

No._____

IN THE SUPREME COURT OF THE UNITED STATES

HEATHER DAWN GRIFFITH, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether, in a prosecution under 21 U.S.C. § 846, Federal Rule of Criminal Procedure 11(b)(3) requires a statement sufficient to show an agreement to distribute a particular quantity of a controlled substance.

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Heather Dawn Griffith asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on March 16, 2021.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, reported at 839 Fed. Appx. 920 (5th Cir. 2021), is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on March 16, 2021. This petition is filed within 150 days after entry of judgment. *See* Supreme Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 841 provides, in relevant part, “Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance[.]”

Title 21 U.S.C. § 846 provides that “Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 11(b)(3) provides that “Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.”

STATEMENT

Petitioner Heather Griffith was indicted for conspiracy to possess more than 50 grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. § 841(a), (b)(1)(A) and 846.¹ She was living with her new boyfriend, Jesse Hardee at his house. Griffith was addicted to heroin. Hardee, a drug dealer, fed her addiction by giving her heroin during the nine or so weeks they were together. The police learned of Hardee’s dealing and detained him. They found \$30,000 in his car. The police later searched Hardee’s house, where they found finding small amounts of heroin and methamphetamine in Griffith’s purse. A much larger quantity of methamphetamine was found in other parts of the house and in Hardee’s shop.

After Hardee and Griffith were charged with a drug conspiracy, Griffith appeared headed for trial. Then, just four days before her trial, she entered a guilty plea to the charge made in the indictment. The plea was made pursuant to a guilty plea.

At the guilty plea hearing, the magistrate judge read the factual basis for the plea aloud in Griffith’s presence. He then asked Griffith whether the facts set out in

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

the written factual basis were correct and accurate; Griffith stated that the only thing she knew about were the drugs that she had in her purse. She also admitted that Hardee had asked her to pick up a package he had left behind. The magistrate asked Griffith "Is that what you're pleading guilty to today?" Griffith answered. "Yes, Sir."

The factual basis provided:

On Tuesday, November 26th, 2019, Midland DEA, Ector County Sheriffs Office SID, and Crane County Sheriffs Office executed a federal search warrant at 115 Dorothea in Crane, Texas. JESSE HARDEE and HEATHER DAWN GRIFFITH resided at the residence.

HARDEE had been arrested earlier in the day with over \$30,000 cash during a traffic stop.

During the search of the residence, almost 300 grams of methamphetamine and a quantity of heroin were located inside the residence and shop located on the same property near the main residence and seized as evidence. Officers also located a quantity of cocaine, marijuana, ecstasy pills, and mushrooms, and all items were seized as evidence. Located throughout the residence and shop, drug paraphernalia was found and photographed.

GRIFFITH stated the purse located in the northwest bedroom that was found with a quantity of heroin and methamphetamine belonged to her. Also inside the purse was a card with GRIFFITH's name on it.

GRIFFITH retrieved the package on the side of the road that HARDEE had tossed during the traffic stop the night prior. .

In that last paragraph, the word narcotics was crossed out, the word package was handwritten in, and that change was initialed by the prosecutor, defense counsel, and Griffith.

After the plea hearing, the district court accepted Griffith's plea. It sentenced her to 136 months' imprisonment.

Griffith appealed. She argued that the factual basis for her plea was inadequate to show that she agreed with anyone to possess with intent to distribute more than 50 grams of methamphetamine. The factual basis contained facts consistent with Griffith's assertions that she was a heroin addict with a bad boyfriend who sold drugs, gave her heroin, and fed her addiction. She argued that the factual basis did not establish an agreement to distribute more than 50 grams of methamphetamine, but established only that she was present in Hardee's house near the methamphetamine and she did an errand for Hardee.

The Fifth Circuit affirmed the conviction, finding no plain error in the acceptance of the plea based on the factual basis proffered in the district court. It ruled that "the entirety of the record supports a reasonable inference of a tacit agreement between them to possess with intent to distribute narcotics." App. at 2; *see also* Fed. R. Crim. P. 52(b) (stating plain error standard). The court concluded that the "evidence extends beyond Griffith's association with her boyfriend and

presence around his drugs; it also shows that she acted in concert with him and aided him, while personally benefiting from his drug dealing activities.” App. at 2.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE EVIDENCE NECESSARY TO SUPPORT A GUILTY PLEA TO A SECTION 846 DRUG CONSPIRACY CHARGE.

Title 21 U.S.C. § 846 makes it a crime to agree to commit a drug offense, such as possession of more than 50 grams of methamphetamine with intent to distribute it. The § 846 offense elements require only the showing of such knowing agreement. No overt act must be shown by the government. *United States v. Shabani*, 513 U.S. 10 (1994). The agreement itself is the *actus res* of the offense. *Id.* at 16 (citing *Iannelli v. United States*, 420 U.S. 770 (1975)).

Federal Rule of Criminal Procedure 11(b)(3) requires that an adequate factual basis be shown before a district court may accept a guilty plea to a federal criminal charge. See *United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012); *United States v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008). Griffith pleaded guilty to a drug conspiracy charge involving more than 50 grams of methamphetamine, but the factual basis for that plea did not show that Griffith had agreed to a drug offense, or a drug offense involving that quantity of methamphetamine. This case presents the Court with the opportunity to provide guidance as to how complete and specific a factual basis supporting a § 846 plea must be.

The purpose of Rule 11(b)(3)'s factual basis requirement is "to ensure that the defendant's conduct actually corresponds to the charges lodged against him." *United States v. Ramos-Mejia*, 721 F.3d 12, 16 (1st Cir. 2013) (quoting *United States v. Jiminez*, 498 F.3d 82, 86 (1st Cir. 2007)). The factual basis must allow a court to determine, as a matter of law, that the defendant's conduct was conduct proscribed by the statute under which the charge is brought. *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010)). "The intention of Rule 11(b)(3) is to protect a defendant who voluntarily pleads guilty with an understanding of the nature of the charge but 'without realizing that his conduct does not actually fall within the definition of the crime charged.'" *United States v. Angelese-Mascote*, 206 F.3d 529, 530 (5th Cir. 2000)).

To prove a possession with intent to distribute conspiracy, the evidence must show (1) the existence of an agreement between two or more persons to possess with the intent to distribute a controlled substance, (2) knowledge of the agreement on the part of the defendant, and (3) voluntary participation in the agreement by the defendant. *United States v. Nieto*, 721 F.3d 357, 367 (5th Cir. 2013); *United States v. Mastrapa*, 509 F.3d 652, 659-60 (4th Cir. 2007). In cases such as Griffith's in which the indictment alleges an amount of drugs above an enhanced penalty threshold, sufficient evidence of agreement to the amount of drugs alleged is also necessary. Cf. *United States v. Daniels*, 723 F.3d 562, 571 (5th Cir. 2013)

Nothing in the factual basis, in which the word narcotics was crossed out and the word package substituted for it, shows that Griffith agreed with anyone to possess

with intent to distribute more than 50 grams of methamphetamine. The factual basis described only things about Griffith that were consistent with her story that she was a heroin addict with a bad boyfriend who sold drugs, gave her heroin, and fed her addiction. The evidence showed that Griffith had small amounts of heroin and methamphetamine in her purse that was found at the house she lived in with Hardee. That evidence does not show that Griffith knowingly and voluntarily agreed to possess with Hardee a large amount of methamphetamine with the intent to distribute it. It shows only presence around her boyfriend Hardee and his drugs. It showed nothing more than Griffith's mere presence and association with a person dealing drugs. *See United States v. Cessa*, 785 F.3d 165, 180 (5th Cir. 2015) (mere presence and association does not show participation in drug conspiracy). The mere fact that she was around people who had cash or who dealt drugs did not make her a knowing and voluntary participant in a methamphetamine conspiracy.

The Fifth Circuit nonetheless upheld Griffith's conviction. It thought the factual basis showing that drugs were found in the house and her relationship with her boyfriend sufficient. This even though neither the factual basis nor the record on appeal showed Griffith had agreed to move drugs, as opposed to a package, and even though nothing showed an agreement to a large amount of methamphetamine, as opposed to user quantities. *United States v. Vonn*, 535 U.S. 55 (2002) (on Rule 11 review entire record considered). The factual basis in this case did not show an agreement, let alone an agreement to a large amount of methamphetamine. To conclude, as the court of appeals decision did, that the factual basis lacking support

for agreement to purpose and amount undermines the protections of Rule 11(b)(3) and conflicts with *Shabani*. This case is a good vehicle for addressing the issue presented because Griffith is the type of defendant Rule 11(b)(3) is designed to protect. She was around a drug dealer, but not shown to be working together with him. Her case would allow the Court to clarify the degree of specificity necessary to meet the demands of Rule 11(b)(3) to protect from conviction those who found themselves caught up, fed drugs, or tricked by dealers when their conduct around drugs or a drug dealer is insufficient to constitute a crime under federal law.

Conclusion

FOR THESE REASONS, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: May 24, 2021.