

No. 18-__

IN THE

Supreme Court of the United States

JAMES GABRIEL SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 11 provides, “before the court accepts a plea of guilty,” the court must advise and question the defendant, personally and in open court, to ensure that the defendant pleads with a full understanding of the charge, potential penalties, and his constitutional rights. Here, the magistrate judge abruptly recessed a plea colloquy after giving a partial Rule 11 advisement because he had unspecified concerns. Three weeks later, the magistrate judge said he had satisfied himself off the record that Smith was competent to proceed, completed the remaining half of a Rule 11 colloquy, and took Smith’s guilty plea. In affirming the judgment of conviction entered pursuant to Smith’s guilty plea, the Sixth Circuit Court of Appeals did not consider whether the district court followed the procedure mandated by Rule 11, instead, it asked only whether Smith’s plea was “knowing, voluntary, and intelligent.”

Accordingly, one question is presented:

1. FED. R. CRIM. P. 11 requires district courts to engage in a specific, on-the-record plea colloquy. In reviewing a plea colloquy, is it sufficient for an appellate court to consider only whether the defendant entered an informed and voluntary plea?

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PETITION FOR A WRIT OF CERTIORARI

James Gabriel Smiths petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the issue presented herein.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Sixth Circuit is attached hereto at Pet. App. 1A-9A. The United States District Court for the Western District of Michigan's oral ruling denying Smith's motion to withdraw his plea is attached hereto at Pet. App. 10A-12A, and the underlying judgment of conviction is attached hereto at Pet. App. 13A-19A.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 24, 2018. Neither party filed a petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The Fifth Amendment to the United States Constitution provides:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

The Fourteenth Amendment to the United States Constitution provides:

. . . No state shall . . . deprive any person of life, liberty, or property, without due process of law

Federal Rule of Criminal Procedure 11(b)(1) provides:

(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:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;
- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;
- (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
- (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

Federal Rule of Criminal Procedure 11(b)(2) provides:

(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).

Federal Rule of Criminal Procedure 11(b)(3) provides:

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT OF THE CASE

Introduction

Petitioner James Gabriel Smith, a mentally disabled adult, pled guilty to one count of sex trafficking a minor and was sentenced to twenty years imprisonment. On June 15, 2017, a plea colloquy began but abruptly recessed because the magistrate judge “had some concerns” about Smith’s competency that prevented him from taking Smith’s plea. Three weeks later, the magistrate judge reconvened the hearing, explained that he resolved his concerns off the record, completed the parts of a Rule 11 colloquy still outstanding, and took Smith’s plea of guilty, which the district court accepted. The Sixth Circuit Court of Appeals affirmed. It considered the likelihood that Smith entered an informed and voluntary plea, noting that Smith replied, “yes,” when asked whether he understood his maximum sentencing exposure, and that the magistrate judge gave some of the advisements during the hearing at which he took Smith’s plea. The Sixth Circuit Court of Appeals concluded, “It may be a better practice to give all advisements on the same day,” but concluded the magistrate judge’s approach was not erroneous because “nothing in the record leads us to conclude that Smith’s plea was anything but knowing, voluntary, and intelligent.”

Background

On August 3, 2016, Smith was indicted for Sex Trafficking of a Minor, in violation of 18 U.S.C. § 1591, and related offenses. (R. 50 at ID# 176-83, Superseding

Indictment.) Motivated by Smith's attorney's concern that Smith was incompetent, the district court ordered that Smith undergo a full competency evaluation. (R. 98 at ID# 303-04, Order of Commitment for Psychiatric Evaluation.)

According to the competency evaluation, Smith struggled in school until age 14, when he dropped out and never returned. (R. 242 at ID# 1755; 1800, Competency Hr'g Tr. at 6:11-17; 51:18-19.) Smith's IQ was 40 in 4th grade, 47 in 8th grade, 50 when he was 18, and 60 at the time of his competency evaluation at 27 years old. (R. 147-1 at ID# 636-37; 639 Forensic Report at 6-7; 9.) The psychiatrist who examined Smith had to use audio versions of tests because of Smith's "problems with reading." (R. 242 at ID# 1769, Competency Hr'g Tr. at 20:3-5.) Smith has been on social security disability since 2001, with a primary diagnosis of "mental retardation." (R. 147-1 at ID# 636-37, Forensic Report at 6-7.) Despite acknowledging that Smith's "intellectual functioning is significantly below average," the competency examiner opined that Smith was competent to proceed. (R. 242 at ID# 1759; 1794, Competency Hr'g Tr. at 10:15-16; 45:10-14.) The court accepted the competency examiner's findings, and held that Smith was competent to proceed. (R. 169 at ID# 709 Order Determining Defendant Competent to Stand Trial at 1.)

At a June 15, 2017, hearing, pursuant to a pending plea deal, the magistrate judge advised Smith of his rights, penalties, and sentencing exposure. (Pet. App. 27A-31A.) In pertinent part, the magistrate judge advised Smith of his rights to (1) be represented by counsel, (2) maintain his plea of not guilty, (3) have a trial where he

can confront and question the witnesses against him, call his own witnesses, present his own evidence, and either testify or remain silent, and (4) maintain a presumption of innocence. (Pet. App. 27A-28A.) The magistrate judge advised Smith that, by going forward with his guilty plea, he would waive all these rights except for the right to be represented by an attorney. (Pet. App. 28A.) The magistrate judge then read the indictment and advised Smith of the potential penalties. (Pet. App. 29A-31A.) Smith explained the plea agreement had been read to him, and answered “yes” when asked questions. (Pet. App. 29A-32A.)

The magistrate judge then read the elements of sex trafficking of a minor. (Pet. App. 32A.) When the magistrate judge attempted to explain that Smith’s having ridden as a passenger in a car manufactured in Ontario was sufficient to satisfy the interstate commerce element of 18 U.S.C. § 1591, Smith responded, “Yeah, but I don’t own a car.” (Pet. App. 32A-33A.) The magistrate judge then attempted to explain this element, as well as the evidence the government would present against Smith at trial, and Smith simply replied “yes” to each of the magistrate’s questions. (Pet. App. 33A-35A.) Soon thereafter, the magistrate judge abruptly recessed and asked to see counsel in chambers because he “had some concerns.” (Pet. App. 35A; 37A.) Although the magistrate judge did not explain what these concerns were, he recessed the Rule 11 colloquy after a lengthy attempt to explain to Smith what the government would have to prove to obtain a conviction at trial. (Pet. App. 32A-35A.) Moreover, at the beginning of the hearing, the magistrate judge indicated, “Mr. Smith, my concern is

for you in this proceeding. I can't let you plead guilty unless you understand each step of the process . . . If you don't understand everything you're doing, I can't let you go forward with your plea." (Pet. App. 23A.) It appears that the magistrate judge recessed the hearing because he was concerned about Smith's competency to enter a valid plea.

Three weeks later, on July 5, 2017, the magistrate judge reconvened the hearing, stating that his concerns about Smith's ability to enter a valid plea had been "put to rest" off the record. (Pet. App. 37A.) The magistrate judge indicated he would "pick up right where [he] left off" in the Rule 11 colloquy, and therefore did not provide the following advisements which he had earlier provided – Smith's rights to persist in a plea of not guilty, to jury trial, to be represented by counsel at every stage, to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses. (Pet. App. 38A-40A.) Also omitted were advisements on the waiver of these rights for a guilty plea, the nature of each charge to which Smith was pleading, the maximum possible penalties of each charge including imprisonment, fine, and term of supervised release, any mandatory minimum penalties, any applicable forfeitures, possible restitution, and special assessments. (Pet. App. 38A-40A.) The magistrate judge had given all of these at the earlier hearing so just skipped them.

Before sentencing, Smith moved to withdraw his plea, arguing that the magistrate judge's failure to give complete Rule 11 advisements at the plea hearing

contributed to Smith's lack of understanding. (R. 210 at ID# 1059-1061, Motion to Withdraw Plea at 2-4.) Trial counsel explained in oral argument that, over the year she had worked with Smith, and despite many conversations, she was never satisfied that he understood the potential ramifications of a plea, arguing:

I've worked with Mr. Smith now for more than a year and I will say that he does struggle to understand what's going on. I have to have multiple conversations with him about ideas. When we talked about whether he should withdraw his plea I had to come back to him over and over again to make sure that at least I had done my due diligence in communicating what the consequences of that would be. I was never fully sure if he truly understood the potential risk to himself if the Court would have allowed him to withdraw his plea.

(R. 243 at ID# 1863-1864, Sentencing Hr'g Tr. at 45:19-25; 46:1-8.) The district court reviewed the record and found that Smith "had full notice of his rights when he pled," and "was informed of the penalties." (R. 243 at ID# 1824-1825, Sentencing Hr'g Tr. at 6:15; 7:7-8.) As to the specific requirements of Rule 11, the district court found only that, on June 15, 2017, the magistrate judge had advised Smith that he faced life in prison under the plea. (R. 243 at ID# 1825, Sentencing Hr'g Tr. at 7:7-12.) The court did not consider that the magistrate judge took Smith's plea in a different hearing weeks later, or that the Rule 11 advisements were broken up over the course of those three weeks. (R. 243 at ID# 1823-1825, Sentencing Hr'g Tr. at 5-7.)

Post-Conviction Proceedings

Smith appealed to the Sixth Circuit Court of Appeals, arguing that his plea was invalid because the record does not demonstrate that Smith understood either

his sentencing exposure or the interstate nexus commerce element of the charged offense. (R. 28 at ID# 26-34, Br. of Pl.-Appellant James Smith at 19-27.) As to the piecemeal Rule 11 colloquy, Smith argued the plea was constitutionally invalid because complete Rule 11 advisements were not given at the hearing where he entered his plea, and his cognitive limitations made it inappropriate to break up those advisements over multiple hearings. (R. 28 at ID# 28, Br. of Pl.-Appellant James Smith at 21.)

The Sixth Circuit Court of Appeals affirmed. (Pet. App. 9A.) The Sixth Circuit suggested that “it may be better practice to give all advisements on the same day,” but affirmed Smith’s conviction because “nothing in the record leads us to conclude that Smith’s plea was anything but knowing, voluntary, and intelligent.” (Pet. App. 6A)

REASONS FOR GRANTING THE PETITION

This Court should address an important question concerning a district court’s constitutional duty to adhere to FED. R. CRIM. P. 11 to ensure that a criminal defendant makes an informed and voluntary plea. Here, in evaluating the lower court’s plea colloquy, the Sixth Circuit Court of Appeals did not consider whether the district court complied with the procedures mandated by Rule 11. Instead, it concluded that a fragmented Rule 11 colloquy is sufficient so long as a plea appears to have been “knowing, voluntary, and intelligent.”

But this inquiry reflects the old, looser standard that Rule 11 was amended with the specific purpose of heightening, pursuant to this Court’s decision in *Boykin v. Alabama*, 395 U.S. 238 (1969). FED. R. CRIM. P. 11 advisory committee’s note to 1974 Amendment. Had the Sixth Circuit Court of Appeals considered whether the district court complied with Rule 11, it would have concluded that Smith’s plea was invalid because the magistrate judge neither gave Smith all required Rule 11 advisements at the hearing where the judge took his plea, nor created a record on how concerns about Smith’s ability to enter a plea were quelled.

The Sixth Circuit Court of Appeals’ inquiry represents a departure from the accepted and usual course of judicial proceedings sufficient to warrant a grant of certiorari pursuant to this Court’s Rule 10(a). The guilty plea, and the federal rule guiding a court’s acceptance of it, is perhaps the most essential and common practice in the federal justice system. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”) Because the “great majority of all defendants” plead guilty, “the fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.” FED. R. CRIM. P. 11 advisory committee’s note to 1966 Amendment.

Accordingly, a writ of certiorari should issue.

I. **In resolving a FED. R. CRIM. P. 11 challenge to a plea on appeal, reviewing courts must determine whether the district court adhered to each of the procedural requirements in the Rule, on the record, at the time the plea was entered. Merely considering whether the plea was informed and voluntary is insufficient under the Rule.**

Review is warranted because the Sixth Circuit Court of Appeals' decision in this case conflicts with the current Rule 11, as well as the decisions of this Court that have informed the Rule's evolution. The Sixth Circuit's lenient approach to the constitutionally grounded requirements of Rule 11 diminishes the significance of the procedures outlined in the Rule, and risks accepting uninformed or involuntary pleas in violation of due process.

When a defendant chooses to plead guilty, Rule 11 requires that the district court engage in a specific colloquy with the defendant to ensure that he pleads with a full understanding of the nature of the charge, the potential penalties, and his constitutional rights. FED. R. CRIM. P. 11(b)(1). To serve as an adequate indicator of whether a defendant makes an informed and voluntary plea, this colloquy must occur at the arraignment wherein the defendant enters his plea. *See United States v. Sinagub*, 468 F. Supp. 353, 358 (W.D. Wis. 1979) (explaining, “[When] taken literally,” the wording of Rule 11 requires that a district court conduct the Rule 11 colloquy “before eliciting any plea at an arraignment”); *See also* FED. R. CRIM. P. 11 advisory committee's note to 1982 Amendment (codifying *Sinagub* into Rule 11).

The practice of engaging in the full plea colloquy, on the record and immediately before accepting a defendant's plea, comports with the due process

requirements underlying Rule 11, which prohibit a district court from accepting a guilty plea unless it is satisfied that the defendant is making an informed and voluntary plea. *United States v. Adame-Hernandez*, 763 F.3d 818, 830 (7th Cir. 2014) (finding, “Rule 11 is intended to ensure that a defendant makes an informed and voluntary plea” as required under the Due Process Clause.”) Moreover, there must be an adequate record demonstrating that he was competent to enter an informed and voluntary plea at the time he entered it. *Boykin*, 395 U.S. at 243 (explaining that a reviewing court “cannot presume a waiver of [the constitutional rights waived through entry of a guilty plea] from a silent record”); *McCarthy v. United States*, 394 U.S. 459, 470 (1969) (explaining, “There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.”)

At the time this Court decided the seminal cases of *Boykin* and *McCarthy*, Rule 11 prohibited a district court from accepting a guilty plea that is not informed and voluntary, leaving district courts with wide discretion to determine how to meet this requirement. FED. R. CRIM. P. 11 advisory committee’s note to 1974 Amendment. In 1974, sweeping amendments to Rule 11 codified this Court’s decisions in *Boykin* and *McCarthy* to promote specificity and uniformity in the plea process. *Id.* The result was that the former, scant verbiage was replaced with a detailed plea process wherein the district court must “address the defendant personally and in open court” before accepting a guilty plea. FED. R. CRIM. P. 11(b)(1). During this colloquy, the court must

convey specific information about his rights and the consequences of his plea, and it must satisfy itself that the defendant understands those rights. *Id.* The district court must also ensure that the plea is voluntary and supported by a factual basis. FED. R. CRIM. P. R 11(B)(2), (3). In its current form, Rule 11 delineates specific advisements that the defendant must understand to render a guilty plea voluntary. FED. R. CRIM. P. 11(b)(1). This increases the likelihood of a legitimate understanding of the waivers involved.

Rule 11(b)(1) further requires that the district court advise the defendant of the necessary advisements, personally and in open court, “before the court accepts a plea of guilty.” FED. R. CRIM. P. 11(b)(1) In explaining this requirement, the Advisory Committee explained that this requirement will allow the court to “ascertain the plea’s voluntariness . . . [and] develop a more complete record.” FED. R. CRIM. P. 11 advisory committee’s note to 1974 Amendment. The Advisory Committee further explained these goals “are undermined in proportion to the degree the district judge resorts to ‘assumptions’ not based on recorded responses to his inquiries.” *Id.* This requirement incorporated this Court’s reasoning in *McCarthy*, that “there is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant’s understanding of the nature of the charge against him.” *McCarthy*, 394 U.S. at 470.

The revised Rule 11 procedures are so vital to a defendant’s due process rights that, after the 1983 addition of Rule 11(h), which directs that “a variance from the

requirements of this rule is harmless error if it does not affect substantial rights,” the Advisory Committee cautioned that this provision:

[S]hould *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in *McCarthy*, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice . . . It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

FED. R. CRIM. P. 11 advisory committee’s note to 1983 Amendment.

In Smith’s case, the Sixth Circuit Court of Appeals made a casual inquiry as to whether the record contained any indication that would “lead [the Court of Appeals] to conclude that Smith’s plea was anything but knowing, voluntary, and intelligent,” at the expense of considering whether the district court gave all advisements required by Rule 11 at the correct hearing. (Pet. App. 6A.) Moreover, the Sixth Circuit Court of Appeals considered the entire record – including the magistrate judge’s indication that he satisfied his concerns about Smith’s ability to enter a valid plea off the record – rather than focusing on the hearing during which Smith entered his plea. (*Id.*) This shunted Rule 11 as amended in 1974 and instead utilized the former, pre-1974 standard, but this standard was explicitly and intentionally abandoned. FED. R. CRIM. P. 11 advisory committee’s note to 1974 Amendment (explaining, whereas “the former Rule [11] required that the court determine that the plea was made with ‘understanding of the nature of the charge and the consequences of the plea,’” the

amended Rule 11 “identifies more specifically what must be explained to the defendant and also codifies . . . the requirements of *Boykin v. Alabama* . . . which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.”)

Had the Court of Appeals considered whether the district court complied with the procedural requirements of Rule 11, it would have found the record insufficient to demonstrate compliance with the Rule, thus rendering Smith’s plea involuntary. The magistrate judge did not give Smith all required Rule 11 advisements at the hearing during which he took Smith’s plea. Moreover, the record is deficient in the respect that the magistrate judge never revealed on the record how his concerns concerning Smith’s competency were resolved. Therefore, the Court of Appeals would have remanded the case to the district court with instructions to allow Smith to withdraw his invalid plea.

Accordingly, a writ of certiorari should issue for this Court to address this issue.

CONCLUSION

For the foregoing reasons, James Gabriel Smith petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit and review the case and issue discussed herein.

Respectfully submitted,

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