No. 19-

IN THE
Supreme Court of the United States

THEODORE MICHAEL BREWSTER,

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 decisions of this Court 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:

Theodore Michael Brewster:	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, THEODORE MICHAEL BREWSTER, 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 this Court on the issue of adequate factual information to support a knowing and voluntary 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. Theodore Michael Brewster*, No. 18-50840 (5th Cir. Nov. 7, 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.

GROUNDS FOR JURISDICTION

On November 7, 2019, 2019, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Mr. Brewster. 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, Pecos 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 November 9, 2017, the Government filed an indictment against Thomas Michael Brewster. ROA.11. The three count indictment charged in the first two counts that Mr. Brewster, aided and abetted by others, knowingly possessed with intent to distribute fifty kilograms or more of marihuana. ROA.11-13. The third count charged that Mr. Brewster knowingly possessed with intent to distribute less than 500 grams of cocaine. ROA.13.

Arrest Leading to Release on Bond:

On November 16, 2017, Mr. Brewster was arrested. ROA.3. Eleven days later, he appeared before the Magistrate Judge, who ordered that Mr. Brewster be released on bond. ROA.28-30.

Plea Agreement:

The parties entered into a plea agreement which was filed with the Court on April 6, 2018. ROA.132-37. It should be initially noted that the Government sought to obtain the waiver of Mr. Brewster's trial rights and appellate rights. ROA.132-37.

Portions of the plea bargain and matters in the agreement are important to this appeal. For example, as discussed below, missing from the agreement and any acceptance of the agreement by the Court is any language with respect to a departure based on substantial assistance pursuant to U.S.S.G. § 5K1.1.

Paragraph 5 of the agreement provides:

> 5. The Defendant acknowledges that defense counsel has advised him/her of the nature of the charge(s), any possible defense(s) to the charge(s), and the range of possible sentence(s). The Defendant also understands that any recommendation(s) made by the United States Attorney in regards to sentencing is/are not binding on the court.

ROA.133. Paragraph 6 establishes:

> 6. The Defendant, however, understands that the United States Guidelines (U.S.S.G.) Are only advisory and that the court may take other factors into account in fashioning his/her sentence(s), which could result in greater or lesser punishment than that recommended by the U.S.S.G., and that the sentence(s) imposed can be up to the maximum penalty allowed by statute for the offense(s) to which he/she has agreed to plead guilty.

ROA.133.

The agreement then addresses the issue of waiver of appellate rights. ROA.134. This portion of the plea bargain provides:

> By entering into this agreement, the Defendant voluntarily and knowingly waives the right to appeal the sentence on any ground, including but not limited to any challenges to the determination of any period of confinement, monetary penalty or obligation, term of supervision and conditions thereof, and including any appeal right conferred by 18 U.S.C. § 3742. The Defendant also voluntarily and knowingly waives any right to contest the sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to, a proceeding pursuant to 28 U.S.C. § 2255; provided, however, that consistent with principles of professional responsibility imposed on the Defendant's counsel and counsel for the Government, the Defendant does not waive the right to challenge the sentence on grounds of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.

ROA.135.

The Guilty Plea Hearing:

Mr. Brewster entered a plea of guilty on April 6, 2018. ROA.95. The Court asked Mr. Brewster if he understood he would "not be able to appeal [his] conviction to a higher court nor will [he] be able to collaterally attack [his] conviction and sentence except in the very limited circumstances of ineffective assistance of counsel or prosecutorial misconduct." ROA.101. Mr. Brewster responded, "Yes." ROA.101. The Judge completed the hearing and accepted the plea of guilty. ROA.101-13. However, the Court made no mention of U.S.S.G. § 5K1.1.

The Presentence Investigation Report ("PSR"): Offense Conduct

A PSR was prepared and revised on numerous occasions. ROA.138-91. The report included a discussion of the Offense Conduct. ROA.140.

It was determined the investigation started when a Texas Department of Public Safety agent ("the SA") received information from a confidential informant ("the CI") identifying Mr. Brewster as a person in Van Horn, Texas, who was attempting to sell 100 pounds of marihuana. ROA.140. The SA used the CI to contact Mr. Brewster on October 31, 2016, and offer to buy 10 pounds of marihuana. ROA.140-41. The CI was going to deliver to Mr. Brewster $3,750 to purchase the marihuana. ROA.141. It was claimed in the report that Mr. Brewster instructed the CI to pick-up a "motor oil box" near his home that contained the marihuana. ROA.141. The PSR also noted that the CI was to leave the money were he found the box. ROA.141. The report further reflects that on November 1, 2016, the CI went to the designated location, took the box, and left the money. ROA.141.

Subsequently, on November 29, 2016 and November 30, 2016, this process was repeated. ROA.141. However, the CI was instructed to find the marihuana and leave the money in a truck on the property. ROA.141. On both November 29th and 30th, the SA and the CI traveled to the home and located the marihuana. ROA.141. Unlike the first transaction, however, they did not leave the money and exit the property. ROA.141. Instead, the SA called Mr. Brewster on the phone, and it was determined that less money would be left because only 6 pounds of marihuana were at the designated pick up site. ROA.141.

On January 5, 2017, the CI advised SA that Mr. Brewster was attempting to sell cocaine. ROA.142. The CI contacted Mr. Brewster and set up a purchase of 12 grams of the cocaine. ROA.142. The purchase was set up in the same manner as the previous transactions with the pick up truck being the place to exchange the drugs for money.

ROA.142. The SA went along with the CI. ROA.142. The cocaine was delivered, but Mr. Brewster was paid for only the 11.7 grams of the drug because that was the amount which had been left at the pick up site.

Thus, the PSR established the following conclusion:

> For guideline calculation purposes, **Brewster** is responsible for selling **15.5 pounds of marihuana** and **11.7 grams of cocaine.** Pursuant to USSG 2D1.1, comment (n.8), Brewster is responsible for **9.59 kilograms of marihuana.** The following calculations are used in order to combine two different controlled substances for guideline calculations purposes:
>
> - 1 pound = 0.4536 kilograms
> - 15.5 pounds = **7.03 kilograms**
> - 1 gram of cocaine = 200 grams of marihuana
> - 1,000 grams = 1 kilogram
> - 11.7 grams of cocaine = 2,340 grams of marihuana
> - 2,340 grams of marihuana = **2.34 kilograms of marihuana**
> - 2.34 kilograms + 7.03 kilograms = **9.37 kilograms**

ROA.142 (emphasis in original).

The PSR: Initial Report Calculations

In the initial PSR, Mr. Brewster's Base Offense Level was set at 12 because the case involved 9.37 kilograms of marihuana. ROA.143 (citing U.S.S.G. § 2D1.1(a)(5); U.S.S.G. § 2D1.1(c)(14)). There were no adjustments. ROA.143. Two levels were deducted for acceptance of responsibility. ROA.143. Thus, the Total Offense Level was 10.

With respect to Criminal History, the PSR only scored one prior history event. ROA.144. Specifically, Mr. Brewster was assigned 3 points for a marihuana case from 1997. ROA.144-45. Mr. Brewster's Criminal History score was therefore set at II. ROA.145. The

PSR also reflected that Mr. Brewster's maximum statutory punishment was 20 years confinement. ROA.13.

On the issue of the Guidelines, the Probation Officer explained in this initial report:

> **Guideline Provisions:** Based upon a total offense level of 10 and a criminal history category of II, the guideline imprisonment range is 8 months to 14 months. Since the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by (1) a sentence of imprisonment; (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in USSG §5C1.1(e), provided that at least one month is satisfied by imprisonment; or (3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement,
> community confinement, or home detention for imprisonment according to the schedule in USSG §5C1.1(e). USSG §5C1.1(c).

ROA.150 (emphasis in original).

The PSR: Amendments

On August 13, 2018, the PSR was amended. ROA.154. The following information and new calculations were added:

> 15a. On November 14, 2017, subsequent to **Brewster's** indictment for this case, the SA in charge of this case obtained a search warrant for **Brewster's** residence and an arrest warrant for **Brewster.**
>
> 15b. On November 16, 2017, the SA, along with law enforcement agents from multiple agencies coordinated the execution of both warrants. The agents waited for **Brewster** to leave his residence and conducted a traffic stop on the vehicle **Brewster** was driving. **Brewster** was taken into custody without incident and transported to the DPS office in Van Horn. The agents also served the search warrant at the defendant's residence. According to the investigative reports, the agents seized $1,800 in currency and a bank statement.
>
> 15c. On the same day, the SA met with **Brewster** to conduct a post-

arrest interview. **Brewster** was read his rights which he acknowledged and agreed to speak with the agent. **Brewster** was advised he had been arrested for his participation in the smuggling and selling of illegal drugs. **Brewster** explained to the agents that on or about October or November of 2016 he was supposed to make a payment for farming equipment for approximately $15,000. Around the same time, **Brewster** had learned several groups were transporting illegal drugs from Mexico through his property. **Brewster** had made arrangements with these groups allowing them to use **Brewster's** property, as well as a barn located on the property, in order to store the drugs. The people smuggling the drugs could later make arrangements to pick up the drugs so they could be transported to their final destination.

15d. **Brewster** admitted to the agent that **Brewster** and one of his employees, Israel Melendez, would occasionally take backpacks of marihuana dropped off at their property and sell them for a profit. **Brewster** admitted to the agents that on three occasions **Brewster** and Melendez received loads, containing five backpacks per load, at different locations on **Brewster's** farm. **Brewster** admitted to taking one backpack from each of the three loads. **Brewster** also told the agents **Brewster** weighed one of the backpacks on one occasion and it weighed approximately 60 pounds.

16. For guideline calculations purposes, and pursuant to USSG § 1B1.3, **Brewster** is responsible for the relevant conduct for acts and omissions which were part of ". . . the same course of conduct or common scheme or plans as the offense of conviction." **Brewster** is responsible for **900 pounds of marihuana** for the three loads of marihuana each containing five backpacks which weighed approximately 60 pounds. **Brewster** is also responsible for **11.7 grams of cocaine.** Pursuant to USSG 2D1.1, comment (n.8), Brewster is responsible for **410.58 kilograms of marihuana.** The following calculations are used in order to combine two different controlled substances for guideline calculations purposes:

- 1 pound = 0.4536 kilograms
- 900 pounds = **408.24 kilograms**
- 1 gram of cocaine = 200 grams of marihuana

- 1,000 grams = 1 kilogram
- 11.7 grams of cocaine = 2,340 grams of marihuana
- 2,340 grams of marihuana = **2.34 kilograms of marihuana**
- 408.24 kilograms + 2.34 kilograms = **410.58 kilograms**

ROA.158-59 (emphasis in original).

This addition dramatically changed Mr. Brewster's Base Offense Level and hence the Guidelines range of punishment. The amount of marihuana was changed from 9.37 kilograms to 408.24 kilograms. ROA.159. This changed the Base Offense Level from 12 to 26. ROA.143, 160. Further, this increased Mr. Brewster's punishment range from 51 months to 63 months in custody. ROA.167.

Objections to the Revised PSR and the Probation Officer's Response

The Probation Officer openly concedes this revised PSR was the result of Government action, and that the Government did not initially provide this additional information to the Probation Officer. ROA.170. An Addendum to the PSR establishes exactly what occurred. That portion of the Addendum states:

OBJECTIONS

By the Government

The Government has filed the following objections to the PSR on June 13, 2018:

I.

The Government objects to Paragraph 16, page 5 of the PSR regarding relevant conduct for this offense. The Government contends the PSR calculations are correct as calculated in the PSR with the information available. The Government also argues there should be other relevant conduct considered in the calculation. The Government contends the Defendant admitted, during a post-arrest interview, to other amounts of drugs

> he possessed which should be considered under relevant conduct. The Government advises the Defendant admitted to having located backpacks with marijuana on his property.
>
> The Government contends the Defendant admitted to allow his property to be used to store and transport marihuana, as well as multiple other occasions in which the Defendant admitted to finding backpacks with marihuana which he kept and later sold. The Government states the relevant conduct for the Defendant should include an additional 600 pounds, or approximately 272 kilograms, of marihuana which were not included in the initial PSR. Accordingly, the Government contends the correct offense level should be 24.
>
> **Response by the U.S. Probation Officer**
>
> The U.S. Probation Officer completed the initial PSR interview with the pertinent information and records which had been provided by the Government as part of the discovery packet. This initial discovery packet did not include the post-arrest interview of the Defendant by the investigating agents. The U.S. Probation Office contacted the Government upon receipt of this objection in order to obtain a copy of said report. Upon review of the post-arrest interview report, the U.S. Probation [Officer] agrees with the Government's objection to the PSR as being inaccurate in its calculations of the amount of the drugs involved in this offense.
>
> Based on the Government's objections, the PSR was amended to reflect the correct offense level calculations. Paragraphs 15a - 15d were inserted in order to provide the additional offense conduct not included in the initial PSR.

ROA.170-71. The remainder of the report was amended based on these changes.

Mr. Brewster's Motion for Variance

Mr. Brewster filed a motion for a below-Guidelines sentence variance pursuant to 18 U.S.C. § 3553(a). ROA.71-73. In support of the motion, Mr. Brewster argued this case did not involve violence or weapons, and he was not a serious high level drug trafficker. ROA.72. Therefore, Mr. Brewster requested that the Court depart downward below the Guidelines range of 51 to 63 months.

The Sentencing Hearing:

Mr. Brewster was sentenced on September 24, 2018. ROA.115. There was some discussion on the record which resulted in the amount of marihuana being reduced to under 400 kilograms. ROA.118. This brought Mr. Brewster's Offense Level down to 24 and, with a 3-level reduction for acceptance of responsibility, Mr. Brewster's final Offense Level was 21, with a Criminal History category of II. ROA.119. His punishment range was then calculated at 41 to 51 months in the custody of the Bureau of Prisons.

Mr. Brewster's attorney then began to discuss how Mr. Brewster's debriefing after arrest is where the relevant conduct was found which caused the substantial increase in the Guidelines range in the amended PSR. ROA.120. Apparently, after the first debrief, there was a second debrief where Mr. Brewster was ill and could not remember earlier possible drug transactions. ROA.120. Mr. Brewster's attorney stated that the Government nonetheless stated that "he [referring to Mr. Brewster] did great." ROA.121.

Mr. Brewster's attorney then stated that he was surprised by the revised PSR because his client had been told at the debriefing that "[e]verything that you say here is not going to be used against you." ROA.121. Defense counsel then stated that Government agents told him that they "were fine with it [referring to the debriefing]." ROA.121. And then, Mr. Brewster's lawyer claimed, based on the debriefing, the range "jumped up to 51 or 78 or something like that, but now its down to 41." ROA.121.

The Government responded that the first debriefing "was not a proffer at all" and that it was a "post-arrest interview." ROA.122. With respect to the post-arrest interview, the Government claimed:

> MR. KIMBALL: And he admitted that they were using his property. That he had a light on his barn that they used as a site to where they could come in and drop the dope off, he and one of his relatives would pick it up. I forget whether that's an in-law or an outlaw, but it's one of his relatives. And they would pick it up, and they had three prior occasions done that, and it weighed about roughly 60 pounds. And so that's where the relevant conduct came from.

ROA.122-23.

On the issue of the proposed debriefing, the Government explained:

> And so the second interview was a potential 5K interview, a potential interview for him to help himself. And when we got into the second interview, I mean, I sat in on that interview and I told him, I said, "You're backing up, Man. Don't back up. You're not going to help yourself. You told the agent this and now you're not." And I had that conversation with him in the interview. And I told him, I said, you know–and I told Mr. Chavez, "This is not going to work. I'm not going to be able to help him because he backing it up. He's not remembering things that he's already told us."

ROA.123.

Hence, the prosecutor claimed the Government could add this relevant conduct and then change the offense after the PSR was prepared. More specifically, the Government claimed:

> And so that's the reason that ultimately–and when Mr. Austin [referring to the Probation Officer] did the first Presentence Report, the one thing that was not included in the discovery was the post-arrest interview. So when I gave him the post-arrest interview, he realized that the relevant conduct was higher, and that's why he revised it. And that's the government's response.

ROA.123.

This led the Court to overrule "the objection based on Mr. Kimball's response as well as all the writings in the report and the addenda and the responses in writing." ROA.124. The Court added that "[t]he relevant conduct appears to the Court to be calculated correctly and to be inclusive of the correct amounts." ROA.124.

The Court's Sentence

The Court ruled that the Total Offense Level was 21, with a Criminal History category of II. ROA.125. This left Mr. Brewster with a Guidelines' imprisonment range of 41 to 51 months. ROA.125.

The Court found the Guidelines range was fair and reasonable. ROA.127. The Court sentenced Mr. Brewer to serve 51 months in the custody of the Bureau of Prisons. ROA.127.

Notice of Appeal

Mr. Brewster timely filed a notice of appeal. ROA.81. The proceeding in the Fifth Circuit of Appeals followed.

The Fifth Circuit Opinion

On November 7, 2019, the Fifth Circuit Court of Appeals considered the above argument that the guilty plea was not knowing and voluntary. (Appendix A). The Fifth Circuit disagreed with Mr. Brewster and concluded that the plea was knowing and voluntary and affirmed the District Court. (Appendix A, page2). Specifically, the Fifth Circuit explained:

> The magistrate judge who conducted the rearraignment advised Brewster of the nature of the offense and the statutory maximum stntence, and Brewster stated that he understood. The judge expressly advised him that the probation officer would prepare a report calculating his range of punishment

based on the Sentencing Guidelines, including relevant conduct, and Brewster stated that he understood. Because Brewster was aware of the nature of the charges, the statutory maximum punishment, and the fine for the offense, but nevertheless pleaded guilty, his guilty plea was knowing and voluntary. *See United States v. Scott,* 857 F.3d 241, 245 (5th Cir. 2017); *United States v. Washington,* 480 F.3d 309, 315 (5th Cir. 2007). Brewster has not shown the district court plainly erred by not advising him that his sentence could be based on additional drug quantities not listed in the factual basis. *See Scott,* 857 F.3d at 245; *Washington,* 480 F.3d at 315.

AFFIRMED.

(Appendix A, page 2). 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. Brewster 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. Brewster 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.

Substantially Increasing the Sentence With Added Facts

In this case, the Government proceeded with a plea agreement that had a small amount of cocaine as the factual basis. ROA.135. Then, at sentencing, the Government added additional amounts of drugs to the facts to significantly increase the punishment range. ROA.135, 160. Mr. Brewster submits the Government should have included these additional amounts in the original factual basis so that Mr. Brewster would have full knowledge of the nature of the offense to which he was pleading guilty.

The Government explains the entire process in the following fashion:

> After Appellant entered his guilty plea, the Probation Officer prepared a Presentence Report (PSR) which calculated a base offense level of 12, based on an offense involving 9.37 kilograms of marihuana (ROA.143). A two-level reduction for acceptance of responsibility resulted in a total offense level of 10 (ROA.143).
>
> The Government objected to the relevant conduct calculation. (ROA.179). While acknowledging that the report was correctly calculated using the information available at the time, the Government advised that subsequent information obtained during the ongoing investigation should result in an additional 600 pounds, or approximately 272 kilograms of marijuana, which should be included in the initial PSR (ROA.170). The Probation Officer agreed, and amended its report to reflect the correct offense level calculations (ROA.170-71).
>
> The revised PSR established a base offense level of 26 pursuant to U.S.S.G. § 2D1.1(a)(5) and (c)(7), and based on an offense involving 410.58 kilograms of marijuana (ROA.160). The drug quantity was calculated as follows:

> For guideline calculations purposes, and pursuant to U.S.S.G. § 1B1.3, Brewster is responsible for the relevant conduct for acts and omissions which were part of " . . . the same course of conduct or common scheme or plans as the offense of conviction." Brewster is responsible for 900 pounds of marihuana for the three loads of marihuana each containing five backpacks which weighed approximately 60 pounds. Brewster is also responsible for 11.7 grams of cocaine. Pursuant to U.S.S.G. § 2D1.1, comment (n.8), Brewster is responsible for 410.58 kilograms of marihuana. The following calculations are used in order to combine two different controlled substances of guideline calculations purposes:
>
> - 1 pound = 0.4536 kilograms
> - 900 pounds = 408.24 kilograms
> - 1 gram of cocaine = 200 grams of marihuana
> - 1,000 grams = 1 kilogram
> - 11.7 grams of cocaine = 2,340 grams of marihuana
> - 2,340 grams of marihuana = 2.34 kilograms of marihuana
> - 408.24 kilograms + 2.34 kilograms = 410.58 kilograms

(ROA.158-59).

After deducting three levels for acceptance of responsibility under U.S.S.G. §§ 3E1.1(a) and 3E1.1(b), Appellant's total offense level was calculated at 23 (ROA.160).

Appellant received three criminal history points for a 1997 conviction for two counts of Possession With Intent to Distribute Marijuana, out of the Western District of Texas, Pecos Division (ROA.161). This established a criminal history category of II.

Based on a total offense level of 23 and a criminal history category of II, the guideline imprisonment range was calculated at 51 to 63 months, with a statutory maximum sentence of 20 years.

Appellant objected to the revised drug quantity calculation, arguing the original base offense level of 12 was correct (ROA.194). The Probation Officer responded that, based on updated information not previously available at the time of the original calculation, the amended PSR was correct. (ROA.194-95).

> At sentencing, the Government addressed a mathematical error in the calculation of the drug quantity. "The relevant conduct here on the marijuana was 410 kilos. Since I generally give a 5 percent pencil strike anyway for packaging, that gets him under 400 kilos. So the government is going to agree to that." (ROA.118). The Probation Officer advised that the new calculation for "over 100 kilograms but less than 400 kilograms yields an offense level of 24 . . . That would be 41 to 51 months" (ROA.119).

(Government's Response, pages 4-6).

Mr. Brewster submits the Government's factual representation is correct. He also submits that, as argued to the Fifth Circuit, when the law is applied to the facts in this case, there was a violation of Fed. R. Crim. P. 11, as well as due process, and hence Mr. Brewster's plea was not knowing and voluntary. Accordingly, that this Court should grant this Petition to exercise its supervisory powers to uphold Rule 11 and due process.

As this Court explained in *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976), a guilty plea is involuntary when the accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Indeed, "without adequate notice of the nature of the charge against him or proof that he has in fact understood the charge, the plea cannot be voluntary in this latter sense." *Id.* As this Court has further explained, notice of the true nature of the charge is "the first and most universally recognized requirement of due process." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941).

This well established precedent of this Court when applied to the facts of this case demonstrates that the insufficient information at the plea with respect to the facts constitutes a violation of Rule 11 and due process. Despite the existence of facts which

would significantly increase Mr. Brewster's punishment range, these facts were not included in the factual basis of this plea. Because the relevant conduct facts would significantly increase Mr. Brewster's punishment range, and he was not informed of these facts when he entered his guilty plea, Mr. Brewster's plea was not made with full knowledge of the nature of the charge to which he would be pleading and to which he would be sentenced. Hence, this Petition should be allowed to proceed forward and should be granted by this Court.

CONCLUSION

For these reasons, Mr. Brewster requests that this Court grant this Petition to assure the decision in this case does not conflict with the decisions of this Court.

WHEREFORE, Petitioner, THEODORE MICHAEL BREWSTER, 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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