

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

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**In the**  
**Supreme Court of the United States**  
OCTOBER TERM, 2024

JONATHAN TAREK NASSAR,  
*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**  
\_\_\_\_\_

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## **QUESTIONS PRESENTED FOR REVIEW**

- I.** Do the fatal deviances from Rule 11 in this case—that is, the District Court’s abject failure to comply with nearly every requirement of Rule 11--demand a new re-arraignment? *See* FED. R. CRIM. P. 11.
- II.** Was Mr. Nassar’s plea of guilty knowing and voluntary? Was Mr. Nassar’s decision to plead guilty knowingly, voluntarily and intelligently made when he was grossly misinformed about the risks attendant to going to trial?

## TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
REPORTS OF OPINIONS.....	1
JURISDICTION .....	2
BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.....	2
STATEMENT OF THE CASE .....	3
Procedural History .....	3
Statement of Facts .....	3
REASONS WHY CERTIORARI SHOULD BE GRANTED.....	8
CONCLUSION.....	22
RELIEF REQUESTED .....	23
CERTIFICATE OF SERVICE.....	24
APPENDIX.....	25

## TABLE OF AUTHORITIES

### CASES

<u>Bousley v. United States</u> , 523 U.S. 614 (1998) . . . . .	11
<u>Boykin v. Alabama</u> , 395 U.S. 238 (1969) . . . . .	7, 11, 12, 14
<u>Brady v. United States</u> , 397 U.S. 742 (1970). . . . .	11
<u>Duke v. Cockrell</u> , 292 F.3d 414 (5th Cir. 2002) . . . . .	12
<u>Fisher v. Wainwright</u> , 584 F.2d 691 (5th Cir. 1978) . . . . .	12
<u>Machibroda v. United States</u> , 368 U.S. 487 (1962). . . . .	8
<u>Matthew v. Johnson</u> , 201 F.3d 353 (5th Cir. 2000). . . . .	11
<u>McCarthy v. United States</u> , 394 U.S. 459 (1969) . . . . .	7
<u>Puckett v. United States</u> , 556 U.S. ----, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) . . . . .	15
<u>United States v. Abbott</u> , 241 F.3d 29 (1st Cir. 2001) . . . . .	14
<u>United States v. Avila-Santos</u> , 112 F. App'x 342 (5th Cir. 2004). . . . .	12
<u>United States v. Com</u> , 836 F. 2d (5th Cir. 1988) . . . . .	7
<u>United States v. Dominguez Benitez</u> , 542 U.S. 74 (2004). . . . .	8, 13
<u>United States v. Draper</u> , 882 F.3d 210 (5th Cir. 2018) . . . . .	15
<u>United States v. Gaitan</u> , 954 F.2d 1005 (5th Cir. 1992) . . . . .	8
<u>United States v. Gonzalez-Ramirez</u> , 477 F.3d 310 (5th Cir.2007) . . . . .	13
<u>United States v. Gracia</u> , 983 F.2d 625 (5th Cir. 1993) . . . . .	12

<u>United States v. Johnson</u> , 1 F.3d 296 (5th Cir. 1993) . . . . .	7, 8
<u>United States v. Jones</u> , 143 F.3d 1417 (11th Cir.1998). . . . .	8
<u>United States v. Nassar</u> , No. 23-20312 (5th Cir. 2024)(not published) <u>..</u> <i>in passim</i>	
<u>United States v. Reyes</u> , 300 F.3d 555 (5th Cir. 2002) . . . . .	7, 14
<u>United States v. Ruiz</u> , 536 U.S. 622 (2002). . . . .	11
<u>United States v. Sabillon-Umana</u> , 772 F.3d 1328 (10th Cir. 2014). . . . .	15
<u>United States v. Scott</u> , 987 F. 2d (5th Cir. 1993). . . . .	7
<u>United States v. Vonn</u> , 535 U.S. 55 (2002) . . . . .	7, 12, 13, 15
<u>United States v. Washington</u> , 480 F.3d 309 (5th Cir. 2007) . . . . .	7
<u>United States v. Watch</u> , 7 F.3d 422 (5th Cir.1993) . . . . .	12, 13
<u>United States v. Yang Chia Tien</u> , 720 F.3d 464 (2d Cir. 2013) . . . . .	14

## STATUTES

18 U.S.C. § 344. . . . .	4
18 U.S.C. § 1344. . . . .	4
28 U.S.C., § 1254(1). . . . .	5
FED. R. CRIM. P. 11 . . . . .	<i>in passim</i>
Fed. R. Crim. P. 11(b)(1) . . . . .	8, 14
U.S. Const. amend. V . . . . .	6
U.S. Const. amend. XIV . . . . .	6

## **REPORTS OF OPINIONS**

The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Nassar*, No. 23-20312 (5<sup>th</sup> Cir. September 9, 2024). 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. Nassar 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 Southern District of Texas because Mr. Nassar 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 March 15, 2022, Mr. Nassar waived Indictment and was charged by a Superseding Information in the Southern District of Texas, Houston Division, with Bank Fraud, in violation of 18 U.S.C. § 1344. ROA.63, 61-62. On April 11, 2022, Mr. Nassar appeared before U.S. District Court Judge Lynn Hughes and was found guilty of the one-count Information, pursuant to a written, non-binding Plea Agreement. ROA. 307. The case was thereafter re-assigned to Chief Judge Crane. On March 28, 2023, the District Court sentenced Mr. Nassar to a term of 72 months' imprisonment, 3 years' supervised release, and \$100 special assessment. ROA.326. Restitution of \$5,000 was also ordered. ROA.327.

No fine was imposed, but Mr. Nassar was ordered to pay a \$100 special assessment. Thereafter, Mr. Nassar filed a Notice of Appeal. ROA.96. The Fifth Circuit affirmed his conviction and sentence on September 9, 2024.

### **3. Statement of Facts.**

Mr. Nassar is a 44-year old man and father of two young adult children. He has been diagnosed with Schizophrenia Paranoid Type, Depression, Insomnia, Bipolar, and he occasionally experiences auditory and visual hallucinations. He has also abused illegal substances for several years, and he requested substance abuse



treatment during his sentencing hearing. His poor mental health and substance abuse led him to become involved with individuals who stole mail and used it for illegal gains.

Beginning in November 2018, Mr. Nassar and his associates came under investigation by the United States Postal Inspection Service for stealing mail from apartment complex mailboxes. The Postal Inspector believed that Mr. Nassar and his collegeagues were stealing mail by prying open the back panels of mailboxes using a screwdriver or other implement. Mr. Nassar and the co-conspirators would then open and rifle through the stolen mail until they found checks or credit cards intended for others that they could cash or use fraudulently. Because these checks were not made out to Mr. Nassar or his co-conspirators, they would create false identifications with their photo and the name of the intended check recipient to receive the funds listed on the checks. Further, Mr. Nassar used debit and credit cards found in the stolen mail to fraudulently purchase items at local retail stores and withdraw funds though ATMs.

Mr. Nassar was charged by Information with Bank, in violation of 18 U.S.C. § 344. That is the conduct that comprised the charge for which he was found guilty. ROA. 307. Mr. Nassar signed a Factual Basis wherein he stipulated to the elements of the offense. ROA. 442-443. At the rearraignment, the District Court failed to

inquire how Mr. Nassar was pleading to the charge. Mr. Nassar never entered a guilty plea. The District Court found him guilty. ROA. 307.

The PSR assigned Mr. Nassar an adjusted offense level of 7. The PSR assigned an eight-level upward adjustment for loss, a two-level adjustment for the number of victims, a two-level upward adjustment for the fraudulent use of identification, and no adjustment was made for acceptance of responsibility. Based upon a total offense level of 19 and a criminal history category of VI, the advisory guideline range of imprisonment was 63 to 78 months.

Mr. Nassar objected to the adjustment for amount of loss and the lack of adjustment for acceptance of responsibility. These objections were overruled by the District Court. ROA. 314.

Mr. Nassar made the following statement at the sentencing hearing:

**THE DEFENDANT:** And because of the United States Government, and I thank them for this, that I was able to give up -- I was able to get mental health diagnosis, and I found out that I do have a mental illness. And from the counseling that I have received from the government assistance, it helped go back and figure out maybe why -- what was the start of everything going on. I was a drug addict, lost my kids --.... I was a drug addict. And my life just was a downward spiral. I do understand -- I do understand to the fullest that what I did is wrong. And again, I just was blinded by homelessness, drugs, and I would just like an opportunity to -- to get this -- to get myself right. I have made amends with my family members. I'm making amends with my god. I'm hoping to make amends with this court, Your Honor. I do want to ask if you could place me into the drug programs -- any classes that could help

better myself. I have taken classes while I've been incarcerated at Joe Corley. I have the certificates here with me. I just want to better myself, sir, for my kids (indiscernible)....

ROA. 316.

The District Court subsequently sentenced Mr. Nassar to a 72-month term of imprisonment. ROA. 326. The Fifth Circuit affirmed Mr. Nassar's conviction and sentence in an unpublished opinion released on September 9, 2024.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

### **I. THE FIFTH CIRCUIT'S DECISION THAT MR. NASSAR'S SUBSTANTIAL RIGHTS WERE NOT VIOLATED CONFLICTS WITH ESTABLISHED LAW OF THIS COURT. MR. NASSAR'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. NASSAR'S SUBSTANTIAL RIGHTS.**

This Court has long held that 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). This Court has further held that, 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.*<sup>1</sup>

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<sup>1</sup>The District Court is required to ensure that a defendant's plea is intelligent and voluntary and must address the defendant personally for that purpose. *See* Rule 11(b)(2); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). “Because a guilty plea involves the waiver of several constitutional rights, it must be made intelligently

Rule 11 is just that—a Rule. It is not a suggestion. 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

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and voluntarily.” *United States v. Reyes*, 300 F.3d 555, 558 (5th Cir. 2002). When determining whether the defendant's plea is voluntary, the court “considers all relevant circumstances and examines whether the conditions for a valid plea have been met.” *United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007).

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 were several fatal deviancies from Rule 11 in this case. The District Court failed to (1) advise Mr. Nassar of his right to plead not guilty or to persist in such a plea; (2) advise him of the rights he was waiving by pleading guilty; (3) explain the court’s sentencing obligations, including operation of the Sentencing Guidelines; (4) ascertain that the guilty plea was voluntary and not the product of threats, coercion, or promises outside the plea agreement; or (5) ensure that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(1)–(3). The District Court also failed ask Mr. Nassar if he was pleading guilty. Further, the admonishment regarding the appeal waiver was incomplete.

During re-arraignment, the following colloquy occurred:

**THE COURT:** Thank you. We have a new charge?

**MR. HILEMAN:** Yes.

**THE COURT:** And it is bank fraud; and that charge has not gone to a Grand Jury who would look at accusations the government is making, look at the facts they have. In this case it's just what you and Mr. Hileman have worked out, and that includes waiving the indictment?

**THE DEFENDANT:** (Nodding head affirmatively.)

**THE COURT:** Right?

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** Don't nod your head, because he's magical; but he has to write down words.

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** I will accept the waiver. So I understand you have an agreement with the government.

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** You agree to waive your right to -- give up your right to appeal and give up your right to collaterally attack -- that means do something else other than appealing -- and you can't also contest any of the sentence except if it's an upward departure. He tactfully didn't put by me in there. Count 1 in the information is that you executed a scheme to obtain money or property from a federally-insured financial institution by false and fraudulent means. You acted knowing what you were doing, intending to defraud the federally-insured financial institution and the false or fraudulent pretenses, representations or promise that the defendant made were material; that is, they would naturally tend to influence or were capable of influencing the decision of a federally-insured financial institution. The defendant placed the financial institution at risk of loss and civil liability. Do you agree that the financial institution is insured by the Federal Deposit Insurance Corporation?

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** The penalty is up to 30 years and a fine not to exceed -- and/or a fine that can't exceed a million dollars. So this supervised release business, I'm sure she's explained it to you; but that means after you serve your time, you get out and you're still like being on parole and

if you misbehave while you're on parole, you go back into prison. You are a citizen of which nation?

**THE DEFENDANT:** The United States.

**THE COURT:** Sir?

**THE DEFENDANT:** United States.

**THE COURT:** There's a minor tax which you will have to pay right after you pay the million dollars. Mr. Hileman, could you explain the agreement, the plea deal, please?

**MR. HILEMAN:** Yes. The defendant agrees, as the Court has already stated, to plead guilty to that first count of the information, waive his right to indictment, waive his rights to appeal and collaterally attack his conviction and sentence. The United States agrees that he should receive full credit for acceptance of responsibility, agrees that the previous indictment is superseded and those charges won't be pursued and no charges of aggravated identity theft will be brought against him.

**THE COURT:** No aggravated --

**MR. HILEMAN:** -- identity theft charges will be brought against the defendant.

**THE COURT:** Does that sound about right, ma'am?

**MS. CONN:** Yes, Your Honor.

**THE COURT:** Do you understand it?

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** Do you think the government has given him all the information that he has, including stuff that's bad for them and good for him?



**MS. CONN:** I do, Your Honor.

**THE COURT:** All right. Mr. Nassar, I find you guilty as charged in the information. Your sentencing is set for June 21st, 2022 at 1:30 p.m. here.

**THE DEFENDANT:** Yes, Your Honor.

**THE COURT:** Anything else, ma'am?

**MS. CONN:** No, Your Honor

**THE COURT:** All right. ROA. 304-308.

A plea of guilty waives a number of constitutional rights. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Consequently, “the Constitution insists, among other things, that the defendant enter a guilty plea that is ‘voluntary’ and that the defendant must make related waivers ‘knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.’” *Ruiz*, 536 U.S. at 629; *see also Brady v. United States*, 397 U.S. 742, 748 (1970); *accord Bousley v. United States*, 523 U.S. 614, 618 (1998).

“*Boykin* requires that defendants have a hearing prior to entry of the plea, at which there needs to be an affirmative showing that the decision to plead guilty was voluntarily and intelligently made.” *Matthew v. Johnson*, 201 F.3d 353, 367 n.22 (5th

Cir. 2000). “Rule 11 of the Federal Rules of Criminal Procedure requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant.” *United States v. Vonn*, 535 U.S. 55, 62 (2002). “The very premise of the required Rule 11 colloquy is that, even if counsel is present, the defendant may not adequately understand the rights set forth in the Rule unless the judge explains them.” *Id.* at 78 (Stevens, J., concurring). A determination of whether a defendant understands the consequences of his guilty plea does not require a trial court to determine that the defendant has a perfect understanding of the consequences, however. The court must only ascertain whether the defendant has a realistic or reasonable understanding of his plea. *See United States v. Gracia*, 983 F.2d 625, 627-28 (5th Cir. 1993). Compliance with the admonishments required under Rule 11 “provides prophylactic protection for the constitutional rights involved in the entry of guilty pleas.” *Id.* at 627.

The likelihood of imprisonment following a guilty-plea conviction “demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. at 243-44. The record on appeal must reflect that a defendant was apprised fully of his constitutional rights, and specially

instructed on the rights and privileges which he waived by entering the guilty plea. Fed.R.Crim.P. 11©, (d). *See United States v. Avila-Santos*, 112 F. App'x 342, 343 (5th Cir. 2004)(district court must comply with Rule 11 while admonishing defendant plea colloquy). This record demonstrates that Mr. Nassar was not apprised of his constitutional rights that he was waiving.

“The voluntariness of a plea is determined by ‘considering all of the relevant circumstances surrounding it.’” *Fisher v. Wainwright*, 584 F.2d 691, 693 (5th Cir. 1978). Courts considering challenges to guilty pleas “have focused on three core concerns: absence of coercion, the defendant's understanding of the charges, and a realistic understanding of the consequences of a guilty plea.” *United States v. Gracia*, 983 F.2d 625 (5th Cir. 1993). A realistic understanding of the consequences of a guilty plea means that the defendant knows “the immediate and automatic consequences of that plea such as the maximum sentence length or fine.” *Duke v. Cockrell*, 292 F.3d 414, 417 (5th Cir. 2002).

In *United States v. Watch*, 7 F.3d 422, 429 (5th Cir.1993), this Court 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.*

The record in this case demonstrates that Rule 11 and the constitutional requirements of the entry of a guilty-plea were not met in this case. Mr. Nassar, however, did not challenge the omissions or the erroneous admonishment regarding his appellate waiver at the district court and thus this court's review is for plain error. *See United States v. Gonzalez-Ramirez*, 477 F.3d 310, 311-12 (5th Cir.2007). To establish plain error, Mr. Nassar must show that (1) there was error, (2) the error was plain, and (3) the error affected his substantial rights (the “prejudice prong”). *Id.* If plain error is established, the court may exercise its discretion to grant relief, but “only if the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings” (the “fairness prong”). *Id.* Therefore, relief for plain error is tied to a prejudicial effect.

To establish prejudice in the context of a Rule 11 error, Mr. Nassar must show a reasonable probability that, but for the error, he would not have entered the plea. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). 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). Even if Mr. Nassar establishes prejudicial error, this Court may not remedy that error unless it “seriously

affects the fairness, integrity, or public reputation of judicial proceedings.” *Puckett v. United States*, 556 U.S. —, 129 S.Ct. 1423, 1429, 173 L.Ed.2d 266 (2009).

The Fifth Circuit recognized that there was error and that the error was plain. *United States v. Nassar*, No. 23-20132, p. 4 (September 9, 2024)(not published). The Fifth Circuit, however, found that the error did not affect his substantial rights. The Court found that Mr. Nassar did not demonstrate on appeal that he would have declined to enter his guilty pleas but for the Rule 11 violations. position. In *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), this Court held that “a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea deal.” *Id.* at 83.

Mr. Nassar, however, actually never pled guilty. He never entered a plea. Thus, there is thus a reasonable probability that Mr. Nassar would not have pled guilty and instead proceeded to trial.

The district court’s numerous Rule 11 violations resulted in Mr. Nassar ’s unknowing and involuntary guilty plea. Although the district court was “not required to use talismanic words in ascertaining the voluntariness of [Appellant’s] plea.” *United States v. Hernandez-Hernandez*, 359 Fed.Appx. 542, 543 (5th Cir. 2010), the district court still failed to cover numerous Rule 11 inquiries. The compounding of

numerous Rule 11 violations can result in plain error that affects a defendant's substantial rights. Such is Mr. Nassar's case.

The Court failed to properly advise Mr. Nassar of the rights he was waiving by entering his guilty plea. Specifically, the District Court failed to (1) advise Mr. Nassar of his right to plead not guilty or to persist in such a plea; (2) advise him of the rights he was waiving by pleading guilty; (3) explain the court's sentencing obligations, including operation of the Sentencing Guidelines; (4) ascertain that the guilty plea was voluntary and not the product of threats, coercion, or promises outside the plea agreement; or (5) ensure that there was a factual basis for the plea. *See* Fed. R. Crim. P. 11(b)(1)–(3). The District Court also failed to ask Mr. Nassar if he was pleading guilty. The District Court simply found him guilty. ROA.307. Further, the admonishment regarding the appeal waiver was inaccurate because the District Court did not explain the exception to the waiver.

The District Court is required to ensure that a defendant's plea is intelligent and voluntary and **must address the defendant personally** for that purpose. *See* Rule 11(b)(2)(emphasis added); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969). “Because a guilty plea involves the waiver of several constitutional rights, it must be made intelligently and voluntarily.” *United States v. Reyes*, 300 F.3d 555, 558 (5th Cir. 2002). “Before accepting a plea of guilty . . . the court must address the defendant

personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises. . . .' FED. R. CRIM. P. 11(b)(2); *see also United States v. Reggie*, No. 15-30568 (5th Cir. May 27, 2016)(vacating plea where this Court found that the district court erred in failing to determine whether his plea was voluntary as required by Federal Rule of Criminal Procedure 11(b)(2) in a way that violated his substantial rights).

In Mr. Nassar's case, there were multiple deficiencies. Though subject to harmless error analysis, this plea colloquy was woefully deficient. The court did not ask Mr. Nassar a single question about whether his plea was induced by force, threats, or promises. Mr. Nassar has a history of mental illness, substance abuse, and visual hallucinations. The absence of any inquiry into the voluntary nature of the plea by itself establishes that the variance from Rule 11 was not harmless beyond a reasonable doubt. *See United States v. Abbott*, 241 F.3d 29 (1st Cir. 2001) (failure to address a "core concern" such as whether a guilty plea is voluntary is reason enough to permit the withdrawal of a guilty plea); *United States v. Yang Chia Tien*, 720 F.3d 464 (2d Cir. 2013) (failure to probe the obvious effects of medication undermines any conclusion that the plea was knowing and voluntary).

The failure to adhere to even the skeletal mandates of Rule 11 adversely impacted Mr. Nassar's substantial rights. On this record as a whole: the numerous

failures under Rule 11 and the fact Mr. Nassar actually never pleaded guilty, it cannot be gainsaid that the plain error here seriously affected the fairness, integrity and public reputation of judicial proceedings. Accordingly, Mr. Nassar has established the district court committed plain error that affected his substantial rights and the integrity of the judicial proceedings.” *United States v. Draper*, 882 F.3d 210, 215 (5th Cir. 2018).

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. Nassar has met his needed showing on this final prong of plain-error review.

Mr. Nassar 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,

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## **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,

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*Attorney for Petitioner*

## **CERTIFICATE OF SERVICE**

I certify that on the 9th day of December 2024, 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

JONATHAN TAREK NASSAR  
USM# 17517-579  
USP ATWATER  
U.S. PENITENTIARY  
P.O. BOX 019001  
ATWATER, CA 95301

/s/ Amy R. Blalock  
**AMYR.BLALOCK**

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

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**In the**  
**Supreme Court of the United States**

OCTOBER TERM, 2024

\_\_\_\_\_  
JONATHAN TAREK NASSAR,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

\_\_\_\_\_  
**APPENDIX**

\_\_\_\_\_  
OPINION OF THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT

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United States Court of Appeals  
for the Fifth Circuit

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No. 23-20132

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United States Court of Appeals  
Fifth Circuit

**FILED**

September 9, 2024

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

JONATHAN TAREK NASSAR,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Southern District of Texas  
USDC No. 4:20-CR-281-1

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Before JONES, WILLETT, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:\*

Defendant Jonathan Tarek Nassar challenges the validity of his guilty plea for bank fraud. Although the district court deviated from the requirements of Rule 11 during arraignment, the record shows that Nassar understood the substance of Rule 11 and intended to plead guilty. Because any technical Rule 11 violation is not reversible error, we AFFIRM.

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\* 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.

No. 23-20132

I.

Nassar pled guilty to one count of bank fraud under 18 U.S.C. § 1344 pursuant to a written plea agreement. Nassar's plea agreement explained his rights and the rights he was waiving. He and his attorney represented that the agreement was entered knowingly and voluntarily. Based on the plea agreement, Nassar was rearraigned by the district court and was found guilty. The rearraignment was cursory and did not apprise Nassar of several of the rights he was waiving.

Following the rearraignment, a presentence report (PSR) was issued referencing Nassar's plea agreement and his entry of a guilty plea before the district court. The PSR was disclosed to Nassar and his counsel, whose sole objection related to one paragraph of the PSR regarding the monetary loss experienced by one victim. During sentencing before a different district court, Nassar represented that he had reviewed the PSR. Nassar objected to the PSR's monetary loss calculation, his time served attributable to a different sentence, and the sentence recommendation. During sentencing, Nassar took responsibility for his crime. His attorney referenced the plea agreement and previous guilty plea while arguing for a downward adjustment in sentencing. The court sentenced Nassar to a 72-month term of imprisonment and three years of supervised release within the guidelines range in the PSR. Nassar asserts for the first time on appeal that his plea was not knowing and voluntary because the district court did not properly admonish him of his rights during rearraignment pursuant to Rule 11.

II.

Rule 11 requires that a judge "address the defendant personally in open court" and "ensures that a guilty plea is knowing and voluntary by requiring the district court to follow certain procedures before accepting such a plea." FED. R. CRIM. P. 11(b)(1); *United States v. Omigie*, 977 F.3d 397,

No. 23-20132

402 (5th Cir. 2020) (citation omitted). Both Nassar and the government agree that the district court committed Rule 11 error when it did not “(1) advise[] Nassar of his right to plead not guilty or to persist in such a plea; (2) advise him of the rights he was waiving by pleading guilty; (3) explain the court’s sentencing obligations, including operation of the Sentencing Guidelines; (4) ascertain that the guilty plea was voluntary and not the product of threats, coercion, or promises outside the plea agreement; or (5) ensure that there was a factual basis for the plea.” Furthermore, the parties agree that the district court did not accurately describe the scope of Nassar’s appeal waiver and did not ask Nassar if he was pleading guilty but instead “found” Nassar guilty. Based on these deficiencies, Nassar seeks to vacate his plea agreement.<sup>1</sup>

Because Nassar did not raise a Rule 11 objection in the district court, the plea colloquy is reviewed for plain error. *Omigie*, 977 F.3d at 402. To prevail, Nassar must demonstrate “(1) an error (2) that is clear or obvious and that (3) affected [his] substantial rights.” *Id.* (internal quotation marks and citation omitted). To show that an error affected his substantial rights, Nassar must establish that there is a “reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 76, 124 S. Ct. 2333, 2336 (2004). Review of “the entire record” must establish that “the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.” *Id.* at 83 (internal quotation marks and citations omitted). If the first three prongs are satisfied, the court has the discretion to remedy the error only if the error

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<sup>1</sup> Although the plea agreement included a waiver of appeal provision, it cannot be enforced to bar a claim that “the plea agreement of which it was a part” was unknowing or involuntary based on Rule 11 error. See *United States v. Carreon-Ibarra*, 673 F.3d 358, 362 n.3 (5th Cir. 2012) (citation omitted).



No. 23-20132

“seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Omigie*, 977 F.3d at 402 (citation omitted).

### III.

Nassar contends and the government concedes that the first two prongs necessary to demonstrate reversible error are satisfied. Accepting that the district court’s omissions during the plea colloquy constitute clear error, Nassar makes no attempt to “meaningfully address” whether the error affected his substantial rights. *See United States v. Green*, 47 F.4th 279, 289 (5th Cir. 2022). Nassar makes the conclusory statement that the “error affected his substantial rights” and the equivocal and unsupported assertion that if he “had been advised at rearraignment of the rights he was waiving, it cannot be said that he would have entered into a plea agreement.”

These assertions do not establish that the district court’s Rule 11 error affected Nassar’s substantial rights. A defendant’s assertion of “only a theoretical possibility” that a Rule 11 error affected his plea is “inadequate to show plain error.” *Omigie*, 977 F.3d at 403 (citation omitted). Nassar does not point to record evidence that the Rule 11 errors “affected his plea decision.” *See United States v. Molina*, 469 F.3d 408, 412 (5th Cir. 2006). Nassar does not “point to record evidence that he was prepared and willing to go to trial.” *See United States v. Alvarado-Casas*, 715 F.3d 945, 954 (5th Cir. 2013) (citation omitted). Nassar points to no evidence in support of an argument that, but for the Rule 11 error, he would not have pled guilty. *See Dominguez Benitez*, 542 U.S. at 83, 124 S. Ct. at 2340. Nassar’s assertions are thus inadequate to show reversible error.

Instead, the signed plea agreement, PSR, and in-court colloquy during rearraignment and sentencing refute Nassar’s claim that his plea was not knowing and voluntary and reflect his clear intent to plead guilty. *Id.* at 84-85, 124 S. Ct. at 2341; *Omigie*, 977 F.3d at 402-03; *United States v. Cuevas-*

No. 23-20132

*Andrade*, 232 F.3d 440, 444-46 (5th Cir. 2000) (seven independent Rule 11 errors was not reversible error because the record showed they did not affect the defendant's decision to plead guilty).

First, the district court did not advise Nassar of his right to plead not guilty or to persist in that plea. *See* FED. R. CRIM. P. 11(b)(1)(B). But the plea agreement stated that “[i]f Defendant persisted in a plea of not guilty to the charges, Defendant would have the right to a speedy jury trial with the assistance of counsel” or a “trial conducted by a judge sitting without a jury if the Defendant, the United States, and the court all agree.” Nassar signed an addendum to the plea agreement stating: “I have consulted with my attorney and fully understand all my rights with respect to the indictment pending against me.” Defendant’s attorney affirmed in the plea agreement that she “fully explained to Defendant his rights with respect to the pending indictment” and “carefully reviewed every part of this plea agreement with Defendant.” The plea agreement’s specific description of Nassar’s trial rights, understood by him and explained to him by his attorney, belie the notion that an additional “warning from the bench could have mattered[.]” *See Dominguez Benitez*, 542 U.S. at 85, 124 S. Ct. at 2341; *see also Cuevas-Andrade*, 232 F.3d at 445. This Rule 11 violation is not reversible error.

Second, Nassar argues that the court did not advise him of the rights he was waiving by pleading guilty. *See* FED. R. CRIM. P. 11(b)(1)(F). The court did not advise Nassar pursuant to Rule 11 of his additional right (1) to a jury trial; (2) to be represented by counsel; and (3) at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses. *See* FED. R. CRIM. P. 11(b)(1)(C) — (E).

Regardless, Nassar acknowledged that by entering the plea agreement he was “waiving any right to have the facts that the law makes essential to

No. 23-20132

the punishment either charged in the information, or proved to a jury or proven beyond a reasonable doubt.” The agreement states that if Nassar pled not guilty, he “would have the right to a speedy jury trial with the assistance of counsel.” The agreement also apprised Nassar of his right to confront and cross-examine adverse witnesses, rely on the privilege against self-incrimination, testify on his own behalf, and compel the attendance of witnesses. Because the record establishes Nassar’s understanding of these Rule 11 rights, their omission during the plea colloquy is not reversible error.

Third, the court failed to explain the operation of the Sentencing Guidelines, the obligation that the court consider the Guidelines, or the authority of the court to depart from the Guidelines in certain circumstances. *See* FED. R. CRIM. P. 11(b)(1)(M). Nassar’s plea agreement, however, contained a “full explanation” of the meaning and effect of the sentencing guidelines. *See Cuevas-Andrade*, 232 F.3d at 444-45. Nassar signed an addendum affirming that his attorney explained his rights with respect to the sentencing guidelines and that he understood his related rights. Furthermore, the court “did not depart upward from the guidelines,” and the sentence is well below the statutory maximum the court informed Nassar of during arraignment. *See id.* These omissions are not reversible error.

Fourth, the district court did not ascertain that the guilty plea was voluntary and did not result from force, threats, or promises (other than promises in the plea agreement). *See* FED. R. CRIM. P. 11(b)(2). While the court did not directly address the voluntariness of the plea agreement, the agreement provides and Nassar affirmed that the “[d]efendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.” *See Cuevas-Andrade*, 232 F.3d at 445. Nassar’s attorney confirmed that, to her knowledge, the decision to enter into the agreement was voluntary in a signed addendum to the plea

No. 23-20132

agreement. And no allegation is made that the plea was involuntary. *Id.* This Rule 11 error is not reversible error.

Fifth, the court did not ensure that a factual basis for the plea exists. *See* FED. R. CRIM. P. 11(b)(3). The factual basis for the plea itself, however, is not challenged. Indeed, Nassar signed the plea agreement wherein he stipulated to having committed the facts of the offense. The PSR includes an unchallenged factual basis for the plea. *See Omigie*, 977 F.3d at 403. Nassar agreed with the court's brief description of bank fraud during rearraignment and accepted responsibility for the crime during sentencing. On this record, there is no reasonable probability that the failure to conduct an in-court determination of the factual basis for the plea, given the admitted existence of a factual basis, would have led to a different outcome. *See Dominguez Benitez*, 542 U.S. at 85, 124 S. Ct. at 2341.

Sixth, the district court misrepresented the scope of Nassar's appeal waiver. *See* FED. R. CRIM. P. 11(b)(1)(N). In the plea agreement, Nassar waived the right to appeal or collaterally attack his conviction in all cases except for a claim of ineffective assistance of counsel. During the plea colloquy, the district court asked if Nassar agreed to "give up [his] right to appeal and give up [his] right to collaterally attack" without reference to the limited exception to the waiver. Although the court's description of the appeal waiver was inaccurate, the record illustrates Nassar's understanding of the actual scope of the waiver. The plea agreement identified the proper scope of the waiver. The PSR reviewed by Nassar states that he "waived his right to appeal his conviction or sentence except for ineffective assistance of counsel on direct appeal." *See Omigie*, 977 F.3d at 403. And the court's failure to inform Nassar of the additional avenues for appeal he retained did not affect his substantial rights. Because the court's assertion of the defendant's categorical appeal waiver was accepted during the Rule 11 colloquy through sentencing, there is no reasonable probability that an

No. 23-20132

accurate description of Nassar’s less than categorical appeal waiver would have changed the resulting plea.

Seventh, the court did not ask Nassar if he was pleading guilty but “found” him guilty. This error did not affect Nassar’s substantial rights because the record illustrates his clear intent to plead guilty in accordance with the plea agreement. Nassar’s signed plea agreement states that the “Defendant agrees to plead guilty . . .” At arraignment, Nassar said that he understood his guilty plea. Nassar did not challenge the government’s assertion during arraignment that the “defendant agrees . . . to plead guilty to [the] first count[.]” Nassar and his attorney reviewed the PSR and did not challenge the claim that “[t]he Court accepted defendant’s plea of guilty.” *See Omigie*, 977 F.3d at 403. At the sentencing hearing, Nassar’s attorney referenced the “plea of guilty to the Court.” The record shows that both before and after arraignment, the defendant intended to enter and be bound by the plea agreement.

Individually, each Rule 11 omission is an error, but none affected his substantial rights. Nassar argues, however, that the cumulative effect of the omissions is “sufficiently egregious” to constitute reversible error. Nassar relies on this circuit’s unpublished opinion in *United States v. Dolic* to support his claim. In *Dolic*, a Rule 11 violation constituted reversible error only after the district court at the plea colloquy misrepresented the sentencing range that the defendant faced. 439 F. App’x. 425, 428 (5th Cir. 2011).<sup>2</sup> Unlike the affirmative misrepresentation in *Dolic*, here the district court’s Rule 11 errors stem entirely from omissions. Absent a similar misrepresentation, there is not a similar probability of a different result sufficient to constitute reversible error. *See Dominguez Benitez*, 542 U.S. at 85, 124 S. Ct. at 2341.

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<sup>2</sup> This court is not bound by “unpublished” non-precedential opinions.

No. 23-20132

To be sure, the litany of Rule 11 errors in *Dolic* parallels the litany of Rule 11 errors in this case. But no evidence suggests that the confluence of Rule 11 errors here actually affected Nassar’s plea. *See Cuevas-Andrade*, 232 F.3d at 445. Instead, the record is rife with confirmation that, notwithstanding Rule 11 error, Nassar knowingly and voluntarily pled guilty in accordance with the plea agreement.

The record “show[s] that the Rule 11 error made no difference to the outcome here.” *See Dominguez Benitez*, 542 U.S. at 85, 124 S. Ct. at 2341. As a result, the district court’s judgment is AFFIRMED.

***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

September 09, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

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

No. 23-20132 USA v. Nassar  
USDC No. 4:20-CR-281-1

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 Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 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 Fed. R. App. P. 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. Fed. R. App. P. 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

A handwritten signature in black ink that reads "Melissa Mattingly". The signature is written in a cursive style with a large initial 'M'.

By: \_\_\_\_\_  
Melissa V. Mattingly, Deputy Clerk

Enclosure(s)

Mrs. Amy Howell Alaniz  
Ms. Amy R. Blalock  
Ms. Carmen Castillo Mitchell