No._____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS MONTANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of *Certiorari* To The United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In Boykin v. Alabama, 395 U.S. 238, 243-44 (1969), the Court held that due process principles require a trial court to conduct a change-of-plea hearing such that the defendant demonstrates that he is entering his plea knowingly and voluntarily. Boykin also held that a trial court needs to develop a record sufficient for an appellate court examining the plea to determine that the defendant knowingly and voluntarily relinquished core constitutional rights. Id.

The question presented is as follows:

Did the Ninth Circuit's overlooking Petitioner's due process claim regarding his change-of-plea hearing conflict with Boykin and its progeny, particularly considering that the district court record in its totality evidenced that Petitioner had pre-arrest substance abuse issues about which the district court did not inquire?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Eastern District of California, United States of America v. Carlos Montano, No. 1:17-cr-00198-LJO-SKO-1. The district court entered judgment on June 19, 2019.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. Carlos, No. 19-10220. The Ninth Circuit entered judgment on January 7, 2022. It denied Petitioner's petition for rehearing en banc and petition for panel rehearing on February 15, 2022.

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On Petition for A Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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Petitioner Carlos Montano respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on January 7, 2022.

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on January 7, 2022, affirming Petitioner's conviction and sentence.[1] App. 1, 7. The Ninth Circuit later denied

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[1] A copy of the memorandum disposition is included in the Appendix. See App. 1-7 (United States v. Montano, No. 19-10220 (9th Cir. Jan. 7, 2022) (unpublished)).

Petitioner's petition for rehearing en banc and petition for panel rehearing on February 15, 2022. App. 24.

JURISDICTION

The Ninth Circuit entered judgment in this case on January 7, 2022, and denied rehearing on February 15, 2022. App. 1-7, 24. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3; S. Ct. Miscellaneous Order, July 19, 2021.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment reads as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner draws the following facts from the district court record, including hearing transcripts and the Presentence Report, which he has lodged under seal.

See App. 157-189.

A. Petitioner Grows Up in a Broken Household in Fresno, Receives Little Formal Education Because of His Dire Circumstances, and Gravitates Toward a Street Gang with Criminal Pathologies

Petitioner Carlos Montano was born in Fresno, California, in 1990. App. 160. Sadly, his parents separated seven years later, and because Petitioner's father drifted in and out of custodial sentences, his mother – who eventually gave birth to six children – "raised" him "as a single parent." App. 177. Moreover, Petitioner's mother had two convictions of her own by 1996, when Petitioner turned six years old. Id.

Perhaps unsurprisingly given those challenging circumstances, Petitioner's mother "struggled to support him and his siblings." App. 177. That resulted in an "unstable home environment," resulting in the household's either residing "in a one-bedroom apartment or stay[ing] temporarily with family and friends." Id.

Petitioner's mother's mental health predictably, and understandably, soon became quite tenuous. In 1997, she had an argument with Petitioner's father that culminated in her attempting to hang herself. Consequently, Petitioner and his siblings then lived with foster families or at least three biological relatives during the next three to four years, until Petitioner's mother's mental health improved somewhat and he returned to live with her between 2000 and 2001. App. 177-178.

Unfortunately, by that juncture, Petitioner's mother had serious substance abuse problems and serial issues with domestic violence that her multiple boyfriends perpetrated against Petitioner and her. Sadly, soon after moving back in with his mother, Petitioner and several of his siblings were sexually assaulted. App. 178.

Predictably, then, Petitioner started living in his friends' houses to avoid his tumultuous domestic situation. And he "began 'running around the streets,'" after he turned 12 years old. App. 178. Doing so resulted in his being affiliated with a street gang (the "Von Street Dogs") and its concomitant criminal activities, leading to problems with the juvenile criminal justice system that – regrettably – soon morphed into several felony convictions after Petitioner became an adult. App. 169-175, 178.

Moreover, Petitioner's unstable home environment resulted in his attending six separate elementary schools. Sadly and perhaps unsurprisingly, Petitioner then completed only one month of high school before dropping out. App. 179.

B. Petitioner Apparently Distributes Methamphetamine

By the Spring of 2017, Petitioner ostensibly identified as a member of a Fresno-based gang called Bond Street Bulldog. After meeting with Nicholas Bolanos on April 17, 2017, Bolanos furnished a pound of methamphetamine to

Petitioner for distribution-related purposes. Petitioner that same day apparently sold the methamphetamine for $3,000 to a person who happened to be a confidential source for the government. App. 97.

Almost two months later, Petitioner "sold" 292.8 grams of "97% pure" methamphetamine – and, separately, a mixture weighing 199.2 grams containing that controlled substance – to a person in Iowa on June 6, 2017. Petitioner then apparently directed someone identified as J.F. to mail the package to the purchaser. J.F. so complied. App. 97.

Later that same month, Petitioner met with a person on June 22, 2017, who also happened to be one of the government's confidential sources. During the encounter, Petitioner reached into his backpack and removed a black bag, before giving it to the CS. The bag contained 446.3 grams of 99% pure methamphetamine. The CS paid Petitioner $3,000 for the controlled substance. App. 97.

C. Petitioner Supposedly Facilitates a Prostitute to Travel Interstate

Petitioner and a woman identified as J.F. allegedly traveled from Fresno (via a layover in Los Angeles) to New York on July 19, 2017. Ostensibly, Petitioner arranged the trip so that J.F. could engage in prostitution, with Petitioner's receiving J.F.'s profits. App. 97.

After arriving in New York, Petitioner and J.F. soon thereafter traveled across the Hudson River into New Jersey. From there, J.F., who had "post[ed]" her availability "for sexual acts" in that state, had "a controlled call" with an "undercover officer" on July 27, 2017, and J.F. allegedly agreed "to meet [the officer] to perform sex acts for payment . . . ." App. 97.

D. Petitioner Apparently Possesses a Firearm

As persons sometimes are wont to do nowadays, Petitioner posted a video on a social media platform called Snapchat on August 12, 2017. In it, Petitioner, who was in his residence's backyard, apparently drank – significant to this Petition – a substance called promethazine (essentially, prescription-strength cough syrup that contains codeine, an opioid that is a controlled substance) and was "wearing a pistol on his hip . . . ." App. 97, 179, 184. After viewing the video, government agents obtained a search warrant for Petitioner's home, and they seized the firearm from Petitioner. App. 97.

E. The Government Files a Criminal Complaint Against Petitioner Involving 18 U.S.C. § 922(g)(1), and a Grand Jury Indicts Him Soon Thereafter on a Similar Count

Following a lengthy investigation, the government effected Petitioner's arrest and filed a complaint against him in the United States District Court for the Eastern District of California on August 14, 2017. The complaint alleged that

Petitioner, who apparently had four prior felony convictions, had violated 18 U.S.C. § 922(g)(1) by possessing a firearm. App. 76-77, 148. During an arraignment the following day, Petitioner pleaded not guilty to the complaint's charges. App. 78, 82.

Nine days later, a grand jury empaneled in the Eastern District of California returned a one-count indictment against Petitioner that substantially mirrored the complaint's allegations. App. 25-26. It did not, however, allege that Petitioner had possessed a firearm while knowing he had earlier felony convictions. Petitioner appeared at an arraignment on August 25, 2017, and once again pleaded not guilty. App. 50-53.

F. The Government Files Another Complaint, Against Petitioner and Seventeen Other Persons

Not content to prosecute Petitioner solely on the § 922(g)(1) count, the government filed a second complaint on September 6, 2017, in the district court. Encompassing Petitioner and seventeen other defendants, the complaint alleged among other things that Petitioner had not only allegedly violated § 922(g)(1), but also had supposedly violated 21 U.S.C. § 846 by conspiring to possess methamphetamine with intent to distribute. And it also contended that Petitioner had conspired to violate the Mann Act, 18 U.S.C. § 2421, by allegedly

transporting a person in interstate commerce for prostitution. See, e.g., App. 57-65.

Once again, Petitioner appeared in the district court to be arraigned. He pleaded not guilty to the new complaint's allegations on September 7, 2017. App. 67, 71-72.

G. A Grand Jury Returns a First Superseding Indictment

Two weeks later, a grand jury empaneled in the Eastern District of California returned a first superseding indictment on September 21, 2017. Similar to the most-recent of the complaints, this charged Petitioner and sixteen other defendants with a total of 38 counts. App. 27-46.

Particular to Petitioner, the first superseding indictment alleged that he had (a) conspired to possess methamphetamine with intent to distribute (21 U.S.C. § 846, counts 2 and 3); (b) distributed that same controlled substance (21 U.S.C. § 841(a)(1), counts 11-13); (c) possessed a firearm after having been convicted of a felony (18 U.S.C. § 922(g)(1), counts 24 and 27); (d) conspired to transport a person in interstate commerce for prostitution (18 U.S.C. §§ 371 and 2421(a), count 28); and (e) actually transported someone interstate for that purpose (18 U.S.C. § 2421, count 29). App. 32-33, 35, 40-44. But as was true with the indictment's earlier iteration, counts 24 and 27 did not allege that Petitioner knew

he was a convicted felon when he possessed the firearms at issue. App. 40-42.

Petitioner appeared at an arraignment that same day and pleaded not guilty to the first superseding indictment's charges against him. App. 150-151.

H. Petitioner Enters Into a Plea Agreement with the Government, But an Attached Factual-Basis Exhibit Does Not Specify That Petitioner Knew He Was a Felon When He Possessed a Firearm

Following ostensibly protracted negotiations, Petitioner and the government executed a plea agreement on January 25, 2019. In particular, Petitioner agreed to plead guilty to counts 3, 24, and 27 of the first superseding indictment. He also specified that he would generally waive his right to appeal his prospective conviction and any aspect of the custodial sentence the district court might impose. App. 86-87, 94.

The government in turn agreed to dismiss the remaining six counts against Petitioner and potentially recommend that he receive a three-level departure under U.S.S.G. § 3E1.1 for pleading guilty before proceeding to trial and accepting responsibility for his putative conduct. App. 90-91.

Notably, however, the plea agreement's recitation of the necessary elements for count 24 (§ 922(g)(1)) did not specify that Petitioner needed to know he was a felon when he possessed the firearm at issue. App. 92. And perhaps even more importantly, the factual-basis exhibit that the parties attached to the agreement

similarly did not so stipulate, nor did it even state that Petitioner was a convicted felon as of August 12, 2017, when government agents seized a firearm from his residence, or that the gun "had been shipped and transported in interstate and foreign commerce." App. 97. Strangely enough, that purported basis was for alleged conduct on a date entirely different from what the first superseding indictment had alleged for that count (June 9, 2017). App. 40, 97.

Importantly, though, the factual-basis exhibit asserted that Petitioner apparently was consuming promethazine in the Snapchat video (see supra at 6) in which Petitioner had brandished a firearm. App. 97

I. The District Court Conducts a Patently Deficient Change-of-Plea Hearing Under Rule 11, and Notably Does Not Elicit an Adequate Factual Basis for Petitioner's Guilty Plea to the Felon-in-Possession Count

At a perfunctory change-of-plea hearing on February 11, 2019, the district court conducted a manifestly deficient Rule 11 colloquy. Among other things, despite Rule 11(b)(1)'s lengthy list of mandatory tasks that a district court had to accomplish before even determining that the plea was knowing, voluntary, and intelligent, the district court plainly did not do the following: (a) notify Petitioner that any false statement that he might make in open court could later subject him

to criminal liability "for perjury or false statement"[2] (Fed. R. Crim. P. 11(b)(1)(A)); (b) inform him that he had a right to a jury trial[3] (Fed. R. Crim. P 11(b)(1)(C)); (c) notify Petitioner that he had a right to have appointed counsel represent him at trial[4] (Fed. R. Crim. P. 11(b)(1)(D)); (d) notify Petitioner that he had a right to confront adverse witnesses at trial (Fed. R. Crim. P. 11(b)(1)(E))[5]; (e) inform him that he had a right "to be protected from compelled self-incrimination (Fed. R. Crim. P. 11(b)(1)(E))[6]; (f) notify Petitioner that he had a right "to testify and present evidence (Fed. R. Crim. P. (b)(1)(E)); (g) inform him that he had the right "to testify, and present evidence, and to compel the

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[2] Indeed, there is no indication in the transcript that the district court ever placed Petitioner under oath before beginning the hearing – which is customary during a Rule 11 colloquy. See App. 10.

[3] The district court informed Petitioner, "If you wanted to not plead guilty to these three counts and you wanted to go to trial, all you would have to do is tell me." App. 12. But that omitted any reference to Petitioner's constitutional rights under the Sixth Amendment to a jury trial.

[4] Mentioning what would occur if Petitioner were to proceed to trial, the district court stated only that "You would be there, your lawyer would be there. The government would have the burden of proving its case against you. They would attempt to meet the burden by bringing witnesses and evidence. You would watch the witnesses against you. Your lawyer would ask them questions, or cross-examine them." App. 12.

[5] See supra at n.4.

[6] The district court stated only that if Petitioner "wanted to testify, [he] could. If you didn't, nobody would use it against you." App. 12.

attendance of witnesses," (Fed. R. Crim. P. (b)(1)(E))[7]; and (h) notify Petitioner that it was obligated to impose a special assessment of $100 (Fed. R. Crim. P 11(b)(1)(L)).[8] App. 10-11.

In addition to those eight serious deficiencies, the district court committed at least six additional material errors, ones that particularly impacted Petitioner's substantial rights.

First, the district court did not query Petitioner about whether he understood "in determining a sentence, the [district] court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a) . . . ." Fed. R. Crim. P. 11(b)(1)(M). Indeed, and quite remarkably, the district court did not mention the Guidelines or § 3553(a) at all, and instead merely posed the following facile query to Petitioner: "Do you understand I'm not part of the plea agreement, and if I don't follow it, you cannot

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[7] The district court stated only that Petitioner "could bring in witnesses and evidence, and we would help you get that here by the subpoena power of the Court." App. 12.

[8] The district court did note for each count that there was a $100 special assessment, but it did not specify to Petitioner that it was obligated to impose it for each count. Instead, the district court mentioned the assessment's mandatory nature only for count 3. App. 10-11.

take your change of plea back; do you understand that?" App. 13. Petitioner replied affirmatively. Id.

Second, notwithstanding the district court's obligation to "determine that there is a factual basis for the plea" (Fed. R. Crim. P. 11(b)(3)), the district court did not query Petitioner particularly about the exhibit that the parties had attached to the plea agreement. Instead, the district court merely asked Petitioner, "And did you understand the facts?" and ". . . [A]re those facts true?" App, 10. Petitioner replied affirmatively to both questions. Id. The government's prosecutor did not supplement the exhibit with an additional proffer during the hearing. App. 13.

Third, and quite importantly here, the district court did not particularly discuss "the terms of any plea-agreement waiving" Petitioner's "right to appeal or to collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N). Instead, the district court merely asked Petitioner, ". . . [D]o you understand that you are giving up, or waiving, your right to appeal?" Petitioner replied affirmatively. App. 11.

Fourth, the district court also did not address the particulars of the "applicable forfeiture" with Petitioner. Fed. R. Crim. P. 11(b)(1)(J). Rather, the district court stated only that "there are certain things you are agreeing to forfeit, give up permanently, to the government. Do you understand that?" Petitioner stated that he did. App. 11-12.

Fifth, although the district court attempted to recite the essential elements of the three offenses to which Petitioner was pleading guilty, it failed to mention that § 922(g)(1) requires the government to prove beyond a reasonable doubt that the defendant knew of his felon status when he possessed the firearm at issue. See App. 14-15; Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

And finally – and perhaps most importantly for this Petition's purposes – the district court did not make the comprehensive inquiry that Rule 11(b)(2) and the Fifth Amendment's Due Process Clause require "to confirm [Petitioner's] competence and intelligence to enter a plea of guilty." United States v. Fuentes-Galvez, 969 F.3d 912, 915 (9th Cir. 2020). Initially, the district court did not ask Petitioner's sentencing "counsel whether he thought [Petitioner] was pleading knowingly and voluntarily," (id.) only more generally whether there was "any reason" why it "should not take the change of plea." App. 13.

Further, the district court "did not make any inquiries as to whether [Petitioner] was capable of knowingly and voluntarily entering a plea at that time (e.g., whether he was under the care of a physician, whether he was taking any medication, how far he had gone through school, or other questions that might bear on whether [Petitioner] understood the nature of his plea)." Fuentes-Galvez, 969 F.3d at 915; App. 12-13. This is quite significant here because Petitioner had

habitually imbibed promethazine, a prescription medication that contains an opioid (codeine), for 2-3 years before his arrest. App. 179. And the district court "did not ask [Petitioner] whether he understood his attorney or felt fully satisfied with the counsel, representation, and advice given to him by his attorney." Fuentes-Galvez, 969 F.3d at 915.

J. The District Court Sentences Petitioner to a 262-Month Custodial Term on Count 3, and Concurrent 120-Month Terms for the Other Two Counts

During a sentencing on June 17, 2019, the district court determined at the outset – after ostensibly adopting the PSR's Guidelines recommendations (see App. 167-169) – that Petitioner had an adjusted base offense level of 35 for count 3, ostensibly including a three-level downward adjustment under § 3E1.1 for having timely accepting responsibility (see supra at 9). Coupled with Petitioner's falling within Criminal History Category V, that yielded an advisory Guidelines range of 267-327 months.[9] App. 99, 183.

Following extensive arguments from Petitioner's sentencing counsel that emphasized Petitioner's heartbreaking upbringing in Fresno within a broken, dysfunctional family and his limited education (ER 9-15; see also supra at 3-4),

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[9] The district court determined that the Guidelines range under standard grouping principles for the other two counts was the statutory maximum – 120 months. See App. 99, 167-169; U.S.S.G. §§ 2D1.1(a)(5) & (b)(1), 3D1.2(c)(5).

Petitioner briefly allocuted. App. 105-106, 108-109.

Although ostensibly mindful of Petitioner's upbringing and his in-court contrition (see App. 100), the district court then emphasized his concern about what Petitioner's actual and putative victims had endured. App. 100, 107-110. Consequently, without meaningfully analyzing applicable factors under § 3553(a) (see App. 99, 110), the district court – after informing Petitioner that it might have sentenced him to a 720-month term if he had proceeded to trial and been convicted on all counts (App. 110) – sentenced Petitioner to a low-end custodial term of 262 months for count 3. It also sentenced Petitioner concurrently for counts 24 and 29 to 120-month terms. App. 111.

For count 3, the district court imposed a 60-month supervised release period. App. 111. And it imposed concurrent 36-month periods for counts 24 and 29. Id.

Generally speaking, it observed that "[a]ppellate rights have been waived." App. 112.

K. Petitioner's Original Appellate Counsel Files an *Anders* Brief, But a Merits Panel from The Ninth Circuit Strikes It, and Orders New Appellate Counsel to Address Two Issues

Perhaps surprisingly because of the patent deficiencies in the district court's Rule 11 colloquy with Petitioner and the Supreme Court's intervening opinion in

Rehaif, Petitioner's original appointed appellate counsel decided to file an Anders brief in the Ninth Circuit on February 25, 2020. Following review by a merits panel, it ordered on May 18, 2020, that the brief be stricken after determining that the record presents at least two non-frivolous issues: whether the district court plainly erred by (a) not establishing that there was an adequate factual basis under Rule 11(b)(3) for Petitioner's guilty plea to count 24 (§ 922(g)(1)) under Rehaif; and (b) making multiple Rule 11 errors during the plea colloquy with Petitioner, therefore rendering it "not knowing or voluntary." App. 114-115.

Consequently, the merits panel directed the Ninth Circuit to appoint new appellate counsel, who would address at least those two issues in a replacement opening brief. App. 115.

L. The Court of Appeals' Disposition

Following briefing and oral argument, a second merits panel of the Ninth Circuit affirmed Petitioner's conviction and sentence via a short, unpublished memorandum disposition on January 7, 2022. Acknowledging in pertinent part that the district court "did not specifically ask Petitioner if the plea was "'voluntary,'" the Ninth Circuit instead focused on language in Petitioner's written agreement concerning that subject matter and his relinquishing trial rights during his Rule 11 colloquy with the district court, reasoning that they helped to preclude

Petitioner from satisfying "his burden to demonstrate that the Rule 11(b)(2) error affected his substantial rights." App. 1, 6.

More particularly, instead of specifically engaging the Rule 11(b)(2) requirements that the Ninth Circuit had mandated in Fuentes-Galvez (and the district court patently failed to satisfy here), the merits panel highlighted another Ninth Circuit case – United States v. Ferguson, 8 F.4th 1143 (9th Cir. 2021) – that at least implicitly attempted to minimize Fuentes-Galvez's holdings. In particular, the merits panel quoted Ferguson's gloss that Fuentes-Galvez "'was driven by the defendant's unique susceptibility to coercion' – special circumstances that are not present here." App. 6 (quoting Ferguson, 8 F.4th at 1147).

Although Petitioner had contended alternatively that the district court violated the Fifth Amendment's Due Process Clause by having accepted his guilty plea despite patent concerns in the district court record about whether it had been knowing and voluntary, the Ninth Circuit did not address that issue in its unpublished disposition. App. 4-7, 135, 142-143.

ARGUMENT

1. As the Court held in seminal opinions decades ago, such as Boykin v. Alabama, 395 U.S. 238, 243-44 (1969), due process principles require a trial court to conduct a change-of-plea hearing such that the defendant demonstrates that he

is entering his plea knowingly and voluntarily. Concomitant to that constitutional rule, Boykin also held that a trial court must develop a record sufficient for an appellate court examining the plea to determine that the defendant knowingly and voluntarily relinquished core constitutional rights, such as a right to proceed to a jury trial with appointed counsel. See infra at 20-21.

2. The Ninth Circuit's approach in the present case, however, effectively endorsed the district court's having contravened Boykin and similar opinions from the Court that require such a fulsome on-the-record development of the defendant's ability to enter a knowing and voluntary plea. This is particularly so here considering that the record in its totality – including facts manifestly available to the district court such as the factual basis the parties had attached to Petitioner's plea agreement (see App. 97) – demonstrated that Petitioner had been a daily user of a dangerous controlled substance for 2-3 years before his arrest. See supra at 15; infra at 22.

Thus, by not inquiring whatsoever regarding Petitioner's history of substance abuse – particularly considering promethazine contains codeine, a opioid that could cause withdrawal symptoms – the district court did not comply with Boykin's dictates. And the Ninth Circuit essentially ratified that error by not even adjudicating the due process claim that Petitioner had raised in his opening

brief in that court. See supra at 18; infra at 22.

3. Consequently, because the Ninth Circuit's disposition deviates from Boykin and related cases, the Court should grant certiorari to resolve that discrepancy. See S. Ct. R. 10(c).

The Court should therefore grant Petitioner's petition for a writ of certiorari.

I. IN BOYKIN, THE COURT MADE PLAIN THAT REVERSIBLE ERROR OCCURS WHEN A TRIAL COURT DOES NOT DEVELOP AN ADEQUATE RECORD TO ESTABLISH THAT A DEFENDANT IN A CRIMINAL CASE KNOWINGLY AND VOLUNTARILY PLEADED GUILTY.

Expanding on the Court's seminal opinion in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), regarding due process principles and their interplay with a defendant's needing to knowingly and voluntarily relinquish constitutional rights when pleading guilty, Boykin held that trial courts must exercise "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." Boykin, 395 U.S. at 243-44; see also Brady v. United States, 397 U.S. 742, 747 n.4 (1970) ("The new element added in Boykin was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.").

In particular, Boykin noted that human experiences such as

"incomprehension" and "terror" could "be a perfect cover-up of unconstitutionality." Boykin, 395 U.S. at 243. But when a trial court "adequately" creates a record illustrating that within that case's factual circumstances, the defendant's plea occurred knowingly and voluntarily – thus necessarily devoid of factors that could otherwise have rendered it void – then "it leaves a record adequate for any review that may be later sought [] and forestalls the spin-off of collateral proceedings that seek to probe murky memories." Id. at 244.

II. THE NINTH CIRCUIT OVERLOOKED BOYKIN AND ITS PROGENY IN ITS DEPOSITION, INSTEAD FOCUSING NARROWLY ON WHETHER THE DISTRICT COURT HAD COMPLIED WITH RULE 11(b)(2).

A. Simply put, although Petitioner had raised a due process claim in his opening brief in the Ninth Circuit concerning his plea's voluntariness, the second Ninth Circuit merits panel did not address it. See supra at 18. Instead, notwithstanding the district court's record containing evidence – some of which was available to the district court as of the change-of-plea hearing's date – illustrating that Petitioner had habitually consumed a liquid mixture of prescription-strength cough medicine and codeine for 2-3 years before his arrest, the Ninth Circuit instead adjudicated this issue purely from a Rule 11(b)(2)

perspective. App. 4-7; supra at 17-18.

B. In so doing, however, the Ninth Circuit overlooked the more-than-theoretical possibility that Petitioner's history of substance abuse – combined with limited formal education (see supra at 4, 6, 10, 14-15) – might have resulted in his being prone to the type of "incomprehension" or "terror" that the Court discussed in Boykin as creating potential constitutional infirmities in the plea context that a trial court needs to address in-court. Boykin, 395 U.S. at 243. Otherwise, as Boykin further noted, an inadequate record could result in a "perfect cover-up of constitutionality." Id.

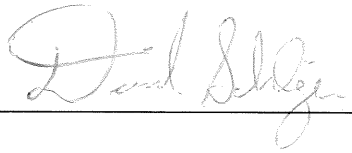
Simply put, the Ninth Circuit's focusing exclusively on Petitioner's Rule 11(b)(2) claim – and, more particularly, its seizing upon narrow language in Ferguson to reject it (see App. 6) – resulted in a demonstrable conflict between its ultimate disposition of Petitioner's direct appeal and what the Court in Boykin and its progeny have long required within the due process context. And at a bare minimum, the Court – if it elects not to address Petitioner's due process claim on the merits in the first instance – should instead instruct the Ninth Circuit to adjudicate it under the principles the Court has long established. See S. Ct. R. 10(c).

III. CONCLUSION.

The Court should grant the petition for writ of certiorari.

Dated: May 16, 2022

Respectfully submitted,



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Counsel for Petitioner

No._____

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS MONTANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on May 16, 2022, as required by Supreme Court Rule 29, I served Petitioner Carlos Montano's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

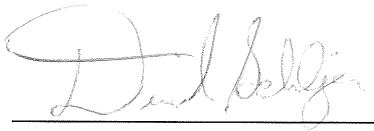
The Honorable Elizabeth B. Prelogar, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

Additionally, I mailed a copy of the motion and the petition to my client, Petitioner Carlos Montano, by depositing an envelope containing the documents in the United States mail, postage prepaid, and sending it to the following address:

Carlos Montano
Register No. 76743-097
FCI Terre Haute
Federal Correctional Institution
P.O. Box 33
Terre Haute, IN 47808

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

Executed on May 16, 2022



DAVID A. SCHLESINGER
Declarant