IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 00-973

ALPHONSO VONN. :

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Washington, D.C.

Tuesday, November 6, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MONICA KNOX, ESQ., Deputy Federal Public Defender, Los Angeles, California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 00-973, the United States v. Alphonso Vonn.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

Respondent pleaded guilty with counsel by his side after having been advised at least twice earlier in the proceedings of his right to the assistance of counsel at all stages of the proceedings. The court of appeals, nevertheless, set aside his guilty plea on the ground that the district court, during the guilty plea colloquy, had failed to advise respondent of his right to the assistance of counsel as required by rule 11(c)(3) of the Federal Rules of Criminal Procedure.

The court of appeals decision is wrong for three reasons.

First, the court of appeals erred by applying a harmless error rather than a plain error standard of review to the district court's violation of rule 11. Respondent had not objected in the trial court to the rule 11 error, and therefore the standard of review is that for

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claims which were not preserved below, rather than claims that were.

Second, the Ninth Circuit applied an incorrect standard for determining whether a rule 11 error affects substantial rights within the meaning of the harmless error and plain error rules. The Ninth Circuit was of the view that unless the defendant could be shown to have knowledge of the precise aspect of rule 11, that the district court had failed to inform the defendant about the guilty plea must be set aside. The correct standard under this Court's cases is whether the error had an effect on the outcome of the proceeding, which in this case means whether the error had an effect on respondent's willingness to enter a knowing and voluntary guilty plea.

And finally, the Ninth Circuit erred by confining its analysis of whether the error in this case warranted reversal to the record of the guilty plea colloquy itself, failing to look at other portions of the official record that illuminated whether the defendant actually had knowledge of the information that the district judge had failed to provide to him. In this case, the district court, through its magistrate judges, had advised respondent, both at the initial appearance after respondent was arrested and at the arraignment after respondent was indicted, of his right to counsel at all

stages of the proceeding. Respondent executed a waiver of rights form in which he acknowledged receiving and understanding these rights, and the district magistrate judge asked respondent at the arraignment whether he understood these rights. If the court of appeals had looked to the entire record to determine whether the rule 11 error in this case warranted reversal, it would have concluded, even under its own standards, applying harmless error review and asking whether the respondent knew the information that he had not been told during the rule 11 colloquy, that respondent, indeed, did have that information and, therefore, entered a valid guilty plea.

QUESTION: Mr. Dreeben?

QUESTION: I'm not sure how your points two and three quite fit together. Your point two is that you look at -- to see the outcome of the proceeding, would it have been different? But then your point three is that you should confine yourself just to the record. If your -- if your point two is whether or not, you know, all the circumstances -- this was a wise plea that he would have -- that he would have entered -- it seems to me you might be going outside the record in order to determine that. And I -- and I have some question about your point two, anyway. I think it goes too far.

MR. DREEBEN: Our second argument is that the

proper inquiry into whether an error affects substantial rights is whether there is an effect on the outcome of the proceeding. And in this case, the relevant proceeding to look to is the guilty plea itself. Now, a court of appeals, in determining whether that standard is met, must of course look at the record.

The difference between the position of the United States and the position of the court of appeals is that the court of appeals says the only record that's relevant is the rule 11 guilty plea colloquy itself. Nothing else matters.

QUESTION: That -- that I understand. But if you're going to -- if your -- if your test under two is whether or not he would have entered the plea, it seems to me that that's a difficult inquiry to make if you confine yourself just to the record even if it's the whole record and not just the rule 11 colloquy plea itself.

MR. DREEBEN: Well, it is -- it's a difficult inquiry to make if there is no information in the record that sheds light on it, and in that instance, the party that bears the burden of proof will probably lose, which is why it matters whether the standard is plain error review, in which the defendant bears the burden of proof, or harmless error review, in which case the Government bears the burden of proof.

But in this case, the claim of the rule 11 error is that the defendant didn't get, at his guilty plea colloquy, information that he had the right to counsel at every stage of the proceeding. Since the record shows that the defendant, in fact, got that information, not once but at least twice, at earlier stages of the proceeding, and he had counsel by his side when he pleaded guilty, not once but twice, it is untenable on this record to suggest that the guilty plea would have come out any differently if the judge had complied with rule 11 in every relevant respect.

QUESTION: Mr. Dreeben, if we answer what is your second question in your petition, not as outlined this morning, the second question being, do you look to the entire record or just the rule 11 colloquy, if we answer that question in your favor, look to the entire record, is it necessary to get into the two anterior questions that you outline, that is plain error versus harmless error, and this one that troubled Justice Kennedy that you don't list as a question in your cert petition?

MR. DREEBEN: Justice Ginsburg, I believe the Court can reverse the judgment based solely on a favorable resolution for the Government of the third question presented it; that is, if the Court does look to the entire record in this case, then I believe that the Ninth

Circuit's judgment is incorrect even if it were correct on the other two points that I've outlined.

But there is a conflict in the circuits over the question of whether harmless error review or plain error review does apply in these circumstances, and the Government sought review on that issue in order to have this Court resolve the conflict.

QUESTION: But if the -- if that is an academic question -- that is, if you could argue, as I think you do, if you look at the whole record -- then it doesn't matter what standard you apply, harmless error, plain error. It's clear that this defendant was advised of his right to counsel at every stage of the proceeding.

MR. DREEBEN: That is true, and the Court could resolve the case solely on that basis. If it did so, it would leave unarticulated in this Court's jurisprudence the precise approach that lower courts should take when rule 11 errors occur.

QUESTION: Well, alternatively we -- we could resolve it just on the basis of your third point. I mean, wouldn't that be just as conclusive, just say the usual plain error rule applies. The burden was -- was on the defendant to establish, and even if you limit the examination just to the colloquy, he hasn't -- he hasn't established it.

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MR. DREEBEN: That would be a resolution on what I think is the first question that we present in the petition.

QUESTION: I'm sorry. Maybe I got your numbers wrong.

MR. DREEBEN: Yes.

QUESTION: But -- but we can certainly resolve it on several of the questions without resolving the other ones.

MR. DREEBEN: It's certainly possible to do that.

The second question, which we did not present separately, but I believe is fairly included within our first question, the definition of what is an effect on substantial rights for purposes of a rule 11 error, is a question that the Court doesn't need to resolve in this case, but it is an important analytical tool for understanding what lower courts should do when confronted with rule 11 errors. And therefore this Court's guidance on it would be useful.

QUESTION: Which is more important? I mean, if -- if we're going to be very parsimonious and -- and not decide any more issues than we have to, which -- which is -- does the Government think is the more important issue in the case?

MR. DREEBEN: The two that we presented I think are both equally important. The question whether plain error or harmless error review applies and the question of what record the court of appeals should look to in deciding --

QUESTION: Is there a conflict on the latter as well?

MR. DREEBEN: There is a conflict on the latter as well.

QUESTION: Any court, other than this one, come out this way?

MR. DREEBEN: No. I believe that the Ninth Circuit is the only court of appeals that has limited the -- the review solely to the guilty plea transcript.

The advisory committee notes to rule 11 make clear that the harmless error rule that was added to rule 11 in 1983, rule 11(h), was to be applied based on the guilty plea record and the rest of the necessarily limited record that is made in guilty plea cases. But that record will include, as it did here, the initial appearance, the arraignment. Sometimes there will be multiple hearings on whether the defendant wishes to change his plea to a plea of guilty. Admissions may be made during the course of those hearings. And, of course, there is a sentencing hearing. And during the sentencing hearing, the defendant

may provide -- be provided with the information that was left out inadvertently of the rule 11 colloquy, and he may at that time either reaffirm his interest in pleading guilty or show no surprise at the information that is provided to him or otherwise make it clear that this rule 11 error had no effect on substantial --

QUESTION: May I ask you --

QUESTION: Why does it make any difference? The -- the plain versus the harmless? My only problem is I foresee writing more words. When I write words on this kind of subject, I worry that I would risk mixing everybody up in the courts of appeals, to tell you the truth. There's already -- there's been a lot written about plain error, substantial error, harmless error. Why not just stick with what we've said? How does it make any difference? Why should we write some new words?

MR. DREEBEN: The Government doesn't ask the -- the Court to write new words. Rather, we ask the Court to apply its existing plain error standards. Under the plain error review that this Court has articulated and, indeed, under harmless error review, the meaning of an effect on substantial rights is defined by its effect on the outcome in the generality of cases.

QUESTION: Right. So, the -- we don't have to talk about plain error or harmless error. The only

difference here, nobody doubts that if it was an error, which it was, or that it was plain, which it was, the issue in this case is whether it affected somebody's substantial rights. Period.

MR. DREEBEN: Well, there are two competing definitions that are proposed for the Court on what an effect on substantial rights is.

QUESTION: All right.

MR. DREEBEN: Justice Kennedy's question suggested that there may be some reason to --

QUESTION: Fine. That's my -- that's -- you've got exactly what I'm concerned about. We should write a paragraph or two about substantial rights, what is an effect on substantial rights. Other than that, there is no need to discuss plain error versus harmless error. Is that right?

MR. DREEBEN: Justice Breyer, I certainly agree and I agreed with other questions that suggest that there is a very straightforward, simple resolution of this case that would involve making very little law. It would make clear that courts are to look to the whole record, and it would then leave unresolved the circuit conflict on plain error versus harmless error.

But the fact is that there are differences between plain error and harmless error review that will

matter in a certain class of cases. One difference between plain error and harmless error review is the one I've mentioned, that the defendant bears the burden of proof if it's plain error; we bear the burden of proof if it's harmless error.

The other difference is that even if an error does affect substantial rights, under plain error review, a judgment is not to be reversed unless there is an impact on the fairness, integrity, or public reputation of --

QUESTION: Mr. Dreeben, one of the advantages -- I don't know if it's a sufficient advantage of Judge Kozinski's position is a simple -- very simple job for the court of appeals: either they got the advice or they didn't during the hearing. How does the Government say the court of appeals should dispose of a case in which the record shows that an arraignment 3 or 4 months before the guilty plea colloquy, the defendant's lawyer says I've advised him about his right to counsel at trial? He tells him that at the arraignment. The record shows that. And then that's all it shows. Then you have the guilty plea colloquy. And -- and the judge fails to comply with the rule. What should you do with that case?

MR. DREEBEN: The court of appeals should affirm because there is ample evidence that the defendant had knowledge of the particular right in question that he

claims was not given to him at the rule 11 colloquy.

QUESTION: There's an irrebuttable presumption that he fully understood it 3 months later.

MR. DREEBEN: No. There's not an irrebuttable presumption. If there were something in the record that indicated --

QUESTION: No, nothing else in the record.

MR. DREEBEN: If there is nothing else in the record, then I think that there's nothing to rebut the presumption.

This Court has indicated in a number of contexts that information that a defendant has been given at one stage of a proceeding -- give rise to a presumption that the defendant has knowledge of it. For example, the defendant is indicted and read the indictment at an arraignment. This Court made clear in Bousley v. United States that there's a presumption that the defendant has been given adequate notice of the charge. Now, that presumption can be overcome later in the proceedings if the judge gives the defendant misinformation about the charge or if the defendant otherwise can show from the record that he didn't have an adequate understanding of the charge.

QUESTION: Well, what about this record where the defendant said a couple of times, I don't understand

what this lawyer is talking about and this is my first time in -- in the criminal process? He was, as you said, told twice and signed a piece of paper that said counsel at every stage of the proceeding, but the defendant also said that he didn't -- he didn't understand what was going on. He didn't understand what his counsel was telling him.

MR. DREEBEN: He said that the first time that he wanted to enter a guilty plea and the district judge recessed the proceedings for a week to give the lawyer an additional chance to explain to the defendant what was going on. He said, take a week. It's not going to cost you anything. You'll get credit for the time. You have a good lawyer. He can explain it to you. And the defendant said, yes, Your Honor, I acknowledge that.

A week went by, and the defendant came back into court, with the advice of counsel, counsel by his side, and pleaded guilty to one of the two counts that were pending against him. The other count was continued on for trial.

Several other proceedings occurred while that second count remained pending, in which the parties obtained continuances for trial because counsel was unavailable. All of this time, the respondent is in the courtroom, hearing this information, being made aware that

he has a lawyer, that his lawyer is with him and his lawyer is going to be with him at trial.

Now, it is true that when the time came for the ultimate guilty plea, the judge didn't enumerate the defendant's right to counsel at trial. And in fact, when the Government tried to alert the district court that it hadn't mentioned the right to counsel, the court said, I didn't alert him to that because he already has counsel. And no one stood up at any point, neither the defendant --

QUESTION: But you agree the court did violate the rule at that point.

MR. DREEBEN: Yes. The court clearly violated the rule because rule 11 is a prophylactic rule that sweeps more broadly than the Constitution. It contains a specific enumeration of rights. It contains those rights that this Court identified in Boykin v. Alabama, as --

QUESTION: The problem with your solution is suggested -- suggested by Justice Stevens' question. My understanding -- it's anecdotal but it's longstanding -- is that judges are very careful about rule 11 proceedings. They go through it point by point with painstaking care, and judges talk to each other about the right way to do it. And, sure, we could write an opinion, now this is the good practice, you should really follow the rule very strictly, but if you don't, it doesn't make any

difference. It seems to me that adoption of your position will inevitably change the seriousness and the formality of rule 11 proceedings as it now exists. I think that is inevitable.

MR. DREEBEN: I don't think that that's a necessary consequence of a ruling in our favor, Justice Kennedy. First of all, all of the court of appeals apply some form of harmless error or plain error review. The Ninth Circuit is in the minority in applying the most restrictive form. All of the other courts, though, currently imply something. And that doesn't detract --

QUESTION: Do you -- do you place any reliance on the amendment to the rule in 1983 to add subsection (h), which says any variance from the procedures required by this rule, meaning rule 11, which does not affect substantial rights, shall be disregarded. Is that applicable here in your view?

MR. DREEBEN: It is -- it is applicable if the Court concludes that plain error review does not apply. Our first submission is that because this was a defaulted not raised below, it can be considered by the court of appeals only under rule 52(b) of the Federal Rules of --

QUESTION: Okay. May -- may I ask you a question? You pointed out -- I guess it's no question -- that subsection (h) was added, in effect, to negate the --

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the automatic reversal rule that -- that had prevailed beforehand. If that was the only thing that was intended by (h), why didn't the drafters of subsection (h) include both the kind of standard language for plain error -- I'm sorry -- the standard language for harmless error as they did and the standard language for plain error, which would clearly have indicated that one or the other of those alternatives would apply, as it would, otherwise in the normal course elsewhere? Why did they just pick one?

MR. DREEBEN: Justice Souter, I believe that the reason that the drafters picked just one is that the drafters were addressing a specific holding of this Court that, as Justice O'Connor indicated, had suggested that there was automatic reversal in the case of a rule 11 violation. And the drafters wanted to negate that specific holding. The rule --

QUESTION: But the cleanest way to negate it would be to simply say, you engage in some kind of an analysis of consequences. You either do it in terms of -- of harmless error or you do it in in terms of plain error. That would have accomplished the object and it would have made it abundantly clear that your position is correct by -- by -- and I just don't -- I just don't understand why they omitted the one.

MR. DREEBEN: The drafters weren't thinking of

this issue. What they were thinking about was specifically negating McCarthy. They also wanted to make it clear -- and they did make clear in the advisory committee notes -- that the addition of rule 11(h) to rule 11 was not intended to have a negative inference that violations of other rules should give rise to per se reversal. Rule 52 would remain in place for all of those other errors involving other rules.

QUESTION: But you could -- you could certainly accept the position that -- that there would not be a per se reversal under another rule without also accepting the position that 52(b) would still apply.

MR. DREEBEN: You could. I believe that there's a general presumption in the Federal criminal system that if an error is preserved at trial, it's subject to harmless error review, which is what rule 11(h) provides for. If an error is not preserved at trial, it's subject to review only under the plain error rule, rule 52(b), and this --

QUESTION: 11(h) is addressed to the district court too, and the -- you're talking about what should the standard be in the court of appeals. But there are other Federal rules. That's a common formula that's addressed to the district judge saying, disregard trial errors that don't have any substantial effect. Whatever those words

are in 11 are both in the civil rules and the criminal rules in other places.

MR. DREEBEN: That's right, and rule 52 is also addressed to the district court. Rule 52 is found in the Rules of Criminal Procedure, not in the Rules of Appellate Procedure. So, it instructs both district courts, court of appeals, and this Court to disregard errors that did not affect substantial rights and give the district court, the court of appeals, and this Court power to set aside judgments where the error was not called to the attention of the district court but the error constitutes plain error.

QUESTION: Mr. Dreeben, I -- I have a perplexity. You -- you said counsel -- appointed counsel was present when -- when the erroneous instruction was given but didn't object?

MR. DREEBEN: Correct. There was a -- an attempt by the Government --

QUESTION: I understand that, but the rule reads if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant.

MR. DREEBEN: That's rule 11(c)(2). The

violation in this case was of rule 11(c)(3), which enumerates for the defendant the various rights, not a complete list, but a partial list of rights that the defendant has at the trial.

QUESTION: I see.

MR. DREEBEN: And those rights --

QUESTION: And that one is applicable whether or not he's represented.

MR. DREEBEN: Correct. That -- that rule is a response to this Court's decision in Boykin v. Alabama which held that if the record is entirely silent on whether the defendant entered a knowing and intelligent plea, a court of appeals on direct review cannot uphold it.

And in response to Boykin, the drafters of the rules wanted to provide a prophylactic buffer to make sure that there could be no valid claims, either on direct appeal or on collateral review, that the defendant pleaded guilty without a sufficient understanding of the rights that he would have at trial if he had gone to trial. So, 11(c)(3) walks through the right to counsel, the right to confront witnesses, the right to self-incrimination, and the right to a jury trial. And then it goes on in 11(c)(4) and says, by pleading guilty, you waive your right to a trial.

QUESTION: Would -- would you be taking the same position regarding plain error review if what were at issue was (c)(2) rather than (c)(3)?

MR. DREEBEN: Yes, but it would be an almost impossible burden --

QUESTION: It would be harder.

MR. DREEBEN: -- for the Government to satisfy.

QUESTION: Because (c)(2) envisions a situation in which there's nobody to make the objection.

MR. DREEBEN: That's right.

QUESTION: And (c)(3), well, doesn't always envision a situation in which counsel is present, does it?

MR. DREEBEN: Actually I want to revise the answer. I think that it would be very hard for us to win if the advice required under (c)(2) were not given and the defendant were not represented by counsel.

QUESTION: Right.

MR. DREEBEN: But not because only counsel can make an objection. If a defendant validly waives the right to counsel, under Faretta v. California, and he's given an adequate colloquy, and he's told of the risks and disadvantages, and he's told by the judge, look, you're not a lawyer. It's going to be difficult for you to do this. If you want to go forward, please understand I'm not going to help you out in this. You're on your own,

and the rules of procedure are complicated. They usually finish up by saying, so if it's up to me, I wouldn't do it, but if you want to do it, it's your choice.

If the defendant goes through that and he elects to go without counsel, he's subject to all the same procedural rules that anybody else is, and it's true that he won't probably do a very good job at protecting his own rights, but once he decides to act as his own counsel, he's not given a free pass to escape from those rights.

Now, if the judge doesn't give the advice required by 11(c)(2) and we can't show that he has gone through a thorough and adequate Faretta colloquy elsewhere in the proceedings, then I suspect we're going to lose that case because a felony trial without counsel is one of the few errors that gives rise to a per se presumption of prejudice without any further showing, and it would be almost impossible for us to show or for the defendant to fail to show that he's entitled to plead anew.

QUESTION: May I ask --

QUESTION: Can we go back to Justice Kennedy's question? That is, taking your position, there is really no muscle behind the instruction to the district judge: You give each one of these warnings. If you could say he got those warnings at the arraignment, he got them even earlier, he signed a card, so it doesn't matter because

he's going to know by the time you get to the rule 11, then what sanction is there to say to a judge, look, don't skip any of these, just go down the list?

MR. DREEBEN: Well, I don't think, Justice Ginsburg, that the Court should frame a rule to provide a sanction. All of the parties to rule 11 fully understand that it should be complied with. The Federal Judicial Center has a bench book. We come to court often with checklists to assist the court. Defense counsel has that responsibility. And judges conscientiously try to do this.

QUESTION: This isn't much of a sanction on the judge anyway. He's not the prosecutor. He's not supposed to care whether this guy gets convicted or not, is he?

MR. DREEBEN: The ultimate sanction would fall on society if --

QUESTION: May I ask you this question, Mr. Dreeben? The -- when the McCarthy was decided, there was a big conflict in the -- all the courts of appeals about should be done in cases like this. And one of the considerations that motivated the McCarthy opinion was avoiding an evidentiary hearing if the record is ambiguous on appeal. It figured that simplicity is desirable.

In your reading of the rule, would there be cases in which the record was not entirely clear before

the court of appeals and that there would have to be a remand for an evidentiary hearing?

MR. DREEBEN: No, Justice Stevens, because whoever bore the burden of proof on appeal is going to have to make that showing based on the existing record, and if the Government bears the burden and it can't establish harmlessness, then the court of appeals should vacate the plea. If the defendant bears the burden and he can't show it, he loses. There will be an opportunity to make a constitutional claim under 2255, but this isn't an endless remand.

QUESTION: The burden of proof you're talking about then is not actually an evidentiary burden. It's the burden that the court of appeals judges the case by.

MR. DREEBEN: Correct. That's correct.

QUESTION: And there never would be a case in your view for -- for more evidence.

MR. DREEBEN: I wouldn't say never and I wouldn't exclude the possibility that a district court -- that a court of appeals had discretion, but it -- it's not the normal procedure. And if you look around --

QUESTION: Of course, violations of the rule are not the normal procedure either. They're very -- quite rare.

MR. DREEBEN: Well, with 60,000 Federal criminal

convictions each year, even a very low error rate is going to produce a large number of cases. And there are a large number of rule 11 cases that come to the court of appeals where there really is no substantial doubt that the defendant had all the information and counsel to plead guilty. Now, he could make an ineffective assistance of counsel claim if he really felt he was missing something so that his plea wasn't intelligent.

But the purpose of rule 11 was not to create a regime in which guilty pleas were upset for minor deviations from the rule. That was exactly what --

QUESTION: This is not a minor deviation. This is not a minor deviation.

MR. DREEBEN: I think this is a minor deviation, Justice Stevens, because this defendant had been told about this right.

QUESTION: Well, assume that he hadn't been told, then it would be a major deviation.

MR. DREEBEN: And he had counsel. And I also think that almost any defendant who pleads guilty in an American court with counsel will have had a discussion with counsel about the option of going to trial, which would include counsel --

QUESTION: Well, if he has counsel at arraignment and at a plea and so forth, surely he must

realize he's going to get counsel at the trial.

MR. DREEBEN: It's virtually inevitable that it will be. And this was not a right that this Court had enumerated in Boykin v. Alabama was one of the rights that the defendant should be advised about.

QUESTION: Okay, but we can't -- we can't start -- I don't think, we can start making distinctions within the -- the rule 11 list among the rights that are supposed to be advised. I mean, if it's on the list, I assume it's got to get equal treatment with any other right that's on the list, even though, I'm sure you're -- you're correct, in most cases, the defendant with counsel is going to know he's got a right to counsel, which means, if you follow the -- the harmless rule, the Government is going to have an easy time meeting its burden.

MR. DREEBEN: He -- he should know that, and rule 11 should be complied with. But I do not believe that there is a court of appeals case that reverses a conviction for failure to give this advice to a counseled defendant.

If I could save the remainder of my time.

QUESTION: Very well, Mr. Dreeben.

Ms. Knox, we'll from you.

ORAL ARGUMENT OF MONICA KNOX

ON BEHALF OF THE RESPONDENT

MS. KNOX: Mr. Chief Justice, and may it please the Court:

This Court has repeatedly held that pleas of guilty will not lightly be set aside when they are carefully and lawfully taken. The premise behind cases from Brady and McMann to Bousley and Hyde is that pleas are taken with care and discernment befitting the grave and solemn act that they are.

The Government today proffers rules that would allow pleas to be taken in almost meaningless formality, taken in casual and sloppy proceedings with omissions, variances, and errors which could not be remedied. That is not what the advisory committee did in rule 11. It is not what this Court has supposed in refusing to set aside pleas later, and in some circumstances, it is not consistent with the Constitution.

Our position is that plain error is never applicable to review of a rule 11 violation on direct appeal, and that a rule 11 variance, which goes directly to the voluntariness or intelligence of the plea is always prejudicial unless the record of the plea colloquy shows that the requirements for an intelligent and voluntary plea were met.

QUESTION: Well, what is the reasoning behind -- you say your position is that plain error is never

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applicable. Now, what is your -- what's the reason you say that?

MS. KNOX: Well, the initial starting place is what the advisory committee did. What the advisory committee did was to seek to abrogate the per se rule of McCarthy by adding (h) into rule 11. When the advisory committee did that, it specifically noted that the class of rule 11 violations that would be considered harmless on appeal would be very limited.

By the Government's rules and if plain error were to apply, the class of errors that would be considered harmless on appeal would be almost unencumbered. It would be --

QUESTION: Well -- well, in this -- in this case, if we do look to the entire record and if we do learn that this defendant was advised that he had a right to an attorney if he went to trial at the trial and had acknowledged that understanding, then why is it not one of these insubstantial errors contemplated by subsection (h)?

MS. KNOX: Well, it is a substantial error in that it is one of the core concerns of rule 11. If the record --

QUESTION: But if -- if it shows that the defendant, in fact, knew, what's the problem?

MS. KNOX: If the record, in fact, shows that

the defendant had the knowledge he needs to render an intelligent plea, I would agree that that would be harmless error. The advisory committee did not anticipate going outside the rule 11 colloquy for that determination, and there are legitimate reasons for that. The issue of whether a plea --

QUESTION: Why didn't they say that? Why didn't they say that?

QUESTION: Is there anything in rule 11 itself that says you cannot look beyond the transcript of the plea hearing itself?

MS. KNOX: Specifically there is nothing --

QUESTION: No.

MS. KNOX: -- in rule 11 that says you cannot do that.

At the time that -- in 1974 when the advisory committee added subsection (g), having to do with taking a complete -- making a complete record of the rule 11 colloquy, though, the advisory committee did specifically say that they were doing that in order to facilitate the reviews of plea challenges later. And that -- they were referring at that point to the transcript of the plea colloquy.

The important point here, I think, is that a plea has to be an intelligent plea at the time it is

given. When Mr. Vonn made his plea, he needed to know of the constitutional rights he was giving up by agreeing to forego a trial at that time.

QUESTION: Well, you speak as if it was a recipe, you know. You have to put all these ingredients in at exactly the same time. But I don't think that makes much sense. If he -- supposing the arraignment had been a week earlier and he'd been told then and signed this waiver of rights, would you say that it couldn't be possible that he would remember them for a week?

MS. KNOX: No. Of course, he could remember them for a week if they were meaningfully given to him to start with.

One of the things I think is important for the Court to focus on is what other proceedings we are going to look at, if we're going to go outside the plea colloquy, to decide whether a defendant has this knowledge or not. What the Government has asked this Court to allow is the circuits to look at appearances such as the initial appearance and the post-indictment arraignment. Those proceedings are -- at least in our district and in many districts, they are mass proceedings. These are not individual rights given to individual defendants. There is no personal colloquy between the court and the defendant. There is no attempt to make sure that the

defendant actually understands these rights and the meanings of these rights.

QUESTION: Ms. Knox, when you say they're mass --

QUESTION: This the arraignment or the -- just one moment. This is the arraignment you talked about, not the sentencing. The sentencing --

MS. KNOX: Not the sentencing.

QUESTION: Okay, thank you.

MS. KNOX: We're talking about the initial --

QUESTION: You're talking about two -- two pre-guilty pleas, the arraignment and when the initial complaint was made. You say they were mass proceedings. Does this record tell us how many defendants were being arraigned?

MS. KNOX: The record does not show how many defendants were being arraigned in this case, no.

QUESTION: But -- and at the arraignment at least at that stage, a lawyer had already been appointed, and wasn't it true that the lawyer was with the client at the arraignment?

MS. KNOX: Yes.

QUESTION: And that, in addition to the oral warning in the courtroom, there was a document that had a rather simple paragraph, unusually plain English for --

for lawyers and judges. And that was signed by the client, or at least to the extent he could sign since he had a broken arm, and it was undersigned by the lawyer. So, that wasn't a mass exercise. That was the client signing a document and his lawyer undersigning and the lawyer saying I represent that my client understands these rights.

MS. KNOX: That's right, and we also have a client who repeatedly told the court that he wasn't understanding what his attorney was telling him. And so, we have -- you can have no confidence on this record that Mr. Vonn understood his constitutional rights because he was handed a piece of paper that he put his X on. Yes, he had counsel with him and his counsel said he understands these. But Mr. Vonn himself was telling the court that he wasn't understanding the proceedings. He wasn't understanding what his attorney was telling him.

This Court has --

QUESTION: Well, all -- all this goes to the question of -- of what would -- will happen, if we get to that point, on -- on remand for consideration of a broader record if we rule against you on that. But what does it have to do with the question whether the -- the trial court should look beyond the four corners? It simply means that in some cases it won't be easy to decide, but

is -- is that much of an objection?

MS. KNOX: Well, I think it means in many cases it may not be easy to decide. One of the --

QUESTION: Well, is -- is your -- your basic point is that Congress intended just to streamline these proceedings and it simply didn't want courts have -- to have to get into difficult evidentiary issues and that's why we should hold that they look no further than the four corners?

MS. KNOX: Well, that is always one of the advantage of prophylactic rules is to prevent that later type of fact finding.

QUESTION: But this prophylactic rule doesn't say what you want us to do. I mean, that's the problem I have. If that's what Congress wanted, why didn't they say it?

I mean, they have subsection (g) which -- which is entitled Record of Proceedings. A verbatim record of the proceedings at which a defendant enters a plea shall be made, and if there is a plea of guilty or nolo, the record shall include blah, blah, blah, blah. It could have been very easy to say, and such record -- such verbatim record shall be the exclusive basis on which the -- any review of -- of the proceeding is conducted.

MS. KNOX: There was no reason, in 1974 when the

advisory committee added (g) to the rule, to say that specifically.

QUESTION: Why?

MS. KNOX: Because it was --

QUESTION: The usual rule is you look to the whole record.

MS. KNOX: Because it was the rule of McCarthy. McCarthy was the law in 1974 when (g) was added to the record, and it was -- so there was no need for the advisory committee to put in there that it was being -- that appellate review would be restricted.

QUESTION: Well -- wait, wait. McCarthy didn't require looking to the record at all for any harmless error. McCarthy said, no harmless error. If you didn't give the instruction, that's it. McCarthy certainly didn't say that in determining whether there's harmless error or not, you only look to the record of the proceeding. It never reached that issue.

MS. KNOX: No, but McCarthy determined the issue of whether there was rule 11 error by looking only at the rule 11 colloquy. That's important in terms of the constitutional rights because under Boykin, those have to be established on the record at the time.

QUESTION: But the Government is not proposing to change that -- that McCarthy rule. The Government

would still look only to the proceedings of -- of the colloquy in determining whether there was rule 11 error, which is what McCarthy did. You only look to that to determine whether there was error.

But we now have a totally different question which is, assuming there is error and assuming there is a harmless error exception to reversal, what do you look to? Simply the whole record which is what usually is done, or for some special reason, should we limit it just to this proceeding? And I -- I think if it's -- we're going to be so limited, it should have said so, especially when there is a section entitled Record of Proceedings.

I mean, all of this is only relevant if we first concede a point that -- that you -- that you do not concede, and that is if there is any such thing as harmless error. But assuming there is such a thing as harmless error, why -- on what basis in these rules could we limit our inquiry just to the -- to the plea colloquy? I don't -- I don't see any basis for that.

MS. KNOX: Other than the policy reason that we've discussed, as well as what my argument as to what the advisory committee meant when it put both (g)and (h) into the rule, I don't have another reason that the Court should do it.

QUESTION: Well, Ms. Knox, I -- as I -- as I

read the advisory committee notes when they added subsection (h), I thought the note stated that harmless error review should be resolved solely on the basis of the rule 11 transcript and the other portions of the limited record made in such cases. It clearly contemplated looking beyond the transcript.

MS. KNOX: I think it contemplated looking at the transcript with certain rule 11 violations.

This morning we have been discussing rule 11 as if all provisions of it are equal, and I don't think that is accurate. I think it's clear that the advisory committee didn't mean that. And in fact, all of the circuits have recognized that there are technical aspects to rule 11 and there are core concerns of rule 11, the core concerns being the (c)(1), (2), (3), and (4) and the (d). That is, the (c) -- the (c) aspects which go to intelligence of the plea and the (d) aspects which go to voluntariness of the plea. Those are the core aspects. Those are what are necessary in order for the court to take an intelligent and voluntary plea.

There are many other aspects to rule 11. It has grown very large over the years. Those are more technical aspects of the rule, and that is what the committee was concerned about. If you look at when the committee added (h) into rule 11, they specifically noted their -- their

disagreement with the circuits that were vacating pleas for technical violations, for the failure to tell a defendant that he could be subject to a perjury charge for any false statements, for the failure to tell a defendant about a special parole term. Those are the concerns that the committee had: the technical errors versus the core concern issues.

As to those technical errors, there could be other proceedings that would be relevant to that. Most notably and the -- what -- the cases the committee cited in discussing these concerns would be a sentencing proceeding. So, for example, the defendant is not told about the possibility of restitution, but restitution is imposed at sentencing, and there is -- neither the defendant nor his counsel says, restitution, where is that coming from? Those are not core concerns. Those -- it is important -- the Government talks about --

QUESTION: What is it in the -- what is it in the language of the rule that supports your dichotomy here? Substantial rights in rule 11(h)?

MS. KNOX: Well, the rule itself --

QUESTION: What -- what is the textual basis?

MS. KNOX: I think the Court --

QUESTION: You're saying that there's some important rule 11 violations and unimportant ones.

MS. KNOX: I think the Court itself recognized in Hyde that all provisions of the rules are not the same in the (c) and (d) provisions.

QUESTION: What is the -- what is the textual basis in the rule for that?

MS. KNOX: Both the (c) and (d) start out with language that says: a court may not accept the plea unless. That was the language this Court looked at in Hyde in deciding that there were provisions of this rule that did not stand on the same footing as other provisions of the rule.

QUESTION: Well, your restitution analysis is under (c)(1).

MS. KNOX: That's true. It is --

QUESTION: So, then that -- so, then there is no textual basis for your distinction.

MS. KNOX: Well, at the time that -- that (h) was added into rule 11, the provisions of (c)(1), (2), and (3) -- excuse me -- (c)(1), (2), (3), and (4) did not include the provisions about restitution. But if you look to what this Court has held is necessary for a knowing and voluntary plea, those are covered primarily by the (c) and (d) provisions. Those are requirements that are necessary in order for this plea to be valid. They are not subject to a harmless error analysis other than to say an

unconstitutional plea necessarily affects the substantial rights of the defendant.

QUESTION: You -- you said a moment ago -- I believe you referred to a case called Hyde.

MS. KNOX: Hyde.

QUESTION: I don't see that in your brief. Is it H-y -- is it a case from this Court?

MS. KNOX: Yes. It's a 1998 court where the Court -- the issue before the Court in Hyde had to do with whether a defendant could withdraw a plea under rule 32(e) of the Federal Rules of Criminal Procedure without a fair and just cause. And the Court held no, that he would need a fair and just cause, and it specifically -- one of the major reasons the Court gave for doing that was to say that the only prerequisites to accepting a plea in the district court are fulfillment of the duties of the court in rule 11(c) and (d). And that once that happens, the court can accept the plea and that the other --

QUESTION: Well, does -- I don't see how that really bears on the question of whether there can be harmless error or not.

MS. KNOX: The point I was trying to make, Mr. Chief Justice, is that there is a basis for distinguishing some of the rule 11 violations from other rule 11 violations, that they do not all stand on equal footing.

And I was only pointing out --

QUESTION: But, you know, even if they don't all stand on equal footing, certainly the -- the provisions added in '74 suggest that all of them are subject to harmless error.

MS. KNOX: The --

QUESTION: I mean --

MS. KNOX: -- advisory committee notes that went along with the addition of (h) --

QUESTION: No. I mean -- I mean the rule -- the additions themselves don't make any effort to distinguish between the various parts of rule 11.

MS. KNOX: The committee notes --

QUESTION: I -- I wasn't asking about the committee notes.

MS. KNOX: Excuse me.

QUESTION: I was asking about the provisions of the rule themselves.

MS. KNOX: No. On the face of rule 11, the language in rule 11 itself draws the distinction only insofar as (c) and (d) have that special provision in it which says the court may not accept a guilty plea unless, and the other aspects of rule (c) -- rule 11 do not have that provision.

The committee notes, though, are the legislative

history behind this rule and they tell us a lot about what the committee meant when it added (h) into the rule. And those committee notes make it clear that they were, in fact, drawing the distinction that I am offering, and in fact, every circuit has drawn that distinction.

QUESTION: Where? I'm looking at the --

QUESTION: What part of the notes?

QUESTION: -- at the notes, the advisory committee notes, on the addition of (h), and what particular part do you say makes it clear that --

MS. KNOX: Well, first, we should back up to the year before (h) was added in. At that point, the advisory committee was adding a provision about special parole to the rules, and when they did that, they were noting that the violations that would not necessarily cause -- cause a necessity to vacate the plea.

When it did that, the committee spoke about certain technical provisions of the rule being qualitatively distinct from the core provisions of the rule that went to voluntariness and intelligence. They spoke disparagingly of circuits that were vacating pleas because the defendant was not told of his -- of being subject to perjury prosecution for a false statement, and the committee specifically noted that because that kind of a right did not go to the intelligence of a plea, that it

stood on a different footing. Those are the types of comments that the advisory committee has made that make it clear.

The other thing in rule (h) --

QUESTION: Were those comments made in connection -- are -- are they placed in the record beside 11(h) and 11(g)?

MS. KNOX: They -- well, no. They were put into the committee notes the year before (h) was added. But when (h) was added, the court -- as I've already made reference to, the committee specifically said that the class of rule 11 errors that would be considered harmless on appeal would be limited. They referred to a number of cases that had been decided by the circuit where the circuits -- they -- they used those as examples of what would be considered harmless under (h) and what would not be considered harmless under (h). The examples they give of what would be considered harmless were the so-called technical violations: the failure to tell him about the perjury prosecution, the special parole. The examples they give of what would be considered harmless under (h) are the intelligence and voluntary: failure to tell him about the nature of the offense, allowing the prosecutor to advise him, which they said would be inherently coercive. The -- the committee itself in those examples

has drawn a distinction in deciding what would be harmless and what would not be harmless between those errors that go to voluntariness and intelligence.

The issue of whether the error is plain error or harmless error is also something that the committee -- it's fairly clear that the committee considered and decided not to apply plain error. The concerns that the committee had were, as I mentioned before, the technical versus core concerns. And the other concern the committee expressly dealt with was the difference between direct appeal and collateral review. They were concerned about, under McCarthy, circuits vacating pleas on collateral review and adversely affecting the interest in finality.

To respond to those concerns, they drafted (h). To do that, they went to rule 52. They adapted the language of rule 52(a). They didn't borrow it verbatim, but they adapted the language of 52(a) and they put it in (h). Every case that the advisory committee was looking at that raised its concerns and that generated the need in their minds for (h) was a case where no objection had been made in the lower court. They looked at rule 52, and they took what they wanted to be the applicable part of 52 and put it into 11.

QUESTION: In other words, your argument is that the -- that they have shown -- and I take it they have

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shown in this litany of examples that you referred to a moment ago -- a series of situations that they wanted to address. Those were all situations, which under rule 52 alone, would have been dealt with on a plain error standard, and they nonetheless imported into -- into rule 11 nothing but the harmless error standard.

MS. KNOX: That's right.

QUESTION: Is that your factual claim in a nutshell?

MS. KNOX: Yes.

And it makes perfect sense that the committee would do that. Rule 11 and rule 11 variances are different than the typical type of proceeding in error that appellate courts deal with. Rule 11 does not give rights to a defendant. Rule 11 puts a duty on the court. In a typical case, a rule -- take rule 43, which deals with the right to be present at all proceedings. That gives the right to a defendant. And therefore --

QUESTION: Maybe this is a little bit repetitive, but -- but assuming you're right that they did just import this and didn't discuss or intend to change what you look to to decide if there is a harmless error, what about Justice O'Connor's question? Because in the note, they do say what you should look to is the transcript of the colloquy and also the other -- other --

the exact words, but you probably know the exact words -- the other portions of the limited record made in such cases. Well, then why wouldn't we look at the other portions, which include the arraignment and all the things the Government wants us to look at?

MS. KNOX: I can only answer what I answered to Justice O'Connor, which is that they were referring to the more technical aspects of rule 11 and not the core requirements. And I base that only on what McCarthy --

QUESTION: Then from your point of view, it isn't a question of what we should look at. We should look at this. It's a question of whether there are some things that simply don't fall within (g) -- or (h) rather. Some things simply don't fall within (h). In other words, there are some things (h), substantial error rule, doesn't apply to in your opinion? Substantial rights.

MS. KNOX: Well, both of those. I -- I contend both of those things so that violations or variances of rule 11 that go directly to the voluntariness or intelligence of the plea are by definition prejudicial because they do affect the substantial rights.

QUESTION: So that you -- you are essentially asking us to restore the automatic reversal rule with respect to this piece of advice; that is, if you plead guilty, you give up your right to counsel at trial. I

take it that your case boils down to that. You say as to that bit of advice, because it's so fundamental, there should be an automatic reversal rule if the judge doesn't give it.

MS. KNOX: No, I'm not actually advocating an automatic reversal rule. I'd be comfortable with that, but it's not actually where the Court has to go.

QUESTION: But what's the difference between your position and --

MS. KNOX: Because in order to determine whether a plea is intelligent, it turns on what knowledge the defendant has. And so the -- when there is an omission by the district court as to the requirements of rule 11, then we -- we don't know whether he has that intelligence -- he has that knowledge or not. It would be possible from the rule 11 colloquy to determine that he, in fact -- even though the court failed to give him the advice, he in fact had that knowledge.

An example would be that he -- the nature of the offense, for example. There could be a colloquy where the court fails to tell him about the nature of the defense -- offense, but the colloquy at the rule 11 proceeding itself indicates the defendant actually knows the elements of the offense either because it comes out when he gives personally a factual basis or his attorney says something

about it when he is standing there.

As to the right to counsel at trial, it could -- there could be something that happens at the rule 11 colloquy that would, in fact, put the defendant on notice that he has that right.

QUESTION: What's something?

MS. KNOX: For example, when the court gives him his right about confronting and cross examining witnesses, it could be given to him in the context of his attorney doing it. So, the court advises him, for example, that if you went to trial, you would have the right through your attorney to confront and cross examine the witnesses against you. That would clearly put him on notice at the rule 11 colloquy.

McCarthy didn't allow even for that type of inquiry. McCarthy was just here are the rule 11 requirements. If it -- if they're not met, you reverse.

Mine would -- my argument, contention would take it a little further, which is here are the requirements of rule 11. If they are not met and they go to the intelligence of a plea, you look only to the rule 11 colloquy to decide whether he otherwise was put on notice of that right.

QUESTION: May I ask you this question? Do you agree with the Government that, assuming that you're right

that it's harmless review, assume the burden is on the Government to establish harmlessness, but that they may look at the entire record, not just to the plea colloquy, that if we look at the entire record, we must conclude that the error was harmless?

MS. KNOX: Absolutely not.

QUESTION: Why not?

MS. KNOX: Because in this record we have two proceedings that occurred months before the taking of Mr. Vonn's pleas. Both of those proceedings were mass advisements. There was nothing personal between the defendant and the court. There was no real attempt to make sure that he understood --

QUESTION: How about the fact that the defendant was actually preparing for trial a week earlier? Is that in the colloquy? Or pardon me. In the record?

MS. KNOX: Well, it's in the record that there was --

QUESTION: Correct me if I'm wrong, but I thought this case was scheduled for trial and they were actually preparing for the trial.

MS. KNOX: It is in the record that it was scheduled for trial. It is also clear from the record that there was somewhat of an ongoing discussion, perhaps disagreement, between defense counsel and Mr. Vonn as to

whether he was going to plead or not. So, the record is unclear exactly as to how much preparation --

QUESTION: Is there any evidence on the record to the effect that his defense counsel had said to him, by the way, if we go to trial, I'm out of here?

MS. KNOX: No.

QUESTION: Okay. Can't we draw an inference from the fact that there is no such thing on the record?

MS. KNOX: No. You know, I have -- defendants believe all sorts of things that may seem odd to attorneys and judges who are familiar with the system. Mr. Vonn was a first-time offender. There's no evidence that he was familiar with exactly how the system worked. It seems extremely odd to all of us sitting here today that a defendant who has an attorney at all pretrial proceedings would have any reason to think that his attorney was going to disappear for trial. But there are defendants who believe that kind of thing.

QUESTION: Well, in this very case, I thought he originally entered a plea to one charge, but he was going to go on to trial on the other. There was no doubt about that, was there? They were continuing to prepare for trial on another charge.

MS. KNOX: They -- it is true that the -- the gun use allegation had been set for trial. Whether they

were preparing or not is unclear from this record because what is clear from the record is that there was a disagreement about the defendant. And in fact, when -- whether he would plead. And in fact, when the defendant eventually pled to that second charge, the gun use allegation, he specifically denied the elements that would make his activity criminal. He specifically denied that either he personally had a gun or that he had any knowledge of his co-defendants having guns. And so, there clearly was a dispute about that.

Thank you.

QUESTION: Thank you, Ms. Knox.

Mr. Dreeben, you have half a minute left.

(Laughter.)

MR. DREEBEN: Unless the Court has any short questions --

(Laughter.)

MR. DREEBEN: -- the Government will submit.

QUESTION: Very well.

The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

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