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

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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?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

APPENDIX.....iv

TABLE OF AUTHORITIES.....v

DECISIONS BELOW.....2

JURISDICTIONAL STATEMENT.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....5

I. THIS COURT SHOULD SET THE PARAMETERS OF THE RULE 11 DUTY TO ENSURE A FACTUAL BASIS EXISTS TO SUPPORT A GUILTY PLEA 6

A. The Legal Framework and the Resulting Dilemma.....7

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.....11

C. This Petition Should be Granted Because it Reveals How Lack of Boundaries in Rule 11 Proceedings Gives Rise to the Dilemma.....14

CONCLUSION.....18

APPENDIX

Page(s)

APPENDIX A
Order of the Court,
United States Court of Appeals for the Sixth Circuit
Case No. 10-1214, August 1, 2011.....1a

APPENDIX B
Order of the Court,
United States Court of Appeals for the Sixth Circuit
Case No. 10-1214, May 23, 2011.....6a

APPENDIX C
Order of the Court,
United States Court of Appeals for the Sixth Circuit
Case No. 10-1214, June 13, 2011.....8a

APPENDIX D
Order of December 11, 2009
Memorandum and Order Denying Petitioner's Motion to Vacate, Set Aside, or Correct Sentence Under § 2255
United States District Court for the Eastern District of Michigan
Case No. 2:05-CR-80955-AC-RSW, ...10a

APPENDIX E
Order of January 22, 2010
Case No. 2:05-CR-80955-AC-RSW, Order Denying Motion for Cert. of Appealability.....19a

TABLE OF AUTHORITIES

Page(s)

CASES

Boykin v. Alabama,
395 U.S. 238 (1969).....11

Hill v. Lockhart,
474 U.S. 52 (1985).....13

McCarthy v. United States,
394 U.S. 459 (1969).....11

Mitchell v. United States,
526 U.S. 314 (1998).....8, 9

Padilla v. Kentucky,
130 S. Ct. 1473 (2010).....12

Strickland v. Washington,
466 U.S. 668 (1984).....12

United States v. Burch,
156 F.3d 1315, 1322-23 (D.C. Cir. 1998).....10

United States v. Mezzanatto,
513 U.S. 196 (1994).....8, 9, 10

United States v. Mitchell,
2011 WL 322371, *9 (10th Cir. 2001).....10

United States v. Sylvester,
583 F.3d 285 (5th Cir. 2009).....10

United States v. Young,
223 F.3d 905, 911 (8th Cir. 2000).....10

STATUTES

18 U.S.C. § 1956(a)(1) and (h).....3

28 U.S.C. § 848(a) and (c).....3

28 U.S.C. § 1254(1).....2

28 U.S.C. §2255.....5

OTHER AUTHORITIES

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 (2006).....7, 8

Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation,*
38 Hastings Const. L.Q. 1029 (2011).....7, 10

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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.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-1214

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DEMETRIUS EDWARD FLENORY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Demetrius Edward Flenory, a pro se federal prisoner, appeals a district court judgment denying his motion to vacate sentence, construed as filed pursuant to 28 U.S.C. § 2255. This court construes the notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b).

Pursuant to a Federal Rule of Criminal Procedure 11 agreement, Flenory pleaded guilty to conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848 and conspiring to launder money in violation of 18 U.S.C. § 1956(h). In 2008, the district court sentenced him to 360 months of imprisonment. Flenory did not appeal.

In his motion to vacate sentence, Fleonry claimed that: 1) his guilty plea was obtained by fraud; 2) his attorney was ineffective during the plea negotiations; 3) Congress lacked the authority to enact the Controlled Substances Act (CSA), 21 U.S.C. §§ 801-971; 4) the charges of conspiracy and continuing criminal enterprise violate the Constitution and statutes enacted by Congress; 5) Congress lacked the authority to enact Federal Rule of Criminal Procedure 11; and 6) he was not indicted by a valid grand jury. The district court denied Flenory's motion to vacate sentence and found no grounds upon which to grant him a certificate of appealability.

Upon consideration, Felnory's application for a certificate of appealability is denied because he has not made a substantial showing of the denial of a federal constitutional right for the reasons set forth in the district court's memorandum and order of December 11, 2009. *See Tennard v. Dretke*, 542 U.S. 274, 282 (2004).

Flenory first contended that the prosecution fraudulently induced his guilty plea by adding indictment counts that had no legal basis. The district court, however, by complying with the requirements of Federal Rule of Criminal Procedure 11, properly determined that Flenory knowingly and voluntarily entered a guilty plea. Rule 11 ensures that a defendant pleading guilty understands his applicable constitutional rights, that his plea of guilty is voluntarily made with a full understanding of the nature of the crime charged and the

consequences of his guilty plea, and that a factual basis exists for the crime to which the plea is being offered. *United States v. Lalonde*, 509 F.3d 750, 759-60 (6th Cir. 2007); *United States v. Goldberg*, 862 F.2d 101, 106 (6th Cir. 1988).

Flenory executed a plea agreement, and the terms of that agreement were summarized in open court. The district court also explained the elements of the offenses and consequences of Flenory's plea in terms of the possible length of sentence. The district court addressed Flenory's right to plead not guilty, his right to trial by jury, the right to counsel, the right to cross-examine witnesses, and the right to subpoena witnesses. The defendant stated that he understood these rights and that he was waiving them. The district court went further to explain the presumption of innocence, the government's burden to prove its case beyond a reasonable doubt, and Flenory's right to remain silent. The charges against Flenory were set forth in open court, and Flenory endorsed the factual basis as true and accurate. Thus, the court met Rule 11's requirements. Consequently, the record reveals that Flenory knowingly, intelligently, and voluntarily pleaded guilty.

Flenory claimed that his attorney was ineffective because counsel should have known the indictment was "bad" and should not have pursued a plea agreement. To establish ineffective assistance of counsel, a petitioner must show both that his attorney's performance was deficient and that his defense was prejudiced by counsel's alleged errors.

Strickland v. Washington, 466 U.S. 668,687 (1984). Flenory did not establish that his attorney performed deficiently. Rather, Flenory merely contended – without – support – that the indictment was "bad." His contention is meritless for the reasons that follow.

Flenory argued that Congress lacked the authority to enact 21 U.S.C. §§ 801, 848, and Federal Rule of Criminal Procedure 11. Flenory's challenge to the constitutionality of the CSA is foreclosed by precedent. *See, e.g., United States v. Brown*, 276 F.3d 211, 214-15 (6th Cir. 2002) (noting that the circuit courts have consistently rejected the argument that Congress lacks the authority to regulate drug crimes that occur solely intrastate); *United States v. Scales*, 464 F.2d 371,373 (6th Cir. 1972) (concluding that Congress did not exceed its powers under the Commerce Clause by enacting § 841). As the Supreme Court recently noted, it is well-established that Congress has the power "to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," including the possession and distribution of illegal drugs. *Gonzales v. Raich*, 545 U.S. 1, 17, 20-22 (2005) (upholding constitutionality of the CSA as applied to the intrastate manufacture and possession of marijuana for personal medical use). Flenory's challenge to the constitutionality of Rule 11 is similarly foreclosed. *See Goldberg,* 862 F.2d at 106.

Finally, Flenory contended that he was not indicted by a valid grand jury. Flenory argued that

"the words 'grand jury' were construed by their authors since 1906 and that Congress had no authority to change the *meaning* or the *intent* of the Fifth Amendment's authors, rendering all grand jury proceedings since then unconstitutional." The grand jury's evolution since 1906 does not render Flenory's grand jury invalid. *See United States v. Smith*, 687 F.2d 147, 149 (6th Cir. 1982).

Accordingly, Flenory's application for a certificate of appealability is denied. All outstanding motions are also denied.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-1214

DEMETRIUS EDWARD FLENORY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: COLE, MCKEAGUE, and WHITE, Circuit Judges.

Demetrius Edward Flenory, petitions the court to rehear en banc its order denying him a certificate of appealability. The motion has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact

in issuing the order, and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10-1214

———

DEMETRIUS EDWARD FLENORY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

Before: COLE, MCKEAGUE, and WHITE, Circuit Judges.

Demetrius Edward Flenory, a federal prisoner, petitions for rehearing en banc of this court's order entered on November 18, 2010, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all of the active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to

established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Clerk

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

DEMETRIUS EDWARD FLENORY,

Defendant/Petitioner.

Case No. 05-80955-02

MEMORANDUM AND ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. §2255

1. Introduction

This is a habeas case under 22 U.S.C. § 2255. Petitioner Demetrius Edward Flenory (Petitioner) plead guilty under a Rule 11 agreement to continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 21 U.S.C. § 848 and conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). Petitioner was sentenced to 360 months of imprisonment. Petitioner did not file a direct appeal. Before the Court is Petitioner's pro se motion to vacate his sentence under § 2255, claiming that his constitutional rights have been violated. He specifically claims that (1) his guilty plea was fraudulently obtained, (2) he received ineffective assistance of counsel during his plea negotiations, (3) Congress lacked authority to enact 21 U.S.C. § 801, (4) the charge of conspiracy and CCE violates the Constitution and statutes enacted by Congress, (5) Congress lacked the authority to enact Rule 11, and (6) Petitioner was not indicted by a valid grand jury. The government has filed a response, contending all of Petitioner's claims lack merit. The Court agrees. Accordingly, the motion will be denied.

II. Background

On October 28, 2005, Petitioner was charged in a multi-count and multi- defendant indictment with various drug related charges. In particular, Petitioner was charged as one of the leaders of a large scale cocaine distribution organization. The organization, which was started by Petitioner and his brother, eventually adopted the name Black Mafia Family. The offenses occurred from January

1990 to the date of the indictment. Petitioner was denied bond. The indictment was superceded several times. The Fourth Superceding Indictment, filed December 15, 2006, is the governing charging document.

On November 19, 2007, Petitioner plead guilty to CCE and money laundering, which were Counts 3 and 10 of the Fourth Superceding Indictment. The plea was part of a Rule 11 agreement in which Petitioner and the government agreed the sentencing guideline range was 360 months to life.

III. Analysis

A. General Standard

Title 28 U.S.C. § 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . of that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

To prevail under § 2255, Petitioner must show a "fundamental defect which inherently results in a complete miscarriage of justice." U.S. v Timmreck, 441 U.S. 780,783 (1979) (quoting Hill v U.S., 368 U.S. 424, 428 (1962)).

B. Guilty Plea Claim

Petitioner first claims that his guilty plea was obtained fraudulently. He alleges that there was a "stacking of bogus charges" which "deceived" him into thinking he was facing more charges than the law allows. The Court of Appeals for the Sixth Circuit has held that a defendant's sentence will not be vacated on the ground that the plea of guilty was coerced where the defendant was "carefully interrogated by the trial judge with respect to the offenses committed," where the defendant was represented by "competent counsel," and where the defendant "discussed the offenses freely and voluntarily and freely admitted guilt, while fully aware of [his] rights." United States v. Parker, 292 F.2d 2,3 (6th Cir. 1961)

In addition, it is well-settled that where a court scrupulously follows the requirements of Rule 11 "'the defendant is bound by his statements in response to that court's inquiry.' " Baker v. United States, 781 F.2d 85, 90 (6th Cir. 1986) (quoting Moore v. Estelle, 526 F.2d 690, 696-97 (5th Cir. 1976)).

Here, a review of the plea transcript shows that the Court questioned Petitioner extensively and that Petitioner understood his rights, including the rights he was waiving, the charges against him, and the sentence he faced. Petitioner particularly stated he understood that as to the CCE charge, he faced a mandatory minimum of 20 years and a maximum of life. Petitioner also

testified to the factual basis for each charge– admitting to being a leader of a large scale drug operation and laundering money. At no time did Petitioner object or otherwise express any concerns about his plea. As such, there is no basis in fact or law to find Petitioner's plea.

Based upon the record, it is clear that Petitioner's guilty plea was voluntarily and intelligently made. Moreover, the fact that petitioner waived his right to appeal did not render his plea agreement unconstitutional. See United States v. Ashe, 47 F.3d 770, 775-76 (6th Cir.1995) ("Any right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily."). As such, Petitioner is not entitled to relief on this claim.

B. Ineffective Assistance of Counsel

Petitioner claims that his trial counsel was ineffective because he should have know the indictment was "bad" and should not have pursued a plea agreement. In order to succeed on a claim of ineffective assistance of counsel, Petitioner must show (1) that his counsel's performance was constitutionally deficient in that the performance "fell below an objective standard of reasonableness under prevailing professional norms" and (2) that he was prejudiced by his counsel's errors. Magana v. Hofbauer, 263 F.3d 542, 547 (6th Cir. 2001) (citing Strickland v. Washington, 466 U.S. 668, 687 -88 (1984)). In order to establish prejudice, Petitioner must demonstrate that "there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The Strickland analysis also applies to claims of ineffective assistance of counsel involving counsel's advice offered during the plea process." Magana, 263 F.3d at 547 (quoting Hill v.Lockhart, 474 U.S. 52, 58 (1985)).

Petitioner has not made such a showing. Petitioner's bald assertion that the indictment was "bad" fails to establish any error by counsel. To the contrary, Petitioner's counsel ably represented Petitioner in negotiating a plea agreement which allowed for the possibility that Petitioner would receive a term of years sentence as opposed to a life sentence. Moreover, as discussed below, to the extent Petitioner claims that trial counsel was ineffective for advising Petitioner to plead guilty to statutes which he says are unconstitutional, this claim fails.

C. Constitutional Claims

Petitioner next raises a host of claims regarding the constitutionality of 21 U.S.C.§ 801, 21 U.S.C. § 848, and Rule 11, essentially contending that Congress did not have the authority to enact these statutes and rule. These claims lack merit. First, Congress had the authority under the commerce clause to enact 21 U.S.C. § 801. See United States v. Scales, 464 F.2d 371 (6th Cir. 1972)) ("[T]he provisions of Title II of the Comprehensive Drug Abuse Prevention and Control Act [enacted as the

Controlled Substances Act, 21 U.S.C. §§ 801-971] presently before us clearly constitute a permissible exercise of Congress's powers under the Commerce Clause.").

Second, as to 21 U.S.C. § 848, Petitioner cites Justice Jackson's concurring opinion in Krulewitch v. United States, 336 U.S. 400 (1949) where Justice Jackson found there was no basis for a doctrine of implied or constructive conspiracies. Putting aside that such a statement was dicta, Petitioner was charged with participation in a direct conspiracy and the facts admitted at his plea support the charged crime of running a continuing criminal enterprise. There is no support for Petitioner's argument that conspiracy law in general violates the Constitution. Even Justice Jackson recognized that conspiracy "has some place in modern criminal law." 336 U.S. at 448.

Likewise, the money laundering statutes have been upheld. See United States v Hook, 195 F.3d 299, 310 (7th Cir. 1999) (stating that "Defendant's argument ignores Article 1, Section 8 of the United States Constitution, the Commerce Clause, as a source of legislative authority. Section 1956 of the U.S. Code, Title 18, is a valid extension of congressional power."); United States v Goodwin, 141 F.3d 394, 398-99 (2d Cir. 1997) (stating that "[m]oney laundering is a quintessential economic activity.")

Finally, Petitioner contends that he was denied a fair trial because Congress lacked authority to enact Rule 11 because the right to a jury trial cannot

be waived. This claim fails. It has long been established that the right to plead guilty and waive a trial is constitutionally permissible. See Brady v. United States, 397 U.S. 742, 749 (1970); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). The Constitution requires that such circumstances reflect that the defendant be informed of all the direct consequences of a guilty plea. Brady, 397 U.S. at 755. Rule 11 highlights the constitutional requirements in stating that a defendant pleading guilty understands his applicable Constitutional rights, that his plea of guilty is voluntary with a full understanding of the nature of the crime charged and the consequences of his guilty plea, and that a factual basis exists for the crime to which the plea is being offered. United States v. Goldberg, 862 F.2d 101, 106 (6th Cir. 1988). Moreover, Congress has long been given the right to regulate procedures in federal court, which would include enacting rules of criminal procedure. See Wayman v. Southland, 21 U.S. 1 (1825).

E. Grand Jury Claim

Petitioner's final claim is that the entire grand jury process is unconstitutional. Petitioner suggest that the grand jury process has become something different than what the founding fathers intended because prosecutor may be present and draft indictments. Although neither the Constitution nor the Judiciary Act of 1789 established grand juries, the Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on

presentment or indictment of a Grand Jury...." This requirement has defined the role of the grand jury primarily as the protector of the accused, rather than as the accuser. As the Supreme Court has explained:

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.Wood v. Georgia, 370 U.S. 375, 390 (1962). The grand jury is "an investigative and prosecutorial arm of the executive branch of government" and the United States Attorney has the right to be present and select witnesses to be subpoenaed and generally direct the investigation. United States v. Smith, 687 F.2d 147, 149 (6th Cir. 1982) (quoting In re Grand Jury Proceedings (Schofield), 486 F.2d 85, 90 (3rd Cir. 1973). Even if the role of the grand jury, which has roots in English common law, has changed over time, the process itself is constitutional.

IV. Conclusion

For the reasons stated above, Petitioner's motion under 28 U.S.C. § 2255 is DENIED. All pending motions are DENIED AS MOOT.

SO ORDERED.

s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: December 11, 2009

I hereby certify that a copy of the foregoing document was mailed to Demetrius Flenory,# 13037-078, FCI Jesup, Federal Correctional Institution, 2680 301 South, Jesup, GA 31599 and the attorneys of record on this date, December 11, 2009, by electronic and/or ordinary mail.

S/Julie Owens
Case Manager
(313)234-5160

APPENDIX E

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

DEMETRIUS EDWARD FLENORY,

Defendant/Petitioner.

Case No. 05-80955-02
HON. AVERN COHN

ORDER DENYING MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR A CERTIFICATE OF APPEALABILITY

I.

This is a habeas case under 22 U.S.C. § 2255. Petitioner Demetrius Edward Flenory (Petitioner) plead guilty under a Rule 11 agreement to continuing criminal enterprise (CCE), in violation of 21 U.S.C. § 21 U.S.C. § 848 and conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). Petitioner was sentenced to 360 months of imprisonment. Petitioner did not file a

direct appeal. Petitioner later filed a pro se motion to vacate his sentence under § 2255, claiming that his constitutional rights had been violated. He

specifically claimed that (1) his guilty plea was fraudulently obtained, (2) he received ineffective assistance of counsel during his plea negotiations, (3) Congress lacked authority to enact 21 U.S.C. § 801, (4) the charge of conspiracy and CCE violates the Constitution and statutes enacted by Congress, (5) Congress lacked the authority to enact Rule 11, and (6) Petitioner was not indicted by a valid grand jury.

The Court denied the motion for lack of merit. See Memorandum and Order filed December 11, 2009.Before the Court is Petitioner's motion for reconsideration or, in the alternative, motion for a certificate of appealability. For the reasons that follow, the motion is DENIED.

II.

As to Petitioner's request for reconsideration, E.D. Mich. LR 7.1(g) provides in relevant part:

Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

Petitioner fails to satisfy this standard. While Petitioner disagrees with the Court's analysis and resolution of his claims and says the Court

misinterpreted certain aspects of his claims, he has not convinced the Court that it erred in concluding his claims lacked merit. Moreover, the Court does not find that it misinterpreted his claims such that the result should be different.

III.

As to Petitioner's request for a certificate of appealability (COA), a COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595 (2000), the United States Supreme Court held that where, the petition is dismissed on procedural grounds, petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different matter or that the the issues presented were 'adequate to deserve encouragement to proceed further.'" 120 S. Ct. at 1603-04 (quoting Barefoot v. Estelle, 463 U.S. 880, 898 n.4 (1983)). Where a petition is rejected on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604.

The Supreme Court has also explained that "[t]his threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). "A prisoner seeking a COA

must prove 'something more than the absence of frivolity' 'or the existence of mere good faith on his or her part.'" A prisoner need not prove that "some jurists would grant the petition for habeas corpus .... A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 1040.

In the Sixth Circuit, the Court must make an individualized determination of each claim raised in the petition in considering whether or not to grant a COA. See Murphy v. State of Ohio, 263 F.3d 466 (6th Cir. 2001) (per curiam).

Petitioner raised several claims, as noted above. The Court carefully considered each claim and found they each lacked merit. For the reasons stated in the Memorandum and Order of December 11, 2009, reasonable jurists would not debate the Court's conclusions.

SO ORDERED.

Dated: January 22, 2010

s/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

05-80955-02 USA v. Demetrius Flenory
Order Denying Motion for Reconsideration, etc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was mailed to Demetrius Flenory, # 13037-078, FCI Jesup, Federal Correctional Institution, 2680 301 South, Jesup, GA 31599 and the attorneys of record on this date, January 22, 2010, by electronic and/or ordinary mail.

s/Julie Owens
Case Manager, (313) 234-5160