No. _____

In the Supreme Court of the United States

CHRISTOPHER ERNEST MARTINEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The type and quantum of evidence necessary to constitute an adequate factual basis under Federal Rule of Criminal Procedure 11(b)(3) is well established: there must be some evidence on the record that the conduct which the defendant admits matches the elements of the offense to which the defendant has pleaded guilty. *See McCarthy v. United States*, 394 U.S. 459, 467 (1969); Fed. R. Crim. P. 11, advisory committee's notes to 1966 amendment.

The question presented is: Where the record identifies *no* conduct that matches the clearly established and uncontested elements of the crime of conviction, is the district court's error in accepting the guilty plea under Federal Rules of Criminal Procedure 11(b)(3) "plain," regardless of whether the precedent has established the quantum of evidence the Government was required to prove?

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Petitioner Christopher Ernest Martinez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on January 9, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Martinez*, No. 7:19-cr-00219-DC (W.D. Tex. June 17, 2020) (judgment)
- *United States v. Martinez*, No. 20-50497 (5th Cir. Jan. 9, 2023) (per curiam) (unpublished)

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A copy of the unpublished opinion of the court of appeals, *United States v. Martinez*, No. 20-50497 (5th Cir. Jan. 9, 2023) (per curiam), is reproduced at Pet. App. 1a–7a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on January 9, 2023. This petition is filed within 90 days after entry of the judgment. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND RULE INVOLVED

18 U.S.C. § 2251(a)

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, … with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished … if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign commerce by any means, including by computer ….

18 U.S.C. § 2(a)

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

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

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

STATEMENT

1. Petitioner Christopher Ernest Martinez and his girlfriend, Kelsey Hubbard, were the subject of an eight-count Indictment related to the production, distribution, and receipt of child pornography. Petitioner was charged with two counts of aiding and abetting the production of child pornography on June 5, 2019, and September 13, 2019, in violation of 18 U.S.C. §§ 2, 2251(a) (counts one and two); three counts of distributing child pornography on September 18, 2019, in violation of 18 U.S.C. § 2252(a)(2) (counts five, six, and seven); and one count of receipt of child pornography on September 26, 2019, in violation of 18 U.S.C. § 2252(a)(2) (count eight).

Relevant to this appeal, counts one and two in the Indictment charged Petitioner as follows:

> COUNT ONE
> [18 U.S.C. § 2251(a)]
> That on or about June 5, 2019, in the Western District of Texas, the Defendants,
>
> KELSEY RENE HUBBARD AND
> CHRISTOPHER ERNEST MARTINEZ,
>
> aided and abetted by each other, did employ, use, persuade, induce, entice, and coerce a minor to engage in sexually ex-

> plicit conduct for the purpose of producing a visual depiction of such conduct, using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including computer, in violation of Title 18, United States Code §§ 2251(a) and 2.
>
> COUNT TWO
> [18 U.S.C. § 2251(a)]
>
> That on or about September 13, 2019, in the Western District of Texas, the Defendants,
>
> KELSEY RENEE HUBBARD AND
> CHRISTOPHER ERNEST MARTINEZ,
>
> aided and abetted by each other, did employ, use, persuade, induce entice, and coerce a minor to engage in sexually explicit conduct for the purposes of producing a visual depiction of such conduct, using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, including by computer, in violation of Title 18, United States Code, §§ 2251(a) and 2.

ROA.26–27.[1]

2. Petitioner pleaded guilty to the two aiding-and-abetting production counts (counts one and two), and one distribution count (count five) pursuant to a written plea agreement.[2] ROA.238–52. The plea agreement did not identify the elements of an aiding-and-

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[1] "ROA" refers to the pagination of the record on appeal filed in the Fifth Circuit Court of Appeals.

[2] In exchange for pleading guilty to counts one, two, and five, the Government dismissed counts six, seven, and eight.

abetting offense under 18 U.S.C. § 2. The factual basis summarized the narrative from the detective's affidavit attached to the criminal complaint. ROA.10–12, 240–43. Relevant to counts one and two, the factual basis established that Hubbard took the pornographic photos of her minor daughter on June 5 and September 13, 2019, using her cell phone.

The factual basis also established that Petitioner sent other images of child pornography, unrelated to Hubbard's daughter, to Hubbard on September 18, 2019.[3] On September 26, 2019, Hubbard texted the pornographic images she took on June 5 and September 13 to Petitioner in response to his texts, "Baby please send me [MV-1's] photos again…I think you forgot the other night," and later, "Baby please call me before you're out for the night…and I need those pics of [MV-1] please."

When Hubbard was arrested on October 3, 2019, she admitted to sending the texts to Petitioner containing the pornographic images of her daughter. Petitioner was arrested on October 8, 2019,

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[3] This admission supported Petitioner's plea of guilty to count five, which he did not challenge on appeal.

and admitted that he and Hubbard viewed internet child pornography together. He also admitted to the presence of child pornography on his phone and that he viewed those images.

The factual basis did not describe how Petitioner participated in or assisted Hubbard when she produced the illicit images on June 5 and September 13, 2019. The only reference to Petitioner's knowledge of or interaction with the illicit photos Hubbard produced was when he requested them weeks later, on September 26, 2019.

3. At the plea hearing, the magistrate judge confirmed that Petition was pleading guilty to counts one, two, and five, and reviewed the charges by reading the Indictment. ROA.80–81. Neither the judge nor the prosecutor identified the elements of aiding-and-abetting liability. Defense counsel waived the right to have the factual basis read in open court. The magistrate judge referred to the plea agreement's factual basis generally and confirmed that Petitioner had read it and that it was accurate. ROA.91–93. The judge made no further inquiry into Petitioner's understanding of the aiding-and-abetting charges, nor did he inquire from the prosecutor or Petitioner what conduct supported those convictions. Petitioner pleaded guilty. The judge recommended that the district court accept the plea agreement and guilty plea, which it did.

4. In the presentence report, the offense conduct restated the detective's affidavit attached to the criminal complaint and the plea agreement's factual basis. ROA.180–83; *see also* ROA.10–12, 240–43. The presentence report identified no additional conduct that illustrated how Petitioner participated in or assisted Hubbard's production of child pornography on June 5 and September 13, 2019.

5. At sentencing, the district court adopted the presentence report. The district court asked only, "[s]o will you admit that you're a predator?" ROA.103. Petitioner acknowledged that he was. The court challenged Petitioner, noting that in his arrest statement he had "act[ed] like you didn't even have any clue that [the images] were vile and disgusting." Petitioner acknowledged that "the pictures sent to me were [child pornography]." ROA.104. The Government added that the images Petitioner sent to Hubbard on September 18 were "examples of the photos that he wanted to receive" when he requested the images from Hubbard on September 26. ROA.105.

The district court imposed 360 months' imprisonment each for counts one and two, and 120 months' imprisonment on count five, all to run consecutively to each other, for a total sentence of 840 months' imprisonment, followed by 10 years' supervised release.

6. Petitioner appealed. His first appellate attorney moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). The Fifth Circuit ordered supplemental briefing because counsel's *Anders* brief did "not adequately address the sufficiency of the factual basis to support the guilty plea as to the two counts of aiding and abetting the production of child pornography, … including whether [Petitioner's] solicitation of photographs was sufficient to establish that he aided and abetted the production of child pornography." Counsel submitted a merits brief arguing, instead, that the factual basis failed to establish that the images depicted child pornography. The Fifth Circuit took no action on the merits of that brief and appointed new appellate counsel.

Petitioner submitted new briefing and argued that the district court plainly erred by accepting Petitioner's guilty plea to counts one and two under Rule 11(b)(3) because the record failed to establish any conduct that matched the clearly established elements of aiding-and-abetting liability under 18 U.S.C. § 2. That is because Hubbard produced the images of child pornography on June 5 and September 13, 2019, and Petitioner requested the images after-the-fact on September 26, 2019. The record contained no facts illustrating that Petitioner shared Hubbard's intent to create the illicit images or that he participated in or assisted Hubbard in

their production. Because the two aiding-and-abetting counts carried the highest statutory penalties, Petitioner's substantial rights were affected because a reasonable probability existed that he would not have pleaded guilty had he realized that the factual basis relied on by the court and the Government failed to show that his conduct violated the elements of 18 U.S.C. § 2. This was especially so because the record also failed to reflect that Petitioner was informed of the elements of aiding-and-abetting liability. The district court's error was serious enough to warrant relief.

7. The Fifth Circuit affirmed, holding that any error under Rule 11(b)(3) was not plain because "there is a dearth of caselaw in our court and elsewhere on the scope of aiding-and-abetting liability in the child pornography context … [and] … our court has [not] articulated a clear standard for what amount of evidence of advanced conduct is necessary for aider-and-abettor liability to attach." Pet. App. 6a–7a.

The court acknowledged the absence of evidence on the record describing how Petitioner assisted Hubbard but reasoned that any error was subject to "reasonable dispute" because there were "other indicia" of guilt and no clarity regarding the quantum of evidence necessary to establish a factual basis. Pet. App. 5a. It pointed to Petitioner's admission to the Indictment, as well as the

facts that he and Hubbard had lived together, they "regularly sent each other images of child pornography," and "[Petitioner] obviously knew the photos existed—otherwise he would not have known to ask Hubbard for them." Pet. App. 5a–6a.

Petitioner respectfully submits that the Fifth Circuit's opinion rests on two insufficient foundations: a fundamental misconception of Rule 11(b)(3)'s evidentiary requirement for the type of evidence that must be on the record before a district court accepts a guilty plea; and distorted readings of case law. Its decision conflicts with Rule 11(b)(3) and decisions of this Court and other circuit courts of appeals, including its own.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit Court of Appeals applied a misguided and unprecedented standard for what counts as an adequate factual basis under Federal Rule of Criminal Procedure 11(b)(3). Under its outlier approach, when the record lacks the requisite *type* of evidence—i.e., conduct that matches the clearly established, essential elements of the crime of conviction—it is not a "plain" error for a district to accept the guilty plea, if there is other "indicia of guilt" unconnected to the elements of the crime and no precedent defining the *quantum* of evidence the Government must produce. The Fifth Circuit's view destroys the rights of defendants that Rule 11(b)(3) is intended to protect and amounts to a breathtaking departure from decisions by this Court and other courts of appeals, including the Fifth Circuit itself. This Court should grant certiorari to clarify that, when the record contains *no* factual evidence of conduct that matches the clearly established elements of the crime, the district court's error in accepting a guilty plea under Rule 11(b)(3) is plain—the question of "how much evidence" is not relevant.

2. Over 97% of federal criminal convictions are pleas of guilty.[4] When properly administered, plea bargaining is an "essential" and "highly desirable" part of the criminal process. *Santobello v. New York*, 404 U.S. 257, 261–62 (1971). Yet, serious consequences flow from guilty pleas:

> A plea of guilty … is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. 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.

Kercheval v. United States, 274 U.S. 220, 223 (1927).

A district court's compliance with Federal Rule of Criminal Procedure 11 ensures the constitutional validity of a guilty plea. The Rule is "designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). Its goal is also to "produce a complete record at the time

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[4] U.S. SENT'G COMM'N, ANN. REP. 56 (Table 11) (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf.

the plea is entered of the factors relevant to this voluntariness determination." *Id.*

Rule 11(b)(3) requires the district court to conduct an inquiry to satisfy itself that a factual basis exists to support the guilty plea. The purpose of this inquiry is self-evident—to make sure that the defendant has actually done what the government says he has done, and what he is pleading guilty to doing. *See McCarthy*, 394 U.S. at 466–67. It is obviously inconsistent with basic principles of due process for a court to accept a guilty plea when there is no basis to conclude that the defendant committed the offense charged. *Id.* at 467. Thus, the Rule 11(b)(3) inquiry protects the defendant from being "railroaded." *See id.* at 459 (matching facts to legal elements 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") (quoting Fed. R. Crim. P. 11, advisory committee's notes to 1966 amendment); *United States v. Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992) (same). That is because the risk of a voluntary, but inaccurate plea "remains a matter of concern" such as when "an innocent defendant is seeking to protect another person." *United States v. Godwin*, 687 F.2d. 585, 589 n.4 (2d Cir. 1982) (cleaned up); *see also United States v. Dayton*, 604 F.2d 931, 935

n.3 (5th Cir. 1979) (en banc) (factual basis requirement is intended to "avoid a wrong conviction, such as occurred in 'The Long Black Veil,' the ghostly song of an innocent man executed").

The *type* of evidence sufficient to ensure the factual basis meets Rule 11(b)(3)'s threshold is well defined—there must be evidence on the record that defendant's conduct matches the legal elements of the crime of conviction. *McCarthy*, 394 U.S. at 467 (there must be a relationship between "the law and acts the defendant admits having committed") (quoting Fed. R. Crim. P. 11(b)(3), advisory committee's notes to 1966 amendment); *see also United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998) (rule requires "matching the facts to the legal elements of the charged crime"); *United States v. Fountain*, 777 F.2d 351, 356 (7th Cir. 1985) (no factual basis when record provided no facts that linked Fountain to the crime).

When there is conduct on the record that matches the legal elements of the crime of conviction, the *quantum* of that evidence necessary to constitute a factual basis has been held to be quite low. *See, e.g.*, *United States v. Gonzales-Negron*, 892 F.3d 485, 487 (1st Cir. 2018) (need only a rational basis in fact); *United States v. Tunning*, 69 F.3d 107, 114 (6th Cir. 1995) (preponderance of the evidence not required); *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (same). Not only is the Rule 11 proceeding not a

searching inquiry, it need not even be an inquiry of the defendant; a district court is permitted to assemble the factual basis by securing facts from a number of sources other than the defendant. *See, e.g.*, *United States v. Graves*, 106 F.3d 342, 345 (10th Cir. 1997) (court may obtain factual basis from presentence report); *Tunning*, 69 F.3d at 112 (court may obtain factual basis from prosecutor's statement). Indeed, nothing in Rule 11 prohibits a court from accepting a plea of guilty in spite of a defendant's protestations of innocence. *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970).

Thus, the Rule 11 inquiry is not concerned with the "details" of the crime, but rather with a skeletal factual basis sufficient to protect the defendant's rights. The goal is to make certain that *some* evidence of defendant's conduct matches the elements of the crime.

3. When there is no record of the requisite *type* of evidence necessary to satisfy Rule 11(b)(3)—conduct that matches the elements of the crime of conviction—whether there is precedent establishing the *quantum* of evidence needed for the error to be plain is not relevant. By holding that precedent was needed to clarify how much evidence the Government was required to prove, *see* Pet. App. 6a, the Fifth Circuit asked the wrong question. Its holding stands in stark contract with the basic—but essential—demands of Rule

11(b)(3), and conflicts with decisions by this Court and other the courts of appeals.

The premise for the Fifth Circuit's holding is that the district court may infer the factual basis if there were "other indicia" of guilt, even if those "other indicia" do not match the legal elements of the crime of conviction. By allowing a factual basis to be based on other "indicia of guilt," the Fifth Circuit undermines the very protections Rule 11 is designed to protect against and permits a district court to infer or assume the essential elements of the offense, rather than ensure that conduct on the record fits the crime. There is no foundation in law or policy to support such a diluted interpretation of Rule 11(b)(3). Indeed, this Court expressly rejected the contention that the goals of Rule 11 can be met by allowing district court judges to "resort to assumptions" not based upon a defendant's admissions of conduct. *McCarthy*, 394 U.S. at 467.

The Fifth Circuit's reformulation of Rule 11(b)(3)'s demands also conflicts with its sister circuits. *See United States v. McCreary-Redd*, 475 F.3d 718, 724–25 (6th Cir. 2007) ("In our judgement, to permit the district court to infer a factual basis in the absence of a record demonstrating the existence of a factual basis would tend to negate the well-established safeguards inherent in the Rule 11(b)(3) mandate.") (cleaned up); *United States v.*

Mastrapa, 509 F.3d 652, 659 (4th Cir. 2007) (factual basis insufficient when based on the "erroneous assumptions"); *United States v. Maher*, 108 F.3d 1513, 1529 (2d Cir. 1997) (Rule 11(b)(3)'s requirement turns on "the relationship between (a) the law and (b) the acts the defendant admits having committed," not "competing inferences"); *United States v. Allen*, 804 F.2d 244 (3d Cir. 1986) (remand when district court may have accepted plea based on erroneous assumptions); *United States v. Thompson*, 680 F.2d 1145, 1155 (7th Cir. 1982) ("the court must scrupulously check to guarantee the facts presently on the record encompass the offense").

When the record is void of factual conduct that matches the legal elements of the crime of conviction, the Rule 11(b)(3) error is plain. *See, e.g.*, *United States v. Goliday*, 41 F.4th 778 (7th Cir. 2022) (holding district court plainly erred by accepting defendant's plea of guilt without an adequate factual basis); *United States v. Carillo*, 860 F.3d 1293, 1306 (10th Cir. 2017) (same); *United States v. Wroblewski*, 816 F.3d 1021, 1025 (8th Cir. 2016) (same); *United States v. Garcia-Paulin*, 627 F.3d 127, 133–34 (5th Cir. 2010) (same); *McCreary-Redd*, 475 F.3d at 725 (same). The Court should not permit such a fundamental rewrite of the Rule 11(b)(3)'s mini-

mal—but essential—standard to allow "other indicia" of guilt—unconnected to the legal elements of the crime of conviction—to pass for an adequate factual basis.

4. This petition should be granted because it reveals that that Rule 11(b)(3)'s flexible standard has a breaking point, which the Fifth Circuit breached. This case is the ideal vehicle for resolution of this issue and affirmation that an adequate factual basis demands, in the first instance, the proper *type* of evidence, not a particular *quantity*—there must be evidence on the record of conduct that matches the legal elements. This is the "rule subject to no exceptions." *Tunning*, 69 F.3d at 111 (quoting *Fountain*, 777 F.2d at 357).

The facts here are simple and the elements of aiding-and-abetting liability under 18 U.S.C. § 2 are clearly established and were uncontested by the parties on appeal. *See Rosemond v. United States*, 572 U.S. 65, 73–76 (2014) (discussing history of 18 U.S.C. § 2). "To aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Id*. at 76 (cleaned up). There must be proof that (1) offense was committed by some person; (2) the defendant shared the criminal intent of the principle; (3) engaged in some

affirmative conduct designed to assist the principle; and (4) sought by action to make that criminal venture successful. *See, e.g.*, *United States v. Scott*, 892 F.3d 791, 798–800 (5th Cir. 2018); Fifth Circuit Pattern Jury Instructions (Criminal), § 2.04 (2019).

The record was unequivocal: Hubbard produced child pornography on June 5 and September 13, 2019. Weeks later, on September 26, Petitioner asked Hubbard to send him the child pornography. The record lacks any evidence that Petitioner participated in or assisted Hubbard's crimes. *Compare, e.g.*, *Bozza v. United States*, 330 U.S. 160, 163–64 (1947) (no evidence that defendant had made, helped to make, or ever took part in the unlawful conduct), *and Garcia-Paulin*, 627 F.3d at 133 (factual basis failed to support aiding-and-abetting liability), *with United States v. Block*, 635 F.3d 721 (5th Cir. 2011) (defendant aided and abetted the sexual exploitation of a minor when he proposed the scheme to exploit the minor and negotiated the deal to sell custody of the child for illicit purposes).

The Fifth Circuit acknowledged the absence of aiding-and-abetting conduct on the record but pointed to other "indicia of guilt." Pet. App. 5a–6a. But these other circumstances fail to match the elements of aiding-and-abetting liability under 18 U.S.C. § 2 as a matter of law.

The court pointed to Petitioner's admission to the conduct described in the Indictment. But the charges in counts one and two do not contain factual allegations; they charge that Petitioner "aided and abetted" Hubbard and then simply track the statutory language of 18 U.S.C. § 2251(a). By admitting to the Indictment, Petitioner admitted to legal conclusions, not factual conduct, which do not support a *factual* basis. *See, e.g.*, *Goliday,* 41 F.4th at 785–86 (rejecting argument that use of term "co-conspirator" supported factual basis because term is legal conclusion); *In re Sealed Case*, 936 F.3d 582, 590 (D.C. Cir. 2019) (defendant "may not stipulate to legal conclusions in plea agreement"); *Garcia-Paulin*, 627 F.3d at 133–34 (indictment provided inadequate factual basis under Rule 11(b)(3) when it tracked only the statutory language); *United States v. Adams*, 448 F.3d 492, 500–01 (2d Cir. 2006) (indictment did not provide adequate factual basis "when defendant never admitted the elements necessary for conviction but merely agreed to plead guilty to them"); *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) (rejecting a reading of indictment and defendant's admission of guilt as adequate for the factual basis); *United States v. Satamian*, 40 F. App'x 405, 406–07 (9th Cir. 2002) (defendant's stipulation that he "assisted" the co-defendant in the

commission of their crime was a legal conclusion not a factual admission to aiding-and-abetting liability).

The court also relied on the fact that Petitioner and Hubbard lived together at the time of the offense. Pet. App. 6a. Nothing in the record indicates where Hubbard was when she produced the illicit photos. Even if she were at home, Petitioner's mere presence at the scene of a crime—their shared residence—without more, is not legally sufficient to prove aiding-and-abetting liability. *See, e.g., Bozza*, 330 U.S. at 163–64 (setting aside conviction based on mere presence); *Hicks v. United States,* 150 U.S. 442, 449–50 (1893) (to be present at a crime is not evidence of guilt as an aider and abetter); *United States v. Williams*, 486 F.3d 377, 381–82 (8th Cir. 2007) (no error when district court refused to enter plea of guilty when defendant admitted only that he was present during crime), *reversed on other grounds*, 552 U.S. 1091 (2008); *United States v. Bancalari*, 110 F.3d 1425, 1429 (9th Cir. 1997) ("mere presence at the scene of the crime and knowledge that the crime is being committed is not enough" to convict for aiding and abetting); *United States v. Williams*, 985 F.2d 749, 753 (5th Cir. 1993) (same); Fifth Circuit Pattern Jury Instructions (Criminal) § 2.04.

The court pointed to the fact that Hubbard and Petitioner sent each other images of child pornography. Pet. App. 6a. While this is

evidence of conduct that would meet elements of receipt, distribution, or possession of child pornography, it does not meet the elements for aiding and abetting Hubbard's production of child pornography on June 5 and September 13. *See* 18 U.S.C. § 2251(a); *United States v. Heinrich*, 57 F.4th 154, 159–62 (3d Cir. 2023) (discussing elements of § 2251(a)).

Finally, the fact that Petitioner "obviously knew" about the photos because he requested them weeks after they were produced, *see* Pet. App. 6a, is not enough. Under § 2 there must be "knowing aid to persons committing federal crimes, with the intent to facilitate the crime." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994). The record is silent about Petitioner's role, if any, when Hubbard produced the illicit photos.

There is nothing in this record that can serve as a substitute for a voluntary admission of conduct that matches the uncontested elements for aiding-and-abetting liability. The district court committed a plain error by accepting Petitioner's guilty plea on counts one and two.

The proceedings below highlight the need for the Court's intervention in this area of law. In refusing to vacate Petitioner's guilty

plea, despite the absence of evidence of conduct matching the elements of aiding-and-abetting liability, the Fifth Circuit eliminated the procedural safeguards of Rule 11(b)(3) that are intended to ensure a plea is "truly voluntary" and that the record of a plea's voluntariness is complete. *McCarthy*, 394 U.S. at 465. The Fifth Circuit's formulation will permit potentially unknowing and involuntary pleas so long as the district court can speculate, infer, or assume some other "indicia of guilt." The harm caused to a defendant, like Petitioner, is particularly acute when the record is also silent about whether he was adequately informed of the elements of aiding-and-abetting liability. *Id.* at 467 n.20 ("where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary requisite to a determination that he understands the meaning of the charges"); *McCreary-Redd*, 475 F.3d at 725–26 (holding that district court failed to establish a factual basis in compliance with Rule 11(b)(3), and to the extent that it was, court failed to determine whether defendant understood the nature of the charges).

CONCLUSION

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

Respectfully submitted.

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DATED: April 10, 2023