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

***TREVOR BOUTTE,
Petitioner,***

v.

***UNITED STATES OF AMERICA,
Respondent.***

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

PETITION FOR WRIT OF CERTIORARI

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Dated: May 14, 2018

QUESTION PRESENTED

Is a federal defendant prejudiced under the Sixth Amendment and *Strickland v. Washington* if trial counsel fails to inform the defendant that pleading guilty under 18 U.S.C. § 924(c) results in a sentence that is automatically consecutive to any other sentence? And if so, is the defendant entitled to relief under 28 U.S.C. § 2255?

PARTIES TO THE PROCEEDING

Trever Boutte, Petitioner

United States of America, Respondent.

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TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Petitioner Trevor Boutte respectfully petitions for a writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Fifth Circuit:

OPINIONS BELOW

The Order and Judgment of the Fifth Circuit from which this petition is filed is *United States v. Boutte*, No. 17-40415 (5th Cir. Feb. 12, 2018) and is entitled “Order” (App.1-2). The substantive underlying order is the *Order of Dismissal* (App.6-20) in *United States v. Boutte*, No. 4:15-CV-575, 2017 U.S. Dist. LEXIS 52790 (E.D. Tex. April 6, 2017) (App.6-20) (“Order of Dismissal”).

STATEMENT OF JURISDICTION

On February 12, 2018, the Fifth Circuit issued the Order denying Petitioner’s motion for a certificate of appealability (“COA”). *Boutte*, No. 17-40415 (App.1-2). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2017).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: In all criminal prosecutions, “the accused shall...have the Assistance of Counsel for his defence.” U.S. Const. Amend. VI.

FEDERAL STATUTES AFFECTED

28 U.S.C. § 2255(a) (2018) provides. “A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.”

18 U.S.C. § 924(c)(1)(A)(i) (2018) provides, “Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime...(i) be sentenced to a term of imprisonment of not less than 5 years.”

STATEMENT OF THE CASE

Introduction

Petitioner accepted responsibility under Count 1 for the drugs. However, the firearms that were found at Petitioner's home were never kept by Petitioner in furtherance of a drug-trafficking crime. While engaging in the activity associated with Count 1, Petitioner never used, brandished, or even brandished a firearm. Petitioner was not guilty of the 924(c)-count (Count 1). Despite knowing this, trial counsel failed to correctly advise Petitioner regarding the consecutive-sentencing- consequences of pleading guilty to the 924(c)-count.

Petitioner made a "substantial showing of the denial of a constitutional right" and "...demonstrate(d) that the questions he raises are debatable among reasonable jurists." Petitioner showed that the district court erred by finding that his plea on the § 924(c)-charge (Count 2) was involuntary and uninformed because he received bad advice from trial counsel on its consecutive-sentencing effects. Because of trial counsel's failures, Petitioner received five years for the § 924(c)-charge consecutive to Count 1 and lost the benefit of the safety-valve provision. Thus, Petitioner was prejudiced.

Petitioner thus made a substantial showing of the denial of the effective assistance of trial counsel under the Sixth Amendment. Petitioner also demonstrated that the questions he raised are

debatable among reasonable jurists. A threshold examination of Petitioner's claims and a general assessment of the merits of this claim will show that the Court of Appeals erred by denying Petitioner's motion for a COA.

Background Facts

1. Indictment

On November 7, 2012, Petitioner was indicted for: (1) per Count 1, Petitioner was indicted under 21 U.S.C. § 846 (2012) and 21 U.S.C. § 841(a)(1) (2012) for intentionally and knowingly conspired with other persons to intentionally and knowingly possess with the intent to distribute 5 kilograms or more of a mixture or substance containing a detectible amount of cocaine (ROA.310-313)¹; and (2) per Count 2, Petitioner was indicted under 18 U.S.C. § 924(c) (2012) for knowingly possessing four pistols and a shotgun "in furtherance of a drug-trafficking crime." (ROA.311).

2. Prior to his arrest, Petitioner operated a legitimate, profitable business that received significant cash receipts

Beginning in 2008 through his arrest in 2012, Petitioner worked for Diori Natural Spring Water, earning about \$5,000 per month. (ROA.528). These assertions were supported through bank statements, which showed that a large part of his income through Diori was received from cash-paying customers.

¹ Citations to the Record on Appeal below are cited as "ROA" Followed by the page number. Petitioner will provide any part of the Record on Appeal to the Court upon request.

(ROA.120.126-225). Between November 2009 and December 2012, Petitioner deposited \$382,669 into his business bank accounts. (ROA.120.128-167). Petitioner always paid his taxes. Trial counsel did not present evidence of these facts. No evidence was presented showing that these funds were from illegal activity. He deposited most of this legal cash and was often in possession of large amounts of cash. (ROA.120). Petitioner explained these facts to trial counsel because Petitioner did **not** want the district court to conclude that the cash found in his home was related to drug-dealing. (ROA.120). Trial counsel told Petitioner that the fact that the cash found in the home was derived from legal activities was **not** important. (ROA.120).

3. Petitioner's arrest

The facts supporting Count 1, for which Petitioner took responsibility, occurred in the parking lot of a restaurant: Petitioner parked, entered the restaurant, spoke to a person, returned to the parking lot, placed a bag containing \$147,520 in a vehicle being driven by the person, and in exchange, Petitioner was to receive a quantity of cocaine. (ROA.523). Petitioner never possessed, brandished, or used a weapon. (ROA.523).

4. Items found in Petitioner's home

Inside Petitioner's home, the government found \$30,628 in cash, legally purchased firearms, and approximately 3.4 grams of cocaine. (ROA.542). One of the firearms was inside a briefcase that was in the kitchen. (ROA.542).

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5. Petitioner possessed the firearms because of his interest in target-shooting

Petitioner legally possessed all the firearms found in his home. (ROA.117). Petitioner enjoyed target-shooting. (ROA.117). Petitioner purchased some of the firearms from Mr. Greene, a friend. (ROA.116.124). Petitioner held a Concealed Handgun License No. 02622540 issued by Texas (ROA.116.122.123). Greene knew Petitioner possessed the License. (ROA.124). Petitioner purchased: (1) the 9mm Cobra pistol at a gun show (ROA.116); (2) the Taurus revolver, Kimber pistol, and Para Ordinance pistol from Greene; (3) the other weapons from reputable dealers. (ROA.116-117.124).

6. Prior to pleading guilty to the 924(c)-count (Count 2), trial counsel did not explain its consequences to Petitioner. Petitioner did not learn the consequences until he received the PSR two months after pleading guilty

On January 24, 2013, Petitioner pleaded guilty to Counts 1 and 2. (ROA.442-456). Prior to receiving the presentence investigation report (“PSR”) in late March 2013, Petitioner asked trial counsel how much time he faced for the Counts. Trial counsel told Petitioner that for Count 1, “10 to life.” (ROA.118). During the hearing, the magistrate judge told Petitioner that Count 2 would run “consecutive” with Count 1 and that there was no plea agreement yet on the case. (ROA.118). Petitioner did not understand what the magistrate judge meant since he told Petitioner that there was “no plea agreement”.

(ROA.120). When Petitioner asked trial counsel for an explanation, Petitioner was told to “not worry about it” and that Count 2 “would run together” with Count 1, “not back-to-back” with Count 1, and that Petitioner would see this reflected in the PSR. (ROA.119).

Based on this advice from trial counsel, Petitioner pleaded guilty to Count 2. (ROA.119). Afterwards, there was little communication from trial counsel until Petitioner received the PSR sometime between March 22, 2013 and March 26, 2013, mailed to him by the probation officer. (ROA.117.118). It was when he read the PSR that Petitioner learned the consequences of pleading guilty to Count 2. (ROA.118). Until then, Petitioner did **not** realize that the sentence for Count 2 would be stacked on the sentence for Count 1. (ROA.118).

Petitioner demanded that trial counsel speak to him. (ROA.118). Trial counsel received the PSR on March 27, 2013. (ROA.166). However, trial counsel did not go see Petitioner (in jail) until April 3, 2013, the date that the objections to the PSR were due. (ROA.118).

When trial counsel met with Petitioner on April 3, 2013, trial counsel showed Petitioner a document that was downloaded from the Internet the day before. (ROA.118.226-230). The document contained 18 U.S.C. § 924. (ROA.118.226-230). Trial counsel explained to Petitioner for the first time that the sentence for Count 2 would be stacked on that of Count 1. (ROA.118). When Petitioner asked why he

waited until the due-date of the objections to the PSR to speak with him about the 924(c)-issue, trial counsel told Petitioner that he had been very busy. (ROA.119). Trial counsel told Petitioner, “I should have handled this a whole lot sooner.” (ROA.119). Trial counsel also told Petitioner that he (trial counsel) may have “misspoke” when he told Petitioner what the magistrate judge meant on January 24, 2013 about “consecutive sentence.” (ROA.119).

7. Petitioner files motion to withdraw his plea on Count 2, which is denied

On April 4, 2013, trial counsel filed a motion to withdraw the plea on Count 2 and asked for a trial on the issue. (ROA.355-360). In an affidavit and in open court, Petitioner asserted that he: (1) would **not** have pleaded guilty to Count 2 at the plea hearing had he known that the sentences would be stacked; and (2) did **not** understand the consequences of the plea and was incorrectly advised by trial counsel. (ROA.120.359). On July 31, 2013, the district court denied the motion. (ROA.117).

8. Petitioner is sentenced on August 2, 2013

At the sentencing hearing, the district court overruled Petitioner’s objections to the PSR and the consecutive-nature of the sentence under Count 2 (ROA.117.504.535-538). Petitioner was sentenced to 120-months for Count 1 and a stacked 60-months for Count 2 under 18 U.S.C. § 924(c). (ROA.405.406).

9. The Fifth Circuit affirms the Judgment and sentence

On direct appeal, Petitioner argued: (1) insufficient evidence supporting the possession of a firearm in furtherance of a drug-trafficking crime under 18 U.S.C. § 924(c); (2) error in overruling the objection to Count 2, and (3) error in overruling the Motion to Withdraw his Guilty Plea on Count 2. On May 29, 2014, the Fifth Circuit affirmed. *United States v. Boutte*, 569 Fed.Appx. 311 (5th Cir., May 29, 2014) (ROA.414-418).

10. Petitioner files the motion under 28 U.S.C. § 2255

In the motion under 28 U.S.C. § 2255, Petitioner asserted in relevant part that the guilty plea on Count 2 was involuntary and uninformed because Petitioner received ineffective assistance of counsel (IATC) regarding the consecutive-effect of § 924(c).

11. Although trial counsel was not required to submit an affidavit addressing the allegations, the magistrate judge recommended against relief, and the district court adopted the recommendations.

Trial counsel was not required to submit an affidavit responding to Petitioner's allegations. On January 30, 2017, the magistrate judge recommended against relief. (ROA.257-265; App.21-32). On February 9, 2017, Petitioner filed timely objections to the magistrate's recommendations. (ROA.266-275). On April 6, 2017, the district judge adopted the magistrate's recommendations and signed the order

of dismissal. (ROA.276-286; App.6-20). The district court also denied the COA. (App.3-5).

12. The Fifth Circuit denies Petitioner’s motion for a COA.

On February 12, 2018, the Fifth Circuit denied Petitioner’s motion for a COA. *Boutte*, No. 17-40415 (App.1-2).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

REASONS FOR GRANTING THE WRIT

I. A federal defendant is prejudiced under the Sixth Amendment and *Strickland v. Washington* if trial counsel fails to inform the defendant that pleading guilty under 18 U.S.C. § 924(c) results in a sentence that is automatically consecutive to any other sentence. When such prejudice occurs, the defendant entitled to relief under 28 U.S.C. § 2255

1. By denying the motion for COA, the Fifth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

To obtain a COA, an applicant “must make a

substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2) (2017). In determining whether to grant a COA, the inquiry is limited to a threshold examination that “[r]equires an overview” of the movant’s claims and “[a] general assessment of (the merits of the claims).” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Buck v. Davis*, 137 S.Ct. 759, 773 (2017).

Petitioner made a “substantial showing of the denial of a constitutional right” and “...demonstrate(d) that the questions he raises are debatable among reasonable jurists.” Petitioner showed that the district court erred by finding that his plea on the § 924(c)-charge (Count 2) was involuntary and uninformed because he received bad advice from trial counsel on its consecutive-sentencing effects. Petitioner accepted responsibility for Count 1 but was not guilty of Count 2. Further, due to the consecutive-sentencing-effect of the § 924(c)-charge, Petitioner received five years consecutive to Count 1 and lost the benefit of the safety-valve provision. Thus, Petitioner was prejudiced.

A guilty plea entered by a defendant fully aware of the direct consequences, including the value of commitments made to him by the court, prosecutor, or his counsel must stand unless induced by threats, **misrepresentation**, including unfulfilled or unfulfillable promises, or by promises that are by their nature improper. *Brady v. United States*, 397 U.S. 742, 755 (1970). See *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) and *Henderson v. Morgan*, 426 U.S. 637,

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644-645 (1976) (“[a] plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received ‘real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.’”) (internal citations omitted).

To prove IATC in a plea-setting, a defendant must show by a preponderance of the evidence that trial counsel’s performance: (1) was deficient, and (2) prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill*, 474 U.S. at 56. When a defendant pleads guilty, the law has been that “[P]rejudice occurs if ‘there is a reasonable probability that, but for (trial) counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.’” *Hill*, 474 U.S. at 59. A court must determine “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill*, 474 U.S. at 56.

A trial counsel’s ignorance of a point of law that is fundamental to the case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*. *Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (Defendant received IATC because trial counsel incorrectly thought that state law barred access to certain records); *Lafler v. Cooper*, 566 U.S.

156, 165 (2012) (The Sixth Amendment’s right to effective counsel applies to pretrial critical stages that are part of the entire criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice.”).

The lower courts concluded that because Petitioner pleaded guilty and the magistrate judge explained “consecutive” in ‘laymen’s terms, and (Petitioner) unequivocally indicated he understood the penalty he faced,’ then any issue that arose outside of the record is irrelevant.” (ROA.280). During this exchange, the magistrate asked, “[N]ow, do you understand that that particular count, I believe, is served consecutively? That means that you’ll be sentenced first on count one and then whatever sentence you receive on count one, you’ll get a sentence on count two, and you’ll have to serve count two after you serve count one?” and Petitioner responded, “Yes, sir.” (ROA.449).

The question is, was Petitioner’s response of “Yes, sir” to the magistrate’s question voluntary? Petitioner paid trial counsel \$35,000 to represent him properly, so counsel could not complain about lack of funds or compensation. (ROA.115). And, trial counsel was in possession of the proposed plea papers since December 20, 2012 when it was emailed to him by the U.S. Attorney’s Office, so counsel could not complain about the lack of time to do his job. (ROA.232). Yet, prior to pleading guilty on January 24, 2013 (ROA.442-456), trial counsel had **not** explained to Petitioner the consequences of pleading guilty to the 924(c)-count (Count 2) even though trial counsel was

in possession of the proposed plea papers for over a month. (ROA.232). And, Petitioner was confused when the magistrate judge told him that there was **no** plea agreement yet on the case, another critical factor not explained to Petitioner by trial counsel. (ROA.118.449). Petitioner did not understand “consecutive” in the context of how the magistrate judge phrased it, telling Petitioner that there was “no plea agreement.” (ROA.120). Petitioner immediately asked trial counsel what the magistrate judge meant but was told by counsel to “not worry about it” and that Count 2 “would run together” with Count 1. (ROA.119). Trial counsel’s excuse was that he may have “misspoke” when he told Petitioner what the magistrate judge meant on January 24, 2013 about “consecutive sentence.” (ROA.119).

Trial counsel did more than misspeak. Despite knowing that Petitioner did **not** keep firearms in furtherance of a drug-trafficking crime (ROA.119), trial counsel allowed the plea-hearing to proceed. Months later, it was the PSR and **not** trial counsel that provided the consequences of pleading guilty to Count 2. (ROA.118). By then it was too late to reverse the damage. Further, although Petitioner demanded a meeting immediately and counsel received the PSR on March 27, 2013 (ROA.166), he did **not** meet with Petitioner in jail until April 3, 2013, the due-date of the objections. (ROA.118). That day, trial counsel for the first time explained the consequences of 18 U.S.C. § 924(c) to Petitioner. (ROA.118.226-230). Trial counsel blamed his failures on being too busy (ROA.119), admitted that he “...should have handled this a whole lot sooner” (ROA.119), and said he may

have “misspoke.” (ROA.119).

In addition, trial counsel provided bad advice regarding Petitioner’s insistence that evidence be presented regarding the \$30,628 cash found in Petitioner’s safe. The presence of this cash could have been explained by Petitioner’s legitimate water-business, which again allowed deposits of \$382,669 into his bank account over about three years. (ROA.120.128-167). Petitioner deposited most but not all the cash receipts from the water-business, which was legal. (ROA.120). No evidence was presented that the cash found in his home was from illegal activities. Petitioner explained this to trial counsel because he was concerned that the cash found would be deemed to be proceeds of drug-trafficking. (ROA.120). Trial counsel told Petitioner that these facts were **not** important to the case. (ROA.120). However, the facts were important since on direct appeal, the Fifth Circuit Court deemed the \$30,628 cash to be “drug proceeds.” *Boutte*, 569 Fed.Appx. at 312. The unexplained presence of a large amount of cash is critical. *See United States v. Simmons*, 582 F.3d 730, 737-738 (5th Cir. 2009) (“[W]hen there is a sufficient basis to believe that cash found in a defendant’s possession was derived from drug sales, a court properly includes the drug equivalent of that cash in the drug-quantity calculation.”). As the Fifth Circuit explained in *Simmons*, (1) the cash was found in the same area where the defendant prepared, packaged, and conducted heroin sales; (2) the defendant had a longstanding reputation as a heroin trafficker, and (3) the defendant apparently held no other job since the 1970s. *Id.* Unlike Petitioner’s case, in *Simmons*,

“[t]here was no hint that (the drug-dealing was) situational or isolated,” and instead was “[a] persistent ‘drum-beat of drug-dealing’ that had gone on for years if not decades.” *Id.* at 738. Petitioner’s drug-dealing activities on the other hand were isolated incidents in what was otherwise a law-abiding and legitimate life. Logically, those who derive their living from trafficking drugs generally do not engage in full-time legitimate employment as Petitioner did.

Finally, no evidence was presented showing that Petitioner ever used, brandished, or even possessed a firearm during any drug-trafficking or other illegal activity. (ROA.523). Petitioner’s possession of the firearms found in his home was legal. He held a Concealed Handgun License and enjoyed target-shooting. He purchased all the firearms legally. (ROA.116.117.122-124). Those who derive their living from trafficking drugs generally do not maintain handgun licenses or purchase firearms legally.

None of the assertions above were rebutted by trial counsel, the government, or the district court. Although Petitioner submitted to the district court a copy of the document containing 18 U.S.C. § 924 printed by trial counsel immediately before the April 3, the district court dismissed this evidence because “[i]t does not support (Petitioner’s) contention that counsel failed to review or discuss the elements of the statute with (Petitioner) before the change of plea hearing.” (ROA.280).

It is not clear what would support Petitioner's contentions if the evidence he submitted do not. Perhaps an explanation by trial counsel would also support the contentions as the documentary evidence submitted by Petitioner fully supported his contentions. However, the district court did not require an affidavit or declaration from trial counsel. Undersigned counsel attempted to obtain an affidavit from trial counsel, but trial counsel did **not** respond.

Had trial counsel performed minimal investigation as undersigned counsel did in the habeas-investigation (ROA.126-225), the district court could have considered the evidence during trial.

At trial, on appeal, and during the habeas proceeding, Petitioner has asserted these arguments. Petitioner even filed a motion to withdraw the plea of guilty on Count 2 and requested a trial on the 924(c)-issue. (ROA.355-360). Thus, Petitioner's plea of guilty to Count 2 was not voluntary and intelligent. *See Bousley v. United States*, 523 U.S. 614, 618 (1998) (A plea is "constitutionally valid only to the extent it is voluntary and intelligent." A plea of guilty entered based on, misrepresentations by trial counsel is not a voluntary and intelligent plea. *Brady*, 397 U.S. at 755. It is true that a defendant's awareness of "relevant circumstances" does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea with its accompanying waiver of various constitutional rights despite various forms of misapprehension under which a defendant might labor. *United States v. Ruiz*, 536 U.S. 622, 630 (2002).

Here, whether the 924(c)-count would run concurrent or consecutive when Petitioner had evidence to prove that he may not be guilty of it is **not** a “form of misapprehension under which” Petitioner labored. Trial counsel did not merely “misjudge() the admissibility of a confession as explained in *McMann v. Richardson*, 397 U.S. 759, 770 (1970)] or failed to point out a defense as explained in *United States v. Broce*, 488 U.S. 563, 573 (1989). It is simple: Petitioner would **not** have pleaded guilty to Count 2 if he received competent advice from trial counsel. The district court’s findings were clearly erroneous.

Petitioner was prejudiced in two material ways. First, as explained above, Petitioner was prejudiced because the consecutive-sentencing-nature of 18 U.S.C. § 924(c)(1) resulted in a stacked sentence of 180 months rather than the 120 months that Petitioner was led by trial counsel to believe he would receive.

Second, trial counsel’s ineffectiveness prejudiced Petitioner because the consecutive-sentencing-nature of § 924(c)(1) made Petitioner ineligible for safety-valve relief for drug offenses. Petitioner was convicted under 21 U.S.C. § 846 (2012) and 21 U.S.C. § 841(a)(1) (2012) for intentionally and knowingly conspiring to intentionally and knowingly possess with the intent to distribute 5 kilograms or more of a mixture or substance containing a detectible amount of cocaine. (ROA.310-313). Under 18 U.S.C. § 3553(f) (2013), a person convicted under 21 U.S.C. §§ 841, 844, 846, 960, or 963 is eligible for “safety-

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valve” relief. However, a § 924(c) disqualifies such person for the relief. Under 28 U.S.C. § 994, the district court must “without regard to any statutory minimum sentence” provide the safety-valve relief if the court finds at sentencing (after the Government has been afforded the opportunity to make a recommendation), that:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the

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defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f) (2013). But-for the 924(c)-count, Petitioner would have qualified for the “safety-valve” because: (1) Petitioner’s criminal history score was zero; (2) Petitioner did not use violence or credible use of violence (or induce another person to do so); (3) no person was physically harmed in any manner, so there was no death or serious bodily injury to any person; (4) there was no evidence that Petitioner was an organizer, leader, manager, or supervisor of others in the offense under Count 1; nor was Petitioner engaged in a continuing criminal enterprise; and (5) there was no evidence that Petitioner was at any time untruthful with the Government or failed to disclose his activities to the Government; and even if the Government determined that Petitioner has no relevant or useful other information to provide or that the Government is already aware of the information, Petitioner would still have been found to have complied with this requirement. (ROA.524-554). 18 U.S.C. § 3553(f)(1)-(5) (2013).

Petitioner’s Total Offense Level for Count 1

was 29. Petitioner's criminal history category was I. Thus, the U.S.S.G. range would have been 87 to 108 months. (ROA.53). Because the minimum sentence for Count 1 without safety-valve relief is 120 months, and 18 U.S.C. § 924(c) mandates that the 60-month minimum run consecutive to Count 1, instead of 87-108 months, Petitioner received 120 months for Count 1 plus 60 months for Count 2. Thus, Petitioner was harmed. See *Hill*, 474 U.S. at 59.

2. This Court should extend its holding in *Lee* to those situated like Petitioner

Once Petitioner learned that he received bad advice regarding Count 2, he insisted on withdrawing his guilty plea on that count and wanted to go to trial on the issue. In *Lee v. United States*, 198 L.Ed.2d 476 (2017), citing *Lafler*, 566 U.S. at 165 and *Hill*, 474 U.S. at 58, this Court held that if a noncitizen proves that he received ineffective counsel and bad advice regarding the risk of deportation if he pleads guilty to an offense for which deportation is presumably mandatory (satisfying prong 1 of *Strickland*), to prove the prejudice-prong (prong 2), the noncitizen need **not** prove that he would have likely prevailed at trial, but that he would have simply gone to trial. The holding of *Lee* should be extended to all involuntary-plea cases.

Petitioner showed by a preponderance of the evidence that he received ineffective counsel regarding the consequences of the 924(c)-charge (Count 2). The evidence Petitioner presented at the habeas proceeding (that trial counsel should have

presented) showed a reasonable likelihood that he may have prevailed at trial on Count 2. However, Petitioner should be given the benefit of this Court's holding in *Lee* since all Petitioner should have to show that he would have gone to trial had he received effective and competent trial counsel.

3. The Fifth Circuit's decision conflicts with the decision of another United States court of appeals on the same important matter.

The issue of a defendant understanding why he is charged with a 924(c)-charge was the basis of the Sixth Circuit's opinion in *United States v. Maye*, 582 F.3d 622 (6th Cir. 2009). In *Maye*, the appellant argued that the government failed to provide the necessary factual basis for his guilty plea to the 924(c)-charge as required by Fed. Rule Crim. Proc. 11(b)(3) (2018) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."). *Maye*, 582 F.3d at 626. But as the Sixth Circuit pointed out, **"underlying (the) challenge" was "Maye's assertion that he never truly understood the nature of the (924(c)-charge) to which he pleaded guilty. *Id.* at 627 (emphasis supplied).**

Citing *Bousley*, 523 U.S. at 618-619, the Sixth Circuit observed that "[T]here can be no dispute that a defendant must understand the various elements of any offense to which he pleads guilty before that plea can be considered constitutionally valid." The Sixth Circuit also observed that "[I]n

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many cases, such an understanding may be garnered merely from a reading of the indictment and from an opportunity for the defendant to ask questions about the charge...In more complicated instances, ‘further explanation may be required.’” *Id.* (internal citation omitted).

During the plea-hearing in *Maye*, the district judge attempted to ensure Maye's understanding of the 924(c)-charge:

District Court: Did you possess a chrome-plated revolver which you displayed in close proximity to the drug transaction?

Maye: Can you repeat that part, please?

District Court: (reading from a document) During the transaction, Maye possessed a chrome-plated revolver, which was displayed in close proximity to the drug transaction. Is that accurate?

Maye: Yes, sir.

Id. at 627. In conjunction with other information elicited during the hearing, these answers led the district court to accept Maye's guilty plea. *Id.*

By the time of Maye's sentencing, however, it was obvious that at least Maye was confused as to what was required to establish guilt of a 924(c)-charge. *Id.* (The Sixth Circuit believed that the district judge and defense attorney were also

confused). The district judge certainly did not believe that “a specific nexus between the gun and crime charged” need be shown but, rather that the government must show only that Maye possessed a firearm and that the firearm was located somewhere near the illegal drug transaction. The relevant part of the exchange showed that Maye clearly remained confused about the charge (*Id.* at 628-630):

District Court: Mr. Maye, do you have something to say in mitigation, sir?

Maye: Like, I was kind of confused on one of the charges.

THE COURT: What's that?

Maye: I was kind of confused on one of the charges I was charged with, which is a 924(c).

District Court: What were you confused about?

Maye: Like exactly how I got charged with the 924(c).

District Court: Don't you think the time to visit that would have been the day we took your plea when I asked you if all the statement of facts that you were pleading guilty to were accurate?

Maye: Yes.

District Court: Okay. Are you now wanting to back away from your plea agreement?

Maye: As far as that case, somewhat, yes.

District Court: Really.

Maye: Because at the time at pretrial when I had changed my plea from not guilty to guilty, it was like a less than [a] 10 minute thing, and then we –

Maye: I mean, I'm not denying the fact that I had the gun, but as far as what I learned from being in jail, like the 924(c) is committing a crime by having a gun.

District Court: The 924(c)-charge charged you with possession of a firearm in furtherance of a drug trafficking crime. You had it in your possession for use in a drug trafficking crime. You're not being charged with brandishing it or otherwise using it. You had it, and that was sufficient. Specifically, the elements that you previously heard were that you...possessed a firearm in furtherance of a drug trafficking crime. And I would assume that it was based upon that fact that

you were charged with it, that you did so knowingly and intentionally...[T]hose are the elements that the government would have to prove if you had gone to trial on that count. Do you understand that?

Maye: Yes.

District Court: All right. And just so we can reiterate for the record, and perhaps you'll want to talk with [defense counsel] about this, but at the time that I accepted your plea, you indicated that you understood these elements; in fact, you had the opportunity to read along with them and consult with [defense counsel] at the time, and whether you agreed with those elements and whether you knowingly and voluntarily were giving up your right to have the government prove these elements beyond a reasonable doubt. All of those things you have done prior to today's date. That's what the government would have to prove at trial.

Maye: Okay. Well, I think I was just under the impression that I was being charged for having a gun period, point blank.

District Court: I'm sorry. Come again with that.

Maye: I said I was under the impression that I was just being charged with having the gun

in my apartment. From what I learned in jail or -- I mean --

District Court: Which is the best place to get legal advice, is the jail, right? Okay. So why don't you -- why don't you learn from your lawyer who is standing right next to you, the one that's passed the bar, unlike your friends in the county jail. All right. Why don't you gentlemen have a seat and chat about this for a moment. Okay?

[defense counsel]: Your Honor, I have explained to Mr. Maye to the best I can the elements of the offense and why he's guilty of them or why I believe he's guilty of them, and I don't know that I can do any more -- or that anybody can do any more, and I'm still at this time not certain that Mr. Maye understands why the situation -- given the facts of the situation as were explained and applying the law to those facts why that makes him guilty of the offense. He has requested that the Court explain it to him, and that's where we are.

District Court: The incident -- the Court's going to reread the statement of facts that was read at the time that the Court accepted your guilty plea. And at the time that I accepted your guilty plea, I asked you if the statement of facts was true, and you said they were. So paragraph 1, on or about March 2, 2006, up to and including November 28, 2006,

(you) did possess with intent to distribute, manufacture and distribute approximately 25.81 grams of cocaine base, commonly referred to as crack, a Schedule II controlled substance and did possess a firearm in furtherance of a crime of drug trafficking...

[defense counsel] Do you need him to read that, or are you clear?

Maye: Yeah, I'm clear.

District Court: Mr. Maye, are you guilty as charged and as you have previously indicated with respect to Count 1, which is the possession with intent to distribute, manufacture and distribute approximately 25.81 grams of cocaine base, and with respect to Count 2, the possession of a firearm in furtherance of a drug trafficking crime, a violation of 18 United States Code, Section 924(c)(1)(A)(a)?

District Court: You are guilty of Counts 1 and 2 as charged, correct?

Maye: That's correct.

District Court: And you understand why you're guilty?

Maye: Yes, I understand now.

District Court: Why don't you tell me one more time. Why are you guilty?

Maye: Because on Count 1 where I did make the sale to the CI; and on Count 2, I was guilty because I had -- I just had the gun period, point blank. I was just under the impression that --

District Court: You had the gun with you, and you were selling crack cocaine?

Maye: Are you saying with me, like, on me?

District Court: No. In your possession, in your constructive possession, in your apartment.

Maye: Oh, yes, it was in my apartment.

District Court: Okay. And it was your gun?

Maye: Yes.

District Court: And it was in your apartment?

Maye: Yes.

District Court: And it was -- nobody else lived there?

Maye: No.

District Court: Okay. Very good.

Maye: Oh.

District Court: Go ahead.

Maye: All right. But the thing -- the main thing I was confused about is that the sale took place on the front porch and not in my apartment, so I was thinking that the 924 means that the crime would have to happen at the same place that the gun was at.

District Court: When we get done with all this, I'm going to tell you about your appellate rights, all right?

Maye: Okay.

What occurred in *Maye* was remarkably like Petitioner's case. Both were charged with a drug-count in Count 1 and with the 924(c)-charge in Count 2. Due to bad advice from trial counsel, both pleaded guilty at the plea-hearing as though they understood the consequences of the 924(c)-charge. And, like in *Maye*, the Fifth Circuit and district court concluded that because Petitioner pleaded guilty and the magistrate judge explained "consecutive" in 'laymen's terms, and (Petitioner) unequivocally indicated he understood the penalty he faced,' then any issue that arose outside of the record is irrelevant." (ROA.280).

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The only difference procedurally was that Petitioner filed a motion to withdraw the plea on Count 2 and asked for a trial on the issue (ROA.355-360), asserting that he: (1) would **not** have pleaded guilty to Count 2 at the plea hearing had he known that the sentences would be stacked; and (2) did **not** understand the consequences of the plea and was incorrectly advised by trial counsel (ROA.120.359) and again pronounced his confusion during sentencing, and Maye merely voiced his confusion in open-court during sentencing.

However, unlike in Petitioner's case, in *Maye*, the Sixth Circuit held that the Court failed to make Maye aware of the consequences of the 924(c)-charge. *Id.* at 630. And, the Sixth Circuit held that the government failed to advance a sufficient factual basis for the defendant's guilty plea. *Id.* at 631. "Without any evidence that the firearm found in Maye's residence as 'possessed to advance or promote the commission of the underlying [drug-trafficking] offense,' the district court (committed plain error by) entering judgment on (Maye's) section 924(c) guilty plea..." *Id.* Thus, the Fifth Circuit entered a decision in conflict with the decision of the Sixth Circuit, and Petitioner asks this Court to grant this petition.

CONCLUSION AND PRAYER

For the reasons stated in this petition, the Fifth Circuit: (1) decided an important federal question in a way that conflicts with relevant decisions of this Court; and (2) entered a decision in conflict with the decision of another United States court of appeals on

the same important matter. Petitioner asks this Court to reverse the Fifth Circuit's Order and grant relief as requested in the motion filed under 28 U.S.C. § 2255. In the alternative, Petitioner asks this Court to reverse the Fifth Circuit's Order and remand the case back to the Fifth Circuit for consideration of Petitioner's claim on its merits.

Respectfully submitted,

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