No. 23A222

IN THE
Supreme Court of the United States

JONG WHAN KIM,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Scottie Forbes Lee
David Keirstead
ELLIS & WINTERS LLP
300 North Greene St.
Suite 800
Greensboro, NC 27402
(336) 389-5684

Michelle A. Liguori
Counsel of Record
ELLIS & WINTERS LLP
4131 Parklake Ave, Suite 400
Raleigh, NC 27612
(919) 573-1294
michelle.liguori@elliswinters.com

Counsel for Petitioner Jong Whan Kim

QUESTION PRESENTED

Rule 11(b)(1)(G) of the Federal Rules of Criminal Procedure requires that, during a plea hearing, before a district court accepts a plea of guilty, it must first "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which [he] is pleading." The question presented, on which the circuits are deeply divided—with at least four on one side and five on the other—is:

Is it error for a district court to rely on a defendant's pre-hearing review of the indictment to inform him of the nature of the offense?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Jong Whan Kim.

Respondent, plaintiff-appellee below, is the United States of America.

RELATED PROCEEDINGS

United States v. Tammy Thompson, No. 7:18-cr-200-FL-2 (E.D.N.C. 2022).

TABLE OF CONTENTS

Page:

APPENDIX

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Regulations:

Rules:

Other Authorities:

INTRODUCTION

Guilty pleas are ubiquitous in the United States. Over ninety percent of criminal indictments are resolved by plea.[1] The omnipresence of plea bargaining means that the procedures used to obtain pleas are of great "importance" to the "administration of criminal law in the federal court[s]." McCarthy v. United States, 394 U.S. 459, 463 (1969).

Rule 11(b)(1)(G) of the Federal Rules of Criminal Procedure requires that, during a plea hearing, before a district court accepts a plea of guilty, it must first "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which [he] is pleading." As this Court explained in McCarthy, the purpose of Rule 11 is to "expose[ ] the defendant's state of mind on the record through personal interrogation," to facilitate the court's "own determination of [the] guilty plea's voluntariness," and to "facilitate[ ] that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary." 394 U.S. at 467.

---

[1] See Lindsey Devers, Bureau of Justice Assistance, Dep't of Justice, Plea and Charge Bargaining, Research Summary 1 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf ("scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through [plea bargaining]"); McCarthy, 394 U.S. at 463 n.7 (noting statistics from the Director of the Administrative Office of the Courts showing that, "[d]uring 1968 approximately 86% (22,055 out of 25,674) of all convictions obtained in the United States district courts were pursuant to a plea of guilty or its substantial equivalent, a plea of nolo contendere").

As its decision below indicates, the Fourth Circuit has gone astray in applying Rule 11(b)(1)(G). It falls in line with four other circuits that have drifted from the dictates of Rule 11 and McCarthy.

Correctly applying Rule 11(b)(1)(G) and McCarthy, at least four circuits, including the First, Second, Fifth, and D.C. Circuits, hold that a district court may not rely on a defendant's pre-hearing review of the indictment to inform him of the nature of the charge to which he is pleading guilty. Instead, these circuits, consistent with the language of Rule 11(b)(1)(G) and McCarthy, hold that, for a guilty plea to be valid, the district court must personally engage with the defendant on the record in a way that confirms the defendant understands the nature of the charges to which he is entering a plea. Courts in these circuits have found plain, reversible error where the defendant entered a guilty plea after being misinformed of the mens rea element of the charge.

In contrast, the Third, Sixth, Tenth, and Eleventh Circuits, along with the Fourth Circuit, permit district courts to rely on a defendant's pre-hearing review of the indictment to inform him of the nature of the charges—with at least one presuming that a pre-hearing review of the indictment is sufficient. In these circuits, a guilty plea can be valid even when there is no discussion on the record about the nature of the charge to which the defendant is pleading guilty. The Fourth Circuit's decision in this case shows that, applying this rule, a guilty plea can be valid even when the district court incorrectly discussed an element of the charge with the defendant.

Basic fairness and the public reputation of criminal proceedings in the United States require that guilty pleas be made knowingly and voluntarily, and that courts make a record to show that defendants understand the charges to which they're pleading guilty. That's why this Court held as it did in McCarthy. This Court should grant certiorari in this case and reverse the Fourth Circuit's decision, which allows Mr. Kim's guilty plea to stand where his plea agreement and the district court's Rule 11 colloquy misadvised him of the mens rea element of his offense and the record shows that Mr. Kim was torn about whether or not to plead guilty. Reversal here would allow the Court to correct the Fourth Circuit and other circuits that have gone astray in allowing district courts to rely on a defendant's pre-hearing review of the indictment to satisfy Rule 11(b)(1)(G) and would help ensure the proper and uniform administration of Rule 11(b)(1)(G) in federal courts throughout the United States.

OPINIONS AND RULINGS BELOW

The Fourth Circuit's opinion is reported at 71 F.4th 155. See Petitioner's Appendix A ("App. A").

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on June 20, 2023. On September 7, 2023, the Chief Justice extended the time within which Mr. Kim could file a petition for a writ of certiorari to and including October 18, 2023. Mr. Kim invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 11(b)(1)(G) provides:

> 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[.]

Fed. R. Crim. P. 11(b)(1)(G).

Section 841(a)(1) of the Controlled Substances Act makes it unlawful:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 841(a)(1).

Section 1306.04(a) of Title 21 of the Code of Federal Regulations provides that:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

21 C.F.R. § 1306.04(a).

STATEMENT OF THE CASE

Ruan v. United States, 142 S. Ct. 2370 (2022), changed the law in the Fourth Circuit on the mens rea that the government must prove to convict a medical doctor under section 841(a)(1) for issuing unauthorized prescriptions. See App. A at 2.

When the petitioner, Jong Whan Kim, was indicted, entered his pleas, and was sentenced, the Fourth Circuit did not apply the knowingly or intentionally mens rea in section 841(a)(1) to the "[e]xcept as authorized" element of the offense. See United States v. Hurwitz, 459 F.3d 463, 475 (4th Cir. 2006). As a result, before Ruan, to convict Mr. Kim, the government did not have to prove that he knowingly or intentionally acted outside the usual course of professional practice and not for a legitimate medical purpose. Accordingly, the government could convict him by proving only that his conduct was objectively outside the usual course of professional practice and not for a legitimate medical purpose. See id.

Now, under Ruan, the government would not be able convict Mr. Kim without affirmatively proving subjective intent—that Mr. Kim knowing or intentionally acted outside the usual course of processional practice and not for a legitimate medical purpose. See Ruan, 142 S. Ct. at 2377-78, 2382.

A. Mr. Kim pleads guilty to the elements as they existed in the Fourth Circuit before Ruan.

Mr. Kim is a 76-year-old immigrant from South Korea. App. A at 3. He attended medical school in the United States when he was in his forties. App. A at 3. In December 2018, Mr. Kim was indicted for issuing prescriptions for opioid medications from October 2017 to June 2018, including to a confidential informant,

that were outside the usual course of professional practice and not for a legitimate medical purpose, in violation of section 841(a)(1). App. A. at 6.

1. Mr. Kim is charged under pre-Ruan law.

At his arraignment in February 2020, Mr. Kim pleaded not guilty. See JA15.[2] He retained defense counsel, who prepared the case for trial. JA9. Counsel retained and disclosed an expert witness who was expected to testify that several of the prescriptions Mr. Kim issued to the confidential informant were, in fact, within the usual course of professional practice and for a legitimate medical purpose. JA22. The case reached the eve of trial twice, with the parties filing proposed jury instructions in January 2021 and amended proposed jury instructions in July 2021. JA19, JA22.

In July 2020, the government filed a superseding indictment with additional charges. JA17. A year later, in July 2021, the government filed a second superseding indictment. JA20. Apparently forecasting a potential change in the law, but keeping its options open, the government's superseding indictment and second superseding indictment alleged, in the conjunctive, that, in issuing the charged opioid prescriptions, Mr. Kim was "acting and intending to act outside the usual course of professional practice and not for a legitimate medical purpose." JA17 at 1-13, JA20 at 1-3, 5-6; see Turner v. United States, 396 U.S. 398, 420 (1970) (discussing the general rule that, "when a jury returns a guilty verdict on an indictment charging

[2] The JA references in this petition are to the Joint Appendix filed in the Fourth Circuit.

several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged").

Around the same time that it filed the second superseding indictment, the government offered Mr. Kim a plea deal. JA50. As a condition of the deal, the government required Mr. Kim to stipulate that funds he had in a particular bank account were proceeds of his offenses. JA50. Sylvia Kim, Mr. Kim's estranged wife, had used funds in that bank account to retain Mr. Kim's counsel. This meant that the proposed plea agreement would subject counsel's fee to forfeiture. JA194. As a result, counsel had a conflict of interest in advising Mr. Kim about the plea agreement, and, because of that conflict, counsel moved to withdraw. JA21. The district court granted the motion to withdraw, and, in July 2021, appointed counsel for Mr. Kim. JA23, JA47-48.

A few months later, Mr. Kim's appointed counsel reached a plea agreement with the government. See JA62, JA66-67.

2. Before Ruan is decided, the district court continues Mr. Kim's first plea hearing after he raises questions about his guilt.

On November 30, 2021, the district court held a change-of-plea hearing, at which Mr. Kim's appointed counsel represented that, pursuant to a plea agreement, Mr. Kim was prepared to plead guilty to eight violations of section 841(a)(1) and a related conspiracy charge. See JA39-40, JA43-44, JA62.

At the hearing, Mr. Kim noted that he was "having a little bit of hearing difficulty." JA59. He informed the district court that he wore a hearing aid. JA59-60. The court worked through a miscommunication with Mr. Kim about whether he

was able to communicate effectively with his counsel, and instructed Mr. Kim that it was very important that he understand the court and that the court understand him. JA61.

The court asked Mr. Kim if he had read the second superseding indictment. JA62. He answered, "Yes, Your Honor." The court asked if Mr. Kim wanted the government to read the second superseding indictment to him and he responded: "No, Your Honor. My counsel has explained to me those things."[3] JA62.

Consistent with Rule 11(b)(1)(G), the court still went over the elements of the offenses. It advised Mr. Kim, consistent with Fourth Circuit law at the time, that, on count 4:

> In order to prove this, the government must bear the burden of showing beyond a reasonable doubt that you prescribed, dispensed, or distributed oxycodone; you acted knowingly and intentionally; and you did that outside the course of professional practice and not for a legitimate medical purpose.

JA73.

Varying its language slightly each time, the district court similarly advised Mr. Kim of the elements on the other section 841(a)(1) counts. See JA73-75. The court did not once reference the superseding and second superseding indictment's allegations that Mr. Kim was "acting and intending to act outside the usual course of professional practice and not for a legitimate medical purpose." See JA73-75. Nor did it tell Mr. Kim that, to convict him, the government would have to prove that he

[3] As shown here, and in other places throughout this petition, Mr. Kim's English is not perfect. Born in South Korea, English is not Mr. Kim's native tongue.

knowingly or intentionally so acted. See JA73-75. That was not the law at the time. See Hurwitz, 459 F.3d at 475.

In stating a factual basis for the plea, the government explained that each of the relevant charges related to prescriptions or other transactions with the confidential informant and the confidential informant's father. JA76-82. Then, when the court asked Mr. Kim if he committed the crimes subject to the plea agreement, the hearing came to a halt. Mr. Kim told the court:

> Your Honor, nothing I was doing willfully. I'm not guilty of any of this, Your Honor. I was just advised by my counsel that this is the only way I can alleviate—mitigate my sentence.

JA86.

After he made this statement, the court gave Mr. Kim the opportunity to speak with his counsel. JA86. Following a recess, the court asked counsel what Mr. Kim would say if the court asked him again if he was guilty, because when the court had asked him earlier, Mr. Kim "seemed to have some real angst." JA86. Counsel responded that they were not in a position to enter a guilty plea that day, and asked for a continuance. JA87.

The court set aside the plea agreement and continued the hearing. JA87-89.

3. Mr. Kim's plea agreement does not reference the mental state now required under Ruan.

Over the next month, Mr. Kim's counsel negotiated a revised plea agreement with the government, under which Mr. Kim agreed to plead guilty to seven violations of section 841(a)(1) and a related conspiracy count (which were all but one of the counts subject to the original plea agreement). JA193.

The plea agreement stated that, for the section 841(a)(1) counts, the government had to prove the following elements:

> First: the defendant prescribed, dispensed or distributed a quantity of oxycodone, a Schedule II controlled substance;
>
> Second: the defendant acted knowingly and intentionally; and
>
> Third: the defendant prescribed, dispensed or distributed the quantity of oxycodone, a Schedule II controlled substance, outside the usual course of professional practice and other than for a legitimate medical purpose.

JA198; see JA198-203.[4] The plea agreement did not reference in any way the indictment's allegation that Mr. Kim was "acting and intending to act outside the usual course of professional practice and not for a legitimate medical purpose." See JA193-207.

For sentencing purposes, the parties agreed that Mr. Kim would be held responsible for the drug quantities associated with each of the counts subject to the plea agreement. See JA98-99, JA168-170, JA178-179, JA205-206.

4. No one at the second change-of-plea hearing references the mental state now required under Ruan.

The district court reconvened the change-of-plea hearing on December 28—about one month after the first hearing. JA93-94. The court asked whether it was Mr. Kim's "intention to plead guilty to [counts] 1, 4, 8, 11, 14, 20, 21, and 32," and counsel responded in the affirmative. JA94. The court noted that it viewed the hearing as a continuation of the November 30 hearing, and thus, with counsel's agreement, the court did not repeat the elements of the offenses. JA94-96.

[4] Mr. Kim's first plea agreement is not in the record.

The government discussed controlled purchases with the confidential informant as the factual basis for the plea. JA96. The government described six visits by the informant to Mr. Kim's clinic. JA96-99.

The first visit occurred on January 30, 2018. JA96. The government asserted that, during the visit, office staff took the informant's blood pressure and collected basic information from him. JA96. The informant then went back to see Mr. Kim, who asked what was wrong, pulled up the informant's medical and prescription history, and performed a drug screen. JA96-97. As a result of this visit, Mr. Kim wrote a prescription for methadone. JA97. The clinic charged $200 for this first visit, and for each subsequent visit.

The informant returned to the clinic on February 27, 2018, and March 28, 2018, for second and third visits. JA97. After waiting for over an hour each time, he was called back to see Mr. Kim. JA97. According to the government, Mr. Kim performed minimal medical examination. After the second visit, Mr. Kim wrote the informant a prescription for oxycodone, and after the third visit, he wrote a prescription for oxycodone and OxyContin. JA97.

The government discussed three other visits during which the informant saw Mr. Kim, received prescriptions, and also purchased marijuana from Ms. Thompson. See JA97-99. Sometimes Mr. Kim was present when the informant purchased marijuana from Ms. Thompson, and on one occasion, he collected money from the informant. See JA97-99. During one visit, Ms. Thompson discussed Mr. Kim issuing prescriptions in exchange for construction services. JA98. During the last visit, Mr.

Kim agreed to write a prescription for the informant's father, who had not been a patient and was not present that day. JA98.

Following the government's statement of the factual basis, the court asked Mr. Kim if he was guilty of counts 1, 4, 8, 11, 14, 20, 21, and 32, and he responded that he was. JA104. The court found that Mr. Kim's plea was knowing and voluntary, and accepted it as to the counts stated. JA104.

At the sentencing hearing on April 7, 2022, in his allocution statement, Mr. Kim continued to express concerns about whether he had a culpable mental state. He told the court that he was sorry for making mistakes, and that he "didn't mean to break any laws." JA132.

Following the sentencing hearing, the court entered judgment. JA148-155. Mr. Kim filed a notice of appeal the next day. JA156.

B. Mr. Kim appeals his convictions based on Ruan; the Fourth Circuit finds no error, plain or otherwise, even though the district court never engaged with Mr. Kim about the mens rea required to convict him under Ruan.

About two and a half months after Mr. Kim filed his notice of appeal, Ruan held that when the government charges a medical doctor authorized to write prescriptions with prescribing controlled substances in violation of section 841(a)(1), the government has to prove beyond a reasonable doubt that the defendant knowingly and intentionally acted in an unauthorized manner. 142 S. Ct. at 2382. On appeal, Mr. Kim asked the Fourth Circuit to vacate his guilty pleas based on Ruan. 4th Cir. Opening Br. He contended that, before he pleaded guilty, he was not informed of the mens rea now required under Ruan, and, especially in light of his hesitancy to plead

guilty and his explicit concerns about whether he had the mental state required for convictions, the record demonstrated a reasonable probability that, if he had been informed of the mens rea now required under Ruan, he would not have entered his pleas. See JA86, JA132.

Despite readily acknowledging that Ruan changed the law on the mens rea required to convict a medical doctor under section 841(a)(1), the Fourth Circuit found "no error, plain or otherwise," with Mr. Kim's plea colloquy. App. A at 2, 14. Relying on the second superseding indictment's allegations that Mr. Kim was "acting and intending to act" in an unauthorized manner, the Fourth Circuit held that Mr. Kim's review of the indictment, before the change-of-plea hearing, was sufficient to inform him of the nature of the section 841(a)(1) charges, as required after Ruan. App. A at 11-12. The Fourth Circuit did not engage with the fact that Mr. Kim's plea agreement and the district court's plea-hearing discussion of the elements of the section 841(a)(1) charges were both inconsistent with Ruan. See App. A at 11-14.

The Fourth Circuit also held that, in any event, Mr. Kim's substantial rights were not affected because, in the Fourth Circuit's view, there was significant "circumstantial evidence" of Mr. Kim's guilt. App. A at 16. In discussing the circumstantial evidence, the Fourth Circuit focused on the latter charges to which Mr. Kim pleaded guilty, which related to the confidential informant's last few visits to Mr. Kim's clinic and the prescription issued to the informant's father. App. A at 16. The Fourth Circuit noted appointed counsel's statement that he and Mr. Kim's children encouraged Mr. Kim to plead guilty. App. A at 16-17. It did not discuss that

Mr. Kim's retained counsel prepared the case for trial and mounted a defense, nor that Mr. Kim continued to maintain at sentencing that he lacked the mental state required to convict him. See App. A at 15-18.

The Fourth Circuit referred to Mr. Kim's halting of the first plea hearing—which resulted in a continuation of the hearing and cancellation of his initial plea agreement based on his concerns that he was not guilty and had not acted willfully—as an "isolated hiccup." App. A at 15.

Mr. Kim now asks this Court to grant certiorari and reverse.

REASONS FOR GRANTING THE PETITION

This Court should grant Mr. Kim's petition for four reasons. First, the Fourth Circuit's decision below contributes to a deep split between the circuits on the correct application of Rule 11(b)(1)(G) and McCarthy. Second, the Fourth Circuit's decision falls on the wrong side of the split, conflicts with this Court's precedent, and should be corrected. Third, Mr. Kim's case cleanly presents the issue of whether it is error to rely on a defendant's pre-hearing review of the indictment to inform him of a key aspect of a criminal charge to which he enters a guilty plea, and is otherwise a good vehicle for resolving the split. Finally, granting certiorari and reversing would have a meaningful impact on the administration of criminal law in the federal courts, where most federal criminal charges are resolved by plea and a significant portion of the country falls within the circuits that are misapplying Rule 11(b)(1)(G).

I. The decision below deepens an existing circuit split.

As this Court explained in McCarthy, Rule 11 "expressly directs the district judge to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea." 394 U.S. at 464. The rule, in particular, requires that, before a district court accepts a plea of guilty, it must first "inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which [he] is pleading." Fed. R. Crim. P. 11(b)(1)(G).

The purpose of Rule 11 is to "expose[ ] the defendant's state of mind on the record through personal interrogation," to facilitate the court's "own determination of the guilty plea's voluntariness" and to "facilitate[ ] that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary." McCarthy, 394 U.S. at 467. "Both of these goals are undermined" when "the district judge resorts to assumptions not based upon recorded responses to [the judge's] inquiries." Id. (quotation omitted). Thus, Rule 11 requires a district court to "personally inquire whether the defendant understood the nature of the charge" in open court. Id.

Despite this Court's clear instruction in McCarthy, the circuits have taken varying approaches to Rule 11.

A. The First, Second, Fifth, and D.C. Circuits correctly apply Rule 11 and require district courts to engage with the defendant at the plea hearing about the nature of the charge.

Consistent with Rule 11 and McCarthy, at least four circuits—namely, the First, Second, Fifth, and D.C. Circuits—require a district court to read the indictment or otherwise explain the elements of the offense to the defendant during the plea hearing.

The Second, Fifth, and D.C. Circuits have expressly held that it is error for a district court to rely on a defendant's representation that he has read and discussed the indictment with his counsel before the plea hearing. See, e.g., United States v. Blackwell, 199 F.3d 623, 625-26 (2d Cir. 1999) (finding reversible error where the district court relied on a statement by the defendant's attorney that he had explained the plea agreement and indictment to the defendant, and the district court did not personally question the defendant to ensure he understood the nature of the charge); United States v. Lujano-Perez, 274 F.3d 219, 226 (5th Cir. 2001) (finding reversible error where the district court failed to admonish the defendant of the nature of the charge, and collecting cases showing that, under Fifth Circuit precedent, a failure to explain the nature of the charge has only been deemed harmless if the indictment was read to the defendant at the plea hearing); United States v. Dewalt, 92 F.3d 1209, 1212 (D.C. Cir. 1996) (finding the district court erred when it asked the defendant "only whether he had received a copy of the indictment and whether he understood the charges therein" and nothing in the plea colloquy, including the prosecutor's factual proffer, would lead a reasonable person to believe that the defendant understood the mens rea required for the offense); see also United States v. Pena, 314

F.3d 1152, 1157 (9th Cir. 2003) ("Because there is a marked difference between being warned in open court by a district judge and reading some boiler-plate language during the frequently hurried and hectic moments before court is opened for the taking of pleas and arraignments, the [defendant's] reading of the plea agreement [before the hearing] is no substitute for rigid observance of Rule 11." (quotation omitted)).

Similarly, in United States v. Gandia-Maysonet, 227 F.3d 1, 4-5 (1st Cir. 2000), the First Circuit found reversible error in circumstances analogous to Mr. Kim's. In Gandia-Maysonet, the indictment's allegations correctly tracked the law, "and [the defendant] agreed that his counsel had discussed the indictment with him[,]" but the plea agreement and the judge's discussion of the charge at the Rule 11 hearing misstated the scienter element. Id. at 5. Instead of properly informing the defendant that the mens rea for the charge was an "intent to cause death or serious bodily harm," the district court and the plea agreement incorrectly stated that it was "knowingly and unlawfully" committing the offense. Id. at 4. On appeal, the First Circuit held that it was insufficient that the indictment correctly stated the required mens rea because both the judge and the plea agreement had misstated it. Id. at 4-5. In so holding, the court acknowledged that, "[i]t is settled law that an understanding of the charges by the defendant is a critical element for a guilty plea." Id. (citing Bousley v. United States, 523 U.S. 614, 618-19 (1998)). And because the defendant was "misadvised four times as to the scienter requirement," the guilty plea had to be vacated. Id. at 4, 7.

These Circuits are correctly applying Rule 11 and vacating guilty pleas where the district court did not engage with the defendant about key aspects of the nature of the charge.

B. The Third, Sixth, Tenth, and Eleventh Circuits, in addition to the Fourth Circuit, erroneously permit a district court to rely on a defendant's pre-hearing review of the indictment to inform him of the nature of the charge.

At least four circuits, in addition to the Fourth Circuit, have taken a varying—and concerning—approach to Rule 11.

The Third, Sixth, Tenth, and Eleventh Circuits allow a district court to satisfy Rule 11 by relying on information that the defendant received outside of the plea hearing, such as his pre-hearing review of the indictment and discussion of the offenses with his attorney. See United States v. Scott, 93 F. App'x 476, 477 (3d Cir. 2004) (unpublished) (holding that the district court adequately informed the defendant and ensured he understood the nature of the charge where he acknowledged that he had reviewed the indictment with his attorney and waived a reading of the indictment during the plea hearing); United States v. Lalonde, 509 F.3d 750, 760-61 (6th Cir. 2007) (explaining that a district court can presume that the defendant has been informed of the nature of the charges if he received a copy of the indictment); United States v. Hughes, 550 F. App'x 551, 553 (10th Cir. 2013) (unpublished) (affirming conviction where the defendant's plea agreement and Rule 11 colloquy omitted the mens rea element of the offense, but the indictment correctly stated the mens rea element, based on the fact that the defendant affirmed that he had received a copy of the indictment and discussed it with his attorney); LoConte v.

Dugger, 847 F.2d 745, 751 (11th Cir. 1988) ("Although the defendant must be informed about the nature of the offense and the elements of the crime, he need not receive this information at the plea hearing itself. Rather, a guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing.").[5]

The Sixth Circuit's decision in Lalonde, in contrast to the First Circuit's decision in Gandia-Maysonet, found no Rule 11 error where the district court misstated one of the elements of the offense at the plea hearing but the indictment correctly stated the elements. 509 F.3d at 759-61. The Sixth Circuit held that, "the district court was entitled to presume that Lalonde had been informed of the nature of the charges against him because he had been provided with a copy of the indictment prior to his plea hearing." Id. at 760. In holding that no Rule 11 violation occurred, the Sixth Circuit relied on the fact that "the district court confirmed that [Lalonde] had read and understood the indictment and had discussed all the counts with his attorney." Id.

The Fourth Circuit's decision in this case, which relied on Mr. Kim's pre-hearing review of certain allegations in the indictment—allegations that were different than the district court's statement of the mens rea element at his plea

[5] See also United States v. Dietz, 442 F. App'x 471, 473 (11th Cir. 2011) (unpublished) (affirming conviction where the district court did not explain the nature of the charge at the plea hearing, but asked whether the defendant had reviewed and discussed the indictment with his attorney and whether he understood the indictment and charges against him).

hearing and the statement of the elements in his plea agreement—falls into and strengthens this latter half of the split.

The Fourth Circuit is on the wrong side of the split.

II. The Fourth Circuit erred in affirming Mr. Kim's convictions.

The record does not demonstrate, as Rule 11 requires, that Mr. Kim knew, before he entered his pleas, of the true nature of the charges against him as the law now requires under Ruan. Instead, the record demonstrates that Mr. Kim's plea agreement and the Rule 11 colloquy misinformed him of the mens rea element of the section 841(a)(1) charges to which he pleaded guilty. In this situation, under this Court's precedent, there was plain error. The Fourth Circuit's holding to the contrary was erroneous.

A. The Fourth Circuit's conclusion that there was no error, plain or otherwise, conflicts with this Court's precedent.

Under this Court's precedent, in the guilty-plea context, a change in the law with respect to the elements of a claim gives rise to plain error if the district court does not correctly inform the defendant of the elements under the law as changed. In Greer v. United States, for example, this Court easily concluded that errors occurred, and those errors were plain, when, at the time they entered their pleas, the defendants were correctly informed of the mens rea required to convict them, but, while the cases were pending on appeal, the law changed to require a heightened mens rea. 141 S. Ct. 2090, 2097 (2021).[6]

[6] Greer involved Rehaif errors. In Rehaif v. United States, this Court held that in prosecuting a felon-in-possession charge under 18 U.S.C. §§ 922(g) and 924(a)(2),

As this Court has explained, regardless of "whether a legal question was settled or unsettled at the time" of the trial court proceedings, "it is enough that an error be 'plain' at the time of appellate consideration." United States v. Henderson, 568 U.S. 266, 279 (2013). "[P]lain error" covers both "trial court decisions that were plainly correct at the time when the judge made the decision" and decisions where "the law at the time of the trial judge's decision was neither clearly correct nor incorrect, but unsettled[.]" Id. at 274.

Similarly, in Bousley v. United States, this Court explained that a guilty plea would be constitutionally invalid if, as the defendant there claimed, neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. 523 U.S. 614, 618-19 (1998). As Justice Stevens explained in his concurrence:

> The fact that all of his advisers acted in good-faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for petitioner were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime that he did not commit. Our cases make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid.

523 U.S. at 626 (Stevens, J., concurring).

At the time of Mr. Kim's plea hearing, neither the district court, nor the government, nor defense counsel could have believed that, to convict Mr. Kim, the

---

"the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." 129 S. Ct. 1291, 2200 (2019). A Rehaif error occurs when the district court fails to inform the defendant that the government has to prove that he knew he was a felon when he possessed a firearm.

government would have to prove that he knowingly and intentionally acted in an unauthorized manner, because that was not the law in the Fourth Circuit at the time. For the district court to have ensured that Mr. Kim knew he was pleading guilty to knowingly and intentionally acting in unauthorized manner—even where that mens rea was not required to convict him at the time, and especially where Mr. Kim had denied having that mens rea at the conclusion of his first change-of-plea hearing—the district court would have been required to engage with Mr. Kim, specifically, about this mens rea. It did not, and under these circumstances, Rule 11's requirement that the district court inform him of the nature of the charges and ensure that he understood, was not met.

Under Greer, Henderson, Bousley, and McCarthy, the Fourth Circuit's decision was erroneous.[7]

[7] In other contexts, as well, this Court and others have confirmed that Rule 11 is not satisfied when a district court does not inform the defendant of the required mens rea for a charge to which he is entering a guilty plea. See, e.g., Henderson v. Morgan, 426 U.S. 637, 647 (1976) (affirming district court's grant of habeas relief from state court conviction for second-degree murder, where defendant pleaded guilty without being informed that the intent to cause death of the victim was an element of the offense); United States v. Balde, 943 F.3d 73, 98 (2d Cir. 2019) ("Because Balde was not informed about the requisite mens rea standard, we now know that he was not properly informed as to the 'nature of each charge to which [he was] pleading' guilty." (quoting Fed. R. Crim. P. 11(b)(1))); United States v. Maye, 582 F.3d 622, 627, 630-31 (6th Cir. 2009) (finding reversible error where, at the plea hearing, the district court and defense counsel misunderstood "what exactly was required to establish guilt" of the offense at issue); United States v. Guzman-Merced, 984 F.3d 18, 21 (1st Cir. 2020) ("The district court's failure to explain the mens rea necessary to support a conviction under section 922(g)(1) during the plea colloquy calls into question whether [the defendant] fully understood the nature of the charges against him, which is necessary for a plea to be knowing and voluntary.").

While the Fourth Circuit emphasized a reference to a subjective mens rea in Mr. Kim's indictment in affirming his convictions, the plea agreement makes no mention of this mens rea, and chiefly, neither did the district court at the change-of-plea hearing. At best, Mr. Kim received conflicting accounts of the nature of the charges against him, none of which satisfied Rule 11.

With so many criminal convictions occurring through pleas, see supra p. 1 fn.1, a district court's duty to clarify the record and confirm a defendant's understanding of the nature of the charges is of paramount importance. As this Court explained in McCarthy, "[i]t is . . . not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." McCarthy, 394 U.S. at 471.

Here, under McCarthy, the Fourth Circuit seriously erred in affirming Mr. Kim's conviction based on his pre-hearing review of the indictment, where the record affirmatively demonstrated that the district court failed to inform him and in fact misinformed him of the mens rea required to convict him.

B. The error here is highlighted by the fact that other circuits have found plain, reversible error in similar circumstances.

Courts in other circuits have found reversible error and vacated guilty pleas based on similar circumstances to Mr. Kim's. As mentioned above, the clearest example of this is in Gandia-Maysonet. See 227 F.3d at 4-5. There, the defendant sought to overturn his guilty plea because of a Rule 11 violation where the indictment "correctly tracked the statute, and [the defendant] agreed that his counsel had

discussed the indictment with him." Id. Nevertheless, the First Circuit vacated the plea because the plea agreement and the district court misstated the scienter element, which, "if accepted by [the defendant], could well have encouraged him to plead guilty." Id. at 5. The First Circuit concluded that the misstatements of the mens rea element affected the defendant's substantial rights, even though his "plea had a rational basis in the facts[.]" Id. at 7.

Similarly, in Blackwell, the Second Circuit vacated a guilty plea when a district judge never explained the elements of a charge nor asked the defendant if he understood the charge. 199 F.3d at 625-26. Citing McCarthy, the Second Circuit held that a defendant's affirmation that he read and understood the plea agreement and the fact that his counsel had spent "several hours" explaining the plea agreement and charges to him was "not enough to demonstrate that the defendant understands the nature of that charge. Rather, a district court must personally question the defendant to confirm that he possesses the requisite understanding." Id. at 626 (citation omitted).

Likewise, in the D.C. Circuit, a defendant appealed his guilty plea arguing "that the district judge who presided at his plea hearing failed to inform him of [the] knowledge element [of his charge] and thus failed to comply with Rule 11(c)(1)." Dewalt, 92 F.3d at 1212. The appellate court noted that the judge appeared "to have approached his solemn task with a somewhat casual attitude" by relying on the defendant's affirmation that he received a copy of the indictment and understood the charges therein. Id. According to the D.C. Circuit, the defendant's affirmation was

"a poor indicator indeed of what he really understood." Id. at 1214. The court analogized the situation to one where "a student . . . emerges from a French movie impressed with how much of it he understood," stating that "without some authoritative guidance, he cannot know whether he understood anything correctly." Id. In holding that the government failed to carry its burden to demonstrate that the Rule 11 violation was inconsequential, the D.C. Circuit court concluded that, "[w]here a defendant has shown his plea was taken in violation of Rule 11, we have never hesitated to correct the error, even if the defendant failed to assert a legally cognizable defense." Id. (citing United States v. Cray, 47 F.3d 1203, 1207 (D.C. Cir. 1995) (cleaned up)).

Had Mr. Kim been in any of these circuits—which apply the law correctly—the outcome of his appeal would have been different.

III. Neither the plain error standard nor the Fourth Circuit's alternative holding on the substantial rights element is an impediment to resolving the circuit split in this case.

This case cleanly presents the issue of whether it is error under Rule 11 and McCarthy to rely on a defendant's pre-hearing review of the indictment to inform him of a key aspect of a criminal charge to which he enters a guilty plea. The plain error standard of review and the possibility of affirmance on the substantial rights element do not impact that conclusion.

A. The plain error standard is not a barrier to resolving the circuit split.

Plain error review nearly always applies when a defendant appeals a conviction on the ground that the district court erred in informing him of the nature

of a charge to which he pleaded guilty, because such issues almost never arise during the plea colloquy itself. See, e.g., Greer, 141 S. Ct. at 2096 (reviewing for plain error argument that district court misadvised defendant of mens rea element of felon-in possession charge); United States v. Dominguez Benitez, 542 U.S. 74, 80-81 (2004) (reviewing for plain error argument that district court failed to warn defendant that he could not withdraw his guilty plea if the court did not accept the government's sentencing recommendations). The issue meaningfully arises when a defendant learns about the misinformation later—like here, where the law changed after judgment was entered. In such cases, the defendant necessarily would not have brought the issue to the district court's attention during the plea colloquy and, as a result, plain error review will apply. See Greer, 141 S. Ct. at 2097.

In any event, in Mr. Kim's case, the Fourth Circuit held that there was no error at all—not just that the plain error standard was not satisfied. App. 2, 14. This underscores that the Fourth Circuit has an errant view of Rule 11(b)(1)(G) and that this Court should step in to correct it.

B. The record easily shows that Mr. Kim's substantial rights were affected by the error; the Fourth Circuit's erroneous conclusion to the contrary is no obstacle to certiorari review.

The Fourth Circuit's alternative affirmance on the substantial rights element of plain error review likewise is not a barrier to resolution of the circuit split. For one, the Fourth Circuit's substantial rights holding is especially weak. In addition, the possibility of affirmance on the substantial rights element of plain error review will be present in any case challenging the knowing and voluntary nature of a guilty plea.

1. The Fourth Circuit's substantial rights analysis is refuted by the record and cases addressing analogous issues.

Under the plain error standard, for a defendant to obtain relief, he must show that the plain error affected his substantial rights, "which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Greer, 141 S. Ct. at 2096.

The record in this case paints a picture of a defendant who was torn about pleading guilty, and who specifically questioned whether he had the mens rea about which he was erroneously informed. The Fourth Circuit, however, held that, even if the district court plainly erred in advising Mr. Kim of the nature of the section 841(a)(1) charges, his convictions should be affirmed based on the significant "circumstantial evidence" that he had the mental state required under Ruan. App. A at 16. Based on this circumstantial evidence, the Fourth Circuit held that Mr. Kim could not demonstrate that there was a reasonable probability that he would not have entered his pleas had he been correctly informed of the mens rea required under Ruan. See App. A at 17-18. This conclusion does not withstand scrutiny.

Numerous aspects of the record demonstrate a reasonable probability that, notwithstanding the circumstantial evidence that the Fourth Circuit identified, Mr. Kim would not have entered his pleas had he been informed of the mens rea now required under Ruan. Chief among them is the fact that Mr. Kim halted his first plea hearing based on his belief that he was not guilty and his specific reference to his mental state as the source of his doubt about his guilt. JA86. Plea hearings are not continued in this manner every day. The Fourth Circuit's statement that this was an

"isolated hiccup" is curious and demonstrates the type of "casual attitude" that the D.C. Circuit criticized in Dewalt. See App. A at 15A; Dewalt, 92 F.3d at 1212.

Other aspects of the record undermine the "isolated" nature of the so-called "hiccup" at the plea hearing, and underscore Mr. Kim's propensity to contest his guilt. For one, Mr. Kim retained counsel who thoroughly prepared a defense, twice getting to the eve of trial. See generally JA15, JA18, JA20, JA24. Among other things, counsel retained an expert witness who was prepared to testify that several of the prescriptions Mr. Kim issued to the confidential informant were, in fact, within the usual course of professional medical practice and for a legitimate medical purpose. See JA22. The record also showed that, while his subsequent, appointed counsel recommended a plea, Mr. Kim was hesitant to follow counsel's advice and did so only after his children begged him to. See App. A at 16-17.

The Fourth Circuit's dismissal of the possibility that Mr. Kim would have proceeded to trial likewise ignores that medical doctors facing similar charges often proceed to trial on similar evidence. See, e.g., United States v. Kahn, 58 F.4th 1308 (10th Cir. 2023); United States v. Ruan, 56 F.4th 1291 (11th Cir. 2023); United States v. Brizuela, 962 F.3d 784 (4th Cir. 2020); United States v. Hurwitz, 459 F.3d 463 (4th Cir. 2006); United States v. Tran Trong Cuong, 18 F.3d 1132 (4th Cir. 1994). This makes section 841(a)(1) charges against medical doctors different from felon-in-possession charges, which were at issue in Rehaif and Greer. In Greer, this Court noted that satisfying the substantial rights element of plain error review is difficult in the context of Rehaif errors, because: "If a person is a felon, he ordinarily knows

he is a felon." Greer, 141 S. Ct. at 2097. This is not so in the context of Ruan errors, which involve the more complex question of whether, each time he issued a charged prescription, the defendant knew or intended that doing so was outside the scope of his authorization to prescribe controlled substances for medical purposes.

This explains why the Tenth and Eleventh Circuits, in their remand decisions in Kahn and Ruan, vacated jury convictions and granted the defendants new trials based on instructional error under this Court's decision in Ruan. The Tenth Circuit, in particular, noted that, because the defendant's intent was disputed, it was a matter for the jury to resolve. See Kahn, 58 F.4th at 1319 ("[W]hile the government may point to voluminous trial testimony and numerous exhibits meant to prove (through circumstantial evidence) that Dr. Kahn knowingly or intentionally acted in an unauthorized manner, we cannot reach this conclusion."). Here, Mr. Kim, including by twice getting to the eve of trial and halting his first plea hearing, demonstrated a willingness to submit the issue of his intent to the jury.

Finally, the Fourth Circuit erred by focusing exclusively on whether Mr. Kim would have proceeded to trial had he been informed of the mens rea now required under Ruan. Rather, the appropriate inquiry is whether the result of his criminal proceedings would have been different absent the error. See Greer, 141 S. Ct. at 2096. Thus, the Fourth Circuit also should have considered whether there was a reasonable probability that Mr. Kim would have reached a different plea agreement with the government had he known of the government's burden to prove his willful conduct. See McCarthy, 394 U.S. at 463-64 ("the District Judge did not comply with Rule 11

in this case; and in reversing the Court of Appeals, we hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11" (emphasis added)); Majko v. United States, 457 F.2d 790, 791 (7th Cir. 1972) ("because the transcript of the hearing reveals that the dictates of McCarthy were not followed [the] petitioner must have a second opportunity to plead to these charges" (emphasis added)).

Because Ruan heightened the burden on the government to prove the section 841(a)(1) violations charged in his case, Mr. Kim would have had a different bargaining position if Ruan were the law while he was negotiating a plea with the government. Notably, the Fourth Circuit's discussion of the "circumstantial evidence" of Mr. Kim's mental state focused on the latter charges to which he pleaded guilty, and not on earlier charges, where the nature of the evidence was different and on which Mr. Kim had expert testimony in his defense. See App. A at 16-17; JA96-99.

For all of these reasons, the Fourth Circuit's substantial rights analysis was erroneous, it did not support the court's affirmance of Mr. Kim's convictions, and it does not provide a barrier to resolving the circuit split at issue here.

2. This Court can correct the Rule 11 error even if it agrees with the Fourth Circuit's substantial rights analysis.

In any event, even if this Court were to agree with the Fourth Circuit's substantial rights analysis, it still would have the opportunity to address the court's plain error holding, which was independent of the substantial rights analysis. See App. A at 15-18. Moreover, as noted above, because plain error review will almost always apply to cases implicating the current split, nearly any case raising the issue presented here will involve a possibility of affirming on the substantial rights element of plain error. In sum, this Court will not see a better vehicle for resolving the circuit split discussed in this petition.

IV. Granting certiorari and reversing would have a meaningful impact on the administration of criminal law in the federal courts.

Finally, review and reversal here are important to the administration of justice in the federal courts.

Each year, thousands of criminal defendants stand before judges seeking to resolve criminal charges by entering guilty pleas. For many, this is the most consequential decision in their lives. While the exchange between the judge and defendant may not last long, its "importance" is evident. See McCarthy, 394 U.S. at 463. A thorough plea colloquy that satisfies McCarthy involves only a tiny fraction of a district court's time—especially compared to the amount of time required for a trial.

Mr. Kim's case illustrates the error in depending on a defendant's pre-hearing review of the indictment to inform him of the nature of the charges. In Mr. Kim's case, the Fourth Circuit allowed guilty pleas to stand where Mr. Kim was actively

misinformed about an important element of his charges. In doing so, the Fourth Circuit incorrectly concluded that Mr. Kim was informed of an element that neither the judge, nor the government, nor Mr. Kim's counsel could have thought was needed for a conviction.

The Fourth Circuit's error is not isolated. Besides the Fourth Circuit, the Third, Sixth, Tenth, and Eleventh Circuits also allow a district court to satisfy Rule 11 by relying on information that the defendant received outside of the plea hearing, including a pre-hearing review of the indictment and discussion of the offenses with his attorney. Such a deep split raises questions of basic fairness. If Mr. Kim had been in the First, Second, Fifth, or D.C. circuit, his guilty pleas likely would have been vacated.

Indeed, this Court has recognized the significance of ensuring equal application of Rule 11 to the fair administration of the criminal justice system. See, e.g., McCarthy, 394 U.S. at 463 ("Because of the importance of the proper construction of Rule 11 to the administration of criminal law in the federal court, and because of a conflict in the courts of appeals over the effect of a district court's failure to follow the provisions of the Rule, we granted certiorari."). The Court should do so again here, to help ensure the legitimacy of guilty pleas entered throughout the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Michelle A. Liguori
Michelle A. Liguori
Counsel of Record
ELLIS & WINTERS LLP
4131 Parklake Ave, Ste 400
Raleigh, NC 27612
(919) 865-7000
michelle.liguori@elliswinters.com

Scottie Forbes Lee
David Keirstead
ELLIS & WINTERS LLP
300 North Greene Street, Ste 800
Greensboro, NC 27402
(336) 389-5684
scottie.lee@elliswinters.com
david.keirstead@elliswinters.com

CJA Counsel for Petitioner

OCTOBER 18, 2023