

NO. 18-5945

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

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACQUELINE E. SHAPIRO, ESQ.
40 N.W. 3rd Street, Penthouse One
Miami, Florida 33128
Tel. 305-403-8207
Counsel for Petitioner

REPLY TO BRIEF IN OPPOSITION

1. *Question presented*: Does a federal magistrate have authority to accept a felony guilty plea?

The government does not dispute the existence of a circuit conflict with regard to whether a magistrate judge can accept a guilty plea. BIO at 6, 14. The government's indication of a change in the Department of Justice's policy to preclude the procedure followed in petitioner's case, in which the magistrate judge accepted his guilty plea, *see* BIO at 20, does not diminish the need for this Court to address the constitutional and statutory issues presented. That the DOJ has revised its policy demonstrates a recognition that the procedure followed in petitioner's case was inherently improper. Nor does the new policy, even assuming its uniform application and effect in the future, offer a guarantee of how courts will respond in managing their cases. The Court should grant certiorari to resolve the circuit conflict.

2. *Question presented*: 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?

The government takes the untenable position that a defendant's stipulation to a factual basis for the offense to which he pleads guilty relieves the court of appeals of any obligation to review whether the factual basis is legally adequate to establish the offense. BIO at 21-22. This position fails to comport with the recognized principle that appellate courts have an obligation to evaluate the legal propriety of a factual basis.

See Class v. United States, 138 S.Ct. 798, 805-06 (2018) (defendant's factual admissions in a guilty plea do not waive the right to challenge the government's authority to prosecute such conduct); *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (a guilty plea is involuntary and violates due process if entered without a factual predicate). A defendant's agreement that a factual basis exists—without an actual showing of such a basis in the record—does not relieve the appellate court of its core duty to independently review whether the factual basis, regardless of whether it is stipulated to or not, rises to level of an offense under the law. A determination of legal sufficiency, like jurisdiction, is not susceptible to a criminal defendant's agreement or waiver, but should instead be resolved judicially.

The harm to basic procedural and constitutional guarantees arising from the government's position is heightened in this case by the government's strained reading of the record and the law in asserting that petitioner Chiddo's factual stipulation establishes a factual basis for the offense of conspiracy to which he pled guilty and of which he was convicted. The stipulated factual basis is premised on recorded conversations between the petitioner and his codefendant concerning a sale of narcotics and police observation of the petitioner engaged in a sale of narcotics. The recorded conversations, however, disclosed nothing beyond a discussion of petitioner's offering to sell narcotics to another drug dealer and did not show petitioner's guilt of conspiracy. Similarly, police observation of the petitioner disclosed nothing beyond his sale of narcotics to customers. Pet. App. 37a. These facts are inadequate to show any more than a buyer-seller relationship—which, regardless of the stipulations by

petitioner at his plea colloquy, fail to establish the elements of the charged conspiracy.

See, e.g., United States v. Hughes, 817 F.2d 268, 273 (5th Cir. 1987) (citing *United States v Apollo*, 476 F.2d 156, 161–62 (5th Cir. 1973) (“[A] buyer-seller relationship, without more, will not prove a conspiracy.”).

The Eleventh Circuit’s singular approach, not joined by any other circuit, of eliminating the imperative for Article III evaluation of a factual basis for a guilty plea as well as any other judicial obligation in considering a factual basis, merits the grant of certiorari. *See Class v. United States*, 138 S.Ct. at 805-06; *North Carolina v. Alford*, 400 U.S. at 37-38.

The government acknowledges that a question similar to that presented in the instant petition is before the Court in *Qualls v. United States*, No. 18-5771 (filed Aug. 22, 2018). BIO at 7 n.2. In light of that, Petitioner Chiddo asks that the Court, alternatively, join his present petition with that in *Qualls* or stay its decision as to petitioner Chiddo pending the Court’s resolution of the certiorari proceedings in *Qualls*.

CONCLUSION

The importance of the issues raised by Eleventh Circuit’s unwarranted expansion of magistrate jurisdiction and restriction of appellate review of the acceptance of a guilty plea warrants granting the petition for a writ of certiorari.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.
Counsel for Petitioner

Miami, Florida
November 2018