No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERNEST KYLE DYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari To
the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

K. Wesley Mishoe, Esquire
TUCKER ARENSBERG, PC
300 Corporate Ctr. Dr., Ste. 200
Camp Hill, PA 17011
wmishoe@tuckerlaw.com
(717) 221-7961

CJA Counsel for Petitioner

QUESTION PRESENTED

When a defendant enters a conditional guilty plea, reserving the right to appeal an adverse decision on a motion to suppress, what harmless-error standard governs the determination of whether the defendant "prevails on appeal" under Federal Rule of Criminal Procedure 11(a)(2)?

RELATED PROCEEDINGS

United States District Court for the Middle District of Pennsylvania: United States of America v. Ernest Kyle Dyer (No. 1:17-CR-00226-001). Criminal judgment entered on October 28, 2021.

United States Court of Appeals for the Third Circuit: United States of America v. Ernest Kyle Dyer (No. 21-3087). Published opinion and judgment entered on November 29, 2022.

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INTRODUCTION

In *United States v. Davila*, 569 U.S. 597 (2013), this Court granted certiorari to resolve an important question of federal law: whether a federal judge's involvement in plea discussions, in violation of Federal Rule of Criminal Procedure 11(c)(1), warranted an automatic vacatur of a guilty plea. The Court ultimately held that Rule 11(h), which provides that a "variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights," controlled. As such, violations of Rule 11(c)(1) do not automatically result in the unwinding of a guilty plea; instead, courts must consider the complete record to assess the impact of the violation on the defendant's decision to plead guilty. *Davila*, 569 U.S. at 608. "[P]articular facts and circumstances matter." *Id.* at 611.

This case presents a different, yet equally important question of federal law under Rule 11: when a defendant enters a conditional guilty plea, reserving the right to appeal an adverse decision on a motion to suppress, what harmless-error standard governs the determination of whether the defendant "prevails on appeal" under Federal Rule of Criminal Procedure 11(a)(2)?

Petitioner, Ernest Kyle Dyer, advocates that the standard endorsed by the United States Court of Appeals for the First Circuit should govern. Under that standard, courts can only find harmless error if the record clearly demonstrates that the defendant's decision to plead guilty would have been the same if the evidence otherwise considered material was not present. *See United States v. Molina-Gomez*, 781 F.3d 13, 25 (1st Cir. 2015). That standard aligns with *Davila*, which similarly forecloses the dissolution of a guilty plea (albeit for different reasons) absent evidence in the record that demonstrates why a defendant pleaded guilty. As well, that standard is consistent with Rule 11 and does not

require courts to engage in an unreasonable degree of speculation. The standard adopted by the United States Court of Appeals for the Third Circuit and other courts of appeals does just the opposite.

In the published opinion below, the Third Circuit adopted a "materiality" standard in the published decision below. Thereunder, the government can satisfy its burden of proving harmless error when the evidence at issue in the suppression motion was immaterial to the count(s) of conviction and the government's case generally. That standard is also endorsed by the Sixth, Ninth, and District of Columbia Circuits. *See Dyer*, 54 F.4th at 160—161 (citing *United States v. Lustig*, 830 F.3d 1075, 1087, 1091 (9th Cir. 2016); *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014); *United States v. Leake*, 95 F.3d 409, 420 & n. 21 (6th Cir. 1996)).

To provide uniformity across the federal courts of appeals, the Court should grant this petition. Doing so on the important question of federal law would also ensure that defendants, prosecutors, and judges understand the ramifications of conditional pleas that involve reserved suppression issues. This case, which has straightforward facts and poses no hurdles to review, provides the perfect vehicle for the Court to do just that and settle the question.

OPINIONS BELOW

The opinion below is published at *United States v. Dyer*, 54 F.4th 155 (3d Cir. 2022).

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Third Circuit, which entered its published opinion and judgment on November 29, 2022, had jurisdiction under 28 U.S.C. §§ 1291, 3742(a). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1254.

PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 11 provides that, "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea." FED. R. CRIM. P. 11(a)(2).

STATEMENT OF THE CASE

A. Factual Background

On June 26, 2017, Starr Bowman was at York Hospital. While there, a special agent from the Federal Bureau of Investigation approached her to ask about Dyer. Bowman complied. She told the officers, among other things, that Dyer (her boyfriend) possessed a firearm, prostituted girls, and sold drugs from his residence.

About two weeks later, on July 7, 2017, Bowman called 9-1-1 to report that she was being followed by Dyer and his associates. Bowman also reported that Dyer pulled a gun and shot at her. When local law-enforcement officers arrived at Bowman's location, they saw that she had a swollen left eye. Bowman proceeded to tell the officers that the FBI was investigating Dyer. Bowman further stated that earlier in the evening, she went to her neighbors' residence. An altercation between her and Dyer ensued. During the altercation, Dyer brandished a Hi-Point .40 firearm, pointed it at her, and struck her in the eye with it. Bowman escaped. Dyer then allegedly called and threatened Bowman, which is what prompted her to call for help.

Detective Mark Baker, a police officer with the Northern York County Regional Police Department and task force officer with the FBI, subsequently applied for a search warrant of Dyer's residence. In the search-warrant application, Detective Baker identified the following items

that were to be searched for and seized: "firearms, illegal drugs, [and] cell phones possessed or belonging to . . . Dyer." (App. to Pet. Cert., 62a.) With respect to the "illegal drugs," Detective Baker did not reference any details concerning Dyer's possession, sale, or use of them. Detective Baker only wrote in the affidavit of probable cause that Bowman "disclosed there may be illegal drugs . . . in [Dyer's] residence." (App. to Pet. Cert., 64a.)

When law enforcement executed the search warrant, Dyer was present and arrested. Dyer's mother (Annie Dyer), Dyer's son (Taquan Holmes), and Summer Bechtold were also present. (App. to Pet. Cert., 69a—70a.) Because Bechtold and Holmes had outstanding arrest warrants, they too were arrested. (*Id.*)

Dyer waived his *Miranda* rights and briefly spoke with Detective Baker. (App. to Pet. Cert., 70a.) Dyer told Detective Baker that a firearm was inside a Dirt Devil commercial carpet cleaner. (*Id.*) Upon searching the carpet cleaner that was in the residence, officers discovered and seized a Hi-Point .40 firearm. (*Id.*) A further search of Dyer's residence resulted in the seizure of evidence indicative of drug trafficking, numerous firearm-related items in Annie Dyer's room, and one black belly-band holster in Dyer's room. (*Id.*) As well, relevant to this petition, law enforcement seized a "box containing green pills, drug packaging material and ID of T. Holmes – bedroom of T. Holmes on shelf." (*Id.*)

A few days later, on July 12, 2017, law enforcement interviewed Bechtold. During the interview, Bechtold explained that when she and Holmes were being processed, Holmes told her that he had dropped molly in the windowsill of his bedroom as the police made entry into the house. (App. to Pet. Cert., 81a.) Holmes also supposedly told Bechtold that he stashed approximately $700 in the ceiling. (*Id.*)

Bechtold went on to state that Dyer had threatened to kill Bowman, she was present when Dyer struck Bowman with a firearm, Dyer was selling ecstasy and fentanyl, Dyer used her for prostitution, and Dyer carried a firearm. (*See* App. to Pet. Cert., 79a—81.) Regarding the drugs, Bechtold expressed that Dyer and Holmes obtained the fentanyl from patches that they would handle while wearing gloves and masks. (App. to Pet. Cert., 80a—81a.)

The day after Bechtold was interviewed, Special Agent Ryan Anderson of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, applied for and obtained a second search warrant for Dyer's residence. Law enforcement sought to search for and seize: firearms, ammunition, firearms-related documentation or records, financial records, firearms accessories, controlled substances and paraphernalia, and sex-trafficking paraphernalia. (App. to Pet. Cert., 85a.)

On July 14, 2017, law enforcement executed the second search warrant. During that search, law enforcement found an unlabeled pill bottle sitting on the outside windowsill of the second floor of the residence. A baggy with gel-cap pills were inside the bottle along with a substance that determined to be bath salts. Law enforcement did not find money in the ceiling or discharged shell casings in the areas outside where Bowman and Bechtold had also claimed Dyer shot a firearm. In addition to the pill bottle on the windowsill, law enforcement seized digital scales with residue and zip lock baggies that contained residue which tested positive for cocaine.

B. Procedural History

1. Proceedings In The District Court

On the same date that law enforcement executed the first search warrant, Special Agent Anderson filed a federal criminal complaint, charging Dyer with felon in possession of a firearm. Thereafter, a grand jury returned

an indictment before eventually returning a superseding indictment.

In the superseding indictment, the grand jury charged Dyer with Count I – felon in possession of a firearm, Count II – possession of a firearm in furtherance of drug trafficking, Count III – criminal conspiracy to distribute and possess with the intent to distribute pentylone, and Count IV – distribution and possession with the intent to distribute pentylone. (App. to Pet. Cert., 86a—92a.)

While those charges were pending, Dyer moved to suppress evidence on grounds that the search warrants were not supported with probable cause. (App. to Pet. Cert., 93a—102a.) After an evidentiary hearing and briefing by the parties, the district court granted in part and denied in part Dyer's motion. (App. to Pet. Cert., 61a.)

The district court found that the first search warrant was supported with probable cause as to the firearms and cell phones, but not as to controlled substances. (App. to Pet. Cert., 34a—39a.) The district court also concluded that the good-faith doctrine did not justify the police seizing drug-related evidence during the first search. (App. to Pet. Cert., 39a—46a.) Furthermore, the court held that the plain-view exception "permitted [law enforcement] to seize the [box containing] green pills, plastic packaging, and ID card." (App. to Pet. Cert., 46a, 53a.)

Regarding the second warrant, the court found that it too was supported with probable cause. (App. to Pet. Cert., 57a—59a.) The district court additionally considered whether discovery of the items seized during the first search would have been inevitably discovered during the second. The court answered in the negative. (App. to Pet. Cert., 59a—60a.) The government "did not raise the argument in its brief[ing] or explain what evidence it believed would have supported such a finding[.]" (App. to Pet. Cer., 59a.) The record was insufficient to support a finding of inevitability. (*Id.*) A contrary ruling "would

[have] require[d] impermissible speculation." (App. to Pet. Cert., 60a.)

In the end, the district court suppressed a Swann DVR and charger, drug paraphernalia, a black padfolio with paperwork and receipt book, flash drives, and clear empty sandwich bags from the freezer. (App. to Pet. Cert., 61a.) The court did not suppress other evidence, including the firearm found inside the carpet cleaner. (*See id.*)

On May 5, 2021, Dyer entered a conditional plea agreement with the government. (App. to Pet. Cert., 211a—236a.) Dyer agreed to plead guilty to Count I — felon in possession of a firearm. (App. to Pet. Cert., 211a—212a.) Dyer also agreed to waive his right to file a direct appeal, "on the express condition that [he] reserve[d] the right to appeal the adverse suppression ruling." (App. to Pet. Cert., 229a.)

At the change-of-plea hearing that followed, the district court acknowledged that Dyer was "reserving the right to appeal [its] ruling on the suppression hearing" and that he had "the right to appeal [the] ruling on [his] suppression matter." (App. to Pet. Cert. 244a, 247a.) No other limitations or conditions were imposed on Dyer's right to appellate review of the suppression motion. At the conclusion of the hearing, the district court accepted Dyer's conditional plea.

On October 28, 2021, the district court entered judgment against Dyer, sentencing him to, among other things, 110 months imprisonment. (App. to Pet. Cert., 252a—258a.) Dyer timely appealed. (App. to Pet. Cert., 259a—260a.)

2. Proceedings In The Third Circuit

On appeal, Dyer argued that the district court erred when it held that the plain-view exception permitted law enforcement to seize the "box containing green pills, drug

packaging material and ID of T. Holmes – bedroom of T. Holmes on shelf." Dyer also argued that the remedy for the district court's error was to allow him the opportunity to withdraw the conditional guilty plea. In supplemental briefing ordered by the Third Circuit, the parties addressed the effect of harmless error on the case, whether a court under any circumstances could decide that a defendant's decision to plead guilty would have been different absent error by the district court, and the relationship between materiality and harmless error in this context.

In a published opinion, the Third Circuit affirmed. (App. to Pet. Cert., 1a—17a.) The court did not decide whether the district court erred in declining to suppress the box and its contents under the plain-view exception. (App. to Pet. Cert., 10a.) The court held, any error was harmless. (App. to Pet. Cert., 12a, 15a.)

According to the court, in the context of conditional guilty pleas, a defendant only "prevails on appeal" under Rule 11 when courts reverse. And a court "will reverse only if . . . evidence erroneously admitted was material to the defendant's decision to plead guilty, such that" the district court's "error was not harmless." (App. to Pet. Cert., 11a.) In Dyer's case, because "the evidence contained in the Box [did not] pertain to the count to which Dyer pleaded guilty" or "add anything to the Government's case," the court "reasonably conclude[d]" that the evidence "could have had no effect on [Dyer's] decision to plead guilty." (App. to Pet. Cert., 12a.) Thus, any error in admitting the box and its contents was harmless, meaning that Dyer did not "prevail on appeal" under Rule 11. (App. to Pet. Cert., 12a, 15a.)

REASONS FOR GRANTING THE PETITION

This Court only reviews cases when "compelling reasons" exist. SUP. CT. R. 10. The Court should grant review in this case because the Third Circuit's published opinion conflicts "with the decision of another United States court of appeals on the same important matter" and involves "an important question of federal law that has not

been, but should be, settled by this Court." SUP. CT. R. 10(a), (c).

Federal Rule of Criminal Procedure 11 provides that, "[w]ith the consent of the court and the government, a defendant may enter a conditional plea of guilty or *nolo contendere*, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion." FED. R. CRIM. P. 11(a)(2). The second part of the provision provides that "[a] defendant who prevails on appeal may then withdraw the plea." *Id.*

For a defendant to "prevail on appeal," an error by the district court on an adverse pretrial suppression motion must not be harmless. That is, harmless error applies. Indeed, if Federal Rule of Criminal Procedure 52(a)[1] "is to mean what it says in the context of Rule 11, [a] Defendant cannot prevail if the error in admitting the challenged evidence was harmless." *United States v. Dyer*, 54 F.4th 155, 162 (3d Cir. 2022); *see United States v. Benard*, 680 F.3d 1206, 1215 (10th Cir. 2012) (Gorsuch, J., concurring in part and dissenting in part) (agreeing that courts must decide whether such an error was harmless, but expressing caution about the panel majority's approach and disagreeing with the panel majority's harmless-error holding).

While the courts of appeals are near uniform in accepting that harmless error applies in the context of Rule 11 conditional pleas, they are not on the same page regarding the harmless-error standard that governs.

[1] Rule 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." FED. R. CRIM. P. 52(a).

Instantly, in affirming Dyer's judgment of conviction and sentence, and holding that the alleged error by the district court was harmless, the Third Circuit adopted a "materiality" approach from the Sixth, Ninth, and District of Columbia Circuits. *See Dyer*, 54 F.4th at 160—161 (citing *United States v. Lustig*, 830 F.3d 1075, 1087, 1091 (9th Cir. 2016); *United States v. Peyton*, 745 F.3d 546, 557 (D.C. Cir. 2014); *United States v. Leake*, 95 F.3d 409, 420 & n. 21 (6th Cir. 1996)). Thereunder, the government can satisfy its burden of proving beyond a reasonable doubt that a district court's error did not contribute to the defendant's decision to plead guilty when the relevant evidence was immaterial to the count(s) of conviction and the government's case generally. *See Dyer*, 54 F.4th at 160 ("None of the evidence contained in the Box pertains to the count to which Dyer pleaded guilty, being a felon in possession of a firearm, nor did it add anything to the Government's case").

The First Circuit, by comparison, accepts that courts can only find harmless error in the conditional-plea context if the record clearly demonstrates that the defendant's decision to plead guilty would have been the same if the evidence a court considers material was not present. To that end, in *United States v. Molina-Gomez*, the First Circuit agreed with the defendant that the district court erred in declining to suppress incriminating statements. *United States v. Molina-Gomez*, 781 F.3d 13, 25 (1st Cir. 2015). But even though the error was unlikely to have affected the defendant's decision to plead guilty considering the "remaining admissible evidence against him," the court reversed and remanded. *Molina-Gomez*, 781 F.3d at 25. The court gave the defendant the opportunity to withdraw his conditional plea, emphasizing that "a court has no right to decide for a defendant that his decision [to plead guilty] would have been the same had the evidence the court considers harmless not been present." *Id.* Thus, because the record did not indicate why the defendant pleaded guilty, including what role, if any, the district court's error had in the decision, the government could not satisfy its burden of proving that the error was

harmless.[2] That standard is consistent with this Court's precedent in a different plea context.

In *Davila*, the petitioner argued that a magistrate judge's involvement in plea discussions, in violation of Rule 11(c)(1), warranted the automatic unwinding of his guilty plea. The Court disagreed, holding that courts must consider all that transpired in the district court to assess the impact of the error on the defendant's decision to plead guilty. *Davila*, 569 U.S. at 608. The Court further emphasized that "particular facts and circumstances matter." *Id.* at 611.

There, the petitioner not only waited to plead guilty a few months after the magistrate judge's purported involvement with plea discussions, but he also clearly indicated why he entered his guilty plea. *Id.* at 601—03. The petitioner stated under oath that he entered the without force or pressure. The petitioner then asserted in connection with a motion to vacate his plea before sentencing, that he pleaded guilty for "strategic" reasons, i.e., "to force the government to acknowledge timeframe errors made in the indictment" and to "make the court aware that the prosecution was 'vindictive.'" *Id.* at 603. Thus, the petitioner's intentions for entering the plea were clear.

[2] The Tenth Circuit adhered to a similar standard. *See Benard*, 680 F.3d at 1214 ("On the basis of the record before us, we cannot conclude beyond a reasonable doubt that the district court's error did not contribute to Defendant's decision to plead guilty. The record does not indicate why Defendant decided to plead guilty, what other defenses or evidence he might have produced on his behalf, or how the altered bargaining positions of the parties might have affected his decision if his post-arrest statements had been properly suppressed"). But the year after the Tenth Circuit decided *Benard*, the court found a district court error harmless upon consideration of, among other things, the materiality of the evidence that the defendant sought to suppress. *United States v. Mikolon*, 719 F.3d 1184, 1189 (10th Cir. 2013).

Similarly, under the First Circuit's approach, to find harmless error on review of a suppression motion reserved in a conditional guilty plea, the court assesses the complete record for reasons why a defendant pleaded guilty. The "materiality" standard does not require that step. The standard, instead, injects "an unacceptable degree of speculation" into the harmless-error equation. *People v. Hill*, 528 P.2d 1, 29 (Cal. 1974), *rev'd on other grounds by People v. Devaughn*, 558 P.2d 872 (1977); *see People v. Grant*, 380 N.E.2d 257, 264 (N.Y. 1978) (expressing that "appellate court[s] [are] rarely equipped to answer" whether there is a reasonable possibility that an error contributed to a plea "without resorting to speculation").

In that vein, even when the government's case "may continue to appear invulnerable" after the suppression of certain evidence, "the defendant may have or believe [(s)]he has means of impeaching, discrediting[,] or casting doubt on [the government's case], and the items excluded on appeal might be the very ones which posed the most difficult strategic problems for the defendant." *Hill*, 528 P.2d at 29. Reviewing courts would only know that if the information was placed into the record by the defense. Additionally, unless information is included in the record, reviewing courts will not know the defense strategy or what countervailing proof, if any, defendants might have utilized but for an erroneous pretrial suppression ruling. And a defendant's decision to plead guilty "may be based on [a] factor . . . outside the record" that goes unaccounted for by focusing exclusively on the materiality of the pertinent evidence. *Grant*, 380 N.E.2d at 264.

Finally, the "materiality" standard is in apparent tension with Rule 11(a)(2). The Rule expressly requires the government to consent to a conditional guilty plea before a defendant may enter one. FED. R. CRIM. P. 11(a)(2). That requirement serves to "ensure that conditional pleas are allowed only when the decision of [a] court of appeals [would] dispose of [a] case . . . by such action as . . . suppressing essential evidence." FED. R. CRIM. P. 11, advisory committee's note to 1983 amendments. By

focusing on the materiality of pertinent evidence, reviewing courts overlook what the parties should be presumed to believe— that the non-suppressed evidence is material or essential.

The Court should promptly address and settle the question presented in this case, relating to application of harmless error. The issue is an important one. Because guilty pleas serve "an essential component of the administration of justice" (and otherwise are the criminal justice system), defendants, prosecutors, and judges must have a clear understanding of the consequences of conditional pleas and the standards that will govern review of reserved suppression issues on appeal. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *see Class v. United States*, 138 S. Ct. 798, 807 (2018) (Alito, J., dissenting) ("Roughly 95% of felony cases in the federal and state courts are resolved by guilty pleas. Therefore, it is critically important that defendants, prosecutors, and judges understand the consequences of these pleas") (footnote omitted). Given the First Circuit's position, moreover, settling the issue would provide uniformity among the courts of appeals.

This case consists of straightforward facts. It also does not pose any procedural or jurisdictional hurdles to review. Therefore, this case provides the Court with the perfect vehicle to accomplish the task of settling the question presented.

CONCLUSION

For these reasons, Dyer respectfully requests the Court to grant this petition for a writ of certiorari.

s/ K. Wesley Mishoe
K. Wesley Mishoe (I.D. 321983)
TUCKER ARENSBERG, P.C.
300 Corporate Ctr. Dr., Ste. 200
Camp Hill, Pennsylvania 17011
(717) 221-7961
wmishoe@tuckerlaw.com

Date: February 6, 2023

CJA Counsel for Petitioner