No. 20-6802

In the Supreme Court of the United States

NOEL JONES,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONER

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In its response, the government argues (at 8–9) that the Court should hold Mr. Jones's petition pending its decision in *United States v. Gary*, No. 20-444, due to similarities between the issue in that case and Mr. Jones's first question presented. Mr. Jones agrees with the government's position on the first question and respectfully requests that his petition be held on that question pending disposition of *Gary*. However, for the reasons discussed in Mr. Jones petition and below, the Court also should grant certiorari on the second question presented related to the inadequacy of Mr. Jones's factual basis.

I. The Court should grant certiorari on Mr. Jones's second question.

Mr. Jones's second question for certiorari asks whether a defendant's ongoing buyer-seller relationship with a heroin supplier who is part of a large drug distribution conspiracy is sufficient to establish the defendant's knowing and voluntary participation in that broad conspiracy. The government raises two arguments in opposition to certiorari on that issue. First, the government argues (at 9–11) that the Fifth Circuit's ruling was correct and does not conflict with this Court's decision in *Kotteakos v. United States*. Second, the government argues (at 11–13) that, even if error occurred, Mr. Jones's case is a poor vehicle for further review because he would not be able to satisfy the other requirements necessary for plain error relief. The government is wrong on both points. For the reasons discussed in the petition and below, the Court should grant certiorari on Mr. Jones's second question arising from the inadequate factual basis for his guilty plea.

A. The Fifth Circuit's sufficiency finding is wrong and conflicts with Kotteakos.

The factual basis requirement in Fed. R. Crim. P. 11(b)(3) seeks 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." *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (citation omitted). Thus, the question is not whether the factual basis establishes the defendant's involvement in *some* conspiracy. It is whether the facts are "precise enough and sufficiently specific to demonstrate that the accused committed the *charged criminal offense*." *United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992) (internal quotation marks and citation omitted) (emphasis added); *see also United States v. Marek*, 238 F.3d 310, 314 (5th Cir. 2001) (en banc) ("That [the defendant] pleaded guilty—a legal conclusion on her part—ostensibly admitting to discrete facts supporting the charge against her, is not itself sufficient to support her guilty plea.").

Here, Count 1 of the indictment charged Mr. Jones with conspiring with eleven other individuals over a period of more than three years to distribute more than a kilogram of heroin. But his factual basis only described his involvement in a street-level drug-dealing partnership with one other individual. While Mr. Jones and his partner purchased their supply from a member of the sprawling conspiracy charged in the indictment, there were no specific facts establishing that Mr. Jones either knew about or voluntarily participated in any broader conspiracy. Nor did the factual basis describe any drug dealing activity by Mr. Jones outside of a nine-month window in 2013 when he and his partner conducted six controlled drug buys totaling

28 grams. That is plainly insufficient to establish Mr. Jones's involvement in the extensive drug conspiracy charged in the indictment.

The government claims that the Fifth Circuit's ruling was correct and does not conflict with this Court's decision in *Kotteakos v. Unites States*, 328 U.S. 750 (1946). However, the government's argument is conclusory and merely recites language from the Fifth Circuit's decision. It does not—and cannot—show how Mr. Jones's factual basis establishes his involvement in the specific conspiracy to which he pleaded guilty. Indeed, even if the reference to "daily sales" in Mr. Jones's factual basis could be considered sufficient to establish the requisite drug quantity, it still does not prove his knowing and voluntary participation in the charged conspiracy—an independent element of the charged crime. That is the question raised by Mr. Jones's petition. Just like in *Kotteakos*, the conspiracy proved by Mr. Jones's factual basis is distinct from the conspiracy charged in the indictment, and his conviction therefore is invalid.

B. This case is a good vehicle to address the second question.

The government also argues (at 11–13) that Mr. Jones's case presents a poor vehicle for further review because, in its view, Mr. Jones would not be able to satisfy the other requirements for plain error relief. The government is incorrect. As argued in the proceedings below, and as recent Fifth Circuit precedent establishes, Mr. Jones easily can satisfy the other prongs of plain error review in this case.

First, the inadequacy of the factual basis in this case was clear and obvious error. "An error is plain, in this context, if it is 'clear or obvious' what the government must prove to establish the offense, and, notwithstanding that clarity, the district

court accepts a defendant's guilty plea without an adequate factual basis." *United States v. Alvarado-Casas*, 715 F.3d 945, 951 (5th Cir. 2013). The Fifth Circuit's pattern jury instructions clearly state that a guilty verdict cannot be rendered if it is determined that "[the] defendant was not a member of the conspiracy charged in the indictment . . . even though that defendant may have been a member of some other conspiracy." Pattern Crim. Jury Instr. 5th Cir. 2.16. Moreover, longstanding Fifth Circuit precedent explains that "[t]he question whether the evidence establishes the existence of one conspiracy (as alleged in the indictment) or multiple conspiracies" is a factual determination that must be established beyond a reasonable doubt. *United States v. Mitchell*, 484 F.3d 762, 769 (5th Cir. 2007). Thus, it is clear that the government had to prove Mr. Jones's involvement in the *charged* conspiracy to establish his guilt, making the error here clear and obvious.

Mr. Jones also can satisfy the third and fourth prongs of plain error review. Importantly, the Fifth Circuit recently held that a deficiency in a factual basis regarding the "possession" element of an 18 U.S.C. § 922(g) offense both affected the appellant's substantial rights and seriously affected the fairness and integrity of the proceedings, mandating vacatur under plain error review. *See United States v. Smith*, __ F.3d __, 2021 WL 1783355, at *6 (5th Cir. May 5, 2021). In that case, the Fifth Circuit explained that the appellant's mistaken belief that the factual basis was sufficient to satisfy the challenged element "led him to plead guilty," thereby affecting his substantial rights. *Id.* The court further explained that "[t]he fact that Smith is or could be innocent" of the charge "is reason alone for us to correct the district court's

error." *Id.* Likewise, in Mr. Jones's case, the clear or obvious error in his factual basis led him to plead guilty to a conspiracy in which he was not involved, and his innocence of that charged—regardless of his guilt of some other, lesser conspiracy—"is reason alone" to correct the error under plain error review.

The government suggests (at 12) that Mr. Jones's admission to his involvement in a separate conspiracy with Terrell Dyer prevents him from satisfying the final prongs of plain error review. It does not. While Mr. Jones's factual basis stated that he "worked with TERRELL DYER to resell the heroin [they purchased] in gram quantities to street-level customers on a daily basis," that only generated a one-kilogram drug quantity when combined with the dates in the indictment for the sprawling conspiracy charged in Count 1. And, as discussed, Mr. Jones's and Mr. Dyer's admitted sales all occurred within a nine-month window in 2013. Accordingly, if Mr. Jones had properly been informed that the facts to which he admitted did not establish his knowing and voluntary participation in the broadly charged conspiracy in the indictment, there is more than a reasonable probability that he would not have entered the plea. *See United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004).

Additionally, the district court's erroneous acceptance of Mr. Jones's guilty plea resulted in a broad scope of conduct being attributed to him at sentencing, which was wholly unrelated to the drug-dealing partnership to which he actually admitted. As described in the PSR, the evidence collected by the government related to the charged conspiracy proved more than *three kilograms* of heroin was involved.

Moreover, at Mr. Jones's sentencing, the court heavily relied on the overdose death of a man who purchased heroin from Terence Taylor, the central figure of the charged conspiracy. Mr. Taylor had previously sold heroin to the man on multiple occasions and was selling over 160 grams of heroin per month during that time period. Indeed, the quantities for which Mr. Taylor and his suppliers were directly responsible alone totaled nearly three kilograms. Thus, even if it is possible that Mr. Jones's conspiracy with Mr. Dyer involved more than a kilogram of heroin, there still is a reasonable probability that he would not have pleaded guilty to the conspiracy as charged, because it caused the court to afford greater weight to aggravating circumstances and conduct of charged co-conspirators in determining Mr. Jones's sentence.

Finally, the government argues (at 12–13) that Mr. Jones received "substantial benefits" from pleading guilty to the sprawling drug conspiracy in Count 1—namely, the government's dismissal of six substantive distribution counts and a firearm possession charge, and its agreement not to charge him with an enhancing prior drug conviction. But all of the dismissed counts carried significantly lower sentencing exposure than the conspiracy alleged in Count 1. At most, Mr. Jones would have faced a statutory maximum of 10 years on the firearm count and an enhanced statutory maximum of 30 years on each of the substantive distribution counts if charged with a prior conviction. Moreover, the lower statutory maximums for those offenses would have generated a lower career offender Guidelines range than the one applied to Mr. Jones at his sentencing, which was based on the maximum of life imprisonment for Count 1. And, even if Mr. Jones were found guilty of a conspiracy involving one

kilogram of heroin *and* charged with an enhancing prior conviction, his career offender offense level would remain the same due to the statutory maximum of life. Thus, the purported "benefits" cited by the government would not have persuaded Mr. Jones to plead guilty to the large conspiracy charged in Count 1 if he properly had been informed that his admitted conduct did not satisfy all of the required elements of that conspiracy. At the very least, there is a reasonable probability that he would not have so pled.

In sum, Mr. Jones's factual basis was plainly inadequate to support his conviction of Count 1 in this case, the Fifth Circuit's contrary ruling conflicts with this Court's decision in *Kotteakos*, and Mr. Jones will be able to satisfy the other requirements of plain error review upon correction of the error. Accordingly, Mr. Jones's case presents a good vehicle to address this question, and the Court should grant certiorari on question two in the petition.

II. Alternatively, the Court should hold Mr. Jones's petition pending its decision in *United States v. Gary*.

In responding to Mr. Jones's first question presented, the government argues only that his petition should be held pending the outcome of *United States v. Gary* because the issues are similar enough such that the Court's decision in *Gary* could affect the proper disposition of Mr. Jones's petition. Mr. Jones agrees. Accordingly, in the event this Court decides that certiorari is unwarranted on the second question presented, Mr. Jones respectfully requests that his petition be held on the first question pending resolution of *Gary*.

CONCLUSION

This Court should grant Mr. Jones's petition for writ of certiorari on the second question presented or, alternatively, hold his petition pending disposition of *Gary*.

Respectfully submitted May 11, 2021,

/s/ Samantha Kuhn
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