No.

In the Supreme Court of the United States

DEMETRIUS EDWARD FLENORY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni Jr.*
Paetra T. Brownlee
Michael M. Brownlee
BROWNSTONE, P.A.
400 North New York Avenue
Suite 215
Winter Park, Florida 32789
(407) 388-1900
**Counsel of Record*

December 27, 2011

QUESTIONS PRESENTED

1. Whether a Defendant's Fifth Amendment right to avoid self-incrimination is violated when a trial court conditions entry of a Rule 11 guilty plea on a confession from the Defendant and testimony regarding the extent of the Defendant's culpability, where such requirements were not contemplated by the plea agreement?

2. Whether a Defendant's due process rights are violated when he has waived the protections of Fed. R. Evid. 410 pursuant to a plea agreement, and the trial court, *sua sponte*, compels the Defendant's confession and other inculpatory testimony at the plea hearing?

3. Whether a Defendant's Sixth Amendment rights are violated by trial counsel's failure to object to plea hearing questioning by the trial court and the Prosecutor where such questioning results in a confession and inculpatory testimony?

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PETITION FOR WRIT OF CERTIORARI

In this case, Petitioner, Demetrius Edward Flenory, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, denying Mr. Flenory's Motion for a Certificate of Appealability (App. A), is unpublished. Its order denying panel rehearing (App. B), as well as its order denying rehearing en banc (App. C) are, likewise, unpublished.

The opinion and order (App. D) of the district court, denying Mr. Flenory's habeas motion, is unpublished. The district court's denial of Mr. Flenory's Motion for Reconsideration or Alternative Motion for Certificate of Appealability (App. E) is not published in the Federal Supplement, but is available at 2010 WL 331710.

JURISDICTION

The court of appeals filed its opinion on November 18, 2010. The petition for rehearing en banc was denied on June 13, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On October 28, 2005, Mr. Flenory was indicted for various drug charges. The indictment was

superceded several times, until a final Fourth Superceding indictment was filed on December 15, 2006. Mr. Flenory maintained his innocence throughout plea negotiations, but nonetheless entered into a Rule 11 plea agreement with the United States of America on November 11, 2007.

Therein, Mr. Flenory agreed to enter a guilty plea in response to Count 3, which alleged a Continuing Criminal Enterprise, in violation of 21 U.S.C. § 848(a) and (c), and to Count 10, which alleged a Conspiracy to Launder Money Instruments, in violation of 18 U.S.C. § 1956(a)(1) and (h). The plea agreement provided, *inter alia*, that if Mr. Flenory withdrew his plea before sentencing, he would waive any protections afforded by Rule 410 of the Federal Rules of Evidence, as well as his right to direct appeal. Such waiver provision also provided that the government could use testimony and evidence elicited through the Rule 11 proceedings against Mr. Flenory "in any proceeding." The plea agreement did not, however, contain any provision requiring that Mr. Flenory confess to the crimes alleged in the plea agreement, or supply the government with any statement or evidence to corroborate its allegations against him.

Nonetheless, at the plea hearing, the trial court informed Mr. Flenory that, in order for the court to accept his guilty plea, Mr. Flenory needed to confess and answer certain questions, in order to satisfy the trial court that he was truly guilty. It further informed Mr. Flenory that a guilty plea would constitute a waiver of his right against self-incrimination throughout the course of answering the

trial court's questions. Specifically, the trial court instructed Mr. Flenory, "i[f] you plead guilty you also understand you waive your right not to incriminate yourself since I may ask you questions about what you did to satisfy myself that you are guilty and you will have to acknowledge the fact that you are guilty." The trial court also instructed Mr. Flenory that, if he withdrew his guilty plea for any reason, the government would be able use his answers throughout the plea colloquy against him. To wit: "[a]nd if I let you withdraw your plea for any reason, they can use these statements made here today against you, right?" Mr. Flenory responded, "I guess, yes."

The trial court proceeded to ask Mr. Flenory whether he was guilty of each of the charges contemplated by the plea agreement, and asked direct questions about the extent of his culpability. In addition, the trial court, *sua sponte*, offered the government an opportunity to question Mr. Flenory. In response, Mr. Flenory confessed and, by answering the detailed questions of the trial court and government, provided inculpatory testimony regarding the specific details of the charged crimes. Until that point, Mr. Flenory had never confessed to any of the government's allegations, and had not cooperated with the government requests for specific information related to his charges. On September 12, 2008, the trial court sentenced Mr. Flenory to thirty (30) years in prison, followed by five years of supervised release.

On September 9, 2009, the Petitioner filed a *pro se* Motion to Vacate Sentence pursuant to 28

U.S.C. § 2255, alleging, *inter alia*, ineffective assistance of counsel during plea negotiations. That Motion was denied on December 11, 2009. The Petitioner then filed a *pro se* Motion for Reconsideration or Alternative Motion for Certificate of Appealability, which was denied on January 22, 2010. Next, Mr. Flenory applied to the Sixth Circuit Court of Appeals for a certificate of appealability, which was denied on November 18, 2010. Finally, Mr. Flenory's motion for rehearing en banc was denied on June 13, 2011.

REASONS FOR GRANTING THE WRIT

This Petition presents an opportunity for the Court to provide lower courts with much-needed guidance concerning the parameters of the Rule 11 duty to ensure that a factual basis exists for the entry of a guilty plea. Frequently, part of a court's inquiry in determining whether a factual basis for a guilty plea exists compels defendants to confess, and in some cases, to provide details about their guilt on the record. Notwithstanding the admissibility of the guilty plea and any statements and admissions made during the Rule 11 process in future proceedings, defendants are reticent to invoke the Fifth Amendment during Rule 11 proceedings for a wide variety of reasons.

Traditionally, these issues were not problematic for a defendant who chose to withdraw his plea, because Fed. R. Evid. 410 provides that inculpatory statements made during Rule 11 proceedings are inadmissible except in certain

unique circumstances. However, it is now standard practice for Rule 11 plea agreements to include a waiver of the protections afforded by Fed. R. Evid. 410 if a plea is withdrawn. Thus, if a defendant who has waived the protections afforded by Fed. R. Evid. 410 wishes to withdraw a guilty plea before sentencing, he faces a serious dilemma. Either the defendant can stand by the plea, even if legitimate grounds exist for its withdrawal, or he can withdraw the plea, and prepare to have any incriminating statements or answers made during Rule 11 proceedings used against him. More often than not, this dilemma leads the defendant to stand by the plea rather than proceeding to trial where he will face the government's newly-obtained confession. Instead, the defendant will elect to use habeas petitions, and other forms of collateral attack, in hopes of setting aside the plea post-sentencing.

By establishing the parameters of the Rule 11 duty to ensure that a factual basis exists for a guilty plea, this Court can resolve the dilemma. Resolution is critical because this issue involves important constitutional interests. In addition, the resolution of this issue would alleviate the glut of motions clogging our judicial system which seek to set aside sentences after they have been imposed, because it would encourage necessary plea withdrawals before sentencing.

Finally, this case is the ideal vehicle for the resolution of this issue. The facts are simple and undisputed. More importantly, the proceedings below highlight the need for this Court to establish basic guidelines that the lower courts should follow

when dealing with a defendant who has waived his Fed. R. Evid. 410 rights, and enters into a Rule 11 plea agreement.

I. THIS COURT SHOULD SET THE PARAMETERS OF THE RULE 11 DUTY TO ENSURE A FACTUAL BASIS EXISTS TO SUPPORT A GUILTY PLEA

A. The Legal Framework and the Resulting Dilemma.

At the outset, it is important to recognize the incredible importance the plea process has in our federal court system. Almost all criminal convictions are obtained by guilty plea, and the numbers are rising. From 2008 through 2011, less than 4% of federal defendants took their case to trial. From 1985 to 2009, the percentage of pleas entered in the federal district courts grew dramatically, from approximately 87% to over 95%. Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 Hastings Const. L.Q. 1029, 1030 (2011); *see also* Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1064 (2006) ("Any way you slice it, plea bargaining is a defining, if not the defining, feature of the present federal criminal justice system."). The widespread prevalence of guilty pleas in the federal criminal system merits clear guidelines for courts handling Rule 11 plea agreements.

Rule 11(b)(3) provides, before entering a judgment on a guilty plea, a court must determine there is a factual basis for the plea. Traditionally, the trial court makes this determination simply by accepting the "Statement of the Facts" or "Statement of the Offense" section of the plea agreement. In this respect, the agreed-upon statement of the factual basis for the plea represents an important stipulation between the parties. *Mitchell v. United States*, 526 U.S. 314, 322 (1998). Further, as is the plea process generally, the stipulated statement of the facts is the product of a bargain. *See, e.g.,* Brown & Bunnell, *supra* at 1070 (noting the statement of the facts is "often is a subject of considerable negotiation between the parties" because both the defendant and the prosecution have competing interests in putting the facts into a favorable context); *see also United States v. Mezzanatto*, 513 U.S. 196, 206 (1994) (discussing the importance of bargaining to plea agreements). Therefore, in cases featuring Rule 11 plea agreements, especially where they are signed by U.S. attorneys, and by the defendant and his counsel, the court can be satisfied of the factual basis for the plea without further inquiry. In fact, because of the competing interests at stake, as well as the fact the plea is the product of a bargain, there is good reason for the court not to inquire into facts not stipulated to by the parties. To wit, a Defendant may agree to bargain with the government and waive the critical constitutional right to trial by jury for the sole purpose of ensuring certain facts are not introduced into the public sphere.

Accordingly, the inquiry at a plea colloquy

should be narrow, as its purpose is simply to "protect the defendant from an unintelligent or involuntary plea." *Mitchell v. United States*, 526 U.S. 314, 322 (1998). Of course, a trial court is permitted to make whatever inquiry it deems necessary to satisfy itself that the defendant is not being pressured into taking a plea for which there is no factual basis. *Id.* at 324. However, there is no requirement that the trial court be convinced the defendant is guilty, or must hear the defendant confess to the charged offenses before accepting the plea. This makes perfect sense, as statements and admissions uttered during Rule 11 proceedings are admissible against a defendant in subsequent proceedings, as is the plea itself, in the event the plea is accepted. *Id*. at 324. Hence, if courts are permitted to make specific factual inquiries during Rule 11 proceedings, to such an extent that the court is fully satisfied the defendant is guilty, the plea bargaining system would break down.

Traditionally, Rule 410 of the Federal Rules of Evidence provided an important safeguard for defendants who entered a guilty plea. Rule 410 provides that statements made during Rule 11 proceedings, as well as the guilty plea itself, are not admissible in the event a guilty plea is subsequently withdrawn. The goal of provisions such as these is to encourage a free and open discussion between the prosecution and the defense, and to eliminate the need for trial in many cases.

However, over the dissent of Justices Stevens and Souter, in *United States v. Mezzanatto*, this Court held that absent signals that an agreement

was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable. *Mezzanatto*, 513 U.S. at 198. The dissenters feared the majority's ruling was "at odds with the intent of Congress" and "would render the Rules largely dead letters." *Id.* at 211 (Souter, J., dissenting). In addition, the dissent presciently warned that the inevitable result of the majority's reasoning would eventually come to function as a waiver of trial itself. *Id.* at 217.

Mezzanatto's progeny has borne out the fears espoused by Justices Souter and Stevens, as it is now standard practice for federal prosecutors to insist on 410 waiver provisions as a precondition to plea negotiations. *See* Moriarty & Main, *supra* (*citing* Mark Calloway, et al., *More Defendants are Asked to Waive Plea Deal Rights; Prosecutors Increasingly Insist that Defendants Waive Protections Against Use of Statements at Trial*, Nat'l L.J. S1 (Col. 1) (2007)) ("[f]ederal prosecutors are now insisting, as part of the plea agreement process, that defendants waive their 'rights' under . . . FRE 410 . . . [and] *Mezzanatto* has served as the foundation for a line of cases that have expanded the breadth of these waivers over time."). Further, a number of circuits have approved of use of evidence brought in through Rule 410 waivers in the prosecution's case-in-chief. *See, e.g.*, *United States v. Sylvester*, 583 F.3d 285 (5th Cir. 2009); *United States v. Burch*, 156 F.3d 1315, 1322-23 (D.C. Cir. 1998); *United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000); *United States v. Mitchell*, 2011 WL 322371, *9 (10th Cir.).

Thus, if a defendant who has waived the protections afforded by Fed. R. Evid. 410 wishes to withdraw a guilty plea before sentencing, he faces a serious dilemma. Either he can stand by the plea, even if legitimate grounds exist for withdrawal, or he can withdraw the plea, and prepare to have any incriminating statements or answers made during Rule 11 proceedings used against him at trial. As explained above, circuit courts are now permitting use of Rule 11 evidence in the case-in-chief. Naturally, such an expansive interpretation of waiver provisions reduces the likelihood that a defendant will decide to proceed to trial. Instead, the defendant will elect to use habeas petitions and other forms of collateral attack in hopes of setting aside the plea post-sentencing.

B. Intervention by This Court is Critical Because The Dilemma Implicates Important Constitutional Interests and its Resolution Would Reduce the Amount of Post-Conviction Relief Motions Clogging the Courts

This issue merits resolution by this Court, given the Constitutional issues at stake, as well as the deleterious effect this dilemma has on the efficiency of our federal court system. A bevy of constitutional rights are implicated by the plea process. For instance, due process requires that a plea be intelligently and voluntarily made. *See, e.g. McCarthy v. United States*, 394 U.S. 459 (1969). For instance, in *Boykin v. Alabama*, 395 U.S. 238, 239 (1969), there was nothing in the trial record

concerning the voluntariness and intelligence of the defendant's guilty plea. This Court reversed the defendant's conviction, finding that an affirmative showing of voluntariness in the record was necessary to show that he waived his constitutional rights. *Id*. at 244. Critical to *Boykin's* holding was the idea that a plea is not only a confession, but a conviction, and thus due process was implicated. A court that forces a Defendant to confess during the colloquy and reveal facts regarding the plea contradicts the rationale expressed in *Boykin,* because it essentially forecloses on a Defendant's right to withdraw the plea where a waiver provision exists in the plea agreement.

In addition, under the Sixth Amendment, the defendant has a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* provides a two-prong test that a defendant must meet to justify reversal of a conviction for ineffective assistance of counsel. The first prong requires that the defendant show defense counsel's performance "fell below an objective standard of reasonableness." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (*quoting Strickland*, 466 U.S. at 688) (internal quotation marks omitted). Under the second prong of *Strickland*, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (*quoting Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

The Sixth Amendment right to effective assistance of counsel is also implicated during the

plea bargaining process, and the two-pronged *Strickland* test applies. *Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the defendant challenged the voluntariness of his guilty plea by alleging ineffective assistance of counsel. The defendant's attorney did not inform him that he would have to serve half of his sentence before becoming eligible for parole. *Id.* at 53. The *Hill* Court found that the first prong of the *Strickland* test was satisfied because defense counsel's erroneous advice was unreasonable. *Id*. at 56-57. The Court did not reverse the defendant's conviction, however, because he did not satisfy the second prong of *Strickland*. *Id.* at 60. The Court explained that under *Strickland* a defendant must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. This court should shed light on counsel's duties in the context of waiving important constitutional and evidentiary rights as part of plea bargaining. As explained above, the frequency with which Rule 410 waivers are included in plea agreements suggests attorneys are not adequately advising their clients of the ramifications of the waivers in the event a client wishes to withdraw a plea. Given the latitude afforded to judges to ensure a factual basis exists for a plea, there is always a possibility the plea colloquy can lead to critical admissions, which can be used against them later.

The Fifth Amendment right not to incriminate one's self is always at issue when a client enters a guilty plea through an agreement containing a Rule 410 waiver provision and later wishes to withdraw the plea. Of course, the plea itself is an admission.

In addition, where a defendant is questioned during the plea colloquy, he is permitted to invoke his Fifth Amendment rights, but such an invocation could lead to undesirable results. For instance, the court could find a factual basis does not exist, and refuse to accept the plea. More importantly, a defendant may think it unwise to refuse to answer the court's questioning, in light of the sentencing proceedings looming ahead. Thus, even the savvy defendant or his counsel, who contemplates the effect of the plea colloquy on a subsequent decision to withdraw the plea, is caught in a trap. Because the dilemma at issue in this petition undercuts the rational of the right to avoid self-incrimination, this Court should intervene and offer guidance to the lower courts on the proper method for resolution.

Finally, by establishing the parameters of the Rule 11 duty to ensure a factual basis exists for a guilty plea, this Court can help to alleviate the glut of motions clogging our judicial system, which seek to set aside sentences after they have been imposed. For instance, if this Court ruled that, during the plea colloquy, trial courts could not inquire into matters beyond the stipulated facts in the plea agreement, defendants would not be so reluctant to withdraw pleas pre-sentencing. Similarly, if conditions had to be met before waiver provisions were added to plea agreements, the use of waivers of Rule 410 rights would decrease, and defendants who wish to withdraw pleas would be encouraged to do so before sentencing. Pre-sentencing withdrawal is much more desirable than post-sentencing withdrawal, as the same trial judge is likely to rule on the withdrawal, and the pre-sentencing withdrawal

standard is much lower for the defendant. Thus, more cases would proceed to trial, and fewer motions for post-conviction relief would be filed, if this Court were to impose clear boundaries during Rule 11 proceedings.

C. This Petition Should be Granted Because it Reveals How Lack of Boundaries in Rule 11 Proceedings Gives Rise to the Dilemma

The instant Petition should be granted because this case is the ideal vehicle for resolution of this issue. The facts are simple and undisputed. More importantly, the proceedings below highlight the need for the Court's intervention in this area of the law. For instance, Mr. Flenory maintained his innocence throughout plea negotiations, but nonetheless, eventually entered into a Rule 11 plea agreement. The plea agreement provided that if Mr. Flenory withdrew his plea before sentencing, he would waive any protections afforded by Rule 410 of the Federal Rules of Evidence. This waiver provision also provided that the government could use testimony and evidence elicited through the Rule 11 proceedings against Mr. Flenory "in any proceeding." Critically, the plea agreement did not require Mr. Flenory to confess to the crimes alleged, or to supply the government with any statement or evidence to corroborate the government's allegations.

Nonetheless, at the plea hearing, the trial court informed Mr. Flenory that, in order for the court to accept his guilty plea, Mr. Flenory needed to confess and answer certain questions to satisfy the

trial court that he was truly guilty. The trial court further informed Mr. Flenory that his guilty plea constitutes a waiver of his right against self-incrimination when answering the trial court's questions. Specifically, the trial court asked Mr. Flenory, "i[f] you plead guilty you also understand you waive your right not to incriminate yourself since I may ask you questions about what you did to satisfy myself that you are guilty and you will have to acknowledge the fact that you are guilty." The trial court also instructed Mr. Flenory that if he withdrew his guilty plea for any reason, the government would be able use his responses during the plea colloquy against him. To wit: "[a]nd if I let you withdraw your plea for any reason, they can use these statements made here today against you, right?" Mr. Flenory responded, "I guess, yes."

The trial court proceeded to ask Mr. Flenory whether he was guilty of each of the charges contemplated by the plea agreement, and asked specific questions about the extent of his culpability. In addition, the trial court, *sua sponte*, offered the government an opportunity to question Mr. Flenory. Directly in response to the questioning by the trial court and the government, Mr. Flenory confessed, and provided inculpatory testimony regarding details of the alleged crimes. Until that point, Mr. Flenory had not confessed, and had not cooperated with any government request for specific information related to his charges. After the entry of his plea, Mr. Flenory was sentenced to a total of thirty (30) years in prison, with five years supervised release to follow.

Without a doubt, Mr. Flenory was caught in

the dilemma described above. The trial court's insistence that he explain, in detail, the manner in which he committed the crimes alleged against him, effectively eviscerated Mr. Flenory's ability to withdraw his plea before sentencing. Indeed, had he done so, Mr. Flenory would have been confronted with his compelled confession at trial. The trial court's questioning during the plea colloquy not only infringed on Mr. Flenory's Fifth Amendment rights, but it was unnecessary. Ultimately, the parties had already stipulated to certain facts. Worse still, Mr. Flenory's attorneys did nothing to protect against his admissions and the exchange between Mr. Flenory and the trial court, notwithstanding that they could have invoked his Fifth Amendment rights. However, even had the attorneys done so, Mr. Flenory faced life in prison and was set to be sentenced by the same trial court. Thus, Mr. Flenory was naturally hesitant to refuse to answer the trial court's questions, for fear that the trial court would either refuse to accept his plea or would impose a harsh sentence upon him.

Thus, Mr. Flenory, like countless defendants across the country who enter into plea agreements containing Rule 410 waiver provisions, chose not to withdraw his plea before sentencing, and instead, was forced to resort to other methods of post-conviction relief. These methods are much less likely to ensure the preservation of defendants' constitutional rights, and unnecessarily burden our court system. Therefore, this Court should intervene, and resolve the dilemma that arises when defendants enter into plea agreements with Rule 410 waivers, and are questioned extensively and unnecessarily during Rule 11 proceedings.

CONCLUSION

For the reasons described herein, the Petitioner respectfully requests that this Court grant his petition for a writ of certiorari, and review the proceedings below.

Respectfully Submitted on this 27th day of

December, 2011.

Robert L. Sirianni Jr., ESQ.
Counsel of Record
BROWNSTONE, P.A.
400 N. NEW YORK AVE.
SUITE 215
WINTER PARK, FLORIDA
32789
(800) 215-1839

APPENDIX