No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND SANCHEZ LOPEZ,

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether 18 U.S.C. §2252A(5)(B) authorizes conviction upon proof that materials used to produce child pornography once crossed state lines at an unspecified prior occasion, when there is no evidence that the defendant's possession of child pornography itself caused such movement?

II. Whether Article I, Section 8 of the United States Constitution permits Congress to impose criminal sanctions for all conduct undertaken using materials that have moved in interstate commerce, however remotely, whether or not the criminal conduct caused such movement?

III. Whether the sufficiency of a factual basis for a defendant's plea should be subject to plain error review, or whether, under *Sullivan v. Louisiana*, 508 U.S. 275 (1993), such a case lacks "an object" upon which review for harmless and plain error may operate?

PARTIES

Raymond Sanchez Lopez is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Raymond Sanchez Lopez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Lopez*, 729 Fed. Appx. 445 (5th Cir. April 19, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The district court entered an amended judgment on November 29, 2017, which judgment is attached as an Appendix. [Appx. B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on April 19, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

Article I, Section 8 of the U.S. Constitution provides in part:

> The Congress shall have power... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian [sic] tribes

Title 18, Section 2251(a) of the United States Code provides:

Title 18, Section 2252A(a)(5)(B) of the United States Code provides:

> Certain activities relating to material constituting or containing child pornography
>
> (a) Any person who–
>
> ***
>
> (5)
>
> ***

(B) knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer;

***

shall be punished as provided in subsection (b)...

Federal Rule of Criminal Procedure 11(b)(3) provides:

Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

STATEMENT

A. Facts and Trial Proceedings

Petitioner was indicted on one count of possessing child pornography that had been created "using materials that had been mailed, shipped, transported in and affecting interstate and foreign commerce." He pleaded guilty pursuant to a plea agreement that contained a waiver of appeal. Petitioner admitted in his factual resume that the child pornography had been stored on a micro SD card that had been manufactured in Taiwan. The factual resume contained no admission that the card had moved recently in interstate commerce. Nor did it admit that the images had themselves moved in interstate commerce. The district court accepted the plea and imposed a sentence of 120 months imprisonment.

B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit a constitutional offense. Specifically, he argued: 1) that 2252A(a)(5)(B) should be construed to require either recent movement of materials from which child pornography had been generated, or movement of these materials as a result of the defendant's conduct, and 2) that if these statutes could not be so construed, they exceeded Congressional power to regulate interstate commerce under Article I, Section 8 of the Constitution. He cited *Bond v. United States*, __U.S.__, 134 S. Ct. 2077 (2014) and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)(Roberts, J., concurring), in support of these contentions. Petitioner conceded that both claims would fail under the Circuit's requirement of plain error. *See United States v. Trejo*, 610 F.3d 308 (5th Cir. 2010). But he argued for further review that plain error is not applicable to the defendant's failure to admit a constitutional offense in the factual resume. Such a failure, he argued, is analogous to a jury verdict that fails to find every element of the offense beyond a reasonable doubt. Defective verdicts of this kind are treated as the absence of a conviction, rather than an error that may disregarded as harmless or forfeited. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

The court below applied plain error and rejected these arguments. *See* [Appx. A]. It found

that the statutes of conviction need not be restrictively construed because "the Commerce Clause authorizes Congress to prohibit local, intrastate possession and production of child pornography where the materials used in the production were moved in interstate commerce." [Appx. A](citing *United States v. Dickson*, 632 F.3d 186, 192 (5th Cir. 2011), and *United States v. Kallestad*, 236 F.3d 225, 226-31 (5th Cir. 2000)). For the same reason, it rejected the constitutional argument. *See* [Appx. A].

REASONS FOR GRANTING THE WRIT

I. This Court should hold the instant Petition in light of any case establishing further limitations on Congressional power to criminalize areas of traditional state responsibility under the Commerce Clause.

Federal Rule of Criminal Procedure 11 requires that the admissions made by the defendant in connection with a plea establish a prosecutable offense. *See* Fed. R. Crim. P. 11(b)(3). In Petitioner's district, these admissions are called the "factual resume."

Petitioner's factual resume admitted that the micro SD card used to store the prosecutable image had been manufactured in Taiwan. It did not admit that the offense itself caused the movement of the card, nor of any images, nor that the movement of the card was recent. Nor did it admit any other fact establishing that the offense involved the buying, selling, or movement of any commodity. Petitioner contended below that the factual resume was therefore insufficient to establish a violation of 18 U.S.C. §2252A(5)(B).

Section 2251 of Title 18 authorizes conviction when the defendant possesses an image of child pornography, if that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer..." 18 U.S.C. §2252A(5)(B). To be sure, the statute may be read to include conduct that has little or nothing to do with the movement of commodities in interstate commerce, such as the possession of child pornography made with an electronic card that crossed state lines years ago for entirely innocent purposes. Under this view of the statutes, Petitioner's conduct represented a federal offense. But *Bond v. United States*, __U.S.__, 134 S. Ct. 2077 (2014), suggests that this is not the proper reading.

Bond was convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 134 S.Ct. at 2085-2086; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a

romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 2093. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 2090-2091.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529 U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 134 S. Ct. at 2091-2092.

As in *Bond*, it is possible to read §2252A(5)(B) to reach the conduct admitted here: possession of an image made with materials that once crossed state lines, without proof that the crime caused anything to move across state lines, nor even proof that anything moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually

any conduct anywhere in the country, with little or no relationship to commerce, or to the interstate movement of commodities.

It is plain that Congress intended the "interstate movement" requirement to bind §2252A(5)(B) to federal interests in interstate commerce. This prong of the statutes should therefore be read in a way that accomplishes this purpose. The better reading of the phrase "produced ... using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer" – which appears in both §2252A(5)(B) – therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused something to move in interstate commerce, 2) proof that the prosecuted image moved in interstate commerce, or, at least, 2) proof that something moved in interstate commerce at a time reasonably near the offense.

The court below rejected these claims, however, because it found them foreclosed by its own precedent. *See* [Appx. A](citing *United States v. Dickson*, 632 F.3d 186, 192 (5th Cir. 2011), and *United States v. Kallestad*, 236 F.3d 225, 226-31 (5th Cir. 2000)). This Court "regularly hold(s) cases that involve the same issue as a case on which *certiorari* has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996)(Scalia, J., dissenting).) Ultimately, a GVR is appropriate where intervening developments reveal a reasonable probability that the outcome below rests upon a premise that the lower court would reject if given the opportunity for further consideration. *See Lawrence*, 516 U.S. at 168. In the event that this Court grants *certiorari* in any case presenting the limits of federal power under the Commerce Clause, or the proper construction of criminal statutes to avoid transgressing such limits, the instant case should be held.

II. The applicability of *Sullivan v. Louisiana*, 508 U.S. 275 (1993) to a guilty plea is an important question of federal law that has not been, but should be, resolved by this Court.

Federal Rule of Criminal Procedure 11 requires that the district court "determine that there is a factual basis for the plea" before entering judgment thereon. *See* Fed. R. Crim. P. 11(b)(3). The act of admitting guilt is unlike the other protections – like admonishment about the penalties and about trial rights – that accompany a defendant's decision to enter a plea of guilty. *See* Fed. R. Crim. P. 11(b)(1-2). The admission of guilt is the very heart of the plea – it is in the ordinary case the sole moral and legal justification for punishment in the absence of trial. *See North Carolina v. Alford*, 400 U.S. 25, 32 (1970)("Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind.") Thus, while *Boykin v. Alabama*, 395 U.S. 238 (1969), observed that "[a] plea of guilty is more than a confession which admits that the accused did various acts," there is ordinarily no plea without a confession. *Boykin*, 395 U.S. at 242.

The court below found that the plain error doctrine, codified in Federal Rule of Criminal Procedure 52, applies to breaches of this requirement. *See* [Appx. A](citing *United States v. Trejo*, 610 F.3d 308 (5th Cir. 2010)). This conclusion seriously undermines the defendant's protections against erroneous pleas of guilty, misunderstands the function of Rule 52, and reflects confusion as to the proper application of *Sullivan v. Louisiana*, 508 U.S. 275 (1993).

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court evaluated the applicability of the harmless error doctrine to a claim of instructional error, specifically to a claim that the jury was not properly instructed on reasonable doubt. *See Sullivan*, 508 U.S. at.277. The State argued that the verdict would have been the same but for the misinstruction. A unanimous court, however, held that it would violate the defendant's right to trial by jury for an appeals court to overlook the error. *See id.* at 281. This Court reasoned that criminal defendants have a right to have the jury determine in the first instance that they are guilty beyond a reasonable doubt, and that to ignore the faulty instruction would essentially substitute the court of appeals' opinion for that of a jury. *See id.* It

explained further:

> Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

See Sullivan, 508 U.S. at 280.

In *United States v. Dominguez-Benitez*, 542 U.S. 74 (2004), however, this Court made clear that the logic of *Sullivan* did not apply to all claims of error in the taking of a plea. Rather, the Court held that in the absence of an objection at the colloquy, the doctrine of plain error applied to the failure of the district court to provide the defendant with the proper warnings. *See Dominguez-Benitez*, 542 U.S. at 82. This required the defendant to show a" reasonable probability that, but for the error, he would not have entered the plea." *See id.* at 83.

Dominguez-Benitez, however, deals with claims of "error" in the taking of a plea – it does not purport to establish a standard of review for the absence of a cognizable plea. *See id.* Indeed, *Dominguez-Benitez* establishes that, in the Rule 11 context, the "outcome" presumed to exist when the doctrine of plain error is applied ***is*** the plea, which in the ordinary case is the admission of guilt. It would appear at least arguable under *Sullivan* that the plea of guilty is the "object" upon which harmless or plain error analysis acts. By this logic, the defendant's claim that he never admitted guilt, and accordingly entered an incomplete plea, is thus arguably not subject to either doctrine. The courts of appeals have nonetheless applied the doctrine of plain error to claims of this kind. *See United States v. Garcia*, 587 F.3d 509, 515 (2d Cir. 2009); *United States v. Tann*, 577 F.3d 533, 535 (3d Cir. 2009); *United States v. Edgerton*, 408 Fed. Appx. 733, 735-736 (4th Cir.

2011)(unpublished); *United States v. Marek*, 238 F.3d 310, 315 (5th Cir. 2001)*(en banc)*; *United States v. Maye*, 582 F.3d 622, 626-627 (6th Cir. 2009)*; United States v. Luna-Orozco*, 321 F.3d 857, 860 (9th Cir. 2003).

The issue merits this Court's attention. First, the application of plain error review to the sufficiency of the defendant's plea effectively renders Federal Rule 11(b)(3) unenforceable. This provision "is designed to 'protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.'" *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quoting Fed. R. Crim. P. 11, Notes of Advisory Committee on Criminal Rules). A defendant who ***does not understand*** that his conduct is not prosecutable is obviously very unlikely to object to the inadequacy of his own factual basis. Given the function of the factual basis requirement – to protect the defendant from inadvertent pleas to innocent conduct – it is bizarre to suggest that the defendant, rather than the district court, should bear the burden of identifying such misapprehension.

Second, the application of the plain and harmless error doctrines to the insufficiency of the factual basis misunderstands the function of Rule 52. Federal Rule of Criminal Procedure 52 is the foundation for the doctrines of harmless and plain error. The doctrine of harmless error provides that an error may be ignored if it has no effect on the outcome. *See* Fed. R. Crim. P. 52(a). The doctrine of plain error provides that a party complaining of unpreserved error must demonstrate plain or obvious error and that the error affects the defendant's substantial rights. *See* Fed. R. Crim. P. 52(b). These Rules deal with "error," what this Court has described as "deviation from a legal rule." *United States v. Olano*, 507 U.S. 725, 732-733 (1993). And while the entry of conviction without a factual basis is an error in this sense, it is something more as well. It is the total absence of a plea, akin to the absence of a verdict of guilty in a trial. Conviction in the absence of plea or verdict is not the type of "error" that can be plausibly subjected to harmless or plain error review.

Third, the failure of this Court to specify the analog of *Sullivan* in the plea context has generated inconsistent opinions within the courts of appeals. The D.C. Circuit has suggested that

some Rule 11 errors, such as extensive judicial participation in a plea agreement, may be beyond the reach of the plain error doctrine. *See United States v. Baker*, 489 F.3d 366, 372 (D.C. Cir. 2007)(observing that "not all Rule 11 violations are created equal" and finding the standard of review a "difficult question"). The Fourth Circuit, however, cited this Court's decisions in *Dominguez-Benitez* and *United States v. Vonn*, 535 U.S. 55 (2002) for the proposition that "all forfeited Rule 11 errors were subject to plain error review." *United States v. Bradley*, 455 F.3d 453, 461 (4th Cir. 2006). This confusion regarding the scope of Rule 52 could be rectified by granting *certiorari* in this case.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court issue an order granting the writ of *certiorari* to review the decision below or for such relief as to which he may be justly entitled.

Respectfully submitted this 18th day of July, 2018.

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