

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ALLEN HILER,
aka Teg,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

Stephen R. Hormel
Hormel Law Office, L.L.C.
17722 East Sprague Avenue
Spokane Valley, WA 99016
Telephone: (509) 926-5177
Facsimile: (509) 926-4318

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Does a federal criminal defendant's valid waiver of appeal in a plea agreement bar the defendant from an appeal that challenges the sufficiency of the factual basis of a guilty plea where the district court is required to determine that there is a factual basis for the plea pursuant to Federal Rule of Criminal Procedure 11(b)(3)?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	ii
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	2
RELEVANT STATUTES AND RULES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDIX	12
Ninth Circuit Order Dismissing Appeal	1
Ninth Circuit Order Denying Reconsideration	1
18 U.S.C. § 924(c)	3
18 U.S.C. § 1951	5
Fed. R. Crim. P. 11	5
Indictment	10
Plea Agreement	14
Appellee United State's Motion to Dismiss Appeal	27
Defendant-Appellant's Response to United State's Motion to Dismiss Appeal	42

TABLE OF AUTHORITIES

Case Authority

<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974)	8
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	7,8
<i>Class v. United States</i> , 138 S. Ct. 798 (2018)	5,8,9
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	7
<i>McCarthy v. United States</i> , 394 U.S. 459 (1969)	7
<i>Menna v. New York</i> , 423 U.S. 61 (1975) (<i>per curiam</i>)	9
<i>Taylor v. United States</i> , __U.S.__, 136 S. Ct. 2074 (2016)	4,5
<i>United States v. Adams</i> , 448 F.3d 492 (2d Cir. 2006)	10
<i>United States v. Broce</i> , 488 U.S. 563 (1989)	9
<i>United States v. Hildenbrand</i> , 527 F.3d 466 (5th Cir. 2008)	10
<i>United States v. Lloyd</i> , 901 F.3d 111 (2d Cir. 2018)	9
<i>United States v. Mastrapo</i> , 509 F.3d 652 (4th Cir. 2007)	10
<i>United States v. McCoy</i> , 895 F.3d 358 (4th Cir. 2018)	9,10
<i>United States v. Portillo-Cano</i> , 192 F.3d 1246 (9th Cir. 1999)	10
<i>United States v. Puentes-Hurtado</i> , 794 F.3d 1278 (11th Cir. 2015)	10

Federal Statutes and Rules

18 U.S.C. § 924(c)	1,2
18 U.S.C. § 1951	1,2,4,5,9
28 U.S.C. § 1254	2
Fed. R. of Crim. P. 11	<i>passim</i>

Other Authority

Advisory Committee Notes on 1966 Amendments to Fed. R. Crim. P. 11 6,7,10

No. _____

IN THE UNITED STATES SUPREME COURT

GERALD ALLEN HILER,
aka Teg,

PETITIONER,
vs.

UNITED STATES OF AMERICA,
RESPONDENT.

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

Petitioner, GERALD ALLEN HILER (hereinafter Hiler) respectfully prays that a writ of certiorari issue to review the order dismissing his direct appeal from the United States Court of Appeals for the Ninth Circuit entered on November 19, 2020.

OPINION BELOW

On November 19, 2020, the Ninth Circuit Court of Appeals entered an order dismissing Hiler's direct appeal following a conviction for a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and a conviction for brandishing a firearm in relation to the robbery in violation of 18 U.S.C. § 924(c). The order is attached in the Appendix (App.) at page 1. The Ninth Circuit denied a motion for reconsideration and suggestion for a hearing en banc on February March 8,

2021. App. 2. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

RELEVANT STATUTORY PROVISIONS & FEDERAL RULES

18 U.S.C. § 924(c): *See*, App. 3-5.

18 U.S.C. § 1951: *See*, App. 5.

Fed. R. of Crim. P., Rule 11: *See*, App. 5-9.

STATEMENT OF THE CASE

This petition asks the Court to resolve the question of whether a federal criminal defendant who executed a waiver of appeal in a plea agreement with the government, nonetheless, retains the right to appeal a claim that the factual basis for a guilty plea was insufficient to establish all elements of the offense. Rule 11(b)(3) of the Federal Rules of Criminal Procedure governs. Before entering judgment following a defendant's guilty plea, Rule 11(b)(3) requires the district court to determine that there is a sufficient factual basis to support the plea. Fed. R. Crim. P. 11(b)(3); App. 7.

Hiler was charged with three others in a three count indictment. Count I charged conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a). App. 11. Count II charged a substantive Hobbs Act robbery in violation of § 1951(a) and (b). App. 11-12. Count III charged brandishing a firearm in furtherance of the Hobbs Act robbery in violation of 18 U.S.C. § 924(c)(1)(A)(i) and (ii) and 2. App. 12.

The victims of the robbery were husband and wife, the Genoveses. The Genoveses and the defendants resided in Montana. Hiler's codefendant, Kielan Franklin, gave the Genoveses \$1,200.00 to acquire heroin. The Genoveses traveled from Montana to Washington State where they purchased an insufficient amount of heroin.

When the couple returned to Montana, they did not deliver any heroin to Franklin. After heated email exchanges, Franklin rounded up Hiler and the others to forcibly obtain his heroin, or to get the money back he had given to the Genoveses. Hiler and the others went into the Genoveses' home where Hiler brandished a firearm at Ms. Genovese to obtain Franklin's heroin or get his money back. Instead leaving with either, the robbers took a small amount heroin that was unrelated to the heroin the Genoveses purchased in Washington. The robbers also took a wedding ring, cell phone and an expensive purse.

Before trial, Hiler pleaded guilty to Counts II and III pursuant to a plea agreement he entered into with the government. App. 14-26. The government agreed to dismiss Count I. App. 15. In exchange, Hiler agreed to waive appeal on "any aspect of his sentence." App. 21-22. The plea agreement contained two appeal waiver provisions.

In the first provision, Hiler agreed to waive "the right to appeal or collaterally attack any aspect of the sentence. ... if the sentence imposed is within or below the guideline range as calculated by the Court..." App. 21-22. In the second provision, Hiler agreed to waive appeal on any aspect of his sentence if the government made a motion for reduction of sentence for substantial assistance and "the Court accept[ed] the plea agreement." App. 22.

The district court accepted the plea agreement after the government made a motion for a reduction in sentence. Thus, the waiver of Hiler's right to appeal any aspect of his sentence was

valid and enforceable. Hiler filed an appeal, but did not appeal any aspect of his sentence.

Instead, he claimed that his guilty pleas to both Count II and Count III were not supported by a sufficient factual basis as required under Rule 11(b)(3). He did not object to an insufficient factual basis before the district court. Thus, Hilier's success on appeal rested on whether he could meet the plain error standard of review.¹

In particular, Hiler claimed the that the district court did not have a sufficient factual basis to establish the commerce element of the Hobbs Act robbery § 1951(a). Since the charge of brandishing the firearm relied on the validity of the conviction on the Hobbs Act robbery, Hiler maintained that both counts of conviction should be vacated if the Ninth Circuit agreed that there was an insufficient factual basis on the commerce element to support his guilty pleas.

The commerce element for a Hobbs Act robbery subjects a person to federal prosecution if the robber "in any way or degree obstructs, delays, or affects commerce...." during the course of the robbery. 18 U.S.C. § 1951. The thrust of Hiler's claim centered on the Court's decision in *Taylor v. United States*, __ U.S. __, 136 S. Ct. 2074 (2016).

In *Taylor*, the Court held that "the Act's commerce element" is satisfied with evidence that "a defendant knowingly stole or attempted to steal drugs or drug proceeds" of a drug dealer. *Taylor*, __ U.S. __, 136 S. Ct. at 2081. On appeal, Hiler claimed that, after reviewing all proceedings, including the trial testimony of the Genoveses at a codefendant's trial, the factual basis for his guilty pleas was insufficient to find that he and the other codefendants targeted drugs or drug proceeds of a dealer as *Taylor* requires. *Id.* at 2082 ("Our holding is limited today to

¹ The Opening Brief that sets out the facts on law relating to the insufficient factual basis raised on appeal was submitted in the Ninth Circuit record for review at DktEntry 14.

cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds.”).

After Hiler filed the opening brief, the government filed a motion to dismiss. App. 27. The government claimed that Hiler waived his right to appeal because “he waived his right to appeal from a sentence.” App. 38. The government claimed that “[t]he district court complied with Fed. R. Crim. P. 11.” App. 39. The government never addressed Hiler’s issue that the record of proceedings failed to establish a factual basis for the commerce element of § 1951(a).

Hiler filed a response to the government’s motion to dismiss. App. 42. Hiler asserted that a dismissal of his appeal would run contrary to other circuits’ authority that hold a defendant’s valid waiver of appeal does not bar an appeal challenging the sufficiency of the factual basis for a guilty plea. App. 47-48. The Ninth Circuit rejected Hiler’s position and dismissed his appeal.

The Order dismissing Hiler’s appeal stated:

Appellee’s motion to dismiss this appeal (Docket Entry No. 19) is granted. As reflected in the parties’ plea agreement, appellant waived the right to challenge the sufficiency of the evidence supporting his convictions by entering an unconditional guilty plea. *See Class v. United States*, 138 S. Ct. 798, 805 (2018) (“[A] valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty.” (internal quotations omitted)). To the extent appellant argues that his plea was invalid because the factual basis was insufficient, the record shows that appellant’s plea was knowing and voluntary, and supported by an adequate factual basis. *See Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016).

DISMISSED

App. 1.

Dismissal of his appeal eliminated Hiler’s right to meaningful appellate review on his challenge to the factual basis of his guilty pleas. Hiler seeks to have his appeal reinstated so the merits of his issues are meaningfully and fully addressed by both the government and by the Ninth Circuit. This Court should resolve the split in the circuits occasioned by the Ninth Circuit’s dismissal of Hiler’s appeal.

REASONS FOR GRANTING THE WRIT

The Court should take this opportunity to resolve the question of whether a federal criminal defendant’s valid waiver of appeal in a plea agreement bars the defendant from an appeal that challenges the sufficiency of the factual basis of a guilty plea. The Ninth Circuit’s order dismissing the appeal conflicts with decisions from other circuits. Resolution of this question will ensure consistent and uniform application of the Federal Rules of Criminal Procedure, particularly, Rule 11 and its relationship to appeal waivers and a defendant’s right to seek appellate review on the validity of a guilty plea entered pursuant to Rule 11.

Federal Rule of Criminal Procedure 11 contains requirements that must be met by a district court for considering, and before accepting, a defendant’s guilty plea to an offense. Fed. R. Crim. P. 11(b). One such requirement is that ‘[b]efore 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); App. 7.

Subparagraph (b)(3) was added to Rule 11 in 1966. The Advisory Committee Notes for the 1966 Amendments to Rule 11 state:

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the

presentence report, or otherwise, 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. Such inquiry should, e.g., 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. For a similar requirement see Mich.Stat.Ann. § 28.1058 (1954); Mich.Sup.Ct.Rule 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *People v. Barrows*, 358 Mich. 267, 99 N.W.2d 347 (1959); *People v. Bumpus*, 355 Mich. 374, 94 N.W.2d 854 (1959); *People v. Coates*, 337 Mich. 56, 59 N.W.2d 83 (1953). See also *Stinson v. United States*, 316 F.2d 554 (5th Cir.1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

See, Advisory Committee Notes on 1966 Amendments to Fed. R. Crim. P. 11. Hence, the policy underlying the requirement for a factual basis to support a guilty plea is rooted in principles of due process.

This is evident from the Court's decision in *Boykin v. Alabama*, 395 U.S. 238 (1969).

There, the Court noted the following:

In the federal regime we have Rule 11 of the Federal Rules of Criminal Procedure which governs the duty of the trial judge before accepting a guilty plea. See *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418. We said in that case:

‘A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be ‘an intentional relinquishment or abandonment of a known right or privilege.’ *Johnson v. Zerbst*, 304 U.S. 458, 464 ... (1938). Consequently, if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses

an understanding of the law in relation to the facts.' *Id.*, at 466, 89 S.Ct., at 1171.

Boykin, 395 U.S. at 243 n. 5. The question here centers on whether a defendant who pleaded guilty and, in the process, entered a valid waiver of the right to appeal a sentence, is barred from an appeal that challenges the factual basis of the guilty plea.

The Ninth Circuit answered the question in the affirmative by dismissing Hiler's appeal. App. 1. In so doing, the Ninth Circuit relied on the Court's decision in *Class v. United States*, __ U.S. __, 138 S. Ct. 798 (2018), stating, [a]s reflected in the plea agreement, appellant waived the right to challenge the sufficiency of the evidence supporting his convictions by entering an unconditional guilty plea." App. 1 (citing *Class*, __ U.S. __, 138 S. Ct. at 805) ("[A] valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty.") (internal quotations omitted)). The Ninth Circuit's order misconstrues *Class*.

Class addressed the question of "whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." *Class*, __ U.S. __, 138 S. Ct. At 803. The Court held that a guilty plea does not preclude such an appeal. *Id.*

Significantly, *Class* distinguished cases where a defendant's appeal challenged "case-related constitutional defects that 'occurred prior to the entry of the guilty plea.'" *Id.* at 804-05 (quoting *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)). In such cases, a guilty plea will bar appeals on such "case-related constitutional defects" that occurred prior to a defendants guilty plea. *Id.*

The Court held that the defendant in *Class* retained the right to direct appeal since he was challenging “the Government’s power to criminalize Class’ (admitted) conduct.... [which] call into question the Government’s power to ‘constitutionally prosecute’ him.” *Class*, __U.S.__, 138 S. Ct. at 805 (quoting *United States v. Broce*, 488 U.S. 563, 575 (1989) (quoting *Menna v. New York*, 423 U.S. 61, 61-62 n. 2 (1975) (*per curiam*))).

Hiler’s claim on appeal also challenged the government’s power to prosecute him. Without a factual basis supporting the commerce element in § 1951(a), the government is without jurisdiction to prosecute a Hobbs Act robbery. The same is true if any element of the offense lacked a sufficient factual basis.

Other circuit’s recognize this. These circuits do not bar appeals for defendants who have entered valid appeal waivers if the defendants are challenging the factual basis of their guilty pleas.

For example, the Second Circuit holds that an “[a]ppeal waiver included in a agreement does not bar challenges to the process leading to the plea.” *United States v. Lloyd*, 901 F.3d 111, 118 (2d Cir. 2018). The Second Circuit must “be assured that a defendant’s plea was voluntary and knowing, [or it] will not enforce any waivers provided in the related plea agreement.” *Id.* In *Lloyd*, the Second Circuit rejected the government’s argument that a waiver of appeal was enforceable and reviewed on direct appeal the defendant’s challenge to the factual basis of a guilty plea. *Id.* at 118,123.

Likewise, in *United States v. McCoy*, 895 F.3d 358 (4th Cir. 2018), the Fourth Circuit recognized that “the very purpose of requiring a district court to ‘satisfy itself that there is a factual basis for the plea before entering judgment’ is to ensure ‘the plea is made voluntarily with

the understanding the nature of the charge.” *Id.* at 364 (citing Fed. R. Crim. P. 11, Advisory Committee Notes, 1966 Amendments). The Fourth Circuit observed that a defendant in “arguing that his plea lacks a factual basis, … raises the possibility that his decision to plead guilty is the product of coercion or misunderstanding.” *Id.* (citing *United States v. Mastrapo*, 509 F.3d 652, 659-60 (4th Cir. 2007)).

McCoy referenced other circuits who refuse to bar a defendant’s appeal in the face of an appeal waiver when the defendant is claiming there was an insufficient factual basis for a guilty plea. *McCoy*, 895 F.3d at 364 (citing *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015) (“Such a claim goes to the heart of whether the guilty plea, including the waiver of appeal, is enforceable.”) (quotation in original); *United States v. Hildenbrand*, 527 F.3d 466, 474 (5th Cir. 2008) (“If the factual basis is not sufficient as to any count, the conviction should be vacated.”) (quotations in original); and *United States v. Adams*, 448 F.3d 492, 497, 502 (2d Cir. 2006) (“A lack of a factual basis for a plea is a substantial defect calling into question the validity of the plea.”) (quotations in original)). Consistent with the circuits having addressed this question, *McCoy* held “that even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea.” *McCoy*, 895 F.3d at 364.

The Ninth Circuit recognizes that if a plea “agreement is involuntary or otherwise unenforceable, then the defendant is entitled to appeal.” *United States v. Portillo-Cano*, 192 F.3d 1246, 1250 (9th Cir. 1999). The Ninth Circuit also recognized that a challenge to the “soundness of [a] plea allocution under Rule 11, [] goes to the heart of whether [a] guilty plea, including a waiver, is enforceable.” *Id.* Yet, in this instance, when confronted with a claim of a Rule 11(b)(3) defect in the factual basis of a guilty plea, the Ninth Circuit summarily dismissed Hiler’s

appeal and enforced the appeal waiver. App. 1.

The Ninth Circuit's order dismissing Hiler's appeal conflicts with the authority from other circuits that hold an appeal waiver does not bar an appeal challenging the factual basis of a guilty plea under Rule 11(b)(3). This case provides the Court with an excellent opportunity and an ideal vehicle to resolve a question important to the uniform application of the Federal Rules of Criminal Procedure. This case offers the Court an opportunity to resolve the conflict among various United States courts of appeals.

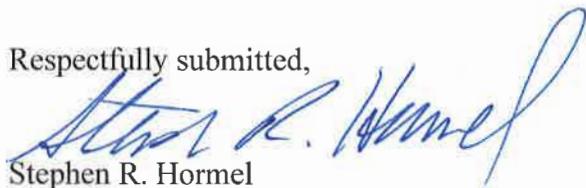
By dismissing appeals in cases like this, the Ninth Circuit, and other circuits who follow such practice, are preventing meaningful appellate review for defendant's who have pleaded guilty and then learn that there may be insufficient factual basis to support their pleas. A majority of the circuits that have addressed this question have refused to bar an appeal to challenge the factual basis of guilty pleas. These circuits refuse to enforce a valid waivers of appeal under these circumstances. The Court is urged to address and to resolve this question.

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 5th day of August, 2021.

Respectfully submitted,


Stephen R. Hormel
17722 East Sprague Avenue
Spokane Valley, WA 99016
Telephone: (509) 926-5177
Facsimile: (509) 926-4318
Attorney for Hiler