

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL K. JUDY,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BRESNEHAN
Law Offices of Michael J. Bresnehan, P.C.
1761 East McNair Drive, Suite 101
Tempe, AZ 85283-5002
Telephone: (480) 345-7032
mbresnehan@hotmail.com
Attorney for Petitioner

DATE SENT VIA UPS Overnight Delivery: June 14, 2018

QUESTIONS PRESENTED

Where a defendant challenges, on appeal, the validity of his guilty plea based on a clear violation by the district court of Rule 11 (b)(1)(M), Fed.R.Crim.Proc., must the Ninth Circuit Court of Appeals consider the impact, if any, of that error on the defendant when determining the validity of that guilty plea?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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The Petitioner, Michael K. Judy (“Judy”), respectfully requests that a Writ of Certiorari be issued to review the November 21, 2017 Order of the Ninth Circuit Court of Appeals dismissing Judy’s appeal, and its March 19, 2018 Order denying Judy’s Petition For Panel Rehearing /*En Banc* Hearing (which the Panel treated as a motion for reconsideration and motion for reconsideration *en banc*).

OPINION BELOW

The Ninth Circuit Court of Appeals denied relief in its Order dated November 21, 2017 dismissing Judy’s appeal. (Appendix D, hereto) The Court of Appeals denied Petitioner’s Petition For Panel Rehearing/En Banc Hearing in its order dated March 19, 2018. (Appendix E, hereto) The district court's minutes and orders are unreported.

JURISDICTION

The Order of the United States Court of Appeals for the Ninth Circuit dismissing Judy’s appeal was entered on November 21, 2017, and its Order denying Petitioner’s Petition for Panel Rehearing/En Banc Hearing was entered on March 19, 2018. That Court had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 11(b)(1), Fed.R.Crim.Proc. reads as follows:

(b) 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:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be presented by counsel – and if necessary have the court appoint counsel – at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self incrimination, to testify and present evidence, and to compel the attendance of

witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

STATEMENT OF THE CASE

On April 14, 2015, an indictment was filed in the United States District Court, District of Arizona, charging Judy with five counts of Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§1153, 2241(c), and 2245(2)(C); one count of Abusive Sexual Contact, in violation of 18 U.S.C. §§1153, 2244(a)(1) and 2245(3); one count of Abusive Sexual Contact, in violation of 18 U.S.C. §§1153, 2244(a)(1), 2244(c) and 2246(3); one count of Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§1153, 2241(c) and 2246(2)(C); two counts of Attempted Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§1153, 2241(c) and 2246(2)(B); two counts of Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§1153, 2241(c) and 2246 (2)(B); one count of Attempted Aggravated Sexual Abuse of a Child, in violation of 18 U.S.C. §§1153, 2241(c) and 2246(2)(D); two counts of Sexual Abuse, in violation of 18 U.S.C. §§1153, 2242(2)(B) and 2246(2)(C); and two counts of Kidnapping, in violation of 18 U.S.C. §§1153 and 1201(a)(2).

CASE HISTORY

Judy had his initial appearance on June 25, 2015. It should be noted that Judy, who speaks both English and Navajo, indicated that his primary language is Navajo, and requested a Navajo interpreter “for further proceedings”, as there was no Navajo interpreter present to assist him at his initial appearance.

(CR 63; R.T. 6/25/15, pp. 1-15, ER VOL. II, pp. 144-158) ¹

On July 8, 2018, Judy was arraigned on the indictment, with the assistance of a Navajo interpreter. Judy waived a reading of the indictment, and entered pleas of not guilty on all counts. A trial was set for August 4, 2015, and was continued several times at Judy's request. (CR 19, 20, 22, 23, 24, 25, 34)

On March 3, 2016, Judy entered into a plea agreement, pleading guilty to Count 12 of the indictment. The agreement contained a stipulation that Judy would be sentenced to a term of imprisonment not less than 120 months, and not greater than 288 months. The government also agreed to recommend a three (offense)-level reduction under the United States Sentencing Guidelines ("U.S.S.G.") for acceptance of responsibility. There were no other agreements regarding sentencing except that Judy would be required to register as a sex offender, and undergo sex offender treatment and counseling as directed by his probation officer while on supervised release. (CR 53; ER VOL. II, pp. 37-46)

The plea agreement contained the following waiver of defenses and appeal rights:

¹ The abbreviation "CR" refers to the Clerk's Record, and will be followed by the event number designated in the Clerk's file. The abbreviation "ER" refers to the Excerpts of the Record, and will be followed by the relevant page number referenced in Appellant's Excerpts of Record. The abbreviation "PSR" refers to the Presentence Investigation Report and will be followed by the relevant page and paragraph numbers of that report. "R.T." refers to the Court Reporter's Transcript, and will be followed by the relevant date and page number of the transcript.

The defendant waives (1) any and all motions, defenses, probable cause determinations, and objections that the defendant could assert to the indictment or information; and (2) any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, an order of restitution, or forfeiture, the entry of judgment against the defendant, or any aspect of the defendant's sentence, including the manner in which the sentence is determined, including but not limited to any appeals under 18 U.S.C. § 3742 (sentencing appeals) and motions under 28 U.S.C. §§ 2241 and 2255 (habeas petitions), and any right to file a motion for modification of sentence, including under Title 18 U.S.C. § 3582(c). This waiver shall result in the dismissal of any appeal, collateral attack, or other motion the defendant might file challenging the conviction, order of restitution or forfeiture, or sentence in this case. This waiver shall not be construed to bar an otherwise-preserved claim of ineffective assistance of counsel or of "prosecutorial misconduct" (as that term is defined by Section II.B of Ariz. Ethics Op. 15-01 (2015)).

(CR 53; ER VOL. II p. 41)

The change of plea proceeding was conducted by the Honorable Steven P. Logan, district court judge. A Navajo interpreter was present to assist Mr. Judy.

During the change of plea colloquy, Judy asserted that he understood the plea agreement "*with the exception of the length of sentence, the date when I would have completed my sentence, that I don't understand*". The colloquy continued, in relevant part, as follows:

THE COURT: Did anyone make you any promises to get you to enter into this Plea Agreement, other than the promises that are contained in your Plea Agreement?

THE DEFENDANT: Yes.

THE COURT: What other promises were made to you?

My apologies, clearly my question was confusing.

You have this ten-page document. It's called a Plea Agreement. It's a contract that you have with the United States Federal Government.

My question is: Are all the promises contained only in this document?

THE DEFENDANT: *If that's the way it's – if that's the way that I understand, it is fine.*

MR. SMITH: Your Honor, for clarification, counsel can avow to the Court that there has been no additional promises relayed to Mr. Judy outside the four corners of this document.

THE COURT: Is that correct, Mr. Judy?

THE INTERPRETER: Your Honor, the interpreter needs to have Mr. Smith restate his – his presentation.

MR. SMITH: Defense counsel promises the Court that no promises have been given to Mr. Judy besides those set forth in the plea.

THE COURT: Is that correct, Mr. Judy?

THE DEFENDANT: Yes.

(CR 61; R.T. 3/03/16, pp. 7-8; ER VOL. II, pp. 76-77)

When asked whether he was “pleading voluntarily on your own free will because you believe you’re guilty of this crime,” Judy responded with the following non sequitur: “*Yes, I did it.*” (CR 61; R.T. 3/03/16, p. 8; ER VOL. II, p. 77)

Admittedly, the written plea agreement contained the following written acknowledgment:

My guilty plea is not the result of force, threats, assurances, or promises, other than the promises contained in this agreement. I voluntarily agree to the provisions of this agreement and I agree to be bound according to its provisions.

(CR 37; ER VOL. II, p. 100)

The judge explained Judy's appellate waiver as follows:

THE COURT: If your plea is accepted and if I impose a sentence permitted by the terms of your agreement –

THE INTERPRETER: Your Honor, please.

THE COURT: -- you will not be permitted to withdraw from your plea or challenge your judgment and sentence on appeal or in a collateral proceeding –

THE DEFENDANT: Yes.

THE COURT: -- with the exception of an appeal based on ineffective assistance of counsel or prosecutorial misconduct.

Do you understand that?

THE DEFENDANT: Yes.

(CR 61; R.T. 3/03/16, p. 11; ER VOL. II, p. 80)

Later, the judge confirmed that Judy had reviewed his appeal rights with his attorney. (CR 61; R.T. 3/3/16, p. 14; ER VOL. II, p. 83)

During the plea colloquy, the judge made no mention of the court's obligation to calculate the applicable sentencing-guideline range, and to consider that range,

possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a), all as required under Rule 11(b)(1)(M), Fed.R.Crim.Proc. (CR 61; R.T. 3/3/16, pp. 1-23; ER VOL. II, pp. 70-92), though the plea agreement contained the following language:

The Court is required to consider the Sentencing Guidelines in determining the defendant's sentence. However, the Sentencing Guidelines are advisory, and the Court is free to exercise its discretion to impose any reasonable sentence up to the maximum set by statute for the crime(s) of conviction, unless there are stipulations to the contrary that the Court accepts.

(CR 53; ER VOL. II, p. 38)

Moreover, the judge did advise Judy of the following:

THE COURT: Sir, I have this document here, it's called the Federal Sentencing Table. There should be a copy of the Federal Sentencing Table on the lectern in front of you. Have you had a Chance to review the Federal Sentencing Table with your lawyer, Mr. Smith?

THE DEFENDANT: Yes.

(CR 61; R.T. 3/03/16, p. 9; ER VOL. II, p. 78)

Later, when asked by the judge whether Judy would like to give up his right to a trial, the following colloquy ensued:

THE DEFENDANT: *What are-what are those things that are involved in a trial?*

THE COURT: Sir, a trial means that the United States Government must come into this room and provide the jury members with sufficient information that would leave each and

every jury member firmly convinced of your guilt before any of those jury members can vote in finding you guilty. That's a trial in case you wish to maintain your innocence.

I believe what you're trying to do is enter a plea of guilty. You've already told me that you're guilty of this crime. In order to enter the plea of guilty you must waive your right to go to trial.

THE DEFENDANT: Yes.

THE COURT: So you wish to enter a plea of guilty?

THE DEFENDANT: *This is where we are now. I will no longer hide this. I will accept the events that happened, what I've done. And this is not something that I wish to hide anymore. I will make – try to make things right. And in time I wish to be forgiven, and perhaps the Lord will forgive me as well.*

THE COURT: Do you wish to plead guilty to Count No. 12? Yes or no.

THE DEFENDANT: That's correct.

THE COURT: Sir, as to Count 12 of the Indictment, charging you with Aggravated Sexual Abuse of a Minor, which is a Class A felony under 18 U.S.C. Section 1153 and 2241(c), sir, how do you wish to please, guilty or not guilty?

THE DEFENDANT: Yes, I plead guilty.

THE COURT: Sir, this Court accepts your plea of guilty. This Court also finds that you've knowingly, intelligently and voluntarily entered a plea of guilty, that you understand the charge, and that there's a factual basis for your plea, and also that you're competent to enter a plea of guilty.

It's ordered that a Presentence Report be prepared in your case.

(CR 61; R.T. 3/03/16, pp. 20-21; ER VOL, II, pp. 89-90) (Appendix A, hereto)

On July 18, 2018, the Probation Department filed its initial PSR. (CR 42)
(under seal)

In the report, the PSR writer provided the following Sentencing Guidelines
score:

Base Offense Level (U.S.S.G. § 2A3.1(a))	27
Use of Force (U.S.S.G. § 2A3.1(b)(1))	+4
Victim Under 12 Years of Age	+4
Acceptance of Responsibility	<u>-3</u>
Total Offense Level	<u>32</u>
Criminal History Category I	

The Probation Department calculated the Guidelines prison sentencing range to be 121 to 151 months, and recommended an upward departure to 240 months under U.S.S.G. § 5K2.21 (Dismissed and Uncharged Conduct). (CR 42) (PSR, ¶ 34-44, p. 11) (under seal).

On July 20, 2016, the government filed its sentencing memorandum (CR 44; ER VOL. II, pp. 35-43) positing that Judy's Guidelines matrix was 32/I, and the Guidelines prison range was 121-151 months. The government went on to request an upward departure of six offense levels, and a prison sentence of 288 months under 18 U.S.C. § 3553(a) and U.S.S.G. § 5K2.21.

On August 1, 2016, Judy filed his objections to the PSR. (CR 48; ER VOL. II, pp. 59-60) There, Judy objected to the sentencing-guidelines range for dismissed Count 15, which appeared to be at the center of the Probation Department's push for an upward departure from the presumptive sentencing-guidelines range. (CR 42) (PSR ¶ 93, p. 19) (under seal)

On that same date, Judy filed a sentencing memorandum (CR 49; ER VOL. II, pp. 50-58) requesting a prison sentence within the 121-151 month sentencing-guidelines range.

On August 2, 2016, the government filed a response to Judy's objections to the presentence report. (CR 50; ER VOL. II, pp. 47-49) In its response, the government agreed with Judy's Guidelines scoring of dismissed Count 15, and presented its own calculation of what the sentencing-guidelines range would have been without the plea agreement (i.e., life), while re-urging a six-level upward departure under § 5K2.21.

On August 3, 2016, the Probation Department filed its final draft PSR. (CR 51) (under seal). It contained the same Guidelines matrix and sentencing range as the original draft. (i.e., 32/I) (CR 51; PSR ¶ 80, p. 17) (under seal), together with the same recommended prison sentence of 240 months. The PSR writer agreed with Judy's Guidelines sentencing calculation of dismissed Count 15, and with the government's calculation of the overall impact the plea agreement had on the Guidelines sentencing calculation. (CR 51) (PSR, p. 28) (under seal)

Judy was sentenced on August 8, 2016. He was assisted throughout that proceeding by a Navajo interpreter.

At the sentencing proceeding, the district court sustained Judy's objection to the Probation Department's sentencing-guidelines calculation of dismissed Count 15, and concluded that the correct sentencing-guidelines range for that count was 87-108 months. (CR 62; R.T. 8/08/16, p. 6; ER VOL. I, p. 14)

The district court went on to make findings that the Guidelines base offense level for Count 12 was 27, pursuant to U.S.S.G. § 2A3.1(a). The court found that force was used to commit the act of aggravated sexual abuse, and added four offense levels pursuant to U.S.S.G. § 2A3.1(b)(1). The court further found that the victim was under 12 years of age at the time of the offense, and added four additional offense levels pursuant to U.S.S.G. § 2A3.1(b)(2)(A). Thus, the court calculated Mr. Judy's adjusted offense level as 35, and, after awarding Judy reduction of three offense levels for acceptance of responsibility, arrived at a Guidelines matrix of 32/I, and a Guidelines prison sentencing range of 121-151 months. (CR 62; R.T. 8/08/16, pp. 8-9; ER VOL. I, pp. 16-17) Judy agreed with this calculation. (CR 62; R.T. 8/08/16, pp. 6-7, 9-11; ER VOL. I, pp. 14-15, 17-19)

The court acknowledged reading and considering Judy's objections to the PSR, and his sentencing memorandum. (CR 62; R.T. 8/08/16, p. 9; ER VOL. I, p. 17)

At the sentencing proceeding, Judy stipulated to a restitution sum of \$5,300.00.

(CR 62; R.T. 8/08/16, p. 17; ER VOL. III, p. 184) Judy was permitted a full opportunity to allocute, and did so. (CR 62; R.T. 8/08/16, pp. 23-25; ER VOL. III, pp. 190-192) After considering the statements of defense counsel, Judy the prosecutor and three of the alleged victims, and after making certain findings, the district court departed upward seven offense levels from the earlier calculated offense level of 32, bringing the guidelines-sentencing range to 262-327 months. Against that backdrop, the district court imposed a prison term of 288 months, to be followed by a five-year term of supervised release with sex offender terms. The court also imposed a \$100.00 assessment, and ordered \$5,300.00 in restitution, to be paid, while incarcerated, at the rate of \$25.00 per quarter, and, after being released from custody, the rate of \$25.00 per month. (CR 55; ER VOL. I, pp. 2-6) (CR 62; R.T. 8/08/16, pp. 44-45; ER VOL. I, pp. 25-26) (Appendix C, hereto)

In imposing its sentence, the district court cited to several of the § 3553(a) factors, and to U.S.S.G. §§ 5K2.3 (extreme psychological injury), 5K2.8 (extreme conduct) and 5K2.21 (dismissed and uncharged conduct) to support its upward departure. (CR 62; R.T. 8/08/16, pp. 40-44; ER VOL. III, pp. 207-210; ER VOL. I, p. 25)

When asked by the sentencing judge whether he (Judy) had agreed to waive his appeal rights, Judy responded: “*I really don’t know*”. The judge did not pause to explore this with Judy. Rather, the judge simply continued with the sentencing

colloquy. The sentencing proceeding transcript contains the following exchange:

THE COURT: Mr. Judy, do you also agree, sir, that you have waived your right to appeal?

THE DEFENDANT: *I really don't know.*

THE COURT: Mr. Judy, if you believe you have a right to appeal, you need to file the notice of appeal in writing with the clerk of this court no more than 14 days from the date that your judgment is filed.

This Court's had a chance to review the Plea Agreement in the case, and I believe the sentencing is consistent with what was negotiated by you, Mr. Judy. However, *if you think I'm wrong* and you think there was prosecutorial misconduct or that your lawyer was ineffective, you can certainly plead (sic) if you choose to do so.

And if you can't afford to pay the costs of the appeal or the lawyer to assist you, those costs will be paid on your behalf.

Do you understand that?

Do you understand that, Mr. Judy?

THE DEFENDANT: (In English): *I need to study some more.*

THE COURT: Mr. Smith, is there anything else from you?

MR. SMITH: No, Your Honor.

THE COURT: Is there a location where your client would like to be housed?

MR. SMITH: He'd like to remain in Arizona or in the southwest, if possible.

THE COURT: Mr. Judy, is there anything else from you, sir?

THE DEFENDANT: *If that's going to happen, what's available?*

THE COURT: I'm sorry, I didn't understand.

THE DEFENDANT: *If that's going to happen, what's available?*

THE COURT: If what's going to happen what's available, Mr. Judy?

THE DEFENDANT: *I don't know about these processes, these court processes, I don't know about them.*

THE COURT: Which court processes?

THE DEFENDANT: *I didn't understand what's going on.*

THE COURT: When did you stop understanding what was going on, Mr. Judy?

THE DEFENDANT: *I don't really understand what you mean about the appeal process.*

THE COURT: Mr. Smith will go into great detail with you about the appellate process that this Court finds that you've waived.

This Court also finds that you've knowingly, intelligently and voluntarily entered your plea of guilty in your case, that you understood the charge in your case, and as I found months ago, that there was a factual basis for your plea. And I also found that you were competent, just like I find that you're competent today, Mr. Judy.

(CR 62; R.T. 8/08/16, pp. 51-53; ER VOL. I, pp. 32-33; ER VOL. III, p. 211)

(Appendix B, hereto)

Judy filed a timely notice of appeal to the Ninth Circuit Court of Appeals.

(CR 56; ER VOL. II, pp. 35-36)

On appeal, Judy argued that the appeal waiver in his plea agreement did not bar his appeal, or the requested relief therein, because Judy's guilty plea, and his purported appeal waiver, were not knowing and intelligent, and, hence, are not enforceable. More specifically, Judy argued that during the change of plea proceeding, the district court judge did not adequately explain to Judy his trial and appeal rights, or adequately determine that Judy understood those rights, and wished to waive them in order to plead guilty under the plea agreement. Nor did the judge explain to Judy the role of the United States Sentencing Guidelines in the district court's determination of the sentence. These omissions constituted violations of Rule 11(b)(1), Fed.R.Crim.Proc., and clearly prejudiced Judy, as his on-the-record statements made clear he didn't understand his trial and appellate rights, or how his sentence would be calculated. This being so, Judy's plea was invalid, and his plea agreement unenforceable. The district court erred in finding Judy's guilty plea to be knowing and intelligent. Judy argued that under either the harmless error or plain error standard of review, Judy was entitled to relief.

Rather than filing a responsive brief, the government filed a motion to dismiss the appeal based on the appellate waiver in Judy's plea agreement. The government argued that Judy's guilty plea was knowing and voluntary, and, therefore, so was the plea waiver which precluded an appeal from the judgment and sentence. (Appendix

D, hereto)

Judy filed a response to the government's motion to dismiss, arguing that, for a variety of reasons clearly supported by the record, including the district court's failure to comply with Rule 11(b)(1)(M), Fed.R.Crim.Proc., the plea was not voluntary, knowing and intelligent. (Appendix E, hereto)

The Court of Appeals granted the government's motion to dismiss the appeal, holding, in pertinent part, that the record reflected that Judy's plea *was* knowing and voluntary, and, hence, his appellate waiver was enforceable. (Appendix F, hereto) *Nowhere in its order denying relief did the Court of Appeals acknowledge the district court's clear violation of Rule 11(b)(1)(M), or its impact, if any, on the validity of Judy's guilty plea.*

Judy filed a petition for panel rehearing and rehearing *en banc*, which was treated as a motion for reconsideration and motion for reconsideration *en banc*. That petition was denied. (Appendix G, hereto)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit Court of Appeals' failure, altogether, to address the district court's clear violation of Rule 11(b)(1)(M), and its impact, if any, on the validity of Judy's guilty plea, constitutes a troubling precedent for the district courts within that Circuit, incorrectly suggesting that the requirements of Rule 11(b)(1)(M) are not requirements at all – but are merely advisory in nature – and that the complete

absence of Rule 11(b)(1)(M) admonitions during the change-of-plea colloquy need not be considered in any appellate determination of the validity of a defendant's guilty plea, even where the error is expressly raised on appeal.

Thus, the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

ARGUMENT

Where a defendant challenges, on appeal, the validity of his guilty plea based on a clear violation by the district court of Rule 11 (b)(1)(M), Fed.R.Crim.Proc., the Ninth Circuit Court of Appeals must consider the impact, if any, of that error on the defendant when determining the validity of that guilty plea.

A valid guilty plea must be made voluntarily and knowingly. *Boykin V. Alabama*, 395 U.S. 238, 242-44 (1969); see, also, Fed.R.Crim.Proc. 11. To this end, Rule 11 is “meant to ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea”. *United States v. Vonn*, 535 U.S. 55, 58 (2002).

Rule 11(b)(1), Fed.R.Crim.Proc., provides, in pertinent part:

Before the court accepts a plea of guilty...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...(C) the right to a jury trial...(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify, and present

evidence, and to compel the attendance of witnesses; (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere...(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)...(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence...

Id.

Judy, who completed his education through high school on the Navajo Indian Reservation in northern Arizona, and who's primary language was/is Navajo (CR 52; PSR, ¶¶ 72-73, p. 16), at times clearly did not fully comprehend certain important concepts discussed during his change-of-plea and sentencing proceedings. When asked, during his change-of-plea proceeding, whether he understood the plea agreement, Judy asserted that he understood the plea agreement “*with the exception of the length of sentence, the date when I would have completed my sentence, that I don't understand,*” suggesting that he did not understand the nature of the Sentencing Guidelines and their role in the sentencing process. This should have prompted the judge to discuss the court's obligations under Rule 11(b)(1)(M); but the judge failed to do so.

The district court had a duty, under Rule 11(b)(1)(M), and, arguably, under the Due Process Clause of the United States Constitution, to determine that Judy understood the district court's obligation to calculate the applicable sentencing-

guidelines range, and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a). See, also, *Boykin v. Alabama*, 395 U.S. at 242-43 (due process requires that a guilty plea be knowing and voluntary); *Mitchell v. United States*, 397 U.S. 742, 755 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970) (a guilty plea is voluntary only if the defendant is fully aware of the direct consequences of his or her plea).

The Court of Appeals had a duty to acknowledge the district court's Rule 11(b)(1)(M) error, and to determine whether that error entitled Judy to relief under either Rule 52(a) or (b), Fed.R.Crim.Proc. Its failure to do so deprived Judy of due process, and signaled to the many district courts within the Ninth Circuit that the requirements of Rule 11(b)(1)(M) are optional, and that the absence of Rule 11(b)(1)(M) admonitions during the plea colloquy are, per se, inconsequential, and will not necessarily be part of any retrospective appellate determination of the validity of a defendant's guilty plea, even where the error is expressly raised on appeal.

The record in the instant case is replete with evidence that, at the time of his change of plea, Judy was confused about the nature of a trial, the role the Sentencing Guidelines would play in the district court's determination of his sentence, and his appeal rights.

For the reasons forth, *infra*, the harmless error standard of review may have been applicable here. However, even under the plain error standard of review, Judy was entitled to relief. The district court's failure to comply with Rules 11 (b)(1)(E), (F), (M) and (N) was error. The error was plain or obvious. *United States v. Olano*, 507 U.S. 725, 734 (1993) ("Plain" is synonymous with "clear", or equivalently, "obvious"). The error affected Judy's substantial due process right to a knowing and intelligent waiver of his trial and appeal rights, and prejudiced Judy. In other words, based on the totality of the circumstances, the probability of a different result was sufficient to undermine confidence in the outcome of the proceeding.² *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) Thus, Judy was arguably entitled to relief under Rule 52(b), Fed.R.Crim.Proc. *Id.*

While such claims brought for the first time on appeal are generally subject to plain error analysis, where, as here, a defendant clearly states in the record that he does not understand his trial and appeal rights, or how his sentence will be calculated, and the district court does not take effective steps to ameliorate the

² Even a sentence at the low end of the prison range stipulated to under the plea agreement (10 years) would likely have been close to a natural life sentence for Judy, given his age, and a clear understanding of the likely impact of the Sentencing Guidelines on his (Judy's) sentence would have alerted Judy to the real possibility of a sentence substantially greater than ten years. It would be counterintuitive to believe Judy would not have sought a better deal, or gone to trial, given those prospects. Moreover, even if Judy fully understood that the shortest sentence he could possibly get under the plea agreement was ten years, if nevertheless, he held a reasonable belief that he could appeal any sentence higher than ten years, his guilty plea was not knowing and intelligent.

problem, a proper record preserving those claims has arguably been made, thus calling for the harmless error standard of review under Rule 52(a), Fed.R.Crim.Proc. (Judy's attorney's inexplicable silence in the face of Judy's statements notwithstanding). See, e.g., *United States v. Aguilar-Vera*, 698 F.3d 1196, 1201 (9th Cir. 2012) (where defense counsel asked the judge to make a Rule 11(b)(2) finding, but did not object after the judge failed to do so – harmless error standard was found to apply, as the Rule 11(b)(2) issue was deemed to be preserved). See, also, *United States v. Gray*, 581 F.3d 749, 752 (8th Cir. 2009) (where the Court found defendant's *pro se* post-plea statements to the district court that he did not realize that his plea would trigger a mandatory minimum 15-year prison sentence to constitute an "objection" to the district court's alleged failure to comply with Rule 11(b)(2), thus allowing for harmless error review). In demonstrating harmless error, "it is not enough to negate an effect on the outcome of the case". *United States v. Dominguez Benitez*, 542 U.S. at 81 n.7. Rather, the government must prove that the error was harmless beyond a reasonable doubt. *Id.*

On this record, Judy was entitled to have his case remanded with instructions to set aside the plea, judgment of guilt, and sentence, or, alternatively, to have his case remanded to the district court with instructions to determine the impact, if any, of the Rule 11(b)(1)(M) error on the validity of Judy's guilty plea.

Thus, the petitioner respectfully moves this Court to grant the Writ, and remand the case to the Ninth Circuit Court of Appeals with instructions to set aside Judy's plea, judgment of guilt and sentence, or, alternatively, to determine the impact, if any, of that error on the validity of Judy's guilty plea.

CONCLUSION

The Ninth Circuit Court of Appeals' failure, altogether, to address the district court's clear violation of Rule 11(b)(1)(M), and its impact, if any, on the validity of Judy's guilty plea, constitutes a troubling precedent for the district courts within that Circuit, incorrectly suggesting that the requirements of Rule 11(b)(1)(M) are not requirements at all – but are merely advisory in nature – and that the complete absence of Rule 11(b)(1)(M) admonitions during the change-of-plea colloquy need not be considered in any appellate determination of the validity of a defendant's guilty plea, even where the error is expressly raised on appeal.

Thus, the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

RESPECTFULLY SUBMITTED this 14th day of June, 2018 by

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING—PROOF OF SERVICE

Michael J. Bresnehan, Attorney for Petitioner, declares under penalty of perjury that the following is true and correct:

In accordance with Sup.Ct.R. 29.2, I have on this 14th day of June, 2018, caused to be delivered by UPS overnight delivery the original and ten (10) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to the Clerk, Supreme Court of the United States, One 1st St. NE, Washington, D.C. 20543, within the period prescribed in Sup.Ct.R. 13.1; and

In accordance with Sup.Ct.R. 29.5, I have on this 14th day of June, 2018, caused two copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC 20530-0001, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to Rachel Christina Hernandez, Assistant United States Attorney, Two Renaissance Square, 40 North Central Avenue, Suite 1200, Phoenix, Arizona 85004, and caused one copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to be delivered via First Class United States Mail to the Petitioner, Michael K. Judy, FCI Stafford,

Federal Correctional Institute, Post Office Box 9000, Safford, Arizona, 85548.

EXECUTED this 14th day of June, 2018.

MICHAEL J. BRESNEHAN, P.C.

s/ Michael J. Bresnehan
Michael J. Bresnehan
Attorney for Petitioner