No. 19-2154

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABIEL PEREZ-PEREZ,
Defendant-Appellant.

Appeal from the United States District Court
for the District of New Mexico
District Court No. 1:17-CR-03241-JCH-1 (Honorable Judith C. Herrera)

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AOKI CENTER FOR CRITICAL RACE AND NATION STUDIES IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 29(b)(2), Federal Rules of Appellate Procedure, the National Association of Criminal Defense Lawyers ("NACDL") and the AOKI Center for Critical Race and National Studies ("AOKI Center") respectfully request leave of court to file the accompanying brief as *amici curiae* in support of Defendant/ Appellant Abiel Perez-Perez and his Petition for Panel Rehearing and Rehearing En Banc. In support of this request, *Amici* state as follows:

This case presents critical issues involving the constitutional rights of due process and to trial by jury, and the proper application of rules concerning harmless error. *Amici* respectfully submit their proposed brief may aid in the Court's resolution of these important questions.

NACDL regularly participates in litigation to ensure justice and due process for those accused of crime or misconduct. NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in twenty-eight countries—and ninety state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges are committed to preserving fairness and promoting a rational and humane criminal justice system.

The American Bar Association recognizes NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice. In furtherance of this and its other objectives, NACDL files numerous briefs *amicus curiae* each year in federal courts addressing a wide variety of criminal justice issues. This Court has previously granted NACDL leave to file as *amicus curiae*. *See, e.g.*, *United States v. Miguel Bustamante-Conchas*, No. 15-2025, *United States v. Ismael Petty*, No. 15-1421, and *United States v. Sonya Evette Singleton*, No. 97-3178.

Aoki Center is a program of the University of California, Davis School of Law. It was formed to critically examine legal issues through the lens of race, ethnicity, citizenship, and class. The Aoki Center seeks to advance civil rights, critical race theory, and immigration issues through furthering scholarly research on the intersection of race and the law, and the filing of briefs *amicus curiae*.

Mr. Perez filed his Petition for Panel Rehearing and Rehearing En Banc on May 7, 2021, and the proposed brief *amici curiae* is being submitted within the time limits set forth in Rule 29(b)(2), Federal Rules of Appellate Procedure.

CONCLUSION

For the foregoing reasons, NACDL and AOKI Center respectfully request the Court grant leave to participate as *amici* in support of Mr. Perez-Perez, and order the filing of the accompanying brief *amici curiae*.

Date: May 17, 2021

Respectfully Submitted,

/s/ *David M. Porter*
/s/ *John Ormonde*

Attorneys for Amici Curiae
NACDL and AOKI Center

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

/s/ *Alex Moyle*
Alex Moyle

ATTACHMENT

Proposed Amicus Brief

No. 19-2154

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INTRODUCTION

Everyone agrees the district court violated Abiel Perez's constitutional rights not just one, but twice – first when it failed to inform him that the government had to prove he was here illegally or unlawfully, and again when it failed to inform him that the government had to prove he *knew* he was here illegally or unlawfully.[1] All three members of the panel also agree Mr. Perez has a compelling defense that he was not aware he was unlawfully present in this country at the time of his offense. Under this Circuit's precedent, because Mr. Perez satisfied his burden under the plain error test by establishing a plausible defense, the panel's unanimous conclusion should have ended the appeal; the judgment should have been vacated and the case remanded for further proceedings.

But the majority went on to speculate about Mr. Perez's "motivation for accepting the plea agreement." Slip op. at 16-17. Relying only on (1) the fact that the information's charges carried no mandatory minimum term (even though they *increased* the applicable guideline range) and (2) its surmise that unspecified quantity charges are "uncommon," the majority "confidently concluded" his motivation was to avoid the mandatory minimums in the hope of obtaining a downward variance. *Id*. at

[1] Pursuant to Fed. R. App. P. 29(a)(4)(e), counsel for Amici state that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than Amici, their members, or their counsel made such a contribution.

15-16. Why? Because the "only advantage" offered to Mr. Perez under the plea offer was to take the mandatory minimum off the table. *Id*. at 17.

It is unwise, however, to speculate about the possible motivations a defendant might have for accepting a plea offer without virtually any evidence of what actually transpired during the negotiations. As numerous commentators have observed, the plea-bargaining process is notoriously opaque, and charge bargains (such as the one involved in this case), even more than sentencing concessions, suffer from a special lack of transparency. The record in this case is fairly typical and there is certainly no direct evidence of Mr. Perez's motivation to acquiesce to the government's plea offer, but what scant clues do emerge suggest a number of reasons *other* than avoiding a mandatory minimum term: the trial penalty; the disparate resources of the parties -- an illiterate, Spanish-speaking alien vis-à-vis the Federal Government; and, his lengthy and onerous pretrial detention of more than 18 months. Because the panel undervalued Mr. Perez's constitutional rights, described by the Supreme Court as "of surpassing importance," *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), and misapplied the plain error doctrine, this Court should grant rehearing and reconsider the case en banc.

ARGUMENT

I. The majority erred by failing to apply the *Trujillo* presumption.

Defendants who receive a plea offer from the government have a constitutional right to be informed of the true nature of the charges against them so they have adequate notice of the specific elements the government must prove beyond a reasonable doubt at trial. *Hicks v. Franklin*, 546 F.3d 1279, 1284 (10th Cir. 2008) (citing *Smith v. O'Grady*, 312 U.S. 329, 334 (1941), which described the right as "the first and most universally recognized requirement of due process"). Without this fundamental guarantee of due process, a defendant's plea cannot be voluntary 'in the sense that it constituted an intelligent admission that he committed the offense.'" *Hicks*, 546 F.3d at 1284 (quoting *Henderson v. Morgan*, 426 U.S. 637, 645 (1976)).

This principle was applied in this Circuit just last year in the post-*Rehaif* case of *United States v. Trujillo*, 960 F.3d 1196. In that case, the defendant pled guilty to being a felon in possession of a firearm but because he didn't raise the *Rehaif* issue below, this Court reviewed for plain error. Where, as here, the district court failed to advise a defendant of an element of the charge, this Court explained that the effects of the error can be measured by "the strength of the government's case and the defendant's own admissions." *Id*. at 1207. "[I]f the evidence of a defendant's knowledge of his [prohibited] status is weak, we can presume his substantial rights

were affected because he might have proceeded to trial if he had known the government would be required to prove he knew [of his prohibited status]." *Ibid.*

All three members of the panel here agreed not merely that the evidence of Mr. Perez's knowledge of his prohibited status was weak but that the record provided "ample support" for this potential defense, observing: (1) Mr. Perez had been in the United States for at least seven years at the time of the offense; (2) he was married to a U.S. citizen; (3) his wife had initiated the process for him to adjust his residency status to lawful based on their marriage; (4) his bond money was returned and the removal proceedings concluded without him being removed; and, (5) he was illiterate, unsophisticated, and unfamiliar with the complexities of immigration law. Slip op. at 9. Moreover, the panel rejected each of the government's arguments to rebut the *Trujillo* presumption. Slip op. at 10-14.

At this point, the panel was obliged to follow its recent precedent, vacate the judgment, and remand the case for further proceedings. *See United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014) (per Gorsuch, J.) (courts have "adopted explicit presumption that a clear guidelines error will satisfy the latter two steps of plain error review"; concluding case "falls within the heartland of the presumption, not any exception"); *United States v. Cook*, 970 F.3d 866, 882 (7th Cir. 2020) (post-*Rehaif* plain error case concluding "[o]nly in the exceptional case will prejudice not be found"). Instead, the majority proceeded to speculate about Mr.

Perez's motivation for accepting the government's plea offer. In doing so, the majority misconceives the plea bargaining process, and its conclusion is belied by what little relevant evidence is discernable from the record, as discussed below.

II. The majority erred because what little relevant evidence can be gleaned from the opaque plea-bargaining process indicates Mr. Perez did not plead guilty to avoid the mandatory minimum charges.

"[W]hether an error was in fact harmless because it did not prejudice the defendant must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind." *United States v. Harrington*, 354 F.3d 178, 184 (2d Cir. 2004) (quotation omitted); *see also United States v. Fuentes-Galvez*, 969 F.3d 912, 916 (9th Cir. 2020) (cleaned up) (Rule 11 requirements "were specifically adopted to avoid having to speculate and engage in retrograde mind reading with regard to an individual defendant's state of mind and circumstances at the time of the plea").

Adherence to this rule against speculation is particularly compelling because, as many scholars have noted, the plea-bargaining process is "notoriously opaque."[2]

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[2] Noted Criminology Scholar Jenia Turner Speaks at CSU Sept. 19, available at: https://www.csuohio.edu/news/constitution-day-lecture-discusses-criminal-justice-reform ("[u]nlike the trials it replaces . . . plea bargaining remains notoriously opaque"); *see also* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 962 (2006) (discussing "opaque charge bargaining"); William J. Stuntz, *The Collapse of American Criminal Justice* 302 (2011) ("[g]uilty pleas, especially ones that happen early in the process, are largely

Charge bargains (such as the one involved in this case), even more than sentencing concessions, suffer from a "special lack of transparency." Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003). Relatedly, most appellate judges "have very limited experience with high-risk decisions facing criminal defendants. Few have ever represented [criminal] defendants and fewer still have ever sat in the position of a defendant."[3]

In this case, the majority relied on (1) the fact that the information's charges carried no mandatory minimum term (even though they increased the applicable guideline range) and (2) its surmise that unspecified quantity charges are "uncommon,"[4] to speculate that Mr. Perez's motivation in accepting the plea offer was to avoid a mandatory minimum term in the hope of obtaining a downward variance. It's important to recall that fully *three quarters* of all federal offenders

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invisible. So is the bargaining that lies behind them"); *cf.*, Rule 11(c)(1), Fed. R. Crim. P. (district court "must not participate" in plea negotiations).

[3] César Cuauhtémoc García Hernández, *7 Cir: Migrant Defendants Entitled to Roll the Dice with a Jury*, crImmigration (July 16, 2015) (available at: http://crImmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/).

[4] According to recent data from the United States Sentencing Commission, approximately one third of non-fentanyl drug offenders were convicted of an offense that did *not* carry a mandatory minimum penalty, suggesting that unspecified quantity charges are not at all "uncommon." United States Sentencing Commission, *Fentanyl and Fentanyl Analogues* 36 (Jan. 2021), available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210125_Fentanyl-Report.pdf.

received guideline sentences in fiscal year 2019;[5] the most critical factor affecting Mr. Perez's sentence was not the mandatory minimum term, but the applicable guideline range. The plea agreement's inclusion of the Section 922(g)(5) charge actually further increased his guideline range (to 78 to 97 months) above the 60-month mandatory minimum. The "significant benefit" the majority claims the plea agreement conferred on Mr. Perez ("by allowing him to avoid any mandatory minimum sentence") was, to the contrary, quite illusory. In other words, the ability to argue for a variant sentence below 60 months hardly seemed to be of any benefit, much less a "significant" one. Rather than accepting a plea with little benefit, Mr. Perez could have exercised his right to require the government to prove at trial all the elements of the Section 922(g)(5) offense beyond a reasonable doubt.

What few clues emerge from the opaque plea-bargaining process in this case suggest Mr. Perez did not plead guilty to avoid the mandatory minimum charges. Criminal defendants like Mr. Perez face a substantial trial penalty. A Human Rights Watch report found that federal drug offenders convicted after trial receive sentences on average three times longer than defendants who accept a plea bargain. Jamie

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[5] United States Sentencing Commission, *Annual Report 2019*, 8 (available at: https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report.pdf) ("75.0 percent of all offenders received sentences under the Guidelines Manual," meaning sentences that were "within the applicable guidelines range, or . . . outside the applicable guidelines range and the court cited a departure reason from the Guidelines Manual").

Fellner, *Plea Bargains – the Unfair Difference Between 10 Years and Life*, HUMAN RIGHTS WATCH (Dec. 4, 2013) (available at: https://www.hrw.org/news/2013/12/04/plea-bargains-unfair-difference-between-10-years-and-life) (in fiscal year 2012, the average sentence for federal drug defendants pleading guilty was 5 years, 4 months, but for defendants convicted after trial, it was 16 years); *see also* NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 25-26 (2018) (describing charge bargaining).

The record is clear in this case that Mr. Perez sought to avoid the trial penalty. His second attorney, Robert Cooper, noted Mr. Perez "has been requesting a plea offer for some time [*i.e.*, since December 10, 2018]." I:109.[6] The government rejected this offer and proposed its counter-offer on January 16, 2019. *Ibid*. Contrary to the picture painted by the majority of Mr. Perez being a sophisticated gambler and negotiator who made "calculated decision[s]," and "strategic choice[s]," it was actually the government's counter-offer that "require[d] the Defendant to plead to a count alleging possession of firearms for which the Defendant is not presently charged." I:109-110.

Indeed, the significant power imbalances that plague the federal criminal justice system were certainly exacerbated in this case. Mr. Perez, who had no

[6] Record citations are to volume and page number of the three-volume record on appeal filed in this Court on November 21, 2019.

criminal history points, had no experience with the criminal justice system, had only a sixth-grade education, could barely read, and didn't speak English. Arrayed against him was the Federal Government, which was represented by a prosecutor who understood the grouping rules. The sophisticated player in this case was not Mr. Perez.

Moreover, the impact of pre-trial incarceration can unduly influence a person to take a plea, and research shows pre-trial release significantly reduces the probability a defendant will plead guilty. Will Dobbie, Jacob Goldin, & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. No. 2, 201-40 (Feb. 2018). Mr. Perez was detained pending resolution of the charges on October 26, 2017, *see* I:5, ECF 3, for more than 18 months before he pled guilty on May 3, 2019, *see* I:15, ECF 101, a period of 554 days.[7] This is *more than double* the average period of detention for a pretrial defendant in federal custody. Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, FED. PROB. 52, 53 (Sept. 1, 2017) ("[a]s of 2016, the average period of detention for a pretrial detention had reached 255 days"). During that lengthy incarceration at a local jail, which of course is not designed for long-term detention, Mr. Perez saw both of

[7] He pled guilty on May 3, 2019, *see* I:13, ECF 101, 554 days after he was ordered detained.

his co-defendants plead guilty: the first, Antonio Escobedo-Iniguez, who pled guilty on July 10, 2018, and the second, Diego Torres-Ledesma, who pled guilty on March 29, 2019.

Finally, the fact that Mr. Perez's plea agreement increased his applicable guideline range suggests that we are missing the complete picture of what transpired. The majority views the plea as a "calculated" trading of the new charges for the old, but it is entirely possible, perhaps even likely, that the government threatened to bring the Section 922(g)(5) charge regardless of whether a plea was entered, which would completely refute the majority's reasoning. After all, months before Mr. Perez's arrest, acting Attorney General Sessions released a memorandum urging federal prosecutors to "employ the full complement of federal law," explicitly including 18 U.S.C. § 922 charges, to address violent crime. *See* Office of the Attorney General, Memorandum for all Federal Prosecutors: Commitment to Targeting Violent Crime (March 8, 2017). Under this plausible set of facts, the reasons for the plea agreement would have been, among others, efficiency, and the government's inability to prove the original charges.[8] Thus, it is plausible the majority's reasoning is entirely

[8] The government "has a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging." H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65 (2011). And prosecutors commonly offer substantially higher plea discounts to convince defendants that they believe have a

incorrect, and Mr. Perez was never given a fair opportunity to prove otherwise. *See* Pet'n for Rehearing at 9-13.

In sum, the information that can be gleaned from the record suggests Mr. Perez's motivation in pleading guilty was not to avoid the mandatory minimum charges of the indictment but rather to avoid the substantial trial penalty and to transfer out of the onerous conditions of pretrial detention, which he suffered for more than 18 months; and, in the event that the prosecutor threatened to bring the Section 922(g)(5) charges regardless of the plea, to reduce the guideline range he would have faced if convicted at trial.

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good chance of acquittal into waiving their right to a trial. Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714-15 (1981).

CONCLUSION

For the reasons set forth above and in the petition for rehearing, the National Association of Criminal Defense Lawyers and the Aoki Center for Critical Race and Nation Studies respectfully requests either the panel or the en banc court grant Mr. Perez's petition for rehearing and vacate the judgment below.

Date: May 17, 2021

Respectfully Submitted,

/s/ David M. Porter
/s/ John Ormonde

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* Counsel for Amici Curiae gratefully express their appreciation to Matthew Charnin, Musa Dajani, Tariq El-Gabalawy, Jordan McKee, Melissa Stratton, Jessica West, Nora Williams, Lion Wintemute, and Jennifer Wong, students at the University of California, Davis, King Hall School of Law.

CERTIFICATIONS

I hereby certify that the following is true and correct to the best of my knowledge and belief, formed after a reasonable inquiry:

(1) This brief is proportionally spaced and contains 2,234 words and therefore complies with the applicable type-volume limitations;

(2) Any required privacy redactions have been made;

(3) If required to file additional hard, the ECF submission is, with the exception of any redactions, an exact copy of those hard copies;

(4) The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program Symantec AntiVirus Corporate Edition, which is continuously updated, and, according to the program is free of viruses;

(5) On May 17, 2021, I electronically filed the foregoing using the CM/ECF system, which will send notification of this filing to opposing counsel, Assistant United States Attorney Tiffany L. Walters – Email: Tiffany.Walters2@usdoj.gov;

(6) I sent a copy of the foregoing, via U.S. Mail, to Abiel Perez-Perez, Reg. No. 93907-051, c/o Gils W. Dalby, Correctional Institution, 805 North Ave., F, Post, TX 79356.

/s/ *Alex Moyle*
Alex Moyle