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Note

The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After Pleading Guilty

Steven Schmidt*

On September 4, 1991, the United States government charged Gary Johnson with conspiracy to possess with the intent to distribute fifty grams or more of “crack” cocaine.1 Acknowledging that he had participated in a drug deal, Mr. Johnson decided to plead guilty.2 At his plea hearing, however, Mr. Johnson denied that he conspired to sell over fifty grams of “crack” cocaine.3 Rather, he admitted to possessing and selling thirty-four grams and thereafter stated to the court that he had qualms with his plea agreement because “a man should be tried on what he sold.”4 The district court ignored this fact and sentenced him to more than ten years in prison.5 In the face of this apparent injustice, Mr. Johnson appealed his conviction, claiming that there was no factual basis to support his guilty plea because he did not commit the acts charged in the indictment.6 In twenty-six words, however, the Eleventh Circuit denied Mr. Johnson the right to another opportunity to be heard:

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1. Initial Brief of Appellant at 7, United States v. Johnson, 89 F.3d 778 (11th Cir. 1996) (No. 94-2149), 1995 WL 17061772 at *7. Mr. Johnson was also charged with possession with intent to distribute five or more grams of “crack” cocaine. Id.
2. See id.
3. See id. at 9–12.
4. Id. at 9.
5. See Johnson, 89 F.3d at 779.
6. See id. at 784.

284
“Johnson’s contention [was] barred by his guilty plea. ‘A guilty plea, since it admits all the elements of a formal criminal charge, waives all nonjurisdictional defects.’” As a result, the court upheld Mr. Johnson’s convictions and forced him to serve the remainder of his sentence.

Although over fourteen years old, the reasoning the Eleventh Circuit stressed continues to underline one argument in a split among the federal courts regarding the right of a criminal defendant to challenge, on direct appeal, the adequacy of the factual basis that supports his guilty plea. The Federal Rules of Criminal Procedure state that “[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” The existence of this factual basis requirement protects the rights of criminal defendants and helps to prevent the punishment of innocent individuals. Given the importance of this right, courts of appeals from multiple circuits have held that a defendant does not sacrifice his right to appeal the adequacy of the factual basis of his conviction despite having entered a guilty plea. These courts reason that a lack of an adequate factual basis is a substantial defect which is “so fundamental as to cast serious doubt on the voluntariness of the plea.” These decisions, however, conflict with other opinions which provide that a defendant waives his right to appeal any nonjurisdictional defects after entering a guilty plea at the district court level. These courts have held that the adequacy of the factual basis that supports a guilty plea is a nonjurisdictional defect that is logically consistent “with the is-

7. Id. (quoting United States v. Fairchild, 803 F.2d 1121, 1124 (11th Cir. 1986)).
8. Id. at 785.
10. See John L. Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?, 126 U. PA. L. REV. 88, 95 (1977) (explaining that the factual basis requirement serves to protect the rights of criminal defendants).
11. See United States v. Lacey, 569 F.3d 319, 323–24 (7th Cir. 2009), cert. denied, 130 S. Ct. 431 (2009); United States v. Adams, 448 F.3d 492, 497 (2d Cir. 2006); United States v. Baymon, 312 F.3d 725, 727 (5th Cir. 2002); United States v. McKelvey, 203 F.3d 66, 69–70 (1st Cir. 2000).
12. Adams, 448 F.3d at 502 (quoting Godwin v. United States, 687 F.2d 585, 591 (2d Cir. 1982)).
13. See United States v. Johnson, 89 F.3d 778, 784 (11th Cir. 1996); United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993); United States v. Freed, 688 F.2d 24, 25–26 (6th Cir. 1982).
sue of factual guilt,”14 and therefore cannot be reviewed on appeal.

This Note explores whether federal criminal defendants preserve the right to challenge the adequacy of the factual basis of their convictions on appeal after entering an unconditional guilty plea at the district court level. Part I examines the background principles of the factual basis requirement and the rationale behind decisions that both allow and deny appellate review of claims alleging an inadequate factual basis. Part II articulates important legal and policy arguments that demonstrate why appellate courts must review a defendant's challenge to the adequacy of the factual basis of his guilty plea. Part III explores possible resolutions to this complex circuit split and suggests that the Supreme Court propose an amendment to the Federal Rules of Criminal Procedure to preserve the right of federal defendants to appeal the adequacy of the factual basis of an unconditional guilty plea. Moreover, the proposed amendment should mandate that courts of appeals adopt a “plain error” standard when analyzing inadequate factual basis appeals to eliminate the current inconsistencies that exist with the standard of review for these important claims. This Note concludes that such action is urgently needed to resolve the confusion and ambiguity that exist in the federal criminal justice system concerning this vital protection of the rights of criminal defendants.

I. BACKGROUND PRINCIPLES OF THE FACTUAL BASIS REQUIREMENT

The factual basis requirement has evolved into an important protection for criminal defendants. The Supreme Court has addressed the concept on numerous occasions, but has put forth varied signals regarding the essential nature of the requirement. As a result, the courts of appeals have applied divergent legal reasoning and a wide variety of standards of review when examining a defendant's claim that an inadequate factual basis supports her guilty plea. The result is an amalgam of case law that places the defendant's right to put forth an inadequate factual basis appeal in doubt.

14. Freed, 688 F.2d at 25; see also Willis, 992 F.2d at 490 (“[A] guilty plea constitutes a waiver of all nonjurisdictional defects including ‘the right to contest the factual merits of the charges.’” (internal citations and quotation omitted)).
A. HISTORICAL DEVELOPMENT OF THE FACTUAL BASIS REQUIREMENT

For the majority of its history, the American criminal justice system has not required courts to assure that a sufficient set of facts supported a plea of guilty. Prior to 1966, the Federal Rules of Criminal Procedure contained no such requirement, and some courts specifically noted that they were not required to conduct a factual basis inquiry. Moreover, most appellate courts refused to review the facts underlying a guilty plea because the “plea itself [was] considered decisive on the issue.” As a result, the process for pleading guilty “often ignore[d] the issue of guilt or innocence,” and did not require the courts to look at the facts or circumstances underlying the defendant’s plea.

The factual basis requirement arose as an element of the Supreme Court’s efforts to increase the rights of criminal defendants under Chief Justice Earl Warren. As part of this push, in 1966 the Court amended Rule 11 of the Federal Rules of Criminal Procedure to include the requirement that a factual basis supports a defendant’s plea of guilty. The new rule stated that “[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.” The Advisory Committee’s note to the amendment explained that the requirement that a factual basis supports a guilty plea would “protect a defendant who is in the position of

15. See Note, The Trial Judge’s Satisfaction as to the Factual Basis of Guilty Pleas, 1966 WASH. U. L.Q. 306, 307–08 (“[T]he courts have held that Rule 11 does not require an inquiry into the factual basis of a guilty plea.”).
17. See, e.g., Adkins v. United States, 298 F.2d 842, 844 (8th Cir. 1962) (per curiam) (explaining that there is “no requirement that the court must enter a formal finding” of a factual basis to support a guilty plea).
18. Note, supra note 15, at 309 (citing Adam v. United States, 274 F.2d 880 (10th Cir. 1960); Bloombaum v. United States, 211 F.2d 944 (4th Cir. 1954); Richardson v. United States, 217 F.2d 696 (8th Cir. 1954); Friedman v. United States, 200 F.2d 690 (8th Cir. 1952)).
19. Id. at 306.
20. Id. at 307–08.
21. See Terry L. Elling, Guilty Plea Inquiries: Do We Care Too Much?, 134 MIL. L. REV. 195, 211 (1991) (“Consistent with its well-known concern for an extension of individual rights, the Supreme Court, under Chief Justice Earl Warren, subjected guilty pleas to considerable scrutiny.”).
23. Id.
pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.”24 The Advisory Committee further stated that a court should set aside a guilty plea if it is not supported by a sufficient factual basis.25

Shortly after the 1966 amendments, the Supreme Court solidified the importance of the factual basis requirement in McCarthy v. United States.26 In that case, the petitioner challenged the validity of his guilty plea on a charge of federal tax evasion, arguing that the trial “court had entered judgment without determining ‘that there [was] . . . a factual basis for the plea.’”27 In a unanimous opinion, the Court held that a criminal defendant may “plead anew” if the district court accepts a guilty plea without “fully adhering to the procedure[s]” of Rule 11.28 The Court explained that to comply with Rule 11, the judge must “personally inquire” into whether the defendant understands the charges, and must “satisfy himself that there is a factual basis for the plea.”29 The Court made it explicitly clear that it based its decision solely on its “supervisory power over the lower federal courts” and did not address any constitutional arguments raised by the petitioner.30

B. MIXED SIGNALS: SUPREME COURT RULE 11 JURISPRUDENCE AFTER MCCARTHY

In subsequent decisions following McCarthy, the Warren Court continued to state the importance of strict adherence to the requirements of Rule 11.31 Under Chief Justice Warren Burger, however, the Court retreated somewhat from these stringent Rule 11 requisites with a series of cases known as the

25. Id. The Advisory Committee also explained that the factual basis requirement did not apply to nolo contendere pleas, stating that “it is desirable in some cases” to allow for a nolo contendere plea without a factual basis inquiry. Id.
27. Id. at 462 (quoting FED. R. CRIM. P. 11(b)(3)). McCarthy also argued that the district court failed to determine that the guilty plea was made “voluntarily with understanding of the nature of the charge.” Id.
28. Id. at 463–64.
29. Id. at 467.
30. Id. at 464.
31. See, e.g., Boykin v. Alabama, 395 U.S. 238, 242 (1969) (holding that the trial court must make an “affirmative showing” that a guilty plea is “intelligent and voluntary”).
Brady Trilogy. Although none of these three cases directly addressed issues involving the factual basis requirement, they demonstrated the Court’s view that “adequate representation will cure a number of ills if a defendant’s guilty plea is otherwise accurate and voluntary.” Moreover, in North Carolina v. Alford, the Burger Court arguably diluted the importance of the factual basis requirement when it held that a defendant could refuse to admit to the facts of a crime and still plead guilty for the sole purpose of avoiding a harsher punishment.

In its more recent jurisprudence, the Supreme Court has sent mixed signals regarding the importance of the factual basis requirement. On the one hand, the Court has permitted defendants to challenge the factual basis of their pleas via collateral attack. In Bousley v. United States, the Court held that the defendant could challenge the validity of his guilty plea because of the Supreme Court’s interpretation of a federal gun statute that followed his conviction. The Court explained that if the petitioner could prove that the district court had “misinformed him as to the elements” of the offense charged, his plea would be “constitutionally invalid.”

The Court, however, based its reasoning on the constitutional principles set forth in Brady v. United States that a guilty plea must be “voluntary” and “intelligent,” and not on the Rule 11 factual basis requirement.

On the other hand, the Supreme Court has stressed the importance of the finality of plea agreements, and has limited the factual basis requirement in some circumstances. For ex-
ample, in *United States v. Broce*, the Court held that a guilty plea “comprehend[s] all of the factual and legal elements necessary to sustain a binding, final judgment of guilt,” and it therefore prohibits a defendant from challenging his conviction on the grounds of double jeopardy. In issuing its holding, the Court distinguished Broce’s claim from that of the petitioners in *Blackledge v. Perry* and *Menna v. New York*, two cases where the Court permitted review of the defendant’s claim. The Court explained that the *Blackledge* and *Menna* decisions were “exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence,” and Broce’s claim, which sought to introduce new evidence, did not fit into this category. The reasoning presented in *Broce* represents the Court’s beliefs that a guilty plea symbolizes the final adjudication of a case and that the factual basis requirement should not extend beyond the scope of Rule 11.

This divergence of precedents from the Supreme Court regarding the importance of the factual basis requirement has left lower courts with a lack of clear guidance for deciding whether a defendant has the ability to challenge the factual basis underlying her guilty plea. As the discussion in the next section demonstrates, the various courts of appeals have taken great liberty in interpreting Supreme Court decisions to fit their desired outcomes.

C. NAVIGATING A LABYRINTH: THE CURRENT CIRCUIT SPLIT

The question of whether a defendant may appeal his conviction after entering an unconditional guilty plea has produced a wide array of opinions from the federal appellate courts. The case law has developed in such a manner that conflicting au-

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43. Id. at 569.
44. Id. at 565.
46. 423 U.S. 61 (1975) (per curiam).
47. *Broce*, 488 U.S. at 569, 574.
48. Id. at 576.
49. Id. at 570, 574. The Supreme Court has stressed the importance of the finality of guilty pleas in other contexts, as well. See Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 736 (2008) (noting the importance the Court has placed on the finality of guilty pleas with regard to whether judges must inform defendants of the collateral consequences of plea agreements).
authority exists even within circuits. Moreover, circuit courts have applied various standards of review to inadequate factual basis claims. Nevertheless, two discrete legal arguments have emerged that alternatively support and oppose a defendant’s right to appeal the adequacy of the factual basis of his guilty plea.

1. Perplexing Intra-Circuit Splits

A recent decision from the Eighth Circuit provides an apt example of the muddled case law that has materialized within the federal appellate courts. In United States v. Cheney, the Eighth Circuit recognized that in a 1994 case it had “reviewed the adequacy of a factual basis under Rule 11 despite an unconditional guilty plea.” Conversely, the appellate court noted that, in a 2001 decision, it held that “a defendant, by entering a guilty plea that was not conditional, [had] waived his right to appeal the sufficiency of the factual basis for one element of the offense of conviction.” After identifying this conflict, the court of appeals in Cheney chose not to resolve the dispute and elected to review the adequacy of the factual basis of the defendant’s plea because the government failed to argue that the defendant had waived his right to an appeal.

Similar jurisprudence from the Fourth Circuit presents another example of a puzzling intra-circuit split. In United States v. Willis, the court of appeals announced, with the purpose of “eras[ing] any ambiguity that may have existed,” that a guilty plea “establishes the elements of the offense and the material facts necessary to support the conviction.” The court, therefore, concluded that the defendant waived any right to appeal the adequacy of the factual basis of his plea. However, less than four years later in United States v. Mitchell, the Fourth Circuit declined to follow its own unambiguous rule, stating that “it is well settled that a defendant may raise on direct appeal the failure of a district court to develop on the

50. 571 F.3d 764 (8th Cir. 2009).
51. Id. at 768 (citing United States v. Marks, 38 F.3d 1009, 1012–13 (8th Cir. 1994)).
52. Id. (citing United States v. Beck, 250 F.3d 1163, 1165 (8th Cir. 2001)).
53. Id. at 769.
54. 992 F.2d 489 (4th Cir. 1993).
55. Id. at 490.
56. Id. at 491.
57. 104 F.3d 649 (4th Cir. 1997).
record a factual basis for a plea.” The court noted the Willis decision, but decided that it did not control because, unlike the defendant in Willis, the defendant in Mitchell specifically challenged the factual basis of his plea under Rule 11. Subsequent decisions from the Fourth Circuit have vacillated, with some judges following the precedent set in Mitchell and reviewing a factual basis appeal, and others following Willis by concluding that a defendant’s guilty plea waives his right to challenge the facts that support his conviction.

2. Reasoning of the Courts of Appeals

The examples from the Eighth and Fourth Circuits demonstrate the confusion and inconsistencies that exist among the courts of appeals. Indeed, similar intra-circuit splits exist in the Sixth and Eleventh Circuits. Despite this confusion, the abundance of available case law has produced two distinct arguments governing whether defendants can appeal the factual basis of their convictions after entering an unconditional guilty plea.

Courts holding that a defendant waives his right to appeal base their decisions principally on the idea that a guilty plea forgoes a challenge to all nonjurisdictional defects. Tradition-ally, a jurisdictional defect is a defect that “goes to the power of a federal court to try a defendant.” These defects include challenges to subject-matter jurisdiction, personal jurisdiction, and

58. Id. at 652 n.2.
59. Id.
64. See Johnson, 89 F.3d at 784; United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993).
65. United States v. Moloney, 287 F.3d 236, 239 (2d Cir. 2006).
adequate notice. In determining that the factual basis requirement does not fall into this category, courts have concluded that any claim “not logically inconsistent with the issue of factual guilt,” including “the right to contest the charges,” is nonjurisdictional. By determining that an appeal based on the factual basis requirement is nonjurisdictional, courts avoid evaluating the factual discrepancies raised by the defendant.

In addition, in holding that a defendant has waived his right to appeal the adequacy of the factual basis of his guilty plea, courts of appeals have emphasized the importance that the Supreme Court has placed on the finality of guilty pleas. Moreover, those arguing that a defendant has no right to such an appeal often cite tactical decisions the defendant has made to support their argument. For example, courts have held that a defendant forgoes any challenge to the adequacy of the factual basis of his conviction when he signs a waiver that expressly states that he will not appeal. If the express waiver is “entered into knowingly and voluntarily” by the defendant, the plea is “valid.” In addition, courts have noted that defendants may enter conditional pleas under Federal Rule of Criminal Procedure 11(b)(2). A conditional plea allows a defendant, with “the consent of the court and the government,” to reserve “the right to have an appellate court review an adverse determination of a specified pretrial motion.” The defendant may

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66. See Restatement (Second) of Judgments § 65 cmt. d (1982) (noting that issues of adequate notice, territorial jurisdiction, and subject-matter jurisdiction are “jurisdictional” when a consideration in default judgments).

67. Freed, 688 F.2d at 25; see also United States v. Beck, 250 F.3d 1163, 1166 (8th Cir. 2001) (“[A] valid guilty plea forecloses an attack on a conviction unless ‘on the face of the record the court had no power to enter the conviction or impose the sentence.’” (quoting Walker v. United States, 115 F.3d 603, 604 (8th Cir. 1997)).

68. See, e.g., Beck, 250 F.3d at 1166 (8th Cir. 2001) (“[A guilty plea] does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.” (quoting Brady v. United States, 397 U.S. 742, 757 (1970)); Willis, 992 F.2d at 490 (noting that after a defendant enters a guilty plea, the “inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary.” (quoting United States v. Broce, 488 U.S. 563, 569 (1989)).

69. See, e.g., United States v. Elliott, 264 F.3d 1171, 1174 (10th Cir. 2001).


71. See Beck, 250 F.3d at 1165.

then withdraw the plea if she prevails on appeal.\textsuperscript{73} Courts have explained that under the Federal Rules of Criminal Procedure, the defendant has an “affirmative duty” to preserve challenges for appeal.\textsuperscript{74} Courts have therefore concluded that defendants who agree to waive or fail to preserve their right to an appeal cannot argue at the appellate court level that they are entitled to review.\textsuperscript{75}

Decisions permitting appellate review of factual basis claims stress the importance of factual accuracy and the principle that the underlying facts must constitute a crime.\textsuperscript{76} Many of these decisions rely on the primary purpose of the factual basis requirement, which is to protect the rights of a defendant who does not realize that “his conduct does not actually fall within the definition of the crime charged.”\textsuperscript{77} One court allowing review explained that the factual basis requirement “ensures that the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime.”\textsuperscript{78} Another decision permitting review identified “the core objectives of Rule 11,” which include ensuring that the plea is “free from coercion” and that the defendant understands the “nature of the charges against her” and the “direct consequences of the guilty plea.”\textsuperscript{79}

Similarly, other courts have noted that a plea of guilty is a “grave and solemn act” because it waives important rights, and therefore it is crucial that judges “follow the detailed procedures set forth in Fed. R. Crim. P. 11(b),” including the factual basis requirement.\textsuperscript{80} One court stressed the importance of the factual basis requirement by stating that a defendant pleading guilty “to actions that do not constitute a crime” results in “a complete miscarriage of justice.”\textsuperscript{81}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} See United States v. Pickett, 941 F.2d 411, 416 (6th Cir. 1991).
\item \textsuperscript{75} See Beck, 250 F.3d at 1165.
\item \textsuperscript{76} See United States v. Smith, 160 F.3d 117, 121–22 (2d Cir. 1998) (discussing the rationale underlying the factual basis requirement).
\item \textsuperscript{77} See United States v. Baymon, 312 F.3d 725, 727 (5th Cir. 2002) (quoting United States v. Johnson, 194 F.3d 657, 659 (5th Cir. 1999)).
\item \textsuperscript{78} United States v. Thomas, 367 F.3d 194, 197 (4th Cir. 2004) (quoting United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991)).
\item \textsuperscript{79} United States v. Camacho, 233 F.3d 1308, 1314 (11th Cir. 2000).
\item \textsuperscript{80} United States v. Adams, 448 F.3d 492, 497–98 (2d Cir. 2006) (citing Bradshaw v. Stumpf, 545 U.S. 175, 182–83 (2005)).
\item \textsuperscript{81} United States v. McKelvey, 203 F.3d 66, 70 (1st Cir. 2000) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).
\end{itemize}
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THE NEED FOR REVIEW

Many decisions evaluating the adequacy of the factual basis of a guilty plea do so without even questioning whether the defendant’s plea waived his right to an appeal, and simply take it as a given that the appellate court may review the claim. However, decisions that do consider whether a defendant has waived his right to an appeal and ultimately permit review have stressed the important goal of the criminal justice system to protect a defendant’s rights and to ensure that he is not convicted for acts that do not constitute a crime. Although many of these courts ultimately find that an adequate factual basis did exist and affirm the defendant’s conviction, their willingness to review a defendant’s claim emphasizes the importance of the factual basis requirement to the fair administration of justice.

3. Differing Standards of Review

In addition to the confusion regarding whether to permit review, appellate courts have applied many different standards of review when evaluating defendants’ claims of an inadequate factual basis. Some courts have used a “de novo” standard for the factual basis requirement, which evaluates the legal reasoning anew and does not defer to the trial courts holdings. Other courts have applied an “abuse of discretion” standard. Under this standard, a court will not overturn a finding that a

82. See, e.g., United States v. Lacey, 569 F.3d 319, 323–24 (7th Cir. 2009) (reviewing the factual basis of the defendant’s conviction for possessing child pornography without determining whether the defendant had waived his right to appeal by entering a guilty plea).

83. See, e.g., United States v. Hildenbrand, 527 F.3d 466, 474 (5th Cir. 2008) (“The purpose of the rule is to protect a defendant who may plead guilty . . . without realizing that his conduct does not actually fall within the definition of the charged crime.”); United States v. Maher, 108 F.3d 1513, 1524 (2d Cir. 1997) (“Rule 11(b)(3) requires the court to assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty.”).

84. See, e.g., Lacey, 569 F.3d at 323–24 (determining that a sufficient factual basis existed to support the defendant’s plea of guilty for possessing child pornography); United States v. Baymon, 312 F.3d 725, 730 (5th Cir. 2002) (finding a sufficient factual basis to support the defendant’s guilty plea for accepting a bribe).

85. See, e.g., United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001).


sufficient factual basis existed unless the determination “cannot be located within the range of permissible decisions.” 88 Other courts have applied a “clearly erroneous” review standard, under which the appellate court may not overturn the trial court unless it believes that the error is clear. 89 Although not as deferential as an abuse of discretion standard, the clear error standard still affords the trial court great latitude, and an appellate court may not overturn a decision because it disagrees with the trial courts’ findings. 90 Still other courts have applied a “plain error” standard of review, 91 which applies when a defendant fails to raise a claim at the district court level. 92 Under the plain error standard, the defendant must demonstrate that there is “(1) an error; (2) that is clear or plain; (3) that affects [his] substantial rights; and (4) that seriously affects the fairness, integrity or public reputation of judicial proceedings.” 93 In addition, the Supreme Court has stated that in order to satisfy the plain error standard after entering a guilty plea, the defendant “must show a reasonable probability that, but for the error, he would not have entered the plea.” 94

This mix of case law has produced an ambiguous standard, which allows individual judges almost unfettered discretion in deciding whether and how to consider a defendant’s claim that an inadequate factual basis supports his guilty plea. Moreover, mixed messages from the Supreme Court have placed the defendant’s right to challenge the adequacy of the factual basis of his conviction in doubt. As the next Part demonstrates, it is crucial that the criminal justice system preserve a defendant’s right to appeal and grants her the opportunity to challenge the facts that support her plea.

89. See United States v. Rivas, 85 F.3d 193, 194 (5th Cir. 1996).
90. Peters, supra note 86, at 245 (“[A] reviewing court must not reverse the trial court under this standard of review merely because it disagrees with it or because it would have interpreted the facts differently.” (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573–75 (1985))).
91. See United States v. Baymon, 312 F.3d 725, 727 (5th Cir. 2002).
92. See FED. R. CRIM. P. 52(b).
II. THE IMPORTANCE OF FACTUAL BASIS REVIEW

There are a variety of reasons why the criminal justice system should afford defendants the right to appeal the adequacy of the factual basis of their convictions after entering an unconditional guilty plea. First, the case law that defines a factual basis defect as nonjurisdictional oversimplifies the concept of a jurisdictional defect. Second, even if a factual basis defect is considered nonjurisdictional, Supreme Court precedent dictates that appellate review may still occur. Third, the concept of “plain error” review embedded in the Federal Rules of Criminal Procedure dictates review of an inadequate factual basis claim. Fourth, important public policy concerns mandate that a defendant maintain his right to appeal if he alleges that an inadequate factual basis supports his plea. These reasons reveal the important need for the criminal justice system to act urgently to resolve this confusing circuit split.

A. AN INADEQUATE FACTUAL BASIS MAY REPRESENT A JURISDICTIONAL DEFECT

Decisions that deny review rest primarily on the idea that an inadequate factual basis falls under the category of a nonjurisdictional defect that a defendant may not contest after he enters a guilty plea. However, this argument erroneously limits the definition of a “jurisdictional defect,” and fails to capture the importance of the factual basis requirement to an effective and just guilty plea.

As traditionally understood, a jurisdictional defect is a defect that “goes to the power of a federal court to try a defendant.” Some courts have differentiated between jurisdictional defects and offense elements that go “to the merits of the case.” In so doing, these courts have concluded that factual basis errors fall into the latter category. However, certain factual basis errors are jurisdictional defects. For example, in order to secure a conviction of a noncitizen or resident alien under the Federal Maritime Drug Law Enforcement Act (MDLEA), the government must demonstrate that the defendant manufactured, distributed, or possessed with the intent to distribute “a controlled substance on board a vessel of the Unit-

95. See, e.g., United States v. Johnson, 89 F.3d 778, 784 (11th Cir. 1996).
96. United States v. Moloney, 287 F.3d 236, 239 (2d Cir. 2002).
98. See United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993).
ed States or a vessel subject to the jurisdiction of the United States."99 Congress has specifically stated that the fact of whether the ship is a vessel of the United States or under its jurisdiction is “not an element of an offense.”100 Therefore, if in determining the factual basis for a defendant’s guilty plea the court fails to establish the fact that the defendant was “on board a vessel of the United States or a vessel subject to the jurisdiction of the United States,”101 then there is not only a factual basis error, but also a defect in the court’s subject-matter jurisdiction over the defendant.102

This example demonstrates how an error in the factual basis supporting a guilty plea agreement can strike at subject-matter jurisdiction and “‘the courts’ statutory or constitutional power to adjudicate the case.’”103 The Supreme Court has explained that this issue “can never be forfeited or waived,”104 and Congress has provided through the Federal Rules of Criminal Procedure that a court may hear a claim of a defect in subject-matter jurisdiction “at any time while the case is pending.”105 As a result, the argument that a defendant waives a claim of an inadequate factual basis fails when a factual basis error also affects the court’s subject-matter jurisdiction.

B. REVIEW OF A FACTUAL BASIS ERROR IS APPROPRIATE EVEN IF IT IS CONSIDERED A NONJURISDICTIONAL DEFECT

Those who contend that a guilty plea waives a defendant’s right to challenge the factual basis that supports his plea will state that absent an express statute from Congress, as is the case with the MDLEA, the factual basis underlying a conviction is a nonjurisdictional defect because it involves offense elements that are “not logically inconsistent with the issue of factual guilt.”106 Even if one accepts this reasoning, the impor-

100. Id. § 70504.
101. Id. § 70503(a).
102. See, e.g., United States v. Tinoco, 304 F.3d 1088, 1105 (11th Cir. 2002) (holding that the jurisdictional element of the MDLEA should be treated as an issue of subject-matter jurisdiction).
104. Id.
tance of the factual basis requirement mandates appellate review regardless of whether a court considers the claim nonjurisdictional. On multiple occasions, the Supreme Court has permitted appellate review of nonjurisdictional defects. For example, in *Blackledge*, the Court held that the defendant's guilty plea did not waive a due process challenge of prosecutorial vindictiveness. In holding that the defendant did not waive his right to appeal, the Court differentiated between the defendant's claim and “independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,” which the Court had previously held were waived by such a plea. The Court explained that unlike these “independent claims,” Perry’s claim directly addressed “the right not to be haled into court at all upon the felony charge.” The Court emphasized the importance of this right and concluded that the defendant’s guilty plea did not bar a challenge to his conviction.

Moreover, in *Menna*, the Supreme Court allowed the defendant to challenge his guilty plea on Fifth Amendment grounds of double jeopardy. The Court expressly stated that its earlier decisions did not stand for the proposition that “guilty pleas inevitably ‘waive’ all antecedent constitutional violations.” On the contrary, the Court described the effect of a guilty plea as rendering “irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt.”

The language used in *Blackledge* and *Menna* creates confusion in that it appears to distinguish between jurisdictional defects that can be reviewed and nonjurisdictional claims that are waived, yet permits review of certain nonjurisdictional de-

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108. Id. at 28–29.
111. Id. at 31.
112. 423 U.S. 61 (1975) (per curiam).
113. Id. at 62.
114. Id. at 63 n.2.
115. Id.
116. See id. (“A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt . . . .”}). This language is practically identical to the definitions used by courts of appeals to distinguish between jurisdictional and nonjuris-
fects. Indeed, scholars have criticized the Court’s holdings, arguing that the Court “has not found a meaningful device for separating claims that should survive a guilty plea from claims that should not.”117 Regardless of the confusion the cases create, the holdings of *Blackledge* and *Menna* demonstrate that the determination of whether a guilty plea waives a particular claim does not rest solely on the classification of the claim as a “jurisdictional defect.”118 On the contrary, the Court has shown that it will examine the nature of the argument and conclude, in certain circumstances, that the defendant’s claim must be heard on appeal.

A relatively recent Supreme Court case provides further support for the idea that whether a claim is “jurisdictional” does not decide the question of appellate review. In *United States v. Cotton*,119 the Court expressly found that a defect in the indictment did not represent a jurisdictional defect because “defects in an indictment do not deprive a court of its power to adjudicate a case,”120 but rather go “only to the merits of the case.”121 After it put forward this holding, however, the Court did not rule that the defendant waived his right to appeal.122 On the contrary, the Court described the defendant’s claim as “forfeited” and engaged in plain error review.123 The unanimous Court’s analysis further demonstrates that an appellate court may review the merits of a defendant’s appeal regardless of whether a jurisdictional or nonjurisdictional defect is at issue.

Despite this recent reaffirmation from the Court that a determination of whether a claim is jurisdictional does not control whether it is waived, proponents of the idea that a defendant’s guilty plea waives a challenge to the adequacy of the factual basis of his conviction may contend that the holdings and r-

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120. *Id.* at 630.
121. *Id.* at 631 (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)). In issuing its ruling, the Court expressly overruled its prior precedent set in *Ex Parte Bain*, 121 U.S. 1 (1887).
123. *Id.*
tionales of Blackledge and Menna do not apply because an error
in the factual basis does not represent a constitutional viola-
tion.124 Moreover, these proponents may cite the Court’s expla-
nation in Menna and argue that a factual basis defect is one
that is “not logically inconsistent with the valid establish-
ment of factual guilt.”125 Even if one agrees with this reasoning, the
Federal Rules of Criminal Procedure and the concept of plain
error review dictate that a defendant may challenge the ade-
quacy of the factual basis that supports his guilty plea.

C. Plain Error Review Ensures That a Defendant Does
Not Waive a Claim of an Inadequate Factual Basis

By its nature, a defendant will not raise a factual basis er-
ror at the trial court level; if a defendant objects to the factual
basis underlying his plea, a judge simply cannot and will not
accept the plea agreement.126 As a result, some courts have
concluded that a defendant who fails to raise an inadequate
factual basis claim at the trial court level has waived his right
to appeal.127 However, the Federal Rules of Criminal Procedure
allow for review of claims not raised at the trial court level
when “plain error” has occurred.128 As discussed above, the Su-
preme Court has established a four-part test for determining
whether a claim may be reviewed for plain error.129

Supreme Court precedent dictates that the plain error
standard should apply to factual basis errors. In United States
v. Vonn,130 the Court explicitly held that the plain error stand-
ard applied to violations of Rule 11 of the Federal Rules of
Criminal Procedure.131 The Court concluded that the defendant
carries the burden to demonstrate that the trial court judge vi-
olated the Federal Rules by failing to adequately advise him of

124. See John G. Douglass, Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining, 50 EMORY L.J. 437, 474 (2001) (“The Court has never imposed a constitutional duty upon courts to find a factual basis in support of a guilty plea.”).
125. Menna v. New York, 423 U.S. 61, 63 n.2 (1975); see also United States v. Freed, 688 F.2d 24, 25 (6th Cir. 1982).
126. See FED. R. CRIM. P. 11(b)(3).
127. See United States v. Elliott, 264 F.3d 1171, 1174 (10th Cir. 2001).
128. See FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”).
131. Id. at 59.
his right to counsel.132 Although the Court imposed this demanding standard on the defendant, it specifically did not hold that he had waived his right to appeal. On the contrary, the Court expressly evaluated the defendant’s claim as “forfeited” rather than “waived.”133 The Court noted that the government had argued earlier that the defendant had waived his claim, but that the court of appeals had rejected this argument.134 In its holding, the Supreme Court elected not to disturb this aspect of the court of appeals’s analysis.135

The Court’s holding in Vonn dictates that appellate courts should analyze Rule 11 errors, including inadequate factual basis claims under Rule 11(b)(3), as forfeited claims under the plain error standard. In United States v. Olano,136 the Supreme Court explained the crucial difference between a “forfeiture” and a “waiver.”137 The Court stated that “forfeiture is the failure to make the timely assertion of a right,” whereas “waiver is the ‘intentional relinquishment or abandonment of a known right.’”138 Moreover, the Supreme Court has stated in various contexts that a waiver must be “knowing,” “intelligent,” and “voluntary.”139 Therefore, a waiver must involve a conscious action by the defendant to abandon his rights.140

Given these definitions, it is difficult to contend that a defendant makes an “intentional relinquishment or abandonment” of the right to challenge the adequacy of the factual basis of his conviction when he pleads guilty. If the defendant knew that the facts underlying his plea were inadequate, it is extremely unlikely that he would have entered a guilty plea. When a defendant enters a plea of guilty but fails to recognize that an inadequate set of facts supports his plea, he forfeits the claim at the trial court level by “failing to make a timely assertion” of his right under Rule 11(b)(3).141

132. Id.
133. Id. at 59 n.1.
134. Id. at 61 n.3.
135. Id.
137. Id. at 733.
138. Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
139. See, e.g., Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that a waiver of the Miranda warnings must be knowing, intelligent, and voluntary).
140. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (“A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”).
Therefore, the correct standard of review for factual basis claims is the plain error standard. A step-by-step analysis of the four-pronged plain error test as it applies to inadequate factual basis claims demonstrates that, in many circumstances, these claims warrant reversal. First, the Court has explained that an “error” is a “deviation from a legal rule.”\textsuperscript{142} In this instance, an inadequate factual basis deviates from Federal Rule of Criminal Procedure 11(b)(3). Second, the Court has stated that when deciding whether an error is “plain,” appellate courts must ask whether the error is “clear” or “obvious.”\textsuperscript{143} An error in which the underlying facts do not constitute a crime would assuredly meet this standard.

Third, in defining whether an error “affects a substantial right,”\textsuperscript{144} the Court has explained that “the error must have been prejudicial: It must have affected the outcome of the district court proceedings.”\textsuperscript{145} A lack of sufficient facts supporting a guilty plea affects the outcome of the district court proceedings and must be considered “prejudicial.” The Court has expounded that the “court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant.”\textsuperscript{146} A factual basis error that leads to a conviction in a case where the defendant did not actually commit a crime falls under this standard. Fourth, a factual basis error must “seriously affect[] the fairness, integrity or public reputation of judicial proceedings.”\textsuperscript{147} A court convicting an innocent defendant destroys the public’s faith in the judicial system.\textsuperscript{148} Finally, the Court has explained that for plain error review under Rule 11, the defendant “must show a reasonable probability that, but for the error, he would not have entered the plea.”\textsuperscript{149} If a defendant realized that the factual basis supporting his plea did not constitute a crime, it is extremely unlikely that he would choose to plead guilty.

\textsuperscript{143} Id. at 734.
\textsuperscript{144} Id. (quoting FED. R. CRIM. P. 52(b)).
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 736.
\textsuperscript{147} Id. (quoting United States v. Atkinson, 297 U.S. 157, 160 (1938)).
Plain error review represents an important procedural protection for defendants who fail to raise claims at the district court level. Consequently, it is essential that appellate courts apply the plain error standard and evaluate the merits of defendants' inadequate factual basis claims.

D. Public Policy Concerns Underscore the Need to Permit Appellate Review of Inadequate Factual Basis Claims

In addition to the applicable legal arguments, important public policy concerns dictate that a defendant preserves his right to appeal the adequacy of the factual basis that supports his convictions when he enters a guilty plea. First, the factual basis requirement serves to protect the fundamental principle of our criminal justice system that the state will not convict an innocent individual. Second, unfortunate realities and inequalities that exist within the plea bargaining system dictate that courts must allow appellate review of factual basis claims.

1. The State Should Not Convict Innocent Individuals

Courts of appeals that have permitted review of factual basis claims have primarily supported their decisions with important policy justifications underlying the factual basis requirement.150 Indeed, the idea that the state will not convict an innocent individual for a crime that he did not commit represents one of the most fundamental principles of the U.S. criminal justice system.151 Allowing innocent individuals to plead guilty to crimes that they did not commit undermines the public's confidence in the fairness and integrity of the judicial system.152 The Supreme Court has explained that “in our free


151. See ABA Comm. on Criminal Justice Standards, ABA Standards for Criminal Justice Pleas of Guilty, No. 14-1.6 cmt. at 66 (3d ed. 1999) (“Our system has concluded, in order to protect the innocent, that persons whose conduct does not fall within the charges brought by a prosecutor should not be permitted to plead guilty.”); Barkai, supra note 10, at 95 n.43 (“The desired outcome is that the defendant should be declared guilty if and only if he has committed the offense with which he is charged.”) (quoting JOHN RAWLS, A THEORY OF JUSTICE 85 (1971)).

society,” it is essential that an ordinary citizen have “confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.”\textsuperscript{153} The underlying principle of the factual basis requirement, which is to protect a defendant who does not realize “that his conduct does not actually fall within the charge,”\textsuperscript{154} accords with this fundamental notion.

Although these values seem engrained in our judicial system, some scholars have argued that allowing innocent individuals to plead guilty to crimes that they have not committed provides a positive outcome for defendants, and thus benefits the criminal justice system.\textsuperscript{155} These scholars contend that in our current system, there is little doubt that truly innocent individuals plead guilty to crimes that they did not commit, mostly to avoid harsher punishments.\textsuperscript{156} Specifically, these scholars claim that most innocent defendants are recidivists charged with petty crimes.\textsuperscript{157} As a result, it is in the best interest of the defendant to plead guilty to a crime that he did not commit in order to avoid the “process cost” of taking the case all the way through to trial.\textsuperscript{158}

Although this view does capture some of the unfortunate realities of our current system, its rationale undermines important foundations of our criminal law. Allowing an innocent individual to plead guilty to a crime he did not commit contradicts the important ideal that a guilty plea represents a defendant’s knowing admission of the fact that he committed a

\textsuperscript{153} In re Winship, 397 U.S. 358, 364 (1970).

\textsuperscript{154} McCarthy v. United States, 394 U.S. 459, 467 (1969) (quoting FED. R. CRIM. P. 11 advisory committee’s note (1966)).

\textsuperscript{155} See Josh Bowers, Punishing the Innocent, 156 U. PA. L. REV. 1117, 1120 (2008) (arguing it is in the best interest of certain innocent criminal defendants to plead guilty).


\textsuperscript{157} See Nancy J. King et al., When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States, 105 COLUM. L. REV. 959, 982 (2005) (noting that defendants, in general, often plead guilty to avoid charges that carry higher sentences).

\textsuperscript{158} See Bowers, supra note 155, at 1125 (“[T]he recidivist majority is overrepresented among the population of wrongfully accused.”).

\textsuperscript{159} Id. at 1119–20 (“For the typical innocent defendant in the typical case . . . the best resolution is generally a quick plea in exchange for a light, bargained-for sentence.”).
If our system is willing to stand idly by while the State convicts an individual without putting forth facts that prove his guilt, “the presumption of innocence[, . . . whose ‘enforcement lies at the foundation of the administration of our criminal law,”161 will surely fall by the wayside. Above all, it is simply morally unacceptable for the State to knowingly punish innocent individuals.162

These important public policy concerns demonstrate the essential role of the factual basis requirement. As a result, it is crucial that the federal judicial system preserve a defendant’s right to challenge the adequacy of the factual basis that supports his guilty plea.

2. The Realities of the Plea Bargaining Process Highlight the Necessity of Review

In addition to protecting innocent defendants from pleading guilty to crimes that they did not commit, other realities of the plea bargaining process demonstrate the necessity of appellate review of factual basis claims. First, inconsistent and sometimes careless behavior by trial court judges reveals that the factual basis requirement does not always serve its important function of providing protection for criminal defendants.163 Although the Federal Rules establish a factual basis requirement, they do not set forth procedures for conducting factual basis inquiries.164 As a result, trial judges have vast discretion in fulfilling the factual basis requirement.165

160. See Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 HASTINGS L.J. 957, 969 (1989) (“[O]ur criminal justice system is committed to the dual assumptions that the defendant knows the facts that determine his guilt and that he is sincere if he confesses those facts in a guilty plea.”).
162. Bibas, supra note 148, at 1384 (“One should recoil at the thought of convicting innocent defendants. . . . There is something profoundly troubling about knowingly facilitating injustice . . . .”).
164. See Barkai, supra note 10, at 128 (explaining that the scope of factual basis inquiries in the federal system “varies from case to case”).
165. See ABA Comm. on Criminal Justice Standards, supra note 151, No. 14-1.6(a) cmt. at 66 (noting that the court has “significant flexibility” in fulfilling the factual basis requirement); Penrod, supra note 163, at 1142 (hig-
Inevitably, this discretion leads some judges to disregard the importance of the requirement. For example, a survey of state trial court judges in Indiana revealed that the state’s lack of process requirements for factual basis inquiries led judges to “abdicate . . . their responsibility to ensure that a plea of guilty is voluntarily made with full appreciation of the consequences of the action.”166 Other studies reveal that judges often neglect the factual basis requirement and that “questions during pre-trial tend to focus on the appropriate sentence rather than on the factual basis for the plea.”167 Some scholars have argued that these realities of the judicial system produce a factual basis requirement that is “relatively unimportant”168 and “more form than substance.”169 The inattention that some judges grant to the factual basis requirement highlights the necessity of allowing defendants the opportunity to challenge the factual basis of their guilty pleas on appeal.

Moreover, other deficiencies inherent in the plea bargaining process demonstrate the importance of permitting defendants to challenge the adequacy of the factual basis of their convictions. Many commentators have noted that the government’s principal goals in plea bargaining are efficiency and obtaining convictions, as opposed to justice and fairness.170 In striking an agreement with the defendant, the prosecutor hopes to secure a guilty plea as quickly as possible, regardless of the factual realities of a case.171 In addition, racial disparities affect the plea-bargaining process,172 and minorities may be more likely to re-

166. Penrod, supra note 163, at 1142.
168. Alschuler, supra note 35.
171. See id. at 192. (“Plea bargaining’s prime incentive to the prosecutor is an increase in the total efficiency of the criminal justice system.”).
ceive a harsher charge and sentence than white defendants.\textsuperscript{173} Moreover, ineffective assistance of counsel also affects a defendant’s decision to plead guilty. The fact that such claims frequently accompany factual basis appeals demonstrates that a defendant will often plead guilty because of his attorney’s failure to recognize that the facts involved in the case do not constitute a crime.\textsuperscript{174} The vast variety of concerns regarding the practical realities of the criminal justice system reemphasize the importance of allowing appellate review of inadequate factual basis claims.

Sound legal arguments and important public policy concerns accentuate the need to ensure that defendants preserve the right to state a claim on appeal that an inadequate factual basis supports their convictions. The remainder of this Note discusses action that the Supreme Court should take in order to ensure that defendants have the ability to challenge the adequacy of the factual basis of their guilty pleas.

III. CLEARING UP THE CONFUSION: PROVIDING CLEAR RULES FOR FACTUAL BASIS APPEALS

Both legal arguments and policy justifications reveal the importance of allowing defendants to challenge the adequacy of the factual basis of their guilty pleas. However, the current state of the law has led to ambiguity and confusion regarding whether a defendant has the right to file such an appeal. Through its power of judicial rulemaking, the Supreme Court should eliminate this confusion and firmly establish that a defendant has the ability to challenge the adequacy of the factual basis of his guilty plea on appeal. The Court should propose an amendment to the Federal Rules of Criminal Procedure explicitly stating that a defendant does not waive his right to appeal the adequacy of the factual basis that supports his guilty plea, and that appellate courts should review such claims under a plain error standard. Although the Court could settle the issue through its power of judicial review, an amendment to the Federal Rules represents the clearest and easiest way to resolve the current circuit split.


\textsuperscript{174} See, e.g., United States v. Negron-Narvaez, 403 F.3d 33, 34 (1st Cir. 2005); United States v. Johnson, 89 F.3d 778, 785 (11th Cir. 1996).
A. AN AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE WOULD SECURE A DEFENDANT’S RIGHT TO APPEAL

Although its previous case law answers some questions regarding when a defendant may challenge the factual basis of his plea, the Supreme Court has not directly addressed the issue of whether a defendant waives his ability to put forth on appeal a claim of an inadequate factual basis after entering an unconditional guilty plea. It is notable that in its recent discussion of this question, the Eighth Circuit did not cite any Supreme Court precedent. The Supreme Court’s silence on the issue has led to an amalgam of divergent case law from the courts of appeals and confusion regarding whether a defendant has waived his right to challenge the facts that support his guilty plea.

The most efficient and effective manner to resolve the ambiguity is for the Court to propose an amendment to the Federal Rules of Criminal Procedure. The Rules Enabling Act allows the Supreme Court to “prescribe general rules of practice and procedure” for the federal courts. This multistep process first involves discussion and public debate of the proposed amendment by the Federal Rules of Criminal Procedure Advisory Committee. After the Advisory Committee approves the proposed amendment, it moves to the Judicial Conference of the United States, a group of federal judges under the direction of the Chief Justice of the United States, for further approval. After granting approval, the Judicial Conference transmits the proposed amendment to the Supreme Court, who in turn submits the rule to Congress for review. If Congress does not take any action on the proposed rule, it becomes effective.

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175. See Bousley v. United States, 523 U.S. 614, 616 (1998) (holding that a defendant may challenge the adequacy of the factual basis of his conviction via collateral attack).
176. See United States v. Cheney, 571 F.3d 764, 768 (8th Cir. 2009).
178. See 28 U.S.C. § 2073(b)–(d) (specifying the role of the standing committees to the Judicial Conference).
180. See id. § 2073(a)(1) (“The Judicial Conference shall prescribe and publish the procedures for the consideration of proposed rules under this section.”).
181. See id. § 2074 (2006).
182. Id. For a general description and discussion of the rulemaking process, see James C. Duff, A Summary for the Bench and Bar, UScourts.gov (Oct.
Before initiating this process, the Advisory Committee must first determine where and how to amend the Federal Rules of Criminal Procedure to properly ensure that a defendant has the right to appeal the adequacy of the factual basis of her guilty plea. Rule 11(b)(3) of the Federal Rules, which currently defines the factual basis requirement, represents the most logical location to include such an amendment. A simple sentence following the current version of the rule would suffice to resolve the confusion regarding whether a defendant may lodge an appeal based on an inadequate factual basis. The sentence should state: “A defendant’s guilty plea does not waive a claim of an inadequate factual basis on appeal.” This basic change would ensure the protection of a defendant’s rights when he decides to plead guilty.

B. THE AMENDMENT SHOULD REQUIRE A PLAIN ERROR STANDARD OF REVIEW FOR FACTUAL BASIS APPEALS

In addition to establishing that a defendant entering a guilty plea does not waive a factual basis appeal, any amendment to the Federal Rules of Criminal Procedure should specifically address the appropriate standard of review to apply to a claim of an inadequate factual basis. As previously noted, the appeals courts have applied a wide array of standards to claims challenging the factual basis of a guilty plea. Given the unique nature of how factual basis appeals arise, however, the plain error standard represents the most appropriate standard of review. Since a defendant does not raise a factual basis claim at the trial court level, the claim will logically become “forfeited.” As a result, appellate courts should apply the standard four-pronged plain error analysis to determine whether a defendant’s claim of an inadequate factual basis warrants reversal.

One could argue that the “rigorous standard” of plain error review creates too difficult a requirement for the defendant and destroys the purpose of even allowing a defendant to ap-

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183. See United States v. Olano, 507 U.S. 725, 733 (1993) (explaining that a claim is forfeited when a defendant does not make a “timely assertion of right”).


However, the factual basis requirement is of such great importance that a finding of an inadequate factual basis on appeal will often satisfy the plain error test. The notion that the state would convict an innocent individual represents a fundamental "miscarriage of justice" that would merit appellate review and reversal even under a plain error standard.

Other standards of review are not appropriate for inadequate factual basis claims. A de novo standard is not suitable for factual basis appeals because appellate courts do not have the capacity to engage in a renewed factual inquiry. On the opposite end of the spectrum, an abuse of discretion standard does not provide the defendant with appropriate protection. The rigid nature of this standard leads to almost no reversals, and therefore renders a defendant's appeal practically meaningless. One could contend that because "the district court's acceptance of a guilty plea is considered a factual finding," an inadequate factual basis claim should be reviewed under the clear error standard. However, this logic ignores the important factor that the defendant failed to recognize the factual basis error at the trial court level and thus "forfeited" his claim. Although it is essential that a defendant maintain his right to appeal, it is also important that the criminal justice system creates incentives for the defendant "to think and act early when Rule 11 is at stake." The plain error standard strikes the proper balance of protecting the rights of the defendant and maintaining the integrity of the system.


187. See, e.g., Garcia, 587 F.3d at 521 (holding that a factual basis error represents a plain error that requires reversal of the defendant's conviction); Majko v. United States, 457 F.2d 790, 791–92 (7th Cir. 1972) (per curiam) (reversing a guilty plea on the grounds of an inadequate factual basis based on the common-law plain error doctrine).

188. See, e.g., United States v. Stanley, 270 F. App'x 454, 455 (8th Cir. 2008) (reversing a defendant's conviction because a factual basis error represents a miscarriage of justice).


190. See Peters, supra note 86, at 244 (noting that abuse of discretion is a "difficult standard for an appellant to overcome").

191. United States v. Rivas, 85 F.3d 193, 194 (5th Cir. 1996); see also FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .").

C. A SUPREME COURT DECISION RESOLVING THE ISSUE IS AN UNLIKELY SOLUTION

Some may argue that an amendment to the Federal Rules of Criminal Procedure represents an improbable and inadequate solution to the issue at hand. Specifically, critics may point to the complexity of the amendment process and the low chance that a proposed amendment will actually become law.\(^1\)

As an alternative, these critics may argue that a decision from the Supreme Court is the most practical solution to establish whether a defendant has the right to appeal the adequacy of the factual basis that supports his guilty plea.

The recent decision from the Supreme Court in *Flores-Figueroa v. United States*\(^2\) provides an apt example of a case that could have provided this opportunity. In *Flores-Figueroa*, the Court ruled that the statutory language of the federal aggravated identity theft statute\(^3\) required the Government to demonstrate that the defendant "*knew* that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'"\(^4\) As a result of this holding, a defendant who previously pled guilty to aggravated identity theft could now challenge the factual basis of his plea on direct appeal. Specifically, the defendant could argue that the facts underlying his plea do not constitute a crime because he did not know that the means of identification actually belonged to another person. If the court of appeals hearing this challenge decided that the defendant's guilty plea waived his right to appeal, the Supreme Court would have the opportunity to grant certiorari. The Court could then resolve the ambiguity that exists among the lower courts and conclude that a defendant maintains his right to appeal the adequacy of the factual basis of his guilty plea.

However, a decision from the Supreme Court such as the one described above is unlikely for many reasons. First, the Court's relatively small docket makes it unlikely that it will grant a writ of certiorari solely to review whether a defendant

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has waived his right to appeal. Second, the current composition of the Court renders it unclear whether it would hold that a defendant may challenge the adequacy of the factual basis of his guilty plea on appeal. It is quite possible that the majority of the Justices, citing the importance of the finality of plea agreements, could adopt the reasoning of appellate courts that have held that a defendant’s guilty plea waives his right to challenge the adequacy of the factual basis of his conviction.

Third, the Court has ruled explicitly that a defendant can challenge the factual basis of his guilty plea via collateral attack. Therefore, it is likely that defense attorneys will advise their clients to forgo a direct appeal and simply file a motion to vacate the sentence, especially given the uncertainty of how the Court may rule on whether the defendant has the ability to challenge the plea on direct appeal. As a result, it is unlikely that a direct appeal would reach the Supreme Court. Although the above example demonstrates that a factual basis appeal to the Supreme Court is possible, a perfect storm of facts and lower court decisions would need to occur.

On the other hand, the Court does not need to wait for a perfect set of facts and decisions to propose an amendment to the Federal Rules of Criminal Procedure. Recognizing the urgency of the issue, the Court can proceed immediately by proposing additional language to Federal Rule of Criminal Procedure 11(b)(3) to solidify a defendant’s right to appeal the adequacy of the factual basis that supports his conviction.

CONCLUSION

The requirement that a factual basis underlies a guilty plea serves an important role in protecting the rights of criminal defendants. A defendant who enters a guilty plea without facts that support it should have the right to appeal his conviction. However, inconsistencies among the courts of appeals and a lack of guidance from the Supreme Court have led to ambiguity and confusion among the lower courts regarding whether

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197. See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 738 (2001) (noting a dramatic decline in the number of cases that the Supreme Court hears annually).

198. For example, in his dissent in *Bousley*, Justice Scalia, joined by Justice Thomas, stressed the importance of the finality of plea agreements in the criminal justice system and described the majority’s opinion as a “grave mistake.” *Bousley v. United States*, 523 U.S. 614, 636 (1998) (Scalia, J., dissenting).

199. See id. at 629.

the defendant possesses this essential right to an appeal. The nature of the factual basis claim, the procedural device of plain error review, and public policy concerns all support allowing a defendant to appeal the adequacy of the factual basis of his conviction. The Supreme Court should take the immediate step of proposing an amendment to the Federal Rules of Criminal Procedure to ensure that a defendant may challenge the adequacy of the factual basis of his plea on appeal. Preserving this right will ensure important protections for criminal defendants and help maintain the integrity of the criminal justice system.