NO. _____

---

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

MARCUS DARWYN JONES, a/k/a "Dab,"
*Petitioner,*

v.

UNITED STATES of AMERICA,
*Respondent.*

---

**On Petition for a Writ of Certiorari from**
**The United States Court of Appeals for the Fifth Circuit**

---

# PETITION FOR WRIT OF CERTIORARI

---

MARY MARGARET PENROSE
Texas A&M School of Law
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4021 (phone)
(817) 212-3891 (facsimile)
megpenrose@law.tamu.edu

*Attorney for Petitioner*

---

## QUESTIONS PRESENTED

1. Whether reliance on a prosecutor's legal misstatements regarding the consequences of a guilty plea renders that plea involuntary and unknowing.

2. Whether a judge or prosecutor can waive SORNA provisions so that individuals pleading guilty based on assurances SORNA will not apply are protected against SORNA's application.

## PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Marcus Darwyn Jones, a/k/a "Dab," is a federal inmate currently serving a 204-month sentence. Respondent is the United States of America.

## RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Federal Cases:



State Cases:



Federal Statutes:



Federal Rules:

## PETITION FOR WRIT OF CERTIORARI

---

Marcus Darwyn Jones, a/k/a "Dab," respectfully petitions this Court for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The Fifth Circuit's opinion in *United States v. Marcus Darwyn Jones*, No. 19-10600, is not published in the Federal Reporter. It is attached as Appendix A. The Fifth Circuit's order denying panel rehearing is also unreported and is attached as Appendix B. The District Court's judgment in *United States v. Marcus Darwyn Jones*, 3:17-CR-357-1, is attached as Appendix D.

## STATEMENT OF JURISDICTION

The Fifth Circuit's judgement was entered on February 1, 2021. Petitioner filed a timely petition for panel rehearing. That petition for panel rehearing was denied on March 12, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

### 18 U.S.C. §1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, or obtained had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, or obtained had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

. . .

### 18 U.S.C. §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

. . .

**18 U.S.C. §2250. Failure to register (as a sex offender)**

**(a) In General.**

Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

**(b) Affirmative Defense.**

In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

. . .

**Sex Offender Registration and Notification Act, 34 U.S.C. §20901, et seq.**

**34 U.S.C. §20901. Declaration of purpose**

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders . . .

**34 U.S.C. §20911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators**

In this subchapter the following definitions apply:

**(1) Sex offender**

The term "sex offender" means an individual who was convicted of a sex offense.

. . .

**(5) Amie Zyla expansion of sex offense definition**

**(A) Generally**

Except as limited by subparagraph (B) or (C), the term "sex offense" means-

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

. . .

**(6) Criminal offense**

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note)) or other criminal offense.

**(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators**

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

. . .

**(9) Sex offender registry**

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

. . .

**(14) Minor**

The term "minor" means an individual who has not attained the age of 18 years.

**34 U.S.C. §20913. Registry requirements for sex offenders**

**(a) In general**

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

**(b) Initial registration**

The sex offender shall initially register-

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

**(c) Keeping the registration current**

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

. . .

## STATEMENT OF THE CASE

This case presents a significant question regarding the voluntary nature of plea bargains that urgently requires the Court's review: whether reliance on a prosecutor's legal misstatements regarding plea consequences renders that plea involuntary. This Court has recognized that our criminal justice system is largely a system of pleas, not trials. A system based on pleas requires that criminal defendants receive accurate legal information during plea negotiations. This Court has held that criminal defense attorneys must provide accurate legal advice to clients during plea negotiations. An unanswered question, however, is whether prosecutors must likewise provide accurate legal information during plea negotiations. This question should be resolved in this case – a case where the prosecutor affirmatively misrepresented the legal consequences of Petitioner's plea to both Petitioner and the District Court.

This case arrives at the crossroads of *United States v. Brady*, 397 U.S. 742 (1970) and *Santobello v. New York*, 404 U.S. 257 (1971) and the line of cases requiring accurate legal advice during plea bargaining – *Padilla v. Kentucky*, 559 U.S. 356 (2010) and *Lafler v. Cooper*, 566 U.S. 156 (2012). Both *Brady* and *Santobello* mandate that promises made during plea negotiations be made known and be free from deception. *Padilla* and *Lafler*, while arising in the ineffective assistance of counsel setting, emphasized that defendants should receive accurate legal information during plea negotiations. This case presents the Court with an opportunity to require that prosecutorial statements regarding plea consequences,

and legal assurances, be held to the same accuracy standard during plea negotiations.

The appellate court below erred in relying on the Rule 11 colloquy to resolve this case. *Appendix A.* This case involves a prosecutor's false legal assurances made during plea negotiations. Federal Rule of Criminal Procedure 11 only captures a criminal defendant's side of the negotiations. But what happens when the prosecution makes a promise, particularly an unfulfillable promise, based on an affirmative legal misrepresentation of the consequences of Petitioner's plea? And what is the impact when the prosecution stands silently by during the Rule 11 proceedings? Currently, there is no answer. This void in the law needs resolution. This void in the law prompted Petitioner to plead guilty without true knowledge of his plea consequences.

Petitioner was originally indicted for sex trafficking two minors under 18 U.S.C. § 1591(a). His goal, during plea negotiations, was to avoid the Sex Offender Registration and Notification Act (SORNA). Petitioner refused plea offers that contained SORNA requirements. Following negotiations specifically structured to avoid SORNA, the prosecutor offered Petitioner a plea for Use of a Facility in Interstate Commerce in Aid of a Racketeering Enterprise (18 U.S.C. § 1952(a)(2)) with sex trafficking serving as the underlying offense. The prosecutor assured Petitioner that this RICO plea did not invoke SORNA's provisions. Only after this assurance did Petitioner agree to plead guilty.

Shortly after pleading guilty, and prior to sentencing, Petitioner realized that SORNA would apply to his plea. He immediately sought to withdraw his plea. Petitioner's attorney would not file this request. Petitioner thus sought new counsel to help him withdraw his plea. Petitioner also filed a *pro se* Motion to Withdraw his Plea. The Court appointed replacement counsel. Replacement counsel filed a Motion for Hearing on Petitioner's *pro se* Motion – but did not file, or re-file, a Motion to Withdraw Petitioner's Plea. The prosecutor, in responding to Petitioner's *pro se* filing, inaccurately stated "the ultimate charges that [Petitioner] pled guilty to do not require sex offender registration." The District Court, finding that Petitioner could not represent himself while being represented by counsel, struck Petitioner's *pro se* filing without addressing the SORNA question and ruled that counsel's request for a hearing was moot.

During sentencing, Petitioner reminded the District Court he sought to withdraw his plea. The District Court admonished Petitioner regarding the 3 attorneys the Court had already provided in this case. But the District Court did not consider Petitioner's arguments about the voluntariness of his plea. Instead, the District Court sentenced Petitioner to 204 months in federal prison. The District Court did not impose SORNA requirements in its judgment. *Appendix D.* This appeal followed.

Petitioner, as part of his plea, waived his right to appeal subject to 3 exceptions. Petitioner reserved the right to challenge the voluntariness of his guilty plea. Appellate counsel initially filed an *Anders* brief based on the appellate waiver.

Petitioner filed a response alleging that he had been misinformed and lied to about his plea consequences. The Fifth Circuit entered an Order requiring appellate counsel to address "whether [Petitioner] is correct that he was misinformed about the sex offender registration requirement and whether it affected the knowing and voluntary nature of his guilty plea . . . ." *Appendix C.* Appellate counsel withdrew the *Anders* brief and filed a merits brief addressing the Court's questions.

Petitioner's primary appellate challenge was the voluntariness of his plea based on his attorneys' and the prosecutor's inaccurate legal advice regarding SORNA. Simply put, Petitioner was misinformed about the consequence of his plea. Respondent, the United States, sought to frame Petitioner's claim as an ineffective assistance of counsel claim. It also asserted that SORNA did not apply to Petitioner's conviction. Petitioner clarified, in his Reply Brief, that his appeal "focuses on the inaccurate statements of his attorneys *and the prosecutor*" (emphasis in original). Petitioner reminded the appellate court that "[a]n individual cannot bring an ineffective assistance of counsel claim against a prosecutor's misstatements." Petitioner's appellate brief focused on the voluntariness of his plea based on this Court's constitutional cases – *Boykin v. Alabama*, 395 U.S. 238 (1969) and *United States v. Brady*, 397 U.S. 742 (1970). His brief also argued that neither prosecutors nor judges can waive SORNA's provisions.

The Fifth Circuit, in ruling against Petitioner, sidestepped the critical question of SORNA's applicability and its relation to Petitioner's plea. In doing so, it focused on the Rule 11 colloquy. The appellate court held Petitioner to his sworn

statements before the Magistrate Judge in finding that his plea was knowing and voluntary. It did not address SORNA's applicability. It found no need to do so. Yet, SORNA's applicability was – and is – central to the question of whether Petitioner's plea was knowing and voluntary.

Petitioner filed a timely Petition for Panel Rehearing. Petitioner's request sought reconsideration of the SORNA issue. Petitioner emphasized SORNA's centrality to his appellate claim, namely, that the prosecutor and his attorneys' legal misstatements regarding his plea consequences hinged on SORNA's applicability. If SORNA applies, Petitioner's plea should be vacated. If it doesn't, the plea is valid. But the voluntary and knowing nature of Petitioner's plea cannot be resolved without determining whether the prosecutor misled Petitioner. Petitioner pointed to the record evidence where the prosecutor misstated the legal consequences of Petitioner's plea. The prosecutor, in responding to Petitioner's *pro se* Motion to Withdraw his plea inaccurately advised the Court that "the ultimate charges that [Petitioner] pled guilty to do not require sex offender registration." ROA.94.[1]

The Fifth Circuit denied Petitioner's request for panel rehearing without explanation. *Appendix B.*

By not resolving SORNA's applicability to Petitioner's plea, the appellate court avoided the question of what consequences should flow from reliance on a prosecutor's legal misstatements during plea negotiations. It avoided resolution of

[1] ROA signifies the Fifth Circuit appellate record. ROA.94 indicates that this quoted material is found on page 94 of the appellate record.

whether a prosecutor or judge can waive SORNA's application in individual cases. The appellate court left urgent legal questions unanswered.

Because Petitioner is subject to SORNA registration requirements and restrictions, despite the prosecutor's erroneous assurances to the contrary, his plea should be vacated. The United States secured Petitioner's plea under false legal pretenses after giving inaccurate legal advice regarding the plea's consequences. Petitioner's right to jury trial has been violated due to his reliance on the prosecutor's legal misstatements. Had Petitioner been accurately informed of SORNA's applicability, he would not have pled guilty. Petitioner's *pro se* attempts to withdraw his plea upon learning the accurate legal consequences of his plea confirm his desire to put the United States to its proof. Petitioner's guilty plea, which relied on the prosecutor's erroneous legal assurances, is involuntary and unknowing.

## REASONS FOR GRANTING THE PETITION

### I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THIS COURT HAS NOT RESOLVED THE QUESITON OF WHETHER A DEFENDANT'S RELIANCE ON THE PROSECUTOR'S LEGAL MISSTATEMENTS AND ASSURANCES DURING PLEA NEOGOTIATIONS RENDERS THAT PLEA INVOLUNTARY OR UNKNOWING.

This Court should grant the Petition because the question presented is of national importance. Our criminal justice system is a system of pleas, not trials. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376, at 1389 (2012). This Court has established that criminal defendants are entitled to accurate legal advice before pleading guilty. In *Hill*, *Padilla*, and *Lafler* this Court emphasized the importance

of accurate legal advice as a predicate to a valid guilty plea. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Padilla v. Kentucky*, 559 U.S. 356 (2010); and, *Lafler v. Cooper*, 566 U.S. 156 (2012). These cases, each focusing on defense counsel's advice, have cemented the role that accurate legal information plays during plea negotiations. This Court has not yet, however, evaluated the prosecutor's role in ensuring that accurate legal information is provided. This case presents that question head-on.

While no criminal defendant is constitutionally entitled to receive a plea offer, plea offers are entitled to constitutional protection. *See e.g., Lafler*, 132 S. Ct. at 1387. This Court has found that a guilty plea is valid only when "the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)(quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). Part of discerning a voluntary and intelligent choice among alternative courses depends on accurate legal information. This Court has increasingly recognized the need for accurate legal information during plea negotiations. Inaccurate legal advice given during plea negotiations raises constitutional concerns. The question this case raises is whether the need for legal accuracy is one-sided or whether all pleas must be based on the exchange of accurate legal information.

The prosecutor in this case assured Petitioner that a RICO plea, with an underlying crime of sex trafficking of children, would not result in SORNA consequences. ROA.90, ROA.94. But it does. SORNA has broad application to sex crimes. SORNA's most recent amendments sought to expand, rather than constrict,

its application. SORNA's primary goal is to protect children from sexual predators. *See* 34 U.S.C. § 20901. Petitioner was indicted for prostituting out two separate 15 year-old girls. While the Government sought to insulate this crime from SORNA by enveloping sex trafficking of children within RICO, the underlying offense remains a specified sexual offense against a minor. *See* 34 U.S.C. §§ 20911(5)(A)(ii), (7)(E), (7)(H), (7)(I).

SORNA's purpose is provided in its opening paragraph:

> In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter, establishes a comprehensive national system for the registration of those offenders.

34 U.S.C. § 20901.

Respondent has taken the remarkable position that Petitioner's crimes do not qualify under SORNA. ROA.90, ROA.94. *See also Respondent's Appellate Brief*, at 26, 28 (noting that the Fifth Circuit has not yet applied SORNA to a RICO claim). Yet the Government alleges that Petitioner recruited two minors for use in prostitution. He allegedly advertised the minors online. He allegedly rented hotel rooms for them to conduct prostitution. He allegedly supervised their sexual activities. And he allegedly engaged in sexual intercourse with one of the minors. These allegations appear to fall directly under SORNA's definition of a "criminal offense that is a specified offense against a minor" under 34 U.S.C. §§ 20911 (A)(ii), (7)(E)(Solicitation to practice prostitution), (7)(H)(Criminal sexual conduct involving

a minor, or the use of the Internet to facilitate or attempt such conduct), and (7)(I)(Any conduct that by its nature is a sex offense against a minor).

Under SORNA's plain language, Petitioner qualifies as a sex offender. As this Court has stated, courts should begin any statutory interpretation "with the text." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). To determine whether SORNA applies to Petitioner:

> [W]e begin with the text. We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." When the statutory "language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce [the statute] according to its terms."

*Id.* (internal citations omitted).

SORNA's terms are clear. Its purpose is equally clear. When enforced according to its terms, the Government enveloping a sex trafficking of children allegation within a RICO plea does not insulate that plea from SORNA's textual application. Under SORNA's terms, even convictions under RICO qualify as a sex offense where the underlying activity includes a "criminal offense that is a specified offense against a minor." 34 U.S.C. § 20911(5)(A)(ii).

Importantly, SORNA does not exclude RICO crimes from its terms. Instead, SORNA speaks to individuals – as sex offenders. 34 U.S.C. § 20911(1). A "sex offender" is simply any individual "convicted of a sex offense." And, sex offenses explicitly include any "criminal offense that is a specified crime against a minor." 34 U.S.C. § 20911(5)(A)(ii). To bury such crime within a RICO claim to circumvent SORNA's application would be at odds with both the statute's text and purpose.

This is not a case where the Petitioner makes unsupportable claims of prosecutorial misstatements. In this case, the prosecutor provided the District Court with the plea exchange discussions on this very point. Nicole Dana, the Assistant U.S. Attorney prosecuting Petitioner, advised the District Court that:

> Jones's second attorney, after continued negotiations, requested a 25 year offer that did not require sex offender registration, as the 18 U.S.C. § 1591 offer absolutely would. After consideration, the government agreed and prepared new plea paperwork for two counts of 18 U.S.C. § 1952.

ROA.90.

The prosecutor emphasized the centrality of SORNA's application to Petitioner's plea a second time in this same filing:

> Jones's second attorney requested a plea to other charges that would not specifically require sex offender registration. The undersigned agreed, and the ultimate charges that Jones pled guilty to do not require sex offender registration.

ROA.94.

These two prosecutorial representations – given to the District Court under the prosecutor's signature – prove Respondent provided Petitioner with inaccurate legal information regarding his plea. They likewise underscore the importance of SORNA's applicability to his plea. SORNA conditions were pivotal to any plea agreement. Only after the government relented and offered a plea that "[did] not require sex offender registration," did Petitioner accept the bargain. The Government knew what Petitioner sought – a guilty plea without SORNA conditions. The Government inaccurately told Petitioner that a RICO conviction

with an underlying offense of sex trafficking of children "[did] not require sex offender registration." And only upon this assurance did Petitioner plead guilty.

The Government's false assurances about SORNA's applicability misled Petitioner. These inaccurate legal statements induced Petitioner to plead guilty. Thus, Petitioner should not be held to the plea consequences when he accepted, or he was advised he was accepting, an entirely different plea. Due to the prosecutor's inaccurate legal statements, Petitioner could face a separate federal crime for failing to register as a sex offender if he travels in interstate commerce despite assurances this condition would not apply to him. *See* 18 U.S.C. § 2250. Petitioner did not get the bargain he struck. He now faces consequences that Respondent promised would not apply. He was misled by an unfulfillable promise.

This Court has previously ruled that any plea induced by promises requires that "the essence of those promises must in some way be known." *Santobello v. New York*, 404 U.S. 257, 261 (1971). "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.*at 262. Here, that promise is unfulfillable. The prosecution promised Petitioner that the RICO plea it offered would not invoke SORNA conditions. This promise was legally incorrect and unfulfillable. This promise violated *Santobello*'s requirements that such promise be made known. Yet during the Rule 11 proceedings, the prosecution did not make known its intentional structuring of the plea to avoid SORNA's applicability.

Petitioner should not be held solely responsible for having failed to alert the Magistrate Judge to plea consequences that were known – in fact, agreed to – by the Government. The appellate court's focus on Petitioner's Rule 11 colloquy insulates prosecutors that provide inaccurate legal information relating to a defendant's plea during plea negotiations. Further, the appellate court's focus on Petitioner's testimony relieves the Government from sharing its knowledge – and understanding – that SORNA conditions were central to this particular plea. The Petitioner refused all plea offers until SORNA was taken off the table. Once the Government assured him SORNA would not apply, he accepted the plea.

Respondent is not an innocent bystander under these conditions. The Government is responsible for misleading Petitioner about his plea consequences. Petitioner's Rule 11 testimony – testimony that relied on the prosecutor's legal misstatements – does not relieve the Government of its responsibility for providing inaccurate legal advice during plea negotiations. Petitioner should not stand alone in facing the consequences of the prosecution's legal misstatements.

A system based on pleas requires accurate legal advice for an accused to make a knowing and voluntary decision of whether to plead guilty or proceed to trial. This Court has already established the importance of a criminal defendant's own attorney providing accurate legal advice. But there remains a void in the jurisprudence – whether a prosecutor's erroneous legal statements regarding the consequences of a plea renders that plea involuntary. This Court should accept this Petition to resolve this urgent question. To ignore a prosecutor's erroneous legal

statements and allow the State to affirmatively give inaccurate advice regarding a plea and its consequences would undermine our plea-reliant justice system. It would provide criminal defendants with protection against their counsel but no similar protection against the State. It would allow the Government to secure guilty pleas under false pretenses.

## II. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE IT DIRECTLY CALLS INTO QUESTION WHETHER A PROSECUTOR OR JUDGE CAN WAIVE THE APPLICABILITY OF *SORNA* IN INDIVIDUAL CASES.

This Court should also grant the Petition to resolve the question of whether a prosecutor or judge can waive SORNA's applicability. SORNA was passed by Congress to protect society from sex offenders. *See* 34 U.S.C. § 20901. SORNA automatically attaches to certain sexually-related convictions. *See* 34 U.S.C. § 20911(1), (5)(A)(listing 5 definitions for sex offense). SORNA does not speak to courts or prosecutors. Rather, SORNA speaks directly to sex offenders. SORNA imposes criminal penalties on individuals that fail to comply with its conditions, including registration. 18 U.S.C. § 2250.

Respondent urged the Fifth Circuit to deny Petitioner's appeal because:

> The government is not aware of any case holding that a defendant is subject to SORNA registration where that mandatory condition of supervised released is not ordered in the federal judgment.

*Respondent's Appellate Brief*, at 29. Respondent further argued that the District Court's failure to place SORNA requirements in the judgment "would present a hurdle – and perhaps an insurmountable one – if the government attempted to bring an action against Jones for failing to register." *Id.*

Respondent's position is at odds with SORNA's language. It is at odds with SORNA's purpose. And it fails to appreciate that states – not merely the federal government – have registration requirements of their own that fall under SORNA. This position appears to be a continuation of the legal misstatements provided to Petitioner regarding his plea consequences. The Government suggests it might be estopped from prosecuting Petitioner due to the judge's inaction on SORNA.

It is unlikely the United States believes that an individual prostituting out two 15-year old girls does not qualify as a sex-offender. If, however, the Government believes SORNA can be waived, individual prosecutors and judges can circumvent the plain language of SORNA simply by agreeing not to impose SORNA conditions. And judges who fail, or refuse, to check the SORNA conditions box can undermine the will of Congress. This presents a serious separation of powers issue.

Section 2250, the federal statute criminalizing an individual's failure to register as a sex offender, provides 3 affirmative defenses for those failing to register. RICO convictions are not one of the listed affirmative defenses. Neither is waiver of SORNA's conditions by a prosecutor or federal judge. Thus, while the prosecutor in this case told Petitioner he would not be subject to SORNA, the prosecutor did not have that power. Prosecutors only power in relation to SORNA is to avoid charging individuals with sexual offenses. Any promise assuring an individual convicted of a sex offense that they can avoid SORNA is unfulfillable. Prosecutorial waiver is not an affirmative defense under 18 U.S.C. § 2250.

Likewise, federal judges are not statutorily empowered to waive SORNA's applicability. Judicial waiver is not an affirmative defense listed in 18 U.S.C. § 2250. When a judge enters any judgment based on a sexual offense, SORNA's statutory language kicks in and applies – with, or without, the judge's approval. It is the act of conviction that triggers SORNA's provisions. A judge's failure – or refusal – to check the SORNA box in a final judgment does not displace Section 2250's application. And, based on separation of powers, it shouldn't.

The statutory requirements speak directly to "sex offenders," not prosecutors and judges. *See* 34 U.S.C. § 20911(1), 34 U.S.C. § 20913(a). Section 20911 (1) defines a "sex offender" as "an individual who was convicted of a sex offense." 34 U.S.C. § 20911(1). "Sex offenses" are then defined to include "a criminal offense that is a specified offense against a minor." 34 U.S.C. § 20911(5)(A)(ii). And, adding certainty to SORNA's applicability in this case, Section 20911(7) expands the definitions of specified offenses against minors to broadly include:

> an offense against a minor that involves any of the following:
>
> (E) Solicitation to practice prostitution.
>
> (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
>
> (I) Any conduct that by its nature is a sex offense against a minor.

34 U.S.C. § 20911(7). The plain language focuses on "an offense" that "involves any of the following . . . ." This language was an attempt to expand SORNA's application. The very title of subsection 7 indicates a desire to broaden SORNA's

application to, among other crimes, "(I) Any conduct that by its nature is a sex offense against a minor." *See* 34 U.S.C. § 20911(7).

Petitioner is accused of prostituting out two 15 year-old girls on multiple occasions. This allegation appears to fall within the plain language of Section 20911(7). Petitioner is also accused of having sex with one of the 15 year-old girls. This allegation appears to fall within the plain terms of 34 U.S.C. § 20911(7). The text, and structure, of SORNA's residual clause demonstrate that Congress intended SORNA's registration and other provision to apply to those individuals that commit sex offenses – even where that crime is enveloped in a RICO conviction. Empowering prosecutors and judges to strategically avoid SORNA's provisions would undermine the protections society is afforded against sex offenders.

Neither the sentencing judge nor the prosecutor intended for SORNA to apply in this case. That appears clear. The prosecutor, in responding to the merits of Petitioner's *pro se* Motion to Withdraw Plea, informed the Court that the Government had intentionally structured the plea to avoid SORNA's application. The Government's intent was to waive SORNA's applicability for Petitioner. Respondent, in the Court of Appeals, took the position that SORNA did not apply to Petitioner's conviction because the Fifth Circuit had not previously imposed SORNA conditions in a RICO conviction. But the RICO conviction's underlying crime was a sex offense – prostituting out two minors. The Government's understanding of SORNA, as it relates to Petitioner, appears legally mistaken.

Respondent asserts that because the District Judge failed to memorialize SORNA's application in Petitioner's judgment, it cannot legally apply. Respondent's appellate brief asserted that it "is not aware of any case holding that a defendant is subject to SORNA registration where that mandatory condition of supervised release is not ordered in the relevant federal judgment." *Respondent's Appellate Brief*, at 29. Were this the law, judges and prosecutors could simply negate SORNA's application by failing – or refusing – to check a box in the criminal judgment. At least one state court has found against the Government's position on this point. *See Commonwealth v. Giannantonio*, 114 A.3d 429, 432 (Pa. Super. Ct. 2015).

Respondent's interpretation is at odds with SORNA's preamble and statutory text. It is at odds with the expansive amendments. SORNA applies to "sex offenders." 34 U.S.C. § 20913(a). The statute commands that "[a] sex offender shall register and keep the registration current . . . ." 34 U.S.C. § 20913(a). Criminal penalties often follow where an individual fails to comply. *See* 18 U.S.C. § 2250. SORNA does not speak to those within the judicial process. SORNA speaks to the convicted.

Respondent's waiver approach seeks to redraft SORNA's provisions. It undercuts Congress's goal in protecting society from sexual predators. It empowers prosecutors and judges to repudiate a statutory requirement. If individual judges and prosecutors can waive SORNA's provisions, SORNA becomes a negotiating chip

in the plea bargaining process. If SORNA can be waived, society will not realize the benefits and protections Congress intended against sex offenders.

This Court should grant Petitioner's request for certiorari to announce whether SORNA's provisions are mandatory, as Congress intended, or subject to waiver as Respondent argues. This is an urgent question as prosecutors seeking plea bargains often seek leverage or enticements to secure a conviction. This Court should clarify whether SORNA is subject to waiver by judges and prosecutors.

## CONCLUSION

Because this case raises questions of national importance regarding a prosecutor's duty of legal accuracy during plea negotiations, certiorari should be granted. In addition, because this case raises questions of national importance relating to whether prosecutors and judges can waive SORNA's applicability, certiorari should be granted.

/S/ MARY MARGARET PENROSE

MARY MARGARET PENROSE
Texas A&M School of Law
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4021 (phone)
(817) 212-3891 (facsimile)
megpenrose@law.tamu.edu

*Attorney for Petitioner*