No. _____

In the

Supreme Court of the United States

VINCENT RAYMOND RIOS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Questions Presented

Should the Ninth Circuit have vacated Mr. Rios's guilty plea for lack of a knowing and voluntary waiver of his constitutional rights, for these reasons, individually or in combination:

1. Mr. Rios is a native Chamarro speaker, with limited English proficiency, who did not receive the assistance of a Chamarro interpreter when he agreed to enter his plea agreement or when he entered his guilty plea in court.
2. Mr. Rios was not advised, either in his plea agreement or during his plea colloquy, that drug type and quantity was an element that the prosecution would have to prove to the jury, if the case went to trial.
3. Mr. Rios's counsel, who was not long after deemed a ward of the court and incompetent to handle his own affairs, conceded he did not provide Mr. Rios discovery, did not ensure the presence of an interpreter, did not ensure that the plea agreement contained the proper elements, told Mr. Rios how to answer the court's question so the guilty plea would go through, and overall did not provide competent representation.

Statement of Related Proceedings

- *United States v. Vincent Raymond Rios.,* 20-10199 (9th Cir. Mar. 17, 2022)
- *United States v. Vincent Raymond Rios,* 1:16-cr-00039 (D. Guam June 18, 2020)

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UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Vincent Raymond Rios petitions for a writ of certiorari to review the memorandum decision entered by the United States Court of Appeals for the Ninth Circuit affirming the judgment entered below.

Opinions Below

The Ninth Circuit's memorandum disposition affirming the district court judgment was not published. (App. 1a-4a.) The district court judgment was entered June 19, 2020, and is not published. (App 19a-27a.)

Jurisdiction

The Ninth Circuit issued its memorandum disposition affirming the judgment on March 17, 2022. (App. 1a-4a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory and Guideline Provisions Involved

Federal Rule of Criminal Procedure 11(b) provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

. . .

(G) the nature of each charge to which the defendant is pleading;

. . .

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

Statement of the Case

1. On November 30, 2016, the United States Attorney charged Mr. Rios with three counts of possession with intent to distribute, and attempted possession with intent to distribute, methamphetamine. Faced with serious criminal charges. Mr. Rios retained attorney Howard Trapp. The day he entered his appearance, Mr. Trapp moved to dismiss the case on technical grounds relating to federal criminal jurisdiction over offenses that occur in the

territory of Guam. Mr. Trapp filed no other pleadings, nor did he respond to the government's many motions in limine.

It is undisputed that Mr. Trapp provided no discovery to Mr. Rios before persuading him to enter a plea agreement. And the plea agreement he negotiated was deficient in several fundamental ways. For one, it did not advise Mr. Rios that the government would have to prove, and the jury would have to find, the quantity of drugs involved—even though the quantity and type of drugs was the element that raised the mandatory minimum from zero to twenty years. Mr. Trapp did not correct this oversight in the plea agreement, nor did he object when the magistrate judge repeated the error during the plea colloquy. Mr. Rios entered his guilty plea having been advised—both in writing and orally—that, to secure the twenty-year mandatory minimum, life maximum, sentence it sought, the government would have to prove only that Mr. Rios joined in an agreement to distribute methamphetamine, knowing and intending to accomplish that purpose.

After the change-of-plea hearing, the sentencing date was continued multiple times, for over a year. During that year plus, Mr. Trapp didn't file any position regarding sentencing. Three days before the scheduled sentencing date—and still no position paper filed—on July 27, 2018, Mr. Rios filed a pro se motion to withdraw his plea. On the date set for sentencing, Mr. Trapp was

absent for medical reasons. The court relieved Mr. Trapp as Mr. Rios's counsel and set the hearing over for Mr. Rios to retain new counsel.

2. Substitute counsel, Phillip Torres, entered the case and helped in Mr. Rios filed a counseled motion to withdraw the plea. Mr. Rios alleged that Mr. Trapp had only visited him on a couple of occasions (and not once in the year since the plea hearing), that he hadn't provided any discovery because, supposedly, it was for attorney's eyes only, and that Mr. Trapp had instructed him to simply say "Yes," to the court's questions during the change-of-plea hearing.

The district court held two hearings. At the first, on October 1, 2018, it surfaced that a couple weeks prior, on September 14, 2018, Howard Trapp was found to be suffering from a disability that prevented him from caring for himself, and was appointed a guardian. The second hearing focused on the impact those deficits may have had on Mr. Rios's case. Counsel introduced the audio recording of the change-of-plea hearing, and argued that both the strange instruction to flush the plea agreement and the frequently prompting on how to answer questions provided reason to believe Mr. Trapp's issues may have pre-dated the change-of-plea hearing. There was no dispute that Mr. Trapp did not provide Mr. Rios the discovery in the case; Mr. Trapp admitted as much in a declaration. Mr. Rios argued this, too, provided a fair and just reason to permit withdrawal of the plea.

Counsel also raised issues relating to Mr. Rios's English-language abilities: Mr. Rios's ability to read and write in English was limited. The government disputed this account, saying that Mr. Rios had used multiple bank accounts, had been employed, had traveled to the mainland United States, and had pulled off a drug and money laundering scheme—all signs, in the government's view, that Mr. Rios's proficiency in English was not minimal. At the close of the hearing, the district court asked whether the court should appoint a Chamarro interpreter for future proceedings. Defense counsel Torres declined without consulting with Mr. Rios. He did believe that Mr. Rios needed an interpreter for future proffer sessions with the government. The prosecutor confirmed that they would do so, and added that they had a Chamarro speaking agent present during the five proffer sessions that had occurred to date.

3. About two months after that hearing, the same defense counsel, Mr. Torres, filed a brief asking the district court to hold a competency hearing. Counsel had became convinced that Mr. Rios didn't understand what had transpired in his case. A hearing was set—another hearing in which no interpreter was present. At that hearing, Mr. Torres reported that Mr. Rios wanted to fire him. He said that Mr. Rios had not authorized him to retract the motion to withdraw the plea agreement, and that it had not been Mr. Rios's intent to do so. The district court directed her comments to Mr. Rios, and asked

whether he understood what Mr. Torres had said. He indicated he did not understand what the court was saying. After Mr. Rios affirmed several shorter, simpler questions, the district court found Mr. Rios qualified for appointed counsel and relieved Mr. Torres.

The magistrate court appointed new counsel, William Gavras, and urged Mr. Rios to cooperate with him. As one of his first moves, defense counsel Gavras asked that a Chamarro interpreter be appointed. The magistrate court did so. Shortly thereafter, Mr. Rios renewed his prior motion to withdraw his guilty plea, supported by a declaration that had been translated for him into Chamarro. (3-ER-353; 3-ER-404-405.) In that declaration, Mr. Rios asserted that English is not his first language, and his English comprehension is limited. (3-ER-405.) He stated that his prior counsel hadn't used an interpreter when he discussed withdrawing the motion, and complained that he was not provided with an interpreter during the hearings relating to the motion. (*Id*.) He only understood what Mr. Torres had done a few days after the hearing, when he asked Torres when the trial would be—and learned there wouldn't be a trial. (*Id*.) Mr. Rios reiterated that he had received ineffective assistance from Mr. Trapp during the negotiation of his plea and plea colloquy, and that he had not knowingly and voluntarily entered his guilty plea. He asked the district court for leave to withdraw his plea.

The government once again opposed the motion. In response to the first motion, the withdrawn motion, the government again argued there was no good reason for permitting withdrawal, given that Mr. Rios waited so long in filing his motion. (3-ER-366.) It again averred that it would face prejudice if the motion were granted, because it had released its trial witnesses from their subpoena and because it had dismissed charges from the indictment. (*Id.*) The district court, too, would be inconvenienced, the government argued, in that a trial would substantially disrupt the district court's docket. (3-ER-367.) The government argued that Mr. Rios had had the close assistance of highly experienced counsel at every juncture, and pointed to his assent, during the plea hearing, that he was satisfied with his counsel and that he understood the nature of his plea and the potential consequences. (3-ER-367-368.)

Responding to the new allegations, the government argued that defense counsel Torres made a strategic choice to withdraw the first motion to withdraw, and that the district court should not second-guess that decision. (3-ER-387.) Otherwise, the government simply reiterated that disappointment with the government's sentencing recommendations and regrets are not a basis to withdraw a plea, and that the prejudice to the government, disruption to the court's calendar, and delay all provided ample grounds to deny the renewed motion. (3-ER-388-401.)

The district court set a hearing to take evidence regarding Mr. Rios's language abilities. Mr. Rios's attorney called the court's Chamarro interpreter, Ronald Laguana, as a witness. Mr. Laguana served as a court interpreter for the Chamarro language for over 20 years. He has the equivalent of a master's degree, and used to teach both Chamarro and English language and history, grades K-12. (3-ER-427-428.) He had spent four hours with Mr. Rios. (3-ER-432.) Mr. Laguana testified that Mr. Rios understood "simple English," but when there were more technical terms, he would consistently turn to the interpreter and ask him to explain. (3-ER-423.) In Mr. Laguana's estimation, Mr. Rios has "basic comprehension and he can speak [English]" but he "has trouble understanding court terms and high-intellect language." (3-ER-424.) When Mr. Laguana attempted to testify further regarding Mr. Rios's proficiency, the government objected—and the district court accepted—that his testimony had strayed into "expert" testimony, and that he had to confine his testimony to "lay" observations. (3-ER-429.) In light of the district court's limitations, Mr. Laguana testified only that Mr. Rios had an "intermediate" ability in English, and would not understand specialized legal terms without an interpreter. (3-ER-430.)

Government counsel elicited that Mr. Laguana's knowledge about Mr. Rios's prior travel and work was limited. (3-ER-432-434.) But, as Mr. Laguana testified on redirect, neither traveling off Guam or working as a mechanic was

inconsistent with the proposition that Mr. Rios had less-than-proficient English language skills. (3-ER-435-436.)

The district court then asked Mr. Laguana whether Mr. Rios speaks English "well." Mr. Laguana attempted to explain two potential scales of language proficiency, "BICS and CALP"—the Basic Interpersonal Communication Skills and Cognitive Academic Language Proficiency scale. (3-ER-439.) The district court once again cut him off: "BICS and CALP sounds like now we're getting into specialized knowledge and training. . . . I just want you, from your lay opinion." (3-ER-439-440.) When defense counsel tried to clarify what it meant for him to answer questions about language proficiency, a skill in which he had decades of experience, as a lay person, the district court interjected: "Mr. Rios has been sitting in Court this entire time. He looks like he understands English." (3-ER-441.) And although the district court had instructed Mr. Rios to raise his hand during the hearing while his interpreter was on the stand—and thus not providing interpretation—if there was something he didn't understand, the court noted that he hadn't done so. (*Id*.)

Mr. Rios interjected at this point: "Even with you guys talking here, I still do not understand what's going on. . . . I still don't get what —when you're talking everything, talk, I still don't understand." (3-ER-442.)

The district court responded:

The Court: I see, all right. Well, . . . I mean I got an offer of proof. . . . [L]et me ask you this, Mr. Laguana, is it your opinion, your lay opinion that the defendant understands English? . . .

Mr. Laguana: Somewhat.

The Court: All right. Does he understand English very well? Or fairly well?

Mr. Laguana: Fairly well.

The Court: Fairly well. You feel he understands English fairly well?

Mr. Laguana: I guess.

(3-ER-442.)

After being put to that binary choice, Mr. Laguana stopped testifying and resumed his position as interpreter for Mr. Rios. But he didn't begin translating. Instead, the district court continued the protocol where Mr. Rios had to raise his hand if he wanted the interpreter's help. (3-ER-445.) The district court then moved on to the government's exhibits regarding Mr. Rios's English language abilities. The first was a statement Mr. Rios gave to police when he purchased a stolen motorbike:

The bike was on Facebook, it was addvertise by AJ Tainatongo selling an R6 Yamaha. I text him on Facebook if I can see the Yamaha R6. He

text back that we can meet at Malolo 76 gas station parking lot. And we meet at 76 gas station 76 about 900 pm at night. I am interested buying the bike for 3,800.00. Than I look at the registration and ownership for the license plate nuber M771 and it match. So I go and head and bought it. 4-5 months agao on Barrigada 76 gas station, I got pull over, I for got to mention when I bought the bike from AJ Tanatonga, net day got it inspection, insurance, cause the bike R6 was expired. Back to when I got pull over, two officer pulled me over cause I was speeding at Mangilao to Barrigada 76 gas station. When the officer read the registration VIN number, it didn't match whats on

registration on the bike. So Officer Champion pull in and ask

me what do I do this time. I said I was speeding. Than the officer ask me how do I got the bike, I said got it on Facebook advertise. Officer call in for the bik statuse but DNV revenue was close. The officer Champion ask me for my phone number and address that they will be calling me for that bike if its stolen or what. And until now still no call. I don't want to prosue againts my brother in law Bill Bo Wolford.

(3-ER-492-494 (all errors in original).)

The second exhibit was a recorded phone call. The call contains a mix of Chamarro and English throughout, but the government principally pointed to a brief description Mr. Rios gave about the plight of another inmate:

> Lana, the one they just got his pre-investigation report. They gave him the max. Ten. . . . He fired his, ah, *si* Jeffrey Moots *nai*. And, ah, Moots gonna like ah, you know in the beginning they offered they offered the guy seven years, right? So he has to cooperate. In the way beginning, this is what ah messed him up, nai. Because he ah, he got arrested. They release. He cooperated with the government. This is like five years ago, you know. He gave information. So now they went in this morning, they pick him up. You know they let him go. Then five years later. It's almost statute of limitations, eh, five years. Then went and arrested him. Then ah what is it. They went and offered him a plea agreement right plea. Offer a plea agreement. And he take it and signed it, then he cooperated, so they went release pretrial release. The one I told you. Two months three months later came back in. He violated. So they revoked him now they picked him up I think to cooperate with the government. He refused. So he refused *nai*, then he fired his attorney. Then they have a court hearing. They denied it. You know *ti nao taotao* so they give him max ten. . . . Because if he doesn't violate *nai* be out there. But no, he violated and he just straight. What's that they're violating at he just . . .

(3-ER-487-488 (Chamarro words in italics; responses omitted).)

The court then heard argument. Defense counsel argued that, whatever Mr. Rios's English language abilities, they were not sufficient to plead guilty

without an interpreter. (3-ER-454.) The district court pointed out that Mr. Rios had an interpreter available during the motion hearing, but hadn't used him. She then directed herself to Mr. Rios, again: "Mr. Rios, you understand? Do you understand me right now?" (*Id.*) Mr. Rios responded that he understood while the agent was reading the police report into the record, but the "[b]ig words, long words, I can't understand." (*Id.*) But, the district court said, "[h]e had this opportunity all this time, Mr. Gavras. The Court notes he's not taking advantage of it." (3-ER-455.) Contrary to the district court's suggestion, counsel argues that this proved only that he's a passive person. And just like he went along during the plea colloquy when his counsel told him how to answer questions, he also was sitting by during the hearing. (3-ER-457.)

The prosecutor urged the court to deny the motion. She pointed to the recorded call, in which Mr. Rios used words like "preinvestigation report" being sentenced the "max," firing an attorney, cooperation, offer, "statute of limitations," and "pretrial release." This proved "he's picking up the terms . . . used in Court," and reflected the fact that he has prior convictions and that he's intelligent. (3-ER-460-461.) The police report, where he talked about registering a vehicle and the VIN number, also demonstrated his proficiency in English, the prosecutor argued. (3-ER-461-462.)

The district court then denied the motion. She relied on Mr. Laguana's assessment that Mr. Rios was "fairly" competent in English and that he sought

assistance when he needed it. (1-ER-3.) The transcript of the recorded call from prison demonstrated that Mr. Rios understood a lot of technical terms. (1-ER-4.) And his written statement to the police: "I mean, I don't think he writes like a college graduate, but he does write such that someone could understand what he's trying to get across." (1-ER-5.) Because he understood English "fairly well," the motion to "reassert the motion to withdraw the guilty plea" was denied. (1-ER-5.)

With respect to the underlying motion, the district court concluded there was no fair and just reason to permit withdrawal of the plea. The magistrate court conducted a thorough inquiry, and Mr. Rios never said that he did not understand the questions he was asked. (1-ER-10-14.) The allegation that he was just giving the answers Mr. Trapp told him to give was unsubstantiated; he promised the court he would tell the truth at the beginning of the hearing. (1-ER-11.)

The district court rejected the claim that Mr. Trapp hadn't provided effective assistance, and hadn't visited him after the plea agreement colloquy; it found more credible the testimony of the agent who said that Mr. Trapp had been present at one of the debrief sessions and that someone from Mr. Trapp's firm was present at the others. (1-ER-14.) The district court noted Mr. Trapp's declaration admitting that he had not provided Mr. Rios with discovery, but found it not to warrant withdrawal of the plea, since Mr. Rios said, during the

plea colloquy, that he was satisfied with Mr. Trapp's representation. (1-ER-15.)

The district court thus denied the motion to withdraw the plea, and reset the date for sentencing. An amended PSR was issued to reflect the changes in the law relating to the First Step Act. On the date of sentencing, the court asked the Chamarro interpreter to be present on standby "in case you need him." (3-ER-521-522.) After hearing the arguments of counsel, the court sentenced Mr. Rios to 27 years in custody.

Mr. Rios timely appealed. On appeal, he argued that the district court erred in not permitting him to withdraw his plea based on his lack of English language competency; that his plea wasn't knowing and voluntary because he wasn't advised that drug quantity and type was something that the government would have had to prove to the jury, if he had gone to trial; and that his counsel's ineffectiveness was a basis to withdraw the plea. The court of appeals affirmed. It found that the district court did not clearly err in concluding that Mr. Rios's English-language abilities were not so deficient as to render his guilty plea not knowing and voluntary, (App. 2a-3a); that the *Apprendi* error did not "seriously affect the fairness, integrity or public reputation of judicial proceedings," given the quantity of drugs involved in the case, (App. 1a-2a); and that any ineffective-assistance-of-counsel claims should be reviewed on habeas, not on direct appeal, (App. 3a-4a).

Reasons for Granting the Writ

A defendant's guilty plea "is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). A defendant who pleads guilty stands as a witness against himself, and relinquishes his right to be tried by a jury and to confront his accusers. The waiver of these important rights is acceptable only if is knowingly, intelligently, and voluntarily offered by a person aware of the likely consequences of the choice. And to ensure that the defendant makes an informed decision, the law erects safeguards around a defendant's choice to plead guilty. The Sixth Amendment assures him the right to the assistance of competent counsel in deciding whether to plead guilty. Statutes require a court, sua sponte, to evaluate a defendant's language capacity and assign an interpreter where necessary, so that even non-native speakers can fully participate in decisions relating to their case. And Rule 11 requires a court taking a guilty plea to review the elements of the offense with the defendant on the record, to make sure he knows what the government would have to prove if there was a trial. All of these safeguards serve to ensure that a criminal defendant understands the consequences of his choice to plead guilty. And all of these safeguards failed here.

Mr. Rios pleaded guilty four months after being charged. His attorney conceded that he never showed him any discovery before that plea—and not long after the change of plea, the attorney was himself made a ward of the court, deemed incompetent to handle his own affairs, let alone those of an individual agreeing to be sent to prison for decades. Mr. Rios was never advised, not in his plea agreement or his guilty plea colloquy, that the serious drug charges leveled against him would only stand if the government proved the drug type and quantity involved to the jury. And Mr. Rios was a deprived of the assistance of a Chamarro language interpreter until it was too late—though once an interpreter was on the scene, he corroborated that Mr. Rios's simple plea, "I still do not understand what's going on," was not for show.

Where one safeguard fails, the existence of other protections might convince a court that the error is harmless. But not when they all fail at once. The knowing and voluntary standard is designed to protect the autonomy of the defendant, to protect his right to make an intelligent choice among available options. Those safeguards failed here. Mr. Rios's case should be remanded for his guilty plea to be vacated.

The Ninth Circuit should have vacated his conviction. Because it failed to do so, this Court should grant certiorari and correct the error.

A. Mr. Rios's guilty plea should be vacated because he was not provided with an interpreter.

The most compelling reason for finding that Mr. Rios's guilty pleas were not knowing and voluntary is that the entire process took place in a language in which Mr. Rios was not competent. Mr. Rios is a native Chamarro speaker. While he had some basic comprehension in English, he lacked sufficient language proficiency to enter a knowing and voluntary plea in English. The district court's contrary conclusion, that his English was sufficient to the task, was both substantively wrong, and made after a hearing that improperly cut off relevant testimony and improperly limited Mr. Rios's ability to participate in the hearing. On either basis, the Ninth Circuit should have vacated his plea. Because it failed to do so, this Court should grant the writ.

1. *Mr. Rios's English-language proficiency was too limited to permit him* to *enter a knowing and voluntary guilty plea.*

There were several indicators that Mr. Rios's English language abilities were not sufficient for him to enter a plea agreement and a guilty plea in English with "fully aware of the direct consequences" of what he was doing. *Brady*, 397 U.S. at 755. The most direct testimony on this point was that of the court-appointed interpreter, who testified that Mr. Rios's capacity to understand English was limited. He explained that, during his meetings with Mr. Rios and counsel, Mr. Rios understood "simple English," but that he

required assistance with more "technical terms." (3-ER-423.) Mr. Rios "has basic comprehension" but "he has trouble understanding court terms and high-intellect language." (3-ER-424.) It was Mr. Laguana's opinion that Mr. Rios would not understand most specialized legal terms without a translator. (3-ER-430.) The court-appointed interpreter is a neutral party, hired by the court, with no motive to slant his testimony to help the defendant. His testimony about Mr. Rios's level of English-language comprehension, therefore, should be given significant weight.

Several objective indicators bolster the interpreter's testimony. Perhaps most telling, the prosecutor stated that she had a Chamarro speaker on hand during each of the proffer sessions with Mr. Rios. Mr. Rios had made several attempts to provide information to the government that might earn him a reduction in his sentence. According to the prosecutor, there had been five prior proffers, and during each one, the government had had a Chamarro-speaking agent on hand to assist. (3-ER-301-302.) A proffer, which involves discussing historical and biographical facts, is a less technical exercise than either a written plea agreement or the colloquy during a change-of-plea hearing. That the government saw fit to ensure language assistance when it wanted accurate information from Mr. Rios is a strong indicator that Mr. Rios's language skills were not sufficient for him to enter a knowing and voluntary plea in English.

Defense counsel (from Mr. Torres on) also reported difficulties in comprehension. Mr. Torres urged the district court to retake the plea colloquy, because he was concerned that Mr. Rios did not have sufficient language abilities to make the plea knowing and voluntary. (3-ER-277.) His assessment was that, in English, Mr. Rios's primary language was Chamarro and that he "has a comprehension problem" in English. (3-ER-283.) When he didn't persuade the court to inquire further into the plea, he urged the district court to make sure there was a Chamarro interpreter present at future proffer sessions. (3-ER-301-302.)

That same attorney, shortly thereafter, moved for a competency hearing because he found his client's lack of ability to comprehend the proceedings so troubling. (3-ER-304-306.) In that motion, he reported that his client had not understood that the motion to withdraw had been withdrawn. Defense attorneys have a solemn duty to declare a doubt about his client's competency, when necessary. *See Smith v. Rock*, 554 F. Supp. 2d 505, 521 (S.D.N.Y 2008) (discussing A.B.A. Standards for Criminal Justice, Standard 7-4.2(c)). It's not a responsibility taken lightly, given the potentially grave consequences to a client of doing so. Though he was mistaken about the reason for his client's confusion, counsel's assessment that his client did not understand that the motion had been withdrawn should be "given great weight." *United States v. Widi*, 684 F.3d 216, 220 (1st Cir. 2012).

Mr. Gavras shared Mr. Torres's assessment that there were significant comprehension problems, but attributed them to language issues, not mental competence. (3-ER-347.) He insisted that an interpreter should be appointed. (*Id.*) He used an interpreter throughout his representation, including after the motion hearing, to prepare for sentencing. (3-ER-437-38; 3-ER-503.) He represented to the court was that he didn't feel comfortable discussing any matter of substance without an interpreter present. (3-ER-437-438.) As an officer of the court, his representations, too, should be afforded weight.

Indeed, the only attorney who represented Mr. Rios for any significant length of time who did not report language difficulties was Mr. Trapp, whose representation was problematic for other reasons. That both Mr. Torres and Mr. Gavras perceived deficiency in Mr. Rios's English-language abilities and overall comprehension corroborated the court interpreter's assessment of Mr. Rios's language abilities.

And finally, there were indicators during the court proceedings that Mr. Rios was not tracking. Several times during the proceedings on the motion to withdraw, Mr. Rios interjected that he was having difficulty following what was going on. At one point, while counsel and the court and the court interpreter were all speaking, Mr. Rios interjected,

> Can I just say something for the record, Your Honor. Even with you guys talking here. I still do not understand what's going on. I'm still—I still

> don't get what's—when you're talking everything, talk, I still don't understand.

(3-ER-442.) He interrupted twice more during the same hearing to express concerns that he did not understand what was going on. (3-ER-445 ("I understand some but I don't understand all."); 3-ER-454-455 ("When he's reading, yes, Your Honor, I understand. It's simple meaning, it's—it's so easy to understand. Big words, long words, I can't understand what—" "My own writing, I understand. Elementary writing, I understand . . . Basic elementary writing. Simple, simple.").

When he spoke, moreover, his English was halting and tangled. In one of his only sustained conversation on the record, he struggled to convey his message:

> Your Honor— Counselor, Your Honor, what is this, to say for—from Trapp to Torres, all ineffective Counsel, Your Honor, because of—what is that, uh . . . ineffective counsel cause . . . hold on, Your Honor, just give me time to mind my head . . . .

(3-ER-329.) And:

> I didn't want this guilty plea, I wanted to—I didn't accept—what's that, I didn't—what do you call that, I didn't satisfy with this guilty plea being offered by Trapp that forced me to sign the plea.

(*Id.*) And:

I did submit him that they dismiss the motion to withdraw the guilty plea. I didn't ask Mr. Torres to go ahead and dismiss the guilty plea.

(3-ER-332.) The on-the-record conversations, held at a moment when Mr. Rios was desperate to be understood about his intent, display a rudimentary ability to communicate in English, and corroborate Mr. Laguana's testimony that his proficiency was limited.

The combined effect of this testimony was a strong showing that Mr. Rios has significant language deficiencies that warranted appointment of an interpreter right off the bat, both for attorney visits and for court. Given the pervasiveness of complex legal concepts in a plea agreement and plea colloquy, the failure to use an interpreter deprived Mr. Rios of his right to enter a guilty plea with full understanding of the consequences of his choice.

2. *The Rule 11 colloquy did not buttress the knowing and voluntary nature of the plea.*

The district court, however, denied that Mr. Rios's language abilities affected his ability to knowingly and voluntarily enter a plea. The court placed great weight on the Rule 11 colloquy conducted by the magistrate court. The court noted that Mr. Rios answered questions appropriately, including stating that he understood the plea agreement and that he was satisfied with it. At no

point, the court noted, did Mr. Rios state that he did not understand. (1-ER-10-13.)

As a general rule, a thorough Rule 11 colloquy may be sufficient to persuade a court that any deficiencies in language ability did not go to the knowing and voluntary nature of the plea. *See, e.g.*, *United States v. Nostratis*, 321 F.3d 1206, 1208-09 (9th Cir. 2003). Where a defendant cogently and correctly answers difficult questions, without the need for frequent repetition, consultation with counsel, or stumbles, it can be compelling evidence that he has the language capability to knowingly and voluntarily enter a plea.

Here, however, the court was wrong to draw reassurance from the Rule 11 colloquy. First, the answers Mr. Rios gave were cursory. He stated his name (after his defense counsel simplified and repeated the court's question, *see* 4-ER-560,) his age, and his eighth-grade education. In response to the question about whether he was under the care of a doctor or psychiatrist or being treated for addiction, he said "Yes, Your Honor, that's in RSA, Your Honor, RSA residential . . . [a]ssistant." (4-ER-561.) Apart from those basic biographical questions, the balance of Mr. Rios's statements during the change-of-plea hearing were yeses and nos, and "guilty, your Honor."

He got two questions wrong, stating twice that there had been threats or promises made. (4-ER-563; 4-ER-565.) Those two mistakes came on two of only six questions during the hour-long hearing that didn't require a "yes" answer,

which tends to corroborate his claim that he followed Mr. Trapp's instructions to just answer yes to the court's questions. (2-ER-99.)

And while it's true that even the most competent English speaker might have an occasional stumble, here, there's more. The audio file of the change-of-plea hearing demonstrates that Mr. Trapp was coaching Mr. Rios during the hearing, providing the "correct" answer between the question and Mr. Rios's response. A defendant who independently and correctly answers a court's questions without messing up too often, or asking for clarification, might be presumed to have a basic level of English language comprehension. But the opposite inference should be drawn where counsel provides the answer to questions—and apparently feels the need to offer this crutch—before his client answers. In this highly unusual case, the Rule 11 colloquy weakens the claim that Mr. Rios understood the proceedings.

3. *The contrary factors that the district court found convincing should not persuade the Court that Mr. Rios knowingly and voluntarily entered his plea.*

The district court did not solely rely on the Rule 11 colloquy, but none of the other factors it relied on are persuasive. The court pointed to the government's exhibits: the police report handwritten by Mr. Rios, and the recorded phone call. The police report, the district court noted, isn't written in sophisticated language, but Mr. Rios "does write such that someone could

understand what he's trying to get across." (1-ER-5.) And the recorded phone call was probative, because Mr. Rios used legal terms, including max, violation, offer, cooperation, and statute of limitations. (1-ER-4.)

Neither exhibit is persuasive. The police report is rife with errors. The statement doesn't use technical or legal terms, or touch on legal concepts. The terms the court deemed sophisticated, like "VIN number" and vehicle registration, aren't particularly probative when one recalls that Mr. Rios was a mechanic. (2-ER-249.) And because none of the circumstances of its making are in the record, including whether another individual helped him write it, it is minimally relevant to establish Mr. Rios's ability to understand complicated legal concepts in English.

With respect to the recorded phone call, there is a portion that discusses certain legal concepts, to be sure. But none of those words are particularly technical; most have entered the general lexicon. At the time of its making, moreover, Mr. Rios had spent two-and-a-half years sitting in custody, day after day, killing time with other federal inmates—including many who, presumably, spoke only English. By that point, it would be surprising if he *hadn't* picked up some basic legal terms. When he entered his guilty plea, however, he had been in custody for only four months, making this phone call of limited relevance to Mr. Rios's language abilities in early 2017.

In any event, the ability to throw around legal argot is no guarantee of the ability to understand the consequences of a guilty plea. The difference is apparent from the substance of the recorded call itself. While true that Mr. Rios used several legal terms, it's far from evident that he used them correctly. A PSR can't "give" anyone "the max"; it's only a probation officer's recommendation. (3-ER-487.) Federal plea agreements can't promise a particular sentence, and they certainly don't promise a lower sentence for cooperation *before* that cooperation has occurred. A person who is charged, plead guilty, and is released on pretrial release would not have a conceivable statute-of-limitations, since the statute of limitations stops running once charges are filed. *United States v. Bracy*, 67 F.3d 1421, 1426 (9th Cir. 1995). None of this demonstrates the mastery of legal concepts, in English, that the district court assigned to it.

B. Mr. Rios's guilty plea was not knowing and voluntary because he was not informed that the drug type and quantity were a crucial element of the offense.

"[R]eal notice of the true nature of the charge" is "the first and most universally recognized requirement of due process." *Bousley v. United States*, 523 U.S. 614, 618 (1998) (cleaned up). As a matter of due process—and under Rule 11—"[w]here a defendant pleads guilty to a crime without having been informed of the crime's elements," the knowing and voluntary standard "is not

met and the plea is invalid." *Bradshaw*, 545 U.S. at 183; *see also* Fed. R. Crim. P. 11(b)(1)(G).

Here, the court failed to inform Mr. Rios that if he went to trial, the government would have to prove the quantity of the controlled substance it alleged. (4-ER-573-574.) The plea agreement contained no such advisal either: In its statement of the elements, the plea agreement did not advise Mr. Rios that the government would have to establish beyond a reasonable doubt any particular quantity of controlled substance. (2-ER-40.) Going further, the factual basis for the plea stated that the drug type and quantity admissions in the plea agreement were made "for sentencing purposes." (2-ER-44.) The failure to advise Mr. Rios that he had a right to a jury finding on drug type and quantity, and that he could not he could subjected to a mandatory minimum and heightened statutory maximum on Count One without it, constitutes plain error.

Indeed, the court of appeals has already held this precise error satisfies the first three prongs of the plain-error standard. In *United States v. Minore*, 292 F.3d 1109 (9th Cir. 2002), the court considered a defendant who claimed his agreement to plead guilty was invalid because he was not informed that, under *Apprendi v. New Jersey*, the government would have to prove the type and quantity of drugs necessary to trigger a heightened statutory maximum for his drug charge. The court deemed this plain error. Drug type and quantity

were the "functional equivalent" of elements of a drug offense, and therefore it was error not to advise a defendant of his rights under *Apprendi* during the plea colloquy. *Id.* at 1116-17. The error was plain, because *Apprendi* was settled law. *Id.* at 1118. And, given the magnitude of the oversight—the omission of an element that triggered both a mandatory minimum and a higher statutory maximum—the failure to advise of the right to a jury finding on type and quantity is not a "minor or technical" oversight, and it necessarily affected the defendant's substantial rights. *Id.* at 1118.

The error that was plain in 2002 is no less plain nearly twenty years later. Under *Minore*, the first three prongs of the plain-error standard should be deemed met here.

The *Minore* court found the defendant there to have faltered on the fourth prong: He did not establish that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," because the evidence of drug type and quantity was overwhelming and essentially uncontroverted. *Id.* at 1120 (quoting Fed. R. App. P. 52(a)). The fourth prong is a "case-specific and fact-intensive" inquiry, though. *Puckett v. United States*, 556 U.S. 129, 142 (2009). And under the facts of this case, Mr. Rios's claim should succeed where the *Minore* defendant's failed.

First, Mr. Rios has, in his post-plea motions, maintained his innocence. (2-ER-92, 3-ER-504.) Given that claim, the court's failure to advise him of the

element that triggered that mandatory-minimum sentence should, alone, satisfy the fourth prong. To require Mr. Rios to serve a 27-year sentence when he maintains his innocence and when he was never advised of the element that converted his offense with a twenty-year *maximum* into one with a serious mandatory minimum surely threatens the public perception of the courts. *See Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) ("[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?") (cleaned up).

Second, the evidence of guilt here was not overwhelming. As described in the PSR, the instant investigation began with the interception of two packages mailed from Washington to Guam, addressed to "Sophie Baker" and "Sophy Baker." (PSR ¶¶ 20, 21.) One of those packages contained drugs. Two individuals came to the post office to retrieve the package, Mr. Rios and his girlfriend, Sue Ann Baker. (PSR ¶ 24.) When questioned, Mr. Rios said nothing. (PSR ¶ 27.) Ms. Baker agreed to talk, and placed all the blame on Mr. Rios while minimizing her own involvement. (PSR ¶¶ 28-32.) She claimed that Mr. Rios had mailed the packages while the two were visiting Washington. (PSR ¶ 32.) Then again, she also claimed that the drugs found in her own purse weren't hers. (PSR ¶ 41.) Officers then searched several locations shared by

Ms. Baker and Mr. Rios, and located additional stashes of methamphetamine and money. (PSR ¶ 36, 42 (finding drugs in the Mercedes Benz in which Baker was a passenger); PSR ¶ 43 (finding drugs in the hotel room that Baker and Rios rented, in a safe to which Baker provided the passcode). The record reflects no surveillance, no forensics, no confession from Mr. Rios—instead, the weight of the evidence against Mr. Rios came from the statement of the other potential suspect, Ms. Baker, and items found in their joint spaces. And for her agreement to say these things about Mr. Rios, Ms. Baker received a greatly reduced sentence—24 months, compared to Mr. Rios's 27 years, even though she was heavily involved in drug trafficking. *See* Judgment, *United States v. Baker*, Dkt. 27, 1:17-cr-2 (D. Guam Apr. 23, 2018); Government's Sentencing Memorandum, *United States v. Baker*, Dkt. 31, 1:17-cr-2, at 5 (D. Guam Oct. 13, 2017) (Baker "actively provide[d] support for a sizeable drug distribution system").

There was, of course, also the factual basis of the plea agreement. But it would be circular to rely solely on the factual basis of a plea to prove that the plea was knowingly and voluntarily made. It would be particularly problematic here, given that Mr. Rios was informed that his admissions were "for sentencing purposes," and that he labored from both language and counsel issues, as discussed elsewhere in the brief.

The fourth prong of the plain-error standard says that an appellate court should, in its discretion, correct errors that, if left uncorrected, would diminish the public perception of the judicial system. As the Ninth Circuit has previously held, "the right to be informed of the nature of the charges is so vital and fundamental that it cannot be said that its omission did not affect his substantial rights and the fairness, integrity, or public reputation of judicial proceedings." *United States v. Pena*, 314 F.3d 1152, 1158 (9th Cir. 2003). Given the totality of the facts, leaving this grave oversight uncorrected would leave an individual professing his innocence serving a 27-year sentence even though he didn't understand the crux of the charge against him. The court of appeals should have exercised its discretion to notice the error, deemed the fourth prong satisfied, and remanded. Having failed to correct this error, this Court should grant the writ, and remand with instructions that the plea be vacated.

C. Mr. Rios's plea should be vacated because he did not receive competent advice before entering the plea.

In considering the circumstances that led to Mr. Rios's entry of his guilty plea, the court of appeals should have considered the competence of the attorney who helped him enter that plea, Howard Trapp.[1]

[1] Claims that an attorney has provided constitutionally deficient performance are not generally addressed on direct appeal. *United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000). That doesn't preclude a court from considering whether "competent counsel" assisted in the entry of the guilty plea, as part of its inquiry into the circumstances surrounding the entry of a

Competent counsel is crucial to ensuring that a guilty plea is knowingly and intelligently entered. Indeed, throughout its seminal case on knowing-and-voluntary guilty pleas, this Court returns to "competent counsel" as a bulwark against pleas that are not knowingly and voluntarily made. *Brady*, 397 U.S. at 743, 749, 754, 756, 757. Though the district court goes over the highlights on the record, it is counsel that is expected to talk a defendant through all of the consequences of his choice, and to describe the benefit of a plea agreement and the likely outcome of a trial, should the plea be declined. Counsel's failure to provide competent representation thus goes directly to the knowing and voluntary nature of the plea. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.") (cleaned up).

Here, Mr. Rios did not enter his guilty plea with the assistance of competent counsel; counsel performed deficiently in several ways. First, Mr.

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plea. Moreover, here, the record is sufficiently developed to permit consideration even under the standard that applies to ineffective-assistance-of-counsel claims. *Id*. Because there were multiple hearings on the motion to withdraw, declarations regarding Mr. Trapp's representation, and findings by the district court relating to the effectiveness of counsel's representation, there was a sufficiently developed record to permit the Ninth Circuit to examine the counsel-based claim here.

Trapp conceded that he did not provide Mr. Rios with the discovery the government had produced pretrial. Mr. Rios's (unrebutted) declaration states he asked to review his discovery, and Mr. Trapp told him it was for attorney's eyes only. (2-ER-99.) The wholesale failure to provide discovery upon a client's request violates an attorney's duty to keep his client informed, and to respond to reasonable requests for information. *See* A.B.A. Criminal Justice Standards for the Defense Function 4-3.3(c) (4th ed. 2017) ("A.B.A. Standards") (counsel should, "as early as practicable in the representation . . . discuss and share with the client evidentiary materials relevant to the matter"); A.B.A. Standard 4-3.9(a)-(b) (requiring criminal defense counsel to "keep the client reasonably and currently informed about developments . . . [including in] discovery" and "promptly comply with the client's reasonable requests . . . for copies of or access to relevant documents").[2]

Failing to provide discovery was not merely a lapse in ethical duties, but goes directly to whether Mr. Rios had the assistance of competent counsel when deciding whether to enter a guilty plea. As the Supreme Court has held, a violation of the A.B.A. Standards or ethical rules does not, per se, establish deficient performance, but, in as much as those rules do reflect prevailing

[2] https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

norms of practice, they are "guides to determining what is reasonable" to expect from defense counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

And *this* canon exists for an important reason. A defendant cannot intelligently decide whether to go to trial or enter a guilty plea without some basic understanding of the evidence the government has against him. A knowing decision about pleading or going to trial requires evaluating the government's evidence and its source, since a defendant's choice might be different if the evidence consists of a snitch with motive to lie versus video surveillance or forensic evidence.[3] Without seeing the evidence, a defendant cannot provide his counsel leads that might impeach the government's evidence or place it in a significantly different light. Mr. Rios has asserted his innocence of the offense, (2-ER-92, 3-ER-504,) and may well have made a different calculus about pleading versus going to trial had he known the evidence the government possessed.

In the main, a criminal defendant "has the right to see and know what has been produced" by the government. *United States v. Hung*, 667 F.2d 1105,

[3] As one potential example, the PSR suggests that much of the evidence about the packages charged in Count One and Count Two came from the statements of Mr. Rios's girlfriend, who (after the two were separated by arrest) cooperated with the government and, in exchange, received a sweetheart deal.

1108 (9th Cir. 1981). A court can limit that right in certain circumstances, but it should not be denied all together. And it's hard to imagine the circumstances where *defense counsel* could reasonably place limits on his client's access to discovery, if his client has asked for the materials and no court order precludes him from providing them. Mr. Trapp's failure to provide Mr. Rios with discovery was improper.

Second, Mr. Trapp performed deficiently in failing to ensure that Mr. Rios was provided with an interpreter during court proceedings, and failing to use an interpreter in his own meetings with Mr. Rios. Whether the plea fails for lack of an interpreter or not, Mr. Rios certainly was an individual who had less than fluent English-language abilities. The threshold to appoint an interpreter is not a terribly high bar; indeed, when Mr. Gavras asked the magistrate judge to order an interpreter, the court was happy to oblige, based solely on counsel's representation that an interpreter would be useful and that his client wanted one. (3-ER-347.)

Again, this violates the ethical canons applicable to defense counsel, which requires defense counsel to "communicate with a client . . . [using] language and means" of communication "that the client is able to understand," and to ascertain whether any impairment or disability might adversely affect the representation, and to request appropriate protective measures. *See* A.B.A. Standard 4-3.1(c), (d). Just as counsel is expected to assess his client for

physical disabilities or mental impairments that might affect the case,[4] so too should counsel evaluate and ensure that his client understands the language in which proceedings occur. Mr. Trapp failed to do so, and that failure directly affected Mr. Rios's ability to fully understand the consequences of his decision to enter a guilty plea and a plea agreement, for the reasons set out above. *See supra*, p. 33-39.

Third, Mr. Trapp did not correct the plea agreement's failure to advise that drug type and quantity was part of the government's burden of proof, and there is no reason to think that his advice to Mr. Rios was more complete than the information in the plea agreement. Counsel's role is to make sure that his client understands the charges in his case. That basic level of representation was apparently lacking in this case.

Fourth, Mr. Trapp's conduct during the change-of-plea hearing was also problematic. He told Mr. Rios in advance that he should "just say yes," and then is heard, in the audio file for the hearing, prompting Mr. Rios as individual questions arose. He assented to adding an additional charge to the plea agreement, but is never heard explaining this change to his client. His "explanation" of the fact that the agreement was being amended to double the

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[4] *Cf. Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995) ("[W]here counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition . . . without a supporting strategic reason, constitutes deficient performance.").

supervised-release term was to say that supervised release was "like parole." (Audio, 4:40-4:42.) His failure to explain the myriad on-the-fly changes, including one as big as the number of charges to which he was pleading guilty, tends to corroborate Mr. Rios's allegations that Mr. Trapp did not fully advise him before he entered his plea. These collective failures demonstrate that Mr. Trapp was not playing his part to ensure that Mr. Rios entered his guilty plea with eyes open.

Certainly relevant to these failings is that Mr. Trapp was actually deemed incompetent after the plea, while he was still ostensibly representing Mr. Rios. As defense counsel Torres proffered in 2018, Mr. Trapp had been having issues for much of the past year, including during the time he was counsel of record for Mr. Rios. Other defense attorneys had been covering for him for the "better part of the previous year," and the public guardian opined that his capacity issues had been going on for "some time." (2-ER-147.) And though the record is unclear exactly when Mr. Trapp's difficulties began, in some ways, the thing speaks for itself: That such an experienced defense attorney would make elementary mistakes, like not providing discovery, or overlooking the crucial missing elements in the plea agreement, or overlooking numerous errata in the plea agreement, or telling a client how he should answer questions during the change-of-plea hearing, or not responding to the government's motions or filing a sentencing pleading—all of these suggest that

Mr. Trapp's health issues had begun by the time Mr. Rios entered his plea. Mr. Trapp was not serving as competent counsel when he assisted Mr. Rios in entering his guilty plea.

But for these errors, there is a reasonable probability that Mr. Rios would not have entered his guilty plea and would instead have insisted on a trial. *Hill*, 474 U.S. at 58. Mr. Rios said as much, (2-ER-99,) and his statement is credible. Mr. Rios professed his innocence at multiple junctures, and twice moved to withdraw his plea. He was eager to get to work with his counsel on trial defenses. (3-ER-306.) Though he faced a potential life sentence if he did not plead guilty, the sentence contemplated by the plea agreement would—does—leave him in custody until he is nearly 65 years old.

Contrary to the district court's conclusion, these errors were not overcome by Mr. Rios's statement, during the Rule 11 colloquy, that he was subjectively satisfied with Mr. Trapp's representation. At the time, he may well have been: he thought that he had received a deal that would result in minimal jail time, and he was unaware of the elements of the offense, his right to an interpreter, or that it was his attorney, not some other entity, that was preventing him from viewing his discovery. He didn't know what he didn't know. That shouldn't preclude Mr. Rios from raising his credible, substantiated problems with counsel once those failures came to light.

A court must consider the totality of the circumstances in deciding whether a plea (and plea agreement) were knowingly, voluntarily, and intelligently entered. The combined weight of the circumstances in this case—Mr. Rios's language abilities, his counsel's numerous failings, and everyone's failure to advise him of the *Apprendi* element of the most serious offense, should have persuaded the court of appeals that vacatur of the guilty plea is appropriate. The Court should grant the writ, remand, and set the parties back to square one.

Conclusion

For the foregoing reasons, Mr. Rios respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: June 14, 2022

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