No._____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS ZAMUDIO, PETITIONER

V.

UNITED STATES OF AMERICA

_____

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

_____

PHILIP J. LYNCH
Law Offices of Phil Lynch
17503 La Cantera Parkway
Suite 104-623
(210) 378-3114
LawOfficesofPhilLynch@satx.rr.com

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the courts of appeals, by creating checklists of considerations for the district courts to follow, have improperly narrowed the "fair and just reason" standard that Federal Rule of Criminal Procedure 11(d) sets for evaluating a defendant's request to withdraw a guilty plea.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rule

No._____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS ZAMUDIO, PETITIONER

V.

UNITED STATES OF AMERICA

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

Carlos Zamudio asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 22, 2022.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The unpublished opinion of the court of appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on March 22, 2022. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The pertinent part of Federal Rule of Criminal Procedure 11(d) provides:

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

STATEMENT

Petitioner Carlos Zamudio was charged with conspiring to possess one kilogram or more of cocaine with the intent to distribute it, in violation of 21 U.S.C.

§ 841(a)(1), (b)(1)(B) and § 846(A)(ii).[1] Represented by appointed counsel, Zamudio agreed to plead guilty to a superseding cocaine conspiracy allegation that contained no specific drug quantity. A U.S. magistrate judge held a guilty plea hearing, after which he recommended that Zamudio's guilty plea to the superseding charge be accepted. The district court accepted that recommendation and Zamudio's plea.

Two weeks after the district court accepted the plea, new, retained counsel appeared for Zamudio. New counsel successfully moved to continue the scheduled sentencing hearing for 60 days.

Retained counsel miscalendered the new sentencing date and missed the hearing. He asked for another continuance. That request was granted, and then, after the pandemic began, the district court twice more reset sentencing.

Eventually, retained counsel got around to filing a motion on Zamudio's behalf to withdraw the guilty plea. The motion contended that appointed counsel had not allowed Zamudio time to review the discovery adequately and had pushed for him to accept a plea agreement. The motion specifically alleged that appointed counsel had not allowed Zamudio to listen to intercepted Spanish-language calls that formed a significant part of the government's case against Zamudio. Instead, appointed counsel, who did not speak Spanish, relied on English translations provided by the government. Only with retained counsel, after the plea, was Zamudio able to listen to the intercepted calls and assess the statements that the government had construed in its English translation as inculpatory.

---

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

The motion to withdraw also asserted that Zamudio had not been able to sufficiently review the plea agreement. Appointed counsel simply told Zamudio to read the document, and Zamudio, daunted by the legal language, had made it through only a couple of paragraphs.

Retained counsel stated that his actions, not Zamudio's, resulted in the withdrawal motion being delayed until months after the plea was entered. Counsel attributed his tardiness to his fine ethical sense and his desire to apprise Zamudio fully on the law and the facts.

The government opposed the motion to withdraw the plea. The district court denied the motion without holding a hearing on it. Appendix B. In assessing the motion, the court applied the seven factors the Fifth Circuit has developed for determining whether a "fair and just" reason exists under Federal Rule of Criminal Procedure 11(d) to permit withdrawal of the plea. *See, e.g, United States v. Carr,* 740 F.2d 339 (5th Cir. 1984). The court, rather than considering the fairness and justness of Zamudio's request, went down the *Carr* factor checklist and decided more of the factors weighed against Zamudio than for him. Appendix B.

Zamudio appealed. He argued that he had presented a fair and just reason for withdrawing his plea and that the district court had erred by concluding otherwise. The Fifth Circuit disagreed and affirmed his conviction. Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE ON THE MEANING OF THE "FAIR AND JUST" STANDARD SET FORTH IN FEDERAL RULE OF CRIMINAL PROCEDURE 11(d)(2).

.

Federal Rule of Criminal Procedure 11(d)(2) allows a defendant to withdraw his plea of guilty after it is entered, but before he is sentenced, for any fair and just reason. In a criminal justice system that "is for the most part a system of pleas," *Lafler v. Cooper,* 566 U.S. 156, 170 (2012). Rule 11's fair and just standard provides a precious safeguard for defendants who, in the stress and heat of being prosecuted, agree to a plea that further reflection shows to have been poorly thought-out, poorly counseled, or made on incomplete information. As the Court put it long ago, guilty pleas that "have been unfairly obtained or given through ignorance, fear or inadvertence[.]" may be vacated. *Kercheval v. United States,* 274 U.S. 220, 224 (1927). The trial courts must have discretion to allow a defendant to "substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." *Id.*

The *Kercheval* standard was cited by the advisory committee notes to Federal Rule of Criminal Procedure 32 in 1983, when Rule 32(e), adding a fair and just standard to the rule, was promulgated. The advisory committee noted that courts had often relied on the *Kercheval* standard, as shown by cases such as *United States v. Strauss,* 563 F.2d 127 (4th Cir. 1977) and *United States v. Barker,* 514 F.2d 208 (D.C. Cir. 1975). The advisory committee also made clear that the defendant bore the

burden of showing a "fair and just" reason. The substance of Rule 32(e) was moved to Federal Rule of Criminal Procedure Rule 11(d) in 2002. Rule 11(d), by its plain terms, preserved that right of a defendant to have his plea withdrawal request reviewed for fairness and justness by a district court exercising its full discretion.

The "fair and just" language in the rule affirms the considerable discretion that *Kercheval* taught was necessary. 274 U.S. at 225. Over the years, however, the courts of appeals have created checklists of considerations for district courts to run through when considering whether to grant a request to withdraw a guilty plea. The effect of these checklists has been to limit the discretion granted to the district courts by Rule 11(d)(2) and to make it considerably more difficult for a defendant to withdraw his plea.

The exact number of considerations these checklists set out between the circuits, but there are commonalities among the lists and all the lists act to narrow the district court's discretion and to fix a standard of fairness and justness. The circuits have done so, even when they recognize that withdraw of a plea require "an idiocratic, particularistic, factbound assessment—an assessment which is facilitated because the judge has overseen pretrial proceedings, conducted the Rule 11 inquiries, accepted the original guilty plea, and heard at first hand the reasons bearing upon its withdrawal." *United States v. Pellerito,* 878 F.2d 1537, 1538 (1st Cir. 1989). The First Circuit further acknowledged that appellate courts "lack the district judge's `feel' for the case[.]" a feel that necessarily informs the decision of what is fair and just. *Id.*

Thus, the First Circuit has laid down considerations for the district court to tick through, then the tabulate the totals in determining fairness. In *United States v. Tilley,* the court set out five factors: "(1) the timing of defendant's change of heart; (2) the force and plausibility of the reason; (3) whether the defendant has asserted his legal innocence; (4) whether the parties had reached (or breached) a plea agreement; and (5) most importantly, whether the defendant's guilty plea can still be regarded as voluntary, intelligent, and otherwise in conformity with Rule 11." 964 F.2d 66, 72 (1st Cir. 1992). These checklistlike factors, not the district court's "feel" for, experience with, or sense of justice about the defendant's case now define what can be labeled "fair and just." See, e.g., *United States v. Bruzon-Velazquez,* 475 F.Supp.3d 86, 89 (D. Puerto Rico 2020) (working through checklist before denying defendant's request).

The Fifth Circuit has taken a similar approach with a similar result. The Court drew up a list of seven factors for the district courts to run through when considering a motion to withdraw a guilty plea under Rule 11(d)(2). These factors are (1) whether the defendant asserted his innocence; (2) whether the plea was knowing and voluntary; (3) whether defendant was assisted by counsel; (4) whether the defendant delayed filing his motion and, if so, why,; (5) whether withdrawal would prejudice the government; (6) whether withdrawal would substantially inconvenience the court, and (7) whether withdrawal would waste judicial resources. *United States v. Carr,* 740 F.2d 739 (5th Cir. 1984). The district court in this case tabulated up the count of

factors and determined that four of seven went against allowing withdrawal of the plea. Appendix B.

The Rule 11(d)(2) process plays out similarly in the Tenth Circuit. The court has set forth a number of factors, and the district courts decide fairness and justness by working through the list of factors. *See, e.g., United States v. Reed,* 2020 WL 6743099 (D N.M. 2020) (citing list from *United States v. Hamilton,* 510 F.3d 1209, 1214 (10th Cir. 2007)).

These checklists have taken the plea-withdrawal analysis away from its basic premise, captured in the plain language of Rule 11(d)(2), that a defendant should be able to "substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege seems fair and just*." *Kercheval,* 274 U.S. at 224. What seemed fair and just was to be what the trial court perceived in its understanding of the particular case. *Id.* The checklists take the focus from fairness and justness and put it on an approved appellate template of those concepts. The checklists take the focus from the defendant's particular case and put it on fitting the case into pre-formed categories. The checklists take the focus from how fair and just the case "seems" *Kercheval,* 274 U.S. at 224, and "feel[s]" Pellerito, 878 F.2d at 1538, to the trial judge and puts it on scorekeeping.

Checklists for fairness and justness under Rule 11(d)(2) thwart the achievement of fairness and justness. Zamudio's case illustrates this well. Zamudio's appointed attorney did not review the Spanish-language versions of the discovery, instead pushing his client to take a deal based on the government's representations

that the Spanish statements were inculpatory. Instead of considering how this omission affected Zamudio's ability to make an intelligent and voluntary plea after assessing the evidence against him, the district court focused on the fact that, in the withdrawal motion, retained counsel had not clearly declared that Zamudio was innocent. Appendix B. The district court also focused, as the checklist required it to, on the fact that Zamudio had counsel during the plea proceedings, rather than on what counsel failed to do and failed to tell Zamudio leading up to the entry of the plea. Appendix B. And the Court accorded too much weight to the checklist factor about the length of time between the plea and the withdrawal request rather than emphasizing that, again, the record showed a failing of counsel. Retained counsel, by his own admission, let the pale cast of his feelings interfere with Zamudio's resolve. Zamudio told counsel what he wished to withdraw the plea. Counsel did not act. Counsel pondered. Counsel felt conflicted. He was caught between his feeling that the plea bargain was beneficial and his client's "steadfast[ness]" in wishing to withdraw the plea and meet the government's case at trial. EROA.79. Taken together, judged on their appearance–how they seemed and how they affected the feel of the case–the particulars showed a fair and just reason to grant Zamudio a release from his plea and the restoration of his right to trial. Split into items on a list, fairness and justness were parsed away. Zamudio's case therefore presents a good vehicle for considering the question presented.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: May 9, 2022.