

18-6557 ORIGINIAL

No. _____

Supreme Court, U.S.
FILED

OCT 05 2018

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

CASEY O'DELL — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CASEY O'DELL

(Your Name)

USP TUCSON PO BOX 24550

(Address)

TUCSON AZ 85734

(City, State, Zip Code)

520-663-5000 (prison phones)

(Phone Number)

QUESTION(S) PRESENTED

1. WHETHER THE THIRD CIRCUIT DECISION BELOW REGARDING WHETHER THE FED.R.CRIM.P. 11(b)(1)(N) RULE WAS VIOLATED BY THE INADEQUACY OF THE CHANGE OF PLEA COLLOQUY?
2. WHETHER THE THIRD CRICUIT DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN UNITED STATES v. GONZALEZ-LOPEZ, 548 U.S. 140 150-52 (2006)?
3. WHETHER THE THIRD CIRCUIT DECISION CREATED A CIRCUIT SPLIT WITH THE FIFTH AND SEVENTH CIRCUITS REGARDING WHETHER THE ADEQUACY OF THE PLEA COLLOQUY CONSTITUTED "STRUCTURAL ERROR"?

LIST OF PARTIES

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

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

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Strickland v. Washington, 466 U.S. 668, 684 (1984)	(9)
Tollett v. Henderson, 411 U.S. 258, 267 (7	
United States v. Gonzalez-Lopez, 548 U.S. 140, 150-52 (2006)	(7 , 9
United States v. Smith, 618 F.3d 657 (7th Cir. 2010)	(7
United States v. Sanchez-Guerrero, 546 F.3d 328, 332 (5th Cir. 2008)	(7
United States v. Vonn, 535 U.S. 55, 59 (2002)	(9

STATUTES AND RULES

Federal Rule of Criminal Procedure 11(b)(1)(N)	7-9
--	-----

OTHER

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5-7-10
CONCLUSION.....	6

INDEX TO APPENDICES

APPENDIX A - Opinion of the Third U.S. Circuit Court of Appeals

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 26, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Sixth Amendment to the U.S. Constitution - Ineffective Assistance of counsel;
2. Fifth Amendment to the U.S. Constitution - Deprivation of Due Process;

STATEMENT OF THE CASE

The defendant/petitioner was charged in the United States District Court for the Middle District of Pennsylvania in a multi-count indictment to which the petitioner pled guilty to : Count 10 (Criminal Conspiracy to produce child pornography in violation of 18 U.S.C. 2251(e)); Count 13 (Criminal conspiracy to publish a notice or advertisement seeking child pornography in violation of Section 2251(e)); The petitioner was sentenced to a term of life imprisonment by virtue of the length of the sentence of months imposed.

The petitioner appealed his sentence to the United States Court of Appeals for the Third Circuit seeking to challenge, ineffective assistance of counsel and the reasonableness of his sentence, whether the plea was knowing and voluntary, whether the appeal waiver was enforceable and other grounds. The appeal was dismissed pursuant to the appeal waiver in a summary dismissal.

This petition follows seeking to resolve a circuit split that involves the level of inquiry required to render a plea waiver "knowing and intelligently" made, whether the district court's colloquy satisfied Fed.R.Crim. P. 11(b)(1)(N) and whether the appellate court acted contrary to prior Supreme Court precedent.

REASONS FOR GRANTING THE PETITION

Petitioner seeks to reverse his conviction because the decisions below were erroneous, and the decision constitutes a circuit split which only this Court may resolve. The arguments in favor of such continue in the following pages.

It is true that an unconditional guilty plea typically waives non-jurisdictional defects in the proceedings in lower courts. See: *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This Court has held, however, that the erroneous deprivation of the right to counsel of choice in violation of the Sixth Amendment is a "structural error" in a criminal proceeding and is not subject to harmless error analysis. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-52 (2006). This Court stated that:

"Different attorneys will pursue different strategies. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decided to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the framework within which the trial proceeds, or indeed on whether it proceeds at all...Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all." *Id.* at 150.

Relying on *Gonzalez-Lopez*, the Seventh Circuit and the Fifth Circuit have held that a defendant's guilty plea does not preclude him from challenging on appeal a denial of his right to counsel of choice. See: *United States v. Smith*, 618 F.3d 657 (7th Cir. 2010); *United States v. Sanchez-Guerrero*, 546 F.3d 328, 332 (5th Cir. 2008). As the Fifth Circuit stated, it is obvious that the choice of counsel may seriously impact a defendant's decisions.." *Id.* "If a defendant is erroneously denied the counsel of his choice, it is a structural error in

the trial that brings into question the voluntary and intelligent character of the guilty plea itself." Id.

Under the circumstances here, the petitioner was neither given counsel of choice in the district court or on appeal. And when that issue was brought to the attention of both courts, the circuit court issued a dismissal based on an invalid appellate waiver which puts at odds the decisions of the Third Circuit versus those of the Seventh and Fifth Circuits. The government argued that the petitioner waived the right to appeal via the appellate waiver in his plea agreement. Appellate waivers are not blindly enforced in other circuits. See, e.g: United States v. Rhodes, 330 F.3d 949, 952 (7th Cir. 2003). Here the district court failed to conduct the appropriate plea colloquy between the defendant and the district court judge. See Fed.R.Crim.P. 11(b) (1) (N). The appellate waiver itself was reasonable clear. That, however, is not the end of the inquiry. If it was, Rule 11(b)'s requirement that the district court address the defendant personally would be a dead letter.

Federal Rule of Criminal Procedure 11 was amended effective December 1, 1999 "to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights." Fed.R.Crim.P. 11, 1999 advisory committee notes. The newly added provision stats that the district court "must inform the defendant of, and determine that the defendant understands...the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." Fed.R.Crim.P. 11(b) (1) (N).

Here, the district court erred by failing during the

plea colloquy to advise O'Dell of the terms of the appellate waiver and determine whether he understood that provision. Because this omission was not argued before the district court, the Third Circuit should have reviewed the matter for plain error. *United States v. Vonn*, 535 U.S. 55, 59 (2002). Specifically, O'Dell was required to show that his substantial rights were affected and that the error seriously affected the fairness, integrity, or public reputation of the court proceeding. *Vonn*, 535 U.S. at 62-63.

First, O'Dell's substantial rights were affected; the violation of his Sixth Amendment rights occurred and was complete at the time the appellate court refuses to substitute counsel during the direct appeal. Second, the error had a significant effect on the fairness of the proceedings. The right to counsel is one of the bedrock elements protecting the fairness of the adversary process. See, e.g.: *Strickland v. Washington*, 466 U.S. 668, 684 (1984). This Court made it clear in *Gonzalez-Lopez* that "the right to select counsel of one's choice...has been regarded as the root meaning of the constitutional guarantee" contained in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48. This court therefore should consider whether the trial court complied with Rule 11(b)(1)(N)'s requirements. During the course of the guilty plea colloquy the court did not explain, quote, or even summarize the impact of the appellate waiver to O'Dell. Nor did it elicit from him a statement that reasonably can be construed as indicating awareness that he was giving up his right to appeal. Rather, the court referred to the plea agreement's appellate waive only obliquely, and in a brief

question not to O'Dell himself but to the attorneys the court had representing him. This was inadequate and it did not comport with the requirement's of Rule 11(b) (1) (N). All that was stated in the record -- by counsel, not the court -- was that the petitioner understood the waiver and knew what such a waiver meant. Because of this, the court failed to reasonably demonstrate that the petitioner understood, or even said he understood, the appellate waiver. Because of this and because the Third Circuit enforced a waiver other circuits have determined should not have been enforced, and because petitioner did not have his choice of counsel his fundamental constitutional rights were violated, the plea was not knowingly and voluntarily accepted by petitioner and the court, it therefore creates a circuit-split this court should resolve and an appellate decision contrary to prior decisions of this Court.