

No. 19-

IN THE
Supreme Court of the United States

JOSE LUIS URIAS-MARQUEZ,

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—conflicts with the decision of the D.C. Circuit, to wit, *United States v. Lee*, 888 F.3d 503 (D.C. Cir. 2018), 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:

Jose Luis Urias-Marquez: 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, JOSE LUIS URIAS-MARQUEZ, 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 ruling of the D.C. Circuit in *United States v. Lee*, 888 F.3d 503 (D.C. Cir. 2018), on the issue of requiring the District Court to clearly explain the appeal waiver, as well as the specific constitutional rights at waiver, 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. Jose Luis Urias-Marquez*, No. 18-50585 (5th Cir. Oct. 30, 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, Pecos Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

On October 30, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Mr. Urias-Marquez. 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 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 August 10, 2017, the Government filed an indictment against Jose Luis Urias-Marquez and three co-defendants. ROA.16-17. Count One of the indictment charged that Mr. Urias-Marquez, aided and abetted by his co-defendants, knowingly possessed with intent to distribute 50 kilograms or more, but less than 100 kilograms, of marijuana, a controlled substance. ROA.16. Count Two of the indictment charged:

On or about August 4, 2017, in the Western District of Texas, Defendant,

JOSE LUIS URIAS-MARQUEZ,

knowingly and intentionally did forcibly assault RM, an agent with the United States Border Patrol, a component of the Department of Homeland Security, an agency and branch of the United States government, while engaged in and on account of the performance of official duties during such person's term of service, and where such acts involved physical contact with the victim of said assault and with the intent to commit another felony.

A violation of Title 18, United States Code, Section 111(a)(1).

ROA.17. Count Three was almost identical to Count Two, but additionally alleged: "such acts involved use of a deadly and dangerous weapon." ROA.18.

The Sentencing Enhancement:

On the same day, August 10, 2017, the Government filed a Sentencing Enhancement Information alleging:

That the Defendant,

JOSE LUIS URIAS-MARQUEZ,

- 1) On or about October 13, 2000, the Defendant was convicted and sentenced for possession with intent to distribute marijuana in the United States District Court, Western District of Texas, Pecos Division, Case Number P-00-CR-247(6). The Defendant was sentenced to a term of imprisonment of 27 months, a term of supervised release of five (5) years, and a \$100.00 special assessment.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the Defendant that upon his conviction for the offense charged in Count of the above-numbered Indictment, the government will request the Court to enhance Defendant's sentence for said offenses pursuant to the sentencing provisions of Title 21, United States Code, Section 841(b)(1)(C). Due to the Defendant's prior felony drug convictions, this statute provides for a maximum term of thirty (30) years imprisonment; for

a term of supervised release of at least six (6) years; a fine of up to \$2,000,000.00 on each count, 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.46-47.

Arrest Leading to Detention Without Bond:

On August 4, 2017, Mr. Urias-Marquez was arrested. ROA.8. Seven days later, he appeared before a Magistrate Judge, who ordered that he be detained without bond. ROA.23-24.

The Plea Agreement:

A plea agreement was filed with the Court on February 15, 2018. ROA.104-09. Mr. Urias-Marquez speaks Spanish and has no formal education. ROA.139. He signed the plea agreement with an "X." ROA.109. The agreement and Mr. Urias-Marquez' plea are discussed in the arguments portion of the guilty plea hearing. ROA.104-09. However, it should be noted that the Government sought to obtain the waiver of the trial rights and appellate rights of Mr. Urias-Marquez. ROA.104-09.

The Guilty Plea Hearing:

On February 15, 2018, the Magistrate Judge accepted Mr. Urias-Marquez' plea of guilty. ROA.92. Relevant to this appeal, the following exchange took place between the Magistrate Judge and Mr. Urias-Marquez:

THE COURT: I have a plea agreement with your signature. Did you sign this plea agreement, Mr. Urias?

THE DEFENDANT: Yes, sir.

THE COURT: Did you do so after reviewing all of it in Spanish with Mr. Gonzales?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand, accept, and agree to be bound by its terms?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Urias, in this plea agreement, you're agreeing to lead guilty to count one of the indictment and at sentencing the Government will move to dismiss any of the remaining counts against you.

It explains what needs to happen in order for you to get the third point for acceptance of responsibility. There's an explanation here about what needs to happen with respect to the disposition of your personal property.

There's an appellate waiver in here in which you're giving up your right to appeal your sentence, both directly and collaterally, except on the grounds of ineffective assistance of counsel or prosecutorial misconduct.

There's an explanation in here in writing about the immigration consequences of pleading guilty. And then it references and incorporates a factual basis which explains what happened in this case that makes you guilty of this charge.

Now I did not go over this plea agreement with you word for word or even section by section in the level of the detail that you went over it with your lawyer. But my question is: Are these the general terms of your plea agreement as you understand then, Mr. Urias?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Kimball, is there anything else you'd like me to admonish Mr. Urias with respect to the plea agreement?

MR. KIMBALL: No, Your Honor.

ROA.82-83. There was no other mention of the appeal waiver during the guilty plea hearing.

The Presentence Investigation Report:

The final revised Presentence Investigation Report (sometimes referred to as “PSR” or “report”) was filed on June 13, 2018. ROA.127-41. The offense conduct involved a suspicious vehicle near Marfa, Texas, that was stopped for an immigration inspection. ROA.131. Two individuals were also suspicious, so they were placed in handcuffs. ROA.132. One of these individuals said they had dropped off five people who were carrying square backpacks. ROA.132.

A search began for the five individuals. ROA.132. They were spotted in the brush. ROA.132. Subsequently,

[t]he individuals ran up a hill traveling east and disappeared from sight. Agents called for backup to assist with the search. While searching the area, agents located four sugar sacks along the fence line on the eastern side of the highway. In the sacks were 32 bundles which contained a green, leafy substance which later tested positive for marijuana. At total of **92.3 kilograms of marijuana** was seized. Agents later located five individuals lying on the ground. They were later identified as Martin Carvajal-Valdez, Alexis Ortega-Marrufo, **Jose Luis Urias-Marquez**.¹ Agents ordered the individuals to stay on the ground and turn over on to their stomachs. All of the subjects complied with the exception of **Urias-Marquez**. He remained on his back. He also appeared to be clutching his abdomen. Agents again instructed **Urias-Marquez** to turn over onto his stomach. As he was turning over, agents noticed he was holding a large knife with both hands. One of the agents jumped on top of **Urias-Marquez** and held him down. He ordered **Urias-Ma[r]quez** multiple times to let go of the knife and extend his arms beneath him. **Urias-Marquez** ignored the orders and continued to clutch the knife against his abdomen. The agent began striking **Urias-Marquez** until he let go of the knife and placed **Urias-Marquez**’ hands behind his back and detained him. All of the individuals were taken into custody and transported to the USBP station in Marfa for processing.

¹Although the PSR states that agents “located five individuals lying on the ground,” only three names are listed as having been identified.

ROA.132 (emphasis in original).

Some of these individuals believed Mr. Urias-Marquez “seemed to be in charge” or was the “guide of the group.” ROA.133. There was no breakdown as how much marijuana was in each backpack. ROA.133. However, the probation officer concluded in the PSR that Mr. Urias-Marquez was “accountable for 92.3 kilograms of marijuana.” ROA.133.

The PSR Computations:

Pursuant to U.S.S.G. § 2D1.1, Mr. Urias-Marquez was held accountable for 92.3 kilograms of marijuana, and the probation officer assigned a base offense level of 22 to Mr. Urias-Marquez. ROA.134. Two levels were added because Mr. Urias-Marquez was found to be an organizer, leader, manager or supervisor of the operation. ROA.134 (citing U.S.S.G. § 3B1.1(c)). This brought Mr. Urias-Marquez’ adjusted offense level to 24. ROA.134.

However, this level was changed by a Chapter 4 enhancement. ROA.134. The probation officer reasoned:

The defendant was at least 18 years old at the time of the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense; therefore, the defendant is a career offender. The offense level for a career offender is 34 because the statutory maximum term of imprisonment is 25 years or more. USSG § 4B1.1(b)(2).

The defendant was convicted on July 20, 2000, for Possession with Intent to Distribute a Quantity of Marijuana in an Amount of 100 Kilograms or More but Less than 1,000 Kilograms; Aid and Abet, in the U.S. District Court, Western District of Texas, Pecos Division, Docket No.: P-10-CR-381(04), on January 10, 2011.

ROA.134-35. Thus, Mr. Urias-Marquez' offense level was adjusted to 34 and reduced by 3 levels for acceptance of responsibility, which gave him a total offense level of 31. ROA.135.

The PSR Criminal History:

Mr. Urias-Marquez had a 2000 conviction for possession of more than 100 kilograms of marijuana and he received 3 points for that conviction. ROA.135. Next, he had a 2006 illegal entry after deportation conviction and he received another 3 points for that prior offense. ROA.136. Finally, he had a 2010 conviction for aiding and abetting possession with intent to distribute marijuana. ROA.137. His punishment for this offense was particularly harsh because he received 3 points for that conviction and another 2 points because he was on community supervision for that offense when he committed the instant offense. ROA.137. Therefore, his criminal history score was 11, which would calculate to a Category V. ROA.137. However, because Mr. Urias-Marquez was a career offender, his category was VI pursuant to U.S.S.G. § 4B1.1(b). ROA.137.

PSR: Final Calculations:

The maximum statutory term of imprisonment was determined to be 30 years. ROA.139. The report concluded: "based upon a total offense level of 31 and a criminal history category of VI, the guidelines range is 188 months to 235 months." ROA.139.

The Sentencing Hearing:

The sentencing hearing was held on June 18, 2018. ROA.97. Neither side had any objections to the PSR. ROA.99. Hence, the Court determined the report was accurate. Specifically, the Court found that the total base offense level was 31, with a criminal history

category of VI, and thus concluded the Guidelines range was 188 months to 235 months in the custody of the BOP. ROA.99.

Counsel for Mr. Urias-Marquez then presented his argument with respect to the sentence to be imposed. He explained:

MR. GONZALES: Your Honor, you'll note that the--the huge jump in the calculations comes from the enhancements provided for in Paragraph 27 on Page 8--

THE COURT: Yes, sir.

MR. GONZALES: --and 9. Otherwise, he would be looking at a significantly lower sentence. Other than the fact that he has criminal history that probably led to him being incarcerated in the United States probably for the good part of his adult life; and with the sentencing he's looking at, will, in all likelihood--does--when he does get out, will have spent probably more than three fourths of his life incarcerated here in the United States or Mexico.

One of the things that the Court is going to address that--in--in the violation case coming up is that that particular case is just--he's not less than three fourths of his life incarcerated here in the United States or Mexico.

One of the things that the Court is going to address that--in in the violation case coming up is that that particular case is just--her's not less than three times, either in enhancements or supervised release--and I'm speaking on his behalf more so--that he feels like he's being punished again and again for essentially the same offense.

However, I understand the laws and the statutes that provide for enhancements, such as this case, it just seems that--that when you try to balance fairness with repeat offenders, sometimes it appears--because if you look at the sentences that the other codefendants received, they were--36 months was what the other two received that I have record of, which is, you know, ten to 15 years less than what he's facing.

I don't know what the answer is. I don't really know who--it is kind of hard to sit here and ask the Court for compassion. I don't think that's what I'm doing it. I'm bringing it up to make it--if there was a way to make it where it was not so skewed and his sentence is not--being realistic, he's looking at 20 years and

everybody else is looking at 30 months. And I guess in that I would ask the Court to sentence at or below the minimum range. We would ask the Court to—to recommend either in Pennsylvania or Florida as a place that he could do his time. Thank you.

ROA.100-01 (emphasis added). In response, the Government argued:

MR. MILLER: Your Honor, the defendant also had two additional charges that the government forego that were assault charges on a Border Patrol agent during the time that he was—that they tried to seek to get him into custody or during this backpacking event. Taking that into consideration, I just want the Court to be aware of that. Thank you, Your Honor.

ROA.101.

The Judge then ruled that he would “not depart from the recommended sentence” of 188 months to 235 months in the custody of the BOP. ROA.101-02. However, the Court sentenced Mr. Urias-Marquez to a term of imprisonment of 235 months, the highest punishment set forth in the Guidelines range. ROA.102. Specifically, the Judge stated:

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 reasonable sentence, I find the guideline range in this case to be fair and reasonable.

The defendant is placed in the custody of the United States Bureau of Prisons to serve a term of imprisonment of 235 months.

ROA.102.

The Notice of Appeal:

Mr. Urias-Marquez timely filed a notice of appeal. ROA.63-64. Proceedings followed in the Fifth Circuit.

The Fifth Circuit Opinion

On appeal, Mr. Urias-Marquez challenged the substantive reasonableness of the 235-month sentence he received upon pleading guilty to possession with intent to distribute marijuana and aiding and abetting. (Appendix A, page 1). Although Mr. Urias-Marquez acknowledged his plea agreement included a waiver of his right to appeal, he argued that the waiver was invalid and unenforceable because the District Court failed, under Federal Rule of Criminal Procedure 11, to adequately advise him regarding the nature of the charge to which he was pleading or the scope of the appeal waiver itself. (Appendix A, pages 1-2). The Fifth Circuit rejected Mr. Urias-Marquez' argument and concluded that the waiver was sufficient. (Appendix A, page 2). Specifically, the Appellate Court ruled that the "record demonstrates that Urias-Marquez knew he had a right to appeal and knew he was giving up that right by pleading guilty." (Appendix A, page 2) (citing *United States v. McKinney*, 406 F.3d 744, 746 & n.2 (5th Cir. 2005)). The Court explained:

As Urias-Marquez failed to preserve his challenges to the Rule 11 admonishments, we review for plain error. *See United States v. Vonn*, 535 U.S. 55, 62-63 (2002). The record confirms the district court's compliance with Rule 11 at arraignment. The court informed Urias-Marquez of the nature of the charges by reciting each element of possession of marijuana with intent to distribute and aiding and abetting, which Urias-Marquez, under oath, confirmed that he understood. *See United States v. Lujano-Perez*, 274 F.3d 219, 224 (5th cir. 2001). It also recited the material portions of the appeal waiver provision, which Urias-Marquez, again under oath, confirmed he understood. "[S]olemn declarations in open court carry a strong presumption of verity." *United States v. McKnight*, 570 F.3d 641, 649 (5th Cir. 2009). . . .

(Appendix A, page 2). Accordingly, the Fifth Circuit concluded “[t]he waiver in this case is valid and enforceable and plainly bars Urias-Marquez’s appeal of his sentence,” and the appeal was dismissed. (Appendix A, page 2).

Petition for Writ of Certiorari

This Petition for Writ of Certiorari is now respectfully filed with this Court. For the reasons set forth below, Mr. Urias-Marquez contends this case deserves encouragement to proceed further and therefore respectfully requests that this Court grant this Petition and allow this matter to proceed.

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

I.

Legal Background

Mr. Urias-Marquez 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 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. Mr. Urias-Marquez 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).

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 11) (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. (Government’s Brief, page 11).

III.

The Holding in this Case is Contrary to *United States v. Lee*

United States v. Lee, 888 F.3d 503 (D.C. Cir. 2018), was one of the main cases the parties addressed before the Fifth Circuit. In *Lee*, the issue of whether specifics such as the appeal waiver should be part of the oral admonishments at the guilty plea hearing was squarely before the Court. *Id.* at 508. Here, the Government when before the Fifth Circuit crafted its brief in a fashion so that it left out the finding in *Lee* that it was reversible error for the Court to fail to advise the accused of each specific right the accused was waiving. As the Court in *Lee* explained, this cannot stand. Specifically, the Court pointed out:

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

Id. at 506.

The remainder of the ruling in *Lee* establishes the error in that case was ultimately harmless. *Id.* at 506-08. Here, however, based on the District Court's failure to obtain a specific, individualized answer on the waiver, this error caused harm because there is no evidence Mr. Urias-Marquez understood there was an appeal waiver or that he knowingly waived his rights on appeal. *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*, 571 U.S. 1083 (2013).

IV.

No Voluntary and Knowing Waiver of Appellate Rights

As noted above, when the Court discussed with Mr. Urias-Marquez the particulars of the plea agreement, which included the waiver, the Court did not discuss each specific portion of the particulars of the agreement. ROA.82-83. Indeed, the Court went through eight different and distinct legal concepts and then asked Mr. Gonzalez (defense counsel) if those were the "general" terms of the agreement. ROA.83. While all of these matters are important legal matters, the subtle presentation of the waiver of appeal provision prevented the waiver from being freely, voluntarily and knowingly made. Respectfully, the Fifth Circuit in this regard treated this fundamental right as a singular inquiry which, in turn, violated Rule 11 and Mr. Urias-Marquez' constitutional guarantees. *See Lee*, 888 F.3d at 506-08.

The *Lee* case is further authority that there was no valid waiver of appeal in this case. This Court is left to guess if Mr. Urias-Marquez understood he was waiving the right to appeal a case where he could receive up to a 30 year sentence, and actually received a 265 month sentence. Mr. Urias-Marquez' plea on the issue of waiver was therefore not freely, voluntarily and knowingly made because the Court should have clarified this right.

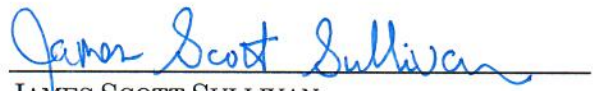
This error was even more fatal in light of Mr. Urias-Marquez' background. His signature on the plea agreement was an "X." ROA.109. Further, he is a Spanish speaker with no formal education. ROA.139. Clearly then, if the Court was to verify Mr. Urias-Marquez knew and understood he was waiving an appeal, the Court should have isolated that concept and discussed it separately with Mr. Urias-Marquez. The Court did not do so in this case and therefore Mr. Urias-Marquez did not voluntarily and knowingly waive his right to appeal.

To this end, it is important to understand the underlying reasoning in *Lee* because it is constitutionally and statutorily on-point with the facts in this case. The Courts must infer and, more importantly, "determine that the defendant understands" the specific terms of the agreement. *Lee*, 888 F.3d at 508. Where, as in this case, the Court listed eight specific important rights but failed to verify the rights were acknowledged, there was error of constitutional magnitude, and *Lee* clearly affirmed that right. Accordingly, Mr. Urias-Marquez respectfully submits that the Fifth Circuit's ruling is contrary to the holding in *Lee*. He therefore respectfully requests that this Court exercise its jurisdiction over this case to resolve the conflict which exists between the Circuit Courts.

CONCLUSION

For these reasons, Mr. Urias-Marquez 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, JOSE LUIS URIAS-MARQUEZ, 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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