either former Federal Rule of Criminal Procedure Rule 32 or current Rule 11. Some of the aforementioned factors like "timing" and "perceived strength" of a movant's innocence proclamation are evidently abstract and arbitrary and have serve to maintain in prison innocent individuals without any detailed review or analysis of their cases. Such is Petitioner case here.

The First Circuit, following the aforementioned pattern employed by other courts, employs a complex multi-layered test that requires district courts to "consider the totality of circumstances in determining

whether a defendant has carried its burden to withdraw a guilty plea. *United States v. Flete-García*, 925 F.3d 17, 24 (1st. Cir. 2019).

The multi-layered test requires the district court to first "ascertain whether the plea was voluntary, intelligent and informed when tendered". *United States v. Merritt*, 755 F.3d 6, 9 (1st. Cir. 2014). The standard calls for the district court to examine the so-called "strength" of the reason for wishing to withdraw the plea, the timing of the motion, and any assertion of legal innocence. *Id.* Only if these factors play in defendant's favor, then the district court must consider any prejudice the government should face if the motion is granted. *United States v. Fernández-Santos*, 865 F.3d 10, 15 (1st. Cir. 2017).

The First Circuit multi-layered test, however, has the same infirmity that most of the four (4) or five (5) prong tests used by circuit courts around the country to evaluate a good faith request to withdraw a plea of guilty filed by a defendant. All these tests make a judicially created run around that ignores the core language in Rule 11. The tests claim that the lower courts must examine if defendants request to withdraw a plea of guilt is based on a fair and just reason but fails to explain what is the meaning of such term.

Worse, even in cases where the movant makes a good faith proclamation of innocence, still such proclamation must be examined in the light of the evidentiary weight of the proclamation, the timing of the proclamation and the prejudice that the withdrawal would cause the government. However, neither the evidentiary weight, timing or prejudice are contained in the language of Rule 11, Fed. R. Crim. P. Such factors are judicial creation to give a run around the basic principle contained in Rule 11 Fed. R. Crim. P. which is that if defendant presented a fair and just reason to withdraw his/her plea, he or she must be allowed to do so.

It is hard to find a more fair and just reason to withdraw a plea, than actual innocence, irrespective of whether the Rule 11, Fed. R. Crim. P. colloquy complied with procedural requirements. Actual innocence, supported with a good faith proffer of evidence should be enough to satisfy the clear definition of fair and just reason.

Fair is not a simple word to define. It has multiple meanings. But in the context of a criminal case, it appears that the definition most germane as an adjective is “confirming with the established rules”. As an

adverb the definition is "in a manner that is honest or impartial or that conforms to rule. https://www.merriam-webster.com/dictionary/fair. Likewise, just is defined as "having a basis in or conforming to fact or reason". https://www.merriam-webster.com/dictionary/just.

Thus, applying the plain language of Rule 11, Fed. R. Crim. P. it seems that a request to withdraw a plea that has a good faith basis on fact and/or law should be enough and sufficient to trigger the rule application and allow a defendant to withdraw his plea. Noteworthy is that Rule 11(d) Fed. R. Crim. P. places the power to withdraw a plea of guilty in the hands of the defendant, not the government or the Court. Rule 11(d)(2)(B) commences with the wording that "[a] defendant may withdraw a plea of guilty… after the court accepts the plea, but before it imposes sentence if; the defendant can show a fair and just reason for requesting the withdrawal.

Thus, it draws that once defendant moves to withdraw a plea of guilty, the only determination a trial court must do is to determine whether the defendant has shown a fair and just reason for his request. If he/she has, then it is axiomatic that he has complied with the Rule's requirement and his withdrawal request must be granted.

Courts, however, as explained, have devised a complex multi-factor test that are clearly outside Rule 11, Fed. R. Crim. P. language and clearly designed to curtail defendant's exercise of his statutory and constitutional rights to a jury trial by holding him accountable for his plea of guilt irrespective of whether he has a fair and just reason.

Neither before or after *Neely*, supra this High Court has discussed and entertained the issued at hand. Justice Douglas invitation to this Court to examine the constitutional ramifications of a defendant's right to move for withdrawal of his/her plea of guilty stands still.

Thousands of unwary innocent defendants, seduced by a system that prices acceptance of responsibility and waivers of trial over the exercise of constitutional rights continue to be unfairly incarcerate. For decades, their plight has been obscured and condemned to be ignored. That changed recently.

In 2017 the Innocence Project and members of the Innocence Network launched GuiltyPleaProblem.org, a public education campaign to expose the problem of innocent people pleading guilty to crimes they didn't commit. The referenced page provides the following compelling statistics for this High Court to further examine this issue with this

Petition. 95% of felony convictions in the United States are obtained through guilty pleas. 18% of known exonerees pleaded guilty to crimes they didn't commit. https://guiltypleaproblem.org.

In the federal system the percentage of plea agreement resolution in criminal cases is even higher. It goes up to 97%, with fewer than 3% of cases going to trial.[3] "[I]n 2012, the average sentence for federal narcotics defendants who entered into any kind of plea bargain was five (5) years and four (4) months, while the average sentence for defendants who went to trial was sixteen (16) years. *Id.*

Many defendants would accept a plea of guilty, irrespective of his/her actual guilt to escape mandatory minimums or to reduce the so-called trial penalty, if convicted at trial. A recent study highlights the severe impact the trial penalty has on the free exercise of consent to enter a plea of guilty for innocent individuals. See, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, (NACDL 2018), found at

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[3] https://www.nacdl.org/getattachment/8e5437e4-79b2-4535-b26c-9fa266de7de8/why-innocent-people-plead-guilty-_-jrakoff_ny-review-of-books-2014.pdf

https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

Just last year Senior Federal Judge Hon. Jed S. Rakoff published a seminal work on the matter of this Petition based on his extensive experience as federal judge, federal prosecutor, and defense attorney. The book, Judge Jed. S. Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free, and Other Paradoxes of the Our Broken Legal System*, Macmillan 2021 is an indictment of the system that prosecuted and convicted Mr. Martínez-Rivera notwithstanding his pleas of innocence.

In his book Judge Rakoff details the aforementioned statistics and decries how the secretive plea-bargaining process, coupled with the courts' reluctance to inquire on the actual factual basis of pleas, in the hopes of evading multiple lengthy jury trials, subvert the Framers' concept of the jury as the fact-finding mechanism that serves to protect individuals from governmental powers. *Id at Chapter 2.*

As the aforementioned book highlights it is a good time for the Court to take up this important issue and provide real and actual

guidance that shed light on the cryptic term "fair and just reason" outlining that this Nation's history and heritage, particularly the Framers' intent on protecting the institution of the jury as a guarantee against governmental abuses and overreaching requires multiple layers of scrutiny and protections prior to fully depriving a defendant of his right to trial.

While it seems logical, that once a defendant is sentenced any attack on such sentence must be based on post-judgment motion or process, it equally seems logical that when a defendant rises his innocence prior to being sentenced, lower courts should engage in a meaningful and careful assessment of the movant's innocence proclamation to protect his/her right to a jury determination of guilt.

The multi-factor tests applied today, in different forms, by different courts gave undue consideration and weight to the procedural convenience of maintaining pleas and thus reducing trials, while at the same time giving minimal consideration, if any, to defendants' proclamation of innocence. Such proclamation is rejected if it comes late in the process (whatever that may mean) or if the proclamation causes

undue prejudice to the government which usually means having the government present the case to a jury.

The procedural convenience of a maintaining a guilty plea, even on account of an innocence proclamation, for the court and government to be able to avoid a jury trial is not only a violation of the Fifth Amendment Due Process rights of a defendant and the Sixth Amendment right to jury trial, but worse a gross violation of the Framer's intent when they created the jury institution.

This petition is a valid vehicle for this High Court to commence to articulate a change that respects the language of Rule 11 Fed. R. Crim. P. and the intent of the Framers in devising a protective mechanism around the presumption of innocence and the jury trial. Mr. Martínez-Rivera merited a due consideration and examination of his innocence proclamation. The system in place, which is outside any language included in Rule 11 deprived him of such right, and worse deprived him of his right to jury trial with the considerably unfair outcome of having him served 20 years in prison for a crime he did not commit. This Court's review is Mr. Martínez-Rivera's last chance to correct this miscarriage of justice that has kept him imprisoned and will

keep him wrongfully imprisoned for most of his adult life. This Court may correct this miscarriage while at the same time providing future guidance that could prevent the type of unfair resolution that occurred in this case to be repeated in the United States.

Accordingly, it is respectfully requested that the Certiorari Petition be granted, and the judgment issued by the United States Court of Appeals for the First Circuit Court be reversed, with judgment issued directing the United States District Court for the District of Puerto Rico to allow Mr. Martínez-Rivera to withdraw his guilty plea, vacate his conviction and judgment and to set the case for jury trial at the earliest possible time.

## CONCLUSION

For the reasons expressed above, this Court should grant this Petition for Certiorari and provide the relief herein requested.

Respectfully submitted,

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Counsel of Record for Petitioner Martínez-Rivera

Date: January 11, 2021

## CERTIFICATE OF SERVICE

I, Raúl S. Mariani Franco, certify that on January 11, 2022, copies of the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI were served to each party to the above proceeding, or to that party's counsel, and on every other person required to be served, pursuant to Supreme Court Rules 29.3 and 29.4, by depositing an envelope containing the above documents in the United States mail, properly addressed to them with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

In Breckenridge Colorado, today January 11, 2022.

*S/Raúl S. Mariani Franco*
RAUL S. MARIANI FRANCO

## CERTIFICATION OF WORD COUNT AND FONT

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5509 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 11, 2022.

*S/Raul S. Mariani Franco*
RAUL S. MARIANI FRANCO

# APPENDIX A

2021 WL 3918875
Only the Westlaw citation is currently available.
United States Court of Appeals, First Circuit.

UNITED STATES, Appellee,
v.
Roberto MARTINEZ-RIVERA, a/k/a Matatan,
Defendant - Appellant.

No. 20-1233
|
Entered: August 6, 2021

**Attorneys and Law Firms**

Victor O. Acevedo-Hernandez, Alexander Louis Alum, Marie Christine Amy, Mariana E. Bauza Almonte, Julia Meconiates, US Attorney's Office, San Juan, PR, for Appellee United States.

Raul S. Mariani-Franco, San Juan, PR, for Defendant - Appellant Roberto Martinez-Rivera.

Roberto Martinez-Rivera, Coleman, FL, Pro Se.

Before Howard, Chief Judge, Lynch and Barron, Circuit Judges.

**JUDGMENT**

***1** After pleading guilty to violating 18 U.S.C. § 1962(d), defendant-appellant Roberto Martinez-Rivera moved to withdraw his plea. He argued that his guilty plea could not be considered voluntarily, knowingly, or intelligently entered and that he was actually innocent. The district court denied the motion without holding an evidentiary hearing and sentenced Martinez-Rivera to 240 months' imprisonment. On appeal, Martinez-Rivera challenges the district court's denial of his motion to withdraw the guilty plea, as well as the district court's decision not to hold an evidentiary hearing before disposing of the motion.

We assume, without deciding, that the appeal-waiver provision in the operative plea agreement does not bar this appeal. Even so, having carefully reviewed the parties' submissions and relevant portions of the record, we conclude that the appeal does not present a "substantial question" and that affirmance is in order. 1st Cir. R. 27.0(c). Martinez-Rivera has failed to demonstrate an abuse of discretion as to the district court's decision to deny the motion to withdraw without first holding an evidentiary hearing. See United States v. Santiago Miranda, 654 F.3d 130, 137 (1st Cir. 2011) (reviewing for abuse of discretion both the denial of a motion to withdraw a guilty plea and the refusal to hold an evidentiary hearing and reiterating that an evidentiary hearing is not required where "the facts alleged are contradicted by the record or are inherently incredible and to the extent that they are merely conclusions rather than statements of fact") (internal quotations omitted); see also United States v. Flete-Garcia, 925 F.3d 17, 24 (1st Cir. 2019) (discussing relevant factors for withdrawal of guilty plea).

Affirmed. See 1st Cir. R. 27.0(c).

**All Citations**

Not Reported in Fed. Rptr., 2021 WL 3918875

End of Document

# APPENDIX B

Fed. R. Crim. P. 11(d)

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.