No. 20-

IN THE
Supreme Court of the United States

CASEY LEE JONES,

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

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 227-6000

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–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:

Casey Lee Jones:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

RULES:

SENTENCING GUIDELINES:

PETITION FOR WRIT OF CERTIORARI

Petitioner, CASEY LEE JONES, 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 appeal waiver as well as the minimum and maximum sentence when taking the 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. Casey Lee Jones*, No. 18-50401 (5th Cir. Oct. 4, 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.

GROUNDS FOR JURISDICTION

On October 4, 2019, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Mr. Jones. 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/Odessa 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

Overview:

Mr. Jones, who pleaded guilty to one count of Possession with Intent to Distribute 5 Grams or More of Actual Methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(B), appealed the sentence imposed upon him by the United States District Court for the Western District of Texas. ROA.46-51. The count of the indictment to which he pleaded guilty alleges that, on or about November 22, 2017, Casey Lee Jones:

> unlawfully, knowingly, and intentionally possessed with intent to distribute a controlled substance, which offense involved 5 grams or more of actual methamphetamine, in violation of Title 21 U.S.C. 841(a)(1) and 841(b)(1)(B).

ROA.22. Mr. Jones was sentenced to serve 188 months in custody. ROA.46-51.

Background

On December 14, 2017, a criminal complaint was filed against Mr. Jones. ROA.8. He was arrested and charged with a single crime related to the possession and distribution of methamphetamine. ROA.8-12. Mr. Jones was subsequently indicted on January 3, 2018. ROA.22. The case was later set for trial. ROA.26. However, on January 30, 2018, Mr. Jones pleaded guilty pursuant to the single count of the indictment pursuant to a plea agreement. ROA.107-115. Specifics of the plea agreement are discussed below.

The Guilty Plea Hearing

At his guilty plea hearing, Mr. Jones admitted the following facts were true and correct as recited by counsel for the United States:

> On November 22nd, 2017, Detective Sedillo with the Midland Police Department Narcotics Unit was conducting surveillance on 224 Mitchell in reference to Casey Jones possessing and distributing methamphetamine from the residence. Detective Sedillo observed Jones' vehicle pull away from the residence, and a traffic stop was conducted at Crestview and Wall Street. The driver and the sole occupant of the vehicle was placed under arrest for having multiple warrants. During an inventory of the vehicle, officers located approximately 1.3 ounces of methamphetamine and a black Ruger LCP, .380 caliber, semiautomatic pistol, with Serial No. 371251965 in Prescott, Arizona. During the traffic stop, Casey Jones arrived on the scene and was advised–and advised that he was the owner of the vehicle. Detective Sedillo knew from his investigation that Jones was a felon who was distributing large quantities of methamphetamine. At this time, both the driver and Jones were detained and transported to the Midland Police Department6. Once at the Midland Police Department, Jones was read the Miranda warning, which he advised he understood. During the interview, Jones admitted ownership of the quantity of methamphetamine and firearm that was located in the vehicle. Jones stated that he had asked the other person who was driving the car to run an errand for him, and the person did not have knowledge of these items in the vehicle. Jones admits that he possessed the methamphetamine recovered with the intent to distribute it in Midland, Texas.

ROA.70-71. It was later revealed that law enforcement had used Facebook to setup his arrest. ROA.89.

The Judge asked Mr. Jones if he understood the factual basis as read by the U.S. Attorney, and Mr. Jones answered: "Yes, sir." ROA.71. "Is that what you did, sir?," the Judge further inquired of Mr. Jones. ROA.71. Mr. Jones said: "Correct. Yes, sir." ROA.71.

Waiver of Appeal was Not Discussed at the Plea Hearing

As noted, prior to entering his plea of guilty, Mr. Jones executed a plea agreement which he had entered into with the Government. ROA.107-115. This plea agreement included a waiver of appeal. ROA.109-110. However, and significantly, there was no discussion of the appeal waiver at the plea hearing. *See* ROA.58-73.

The Presentence Investigation Report: Overview

A United States Probation Officer prepared a Presentence Investigation Report ("PSR" or "the report"). ROA.116-180. Important to the issues in this appeal is the final version the PSR, which provides: (1) a factual basis for the offense and relevant conduct of the offense; (2) the recognition of potential sentencing Guideline provisions relevant to Mr. Jones' commission of the offense to which he pleaded guilty; and (3) a conclusion by the Probation Officer as to which Guidelines are applicable in this case. ROA.160-80.

The PSR: The Case Explained

As set forth in the PSR, a Midland Police Department Detective was conducting surveillance at a Midland residence. ROA.162. A silver Honda owned by Mr. Jones pulled

up to the residence. ROA.162. A while male exited the vehicle and within minutes returned to the car. ROA.162. The Detective followed the vehicle as it pulled away from the house. ROA.162. The Detective pulled the vehicle over for a traffic stop and the driver was arrested for outstanding warrants. ROA.162. Mr. Jones arrived on the scene as the traffic stop was being conducted and claimed ownership of the car. ROA.162. The vehicle was searched and officers found 34.1 grams of methamphetamine which was 97% pure, several pills in plastic baggies, a digital scale, and a .380 caliber semiautomatic pistol. ROA.162.

The driver of the vehicle and Mr. Jones were detained and taken to the Midland Police Department. ROA.163. Mr. Jones was read his Miranda warnings and interrogated by police. ROA.163. He denied ownership of any guns or the methamphetamine which was seized from his vehicle. ROA.163. Mr. Jones admitted he was staying at the home which the officers had under surveillance but he also said that he "slept on the couch and did not have a room at the residence." ROA.163.

On the same day, Midland Police Officers executed a search warrant of the residence at issue. ROA.163. The officers claim that Mr. Jones had a bedroom in the residence. ROA.163. In that bedroom, the officers found a 9 mm pistol with 13 rounds of ammunition, 3 magazines for various firearms, a 50 millimeter vial of anabolic steroids and "83.8 grams of an unknown white substance used to mix methamphetamine." ROA.163.

Mr. Jones was again given his Miranda warnings. ROA.163. He then admitted to the officers that the methamphetamine and firearm located in the car belonged to him. ROA.163. Mr. Jones explained that he kept the gun to prevent a robbery. ROA.163. Mr.

Jones also acknowledged that he would travel to Lubbock, Texas, to pickup methamphetamine. ROA.163. He said that on one such trip to Lubbock he picked-up 2 pounds of this substance. ROA.163. This caused the Probation Officer to conclude in the PSR that Mr. "Jones is accountable for at least 2 pounds (907 grams) of actual methamphetamine." ROA.163.

The PSR: Calculations

As noted above, Mr. Jones pleaded guilty to possession with intent to distribute methamphetamine in violation of 28 U.S.C. § 841(a)(1). ROA.164. This resulted in a Base Offense Level of 34 under U.S.S.G. § 2D1.1(a)(5). ROA.164. The Probation Officer recommended a 2 level enhancement for possession of the 2 handguns under U.S.S.G. § 2D1.1(a)(5). ROA.164. Next, the Probation Officer deducted 3 levels for acceptance of responsibility. ROA.164. The PSR therefore reflects that Mr. Jones' adjusted Base Offense Level is 33. ROA.164.

The PSR next addressed Mr. Jones' Criminal History. ROA.165-71. The Probation Officer determined Mr. Jones would be assigned Criminal History points for: (1) displaying a fictitious driver's license, (2) twice driving with an invalid license, (3) possession of a controlled substance and (4) escape. ROA.165-71. The Probation Officer therefore determined that Mr. Jones had a Criminal History score of 8 and thus a Criminal History Category of IV. ROA.171.

The PSR: Objections and Response

Mr. Jones filed objections to the PSR, to which the Probation Officer responded. ROA.187-91. These objections preserve an issue for review on appeal. Mr. Jones made several objections. The first objection involved the base offense level calculation. This objection was fact specific and it provides:

> Defendant objects to paragraphs 10, 11 and 16 regarding Defendant's Base Offense Level. The Defendant's post detention statement was that if the agents wanted, he **could** obtain 2 pounds of methamphetamine in Lubbock in the past. This detention and debriefing occurred the day before Thanksgiving and the Defendant was telling the agents anything possible to be released. He knew he was going away for a long time and may never see his mom, friends or family again. He was released that day then arrested on December 21, 2017. The only evidence relied upon by the pre-sentence investigation report is the Defendant's own self-serving (at the time) statements. It must be noted and assumed that the agents told Defendant that if he cooperated or fully debriefed to his actions that the agents would talk to the AUSA and/or Sentencing Judge for a reduced sentence. Obviously, the exact opposite has occurred. The Defendant's sentence is now being increased six(6) levels due to his cooperation. If Defendant had waited to debrief after speaking with an attorney or after an attorney as hired or appointed, this same information would and could only be used in his favor rather than to his detriment. It is undisputed that the main tool of federal investigation is knowledge through such debriefings. Thus, to further future federal investigations, to follow the directions of 18 U.S.C. [§] 3553(a) and to prevent a chilling effect on future debriefings, this court should consider removing the additional weight to lower the Defendant's Base Offense Level from a 34 to a Level 28.

ROA.226-27 (bolded emphasis in original).

The second objection made by Mr. Jones was likewise fact specific and addressed the amount of "actual" methamphetamine reflected in the PSR. ROA.227. Mr. Jones argued:

> The jump to the conclusion in this case to count all "relevant conduct" methamphetamine as "actual" methamphetamine does not meet the level of preponderance of the evidence standard. It is just as likely that the "relevant conduct" methamphetamine is diluted methamphetamine that has been "cut"

> as it is that it is pure methamphetamine. The court has heard countless witnesses and experts testify about street level drug dealing and how unorganized and chaotic it is. It is not an exact science and has nowhere near the efficiency and uniformity one would expect from a laboratory or retail store. To suggest that it is more likely that the "relevant conduct" methamphetamine was "actual" methamphetamine than "cut" methamphetamine is the same as suggesting that street level dealers run operations as efficient and uniform as scientific labs and Wal-Mart. Also, the court must realize the number one reason people deal drugs is for profit. The more a drug dealer dilutes the product, by adding cutting agents between purchase and sale, the more profit he makes. Drug dealers don't have a DEA lab to determine the quality of their product. With the incentive of profit in mind, it's very likely that the "relevant conduct" methamphetamine allegedly sold to Defendant was "cut" methamphetamine and not "actual" methamphetamine. Therefore, this court should consider removing the additional "relevant conduct" weight to lower the Defendant's Base Offense Level from a 34 to a Level 28.

ROA.227-28.

The third objection was to paragraph 31 of the PSR. ROA.228. Mr. Jones contended: "Pursuant to USSG 4A1.2(c)(1), this sentence should not be counted as it is similar to false information to a police officer and Defendant did not receive jail or probation." ROA.228. Thus, Mr. Jones argued this prior offense was a class E misdemeanor with "zero days in jail" and a $500 fine. Hence, Mr. Jones concluded, he should receive no criminal history point for the prior offense. ROA.228.

Finally, Mr. Jones objected to paragraph 41 of the PSR. ROA.228. Pursuant to the Guidelines, Mr. Jones received 8 years probation and did not have his supervised release revoked. ROA.228. Therefore, in his objections to the PSR, Mr. Jones argued he should receive 1 criminal history point, instead of 2 points, for the prior offense. ROA.228.

The Sentencing Hearing

Mr. Jones was sentenced on May 3, 2018. ROA.74. Relevant to this appeal were the two objections Mr. Jones raised to the offense level calculation in the PSR. ROA.76. At sentencing, Mr. Jones in his first objection focused the attention of the Court on the amount of the "actual" methamphetamine. ROA.76. Because there was merely a statement made by Mr. Jones to the agents that he had on a previous occasion picked-up 2 pounds of methamphetamine in Lubbock, the Probation Officer concluded that the actual methamphetamine amount was more than 900 grams, rather than the 34.1 grams found by the agents. ROA.76. This resulted in a 6-level increase from 28 to 34 on the Total Offense Level. ROA.76. Hence, Mr. Jones argued it was never established by a preponderance of the evidence that there were 2 pounds of actual methamphetamine. ROA.76.

Mr. Jones also pointed out that what was established was that Mr. Jones made the statement while he was being questioned by agents and that indeed the agents released him from custody after he made the statement. ROA.77. More specifically, Mr. Jones contended he made the statement so that the agents would let him go home and that is exactly what happened: they sent him home. ROA.77.

Importantly, Mr. Jones also pointed out that only one of the police reports noted the statement, while the other police report states that Mr. Jones "denied everything." ROA.77. Mr. Jones, through his attorney, discussed caselaw addressing this issue and made a legal argument in favor of his objection to the PSR. The Court noted the arguments and then

allowed the Government to address the Court on Mr. Jones' first and second objections to the PSR. ROA.85.

In addressing the Court, the Government took the position that the two reports are not in conflict because they invoked "conversations that happened at different times." ROA.86-87. To this end, the Government argued that the initial statement by Mr. Jones that he "did not know anything was placed in a report and never added-to based on subsequent conversation." ROA.87. The Government then claimed Mr. Jones made other statements after the search warrant was executed and Miranda warnings were issued. ROA.87. Hence, the Government argued that the second statement about the drug transaction was, as it was described by the prosecution, "not a lie." ROA.87.

The Government next described Mr. Jones as a "cooperating individual who didn't work out with the authorities." ROA.87-88. Indeed, the authorities tricked Mr. Jones on Facebook to set up his arrest. ROA.89.

With respect to the first objection, the prosecutor explained the Government's response in the following fashion:

> But Objection 1 is basically the argument; and the argument and summary that I'm hearing is, yes, I said it. I don't deny that I said it. My reason you shouldn't believe it is because I was just saying anything I could say to get out of jail.
>
> And I think when you take that and facts and circumstances of the event and how this transaction transpired, I don't think that that's persuasive, and the government doesn't believe it is persuasive. He wasn't in custody. If he didn't want to go to jail, he would have never went to the traffic stop. And the answer and justification for why he was let go that day was based on his own desire to assist himself and cooperate.

> And I point that out because in the written motion, Mr. Chavez stated that it must be noted and assumed that the agents told defendant that if he cooperated or fully debriefed to his actions, the agents would talk to the AUSA or sentencing judge for a reduced sentence, and obviously the exact opposite has occurred.
>
> Some parts of that are accurate. The agents did speak to the government. Mr. Jones did plead with a plea agreement. He was afforded opportunities. He's made the decisions not to assist himself and avail himself to anything that the government could have done.
>
> So while that's a true statement, it's a little bit of mischaracterization to say, well, he only–to use that as evidence to bolster of why he gave a false statement. I don't think the Court has any information that the statement that came from the defendant to drug investigators identifying specific sources of supplies in an area, I don't think there is anything here to say other than, well, no, it just wasn't true then. There is no –there's nothing to say it's not reliable.
>
> Additionally, this statement is recorded. So in regards to the conflicting reports and one's a lie and those sort of things, I don't want any mischaracterization that the entirety of the statement in regards to the admitted conduct that was relied on by United States Probation Office, it's recorded. This is not an officer saying, oh, Mr. Jones said X.

ROA.89-90.

The Government then discussed Mr. Jones' "purity" analysis and weight analysis regarding the methamphetamine and the PSR. ROA.90-91. Because the alleged weight on the "2" pounds of methamphetamine was based solely on a single statement and never seized by the Government, the prosecutor maintained "probation made a conservative estimate." The Government claimed:

> They didn't extrapolate and try to figure out how many trips are 2 pounds–2 ounces, how many trips–they held him only accountable for 2 pounds, including 1.3 ounces that were recovered.

ROA.91. The prosecution added this was the conclusion "because of Mr. Jones' actions and what he chose to do and he forced the government's hand." ROA.91.

The Ruling of the Court on Objections 1 and 2

The Court "took into consideration" the Probation Officer's responses to Mr. Jones' objections 1 and 2. ROA.91. The Judge noted U.S.S.G. 1B1.3(a)(1)(A), which provides the Base Offense Level, should be determined based on "all acts and omissions committed, aided and abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." ROA.92. The Court found the 2 pounds should be included in the Base Offense Level in this case in light of Mr. Jones' admission during his interview "that he made multiple trips to Lubbock and East Texas, at least a few times, and on one trip in particular–I mean just one trip was 2 pounds and 2 to 6 ounces on the other trips." ROA.92.

The Judge also agreed the Probation Officer's calculation was "somewhat conservative" and observed:

> And I agree with Ms. Young [referring to the prosecutor], that the calculation has been somewhat conservative. It kind of stopped at 2 pounds, which I actually appreciate, because it could have been higher as to Objection 2. I know we're taking these together. Looking at the purity of '97 percent purity. And, of course, look at *U.S. v. Valdez,* [453 F.3d 252, 265 (5th Cir. 2006),] looking at *U.S. v. Rodriguez,* [666 F.3d 944, 947 (5th Cir. 2012),] the Fifth Circuit clearly states: In estimating drug quantity, a court may extrapolate the quantity from any information that has sufficient indicia of reliability as reported to probable accuracy. I believe there to be sufficient indicia of reliability from the statement that Mr. Jones made.
>
> And *Baggott* even–the Fifth Circuit in [*United States v.*] *Baggott*[,] [694 F. App'x 306, 307 (5th Cir. 2017)], even tell us that looking at the purity level would look–the courts would look to see if it's plausible in light of the record as a whole. And based upon that, the Court will overrule Objections 1 and 2,

> based upon what I've stated, based upon what Ms. Young has stated, based upon, more importantly even what Ms. Foster has state[d].

ROA.92-93 (full citations added).

Additional Objections to the PSR

The Court then addressed, and overruled, Mr. Jones' objections to the Criminal History calculation contained in the PSR. ROA.93-99. Because these objections are not part of this appeal, and for the sake of brevity, they are not discussed herein.

Setting the Range of Punishment and Possible Variance

The Court adopted the PSR and determined Mr. Jones' Base Offense Level was 33, with a Criminal History of Category IV, which resulted with a punishment range of 188 months to 235 months in the custody of the BOP. ROA.99-100. Mr. Jones requested a downward variance and departure from this punishment range. ROA.100.

Mr. Jones again referred to the fact that his sentence was increased by 6-levels based on his statement about a 2-pound transaction. ROA.100. The attorney for Mr. Jones noted that the Court's action on the Guidelines range was an 11-year increase in Mr. Jones' term of incarceration. ROA.101. This conclusion was based on the determination that, if the levels had not been added, Mr. Jones would have been at a Base Offense Level of 27, with a Criminal History Category IV, as opposed to his present Guideline Base Offense Level of 33, with a Category IV. ROA.101.

The Court's Final Ruling on the Request

The Court then denied Mr. Jones' request for a variance and downward departure. ROA.101. The Judge found the Guidelines "present[ed] any circumstances outside the

heartland of cases, and so I believe that this is an accurate reflection." ROA.101. After additional argument, the Judge explained that "the Court does not depart from the recommended sentence." ROA.103.

The Pronouncement of Sentence

In pronouncing Mr. Jones' sentence, the Court ordered:

> Pursuant to the Sentencing Reform Act of 1984, which I have considered in an advisory capacity, and the sentencing factors set forth in 18 U.S.C., Section 3553(a), which I have considered in arriving at a fair and reasonable sentence. I find the guidelines in this case to be fair and reasonable, and I place the defendant in the custody of the United States Bureau of Prisons to serve a term of imprisonment of 188 months, which is the bottom of the guideline range, which is kind of unusual for a Category IV, in my opinion, in my practice so far in all of these three and a half months. So I just want you to know, okay.

ROA.103-04.

Notice of Appeal

The Court entered the Judgment on May 7, 2018. (Appendix B), ROA.49-50. Mr. Jones timely filed his *pro se* Notice of Appeal on May 10, 2018. ROA.52.

The Fifth Circuit Opinion

On October 4, 2019, the Fifth Circuit Court of Appeals considered the above argument that the appeal waiver was invalid and that challenges to the sentence should be heard. (Appendix A, pages 1-2). The Fifth Circuit disagreed and concluded that the waiver of appeal was valid, and dismissed the appeal. (Appendix A, pages 2-3). Specifically, the Fifth Circuit explained that the District Court is not required to directly address the appeal

waiver with the defendant during the plea colloquy. (Appendix A, page 2). The Appellate Court explained:

> [T]his Court will enforce an appeal waiver provision, "regardless of whether the district court addressed it directly[,]where the record indicates the defendant has read and understood his plea agreement and has raised no questions about the waiver." *United States v. Higgins*, 739 F.3d 733, 737 (5th Cir. 2014). In this respect, the record is clear: Before the magistrate judge accepted Jones's plea, Jones confirmed that he had discussed the plea agreement with his attorney, that he agreed to it, and that he signed it. He raised no questions about the waiver during the colloquy. He will therefore "be held to the bargain to which he agreed." *United States v. Portillo*, 18 F.3d 290, 293 (5th Cir. 1994).
>
> The appeal is DISMISSED.

(Appendix A, pages 2-3). This Petition for Writ of Certiorari is now respectfully filed with this Court.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Legal Background

Mr. Jones did not preserve for review any argument that his plea was unknowingly, involuntary, 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 un-objected 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. Mr. Jones

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).

Before the Fifth Circuit, the Government argued that Mr. Jones has waived his right to appeal his conviction and sentence. (Government's Brief, pages 10-12). At the core of this argument was the assertion that the waiver of appeal was complete because it was written in the plea agreement. (Government's Brief, pages 10-12). However, more significant was the obvious concession by the Government that, at the plea hearing–where rights are preserved, verified and also waived–the issue of waiver of appeal was never uttered. *See* (Government's Brief, pages 10-12). Hence, the issue was whether unspoken waivers of appeal will be upheld by the Courts.

In addressing this issue, as the Government reminded us, courts should be mindful:

> The federal rules provide that the court "must address the defendant personally" and inform the defendant of, and determine that the defendant understands, "the terms of any plea agreement provision waiving the right to appeal or collaterally attack the sentence."

(Government's Brief, page 10) (quoting FED. R. CRIM. P. 11(b)(1)(N)). Clearly, the Government was careful to point out that the terms of the plea agreement must be discussed with the defendant in open court, but then simultaneously argued that any "waiver of appeal" does not need to be discussed with the accused. *See* (Government's Brief, pages 10-

12). Respectfully, such a proposition was so flawed that the only reasonable conclusion this Court can reach legally is that the waiver cannot be enforced in this case.

The main case the parties have addressed in this appeal was *United States v. Lee,* 888 F.3d 503 (D.C. Cir. 2018). In *Lee*, the issue was squarely before the Court as to whether the appeal waiver should be part of the oral admonishments at the guilty plea hearing. *Id.* at 508. From this, the Government argued to the Fifth Circuit that Mr. Lee had waived his right to appeal even though "the lower court failed to address the waiver-of-appeal with [the defendant]." (Government's Brief, page 11).

Respectfully, the Government when before the Fifth Circuit crafted its brief in a fashion so that it left out the finding in *Lee* that the failure to advise the accused of the waiver was error. As the Court in *Lee* explained, this cannot stand. Specifically, the Court explained:

> At the plea hearing, however, the magistrate judge failed to discuss the appeal waiver. That was error under Rule 11(b)(1)(N).

888 F.3d at 506.

III.
The Holding in this Case is Contrary to *Lee*

Before the Fifth Circuit, Mr. Jones argued that the issue of the impact of this error remains unsettled in the Fifth Circuit. *See United States v. Pleitez,* 876 F.3d 150 (5th Cir. 2017) (explaining waiver must be knowing and voluntary and analysis must apply to circumstances at hand); *United States v. Avila-Jaimes,* 681 F. App'x 373 (5th Cir. 2017) (discussing facts before court to determine whether waiver was knowing and voluntary

despite issues with translation); *United States v. Walton,* 537 F. App'x 430 (5th Cir. 2013) (upholding plea waiver where district court carefully and accurately reviewed appeal waiver with defendant), *cert. denied,* 134 S. Ct. 712 (2013). Notwithstanding the Government's response, and because there was no evidence Mr. Jones understood there was an appeal waiver, Mr. Jones argued to the Fifth Circuit that the Court should review the claims in this appeal. Despite the fact that Mr. Jones cited the *Lee* opinion, and opinions of this Court, finding that it is reversible error to fail to discuss the plea waiver with the defendant at the plea hearing, the Fifth Circuit did not address *Lee* and held that the Court was not required to discuss the waiver with the defendant.

Respectfully, all of this establishes there is a conflict between the Fifth Circuit and the District of Columbia Circuit Court of Appeals ("D.C. Circuit"). The D.C. Circuit has clearly held it is error for the Courts to fail to discuss a plea waiver with the defendant. *Lee*, 888 F.3d at 506. By contrast, the Fifth Circuit has held "regardless of whether the district court addressed it directly, where the record indicates the defendant has read and understood his plea agreement and has raised no questions about the waiver," the appeal waiver would be enforced. *See* (Exhibit A, at page 2) (quoting *United States v. Higgins,* 739 F.3d 733, 737 (5th Cir. 2014)). This is a conflict in need of this Court's supervision and is only more crucial considering that *Lee* was argued to the Fifth Circuit and the Court did not address *Lee*. Accordingly, Mr. Jones respectfully requests that this Court grant this Petition to resolve the conflict.

CONCLUSION

For these reasons, Mr. Jones 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, CASEY LEE JONES, 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.

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 227-6000