No. 13-____

In the Supreme Court of the United States

DEVON TOEPFER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In *Massaro v. United States*, 538 U.S. 500, 504 (2003), the Court held that ineffective assistance of counsel claims need not first be presented on direct appeal to avoid a procedural default that would bar review in a post-conviction motion under 28 U.S.C. § 2255 motion, even if the pertinent record was fully developed in the district court. The Court held that there was no judicial benefit in directing courts on § 2255 review to scour the record to determine if such a claim could have been adequately presented on direct appeal. The question presented is: Does the same rule of non-waiver apply to collateral review of a due process violation premised on petitioner's reliance on the judge's statements and promises that induced petitioner to forego a favorable plea offer and proceed to trial, where the issue of the voluntariness of petitioner's decision to reject the plea offer ordinarily requires evidentiary development?

II. Did the court of appeals correctly conclude that petitioner's "contention that his decision to go to trial was involuntary does not state a cognizable due process violation" because there is no requirement under the Due Process Clause that "a defendant's decision to forego a guilty plea and head to trial" be made knowingly and voluntarily?

PARTIES TO THE PROCEEDINGS BELOW

There are no parties to the proceeding other than those listed in the style of the case.

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Petitioner Devon Toepfer respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 12-13407 in that court on May 13, 2013, *Toepfer v. United States*, which affirmed the final order of the United States District Court for the Southern District of Florida denying relief under 28 U.S.C. § 2255.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *Toepfer v. United States*, 518 Fed.Appx. 834 (11th Cir. 2013), which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (1a), along with a copy of the decision denying rehearing. App. 49a

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on May 13, 2013 and rehearing was denied on June 13, 2013. This petition is timely filed pursuant to Sup. Ct. R. 13.1, following the Court's granting of a 30-day extension of time to file the petition. The district court had jurisdiction pursuant to 28 U.S.C. § 2255. The court of appeals had

jurisdiction pursuant to 28 U.S.C. § 2253 in light of the district court's granting of a certificate of appealability.

CONSTITUTIONAL PROVISION INVOLVED

Petitioners intend to rely upon the following Constitutional provision:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner Devon Toepfer, a federal prisoner serving a 140–month sentence for multiple drug offenses, sought to vacate his sentence under 28 U.S.C. § 2255 motion to vacate sentence raising multiple claims including ineffective assistance of counsel and that he was denied due process because his decision to forego a guilty plea and proceed to trial was involuntary.[1]

Petitioner was charged in April 2004 with conspiring to manufacture and possess with intent to distribute at least 1,000 marijuana plants, and with manufacturing and possessing at least 1,000

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[1] The statement of the case is taken largely from that set forth by the court of appeals. *See* App. 1a-18a.

marijuana plants and other lesser counts relating to the marijuana growing allegations. Apart from his arraignment, petitioner was given two concrete opportunities to enter a guilty plea. In December 2005, before the jury selection for petitioner's trial was completed, the trial judge advised petitioner in open court that his decision to go to trial or plead guilty should be made in light of the judge's promise to sentence him based on an independent judicial determination of the number of marijuana plants (the principal sentencing variable), but that if petitioner went to trial the trial court would sentence petitioner in accordance with the number of plants found by the jury. This factor was very important to petitioner because he knew from his lawyer that a valid statute of limitations defense would expose petitioner to only a small risk at trial of being held responsible for a large number of marijuana plants, and that only lesser marijuana charges would carry a strong risk of conviction.

The trial court emphasized that it would "have no discretion as to [his] sentence" and "would be bound to any finding that the jury makes." If, however, petitioner entered a guilty plea, the court explained that it could make a finding of fewer than 1,000 marijuana plants, which would trigger a 5–year mandatory minimum. Petitioner said that he understood those consequences but still wanted to go to trial. The record was in dispute as to how many conferences the district court had with petitioner on this subject prior to completion of the jury selection,

with counsel and the district court indicating that two such conferences may have occurred, but only one was reported by the court reporter.

At trial, defense counsel argued that petitioner was not involved in the marijuana grow houses implicated in several of the drug counts and that much of the alleged offense conduct was outside the applicable statute of limitations. The jury found petitioner guilty on the conspiracy and substantive marijuana plant growing counts, but returned a special verdict finding that those offenses involved fewer than 1,000 marijuana plants. The jury also convicted petitioner on lesser drug charges.

The district court, over defense counsel's objections, sentenced petitioner without regard to his acquittal of most of the marijuana allegations and imposed a 140-month prison term. On appeal, petitioner challenged the district court's failure to comply with the parties' agreement that the jury's drug quantity findings would be binding at sentencing. App. 5a. Affirming the judgment on direct appeal, the Eleventh Circuit held, in relevant part, that the trial court was entitled to calculate petitioner's sentence based on judge-found facts, that the record did not show that the government and the trial court consented to be bound at sentencing by the jury's drug quantity determination, and that any such agreement would not have precluded the district court from fulfilling its obligations under the sentencing guidelines to make independent factual findings. *United States v. Toepfer*, 317 Fed.Appx. 857, 862 (11th Cir.2008) (unpublished).

Petitioner sought certiorari review. This Court denied the petition for a writ of certiorari on January 21, 2009, *see Toepfer v. United States*, 555 U.S. 1136 (2009), after the United States filed a response asserting that there was no constitutional basis to require adherence to a judge's pretrial representation that it be bound at sentencing by the jury's findings. *See* U.S. Br. in Opp. (No. 08-469 (Dec. 10, 2008), 2008 WL 5195627 at 10 n.6 ("Petitioner, relying on this Court's decision in *Smith v. Massachusetts*, 543 U.S. 462 (2005), also argues that the district court violated his Fifth Amendment due process rights when it imposed the 140-month sentence despite petitioner's 'reliance on the trial court's plea-related advice.' Pet. 13. *Smith*, however, spoke only to the Fifth Amendment's Double Jeopardy clause and thus does not bear on this case.").

Petitioner thereafter filed his § 2255 motion, raising claims of ineffective assistance of counsel relating to plea/trial decisional advice, failure of appellate counsel to insure a complete record on appeal, including as to the district court's assurances regarding the differential sentencing consequences of conviction at trial or a guilty plea, and the substantive issue relevant to this petition: whether his decision to forego a guilty plea and proceed to trial was "involuntary," and thus a violation of due process, based on misrepresentations by the government, the trial court, and defense counsel about the sentencing consequences of a conviction at trial. Following an evidentiary hearing, at which petitioner and trial counsel testified,

the district court rejected the ineffective-assistance claims on the merits and rejected the due process challenge as procedurally defaulted. Regarding record incompleteness, the district court concluded that the transcript omissions regarding ineffectiveness of trial counsel were likely inconsequential, but acknowledged "omission of a sidebar discussion in which the Court asked counsel why a plea agreement had not been reached" and discussed with counsel the trial court's intention to colloquy the defendant about the matter. App.44a.

The Eleventh Circuit affirmed the district court's denial of relief and concluded as to the procedural default ruling that petitioner had not preserved the issue by raising as a due process issue on appeal and in this Court on certiorari that the sentencing court was bound by representations made as part of a colloquy with petitioner regarding his choice to go to trial and holding, as follows, that unlike ineffective assistance of counsel claims regarding plea advice, claims that judicial advice so misled a defendant that he chose to proceed to trial involuntarily must be raised on direct appeal:

> A criminal defendant who fails to raise an available challenge on direct appeal is procedurally barred from raising that claim in a § 2255 motion, absent a showing of cause and prejudice or actual innocence. *McKay* [*v. United States*, 657 F.3d 1190, 1196 (11th Cir.2011)]; *see also Massaro v. United States*, 538 U.S. 500, 504, 123 S.Ct. 1690, 1693, 155 L.Ed.2d 714

(2003). The only generally recognized exception to the procedural default rule concerns claims of ineffective assistance of counsel, which may be brought for the first time on collateral review. *Massaro*, 538 U.S. at 504, 123 S.Ct. at 1694; *see Lynn v. United States*, 365 F.3d 1225, 1234 n. 17 (11th Cir.2004). In fact, we generally do not consider ineffective-assistance claims on direct appeal if the district court neither entertained those claims nor developed a sufficient factual record. *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir.2002).

Toepfer did not, as he contends, argue on direct appeal that he was denied due process because his decision to go trial was somehow rendered involuntary by alleged misrepresentations about the binding effect of the jury's verdict. And contrary to his suggestion, due process challenges to the voluntariness of a plea decision are routinely raised and decided on direct appeal. *See*, *e.g.*, *United States v. Moriarty*, 429 F.3d 1012, 1018–20 (11th Cir.2005); *United States v. Pierre*, 120 F.3d 1153, 1156–57 (11th Cir.1997). Unlike ineffective-assistance claims, there is no default rule that due process claims must initially be raised on collateral review except in rare circumstances where the factual record is sufficiently developed. Because Toepfer's due process claim is subject to the procedural default rule and he does not suggest that he has shown

> either cause and prejudice or actual innocence, the district court properly rejected that claim as procedurally barred.

App. 12a-14a (footnote omitted). The court of appeals alternatively disputed the existence of a cognizable due process claim, holding that there is no violation of the Due Process Clause where a defendant's decision to proceed to trial, rather than accept a favorable plea offer, is rendered involuntary by misstatements or assurances by the trial judge and that such issues can only be considered under the Sixth Amendment as violations of the right to effective assistance of counsel. App. 14a n.2 ("Toepfer's contention that his decision to go to trial was involuntary does not state a cognizable due process violation, at least not under existing law. While due process demands that a defendant make a knowing and voluntary decision to plead guilty because '[a] guilty plea involves the waiver of a number of a defendant's constitutional rights,' [*Moriarty*], 429 F.3d at 1019, that requirement has not been extended to a defendant's decision to forego a guilty plea and head to trial, *see United States v. Forrester*, 616 F.3d 929, 939 (9th Cir.2010). The Supreme Court has also suggested that, because there is no freestanding constitutional right to a plea bargain, the proper vehicle for challenging an ill advised decision to forego a guilty plea is through an ineffective-assistance claim under the Sixth Amendment's right to counsel. *See Missouri v. Frye*, —— U.S. ——, 132 S.Ct. 1399, 1406, 1410, 182 L.Ed.2d 379 (2012); *Lafler* [*v. Cooper*, 566 U.S. ——, 132 S.Ct. 1376,] 1384, 1387 [(2012)].").

REASONS FOR GRANTING THE WRIT

I. Just as the failure to raise on direct appeal a claim of ineffective assistance of counsel does not procedurally default the claim, the failure to raise on direct appeal a claim of reliance on statements by the trial court that rendered involuntary the petitioner's rejection of a plea offer does not constitute a procedural bar.

The Eleventh Circuit applied the procedural default doctrine in a manner that its directly inconsistent with this Court's holding and reasoning in *Massaro v. United States*, 538 U.S. 500, 504 (2003), that issues that are not fully developed in the record of a criminal case at the time of conviction – such as those relating to consultation with counsel and a defendant's reliance on counsel's advice – need not be raised on direct appeal, but may be first raised collaterally in a 28 U.S.C. § 2255 motion. The court of appeals concluded that due process challenges arising from a defendant's claim of reliance on judicial misstatements in plea discussions are "available [to] challenge on direct appeal." App. 12a. However, just as Sixth Amendment issues of ineffective assistance of counsel ordinarily cannot be resolved without an opportunity for record development in the trial court, the Fifth Amendment question of whether judicial misstatements in plea discussions caused an involuntary choice by petitioner to go to trial is one that ordinarily requires evidentiary

development, and clearly did so in petitioner's case, where the district court noted that the transcribed record of the plea discussion issues was incomplete and where petitioner did not have an opportunity until the § 2255 evidentiary hearing to explain his reliance on the district court's assertions regarding the decision to forego a favorable plea offer.

Massaro did not articulate the restrictive procedural default limitation that the Eleventh Circuit read into that decision. Instead, the Court made clear in *Massaro* that the existence of a procedural default exception should be based on whether or not the dual objectives underlying the procedural default rule – conserving judicial resources and preserving finality of judgments – are furthered or diminished by allowing an exception to apply. In *Massaro*, the Court recognized that ineffective-trial-counsel claims typically depend on evidence outside the appellate record, and that "few such claims will be capable of resolution on direct appeal." 538 U.S. at 504-505, 507. The Court found that imposing a procedural default in that context did not further the doctrine's objectives. There is no basis for a contrary finding regarding a claim of involuntariness amounting to a due process violation, as raised by petitioner, where the question of whether the petitioner reached his plea knowingly or unknowingly depends upon a blend of record and extra-record information and the critical question of what was in the petitioner's thinking when he chose to go to trial. Here, likewise, the objectives of the procedural default rule would be impeded by forcing undeveloped

involuntariness claims to be raised on direct appeal.

Thus, in this Court's decisions in *Missouri v. Frye*, 132 S.Ct. 1399, 1406, 1410 (2012), and *Lafler* [*v. Cooper*, 132 S.Ct. 1376, 1384, 1387 (2012) – addressing the related claim of the defendant's reliance on counsel's misadvice in the context of a decision to proceed to trial – the Court placed heightened importance on the need for a compete-record analysis of the plea/trial decision in the habeas proceedings.

Simply stated, the distinction made by the Eleventh Circuit – resting on the availability of direct appellate review of violations of Fed. R. Crim. P. 11 violations by the district court, *see* App. 14a (citing *United States v. Moriarty*, 429 F.3d 1012, 1018–20 *United States v. Pierre,* 120 F.3d 1153, 1156–57 (11th Cir.1997) (11th Cir.2005), both of which concerned review of technical violations of Rule 11, and neither of which, given the Eleventh Circuit's pre-*Davila*[2] rule of automatic reversal for judicial involvement in plea discussions, would have called for review of the impact of such judicial misadvice on a plea decision) – between judicial misadvice cases and counsel-misadvice cases has no support in the case law.

Issues regarding the *involuntariness* of a plea have traditionally been reviewed in collateral proceedings, because whether a defendant's decision was made knowingly depends on what the defendant knew. And

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[2] *United States v. Davila*, 133 S.Ct. 2139, 2148 (2013).

the record rarely is complete about such matters, due in part to the fact that the defendant has a right to silence and is rarely colloquied comprehensively about a decision to go to trial.

Just as other involuntariness inquiries require evidentiary development, *see*, *e.g.*, 18 U.S.C. § 3501 (requiring pretrial determination of voluntariness of confession), it would be the rare exception where a voluntariness issue was fully developed prior to any evidentiary inquiry. *Cf. Fontaine v. United States*, 411 U.S. 213, 214-15 (1973) (remanding for evidentiary hearing § 2255 motion alleging plea was not voluntary because it was induced by a combination of fear, coercive police tactics, and illness); *Sanders v. United States*, 373 U.S. 1, 19-20 (1963) (evidentiary hearing required under § 2255 when petitioner claimed his plea was not voluntary because he was under the influence of drugs at the plea hearing); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) (remanding for evidentiary hearing § 2255 motion alleging guilty plea was not knowing and voluntary because it was induced by prosecutor's promises regarding length of sentence defendant would receive). Consequently, the Eleventh Circuit's decision, that appears to conflate Rule 11 issues with due process issues, warrants this Court's clarification, particularly in view of the Court's recent decisions in *Davila*, *Frye*, and *Lafler*.

II. The Due Process Clause is violated where the trial court, in a colloquy with a criminal defendant, so misstates the law applicable to the consequences of the defendant's decision whether to proceed to trial that defendant's choice to go to trial is rendered involuntary and unintelligent.

Certiorari is warranted in this case to address whether the court of appeals correctly foreclosed review of due process violations arising from the judicial participation in plea discussions that render involuntary the defendant's decision to reject a plea offer and proceed to trial. The Eleventh Circuit, relying on *United States Forrester*, 616 F.3d 929 (9th Cir. 2010), questioned the existence of a due process right to be free from judicial interference leading to a defendant's rejections of a plea offer. App. 14a n.2.

But in *Forrester*, the Ninth Circuit expressly limited its rejection of the defendant's due process claim based on the district court's misadvice leading the defendant to forego a guilty plea to the specific facts in that case, which the Ninth Circuit concluded, reflected that any impropriety was harmless. At the same time, the Ninth Circuit recognized such a due process right might indeed exist and merit vindication, in a distinct factual context. 616 F.3d at 939 ("Though a defendant may have a right to voluntarily and intelligently reject a plea offer, we need not reach that question in this case because any error was harmless.").

Thus, the Eleventh Circuit's reliance on *Forrester* to foreclose the availability of a due process claim in where the error was not harmless – such as petitioner's case – is critically misplaced. Unlike *Forrester*, where the judicial misadvice consisted of overstating the maximum and minimum penalties – a misadvice which the Ninth Circuit stressed would, if anything, enhance the defendant's likelihood of pleading guilty – here, by contrast, the district court misinformed petitioner of the binding nature and unique value of the jury's verdict, which clearly made him far more likely to forego entering into a guilty plea where he believed he would, and did, win the vast majority of the disputed allegations at trial. The misadvice to petitioner was by any measure harmful and resulted in a significant increase in his sentence.

This Court recently addressed a related body of law concerning judicial participation in the plea process in violation of Fed. R. Crim. P. 11, a non-constitutional violation, and held that judicial participation that may have contributed to the decision to plead guilty is reviewable under Rule 11 for harmless error. *United States v. Davila*, 133 S.Ct. 2139, 2148 (2013) (concluding that "Rule 11(c)(1)'s prohibition on judicial participation in plea discussions ... serves a more basic purpose" than other provisions of Fed. R. Crim. P. 11).

Although the constitutional implications of judicial participation in plea discussions was not directly addressed in *Davila*, the issue underlying the decision is whether substantial rights of a defendant are

adversely affected by impermissible judicial involvement in the decision to plead guilty or go to trial. *See Davila*, 133 S.Ct. at 2150 ("Rather than automatically vacating Davila's guilty plea because of the Rule 11(c)(1) violation, the Court of Appeals should have considered *whether it was reasonably probable that*, but for the Magistrate Judge's exhortations, *Davila would have exercised his right to go to trial*. In answering that question, *the Magistrate Judge's comments should be assessed, not in isolation, but in light of the full record*.") (emphasis added).

The Court compared the significance of a *technical* judicial participation violation (of a prophylactic rule to avoid the risk of judicial influence on the plea decision) to the types of errors, including constitutional errors, deemed to be structural, and concluded that such a technical violation was not structural, but that there would be error if there was a substantial probability, from review of the entire record, that judicial participation caused a defendant to plead guilty rather than go to trial. *Id*. at 2149.

The *Davila* decision clearly suggests that where a trial court has affirmatively misled a defendant as part of a plea discussion, to such an extent that the defendant chooses to go to trial rather than plead guilty, that there would be much more than a mere technical violation of the criminal rules and would be a substantial violation of one of the most fundamental decisions available to an individual, whether to proceed to trial on criminal charges.

The Court has found that the Due Process Clause is violated when a range of decisions that are personal to the defendant are made involuntarily or without the defendant's personal consent. Where an inherently personal right of fundamental importance is involved, the defendant's consent is required. Among those rights that a defendant must personally waive are the right to go to trial or plead guilty, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); the right to be tried by a judge or jury, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942), the right to be represented by counsel, *Faretta v. California*, 422 U.S. 806, 835 (1975); and the right to appeal. *Fay v. Noia*, 372 U.S. 391, 439 (1963). *Cf. Teague v. Lane*, 489 U.S. 288, 329 n. 2 (1989) (Brennan, J., dissenting) (noting the important distinction between "fundamental personal right [and] a prophylactic rule devised by this Court to deter violations of personal constitutional rights by law enforcement officials").

The conclusion by the Eleventh Circuit that there is no due process right to make the decision to proceed to trial voluntarily, without affirmative misleading by the trial court, is inconsistent with this Court's decisions recognizing fundamental personal rights by a criminal defendant, the interference with which violates due process.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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