No. 18 - 6772

In the Supreme Court of the United States

DONOVAN GRANT,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOSHUA L. SOLOMON
CJA-Appointed Counsel of Record
POLLACK SOLOMON DUFFY LLP
101 Huntington Avenue, Suite 530
Boston, MA 02199
Telephone (617) 439-9800
E-mail jsolomon@psdfirm.com
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Petitioner Donovan Grant respectfully submits this reply brief in support of his petition for a writ of *certiorari* and in response to the government's opposition to that petition.

I. The Government's Opposition Fails to Appreciate the Significance of the First Circuit's Having Affirmed Mr. Grant's Conviction Based on a Different Alleged Crime Than the One to Which Mr. Grant Pled Guilty.

The opposition's first argument erroneously asserts that the First Circuit did not base its decision on having found in the record a different crime from the alleged crime to which Mr. Grant pled guilty. Rather, the opposition posits, the First Circuit merely found no prejudice when applying the plain-error standard of review because it concluded that Mr. Grant would have pled guilty regardless of the claimed Rule 11 error. What this argument overlooks, however, is *why* the First Circuit reached that prejudice conclusion: it expressly based its finding of no prejudice on its finding in the record a factual basis for a separate crime, from which it concluded that Mr. Grant would have pled guilty regardless of the lack of factual basis for the crime to which he actually pled. In that regard, the opposition fails to acknowledge the sentence immediately before the First Circuit's prejudice determination:

> The unobjected to portions of the PSR, together with the district court's determination, after an evidentiary hearing and beyond a reasonable doubt, that Grant believed that the second shipment contained heroin, support a finding that Grant knew that the October 15, 2015 transfer of funds, as an advance payment for the second shipment, represented proceeds of specified unlawful activity: the conspiracy to possess with intent to distribute and distribute heroin, as charged in Count One

(Appendix A, at 3a.) The First Circuit's decision then goes on to conclude, "[i]n view of this factual basis for the offense charged in Count Ten, we are not persuaded

that there is a reasonable probability that, but for the [alleged Rule 11] error, [Grant] would not have entered the plea." (*Id.* (internal quotation marks omitted; editing in original).)

As this explanation makes clear, the First Circuit affirmed the conviction not based on there having been an adequate factual basis for the supposed crime to which Mr. Grant pled guilty (i.e. the financial transaction on October 20, 2015). Indeed, it "assume[d] for purposes of this appeal, without deciding, that there was an insufficient factual basis to support Grant's plea to the conspiracy-to-commit-money-laundering charge based upon the facts proffered by the government at the change-of-plea hearing . . . ." (*Id.*) Instead, the First Circuit turned to *another* alleged crime that it found in the record – the October 15, 2015 financial transaction – which led the First Circuit to conclude that Mr. Grant would have pled guilty regardless of the lack of a factual basis for the crime to which he did plead. The opposition's reasoning that this is merely a prejudice determination elides over the fact that identifying a factual basis for a different crime was the express predicate for the First Circuit's prejudice determination. While framing its decision as a prejudice determination, the First Circuit thus unquestionably based its affirmance on having found in the record a factual basis for a separate crime.

Using the prejudice inquiry of plain-error review in this way has widespread significance for the effectiveness of Rule 11, as plain-error review will nearly always apply when reviewing a guilty plea. By definition, the defendant will have pled guilty; he thus will not have challenged before the District Court the factual basis for the

guilty plea, leading to plain-error review on any appeal challenging the conviction. If the prejudice inquiry of plain-error review were then triggered because the reviewing court is able to identify a separate crime in the record, as the First Circuit reasoned, then finding a separate crime in the record will always suffice as a basis for affirming convictions that were actually obtained without adequate factual bases. In short, given the ubiquity of plain-error review when assessing guilty pleas, there is no significance to the difference between Mr. Grant's formulation of the question – can a reviewing court affirm a guilty plea based on a different crime than the one to which the defendant pled guilty – and the opposition's implicit formulation of the question – can a reviewing court affirm a guilty plea because record evidence of a different crime means the defendant was not prejudiced in pleading guilty to a crime for which there was no factual basis. In both formulations, the reviewing court's identification of a separate crime either suffices or not. The First Circuit held that it does.

The Fifth Circuit, in contrast, in *United States v. Broussard*, 669 F.3d 537, 549 n.7 (5th Cir. 2012), refused to look to other charged criminal conduct, even on plain-error review. The opposition looks past this aspect of *Broussard* when asserting that there is no conflict because the Fifth Circuit there looked to the entire record on plain-error review. What that argument misses, however, is that even when looking to the entire record, the Fifth Circuit declined to rely on a separate crime as the basis for affirming the conviction.

Given the significance of Rule 11's mandate that District Courts must ensure that pleas are knowing and voluntary, and the constitutional implications when they

are not, this Court should address whether a conviction by plea can be upheld on a finding that the record would support a *different* crime, not that there was an adequate factual basis for the plea.

The opposition's remaining arguments as to the First Circuit's invocation of the earlier financial transaction simply misconstrue what the First Circuit held. The opposition contends that "[c]onsistent with the indictment, the government at petitioner's change-of-plea hearing recited multiple transactions and never agreed that only one could have supported the charged conspiracy." (Oppos. at 12.) The record reveals the opposite. As set forth in detail in Mr. Grant's petition, the prosecutor, the District Court, and Mr. Grant all relied on only the October 20, 2015 financial transaction as the basis for the money-laundering plea. The prosecutor described the October 20 transaction, immediately after which the District Court asked, "And ***that's*** the money laundering?" (Appendix C, at 63a (emphasis added).) The government replied, "It is, your Honor." (*Id.* at 63a.) Then when taking Mr. Grant's plea, the District Court asked him, "And you did do the business – putting aside the quantity and the price, you did do the business about the money transfer [singular] and the deposit [singular], is that correct?" Mr. Grant responded, "Yes, your Honor." (*Id.* at 66a.)

Nor did the First Circuit hold, as the opposition contends, that Mr. Grant's plea was adequately supported by a factual basis because "multiple transactions" combined to show a conspiracy to engage in money laundering. The First Circuit made clear that it understood that the District Court accepted Mr. Grant's plea based

on one transaction, on October 20, going so far as to assume that there was not an adequate factual basis "upon the facts proffered by the government at the change-of-plea hearing regarding the advance payment on October 20, 2015, for the third shipment." (Appendix A, at 3a.) The First Circuit never reasoned that there was nonetheless an adequate factual basis because the October 20 and October 15 financial transactions were part of the same conspiracy. The First Circuit simply looked to the earlier transaction alone and found that it – a separate alleged criminal transaction – was sufficient.

Similarly, the opposition defends a decision that the First Circuit never made when arguing that "the government's proffer supported a rational inference that petitioner received payment for the third shipment [i.e. the October 20 shipment] with knowledge that the funds were proceeds of prior drug transactions by the Antoine organization." (Oppos. at 15.) Once again, the First Circuit did not base its affirmance on the third transaction – the only one that the prosecution presented as the basis for the money-laundering plea, and the only one that Mr. Grant acknowledged (incorrectly, it turns out) as a factual basis for that plea. Rather, the First Circuit expressly based its affirmance on only the *second* financial transaction, conducted on October 15, 2015. (Appendix A, at 3a ("The unobjected to portions of the PSR, together with the district court's determination . . . that Grant believed that the second shipment contained heroin, support a finding that Grant knew that ***the October 15, 2015 transfer of funds***, as an advance payment for the second

shipment, represented proceeds of specified unlawful activity. . . ." (emphasis added).)

Mr. Grant unambiguously pled guilty to the crime of money laundering based on the October 20, 2015 financial transaction. The First Circuit unambiguously allowed that plea to stand because of the October 15, 2015 financial transaction – a different allegedly criminal act. This Court should review whether the plain-error doctrine is such that Courts of Appeals may properly affirm convictions in this manner using separate alleged crimes.

II. The Opposition Misreads the First Circuit's Decision When Arguing That the First Circuit Did Not Expand the Crime of Money Laundering Beyond the Limits that Other Courts of Appeals Have Imposed.

By misinterpreting the First Circuit's decision as to the meaning of "proceeds of specified unlawful activity" in the money-laundering statute, the opposition avoids grappling with the implications of what the First Circuit actually held.

As the opposition portrays it, the First Circuit concluded that the October 15 financial transaction satisfied the "proceeds" element of 18 U.S.C. § 1956(a)(1) because the transferred funds were derived from unidentified *earlier* criminal conduct that was part of an ongoing drug conspiracy. But once again, that is not what the First Circuit held. The First Circuit made clear that it viewed the second "drug" shipment itself as the illegal transaction from which the funds were "proceeds," and the pre-payment for that same shipment as the financial transaction in those proceeds.

The First Circuit never suggested, let alone held, that some earlier unlawful transaction gave rise to proceeds that were then used as payment for the October 15, 2015 transaction. To the contrary, the court expressly reasoned that it was the illegality of the second (i.e. October 15, 2015) shipment, not some earlier transaction, that made the October 15 financial transaction a form of money laundering. Specifically, as discussed in Mr. Grant's petition, the illegality of that "drug" transaction turned on whether Mr. Grant believed the second shipment contained actual heroin. In explaining its affirmance of the money-laundering conviction, the First Circuit expressly invoked the finding that Mr. Grant believed the second shipment contained actual heroin, and thus was unlawful:

> The unobjected-to portions of the PSR, together with the district court's determination, after an evidentiary hearing and beyond a reasonable doubt, ***that Grant believed that the second shipment contained heroin***, support a finding that Grant knew that the October 15, 2015 transfer of funds, ***as an advance payment for the second shipment***, represented proceeds of specified unlawful activity: the conspiracy to possess with intent to distribute and distribute heroin, as charged in Count One.

(Appendix A, at 3a (emphasis added).) In quoting from this passage, the opposition omits the language before "the October 15, 2015 transfer of funds." (Oppos. at 16) That omitted language ("that Grant believed that the second shipment contained heroin") is what makes clear that the First Circuit was relying on the second shipment as the "specified unlawful activity." By invoking the District Court's finding as to Grant's belief about the contents of the second shipment – the finding that made the second shipment an unlawful drug transaction – the First Circuit made clear that

it was viewing the second transaction as both the "unlawful activity" that produced "proceeds," and the financial transaction in those proceeds.

In this way, the First Circuit treated the "advance payment" for drugs as money laundering because such a drug transaction is an unlawful activity. The cases from other Circuits to which Mr. Grant's petition cites have expressly held that the money laundering statute is not that broad. According to those cases, for the financial transaction to be one involving "proceeds" from unlawful activity, the unlawful activity from which the funds were derived must have been a separate transaction from the one in which the funds are then used.

In fact, as it did before the First Circuit, the government acknowledges that other Courts of Appeals have required the predicate "unlawful activity" that generates the "proceeds" to be a separate transaction from the financial transaction in those proceeds. (*See* Oppos. at 16-17 ("Indeed, the government itself argued below . . . as petitioner does before this Court . . . that 'predicate offenses must produce proceeds before anyone can launder those proceeds.'" (quoting *United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998)).) The opposition depicts the First Circuit's decision here as consistent with those other Circuits' decisions only by overlooking what the First Circuit actually held.

The First Circuit's decision, by holding that a single drug transaction can supply both the illegal activity that makes the funds "proceeds" from unlawful activity, and the financial transaction in which those proceeds are used, directly conflicts with those other Circuit decisions.

CONCLUSION

For the reasons provided in Mr. Grant's petition and herein, the Court should grant his petition.

Respectfully submitted,

/s/ Joshua L. Solomon

JOSHUA L. SOLOMON
Counsel of Record
POLLACK SOLOMON DUFFY LLP
101 Huntington Avenue, Suite 530
Boston, MA 02199
jsolomon@psdfirm.com
(617) 439-9800
Counsel for Petitioner

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