No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2019

PATRICK LLOYD,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

STEVEN Y. YUROWITZ
NEWMAN & GREENBERG LLP
950 THIRD AVENUE -- 32ND FLOOR
NEW YORK, NEW YORK 10022
TELEPHONE: 212-308-7900
FAX: 212-826-3273

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

The Second Circuit agreed that the district court committed error when it accepted petitioner's plea without ensuring that he "understood the nature" of the charges to which he was pleading guilty. *United States v. Lloyd*, 901 F.3d 111, 115 (2d Cir. 2018). Moreover, the Second Circuit concluded that petitioner presented "a colorable argument that [petitioner] might have been confused about the complexities of the *Pinkerton*-based firearms charge, in which he bears criminal liability for his codefendant's firearms possession." *Id.* at 122. Nevertheless, the Second Circuit refused to vacate petitioner's plea because he was "unable to identify any aspect of the record suggesting that, had the District Court explicitly reviewed the elements of that liability with him at his change-of-plea hearing, he would not have entered a plea of guilty" to the firearms count. *Id.* In support of its troubling holding the Second Circuit cited this Court's decision in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), which held that a "defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." 542 U.S. at 83. Even *Dominguez Benitez* recognized that such a rule does not apply to all Rule 11 errors:

> 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. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

See id. at 84 n.10 (*citing Boykin v. Alabama*, 395 U.S. 238 (1969)). Ensuring that a defendant receives "real notice of the true nature of the charge against him," the purpose of Rule 11(b)(1)(G) is "the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976). As a result, this petition raises the following question of importance, and over which the Circuits are divided:

> Whether *Dominguez Benitez's* harmless error rule applies to Rule 11(b)(1)(G)'s requirement that before a guilty plea can be accepted the district court must ensure that the defendant understands the nature of the charges against him?

TABLE OF CONTENTS

QUESTION PRESENTED 1

TABLE OF AUTHORITIES 4

OPINIONS BELOW 5

JURISDICTION 5

RULE INVOLVED 6

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 16

APPENDICES

Appendix A — Opinion of Court of Appeals

Appendix B — Order of Court of Appeals denying Petition for rehearing

TABLE OF AUTHORITIES

Cases

Boykin v. Alabama, 395 U.S. 238 (1969) 2, 13

Henderson v. Morgan, 426 U.S. 637 (1976) 2, 14

Kercheval v. United States, 274 U.S. 220 (1927) 11

McCarthy v. United States, 394 U.S. 459 (1969) 11, 12

Pinkerton v. United States, 328 U.S. 640 (1946) 7

United States v. Bradley, 381 F.3d 641 (7th Cir.2004) 13

United States v. Coffin, 713 Fed.Appx. 572017 WL 5592282 (2d Cir. 2017) 12

United States v. Delgado-Hernandez, 420 F.3d 16 (1st Cir. 2005) 14

United States v. Dominguez Benitez, 542 U.S. 74 (2004) 1, 12

United States v. Fernandez, 205 F.3d 1020 (7th Cir. 2000) 13

United States v. Lalonde, 509 F.3d 750 (6th Cir.2007) 13

United States v. Lloyd, 901 F.3d 111 (2d Cir. 2018) 1

United States v. Manzella, 791 F.2d 1263 (7th Cir. 1986) 15

United States v. McReary-Redd, 475 F.3d 718 (6th Cir. 2007) 13

United States v. Murraye, 596 Fed.Appx. 219, 2015 WL 427503 (4th Cir. 2015) 14

United States v. Pineda-Buenaventura, 622 F.3d 761 (7th Cir. 2010) 14

Rules

Fed.R.Crim.P. 11 Advisory Committee Note (1983) (Rule 11(h) 13

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Lloyd,* 901 F.3d 111 (2d Cir. 2018) (Wesley, Chin and Carney, Circuit Judges), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated December 10, 2018, denying petitioner's petition for rehearing with a suggestion for rehearing *en banc* is annexed hereto as Appendix B.

JURISDICTION

The judgment of the of United States Court of Appeals sought to be reviewed was entered on August 20, 2018, and the order of that court denying petitioner's petition for rehearing was entered on December 10, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11, Fed.R.Crim.Pro.

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.

(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:

. . .

(G) the nature of each charge to which the defendant is pleading; . . .

(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).

(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.

. . .

(d) WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) FINALITY OF A GUILTY OR NOLO CONTENDERE PLEA. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

. . .

(h) HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

STATEMENT OF THE CASE

1. On April 23, 2014, a grand jury in the Northern District of New York returned a third superseding indictment ("Indictment") against petitioner and five codefendants. A18-A21.[1] The Indictment alleged that, from 2012 through September 2013, petitioner and his codefendants conspired to distribute controlled substances in upstate New York. The Indictment charged petitioner with conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), and 846 ("the drug count") and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 17 U.S.C. § 924(c)(1) ("the firearm count"). The firearm count was alleged to have occurred during the same time period and was based on the seizure of weapons by law-enforcement from the home of codefendant Spencer, a seizure that occurred some five-months after petitioner's arrest and incarceration. A19, PSR at 1-2. In other words, petitioner's guilt of the firearm offense turned was premised on a *Pinkerton* theory of liability. *See generally Pinkerton v. United States*, 328 U.S. 640 (1946).

In August 2015, on the eve of trial, petitioner agreed to plead guilty pursuant to a plea agreement. The change of plea hearing was conducted by the district court. The district court confirmed that petitioner intended to change his earlier plea of not guilty "and enter a plea of guilty to Counts [1] and [2] of the [Indictment], charging him with conspiracy to possess with the intent to distribute

[1] "A__" refers to the Appendix filed in the Court of Appeals; "PSR" refers to the Pre-Sentence Report filed with the Court of Appeals under seal.

and the distribution of controlled substances and the possession of a firearm in furtherance of a drug trafficking crime, all in violation of federal law, all pursuant to the terms of a plea agreement." A43. Petitioner confirmed that he had had a chance to read the written plea agreement and discuss it with counsel, and that he understood the terms and conditions of the plea agreement. A45. The district court then informed petitioner that it would "incorporate the plea agreement into the record of these proceedings since [petitioner had] read it and [he] underst[oo]d it and [he had] discussed it with counsel." *Id.*

The district court then addressed the constitutional rights that petitioner would relinquish by pleading guilty. The district court then advised petitioner of the maximum and minimum terms of imprisonment and supervised release, as well as the maximum possible fine, for each count of conviction, and that he faced a $100 special assessment on each count. The district court confirmed that petitioner was a United States citizen and told him that, as a consequence of his conviction, he would lose the right to vote and to carry firearms. Petitioner confirmed that understood these consequences of a conviction. Next, the district court explained the terms of Lloyd's appeal and collateral attack waiver. A52. Petitioner again confirmed that he understood, and the district court confirmed with petitioner that nobody had threatened him, pressured him to plead guilty, or promised him any benefit not identified in the plea agreement. The district court then "turn[ed] to the last area": determining whether "there are facts that would demonstrate . . . that [petitioner] committed the two crimes [he was] pleading guilty to." A55–56. On this point, the district court and petitioner engaged in the following exchange:

> THE COURT: . . . Now, here is what I always do: When a plea agreement is filed, I sit down and read the facts that are contained in it, so I get a copy of this in advance. Even though you didn't execute the final one until you appeared here in court, I have seen a copy, I read those facts and the facts in the plea agreement will support your plea if they're true. I know you signed the agreement saying they're true, but I like to make doubly certain: Are the facts contained in this plea agreement true?
> THE DEFENDANT: Yes.
> THE COURT: Then you are admitting them to me?
> THE COURT: Then as to the two counts in the indictment, the drug count and the gun count, how do you plead, guilty or not guilty?
> THE DEFENDANT: Guilty.

A56. The District Court accepted petitioner's guilty plea.

On September 8, 2016, the district court sentenced Lloyd to, *inter alia,* 20 years' imprisonment on Count 1 (the drug count), and 5 years' imprisonment on Count 2 (the firearm count), the statutory minimum on each count. A66. Petitioner acting pro se, filed a notice of appeal after which the Second Circuit appointed counsel. A77-A78.

2. On appeal petitioner challenged both the knowing and voluntary nature of his plea, in particular his plea to Count Two which was based on *Pinkerton* theory since the district court had failed to adhere to the requirements of Rule 11 in that he failed to ensure that petitioner understood the nature of the charge against him or that there was a factual basis for the plea. Petitioner also challenged the validity of *Pinkerton* liability in general arguing that it was a judicially crafted common-law crime.

The Second Circuit agreed that the district court had committed error in failing ensure before it accepted his guilty plea that he "understood the nature" of

the charges to which he was pleading guilty. *Lloyd*, 901 F.3d at 115. Moreover, the Second Circuit concluded that petitioner presented "a colorable argument that he might have been confused about the complexities of the *Pinkerton*-based firearms charge, in which he bears criminal liability for his codefendant's firearms possession." *Id.* at 122. Nevertheless, the Second Circuit refused to find that the district court committed plain error sufficient to vacate petitioner's guilty plea since it was "unable to identify any aspect of the record suggesting that, had the District Court explicitly reviewed the elements of that liability with him at his change-of-plea hearing, he would not have entered a plea of guilty" to the firearms count. *Id.* Having found that petitioner's guilty plea was valid it refused to consider whether the *Pinkerton* theory was constitutional instead dismissing the remainder of petitioner's appeal based on the appeal waiver contained in the plea agreement. *Id.* at 124. The Second Circuit subsequently denied petitioner's rehearing petition without explanation. Appendix B.

REASONS FOR GRANTING THE WRIT

Long ago this Court recognized the serious consequences that flow from a guilty plea:

> A plea of guilty ... is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

Kercheval v. United States, 274 U.S. 220, 223 (1927). In *McCarthy v. United States*, 394 U.S. 459, 470 (1969), a case involving the same failure as the instant case, i.e., the district court's failure to ensure that the defendant understood the nature of the charges, this Court noted that Rule 11 serves two purposes. First, it is "designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." 394 U.S. at 465. In addition, the "Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination." *Id.* Here, the Second Circuit agreed that no such determination was ever made.

Nevertheless, in refusing to vacate petitioner's guilty despite such a complete failure, the Second Circuit created dangerous precedent which permits a potentially unknowing and involuntary plea so long as the reviewing court can speculate or assume that the defendant would have, in any event, pled guilty. In other words, so long as the parties do not elicit any out-of-the-ordinary responses during the plea proceedings a district court can freely ignore the requirements of Rule 11 -- as the

district judge in this case has repeatedly done[2] -- safe in the knowledge that such errors will be deemed harmless. It was precisely this assumption and practice that *McCarthy* rejected:

> the Government argues that since petitioner stated his desire to plead guilty, and since he was informed of the consequences of his plea, the District Court "could properly *assume* that petitioner was entering that plea with a complete understanding of the charge against him."
> We cannot accept this argument.

394 U.S. 464-465.

In support of its troubling holding, the Second Circuit cited this Court's later decision in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), where the Court determined that a "defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 83. *Dominguez Benitez* involved a different provision of Rule 11, i.e., Rule 11(c)(3)(B) which requires the district court to advise the defendant that he will not have a right to withdraw his plea even if the court disagrees with the government's recommendation. Even *Dominguez Benitez* recognized, however, that its harmless error rule does not apply to all Rule 11 errors:

---

[2] The Second Circuit had previously vacated a plea taken by the same district court judge because as in this case, the district court failed to follow the requirements of Rule 11, relying instead on his "incorporation" of the plea agreement into the record. *United States v. Coffin*, 713 Fed.Appx. 572017 WL 5592282 (2d Cir. 2017). The Second Circuit noted the district court's statement that this "incorporation" method was "routine in the way in which I take a plea." *Id.* at 60 n. 2.

> 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. We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

See 542 U.S. at 84 n.10 (*citing Boykin,* 395 U.S. 238 (1969)).

In other words, while some Rule 11 errors are undoubtedly subject to a harmless error determination, indeed subsequent to *McCarthy,* Rule 11 was specifically amended to add the harmless error provision (*see* Fed.R.Crim.P. 11 Advisory Committee Note (1983) Rule 11(h)), where the Rule 11 protections are designed to ensure the entry of a knowing and voluntary plea, the harmless error rule should not apply since a "defendant's clear understanding of the nature of the charge to which he is pleading guilty relates to the very heart of the protections afforded by the Constitution and Rule 11." *United States v. Fernandez,* 205 F.3d 1020, 1027 (7th Cir. 2000).

Indeed, at least two appellate courts have rejected the Second Circuit's view concluding after *Dominguez Benitez* that the "[f]ailure to comply with Rule 11(b)(1)(G) is plain error, and "cannot be said to be harmless, even for an educated, well-represented defendant." *United States v. Lalonde,* 509 F.3d 750, 759-60 (6th Cir.2007); *United States v. Bradley,* 381 F.3d 641, 647 (7th Cir.2004) ("Misunderstanding of the nature of the charge . . . is not harmless error"); *see also United States v. McReary-Redd,* 475 F.3d 718, 721-726 (6th Cir. 2007) (vacating plea on plain error grounds where the district court failed to ensure that the defendant understood the nature of the charges or a factual basis for the plea; and

noting that even though under plain error the defendant bears the burden to show a substantial deprivation of his rights "the lack of a sufficient factual basis for a plea can never be harmless error"); *United States v. Pineda-Buenaventura*, 622 F.3d 761 (7th Cir. 2010) (district court's failure to adhere to Rule 11 constituted plain error since a "defendant's clear understanding of the nature of the charge to which he is pleading guilty relates to the very heart of the protections afforded by the Constitution and Rule 11"); *but see United States v. Delgado-Hernandez*, 420 F.3d 16, 27 (1st Cir. 2005) (refusing to vacate plea despite defendant being misadvised concerning the nature of the charges since defendant could not demonstrate that "he would have chosen to face trial" had the charge been properly explained); *United States v. Murraye*, 596 Fed.Appx. 219, 2015 WL 427503 (4th Cir. 2015) (refusing to vacate defendant's plea despite the fact that the district court committed plain error in failing to adhere to, *inter alia*, Rule 11(b)(1)(G), since the record failed to show that the errors "influenced Appellant's decision and to plead guilty").

Because a guilty plea cannot "be voluntary in the sense that it constituted an intelligent admission that [the defendant] committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process" (*Henderson v. Morgan*, 426 U.S. 637, 645 (1976)), it would be wrong to uphold a guilty plea that violated Rule 11(b)(1)(G), absent some assurance the defendant understood the nature of the charge and therefore his plea was knowing and voluntary. This is particularly true when dealing with a plea such as the instant case which relied on a *Pinkerton*

theory of liability. All would agree that *Pinkerton* liability -- here for a possessory offense -- is not something readily understood by a lay person. *See, e.g., United States v. Manzella*, 791 F.2d 1263, 1268 (7th Cir. 1986) (The [Pinkerton] instruction we have quoted contains every element of the *Pinkerton* doctrine, arrayed in an order calculated to maximize the likelihood that the jury will grasp this complicated concept").

In sum, the *Dominguez Benitez* standard is not a workable or appropriate test in the context of a potentially unknowing or involuntary plea. As a result, even assuming some harmless error test is appropriate the relevant inquiry should not be whether the defendant can demonstrate that had he been properly advised "he would not have entered a plea of guilty" as the Second Circuit held but rather as the Advisory Committee intended Rule 11(h) to function, i.e., whether the defendant's responses "clearly indicate his awareness of the missing element" thereby confirming that notwithstanding the district court's failure to adhere to Rule 11, the defendant's plea was still knowing and voluntary. Fed.R.Crim.P. 11 Advisory Committee Note (1983) (Rule 11(h)).

As the Second Circuit itself recognized given the complex nature of a *Pinkerton* charge the record is far from clear that petitioner understood the nature of the charges to which he was pleading guilty.

CONCLUSION

In view of the split in the Circuits, as well as the important constitutional rights at stake, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

Steven Y. Yurowitz
Newman & Greenberg LLP
950 Third Avenue -- 32nd Floor
New York, New York 10022
TELEPHONE: 212-308-7900
FAX: 212-826-3273

ATTORNEY FOR PETITIONER