NO:

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID CHIDDO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The circuits are divided on whether the Federal Magistrates Act's "additional duties" clause, 28 U.S.C. § 636(b)(3), authorizes magistrates to accept a felony guilty plea. The Eleventh Circuit concluded that a magistrate's acceptance of petitioner's guilty plea was statutorily authorized, that the district court was not required to enter an order authorizing a magistrate-conducted plea, and that no order or report by the magistrate upon acceptance of the plea was required; that rules governing appeal from a magistrate's ruling were inapplicable; and that by stipulating that proffered facts supported the plea, petitioner was barred from appealing, even on a plain error basis, the absence of any factual basis for the plea accepted by the magistrate.

The questions presented are:

1. Does a federal magistrate have authority to accept a felony guilty plea?

2. Where a plea agreement provides that stipulated facts present an adequate basis to sustain a guilty plea, is the right to appeal the district court's failure to elicit a sufficient factual basis waived, precluding even plain error review?

INTERESTED PARTIES

The only parties interested in the proceeding other than those named in the caption of the appellate decision.

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PETITION FOR WRIT OF CERTIORARI

David Chiddo respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 15-15788 in that court on June 8, 2018, *United States v. Chiddo* (not published in the Federal Reporter).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (1a).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on December 1, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const. Art. III, § 1:

> The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Const. amend. V (Due Process Clause):

> No person shall … be deprived of life, liberty, or property, without due

process of law . . . .

28 U.S.C. § 636(b)(3):

> A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

The entire text of 28 U.S.C. § 636 is reproduced in the Appendix. App. 39a-44a.

Fed. R. Crim. P. 11(b)(3):

> 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 OF THE CASE

Petitioner stands convicted and sentenced to prison for 151 months, yet no Article III judge has ever considered whether petitioner committed a crime, and the court of appeals concluded that petitioner is barred from appellate review of the absence of any factual basis for his conviction.

Petitioner was charged on July 21, 2015, with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846, and other related drug offenses. DE:106. Petitioner entered into a plea agreement with the government, which provided for his plea of guilty to the cocaine conspiracy charge in exchange for dismissal of the other drug charges. Petitioner also signed a stipulated factual basis for his guilty plea. App. 35a-38a.

Petitioner appeared before a federal magistrate to enter his guilty plea. The magistrate conducted a colloquy and accepted the plea. App. 17a-28a. The magistrate accepted the factual basis for the plea, which provided that petitioner, on two occasions

in June 2012, had engaged in hand-to-hand sales of cocaine, amounting to a total of 7 grams. App. 37a. The district court thereafter sentenced petitioner to a 151-month term of imprisonment. App. 11a.

Petitioner appealed his conviction, challenging the authority of the magistrate to accept his guilty plea and the absence of a factual basis for the plea. The Eleventh Circuit affirmed, concluding that although the magistrate accepted the plea and adjudicated petitioner guilty, the district court retained authority to overrule the magistrate if requested to do so, and that, with regard to the absence of a factual basis for the plea, a defendant, by stipulation with the government, may waive the requirement of judicial evaluation of the adequacy of the factual basis. App. 4a-10a.

Explaining its prior published decisions on magistrate plea acceptance, the Eleventh Circuit stated:

> This Court applies plain error review to statutory and constitutional challenges to a magistrate judge's acceptance of a felony guilty plea raised for the first time on appeal. *United States v. Woodard*, 387 F.3d 1329, 1331 (11th Cir. 2004) (per curiam). ... [Under *Woodward*] a magistrate judge has the authority under the [Federal Magistrate Act]'s catchall "additional duties" clause to conduct Rule 11 proceedings and accept a felony guilty plea, when the defendant consents. *I d.* [at 1333]; 28 U.S.C. § 636(b)(3). ... [In] *Brown v. United States*[,] 748 F.3d 1045, 1071 n.53 (11th Cir. 2014)[,] [w]e concluded that regardless of whether a magistrate judge categorizes his actions as acceptance of a plea or an R&R, a magistrate judge's actions in a Rule 11 hearing are "akin to a report and recommendation rather than a final adjudication of guilt." Moreover, such actions by a magistrate judge do not violate Article III because a district court retains the ability to review the plea as a matter of law, if requested.

App. 4a-5a.

Turning to the absence of a factual basis for the guilty plea accepted by the magistrate, the court of appeals ruled that petitioner could not challenge that Fed. R. Crim. P. 11 defect on appeal, even on a plain error basis, because petitioner had "invited any alleged errors by the Magistrate Judge." App. 9a. The court of appeals held, by submitting a plea agreement to the magistrate in which he asserted that the stipulated facts established the offense, petitioner had invited any error due to the absence of a factual basis:

> [Petitioner] stated at his change-of-plea hearing that he had received a copy of the superseding indictment, had fully discussed the charges with counsel, and was fully aware of the charges. He also stated that he had read and understood the stipulated factual basis and discussed it with counsel before signing it, i.e., agreeing that the facts stated therein provided a sufficient factual basis for entry of his guilty plea, and that he agreed to the elements of the offense set forth therein. Finally, [petitioner] failed to object to the factual basis of the conviction at the plea hearing and at sentencing. ... Therefore, because [petitioner] invited any error by the Magistrate Judge in determining that he understood the nature of the charges against him and that there was a sufficient factual basis for the guilty plea, this Court is precluded from reviewing these claims.

App. 9a-10a.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari to Consider Whether the Magistrate Lacked Authority to Accept Petitioner's Guilty Plea to a Felony Offense.

The Federal Magistrates Act, 28 U.S.C. § 631–36, limits the tasks that magistrates may perform in criminal cases. Among other things, it authorizes them to "hear and determine" nondispositive pretrial matters, issue reports and recommendations regarding dispositive motions, and, with the defendant's consent, try

misdemeanor cases and enter a sentence on a class A misdemeanor. *See id.* § 636(a)(3), 636(a)(5), 636(b); 18 U.S.C. § 3401(b). The Act also contains a catchall provision that authorizes magistrates to perform only "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

Congress carefully structured the Act to avoid "improperly delegat [ing]" their core duties to magistrates, *Mathews v. Weber*, 423 U.S. 261, 269 (1976), "in the interests of policy as well as constitutional constraints," *Gomez v. United States*, 490 U.S. 858, 872 (1989). At the same time it authorized magistrates to preside over civil and misdemeanor trials, it recognized that magistrates "[could] only accept guilty pleas in misdemeanor cases." S. Rep. No. 96-74, at 17 (1979). The Senate would have "permit[ted] a … magistrate to accept a guilty plea … in a case lying outside his trial jurisdiction" if the defendant consented and the district court "assur[ed] himself that there [wa]s a factual basis for the plea accepted" prior to sentencing. *Id.* But the House disagreed, the Senate "recede[d]," and Congress asked the Judicial Conference to "study the issue." S. Rep. No. 96-322, at 10 (1979) (Conf. Rep.).

The Judicial Conference shared the House's concerns: because "the taking of a guilty plea is a critical step in a criminal case and represents a disposition on the merits," it recommended that "no change be made in the current law that reserves [guilty pleas] to judges." The Federal Magistrate System: Report to the Congress by the Judicial Conference of the United States 52, 53 (1981); *see also* Administrative Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150

F.R.D. 247, 306 (1993) (noting the Magistrate Judges Committee's "strong view that … the acceptance of guilty pleas … should not be delegated to magistrate judges" regardless of consent).

Beyond these specifically enumerated grants of authority, the Act also contains a catchall provision: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). "The general, nonspecific terms of [§ 636(b)(3)], preceded by text that sets out permissible duties in more precise terms, constitute a residual or general category that must not be interpreted in terms so expansive that the paragraph overshadows all that goes before." *Gonzalez v. United States*, 553 U.S. 242, 245 (2008). Because the "statute creates an office to which it assigns specific duties, those duties outline the attributes of the office. Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties." *Gomez*, 490 U.S. at 864. To determine whether a designated task qualifies as a permissible "additional dut[y]" under the statute, courts ask whether it is "comparable in responsibility and importance" to an enumerated duty. *Peretz*, 501 U.S. 923, 933 (1991).

In conflict with the Eleventh Circuit's decision in petitioner's case, the Seventh Circuit has held that a magistrate lacks authority to accept a guilty plea. *United States v. Harden*, 758 F.3d 886, 889 (7th Cir. 2014). Reversing Harden's guilty plea, the Seventh Circuit explained that, under *Peretz*, whether a task not listed in the statute qualifies as a "permissible additional duty" that a magistrate may perform

turns on whether the task is "comparable" to the enumerated duties in terms of "responsibility and importance." 758 F.3d at 888 (internal quotation marks omitted). Under that standard, accepting a guilty plea does not qualify because it is simply too important. As the "long, searching colloquy" required by Federal Rule of Criminal Procedure 11(b) demonstrates, a defendant who pleads guilty waives one of his most crucial rights—the right to a trial—and often waives other essential rights, such as the right to appellate and post-conviction review. *Id.*; *see id.* at 888-89. Because so much hangs in the balance, the court must ensure the defendant is competent, is acting voluntarily, comprehends the charges, understands the rights he relinquishes by pleading guilty, and knows the terms of any plea agreement. *Id.* at 888.

The Seventh Circuit also explained that accepting a guilty plea "final[ly] and consequential[ly] shift[s]" the defendant's status in a way that differs from the voir dire proceedings authorized by *Peretz*. *Harden*, 758 F.3d at 889. Voir dire, of course, is followed by a trial; while it shapes how that trial will play out, it does not by itself resolve the case. Once the court has accepted the plea, however, "the prosecution is at the same stage as if a jury had just returned a verdict of guilty." *Id.* Given that finality, accepting a guilty plea "is quite similar in importance to the conducting of a felony trial," a proceeding that it is "quite clear" a magistrate may not conduct "even with the consent of the parties." *Id.* at 889 (citing *Gomez,* 490 U.S. at 873-74 (1989)). Under *Gomez*, "the carefully defined grant of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial." 490 U.S. at 872.

The Seventh Circuit acknowledged that its "reasoning place[d it] in conflict with several of [its] sister circuits." *Harden*, 758 F.3d at 891; *see also id.* at 891 n.1 (noting that because the decision "create[d] a split among circuits," the panel circulated it to the full court but "[n]one voted to hear [it] en banc"). It explained, however, that those courts have placed too much emphasis on *Peretz*'s statement that Congress intended to give courts "'significant leeway to experiment with possible improvements in the efficiency of the judicial process'" and on concerns about caseloads. *Id.* at 891 (quoting *Peretz*, 501 U.S. at 932). "[T]he [Supreme] Court has never suggested that magistrate judges, with the parties' consent, may perform every duty of an Article III judge, regardless of the duty's importance," and "the prevalence of guilty pleas does not render them less important, or the protections waived through them any less fundamental." *Id.* Because "[a] felony guilty plea is equal in importance to a felony trial leading to a verdict of guilty," the district court "cannot delegate this vital task" "without explicit authorization from Congress." *Id.*

Like the Seventh Circuit, the Ninth Circuit has explained the limitations on magistrate authority in relation to felony pleas. In *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (*en banc*), the defendant consented to have his plea colloquy—but not the actual acceptance of his plea—performed by a magistrate. The magistrate then recommended that the district court accept the plea. The court accepted the report and recommendation without any objection, and the defendant unsuccessfully moved to withdraw his plea. On appeal, he challenged the magistrate's authority to conduct his plea colloquy.

The Ninth Circuit rejected his argument, but in doing so suggested that only district judges, not magistrates, may actually accept guilty pleas. The court began by reasoning that the tasks involved in overseeing a plea colloquy adequately resemble those at stake in the enumerated duties of holding a suppression hearing or making a probable cause determination to qualify under the "additional duties" clause. *See id.* at 1120. It found "further support" for this conclusion by pointing to the "three levels of procedural safeguards inhering within existing practice," one of which was defendants' "absolute right to withdraw guilty pleas taken by magistrate judges at any time before they are accepted by the district court." *Id.* at 1121 (emphasis added).

This protection, key to the Ninth Circuit's decision, exists only if magistrates cannot accept pleas. Under Federal Rule of Criminal Procedure 11(d)(1), defendants may withdraw a plea "for any reason or no reason" "before the court accepts [it]." Under Federal Rule of Criminal Procedure 11(d)(2), however, they may only withdraw for a "fair and just reason" after the court accepts it. Thus, given the role that the defendant's "absolute right" to withdraw played in *Reyna-Tapia*'s reasoning, the Ninth Circuit would likely side with the Seventh and hold that magistrates may supervise plea colloquies but not finally accept the resulting pleas themselves.

The Fourth and Tenth Circuits are aligned with the Eleventh Circuit in failing to distinguish between felony case decision, in the acceptance of a guilty plea, and mere recommendations made to the Article III judge. These circuits have explicitly held—in opinions containing extensive analysis and full consideration of the issue—that magistrates may accept felony guilty pleas with the defendant's consent. *See United*

States v. Benton, 523 F.3d 424, 433 (4th Cir. 2008); *United States v. Salas-Garcia*, 698 F.3d 1242, 1253 (10th Cir. 2012).

In *Benton*, the court concluded that acceptance of a guilty plea is an "additional duty" that may be delegated under 28 U.S.C. 636(b)(3) and that such a delegation, with the parties' consent, is constitutional. 523 F.3d at 433. The court concluded that a magistrate's acceptance of a plea is "the natural culmination of a plea colloquy"; involves "*far less discretion* than that necessary to perform many tasks unquestionably" authorized; and is "comparable in responsibility and importance" to the colloquy components of conviction by plea. *Id.* at 431-432 (emphasis added). The court reasoned that "a defendant's consent waives any individual right" under Article III and that structural Article III concerns are satisfied by the district court's "ultimate control over the magistrate's plea acceptance." *Id.* at 432. When the parties have consented, "acceptance of a plea is a duty that does not exceed the responsibility and importance of the *more complex* tasks a magistrate is explicitly authorized to perform ... and the ultimate control of the district judge over the plea process alleviates any constitutional concerns." *Id.* (emphasis added).

Contrary to the Fourth Circuit, the premise that the actions and discretion of a magistrate in following a colloquy formula under Fed. R. Crim. P. 11 are just as complex, and no more ministerial, than *deciding* whether a the plea meets all of the societal goals and protects the constitutional interests at stage, including assuring that the defendant's guilt of a federal offense is sufficiently established by an asserted factual basis (and is not the product of the confusion, compromise, or creativity on the

part of the prosecution or defense) is incorrect. But more importantly, the *Benton* complexity analogy is not so indisputably correct as to permit expanding magistrate authority beyond rule and constitutional limits. *See Benton*, 523 F.3d at 431-32 (reasoning that accepting a plea "involves none of the complexity and requires far less discretion" than conducting felony voir dire or supervising a civil trial because an allocution is a "largely ministerial function" and a "catechism"); *Woodard*, 387 F.3d at 1332-33 (reasoning that a plea colloquy is a "highly structured event" that involves questions "remarkably similar" to those involved in making a recommendation on a suppression motion).

Accepting a felony plea is not a duty "comparable in responsibility and importance" to those spelled out in the Federal Magistrate's Act. *Peretz*, 501 U.S. at 933. Taking such a step is hardly the kind of "subordinate dut[y]" that Congress sought to transfer away from district courts so they would not be "distract[ed]" from other, "more important matters." *Id.* at 934. Unlike someone who loses a suppression motion (if the district court ultimately agrees with the magistrate's recommendation), someone whose felony case proceeds to trial after voir dire, or someone who may have to pay damages if she loses her civil case, "[a] defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). A guilty plea is thus "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial." *Brady v. United States*, 397 U.S. 742,

748 (1970). Accepting the surrender of these rights—and the train of direct and collateral consequences that follow from it—is an extremely important decision, as Rule 11's detailed colloquy procedures illustrate. *Cf. Libretti v. United States*, 516 U.S. 29, 49-50 (1995) (noting that Rule 11 is designed to ensure the defendant's waiver is knowing and voluntary).

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("[Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system." (internal quotation marks omitted)). As a consequence of the proliferation of use of the "additional duties" provision, that parallel criminal justice system is increasingly administered in the first instance by magistrates, not Article III judges.

Whether that role in the criminal justice system comports with the Magistrates Act's precisely crafted scheme, and Article III's essential limits, is an important question. A felony guilty plea carries with it enormous consequences, and not always just for the individuals involved, but frequently in changing the ways entire businesses or other segments of society self-govern, in order to avoid significant jail time, the threat of deportation, disenfranchisement and the loss of other civil rights, and immeasurable social stigma.

The system's pervasive incentives to plead guilty as quickly as possible—including the prosecutor's significant information advantage and almost

unilateral control over the defendant's sentence through charging and Guidelines-related decisions—have already led some innocent defendants to plead guilty and some judges to question whether the system as a whole is just. *See* Univ. of Mich. Law School, *Nat'l Registry of Exonerations*, http://bit.ly/1VZ3VtQ (last visited Aug. 7, 2015); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014). In the world of near-universal plea bargaining, it is important for the Court to mark the lines between what Congress authorized magistrates to do and what it reserved for Article III judges.

In addition, constitutional avoidance counsels in favor of prohibiting non-Article III judges from accepting felony pleas. Authorizing magistrates to accept felony pleas would present such a risk. *Gomez* noted "abiding concerns regarding the constitutionality of delegating felony trial duties to magistrates," "even with defendant's waiver of rights." 490 U.S. at 863 & n.9. Those concerns were justified. Adjudicating someone guilty of a federal felony offense is a core part of an Article III judge's responsibilities, an essential individual and structural protection. *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (former military personnel may not be prosecuted before military tribunals because those tribunals do not have "the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts," including life tenure and salary protection).

The avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."

Clark v. Martinez, 543 U.S. 371, 381 (2005). Because the canon "is not a method of adjudicating constitutional questions by other means," *Clark*, 543 U.S. at 381, the question is not whether the interpretation at issue would in fact violate the Constitution, but rather whether it"presents a significant risk" of doing so. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

Accordingly, this Court has stressed the limited, carefully supervised role that magistrates play when it has addressed Article III challenges to their actions. *See United States v. Raddatz*, 447 U.S. 667, 681-82 (1980) (reserving judgment on whether Congress could authorize a magistrate to "render[] a final decision on a suppression motion" because the Act only authorized magistrates to make recommendations subject to *de novo* review); *Peretz*, 501 U.S. at 938 (requiring the handling of the matter to "invariably remain[] completely in control" of the district court (internal quotation marks omitted)). When a magistrate finally accepts a plea, that control is weakened or removed entirely; the magistrate enters a judgment of guilty and thereby brings about a "final and consequential shift" in the defendant's status. 758 F.3d at 889.

The Magistrates Act need not be construed to raise these complicated questions. It does not list accepting pleas as one of a magistrate's duties; rather, the question is whether accepting pleas is sufficiently similar to the enumerated tasks to fall within the "additional duties" clause. Because nothing in the statute compels the Court to understand this catchall provision to cover accepting felony pleas, it should not do so, thereby eliminating any constitutional concerns raised by a broader reading of the Magistrates Act. *See Gomez*, 490 U.S. at 864, 871-74 (holding that unconsented felony

voir dire does not fall within the "additional duties" clause in part because of constitutional concerns).

The recurring nature of this issue further underscores its importance. The magistrate shortcut to felony adjudication has become the norm in federal courts across the country—making it all the more difficult for any defendant to summon up the courage to *disrupt the system* by enforcing the right to adjudication by an Article III judge.

The importance of acceptance versus mere colloquy-and-report is heightened by the impact on a defendant's right to withdraw a plea. Before a court accepts the plea, the defendant may withdraw it "for any reason or no reason." Fed. R. Crim. P. 11(d)(1). In light of this rule, courts have held that defendants may unconditionally withdraw not-yet-accepted pleas even where a magistrate had already overseen the colloquy, issued a report and recommendation, and the district court received no timely objection. *See United States v. Dávila-Ruiz*, 790 F.3d 249, 252 (1st Cir. 2015) (vacating in such circumstances because "Rule 11(d)(1) is clear as a bell: it renders a district court powerless to deny a plea-withdrawal motion when the motion is made before the plea has been accepted"); *United States v. Arami*, 536 F.3d 479, 483 (5th Cir. 2008) (reversing in such circumstances because "Rule 11(d)(1) is an absolute rule: a defendant has an absolute right to withdraw his or her guilty plea before the court accepts it"); *cf. United States v. Mendez-Santana*, 645 F.3d 822, 826-27 (6th Cir. 2011) (noting that the 2002 amendment to Rule 11 "vitiated" old cases requiring a reason any time a plea was withdrawn before sentencing by granting defendants "an absolute

right to withdraw an unaccepted guilty plea").

After the plea is accepted, however, the defendant must show a "fair and just reason" to withdraw. Fed. R. Crim. P. 11(d)(2)(B); *see, e.g., Benton*, 523 F.3d at 428-33 (rejecting defendant's argument that he need not show a reason because the magistrate had authority to accept his plea and had done so). And if the district court denies such a request, its decision is reviewed only for abuse of discretion. *See, e.g., United States v. Symington*, 781 F.3d 1308, 1312 (11th Cir. 2015); *United States v. Fard*, 775 F.3d 939, 943 (7th Cir. 2015); *United States v. Kerr*, 752 F.3d 206, 223-24 (2d Cir. 2014); *United States v. Briggs*, 623 F.3d 724, 727 (9th Cir. 2013). Given these rules, whether a magistrate can accept a plea or is instead limited to making a report and recommendation has significant consequences for the defendant's rights.

The magistrate in petitioner's case acted in derogation of the jurisdictional and constitutional limits that govern the finding of a defendant guilty of a felony offense. The magistrate failed to comply with any of the procedural limitations on involvement in plea proceedings. There was no order of referral of the matter to the magistrate. The magistrate did not correctly inform petitioner of his right to object to acceptance of the guilty plea and erroneously advised him regarding a right to appeal that never arose because the magistrate never entered either a report or an order on the plea and the district court never entered any order adopting the magistrate's actions. This Court should enforce the line that Congress drew between what Article I magistrates may do and what Article III judges must do. As this Court has recognized, it has a duty "to correct … violations of a statutory provision that embodies a strong policy

concerning the proper administration of judicial business." *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (internal quotation marks omitted). That task is particularly important under the "additional duties" clause of the Magistrates Act, which the Court has repeatedly warned should not be expanded in such a way as to "overshadow[]" all the careful limitations that "go[] before [it]." *Gonzalez*, 553 U.S. at 245; *see also Gomez*, 490 U.S. at 864. Whether the Act authorizes magistrates to accept felony guilty pleas is thus inherently important and warrants granting certiorari.

II. The Court Should Grant Certiorari to Consider Whether Petitioner Is Barred from Appealing the Absence of a Factual Basis for His Guilty Plea Because He Stipulated to the Existence of a Factual Basis.

"Before 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) (emphasis added). Petitioner's plea proceeding was marked by the absence of a factual basis supporting the conspiracy plea, as required under Rule 11(b)(3). The decision of the Eleventh Circuit that petitioner, based on the terms of his plea agreement, could not challenge the absence of a factual basis for the conviction is inconsistent with this Court's decisions in *Class v. United States*, 138 S.Ct. 798 (2018), and *North Carolina v. Alford*, 400 U.S. 25 (1970). It is a fundamental requirement of due process that a defendant's guilty plea not be accepted absent a factual basis and the defendant's understanding of the offense. A plea entered without a factual predicate is not a voluntary plea and violates due process. *Alford*, 400 U.S. at 37-38.

In *Class*, the Court reversed as unduly restrictive a decision expanding the scope

of implied waivers of important rights in a guilty plea proceeding. *Class*, 138 S.Ct. at 805 (explaining that a "guilty plea does not make irrelevant" certain constitutional or jurisdictional claims). The Court explained in *Class* that a defendant's factual admissions in a plea do not waive the right to challenge the authority of the government to prosecute such conduct:

> Unlike the defendants in *Broce*, Class' challenge does not in any way deny that he engaged in the conduct to which he admitted. Instead, like the defendants in Blackledge and Menna, he seeks to raise a claim which, " 'judged on its face' " based upon the existing record, would extinguish the government's power to " 'constitutionally prosecute' " the defendant if the claim were successful.

138 S.Ct. at 805–06 (citing *United States v. Broce*, 488 U.S. 563, 575 (1989); *Blackledge v. Perry*, 417 U.S. 21 (1974); *Menna v. New York*, 423 U.S. 61, 62-62 (1975)).

The Court should therefore grant certiorari and remand in light of *Class* or should hear the case on the merits to preserve the essential requirement of judicial assurance that there is a basis for the guilty plea.[1]

The Eleventh Circuit adopted the government's contention that because petitioner's plea agreement admitted his *legal* guilt, that foreclosed review of the factual basis issue. Contrary to the government's view, a defendant at a plea colloquy cannot relieve the court of the responsibility to consider whether the conduct admitted

[1] An appeal waiver included in a plea agreement does not bar challenges to the process leading to the plea. Challenges that typically survive appeal waivers include those asserting that the district court failed to comply with the important strictures of Rule 11, which governs entry of guilty pleas. *See United States v. Adams*, 448 F.3d 492, 497 (2d Cir. 2006); *cf. United States v. Pattee*, 820 F.3d 496, 504 (2d Cir. 2016) ("Rule 11, with its list of elements that the Supreme Court and Congress have determined should be addressed with every defendant, constitutes a required minimum in assuring that a defendant understands the nature of the charges, the penalties he faces, and the rights that he is giving up by entering a plea.").

fell within the definition of a criminal offense under the United States Code. This is a question of law. Thus, it is the *court* that determines whether the facts adduced at a plea hearing suffice to establish a basis for a criminal conviction; indeed, this is one of the primary purposes of a plea colloquy. *See* Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); Advisory Committee Notes on Rule 11 (1966 Amendments) (the purpose of the inquiry into the factual basis for the plea is to "protect a defendant [who is pleading guilty] without realizing that his conduct does not actually fall within the charge").

Because a Rule 11(b)(3) inquiry is designed for a court to determine whether there was sufficient evidence to support entry of a judgment of conviction, it constitutes, in effect, a form of sufficiency of the evidence inquiry—the type of inquiry that presents a legal question. Thus, the government's reliance on petitioner's "admissions" to having violated provisions of the United States Code is insufficient to override petitioner's Rule 11 and due process rights.

Petitioner conceded facts showing that he twice sold cocaine in minor hand-to-had transactions conducted on the basis of individually-negotiated transactions. App. 37a. The plea agreement, on which the magistrate based the finding of a factual basis, App. 26a, merely set forth generic facts of two arms-length drug sales by petitioner, each sale involving less than 4 grams of cocaine. *Id.* Neither the plea nor the post-plea proceedings revealed facts showing petitioner was guilty of a conspiracy offense.

But the court of appeals held that appellate review was barred because

petitioner assented to the legal conclusion offered in the plea agreement that he violated the drug conspiracy laws and that the agreed facts provided a basis for that conclusion. App. 9a-10a. The Eleventh Circuit ruled that petitioner's plea agreement *invited* the magistrate's acceptance of any inadequate factual basis for the plea. *Id.*

The Eleventh Circuit's ruling—that a defendant may simply stipulate away the need for a reviewable judicial finding of a basis for the conviction—contravenes not only this Court's recent decision in *Class*, but alsothis Court's decision in *Alford* to this extent: particularly in the absence of the defendant's admission of commission of acts constituting a crime, the court must review carefully the facts of the case to assure that the plea passes constitutional muster. 400 U.S. at 37-38.

The Eleventh Circuit's holding that barred petitioner from appealing the absence of a factual basis for his plea undermines a core component of the Fed. R. Crim. P. 11 plea colloquy. The plea agreement included petitioner's agreement that he was guilty of conspiracy, but his mere acquiescence to the conspiracy charge added nothing to the factual basis for the plea. Conclusory assertions as to engaging in a "conspiracy" are inadequate to constitute a requisite factual basis within the meaning of Fed. R. Crim. P. 11, and the facts instead fell well short of showing petitioner's guilt of conspiracy.

No other circuit has adopted the Eleventh Circuit's approach of dispensing entirely with not only Article III consideration of a factual basis, but of all judicial obligations in the evaluation of a factual basis for a guilty plea. *See* App. 9a-10a. The magistrate's failure to elicit a factual basis for the plea called for appellate review, at least on a plain error basis. This Court held in *Alford* that a negotiated guilty plea

entered over *protestations* of factual innocence comported with due process of law and the intelligence and voluntariness required to waive the right to trial by jury, because refusal to allow a court to accept a plea of guilty to a lesser charge in the face of overwhelming evidence of the defendant's guilt would not serve the interests of the defendant. Thus, it is precisely where the factual basis is strong that a court may ignore that what the defendant is prepared factually to admit to is not a crime. This Court held that where such "strong evidence of actual guilt" significantly negated Alford's claim of innocence, there was no constitutional error in accepting the plea.

Although petitioner was not protesting his innocence, neither was he admitting to facts that would show his guilt. In such a circumstance, the same constitutional premises for requiring a judicial finding of actual evidence of guilt applies. Thus, contrary to the Eleventh Circuit, it is precisely when the defendant proceeds to admit only facts that do not show his guilt that close judicial review is necessary. *See United States v. Davis*, 516 F.2d 574, 578 (7th Cir. 1975) (noting that a defendant's failure to admit guilt is a "danger signal" requiring greater judicial review). Much like an *Alford* plea clearly puts the court on notice that the guilty plea is problematic and the risk of a false conviction greater, *see United States v. Buckley*, 847 F.2d 991, 994 (1st Cir. 1988); *Joyner v. Vacco*, 23 Fed.Appx. 25 (2d Cir. 2001); *United States v. Jerry*, 487 F.2d 600 (3d Cir. 1973), application of an invited error doctrine to bar review of the absence of a factual basis for a plea when the defendant has admitted only facts that do not show guilt calls for greater, not lesser, scrutiny.

In *United States v. Mastrapa*, 509 F.3d 652 (4th Cir. 2007), the Fourth Circuit

reversed a district court's acceptance of a guilty plea that had not proceeded as an *Alford* plea before the magistrate, but that the district judge on review of the plea treated as an *Alford* plea when it became apparent that the defendant contested the element of knowledge essential for the conspiracy charge. The Fourth Circuit vacated the plea on plain error review for an insufficient factual basis, reiterating that for an *Alford* plea to be properly accepted, "'the record before the judge [must] contain[ ] strong evidence of actual guilt.'" *Mastrapa*, 509 F.3d at 659.

Guilty pleas are fundamental to federal criminal justice. But the acceptance of mere pleas without a factual basis presents multiple levels of potential abuse and fails to establish a knowing and voluntary plea. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court vacated a guilty plea pursuant to the Court's supervisory powers over the lower federal courts in connection with Rule 11 adherence, 394 U.S. at 464. The Court noted that by "personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack," 394 U.S. at 466-67. In connection with factual basis, Chief Justice Warren explained, "Rule 11 also requires the judge to satisfy himself that there is a factual basis for the plea. The judge must determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.' Requiring this examination of the relation between the law and the acts the defendant admits having committed 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.'" 394 U.S. at 467 (quoting Rule 11; footnotes omitted).

Circuit decisions following *McCarthy* have vacated guilty pleas where the district court failed to clearly determine a factual basis in complex or conspiracy cases, *e.g., United States v. Lowery*, 60 F.3d 1199, 1205 (6th Cir. 1995) ("It is not difficult to understand that Pelfrey, a lay person, might not understand why he would be guilty of aiding and abetting the crime of "using and carrying" a firearm on these facts. Pelfrey did not possess a gun at all, and he did not help Lowery obtain or prepare the sawed-off shotgun."); *United States v. Goldberg*, 862 F.2d 101, 109 (6th Cir. 1988) ("when the crime alleged is a complex one, or an uncommon one as in this case, it is incumbent upon the district court to closely examine the relationship between the law and the acts of the defendant. *McCarthy*, 394 U.S. 459. Assuring that there is a sufficient factual basis is intimately related to the question of whether the plea is entered into knowingly."); *United States v. Van Buren*, 804 F.2d 888, 892 (6th Cir. 1986) ("The charge of utilizing a communication facility to further a conspiracy or in the commission of a conspiracy is a complex charge that a lay person would not easily understand. To fully understand the charge against him, defendant must have understood what it meant to be a member of a conspiracy and to act in furtherance of that conspiracy. ... Because the charge in the indictment is complex and the Court failed to determine that defendant understood it, the reading of the indictment and defendant's response that he had no further questions do not establish a factual basis

for the plea."); *United States v. Smith*, 60 F.3d 595, 597 (9th Cir. 1995) (vacating guilty plea and conviction for non-compliance with Rule 11(c)(1) notwithstanding prosecution's factual basis allocution and written plea agreement; trial court's dialogue with the defendant and counsel that they had discussed the subject matter of the plea insufficient notwithstanding defense counsel's statement that defendant was making "the plea 'with a full understanding of the nature of the charges and the consequence of the plea.'").

Based on *McCarthy* and the decisions ensuing from it, the district court's failure to develop a factual basis for the plea at hand renders petitioner's guilty plea invalid. If reviewed on the merits, petitioner's claim of an absence of a factual basis would likely succeed. The buyer-seller dealings set forth in the purported factual basis for petitioner's plea showed two minor drug deals.[2] On these facts, there was not enough for the magistrate to find the Rule 11 requirement met. Nor did the magistrate ever set forth any memorandum or order accepting the plea and explaining why this could be a valid factual basis for the plea.

That the defendant stipulated to the factual basis does not remedy the noncompliance with Rule 11, which imposes a separate and independent requirement on the court. The doctrine of invited error is inapposite in this context, where the

[2] The existence of a simple buyer-seller relationship alone does not furnish the requisite evidence of a conspiratorial agreement. *United States v. Hughes*, 817 F.2d 268, 273 (5th Cir. 1987) ("[A] buyer-seller relationship, without more, will not prove a conspiracy."). When the defendant merely receives "small amounts" of drugs from a supplier "and there [is] no evidence that the defendant turned around and sold this [drug] or performed any errands or collections for his supplier or otherwise assisted the ongoing 'business,'" there is only a buyer-seller arrangement. *United States v. Dekle*, 165 F.3d 826, 830 (11th Cir. 1999).

district court failed to fulfill its duty of an independent finding. The defendant's stipulation did not waive the requirement of compliance with Rule 11.

Petitioner urges this Court to grant the writ to consider whether this important exception to the normal limitations on acceptance of guilty pleas, as sweepingly applied by the Eleventh Circuit below, exceeds permissible bounds. Further, because the reviewability of guilty pleas in light of *Class* has altered existing judicial doctrines limiting the scope of appeal, the Court should grant the petition, vacate the judgment below, and remand for further proceedings in light of *Class*.

CONCLUSION

The Court should grant the petition because of the importance of guilty pleas in the federal judicial system.

Respectfully submitted,

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Counsel for Petitioner

Miami, Florida
September 2018

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, *United States v. Chiddo*, No. 15-15788 (11th Cir. June 8, 2018) 1a

Judgment of Conviction, United States District Court, S.D. Fla., *United States v. Chiddo*, No. 15-cr-80077-DTKH (S.D. Fla. Dec. 21, 2018) 11a

Transcript of plea hearing, United States District Court, S.D. Fla., *United States v. Chiddo*, No. 15-cr-80077-DTKH (S.D. Fla. Sept. 11, 2015) 17a

Plea agreement, United States District Court, S.D. Fla., *United States v. Chiddo*, No. 15-cr-80077-DTKH (S.D. Fla. Sept. 11, 2015) 29a

28 U.S.C. § 636 . . . . . 39a

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-15788
Non-Argument Calendar

D.C. Docket No. 9:15-cr-80077-DTKH-7

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID CHIDDO,
a.k.a. D-Money,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 8, 2018)

Before TJOFLAT, MARCUS, and ROSENBAUM, Circuit Judges.

PER CURIAM:

David Chiddo appeals his conviction, following a guilty plea, for conspiracy to possess with intent to distribute cocaine. Chiddo argues that the Magistrate Judge erred by accepting his felony guilty plea without a referral order and without

entering a report and recommendation ("R&R"), and by misadvising him of his right to object to that acceptance to the District Court. He further argues that the Magistrate Judge erred by failing to ensure that a factual basis existed for his plea and that he understood the nature of the offense.

But we find no plain error in the Magistrate Judge's conduct here. The Magistrate Judge did not plainly err in accepting Chiddo's guilty plea because Chiddo consented to the Magistrate Judge conducting the plea hearing, a magistrate judge can conduct a change-of-plea hearing without entering an R&R, and no statute or binding precedent requires a specific referral order. The Magistrate Judge adequately advised Chiddo of his ability to challenge the acceptance of the plea before the District Court, and Chiddo had the opportunity to do so. Moreover, Chiddo invited any alleged errors by the Magistrate Judge, precluding their review.

Accordingly, we affirm.

I.

This Court applies plain error review to statutory and constitutional challenges to a magistrate judge's acceptance of a felony guilty plea raised for the first time on appeal. *United States v. Woodard*, 387 F.3d 1329, 1331 (11th Cir. 2004) (per curiam). "The four-prong test to establish plain error is: (1) there must have been an error; (2) the error must have been plain; (3) the error must have

seriously affected substantial rights; and (4) the error must have seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* To be sufficiently "plain," the alleged error "must be clear from the plain meaning of a statute or constitutional provision, or from a holding of the Supreme Court or this Court." *United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010).

The powers of magistrate judges are set forth in the Federal Magistrate Act ("FMA"), 28 U.S.C. §§ 631–36. Magistrate judges may "hear and determine any pretrial matter pending before the court, except" certain types of motions. *Id.* § 636(b)(1)(A). Magistrates may also conduct hearings and submit to the district court proposed findings of fact for, and recommendations for the disposition of, certain enumerated matters, including the motions excepted in § 636(b)(1)(A). *Id.* § 636(b)(1)(B). A magistrate judge must file proposed findings and recommendations with the court and mail a copy to all parties. *Id.* § 636(b)(1)(C). Importantly, the statute's "catchall" clause states that "[a] magistrate judge may be assigned such *additional duties* as are not inconsistent with the Constitution and laws of the United States." *Id.* § 636(b)(3) (emphasis added).

In *Woodard*, we addressed whether a magistrate judge has the authority to accept a defendant's felony guilty plea and adjudicate him guilty. 387 F.3d at 1331. Woodard consented to a magistrate judge conducting his change-of-plea hearing and a Federal Rule of Criminal Procedure 11 colloquy, after the Magistrate

Judge explained that he was a magistrate and that Woodard had the right to have the District Court conduct the hearing. *Id.* at 1330. The Magistrate Judge accepted Woodard's guilty plea, stating "[t]he plea is, therefore, accepted by me, and the defendant is now adjudged guilty of that offense." *Id.* The Magistrate Judge did not prepare an R&R. *Id.* at 1334. At sentencing,[1] Woodard did not object to the sentence imposed or to the plea colloquy conducted by the Magistrate. *Id.* at 1330–31.

We first determined that conducting a Rule 11 proceeding is comparable to the duties enumerated in the FMA. *Id.* at 1333. We therefore held that a magistrate judge has the authority under the FMA's catchall "additional duties" clause to conduct Rule 11 proceedings and accept a felony guilty plea, when the defendant consents. *Id.*; 28 U.S.C. § 636(b)(3). In so holding, we noted that "the presence or absence of consent" is the "crucial factor" in determining what the additional duties clause encompasses. *Woodard*, 387 F.3d at 1332. We then held that this statutory delegation to a magistrate judge did not violate Article III because a district court, as a matter of law, retains the ability to review the Rule 11 proceeding if requested by the Defendant. *Id.* at 1334.

This Court later clarified the circumstances giving rise to the appeal in *Woodard*, our holding, and the reasoning behind it as part of our decision in *Brown*

[1] Woodard's sentencing hearing was conducted by the district judge. *Woodard*, 387 F.3d at 1330.

v. United States. *See* 748 F.3d 1045, 1071 n.53 (11th Cir. 2014). The District Court in *Woodard* had referred the proceeding to the Magistrate Judge "with instructions to submit a report and recommendation regarding all pretrial motions." *Id.* The *Brown* District Court clarified "the mechanics of the district court's actions" in *Woodard*, stating that although the Magistrate did not err by accepting Woodard's plea and adjudicating him guilty, in fact *the District Court* had made the final adjudication of guilt by entering judgment. *Id.* We concluded that regardless of whether a magistrate judge categorizes his actions as acceptance of a plea or an R&R, a magistrate judge's actions in a Rule 11 hearing are "akin to a report and recommendation rather than a final adjudication of guilt." Moreover, such actions by a magistrate judge do not violate Article III because a district court retains the ability to review the plea as a matter of law, if requested. *See Id.*

Although this Court has not squarely addressed whether a formal referral order is required before a magistrate judge may conduct a Rule 11 hearing and accept a guilty plea, we have stated that § 636(b)(1) does not require a written referral order. *Jeffrey S. by Ernest S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 511 n.13 (11th Cir. 1990).[2] Nothing in the statutory language requires a formal or written referral order. *See* 28 U.S.C. § 636(b)(1). The Southern District of

[2] We also noted that "[s]ome courts have expressed the sound opinion that a written referral would be good practice." *Jeffrey S. by Ernest S.*, 896 F.2d at 511 n.13 (11th Cir. 1990) (citations omitted).

Florida's local rules state that a district judge may refer a matter to a magistrate judge, and "[n]o specific order of reference shall be required except as otherwise provided in these [rules]." S.D. Fla. Magistrate Judge R. 2.

Rule 11 of the Federal Rules of Criminal Procedure provides that a defendant may withdraw a guilty plea before the court accepts the plea, for any reason or no reason; or after the court accepts the plea, but before it imposes sentence, if the defendant can show a fair and just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(1)–(2).

Here, Chiddo argues that the Magistrate Judge exceeded his authority by accepting his guilty plea without an order of referral from the District Court and without entering an R&R; and that the Magistrate misadvised him that he could appeal prior to sentencing, when the correct procedure would have been for him to object to an R&R. These arguments are unavailing.

Chiddo has not demonstrated that the Magistrate Judge here erred, let alone plainly so. First, § 636(b)(3) requires merely that the magistrate "be assigned" additional duties. It does not impose any particular method of assignment. Our precedent indicates no written referral order is required. *See Jeffrey S. by Ernest S.*, 896 F.2d at 511 n.13. We can, moreover, infer from the relevant Southern District of Florida local rule, and the District Court's acknowledgement at sentencing of Chiddo's guilty plea before the Magistrate, that the District Court

"assigned" the matter to the Magistrate by some effective means. Chiddo has not pointed to any statute, constitutional provision, or Supreme Court or Eleventh Circuit holding requiring a written referral order before a magistrate may conduct a Rule 11 hearing.[3] *Rodriguez*, 627 F.3d at 1381. Accordingly, Chiddo demonstrates no plain error by the Magistrate Judge in accepting Chiddo's guilty plea without a formal order of referral.

Second, no authority mandates that a magistrate judge enter an R&R after he conducts a plea hearing. *See Woodard*, 387 F.3d at 1334 (finding no plain error where the Magistrate Judge accepted a guilty plea without entering an R&R).[4] Third, the Magistrate Judge adequately advised Chiddo of his ability to challenge

[3] In support of this position, Chiddo primarily relies on *United States v. Bolivar-Munoz*, 313 F.3d 253, 255 (5th Cir. 2002). There, the Fifth Circuit found that a memorandum issued almost three years before the defendants' cases, which merely laid out general procedural instructions to the Magistrate, was not a proper referral order. *Id.* at 255–56.

Chiddo's reliance is misguided. First, of course, this Fifth Circuit case does not bind this Court and thus cannot establish plain error. Moreover, even if *Bolivar-Munoz* bound this Court, it would in fact support the conclusion that Chiddo waived his right to raise this procedural defect by failing to object to the Magistrate Judge's actions in the District Court. *See id.* at 256 (finding that the defendants waived their right to object to the Magistrate's actions by failing to raise the procedural defect before the District Judge had accepted pleas, sentenced the defendants, and entered judgment).

[4] In support of his argument on this point, Chiddo relies on *Brown* for the proposition that § 636 requires a magistrate judge to enter an R&R in plea proceedings. This mischaracterizes *Brown*. There, this Court merely stated that a magistrate judge's actions in plea proceedings "are akin to a report and recommendation" because a district court retains the ability to review the proceeding as a matter of law, if requested. *Brown*, 748 F.3d at 1072 n.53.

the plea,[5] Chiddo had the opportunity to challenge the plea,[6] and Chiddo consented to the Magistrate Judge conducting the plea hearing.[7]

Thus, Chiddo has not pointed to binding authority requiring a magistrate judge to be assigned duties by referral order or to enter an R&R following a plea hearing the magistrate conducted. Neither has he pointed to binding authority indicating that the Magistrate misadvised Chiddo regarding his right to challenge the plea. Accordingly, the Magistrate Judge did not plainly err. *See Rodriguez*, 627 F.3d at 1381.

II.

When a party induces or invites the court below into making an error, we are precluded from invoking the plain error rule and reversing. *See United States v.*

[5] The Magistrate Judge was not, as Chiddo argues, required to tell Chiddo he could file objections to an R&R. As discussed above, the Magistrate Judge was not required to enter one.

[6] The Magistrate Judge informed Chiddo of his right to challenge his plea before sentencing: "you may appeal that plea of guilt to the District Judge, and if you do that, you must do so before your sentencing . . . . I advise you that failure to file timely objections related to the plea before District Judge or Court of Appeals will result in waiver." Chiddo indicated, under oath, that he understood. Chiddo's argument that he lacked the opportunity to challenge his plea without a district court order fails—he could have filed a motion to withdraw plea before sentencing, or objected at sentencing when the District Court asked if he had any objections. Chiddo failed to do either.

[7] Chiddo challenges the Magistrate Judge's authority under § 636 and Article III to accept his guilty plea. But a magistrate judge's actions in a Rule 11 proceeding are effectively an R&R, not a final adjudication of guilt. *Brown*, 748 F.3d at 1071 n.53. The Magistrate Judge had authority to conduct the hearing under § 636, because Chiddo expressly consented; and the delegation of this duty did not violate Article III, because the District Court retained the ability to review the plea if Chiddo had so requested. *See Woodard*, 387 F.3d at 1330, 1333. Finally, because no procedural errors occurred, we need not address Chiddo's argument that consent cannot cure the errors alleged.

Love, 449 F.3d 1154, 1157 (11th Cir. 2006). A defendant can invite such error through his actions during the plea process and at sentencing. *See id.* (concluding that the defendant invited any error by the District Court in sentencing him to five years of supervised release where he signed a plea agreement acknowledging that the Court could impose such a sentence and did not object at sentencing to a sentence including supervised release).

This Court has held (albeit in an unpublished opinion) that a defendant invited the alleged errors at his plea colloquy—of failing to ensure that he understood the nature of the charges against him and failing to ensure an adequate factual basis existed—when he (1) agreed at the plea colloquy that the elements of the offense were correctly stated and that the stipulated factual proffer provided a sufficient factual basis, and (2) failed to object to the basis of the conviction at the plea hearing or at sentencing. *United States v. Peerani*, 576 F. App'x 949, 950 (11th Cir. 2014); *see also United States v. Daniels*, 225 F. App'x 795, 796 (11th Cir. 2007) (determining that the defendant invited any error in accepting his guilty plea without a sufficient factual basis, because he had petitioned the Court to accept his plea even though he denied specific knowledge of the type of drug involved in his offense).

Here, Chiddo invited any alleged errors by the Magistrate Judge. Chiddo stated at his change-of-plea hearing that he had received a copy of the superseding

indictment, had fully discussed the charges with counsel, and was fully aware of the charges. He also stated that he had read and understood the stipulated factual basis and discussed it with counsel before signing it, *i.e.*, agreeing that the facts stated therein provided a sufficient factual basis for entry of his guilty plea, and that he agreed to the elements of the offense set forth therein. Finally, Chiddo failed to object to the factual basis of the conviction at the plea hearing and at sentencing. The circumstances here thus mirror those in *Peerani*, 576 F. App'x at 950. Therefore, because Chiddo invited any error by the Magistrate Judge in determining that he understood the nature of the charges against him and that there was a sufficient factual basis for the guilty plea, this Court is precluded from reviewing these claims.[8] *See Love*, 449 F.3d at 1157.

AFFIRMED.

[8] Even if this Court determined that Chiddo's claims are not barred by invited error, Chiddo would have to overcome the high hurdle of plain error review because he failed to raise these issues in district court. *See United States v. Monroe*, 353 F.3d 1346, 1349 (11th Cir. 2003).

UNITED STATES DISTRICT COURT

Southern District of Florida
West Palm Beach Division

UNITED STATES OF AMERICA
v.
DAVID CHIDDO

JUDGMENT IN A CRIMINAL CASE

Case Number: **15-80077CR-Hurley**
USM Number: **0747-104**

Counsel For Defendant: **Flynn Parker Bertisch**
Counsel For The United States: **Stephen Carlton**
Court Reporter:**Gizella Baan-Proulx**

The defendant pleaded guilty to count(s) 12 of the Superseding Indictment.

The defendant is adjudicated guilty of these offenses:

TITLE & SECTION	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
21:846	Conspiracy to possess with intent to distribute cocaine	06/04/2015	12s

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

All remaining counts are dismissed on the motion of the government.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **12/17/2015**

Daniel T. K. Hurley
Daniel T. K. Hurley
United States Senior District Judge

Date: Dec. 21, 2015

DEFENDANT: **DAVID CHIDDO**
CASE NUMBER: **15-80077CR-Hurley**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **151 months as to Count 12s**.

The court makes the following recommendations to the Bureau of Prisons: that the Defendant be placed in a facility in, or as close to the Southern District of Florida as possible. Recommending that the Defendant be allowed to participate in a 500 hour drug treatment program.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DAVID CHIDDO**
CASE NUMBER: **15-80077CR-Hurley**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to count 12s**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **DAVID CHIDDO**
CASE NUMBER: **15-80077CR-Hurley**

SPECIAL CONDITIONS OF SUPERVISION

Association Restriction - The defendant is prohibited from associating with co-defendants while on probation/supervised release.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

DEFENDANT: **DAVID CHIDDO**
CASE NUMBER: **15-80077CR-Hurley**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$0.00	$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

NAME OF PAYEE	TOTAL LOSS*	RESTITUTION ORDERED	PRIORITY OR PERCENTAGE

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **DAVID CHIDDO**
CASE NUMBER: **15-80077CR-Hurley**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A. Lump sum payment of $100.00 due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

CASE NUMBER DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)	TOTAL AMOUNT	JOINT AND SEVERAL AMOUNT

The Government shall file a preliminary order of forfeiture within 3 days.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 15-CR-80077-HURLEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID CHIDDO,

Defendant.

West Palm Beach, FL
September 11, 2015

CHANGE OF PLEA PROCEEDINGS
BEFORE THE HONORABLE JAMES M. HOPKINS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: **STEPHEN CARLTON**
United States Attorney's Office
500 S. Australian Avenue
Suite 400
West Palm Beach, FL 33401
561-820-8711

FOR THE DEFENDANT: **FLYNN P. BERTISCH, ESQ.**
Salnick, Fuchs & Bertisch
1645 Palm Beach Lakes Boulevard
Suite 1000
West Palm Beach, FL 33401
561-471-1000

Official Court Reporter: Pauline A. Stipes
HON. ROBIN L. ROSENBERG
Ft. Pierce/West Palm Beach, Fl
772.467.2337

THE COURT: Good morning.

Please swear the Defendant in.

(Thereupon, the Defendant was duly sworn.)

THE COURTROOM DEPUTY CLERK: Please state your name.

THE DEFENDANT: David Chiddo.

BY THE COURT:

Q. Mr. Chiddo, do you know you are now under oath, and if you answer untruthfully, you could be prosecuted?

A. Yes, sir.

Q. Do you understand I am the Magistrate Judge, and I will not be deciding what sentence should be imposed in your case?

A. Yes.

Q. Do you understand the District Judge will preside over the sentencing hearing?

A. Yes, sir.

Q. Do you understand you have the right to require the District Judge to conduct the change of plea hearing instead of me doing it?

A. Yes, sir.

Q. If you agree to allow me to conduct the plea hearing, you are not requiring the District Judge to do it?

A. Yes.

Q. Do you allow me to do the plea hearing instead of the District Judge?

A. Yes.

THE COURT: Mr. Bertisch, do you consent?

MR. BERTISCH: Yes.

THE COURT: Government?

MR. CARLTON: Yes.

BY THE COURT:

Q. Where were you born?

A. New York.

Q. How old are you?

A. Thirty in less than a month.

Q. How far did you go to school?

A. I have a GED, actually an Associate's Degree now.

Q. Have you been treated for a mental illness or addiction to narcotic drugs of any kind?

A. Yes.

Q. Can you tell me about that?

A. My wife and my daughter were murdered, so they treated me for a mental illness.

Q. How long ago was that?

A. They died June 26th.

Q. Are you taking any medication?

A. No, sir.

Q. Are you currently under the influence of any drug, medication or alcoholic beverage of any kind?

A. No, sir.

Q. Okay.

If you have any difficulty understanding anything that is going on today, would you please tell me and your attorney?

A. Yes.

THE COURT: Mr. Bertisch, have you had any difficulty communicating with your client?

MR. BERTISCH: No, Your Honor.

BY THE COURT:

Q. Have you received a copy of the superseding indictment pending against you, that is, the written charges against you in this case, and have you fully discussed the charges with your attorney?

A. Yes.

Q. Are you fully aware of the charges in this case?

A. Yes.

Q. Did you have an opportunity to read and discuss the Plea Agreement with your attorney before you signed it?

A. Yes.

Q. Is that your signature at the end of the Plea Agreement on page six?

A. Yes.

THE COURT: Mr. Bertisch?

MR. BERTISCH: Yes.

THE COURT: Mr. Carlton?

MR. CARLTON: Yes.

BY THE COURT:

Q. Do you fully understand that Plea Agreement?

A. Yes.

Q. Does the Plea Agreement contain all of the understandings you have with the Government?

A. Yes.

Q. Has anyone made any promises to persuade you to accept it?

A. No.

Q. Has anyone persuaded you to accept it?

A. No, sir.

Q. Do you understand the Plea Agreement contains merely recommendations, and the Court could reject the recommendations and impose a sentence more severe?

A. Yes.

Q. Do you understand, with respect to paragraph one, you are pleading to Count 12, which charges conspiracy to possess with intent to distribute a controlled substance, in violation of Title 21 United States Code, Section 841 (b)(1)(C), all in violation of Title 21 united States Code, Section 846?

A. Yes, sir.

Q. Do you further understand that pursuant to paragraph four of the Plea Agreement, the Court may impose a statutory maximum of 20 years imprisonment, followed by a mandatory minimum term of three years up to life, and a maximum fine up to a million dollars?

A. Yes, sir.
Q. In addition, a special assessment in the amount of $100 will be imposed at the time of sentencing. Do you understand that?
A. Yes.
Q. Do you understand the offense to which you are pleading guilty is a felony, and if the plea is accepted, you will be a felon and you will lose the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any firearm?
A. Yes, sir.
Q. Do you understand if you violate the conditions of supervised release you can be given additional time in prison?
A. Yes.
Q. Do you understand your sentence will be determined by a combination of advisory Sentencing Guidelines, possible departures from the guidelines, and other statutory factors?
A. Yes.
Q. Have you and your attorney discussed how the Sentencing Guidelines might apply in your case?
A. Yes, sir.
Q. Do you understand the Court may not be able to determine the sentence until after the Pre-Sentence Report is completed and you and the Government have an opportunity to challenge the reported facts and the guidelines recommended by the Probation

Officer, and the sentence imposed may be different from any estimate your attorney had given you?

A. Yes.

Q. Do you also understand after the guideline has been determined, the Court has the authority to depart upward or downward from that range and also examine other statutory sentencing factors that may result in a sentence greater or lesser than the advisory guideline sentence?

A. Yes, sir.

Q. Do you understand that parole has been abolished, and if you are sentenced to prison, you will not be released on parole?

A. Yes, sir.

Q. Do you understand that, under some circumstances -- normally, you or the Government would have the right to appeal any sentence imposed, but there is a sentencing appeal waiver in paragraph 11 of your Plea Agreement?

A. Yes.

Q. Have you had an opportunity to review the sentencing waiver and discuss it with your attorney?

A. Yes.

Q. Do you fully understand it?

A. Yes.

Q. Do you understand you are giving up your right to appeal any sentence, including any restitution order, or appeal the

manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is a result of an upward departure or upward variance from the guideline range that the Court establishes at sentencing?

A. Yes.

Q. Do you understand nothing affects the Government's ability to appeal, and if they do, you will be released of this waiver?

A. Yes.

Q. I find the appellate waiver is knowingly and intelligently entered into.

Do you understand you have the right to have a trial by jury?

A. Yes.

Q. And at such trial you would be presumed innocent and the Government would have to prove your guilt beyond a reasonable doubt?

A. Yes.

Q. And do you understand you have the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to compel witnesses to testify in your defense?

A. Yes.

Q. Do you understand that should you decide not to testify or put on any evidence at such trial, these facts could not be

used against you?
A. Yes.
Q. Do you further understand that by entering a plea of guilty, if that plea is accepted, there will be no trial, and you will have waived or given up the right to trial, as well as the rights associated with the trial as I described them to you?
A. Yes, sir.
Q. Did you have an opportunity to read and discuss with your attorney the stipulated factual basis before you signed it?
A. Yes.
Q. Is that your signature on page four?
A. Yes.
THE COURT: Mr. Bertisch?
MR. BERTISCH: Yes, sir.
THE COURT: Mr. Carlton?
MR. CARLTON: Yes, Your Honor.
BY THE COURT:
Q. Do you understand the factual basis?
A. Yes.
Q. Are the facts true and accurate to the best of your knowledge and belief?
A. Yes, sir.
THE COURT: Government, anything else I need to cover before taking the plea and adjudicating guilt?

MR. CARLTON: No.

BY THE COURT:

Q. Mr. Chiddo, how do you plead to Count 12 which charges conspiracy with intent to distribute a controlled substance or mixture containing a detectable amount of cocaine, in violation of Title 21 United States Code, Section 841(b)(1)(C), all in violation of Title 21 United States Code, Section 846, guilty or not guilty?

A. Guilty, sir.

THE COURT: Very well. In United States versus David Chiddo, 15-80077-CR-Hurley, the Defendant is fully competent and capable of entering an informed plea, and the Defendant is aware of the nature of the charges and the consequences of the plea, and the plea is a knowing and voluntary plea, supported by an independent basis in fact containing each of the essential elements of the offense.

The plea is accepted and the Defendant is adjudged guilty.

Mr. Chiddo, you may appeal that plea of guilt to the District Judge, and if you do that, you must do so before your sentencing. Do you understand?

THE DEFENDANT: Yes.

THE COURT: In connection with that, I advise you that failure to file timely objections related to the plea before the District Judge or Court of Appeals will result in a waiver.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: I also want to advise you a written Pre-Sentence Report will be prepared to assist the judge at sentence, and you will be asked to give information for the report and your attorney may be present if you wish.

The Court will permit you and your attorney to read the report and file any objections before the sentencing hearing, and you will have to contact Judge Hurley's chambers to find out the date and time.

You and your attorney will have an opportunity to speak at the sentencing hearing.

Anything else, Government?

MR. CARLTON: No.

THE COURT: Defendant?

MR. BERTISCH: I would ask if the Court could recommend that Mr. Chiddo remain in Palm Beach County, the death of the wife and daughter, again -- I know the Marshal doesn't have to, but I ask that he stay here.

THE COURT: I will note that and ask the Marshals to take that into consideration.

MR. BERTISCH: Other than that, nothing else.

THE COURT: Good luck to you all. Thank you all and good luck, sir.

THE DEFENDANT: Thank you, sir.

(Thereupon, the hearing was concluded.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: April 25, 2016

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-80077-CR-HURLEY(s)

UNITED STATES OF AMERICA

vs.

DAVID CHIDDO,
a/k/a "D-Money,"

Defendant.
_____/

PLEA AGREEMENT

The United States of America and DAVID CHIDDO, (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to Count Twelve (12) of the Superseding Indictment which charges the defendant with Conspiracy to Possess with Intent to Distribute a Controlled Substance, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(b)(1)(C), all in violation of Title 21, United States Code, Section 846.

2. The United States agrees to seek dismissal of all remaining counts of the Superseding Indictment after sentencing.

3. The defendant is aware that the sentence will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the court relying in part on the results of a Pre-Sentence Investigation by the court's

probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

4. The defendant also understands and acknowledges that as to Count Twelve (12) of the Superseding Indictment, the Court may impose a statutory maximum period of twenty (20) years imprisonment, followed by a mandatory minimum term of supervised release of 3 years up to life. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to $1 million.

5. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 4 of this agreement, a special assessment in the amount of $100 will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

6. The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the court and the probation office of all facts

pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

7. The United States agrees that it will recommend at sentencing that the court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, the government will make a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. The United States, however, will not be required to make this motion if the defendant: (a) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (b) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (c) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. The Defendant understands that if he violates any provision of this agreement, or

if his guilty plea is vacated or withdrawn, the government will be free from any obligations of the agreement and free to prosecute the Defendant for all offenses of which it has knowledge. In such event, the Defendant waives any objections based upon delay in prosecution. If the plea is vacated or withdrawn for any reason other than a finding that it was involuntary, the Defendant also waives objection to the use against him of any information or statements he has provided to the government, and any resulting leads.

9. The defendant is aware that the sentence has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the court. The defendant understands further that any recommendation that the government makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

10. The government agrees not to file a sentencing enhancement pursuant to Title 21, United States Code, Sections 841(b)(1)(A) and 851.

SENTENCING APPEAL WAIVER

11. The defendant is aware that Title 18, United States Code, Section 3742 and Title 28, United States Code, Section 1291 afford the defendant the right to appeal the sentence imposed in

this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Sections 3742 and 1291 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure and/or an upward variance from the advisory guideline range that the Court establishes at sentencing. The defendant further understands that nothing in this agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b) and Title 28, United States Code, Section 1291. However, if the United States appeals the defendant's sentence pursuant to Sections 3742(b) and 1291, the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that the defendant has discussed the appeal waiver set forth in this agreement with the defendant's attorney.

12. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 9/11/2015 By: _____
STEPHEN CARLTON
ASSISTANT UNITED STATES ATTORNEY

Date: 9/11/15 By: _____
FLYNN BERTISCH, ESQ.
ATTORNEY FOR DAVID CHIDDO

Date: 9/11/15 By: _____
DAVID CHIDDO
DEFENDANT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 15-80077-CR-HURLEY/HOPKINS(s)

UNITED STATES OF AMERICA

vs.

DAVID CHIDDO,
a/k/a "D-Money"

Defendant.
_____/

STIPULATED FACTUAL BASIS

The United States of America and DAVID CHIDDO, (hereinafter referred to as the "defendant") agree that the following facts are true and correct:

1. From in or around January 1, 2012, the exact date being unknown to the Grand Jury, through on or about October 15, 2014, in Palm Beach County, in the Southern District of Florida, and elsewhere the defendant was a member of a drug trafficking organization together with co-defendant, MARVIN LESTER, III, and others. This drug trafficking organization operated in Palm Beach County within the Southern District of Florida and elsewhere including California and Mexico.

2. The defendant admits that he agreed, combined, conspired and confederated with the co-defendants in the above-captioned matter for the purpose of possessing with the intent to distribute less than five hundred (500) grams of cocaine, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C); all in violation of Title 21, United States Code, Section 846, and Title 18, United States Code, Section 2.

3. The elements of the offense described above are as follows:

(1) two or more people in some way agreed to try to accomplish a shared and unlawful plan

to possess with intent to distribute a controlled substance, namely a mixture or substance containing a detectable amount of cocaine;

(2) the Defendant, knew the unlawful purpose of the plan and willfully joined in it; and

(3) the object of the unlawful plan was to possess with the intent to distribute less than five hundred grams of a controlled substance, namely a mixture or substance containing a detectable amount of cocaine.

To "distribute" a controlled substance means to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act.

A person may be a conspirator even without knowing all of the details of the unlawful plan or the names and identities of all the other co-conspirators.

4. During May 2012, law enforcement was actively engaged in a narcotics investigation involving MARVIN LESTER, DAVID CHIDDO, and others. During this investigation DEA utilized the services of 3 confidential informants to conduct a number of controlled purchases of heroin from MARVIN LESTER. On May 4, 2012, law enforcement obtained a judicially-authorized wiretap to intercept wire communications on (561) 715-1653, utilized by Marvin Lester (hereafter target telephone 1, "TT1").

5. In late May, 2012, pursuant to the lawful wiretap (TT1), law enforcement recorded a number of telephone communications between MARVIN LESTER and DAVID CHIDDO. During one of these communications LESTER told CHIDDO that he needed, "some", and asked for CHIDDO'S location. CHIDDO asked LESTER what he needed and LESTER replied, "a ball", which is common street terminology for $1/8^{th}$ ounce of narcotics, and most frequently used when referring to cocaine. CHIDDO stated that he had been waiting for LESTER. Before finishing the telephone call

LESTER asked CHIDDO to hold it for him and CHIDDO agreed.

6. In June 2012, agents lawfully intercepted a series of telephone calls on (561) 907-9122 (hereafter target telephone 2, "TT2"), which was used by MARVIN LESTER. During these interceptions, LESTER spoke with CHIDDO and asked if he was good, to which CHIDDO replied he was. CHIDDO advised that the price was eleven, which was believed to be $1,100. LESTER complained about the price but agreed. CHIDDO told LESTER that the price he stated was what he (CHIDDO) had paid. CHIDDO and LESTER then negotiated a meeting place to conduct the transaction and the telephone call ended. Several minutes later LESTER utilized target telephone 2 to place a telephone call and speak with CHIDDO. LESTER stated that he did not want any problems and CHIDDO advised that it was powdery, but fine. LESTER and CHIDDO then continued to negotiate a location where the transaction could be conducted.

7. In late June, 2012, during another recorded telephone call occurring on target telephone 2, law enforcement learned of another impending narcotics transaction between CHIDDO and LESTER. During this conversation LESTER told CHIDDO to, "Save my shit nigga." CHIDDO responded that LESTER had better tighten up then, and that he (CHIDDO) had re-ups also. LESTER asked that CHIDDO put his to the side, which was believed to be a reference to holding the narcotics for LESTER and not selling it during CHIDDO'S other re-ups of customers and/or distributors. CHIDDO agreed and told LESTER to come and meet him. As a result of this intercepted telephone call law enforcement established surveillance on CHIDDO. The surveillance was continued as CHIDDO departed from 433 46th Street, West Palm Beach, Florida, and traveled to a Kentucky Fried Chicken located in the 4700 block of Broadway Avenue, West Palm Beach, Florida. While CHIDDO was present at the Kentucky Fried Chicken, law enforcement observed him conduct a hand to hand transaction with the occupants of a blue Chevrolet vehicle, bearing Florida tag B919AC. Law

enforcement subsequently followed the blue Chevrolet and conducted a traffic stop of the vehicle. A search of the vehicle revealed approximately 3.6 grams of cocaine and 14, 40 milligram Oxycodone pills. One of the occupants of the vehicle admitted that the illegal narcotics were purchased from a subject known only as, "D-Money", a known alias for DAVID CHIDDO.

The defendant admits the facts described above satisfy and support a finding that the elements of the offense have been provided and support a factual basis for the entry of his plea of guilty to Count Twelve (12) of the pending Superseding Indictment.

WIFREDO A. FERRER
UNITED STATES ATTORNEY

Date: 9/11/2015

By: _____
STEPHEN CARLTON
ASSISTANT UNITED STATES ATTORNEY

Date: 9/11/15

By: _____
FLYNN BERTISCH, ESQ.
ATTORNEY FOR DEFENDANT

Date: 9/11/15

By: _____
DAVID CHIDDO
DEFENDANT

28 U.S.C. § 636

Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law –

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial1 relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary –

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the

availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority. –

(1) In general. – A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. – A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. – In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate

judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, or both, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.--In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. – The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.--Upon the commission of any such act –

> (A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or
>
> (B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where –
>
> > (i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,
> >
> > (ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or
> >
> > (iii) the act constitutes a civil contempt,
>
> the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order

requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.--The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of

the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.