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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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UNITED STATES *v.* VONNCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 00–973. Argued November 6, 2001—Decided March 4, 2002

Federal Rule of Criminal Procedure 11 lays out steps that a judge must take to ensure that a guilty plea is knowing and voluntary. Rule 11(h)'s requirement that any variance from those procedures “which does not affect substantial rights shall be disregarded” is similar to the general “harmless-error” rule in Rule 52(a). However, Rule 11(h) does not include a plain-error provision comparable to Rule 52(b), which provides that a defendant who fails to object to trial error may nonetheless have a conviction reversed by showing among other things that plain error affected his substantial rights. After respondent Vonn was charged with federal bank robbery and firearm crimes, the Magistrate Judge twice advised him of his constitutional rights, including the right to be represented by counsel at every stage of the proceedings; Vonn signed a statement saying that he had read and understood his rights; and he answered yes to the court's questions whether he had understood the court's explanation of his rights and whether he had read and signed the statement. When Vonn later pleaded guilty to robbery, the court advised him of the constitutional rights he was relinquishing, but skipped the advice required by Rule (11)(c)(3) that he would have the right to assistance of counsel at trial. Subsequently, Vonn pleaded guilty to the firearm charge and to a later-charged conspiracy count. Again, the court advised him of the rights he was waiving, but did not mention the right to counsel. Eight months later, Vonn moved to withdraw his guilty plea on the firearm charge but did not cite Rule 11 error. The court denied the motion and sentenced him. On appeal, he sought to set aside all of his convictions, for the first time raising Rule 11. The Ninth Circuit agreed that there had been error and held that Vonn's failure to object before the District Court to the Rule 11 omission was

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of no import because Rule 11(h) subjects all Rule 11 violations to harmless-error review. Declining to go beyond the plea proceeding in considering whether Vonn was aware of his rights, the court held that the Government had not met its burden, under harmless-error review, of showing no effect on substantial rights, and vacated the convictions.

Held:

1. A defendant who lets Rule 11 error pass without objection in the trial court must satisfy Rule 52(b)'s plain-error rule. Pp. 5–18.

(a) Relying on the canon that expressing one item of a commonly associated group or series excludes another left unmentioned, Vonn claims that Rule 11(h)'s specification of harmless-error review shows an intent to exclude the plain-error standard with which harmless error is paired in Rule 52. However, this canon is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives. Here, the harmless- and plain-error alternatives are associated together in Rule 52, having apparently equal dignity with Rule 11(h), and applying by its terms to error in the application of any other Rule of Criminal Procedure. To hold that Rule 11(h)'s terms imply that the latter half of Rule 52 has no application to Rule 11 errors would amount to finding a partial repeal of Rule 52(b) by implication, a result sufficiently disfavored, *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 1017, as to require strong support. Support, however, is not readily found, for Vonn has merely selected one possible interpretation of the supposedly intentional omission of a Rule 52(b) counterpart while logic would equally allow a reading that, without a plain-error rule, a silent defendant has no right of review on direct appeal. Pp. 7–10.

(b) Vonn attempts to find support for his reading by pointing beyond the Rule's text to *McCarthy v. United States*, 394 U. S. 459—which was decided when Rule 11 was relatively primitive—and the developments in that case's wake culminating in Rule 11(h)'s enactment. One clearly expressed Rule 11(h) objective was to end the practice of reversing automatically for any Rule 11 error, a practice stemming from reading *McCarthy* expansively to require that Rule 52(a)'s harmless-error provision could not be applied in Rule 11 cases. However, *McCarthy* had nothing to do with the choice between harmless-error and plain-error review. Nor is there any persuasive reason to think that when the Advisory Committee and Congress considered Rule 11(h) they accepted the view Vonn erroneously attributes to this Court in *McCarthy*. The Advisory Committee focused on the disarray, after *McCarthy*, among Courts of Appeals in treating trivial errors. The cases cited in the Committee's Notes cannot relia-

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bly be read to suggest that plain-error review should never apply to Rule 11 errors, when the Notes never made such an assertion and the cases never mentioned the plain-error/harmless-error distinction. Rather, the Committee should be taken at its word that the harmless-error provision was added because some courts read *McCarthy* to require that Rule 52(a)'s general harmless-error provision did not apply to Rule 11 proceedings. The Committee implied nothing more than it said, and it certainly did not implicitly repeal Rule 52(b) so far as it might cover a Rule 11 case. Pp. 10–16.

(c) Vonn's position would also have a tendency to undercut the object of Rule 32(e), which governs guilty plea withdrawal by creating an incentive to file withdrawal motions before sentence, not afterward. This tends to separate meritorious second thoughts and mere sour grapes over a sentence once pronounced. But the incentive to think and act early when Rule 11 is at stake would prove less substantial if a defendant could be silent until direct appeal, when the Government would always have the burden to prove harmlessness. Pp. 16–18.

2. A reviewing court may consult the whole record when considering the effect of any Rule 11 error on substantial rights. The Advisory Committee intended the error's effect to be assessed on an existing record, but it did not mean to limit that record strictly to the plea proceeding, as the Ninth Circuit did here. *McCarthy* ostensibly supports that court's position; but it was decided before Rule 11(h) was enacted, and it was not a case with a record on point. Here, in addition to the transcript of the plea hearing and Rule 11 colloquy, the record shows that Vonn was advised of his right to trial counsel during his initial appearance and twice at his first arraignment, and that four times either he or his counsel affirmed that he had heard or read a statement of his rights and understood them. Because there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceeding, cf. *Bousley v. United States*, 523 U. S. 614, 618, the record of Vonn's initial appearance and arraignments is relevant in fact and well within the Advisory Committee's understanding of the record that should be open to consideration. Since the transcripts of Vonn's first appearance and arraignment were not presented to the Ninth Circuit, this Court should not resolve their bearing on his claim before the Ninth Circuit has done so. Pp. 18–20.

224 F. 3d 1152, vacated and remanded.

SOUTER, J., delivered the opinion of the Court, Part III of which was unanimous, and Parts I and II of which were joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, GINSBURG, and

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BREYER, JJ. STEVENS, J., filed an opinion concurring in part and dissenting in part.