No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2021

DAVID STEVE ELIAS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
Texas Bar Card No. 02438900
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. After Mr. Elias's plea but before his sentencing, the First Step Act amended § 924(c)(1) to clarify that the consecutive mandatory minimum sentence of 25 years only applies when a defendant commits a subsequent § 924(c) violation after a prior § 924(c) conviction has become final. This provision retroactively applies to Mr. Elias. As such, was the District Court's admonishment-- that the 25-year mandatory minimum sentence applies to Count 4-- a Rule 11(b)(1)(I) error that rises to the level of "plain error" requiring reversal?

II. Does the fatal deviance from Rule 11 in this case–that is, the District Court's failure to advise Mr. Elias at re-arraignment of the correct mandatory minimum terms of imprisonment that could be imposed for his 18 U.S.C. § 924(c)(1)(A)(ii) offenses, demand a new re-arraignment? *See* FED. R. CRIM. P. 11(b)(1)(I).

III. Was Mr. Elias's plea of guilty knowing and voluntary? Was Mr. Elias's decision to plead guilty knowingly, voluntarily and intelligently made when he was grossly misinformed about the risks attendant to going to trial?

IV. Did the District Court's decision to upwardly depart at sentencing in an attempt to "cure" the fatal Rule 11 violation succeed?

V. Did the Fifth Circuit err by employing the "plain error" standard of review? By opposing the Government's motion for upward departure on the basis that the FSA lowered his mandatory minimum sentence, did Mr. Elias implicitly invoke Rule 11 thus requiring the "harmless error" standard of review to apply? Rule 11 does not have a provision stating that plain error review applies to claims not brought to the district court's attention; therefore, "plain error" standard of review is not required in this case.

VI. Is a criminal defendant required to attempt to withdraw his guilty plea before a reviewing court can find that he has shown "substantial prejudice" under the "plain error" standard of review?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPORTS OF OPINIONS

The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Elias*, No. 19-20540 (5th Cir. May 16, 2022)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Mr. Elias files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Texas because Mr. Elias was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fifth and the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. *See Boykin v. Alabama*, 395 U.S. 238 (1969).

The Fifth Amendment says to the federal government that "no person 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." U.S. Const. amend. V. The Fourteenth Amendment prohibits state governments from doing the same. U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. Procedural History.

On January 18, 2018, a four-count Criminal Indictment was returned by a Grand Jury in the United States District Court for the Southern District of Texas, Houston Division, naming David Steve Elias and Lawrence Benjamin Gordon as the defendants. ROA. 11-13. The counts are as follows: Counts 1 and 3: Aiding and abetting carjacking, in violation of 18 U.S.C. §§ 2119 and 2, having occurred on or about July 21, 2017 (Count 1), and July 22, 2017 (Count 3); Counts 2 and 4: Aiding and abetting the brandishing of a firearm, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2, having occurred on or about July 21, 2017 (Count 2), and July 22, 2017 (Count 4). On July 16, 2018, Mr. Elias, appeared with counsel before United States District Judge David Hittner and entered a plea of guilty as to Counts 2 and 4 of the Criminal Indictment, under the terms of a Rule 11(c)(1)(A) written Plea Agreement. ROA.152.[1]

On December 21, 2018, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) ("FSA" or "Act"), was signed into law. On December 22, 2018, the

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

federal government entered into what would turn out to be the longest government shutdown in United States' history.

Mr. Elias was sentenced on July 23, 2019. The District Court sentenced Mr. Elias to a 150-month term of imprisonment on each count, to run consecutive to each other. ROA. 165. A notice of appeal was then timely filed. On May 16, 2022, a panel of the Fifth Circuit affirmed Mr. Elias's conviction in an unpublished decision.

2. Statement of Facts.

Mr. Elias is a bright young man with a tragic past. As a eight-year old child, he suffered a brutal sexual assault that has left him with lasting mental health issues including PTSD . His mother made him leave home when he was fifteen years old; he went into CPS custody. During his young teen years, he began experimenting with illegal drugs. His first encounter with the criminal justice system began when he was just fifteen years old.

This criminal case arose from a series of carjackings in the Houston, Texas area committed by Mr. Elias and a co-defendant. This the criminal conduct that comprised the charges to which Mr. Elias entered a plea of "guilty". ROA.152.

Regarding the sentencing options, as to Count 2, the PSR found that the minimum term of imprisonment is not less than 7 years, and the maximum term is Life, pursuant to 18 U.S.C. § 924(c)(1)(A)(I)(ii). As to Count 4, the PSR determined

that the minimum term of imprisonment is not less than 25 years, and the maximum term is Life, pursuant to 18 U.S.C. § 924(c)(1)(A)(I)(ii). These terms are to run consecutively to each other and to any other term of imprisonment imposed, pursuant to 18 U.S.C. § 924(c)(1)(D)(ii). Counts 2 and 4 are violations of 18 U.S.C. § 924(c)(1) which are excluded from the operation of the grouping rules, as well as the guideline adjustments, pursuant to USSG § 3D1.1(b) and USSG § 2K2.4, respectively, as this statute mandates consecutive sentences. Therefore, there were no guideline computations.

Both the Government and Mr. Elias filed sentencing memorandums. During the sentencing hearing, counsel for Mr. Elias made the following argument to the Court:

> **MR. REED:** So the -- the minimum penalty we're looking at is 14 years. I'm fully aware that the codefendant, who did not shoot at a police officer or pistol-whip one of the victims, got 15 years on, I believe, an upward departure or variance. I understand where the -- the direction the Court is going. What -- what I want to address today is we have -- we have a defendant, Mr. Elias, who -- who has -- who understands, as I do, that he will receive a -- and deserves a heavy punishment. He accepts responsibility and blames no one but himself. The reasons we -- we give the Court to mitigate the degree of a variance are not excuses. They are well-founded reasons that track directly to 3553, the history and circumstances of -- of –
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> *****
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> The -- he knows he can't change the harm he did to the victims, to Officer Chippi, to Mr. Ly, to Arlette Hernandez and Jesus Plazola. He

knows that. And he is genuinely remorseful, although he knows it can't change anything. So what's the appropriate sentence under 3553? We already know that the nature and circumstances of this offense are serious. We know about the seriousness of the offense. We know the Court needs to issue a sentence that -- that provides for deterrence and protection of the public. Our argument, Your Honor, is that the Court has that within its disposal without going all the way to 32 years, as the government urges. All those justify a harsh punishment, but what else do we have? We have a 20-year-old man -- well, now he's 23. We have a 23-year-old man where we do have the benefit, unlike a older defendant, of having an ability to have some insight into the short life of this person as to -- not excuses, but -- but reasons. We do know that at age nine he was the victim of an aggravated sexual assault. We do know that during the period of his -- during the short period of his life, he has engaged in escalating, more intense drug abuse that has led to predictable results. Doesn't blame anyone but himself. Those, I think, under the circumstances are – are fairly predictable when there's a convergence between the PTSD that was written about and diagnosed by Dr. Stolar, and the drug addiction. You get toxic results. However, both of those things can be addressed. Drug -- as Dr. Stolar writes in her report, the drug abuse can be addressed. It has been addressed. He's been incarcerated now for approximately two years with already good results. We know he's going to be incarcerated for much longer. The Court has power and authority to order certain – certain treatments while he's in jail, but also when he gets out of jail. The PTSD is real, Your Honor. It can be addressed, as well, while he's in jail. The -- the -- the -- the question, then, is can -- can he be sufficiently punished, rehabilitated, and have the public protected with a sentence that we know is going to be lengthy without going to the 32 years urged by the government, but one that is closer in line to what the Court has already ordered for his codefendant in the jointly undertaken activity? With the Court having authority to vary even upward from there to recognize some of the conduct, because we do have the benefit -- Your Honor, I've represented much older defendants, and their -- their lives are a hash of -- of – of -- of causes and reasons and -- and neuroses and things that lead them to make all the bad decisions that make them commit crimes. I wouldn't stand before this Court and be able to pointto one particular thing. I --

we have a -- a young defendant where we can draw a fairly straight line between some causes early in his life, through drug abuse, to some of the offenses that are involved in this case. Not a perfect line, but a pretty darn good line, Your Honor, backed up by clinical observation and by a pretty good expert who -- who handles victims of PTSD –

THE COURT: Oh, it was an excellent report, and I don't mean that lightly. It was an excellent report, and I read it all.

MR. REED: And so what I'm -- what I'm urging on this Court is that -- and Dr. Stolar indicates that there's a clear diagnosis of PTSD, and the PTSD is exacerbated by severe substance abuse. She makes the point of stating that this is not a personality disorder. He is not a sociopath or psychotic --

THE COURT: And the exact words were written. It's not a sociopath -- not sociopathic, and -- anyhow, it's in there.

MR. REED: Right. And in my less-than-clinical terms, I read that as he is not hardwired to be a danger. He, with – with incarceration and separation from -- from the drugs and some -- and some rehabilitation on both the PTSD and the substance abuse, he has -- there is good reason to believe that he can -- he can leave in a manner that many of his families [sic] know him to be, as a person who has, in the past, held good jobs, who, in the past, has gone to school, who can leave a productive person not hardwired to be a danger to the community knowing that this is going to be -- there's going to be a harsh punishment. None of this means he's not responsible for his crimes. None of this means -- we're not -- none of this means he should serve a light sentence or receive a downward departure. What this means is that the ends of 3553, both the harsh side, the punishment side, the deterrence side, the protection side can be served -- can be achieved without following the government all the way to the end of their --their upward variance motion, Your Honor. And -- and the Court can -- can issue a reasonable sentence that is tailored to what we know. We have the unique opportunity of knowing things about Mr. Elias. The Court can order a sentence that is appropriate to these circumstances.

Mr. Elias made the following statement on his own behalf:

THE DEFENDANT: I want to apologize to the victims of my crimes. I would like to say I'm sorry to Ms. Hernandez, to Mr. Plazola, and -- and Mr. Ly and Officer Chippi. I'm sorry. I'm sorry for what I did and what I put you-all through. Not a day goes by without me feeling -- without me feeling sorry for what I did. I would also like to apologize to my family for the shame and pain I have brought onto you. Since I've been locked up, I've been a better person. I've learned to appreciate life and the simple things that make it what it is. I've spent most of my time learning about God, and I've come to accept Jesus Christ as my lord and savior. Although I'm locked up, I found a purpose to my life, to help people and give good without expecting anything back, and maybe give that one piece of advice that will change a life for the better. I have a plan to educate myself and take advantage of any opportunity, any program that will help me learn new life lessons. I don't want to take things for granted anymore. I'm going to take something good from this time and better myself every day so when I get out, I'll be ready.

THE DEFENDANT: I just want to say I'm sorry. There's nothing I can say that -- that will make anything right. That's it.

The District Court explained its position on sentencing:

As documented in the government's recommendation for an upward variance, at the time the plea agreement was accepted in this case, all of the parties, including not only the defendant, but his attorney and the government, but also the state attorney, who had unrelated charges pending, agreed that the defendant would plead to -- to two Title 18, United States Code, Section 924(c)(1)(A) double "I" brandishing counts, and that he would receive a mandatory minimum sentence of 32 years, as prior to the enactment of the First Step Act, which was signed into law on December 21st, 2018, pursuant to 18, United States Code, Section 924(c)(1)©. In the case of a second or subsequent conviction under the subsection, the person shall be sentenced to a term of imprisonment of not less than 25 years. As such, the Court makes the

following findings: Guideline 4A1.3(a)(2)(D) provides for an upward departure and/or variance if the defendant was pending trial or sentencing on another charge at the time of the instant offense. As noted in part B, in Cause No. 1558563 in the 179th Judicial DistrictCourt of Harris County, Texas, the defendant was pending sentencing for the offense of aggravated assault on a family member, which also involved a firearm. The Court finds the defendant's criminal history is underrepresented. Guideline 5K2 point -- 5K2.21, dis- -- which is dismissal of -- or undischarged conduct, as detailed in the offense conduct section of the report, the defendant participated in at least one other carjacking. This conduct was not accounted for under the guideline calculation in this case. Guideline 5K2.21, the Court may depart or vary upward to reflect the actual seriousness of the offense based on conduct underlying a charge dismissed as part of a plea agreement in the case or underlying a potential charge not pursued in the case as part of a plea agreement or for any other reason that did not enter into the determination of the applicable guideline range. A conviction in Counts 1 and 3 would have run consecutively to the gun counts. The Court determines this conduct was not accounted for under the guideline calculations in the case. Finally, as a firearm was discharged at police during the commission of the offense, the defendant could have been charged in Count 4 with 18, United States Code, 924(c)(1)(A) triple "I," and the term of imprisonment for that count would have been not less than ten years.The Court determines that the conduct was not accounted for, nor does it reflect the actual seriousness of the offense or the defendant's conduct. For all those reasons, the Court determines that an upward variance is not only sufficient, but necessary to satisfy the factors of 18, United States Code, 3553(a). I also considered the argument of counsel for the government and the defense together with the very detailed psychiatric report in this case. Therefore, pursuant to the law and the judgment of the Court, the judgment is that the defendant is hereby committed to the custody of the Bureau of the Prisons to be imprisoned in the federal penitentiary without parole for a term of 150 months as to Count 2, followed by a consecutive term of 150 months as to Count 4, for a total term of 300 months. That's 25 years in the federal penitentiary without parole.

The District Court sentenced Mr. Elias to a total of 300 months imprisonment; the District Court sentenced Mr. Elias to a term of 150 months imprisonment for each count, to be served consecutively. ROA.180. The notice of appeal was then timely filed. On May 16, 2022, the Fifth Circuit affirmed Mr. Elias's conviction and sentence. *See United States v. Elias*, No. 19-20540 (5th Cir. 2022)(not published).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE FIFTH CIRCUIT ERRED BY USING THE "PLAIN ERROR" STANDARD OF REVIEW.

II. MR. ELIAS'S PLEA OF GUILTY WAS NOT KNOWING OR VOLUNTARY. THE DISTRICT COURT'S FAILURE TO ADEQUATELY ADDRESS THE REQUIREMENTS OF RULE 11 VIOLATED DUE PROCESS AND MR. ELIAS'S SUBSTANTIAL RIGHTS.

This case presents a troubling Fifth Circuit opinion that severely erodes the protections afforded to defendants entering into plea negotiations with the government. *United States v. Elias*, No. 19-20540 (5th Cir. 2022)(not published). In short, the opinion holds that defendants can be grossly misinformed as to their sentencing exposure when deciding whether to enter into a plea agreement, and that this misinformation does not rise to the level of error requiring reversal. *See United States v. Elias*, No. 19-20540 (5th Cir. 2022)(not published). Demanding only that a criminal defendant understands the penalties to be received, not the penalties to be avoided, is tantamount to requiring that the defendant only understand half the bargain. Such reasoning cannot be squared with this Court's long-standing rule that a valid plea must "represent [inter alia] a[n] . . . intelligent choice among the

alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

It is uncontested that the District Court violated Rule 11 in this case. Due to a change in law, the mandatory minimum sentence that Mr. Elias faced at the outset of the plea bargaining process –and the potential sentence for which he was admonished during re-arraignment--substantially changed during the pendency of his case. This error constituted error which requires reversal.

A decision to plead guilty must constitute an "intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). Mr. Elias's plea does not satisfy this standard because he was misinformed as to what his alternatives actually were. The Fifth Circuit decision to the contrary ignores this Court's guidance, creates an intractable split between circuits[2] and at least one state court of

[2]The Seventh Circuit has also addressed the issue presented here and held the opposite of the *Elias* court. In *United States v. De La Torre*, 940 F.3d 938 (7th Cir. 2019), the Seventh Circuit decided, in a consolidated appeal, that the pleas of two different defendants were involuntary because they were based on threats of mandatory minimum sentences that could not be legally imposed.

last resort[3], and opens the door for prosecutors to induce pleas by threatening legally impossible mandatory minimum sentences.

Standard of Review

The Fifth Circuit employed the "plain error" standard of review, stating that "it is this court, and not the parties, that must determine the appropriate standard of review." *See Elias* at 6. The Fifth Circuit concluded: "Although Elias may have invoked Rule 11 by objecting to the Government's upward variance motion, he never attempted to withdraw his guilty plea despite having five months to do so.... We therefore conclude that plain error review applies.....". *See Elias* at 10.

Mr. Elias, however, had no reason to object at his July 2018 rearraignment because the FSA had not yet been enacted. He also had no reason to object to his PSR because it correctly stated his mandatory minimum sentence as fourteen years. When his plea agreement to thirty-two years of imprisonment first became relevant, in the Government's upward variance motion, Mr. Elias opposed the motion. Mr. Elias objected by arguing that he was subject to a lower minimum sentence than what he was told at his re-arraignment. This objection, even without mentioning Rule 11, fairly encompasse[s] the concept that he was misinformed, which is by definition a

[3]In *Morrow v. State*, 219 Kan. 442 (Kan. 1976), the Supreme Court of Kansas held that a defendant's plea could not be voluntary if it was induced by "misrepresentations of the law or by unfulfillable promises." *Id.* at 445.

Rule 11 error that by its own terms can render a defendant's plea unknowing. Thus, by opposing the Government's motion on the basis that the FSA lowered his mandatory minimum sentence, Mr. Elias implicitly invoked Rule 11 below and "harmless error" standard of review should apply. The Fifth Circuit erred by employing the "plain error" standard, and this Court should grant this Petition, vacate the Fifth Circuit's decision and remand for proceedings consistent with this Court's opinion.

Involuntary Plea

Due process requires that a guilty plea be entered knowingly and voluntarily, with knowledge of the consequences of the plea. *McCarthy v. United States*, 394 U.S. 459 (1969). To be valid, a guilty plea must be voluntary, knowing, and intelligent. *United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007). A plea is voluntary if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Id*. When determining whether a plea is voluntary, the court considers all relevant circumstances and examines whether the conditions for a valid plea have been met. *Id*. The conditions for a valid plea require, among other things, that the defendant have notice of the charges against him, understand the constitutional protections waived, and have access to the advice of competent counsel. *Id*.

This case needs additional review. The concept of "voluntariness" is rife with ambiguity. *See Parker v. North Carolina*, 397 U.S. 790, 801-02 (1970) (Brennan, J., dissenting). This ambiguity has created a split between circuit courts and at least one state court of last resort when it comes to the "voluntariness" of a plea induced by a misrepresentation of the law. This Court's intervention is needed to clarify the ambiguity.

The American criminal justice system, and in particular the federal system, is wholly dependent on the plea bargaining process. Due to the thousands of criminal defendants that engage in this process on a daily basis the exceptional importance of the issue presented is self-evident: can the government induce a guilty plea with misrepresentations of the sentencing law applicable after trial. This Court should not permit the current split to deepen but should take this case to clarify that the Constitution protects against such coercive conduct.

Under Rule 11, the district court must address three core principles before accepting a guilty plea: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea."*United States v. Jones*, 143 F.3d 1417, 1418-1419 (11th Cir.1998). Rule 11 also requires the court to inform the

defendant of "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed.R.Crim.P. 11(b)(1)(H).

For a plea to be knowing and voluntary, "the defendant must be advised of and understand the consequences of the [guilty] plea.' *United States v. Gaitan*, 954 F.2d 1005, 1011 (5th Cir. 1992). "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Machibroda v. United States*, 368 U.S. 487, 493 (1962).

To help ensure that the plea is knowing and voluntary, Federal Rule of Criminal Procedure 11 outlines in detail the advice that a district court must give a defendant before accepting a guilty plea. The district courts are expected to comply "fully with both the letter and the spirit of Rule 11 in every instance". *United States v. Johnson*, 1 F.3d 296, 298 (5th Cir. 1993)(en banc).

There was a fatal deviance from Rule 11 in this case. The District Court failed to advise Mr. Elias at rearraignment of the correct mandatory minimum terms of imprisonment that could be imposed for his 18 U.S.C. § 924(c)(1)(A)(ii) offenses. *See* FED. R. CRIM. P. 11(b)(1)(I). This was due to a change in law that benefitted Mr. Elias and through no fault of the District Court or the parties.

During re-arraignment, the following colloquy occurred:

THE COURT: Penalty is a term of imprisonment in the federal penitentiary without parole for not less than seven years and up to life in prison for the first conviction. Now, is this the first conviction?

MS. BASILE: Yes, Your Honor.

THE COURT: All right. There is a -- in this, what is it, the sentencing memorandum -- do I have to state as far as what the alternative would be, the 25 for –

MS. BASILE: He is pleading to two gun counts.

THE COURT: Pleading to two counts, so both of these are now applicable?

MS. BASILE: Yes, sir.

THE COURT: I see. He is pleading to two counts. All right. Let me read it again because both parts are, what is it, applicable. For one term -- and then we are going to go to a second term. The term of imprisonment is not less than seven years in the federal penitentiary without parole and up to life for the first conviction and not less than 25 years without parole and up to life for any subsequentconviction to be served consecutive to the underlying count. There is also five years supervised release and a fine not to exceed $250,000. Do you understand this to be the nature of the charge and the possible penalties pending against you?

THE DEFENDANT: Yes, sir.

On December 21, 2018, the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) ("FSA" or "Act"), was signed into law. Section 403 of the Act amended 18 U.S.C. § 924(c). Under § 403 of the Act, the twenty-five-year

mandatory minimum sentence for a second or subsequent § 924(c) violation is now triggered only if the second violation occurs after the defendant's prior § 924(c) conviction becomes final. First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221-22. The amendment applies to any offense committed before the First Step Act's enactment if a sentence has not yet been imposed. *Id.* § 403, 132 Stat. at 5222. Therefore, the plea agreement and the District Court's colloquy were incorrect. Mr. Elias did not receive the correct admonishments regarding the statutory mandatory minimum sentence in the case.

As of December 21, 2018, the district court had not yet imposed Mr. Elias's sentence. Section 403(a) of the Act changed the definition of the term "conviction" in 18 U.S.C. § 941(c)(1)(c). Previously, in *Deal*, this Court had held that "conviction" in the phrase "second or subsequent conviction" means the finding of guilt by the judge or jury that necessarily precedes entry of a "final judgment of conviction." *Deal*, 508 U.S. at 131-36. Thus, the prior "conviction" – or finding of guilt – could occur in the same preceding and need not have been a prior "final judgment of conviction." *Id.* § 924(c)(1)(C)(I), as revised by First Step Act § 403(a), espouses the dissent's view in *Deal*. *Deal*, 508 U.S. at 137-42. "Conviction" is now defined as a prior final conviction. Section 924(c)(1)(C)(I) currently states: "In the case of a violation of this subsection that occurs after a prior conviction under this

subsection has become final, the person shall … be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. § 924(c)(1)(C)(I).

It appears that the District Court was aware of the change in the law, but sought to "cure" the Rule 11 error by sentencing Mr. Elias pursuant to an upward variance. The District Court's decision to upwardly depart in no way cures the fatal Rule 11 violation, nor was it possible to "cure" the error post hoc.

In *United States v. Hourihan*, 936 F.2d 508, 510 n. 3 (11th Cir.1991), the Eleventh Circuit found that the district court's failure to inform the defendant of the mandatory minimum was reversible error. The court noted that the defendant had not been directed to the relevant portion of the indictment addressing the sentence and that the plea agreement contemplated a guideline sentence lower than the five-year mandatory minimum. The court also observed that the defendant had not been advised of the mandatory minimum until she received the Presentence Investigation Report, after the plea hearing. The court stated: "[I]t is apparent from the plea agreement that Hourihan, her attorney, and the government's attorney contemplated a sentence considerably below five years." *Id*. at 511. In the absence of any evidence that the defendant was aware of the mandatory sentence, the court found that the Rule 11 error was not harmless. *Id*.

Likewise, in *United States v. Watch*, 7 F.3d 422, 429 (5th Cir.1993), the Fifth Circuit found that the district court clearly erred when it failed to advise the defendant of the statutory mandatory minimum, because the error "misled Watch as to the statutory minimum term of imprisonment to which he subjected himself by pleading guilty." Finding that Watch did not fully understand the consequences of his plea and that his rights were substantially violated, the court vacated the conviction and remanded the case, allowing the defendant an opportunity to replead. *Id*.

In *United States v. Padilla*, 23 F.3d 1220 (7th Cir.1994), the Seventh Circuit went so far as to endorse a presumption that a Rule 11 failure affects the defendant's decision to plea. *Padilla* involved a prosecution under 21 U.S.C. 841, and the plea agreement did not mention the mandatory minimum sentence, nor did the district court inform the defendant about the mandatory minimum. *Id*. at 1222. Finding reversible error, the court stated that "ignorance about the necessity ... of serving many years in prison strikes us as an informational lack so serious that unless strong indications to the contrary are apparent from the record a court should presume it influenced a defendant's decision to plead guilty." *Id*. at 1222. The court suggested that failure to inform a defendant of a mandatory five or ten year sentence could not be "deemed inconsequential" if the defendant had no knowledge at all that such a sentence was mandatory. *Id*. at 1223.

Using the "plain error" standard of review, the Fifth Circuit found that Mr. Elias did not sufficiently demonstrate that the error affected his substantial rights.

The Fifth Circuit found:

> Given the plain Rule 11 violation, the issue is whether that error affected Elias's substantial rights. Elias likely failed to meet his burden to show a reasonable probability that but for the district court's Rule 11 error, he would not have entered into his plea agreement..... In fact, Elias's failure to seek to withdraw his guilty plea after learning of the changed minimum undermines any notion that the minimum sentence influenced his decision to plea. We therefore conclude that the Rule 11 error did not affect Elias's substantial rights. *See Elias* at 12.

The Fifth Circuit erred. Mr. Elias demonstrated prejudice. At the outset of the plea, Mr. Elias was not informed of the correct mandatory minimum statutory sentencing scheme. Contrary to the Fifth Circuit's assertion, it is evident from the record before this Court, that Mr. Elias did not have a sufficient awareness of the consequences of his plea of guilty. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). It is certainly reasonable to conclude that such lack of awareness could be material and affect Mr. Elias' s decision to plead guilty.

Mr. Elias acknowledges that he did not seek to withdraw his plea. This fact is not dispositive to the consideration of whether or not Mr. Elias's plea of

guilty–premised on an outdated mandatory minimum sentence-- was knowing and voluntary. Mr. Elias's first attorney withdrew from the case after the re-arraignment and before sentencing. ROA.58. The Government went into the longest shut-down in American history.

With his new counsel, however, Mr. Elias filed a written objection to the proposed upward variance and argued the objection during the sentencing hearing. ROA.6, 53, 160-63, 291-95, 297-310. That Mr. Elias learned of the correct mandatory minimum sentence after his plea of guilty is the harm suffered in this case.

This Court considers the record as a whole in assessing whether a Rule 11 error affected the defendant's substantial rights. *United States v. Vonn*, 535 U.S. 55, 59 (2002) . This Court should remedy the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129 (2009). These three principles are at issue here and demand remand. Reasonable citizens would "bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014). Mr. Elias has met his needed showing on this final prong of plain-error review.

Mr. Elias has demonstrated prejudice and has met the standards required for relief on a plain error review. Therefore, this Court should grant the petition, vacate the decision of the Fifth Circuit, and remand the case to the District Court for proceedings consistent with this Court's decision.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ Amy R. Blalock
AMY R. BLALOCK
Attorney-At-Law
P.O. Box 765
Tyler, TX 75710
(903) 262-7520
amyblalock@outlook.com
Texas Bar Card No. 02438900
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on the 10th day of August 2022, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Carmen Castillo Mitchell
US Attorney's Office,
Southern District of Texas,
Houston, Texas, 77002;

David Steve Elias,
FCI 35469-479
FCI TEXARKANA
FEDERAL CORRECTIONAL INSTITUTION
P.O. BOX 7000
TEXARKANA, TX 75505

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2021

DAVID STEVE ELIAS,

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 16, 2022
Lyle W. Cayce
Clerk

No. 19-20540

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DAVID STEVE ELIAS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-22-1

Before RICHMAN, *Chief Judge*, and COSTA and HO, *Circuit Judges*.

PER CURIAM:*

David Steve Elias pleaded guilty to two counts under 18 U.S.C. § 924(c). At his rearraignment, the district court advised Elias that he faced a thirty-two-year mandatory minimum sentence. Before his sentencing, however, Congress enacted the First Step Act of 2018 (FSA), lowering Elias's mandatory minimum sentence to fourteen years. Elias argues that the

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

district court violated Federal Rule of Criminal Procedure 11 when it incorrectly advised him of his mandatory minimum sentence at his rearraignment, and he seeks to vacate his plea. We affirm.

I

Elias and an accomplice stole two vehicles in July 2017. Elias pistol whipped the first victim and instructed his accomplice to "grab [the victim's] shit." His accomplice then drove away in the victim's car. The next day, Elias and his accomplice stole a second victim's vehicle. Elias pointed a pistol at the victim, ordered him out of the car, and demanded everything he had. Elias then hit the victim in the head with his gun and left in the victim's vehicle. The police were able to track Elias's location using the victim's phone, which Elias had stolen. The police stopped him at a gas station, where Elias got out of the stolen vehicle and shot several rounds at the officers. The shots struck a police unit windshield, and one officer suffered severe injury from the broken glass.

A grand jury indicted Elias on four counts. The indictment included two counts of aiding and abetting carjacking in violation of 18 U.S.C. §§ 2119 and 2, and two counts of knowingly and intentionally brandishing a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. Elias pleaded guilty in a written agreement to the two firearms charges. Under the agreement, Elias waived his right to appeal his conviction or sentence, reserving only the right to bring a claim for ineffective assistance of counsel. In exchange, the Government dismissed the carjacking charges and recommended a sentence reduction for acceptance of responsibility.

Elias was rearraigned in July 2018. At his rearraignment, the district court judge advised Elias of the applicable mandatory minimum sentence for the two § 924(c) firearms offenses. The court told Elias that they carried a

minimum total of thirty-two years of imprisonment: seven years for the first conviction, and an additional twenty-five years for the second. The court also explained that his appeal waiver meant that he would not be able to appeal his sentence. Elias confirmed that he understood.

Later that year, Congress enacted the FSA.[1] The FSA provides that the twenty-five-year mandatory minimum sentence for a repeat § 924(c) conviction is triggered only if the repeat conviction "occurs after a prior conviction under [§ 924(c)] has become final."[2] Congress applied the provision to defendants who are sentenced after the FSA's enactment, which included Elias.[3] Accordingly, Elias's mandatory minimum sentence for his two § 924(c) convictions dropped to fourteen years—seven years for each conviction. Elias's presentence report (PSR) was revised to reflect his reduced mandatory minimum sentence.

The Government requested an upward variance, arguing that Elias's plea deal originally contemplated a thirty-two-year minimum sentence. The Government stated that it would not have dismissed the two carjacking charges had it known that a new mandatory minimum of fourteen years would apply. Elias opposed the Government's request for an upward variance. He argued that the court should not rely on Elias's mandatory minimum sentence at the time of his plea agreement to justify an upward departure now that Congress changed the law.

The district court sentenced Elias to twenty-five years of imprisonment—150 months for each of his two § 924(c) convictions. At the sentencing hearing, the court observed that the parties had intended a thirty-

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[1] Pub. L. No. 115-391, 132 Stat. 5194 (2018).

[2] *Id.* § 403, 132 Stat. at 5222.

[3] *See id.*; *United States v. Gomez*, 960 F.3d 173, 176-77 (5th Cir. 2020).

two-year sentence in the plea agreement. The court based its upward variance on other grounds, but the plea agreement seemed to influence the court's decision to impose a twenty-five-year sentence. The court explained that its sentencing decision followed in part from the parties' agreement that Elias would receive a mandatory minimum sentence of thirty-two years. The court also sentenced Elias to concurrent three-year terms of supervised release. Elias appealed.

II

This case presents three issues for review. First, we determine whether Elias's appeal waiver bars his Rule 11 claim. Second, we decide the appropriate standard for reviewing the claim. Third, applying this standard of review, we assess whether a Rule 11 error affected Elias's substantial rights.

A

We start with the enforceability of Elias's appeal waiver. "This court reviews de novo whether an appeal waiver bars an appeal."[4] A defendant may waive his right to appeal, but that waiver must be "knowing and voluntary" and "appl[y] to the circumstances at hand, based on the plain language of the agreement."[5] Waivers, however, "cannot be enforced 'to bar a claim that the waiver itself—or the plea agreement of which it was a

[4] *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014).

[5] *United States v. Higgins*, 739 F.3d 733, 736 (5th Cir. 2014).

part—was unknowing or involuntary.'"[6] Barring such a claim would lead to "impermissible boot-strapping."[7]

"Guilty pleas must be made intelligently and voluntarily because they involve the waiver of several constitutional rights."[8] Federal Rule of Criminal Procedure 11 "ensures that a guilty plea is knowing and voluntary by requiring the district court to follow certain procedures before accepting such a plea."[9] Among those procedures, Rule 11 requires that "[b]efore the court accepts a plea of guilty . . . the court must inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading . . . [and] any mandatory minimum penalty."[10]

Elias argues that his decisions to waive his right to appeal and enter a guilty plea were both unknowing and involuntary because the district court violated Rule 11 when it incorrectly advised him of his mandatory minimum sentence. Elias may seek a vacatur of his plea on the grounds that it was unknowing or involuntary, even if his appeal waiver was knowing and voluntary.[11] For example, in *United States v. Carreon-Ibarra*,[12] a defendant claimed that he unknowingly and involuntarily entered his plea agreement because the district court incorrectly stated his mandatory minimum

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[6] *United States v. Carreon-Ibarra*, 673 F.3d 358, 362 n.3 (5th Cir. 2012) (quoting *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002)).

[7] *White*, 307 F.3d at 343.

[8] *Carreon-Ibarra*, 673 F.3d at 364.

[9] *Id.* (quoting *United States v. Reyes*, 300 F.3d 555, 558 (5th Cir. 2002)).

[10] FED. R. CRIM. P. 11(b)(1)(G), (I).

[11] *See Carreon-Ibarra*, 673 F.3d at 362 n.3.

[12] 673 F.3d 358.

sentence.[13] The defendant had waived his right to appeal, but we refused to enforce that waiver because the defendant's claim was that his plea agreement was unknowing and involuntary.[14] For the same reasons, Elias's appeal waiver does not bar his Rule 11 claim.

B

We turn next to the standard of review. Both parties agree that we should review Elias's claim for plain error, but "it is this court, and not the parties, that must determine the appropriate standard of review."[15]

Rule 11 violations are reviewed for either plain or harmless error.[16] "When a defendant objects at the district court level to the court's failure to comply with Rule 11 during the plea colloquy," we review for harmless error.[17] The "objection must be sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction."[18] If, however, a defendant raises his Rule 11 objection for the first time on appeal, we generally review for plain error.[19]

We have applied harmless error review in a handful of Rule 11 cases in which the defendant did not attempt to withdraw his guilty plea or object

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[13] *Id.* at 362.

[14] *Id.* at 362 n.3.

[15] *United States v. Torres-Perez*, 777 F.3d 764, 766 (5th Cir. 2015).

[16] *United States v. Powell*, 354 F.3d 362, 367 (5th Cir. 2003).

[17] *Id.*

[18] *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009).

[19] *Powell*, 354 F.3d at 367; *see also United States v. Vonn*, 535 U.S. 55, 58-59 (2002) (holding that a defendant who does not object to a Rule 11 error in the district court is subject to the Rule 52(b) plain-error standard on appeal, even though Rule 11 does not have a provision stating that plain error review applies to claims not brought to the district court's attention).

under Rule 11 in the district court. In *Carreon-Ibarra*, the district court told the defendant that his § 924(c) offense for possession of a firearm carried a five-year mandatory minimum sentence.[20] In the written judgment, however, it became apparent for the first time that the court interpreted the defendant's plea agreement as admitting to possessing a machinegun, which carries a thirty-year mandatory minimum sentence.[21] We applied harmless error review because the defendant objected to being sentenced for the machinegun offense in response to the PSR and at his sentencing hearing.[22] It appeared to the defendant that the district court had sustained his objection, so he did not attempt to withdraw his guilty plea.[23] In applying harmless error review, we emphasized that the district court had "misled" the defendant about the machinegun offense by "repeatedly" telling him that it would "consider the full range up from five to life."[24]

Similarly, in *United States v. Barrow*,[25] an unpublished decision, we reviewed another Rule 11 claim for harmless error despite no attempt to withdraw a guilty plea and a failure to make a Rule 11 objection below.[26] The defendant pleaded guilty to a drug offense that carried a twenty-year mandatory minimum sentence.[27] In the "minutes or hours" before sentencing, the Supreme Court retroactively applied the Fair Sentencing Act

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[20] *United States v. Carreon-Ibarra*, 673 F.3d 358, 360-61 (5th Cir. 2012).

[21] *Id.* at 360, 362.

[22] *Id.* at 363-64.

[23] *Id.*

[24] *Id.* at 363.

[25] 557 F. App'x 362 (5th Cir. 2014) (per curiam) (unpublished).

[26] *Id.* at 365.

[27] *Id.* at 363.

of 2010 to the defendant, lowering his mandatory minimum sentence to ten years.[28] The defendant had previously objected to the PSR's recommendation of twenty years, arguing that the ten-year minimum should apply.[29] We concluded that a defendant who did not attempt to withdraw his guilty plea had nevertheless preserved a Rule 11 error by objecting to the PSR.[30] We reasoned that his objection "fairly encompassed the concept that he was misinformed [at his rearraignment], which is by definition a Rule 11 error that by its own terms can render a defendant's plea unknowing."[31]

Here, Elias had at least five months to withdraw his guilty plea but failed to do so, distinguishing this case from *Carreon-Ibarra* and *Barrow*. In *Carreon-Ibarra*, the defendant did not have an opportunity to withdraw his guilty plea because he did not receive notice that the district court would sentence him for the machinegun offense until the written judgment.[32] Likewise, in *Barrow*, we emphasized that the timing of events was "highly unusual."[33] The district court learned "literally in the midst of the sentencing hearing" that a lower mandatory minimum sentence applied due to a Supreme Court decision released "only minutes or hours beforehand."[34] Here, however, Congress enacted the FSA in December 2018, and the Government provided Elias with notice of the new law in February 2019.

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[28] *Id.* at 365; *see also* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

[29] *Barrow*, 557 F. App'x at 364.

[30] *Id.* at 365.

[31] *Id.* at 365 n.8.

[32] *United States v. Carreon-Ibarra*, 673 F.3d 358, 363-64 (5th Cir. 2012).

[33] *Barrow*, 557 F. App'x at 365.

[34] *Id.*

Over the next five months before Elias's July 2019 sentencing, Elias never attempted to withdraw his guilty plea.

Elias also failed to object under Rule 11 specifically. In *Carreon-Ibarra*, the defendant did not have a reason to object under Rule 11 at his sentencing hearing because he did not know that he was being sentenced for the machinegun offense.[35] We emphasized that the court "repeatedly assur[ed]" the defendant that it would consider sentences below the thirty-year mandatory minimum for the machinegun charge.[36] The Rule 11 error "was not revealed until after the end of the sentencing hearing when the court rendered its written judgment."[37] By contrast, here, the district court stated at sentencing that the parties intended a thirty-two-year sentence in their plea agreement. The court based its variance on other grounds, but it seems that the agreement influenced the court's decision to vary upwardly. Elias had notice at his sentencing hearing of the district court's Rule 11 error, unlike in *Carreon-Ibarra*.[38] Elias objected, but he did so under 18 U.S.C. § 3553, not Rule 11.

There are some similarities between this case and *Carreon-Ibarra* and *Barrow*, however, that provide support for harmless error review. Elias had no reason to object at his July 2018 rearraignment because the FSA had not yet been enacted. He also had no reason to object to his PSR because it correctly stated his mandatory minimum sentence as fourteen years. When his plea agreement to thirty-two years of imprisonment first became relevant, in the Government's upward variance motion, Elias opposed the motion. As

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[35] *See Carreon-Ibarra*, 673 F.3d at 363.

[36] *Id.*

[37] *Id.*

[38] *See id.*

in *Barrow*, Elias objected by arguing that he was subject to a lower minimum sentence than what he was told at his rearraignment.[39] We reasoned in *Barrow* that this objection, even without mentioning Rule 11, "fairly encompasse[s] the concept that he was misinformed, which is by definition a Rule 11 error that by its own terms can render a defendant's plea unknowing."[40] Thus, by opposing the Government's motion on the basis that the FSA lowered his mandatory minimum sentence, Elias may have implicitly invoked Rule 11 below.[41]

Although Elias may have invoked Rule 11 by objecting to the Government's upward variance motion, he never attempted to withdraw his guilty plea despite having five months to do so. The lack of time to withdraw a guilty plea was key to our reasoning in *Carreon-Ibarra* and *Barrow*, distinguishing those cases. We therefore conclude that plain error review applies, and we turn to the merits of Elias's Rule 11 claim.

C

Under plain error review, "[w]hen there was (1) an error below, that was (2) clear and obvious, and that (3) affected the defendant's substantial rights, a 'court of appeals has the discretion to correct it but no obligation to

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[39] *See Barrow*, 557 F. App'x at 365 (objecting to a PSR, not an upward variance motion).

[40] *Id.* at 365 n.8.

[41] *See id.*; *see also United States v. Still*, 102 F.3d 118, 122 n.9 (5th Cir. 1996) (applying harmless error review because although the defendant "did not explicitly raise his Rule 11 argument in the district court and acknowledged at oral argument that the Rule 11 error was not recognized until after his pleas and sentencing, Still's attorney did bring the general issue of Still's understanding of the consequences of his pleas to the district court's attention").

do so.'"[42] To establish that his substantial rights were affected, Elias has the burden "to show a reasonable probability that, but for the error, he would not have entered the plea."[43] If he makes that showing, we exercise our discretion to correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[44]

Here, nobody disputes that the district court violated Rule 11. "A district court commits Rule 11 error when accepting a guilty plea if it fails to inform the defendant 'accurately of the proper minimum sentence' that will result from the plea."[45] Even if a district court "correctly applied the law as it stood" at the time of a defendant's plea, the court's statements regarding a defendant's sentencing range may be "rendered erroneous by a subsequent change in the law."[46] At Elias's rearraignment, the district court advised him that he would be subject to a thirty-two-year mandatory minimum sentence if he pleaded guilty to the two § 924(c) counts.[47] Before his sentencing, Congress enacted the FSA, lowering his mandatory minimum sentence to fourteen years.[48] Because the FSA rendered the district court's stated minimum sentence inaccurate, there was a Rule 11 violation.

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[42] *United States v. Hughes*, 726 F.3d 656, 659 (5th Cir. 2013) (emphasis omitted) (quoting *United States v. Trejo*, 610 F.3d 308, 319 (5th Cir. 2010)).

[43] *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004).

[44] *Puckett v. United States*, 556 U.S. 129, 135 (2009) (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

[45] *United States v. Carreon-Ibarra*, 673 F.3d 358, 364 (5th Cir. 2012) (quoting *United States v. Williams*, 277 F. App'x 365, 367 (5th Cir. 2008) (per curiam) (unpublished)).

[46] *Hughes*, 726 F.3d at 661.

[47] *See* 18 U.S.C. §§ 924(c)(1)(A)(ii), (c)(1)(C)(i) (2006).

[48] *See* Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221-22 (2018).

Given the plain Rule 11 violation, the issue is whether that error affected Elias's substantial rights. Elias likely failed to meet his burden to show a reasonable probability that but for the district court's Rule 11 error, he would not have entered into his plea agreement. In the summary portion of his brief, Elias "contends that the District Court's error materially affected his decision to plead guilty." He fails, however, to provide any support for this assertion. In *United States v. Hughes*,[49] we concluded that a defendant failed to show that a Rule 11 error affected his decision to plead guilty.[50] The defendant did not "direct this court to any portion of the record supporting the proposition that the maximum sentence [he faced] affected his plea decision."[51] Similarly, here, Elias presented no record evidence linking his decision to plead guilty to his thirty-two-year mandatory minimum sentence. In fact, Elias's failure to seek to withdraw his guilty plea after learning of the changed minimum undermines any notion that the minimum sentence influenced his decision to plea. We therefore conclude that the Rule 11 error did not affect Elias's substantial rights.

* * *

Elias's conviction and sentence are AFFIRMED.

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[49] 726 F.3d 656.

[50] *Id.* at 662.

[51] *Id.* (alteration in original) (quoting *United States v. Molina*, 469 F.3d 408, 412 (5th Cir. 2006)).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 16, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-20540 USA v. Elias
USDC No. 4:18-CR-22-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

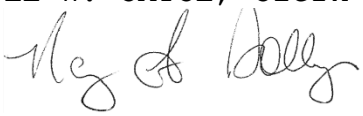
Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Mr. Brent David Chapell
Ms. Carmen Castillo Mitchell
Ms. Paula Camille Offenhauser