No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

VIRGIL LEE BAILEY,

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

KEVIN J. PAGE
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746

QUESTIONS PRESENTED

I. 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

Virgil Lee Bailey is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

UNITED STATES CONSTITUTION

PETITION FOR A WRIT OF CERTIORARI

Petitioner Virgil Le Bailey 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 published opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Bailey*, 924 F.3d 1289 (5th Cir. May 31, 2019), and is provided in the Appendix to the Petition. [Appendix A]. The district court entered judgment on August 31, 2018, which judgment is attached as an Appendix. [Appendix B].

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on May 31, 2019. *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 2252A(a)(2) of the United States Code provides in part:

> (a) Any person who--
>
> ***
>
> (2) knowingly receives or distributes--
>
> (A) any child pornography that has been mailed, or using any means or facility of interstate or foreign commerce shipped or transported in or affecting interstate or foreign commerce by any means, including by computer
>
> ***
>
> shall be punished...

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 Virgil Lee Bailey, Jr. was indicted on one count of producing child pornography using materials that "had been mailed, shipped, transported in and affecting interstate and foreign commerce," and one count of possessing child pornography that had been produced with such materials. He pleaded guilty, and admitted in his factual resume that he used electronics that had been manufactured outside the state of Texas to produce images of child pornography, and that he possessed images that had been created with such electronics. The factual resume contained no admission that the electronics had moved recently in interstate commerce, nor that its movement had any connection with the offense. Nor did it admit that the images had themselves moved in interstate commerce. The plea agreement waived the right to appeal, save for arithmetic error, among other exceptions not relevant here.

B. Appellate Proceedings

On appeal, Petitioner contended that the factual resume failed to admit an offense, because it admitted neither that the defendant's own conduct caused the movement of objects across state lines, nor that the objects involved in the production of the relevant images had moved in the recent past. Although conceding that circuit law required review only for plain error, he contended for further review that the inadequacy of a factual resume should always result in reversal. To preserve review, he also challenged the calculation of his Guidelines, on grounds foreclosed by circuit precedent.

The court of appeals reached the merits of the case in spite of the waiver, but nonetheless reviewed for plain error. *See* [Appendix A]. It then expressly applied the standard of plain error review and found the factual basis adequate." [Appendix A]. Finally, it rejected the Guidelines challenge as foreclosed. *See* [Appendix A].

REASONS FOR GRANTING THE WRIT

I. 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 foregone 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. *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* [Appendix A]. 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. But this Court unanimously 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* does not apply to all claims of error in the taking of a plea. Rather, this 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 the "outcome" presumed to exist when the doctrine of plain error is applied in the Rule 11 context ***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 that he 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)*; 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 falls outside the statute of conviction is obviously very unlikely to object to the inadequacy of her own factual basis. Given the function of the factual basis requirement – to protect the defendant from inadvertent pleas to non-existent offenses – it is bizarre to suggest that the defendant, rather than the 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 had 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 as it relates to pleas of guilty should be addressed by granting *certiorari* in this case.

The instant case well presents the issue. The court below expressly applied the plain error standard of review. *See* [Appendix A]. And in the absence of this standard, Petitioner could raise serious doubts about whether Congress may criminalize all activity undertaken with any object that has ever moved interstate commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519,550-551 (2012)(Roberts, J., concurring). He could accordingly show a reasonable ground for the application of the canon of constitutional avoidance, and the construction of the statute to require a more significant connection to interstate commerce than has been pleaded or admitted here. *Bond v. United States*,572 U.S.844, 857 (2014).

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 28th day of August, 2019.

/s/ Kevin Joel Page
Kevin J. Page
Counsel of Record
FEDERAL PUBLIC DEFENDER'S OFFICE
NORTHERN DISTRICT OF TEXAS
525 GRIFFIN STREET, SUITE 629
DALLAS, TEXAS 75202
(214) 767-2746