No. 22-6751

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

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In accordance with his broadly-worded conditional plea agreement, Petitioner, Ernest Kyle Dyer, appealed the district court's order denying in part his pretrial motion to suppress evidence. Dyer argued that the district court erred when it held that the plain-view exception permitted law enforcement to seize a box's contents. In a published decision, however, the United States Court of Appeals for the Third Circuit affirmed. The court declined to address the merits of the suppression issue, holding instead that any error was harmless.

According to the court, in the context of conditional guilty pleas, a defendant only "prevails on appeal" under Federal Rule of Criminal Procedure 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 [b]ox [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's contents was harmless, meaning that Dyer did not "prevail on appeal" to unwind his guilty plea — the remedial option that Rule 11 permits. (App. to Pet. Cert., 12a, 15a.)

On February 7, 2023, Dyer timely filed a petition for writ of certiorari. Dyer asked: 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 (s)he "prevails on appeal" under Rule 11(a)(2)?

Dyer further highlighted why certiorari is appropriate, namely because of a split in authority among Circuit Courts and the case involves an important question of federal law that has not been settled by this Court. (Pet. Cert., pp. 8—13.) On May 12, 2023, the government filed its brief in opposition. The government's reasons fall short of being persuasive grounds for denying the petition.

1. The government is wrong in asserting that *United States v. Molina-Gomez*, 781 F.3d 13 (1st Cir. 2015) does not conflict with the published decision below and decisions from the Sixth, Ninth, Tenth, and D.C. Circuits. (Br. in Opp., pp. 12—13.)

In *Molina-Gomez*, the subjective mindset of the defendant was critical to the court's decision to remand the case so that he could "determine for himself" whether to plead guilty considering the district court's suppression error or proceed to trial. 781 F.3d at 25—26. Indeed, the First Circuit found it "highly unlikely that the suppression of the[] [defendant's] statements regarding drug trafficking activity — activity that [the defendant] emphatically denied at the time — would have affected his decision to plead guilty." *Molina-Gomez*, 781 F.3d at 25. Yet, the First Circuit still remanded because "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.* at 26 (quoting *United States v. Weber*, 668 F.2d 552, 562 (1st Cir. 1981)).

The import of the decision is that, in cases where a record does not clearly demonstrate the defendant's subjective mindset for entering a conditional plea, the defendant "prevails on appeal" when a circuit court rules in his (or her) favor on suppression issues. Accordingly, if Dyer was prosecuted in the First Circuit, *Molina-Gomez* suggests that the outcome could have been different if he was correct that the district court erred in admitting the box's contents under the plain-view exception.

The Third Circuit, though, did not reach the suppression issue; instead, it focused on the remedial aspect of Rule 11(a)(2). The Third Circuit joined the Sixth, Ninth, Tenth, and D.C. Circuits in essentially ignoring whether a record clearly conveys a defendant's subjective mindset and focusing instead on the "materiality" of the non-suppressed evidence. In fact, the Third Circuit shifted the focus away from Dyer's subjective mindset to how the box's contents would have supported the charges against him or been useful to the government. *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"). And it is now debatable whether it would have mattered to the Third Circuit if Dyer had informed the district court that he entered the plea agreement because the court declined to suppress the box's contents. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 84—85 (2004) (faulting the Ninth Circuit for "pass[ing] over" "[r]elevant evidence . . . includ[ing] Dominguez's

statement to the District Court that he did not intend to go to trial, and his counsel's confirmation of that representation, made at the same hearing" as well as Dominguez's "protests" about sentencing items rather than guilt).[1] [2]

2. Contrary to the government's bald statement, Br. in Opp., p. 12, the subjective-mindset approach is within Rule 11(a)(2)'s text and design. Here, for example, Dyer agreed in writing 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 further acknowledged that Dyer was broadly "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. By consenting to that broad plea language, as the government was required to do under Rule 11(a)(2), the government implicitly agreed that all of the non-suppressed evidence at issue before the district court was not harmless. In kind, without more, it is reasonable to accept that the district court's decision to not

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[1] The Court also expressed, but did not hold, "that the overall strength of the Government's case and any possible defenses that appear from the record" were "[o]ther matters that may be relevant." *Dominguez Benitez*, 542 U.S. at 85. Of course, that case concerned the plain-error standard. Here, it appears undisputed that the governing standard is harmless error.

[2] The government's issues with the subjective-mindset approach are better suited for merits briefing. (*See* Br. in Opp., p. 12.)

suppress the box's contents (along with its decision to not suppress other evidence) is what subjectively drove Dyer to enter the conditional plea agreement.

3. The state-court cases Dyer relies on provide persuasive value even though the state courts might not have had to grapple with a harmless-error analysis. (*Cf.* Br. in Opp., pp. 13—14.) Those decisions provide keen insight into why the First Circuit's approach is the correct one. *See Molina-Gomez*, 781 F.3d at 26 ("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"). To that end, 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." *People v. Hill*, 528 P.2d 1, 29 (Cal. 1974), *rev'd on other grounds by People v. Devaughn*, 558 P.2d 872 (1977). 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 (on appeal from conditional guilty pleas and without a complete trial record) 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 on the materiality of the pertinent evidence. *People v. Grant*, 380 N.E.2d 257, 264 (N.Y. 1978).

* * *

The Court should promptly address and settle the question presented in this case. 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 *Molina-Gomez*, moreover, settling the issue would provide uniformity among the courts of appeals. For these reasons, as well as those previously addressed, Dyer respectfully requests the Court to grant this petition for a writ of certiorari.

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