

No. 20-

IN THE
Supreme Court of the United States

ASHVINBHAI CHAUDHARI,

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—has so far departed from the accepted and usual course of judicial proceedings on important matters and, therefore, the 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.

More specifically, the Fifth Circuit held the plea was not involuntary even though Mr. Chaudhari was not admonished during his guilty plea that he might be ordered to pay restitution and Mr. Chaudhari was ordered to pay approximately \$8,900,000 in restitution. Furthermore, the plea bargain led Mr. Chaudhari to believe a motion by the Government for a downward departure would be granted by the District Court and the District Court in fact denied the Government’s motion for a downward departure. Under the circumstances, Mr. Chaudhari submits his plea was involuntary and therefore he requests that this Court grant this petition.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Ashvinbhai Chaudhari: 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, ASHVINBHAI CHAUDHARI, 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 has so far departed from the accepted and usual course of judicial proceedings on the issue of requiring the District Court to clearly explain to the defendant the consequences of the plea and appellate waiver, as well as the specific constitutional rights subject to the 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. Ashvinbhai Chaudhari*, No. 18-20550 (5th Cir. Feb. 27, 2020), appears at Appendix A to this petition and is unreported.

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

From the State Courts:

None.

GROUND FOR JURISDICTION

On February 27, 2020, the United States Court of Appeals for the Fifth Circuit affirmed the sentence imposed on Mr. Chaudhari. 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

Overview

On April 26, 2017, Mr. Chaudhari entered a plea of guilty to one count of conspiracy to commit money laundering. ROA.469. There was a plea agreement that included a waiver of appeal. ROA.472-73. Because Mr. Chaudhari was not admonished at the guilty plea hearing as to the possibility of restitution and as to the possibility that the Court could deny the Government's motion for a downward departure, Mr. Chaudhari argued to the Fifth Circuit that the appeal waiver did not apply to these two issues. (Appendix A). The Fifth Circuit affirmed the restitution and dismissed the appeal on the basis of the appeal waiver with respect to the denial of the U.S.S.G. § 5K1.1 downward departure. (Appendix A).

The Various Roles Defendants Played Pursuant to the Indictment:

The conspiracy in this case involved leaders who were safely protected in India, as well as people working here in the United States who would be prosecuted. The indictment provided that the conspirators occupied seven distinctive roles. ROA.84-86. The indictment also described each role. ROA.94-86.

“Domestic Runners” were located in the United States who retrieved cash payments of scammed funds. ROA.84. They usually operated regionally. ROA.84. In addition to other work, these runners deposited scammed funds into bank accounts. ROA.84. The runners were directed by “domestic managers.” ROA.84.

These domestic managers provided the runners with resources and supplies. ROA.84. The domestic managers were also often direct points of contact with “call center operators” and “payment processors” who were located in India. ROA.85.

Call center operators were located in India and oversaw the day-to-dy operations of the call centers. ROA.85. They were the managers of these centers and kept track of the facilities to monthly invoices. ROA.85. Some of the call center operators had “equity shares” in the call centers. ROA.85.

The operation also included “callers” who would perform off a script and would make fraudulent and extortionate calls to victims in the United States. ROA.85. These callers would purport to be U.S. government officials or money lenders when extracting scammed funds from victims. ROA.85.

The “payment processors” were located in India. ROA.85 They acted as intermediaries between the call centers and the runners. ROA.85. For example, the payment processors would activate and manage GPR cards which were used for numerous money transactions. ROA.85-86.

The sixth group was comprised of “data brokers.” ROA.86. The data brokers “identified and contacted U.S. and foreign lead generators and marketing companies to purchase names and PII for registering GPR cards and targeting potential victims.” ROA.86. They also “facilitated payment for PII through domestic runners.” ROA.86.

The final group was composed of “Hawaladar.” ROA.86. A Hawaladar is one who operates a “hawala.” ROA.86. A hawala “is an underground banking system based on trust through which money can be made available internationally without actually moving it or leaving a record of the transaction.” ROA.86. Specifically, in this type of these transaction, an individual who wants to send money abroad can contact a Hawaladar, who in turn contacts a different Hawaladar in the country where the money is to be sent, and the two Hawaladars complete the transaction. ROA.86.

The Role of Mr. Ashvinbhai Chaudhari:

Mr. Chaudhari’s role in the conspiracy was limited. Specifically, the indictment described Mr. Chaudhari’s role as that of a domestic runner in Louisiana and Texas. ROA.87-88.

The Indictment:

The indictment summarily declared that the scheme resulted in over hundreds of millions of dollars lost by over 15,000 known victims. ROA.95. This resulted in a multi-count indictment alleging wire fraud and money laundering. ROA.81.

The PSR:

The Presentence Investigation Report (“PSR”) began with a review of the conspiracy, ROA.526-32, which is consistent with the above discussion concerning the indictment and its supporting facts. The PSR assigns the following relevant conduct to Mr. Chaudhari:

- * he was a domestic runner for the conspiracy;
- * he received training from a co-defendant on how to liquidate victim funds from GPR cards;
- * he reported to co-defendants in India;
- * he communicated with others in the conspiracy about the operation via an “App group chat”;
- * he “vacated” scam proceeds from GPR cards and deposited the funds into the conspiracy’s bank accounts;
- * he received fraudulent identification documents which he used to retrieve victim scam payments;
- * he shipped scammed sums to co-conspirators via Federal Express;
- * he received 40% commission for transactions for an unindicted co-conspirator; and
- * he drove various vehicles with co-conspirators to various Walmart stores and other retail outlets to liquidate GPR cards

ROA.533-34.

The PSR explained that, on March 2, 2016, Mr. Chaudhari was pulled over by local police in Baton Rouge, Louisiana. ROA.536. He had over 40 money orders in his possession, totaling approximately \$30,000. ROA.536. These money orders had been funded by victims who had been duped by the scam. ROA.536.

After the various computations for the loss amount analysis were made, as well as those computations matched to a vehicle Mr. Chaudhari drove, the probation officer included in the PSR a section entitled “Sophisticated Laundering as contemplated by U.S.S.G. § 2S1.1(b)(3).” This analysis provided:

The investigation determined this offense involved sophisticated laundering since it involved the use of fictitious entities; shell corporations; and included two or more levels (*i.e.*, layering) of transactions, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate. In the instant case, the conspirators utilized the following methodology which included the layering of transactions, transfers, or transmissions involving victim scam funds in an attempt to make the transactions appear legitimate: the conspirators received funds from the victims, who often placed the funds on stored value cards, at the direction of the conspirators; the conspirators then transferred those funds to GPR cards; the conspirators purchased money orders by utilizing the GPR cards; and the conspirators either cashed the money orders or deposited the funds from the money orders into bank accounts. The conspirators would often work with other conspirators in India and complete the fraudulent scheme in a timely fashion (within 1 day) so that the victims did not have time to report the scam.

ROA.538. The probation officer then determined relevant conduct. ROA.539. The PSR provides a total loss amount of \$5,669,688.40. ROA.539. It was determined this was “sophisticated laundering” and that Mr. Chaudhari was an average participant. ROA.539.

PSR Calculations:

The Probation Officer determined that Mr. Chaudhari's Total Offense Level was 29. ROA.541. The PSR next determined that Mr. Chaudhari's criminal history score was 0. ROA.541. However, the PSR lists an incident under "Other Criminal Conduct." ROA.541. Because it became the District Court's core reason for its sentence, it must be repeated here in full. The PSR provides:

According to the Affidavit for Warrant of Arrest and Detention, an officer with the Austin Police Department (APD) was contacted by apartment staff at 9301 Old Bee Caves Road at approximately 11 a.m. on July 1, 2016. The officer was off-duty at home at the time and was requested to assist in a family violence situation. In the meantime, the courtesy officer of the complex walked to the front of the complex and established contact with the assistant property manager, who directed the courtesy officer to the complainant (identified as Nikita Raval). The complainant was identified as a complainant, who stated she lived with her boyfriend of 8 months (later identified as the defendant, Ashvinbhai Chaudhari with a date of birth of April 26, 1989). The complainant noted she was talking with the defendant at approximately 1:30 a.m. about looking through her phone messages and would not give her phone back to her. The complainant advised it was normal conversation until the defendant became very upset. At this time, the defendant grabbed the complainant by the throat and began strangling her to the point where she could not breathe. The complainant began to see darkness and eventually blacked out. When she regained consciousness, the defendant released her. The complainant said the defendant took her phone and left the apartment. The complainant went to sleep and woke later when the defendant returned to the apartment. The complainant said she was very scared of the defendant and did not have a phone to call anyone to help her. The complainant waited until the office opened and she walked there. The complainant met with a male subject and asked to borrow his phone. The male witness advised the complainant was trembling in fear and was clearly scared of the defendant, who was seen walking through the clubhouse looking for the complainant. The witness advised the apartment staff, who concealed the complainant from the defendant until the APD officer arrived.

Once the APD officer reached the scene, he was given the aforementioned details about the case. The officer observed the defendant walking around the

complex, clearly searching for someone. The officer detained the defendant and asked him what was going on. The defendant admitted to having a disagreement with the complainant. He also admitted to having her phone but he stated he was just trying to fix her broken phone. The complainant advised she did not have a place to go and was frightened of the defendant because he had assaulted her on numerous occasions in the past. The complainant said she feared if the defendant was released, he would assault her again once they were both inside their residence again. Due to the complainant's statement and the fact they both lived together (and neither had a separate place to go), the officer feared further violence might occur between the two of them, possibly resulting in serious bodily injury or death. The APD officer then placed the defendant under arrest for assault.

On July 25, 2016, an Affidavit of Non-Prosecution was filed on behalf of the defendant in this case. According to the affidavit, the complainant said she did not wish to pursue charges against the defendant. She noted she wanted the prosecution of this case to be withdrawn, dismissed and terminated. According to the complainant, this incident was a misunderstanding between her and the defendant (whom she described as only a friend void of any type of romantic relationship). The complainant denied ever being strangled and she recanted the response she gave to the authorities, citing it was exaggerated. She also stated the couple never lived together, she has never been fearful of the defendant, and he has never physically abused her in the past.

According to an employee of the Travis County District Clerk's Office, a writ of habeas corpus was issued against the defendant on June 30, 2017. As a result, a warrant was issued for the defendant's arrest. As of the date of this writing, the warrant remains outstanding.

ROA.542-43. However, because this was only an allegation, it did not affect his Guidelines range or history score.

Therefore, Mr. Chaudhari's Total Offense Level was 29, with a Criminal History Category of I. ROA.548. Based on this, Mr. Chaudhari's guidelines punishment range was set at 87 months to 108 months in the custody of the Bureau of Prisons.

The Sentencing Hearing:

Mr. Chaudhari was sentenced on July 20, 2018. ROA.485. Relevant to this petition was the Government's request for a U.S.S.G. § 5K1.1 ("5K") downward departure. ROA.488. The Government stated, based on the Government's 5K motion for downward departure, that the Government recommended a 64-month sentence. ROA.489-90. The Government explained:

This defendant did debrief with the government. He provided information about a very large number of his co-defendants, and even some unindicted co-conspirators. Additionally, he did suffer himself some personal injury and some threats, we believe partly in connection with his cooperation.

ROA.490. Indeed, after one debriefing session with Mr. Chaudhari, the Government agents noticed a visible injury and requested that he be transferred because the agents feared "for his own personal safety." ROA.490-91.

The Government continued to argue for the lesser sentence:

[AUSA] SAHAF: So, because he provided information about a large number of co-defendants, and some unindicted conspirators as well, and because he did suffer, we believe, some abuse based upon his cooperation, we think a sentence of what is still over five years does send a significant message that is appropriate for this defendant.

ROA.490-91.

Defense counsel then described the beating Mr. Chaudhari took for his assistance:

[ATTORNEY] ASH: Your Honor, he did—when he came to the debriefing, he was beaten up. His eye was all swollen, and the government agents who interviewed him asked that he be moved from Corely unit to FDC for his own

personal safety. So this–this did happen. It's not that it didn't happen, Your Honor.

ROA.491.

The District Judge was not persuaded the departure was appropriate. ROA.491. The Judge therefore denied the Government's request for a downward departure. ROA.491. To this end, the Judge directly and consciously put on the record the basis of his denial of the 5K:

THE COURT: I just want to note that he is not legally in the country. He is an illegal alien. And he also has a number of things. He has a criminal—he has a criminal background, even though no points were given, theft by receiving stolen property in Georgia. Okay? That was a—that was—that was a date—that was an arrest. He also has a pending charge in Travis County, assault by strangulation and/or suffocation.

And that's in Austin. And the description as to what this is, apparently there is an active warrant remaining outstanding.

ROA.491.

The Court then confirmed that the Government was recommending the 64-month sentence despite being aware of Mr. Chaudhari's "criminal background":

[THE COURT]: Are you aware of that?

[AUSA] SAHAFF: Yes, sir.

ROA.491. The Judge went on to explain:

THE COURT: Okay. It says—and just as a part of the description, and this does appear in the presentence report, the complainant apparently—alleged the defendant grabbed the complainant by the throat, and began strangling her to the point where she could not breathe and she blacked out.

There is another arrest. So he is not the first go round again. Another arrest in 2014, acquiring a license plate for the purpose of concealing identification

of a motor vehicle. That is out of Georgia. There is also under that some charge—that's other arrests in Georgia, financial transaction, card fraud, and financial trans—another card fraud.

I have considered 18 United States Code, Section 3553(a). I understand his cooperation, but with that sort of a background, and he is not here in the United States legally, I will sentence within the guidelines, but at the low end of the guidelines.

It is the judgment of the Court, the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned in the federal penitentiary for a term of 87 months.

ROA.491-92.

The second portion of the sentencing which is relevant to this proceeding is restitution. On this issue, the Court ruled:

[Mr. Chaudhari] will pay restitution in the amount of \$8.9 million to the identified victims jointly and severally with all of the other co-defendants in this case. And he's to make a lump sum payment of \$100 immediately. Payments the greater of \$25 per quarter or fifty percent of any wages earned while in prison, and any balance be paid in equal monthly installments of \$200 to commence 60 days after the date of release.

ROA.493.

In closing, the Judge again noted that he was denying the Government's request for a 5K departure to 64 months, which was based on the substantial assistance Mr. Chaudhari had provided. ROA.494. The Court denied the motion despite the fact Mr. Chaudhari's assistance resulted in the indictments of several co-defendants which would not have been secured otherwise and despite the fact that Mr. Chaudhari had been beaten to the point where federal agents requested that he be transferred to a different prison for his own personal safety. To the District Court, it was irrelevant and the Judge sentenced Mr.

Chaudhari to serve an 84-month prison term. ROA.494. Specifically, the Judge reiterated: “For the record, the motion for downward departure is denied.” ROA.494.

Notice of Appeal:

Mr. Chaudhari timely filed a notice of appeal. ROA.441. After briefing, the Fifth Circuit issued its opinion which denied relief on the restitution claim and dismissed the remaining arguments in the appeal on February 27, 2020. (Appendix A).

The Opinion of the Fifth Circuit:

The Fifth Circuit ruled the plea was voluntary despite the lack of an admonishment that the Court could deny the Government’s 5K1.1 motion because “Rule 11 does not require such an admonishment.” (Appendix A, page 2) (citing Fed. R. Crim. P. 11(b)). The Fifth Circuit found that the advisement by the District Court “of the elements of the charge” was sufficient. (Appendix A, page 2) (citing FED. R. CRIM. P. 11(b)(1)(G)).

On the issue of whether the plea agreement and the appellate waiver applied to restitution, the Fifth Circuit agreed that the District Court “clearly erred in failing to admonish Chaudhari of its authority to order restitution.” (Appendix A, page 2) (citing FED. R. CRIM. P. 11(b)(1)(K)). However, the Court ruled the waiver was binding because Mr. Chaudhari “has not demonstrated a reasonable probability that, but for the error, he would not have pleaded guilty.” (Appendix A, page 2) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). The Court bolstered its conclusion with the observation that the possibility of restitution was in the plea papers because the agreement provided that Mr. Chaudhari “would be responsible for a guideline loss amount between \$3,500,000

and \$9,500,000.” (Appendix A, page 3). The Fifth Circuit further noted that Mr. Chaudhari did not object to the restitution amount when it was announced at sentencing. (Appendix A, page 3). Based on these conclusions, the Fifth Circuit ruled:

Because we have addressed the merits of Chaudhari’s restitution argument in the course of assessing the waiver’s enforceability, we AFFIRM IN PART the judgment of the district court with respect to the restitution order.

(Appendix A, page 3).

Petition for Writ of Certiorari

This Petition for Writ of Certiorari is now filed with this Court. For the reasons set forth below, Mr. Chaudhari 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. Chaudhari 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 him or proof that he 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). Additionally, the Court is required by Rule 11 to admonish the defendant that the Court has the authority to order restitution as part of the plea agreement. FED. R. CRIM. P. 11(b)(1)(K).

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. Chaudhari

respectfully submits that in this case the Court which took the plea “failed to perform its duty of ascertaining whether he understood the nature of the charge he was pleading to” and the consequences of that plea. *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.
Reversible Error on Restitution

Before the Fifth Circuit Mr. Chaudhari relied on the Fifth Circuit rule of law that “it is extremely critical that the sentencing judge give as full a disclosure as possible at the time of the plea colloquy regarding the Court’s authority to order mandatory restitution and the probable quantum thereof.” *United States v. Powell*, 354 F.2d 362, 369-70 (5th Cir. 2003). Here, this rule of law was never contested by the Government or the Fifth Circuit. Indeed, the Fifth Circuit held this failure to admonish on restitution was error. (Appendix A, page 2). Nonetheless, the Fifth Circuit upheld the waiver because “Chaudhari has not demonstrated a reasonable probability that, but for the error, he would not have pleaded guilty.” (Appendix A, page 2). However, the Fifth Circuit did not address the significant impact of the failure to admonish on restitution but rather focused on (1) the lack of an objection by Mr. Chaudhari to the lack of any statement by the Court as to restitution and (2) the presence of a restitution range in the written plea agreement signed by Mr. Chaudhari. (Appendix A, pages 2-3). Indeed, the Fifth Circuit did not apply its own cases which address when it is error to fail to admonish on restitution during the guilty plea hearing. As argued in the opening brief:

The decisions of this Court in *United States v. Maharaj*, 176 F. App'x 536, 539 (5th Cir. 2006), and *United States v. Imeh*, 291 F. App'x 637, 641-42 (5th Cir. 2008), provide the framework for evaluating this issue on appeal. In each case, the defendant argued that the District Court's failure to specifically advise him of the Court's authority to order restitution affected his substantial rights. In conducting the analysis into whether the defendants were entitled to relief, this Circuit considered: (1) the difference between the maximum possible fine of which the defendant was advised at the plea hearing and the total amount of restitution and fines imposed by the District Court at sentencing; (2) whether the plea agreement advised the defendant of the Court's authority to order restitution and, if so, whether the defendant acknowledged that he had read and understood the plea agreement during the plea hearing; and (3) whether the defendant was jointly and severally liable with his codefendants for making restitution. *Imeh*, 291 F. App'x at 641-42; *Maharaj*, 176 F. App'x at 539.

(Opening Brief, pages 24-25).

The Fifth Circuit never addressed these issues. Thus, it can only be concluded that the Appellate Court was not applying the plain error analysis, but rather was endorsing a rule of law that this un-objected-to-error would not be reviewed. Respectfully, this is contrary to the holding of this Court in *Davis v. United States*, 140 S. Ct. 1460 (2020). Alternatively, the Fifth Circuit is requiring that the defendant provide "additional evidence" to support reversal, which is contrary to this Court's application of plain error. *United States v. Molina-Martinez*, 136 S. Ct. 1338, 1348-49 (2016). Therefore, Mr. Chaudhari submits this petition should be granted and proceed to further review.

III. Estoppel and Denial of U.S.S.G. § 5K1.1

As established above, the Government, not Mr. Chaudhari on his own behalf, filed a motion for Mr. Chaudhari to be granted a downward departure for his substantial cooperation with the Government. (Opening Brief, page 40). The motion was factually and

legally accepted by the District Court. (Opening Brief, pages 40-41). Nonetheless, the Court denied the motion based on non-assistance related factors. (Opening Brief, page 41).

On appeal to the Fifth Circuit, Mr. Chaudhari claimed that, if the Government sought to foreclose review of its own motion based on the waiver, it was judicially estopped from asserting this new position because it was clearly inconsistent with its request for the departure. (Opening Brief, pages 37-40). On appeal, the Government did assert the appeal waiver with respect to the denial of its own motion. (Government's Brief, page 33). While the government claimed the § 5K1.1 motion was warranted, its support of the motion ceased because the it claimed it must “recognize the district court’s authority to grant or deny the United States request.” (Government’s Brief, page 33). The Government also stated that its new position was not “clearly inconsistent” to the position it took before the District Court. (Government’s Brief, page 33).

The Fifth Circuit agreed. The Court reasoned “the government’s invocation of the waiver-of-appeal provision is not clearly inconsistent with its having filed a U.S.S.G. § 5K1.1 motion for downward departure in the district court.” (Appendix A, page 3) (citing *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014)).

In *Gabarick*, the Fifth Circuit relied heavily on this Court’s opinion in *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001), for describing clearly inconsistent positions. 735 F.3d 550 at 553. The Fifth Circuit noted “judicial estoppel is an equitable doctrine that defies ‘inflexible prerequisites or an exhaustive formula.’” *Id.* (quoting *Maine*, 532 U.S. at 751). The Court further observed the doctrine “prevents a party from asserting a position

in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.” *Id.* (citing *Maine*, 532 U.S. at 751). The Fifth Circuit concluded it prevents the parties from playing “fast and loose” with the courts and protects judicial integrity. *Id.*

The Government’s position before the Fifth Circuit seeking to enforce the waiver of appeal was clearly inconsistent with its initial position that the motion for downward departure was legally sound and should have been granted. Furthermore, as established above, the plea agreement which included a waiver of appeal also included that the Government would move, if legally appropriate, for a U.S.S.G. § 5K1.1 sentence reduction. At sentencing, the Government’s position was unequivocal: Mr. Chaudhari should be granted a downward departure free from any legal action by the Government. Hence, the Government’s decision to assert the waiver was and is clearly inconsistent with its motion for departure. As noted above, it argued the motion was factually and legally sound and the Court accepted the motion. In other words, it was the Government’s motion free of error. Hence, for the Government to now take the position that the denial of its own motion should not be reviewed and still denied because of the waiver of appeal is plainly inconsistent with its unequivocal support of the motion. Stated another way, the Government’s declaration that it must recognize the Court’s authority to deny the motion, (Government’s Brief, page 33), is contrary to the point of irrelevance on the issue of whether the decision was legally sound. Accordingly, Mr. Chaudhari requests that this Court grant this petition.

Mr. Chaudhari would also submit, as he did before the Fifth Circuit, that the denial of the motion for downward departure was without merit. (Opening Brief, pages 23-32). Because of the above-referenced dismissal by the Fifth Circuit pursuant to the waiver of appeal, Mr. Chaudhari asserts his argument on the denial was not reviewed and should now be reviewed by this Court or the matter remanded. (Opening Brief, pages 23-32). This is because the extent of a U.S.S.G. § 5K1.1 denial must be limited solely to assistance related concerns and the District Court failed to follow this mandate. (Opening Brief, page 23). Further, the District Court used uncharged and unproven conduct in denying the departure in contravention to the requirement that “facts relevant to sentencing must be proved by a preponderance of the evidence.” *United States v. Watts*, 519 U.S. 148, 151-52 (1997). Hence, there are significant issues which the Fifth Circuit and this Court must address in the event the Fifth Circuit’s dismissal of the appeal is set aside. Accordingly, Mr. Chaudhari respectfully submits that the Fifth Circuit’s ruling is contrary to the holdings of this Court and the Fifth Circuit’s own case law. He therefore respectfully requests that this Court exercise its jurisdiction over this case to resolve the conflict which exists between the opinion and controlling precedent.

CONCLUSION

For these reasons, Mr. Chaudhari 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 and Circuit Courts.

WHEREFORE, Petitioner, ASHVINBHAI CHAUDHARI, 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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