
IN THE
Supreme Court of the United States

TARAMATIE PERSAUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals incorrectly applied the plain error standard when it reviewed the district court's failure to confirm defendant's plea of guilty was knowing and voluntary only after advising her of her rights.

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PETITION FOR WRIT OF CERTIORARI

Taramatie Persaud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals Panel (App., *infra*, A) is unreported. The ruling of the district court (App., *infra*, B) is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, Due Process Clause, states:

“No person shall ... be deprived of life, liberty, or property, without due process of law ...”

STATEMENT OF THE CASE

Taramatie Persaud was arrested on May 19, 2015. Mrs. Persaud was indicted on September 15, 2015 for forged postal money orders and wire fraud occurring from about January 2012 through or about October 2014. On December 10, 2015, pursuant to a plea agreement, and before being

advised of her rights, Persaud plead guilty to one count of Wire Fraud in violation of Title 18, United States Code, Section 1343 and 2, before the Honorable Roland L. Ellis. The Magistrate Judge never asked Mrs. Persaud how she wished to plead after advising her of her rights.

On January 4, 2016, Judge Wood entered an order accepting Mrs. Persaud's plea. (A.5). On December 12, 2016, Judge Wood sentenced Mrs. Persaud to a term of 21 months' imprisonment to be followed by three years' supervised release (A.8). Additionally, Judge Wood also ordered forfeiture and restitution amounts.

Ms. Persaud timely appealed the plea and conviction to the Second Circuit Court of Appeals. The Second Circuit affirmed the district court's ruling.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW.

The Due Process Clause governs perhaps the most essential and common practice in the federal criminal justice system – the guilty plea. Because of importance and prevalence of guilty pleas, it is necessary to carefully construct and adhere to an acceptable set of standards that ensure intelligent and voluntary guilty pleas. In this instance, the magistrate court failed to determine whether Ms. Persaud's plea was knowing and voluntary *after* she had been advised of her rights in open court.

To be clear, Rule 11, Federal Rules of Criminal Procedure, generally governs the plea process. It instructs the Court as to certain categories of information that the judge must inquire about with each defendant. *Rule 11(h)* states that a “variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights.” However, Rule 11 does not instruct or cover the point in time in which a judge must inquire as to how the defendant pleads – guilty or not guilty. What is unclear is whether Rule 52(b), which covers trial court errors generally, applies in this instance. Rule 11(h), stating, “[a]ny error . . . that does not affect substantial rights must be disregarded,” in line with Rule 52(a) is likewise subject to plain error review under *United States v. Vonn*, 535 U.S. 55 (2002). However, the application of Rule 52(b) in a situation where an inquiry is mandated by due process but not contained specifically within Rule 11 is undecided.

This issue of first impression presents an important question of law. A defendant’s due process rights necessarily require that her plea be entered knowingly and voluntarily. Yet, the Court’s failure to inquire about a defendant’s intent to plead guilty or not guilty after having advised them of all the rights is a significant constitutional question falling outside the confines of Rule 11’s prior application. Whether plain error review applies to such situations remains to be answered.

“A defendant who enters [] a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be ‘an intentional relinquishment or abandonment of a known

right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

This Court’s decision in *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), fundamentally changed the federal plea process. In response, Congress enacted sweeping amendments to Rule 11 to better ensure the entry of knowing and voluntary guilty pleas. The new rule, replete with specific procedures, was designed to guide federal judges and protect the due process interests of defendants. However, instead of protecting against unintelligent and involuntary waivers, the interpretations of Rule 11 by appellate courts and the plain language of the statute veer significantly from the original ideals of *Boykin*. Despite these significant changes, Congress left out the most significant inquiry at any plea hearing – whether the defendant pleads guilty or not guilty.

Subsequently, this Court issued its’ opinion in *McCarthy v. United States*, 394 U.S. 459, 466 (1969). It held that the, “procedure embodied in Rule 11 has not been held to be constitutionally mandated, it is designed to assist the district judge in making the constitutionally required determination that a defendant’s guilty plea is truly voluntary” Rule 11 is also, “intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.”

This Court stated:

By personally interrogating the defendant, not only will the judge be better able to ascertain the plea’s voluntariness, but he will also develop a more complete record to support his

determination in a subsequent post-conviction attack Both of these goals are undermined in proportion to the degree the district judge resorts to “*assumptions*” not based upon recorded responses to his inquiries.

McCarthy v. United States, 394 U.S. 459, 466 (1969) (emphasis added).

While Rule 11 controls plea hearings, it is not the end of the analysis for constitutional purposes. What does control, and is mandated, is a plea hearing that conforms to the Due Process Clause. Here, the Court below made a significant assumption – that Ms. Persaud intended to plead guilty after hearing her rights – without confirming Ms. Persaud’s continued desire to plead guilty. Without a specific inquiry, the court of appeals and the Court are left to guess Ms. Persaud’s true intent. “Consequently, if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.” *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418 (1969).

The question, how do you plead, guilty or not guilty – the very foundation of a plea hearing – is never mentioned in Rule 11 specifically. However, it is impossible to imagine that a plea hearing can occur without this question being asked - one that that question is inherently based on due process. Plainly speaking, this Court has said, “[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” *See Kercheval v. United States*, 274 U. S. 220, 223 (1927).

In fact, “[a]dmissibility of a confession must be based on a “reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant.” *Jackson v. Denno*, 378 U. S. 368 (1964). A reliable determination of whether an individual voluntarily and knowingly entered a plea of guilty cannot be determined without asking the ultimate question of guilty or not guilty. Likewise, until the defendant has been satisfactorily given full and fair opportunity to hear the rights they waive as a result of a guilty plea cannot answer the question of whether they plead guilty or not guilty.

In this instance, the magistrate court, by failing to confirm that Ms. Persaud understood her rights and still intended to plead guilty falls short of the due process obligations inherent in taking guilty pleas. In that same vein, whether a defendant pleads guilty or not guilty is a fundamental question required by due process and is part of the plea calculus.

Beginning with the 1975 Rule **11 revision**, and subsequent appellate decision, there has been a continual erosion of due process protections. Needless to say, Rule 11 has never adequately protected due process rights because it leaves out the most basic and important inquiry in the whole proceeding – the inquiry as to the defendant’s self-inclinatory response to whether they plead guilty or not guilty. Judicial omissions in the context of Rule 11 were once considered inherently prejudicial, irrespective of harm. Today courts place the burden on the *defendant* to demonstrate prejudice. This burden shifting is in conflict with the principles enunciated in *Boykin* and *McCarthy* and the Advisory Committee’s notes to Rule 11. More importantly, it is a violation of Due Process.

Of course, in this case, Ms. Persaud was denied relief based on the Court's determination that she failed to show prejudice. However, the premise that she failed to affirmatively take steps to remedy the issue competes with reality. A defendant's position in a criminal prosecution is precarious, and subject to **an** array of external factors (e.g., judicial mood, temperament, and prejudices, legal and factual findings, judicial sentencing philosophy, counsel's influence, fear of reprisal, etc.). Specifically, as it relates to plea hearings, vulnerability to judicial influence is reflected in the Advisory Committee's notes to Rule 11(e):

The unequal positions of *the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison*, [at] once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. *His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed* [in the proposed plea agreement] is present whether referred to or not

See Fed. R. Crim. P. 11(e) advisory committee's notes (1974 amendments) (emphasis added). A defendant when pleading will display a deferential demeanor. They will seek to appease the court with respect to their conduct. Thus, the defendant will almost always fail in asserting significant concerns with the proceedings, leaving them especially vulnerable to a plain error standard. This standard enacted for the sake of judicial economy runs contrary to due process.

The willingness to sacrifice individual criminal defendants' Due Process rights at the altar of efficiency and finality has subverted the constitutional function of the plea colloquy. Plain error review, an early twentieth-century innovation prompted by concerns of efficiency and finality, had been confined to non-constitutional errors until the last century, when this Court extended the harmless error rule to trial errors of constitutional proportion. This Court should review this case to determine whether the Due Process Clause mandates the confirmation of intent to plead guilty only after a defendant has been adequately warned of their constitutional rights and whether the appropriate standard of review was used.

In *United States v. Vonn*, 535 U.S. 55 (2002), this Court found that Rule 52(b)'s plain error analysis applies to Rule 11 proceedings. Despite Justice Steven's dissent calling into question the Court's ruling versus that in *McCarthy*, no clear determination is made with respect to the standard to be used for portions of a plea colloquy that is not spelled out in Rule 11, but necessarily applies. In this instance, the question of the application of the plain error standard as it relates to the due process requirement to determine whether a defendants' plea is knowing and voluntary, outside the context of Rule 11, has yet to be answered.

CONCLUSION

Based on the forgoing, the petition should be granted.

Respectfully submitted,

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APPENDIX

**APPENDIX A — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, DATED MARCH 20, 2018**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

16-4212

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20th day of March, two thousand eighteen.

PRESENT: DENNIS JACOBS,
RICHARD C. WESLEY,
EDWARD R. KORMAN,*
Circuit Judges.

* Edward R. Korman, United States District Court for the Eastern District of New York, sitting by designation.

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Appendix A

UNITED STATES OF AMERICA,

Appellee,

-v.-

TARAMATIE PERSAUD,

Defendant-Appellant.

Appeal from a judgment of the United States District Court for the Southern District of New York (Wood, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Taramatie Persaud appeals from the judgment of the United States District Court for the Southern District of New York (Wood, *J.*), sentencing her to 21 months in prison after she pled guilty to wire fraud. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Persaud was arrested in 2015 for embezzling rent payments intended for her employer, a property management company, and wiring the proceeds of the scheme to Guyana. The Indictment charged one count of forging postal money orders and one count of wire fraud. In December 2015, she pled guilty to the wire fraud count before a magistrate judge, and was sentenced by the district judge to pay restitution and serve 21 months in prison.

Appendix A

Persaud contends that her guilty plea was not voluntary because the magistrate judge failed to adhere to the Rule 11 requirements for plea colloquies. *See* Fed. R. Crim. P. 11(b). Persaud did not raise the issue of a Rule 11 violation at the time of the plea, so we review for plain error. *United States v. Youngs*, 687 F.3d 56, 59 (2d Cir. 2012) (citing *United States v. Vonn*, 535 U.S. 55, 62-63 (2002)). “Plain error review requires a defendant to demonstrate that (1) there was error, (2) the error was plain, (3) the error prejudicially affected his substantial rights, and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotations omitted).

“[A] guilty plea violates due process and is therefore invalid if not entered voluntarily and intelligently.” *Wilson v. McGinnis*, 413 F.3d 196, 199 (2d Cir. 2005) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970) and *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969)). Rule 11 is “designed to assist the district judge in making the constitutionally required determination that a defendant’s guilty plea is truly voluntary.” *United States v. Maher*, 108 F.3d 1513, 1520 (2d Cir. 1997). It requires the district court to “advise the defendant of the right to plead not guilty, the rights waived by pleading guilty, and other specific consequences of pleading guilty, such as the maximum penalties he faces.” *Youngs*, 687 F.3d at 59; *see* Fed. R. Crim. P. 11(b).

Persaud points to no specific omission under Rule 11, but instead argues that the magistrate judge erred by asking her how she would plead before he finished advising

Appendix A

her of her rights. She claimed this order of recitation violated standard federal practice in this circuit, citing examples of plea colloquies in other cases in the Southern District in which the judge asked whether the defendant “still” wished to plead guilty after being advised of a defendant’s rights. Appellant’s Br. at 8-9.

Whether or not the magistrate judge should have proceeded in a different order, Persaud’s claim fails for lack of prejudice. Crucially, Persaud does not sustain her burden to show that “but for the error, [she] would not have entered the plea.” *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (internal quotations omitted). Persaud was specifically informed that the magistrate judge would not approve the plea until he had “determine[d] that [she] underst[ood] the plea and its consequences, that the plea is voluntary, and that there is a factual basis for the plea.” J. App’x at 24. Persaud concedes that the magistrate judge advised her of each of her Rule 11(b) rights. Appellant’s Br. at 6. She answered questions lucidly under oath and confirmed that she understood each of her rights as they were read to her. After the government recited the elements of her offense and the court instructed her that the government “would have the burden of proving each and every element of the offense beyond a reasonable doubt,” Persaud re-confirmed that she committed the offense and described it in detail. Only after this thorough inquiry did the court enter the plea. Persaud did not protest that she wished to change her mind, or think again, after receiving all of the relevant and necessary information under Rule 11.

Appendix A

“Where a defendant, before sentencing, learns of information erroneously omitted in violation of Rule 11 but fails to attempt to withdraw his plea based on that violation, there can be no” plain error. *Vaval*, 404 F.3d at 152. Persaud’s failure to attempt to withdraw her plea or make a timely objection after she was advised of her rights is fatal to her appeal.

For the foregoing reasons, and finding no merit in Persaud’s other arguments, we hereby **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O’HAGAN WOLFE, CLERK

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT SOUTHERN DISTRICT
OF NEW YORK, FILED JANUARY 4, 2016**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15 CR. 633 (KMW)

UNITED STATES OF AMERICA

- v. -

TARAMATIE PERSAUD,

Defendant.

ORDER

WHEREAS, with the defendant's consent, her guilty plea allocation was made before a United States Magistrate Judge on December 10, 2015;

WHEREAS, a transcript of the allocation was made and thereafter was transmitted to the District Court; and

WHEREAS, upon review of that transcript, this Court has determined that the defendant entered the guilty plea knowingly and voluntarily and that there was a factual basis for the guilty plea;

IT IS HEREBY ORDERED that the defendant's guilty plea is accepted.

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Appendix B

SO ORDERED:

Dated: New York, New York
January 4, 2016

/s/
THE HONORABLE KIMBA M. WOOD
UNITED STATES DISTRICT JUDGE