No. 22-6751

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IN THE SUPREME COURT OF THE UNITED STATES

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ERNEST KYLE DYER, PETITIONER

v.

UNITED STATES OF AMERICA

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

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner "prevail[ed] on appeal," such that he would be entitled to withdraw his conditional guilty plea, Fed. R. Crim. P. 11(a)(2), where the court of appeals found any error in the district court's resolution of the suppression motion on which the plea was conditioned to be immaterial and petitioner advanced no argument as to how it nevertheless influenced his decision to plead guilty.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

United States v. Dyer, No. 17-CR-226 (Oct. 28, 2021)

United States Court of Appeals (3d Cir.):

United States v. Dyer, No. 21-3087 (Nov. 29, 2022)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 54 F.4th 155. The order of the district court (Pet. App. 20a-60a) is unreported but is available at 2019 WL 6218899.

## JURISDICTION

The judgment of the court of appeals was entered on November 29, 2022. The petition for a writ of certiorari was filed on February 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 6a; Judgment 1. Petitioner was sentenced to 110 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-15a.

1. On July 5, 2017, a woman named Starr Bowman called 911 to report that petitioner, who was her boyfriend, had physically attacked her. Pet. App. 20a. When police officers located her, she explained that during an argument petitioner had "brandished a forty caliber Hi-Point pistol" and "struck her in the left eye with it." Id. at 21a. After she "fled," she "began receiving calls from [petitioner], telling her she should return to the house 'with a body bag.'" Id. at 21a-22a.

She also shared other details about petitioner, including that petitioner had hired men to rape her, that he sexually trafficked women, that he used drugs to coerce the women he trafficked, and that drugs might be present in his home. Pet. App. 3a, 22a. Officers checked petitioner's background and found that he had been convicted of a felony and was thus legally prohibited from possessing the firearm he used to strike Bowman. Id. at 22a. Based on Bowman's statements, a detective with the York County, Pennsylvania Police Department prepared an affidavit

and warrant application seeking authorization to search petitioner's residence and seize "[f]irearms, illegal drugs, and cell phones possessed [by] or belonging to" petitioner. Id. at 3a (first set of brackets in original); see id. at 23a-24a. A state magisterial judge approved the search warrant. Id. at 3a, 25a.

Officers executed the search warrant the following day. Pet. App. 3a, 25a. Petitioner was present, "along with an alleged victim of [petitioner's] sex trafficking," petitioner's mother, and his son. Id. at 4a. The officers arrested petitioner, and petitioner then directed the officers to a firearm matching Bowman's description. Ibid. The officers also seized cash, "drug paraphernalia," ammunition, two pistol holsters, and a "[b]ox containing green pills, drug packing material and [an] ID." Ibid. (citation omitted; first set of brackets in original); see id. at 25a.

Later that day, officers interviewed petitioner's alleged sex-trafficking victim, who informed the officers that during their search of petitioner's home, they had missed a bottle of drugs that petitioner's son had left on a windowsill. Pet. App. 26a. She also told officers that petitioner and his son were involved in drug trafficking and packaged drugs for distribution while wearing rubber gloves and medical-grade masks. Id. at 80a.

Based on that information, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives applied for and obtained a second warrant to search petitioner's home, garage, and the

surrounding curtilage for drugs and drug paraphernalia. Pet. App. 4a, 26a. A magistrate judge approved the warrant, which officers executed the following day. Ibid.

During the second search, officers located a bottle of drugs on a windowsill in petitioner's residence. Pet. App. 4a, 26a. They also seized digital scales with visible residue and some "package materials" from petitioner's garage. Id. at 135a. A subsequent lab report identified pills in the bottle on the windowsill as containing pentylone, a category of narcotics often called "'bath salts,'" and the residue on the digital scales as containing traces of cocaine. Id. at 4a-5a & n.2, 135a (citation omitted).

A federal grand jury in the Middle District of Pennsylvania returned a one-count indictment charging petitioner with knowingly possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(a)(2) (Supp. IV 2017). Pet. App. 4a. Several months later, the grand jury returned a superseding indictment charging petitioner with three additional counts: possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); conspiracy to distribute and possess with intent to distribute pentylone, in violation of 21 U.S.C. 846; and possession of pentylone with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 4a-5a, 88a-90a.

2. Petitioner moved to suppress the items seized pursuant to both warrants. Pet. App. 5a. He argued that the searches violated the Fourth Amendment because the affidavits supporting the warrant applications did not provide a sufficient basis for the issuance of the warrants. Ibid. After an evidentiary hearing, the district court granted the motion in part and denied it in part. Id. at 20a-61a.

As to the first search, the district court determined that although the warrant affidavit provided probable cause to search petitioner's home for firearms and cell phones, Pet. App. 34a, the affidavit did not provide probable cause to search petitioner's home for drugs, id. at 38a. The court accordingly excluded some items seized during the first search, including "drug paraphernalia" and "clear empty sandwich bags." Id. at 61a. But the court found that the plain-view doctrine justified the seizure of other items, including the box with green pills, packaging material, and an ID. Id. at 53a.

As to the second search, the district court found that the warrant affidavit provided probable cause and did not rely on any of the evidence improperly seized during the first search. Pet. App. 57a-59a. The court explained that the affidavit provided a "thorough basis for believing additional drugs could be found in a specific location in the house." Id. at 57a-58a. And the court therefore denied petitioner's motion to suppress the bottle of

pentylone pills, digital scales, and drug packaging material seized during the second search. Id. at 60a.

Following the district court's resolution of the suppression motion, petitioner entered a conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2) to possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 6a, 211a-236a. Rule 11(a)(2) allows a defendant to enter a conditional guilty plea while "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). Here, petitioner's guilty plea "reserve[d] the right to appeal the adverse suppression ruling issued by [the District Court]." Pet. App. 6a, 229a (citation omitted; brackets in original). In exchange for petitioner's guilty plea on the felon-in-possession count, the government agreed to move to dismiss the remaining counts against petitioner. Id. at 6a. The district court accepted petitioner's guilty plea, sentenced petitioner to 110 months of imprisonment (to be followed by three years of supervised release), and dismissed the remaining counts. Id. at 6a, 254a.

3. The court of appeals affirmed. Pet. App. 1a-15a. "The sole issue raised by [petitioner] on appeal," the court explained, "is whether the District Court erred when it held that the plain-view exception to the warrant requirement permitted law enforcement to seize the Box from a shelf in [petitioner's]

residence." Id. at 7a. The court noted that because "the first warrant authorized a search for firearms and cell phones," the "officers had a right to search the bedroom in which the Box was found for those items." Id. at 10a. And the court observed that the Box was "large enough to fit 'green pills, drug packaging material, and [an] ID,'" so it also could have potentially been "large enough to fit a cell phone," "for which the officers had a valid warrant to search." Ibid. (citation omitted).

The court of appeals did not ultimately decide the merits of the suppression motion, however, because it found that even "assuming the Box should have been suppressed," petitioner was "not entitled to relief." Pet. App. 10a. The court explained that under Rule 11(a)(2), petitioner "prevail[s]" -- and thus may withdraw his conditional guilty plea -- only if the court of appeals "reverse[s]" the district court. Id. at 11a. And the court stated that reversal is warranted "only if the evidence erroneously admitted was material to the defendant's decision to plead guilty, such that the District Court's error was not harmless." Ibid.

The court of appeals found that the evidence seized from the box -- green pills, an ID, and drug-packaging material -- "could not reasonably have contributed to [petitioner's] decision to plead guilty." Pet. App. 12a. The court observed that "[t]he Government has never asserted that the seized pills were narcotics -- the record suggests they were iron supplements"; the ID provided

no "evidence of [petitioner's] criminal activities"; and "[t]he drug packaging material" was significantly less "relevant and probative" than the other "evidence that [petitioner] committed drug trafficking offenses" -- namely, "the bath salts" and "digital scales with residue from narcotics" that were "seized during law enforcement's second search." Ibid. Accordingly, the court found that the evidence seized from the box neither "pertain[ed] to the count to which [petitioner] pleaded guilty, being a felon in possession of a firearm," nor "support[ed] the [other] charges [against petitioner] in any meaningful way." Ibid. In short, "[t]he Box added absolutely nothing to the Government's case." Ibid.

The court of appeals rejected petitioner's suggestion that courts "should not attempt to determine harmlessness in the guilty plea setting." Pet. App. 12a. The court emphasized Federal Rule of Criminal Procedure 52(a)'s instruction that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see Pet. App. 13a, 15a. "If Rule 52(a) is to mean what it says," the court observed, a defendant "cannot prevail" in the context of a conditional guilty plea "if the error in admitting the challenged evidence was harmless." Pet. App. 15a.

ARGUMENT

Petitioner contends (Pet. 9) that the court of appeals applied an improper "harmless-error standard" in assessing whether he had

"prevail[ed] on appeal" and would be entitled to withdraw his conditional guilty plea under Federal Rule of Criminal Procedure 11(a)(2). The decision below is correct and does not conflict with any decision of this Court, another court of appeals, or a state court of last resort. The petition for a writ of certiorari should be denied.

1. Rule 11(a)(2) permits a defendant, "[w]ith the consent of the court and the government," to "enter a conditional plea of guilty," while "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). But that procedure allows the defendant to "withdraw the plea" only if he "prevails on appeal." Ibid.

As petitioner acknowledges (Pet. 9), "[f]or a defendant to 'prevail on appeal,' an error by the district court on an adverse pretrial suppression motion must not be harmless," and therefore "harmless error applies." That is the plain import of Federal Rule of Criminal Procedure 52(a), which makes clear that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). As this Court has emphasized, as a general rule, "relief for error is tied in some way to prejudicial effect * * * on the outcome of a judicial proceeding." United States v. Dominguez Benitez, 542 U.S. 74, 81 (2004); see United States v. Benard, 680 F.3d 1206, 1216 (10th Cir. 2012) (Gorsuch, J., concurring in part and

dissenting in part) ("[T]he Supreme Court has repeatedly told us that Rule 52(a) must be respected in federal proceedings.").

Here, petitioner ultimately forwent an appeal of most aspects of the district court's suppression decision and appealed only a small slice of it, namely, its determination that the box containing the green pills, drug packaging material, and ID was permissibly seized under the plain-view doctrine. See Pet. App. 7a. And he has never identified any theory for why that minor aspect of the decision, alone, was prejudicial error.

As the court of appeals found, and petitioner does not dispute, the evidence that petitioner elected to challenge "did not support the charges against [him] in any meaningful way." Pet. App. 15a. Indeed, it did not even "pertain[] to the count to which [petitioner] pleaded guilty," the felon-in-possession count. Id. at 12a; see ibid. (observing that "the Government had significantly more relevant and probative evidence" on the drug offenses).

Not only did the evidence "add[] absolutely nothing to the Government's case," but the admission of that evidence "could not reasonably have contributed to [petitioner's] decision to plead guilty," and petitioner "has not advanced any argument as to how the allowance of [it] into evidence could have influenced his decision to plead guilty." Pet. App. 12a, 14a n.4 (emphasis added). Any error in the district court's partial denial of petitioner's suppression motion, therefore, "was harmless." Id. at 15a. And as a result, petitioner did not "prevail[] on appeal"

and is not entitled to "withdraw [his] plea." Fed. R. Crim. P. 11(a)(2); see Pet. App. 15a.

2. Petitioner nonetheless takes issue (Pet. 9) with the "harmless-error standard" that the court of appeals applied. According to petitioner, the court should have asked whether "the record clearly demonstrates that the defendant's decision to plead guilty would have been the same" if the immaterial evidence "was not present." Pet. 10. But that is the very standard -- namely, "whether the government has proved beyond a reasonable doubt that the erroneously denied suppression motion did not contribute to the defendant's decision to plead guilty," Pet. App. 11a -- that the court of appeals applied.

Contrary to petitioner's contention (Pet. 11), that standard is consistent with United States v. Davila, 569 U.S. 597 (2013), which assessed possible prejudice from the violation of an aspect of Rule 11 by looking to whether, without the violation, the defendant "would have exercised his right to go to trial," id. at 612. And petitioner could not satisfy such a standard, because the small bit of evidence at issue in the appeal "was immaterial to his case," Pet. App. 3a, and the record is devoid of any suggestion as to why petitioner might have nonetheless (unreasonably) viewed it as dispositive of his decision to plead guilty to a single (and relatively less serious) charge, in exchange for dismissal of the other charges, see id. at 14a n.4.

To the extent that petitioner is suggesting that the court of appeals' harmless-error analysis should have focused on his subjective mindset, see Pet. App. 14a (describing inquiry as "objective"), he failed to offer any basis for concluding that he might have unreasonably attached some idiosyncratic importance to the evidence here, id. at 14a n.1. And he offers no reason why a defendant should be entitled to enter a guilty plea conditioned on the denial of a suppression decision, appeal only one limited aspect of that decision that the court of appeals finds immaterial, and then, on the theory that he nonetheless "prevail[ed] on appeal," be permitted to withdraw his plea. Fed. R. Crim. P. 11(a)(2). Such an approach would encourage a defendant sandbagging by entering a conditional plea, awaiting the district court's sentencing decision, and then cherrypicking something contestable but irrelevant on which to premise a nominally "prevail[ing]" appeal. Ibid.

A system of that sort would create unwarranted outcomes, produce significant inefficiencies, and ultimately discourage the government and the courts from accepting legitimate conditional pleas. And it is not within Rule 11(a)(2)'s text or design.

3. Petitioner errs in contending (Pet. 1, 10) that the First Circuit's decision in United States v. Molina-Gomez, 781 F.3d 13 (2015), conflicts with the decision below and decisions from the

Sixth, Ninth, and D.C. Circuits.* But the court of appeals itself perceived no conflict; indeed, it cited Molina-Gomez (along with decisions from other circuits) as supporting the standard that it was adopting. Pet. App. 11a. Although it recognized that "[s]ome of the cases that bear on this issue refer to the materiality of the evidence as relevant in assessing whether the defendant has 'prevailed,'" while "some also discuss whether the District Court's error was harmless," it correctly understood those articulations to be two "side[s]" of the same "coin." Ibid. (citation omitted).

Even if tension existed between the standard used by the court of appeals below and the one used by the First Circuit, this case does not implicate it. As noted, the evidence that petitioner sought to suppress here -- green iron supplements, an ID, and drug packaging material -- "added absolutely nothing to the Government's case." Pet. App. 12a. In Molina-Gomez, in contrast, the evidence that "should have been suppressed" -- certain "statements regarding [the defendant's] drug trafficking activity" -- plainly supported the government's case against the defendant. 781 F.3d at 25.

Finally, to the extent that petitioner relies (Pet. 12) on two state-court decisions interpreting certain state procedural

* Petitioner also acknowledges (Pet. 11 n.2) that the most recent Tenth Circuit decision to address the question presented accords with the decision below. See United States v. Mikolon, 719 F.3d 1184, 1189 (2013).

rules governing conditional guilty pleas, that reliance is misplaced. See People v. Grant, 380 N.E.2d 257, 264-265 (N.Y. 1978); People v. Hill, 528 P.2d 1, 29-30 (Cal. 1974), overruled on other grounds, People v. DeVaughn, 558 P.2d 872 (Cal. 1977). Those "state decisions didn't -- and didn't have to -- grapple with the Federal Rules of Criminal Procedure and their command in Rule 52(a) that harmless error analysis applies to all non-structural errors in federal proceedings." Benard, 680 F.3d at 1216 (Gorsuch, J., concurring in part and dissenting in part). And petitioner now acknowledges (Pet. 9) that harmless-error review does apply in the context of Federal Rule of Criminal Procedure 11(a)(2).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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