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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
UNITED STATES, :
Petitioner :
v. : No. 00-973
ALPHONSO VONN. :
- - - - -X

Washington, D.C.
Tuesday, November 6, 2001

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

APPEARANCES:

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

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

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MONICA KNOX, ESQ. On behalf of the Respondent	27

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2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 00-973, the United States v. Alphonso Vonn.
5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN
7 ON BEHALF OF THE PETITIONER

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

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

19 The court of appeals decision is wrong for three
20 reasons.

21 First, the court of appeals erred by applying a
22 harmless error rather than a plain error standard of
23 review to the district court's violation of rule 11.
24 Respondent had not objected in the trial court to the rule
25 11 error, and therefore the standard of review is that for

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

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

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

1 stages of the proceeding. Respondent executed a waiver of
2 rights form in which he acknowledged receiving and
3 understanding these rights, and the district magistrate
4 judge asked respondent at the arraignment whether he
5 understood these rights. If the court of appeals had
6 looked to the entire record to determine whether the rule
7 11 error in this case warranted reversal, it would have
8 concluded, even under its own standards, applying harmless
9 error review and asking whether the respondent knew the
10 information that he had not been told during the rule 11
11 colloquy, that respondent, indeed, did have that
12 information and, therefore, entered a valid guilty plea.

13 QUESTION: Mr. Dreeben?

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

25 MR. DREEBEN: Our second argument is that the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. DREEBEN: Yes.

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

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

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

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

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

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

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

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

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

15 The advisory committee notes to rule 11 make
16 clear that the harmless error rule that was added to rule
17 11 in 1983, rule 11(h), was to be applied based on the
18 guilty plea record and the rest of the necessarily limited
19 record that is made in guilty plea cases. But that record
20 will include, as it did here, the initial appearance, the
21 arraignment. Sometimes there will be multiple hearings on
22 whether the defendant wishes to change his plea to a plea
23 of guilty. Admissions may be made during the course of
24 those hearings. And, of course, there is a sentencing
25 hearing. And during the sentencing hearing, the defendant

1 may provide -- be provided with the information that was
2 left out inadvertently of the rule 11 colloquy, and he may
3 at that time either reaffirm his interest in pleading
4 guilty or show no surprise at the information that is
5 provided to him or otherwise make it clear that this rule
6 11 error had no effect on substantial --

7 QUESTION: May I ask you --

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

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

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

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

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

8 QUESTION: All right.

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

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

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

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

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

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

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

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

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

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

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

7 QUESTION: No, nothing else in the record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. DREEBEN: The drafters weren't thinking of

1 this issue. What they were thinking about was
2 specifically negating McCarthy. They also wanted to make
3 it clear -- and they did make clear in the advisory
4 committee notes -- that the addition of rule 11(h) to rule
5 11 was not intended to have a negative inference that
6 violations of other rules should give rise to per se
7 reversal. Rule 52 would remain in place for all of those
8 other errors involving other rules.

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

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

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

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

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

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

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

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

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

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

5 QUESTION: I see.

6 MR. DREEBEN: And those rights --

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

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

15 And in response to *Boykin*, the drafters of the
16 rules wanted to provide a prophylactic buffer to make sure
17 that there could be no valid claims, either on direct
18 appeal or on collateral review, that the defendant pleaded
19 guilty without a sufficient understanding of the rights
20 that he would have at trial if he had gone to trial. So,
21 11(c)(3) walks through the right to counsel, the right to
22 confront witnesses, the right to self-incrimination, and
23 the right to a jury trial. And then it goes on in
24 11(c)(4) and says, by pleading guilty, you waive your
25 right to a trial.

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

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

6 QUESTION: It would be harder.

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

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

10 MR. DREEBEN: That's right.

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

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

17 QUESTION: Right.

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

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

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

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

19 QUESTION: May I ask --

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

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

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

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

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

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

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

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

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

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

15 MR. DREEBEN: Correct. That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 If I could save the remainder of my time.

22 QUESTION: Very well, Mr. Dreeben.

23 Ms. Knox, we'll from you.

24 ORAL ARGUMENT OF MONICA KNOX

25 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MS. KNOX: Specifically there is nothing --

13 QUESTION: No.

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

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

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

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

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

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

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

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

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

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

8 MS. KNOX: Not the sentencing.

9 QUESTION: Okay, thank you.

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

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

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

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

22 MS. KNOX: Yes.

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

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

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

18 This Court has --

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

1 is -- is that much of an objection?

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

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

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

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

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

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

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

3 QUESTION: Why?

4 MS. KNOX: Because it was --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MS. KNOX: Well, the rule itself --

22 QUESTION: What -- what is the textual basis?

23 MS. KNOX: I think the Court --

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

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

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

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

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

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

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

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

1 unconstitutional plea necessarily affects the substantial
2 rights of the defendant.

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

5 MS. KNOX: Hyde.

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

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

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

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

1 And I was only pointing out --

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

6 MS. KNOX: The --

7 QUESTION: I mean --

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

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

13 MS. KNOX: The committee notes --

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

16 MS. KNOX: Excuse me.

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

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

25 The committee notes, though, are the legislative

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

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

7 QUESTION: What part of the notes?

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

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

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

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

4 The other thing in rule (h) --

5 QUESTION: Were those comments made in
6 connection -- are -- are they placed in the record beside
7 11(h) and 11(g)?

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

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

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

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

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

1 shown in this litany of examples that you referred to a
2 moment ago -- a series of situations that they wanted to
3 address. Those were all situations, which under rule 52
4 alone, would have been dealt with on a plain error
5 standard, and they nonetheless imported into -- into rule
6 11 nothing but the harmless error standard.

7 MS. KNOX: That's right.

8 QUESTION: Is that your factual claim in a
9 nutshell?

10 MS. KNOX: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

1 about it when he is standing there.

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

6 QUESTION: What's something?

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

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

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

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

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

6 MS. KNOX: Absolutely not.

7 QUESTION: Why not?

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

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

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

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

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

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

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

6 MS. KNOX: No.

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

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

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

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

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

11 Thank you.

12 QUESTION: Thank you, Ms. Knox.

13 Mr. Dreeben, you have half a minute left.

14 (Laughter.)

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

17 (Laughter.)

18 MR. DREEBEN: -- the Government will submit.

19 QUESTION: Very well.

20 The case is submitted.

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

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