

No. 19-

IN THE
Supreme Court of the United States

MARGARITA MORA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which held Rule 11 of the Federal Rules of Criminal Procedure had not been violated and further held there was no due process violation—conflicts with the decisions of other Circuits on an important matter, and therefore decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Margarita Mora:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, MARGARITA MORA, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, which is in conflict with rulings of other Circuits on the issue of requiring the District Court to clearly explain the minimum and maximum sentence when taking a plea, such that a compelling reason is presented in support of discretionary review by this Honorable Court.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Margarita Mora*, No. 18-50622 (5th Cir. Aug. 16, 2019), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Midland Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

On August 16, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Ms. Mora. A copy of this Order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. A copy of the Judgment issued by the United States District Court for the Western District of Texas, Midland Division, is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Indictment

On January 24, 2018, the Government filed an indictment against Margarita Mora and her husband, Danny Mora. ROA.8. The indictment charged that Ms. Mora, aided and abetted by her husband, knowingly and intentionally possessed with intent to distribute five grams or more of methamphetamine. ROA.8.

The Sentencing Enhancement

On the same day, the Government filed a Sentencing Enhancement Information Alleging:

That the Defendant,

2. MARGARITA MORA

is a person who has been convicted of a felony drug offense on the following occasion:

On or about September 18, 2009, the Defendant was convicted of Conspiracy to Manufacture Methamphetamine, in the United States District Court for the Western District of Texas–Midland/Odessa Division in Cause Number MO-09-CR-116.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the Defendant that upon her conviction for the offense charged in Count One of the above-numbered Indictment, the Government will request the court to enhance Defendant's sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code, Section 841(b)(1)(B). Due to the Defendant's prior felony drug conviction, this statute provides for a minimum term of imprisonment of ten (10) years, for a maximum term of life imprisonment, for a term of supervised release of at least eight (8) years, and that, notwithstanding any other provision of law, the Court shall not suspend the sentence of, or grant a probationary sentence to Defendant, nor shall Defendant be eligible for parole.

ROA.9-10 (emphasis in original).

The Plea Agreement

A plea agreement was filed with the Court on April 17, 2018. ROA.137-44. In this plea agreement, the Government included a provision which sought to obtain a waiver of Mrs. Mora's trial rights and appellate rights. ROA.138-141.

The Guilty Plea Hearing

On April 17, 2018, the Magistrate Judge accepted Mrs. Mora's plea of guilty. ROA.95. Relevant to the direct appeal and this Petition, the Magistrate Judge explained and asked Mrs. Mora:

Now, as part of your plea agreement, you've waived your right to appeal or to collaterally attack the conviction and sentence you'll receive.

Ms. Mora, did you understand that you waive your right to appeal or to collaterally attack the conviction and sentence you'll receive?

ROA.100. Mrs. Mora responded: "Yes, sir." ROA.100.

The Court then discussed with Mrs. Mora the charges in the indictment, pursuant to which the following exchange took place:

THE COURT: The grand jury charges that on or about December 22nd, 2017, in the Western District of Texas, that you, aided and abetted by each other, unlawfully, knowingly, intentionally possessed with intent to distribute a controlled substance, which involved five grams or more of actual methamphetamine, in violation of Title 21, United States Code, Section 841(a)(1), 841(b)(1)(B), and Title 18 United States Code, Section 2.

Do you understand what you're being charged with?

DEFENDANT MORA: Yes, sir.

THE COURT: Now, I'm going to give you first the range of punishment on the indictment. The range of punishment on the indictment is a minimum of five years imprisonment to a maximum of 40 years imprisonment, up to a \$5 million fine, at least four years of supervised release, up to life of supervised release, and \$100 special assessment.

Do you understand the full range of punishment on your indictment?

DEFENDANT MORA: Yes, sir.

ROA.101. However, the Court then made this punishment range inapplicable by informing

Mrs. Mora:

THE COURT: Now, the government has also filed [a] sentencing enhancement information.

The United States Attorney charges that Margarita Mora is a person who has been convicted of a felony drug offense on the following occasion:

On or about September the 18th, 2009, the defendant was convicted of conspiracy to manufacture methamphetamine, in the United States District Court for the Western District of Texas, Midland-Odessa Division in Cause No. MO-09-CR-116.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the defendant that upon her conviction for the offense charged in Count 1 of the above-numbered indictment, the government will request the Court to enhance the defendant's sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code 841(b)(1)(B). Due to the defendant's prior drug conviction, this statute provides for a minimum term of 10 years imprisonment, for a maximum term of supervised release of at least eight years, and that could go up to life of supervised release, and that notwithstanding any other provision of the law, the Court shall not suspend the sentence or grant a probationary sentence to the defendant, nor shall the defendant be eligible for parole.

Ms. Mora, do you understand the allegations in the sentencing information?

DEFENDANT MORA: Yes, sir.

THE COURT: And your full range of punishment application of the sentencing enhancement information.

DEFENDANT MORA: Yes, sir.

ROA.101-03.

Further, in the guilty plea proceeding, Mrs. Mora was asked to enter he plea.

ROA.110-11. However, Mrs. Mora was only asked about the indicted charge, to which she then pleaded guilty. ROA.111.

The Court then proceeded to what the Magistrate Judge described as "your sentencing information." ROA.111. To this end, the Assistant United States Attorney stated:

MR. HARWOOD: The defendant, Margarita Mora, is a person who's been—who having been convicted of a felony drug offense on the following occasion:

On or about September 18, 2009, the defendant was convicted of conspiracy to manufacture methamphetamine, in the United States District Court for the Western District of Texas, Midland-Odessa Division in Cause No. MO-09-CR-116.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the defendant that upon her conviction for the offense charged in Court 1 of the above-numbered indictment, the government will request the Court to enhance the defendant's sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code, Section 841(b)(1)(B). Due to the defendant's prior felony drug conviction, this statute provides for a minimum term of imprisonment of 10 years, for a maximum term of life imprisonment, for a term of supervised release of at least eight years, and that notwithstanding any other provision of the law, the Court shall not suspend the sentence of or grant a probationary sentence to defendant, nor shall the defendant be eligible for parole. Signed, the U.S. Attorney.

ROA.11-12.

The following exchange then took place between the Court and Mrs. Mora:

THE COURT: All right. Did you understand that sentencing enhancing information, Ms. Mora?

DEFENDANT MORA: Yes, sir.

THE COURT: To the fact that Margarita Mora is a person who's been convicted of a felony drug offense on the following occasion, on or about September the 18th, 2009, that you were convicted of conspiracy to manufacture methamphetamine in the United States District court for the Western District of Texas, Midland-Odessa Division in Cause No. MO-09-CR-116. Is that prior conviction true or not true?

DEFENDANT MORA: Yes, sir. True.

ROA.111-13.

The Assistant United States Attorney then established the factual basis for the plea and the Court addressed Mrs. Mora:

MR. HARWOOD: On December 22nd, 2017, the Ector County Sheriff's Office Narcotics Unit received information about Danny Mora and Margarita Mora delivering methamphetamine to various individuals in Ector County, Texas. After conducting surveillance at a residence, officers observed a vehicle, believed to be driven by Danny Nora and also occupied by Margarita Moore [sic], leave the residence. Officers conducted a traffic stop on the vehicle and confirmed that Danny Nora was driving and Margarita Mora was in the front-seat passenger. Both Mora and mora were asked to exit the vehicle. While speaking with officers, Margarita Mora confirmed that she had a quantity of methamphetamine concealed on her person. Officers recovered the methamphetamine, which was in excess of five grams of actual methamphetamine, from Margarita Mora. The amount of actual methamphetamine possessed by Mora and Mora was a distributable quantity.

THE COURT: All right. Do you understand the factual basis as read by the U.S. Attorney, Ms. Mora?

DEFENDANT MORA: Yes, sir.

THE COURT: Was it accurate, true and correct?

DEFENDANT MORA: Yes, sir.

THE COURT: And is that what you did?

DEFENDANT MORA: Yes, sir.

THE COURT: Well, the only question I have is, was it 50 grams or more?

MR. HARWOOD: Judge, it was five grams or more.

THE COURT: Five grams or more?

MR. HARWOOD: Yes, your Honor.

The factual says officers recovered the methamphetamine, which was in excess of five grams of actual methamphetamine.

THE COURT: All right. With that addition, is that true, Ms. Mora?

DEFENDANT MORA: Yes, sir.

THE COURT: All right. And your factual basis was accurate, true and correct? And you're admitting per your indictment that you pled guilty to that you knowingly and intentionally possessed with intent to distribute a controlled substance, which involved five grams or more of actual methamphetamine. Is that true?

DEFENDANT MORA: Yes, sir.

THE COURT: And that's what you pled guilty to?

DEFENDANT MORA: Yes, sir.

ROA.113-15.

The Court accepted Mrs. Mora's plea of guilty and directed that a Presentence Investigation Report ("PSR") be prepared. ROA.121-23. Sentencing was set for ninety days. ROA.123.

The Presentence Investigation Report ("PSR")

The PSR was filed in its final, revised form on July 24, 2018. ROA.150-75. The offense conduct established a sergeant with the Ector County Sheriff's Office received information "regarding the methamphetamine distribution activities of Danny Mora." ROA.174. The information was that Mr. Mora would be traveling on Highway 385 in a dark colored Ford Explorer. ROA.174. Law enforcement located a vehicle matching this description traveling on Highway 385 and conducted a traffic stop on the Explorer. ROA.174. Mrs. Mora was a passenger in that vehicle. ROA.174-75. Mr. Mora gave the sergeant permission to search the vehicle and no contraband was found. ROA.175.

Mr. Mora gave permission to search his person and no contraband was found. ROA.175. Mrs. Mora refused a search and she was put in a deputy's patrol car. ROA.175.

While one of the officers with Ector County was talking with Mrs. Mora, the sergeant noted: "Ms. Mora pulled a clear plastic container and a glass methamphetamine smoking pipe from the front pocket of her jacket." ROA.175.

The PSR states that "[s]everal plastic baggies containing a total of 11 grams of actual methamphetamine were located in the plastic container." ROA.175. The report also claims that this was "verified by laboratory analysis, DEA.Exhibit 1" ROA.175 at n.1. Thus, the PSR provides that: "Ms. Mora is being held accountable for 11 grams of actual methamphetamine." ROA.175.

Mrs. Mora cooperated with the authorities and, hence, the PSR concludes:

D. Mora admitted the methamphetamine found on **M. Mora** was his and asked **M. Mora** to hide it for him since he was on supervised release for a prior conviction. D Mora stated he would cooperate with authorities in any investigation regarding methamphetamine. **M. Mora** told the authorities she did not want to be away from her children since she also has a prior federal conviction for drugs. **She** stated she would cooperate with law enforcement. **M. Mora** admitted she was only holding the methamphetamine because her husband asked her to do so. Neither **M. Mora** nor D. Mora were arrested at this time. D. Mora was arrested for the instant offense on January 29, 2018, and **M. Mora** was arrested for the instant offense on February 7, 2018.

ROA.175 (emphasis in original).

The Probation Officer determined Mrs. Mora had a base offense level of 24. ROA.150 (citing U.S.S.G. § 2D1.1(a)(5)). The only adjustment was a 3-level adjustment for acceptance of responsibility. ROA.150. This brought Mrs. Mora's offense level to 21. ROA.150.

The Probation Officer then calculated Mrs. Mora's criminal history. ROA.150. She was assigned 3 criminal history points for a 2009 conviction for conspiracy to manufacture 50 grams of methamphetamine. ROA.150-51. This gave Mrs. Mora a criminal history category of II. ROA.151.

These PSR determinations resulted in a Guideline range of 41 months to 51 months in the custody of the Bureau of Prisons. ROA.155. "However," the Probation Officer concluded, "the statutorily required minimum sentence of 10 years is greater than the maximum of the applicable guideline range; therefore, the guideline term of imprisonment is 120 months." ROA.155 (citing U.S.S.G. § 5G1.1(b)). No objections to the PSR were filed. ROA.127.

The Sentencing Hearing

Mrs. Mora was sentenced on August 2, 2018. ROA.125. There were no objections to the PSR. ROA.127. The Court found the PSR to be accurate and thus adopted it and the application of the Guidelines. ROA.127.

However, there were significant issues with the enhancement count. ROA.127. The Court attempted to address this problem and the following exchange took place on the record:

THE COURT: And, Ms. Mora, I know you likely pled true to the sentencing enhancement information; but it alleges that you were previously convicted of a felony drug offense.

I'm sorry, do you need to speak with Ms. Mora?
(Attorney/defendant sotto voce discussion)

MR. BROWN: Your Honor, she—there is some confusion, but the enhancement—or the possible enhancement and the later enhancement was discussed, whether she has a prior conviction for which, I believe, she did somewhere around 37 months.

THE COURT: It alleges, at least what I have—I don't have a copy of the exact enhancement; but it says that back in September of 2009, September 17th, in the United States District Court for the Western District of Texas, Midland-Odessa Division, here in this court, you were convicted for conspiracy to manufacture 50 grams or more of actual methamphetamine.

And so my point to you is if you're going to challenge that prior conviction, you have to do so prior to being sentenced. I'm about to sentence you. And I want to make sure you understand. So if you fail to challenge it—and keep in mind if it is true and you can't challenge it, then you can't challenge it. But if you're going to challenge it, you have to challenge it prior to sentencing. Otherwise, you waive any challenge.

You can't challenge it later. You can't come back and go, "Well, I want to challenge that." And this Court, the Fifth Circuit, Supreme Court even would look back and say, "Well, did she have an opportunity to challenge it prior to sentencing?" So I'm giving you that opportunity. Ms. Mora, do you understand?

(Attorney/defendant sotto voce discussion)

MR. BROWN: Your Honor, for the record, the enhancement—possible enhancement was discussed on numerous occasions with my client.

THE COURT: And, Ms. Mora, let me ask you: Do you understand what I'm telling you? I mean, did you go over this at the guilty plea? Did the judge go over—he doesn't have to, but he may have. Typically, we do go over that enhancement—sentencing enhancement information?

THE DEFENDANT: The enhancement, is it what? Like, just because I was here prior? Is that what it is?

THE COURT: Yes. Were you convicted—just real simply, were you convicted of that case? Was it true? They allege that you were convicted in that case. Is that true or not true?

THE DEFENDANT: Yes, sir.

THE COURT: It is true, right?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. So what I'm telling you is: You may not have a way to challenge it. This may be just empty words; but if there were a way to challenge that, if you say that wasn't true or whatever, you need to do it—you need to tell me now before I sentence you because later you can't.

THE DEFENDANT: Oh, okay.

THE COURT: If you don't, okay?

THE DEFENDANT: Okay. I understand now.

THE COURT: Do you have any challenge that you can make to it?

THE DEFENDANT: No sir.

THE COURT: Okay. There is no way to challenge it. All right. So I wanted to do that.

ROA.127-30.

The Court sentenced Mrs. Mora to the statutory minimum of 120 months in prison. ROA.134. The Court also ordered that she would be placed under supervised release for 8 years. ROA.134. Mrs. Mora asked that she not be sent to Bryan, Texas, and the Judge asked the BOP to honor this request in the Court's Judgment. ROA.83, 135.

The Notice of Appeal

Mrs. Mora filed her own handwritten notice of appeal. ROA.88-91. As an initial matter, she states that she turned over the drugs to the police because the officers told her they would only prosecute her husband. ROA.88. Nonetheless, Mrs. Mora received the news she had been indicted. ROA.88.

Subsequently, Mrs. Mora was given a court appointed lawyer, Mr. Michael Brown. ROA.89. Mrs. Mora states that Mr. Brown told her there was a “possibility of an enhancement because of my prior.” ROA.89 (emphasis added). Subsequently, Mrs. Mora was “pulled to appear in court to plea out.” ROA.89. She states that Mr. Brown told her to “plea guilty” and he “would work on” her sentence. ROA.89. Mrs. Mora remembers “not once during my plea hearing did he [presumably referring to her attorney] mention or make me aware of any enhancements or the possibility of me being enhanced.” ROA.89.

After the Court accepted Mrs. Mora’s guilty plea, there was a second meeting between Mrs. Mora and her attorney which took place before the sentencing hearing. ROA.89. To her recollection, her attorney told her that she would receive no more than 46 months in prison. ROA.89. She notes “not once was anything said about an enhancement or possibility of one being put on me.” ROA.89 (emphasis added).

Thus, with respect to the sentencing proceeding before the District Judge, Mrs. Mora states that this was the first time to her recollection that she had been made aware of the enhancement. ROA.90. Indeed, Mrs. Mora states that she has no memory of the enhancement being explained to her prior the sentencing hearing. ROA.90. Mrs. Mora therefore asked the Court in her notice of appeal to provide her with a new lawyer. ROA.90.

The Fifth Circuit Opinion

On August 16, 2019, the Fifth Circuit denied Mrs. Mora’s claim that the appeal waiver was not enforceable and held that the plea was voluntary and not a violation of Rule 11 or

due process. (Appendix A). Hence, the judgment of the District Court was affirmed. (Appendix B).

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.
Legal Background

Mrs. Mora did not preserve for review any argument that her plea was unknowingly, involuntary, violated due process or was fundamentally flawed to the point of harm. Therefore, review of the issues in this Court will be for plain error. *United States v. Olano*, 507 U.S. 725, 732-33 (1993); *see also United States v. Martinez-Rodriguez*, 821 F.3d 659, 662 (5th Cir. 2016). As this Court has explained, plain error requires a showing of error which is “clear or equivalently obvious,” which “affects [a defendant’s] substantial rights and which “seriously affects the fairness, integrity, or public perception of judicial procedures.” *Olano*, 507 U.S. at 732-34 (internal quotations omitted); *see also Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018) (discussing plain error standard of review).

The Fifth Circuit had long held that the question of whether the requirements of Federal Rule of Criminal Procedure Rule 11 were satisfied is a conclusion of law and is therefore reviewable *de novo*. *United States v. Scott*, 987 F.2d 261, 264 (5th Cir. 1993); *see also United States v. Crain*, 877 F.3d 637, 643 n.15, 645 n.24 (5th Cir. 2017) (discussing *Scott* in context of Rule 11 errors). In this regard, “[t]he voluntariness of a guilty plea [was]

a question of law that [this Circuit] review[ed] *de novo*.” *United States v. Amaya*, 111 F.3d 386, 388 (1997) (citation omitted).

However, this Court later determined that, when noncompliance with the requirements of Rule 11 is raised for the first time on appeal, review is for plain error under Federal Rule of Criminal Procedure 52(b). *United States v. Vonn*, 535 U.S. 55, 59-60 (2002); *see also United States v. Nepal*, 894 F.3d 204, 208 (5th Cir. 2018) (discussing standard of review post-*Vonn*). Nonetheless, it is important to observe that review of the Rule 11 ban on judicial participation in plea negotiations is for plain error under Rule 52(b). *See United States v. Adams*, 634 F.2d 830, 836 (5th Cir. Unit A Jan. 1981) (raising and correcting unobjected to Rule 11(e)(1) error *sua sponte*).

It is also well established by this Court that a guilty plea is involuntary when the accused “has such an incomplete understanding of the charge that [her] plea cannot stand as an intelligent admission of guilt.” *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976) (citations omitted). More importantly, “[w]ithout adequate of the nature of the charge against [her] or proof that [she] has in fact understood the charge, the plea cannot be voluntary in this latter sense.” *Id.*

The accused must be provided “the real notice of the true nature of the charge.” *Smith v. O’Grady*, 312 U.S. 329, 334 (1941). Indeed, this Court has explained that this is “the first and most universally recognized requirement of due process.” *Id.*; *see also Henderson*, 426 U.S. at 645 (quoting *O’Grady*, 312 U.S. at 334). Similarly, Rule 11 of the Federal Rules of Criminal Procedure requires that, “[b]efore the court accepts a plea of

guilty . . . , the court must address the defendant personally in open court . . . [and] must inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading” FED. R. CRIM. P. 11(b)(1)(G).

Additionally, the Fifth Circuit has taken notice of the District Court’s duty to comply with Rule 11’s requirements to explain the charge to the defendant and ensure that he or she understands it is not satisfied by merely having the prosecutor read the indictment to the defendant. *United States v. Benavides*, 596 F.2d 137, 140 (5th Cir. 1979); *see also United States v. Boatright*, 588 F.2d 471, 473 (5th Cir. 1979) (“Reading an indictment to a defendant is usually not an adequate explanation of the charges to the defendant.”); *United States v. Adams*, 566 F.2d 962, 967 (5th Cir. 1978) (“To inform the defendant of the nature of the charge must mean more [than] having the indictment read to the defendant.”). Moreover, the Fifth Circuit has explained that “[r]outine questions on the subject of understanding are insufficient, and a single response, by the defendant that [she] ‘understands’ the charge gives no assurance or basis for believing that [she] does.” *United States v. Lincecum*, 569 F.2d 1229, 1231 (5th Cir. 1978); *but cf. United States v. Dayton*, 604 F.2d 931, 941-43 (5th Cir. 1979) (en banc) (upholding guilty plea where district court read charges and asked defendant whether he understood them, whether he had any questions, whether the facts were true, and whether Government could prove them beyond reasonable doubt), *cert. denied*, 445 U.S. 904 (1980).

Furthermore, this Court has held that lower courts must give the defendant actual notice of the true nature of the charges, including each specific element to which the

accused is pleading guilty; otherwise, the defendant's guilty plea violated due process of law and Federal Rule of Criminal Procedure 11(b)(1)(G). *Henderson*, 426 U.S. at 645. The Fifth Circuit has acknowledged that this is the law. *Benavides*, 596 F.2d at 140; *Boatright*, 588 F.2d at 473; *Lincecum*, 569 F.2d at 1231; *Adams*, 566 F.2d at 967; *see also United States v. Suarez*, 155 F.3d 521, 524-26 (5th Cir. 1998) (reversing conviction because defendant admitted he had possessed drugs but never did admit that he had possessed them with requisite intent to distribute them). Furthermore, the Court is required by Rule 11 to provide the maximum and minimum punishment to the defendant. Fed. R. Crim. P. 11(b)(1)(H), (I).

In sum, the Fifth Circuit in discussing Supreme Court law has stated that the Judge must review “‘guilty pleas for compliance with Rule 11,’ *United States v. Garcia-Paulin*, 627 F.3d 127, 130 (5th Cir. 2010), a rule designed to ‘ensure that a guilty plea is knowing and voluntary, by laying out the steps a trial judge must take before accepting such a plea,’ *United States v. Vonn*, 535 U.S. 55, 58 (2002).” *Nepal*, 894 F.3d at 208. Mrs. Mora respectfully submits that in this case the Court which took the plea “failed to perform its duty of ascertaining whether [she] understood the nature of the charge [she] was pleading to.” *Suarez*, 155 F.3d at 525; *see also United States v. Bruce*, 976 F.2d 552, 559-60 (9th Cir. 1992) (vacating conviction and plea because court failed to explain aiding and abetting and requisite intent to distribute drugs).

II.

Application: Lack of Knowledge and Voluntariness

The guilty plea colloquy establishes Mrs. Mora was not clearly advised of the punishment range as a result of her plea. Indeed, the Court initially told Mrs. Mora her punishment range could be as low as five years in prison. ROA.101. As the record establishes, this representation was false with respect to the implication of a sentencing enhancement that would mandatorily double her minimum to 120 months in the custody of the BOP and make the offense Guideline range obsolete. Counsel submits this is sufficient evidence to remand this case for a new trial.

Moreover, the Court's lack of clarity as to whether the sentencing enhancement means Mrs. Mora "might" have a minimum ten year sentence, or that she would "in fact" receive a minimum ten year sentence further establishes the plea was not knowingly and voluntarily entered. Initially, the Judge stated that, once Mrs. Mora was convicted of Count One in the indictment, the Government "will request" the Court to enhance the minimum sentence to ten years. ROA.102.

The Court did not clarify it was required to increase the minimum sentence to ten years in the custody of the BOP. Further, the Judge only asked if Mrs. Mora "understood" the allegation and the new "full range" of punishment, but did not ask her if it was true as part of the plea to the elements of the offense. ROA.101-03. Rather, the Court proceeded to only ask Mrs. Mora to plead on the indicted charge. ROA.110-11.

Subsequently, the Court returned to the sentencing enhancement information. ROA.111. The prosecution read the sentencing information into the record. ROA.112. The

Court then asked if the prior conviction was “true or not true.” ROA.113. While Mrs. Mora answered “Yes sir, true,” the Judge again failed to say, and indeed never did say, “your minimum sentence will become ten years.” All of this had to be even more confusing for Mrs. Mora because the Court had once discussed with her a minimum of five years in prison, and never told her that the possibility of a five year sentence was factually and legally irrelevant.

The Court then asked the Assistant United States Attorney to establish the “factual basis” for this “plea” to what would ultimately be a ten year sentence for a small amount of contraband. ROA.113-15. However, there is no mention of the sentencing enhancement and only a discussion that the offense to be sentenced on involved more than 5 grams of methamphetamine. ROA.113-15. Indeed, based on this factual information, the court accepted Mrs. Mora’s plea and set sentencing for an offense that had a minimum of ten years imprisonment. ROA.121-22.

It is important to remember that this Court determined that facts that increase a mandatory minimum sentence are elements of the crime. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013). Thus, the facts supporting the elements of the ten year mandatory sentence must be proven beyond a reasonable doubt. *United States v. Harakaly*, 734 F.3d 88, 94 (5th Cir. 2013) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Thus, a plea to all of those sentencing enhancement elements is required and that plea must be knowing and voluntary. *United States v. Nepal*, 894 F.3d 204, 208 (5th Cir. 2018) (reiterating that Court must make certain there is factual conduct admitted by defendant which is sufficient as matter of law to establish violation of statute to which she entered her

plea). The Court failed to do so and thus the guilty plea and all pertinent waivers of rights must be set aside.

The events with respect to the sentencing enhancement that took place at the sentencing enhancement must also be addressed. As an initial matter, Mrs. Mora submits, based on the above review of the sentencing, the District Court could only have been of the opinion that there was confusion about Mrs. Mora's understanding on the sentencing enhancement. The District Court was apparently attempting to remedy any lack of an effective voluntary plea on the elements establishing the sentencing enhancement. In fact, Mrs. Mora's notice of appeal wherein she states she did not fully understand the basis for the ten-year sentence until the sentencing hearing, supports this conclusion. ROA.88-91. However, as discussed below, that proceeding only further established the unconstitutional nature of the plea.

This above-conclusion is supported by the District Court's observation that Mrs. Mora likely pled true to the sentencing enhancement. ROA.127-28. In other words, even the sentencing court was concerned as to whether her plea to the sentencing enhancement was done in a knowing and voluntary fashion. But, the plea had already been accepted.

Nonetheless, the District Court set out to possibly cure any error. Despite the fact that the plea had already been accepted, the District Court decided to attempt to clarify matters, but certainly did not use all the FED. R. CRIM. P. 11 admonishments. Rather, the District Court explained:

And so my point to you is if you're going to challenge that prior conviction, you have to do so prior to being sentenced. I'm about to sentence you. And I want

to make sure you understand. So if you fail to challenge it—and keep in mind if it is true and you can't challenge it, then you can't challenge it. But if you're going to challenge it, you have to challenge it prior to your sentencing. Otherwise, you waive any challenge.

You can't challenge it later. You can't come back and go, "Well, I want to challenge that." And this Court, the Fifth Circuit, Supreme Court even would look back and say, "Well, did she have an opportunity to challenge it prior to sentencing?" So I'm giving you that opportunity. Ms. Mora, do you understand?

ROA.128. The District Court then asked Mrs. Mora if the Magistrate Judge went over this at the guilty plea hearing, but declared: "he doesn't have to, but he may have." ROA.128. The District Court added: "[t]ypically, we do go over the enhancement—sentencing enhancement information." ROA.128. To this, Mrs. Mora replied:

The enhancement, is it what? Like, just because I was here prior? Is that what it is?

ROA.128. All of this discussion establishes Mrs. Mora never intelligently, knowingly, and voluntarily entered her plea of guilty to the elements of this ten year mandatory minimum offense.

However, the District Court continues on rather than starting over with the Rule 11 process. Indeed, despite the importance of the FED. R. CRIM. P. 11 requirements, the Judge asked Mrs. Mora if the conviction is true and concludes "there is no way to challenge it." ROA.120. Thus, Mrs. Mora received the 120 month prison term. ROA.134. Finally, the District Court's reminder to Mrs. Mora of her Rule 11 rights well after the plea provides legitimacy to her representation that she did not understand the impact of the enhancement when her plea was taken. ROA.89-91.

Based on the above discussion, counsel respectfully submits the following proposed legal conclusions as to the error in the conjunctive and in the alternative. First, the plea was a violation of Federal Criminal Procedure Rule 11. Second, the plea was a violation of Mrs. Mora's right to due process. Finally, the plea was not knowing and voluntary. For these reasons, counsel requests that this Court grant this Petition.

III.

Conflict with the Tenth Circuit Court of Appeals

The Tenth Circuit has determined it is a violation of the Federal Rules of Criminal Procedure for the Court which takes a guilty plea to fail to clearly and adequately inform the accused of any minimum and maximum sentence. *United States v. Carillo*, 860 F.3d 1293, 1301 (10th Cir. 2017). Failure to do so is plain error. *Id.* Hence, the Fifth Circuit ruling is in conflict with the Tenth Circuit and Mrs. Mora therefore requests that this Court grant this Petition to address this conflict.

IV.

The Remedy

The above application of the law to the facts establishes that the Court took a plea to possession of more than five grams of methamphetamine which, by the Court's own explanation to Mrs. Mora, had a minimum term of imprisonment of five years. Thus, the Court did not take a valid knowing and voluntary plea of the possession with the sentencing enhancement. *See Nepal*, 94 F.3d at 208 (requiring court to be certain factual conduct admitted by defendant is sufficient as matter of law to establish violation of offense to which defendant pleaded guilty); *see also United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010)

(holding that factual conduct must support statutory violation as matter of law). Hence, this Petition should be granted so that it can be determined if this matter should be remanded to be sentenced with a mandatory minimum of five years, and the appropriate considerations under 18 U.S.C. § 3553(a) as applied under the standards of *Kimbrough*, *Gall*, and *Rita*, each of which require the sentencing Judge to “provide a reasoned basis for exercising his own legal decisionmaking authority.” *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1964 (2018) (discussing *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007)).

Alternatively, if this Court does not concur as to that legal conclusion, this Court should grant this Petition and remand for a new trial. *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001) (“Notwithstanding an unconditional plea of guilty, we will reverse on direct appeal where the factual basis of the plea as shown of record fails to establish an element of the offense of conviction.”). As argued above, the plea in this case was not knowing and voluntary, was a violation of due process, and was not taken in accordance with FED. R. CRIM. P. 11. Therefore, this Court should grant this Petition and permit Mrs. Mora to determine whether she should seek a trial or enter a plea of guilty in accordance with the law.


In making these determinations, Mrs. Mora respectfully submits that this Court should also consider the District Court’s admonishment that Mrs. Mora did not have to be asked during the plea as to her admission of whether the prior conviction was true. ROA.128. As the above discussion of the law establishes this was to be treated as an

element of the offense. *Harakaly*, 734 F.3d at 94; *White*, 258 F.3d at 380. Here, the Court declared that such an admonishment on the sentencing enhancement was not necessary at the guilty plea hearing. ROA.128. Thus, this action supports the legal conclusion that Mrs. Mora was subject only to being sentenced to the offense without the sentencing enhancement.

CONCLUSION

Respectfully, these circumstances establish Mrs. Mora was deprived of due process at her sentencing proceeding. Mrs. Mora therefore requests that this Court grant this Petition to assure conformity in the Circuit Courts and ensure the sentencing decision in this case does not conflict with the decisions of this Court.

WHEREFORE, Petitioner, MARGARITA MORA, respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit.


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