No. 18-8677

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK LLOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly reviewed for plain error petitioner's claim that he was not properly informed in open court of the nature of the charges against him before pleading guilty, as required by Federal Rule of Criminal Procedure 11(b)(1)(G), when he raised that claim for the first time on appeal.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D.N.Y.):

United States v. Lloyd, No. 13-cr-296 (Sept. 8, 2016)

United States Court of Appeals (2d Cir.):

United States v. Lloyd, No. 16-3169 (Aug. 20, 2018)

United States v. Spencer, No. 16-1051 (Sept. 14, 2018) (appeal of co-defendant)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 901 F.3d 111.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2018. A petition for rehearing was denied on December 10, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on March 11, 2019 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of New York, petitioner was convicted of conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and (B), and 846; and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). Pet. App. A5; Judgment 1. The district court sentenced petitioner to 300 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A1-A13.

1. Beginning in 2012, petitioner was associated with a drug trafficking organization that operated in northern New York and New York City. Plea Agreement ¶ 5(a). Petitioner and Michael Spencer purchased heroin, cocaine, and crack cocaine from suppliers in New York City and arranged for couriers to transport the drugs to Massena, New York. Ibid. Petitioner, Spencer, and others coordinated the distribution of those drugs in and around Massena. Ibid. Petitioner and Spencer would front the drugs to their co-conspirators, who would pay for the drugs after they were sold. Id. ¶ 5(b).

During the course of the conspiracy, petitioner was arrested on multiple occasions and held in custody pending a trial in state court. Plea Agreement ¶ 5(c). While petitioner was in custody, Spencer managed the drug-trafficking operation. Ibid. Petitioner

continued to communicate with Spencer to keep abreast of the organization's activities, and at times petitioner directed the activities of his co-conspirators from jail. Ibid.

On September 5, 2013, law-enforcement officers searched Spencer's home pursuant to a search warrant. Plea Agreement ¶ 5(d). During the search, officers discovered cocaine, crack cocaine, a Titan .25 caliber pistol and magazine with ammunition, a loaded Taurus nine millimeter pistol, and a loaded Orion flare gun modified to fire a .22 caliber round. Ibid.

2. A federal grand jury in the Northern District of New York returned a third superseding indictment charging petitioner with conspiracy to possess with intent to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A) and (B), and 846; and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Pet. App. A6; Third Superseding Indictment 1-3. The Section 924(c) count was based on the three firearms discovered in Spencer's apartment and was grounded on the principle set forth in Pinkerton v. United States, 328 U.S. 640, 646-648 (1946), that a defendant is liable for reasonably foreseeable substantive crimes of a co-conspirator in furtherance of the conspiracy. Third Superseding Indictment 2; Pet. App. A5. Petitioner pleaded guilty to both counts of the indictment pursuant to a plea agreement. Plea Agreement ¶ 1(a).

a. The plea agreement contained the statutory citations for each count and listed their elements. Plea Agreement ¶¶ 1(a), 4. For the Section 924(c) count, the plea agreement identified the elements as: "First, that the defendant committed a drug trafficking crime for which he might be prosecuted in a court of the United States," and "Second, that the defendant knowingly possessed a firearm or it was reasonably foreseeable to him that a coconspirator possessed a firearm in furtherance of that drug trafficking crime." Id. ¶ 4.

As part of the factual basis for petitioner's plea to the Section 924(c) count, petitioner admitted that Spencer possessed the firearms found in his own apartment "in furtherance of his and [petitioner's] conspiracy to possess with intent to distribute and to distribute cocaine, crack, and heroin, and it was reasonably foreseeable to [petitioner] who, during the course of the conspiracy, also possessed firearms in furtherance of it." Plea Agreement ¶ 5(e). Petitioner further admitted "that those facts demonstrate [petitioner's] guilt for the offenses to which [he] is pleading guilty." Id. ¶ 5. The plea agreement stated that "[d]efense counsel has advised the defendant of [the] nature of the charges to which the defendant is agreeing to plead guilty." Id. ¶ A. Petitioner waived his right "to appeal and/or to collaterally attack" his convictions and any sentence to a term of imprisonment up to life imprisonment. Id. ¶ 7.

b. During the requisite colloquy at the change of plea hearing, petitioner confirmed under oath that he had read the written plea agreement, that he had discussed it with counsel and had an opportunity to ask questions, and that counsel was able to answer petitioner's questions "in a way so that [petitioner] feel[s] [he] understand[s] the terms and conditions of th[e] plea agreement." 8/6/15 Tr. 4; Pet. App. A6. The district court "incorporate[d] the plea agreement into the record of these proceedings" because petitioner verified that he had read it, understood it, and discussed it with counsel. Ibid.

The court reviewed with petitioner the constitutional rights that he would relinquish by pleading guilty, the applicable statutory maximum and minimum sentences, the collateral consequences of a guilty plea, and the terms of petitioner's appeal and collateral-attack waiver. 8/6/15 Tr. 5-11; Pet. App. A6. Petitioner confirmed that he understood all those aspects of his plea. 8/6/15 Tr. 6-7, 10-11; Pet. App. A6. The court also confirmed that "nobody had threatened [petitioner], pressured him to plead guilty, or promised him any benefit not identified in the plea agreement." Pet. App. A6; 8/6/15 Tr. 14.

Finally, the court addressed whether there was a factual basis for petitioner's plea. The court informed petitioner that it had read the plea agreement and that "the facts in the plea agreement will support your plea if they're true." 8/6/15 Tr. 15. The court stated to petitioner: "I know you signed the plea agreement saying

they're true, but I like to make doubly certain: Are the facts contained in this plea agreement true?" Ibid. Petitioner confirmed that the facts in the plea agreement were true, and the court accepted petitioner's plea of guilty to both counts. Id. at 15-16.

c. The district court sentenced petitioner to the statutory minimum of 240 months of imprisonment on the drug-trafficking count and a consecutive sentence of 60 months of imprisonment on the Section 924(c) count, to be followed by ten years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. A1-A13. On appeal, petitioner claimed (among other things) that his guilty plea was invalid because the district court had failed to comply with Federal Rule of Criminal Procedure 11(b)(1)(G) at the change of plea hearing. Rule 11(b)(1)(G) requires the district court to "address the defendant personally in open court" and "inform the defendant of, and determine that the defendant understands[,] * * * the nature of each charge to which the defendant is pleading."

Because petitioner had failed to assert such an error in the district court, the court of appeals reviewed the claim for plain error. Pet. App. A8; see Fed. R. Crim. P. 52(b). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' * * * (3) that 'affect[s] substantial rights,'" and that (4) "'seriously

affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson v. United States, 520 U.S. 461, 466-467 (1997) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)) (brackets in original). The court of appeals explained that "[i]n the Rule 11 context, we have interpreted the third prong of the plain-error test" -- which asks whether the error affected the defendant's substantial rights – "to require that a defendant show 'a reasonable probability that, but for the error, he would not have entered the plea.'" Pet. App. A8 (quoting, inter alia, United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)).

As a threshold matter, the court of appeals concluded that the district court had not properly complied with Rule 11(b)(1)(G). Pet. App. A8-A9. The court stated that the rule requires the sentencing court to "address the defendant personally in open court" to inform him of the matters listed in Rule 11(b)(1), and reasoned that "making a general mention of [the] information set forth in a written plea agreement" does not satisfy that requirement. Id. at A9. The court of appeals also stated that the district court did not explain to petitioner the elements of the crimes to which he was pleading guilty or ask petitioner to describe his participation in the offense in a way that would have enabled the court to determine whether petitioner "understood the nature of the offense to which he was pleading guilty." Ibid.

The court of appeals determined, however, that petitioner was not entitled to relief on plain-error review because he had not

shown a reasonable probability that, but for the error, he would not have pleaded guilty. Pet. App. A10. The court did not find "any aspect of the record" to suggest that petitioner would not have pleaded guilty to the Section 924(c)(1) charge had the district court explained Pinkerton liability to him. Ibid. Petitioner therefore could not demonstrate that "the error prejudicially affected his substantial rights" so as to satisfy the third element of the plain-error test. Ibid. (quoting United States v. Torrellas, 455 F.3d 96, 103 (2d Cir. 2006)).

ARGUMENT

Petitioner contends (Pet. 11-15) that a violation of Federal Rule of Criminal Procedure 11(b)(1)(G), which requires a district court to inform the defendant of the nature of the charges against him before accepting a guilty plea, is not subject to plain-error review. The court of appeals correctly applied plain-error review and determined that petitioner could not satisfy the third element of the plain-error test. The court's decision does not conflict with any decision of this Court, and petitioner has not identified any conflict among the courts of appeals that warrants this Court's review. The petition for a writ of certiorari should be denied.

1. Federal Rule of Criminal Procedure 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." United States v. Vonn, 535 U.S. 55, 62 (2002). One of Rule 11's

requirements is that the court "inform the defendant of, and determine that the defendant understands, * * * the nature of each charge to which the defendant is pleading." Fed. R. Crim. P. 11(b)(1)(G).

Where a defendant does not object to a Rule 11 error in the district court, he "has the burden to satisfy the plain-error rule." Vonn, 535 U.S. at 59; see Fed. R. Crim. P. 52(b). "[B]efore an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" Johnson v. United States, 520 U.S. 461, 466-467 (1997) (brackets in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)). When all three requirements are satisfied, "the court of appeals has authority to order correction, but [it] is not required to do so." Olano, 507 U.S. at 735. Instead, a reviewing court "may * * * exercise its discretion to notice a forfeited error" only if a fourth condition is satisfied: "the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson, 520 U.S. at 467 (brackets in original; citation omitted).

This Court has repeatedly held that plain-error review applies to forfeited Rule 11 errors. In United States v. Vonn, supra, the sentencing judge did not explain the right to counsel at trial as required by Rule 11(b)(1)(D). 535 U.S. at 59-61. In United States v. Dominguez Benitez, 542 U.S. 74 (2004), the judge did not explain that the defendant could not later withdraw his

plea if the court did not accept the government's sentencing recommendation, as required by Rule 11(c)(3)(B). Id. at 77-78. And in United States v. Davila, 569 U.S. 597 (2013), a magistrate judge "flagrant[ly] violat[ed]" Rule 11(c)(1)(C)'s directive that courts "not participate in plea discussions." Id. at 600 (brackets and citation omitted). In each case, the defendant did not object in the district court, and this Court applied plain-error review.

In Vonn, the Court explained that the Rule 11 error does not excuse a defendant's silence: otherwise, "a defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness." 535 U.S. at 73. Although the sentencing judge has a "duty to advise the defendant" of his rights, "the value of finality requires defense counsel to be on his toes, not just the judge," and the defendant cannot "simply relax and wait to see if the sentence later str[ikes] him as satisfactory." Ibid.; see Puckett v. United States, 556 U.S. 129, 135 (2009) ("[T]he contemporaneous-objection rule prevents a litigant from 'sandbagging' the court -- remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.").

Accordingly, on plain-error review, the defendant has the burden to show an effect on his substantial rights, and this "burden should not be too easy for defendants." Dominguez Benitez, 542 U.S. at 80, 82. In order to establish reversible plain error

under Rule 11, a defendant must show that he affirmatively did not understand his rights and a reasonable probability that he would not have pleaded guilty had he been properly advised. Id. at 82-83.

2. In petitioner's case, the court of appeals correctly applied plain-error review and found that he was not entitled to relief on his forfeited Rule 11(b)(1)(G) claim. In particular, petitioner has identified nothing in the record to indicate that he would not have pleaded guilty -- and instead would have insisted on a jury trial -- if the principles of co-conspirator liability in Pinkerton v. United States, 328 U.S. 640 (1946), had been explained to him in open court, particularly given his express assurances at the plea colloquy as to the adequacy of his discussions with his counsel about the charges and the plea agreement. See Pet. App. A10 ("[Petitioner] has been unable to identify any aspect of the record suggesting that, had the [d]istrict [c]ourt explicitly reviewed the elements of [Pinkerton] liability with him at his change-of-plea hearing, he would not have entered a plea of guilty to that count."); Plea Agreement ¶¶ 4, A (describing the elements of the Section 924(c) offense and confirming that defense counsel advised petitioner "of [the] nature of the charges to which [petitioner] is agreeing to plead guilty"); 8/6/15 Tr. 4 (confirming in open court that petitioner had read the plea agreement, discussed it with his counsel, and

been given an opportunity to ask questions and have them answered such that petitioner understood the plea agreement).

Petitioner resists (Pet. 12-15) plain-error review on the ground that his case involves a different provision of Rule 11 than the one at issue in Dominguez Benitez. He asserts that Rule 11(b)(1)(G), unlike the provision in Dominguez Benitez, is designed to ensure that a plea is knowing and voluntary, and therefore should not be subject to plain-error review. That assertion lacks merit.

Petitioner relies (Pet. 11-12) on the statement in McCarthy v. United States, 394 U.S. 459 (1969) -- which, like petitioner's case, involved a requirement under the then-current version of Rule 11 that a district court ensure that a defendant understands the nature of the charges against him -- that "prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." Id. at 471-472. That statement, however, predated Rule 11's harmless-error provision, which expressly adopted a prejudice analysis for Rule 11 errors that departed from from McCarthy. See Fed. R. Crim. P. 11(h) ("A variance from the requirements of this rule is harmless error if it does not affect substantial rights"); Rule 11 advisory committee's note (1983 Amendments) (18 U.S.C. App, at 912-914). And this Court's decision in Vonn explained that McCarthy does not relieve a defendant

raising a forfeited Rule 11 claim of the burden of showing plain error, noting that "not a word was said in McCarthy about the plain-error rule, or for that matter about harmless error." Vonn, 535 U.S. at 67; see id. at 66-68.

Petitioner also relies (Pet. 12-13) on a footnote in Dominguez Benitez, in which this Court noted that it had held in Boykin v. Alabama, 395 U.S. 238, 243 (1969), that "when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed." 542 U.S. at 84 n.10. In the footnote, the Court stated, "[w]e do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless." Ibid. That observation in Dominguez Benitez has no application here. In Boykin, the defendant was not informed that he had a privilege against self-incrimination, a right to a jury trial, or a right to confront his accusers, and this Court held that a waiver of "these three important federal rights" cannot be presumed from a silent record. 395 U.S. at 243. Petitioner, however, has never asserted that those constitutional rights were not explained to him, and the record reflects that they were. See 8/6/15 Tr. 5-6. An error in complying with the requirements of Rule 11(b)(1)(G), like the errors at issue in Vonn, Dominguez Benitez, and Davila, is subject to plain error review.

3. Petitioner does not identify any meaningful conflict of authority among the courts of appeals.

Petitioner cites (Pet. 13-14) a Sixth Circuit case in which that court concluded that a Rule 11(b)(1)(G) error was reversible without conducting any inquiry into whether the defendant would have pleaded guilty if properly informed of the nature of the charges against him. See United States v. McCreary-Redd, 475 F.3d 718, 726 (2007). Attributing such an approach to the Sixth Circuit as a general matter would be at odds with this Court's decision in Dominguez Benitez, which requires the defendant to "show a reasonable probably that, but for the error, he would not have entered the plea." 542 U.S. at 83. And in a later case involving a forfeited Rule 11(b)(1)(G) claim, the Sixth Circuit explicitly recognized that where a defendant seeks reversal of his conviction, "plain error review requires a heightened showing of prejudice" and the defendant "'must show a reasonable probability that, but for the error, he would not have entered the plea.'" United States v. Lalonde, 509 F.3d 750, 759 (2007) (holding that the district court's inquiry into whether the defendant understood the charges against him was sufficient) (quoting Dominguez Benitez, 542 U.S. at 83). Any intra-circuit tension between those cases is for the Sixth Circuit to resolve. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Petitioner further contends (Pet. 13-14) that the court of appeals' decision in this case conflicts with decisions of the

Seventh Circuit. But none of the decisions that he cites clearly held that a violation of Rule 11(b)(1)(G) is not reviewable for plain error. The Seventh Circuit's decision in United States v. Bradley, 381 F.3d 641 (2004), involved review of the denial of a motion to withdraw a guilty plea, not review of a forfeited Rule 11(b)(1)(G) claim. Id. at 644. The court also "emphasize[d] that th[e] case d[id] not present a mere Rule 11 violation," but that the record "reveal[ed] a far more fundamental misunderstanding about the nature of the charged offense," id. at 647 n.4, amounting to a due process violation. Applying a totality of the circumstances test, the court determined that the error was "not harmless" because "[i]t [wa]s clear that [the defendant] was misinformed during the change-of-plea hearing as to what conduct would suffice to establish the [Section] 924(c) offense with which he was charged." Id. at 646-647. That error culminated in the defendant admitting to facts that did not even establish a violation of Section 924(c). Ibid. This case arises in a different posture and involves no comparable claim of error.

Petitioner cites two additional cases from the Seventh Circuit in which defendants exhibited confusion at the plea hearing about the crimes to which they were pleading guilty. United States v. Fernandez, 205 F.3d 1020 (2000), was decided before Vonn and Dominguez Benitez, and again involved review of a motion to withdraw a guilty plea. Id. at 1023. The court applied its totality of the circumstances test and determined that the specific

Rule 11 error at issue was not harmless based on the particular facts of that case because the defendant's guilty plea was "enveloped in confusion and misunderstanding." Id. at 1026. In particular, when the sentencing court in Fernandez asked the defendant if he had done the things set forth in the factual proffer, he responded "[n]ot all of the acts, partially," and when the court asked the defendant if he understood what his lawyer had told him about pleading guilty, defendant responded "[n]ot everything[,] I thought I was pleading guilty partially." Id. at 1027.

In United States v. Pineda-Buenaventura, 622 F.3d 761 (2010), the Seventh Circuit -- like the court below here -- did apply plain-error review to a forfeited Rule 11(b)(1)(G) claim. See id. at 770. The court found that particular error to warrant plain-error relief, where it could not "say with confidence that [the defendant] ever truly understood the nature of the conspiracy to which he was pleading," because he had exhibited "confusion with the concept of conspiracy" that was "never fully resolved by the court." Id. at 771. The court explained that it could not "clearly determine exactly what acts [the defendant] admitted]," and that the defendant spoke only limited English and had problems communicating with his attorney. Ibid. Here, in contrast, petitioner has never indicated any confusion about the nature of the crime; on appeal, he simply argued (1) that commentators in law review articles had argued that Pinkerton liability should be

abolished because it "violate[s] the prohibition of common-law crimes," Pet. C.A. Br. 15; see id. at 15-17; and (2) that Pinkerton liability is an element of the offense that must be charged in the indictment, id. at 17-20. But petitioner cited no case in support of his novel theory that Pinkerton liability is altogether invalid, Gov't C.A. Br. 22-24, and an indictment need not "contain the specific theory of law which the prosecution intends to use in its attempt to convict the defendant." United States v. Galiffa, 734 F.2d 306, 314 (7th Cir. 1984) (rejecting argument that giving a Pinkerton instruction constituted a constructive amendment of the indictment); see, e.g., United States v. Washington, 106 F.3d 983, 1011 (D.C. Cir.) (per curiam), cert. denied, 522 U.S. 984 (1997). Petitioner's novel legal challenges to Pinkerton liability do not demonstrate that he was confused about the established bounds of that doctrine before he pleaded guilty, or that he would have sought a jury trial but for a Rule 11 error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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