No.

In the
Supreme Court of the United States

BOULDER YOUNG,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the waiver of a right to appeal a judgment of conviction is controlled by the defendant's written waiver or the oral pronouncement of the court at the time of sentencing?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows;

Boulder Young, *et al.*, Petitioner

United States, *et al.*, Respondent

LIST OF THE PROCEEDINGS

United States v. Boulder Young
U.S. District Court
Northern District of Iowa
Western Division
Case No. 17-CR-4030-LTS
Decision Date: January 14, 2017

United States v. Boulder Young
U.S. Court of Appeals
Eighth Circuit
Case No. 19-1187
Decision Date: October 23, 2019

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PETITION FOR A WRIT OF CERTIORARI

Boulder Young respectfully petitions for a writ of *certiorari* to review the judgment of the United States Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit granting the government's motion to dismiss petitioner's petition is unpublished. App. 8a. The opinion of the district court sentencing the petitioner for Distribution of a Controlled Substance can be found at *United States v. Young*, No. 17-CR-4030-LTS, 2017 U.S. Dist. LEXIS 173226 (N.D. Iowa Oct. 3, 2017). App. 1a.

JURISDICTION

The Eight Circuit entered its judgment on January 14, 2019. App. 8a. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. §3553

> (f) Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act . . . the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been

afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines; Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 USCS § 848]; and

> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT

Petitioner Boulder Young, also known as Boulder Daniel McManigal ["Petitioner"], was indicted on May 24, 2017 for four counts relating to the distribution of methamphetamine.[1] The indictment claimed that on three separate occasions, Petitioner sold methamphetamine to ATF agents or informants. The prosecution additionally asserted that Petitioner possessed a reputation for dangerousness, citing proffers provided by two of Petitioner's supposed customers who were both under indictment for related drug charges at the time. Although Petitioner has never been convicted of a felony and possesses a very limited criminal history, the prosecution cited his firearms collection as further evidence of his supposedly violent character.

[1] Count 1; Conspiracy to Distribute a Controlled Substance, Counts 2-4; Distribution of a Controlled Substance

On August 2, 2017, Petitioner agreed to plead guilty to Conspiracy to Distribute a Controlled Substance[2], and signed a memorandum of the proposed plea agreement. The plea was entered on October 2, 2017. App. 1a. This offense carries a mandatory minimum sentence of 120 months in prison. App. 3a. Paragraph 41 of this memorandum requires Petitioner to waive his right to appeal the conviction and the sentence involved. Furthermore, paragraph 41 stipulates that at the conclusion of the sentencing hearing the Court will note that Petitioner's appellant rights are limited. The Magistrate Judge entered the guilty plea on October 2, and it was accepted by the District Court on October 18, 2017. App. 1a.

A. U.S. District Court for the Northern District of Iowa, Western Division

On January 11, 2019, Petitioner was sentenced to the mandatory minimum of 120 months in prison and five years of supervised release. App 8a. Counsel for Petitioner argued that the court should apply the 18 U.S.C. § 3553(f) safety valve provision, authorizing a sentence below the federal minimum. To be eligible for "safety valve" relief, defendant must have minimal criminal history and an offense which is nonviolent in nature. The court held that Petitioner failed to meet the burden of proof due to his possession of several firearms, and the fact that he was in the process of cleaning one of them during a drug deal. The judgment was entered on January 14, 2019.

[2] Count 1

While explaining the sentence to Petitioner, the court erroneously described the conditions of his appellate waiver. While acknowledging that petitioner had signed the waiver, the court provided him with an erroneous description of when he may appeal the decision. Furthermore, the court informed petitioner that if he wished to appeal, he would have to submit a written notice of appeal within 14 days of the sentence. The court also told him that if he could not afford an appellate attorney, one would be provided to him. Petitioner filed his notice of appeal on January 25, 2019.

B. U.S. Eighth Circuit Court of Appeals

Petitioner elected to take a direct appeal. He submitted his appellate brief to the Eight Circuit Court of Appeals on September 23, 2019, arguing that he is eligible for 18 U.S.C. §3553(f) safety valve relief since there was no nexus between his possession of firearms and distribution of methamphetamine. The government moved to have the appeal dismissed on procedural grounds, arguing that Petitioner's waiver of appeal precluded any further review. On October 23, 2019, the court granted the government's motion and dismissed the appeal. App. 8a. The Mandate issued on December 14, 2019.

REASONS FOR GRANTING THE PETITION

I. The Failure of the Trial Court to Accurately Inform Petitioner of his Waiver of Appeal and Determine that Petitioner Understood its Contents Cannot be Characterized as a Harmless Error Under Federal Rule of Criminal Procedure 11(h).

When a defendant enters into a plea agreement with the Government, the defendant may agree to submit an appeal waiver which prohibits any further appeals of the case. The requirements of the waiver are detailed in Federal Rule of Criminal Procedure 11(b)(1)(N), which provides that the court must ensure that the defendant understands the appeal waiver in question. The rule reads in part;

> 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 terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

USCS Fed. Rules Crim. Proc. R 11(b)(1)(N).

However, the inquiry does not end here. Federal Rule of Criminal Procedure 11(h) specifies that if the court varies from any of the requirements present in

Rule 11, the variance can be considered "harmless" if it does not affect defendants' substantial rights. This Court has previously held that a decision affects a party's substantial rights when it "[affects] the outcome of the district court proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

When deciding this case, there is one more rule which this Court should take into consideration. Federal Rule of Criminal Procedure 11(d)(1)(B) states that;

> A defendant may withdraw a plea of guilty or nolo contendere: (1) before the court accepts the plea, for any reason or no reason; or (2) after the court accepts the plea, but before it imposes sentence if: (A) the court rejects a plea agreement under Rule 11(c)(5); or (B) the defendant can show a fair and just reason for requesting the withdrawal.

USCS Fed. Rules Crim. Proc. R 11(d)(1)(B).

Petitioner's guilty plea was entered on October 2, 2019 and he was sentenced on January 11, 2019. Under the "fair and just" exception found in Federal Rule of Criminal Procedure 11(d)(1)(B), Petitioner had the opportunity to withdraw this plea prior to the conclusion of the sentencing hearing. Due to the district court's failure to determine whether or not Petitioner understood the plea he was entering, Petitioner was robbed of the opportunity to withdraw his plea under Rule 11(d)(1)(B). At the very least, the

court's error injected a sufficient degree of uncertainty into the proceedings that it cannot be fairly characterized as harmless under the substantial rights doctrine. *Puckett*, 556 U.S. 129, 135.

II. The Circuit Courts of Appeals Have Differed in Their Interpretations of Federal Rule of Criminal Procedure 11(b)(1)(N) and Federal Rule of Criminal Procedure 11(h).

The failure of Rule 11(h) to define "substantial rights" in its text has led to a lack of unanimity in its application by the various circuit courts. Courts have interpreted the colloquy requirement found in Rule 11(b)(1)(N) differently in regard to the harmless error standard, which has led to a great degree of confusion. The D.C. Circuit, Sixth Circuit, and Eighth Circuit all serve as examples of this disuniformity.

A. The D.C. Circuit has concluded that a court's failure to discuss the appeal waiver at plea hearing does not infringe on defendants' substantial rights as long as defendant still knowingly, intelligently, and voluntarily waived their right to appeal.

In *United States v. Han Lee*, 436 U.S. App. D.C. 182, 888 F.3d 503 (2018), Justice Kavanaugh, speaking for the D.C. Circuit, held that the "court's error — failure to mention the appeal waiver at the plea hearing — cannot possibly be said to have affected the defendant's substantial rights if the defendant still knowingly, intelligently, and voluntarily waived the right to appeal. Conversely, a defendant's substantial rights are affected by a

district court's failure to discuss the appeal waiver at the plea hearing if the defendant did not knowingly, intelligently, and voluntarily waive the right to appeal." *Id.* at 507. While acknowledging that the district court was in error, the D.C. Circuit concluded that the error was essentially harmless and to overrule on this basis would be to "elevate . . . ceremony over substance" *Id.* at 508.

An important addendum to the court's decision is that the defendants' waiver must be knowing, intelligent and voluntary in order to take effect. *Id*. at 506. The court held that a waiver is knowing, intelligent, and voluntary if the defendant is "aware of and understands the risks involved" of waiving their right to appeal. *Han Lee,* 888 F.3d 503, 506 (quoting *United States v. Guillen*, 385 U.S. App. D.C. 216, 561 F.3d 527 (2009)). Additionally, the court stated that in order to determine if the defendant knowingly, intelligently, and voluntarily waived their right to appeal, they must analyze the whole record. *Han Lee*, 888 F.3d 503, 507 (citing *United States v. Laslie*, 716 F.3d 612, 616, 405 U.S. App. D.C. 45 (D.C. Cir. 2013), *United States v. Vonn*, 535 U.S. 55, 59, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002)).

The court held that a written plea agreement in which the defendant waives their right to appeal is strong evidence that the waiver was knowing, intelligent, and voluntary. *Han Lee*, 888 F.3d 503, 507. However, the court explicitly rejected the idea that the existence of a written plea agreement signed by the defendant automatically ends the inquiry. *Id*. The court must also analyze the clarity of the agreement, the statements and signatures of defendant and

counsel, and the judge's questioning and statements at the hearing. *Id*.

B. The Sixth Circuit has held that failure by the court to inquire into a defendant's understanding of their plea waiver constitutes plain error and renders the waiver unenforceable.

The Sixth Circuit, on the other hand, holds that when the court fails to probe a defendant's understanding of their appellate waiver, the waiver is unenforceable against the defendant. *United States v. Almany*, 598 F.3d 238, 240-241 (6th Cir. 2010). Additionally, they explicitly reserve the authority to review the validity of the defendant's waiver *de novo*. *Id*. at 240.

In *United States v. Almany*, defendant's guilty plea, which contained an appellate waiver, was accepted by the lower court. The presiding judge not only failed to explain to the defendant the nature of his appellate waiver, but actively misinterpreted its contents to him. *Id*. The Sixth Circuit held in favor of the defendant, stating that "it is plain error for the District Court to fail to inquire into a defendant's understanding of the appellate waiver provision of his plea agreement, as required by Rule 11(b)(1)(N)." *Almany*, 598 F.3d 238, 240 (citing *United States v. Murdock*, 398 F.3d 491, 495-496 (6th Cir. 2005)).

Furthermore, the Sixth Circuit places a significant amount of weight on oral sentencing more generally. In *United States v. Penson*, 526 F.3d 331 (6th Cir. 2008), the Sixth Circuit Court of Appeals held that

when an oral sentence conflicts with the written sentence, the oral sentence controls. *Id*. at 334. However, when an oral sentence is ambiguous the written judgment can be used as evidence to determine the sentence that was intended. *Penson*, 526 F.3d 331 (citing *United States v. Schultz*, 855 F.2d 1217, 1225 (6th Cir. 1988)). This focus on oral sentencing is incongruous with the D.C. Circuit's characterization of Rule 11(b)(1)(N) errors as "ceremonial." *Han Lee*, 888 F.3d 503, 506-507.

C. The Eight Circuit previously held that a written waiver of appeal does not require an oral colloquy to be effective but has shifted its precedent over time.

The Eight Circuit, which has jurisdiction over this case, has seen its precedent evolve dramatically over the past several decades. The Eight Circuit Court of Appeals, citing to similar holdings in other circuits, held in 1998 that "Although it might have been preferable for the court to have conducted a colloquy with [defendant] regarding his waiver of appeal, such a dialogue is not a prerequisite for a valid waiver of the right to appeal." *United States v. Michelsen*, 141 F.3d 867, 871-872 (8th Cir. 1998) (citing *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995); *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992); *United States v. Portillo*, 18 F.3d 290, 292-93 (5th Cir. 1994); *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992)).

The court's decision in *Michelsen* would not stand for long, however. In 1999, Congress amended Federal Rule of Criminal Procedure 11 to include the

requirement that courts engage in a colloquy with the defendant about the appeal waiver. *See* Fed. R. Crim. P. 11 advisory committee's note (1999 amend.). Although *Michelsen* would continue to be cited as precedent for years afterward[3], it would eventually be overturned in *United States v. Boneshirt*, 662 F.3d 509 (8th Cir. 2011). Acknowledging that the court had "frequently declined to enforce an appeal waiver when the record does not establish that the district court engaged in the colloquy required by Rule 11(b)(1)(N)," the court explicitly rejected the holding in *Michelsen*. *Id.* at 516.

In *Boneshirt*, the court stated that since *Michelsen* was decided prior to the 1999 amendments to the Federal Rules of Criminal Procedure, the precedent established by that case was now overruled and a waiver of appellate rights without oral discussion with the defendant is invalid. *Id.* However, they did not take this precedent as far as the Sixth Circuit. Rather than clearly stating a preference for oral pronouncements at the expense of written sentencing, the court outlined an exception for written pleas entered after the defendant's plea hearing. *Boneshirt*, 662 F.3d 509, 516 (citing to *United States v. Cheney*, 571 F.3d 764, 767 (8th Cir. 2009)). The court concluded that when a sentencing agreement is reached after the defendant's plea hearing, Federal Rule of Criminal Procedure 11(b)(1)(N) is inapplicable.

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[3] *See United States v. Berberich*, 254 F.3d 721 (8th Cir. 2001)

Despite this clarification, the Eighth Circuit's precedent has remained muddled. Two years after the decision in *Boneshirt*, the Eighth Circuit Court of Appeals heard a case in which appellant signed a plea agreement waiving his rights under Federal Rule of Evidence 410(a)[4]. *See United States v. Washburn*, 728 F.3d 775 (8th Cir. 2013). Appellant subsequently postponed his change of plea hearing before eventually experiencing a change of heart and deciding to plead not guilty. *Id*. at 779-780. When the case went to trial, the prosecution attempted to offer the signed plea agreement into evidence. *Id*. The court held that the withdrawn plea was admissible as evidence, citing *Michelsen*. *Washburn*, 728 F.3d 775, 781-782 (citing *Michelsen*, 141 F.3d 867, 871). Specifically, the court held that "a dialogue between the district court and the defendant regarding the knowing and voluntary nature of a plea agreement that usually occurs at a change of plea hearing 'is not a prerequisite for a valid waiver' of a particular right.'" *Washburn*, 728 F.3d 775, 781-782 (citing *Michelsen*, 141 F.3d 867, 871).

This holding can be construed a number of different ways. If one chooses to interpret the holding in *Boneshirt* narrowly, they could conclude that an

[4] Federal Rule of Evidence 410(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions: (1) a guilty plea that was later withdrawn; (2) a nolo contendere plea; (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11 or a comparable state procedure; or (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

oral colloquy is required only in cases concerning a waiver of appellate rights. If the court's language in *Washburn* is interpreted narrowly, the lack of an oral colloquy could be excused for a change of plea hearing but not a sentencing hearing. Additionally, the court's citation to *Michelsen* could be declared *dicta*. The one definite conclusion which can be drawn is that the Eight Circuit' precedent remains muddled and does not fully align with either court discussed above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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