

No.

In The Supreme Court of the United States

JOHN CARL FERRELL, M.D., PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

in forma pauperis

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QUESTION PRESENTED

Does a decision by the Supreme Court, after a plea is entered but before sentencing, present sufficient cause to consider if the plea was entered knowingly and voluntarily, in the context of Due Process as set out in *Boykin v. Alabama*?

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Don Bailey, on behalf of John Ferrell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. Appx. 2) is reported at *United States v. Ferrell*, No. 22-40812 (5th Cir. July 25, 2023). The United States District Court for the Eastern District of Texas entered a

Judgment sentencing Dr. Ferrell to 96 months. *United States v. Ferrell*, 4:21cr167(1) (EDTX Dec. 2, 2022) (Pet. Appx. 3).

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1). The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This appeal is submitted pursuant to Supreme Court rule 10(c) in that the underlying decision by the Fifth Circuit presents a novel issue that has not been determined but should be decided by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process clause of the Fifth Amendment (Pet. Appx. 1)

STATEMENT OF THE CASE

Dr. John Ferrell entered into a Rule 11(c)(1)(C) plea agreement to an information alleging a violation of 21 U.S.C. § 841. (ROA.60-61) In the plea agreement, Dr. Ferrell waived his right to appeal except for ineffective assistance of counsel and the Court not accepting the Rule 11(c)(1)(C) plea. At the plea hearing Dr. Ferrell was required to make a specific admission about what he did by

the Magistrate Judge. Dr. Ferrell admitted that he prescribed medications to people without a good medical reason and that he had prescribed all the medicines listed. (ROA.227-228) The Magistrate Judge entered a Report and Recommendation that the plea be accepted and the District Court adopted the plea agreement but deferred accepting the plea until the pre-sentence report was prepared. (ROA. 68-72)

Subsequently, and before sentencing, this Court issued *Ruan v. United States*, 142 S.Ct. 2370 (2022). In *Ruan* this Court held that in order for a physician to be found guilty for prescribing medication under 21 U.S.C. § 841, the Physician must knowingly and intentionally act in an unauthorized manner.

Dr. Ferrell's attorney filed a motion to set aside the plea based upon the heightened mens rea requirement under *Ruan*. (ROA.91-99) In the motion, Dr. Ferrell's attorney asserted that the actions for which he was criminally charged were appropriated and authorized acts in his practice of medicine. (ROA.93) The Government's response focused on the plea colloquy admission by Dr. Ferrell that he had prescribed medication without a good medical reason. (ROA.102-118)

After conducting a hearing on the motion the District Court denied the motion and noted that Dr. Ferrell had made admissions in the plea colloquy that "I knowingly distributed controlled substances." (ROA.246-248)

Dr. Ferrell was subsequently sentenced to 96 months.(See appx. 2)¹ On Appeal, current counsel focused on the decision in *Kercheval v. United States*, 47 S.Ct. 582, 583-84 (1927) which prevents the use of a previous plea which has been withdrawn in subsequent proceedings.(See Appx. 3) The Government's response did not assert the waiver of appeal but encouraged the Fifth Circuit to enforce it regardless.

The Fifth Circuit focused on the appeal waiver, without addressing the issue of *Kercheval*, and concluded that “Because the waiver is knowingly and voluntarily and applies to Farrell’s (sic) challenge based on the plain language of the plea agreement....and because we have not explicitly recognized a miscarriage-of-justice exception” the appeal was dismissed. (See Appx. 3, p.3)

This writ for certiorari followed.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has avoided the issue of if an intervening Supreme Court opinion, that in this case, could change the outcome at trial, is sufficient to set aside a plea agreement regardless of what was said at the plea hearing. Dr. Ferrell asserts that the path taken by the Fifth Circuit, in relying upon a waiver of appeal to dismiss the appeal, amounts to a denial of due process because *Kercheval*

¹ Counsel erred in the brief to the Fifth Circuit asserting Dr. Ferrell received 87 months.

somewhat clearly prevents what occurred in this case, that is the District Court relying upon what was said at the plea hearing, to defeat a motion to withdraw the plea.

Since the 1969 decision in *Boykin v. Alabama*, 395 U.S. 238 (1969) it has been clear that a plea of guilty must be knowingly and voluntarily entered and cannot be accepted until the Court determines such. Although *Boykin* focuses on the plea colloquy in a State Court in Alabama, in this case, the plea had been accepted but not adopted in order to preserve the ability of the Court to reject the plea without providing Dr. Ferrell the ability to withdraw the plea if the law, as handed down by the Supreme Court, changed. Thus, the question in the current case is, is it a violation of due process under *Boykin* to deny a motion to withdraw a plea when a subsequent decision by the Supreme Court invalidates the mens rea upon which the conviction was founded? Since the Fifth Circuit did not address *Kercheval*, the Court could also consider the application of such in these type of circumstances, but the Fifth Circuit has clearly not reflected on Due Process and the decision in *Boykin*.

CONCLUSION

The Fifth Circuit's determination that they have not recognized a miscarriage of justice exception to the waiver of appeal does not comport with the

Due Process Clause of the Fifth Amendment and the decision in *Boykin v. Alabama*. Thus, this Court should grant certiorari in order to consider does an intervening decision by the Supreme Court suffice to negate a waiver of appeal? Respectfully Submitted;

/s/Don Bailey
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