SUPREME COURT OF THE UNITED STATES

No. 00–973

UNITED STATES, PETITIONER *v.* ALPHONSO VONN

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

[March 4, 2002]

JUSTICE STEVENS concurring in part and dissenting in part.

For the reasons stated in Part III of the Court's opinion, I agree that the effect of a violation of Rule 11 of the Federal Rules of Criminal Procedure should be evaluated on the basis of the entire record, rather than just the record of the plea colloquy, and that a remand is therefore required. Contrary to the Court's analysis in Part II of its opinion, however, I am firmly convinced that the history, the text of Rule 11, and the special office of the Rule all support the conclusion, "urged by the Government" in *McCarthy* v. *United States*, 394 U. S. 459, 469 (1969), that the burden of demonstrating that a violation of that Rule is harmless is "place[d] upon the Government," *ibid*.

In *McCarthy,* after deciding that the trial judge had not complied with Rule 11, the Court had to "determine the effect of that noncompliance, an issue that ha[d] engendered a sharp difference . . . among the courts of appeals." *Id*. at 468. The two alternatives considered by those courts were the automatic reversal rule that we ultimately unanimously endorsed in *McCarthy* and the harmless-error rule urged by the Government.[1] No one even argued

[1] *McCarthy* was decided 15 years after the adoption of Rule 52, and yet neither the parties nor the Court discussed the application of that Rule despite the fact that the defendant had failed to object to the Rule

that the defendant should have the burden of proving prejudice.[2] The Court's conclusion that "prejudice inheres in a failure to comply with Rule 11" was uncontroversial.[3] *Id*., at 471.

During the years preceding the 1983 amendment to Rule 11, it was generally understood that noncompliance with Rule 11 in direct appeal cases required automatic reversal. See Advisory Committee's Notes on 1983 Amendments to Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1568 (hereinafter Advisory Committee's Notes) (citing *United States* v. *Boone*, 543 F. 2d 1090 (CA4 1976); *United States* v. *Journet*, 544 F. 2d 633 (CA2 1976)). Thus, prior to the addition of Rule 11(h), *neither* plain error[4] nor harmless-error review applied to Rule 11 violations. Rejecting *McCarthy*'s "extreme sanction of automatic reversal" for technical violations, Congress added subsection 11(h), which closely tracks the harmless-error

---

11 error.

[2] Nor did the Government make such an argument in the Court of Appeals in this case. That should be a sufficient reason for refusing to consider the argument here, see *United States* v. *Williams*, 504 U. S. 36, 55–61 (1992) (STEVENS, J. dissenting), but, as in *Williams*, the Court finds it appropriate to accord "a special privilege for the Federal Government," *id.,* at 59.

[3] "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *McCarthy* v. *United States*, 394 U. S. 459, 471–472 (1969). Not a word in the proceedings that led to the amendment rejecting the automatic reversal remedy questioned the validity of the proposition that every violation of the Rule is presumptively prejudicial. The amendment merely gives the Government the opportunity to overcome that presumption.

[4] Rule 52(b) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." When a court reviews for plain error, the burden is on the defendant to show that the error affected his substantial rights. *United States v. Olano*, 507 U. S. 725, 734–735 (1993).

language of Rule 52(a).[5] Advisory Committee's Notes 1569. As the Advisory Committee Notes make clear, "Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead *merely* rejects the extreme sanction of automatic reversal." *Ibid.* (emphasis deleted and added). The plain text thus embodies Congress' choice of incorporating the standard found in Rule 52(a), while omitting that of Rule 52(b).[6] Because the pre-existing background of Rule 11 was that Rule 52(b) did not apply, and because the amendment adding Rule 52(a) via subsection (h), did not also add Rule 52(b), the straightforward conclusion is that plain-error review does not apply to Rule 11 errors.

Congress' decision to apply *only* Rule 52(a)'s harmless-error standard to Rule 11 errors is tailored to the purpose of the Rule. The very premise of the required Rule 11 colloquy is that, even if counsel is present, the defendant may not adequately understand the rights set forth in the Rule unless the judge explains them. It is thus perverse to place the burden on the uninformed defendant to object to deviations from Rule 11 or to establish prejudice arising out of the judge's failure to mention a right that he does not know he has.[7] Under the Court's approach, the Gov-

---

[5] Rule 52(a) states: "Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 11(h) states: "Harmless error. Any variance from the procedures required by the rule which does not affect substantial rights shall be disregarded."

[6] The Court incorrectly asserts that this is an argument for repeal by implication of Rule 52(b). *Ante*, at 9 ("To hold that the terms of Rule 11(h) imply that the latter half of Rule 52 has no application to Rule 11 errors would consequently amount to a finding of partial repeal of Rule 52(b) by implication, a result sufficiently disfavored"). This ignores the fact that prior to the enactment of Rule 11(h), courts applied neither Rule 52(a) nor (b) to Rule 11 violations.

[7] The Court states that this is like any other application of the plain-

ernment bears the burden of establishing no harm only when the defendant objects to the district court's failure to inform him. In other words, the Government must show prejudice only when the defendant asks the judge to advise him of a right of which the Rule 11 colloquy assumes he is unaware. To see the implausibility of this, imagine what such an objection would sound like: "Your Honor, I object to your failure to inform me of my right to assistance of counsel if I proceed to trial."

Despite this implausible scenario, and to support the result that it reaches, the Court's analysis relies upon an image of a cunning defendant, who is fully knowledgeable of his rights, and who games the system by sitting silently as the district court, apparently less knowledgeable than the defendant, slips up in following the dictates of Rule 11. See, *e.g. ante*, at 6–7 ("[A] defendant loses nothing by

---

error rule as it is applied to all trial errors. *Ante*, at 17 ("The plain error rule, [Vonn] says, would discount the judge's duty to advise the defendant by obliging the defendant to advise the judge. But, rhetoric aside, that is always the point of the plain error rule. . ."). Unlike most rules that apply to a trial, however, the special purpose of the Rule 11 colloquy is to provide information to a defendant prior to accepting his plea. Given this purpose, it is inconceivable that Congress intended the same rules for review of noncompliance to apply. A parallel example from the self-representation context illustrates this point. Pursuant to *Faretta v. California*, 422 U. S. 806 (1975), a defendant who wishes to represent himself must "be made aware of the dangers and disadvantages of self-representation," *id.*, at 835. Assume a defendant states that he wishes to proceed *pro se*, and the trial judge makes no attempt to warn the defendant of the dangers and disadvantages of self-representation. If the defendant makes no objection to the trial court's failure to warn, surely we would not impose a plain-error review standard upon this nonobjecting defendant. This is so because the assumption of *Faretta*'s warning requirement is that the defendant is unaware of the dangers. It is illogical in this context, as in the Rule 11 context, to require the presumptively unknowing defendant to object to the court's failure to adequately inform. Congress' decision to apply the harmless-error standard to all Rule 11 errors surely reflects this logic.

failing to object to obvious Rule 11 error when it occurs"); *ante*, at 17 ("[A] defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory"). My analysis is based on a fundamentally different understanding of the considerations that motivated the Rule 11 colloquy requirements in the first place. Namely, in light of the gravity of a plea, the court will assume no knowledge on the part of the defendant, even if represented by counsel, and the court must inform him of a base level of information before accepting his plea.[8]

The express inclusion in Rule 11 of a counterpart to Rule 52(a) and the omission of a counterpart to Rule 52(b) is best understood as a reflection of the fact that it is only fair to place the burden of proving the impact of the judge's error on the party who is aware of it rather than the party who is unaware of it. This burden allocation gives incentive to the judge to follow meticulously the Rule 11 requirements and to the prosecutor to correct Rule 11 errors at the time of the colloquy. The Court's approach undermines those incentives.

I would remand to the Court of Appeals to determine whether, taking account of the entire record, the Government has met its burden of establishing that the District Court's failure to inform the respondent of his right to counsel at trial was harmless.

---

[8] See *Kercheval v. United States*, 274 U. S. 220, 223 (1927) ("A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences").