
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS FERNANDO CEJA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

April 14, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS FERNANDO CEJA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
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Attorney for the Petitioner

QUESTIONS PRESENTED

Whether courts may decline to enforce the plain language of Federal Rule of Criminal Procedure 23(a) requiring that a waiver of jury trial be in writing and accept an oral waiver in lieu of a written waiver.

Assuming arguendo that courts may rely on an oral colloquy, whether the oral colloquy must include – at least in the case of a defendant who is a foreign citizen, does not speak English, and has only a minimal foreign education – advice that the jurors will be drawn from the community and the defendant may participate in their selection.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd)

PAGE

TABLE OF AUTHORITIES (cont'd)

STATUTES

PAGE

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

Luis Fernando Ceja petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is also published at 23 F.4th 1218, is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included as Appendix 2. The portions of transcript reflecting the district court's acceptance of Petitioner's waiver of a jury trial are included as Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 2022, *see* App. A001, and a timely petition

for rehearing en banc was denied on March 1, 2022, *see* App. A017. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

Rule 23(a) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> **(a) Jury Trial.** If the defendant is entitled to a jury trial, the trial must be by jury unless:
>
> **(1)** the defendant waives a jury trial in writing:
>
> . . .

* * *

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Waiver of Jury Trial.

Petitioner is a Spanish-speaking defendant who needed an interpreter throughout the proceedings. App. A036, A098. He is an undocumented immigrant whose only education was schooling through the equivalent of eighth grade in Mexico. App. A049, A098. He never attended school in the United States. App. A049, A098.

The district court tried Petitioner in a bench trial, without a jury. App. A039, A099. The court proceeded without a jury because Petitioner's attorney told the court Petitioner would waive the right to a jury trial. *See* App. A023. The court did not have Petitioner sign a written waiver, as required by Rule 23(a) of the Federal Rules of Criminal Procedure, but took the waiver orally instead.

The oral colloquy took up less than one page of transcript, moreover. In

its entirety, it consisted of the following:

> THE COURT: Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?
> THE DEFENDANT: Yes.
> THE COURT: Okay. You understand that you have a right to have a jury make that decision, and [in] a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense?
> Do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: And until and unless they do, you have got a right to be presumed innocent.
> But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision.
> Is that agreeable with you?
> THE DEFENDANT: Yes.

App. A023-24.

After the court engaged in this colloquy with Petitioner, the prosecutor asked the court to make findings that Petitioner appeared competent. *See* App. A024. The court stated in response that "it seems to be knowing, intelligent, free and voluntary." *See* App. A024.

2. Conviction and Appeal.

The court subsequently held the bench trial, found Petitioner guilty of all counts in the indictment, which charged him with various drug offenses, and sentenced him to 20 years in prison. App. A039, A099. Petitioner appealed and argued, among other claims, that his waiver of the right to a jury trial was invalid. *See* App. A042-51. First, he argued the waiver was invalid

because it was not in writing, as required by Rule 23(a). *See* App. A043-45. Second, he argued a series of Ninth Circuit cases taken together recognize a language barrier like Petitioner's and lack of education are "salient fact[s]," *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997), that require an in-depth colloquy which, at a minimum, advises the defendant about four characteristics of a jury trial – that "(1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial," *United States v. Cochran*, 770 F.2d 850, 853 (9th Cir. 1985) (quoting *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983)). *See* App. A045-49. Petitioner then pointed out that the district court's colloquy fell short of these requirements by omitting advice of both the fact the jurors would be drawn from the community and the fact Petitioner would be allowed to participate in selection of the jury. *See* App. A048-51.

A Ninth Circuit panel rejected these arguments (as well as Petitioner's other claims). It first cited Ninth Circuit precedent that "[d]espite Rule 23(a)'s language requiring written waivers, an oral waiver may be sufficient in certain cases." App. A009-10. The panel then turned to the sufficiency of the oral waiver. It noted the first of the Ninth Circuit's oral colloquy cases cited by Petitioner "'implored' – but did not mandate – district courts to ensure jury trial waivers are knowing, voluntary, and intelligent by engaging in a 'substantial colloquy' that informs the defendant of four facts: '(1) twelve members of the community comprise a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial.'" App. A010

(quoting *Cochran*, 770 F.2d at 852-53). The panel then acknowledged the other cases cited by Petitioner – which had required this advice in certain circumstances – but held those cases were distinguishable. *See* App. A010-11.

Petitioner thereafter filed a petition for rehearing en banc, in which he argued the panel had focused solely on the facts of the prior Ninth Circuit cases, but ignored their reasoning. *See* App. A090-108. The Court denied that petition without comment. *See* App. A017.

V.

REASONS FOR GRANTING THE PETITION

There are two reasons to grant the writ in this case. First, the court of appeals below, as well as other courts of appeals, have ignored the plain, unequivocal language of Rule 23(a) that requires a waiver of jury trial to be in writing. They have substituted their view of the purposes of the writing requirement and held it is enough that those purposes be advanced. While there is not a contrary view in other circuits that creates a circuit split, there is a contrary view evidenced by the plain language of the rule. This Court should make clear that the plain language of Rule 23(a), not courts' divination of its purpose, controls.

Second, there is division and confusion in the lower courts over what oral colloquy is necessary. Initially, the courts are divided over whether and when an oral colloquy is required. Secondly, the courts are divided on what must be included in an oral colloquy. Petitioner's case is an excellent vehicle for resolving these conflicts, because the colloquy here was minimal and

Petitioner is a dramatic example of the type of defendant – a foreign citizen with a minimal foreign education who does not speak English – who is least likely to understand the jury trial right and most requires an explanation.

A. THE WRIT SHOULD BE GRANTED BECAUSE FEDERAL COURTS OF APPEALS HAVE IGNORED THE PLAIN LANGUAGE OF RULE 23(a) REQUIRING THAT A WAIVER OF THE RIGHT TO A JURY TRIAL BE IN WRITING.

The plain, unequivocal language of Rule 23(a) requires that a waiver of jury trial be in writing. The rule states that if the defendant is entitled to a jury trial, the trial must be by jury unless, inter alia, "the defendant waives a jury trial *in writing*." Fed. R. Crim. Pro. 23(a)(1) (emphasis added).

The Ninth Circuit did not enforce this provision in Petitioner's case. It stated, "Despite Rule 23(a)'s language requiring written waivers, an oral waiver may be sufficient in certain cases," and simply cited its prior opinion in *United States v. Shorty*, 741 F.3d 961 (9th Cir. 2013). App. A009-10. *Shorty* simply cited *United States v. Saadya*, 750 F.3d 1419 (9th Cir. 1985), *see Shorty*, 741 F.3d at 966, which in turn cited *United States v. Reyes*, 603 F.2d 69 (9th Cir. 1979), and *United States v. Guerrero-Peralta*, 446 F.2d 876 (9th Cir. 1971). *See Saadya*, 750 F.3d at 1420.[1]

[1] As pointed out in Petitioner's opening brief in the court of appeals, the statements were dictum in all of these cases – and in most of the Ninth Circuit's other cases – because the court found the waiver invalid for other reasons. *See* App. A043-44. *But see United States v. McCurdy*, 450 F.3d 282 (9th Cir. 1971) (finding waiver valid).

These cases declined to enforce the writing requirement based on their perception of its purposes. In *Saadya* and *Guerrero-Peralta*, the court characterized the requirement's purpose as "to provide 'the best evidence of the *express* consent of a defendant,'" *Guerrero-Peralta*, 446 F.2d at 877 (quoting *United States v. Virginia Erection Corp.*, 335 F.2d 868, 871 (4th Cir. 1964) (emphasis in original)), and opined that an oral consent on the record was equally good evidence. *See Saadya*, 750 F.3d at 1420; *Guerrero-Peralta*, 446 F.2d at 877. In *Reyes*, the court characterized the purpose of the writing requirement as "indicat[ing] to the defendant that the decision" – there, a partial waiver by agreeing to a jury of less than 12 persons, which Rule 23 also requires to be in writing, *see* Fed. R. Crim. Pro. 23(b)(2) – "is an important step in the trial." *Id.*, 603 F.2d at 71.

The Tenth Circuit has reasoned similarly. It opined, in *United States v. Robertson*, 45 F.3d 1423 (10th Cir. 1995), that "[t]he requirement a defendant give her written consent to waive the right to trial by jury is intended to impress her with the significance of the right relinquished and provide evidence of her consent to forgo that right." *Id.* at 1431. It then held that "[w]hen the purposes of Rule 23(a) have been satisfied by means other than a written waiver, little is served by rigidly requiring compliance with the Rule." *Id.*

The problem with this reasoning is twofold. First, one can easily debate the conclusion that an oral colloquy just as effectively accomplishes the purposes the courts of appeals divined for the writing requirement. Many, if not most, people attach greater significance to written, signed documents, so a written, signed document impresses a person more than a mere oral statement.

A written, signed document may also be less likely to leave ambiguity than an oral statement, at least in some instances.

More importantly, courts' conclusions about the purposes of a statute or rule cannot override the plain language of the statute or rule. As this Court stated in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result' at odds with the intentions of the drafters.'" *Id.* at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

This test is hardly satisfied here. Even assuming the courts of appeals have correctly divined the purposes of the writing requirement, the requirement is hardly "at odds" with those purposes. It is simply the choice the rule made for accomplishing those purposes. And that choice is certainly "not 'so bizarre that Congress "could not have intended"' it," *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 347 (1994) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991), and *Griffin*, 458 U.S. at 575).

In sum, the courts cannot override the choice evidenced by the plain language of Rule 23(a). For better or worse, the rule chose to require the formality of a writing. The courts are bound by that choice and cannot substitute whatever they believe accomplishes the same purposes.

* * *

B. THE WRIT SHOULD BE GRANTED TO RESOLVE A SPLIT IN THE LOWER COURTS ON WHETHER AN ORAL COLLOQUY IS REQUIRED TO ACCEPT A JURY WAIVER AND CLARIFY WHAT THAT COLLOQUY MUST INCLUDE.

1. There Is a Split in the Lower Courts on Whether a Jury Waiver Colloquy Is Required.

There is at least arguably a split in the federal courts of appeals on whether a jury waiver colloquy is even required and most definitely a split in the state courts. The Seventh Circuit in 1978, albeit in an exercise of its supervisory power, established a rule *requiring* "that before a district court accepts a waiver of jury trial the court will interrogate the defendant to ensure that he understands his right to a jury trial and the consequences of waiver," *United States v. Scott*, 583 F.2d 362, 364 (9th Cir. 1978), though the court subsequently qualified this rule, *see United States v. Rodriguez*, 888 F.2d 519, 527-28 (7th Cir. 1989). Other courts of appeals have stopped short of requiring a colloquy but nonetheless "implore[d]," *United States v. Cochran*, 770 F.2d 850, 853 (9th Cir. 1985); *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983), or "strongly urge[d]," *United States v. Robertson*, 45 F.3d 1423, 1432 (10th Cir. 1995), district courts to engage in a colloquy. *See also United States v. Lilly*, 536 F.3d 190, 197-98 (3d Cir. 2008) (noting colloquy "has been endorsed" by multiple other circuits, "as well as by our own"); *Marone v. United States*, 10 F.3d 65, 67 (2d Cir. 1993) ("suggest[ing]" and "urg[ing]" colloquy). The split in the federal courts has been recognized as

recently as 2006. *See State v. Lomax*, 852 N.E.2d 205, 208 (Ohio App. 2006).

There is an even clearer split in the state courts, moreover. As summarized in *State v. Bell*, 720 A.2d 311 (Md. 1998), in a discussion about the unanimity requirement in particular:

> Some states agree that defendants can "knowingly and voluntarily" waive their jury trial right without being informed specifically that a jury's verdict must be unanimous. (Citations omitted.)
>
> A number of jurisdictions, including several federal circuits, recommend that defendants be informed of the aspects of a jury trial, including unanimity, before "knowingly and voluntarily" waiving the right to a jury, but do not so require. . . . (Citations omitted.)
>
> Finally, some jurisdictions require trial courts to inform defendants fully of their jury trial rights, including that the jury must vote unanimously in order to convict. (Citations omitted.)

Id. at 320-21. As summarized in another case, some states, though not all, require a colloquy based on statutory provisions, and others have required or recommended a colloquy "despite the lack of statutory directive." *State v. Lomax*, 852 N.E.2d at 212-13. Examples of jurisdictions requiring a colloquy, based on either constitutional requirements, statutory provisions, or supervisory power, include Alaska, *see Walker v. State*, 578 P.2d 1388, 1389-90 (Ak. 1978); Connecticut, *see State v. Gore*, 955 A.2d 1, 11, 13-14 (Conn. 2008); Delaware, *see Davis v. State*, 809 A.2d 565, 571-72 (Del. 2002); the District of Columbia, *see Jackson v. United States*, 262 A.2d 106, 108-09 (D.C. 1970); Iowa, *see State v. Liddell*, 672 N.W.2d 805, 813 (Iowa 2003); Massachusetts, *see Ciummei v. Commonwealth*, 392 N.E.2d 1186, 1189 (Mass. 1979); and South Carolina, *see State v. Arthur*, 374 S.E.2d 291, 293 (S.C. 1988). *See also Ciummei v. Amaral*, 493 F. Supp. 938, 939 & nn. 1, 2 (D. Mass. 1980) (collecting cases and noting that "[a] few jurisdictions have found

a constitutional mandate for such a colloquy, but most have not," but then adding that "[i]ndependent of any constitutional requirement, several jurisdictions have deemed it advisable to require a contemporaneous colloquy by statute, rule, or in the exercise of a general supervisory power").

2. There Is Confusion in the Lower Courts on What a Jury Waiver Colloquy Must Include.

Because this Court has never addressed the question of whether a colloquy is required for a jury waiver, "it necessarily has not prescribed the contents of a [colloquy]." *State v. Rizzo*, 31 A.3d 1094, 1118 (Conn. 2011). And there is confusion in the lower court opinions on the question.

The federal courts which have urged or "implored" district courts to engage in a colloquy, require "[a]t a minimum," advice that (1) "twelve members of the community compose a jury"; (2) "the defendant may take part in jury selection"; (3) "jury verdicts must be unanimous"; and (4) "the court alone decides guilt or innocence if the defendant waives a jury trial." *United States v. Martin*, 704 F.2d at 274. The Supreme Court of Massachusetts, while "not intend[ing] to create a rigid pattern," has suggested the trial court "might state" that (1) "the jury consists of members of the community"; (2) "the defendant may participate in their selection"; (3) "the verdict of the jury must be unanimous"; (4) "[the jury] will decide guilt or innocence while the judge makes rulings of law in the course of the trial, instructs the jury on the law, and imposes sentence in case of guilt"; and (5) "where a jury is waived, the judge alone decides guilt or innocence in accordance with the facts and the

law." *Ciummei v. Commonwealth*, 392 N.E.2d at 1189-90. The Supreme Court of Delaware has stated that trial courts "should" engage in the colloquy recommended in the federal cases. *Davis v. State*, 809 A.2d at 572. The Supreme Court of South Carolina has held there must be a "searching interrogation of the accused" informing him of "the essential ingredients of a jury trial," though the court did not list what those "essential ingredients" are. *State v. Arthur*, 374 S.E.2d at 293.

Other courts take a different view, however. The Supreme Court of Connecticut has "rejected the defendant's claim that the trial court's failure to inquire about his understanding of the process of juror selection and voir dire . . . rendered his waiver unknowing and involuntary." *Rizzo*, 31 A.3d at 1118. *See also State v. Kerlyn T.*, 253 A.3d 963, 971 n.10 (Conn. 2020) (declining to mandate "a litany of facts delineating the differences between a bench trial and a jury trial"). The Supreme Court of Iowa, while adopting the list of jury trial characteristics set forth in the federal cases, *see State v. Liddell*, 672 N.W.2d at 813-14 (citing, inter alia, *United States v. Robertson*, 45 F.3d at 1432), added the caveat that "these five subjects of inquiry are not 'black-letter rules' nor a 'checklist,'" *id.* at 814, and excused omission of the right to participate in jury selection and the fact that jurors would be drawn from the community, *see State v. Miranda*, 672 N.W.2d 753, 764 (Iowa 2003). And some courts have accepted, at least for some defendants, very minimal colloquies, sometimes requiring no more than asking the defendant if he or she in fact wants to waive his or her right to a jury trial and be tried by the court. *See, e.g., Hedrick v. State*, 474 P.3d 4, 7-8 (Ak. App. 2020), *and cases cited therein*; *Little v. United States*, 665 A.2d 977, 979 (D.C. 1995).

Finally, some courts have suggested the extent of the colloquy required and/or whether it is required will vary depending on the defendant. The Ninth Circuit, in the series of cases which it held were distinguishable from Petitioner's case, *see supra* pp. 5-6, has held that certain "salient facts," including "mental or emotional instability," *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994), a "language barrier," *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997), and a "low I.Q." and being "learning disabled," *United States v. Shorty*, 741 F.3d 961, 967 (9th Cir. 2013), require the four-factor colloquy the court has otherwise just "implored" district courts to engage in. *See Shorty*, 741 F.3d at 967; *Duarte-Higareda*, 113 F.3d at 1003; *Christensen*, 18 F.3d at 825. The District of Columbia Court of Appeals has held merely asking the defendant if she understood the jury trial right and wanted to give it up was sufficient for a college-educated, English-speaking defendant who was employed as an occupational therapist, *see Little v. United States*, 665 A.2d at 979, but held far more was required when the defendant was a foreign citizen who did not speak English, was employed as a janitor, and had only a fifth grade education, *see Lopez v. United States*, 615 A.2d 1140, 1147 & n.10 (D.C. 1992).

3. Petitioner's Case Is an Excellent Vehicle for Addressing the Division and Confusion in the Lower Courts, and It Is a Case in Which There Should Have Been a More Extensive Inquiry.

Petitioner's case is an excellent vehicle for addressing the division and confusion in the lower courts – for two reasons. First, the colloquy here was at

the minimal end of the spectrum. There was nothing approaching a "searching interrogation," *supra* p. 13 (quoting *State v. Arthur*, 374 S.E.2d at 293), but just two short statements by the district court. The district court told Petitioner "you have a right to have a jury make that decision, and [in] a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense." App. A023. It then told Petitioner, "But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision." App. A023-24. The court said nothing about the two other requirements included in the lists set forth by the federal courts and state courts, *see supra* p. 12 – that the jurors would be drawn from the community, and that Petitioner had a right to participate in selecting the jurors.

Second, to the extent the colloquy may vary depending on the defendant, Petitioner falls at the end of the spectrum requiring a more extensive colloquy. He was a foreign citizen who did not even speak English. He had attended school only through the eighth grade. That school had not been in the United States where there is a jury trial tradition, but in Mexico, where there is a civil law system without a jury trial tradition. *Cf. Lopez v. United States*, 615 A.2d at 1147 (taking judicial notice that the American jury system does not exist in civil law countries such as the country the defendant there was from, Honduras). Petitioner's case presents the common circumstance of a foreign non-English-speaking defendant with no American education and a minimal foreign education.

These personal characteristics made the two factors that were omitted

from the colloquy which is at least recommended by most courts – that the jurors would be drawn from the community and the defendant can participate in selecting them – particularly critical. To begin, these are probably the most important aspects of the jury trial right. The requirement that the jurors be members of the community – or, in this Court's words, "peers" – is perhaps the most important. As the Court explained in *Apodaca v. Oregon*, 406 U.S. 404 (1972):

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. [145,] 156 [(1968)]. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." *Williams v. Florida*, [399 U.S. 78,] 100 [(1970)]. . . . As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

Apodaca, 406 U.S. at 410-11. *See also Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring) ("The importance that our system attaches to trial by jury derives from the special confidence we repose in a 'body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement.'" (Quoting *Williams*, 399 U.S. at 87.)).[2] And the right of the defendant to participate in the selection process is similarly critical, for that

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[2] The Court recently overruled the underlying holding in *Apodaca* and *Johnson*, which was that unanimity is not a constitutional requirement, *see Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), but it did so without "reassess[ing] whether the right to a unanimous jury is 'important enough.'" *Ramos*, 140 S. Ct. at 1402.

selection process is, in the words of this Court in another case, "the primary means by which the court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted).

Further, these are characteristics of a jury trial that a defendant who is a foreign citizen speaking only a foreign language with just a foreign eighth grade education would be especially unlikely to already know about. A person raised in a culture like the United States with a bill of rights adopted to protect citizens from the government very likely would envision a jury's main purpose to stand as a wall between the government and the ordinary person and would recognize a panel of ordinary citizens as the logical way to accomplish that purpose. But an uneducated person raised in a culture without a bill of rights would see the main purpose of the criminal justice system as finding the truth and envision a jury not as a group of ordinary people drawn from the community, but as a group of people with special training and expertise in finding the truth. That uneducated foreign citizen also would have no reason to believe he would be allowed to participate in selection of the jury, any more than he would be allowed to select the prosecutor who prosecutes him or the law enforcement officers who investigated him.

The deficiencies in the colloquy in Petitioner's case were therefore critical deficiencies. His case is not just a good vehicle for addressing the question of what sort of colloquy is required, but an illustration of a grossly deficient colloquy.

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: April 14, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LUIS FERNANDO CEJA, AKA Chako, *Defendant-Appellant.*	No. 20-50204 D.C. Nos. 2:18-cr-00742-RGK-DMG-1 2:18-cr-00742-RGK-DMG OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 8, 2021
Pasadena, California

Filed January 26, 2022

Before: Paul J. Kelly, Jr.,[*] Milan D. Smith, Jr., and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Kelly

[*] The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a conviction and sentence for conspiracy to distribute methamphetamine, distribution of methamphetamine in the amount of at least 50 grams, distribution of methamphetamine in the amount of at least five grams, and distribution of methamphetamine within 1,000 feet of a school.

The defendant argued that his oral jury trial waiver was invalid, in this case in which both parties agreed that the district court did not inform the defendant of all four facts that make up a "substantial colloquy" under *United States v. Cochrane*, 770 F.2d 850 (9th Cir. 1985). In particular, the district court did not inform the defendant that he could take part in jury selection or that the jurors would be members of his community. Noting that this court's precedent permits oral jury trial waivers, the panel held that the district court's colloquy was adequate to ensure that the defendant knowingly, voluntarily, and intelligently waived his trial. The panel wrote that because the jury trial waiver was conducted orally through a court-interpreter, the defendant's language skills were not a barrier at his waiver proceeding, and there is no evidence that the defendant suffers from emotional or cognitive disabilities.

Reviewing the district court's denial of the defendant's motion for substitute counsel, the panel held that, given the subject matter of the colloquy (the defendant's

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

dissatisfaction with his counsel's suggested outcomes), the district court did not abuse its discretion in summarizing its ruling using the language of "inadequacy" rather than "conflict"; and that the district court's inquiry, though brief, was more than adequate to discern the defendant's complaints.

The defendant argued that the evidence was insufficient to convict him of distribution of at least 50 grams of methamphetamine. Without resolving whether a defendant's failure to challenge an indictment that could be duplicitous waives a later challenge based on insufficiency of the evidence, the panel wrote that even if it were to reach the merits of the defendant's sufficiency of the evidence claim, the claim would not succeed, because a rational trier of fact viewing the evidence in the light most favorable to the government could find that the defendant distributed 50 grams of methamphetamine in one distribution beyond a reasonable doubt.

Challenging the district court's application of the career offender guideline at sentencing, the defendant contended that his prior convictions under California Health and Safety Code § 11378 are not controlled substance offenses because the California methamphetamine provisions sweep more broadly than the federal provisions. The panel held that even assuming the district court erred under Fed. R. Crim. P. 32 by making no explicit factual finding on the defendant's objection to the Presentence Report regarding whether geometrical isomers exist, and assuming that error was plain, the error was harmless because under *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020), California's definition of methamphetamine is a categorical match to the definition under federal law based on the

scientific fact that geometrical isomers of methamphetamine do not exist.

COUNSEL

Carlton F. Gunn (argued), Law Office of Carlton Gunn, Pasadena, California, for Defendant-Appellant.

Andrew M. Roach (argued) and Gregg Marmaro, Assistant United States Attorneys; Bram M. Adlen, Chief, Criminal Appeals Section; Tracy L. Wilkison, Acting United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

KELLY, Circuit Judge:

Defendant-Appellant Luis Fernando Ceja appeals his conviction and sentence for conspiracy to distribute methamphetamine, 21 U.S.C. § 846; distribution of methamphetamine in the amount of at least 50 grams, 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii); distribution of methamphetamine in the amount of at least five grams, 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(viii); and distribution of methamphetamine within 1,000 feet of a school, 21 U.S.C. § 860(a). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Indictment and Drug Offenses

On October 25, 2018, Mr. Ceja was indicted for three sales of methamphetamine to an informant occurring on October 21, October 29, and November 5, 2014. The transactions were captured on audio and video. On October 21, Mr. Ceja indirectly sold two ounces to the informant through a co-conspirator. On October 29, the informant called the co-conspirator and requested one more ounce of methamphetamine but explained she would purchase two ounces if the co-conspirator could introduce her to Mr. Ceja. At the co-conspirator's house located near a middle school, the informant met Mr. Ceja and paid him for two ounces of methamphetamine. Mr. Ceja gave the informant one ounce and asked the informant to follow him in a car to obtain the second ounce. The parties took a short drive and parked near an apartment complex, where Mr. Ceja entered and re-emerged and gave the informant the second ounce. On November 5, Mr. Ceja distributed an additional ounce to the informant.

B. Request for Substitute Counsel

A few months after his arrest, Mr. Ceja filed an ex parte application seeking a hearing "regarding status of counsel" without providing a reason for the request. The court held a hearing on August 6, 2019. Mr. Ceja was assisted by a Spanish interpreter throughout his court proceedings. Initially, Mr. Ceja only asked the court for assignment to a drug rehabilitation or house arrest program. The court asked whether Mr. Ceja had discussed the request with his attorney, and Mr. Ceja's attorney told the court that Mr. Ceja had rejected a plea agreement and "want[ed] another lawyer that can help him." The court noted that Mr. Ceja had not

yet specifically requested a new attorney and took a brief recess for Mr. Ceja to confer with his attorney. After the recess, the district court asked again what Mr. Ceja wanted the court to do. Mr. Ceja responded:

> DEFENDANT: That I want to change my attorney because as my attorney, he is not helping me.
>
> COURT: In what way?
>
> DEFENDANT: He wants me to accept ten years, and I don't think that's right. And as my attorney, he's not helping me to do the things that I'm telling him to do. That's why I would like to know if you can provide me with another attorney who will help me.

The court responded that it was not counsel's job to "tell you what you want to hear" and that "there's no indication that another attorney would tell you anything else." The court then asked:

> COURT: Is there anything specifically that he has done that you think is inadequate or improper?
>
> DEFENDANT: Well, he wanted me to sign for ten years, and that's a lot of time.
>
> COURT: But [you] don't have to sign for ten years. That's your choice. He probably told you he thinks it's best for you to sign for ten years?

> DEFENDANT: Yes. But I told him to help me with a rehab program for the drugs, whatever is needed because I have to take care of my children who are outside.
>
> COURT: Well, . . . I haven't heard anything to justify inadequacy of counsel. Is there anything else [Counsel] can add?
>
> COUNSEL: I really have nothing. There is no conflict that I see, Your Honor.

The district court then asked if there was "anything else anybody wants to say," and Mr. Ceja's attorney repeated that he had requested the hearing because Mr. Ceja wanted to talk to the court about getting a new lawyer. The district court concluded that "there's no showing of inadequacy of counsel or counsel and the client" and rejected Mr. Ceja's request.

C. Oral Jury Trial Waiver

After filing, and withdrawing, a second request for a new attorney, Mr. Ceja waived his right to a jury trial on February 25, 2020, after the following colloquy:

> COURT: Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?
>
> DEFENDANT: Yes.
>
> COURT: Okay. You understand that you have a right to have a jury make that decision, and a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to

> find you guilty of the offense. Do you understand that?
>
> DEFENDANT: Yes.
>
> COURT: And until and unless they do, you have got a right to be presumed innocent. But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would be the Court's decision. Is that agreeable with you?
>
> DEFENDANT: Yes.

The district court remarked that Mr. Ceja's oral jury trial waiver "seem[ed] to be knowing, intelligent, free and voluntary."

D. Bench Trial and Verdict

Mr. Ceja's bench trial began on March 10, 2020. Before trial, the government, defense counsel, and Mr. Ceja all confirmed that both sides had waived a jury trial. After a one-day bench trial, the court found Mr. Ceja guilty on all four counts for which he was tried.

E. Sentencing and Application of the Career Offender Guideline

Mr. Ceja's sentencing guideline range was 360 months to life imprisonment based on the career offender guideline. *See* U.S.S.G. § 4B1.1. This differed from an earlier pre-plea, Presentence Report (PSR) that did not classify Mr. Ceja as a career offender. The pre-plea PSR concluded Mr. Ceja's

prior convictions under California Health and Safety Code § 11378 were not controlled substance offenses under the career offender guideline. However, between the pre-plea PSR and post-verdict PSR, we decided *United States v. Rodriguez-Gamboa*, 946 F.3d 548 (9th Cir. 2019). In light of that decision, the probation office updated its PSR, concluding that Mr. Ceja's prior convictions were controlled substance offenses, and the career offender guideline applied. Mr. Ceja objected. At sentencing, the district court did not address his objection but nevertheless varied downward because of Mr. Ceja's reliance on the pre-plea PSR, imposing a 240-month sentence.

DISCUSSION

On appeal, Mr. Ceja argues that his convictions and sentence must be vacated because: (1) his oral jury trial waiver was invalid; (2) the district court abused its discretion in rejecting his request for substitute counsel; (3) the evidence is insufficient with respect to his conviction of distribution of at least 50 grams of methamphetamine; and (4) the court erroneously treated his prior convictions as controlled substance offenses under the career offender guideline.

A. Oral Jury Trial Waiver

The adequacy of a jury trial waiver is reviewed de novo. *United States v. Shorty*, 741 F.3d 961, 965 (9th Cir. 2013). Federal Rule of Criminal Procedure 23(a) requires three conditions for a defendant to waive his right to a jury trial: "(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." Case law requires a fourth condition: the waiver must be knowing, voluntary, and intelligent. *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985). Despite Rule 23(a)'s

language requiring written waivers, an oral waiver may be sufficient in certain cases. *Shorty*, 741 F.3d at 966. A written waiver carries the presumption that it was made knowingly, voluntarily, and intelligently. *Id.* Where there is no written waiver—as in this case—there is no such presumption. *See id.*

In *Cochran*, this court "implored"—but did not mandate—district courts to ensure jury trial waivers are knowing, voluntary, and intelligent by engaging in a "substantial colloquy" that informs the defendant of four facts: "(1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." 770 F.2d at 852–53. However, the described substantial colloquy is required where a defendant's mental or emotional state is a salient fact putting the court on notice that a defendant's waiver may not be knowing and intelligent. *United States v. Christensen*, 18 F.3d 822, 825–26 (9th Cir. 1994). Both parties agree that the district court did not inform Mr. Ceja of all four facts that make up a substantial colloquy. In particular, the district court did not inform Mr. Ceja that he could take part in jury selection or that the jurors would be members of his community. However, nothing suggested that Mr. Ceja's waiver might not be knowing and intelligent, and thus the failure of the district court to explicitly explain the jury selection process is not determinative.

Mr. Ceja argues that his language barrier and eighth-grade education obtained in a foreign country constituted salient facts that put the district court on notice that his waiver was not knowing and intelligent. Mr. Ceja relies heavily on *United States v. Duarte-Higareda*, 113 F.3d 1000

(9th Cir. 1997), in arguing that his language barrier required a substantial colloquy, but the facts of that case are readily distinguishable. Mr. Duarte-Higareda also used a Spanish interpreter throughout his district court proceedings, but unlike Mr. Ceja, Mr. Duarte-Higareda waived his right to a jury trial in writing using a form that was printed entirely in English, and there was no evidence that the written waiver was ever translated. *Id.* at 1002. Because Mr. Ceja's jury trial waiver was conducted orally through a court-certified interpreter, his language skills were not a barrier at his waiver proceeding.

Mr. Ceja also relies heavily on *Christensen* and *Shorty* to argue that his limited education in a foreign country constitutes a salient fact, but, again, these cases are inapposite. In *Christensen*, the defendant's manic-depressive disorder required further inquiry into the voluntariness of his waiver. 18 F.3d at 825. In *Shorty*, the defendant had a "low I.Q." and was "learning disabled." 741 F.3d at 967. Here, there is no evidence that Mr. Ceja suffers from emotional or cognitive disabilities. Thus, where this court's precedent permits oral jury trial waivers, the district court's colloquy was adequate to ensure that Mr. Ceja knowingly, voluntarily, and intelligently waived his right to a jury trial.

B. Motion for Substitute Counsel

This court reviews the denial of a motion for substitute counsel for an abuse of discretion and considers: "(1) the timeliness of the motion; (2) the adequacy of the district court's inquiry; and (3) whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense." *United*

States v. Mendez-Sanchez, 563 F.3d 935, 942 (9th Cir. 2009). Mr. Ceja challenges the second factor.[1]

First, Mr. Ceja argues that the district court erroneously focused on counsel's competency, rather than the conflict between Mr. Ceja and his counsel. "[T]he proper focus . . . is on the nature and extent of the *conflict* between defendant and counsel, not on whether counsel is legally *competent*." *United States v. Walker*, 915 F.2d 480, 483 (9th Cir. 1990), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). Although the district court did not directly discuss the purported conflict between Mr. Ceja and his counsel, it did acknowledge that Mr. Ceja's counsel did not see a conflict and received no substantive response after asking if there was anything else anybody wanted to add. Given the subject matter of the colloquy (Mr. Ceja's dissatisfaction with his counsel's suggested outcomes) and its context, the district court did not abuse its discretion in summarizing its ruling on the motion using the language of "inadequacy" rather than "conflict."

Second, Mr. Ceja argues that the district court's inquiry was not sufficiently in-depth. A court's inquiry must provide an adequate foundation for making an informed ruling. *United States v. Reyes-Bosque*, 596 F.3d 1017, 1033 (9th Cir. 2010). Open-ended questions aimed at understanding the core of the issues between a defendant and

[1] The government argues that Mr. Ceja waived this argument on appeal due to his February 2020 request for new counsel and subsequent withdrawal of that request. Because courts should make every reasonable presumption against a finding of waiver of constitutional rights, *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997), we do not deem this claim regarding Mr. Ceja's August 2019 request for new counsel to be waived based on Mr. Ceja's withdrawal of a subsequent request for new counsel.

counsel are adequate. *See Mendez-Sanchez*, 563 F.3d at 942–43. Although brief, the district court's inquiry was more than adequate to discern Mr. Ceja's underlying complaints. The district court was able to discern twice—both before and after the court's recess—that the source of the purported conflict was Mr. Ceja's dissatisfaction with the ten-year plea deal and counsel's inability to get him into a rehab program. The open-ended questions and Mr. Ceja's responses allowed the district court to evaluate whether there was a severe conflict amounting to a breakdown of communication in the attorney-client relationship. *See United States v. McKenna*, 327 F.3d 830, 844 (9th Cir. 2003). The district court did not abuse its discretion in considering this motion.

C. Sufficiency of Evidence

Mr. Ceja argues that the evidence was insufficient to convict him of distribution of at least 50 grams of methamphetamine. The government argues that Mr. Ceja waived this claim for appellate review because his sufficiency of the evidence claim is merely a duplicity challenge to his indictment in disguise. Federal Rule of Criminal Procedure 12(b)(3)(B)(i) is clear that any defense involving a defect in the indictment, including "joining two or more offenses in the same count (duplicity)," must be raised in a pretrial motion or it is waived. *See United States v. McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995). Mr. Ceja contends that he properly brings a sufficiency of evidence claim as he is asserting a violation of his "constitutional right not to be convicted of a criminal offense for which there is insufficient evidence."

We have not resolved whether a defendant's failure to challenge an indictment that could be duplicitous waives a later challenge based on insufficiency of the evidence. And

we need not do so here because even if we were to reach the merits of Mr. Ceja's sufficiency of the evidence claim, it would not succeed. A rational trier of fact viewing the evidence (including the audio and video recordings) in the light most favorable to the government could find that Mr. Ceja distributed 50 grams of methamphetamine in one distribution beyond a reasonable doubt. *See United States v. Laney*, 881 F.3d 1100, 1106 (9th Cir. 2018). While Mr. Ceja gave the informant two one-ounce baggies of methamphetamine at different locations, the deliveries occurred a short distance apart, within a short period of time, between the same individuals, and shortly after Mr. Ceja was given a single payment for both ounces. Consequently, the deliveries are sufficiently related to be rationally considered one distribution. *See United States v. Mancuso*, 718 F.3d 780, 793–94 (9th Cir. 2013); *cf. United States v. Palafox*, 764 F.2d 558, 562–63 (9th Cir. 1985) (en banc) (finding drug offenses "committed at virtually the same time, in the same place, and with the same participants" should not be compounded for punishment purposes, in contrast to distributions involving "two different individuals as part of two separate transactions").

D. Application of the Career Offender Guideline

Whether a conviction qualifies as a controlled substance offense is a question of law reviewed by this court de novo. *United States v. Leal-Vega*, 680 F.3d 1160, 1163 (9th Cir. 2012).

The district court found that Mr. Ceja qualified as a career offender because his two prior convictions under California Health and Safety Code § 11378 are controlled substance offenses. Mr. Ceja contends that his prior state convictions are not controlled substance offenses because the California methamphetamine provisions sweep more

broadly than the federal provisions, and the career offender guideline should not have been applied. However, both Mr. Ceja and the government agree that *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020), controls as a matter of law, and that this case squarely rejects Mr. Ceja's argument regarding his prior state convictions. The district court correctly applied the career offender guideline under *Rodriguez-Gamboa*.

Mr. Ceja also objected to his PSR on the basis that "whether geometric isomers of methamphetamine exist is a factual issue that remains to be resolved in the district court." Federal Rule of Criminal Procedure 32(i)(3)(B) states a sentencing court "must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Any findings of the district court under Rule 32(i)(3)(B) must be "express and explicit." *United States v. Wijegoonaratna*, 922 F.3d 983, 990 (9th Cir. 2019). Where, as here, a defendant does not object to the district court's compliance with Rule 32 at sentencing, this court reviews for plain error. *Id.* at 989. "Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc) (quoting *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009)).

The district court made no explicit factual finding on whether geometrical isomers exist. But even assuming the district court erred, and that error was plain, the error was harmless because there is no possibility that the court's resolution of Mr. Ceja's factual objection would have affected his sentence. Under the plain error standard, a

sentencing error prejudices a defendant's substantial rights "when there is a reasonable probability that he would have received a different sentence had the district court not erred." *United States v. Christensen*, 732 F.3d 1094, 1102 (9th Cir. 2013). This court in *Rodriguez-Gamboa* held, as a matter of law, that California's definition of methamphetamine is a categorical match to the definition under federal law based on the scientific fact that geometrical isomers of methamphetamine do not exist. *See* 972 F.3d at 1154 n.5. The district court expressly stating that fact would not change Mr. Ceja's sentence.

AFFIRMED.

A P P E N D I X 2

FILED

MAR 1 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, AKA Chako, Defendant-Appellant.	No. 20-50204 D.C. Nos. 2:18-cr-00742-RGK-DMG-1 2:18-cr-00742-RGK-DMG Central District of California, Los Angeles ORDER

Before: KELLY,* M. SMITH, and FORREST, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing. Judges Smith and Forrest also vote to deny the petition for rehearing en banc, and Judge Kelly so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote. The petition for panel rehearing and rehearing en banc is **DENIED.**

* The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, sitting by designation.

A P P E N D I X 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ROBERT G. KLAUSNER, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,

Plaintiff,

vs. **Case No. CR 18-742-RGK**

LUIS FERNANDO CEJA, et al,

Defendant.

_____/

REPORTER'S TRANSCRIPT OF
STATUS CONFERENCE
TUESDAY, FEBRUARY 25, 2020
10:00 A.M.
LOS ANGELES, CALIFORNIA

_____

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LAW OFFICES OF HUMBERTO DIAZ
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JHDDiazLaw@gmail.com

ALSO PRESENT: Javier Villalobos, Interpreter

LOS ANGELES, CALIFORNIA; TUESDAY, FEBRUARY 25, 2020

10:00 A.M.

--oOo--

THE COURTROOM DEPUTY: Calling Criminal No. 18-742-RJK *United States of America versus Luis Fernando Ceja and Brenda Jimenez*.

Counsel, please state your appearances.

MR. ROACH: Good morning, Your Honor. Andrew Roach for the United States.

THE COURT: Counsel.

MR. CHAMBERS: Good morning, Your Honor. Mark Chambers on behalf of Mr. Ceja, who is present before the Court in custody and he is being assisted by a Spanish language interpreter.

THE COURT: Okay. Good morning, counsel.

MR. LEFTWICH: Good morning, Your Honor. Curt Leftwich on behalf of Brenda Jimenez, and she is present in court.

THE COURT: Thank you. Anybody else?

MR. DIAZ: Good morning, Your Honor. This is Humberto Diaz, and I'm representing Mr. Guerrero, who is not present.

THE COURT: He's not with us at this time?

MR. DIAZ: No.

THE COURT: We have two things. One is a status conference, and we will get to that later.

The first thing is whether or not -- is the motion to relieve attorney, so let's do that first.

Do you want a closed hearing on that, I'm assuming, counsel?

MR. CHAMBERS: Your Honor, this morning there has been a change of position, and so my understanding is Mr. Ceja now will not be asking for new counsel or to represent himself.

THE COURT: Okay.

MR. CHAMBERS: I was just informed of that, so I'm informing the Court.

THE COURT: Thank you very much.

Mr. Ceja, is that correct, that you no longer wish to relieve your counsel or represent yourself, but you wish to proceed with counsel that you have?

THE DEFENDANT: That's right, yes, I do want him.

THE COURT: Okay. Thank you.

Then that motion will be withdrawn at that time, counsel.

Let's talk about status, because we have a trial date of March 10th.

We have a case that has been put over -- I don't have it right in front of me -- it's been put over twice already.

What is the position of all sides because my understanding

-- well, before you even get to that, let me ask you this: Who is charged in Count 6 of this matter?

MR. ROACH: In Count 6, Your Honor, Count 6 is defendant Ceja and defendant Ramirez.

But Count 6 we're actually -- the government I believe has filed before, I think we envision -- I'm sorry, I'm speaking of the other count. But Count 6, right now, defendant Ceja and defendant Ramirez are charged in that count.

THE COURT: Okay. That just wasn't clear.

So what is the status of -- because I'm under the impression that there may or may not be an agreement as to request for a continuance.

One defendant is saying, yes, and the other one is saying no.

What is the status, first of all?

MR. CHAMBERS: Your Honor, on behalf of Mr. Ceja, Your Honor, we're ready to go on the 10th of next month.

THE COURT: Okay. Counsel?

MR. LEFTWICH: As to Ms. Jimenez. She's going to enter a plea within the next few days.

But the only hold-up on that would be just that she has applied for CASA just recently.

We're hopeful and maybe even cautiously optimistic that she is going to be accepted into that. That would be the only reason to postpone.

She has a plea agreement. She is about to sign, not today because there is one change that needs to be made, but we expect to have that signed, and we can submit -- have it submitted to the Court within the next two days.

THE COURT: Thank you very much counsel.

This is set for the 10th, and it will remain on the 10th. We will see what happens as far as the plea goes and everything else.

Is there anything else we have to discuss today?

MR. CHAMBERS: Yes, Your Honor.

Mr. Ceja is indicating that he wishes to waive jury trial and have a Court trial to commence on the 10th.

THE COURT: Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?

THE DEFENDANT: Yes.

THE COURT: Okay. You understand that you have a right to have a jury make that decision, and a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And until and unless they do, you have got a right to be presumed innocent.

But if you have a Court trial, it's the judge that has to

hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision.

Is that agreeable with you?

THE DEFENDANT: Yes.

THE COURT: Counsel, do you join?

MR. CHAMBERS: Yes, Your Honor.

MR. ROACH: Your Honor, I would just ask if the Court can make some findings that the defendant appears competent to waive his right to jury trial?

THE COURT: From the appearances we have had here in court and from his appearance today, it seems to be knowing, intelligent, free and voluntary on the part of the defendant as to his jury trial.

MR. ROACH: Thank you, Your Honor.

MR. DIAZ: Your Honor, if I may?

THE COURT: Sure.

MR. DIAZ: This is Humberto Diaz on behalf of Mr. Guerrero who is not present.

I don't know what the government intends to do with regards to my client.

We're prepared to proceed to trial, but I'm not waiving jury trial as to Mr. Guerrero.

THE COURT: Counsel, your client is not in front of us.

A jury trial or Court trial, he wouldn't be tried on the 10th.

And there is no question that you haven't joined in the waiver of the jury trial at all.

MR. DIAZ: Very well.

MR. ROACH: Because of his fugitive status that time would be excluded as a matter of law from the speedy trial calculation?

THE COURT: Sure, yes.

MR. ROACH: We're prepared to proceed trial against Mr. Ceja on the 10th.

THE COURT: Anything else from anybody? If not, we will see you back on the 10th.

MR. ROACH: Thank you, Your Honor.

THE COURT: We may see counsel back in the interim.

MR. LEFTWICH: Thank you, Your Honor, next week.

(The proceedings concluded at 10:13 a.m.)

* * *

CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, TERRI A. HOURIGAN, Federal Official Realtime Court Reporter, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the judicial conference of the United States.

Date: November 2, 2020

/s/ TERRI A. HOURIGAN

TERRI A. HOURIGAN, CSR NO. 3838, RPR, CRR
Federal Official Court Reporter

UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE R. GARY KLAUSNER,

UNITED STATES DISTRICT JUDGE PRESIDING

- - -

UNITED STATES OF AMERICA, PLAINTIFF, VS. LUIS FERNANDO CEJA, et al., DEFENDANTS.	CERTIFIED COPY CR 18-00742 RGK

COURT TRIAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, MARCH 10, 2020

LOS ANGELES, CALIFORNIA

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I N D E X

E X H I B I T S

LOS ANGELES, CALIFORNIA; TUESDAY, MARCH 10, 2020

A.M. SESSION

- - -

09:06:53 THE CLERK: Calling calendar item number one, CR 18-00742 RGK: United States of America versus Luís Fernando Ceja.

09:07:01 Counsel, please state your appearances.

09:07:05 MR. MARMARO: Good morning, Your Honor.

09:07:06 Greg Marmaro, on behalf of the United States.

THE COURT: Counsel.

MR. ROACH: Good morning, Your Honor.

09:07:11 Andrew Roach, on behalf of the United States. And with me at counsel table is FBI Special Agent Dante Cross.

MR. CROSS: Good morning, Your Honor.

MR. ROACH: And Assistant United States Attorney Eddie Jauregui.

09:07:19 MR. JAUREGUI: Good morning, Your Honor.

09:07:20 THE COURT: Thank you, Counsel.

09:07:21 MR. CHAMBERS: Good morning, Your Honor.

09:07:21 Mark Chambers, on behalf of Mr. Ceja, who is present before the Court and in custody.

09:07:26 THE COURT: Okay. And, counsel, this set

for trial today.

Are both sides ready?

MR. CHAMBERS: Yes, Your Honor.

MR. ROACH: Yes, Your Honor.

THE COURT: And both sides have waived jury; is that correct?

MR. ROACH: That's correct, Your Honor.

MR. CHAMBERS: Yes, Your Honor.

THE COURT: Okay. That is agreeable with you, sir; is that correct?

Oh, we need a -- do we need a --

THE INTERPRETER: Yes.

THE COURT: Okay. They are at the back table.

THE INTERPRETER: Yes.

THE COURT: Okay. Okay. Counsel, then, do you wish to make an opening statement?

MR. ROACH: Yes, Your Honor.

Before beginning, there is a housekeeping procedure. There is a motion in limine on file. The parties have filed motions in limine regarding the defendant's prior convictions.

THE COURT: Yes.

Do you want to be heard on that?

MR. ROACH: Yes, Your Honor.

A P P E N D I X 4

CA NO. 20-50204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, Defendant-Appellant.	D.C. No. 2:18-cr-00742-RGK

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. GARY KLAUSNER
United States District Judge

CARLTON F. GUNN
Attorney at Law
65 North Raymond Ave., Suite 320
Pasadena, California 91103
Telephone (626) 667-9580

Attorney for Defendant-Appellant

II.

STATEMENT OF ISSUES PRESENTED

A. MUST MR. CEJA'S CONVICTIONS BE VACATED BECAUSE HIS WAIVER OF THE RIGHT TO A JURY TRIAL WAS INVALID?

1. Was Mr. Ceja's Waiver Invalid Because Rule 23(a) of the Federal Rules of Criminal Procedure Requires the Defendant to Waive the Right to a Jury Trial in Writing and There Was No Written Waiver Here?

2. Was Mr. Ceja's Waiver Invalid Even If Oral Waivers Are Sometimes Acceptable Because the District Court's Colloquy Fell Short of What This Court's Case Law Requires?

B. MUST MR. CEJA'S CONVICTIONS BE VACATED BECAUSE THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS CONSIDERATION OF A MOTION FOR SUBSTITUTE COUNSEL?

1. Did the District Court Abuse Its Discretion by Applying an Incorrect Legal Standard in Relying on the Ground that "There's No Showing of Inadequacy of Counsel?"

2. Did the District Court Abuse Its Discretion by Failing to Make an Adequate Inquiry?

* * *

C. MUST A CONVICTION OF DISTRIBUTION OF AT LEAST 50 GRAMS OF METHAMPHETAMINE BE VACATED BECAUSE THE EVIDENCE ESTABLISHED TWO DISTRIBUTIONS OF ONE OUNCE OF METHAMPHETAMINE RATHER THAN A SINGLE DISTRIBUTION OF TWO OUNCES OF METHAMPHETAMINE?

D. MUST MR. CEJA'S SENTENCE BE VACATED BECAUSE THE DISTRICT COURT ERRED IN TREATING MR. CEJA'S PRIOR CONVICTIONS FOR POSSESSION OF METHAMPHETAMINE FOR SALE UNDER CALIFORNIA HEALTH & SAFETY CODE § 11378 AS CONTROLLED SUBSTANCE OFFENSES UNDER THE CAREER OFFENDER GUIDELINE?

1. Does a Conviction for Possession of Methamphetamine for Sale Under California Health & Safety Code § 11378 Fail to Qualify as a Controlled Substance Offense Because the California Methamphetamine Statutes Include Optical and Geometrical Isomers and the Federal Statutes Include Only Optical Isomers?

2. Did the District Court Violate Rule 32(i)(3) of the Federal Rules of Criminal Procedure by Failing to Make an Express Finding About Whether Geometrical Isomers of Methamphetamine Exist?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory provisions are included in the Statutory Appendix.

III.

BAIL STATUS OF DEFENDANT

Mr. Ceja is in custody with a projected release date of March 5, 2036.

IV.

STATEMENT OF CASE

A. MR. CEJA IS INDICTED IN 2018 FOR DISTRIBUTION OF METHAMPHETAMINE IN 2014.

On October 25, 2018, Mr. Ceja and several codefendants were indicted for various drug offenses. The counts in which Mr. Ceja was charged alleged conspiracy to distribute methamphetamine beginning on a date unknown and continuing to November 21, 2014 (Count One); distribution of at least 50 grams of methamphetamine on October 29, 2014 (Count Five), as well as distribution on premises where a minor was present (Count Six) and within 1,000 feet of a school (Count Seven); and distribution of at least 5 grams of methamphetamine on November 5, 2014 (Count Eight). *See* ER-148–53; ER-157–60. There were also additional counts charging only other defendants with distribution of methamphetamine on October 15, 2014 (Counts Two and Three), October 21, 2014 (Count Four), and November 21, 2014 (Count Nine). *See* ER-154–56; ER-161. All of the distributions were also alleged as overt acts in furtherance of the conspiracy. *See* ER-150–53.

Several months after the indictment, Mr. Ceja was arrested, was given

appointed counsel, and pled not guilty. *See* RT(2/20/19). He used a Spanish interpreter, *see* RT(2/20/19) 4, and continued to use an interpreter throughout the proceedings, *see* ER-11; ER-45; ER-131; ER-141; RT(3/26/19) 4; RT(4/4/19) 4.

B. MR. CEJA REQUESTS NEW COUNSEL AND THE COURT DENIES THE REQUEST ON THE GROUND THERE IS NO SHOWING OF INADEQUACY OF COUNSEL.

On July 26, 2019, Mr. Ceja's attorney filed an "Ex Parte Application for Order to Schedule Status of Counsel Hearing." ER-147. The court granted the application and scheduled a hearing on August 6, 2019. *See* CR 108.

At the hearing, the court met with Mr. Ceja and his attorney in camera. *See* ER-141. Mr. Ceja told the court he needed help because he had a drug problem and was seeking a drug program or house arrest. *See* ER-142. The court asked the attorney if he had talked to Mr. Ceja about this, and the attorney told the court:

> Your Honor, we have reviewed and rejected a plea agreement. We've done a reverse proffer with the government. And he says that he wants to go to trial. He says he wants another lawyer that can help him.

ER-142.

The court noted Mr. Ceja had not asked for another attorney and recessed for Mr. Ceja and his attorney to further discuss the matter. *See* ER-142–43. When the court returned, Mr. Ceja clarified, "I want to change my attorney because as my attorney, he is not helping me." ER-143. The court asked, "In what way?," and Mr. Ceja replied:

> He wants me to accept ten years, and I don't think that's right. And as my attorney, he's not helping me to do the things that I'm telling him to do. That's why I would like to know if you

> can provide me with another attorney who will help me.

ER-143.

The court responded by telling Mr. Ceja:

> Another attorney may give you exactly the same advice. They are required to tell you what they think about the case. They are required to tell you what they think is best for you. And then it's your choice either to accept it or not. But their job is not to tell you what you want to hear. It's to tell you what they think is best for you and then you can make the choice. And there's no indication that another attorney would tell you anything else.

ER-144. The court then asked, "Is there anything specifically that he has done that you think is inadequate or improper?," and Mr. Ceja replied, "Well, he wanted me to sign for ten years, and that's a lot of time." ER-144. The court told Mr. Ceja he did not have to sign for ten years and it was his choice, and Mr. Ceja replied, "But I told him to help me with a rehab program for the drugs, whatever is needed because I have to take care of my children who are outside." ER-144.

The court then turned to Mr. Ceja's attorney and asked:

> Counsel, do you wish to be heard? I haven't heard anything to justify inadequacy of counsel. Is there anything else you can add?

ER-144. The attorney said he had nothing to add, he saw no conflict, and he requested a hearing only "because [Mr. Ceja] wanted to have a hearing to talk to you about getting a new lawyer." ER-145. The court then denied the request, stating "there's no showing of inadequacy of counsel." ER-145.

* * *

C. MR. CEJA'S ATTORNEY FILES ANOTHER REQUEST FOR A HEARING REGARDING REPRESENTATION, MR. CEJA WITHDRAWS THE REQUEST, AND THE COURT ACCEPTS AN ORAL WAIVER OF THE RIGHT TO A JURY TRIAL AFTER A BRIEF COLLOQUY.

On February 17, 2020, Mr. Ceja's attorney filed a second application for a hearing on representation, titled "Ex Parte Application for Order to Schedule a Hearing Regarding Defendant's Request for New Counsel or to Proceed Pro Per." ER-138. The attorney indicated at the subsequent status conference that Mr. Ceja had changed his mind. *See* ER-132. The attorney also said Mr. Ceja would be proceeding to trial, but would waive the right to a jury trial. *See* ER-134.

The court did not have Mr. Ceja review and sign a written waiver, but engaged in the following oral colloquy.

> THE COURT: Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?
> THE DEFENDANT: Yes.
> THE COURT: Okay. You understand that you have a right to have a jury make that decision, and a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense?
> Do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: And until and unless they do, you have got a right to be presumed innocent.
> But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision.
> Is that agreeable with you?
> THE DEFENDANT: Yes.

ER-134–35. The court also found that the waiver "seems to be knowing, intelligent, free and voluntary" when the prosecutor asked the court to make findings that Mr. Ceja appeared competent. ER-135.

D. THE PARTIES FILE JOINT JURY INSTRUCTIONS AND A JOINT PROPOSED VERDICT FORM DESPITE THE WAIVER, BUT THE COURT BRIEFLY CONFIRMS THE WAIVER AND GOES FORWARD WITH A COURT TRIAL.

Despite the waiver, the parties filed joint proposed jury instructions and a proposed verdict form shortly before trial. *See* ER-106–28. The court did not acknowledge these filings when the parties appeared for trial, but simply asked, "Are both sides ready?," and "both sides have waived jury; is that correct?" ER-45. The prosecutor and defense attorney both said this was correct, and the court then asked Mr. Ceja, "That is agreeable with you sir; is that correct?" ER-45. Mr. Ceja responded, "Yes." ER-45.

E. THE COURT FINDS MR. CEJA GUILTY IN A ONE-DAY COURT TRIAL.

1. A Supervising Detective Testifies About Undercover Purchases by an Informant on October 15, 2014, October 29, 2014, and November 5, 2014.

The government presented evidence of undercover purchases by an informant on three of the dates alleged in the indictment. Its first two witnesses were a translator who prepared transcripts of recordings of meetings and calls the informant had with Mr. Ceja or other defendants, *see* RT(3/10/20) 16-18, and a detective who supervised the informant and participated in surveillance, *see* RT(3/10/20) 19-82. The detective explained the informant had worn a recording

isomers. *See id.* at 485.

The probation office reversed its position in the final presentence report prepared after trial, however. It opined in the final report that the prior California possession of methamphetamine for sale convictions did make Mr. Ceja a career offender, based on withdrawal of the opinion in *Lorenzo* and a new opinion in *United States v. Rodriguez-Gamboa*, No. 19-50014. *See* PSR, ¶¶ 37, 45, 47, 51 & nn.1, 2.

The career offender guideline increased Mr. Ceja's guideline range from 32 to 37, *see* PSR, ¶¶ 35-37, increased his criminal history category from V to VI, *see* PSR, ¶¶ 50-51, and increased his guideline range to 360 months to life, *see* PSR, ¶ 102. The defense objected to application of the career offender guideline, *see* ER-36, but the district court followed the recommendation in the final presentence report, *see* ER-15. The court did vary downward because of Mr. Ceja's reliance on the probation office's pretrial recommendation, but only to 240 months. *See* ER-15.

V.

SUMMARY OF ARGUMENT

All of Mr. Ceja's convictions must be vacated for two reasons. The first reason is that Mr. Ceja's jury waiver was invalid. To begin, the plain language of Rule 23(a) of the Federal Rules of Criminal Procedure requires that jury waivers be in writing, and Mr. Ceja's waiver was only oral. While some cases have allowed oral waivers, and one of those is an old case in this circuit, a later case in this circuit has left the question open. Allowing oral waivers conflicts with the

plain language of Rule 23(a), and that plain language should be enforced.

Further, there was an insufficient colloquy even if oral waivers are sometimes acceptable. The Court's case law requires a more in-depth colloquy when there are facts that raise concern about the defendant's ability to understand, such as a defendant's inability to speak English or lack of education. The colloquy the case law requires includes informing the defendant that (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial. The colloquy here fell short because it did not inform Mr. Ceja the twelve members of the jury would be drawn from the community and did not inform him he would be allowed to participate in selection of the jury.

The second reason all of Mr. Ceja's convictions must be vacated is that the district court abused its discretion in its consideration of Mr. Ceja's request for substitute counsel. First, the court abused its discretion by applying an incorrect legal standard, because its focus on the adequacy of counsel overlooked case law requiring a focus on the nature and extent of the conflict between the defendant and counsel. Second, the court abused its discretion by failing to make a sufficient inquiry. Case law requires a probing and in-depth inquiry, not a few cursory questions like the court asked here.

There is also a third reason to vacate the conviction for distribution of more than 50 grams of methamphetamine on October 29, 2014. The evidence for that date, viewed in the light most favorable to the government, showed not a single delivery of two ounces of methamphetamine but two deliveries of one ounce – one at Ms. Ramirez's house and the other at the parking lot. Separate deliveries of a

controlled substance are separate distribution offenses under 21 U.S.C. § 841(a)(1). There were thus two distributions of one ounce of methamphetamine, not a single distribution of two ounces of methamphetamine. Since one ounce is less than 50 grams, Mr. Ceja was not guilty of distribution of more than 50 grams.

Finally, Mr. Ceja's sentence must be vacated even if his convictions are not. First, though a holding in *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020) – that a district court finding that geometrical isomers do not exist eliminates the overbreadth of the California methamphetamine statutes – is binding on a panel in this case, the defense respectfully disagrees with that holding and reserves the right to seek en banc and/or Supreme Court review. Second, there must be a remand regardless of *Rodriguez-Gamboa*, because the defense objected that the non-existence of geometrical isomers was a factual question requiring a finding, and the district court failed to make a finding. That failure violated Rule 32(i)(3) of the Federal Rules of Criminal Procedure, which requires express findings on objections to the presentence report.

VI.

ARGUMENT

A. MR. CEJA'S CONVICTIONS MUST BE VACATED BECAUSE HIS WAIVER OF THE RIGHT TO A JURY TRIAL WAS INVALID.

1. Standard of Review.

The adequacy of a jury waiver is reviewed de novo. *United States v. Laney*,

881 F.3d 1100, 1106 (9th Cir. 2018). An invalid waiver is structural error which requires reversal. *Id.* at 1108.

2. Mr. Ceja's Waiver Was Invalid Because Rule 23(a) of the Federal Rules of Criminal Procedure Requires the Defendant to Waive the Right to a Jury Trial in Writing and There Was No Written Waiver Here.

The most basic principle of statutory construction is that plain language controls and unambiguous statutory language must be enforced according to its terms. *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). This principle applies in spades here. Rule 23(a) of the Federal Rules of Criminal Procedure provides – as plainly as could be – that "the trial must be by jury unless," inter alia, "the defendant waives a jury trial *in writing*." (Emphasis added.) Mr. Ceja's waiver was not in writing.

There are circuits that have refused to enforce this plain language and held waivers may be signed by counsel alone or be purely oral. *See United States v. Carmenate*, 544 F.3d 105, 109 (2d Cir. 2008), *and cases cited therein*. This Court has stated an oral waiver "may, under certain circumstances," be sufficient, *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971), but in most cases has gone on to find the waiver in the case at bar insufficient. *See Laney*, 881 F.3d at 1107-08; *United States v. Shorty*, 741 F.3d 961, 966-69 (9th Cir. 2013); *United States v. Saadya*, 750 F.2d 1419, 1420-21 (9th Cir. 1985); *United States v. Reyes*,

603 F.2d 69, 71-72 (9th Cir. 1979); *Guerrero-Peralta*, 446 F.2d at 877.[4] In one old case, the Court actually upheld an oral jury waiver – in a brief two-page opinion, *see United States v. McCurdy*, 450 F.2d 282 (9th Cir. 1971)[5] – but the Court has subsequently stated the question of whether an oral waiver can be sufficient remains open.

> With respect to a defendant's waiver of his right to a constitutional jury of twelve under Rule 23(b), we observed in *dicta* that "an oral stipulation may, under certain circumstances, satisfy the Rule, but it must appear from the record that the defendant personally gave express consent in open court, intelligently and knowingly, to the stipulation." *Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971). Subsequently, in *Reyes*, we cast some doubt on whether an oral stipulation might be enough and emphasized the need to follow the explicit language of Rule 23(b), which calls for stipulations in writing. *Reyes*, 603 F.2d 69, 71-72 (9th Cir. 1979). At the same time, we suggested that a thorough investigation by the district judge might be adequate to validate an oral waiver under Rule 23(b). However, we did not *decide* whether under appropriate circumstances an oral waiver might suffice, as we reversed on the ground that there was no indication in the record that the defendant consented to the waiver at all.

United States v. Olano, 934 F.2d 1425, 1437-38 n.22 (9th Cir. 1991) (emphasis in original), *rev'd on other grounds*, 507 U.S. 725 (1993).[6]

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[4] In some of these cases, the waiver was not a waiver under Rule 23(a) of the right to any jury at all, but a waiver under Rule 23(b) of the right to a jury of twelve.

[5] There are also more recent cases in which the Court has upheld an oral waiver, *see United States v. Reczko*, 818 Fed. Appx. 701, 704 (9th Cir. 2020) (unpublished); *United States v. Liang*, 727 Fed. Appx. 927, 930-31 (9th Cir.) (unpublished), *cert. denied*, 139 S. Ct. 288 (2018), but these are unpublished dispositions which are not precedential.

[6] This discussion was of the waiver of a jury composed of twelve persons under Rule 23(b), but the Court has analyzed that waiver requirement interchangeably with a complete jury waiver under Rule 23(a). *See Saadya*, 750

If the Court needs to resolve the question in this case – which it may not, *see infra* – it should apply the cardinal principle that plain and unambiguous language must be enforced according to its terms. Rule 23(a)'s plain language should be enforced and Mr. Ceja's waiver found invalid because it was not in writing.

3. Mr. Ceja's Waiver Was Invalid Even if Oral Waivers Are Sometimes Acceptable Because the District Court's Colloquy Fell Short of What This Court's Case Law Requires.

Assuming arguendo that an oral waiver is acceptable in some circumstances, it must still be knowing and intelligent. *Shorty*, 741 F.3d at 966. The district court has a "serious and weighty responsibility" to assure this. *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)). It was not assured here for two reasons.

First, there is the absence of a written waiver. A written waiver complying with Rule 23(a) "creates a presumption that the waiver is a voluntary, knowing and intelligent one." *United States v. Cochran*, 770 F.2d 850, 851 (9th Cir. 1985). But the situation is very different when there is not a written waiver. As this Court explained in *Shorty*:

> The two forms of waiver are not equal, however. The writing confers on a waiver the presumption that it was made knowingly and intelligently. (Citations omitted.) There is no writing in this case, and therefore, in determining whether [the defendant's] oral waiver was knowing and intelligent, we

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F.2d at 1420 (Rule 23(a) case relying on Rule 23(b) cases of *Reyes* and *Guerrero-Peralta*).

> proceed without any presumption that it was.

Id., 741 F.3d at 966.

Second, in at least some circumstances, there must be what this Court has characterized as "an in-depth colloquy." *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994). Even in an ordinary case with a written waiver, the Court has "implore[d]" district courts to inform defendants that "(1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *Cochran*, 770 F.2d at 853 (quoting *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983)). And the Court has *required* such a colloquy where there are additional facts raising concern. The Court first did this in *Christensen*. The Court held there, even when there was a written waiver, that the additional fact of "mental or emotional instability" required an in-depth colloquy. *Id.* *See Shorty*, 741 F.3d at 966 (discussing *Christensen*). The Court extrapolated to such a requirement based on *Cochran*'s "imploring."

> In cases where the defendant's mental or emotional state is a substantial issue, "imploring" district courts to conduct fuller colloquies (citations omitted) is not enough. We must require them to do so. Christensen rightly points out that *Cochran* does everything but require such colloquies: "there is every reason for district courts to conduct a colloquy . . . and no apparent reason for not doing so." *Cochran*, 770 F.2d at 852; *see id.* at 853 ("By asking appropriate questions the district court will also be better able to perform its task of determining whether a proposed waiver is in fact being offered voluntarily, knowingly and intelligently"). The suspected presence of mental or emotional instability eliminates any presumption that a written waiver is voluntary, knowing or intelligent.

Christensen, 18 F.3d at 825-26.

Next, in *United States v. Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997),

where the defendant did not speak English, the Court held the language barrier was a "salient fact" that required an in-depth colloquy. *Id.* at 1003. *See also Shorty*, 741 F.3d at 966-67 (discussing *Duarte-Higareda*). Finally, in *Shorty*, where there was not a written waiver, the Court held an in-depth colloquy was required because the district court had been informed the defendant had a low I.Q. and was "learning disabled." *Id.*, 741 F.3d at 967-68.

The Court also made clear in *Shorty* what the in-depth colloquy must include. *See United States v. Osuna-Alvarez*, 614 Fed. Appx. 353, 355 (9th Cir. 2015) (unpublished) (stating *Shorty* "clarified" what in-depth colloquy must include). Drawing on the facts the Court "implored" courts to explain in *Cochran* and required courts to explain in *Christensen*, the Court held: "An in-depth colloquy . . . includes instructing the defendant of the four facts listed in *Cochran*," *Shorty*, 741 F.3d at 966, *i.e.*, that (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial, *id.* (citing *Cochran*, 770 F.2d at 853). And beyond this, "the district court should question the defendant to ascertain whether the defendant understands the benefits and burdens of a jury trial and freely chooses to waive a jury." *Duarte-Higareda*, 113 F.3d at 1002. *See also Shorty*, 741 F.3d at 967 (noting deficient colloquy was aggravated because "the court did not question [the defendant] in a way that would ensure that he understood the two pieces of information he was given").

The Court found the colloquy insufficient in *Christensen* because the district court told the defendant only that there was a right to "a trial in which 12 jurors have to find you guilty" and there would instead be "trial just by the Court."

Id., 18 F.3d at 823. The Court found the colloquy insufficient in *Shorty* because the district court informed the defendant only that a jury consists of twelve jurors and the court would decide instead. *See id.*, 741 F.3d at 967.[7] And the deficiency in *Shorty* was aggravated by the absence of a written waiver. As this Court summarized the deficiencies there:

> First, unlike the courts in *Christensen* and *Duarte-Higareda*, and contrary to the provisions of Rule 23, [the district court] did not obtain a written waiver. As a result, Shorty's waiver is not presumed valid, and his oral waiver – his only waiver – is subject to greater scrutiny. Second, the court was aware of an additional, "salient fact" that should have put it on notice that Shorty's oral waiver "might be less than knowing and intelligent": Shorty informed the court that he has a "low I.Q.," and his attorney told the court that Shorty is "learning disabled." Shorty's low I.Q. and learning disability created a significant possibility that he did not understand the important consequences of waiving a jury trial – and it is this understanding at which the "knowing and voluntary" requirement is aimed. *See Christensen*, 18 F.3d at 826. (Footnote omitted.) Third, under the circumstances, the court's colloquy prior to accepting Shorty's waiver was inadequate to ensure that Shorty understood the right he was waiving. The court instructed Shorty on only two of the four facts required: it told him that a jury consists of 12 jurors and that if he waived his right, the court would try his case. Shorty was not advised, however, that he could help choose the jury or that the jury verdict must be unanimous. (Footnote omitted.) Moreover, the court did not question Shorty in a way that would ensure that he understood the two pieces of information he was given.

Shorty, 741 F.3d at 967.

In the present case, there are additional salient facts similar to those in the foregoing cases and a similarly deficient colloquy. One additional salient fact which is similar – indeed, identical – is the same additional salient fact present in *Duarte-Higareda* – a non-English speaking defendant. Another additional salient

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[7] In *Duarte-Higareda*, there was no colloquy at all. *See id.*, 113 F.3d at 1003.

fact which is similar is that Mr. Ceja is not an educated, sophisticated man. *See* PSR, ¶ 84 (noting Mr. Ceja attended school in Mexico and "has the equivalent of an eight-grade [sic] education"). *Compare United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (recognizing "the sufficiency of the colloquy is highly dependent on the education and legal sophistication of the defendant" and describing defendant in case at bar as "a practicing attorney and partner in a major law firm"); *United States v. Bishop*, 291 F.3d 1100, 1114 (9th Cir. 2002) (describing defendant as "a sophisticated business proprietor"). *See also Shorty*, 741 F.3d at 968 (distinguishing *Bishop* and out-of-circuit cases that "all involve highly educated defendants").

In addition to these additional salient facts, there was evidence of uncertainty both before and after the waiver which should have triggered inquiry. First, Mr. Ceja had indicated through counsel – for a second time – that he wanted a change in representation, but then withdrew that request at the pretrial status conference. Second, despite the purported waiver at the status conference, the parties filed joint proposed jury instructions and a joint proposed jury verdict form just two days before trial, as if jury trial was still a possibility.

Finally, there was a deficient colloquy which did not satisfy the requirements established by *Shorty*, *Christensen*, and *Duarte-Higareda*. To begin, the court did little "to ascertain whether [Mr. Ceja] underst[ood] the benefits and burdens of a jury trial and freely [chose] to waive a jury," *supra* p. 21. In two short statements, *compare United States v. Reczko*, 818 Fed. Appx. 701, 704 (9th Cir. 2020) (unpublished) (noting colloquy "spanning more than 10 pages of transcript"), the court told Mr. Ceja only two things. First, the court told Mr. Ceja "you have a right to have a jury make that decision, and [in] a jury trial 12 people

would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense." ER-134. Second, it told him, "but if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision." ER-134–35.

This colloquy was deficient in at least two respects. First, it did not tell Mr. Ceja that the twelve "people" were not people specially selected or hired to determine guilt or innocence in criminal trials, but "members of the community," *Shorty*, 741 F.3d at 966; *Christensen*, 18 F.3d at 825; *Cochran*, 770 F.2d at 853. Second, the court said nothing at all about a separate fact – that the defendant may take part in jury selection. This omission alone matched the omission in *Christensen*, because that was the only separate fact omitted there. *See Shorty*, 741 F.3d at 967 & n.3 (noting colloquy in case at bar included only two of four facts required – that jury consists of twelve jurors and court would try case if jury waived – and *Christensen* colloquy included fact jury must be unanimous).

The facts omitted here are arguably the most important ones to know, *cf. United States v. Beck*, 491 Fed. Appx. 855 (9th Cir. 2012) (unpublished) (noting "the four elements of [the defendant's] jury-trial right," and singling out "his right to personally participate in jury selection"), especially for a non-English speaking defendant from another country. The jury selection process is, in the words of the Supreme Court, "the primary means by which the court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted). A defendant who is not told he can participate in selecting the jury, especially one from another culture with a

different legal system, might well assume the jury is a group of people specially selected or hired to determine guilt or innocence in criminal trials. That would make the jurors little different from "judges too responsive to the voice of higher authority" and/or "the compliant, biased, or eccentric judge," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968), that our jury system guards against.

In sum, the oral waiver here was not valid even if oral waivers are sometimes acceptable. There were facts that required an in-depth colloquy under this Court's case law and the district court did not engage in the required in-depth colloquy.

B. MR. CEJA'S CONVICTIONS MUST BE VACATED BECAUSE THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS CONSIDERATION OF HIS MOTION FOR SUBSTITUTE COUNSEL AT THE AUGUST 6, 2019 HEARING.

1. Standard of Review.

The denial of a motion for substitute counsel is reviewed for abuse of discretion. *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001). *See, e.g., United States v. Velazquez*, 855 F.3d 1021, 1034 (9th Cir. 2017). A district court "by definition" abuses its discretion when it applies an erroneous legal standard. *Koon v. United States*, 518 U.S. 81, 100 (1996). *See also Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . . ."); *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc) ("The

A P P E N D I X 5

No. 20-50204

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LUIS FERNANDO CEJA,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. 2:18-CR-00742-RGK

GOVERNMENT'S ANSWERING BRIEF

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GOVERNMENT'S ANSWERING BRIEF

I

INTRODUCTION

Defendant is a career drug offender who was convicted in this case for three sales of methamphetamine totaling 138.1 grams to an informant. The transactions were monitored by law enforcement surveillance and were audio- and video-recorded. Defendant's appeal is based primarily on allegations of procedural error that he did not raise in the district court.

Months before trial, defendant requested the appointment of substitute counsel, because his appointed attorney was not achieving the result defendant wanted—a rehab program and little or no jail time—and was recommending a plea deal with a 10-year sentence. Defendant did not (and still does not) identify any conflict resulting in a lack of communication that prevented an adequate defense.

Defendant later renewed but quickly withdrew a similar request, and affirmatively stated he wanted to proceed to trial with his assigned counsel, which he did. He elected to waive his right to a jury trial. He made the waiver orally, in open court, after a colloquy in which he acknowledged that he understood he had a right to trial by a jury composed of 12 people who would have to unanimously agree that he was guilty beyond a reasonable doubt for him to be convicted and that, by waiving that right, he was agreeing that the judge alone would determine his guilt.

After the court convicted defendant on the four counts on which he was tried, it sentenced him to 20 years in prison. The applicable Guideline range, established by the career offender guideline, was 360-months to life. The career offender guideline applied because defendant

had two felony convictions for possession of methamphetamine for sale in violation of California Health and Safety Code § 11378, which this Court has held constitute controlled substance offenses.

On appeal, defendant asserts that the *in camera* hearing on his first request for new counsel was procedurally defective; that his oral jury waiver was invalid; that one count of conviction for distributing over 50 grams (two ounces) of methamphetamine on October 29, 2014 was actually two separate distributions of one ounce each; and that the district court violated Rule 32 by not making an express finding that geometric isomers of methamphetamine do not exist—a scientific reality that this Court has recognized is beyond dispute. For the reasons discussed below, none of these claims has any merit or warrants any relief.

II

ISSUES PRESENTED

A. Whether defendant's oral waiver of jury trial, which defendant confirmed in open court after a colloquy with the court was knowing and intelligent, and therefore constitutionally valid.

B. Whether defendant waived his claim that he was entitled to substitute counsel by withdrawing his objection and affirmatively telling the district court he wanted to proceed to trial with his existing counsel; if not, whether the district court's denial of the initial request constituted plain error warranting reversal.

C. Whether the evidence permitted a rational trier of fact to find that defendant engaged in a single sale of two ounces of methamphetamine for $750 on October 29, 2014, when he accepted full payment for that amount, handed the buyer one ounce, and then had the buyer follow him to a second location for the remaining ounce; if not, whether defendant is entitled to any relief on his challenge to his conviction on that count.

D. Whether the district court plainly violated Fed. R. Crim. P. 32 by failing to make an explicit finding that geometric isomers of methamphetamine do not exist, when this Court has ruled as a matter of law that they do not exist and defendant did not, in any event, affirmatively assert that geometric isomers of methamphetamine do exist or offer any evidence on that issue in the district court.

III

STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

The district court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurisdiction rests on 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. The district court entered judgment on July 22, 2020. (ER-1–6).[1] Defendant filed a timely notice of appeal later that day. (ER-169–75.) *See* Fed. R. App. P. 4(b)(1)(A)(i). Defendant is in custody, serving the 240-month sentence imposed in this case.

B. Statement of Facts and Procedural History

1. Defendant's drug dealing

Defendant has a history of drug-dealing that dates back to 2007 and continued after 2014, when the conduct at issue in this case took

[1] "ER" refers to the Excerpts of Record filed by defendant, "SER" refers to the government's Supplemental Excerpts of Record, and "AOB" refers to Appellant's Opening Brief, such references are followed by applicable page numbers. "Ex." refers to digital exhibits introduced at trial, which the government is moving to transmit to the court, and is followed by applicable exhibit number and time stamp. "CR" refers to the Clerk's Record in the district court and is followed by the docket number. "PSR" refers to the Presentence Investigation Report, which was filed under seal by defendant, and is followed by applicable paragraph references.

place. (PSR ¶¶ 45-48, 56.) He was convicted in 2007 of felony possession of a controlled substance (methamphetamine) in violation of California Health and Safety Code § 11378. (PSR ¶ 45.) He was convicted of the same offense, as well as felony possession of a controlled substance in violation of California Health and Safety Code § 11350(a), in 2011, after 17 bags of methamphetamine were found in his car. (PSR ¶ 47.) And in 2015, he was convicted of transportation or sale of a controlled substance in violation of California Health and Safety Code § 11379(a). In that instance, defendant arranged to sell 18 pounds of methamphetamine to an informant by turning over 10 pounds at one location and the remaining 8 pounds at his residence. (*Id.*)

The charges in this case arose from defendant's conduct in the fall of 2014, when he—along with co-defendants Brenda Jimenez, Luz Elena Ramirez, and others—entered into a conspiracy to distribute methamphetamine to a confidential informant. (ER-148–53). Over a three-week period, defendant (known as "Chako") and his co-conspirators sold a total of 138 grams (5 ounces) of actual methamphetamine to the confidential informant. (PSR ¶¶ 14-17, 23; 2-

SER-356.) Defendant provided the drugs; his co-conspirators helped broker the deals. (2-SER-356–57.) The sales were effected in three controlled buys that were audio- and video-recorded by the informant, under the direction of Los Angeles Police Department Detective Nicholas Williams, who was part of a joint federal-state task force on violent gangs. (1-SER-288–94.)

a. October 21, 2014

In the first deal, on October 21, 2014, the informant contacted Jimenez about purchasing two ounces of methamphetamine. (ER-48; 2-SER-314, 357–58.) Jimenez called Ramirez, who, in turn, called defendant and asked him if he could get two ounces of methamphetamine for the informant. (2-SER-357–58.) Jimenez drove the informant to Ramirez's home and Ramirez called defendant to arrange to pick up the two ounces of methamphetamine. (ER-48–49; 2-SER-318–20, 357–58.) The three left Ramirez's home, drove to a body shop, and pulled up behind a black BMW, where defendant was waiting in the driver's seat. (ER-50; 2-SER-316, 358–59.)[2]

[2] The video from this transaction did not positively show defendant, who remained in the car, but Ramirez positively identified (continued . . . .)

The informant counted out the $920 purchase price and handed it to Ramirez. (ER 50-51; 2-SER-317–18.) Ramirez took the money and got into defendant's car, where she handed the money to defendant and he gave her two ounces of methamphetamine in exchange. (ER-50–51; 2-SER 316-17, 359–60.) Ramirez returned to Jimenez's car, and handed the methamphetamine to the informant in two plastic bindles. (ER-51–52; 2-SER-317–18, 360.) The informant asked Ramirez if she could get additional drugs—at least a pound (or "P") (2-SER-318, 349)—and they made a loose arrangement to meet up again. (ER-53; 2-SER-318.)

The informant followed post-operation procedures and turned the drugs over to Detective Williams. (ER 52-53; 1-SER-293; 2-SER-318–19.) They tested positive for 55.23 grams of pure methamphetamine. (2-SER-390–91.)

b. October 29, 2014

On October 29, 2014, the informant called Ramirez to arrange an additional purchase of methamphetamine. (2-SER-319–20, 362–63; Ex.

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defendant as the driver/seller (2-SER-358-61.) and the officers' onsite surveillance confirmed that the driver was a male Hispanic, 30-35 years old (2-SER-352.)

5, 0:00–0:14.) Ramirez asked the informant if the informant wanted one or two ounces. (2-SER-320; Ex. 5, 0:36–0:38.) The informant said that if she could be introduced to defendant she would purchase two ounces, but otherwise she would buy just one. (2-SER-320–21, 362–63; Ex. 5, 0:38–0:44.) Ramirez—who did not want to introduce customers directly to defendant, as that would potentially cut her out of brokering future deals (2-SER-344, 361)—said that defendant "doesn't like to meet nobody" (2-SER-321; Ex. 5, 0:43–0:46.) The informant said, "Just give me one for right now then." (2-SER- 321; Ex. 5, 0:47–0:50.)

The informant drove to Ramirez's house with sufficient cash to buy two ounces and she told Ramirez that she just wanted to deal with defendant. (2-SER-321.) Ramirez called defendant and asked him to bring methamphetamine to her house. (2-SER-321, 363–64.)

Defendant arrived in a silver Nissan and parked in Ramirez's driveway, one block (less than 500 feet) from a middle school. (ER-56-57; 2-SER-326–29, 363, 365, 369–72.) Ramirez went outside to meet him. (2-SER-364–65.) The informant followed her. (*Id.*)

Defendant remained in his car and handed the informant a plastic bindle containing one ounce of methamphetamine. (ER-57–58; 2-SER-

323–25; Ex. 6, 0:04; Ex. 7, 0:10.) The informant asked, "How much it's going to be?" (ER 163; 2-SER-419; Ex. 6, 0:09.) Defendant initially said, "I give these two for a hundred now. Later, I'll give you let you have them for one hundred and fifty." (*Id.*; Ex. 6, 0:09–0:17.) The informant then asked again, "How much are you giving it to me?" (*Id.*; Ex. 6, 0:18–0:24.) Defendant corrected himself and said, "Uhm, 7-50." (*Id.*) The informant confirmed that the price of $750 was for two ounces of methamphetamine. (*Id.*) Defendant confirmed it was "for the two," and "by the next time, I'll lower it." (*Id.*) The informant counted out $760 aloud, handed it to defendant for the two ounces of methamphetamine, and told defendant, "You owe me ten dollars." (ER 164; 2-SER-420; Ex. 6, 0:40–1:00.)

Defendant, however, had only brought one ounce of methamphetamine with him. (ER-59; 2-SER-324–25, 420; Ex. 6, 1:02–1:15.) He told the informant to "follow me," to get the remaining ounce of methamphetamine that she had just purchased. (2-SER-324-25, 329, 420; Ex. 6, 1:02–1:15; Ex. 7, 0:25–0:36.) The informant replied, "I'll follow you." (*Id.*) The informant, with surveillance trailing, followed defendant in her car to the parking lot of a shopping center. (ER 63; 2-

SER-329.) Defendant parked and entered a nearby apartment complex. (ER-63–64; 2-SER-329–30.). When he re-emerged, he was cupping in his hand a small plastic bindle of methamphetamine. (ER 64; 2-SER-330, 332, 392.)

Defendant walked to the parking lot where the informant—now eating a bag of chips—was waiting for him. (2-SER-330–32.) Defendant placed the bindle into the bag of chips. (2-SER-330–31; Ex. 8, 0:10.) He did not take any chips out of the bag and was not eating anything or holding anything in hands as he walked away. (ER-67; 2-SER-330–33.) Before defendant left, he indicated that the informant should let him know if she wanted more. (2-SER-330–31.)

Detective Williams later recovered the two plastic bindles of methamphetamine, which chemical testing confirmed contained 55.46 grams of pure methamphetamine. (2-SER-332, 392.)

c. November 5, 2014

On November 5, 2014, the informant called defendant directly and arranged to purchase an ounce of methamphetamine for $380 at a gas station parking lot. (2-SER-334–38.) The informant drove to the location, parked next to defendant's car, and exchanged cash for an

ounce of methamphetamine. (*Id.*) They discussed further drug sales for several minutes. Defendant indicated he could supply "pounds" of drug, heroin ("black") and "very good coke." (2-SER-337–38, 349–50.)

During the transaction, defendant received a phone call from Ramirez. (2-SER-338–39.) After the sale, he headed to Ramirez's house, picked her up and drove her to his house, which enabled law enforcement to identify him. (2-SER-339.)

Chemical testing confirmed that the drugs defendant sold the informant on November 5, 2014 contained 27.41 grams of pure methamphetamine. (2-SER-392–93.)

2. Indictment

Defendant was indicted in October 2018 along with Ramirez, Jimenez, and three other co-defendants. (CR 1; ER-148–61.) Defendant was charged in four counts that went to trial: conspiracy to distribute methamphetamine from October 15, 2014 (or earlier)[3] to November 21, 2014, in violation of 21 U.S.C. § 846 (count one); distribution of at least

[3] The indictment charges that the conspiracy began "on a date unknown." (SER-148.) October 15, 2014 is the date of the first overt act. (SER-150.)

50 grams of methamphetamine on October 29, 2014, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A)(viii) (count five); distribution of methamphetamine within 1,000 feet of a school on October 29, 2014, in violation of 18 U.S.C. § 860(a) (count seven); and distribution of at least 5 grams of methamphetamine on November 5, 2014, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(viii) (count eight). (ER-148–61.) The statutory sentencing range for counts one, five, and seven was 10-years to life. 21 U.S.C. § 841(b)(1)(A)(viii). The statutory range for count eight was five-40 years. 21 U.S.C. § 841(b)(1)(B)(viii).

Defendant was arrested in February 2019 and ordered detained. (CR 46, 47.) Defendant used a Spanish interpreter throughout the proceedings. (*See id*; 1-SER-274.)

Ramirez, Jimenez, and two other co-defendants pleaded guilty before defendant went to trial. (PSR ¶¶ 8-11.)

3. Defendant's requests for new appointed counsel

a. First request – August 6, 2019 hearing

In July 2019, defendant's appointed attorney filed an *ex parte* application seeking a hearing "regarding status of counsel." (ER-147.) The two-sentence application did not provide a reason for the request.

b. February 2020 withdrawn request

In February 2020, defendant again sought a hearing on a request for new counsel or, alternatively to proceed pro se. (CR 154, 158, 159.) The court set a hearing for February 25, 2020. (CR 163.)

At the hearing, defense counsel informed the court that defendant changed his mind and was not asking for new counsel or to represent himself. (ER-132.) Defendant personally confirmed on the record that he was withdrawing his request and wanted to continue with his current attorney, stating, "That's right, yes, I do want him." (ER-132.)

4. Defendant's waiver of jury trial

After withdrawing his request for new counsel, defendant advised the district court that he wished to waive jury trial and proceed to a bench trial on March 10. (ER-134.)

COURT:	Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?
DEFENDANT:	Yes.
COURT:	Okay. You understand that you have a right to have a jury make that decision, and a jury trial 12 people would have to agree unanimously beyond a

	reasonable doubt to find you guilty of the offense. Do you understand that?
DEFENDANT:	Yes.
COURT:	And until and unless they do, you have got a right to be presumed innocent. But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision. Is that agreeable with you?
DEFENDANT:	Yes.
COURT:	Counsel, do you join?
DEFENSE COUNSEL:	Yes, Your Honor.

(ER-134.) The court found that "[f]rom the appearances we have here in court and from his appearance today," the jury trial waiver "seems to be knowing, intelligent, free and voluntary on the part of the defendant." (ER-135.) The issue of a written waiver never came up. (*Id.*)

5. Joint submission of instructions and verdict form for the bench trial

In preparation for the bench trial, the parties jointly submitted brief instructions of law and a proposed verdict form for the court's benefit. (ER-106–28.) Both documents reflected preparation for a bench trial. The instructions, titled "Joint Proposed Instructions," provided an agreed-upon framework for the court's analysis by setting forth the elements of the crimes and relevant theories of criminal liability. (ER-114–28.) They did not include any standard instructions or admonitions for a jury trial. (*Id.*) Apart from citing this Court's model jury instructions as the authority for the elements of each of the counts, they did not contain any reference to a jury. (*Id.*)

The verdict form similarly was titled "Joint Proposed Verdict Form" and made no reference to a jury at all. (ER-106–13.) Each count indicated that it was the court, and not a jury, that would decide the case, stating, "The *Court* finds defendant" guilty or not guilty. (*Id.* (emphasis added).) The verdict form had a signature line for the judge, not a jury foreperson. (ER-113.)

None of the other filings usually attendant for jury trials—*e.g.* trial briefs with anticipated length of trial, evidentiary issues, and the

like; proposed voir dire questions; additional jury instructions—were filed. (*See* CR 182–88.)

6. Confirmation of defendant's jury waiver

The parties appeared for trial two weeks later, on March 10, 2021. (ER-41–44; 1-SER-270.) Before starting the trial, the court confirmed that "both sides have waived jury trial." (ER-45; 1-SER-274.) The AUSA, defense counsel, and defendant himself all agreed that they had. (*Id.*)

The court tentatively granted a government motion *in limine* to admit defendant's prior convictions as impeachment if defendant testified. (1-SER-275–76.)

7. The trial

The government presented its case through four witnesses: (1) Ramirez, who participated in the two October deals (2-SER-354–80); (2) Detective Williams (1-SER-288–99; 2-SER-301–52); (3) the translator who prepared transcripts of the informant's recorded calls and meetings with defendant, Ramirez, and other co-defendants (1-SER-282–87); and (4) a DEA forensic chemist who analyzed the methamphetamine involved (2-SER-381–95).

Defendant testified briefly. (ER-99-102; 2-SER-397–99.) On direct, he answered one question about the October 21 transaction, asserting that he was not in a BMW that day selling two ounces of methamphetamine to Ramirez. (2-SER-397–98.) He answered four questions about October 29. (2-SER-398.) He said he drove to Ramirez's house that day and sold 7 grams of methamphetamine for $160. (*Id.*) He asserted that he put his hand in the informant's bag of chips "[b]ecause she offered them to me." (2-SER-398.) He did not actually deny putting drugs into the bag. (*Id.*) He did not address the November 5 transaction at all. (*Id.*)

On cross-examination, he admitted that he was the man in the videos and on the recorded calls with the informant. (2-SER-399.) He confirmed that he met the informant for the first time on October 29 and reaffirmed his claim that, after having just met her, he "followed her to a parking lot and took potato chips after she offered them to [him]." (2-SER-399–400.)

8. Guilty verdicts

The district court found defendant guilty on all four counts tried: count 1, conspiracy to distribute 50 grams or more of pure

12–13.) He did not ask the court to determine whether there were or were not geometric isomers of methamphetamine, just to take defendant's reliance on the pre-plea report into account. (*Id.*) Defendant addressed the court briefly, asking for a drug program and time served or house arrest. (ER-14.)

The court found that the guideline level 37 and Criminal History Category VI set forth in the PSR "are appropriate." (ER-15.) However, the court stated, it was "varying down" to a sentence of 240 months' imprisonment, rather than the 360-month, low-end of the guidelines range "because of the problem" defense counsel had identified, "as far as depending on the pre-plea report which in inaccurate because [defendant] is a career criminal." (*Id.*)

IV

SUMMARY OF ARGUMENT

Defendant was convicted based on overwhelming evidence, following a fair trial for which he made a rational, informed choice to proceed before a judge represented by a lawyer he approved.

His oral waiver of a jury was valid because it followed a colloquy sufficient to establish that the waiver was knowing and intelligent, and

the district court's findings on that are entitled to deference. The absence of a writing does not make the waiver constitutionally infirm.

Defendant waived any claim that he was entitled to replacement counsel by withdrawing his objection and affirmatively stating that he wanted his current counsel to represent him. Even if not waived, the claim is spurious because: (a) there was not even a hint of a breakdown in communication so severe that it resulted in a total lack of communication preventing an adequate defense; and (b) defendant's satisfaction with his counsel at the time of trial rendered the procedural errors he now attributes to the August 2019 hearing immaterial and harmless. Moreover, the record does not support the claimed errors. Rather, it shows that the court conducted a sufficient inquiry and applied the correct standard.

Defendant's purported sufficiency claim with respect to count five is an effort to circumvent his failure to raise a duplicity objection in district court, thereby waiving it. Even if the claim is considered as framed, a rational fact-finder could conclude that defendant sold two ounces of methamphetamine in one distribution on October 29, particularly since defendant did not argue otherwise. The transfers

were part of a single, uninterrupted transaction with a single buyer for a single price, and occurred at two separate (but nearby) locations at defendant's direction. In any event, even if the October 29 sale is regarded as two distributions, that does not affect defendant's guilt or—on the specific facts of this case—his sentence, and therefore does not warrant appellate intervention.

Finally, the district court did not err in applying the career offender guideline. As defendant recognizes, *Rodriguez-Gamboa II*, 972 F.3d at 1152–54, is binding authority that violations of California Health and Safety Code § 11378 are "controlled substance offenses" that qualified defendant for career offender status. Defendant's claim that the district court violated Fed. R. Crim. P. 32 by not making an explicit finding that geometric isomers of methamphetamine do not exist is meritless. The court was not required to make a specific finding because defendant did not place that factual dispute—now resolved as a matter of law—at issue. The court did effectively address and resolve the issue by finding that the career offender guidelines levels were appropriate. And even if there was error, it was harmless in light of *Rodriguez-Gamboa II*. Remand for the court to make a finding on a

point no one can now dispute would be a pointless and a waste of judicial resources.

V

ARGUMENT

A. The District Court Did Not Err by Accepting Defendant's Oral Jury Waiver

1. Standard of review

The determination of whether a defendant's waiver of his Sixth Amendment right to a trial by jury was knowing and intelligent is a mixed question of fact and law, which this Court reviews de novo. *United States v. Shorty,* 741 F.3d 961, 965 (9th Cir. 2013).

2. Defendant's oral waiver was valid

Defendant had every incentive to waive his right to a jury trial. The evidence against him was overwhelming; it included video and audio recordings of defendant selling methamphetamine, as well as testimony by a cooperating co-defendant, the officer who supervised the controlled buys, and the chemist who tested the drugs. (*See* Sections III.B.1 and III.B.7 above.) Defendant had a long history of selling methamphetamine and other drugs (PSR ¶¶ 45, 47-48), and was faced with the near-certainty that those convictions would be used to impeach

him if he testified. (1-SER-275–76.) He was also faced with audio and video evidence that made it impossible for him to deny any involvement in the deals. By waiving jury, defendant could take the stand without the risk that the jurors would be influenced by his prior drug convictions and his admission of some guilt. Defendant's election to minimize the risk of across-the-board convictions by having a judge decide the case was a sound strategic decision, one that defendant affirmatively embraced following a colloquy sufficient to establish that his jury waiver was knowing and intelligent. (ER 45, 134–35.)

An oral waiver does not have the presumption of validity that attaches to a written waiver made pursuant to Federal Rule of Criminal Procedure 23. *Shorty*, 741 F.3d at 966. However, this Circuit has repeatedly acknowledged the validity of oral waivers "where the record clearly reflects that the defendant 'personally gave express consent in open court, intelligently and knowingly.'" *United States v. Laney*, 881 F.3d 1100, 1107 (9th Cir. 2018), quoting *United States v. Saadya*, 750 F.2d 1419, 1420 (9th Cir. 1985); *see also United States v. Reyes*, 603 F.2d 69, 71 (9th Cir. 1979) (addressing the requirements of Rule 23(b) under which a defendant may elect to proceed with a jury of less than

twelve); *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971) (same); *United States v. McCurdy*, 450 F.2d 282, 283 (9th Cir. 1971) (upholding oral waiver where "there was an intelligent, knowing, and express waiver by the defendant in open court, with the consent of both counsel, and with the approval of the trial judge given after appropriate questioning of the defendant"); *Shorty*, 741 F.3d at 966 ("under certain circumstances an oral waiver may be sufficient"); *United States v. Reczko*, 818 Fed. Appx. 701, 704 (9th Cir. 2020) (noting "our caselaw allows some deviation from [the writing] requirement"); *United States v. Liang*, 727 Fed. Appx. 927, 930-31 (9th Cir. 2018) ("Defendant's waiver did not need to be in writing.").

Defendant's suggestion that the Court can invalidate his waiver based solely on the fact that it was not in writing (AOB 17-19) is at odds with this body of case law, as well as the law in other circuits. *See United States v. Carmenate*, 544 F.3d 105, 109 (2d Cir. 2008) (noting agreement among First, Second, Fourth, and Tenth Circuits that strict compliance with the writing requirement of Rule 23(a) is not always required for a waiver to be constitutionally adequate.); *United States v. Laney*, 881 F.3d at 1107 (citing *Carmenate* and other circuit cases with

approval). Defendant is conflating a violation of the rule with a violation of the Constitution. As these cases recognize, a failure to meet the requirements of Rule 23(a) does not necessarily amount to a violation of the Sixth Amendment or constitute reversible error. *Id.* The critical question for Sixth Amendment analysis is whether the record demonstrates that the waiver was made knowingly, voluntarily, and intelligently. *Id.*

In *United States v. Cochran*, 770 F.2d 850, 852 (9th Cir. 1985), this Court suggested that district courts "should conduct colloquies with the defendant before accepting a waiver of the right to jury trial" as a way of ensuring validity of a waiver. The district court did conduct such a colloquy with defendant here. (ER-134–35.)

This Court also "implored" district courts to inform defendants that: "(1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *Id.* at 852. However, the Court made clear that these advisements are not mandatory, and a district court's failure to give them does not result in automatic reversal. *Id.; see also*

id. at 853 ("the failure of a district judge to conduct such an interrogation does not violate either the Constitution, *see, e.g.*, *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983), or Fed. R. Crim. P. 23(a); nor does it *ipso facto* require reversal."); *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (upholding a jury waiver even though the district court did not advise defendant of all facets of a jury trial); *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997) (citing *Cochran*) ("We have declined, however, to impose an absolute requirement of such a colloquy in every case.").

The district court here advised defendant of three of the four elements set forth in *Cochran*:

(1) the court informed defendant that a jury is composed of "12 people" (ER-134);

(3) the court explained that defendant had "a right to have a jury make [the] decision" of his innocence or guilt and that the 12 members of the jury "would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense" and "and until and unless they do, you have got a right to be presumed innocent" (*id.*); and

(4) the court explained that "a court trial means the judge would innocence or guilt, not a jury" (*id.*), and reinforced the point by stating a second time that "if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision" (ER-134–35).

The only *Cochran* element that the district court did not address was defendant's right to take part in jury selection. (*Id.*) That shortcoming does not establish a constitutional defect, given the absence of additional facts raising a concern of possible involuntariness. Unlike *Shorty*, 741 F.3d at 967–68 and *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994) (cited by defendant at AOB 20–24), there was no record showing defendant was "learning disabled" (*Shorty*) or suffered from "mental or emotional instability" (*Christensen*) and may not have understood or appreciated the rights he was waiving. Defendant was, indeed, a native Spanish speaker, but he had the assistance of a court-certified interpreter throughout the proceedings, including the jury waiver colloquy. (1-SER-274.) As this Court recognized in *Duarte-Higareda*, 113 F.3d at 1003 (AOB 20–23), having

that kind of assistance is of far greater significance in a case involving a non-English speaking defendant than having a signed, standard waiver form in English.[5]

Furthermore, although defendant was not highly educated, he was a mature, functioning adult, with no mental or emotional health problems, and he had lived in the United States for decades. (*See* PSR ¶¶ 74, 84–92.) Defendant stated his agreement to and understanding of all the court's statements without reservation or equivocation. (ER-134–35.) The court had had the opportunity to observe and interact with defendant at prior hearings and, based on defendant's past appearances and "his appearance today," the court made a specific finding that defendant's waiver of his right to a jury trial appeared to be "knowing, intelligent, free and voluntary." (ER-135.) All of this supports the validity of defendant's waiver. Indeed, since the district court had the opportunity to observe defendant and his demeanor, its finding on the point should be given some deference. *See United States*

[5] The Central District of California's jury waiver form (available at https://www.cacd.uscourts.gov/sites/default/files/forms/CR-019/CR-19.pdf) is in English.

v. Robinson, 913 F.2d 712, 715 (9th Cir. 1990) (district court's express finding that defendant's waiver of right to counsel was knowing and intelligent was entitled to deference because district court had the opportunity to assess defendant's demeanor).

In addition, given defendant's rational, strategic motivations for waiving jury, it is difficult to imagine that informing defendant that he would also have a right to select the jury would have caused him to change his mind. *See, e.g., United States v. Khan*, 461 F.3d 477, 492 (4th Cir. 2006) (finding waiver jury valid when evidence showed it was made "as a calculated part of the defendants' trial strategy to prevent 'inflammatory and prejudicial evidence' from biasing a jury."). Without a jury present, defendant had the opportunity to take the stand without the concern that his testimony, already weak, would be impeached with his prior convictions.

This Court has never held that merely speaking a foreign language or lacking a professional degree necessitates a greater colloquy than the one held here. Rather, this Court has only held that a court must conduct some form of colloquy with the "defendant to ensure that the waiver is voluntary, knowing, and intelligent" when the

defendant is a non-English speaker. *See Duarte-Higareda*, 113 F.3d at 1003. The district court did just that here.

Finally, there was no "uncertainty" about the waiver, as defendant suggests. (AOB 23.) The fact that the defendant considered asking for new counsel but then withdrew that request before then asking to waive jury (ER-132, 134–35) suggests that defendant and his counsel came to agreement on a trial strategy before they appeared for the status conference, and thus supports an inference that the jury waiver was knowing and intelligent. The instructions and proposed verdict form that the parties jointly submitted (ER-106–28) were expressly tailored to provide the court with a roadmap for the bench trial; they did not include the features one would have for a jury trial, and thus did not suggest that "jury trial was still a possibility." (AOB 23.)

In short, while the colloquy was not lengthy, it was appropriate for the circumstances and did not rise to the level of a constitutional defect warranting reversal.

A P P E N D I X 6

CA NO. 20-50204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, Defendant-Appellant.	D.C. No. 2:18-cr-00742-RGK

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. GARY KLAUSNER
United States District Judge

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CA NO. 20-50204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, Defendant-Appellant.	D.C. No. 2:18-cr-00742-RGK

I.

ARGUMENT

A. THE JURY WAIVER WAS INVALID, AND THE INVALID WAIVER IS STRUCTURAL ERROR REQUIRING REVERSAL.

Mr. Ceja is a non-English speaking foreign citizen with only an eighth grade education in a foreign country with a completely different legal system. He waived his right to a jury trial without being told about crucial elements of the jury trial right – that the 12 jurors are ordinary people drawn from the community and that the defendant gets to participate in selecting those 12 people. The waiver of the right without knowledge of these elements was not an intelligent and voluntary waiver, and this is a structural error that requires reversal without a speculative inquiry into whether Mr. Ceja would have waived the right anyway.

1. The Waiver Was Invalid.

To begin, the question of whether an oral waiver can substitute for the written waiver required by Rule 23 of the Federal Rules of Criminal Procedure is open in this circuit. The Court recognized this in *United States v. Olano*, 934 F.3d 1245 (9th Cir. 1991), *rev'd on other grounds*, 507 U.S. 725 (1993), and statements in subsequent cases are dictum because the oral waivers in those cases were invalid. *See* Appellant's Opening Brief, at 17-18. The Court may continue to leave the question open, however, because the oral waiver in the present case was also invalid.

The government's argument that the district court's colloquy was sufficient fails for several reasons. Preliminarily, it is not really correct to say that the district court advised Mr. Ceja of three of the four elements set forth in *United States v. Cochran*, 770 F.2d 850 (9th Cir. 1985). It was more like just 2½ – indeed, perhaps just 2¼ – of the elements that were included in the district court's advice. In addition to omitting advice that Mr. Ceja could participate in selecting the jurors, the court omitted advice that the "12 people" would be selected from the community rather than from some group, such as a specialized professional panel, that might be less independent of the government. And this would be far from self-evident to a non-citizen with an eighth grade education in a foreign country with a different legal system.

The omitted elements are arguably the most important of the *Cochran* elements, moreover. A majority of the Supreme Court opined in *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), following *Williams v. Florida*, 399 U.S. 78 (1970), and *Duncan v. Louisiana*, 391

U.S. 145 (1968):

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." *Williams v. Florida*, *supra*, at 100. A requirement of unanimity, however, does not materially contribute to the exercise of commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

Apodaca, 406 U.S. at 410-11. *See also Johnson*, 406 U.S. at 373 (Powell, J., concurring) ("The importance that our system attaches to trial by jury derives from the special confidence we repose in a 'body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement.'" (Quoting *Williams*, 399 U.S. at 87.)). While the Court recently overruled *Apodaca* and *Johnson* in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), it did so without "reassess[ing] whether the right to a unanimous jury is 'important enough.'" *Ramos*, 140 S. Ct. at 1402.

The elements omitted here are the same elements omitted in the first of the cases finding a jury waiver invalid based on *Cochran – United States v. Christensen*, 18 F.3d 822 (9th Cir. 1994). The defendant there was advised that (1) there would be 12 jurors; (2) the 12 jurors had to find him guilty; and (3) the court would decide guilt if there was no jury. *See id.* at 823.[1] What was missing

[1] The advice given in *Christensen* about the 12 jurors was that there was a right to "a trial in which 12 jurors have to find you guilty," *id.*, which *United States v. Shorty*, 741 F.3d 961 (9th Cir. 2013), reasonably interpreted as meaning each one of the 12 jurors had to find the defendant guilty, *see Shorty*, 741 F.3d at

were the same elements that are missing here – that the defendant is allowed to participate in selecting the jurors and that the jurors would be drawn from the community.

The government argues that *Christensen* and the later case of *United States v. Shorty*, 741 F.3d 961 (9th Cir. 2013), involved mentally ill and/or learning disabled defendants and that merely not speaking English is insufficient to require the *Cochran* colloquy. This argument fails for two reasons. First, the Court extended the requirement of a *Cochran* colloquy to non-English speaking defendants in *United States v. Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997), as recognized in *Shorty*. *Duarte-Higareda* established that "[a] language barrier, like . . . mental illness, is a 'salient fact' that . . . put[s] the court on notice that [the defendant's] waiver 'might be less than knowing and intelligent.'" *Shorty*, 741 F.3d at 967 (quoting *Duarte-Higareda*, 113 F.3d at 1003, and *Christensen*, 18 F.3d at 825). Such "salient facts" require the in-depth inquiry described in *Cochran*. *See Shorty*, 741 F.3d at 966-67.[2]

Second, there was more than just the language barrier here. While Mr. Ceja did not lack learning because he was "learning disabled," or unable to learn, he lacked learning because it was never provided; he had only an eighth grade education in a foreign country with a completely different legal system. And "the

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967 n.3 (reading advice given in *Christensen* as "includ[ing] the unanimity instruction").

[2] The government's assertion that "[t]his Court has never held that merely speaking a foreign language or lacking a professional degree necessitates a greater colloquy than the one held here," Govt. Brief, at 36, is thus wrong. *Duarte-Higareda* held a language barrier is another circumstance requiring an in-depth inquiry and *Shorty* held the in-depth inquiry must include the four *Cochran* elements.

sufficiency of the colloquy is highly dependent on education and legal sophistication of the defendant." *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015). Mr. Ceja's minimal education in a foreign country combined with the language barrier makes this case a combination of *Duarte-Higareda* and *Shorty*.

2. The Invalid Waiver Requires Reversal Without Speculation About What Mr. Ceja Would Have Done if Properly Advised, Because an Invalid Jury Waiver Is Structural Error.

The government's suggestion that the invalid waiver does not require reversal because Mr. Ceja had good strategic reasons for waiving his right to a jury trial ignores this Court's holding that an invalid jury waiver is structural error that precludes such speculation. As explained in *Shorty*:

> [T]hat Shorty may have made a "tactical choice" to waive a jury tells us nothing about whether he understood what he would be giving up by making such a choice. It was the district court's responsibility to fully inform Shorty of the nature and import of the right he was waiving, no matter his (or his counsel's) reason for waving it. In failing to do so, the district court did not meet its "serious and weighty responsibility" of ensuring that Shorty knew what that right meant and understood the consequences of waving it. An invalid jury waiver is structural error.

Id., 741 F.3d at 969 (citations omitted). The one case the government cites in support of its speculation – *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006) – is from a circuit that rejects the requirement of a jury waiver colloquy, *see id.* at 491-92, and that case has been rejected by this Court. *See United States v. Laney*,

881 F.3d 1100, 1108 n.3 (9th Cir. 2018).[3]

B. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. CEJA'S REQUEST FOR SUBSTITUTE COUNSEL SIX MONTHS BEFORE TRIAL BASED ON THE ABSENCE OF A SHOWING OF INADEQUACY OF COUNSEL AND WITHOUT DETAILED INQUIRY INTO MR. CEJA'S CONFLICT WITH HIS COUNSEL.

All the district court considered in ruling on Mr. Ceja's motion for substitute counsel six months before trial was whether his counsel's representation was adequate. But it is the defendant's conflict with counsel, not counsel's competence, which is the issue. And the court must ask specific questions to explore the defendant's complaint in depth. The district court's inquiry here – two general questions with no follow-up – fell far short of what this Court has

[3] One could also easily debate the government's claim that there were good strategic reasons for the waiver. The government's motion to use Mr. Ceja's prior convictions to impeach him had not yet been granted, so there was far from "near-certainty," Govt. Brief, at 29, that the jury would hear evidence of the prior convictions. And the substantive evidence fell well short of "overwhelming," at least in some respects. In particular, the defense could have attacked the attribution of the greater than 50-gram quantities to Mr. Ceja, which is what triggered the 10-year mandatory minimum sentence. The only identification of Mr. Ceja as the man who sold the two ounces on the first date was a confidential informant who had an obvious motive to please the government. The defense also could have argued there were separate one-ounce transactions on the second date, *see infra* pp. 11-16, and that there was not an ongoing conspiracy to sell larger quantities, but multiple separate conspiracies to sell one-ounce quantities. And these arguments could have been made just as effectively, perhaps more effectively, without Mr. Ceja's testimony, which would have kept the prior convictions out even if the court did rule them admissible for impeachment.

A P P E N D I X 7

CA No. 20-50204

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, Defendant-Appellants.	D.C. No. 2:18-cr-00742-RGK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. GARY KLAUSNER
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IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LUIS FERNANDO CEJA, Defendant-Appellants.	D.C. No. 2:18-cr-00742-RGK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

This case presents the question of when a jury waiver colloquy which this Court has "implored" district courts to conduct in every case, *United States v. Cochran*, 770 F.2d 850, 853 (9th Cir. 1985), is not just "implored," but *required*, *see United States v. Shorty*, 741 F.3d 961 (9th Cir. 2013); *United States v. Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997); *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994). More specifically, is the colloquy required when the defendant is a foreign citizen who does not speak English and has only an eighth grade education in a foreign country?

Rehearing is required because the panel opinion focuses solely on differences in the facts of the cases in which the Court has required the colloquy

and ignores the *reasoning* of those cases. Ignoring the reasoning creates a conflict between the panel opinion and the prior cases.

Rehearing en banc is appropriate because the fundamental nature of the jury trial right makes the question presented here a question of exceptional importance. Rehearing en banc is also appropriate because the partial colloquy the panel opinion deems sufficient omits the most important characteristics of the jury trial right – that the 12 jurors will be members of the community and the defendant may participate in the selection of the jury. It is these characteristics that assure the jury fulfills its constitutional role of "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen," *Williams v. Florida*, 399 U.S. 78, 100 (1970), who are "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability," *Gomez v. United States*, 490 U.S. 858, 873 (1989).

Respectfully submitted,

DATED: February 2, 2022

By s/ Carlton F. Gunn
CARLTON F. GUNN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

STATUTES AND RULES

OTHER AUTHORITIES

I.

INTRODUCTION

In *United States v. Cochran*, 770 F.2d 850 (9th Cir. 1985), this Court "implore[d]" district courts accepting a defendant's waiver of the right to jury trial to conduct a further colloquy, *id.* at 853, which the Court later characterized as "an in-depth inquiry," *United States v. Christensen*, 18 F.3d 822, 826 (9th Cir. 1994). The colloquy the Court implored district courts to conduct was a colloquy informing defendants of four key characteristics of the jury trial right: "(1) twelve members of the community comprise a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *Cochran*, 770 F.2d at 853.

The Court then held in cases after *Cochran* that in some circumstances "'imploring' district courts to conduct fuller colloquies (citations omitted) is not enough. We must require them to do so." *Christensen*, 18 F.3d at 825. One such circumstance is a case "where the defendant's mental or emotional state is a substantial issue." *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013); *Christensen*, 18 F.3d at 825. A second such circumstance is where there is a language barrier requiring the defendant to use an interpreter. *See United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997).

The panel opinion ignores the Court's cases recognizing this second circumstance that requires the in-depth inquiry. The opinion focuses on the different facts of *Duarte-Higareda* while ignoring what *Duarte-Higareda* and the later case of *Shorty* held was required when there is a language barrier. What

Duarte-Higareda and *Shorty* held was required was the four-characteristic explanation described in *Cochran*. As in *Christensen*, *Duarte-Higareda*, and *Shorty*, only some of those characteristics were explained here, and the characteristics that were not explained are those the Supreme Court has indicated are the most critical.

The panel opinion holding the partial colloquy here was sufficient directly conflicts with *Christensen*, *Duarte-Higareda*, and *Shorty*. It also allows omission of the most important characteristics of the jury trial right, which are that the twelve jurors will be members of the community and the defendant may participate in the selection of the jurors. It is these characteristics that assure the jury fulfills its constitutional role of "interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen," *Williams v. Florida*, 399 U.S. 78, 100 (1970), who are "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability," *Gomez v. United States*, 490 U.S. 858, 873 (1989).

The case should be reheard en banc because the right to a jury trial is one of the most fundamental of rights and the most fundamental characteristics of this fundamental right were omitted from the colloquy here.

* * *

II.

STATEMENT OF CASE

A. WAIVER OF JURY TRIAL.

Mr. Ceja is a Spanish-speaking defendant who needed an interpreter throughout the proceedings. *See* ER-11; ER-45; ER-131; ER-141; RT(2/20/19) 4; RT(3/26/19) 4; RT(4/4/19) 4. He is an undocumented immigrant whose only education was schooling through the equivalent of eighth grade in Mexico. *See* PSR, ¶ 84. He never attended school in the United States. *See* PSR, ¶ 84.

The district court tried Mr. Ceja in a bench trial, without a jury. The court proceeded without a jury because Mr. Ceja's attorney said Mr. Ceja would waive the right to a jury trial. *See* ER-134. The court did not have Mr. Ceja sign a written waiver, as required by Rule 23(a) of the Federal Rules of Criminal Procedure, *see id.* (requiring trial by jury unless, inter alia, "the defendant waives a jury trial in writing"), but took the waiver orally instead.

The oral colloquy took up less than one page of transcript, moreover. In its entirety, it consisted of the following:

> THE COURT: Okay. Mr. Ceja, is that your desire to have a court trial which means the judge would decide innocence or guilt, not a jury?
> THE DEFENDANT: Yes.
> THE COURT: Okay. You understand that you have a right to have a jury make that decision, and a jury trial 12 people would have to agree unanimously beyond a reasonable doubt to find you guilty of the offense?
> Do you understand that?
> THE DEFENDANT: Yes.
> THE COURT: And until and unless they do, you have got a right to be presumed innocent.

> But if you have a Court trial, it's the judge that has to hear the evidence and make a decision whether or not the government has proved their case beyond a reasonable doubt, not the jury, so that would just be the Court's decision.
>
> Is that agreeable with you?
>
> THE DEFENDANT: Yes.

ER-134–35.

After the court engaged in this colloquy with Mr. Ceja, the prosecutor asked the court to make findings that Mr. Ceja appeared competent. ER-135. The court stated in response that "it seems to be knowing, intelligent, free and voluntary." *See* ER-135.

B. CONVICTION AND APPEAL.

The court subsequently held the bench trial, found Mr. Ceja guilty of all counts in the indictment, which charged him with various drug offenses, and sentenced him to 20 years in prison. Mr. Ceja appealed and argued, among other claims, that his waiver of the right to a jury trial was invalid. *See* Appellant's Opening Brief, at 16-25. First, he argued the waiver was invalid because it was not in writing, as required by Rule 23(a). *See* Appellant's Opening Brief, at 17-19. Second, he argued this Court's cases taken together – *Cochran*, *Christensen*, *Duarte-Higareda*, and *Shorty* – recognize a language barrier like Mr. Ceja's as a "salient fact" that *requires* the in-depth inquiry advising the defendant about the four characteristics of a jury trial listed in *Cochran*. *See* Appellant's Opening Brief, at 19-23. The district court's colloquy fell short of these requirements by omitting advice of both the fact the jurors would be drawn from the community and the fact Mr. Ceja would be allowed to participate in selection of the jury. *See*

Appellant's Opening Brief, at 23-25.

A panel rejected these arguments (as well as Mr. Ceja's other claims). It first noted that "despite Rule 23(a)'s language requiring written waivers, an oral waiver may be sufficient in certain cases." Panel Opinion, at 9-10 (citing *Shorty*, 741 F.3d at 966).[1] The panel then turned to the sufficiency of the oral waiver. It noted *Cochran* had "'implored' – but did not mandate – district courts to ensure jury trial waivers are knowing, voluntary, and intelligent by engaging in a 'substantial colloquy' that informs the defendant of four facts: '(1) twelve members of the community comprise a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial.'" Panel Opinion, at 10 (quoting *Cochran*, 770 F.2d at 852-53). It then acknowledged *Christensen*, *Duarte-Higareda*, and *Shorty*, but focused solely on the different facts in those cases. As to *Duarte-Higareda*, where the defendant, like Mr. Ceja, used a Spanish interpreter, it focused on the facts that the defendant "waived his right to a jury trial in writing using a form that was printed entirely in English, and there was no evidence that the written waiver was ever translated." Panel Opinion, at 11. As to *Christensen* and *Shorty*, it focused on, in *Christensen*, the defendant's manic-depressive disorder, and, in *Shorty*, the facts that the defendant had a "low I.Q." and was "learning disabled." Panel Opinion, at 11.

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[1] This was dictum in *Shorty* and most of the other Ninth Circuit cases making this statement, as noted in Appellant's Opening Brief, because the Court found the waivers invalid for other reasons. Multiple other circuits have taken the same view, however. *See United States v. Carmenate*, 544 F.3d 105, 109 (2d Cir. 2008), *and cases cited therein*.

III.

ARGUMENT

A. THE PANEL OPINION CONFLICTS WITH *DUARTE-HIGAREDA* AND *SHORTY* BY FOCUSING SOLELY ON THE FACTS OF THOSE CASES AND IGNORING THEIR REASONING.

The panel opinion conflicts with *Duarte-Higareda* and *Shorty* because it focuses solely on the facts of those cases and ignores their reasoning. First, the failure to comply with the Rule 23(a) requirement that the waiver be in writing – while arguably not fatal, *see supra* p. 5 n.1 – is an important consideration. A written waiver complying with Rule 23(a) "creates a presumption that the waiver is a voluntary, knowing and intelligent one." *Cochran*, 770 F.2d at 851. But the situation is very different when there is not a written waiver. As the Court explained in *Shorty*:

> The two forms of waiver are not equal, however. The writing confers on a waiver the presumption that it was made knowingly and intelligently. (Citations omitted.) There is no writing in this case, and therefore, in determining whether [the defendant's] oral waiver was knowing and intelligent, we proceed without any presumption that it was.

Id., 741 F.3d at 966. The panel opinion does recognize the absence of a presumption, but places no apparent weight on its absence. *See* Panel Opinion, at 10.

More importantly, the panel opinion focuses too narrowly on the different facts of *Christensen*, *Duarte-Higareda*, and *Shorty* and ignores their *reasoning*. That reasoning establishes three important points, in three steps.

First, *Christensen* held this Court does not merely "implore," but *requires* an "in-depth colloquy" when there are additional "salient fact[s]," *id.*, 18 F.3d at 825, suggesting a defendant might not understand the waiver. As it stated in considering the "salient fact" there:

> In cases where the defendant's mental or emotional state is a substantial issue, "imploring" district courts to conduct fuller inquiries (citing *Cochran*, 770 F.2d at 853, and *United States v. Martin*, 704 F.2d 267, 274 (6th Cir. 1983)), is not enough. We must require them to do so.

Christensen, 18 F.3d at 825.

Second, *Duarte-Higareda* and *Shorty* extended the category of "salient fact[s]" requiring an in-depth inquiry to the presence of a language barrier, which *Duarte-Higareda* characterized as "like mental illness" for this purpose. *Duarte-Higareda* stated:

> Duarte's language barrier, *like Christensen's mental illness*, is a "salient fact" that was known to the district court and put the court on notice that Duarte's waiver "might be less than knowing and intelligent," 18 F.3d at 825. Under these circumstances, the district court was obliged to conduct a colloquy with Duarte to carry out its "serious and weighty responsibility" of ensuring that a defendant's jury waiver is voluntary, knowing, and intelligent. *Id.* at 826.

Duarte-Higareda, 113 F.3d at 1003 (emphasis added). *Shorty* then made clear that the additional salient fact identified in *Duarte-Higareda* triggered the same requirements established in *Christensen*.

> [I]n *Duarte-Higareda*, we identified another "additional fact" that necessitated an in-depth colloquy, again even where there was a written waiver: a non-English speaking defendant. "Duarte's language barrier," we said, "like Christensen's mental illness, is a 'salient fact' that was known to the district court and put the court on notice that Duarte's waiver 'might be less than knowing and intelligent.'" 113 F.3d at 1003 (quoting *Christensen*, 18 F.3d at 825). Because the district court failed to have a colloquy with Duarte – let alone an in-depth colloquy

> – Duarte's waiver was invalid, and his conviction was reversed. *Id.*

Shorty, 741 F.3d at 966-67. *See also United States v. Bishop*, 291 F.3d 1100, 1113-14 (9th Cir. 2002) (characterizing *Duarte-Higareda* as case that "set out the further safeguard that a colloquy is required where the record indicates that the defendant may have lacked the ability to make an intelligent waiver").

Third, *Shorty* expressly stated what was implied in *Christensen* and *Duarte-Higareda* about what the "in-depth colloquy" must include. It stated: "An in-depth colloquy, we held, includes instructing the defendant of the four facts listed in *Cochran*." *Shorty*, 741 F.3d at 966 (citing *Christensen*, 18 F.3d at 825).

The identical salient fact of the language barrier is present here – as well as a similar, albeit arguably lesser, mental limitation salient fact of Mr. Ceja's minimal eighth grade education in a foreign country, *cf. United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) (recognizing "the sufficiency of the colloquy is highly dependent on the education and legal sophistication of the defendant" and holding shorter colloquy sufficient where defendant was practicing attorney and partner at major law firm); *Bishop*, 291 F.3d at 1114 (contrasting defendant who "was a sophisticated business proprietor" with defendant in *Duarte-Higareda*). The *reasoning* in *Christensen*, *Duarte-Higareda*, and *Shorty* means an "in-depth inquiry" was required here and that in-depth inquiry means informing Mr. Ceja of the four jury trial characteristics listed in *Cochran*: (1) twelve members of the community comprise a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court alone decides guilt or innocence if the defendant waives a jury trial. The panel opinion conflicts with these opinions by ignoring their reasoning and focusing solely on the cases' facts.

B. THE CHARACTERISTICS OMITTED FROM THE COLLOQUY HERE ARE THE MOST CRITICAL BECAUSE THEY ARE THE ONES A FOREIGN CITIZEN NOT EDUCATED IN THIS COUNTRY WOULD MOST LIKELY NOT UNDERSTAND.

The two facts from the in-depth colloquy required by *Christensen*, *Duarte-Higareda*, and *Shorty* that the district court omitted here were the fact the jurors would be drawn from the community and the fact Mr. Ceja would be able to participate in the selection of the jurors. Though not reflected in the panel's opinion, the author of the opinion characterized these facts at oral argument as "two minor points." Oral Argument at 8:04, *United States v. Ceja*, ___ F.4th ___, 2022 WL 224033 (9th Cir. Dec. 8, 2021), *available at* https://www.ca9.uscourts.gov/media/audio/?20211208/20-50204/. In actuality, these are probably the most important facts to explain, especially to a foreign citizen whose only education was minimal education in a foreign country.

First, the requirement that the jurors be members of the community is key. The central purpose of the right to trial by jury was explained by the Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), *Williams v. Florida*, 399 U.S. 78 (1970), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), as follows:

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. at 156. "Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." *Williams v. Florida*, *supra*, at 100. . . . As we said in *Williams*,

> a jury will come to such a judgment as long as it consists of a group of laymen representative of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

Apodaca, 406 U.S. at 410-11. *See also Johnson v. Louisiana*, 406 U.S. 356, 373 (1972) (Powell, J., concurring) ("The importance that our system attaches to trial by jury derives from the special confidence we repose in a 'body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement.'" (Quoting *Williams*, 399 U.S. at 87.)).[2] This central purpose is most directly advanced by the requirement that the jurors be drawn from the community, for that is what assures they are "peers," rather than members of some group of people specially selected or hired to determine guilt or innocence in criminal trials.

Second, the defendant's participation in the selection process is key. The jury selection process is, in the words of another Supreme Court case, "the primary means by which the court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (citations omitted). The defendant's participation allows him to help enforce this right.

A defendant who is a foreign citizen speaking only a foreign language with just a foreign eighth grade education would be especially unlikely to independently know about these characteristics of a jury trial. A person raised in a culture like the United States with a Bill of Rights adopted to protect citizens from

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[2] The Court recently overruled the underlying holding in *Apodaca* and *Johnson*, which was that unanimity is not a constitutional requirement, *see Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), but it did so without "reassess[ing] whether the right to a unanimous jury is 'important enough.'" *Ramos*, 140 S. Ct. at 1402.

the government very likely would envision a jury's main purpose as an entity intended to stand as a wall between the government and the ordinary person and would recognize a panel of ordinary citizens best serves that purpose. But a person raised in a culture without a Bill of Rights would see the main purpose of the criminal justice system as finding the truth and envision a jury as a group of people with special training and expertise in finding the truth, not a group of ordinary people drawn from the community. That foreign citizen also would have no reason to believe he would be allowed to participate in selection of the jury, any more than he would be allowed to select the prosecutor who prosecutes him or the law enforcement officers who investigated him.

The panel thus overlooked the importance of the omitted advice in addition to overlooking the reasoning of *Christensen*, *Duarte-Higareda*, and *Shorty*. The opinion not only conflicts with those cases, but establishes a dangerous precedent allowing courts to omit advice about the most important characteristics of the jury trial right.

* * *

III.

CONCLUSION

This case should be reheard en banc. It should be reheard because the panel opinion directly conflicts with the reasoning of *Christensen*, *Duarte-Higareda*, and *Shorty*. It should be reheard en banc because the right to a jury trial is one of the most fundamental of rights, and the most fundamental characteristics of this fundamental right were omitted from the partial colloquy here.

Respectfully submitted,

DATED: February 2, 2022

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition is proportionally spaced, has a typeface of 14 points or less, and is less than 15 pages in length.

DATED: February 2, 2022

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS FERNANDO CEJA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 14th day of April, 2022, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

April 14, 2022

s/ Carlton F. Gunn
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