NO. _____

IN THE
Supreme Court of the United States

LUIS PITT,

Petitioner,

v.

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

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QUESTION PRESENTED

Whether Petitioner's Due Process rights were violated when the Court of Appeals failed to remedy the District Court's improper acceptance of Petitioner's unknowing and involuntary plea, which conflicts with the Supreme Court's decision in *Bradshaw v. Stumpf*, 545 U.S. 175 (2005) and *Kercheval v. United States*, 274 U.S. 220 (1927)?

LIST OF PARTIES IN THE COURT OF APPEALS

United States of America

Luis Pitt

Jonathan Otero

Pedro Carillo

Anthony Carillo

Josue Franco

STATEMENT PURSUANT TO RULE 14(1)(b)(iii)

United States v. Pitt et al., 3:18-cr-00232-1, is the trial court docket in the District of Connecticut (New Haven), from which this case originates.

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

To secure and maintain the uniformity of judicial decisions, it is up to this Court, Petitioner's last resort, to remedy the lower courts' decision which is in conflict with the Constitutional provisions of the United States Constitution and this Court's authority. Such conflicts warrant the grant of the writ.

Opinion Below

The Order of the Court of Appeals for the Second Circuit is reproduced in the appendix bound herewith (A1).

Jurisdictional Statement

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C § 1254(1). The Court of Appeals issued an order dismissing Petitioner's appeal on April 9, 2021.

Constitutional and Statutory Provisions Involved

The Constitutional provision involved is the protection of the Due Process Clause of the Fifth Amendment (A3).

The statutory provision involved is Federal Rule of Criminal procedure 11 (A3).

STATEMENT OF THE CASE

Waiver of Indictment

On September 25, 2019, Petitioner waived his right to prosecution by indictment and consented to prosecution by information.

Information

Petitioner was charged by a Substitute Information on September 25, 2019. Count One charged that on or about January 26, 2018, in the District of Connecticut, Petitioner, in order to increase his position in the ALKQN organization, assaulted Victim A with a dangerous weapon, in violation of Conn. Gen. Stat. §§ 53a-59(a)(1) and 18 U.S.C. § 1959(a)(3). Count Two charged that on or about January 26, 2018, in the District of Connecticut, Petitioner brandished, carried and used a firearm, and aided and abetted others in brandishing a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. § 1959(a)(3) and 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2(a).

Guilty Plea

Petitioner negotiated an agreement with the government in which he agreed to plead guilty to a Substitute Information to Count One, assault with a dangerous weapon in aid of racketeering, in violation of 18 U.S.C. 1959(a)(3), and Count Two, using, carrying, and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 1959(a)(3) and § 924(c)(1)(A)(ii). The agreement listed the elements of the offenses, as well as the penalties for the offenses, including imprisonment, supervised release and fines.

Government's Motion to Dismiss Appeal

The government filed a motion to dismiss the appeal on November 24, 2020, arguing that Appellant had waived his appellate rights in his plea agreement pursuant to *United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000). The government argued that because Petitioner's plea was knowing and voluntarily, his plea was valid and therefore his appeal wavier should be enforced.

Petitioner's Opposition to Motion

Petitioner filed a response to the government's motion to dismiss on December 1, 2020. Petitioner argued that the instructions set forth in *Gomez-Perez*, 215 F.3d at 315, did not apply to Petitioner's case as there were bases to contest the validity of the waiver of the right to appeal. Petitioner contended that the District Court failed to establish a factual basis for Petitioner's guilty plea and ensure that his plea was knowing and voluntary. Petitioner explained that the District Court did not comply with Federal Rule of Criminal Procedure 11 and the Court should not enforce the appellate waiver under the exercise of its supervisory authority over the district courts. See, *United States v. Zea*, 659 F. App'x 32 (2d Cir. 2016)(citing *United States v. Ming He*, 94 F.3d 782, 792-793 (2d Cir. 1996); *United States v. Blackwell*, 199 F.3d 623, 626 (2d Cir. 1999).

Court's Order

The Court issued an order on April 9, 2021, granting the government's motion to dismiss.

REASONS FOR THE GRANTING OF THE WRIT

POINT I

THE COURT OF APPEALS FAILURE TO REMEDY THE DISTRICT COURT'S IMPROPER ACCEPTANCE OF PETITIONER'S UNKNOWING AND INVOLUNTARY PLEA CONFLICTS WITH THIS COURT'S DECISION IN *BRADSHAW V. STUMPF*, 545 U.S. 175, 183 (2005) AND *KERCHEVAL V. UNITED STATES*, 274 U.S. 220, 223-224 (1927), AND DECISIONS OF OTHER CIRCUITS, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A guilty plea operates as a waiver of constitutional rights, including the rights to a jury trial and against self-incrimination, and it is therefore "valid only if done voluntarily, knowingly, and intelligently, 'with sufficient awareness of the relevant circumstances and likely consequences.'" *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). Adhering to this Court's precedent, the Second Circuit has also detailed the importance of ensuring a defendant's guilty plea was voluntarily and intelligently made prior to be accepted by a sentencing court. In *United States v. Johnson*, 850 F.3d 515, 517, 523 (2d Cir. 2017), the court stated:

> [T]his Circuit has adopted a standard of strict adherence to Rule 11 and . . . therefore [the Court will] examine critically even slight procedural deficiencies to ensure that the defendant's guilty plea was a voluntary and intelligent choice, and that none of the defendant's substantial rights has been compromised.

Id., (quoting *United States v. Livorsi*, 180 F.3d 76, 78 (1999) (quotations, citations, and modifications omitted). Rule 11 requires that before accepting a plea, the district court must determine the factual basis for the Plea. Fed.R.Crim.P. 11(3).

This Court has also reiterated the importance of carefully accepting pleas when it explained that "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. When one so pleads, he may be held bound." *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927)(*citing United States* v. *Bayaud*, 23 Fed. 721). Conversely, then when the guilty plea is not made voluntarily, the defendant should not be held bound.

While the Court of Appeals granted the Government's motion for summary affirmance following its argument that Petitioner's appeal was barred by the waiver rights contained in Petitioner's plea agreement, a defendant cannot waive their right to a knowing, intelligent and voluntary plea. *United States v. Blackwell*, 199 F.3d 623, 626 (2d Cir. 1999)(stating that "we are not satisfied that [defendant's] guilty plea was knowing, intelligent and voluntary, and we will not enforce the provision of the plea agreement waiving [defendant's] right to appeal."

A. <u>The District Court Failed to Ensure that Petitioner Understood the Nature of the Charges and His Plea was Therefore, Unknowing</u>.

During Petitioner's plea proceeding, the Court failed to establish that Petitioner understood the nature of the brandishing a firearm during and in relation to a crime of violence charge (assault) and that Petitioner had knowledge of the brandishing of the firearm. Thus, Petitioner's plea was not knowing and voluntary and the Court of Appeals' affirmance of the District Court's decision conflicts with this Court's decision in *Stumpf*, 545 U.S. at 183 and *Kercheval*, 274 at 223-224; and decisions of the Second Circuit such as in *United States v. Blackwell*,

199 F.3d 623, 626 (2d Cir. 1999) and *United States v. Johnson*, 850 F.3d 515, 517, 523 (2d Cir. 2017), all holding that a plea is only valid if done voluntarily, knowingly and intelligently, calling for an exercise of this Court's supervisory power.

For Petitioner to be guilty of the offense and for the Court to accept Petitioner's guilty plea that he brandished a firearm or aided and abetted others in brandishing a firearm, during the assault, Petitioner was required to have had a certain level of knowledge regarding the brandishing of the firearm during or in furtherance of the assault. Petitioner did not have such knowledge, as evidenced by his responses during his plea allocution.

The plea transcript does not demonstrate that Petitioner's guilty plea was knowing, intelligent and voluntary, as the District Court elicited less than sufficient information to establish that Petitioner understood the meaning of his plea. Petitioner, two times, specifically stated that he did not know that a firearm was going to be used during the assault and that he was not aware that a firearm was used to strike the victim during the assault. The Court responded that it was having trouble understanding how Petitioner could be present for the assault but not know that there were one or more firearms present, brandished, and used in the assault. Petitioner took a moment to confer with defense counsel.

After Petitioner's conversation with counsel, the Court noted that "perhaps my questions were not particularly clear…" When asked for the second time whether Petitioner knew before the assault occurred that the firearm would be used

in furtherance of the assault, Petitioner, this time answered in the affirmative, rather than "no," as he did the first time he was asked. When Petitioner was next asked what he understood the firearm as going to be used for, Petitioner responded saying that "I didn't know what it was going to be used for…" Petitioner conferred with defense counsel again. The Court then stated that the question was whether or not the firearm was present and whether it was going to be used to intimidate the victim. Petitioner and defense counsel conferred once again. Petitioner then stated that he "knew that the gun was going to be used to intimidate or like – intimidate the victim or something."

Petitioner was not sufficiently informed as to the meaning of aiding and abetting the brandishing of a firearm charge to which he pled guilty and the District Court failed to establish a factual basis for Petitioner's plea. Petitioner's responses to the Court's questioning, combined with the fact that he had to confer with defense counsel three times during the proceeding, warrant further inquiry into whether Petitioner was confused and/or did not fully comprehend the nature of the charge. The fact that Petitioner had to confer with defense counsel multiple times within a short time period indicates that he did not fully comprehend and needed additional time and assistance to understand.

The District Court should have suspended the proceedings for more than a moment for Petitioner to confer with counsel outside of court due to Petitioner's contradictory responses to the District Court's questions:

> THE COURT: And you were aware that either you or one of your co-defendants used and brandished a firearm

during the course of that assault?
THE DEFENDANT: Yes.
THE COURT: And were you aware that the firearm -- at least a firearm was used to strike Victim A? I think the reference was hitting him or pistol-whipping him; you were aware of that?
THE DEFENDANT: No.
THE COURT: Were you aware that your co-defendants -- well, did you have a firearm that day?
THE DEFENDANT: No, not at all.
THE COURT: Were you aware that your co-defendants had firearms on them?
THE DEFENDANT: Yes.
THE COURT: And did you see those firearms?
THE DEFENDANT: No.
THE COURT: Were you present for the assault?
THE DEFENDANT: Yes.

THE COURT: I'm having trouble understanding how you could be present for the assault but not know there were one or more firearms present and brandished and used in the assault. Did you know that firearms would be used?
THE DEFENDANT: No.

. . .

THE DEFENDANT: I knew there was a gun, but I never seen it used. And --
THE COURT: You knew that one of your co-defendants had -- had a firearm?
THE DEFENDANT: Yes.
THE COURT: Okay. And did you know before the assault occurred that the firearm would be used in furtherance of the assault?
THE DEFENDANT: Yes.
THE COURT: I'm sorry?
THE DEFENDANT: I said yes.
THE COURT: Okay. Do you know how many firearms were present?
THE DEFENDANT: No.
THE COURT: Was it more than one?
THE DEFENDANT: Not that I know of.
THE COURT: You know of the one?
THE DEFENDANT: Yeah.
THE COURT: Okay. And what did you -- you said -- you answered my question yes, that you knew the firearm was going to be used in furtherance of the assault. What did you

> understand the firearm was going to be used for?
> THE DEFENDANT: I didn't know what it was going to be used for, just --
> MR. PAETZOLD: If I may have one moment, Your Honor?

The District Court failed to establish that Petitioner unequivocably admitted the conduct necessary to secure a valid conviction of brandishing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). It was never clear during the proceeding that Petitioner was unequivocal about his involvement. Rather, Petitioner was confused, providing contradictory responses. In *People v. Brooks (Daniel)* 2017 NY Slip Op 50136(U) the court noted that when the criminal court noticed the defendant maintain his innocence during his plea proceeding, the court suspended the subsequent plea proceeding until after defense counsel had sufficiently discussed the plea agreement with defendant. "As a result, the court responded appropriately to remove any doubt about defendant's guilt and the voluntariness of his plea before the court would allow him to enter into it (see *People v Lopez*, 71 N.Y.2d 662, 666 [1988]; *People v Serrano*, 15 N.Y.2d 304, 310 [1965]; *People v Washington*, 262 A.D.2d 868 [1999]; *People v Murphy*, 243 A.D.2d 954 [1997])."

Petitioner's confusion in the instant case, in which he responded in the affirmative one moment, and in the negative the next moment, should have indicated to the Court that a suspension of the proceedings was warranted. To make matters worse, Petitioner's response of "…or something" when describing what that gun would be used for, further demonstrates that he did not fully comprehend the

nature of the charge. The Court of Appeals' failure to reverse under these circumstances was such a far departure from this Court's precedent so as to call for its supervisory power. *Stumpf*, 545 U.S. at 183; *Kercheval*, 274 at 223-224; *Blackwell*, 199 F.3d at 626; *Johnson*, 850 F.3d at 517, 523.

Petitioner's moment to confer with counsel was not a sufficient amount of time. Understanding the nature of the offense was evidently a complex issue for Petitioner, a lay person, to comprehend, as evidenced by his responses and the need to confer with counsel multiple times in a short sitting. Petitioner's plea had a substantial effect on his life and freedom and as such, instead of simply a moment or few moments to confer, the Court should have stopped or suspended the proceeding for more than a moment until Petitioner had more time to grasp the nature of the offense and confer with counsel outside of the proceeding. As this Court stated in *Kercheval*, "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." 274 U.S. at 224. Most importantly, Petitioner's initial statements that he was unaware that the gun would be used during the assault were unwavering and unequivocal, but his statements that he was the cause of the gun being present and aware of the gun being used were followed by words such as "I guess" and "or something." As a result of these equivocal responses, which were prompted by conferring with defense counsel, the Court should have suspended the proceeding until Petitioner was able to fully comprehend the nature of what he was pleading to

and was not contradicting himself throughout. *Godwin v. United States*, 687 F.2d 585, 590 (2d Cir. 1982)(citing *Kloner v. United States*, 535 F.2d 730, 734 (2d Cir. 1976), *cert. denied*, 429 U.S. 942, 50 L. Ed. 2d 312, 97 S. Ct. 361 (1976); *see Rizzo v. United States,* 516 F.2d 789, 794 (2d Cir. 1975); *Irizarry v. United States,* 508 F.2d 960, 968 n.9 (2d Cir. 1974). Thus, as this Court has indicated that pleas must only be accepted carefully and when done voluntarily, and because Petitioner's plea was not voluntary, this Court should grant its supervisory power and grant certiorari.

This Second Circuit has accepted "a reading of the indictment to the defendant, coupled with his admission of the acts described in it as a sufficient factual basis for a guilty plea, as long as the charge is uncomplicated, the indictment detailed and specific, and the admission unequivocal." *Godwin*, 687 F.2d at 590)(citing *Kloner*, 535 F.2d at 734, *cert. denied*, 429 U.S. 942 (1976); *see Rizzo, supra*, 516 F.2d at 794 (dictum); *Irizarry, supra*, 508 F.2d at 968 n.9 (dictum). A brandishing a firearm or aiding and abetting the use of a firearm in furtherance of a crime of violence charge is far from simple. Further, Petitioner's contradictory and confused responses to the Court's questions and the need to confer with counsel three times and equivocal responses demonstrate that the record fails to provide a factual basis from which the District Court could be satisfied of Petitioner's guilt. The District Court's failure to ensure that Petitioner understood the nature of the offense prior to pleading guilty directly conflicts with this Court's decision in *Stumpf*, 545 U.S. at 183 and *Kercheval*, 274 at 223-224; and decisions of the Second Circuit such as in *Blackwell*, 199 F.3d at 626 and *Johnson*, 850 F.3d at 517, 523, all

holding that a plea is only valid if done voluntary, knowingly and intelligently, calling for an exercise of this Court's supervisory power.[1]

B. Petitioner's Plea was Involuntary.

The sufficiency of any particular colloquy between the judge and the defendant as to the nature of the charges will "vary from case to case, depending on the peculiar facts of each situation, looking to both the complexity of the charges and the personal characteristics of the defendant, such as his age, education, intelligence, the alacrity of his responses, and also whether he is represented by counsel." *United States v. Wetterlin*, 583 F.2d 346, 351 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979). While Petitioner did state during the proceeding that he wished to plead guilty, several factors when combined, demonstrate that his plea was involuntary. It was apparent that Petitioner felt compelled and coerced to plead as evidenced by the following factors:

First, Petitioner was young (24 years-old) and only recently received his G.E.D. as he never completed high school. Second, the courtroom environment served to press on Petitioner to effectuate the Plea Agreement and guilty plea, and

[1]Furthermore, during the plea proceeding, the Court considered the government's opinion on whether a factual basis existed to accept Petitioner's plea on the brandishing charge, an irrelevant factor to consider. Specifically, the Court asked "is the Government satisfied that the factual basis for aiding and abetting the brandishing of a firearm in furtherance of the crime of violence has been met?" The Court should have made its own determination about whether the factual basis was met, as required under Rule 11, where the District Court must determine whether a factual basis exists, instead of relying upon and considering the government's opinion. ." *Godwin*, 687 F.2d at 590)(citing *Kloner*, 535 F.2d at 734, *cert. denied*, 429 U.S. 942 (1976); *see Rizzo, supra*, 516 F.2d at 794 (dictum); *Irizarry, supra*, 508 F.2d at 968 n.9 (dictum).

yet, the Court failed to balance out the pressured environment by reminding Petitioner that he was not required to plead guilty. Third, the Court did not inform Petitioner that the Plea Agreement could be torn up when Petitioner was not sufficiently acknowledging his guilt to the charges. Fourth, Petitioner was not informed during the fact colloquy portion of the plea proceeding that he could still proceed to trial. Because Petitioner was not fully and sufficiently acknowledging his guilt to the charges, the District Court should have reminded him at this stage that he still had the option to proceed to trial. The Court's failure to do so rendered Petitioner's plea involuntary.

For someone who struggles emotionally, this pressure and coercive environment can compel them to plead guilty. As described in Petitioner's presentence investigation report, when asked to describe his mental health, Petitioner replied, "I break down a lot. Just… I try to stay as sane as possible, but it's hard dealing with the circumstances and being away. I am constantly crying… I write like a journal and try to express myself on paper, so I can get through the day." Being emotionally vulnerable, Petitioner likely felt coerced and compelled to plead, making his plea involuntary. When combined, the fact that Petitioner is/was young when he pled, did not have a higher education, and was not reminded that he could in fact proceed to trial, despite the Plea Agreement, indicate that Petitioner's guilty plea was not voluntary. The Court's failure to ensure a voluntary plea renders Petitioner's plea invalid. *Stumpf*, 545 U.S. at 183; *Kercheval*, 274 at 223-224 (a plea of guilty may only be accepted if it is voluntarily and intelligently given).

Consequently, because the Second Circuit did not remedy the District Court's failure to ensure that Petitioner's guilty plea was voluntarily and freely given, conflicting with this Court's as well as other courts' decisions, this Court should exercise its supervisory power and grant certiorari. *McCarthy v. United States,* 394 U.S. 459, 466 (1969)("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.")

C. Petitioner's Appellate Waiver Should Not be Enforced Because His Guilty Plea was Unknowing and Involuntary.

Because Petitioner's plea was unknowing and involuntary, the appellate waiver contained in his plea agreement where he agreed not to challenge his sentence, should not be enforced. A guilty plea "is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970)). As mentioned above, the District Court failed to ensure that Petitioner understood the nature of the charges against him and his plea was ultimately involuntary as evidenced by his background, the pressured courtroom environment and the District Court's failure to advise Petitioner that he could still proceed to trial. As such, Petitioner's appellate waiver should not be enforced, and this Court should exercise its supervisory power and grant certiorari to decide the issue of whether the District Court failed to ensure that Petitioner's plea was voluntary.

CONCLUSION

For the reasons set forth herein, the petition for certiorari should be granted.

Dated: July 1, 2021
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