No.

IN THE SUPREME COURT OF THE UNITED STATES

JOSE FARIAS-VALDOVINOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Christopher S. Swiecicki
SWIECICKI & MUSKETT, LLC
Suite 308
16100 Chesterfield Parkway W
Chesterfield, MO, 63017
Telephone: (636) 778-0209
Chris@SwiecickiLaw.com
Attorney for Petitioner

QUESTION PRESENTED

On January 11, 2017, Petitioner was allegedly involved with the transport of a substance testing positive for methamphetamine in Kansas City, Missouri. After initially pleading not guilty to the charges against him, Petitioner moved to accept a plea agreement containing an appeal waiver, wherein he would plead guilty to aiding and abetting the possession with the intent to distribute a mixture or substance containing methamphetamine. Notably, the evidence against Petitioner was circumstantial and did not speak to Petitioner's intentions or level of knowledge at the time of his arrest.

Petitioner's initial change of plea hearing was rescheduled after Petitioner, a person with a native language of Spanish, was participating via translator, exhibited an inability to understand the charge to which he was pleading. The district court granted a continuance of the change of plea hearing, and a second change of plea hearing was scheduled. At the second change of plea hearing, the district court's Rule 11 plea colloquy involved zero questions regarding Petitioner's intent or level of knowledge surrounding the charge underlying his plea agreement – a specific intent crime. Further, the district court did not inquire into the events that took place on the day of the alleged crime. Regardless, at the close of the second change of plea hearing, the district court declared that Petitioner was aware of the nature of the charges against him, that his plea was made knowingly and voluntarily, and that there was a factual basis to support the plea agreement. At the sentencing hearing, the government admitted that Petitioner's level of knowledge was "subject to interpretation," but insisted that Petitioner's acceptance of the plea agreement was itself sufficient evidence of Petitioner's *mens rea*. Petitioner was sentenced to 10 years in prison.

The court of appeals found that the appeal waiver in Petitioner's guilty plea did not prevent the court from considering the argument that Petitioner's plea was not knowing or voluntary because there was an insufficient factual basis for the underlying charge. Using the plain error review standard, the court of appeals found that the district court did not plainly err in concluding that there was a sufficient factual basis underlying Petitioner's plea agreement, affirming the judgment of the district court.

The Question Presented is:

Whether the district court's omission of an independent inquiry into a defendant's *mens rea* during the Rule 11 plea colloquy for a specific intent crime is sufficient to prove that an inadequate factual basis exists for the plea if the record is silent or the defendant's *mens rea* is unclear.

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I. PETITION FOR A WRIT OF CERTIORARI

Jose Farias-Valdovinos respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

II. OPINIONS BELOW

The opinion of the court of appeals is found in the Appendix at page 1a.

III. JURISDICTION

The Eighth Circuit entered judgment on May 18, 2020. The Eighth Circuit denied a timely petition for rehearing *en banc* on June 24, 2020. This petition is filed timely pursuant to Supreme Court Rule 13.1. This court has jurisdiction under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL PROVISIONS & FEDERAL RULES INVOLVED

This case implicates the waiver of protections granted by the Fifth and Sixth Amendments of the United States Constitution. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right
>
> . . . to be informed of the nature and cause of the accusation…

The Fifth Amendment to the United States Constitution's privilege against compulsory self-incrimination provides in relevant part:

> [N]or shall any person…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.

This case also implicates the extent of the protections afforded defendants under Federal Rule of Criminal Procedure 11, which governs plea agreements and the required plea colloquy between the defendant and the trial court. Federal Rule of Criminal Procedure 11(b)(1)(G) provides in relevant part:

> Before the court accepts a plea of guilty…the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands… the nature of each charge to which the defendant is pleading.

Federal Rule of Criminal Procedure 11(b)(2) provides:

> 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 (other than promises in a plea agreement).

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

> Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

V. STATEMENT OF THE CASE

This case presents a question central to the court's responsibility in the modern American criminal justice system: to what extent must the district court independently verify the factual basis of the charge underlying a guilty plea during the Rule 11 plea colloquy; particularly when the underlying charge is a specific intent

crime and the record is silent on requisite elements? Federal Rule of Criminal Procedure 11 states that the court must "determine that the defendant understands…the nature of each charge to which the defendant is pleading," Fed. R. Crim. P. 11(b)(1)(G), to ensure that the plea itself is *voluntary*, Fed. R. Crim. P. 11(b)(2), and that it is grounded by a *factual basis*, Fed. R. Crim. P. 11(b)(3). As the Eighth Circuit noted in *United States v. Frook*, "a district court's failure to comply with Rule 11—including Rule 11(b)(3)—calls into question the knowing and voluntary nature of a plea, and thus its validity." 616 F.3d 773, 775 (8th Cir. 2010) (internal quotations omitted). In the words of the Rule 11 advisory committee, "[i]t is not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking." Fed R. Crim. P. 11 advisory committee's note to 1983 amendments.

This is the ideal case to address this important question. The record illustrates that the Petitioner, with a native language of Spanish, exhibited a patterned inability to fully understand the charge to which he was pleading. At the initial change of plea hearing the district court noted this incapacity, resulting in a rescheduling. During the Rule 11 plea colloquy at the following change of plea hearing, after learning that the 43-year-old Petitioner had not completed elementary school, the district court engaged in a dialogue with Petitioner focused almost exclusively on the voluntariness of the agreement and his satisfaction with counsel. The charges against Petitioner were noted in name only. The court undertook no line of questioning to evaluate the

factual basis underlying the charge, even though all evidence against Petitioner was circumstantial, and Petitioner's *mens rea* was admittedly "subject to interpretation." App. 47a. At the sentencing hearing, Petitioner raised a number of objections that directly conflicted with requisite elements of the charge to which he had pleaded guilty. After a back and forth with the judge, Petitioner's counsel altered Petitioner's objections so that they would still fit within the requisite elements of the crime although there was no evidence to support Petitioner's counsel's assertion that Petitioner was aware of the principal's possession of drugs, nor principal's intent to distribute those drugs.

The erroneous inquiry that constituted the Eighth Circuit's Rule 11 examination of Petitioner's guilty plea only conveyed that Petitioner was voluntarily pleading guilty. At no point did the court independently evaluate Petitioner's understanding of the elements of the crime to which he was pleading, and the record is void of any explanation of those elements. On the contrary, the record displays that Petitioner consistently lacked comprehension of the factual and substantive implications of the plea agreement and that the district court failed to independently inquire into Petitioner's understanding of the nature of the charge, or his *mens rea* at the time of the arrest. This oversight resulted in a breach of the court's duty to determine that Petitioner's guilty plea was supported by a factual basis. Because the district court failed to verify a number of required elements of the underlying charge, it remains unclear whether Petitioner knew the legal implications of his plea agreement, and whether that plea agreement was grounded in a factual basis. To

date, there has not been any factual development concerning these pivotal questions. This case cleanly presents the question of the court's responsibility in independently evaluating a criminal defendant's understanding of the charges against him, as well as the charge's factual basis, and does so on a factual record that illustrates the policy considerations animating the need for a more substantive inquiry. This Court should grant certiorari.

1. Petitioner was involved with the transport of a substance testing positive for methamphetamine in Kansas City, Missouri on January 11, 2017. *App. 2a*. Members of the Kansas City Missouri Police Department stopped Jose Adrian Medina-Herrera ("Medina-Herrera," "principal," or "co-defendant") coming off of a Greyhound Bus in Kansas City from New York, New York. *App. 2a*. Officers searched Medina-Herrera's bags and found 5.35 kilograms of a substance that tested positive for methamphetamine. *App. 2a*. After placing a 56-gram representative sample of the suspected substance back in Medina-Herrera's suitcase, officers observed Medina-Herrera walk up to a vehicle and place his suitcase and duffel bag in the rear seat. That car was driven by Petitioner. The officers took both men into custody. *App. 3a.*

Petitioner was receiving threatening text messages from an unknown individual in Mexico identified only as "Pariente," who instructed Petitioner to pick up a stranger at a bus terminal in Kansas City, Missouri, and bring him to a hotel or else "Pariente" would harm Petitioner's family. *App. 51a.* Because Petitioner believed "Pariente" to be a member of a Mexican cartel that had murdered his cousin and recently kidnapped his niece, Petitioner felt compelled to comply with the demands.

At the time of his arrest, Petitioner had never communicated with Medina-Herrera, was unaware that Medina-Herrera was transporting narcotics, and knew nothing of Medina-Herrera's scheme to distribute said narcotics. Conversely, Medina-Herrera confirmed that he had knowingly agreed to transport narcotics for an acquaintance he knew in Mexico. The only circumstantial evidence linking the two men were similar text messages from a third-party found in both men's phones directing their movements.

2. The grand jury charged Medina-Herrera and Petitioner each with conspiring to distribute and to possess with intent to distribute 500 grams or more of a mixture containing methamphetamine, in violation of 21 U.S.C. §§841(a)(1), (b)(1)(A), 846 (Count One); and aiding and abetting each other to possess with intent to distribute 500 grams or more of a mixture containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A) and 18 U.S.C. § 2 (Count Two).

After originally pleading not guilty to both counts, Petitioner elected to accept a plea bargain. When asked at the initial change of plea hearing if Petitioner fully understood the charge to which he was pleading, Petitioner responded, "It's not completely clear to me, but that's okay." *App. 21a.* The district court stated that it would not move forward unless it was "completely clear to [Petitioner]." *App. 21a.* Petitioner's counsel attempted to rush the hearing forward, stating that he was "confident that [Petitioner] understands what he's pleading guilty to. *App. 22a.* I'm very confident…I prefer this matter not be set for trial, Judge." The district court, however, noted with trepidation that a pattern was beginning to emerge, stating that

"when we got here at 10:30, [Petitioner] needed some time…we gave him 15 or 10 minutes to go over everything with you, and now he seems to have some concern about the charge we're here to talk about." *App. 22-23a.* Counsel then sought a continuance, which the court granted. *App. 23a.*

At the second change of plea hearing Petitioner pleaded guilty to a charge of aiding and abetting possession with intent to distribute 500 grams or more of a mixture containing methamphetamine, pursuant to a plea agreement containing an appeal waiver. The district court's plea colloquy focused primarily on Petitioner's opinion of his counsel, and whether he had been coerced in any manner to take the plea. After learning that Petitioner "didn't finish elementary," the district court asked Petitioner whether he "desired… to plead guilty to the charge under count 2 of aiding and abetting and possession with the intent to distribute a mixture or substance containing methamphetamine of your own free will because you are, in fact, guilty of that charge?" Petitioner responded affirmatively. The district court later asked if Petitioner understood that, if there were to be a trial, the government would be required to prove that he had in fact "aided and abetted others possessed with intent to distribute a mixture or substance containing a detectable amount of methamphetamine." Again, Petitioner responded affirmatively.

Lastly, the court asked, "[Petitioner], to the lesser-included charge under Count 2 of aiding and abetting the possession with the intent to distribute a mixture or substance containing methamphetamine, as that is all more fully and specifically set out as a lesser-included charge under Count 2, how do you wish to plead, guilty

or not guilty?" Petitioner responded, "Guilty." Those three comments comprise the court's references to the underlying charge, in any manner, during the entire plea colloquy. The court then stated its belief that Petitioner was "aware of the nature of the charges against [him] and also aware of the consequences of [his] plea…that [his] plea is made knowingly and voluntarily; further, that it is supported by an independent basis in fact which contains all of the essential elements of the offense charged against [him]." At no point during the dialogue did the court inquire into the factual basis of the charge, nor of Petitioner's understanding of the elements required to convict a defendant of aiding and abetting possession with intent to distribute. The charge was noted in name only, and no inquiry was taken into Petitioner's *men rea*. Although the court stated that the charge was "more fully and specifically set out as a lesser-included charge under Count 2," the record contains no mention of the elements of that charge, nor a substantive discussion of that charge.

The sentencing hearing was held on October 15, 2018. *App. 42a.* The pre-sentence report ("PSR") recited the facts of the case and recommended a sentence of between 168 and 210 months. At the sentencing hearing, Petitioner raised objections to a number of factual ambiguities and inaccuracies in the PSR. Petitioner stated that he had never met nor communicated with Medina-Herrera prior to their interactions on January 11, 2017, that he did not know Medina-Herrera as "Pariente," and that he had been unaware that Medina-Herrera was transporting narcotics or that the drugs were meant for distribution. *App. 43a.* Petitioner's counsel stated, "My client -- my understanding is my client did know that he was there at the bus station to pick

up someone for some illicit illegal activity. How much knowledge he had -- he had some knowledge of it, not completely all of the knowledge what was contained in the packages and what those packages were for." The court then raised concern, stating that Petitioner "had to know that he was aiding and abetting." Petitioner's counsel responded that Petitioner had "some knowledge of what was transpiring. How much is up – I don't want the court to –." *App. 45a.*

Petitioner's counsel went on to alter the nature of his comments to state that Petitioner knew he was making contact to facilitate Medina-Herrera's drug distribution, and that he simply didn't know Medina-Herrera. *App. 45a.* There is no evidence for this claim anywhere on the record, and Petitioner was never questioned on the matter. When asked for input, the prosecution summarized the evidence against Petitioner as follows, "[Petitioner] gave a statement saying, I came here to pick somebody up. I was contacted by somebody in Mexico to pick somebody up at the bus station, take them to a hotel, and the level of [Petitioner's] knowledge is, of course, subject to interpretation, but considering the fact that [Petitioner] admitted to aiding and abetting possession with intent to distribute…I don't know how necessary it is to drill down that far." *App. 47a.*

When asked if he would like to address the court, Petitioner's first words were, "This is not fair, I didn't have anything to do with this." *App. 49a.* Petitioner then explained that he was "forced to do this" under the credible threat of violence against his family in Mexico. In broken English, Petitioner stated that he was told he "needed to be fooled to not know something illegal that I had to transport, to give to a person."

Then, at the sentencing hearing, the court addressed Petitioner directly about the specifics of his alleged crime for the first time, asking "how he knew the people that he says made threats against him?" Petitioner replied, "They make the choice. They choose you. They pick the most vulnerable, the ones that can't defend themselves." Petitioner was sentenced to 120-months in federal prison and supervised release for a period of three-years.

3. Petitioner filed a timely *Anders* brief challenging the reasonableness of his sentence. The Eighth Circuit, after conducting an independent review under *Penson v. Ohio*, ordered supplemental briefing to address two issues: (1) whether there was a sufficient factual basis underlying petitioner's guilty plea, and (2) whether petitioner's claims would survive the appeal waiver.

Petitioner argued that there was not sufficient factual basis underlying the plea, rendering both the plea and appeal waiver invalid. Petitioner also argued that, due to the absence of a sufficient factual basis, his plea was not knowing and voluntary. In response, the government argued that, because petitioner did not object to the factual basis of his plea nor seek to withdraw it, Petitioner's plea could be reviewed only for plain error and that the district court had not plainly erred in finding a sufficient factual basis. Alternatively, the prosecution argued that all of Petitioner's claims were barred by the appeal waiver.

The Eighth Circuit agreed with the government in part, holding that petitioner's challenge against the substantive unreasonableness of his sentence was barred by his appeal waiver, but found that the appeal waiver would not bar a claim asserting

that his plea was not knowing or voluntary for lack of a sufficient factual basis underlying the plea *App. 2a*. The Eighth Circuit then reviewed the issue of whether Petitioner's plea had a sufficient factual basis using the plain error standard of review. *App. 2a.* In a *per curiam* opinion, the Eighth Circuit concluded that the district court "did not plainly err in finding that there was a sufficient factual basis" for Petitioner's plea. There was no elaboration on the court's reasoning, and nothing suggests that there was any factual development with regard to Petitioner's *mens rea*.

VI. REASONS FOR GRANTING THE PETITION

Federal Rule of Criminal Procedure 11's importance as a safeguard to the rights of defendants is clear and acknowledged. The prevalence of plea agreements and their impact on the rights of the criminal defendants make it imperative that courts ensure that defendants enter into the process with "a full understanding of what the plea connotes and of its consequences," *Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969), and that the plea agreement itself is rooted in a sufficient factual basis and thus valid, *United States v. Williams*, 557 F.3d 556, 560 (8th Cir. 2009) This Court's review is warranted in this case because it cleanly presents an opportunity to better inform the judiciary of the specific duty that it owes to defendants, and the facts clearly implicate the policies underlying Rule 11.

A. The Case Cleanly Presents an Important Question With Far-Reaching Implications

As the Court has noted, "pleas account for nearly 95% of all criminal convictions." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *see also Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). When a defendant accepts a plea, they are waiving three constitutional rights: the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination. *Parke v. Raley*, 506 U.S. 20, 29 (1992); *see also United States v. Gray*, 152 F.3d 816, 819–20 (8th Cir.1998) (discussing the constitutional rights waived by a defendant through a plea agreement). These rights, embedded in the Constitution, are central to our legal identities as Americans and their waiver should not be taken lightly. When a defendant elects to go to trial he has the benefit of the doubt; he is innocent until proven otherwise and he is given the opportunity to plead his own case and attack the arguments of his accusers. The jury acts to mitigate prosecutorial misconduct and appraises the arguments of both sides through their own nuanced understanding of the case. *Cf. United States v. Young*, 470 U.S. 1, 17 (1985) (noting that the potential harm of a prosecutor's inappropriate comments was alleviated by the jury's understanding of the case as a whole). A guilty plea forgoes all of these structural safeguards, and "is more than an admission of conduct; it is a conviction." *Boykin*, 395 U.S. at 242-243.

Plea bargains, although inherently powerful, are not inherently wicked. For the accused, plea bargains offer an avenue for atonement in exchange for mercy in the form of more favorable terms at sentencing. The prosecution, in turn, is able to

conserve valuable resources and ensure a conviction and justice for those wronged. *See Frye*, 566 U.S. at 144. Put concisely, the "chief virtues of plea agreements are speed, economy, and finality." *Rutan v. United States*, 956 F.2d 827, 829 (8th Cir. 1992). However, with speed can come sloppiness, and economy brings the risk of unforeseen consequences which can create situations where defendants are convicted by their own tongue before they've been able to fully comprehend the finality of their decision. Rule 11 is the court's oversight mechanism; the method by which it can independently assure itself that the defendant fully understands the nature of the charges to which he's pleading guilty, that he's done so of his own volition, and that his plea is supported with a factual basis. *See generally* Fed. R. Crim. P. 11.

The purpose of Rule 11 is not up for debate; the advisory committee has been consistent in its explanations throughout a number of revisions. *See* Fed. R. Crim. P. 11 Advisory Comm. Notes (1966) ("Such inquiry should, e.g., 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."); Fed. R. Crim. P. 11 Advisory Comm. Notes (1983) ("[i]t is not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.").

This Court has also addressed its own understanding of the purpose of the Rule 11 plea colloquy, specifically in *Vonn v. United States*, 535 U.S. 55 (2002). *Id.* at 62 ("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."); *Id.* at 79 ("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.") (Stevens, J., concurring).

The court's role as the protector of potentially under-informed defendants is not one that should be taken lightly. When the district court fails to uphold its Rule 11 duties, the only recourse that a defendant has is to appeal the court's ruling after he has already admitted guilt and begun to serve his sentence. Because of the ignorance or lack of understanding on behalf of the defendant that is inherent in these situations, it is highly unlikely (if not impossible) for the defendant to object during trial. This means that the defendant's appeal is now subject to a plain error review standard under Federal Rule of Criminal Procedure 52(b). *Haubrich v. United States*, 744 F.3d 554, 558 (8th Cir. 2014); *see also Vonn*, 535 U.S. at 59 ("We hold that a silent defendant has the burden to satisfy the plain error rule…"); *see generally* Fed. R. Crim. P. 52(b).

Therefore, by not upholding *its* duty to ensure a defendant has entered a guilty plea knowingly, voluntarily, and supported by a factual basis, the court has put the *defendant* in a position where he has the burden of proving that there was (1) an error, (2) that the error was plain/clear, and (3) that the error affected his substantial rights. *Id.* Even if the defendant is somehow able to prove all of this, the court of appeals only has to act on a discretionary basis, "discretion which ought to be

exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Olano v. United States*, 507 U.S. 725, 736 (1993). That is to say nothing of the time that it may take the defendant to compile his appeal, during which he is incarcerated and subjected to the physical and mental hardships that incarceration brings to bear. All of this because the district court was either unaware of its duties under Rule 11, or because *the court* chose speed and economy over diligence.

This case offers the Court an opportunity to clarify exactly what duties a district court owes to criminal defendants during the Rule 11 plea colloquy. At no point during the change of plea hearings did the district court inquire into any of the events underlying Petitioner's guilty plea, nor did it attempt to evaluate Petitioner's understanding of what it meant to be guilty of aiding and abetting possession with intent to distribute. Further, aside from the verifiable, physical claims of the facts on the record, the court made no inquiry into Petitioner's *mens rea*: a key element to the underlying charge that the prosecution admitted remained "subject to interpretation" even at the end of trial. Instead, the court allowed Petitioner to plead guilty without requisite knowledge or understanding of exactly what it was he was pleading guilty to, the lack of which undermines the voluntariness of Petitioner's guilty plea. The court even went so far as to allow the prosecution to use the fact that Petitioner had already pleaded guilty as a shield against inquiry into Petitioner's *mens rea* at the time of the arrest. This circular reasoning twisted the Petitioner's lack of understanding during the erroneous plea colloquy against him, equating his

acceptance of the plea agreement itself with a blanket confession to all requisite elements.

By unambiguously stating what duties the court owes to defendants to ensure that they have entered into the plea agreement knowingly and voluntarily and that their plea has a sufficient factual basis, the Court will create a system that is better for defendants, judges, *and the prosecution*. Defendants will benefit from a more substantial plea colloquy that ensures that they understand what it is that they are pleading and creates space for them to object prior to their acceptance. Judges will understand exactly what their duty is when questioning defendants during a plea colloquy, and by taking just a few more minutes to ask a few more questions, the judge will shield himself from appeals and avoid putting men and women in jail who may not have understood exactly what they were admitting to. Although it may seem counter-intuitive, the prosecution also stands to benefit greatly from increased transparency. When a defendant is forced to admit to the elements of the charge underlying his guilty plea while under oath, the prosecution gains an ironclad case and the potential for overturned convictions will be greatly diminished.

B. The Decision Below is Erroneous: The District Court's Actions Clearly Constitute Plain Error and the Court of Appeals Abused Its Discretion By Not Reversing and Remanding the Case

The court of appeals erred in holding that the district court did not plainly err in finding that there was a factual basis for Petitioner's guilty plea. As the Eighth

Circuit noted in *United States v. Frook*, "a district court's failure to comply with Rule 11—including Rule 11(b)(3)—calls into question the knowing and voluntary nature of a plea, and thus its validity." 616 F.3d at (internal quotations omitted). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)); *see also United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) ("A defendant must enter into a plea agreement and waiver knowingly and voluntarily for these agreements to be valid."). In order for the plea to be valid, it must admit all of the elements of the alleged crime, as well as the *factual basis* for those elements. *Williams*, 557 F.3d at 560 (emphasis added).

"Rule 11(b)(3) of the Federal Rules of Criminal Procedure states that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). In making its determination under Rule 11(b)(3) the district court has a number of tools at its disposal for analysis including the plea agreement itself, the prosecution's summary of the facts, the plea colloquy, and the PSR. *United States v. Qattoum*, 826 F.3d 1062, 1065 (8th Cir. 2016). "A guilty plea is supported by an adequate factual basis when the record contains 'sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense.'" *United States v. Cheney*, 571 F.3d 764, 769 (8th Cir. 2009) (quoting *United States v. Gamble*, 327 F.3d 662, 664 (8th Cir. 2003).

Petitioner plead guilty to the offense of aiding and abetting possession with intent to distribute 500 grams or more of a mixture containing methamphetamine (). In order for Petitioner's guilty plea to have been "supported by an adequate factual basis," the record must have contained "sufficient evidence *at the time of the plea* upon which a court could have reasonably found [Petitioner] likely committed the offense." *Id.* (emphasis added). If the principal offense requires a particular mental state, the aider and abettor must share in that mental state. *United States v. Lard*, 734 F.2d 1290, 1298 (8th Cir. 1984); *see also United States v. Roan Eagle*, 867 F.2d 436, 445 (8th Cir. 1989) ("Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares the requisite intent of the offense.").

The principal offense in this case, possession with intent to distribute a controlled substance, requires that an individual act "knowingly or intentionally." 21 U.S.C.A. § 841(a). Therefore, at the time of Petitioner's plea, the record must have *reasonably* stipulated that it was *likely* that (1) Petitioner *knew* of Medina-Herrera's possession and intent to distribute, (2) had enough *advance knowledge* of the extent and character of the possession and intent to distribute that he could have made the choice to walk away before all elements were complete, (3) *knowingly* acted for the of aiding the commission of Medina-Herrera's possession and intent to distribute, and (4) *intended* to aid and abet Medina-Herrera's underlying crime. Eighth Circuit Model Jury Instructions, 5.01 Aiding and Abetting (18 U.S.C. 2(a)) (2017); *see also Rosemond v. United States*, 572 U.S. 65, 78 (2014) (holding that an aider and abettor

must both actively participate in a scheme and have "advanced knowledge" of the "extent and character" of the scheme).

In its evaluation of the record with regard to Petitioner's guilt, the court could only rely on "the facts which show his part in the crime," and could "not depend on another's degree of guilt." *Cunha v. Brewer*, 511 F.2d 894, 899 (8th Cir. 1975). "Mere presence at the scene of a crime is not enough to prove defendant committed the offense or that he did aid and abet its commission," *Id.*, nor is "mere association between the principal and defendant." *United States v. Santana*, 524 F.3d 851, 853 (8th Cir. 2008). The court must have been able to reasonably ascertain that Petitioner made the knowing choice to "align himself with the illegal scheme in its entirety." *Rosemond*, 572 U.S. at 78.

However, at the time of the Petitioner's guilty plea, the only relevant facts stipulated on the record were that (1) Petitioner arrived at the bus station intending to pick up Medina-Herrera and take him to a hotel, (2) Petitioner had been communicating with an individual in Mexico that he could only identify as "Pariente," and (3) several similar text messages were found on both Petitioner and Medina-Herrera's phones. At the second change of plea hearing, after the initial hearing was cut short and rescheduled due to Petitioner's inability to understand the nature of the charges against him, the district court did not ask Petitioner a single question to ascertain his knowledge or his intentions at the time of his arrest – key elements of the charge underlying Petitioner's guilty plea – evidence for which exists virtually

nowhere on the record. Thus, Petitioner's plea was not grounded in a factual basis, plainly conflicting with Rule 11(b)(3) and invalidating the plea agreement.

One manner by which the court ensures that the plea agreement was entered into knowingly and voluntarily is to properly question the defendant during the plea colloquy. *Andis*, 333 F.3d at 891. In its colloquy, the court "will assume no knowledge on the part of the defendant, even if represented by counsel, and…must inform him of a base level of information before accepting his plea." *Vonn*, 535 U.S. at 80 (Stevens, J., concurring). "The binding nature of the plea thus depends on the fact that it is made voluntarily after proper advice and with an understanding of the consequences." *Frook*, 616 F.3d at 775; *see also Kercheval v. United States*, 274 U.S. 220, 223 (1927) ("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."). "Guilty pleas accepted after an imperfect Rule 11 colloquy, therefore, do not waive all errors under Rule 11." *Frook*, 616 F.3d at 775.

"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." *Vonn*, 535 U.S. at 62. While it is not always necessary to inform a defendant of the elements of the charge to which he is pleading guilty if it is clear that he understands the nature of the charge, *Marks v. United States*, 38 F.3d 1009, 1012 (8th Cir. 1994), the plea cannot be construed as voluntary 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." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

The record at the time of Petitioner's guilty plea illustrates that Petitioner had exhibited a consistent lack of understanding of the nature of the charge against him. At Petitioner's initial change of plea hearing, following a "15 minutes or 10 minutes" conversation with his counsel, Petitioner was still unable to understand the charge to which he was pleading. This was acknowledged by the district court and resulted in a rescheduling of the hearing. At the following hearing, the court's inquiry into Petitioner's understanding of the nature of the charges against him was limited to the following exchanges:

> Court: Is it your desire, sir, to plead guilty to the charges
>
> -- to the lesser-included charge under Count 2
>
> of aiding and abetting and possession with the
>
> intent to distribute a mixture or substance
>
> containing methamphetamine of your own free will
>
> because you are, in fact, guilty of that charge?
>
> Petitioner: Yes

…

Court: [D]o you understand that if there was a trial in your case, the government would be required to prove that you aiding and abetting others -- Was it aiding and abetting others or is it just aiding and abetting distribution?

Prosecution: Aiding and abetting others.

Court: Alright. Aiding and abetting others possessed with intent to distribute a mixture or substance containing a detectable amount of methamphetamine, which is a lesser-included charge contained within Count 2 of the indictment?

Petitioner: Yes

…

Court: [Petitioner], to the lesser-included charge under Count 2 of aiding and abetting the possession with the intent to distribute a mixture or substance

containing methamphetamine, as that is all more fully and specifically set out as a lesser-included charge under Count 2, how do you wish to plead, guilty or not guilty?

Petitioner: Guilty

Court: I find, sir, that you are fully competent and capable of entering an informed plea. *I find that you're aware of the nature of the charges against you and also aware of the consequences of your plea. I find that your plea is made knowingly and voluntarily; further, that it is supported by an independent basis in fact which contains all of the essential elements of the offense charged against you.* I therefore, accept your plea and adjudge you guilty as charged within that lesser-included offense. (emphasis added).

Contrary to the declarations of the district court, there is nothing on the record to substantiate the claims that Petitioner was "aware of the nature of the charges against [him]," "aware of the consequences of [his] plea," that "[his] plea was made "knowingly and voluntarily," or that "[his plea] was supported by an independent basis in fact which contains all of the essential elements of the offense charged against [him]." The elements of the underlying charge, aiding and abetting others in

possession with intent to distribute were not discussed by the district court at either hearing or in the plea agreement. Because there is no evidence to support the claim that Petitioner had any understanding whatsoever of the nature of the charge against him or the elements underlying that charge, Petitioner's plea was made unknowingly and involuntarily in direct conflict with Rule 11(b)(1)(G) and Rule 11(b)(2).

Because Petitioner did not object to these Rule 11 errors at the district court, Petitioner had the burden to show plain error under Rule 52(b). *Frook*, 616 F.3d at 775; *see also Olano*, 507 U.S. at 732-734. "Under plain error review, the defendant must show (1) an error that, (2) was plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings." *Haubrich*, 744 F.3d at 558 (citations omitted). In its review, the appellate court may consult the entire record, especially when considering the effects of any error on a defendant's substantial rights. *Vonn*, 535 U.S. at 59; *see also Young*, 470 U.S. at 16 ("In reviewing criminal cases, it is particularly important for appellate courts to relive the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure…") (citing *Johnson v. United States*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

"Deviation from a legal rule is "error" unless the rule has been waived." *Olano*, 507 U.S. 732. "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-734; *see also Puckett*, 556 U.S. at 135. For an error to qualify as "plain," it must be "clear" or

"obvious." *Olano*, 507 U.S. at 732. "A Rule 11 error affects substantial rights only where the defendant shows a reasonable probability that but for the error, he would not have entered a guilty plea.'" *Haubrich*, 744 F.3d at 558 (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)); *see also Olano*, 507 U.S. at 734 ("The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings."). "If the first three criteria are met, then this court should correct the error if it 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Frook*, 616 F.3d at 776 (citing *Olano*, 507 U.S. at 736).

Because Petitioner never waived or intentionally relinquished his Rule 11 rights, and because the violation of those rights is clear based on the lack of any explanation of the elements of the underlying charge or statements regarding Petitioner's knowledge or state of mind at the time of the alleged crime, these violations rose to the level of cognizable plain errors. These errors were not only plain, but they were also incredibly consequential and negatively impacted Petitioner's substantial rights because "there is a reasonable probability that he would not have pled guilty had he known there was no factual basis for the plea." *United States v. Wroblewski*, 816 F.3d 1021, 1026 (8th Cir. 2016). The sentencing hearing, where Petitioner raised a number of objections to the PSR, proves that this is not only a reasonable possibility but a near certainty. Petitioner "den[ied] knowing that Mr.

Medina-Herrera was transporting narcotics," an assertion that is in direct conflict with the nature of the charge underlying the plea agreement and negates nearly all of the necessary elements. This "contradiction between the plea and the denial of the mental state alleged bespoke the prejudice of an unknowing plea." *Vonn*, 535 U.S. at 69.

During the exchange that followed Petitioner's objections, the district court engaged directly with Petitioner's counsel, who not only seemed confused as to the charge that Petitioner was being sentenced for – "My understanding of the underlying charge is it was some sort of possession." – but also went on to walk back Petitioner's objections and reframe them entirely – Court: "And so I guess your point is that the defendant knew he was making contact to facilitate this crime that he pled guilty to but he did not previously know that person. Is that kind of the gist of all of this?" Petitioner's counsel: "That is my understanding, yes, Judge." This conversation completely circumvented the Petitioner, who was never addressed directly and who was only able to participate in any of the hearings through the assistance of a translator.

While it is not clear that the Petitioner was aware of what was transpiring between his counsel and the court, it is undeniable that the Petitioner instructed his counsel to state that Petitioner did not know that Medina-Herrera was transporting narcotics. When the topic of Petitioner's level of knowledge was raised by the court, the prosecution justified avoiding any further inquiry through circular reasoning: "the level of his knowledge is, of course, subject to interpretation; but considering the

fact that he admitted to aiding and abetting possession with intent to distribute – as the Court indicated, I don't know how necessary it is to drill down that far." Following the prosecution's lead, the court inquired no further into what Petitioner knew at the time of the alleged crime.

The court of appeals erred by not exercising its discretion to remedy these errors, which "seriously affected the fairness, integrity, and public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160 (1936). Petitioner was allowed to plead guilty to a crime the facts of which are entirely unsupported by the record. While the prosecution was well aware of the elements of the charge underlying Petitioner's guilty plea, there is no evidence that Petitioner ever understood the nature of the charge to which he eventually pleaded guilty. Most strikingly, these errors could have been corrected in mere minutes during Petitioner's plea colloquy when Petitioner sat in the courtroom, under oath, answering questions from the district court. However, instead of simply asking Petitioner whether or not he knew Medina-Herrera was in possession of narcotics, the district court took the prosecution's word for it.

What happened to the Petitioner was unfair and strikes at the core of the court's integrity as an institution of justice. When everything on the record painted Petitioner as someone going through the motions without an understanding of what was occurring, the district court took advantage; it shirked its responsibility to seek out the truth of what took place on January 11, 2017, and instead, it allowed a man to send himself to prison without parole before even making sure he knew what he

was doing, much less that he had actually committed the crime. The district court shrugged off a 5-minute conversation that would have made Petitioner's level of knowledge inarguable, instead opting to send a man to prison for 10-years while his level of knowledge was "subject to interpretation" at best, nonexistent at worst.

VII. CONCLUSION

The petition for writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

SWIECICKI & MUSKETT, LLC

By: /s/ Christopher S. Swiecicki

Christopher S. Swiecicki #295792
16100 Chesterfield Parkway W, Suite 308
Chesterfield, MO 63017
636.778.0209 Office
314.341.5796 Cell
636.238.4358 Fax
Chris@SwiecickiLaw.com
Attorney for Petitioner

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