

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**Roberto Elias Martinez,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- I. Whether plain error resulted from the district court erroneously advising the client during plea colloquy that the maximum term of imprisonment was 10 years when, in fact, the statutory maximum term of imprisonment was 20 years and the court imposed a 20-year sentence?

## **PARTIES TO THE PROCEEDING**

Petitioner is Roberto Elias Martinez, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Roberto Elias Martinez seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **OPINIONS BELOW**

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Roberto Elias Martinez*, 822 Fed. Appx. 293 (5th Cir. September 22, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

### **JURISDICTION**

The panel opinion and judgment of the Fifth Circuit were entered on September 22, 2020. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **STATUTORY AND RULES PROVISIONS**

The Fifth Amendment to the United States Constitution provides:

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;

This Petition involves Federal Rules of Criminal Procedure, Rule 11, which states in relevant part:

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;
- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

#### **LIST OF PROCEEDINGS BELOW**

1. *United States v. Roberto Elias Martinez*, 3:18-CR-00066-D-5, United States District Court for the Northern District of Texas. Judgment and sentence entered on August 5, 2019. (Appendix B).
2. *United States v. Roberto Elias Martinez*, 822 Fed. Appx. 293 (5th Cir. September 22, 2020), CA No. 19-10897, Court of Appeals for the Fifth Circuit. Judgment affirmed on September 22, 2020. (Appendix A)

## STATEMENT OF THE CASE

On February 6, 2018, Roberto Elias Martinez (Martinez) was named with several other co-defendants in a sealed indictment. (Document No. 1; ROA.68-73).<sup>1</sup> On July 6, 2018, Martinez pleaded guilty to count 10 of the sealed indictment (ROA.4,28-30,76-96,119-129). As a part of the guilty plea, Martinez entered into a written plea agreement in which he waived his right to appeal. (ROA.199,124). However, one of the exceptions to his waiver of appeal was the right to challenge the voluntariness of the defendant's guilty plea. (ROA.124).

Mr. Martinez pleaded guilty to count 10 of the indictment which charged him with a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). (ROA.28,119). This offense carried with it a statutory maximum sentence of 20 years. (ROA.120). However, at the Rule 11 guilty plea colloquy, the district court admonished and warned Mr. Martinez "that by pleading guilty to count 10 you subject yourself to a maximum term of imprisonment of ten years." (ROA.87).

The pre-sentence report (PSR) found that Mr. Martinez had a total offense level of 36, a criminal history category III and an advisory imprisonment range of 235-293 months. (ROA.146). Because the statutory maximum term of imprisonment was 20 years, the Guideline imprisonment range was capped at 240 months. (ROA.146). The district court imposed a sentence of 240 months imprisonment, a

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<sup>1</sup> For the convenience of the Court and the parties, Petitioner is citing to the page number of the record on appeal below.

\$100 mandatory special assessment, no fine or restitution, and a three year term of supervised release. (ROA.56-62,113).

On direct appeal, Martinez argued that the district court committed plain error by erroneously advising him during the Rule 11 plea colloquy that he was facing a statutory maximum term of imprisonment of 10 years when, in fact, he was facing a maximum term of 20 years imprisonment, and the district court imposed a 20-year sentence. The Court of Appeals, applying the plain error standard of review, affirmed the conviction, finding “Although the district court made a clear and obvious error in advising Martinez of the incorrect maximum sentence, he has failed to show he would not have pleaded guilty but for the error.” *United States v. Martinez*, 822 Fed. Appx. 293, 294 (5<sup>th</sup> Cir. 2020), citing *United States v. Dominguez Benitez*, 542U.S. 74, 76 (2004).

## REASONS FOR GRANTING THIS PETITION

- I. This Court should grant review to determine whether plain error resulted from the district court erroneously advising the client during the plea colloquy that the maximum term of imprisonment was 10 years when, in fact, the statutory maximum term of imprisonment was 20 years and the court imposed a 20-year sentence?**

Martinez's sentence may be vacated if (1) the district court erred, (2) its error was plain, and (3) the error affected Martinez's substantial rights. *See United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, the Court of Appeals has discretion to reverse Martinez's conviction and sentence if it also finds that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Cotton*, 535 U.S. at 631).

Before a plea may be accepted, the district court must "address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, . . . any maximum possible penalty, including imprisonment, fine and term of supervised release . . ." Fed. R. Crim. P. 11(b)(1)(H). For a guilty plea "[t]o be knowing and intelligent, the defendant must have 'a full understanding of what the plea connotes and its consequences.'" *United States v. Hernandez*, 224 F.3d 252, 255 (5th Cir. 2000), citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

Failing to advise Mr. Martinez of the maximum term of imprisonment is unquestionably error. *See United States v. Khan*, 588 F.2d 964, 965 (5th Cir. 1979); *United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1996); *United States v. Hernandez*, 224 F.3d at 255; *Boykin v. Alabama*, 395 U.S. at 244.

Failure to comply with Rule 11 is reviewed by the plain error standard when the error is not objected to in the trial court. *See United States v. Vonn*, 535 U.S. 55, 73-74 (2002). The reviewing court may look to the entire record to determine whether the defendant was prejudiced by the error. See *id.* at 74-75. Moreover, this Court has held, “that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

Here, there is no question that the district court incorrectly advised Mr. Martinez he was facing a maximum term of imprisonment of 10 years. (ROA.87). Of course, Mr. Martinez was actually facing a maximum term of 20 years, and that was the sentence ultimately imposed by the district court. (ROA.56-62,113). However, there is also no dispute that Mr. Martinez was properly advised of the 20-year statutory maximum in his written plea agreement (ROA.120), the factual resume (ROA.28) and the pre-sentence report (ROA.146). The Fifth Circuit found that the error was clear and obvious, but that Martinez failed to show he would not have plead guilty but for the error. *See United States v. Martinez*, 822 Fed. Appx. at 294.<sup>2</sup>

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<sup>2</sup> The Fifth Circuit also found that Martinez had not filed a motion to withdraw his guilty plea. However, prior to sentencing, Martinez did file a pro se document stating, “If defendant would have been made aware of the sentence to be imposed by P.S.I recommendations defendant would never had followed legal counsel recommendation to plead guilty. Defendant does not understand why or how the P.S.I. could effect the outcome of his incarceration of 24 to 30 months to 235 to 293 months. The defendant wishes to bring this to the attention of this Honorable court and ask the Honorable Judge to to (sic) look into this very important and grave matter.” (ROA.42-43).

As best counsel can discern, this Court has yet to identify any Rule 11 error as “structural error” that would require automatic reversal. *See United States v. Davila*, 569 U.S. 597, 611 (2013) (Rule 11(c)(1) was not structural error); *Neder v. United States*, 527 U.S. 1, 8 (1999) (This Court has found structural error in a very limited class of cases); and *United States v. Coleman*, 961 F.3d 1024, 1029 (8<sup>th</sup> Cir. 2020) (“Neither the Supreme Court nor this court has ever identified a constitutionally invalid guilty plea as structural error). However, the Fourth Circuit has relatively recently recognized as structural error the failure of a district court to properly advise the defendant of the elements of the offense to which he is pleading guilty. *See United States v. Gary*, 954 F.3d 194, 203 (4<sup>th</sup> Cir. 2020). This Court has granted the petition for review in *Gary* and briefing is pending. *See United States v. Gary*, No. 20-444, 2021 WL 77245 (January 8, 2021).

This Court should grant review to determine whether structural error occurs when the district court erroneously advises the defendant during the Rule 11 colloquy that the maximum term of imprisonment is ten years when, in fact, the statutory maximum sentence is 20 years, and the defendant receives a sentence of 20 years. In the alternative, this Court should grant review to determine whether such an error – a defendant being erroneously advised that his maximum sentence will be not more than 10 years when he actually receives a sentence of 20 years – suffices as a reasonable probability that, but for the error, he would not have entered the plea.” *See United States v. Dominguez Benitez*, 542 U.S. at 83. Finally, this Court could hold

this case pending its disposition in *United States v. Gary*, No. 20-444. Depending on this Court's ruling in *Gary*, the proper remedy could be for the Court to grant certiorari, vacate and remand for reconsideration. *See Lawrence on behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

## CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit, or in the alternative, hold this case pending a decision in *United States v. Gary*, No. 20-444.

Respectfully submitted this 19th day of February, 2021.

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