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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.

“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.’”⁷ As a result, the court upheld Mr. Johnson’s convictions and forced him to serve the remainder of his sentence.⁸

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.”⁹ The existence of this factual basis requirement protects the rights of criminal defendants and helps to prevent the punishment of innocent individuals.¹⁰ 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.¹¹ 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.”¹² 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.¹³ 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.

9. FED. R. CRIM. P. 11(b)(3).

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.¹⁵ Prior to 1966, the Federal Rules of Criminal Procedure contained no such requirement,¹⁶ and some courts specifically noted that they were not required to conduct a factual basis inquiry.¹⁷ Moreover, most appellate courts refused to review the facts underlying a guilty plea because the “plea itself [was] considered decisive on the issue.”¹⁸ As a result, the process for pleading guilty “often ignore[d] the issue of guilt or innocence,”¹⁹ and did not require the courts to look at the facts or circumstances underlying the defendant’s plea.²⁰

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.²¹ 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.²² 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.”²³ 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.”).

16. See FED. R. CRIM. P. 11 (1944).

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.”).

22. Amendments to Rules of Criminal Procedure for the U.S. District Courts, 383 U.S. 1095, 1097 (1966).

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

24. FED. R. CRIM. P. 11 advisory committee’s note (1966).

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.*

26. 394 U.S. 459 (1969).

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.³² 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."³³ Moreover, in *North Carolina v. Alford*,³⁴ the Burger Court arguably diluted the importance of the factual basis requirement³⁵ 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.³⁶

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*,³⁷ 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.³⁸ 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."³⁹ 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,"⁴⁰ 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.⁴¹ For ex-

32. See Elling, *supra* note 21, at 215 (citing *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970)).

33. *Id.* at 216 (citing *McMann*, 397 U.S. at 766–68).

34. 400 U.S. 25 (1970).

35. See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1293 (1975) (arguing that the *Alford* pleas have made the factual basis requirement "relatively unimportant").

36. *Alford*, 400 U.S. at 37–38.

37. 523 U.S. 614 (1998).

38. See *id.* at 618–19.

39. *Id.* (quoting *United States v. Brady*, 397 U.S. 742, 748 (1970)).

40. *Id.* at 618 (quoting *Brady*, 397 U.S. at 748).

41. See Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1265 (1978) ("The Court has expressly recognized that federal courts and many state courts want a defendant's guilty plea to be a final, binding adjudication . . .").

ample, in *United States v. Broce*,⁴² 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,”⁴³ and it therefore prohibits a defendant from challenging his conviction on the grounds of double jeopardy.⁴⁴ In issuing its holding, the Court distinguished Broce’s claim from that of the petitioners in *Blackledge v. Perry*⁴⁵ and *Menna v. New York*,⁴⁶ 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,”⁴⁷ and Broce’s claim, which sought to introduce new evidence, did not fit into this category.⁴⁸ 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 11.⁴⁹

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-

42. 488 U.S. 563 (1989).

43. *Id.* at 569.

44. *Id.* at 565.

45. 417 U.S. 21 (1974).

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).

thority 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*,⁵⁰ 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."⁵¹ 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."⁵² 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.⁵³

Similar jurisprudence from the Fourth Circuit presents another example of a puzzling intra-circuit split. In *United States v. Willis*,⁵⁴ 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."⁵⁵ The court, therefore, concluded that the defendant waived any right to appeal the adequacy of the factual basis of his plea.⁵⁶ However, less than four years later in *United States v. Mitchell*,⁵⁷ 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.”⁵⁸ 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 11.⁵⁹ Subsequent decisions from the Fourth Circuit have vacillated, with some judges following the precedent set in *Mitchell* and reviewing a factual basis appeal,⁶⁰ and others following *Willis* by concluding that a defendant’s guilty plea waives his right to challenge the facts that support his conviction.⁶¹

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 Sixth⁶² and Eleventh⁶³ 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.⁶⁴ Traditionally, a jurisdictional defect is a defect that “goes to the power of a federal court to try a defendant.”⁶⁵ These defects include challenges to subject-matter jurisdiction, personal jurisdiction, and

58. *Id.* at 652 n.2.

59. *Id.*

60. *See, e.g.*, *United States v. Ketchum*, 550 F.3d 363, 366 (4th Cir. 2008).

61. *See, e.g.*, *United States v. Molina*, 286 F. App’x 94, 96 (4th Cir. 2008).

62. *Compare* *United States v. Freed*, 688 F.2d 24, 25–26 (6th Cir. 1982) (appeal waived), *with* *United States v. Tunning*, 69 F.3d 107, 111 (6th Cir. 1995) (appeal reviewed). Though *Freed* involved an appeal of the adequacy of the factual basis after the entrance of a plea of *nolo contendere*, the court treated it as a guilty plea for the purposes of its analysis. *Freed*, 688 F.2d at 25–26. Subsequent cases from the Sixth Circuit have cited *Freed* for the proposition that entrance of an unconditional guilty plea waives the possibility of appeal based on an inadequate factual basis. *See, e.g.*, *Brooks v. United States*, No. 97-3628, 1998 WL 708746, at *2 (6th Cir. Sept. 29, 1998) (holding that the defendant’s guilty plea precluded him from challenging the factual basis of his conviction for illegal possession of a firearm).

63. *Compare* *United States v. Johnson*, 89 F.3d 778, 784 (11th Cir. 1996) (appeal waived), *with* *United States v. Camacho*, 233 F.3d 1308, 1313 (11th Cir. 2000) (appeal reviewed).

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.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹ If the express waiver is “entered into knowingly and voluntarily” by the defendant, the plea is “valid.”⁷⁰ In addition, courts have noted that defendants may enter conditional pleas under Federal Rule of Criminal Procedure 11(b)(2).⁷¹ 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.”⁷² The defendant may

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).

70. *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); cf. David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1036–38 (1999) (discussing policy reasons that support enforcing waivers in plea agreements).

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

72. FED. R. CRIM. P. 11(b)(2).

then withdraw the plea if she prevails on appeal.⁷³ Courts have explained that under the Federal Rules of Criminal Procedure, the defendant has an “affirmative duty” to preserve challenges for appeal.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.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.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.”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.”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.”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.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.”⁸¹

73. *Id.*

74. *See* United States v. Pickett, 941 F.2d 411, 416 (6th Cir. 1991).

75. *See Beck*, 250 F.3d at 1165.

76. *See* United States v. Smith, 160 F.3d 117, 121–22 (2d Cir. 1998) (discussing the rationale underlying the factual basis requirement).

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)).

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)).

79. United States v. Camacho, 233 F.3d 1308, 1314 (11th Cir. 2000).

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)).

81. United States v. McKelvey, 203 F.3d 66, 70 (1st Cir. 2000) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

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.⁸² 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.⁸³ Although many of these courts ultimately find that an adequate factual basis did exist and affirm the defendant's conviction,⁸⁴ 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,⁸⁵ which evaluates the legal reasoning anew and does not defer to the trial courts holdings.⁸⁶ Other courts have applied an "abuse of discretion" standard.⁸⁷ 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).

86. See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 246 (2009) ("Courts using de novo review examine the trial court's application of the law without affording the lower court discretion.").

87. See, e.g., *United States v. Adams*, 448 F.3d 492, 498 (4th Cir. 2006); *United States v. Mitchell*, 104 F.3d 649, 652 (4th Cir. 1997).

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.

88. *United States v. Gonzalez*, 420 F.3d 111, 120 (2d Cir. 2005) (quoting *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 18 (2d Cir. 2003)).

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).

93. *Baymon*, 312 F.3d at 728 (alteration in original) (quoting *United States v. Vasquez*, 216 F.3d 456, 459 (5th Cir. 2000)); *see also United States v. Olano*, 507 U.S. 725, 732–35 (1993) (explaining the standard for “plain error” review under the Federal Rules of Criminal Procedure 52(b)).

94. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

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.⁹⁵ 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.”⁹⁶ Some courts have differentiated between jurisdictional defects and offense elements that go “to the merits of the case.”⁹⁷ In so doing, these courts have concluded that factual basis errors fall into the latter category.⁹⁸ 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).

97. See *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)).

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-

99. 46 U.S.C. § 70503 (2006).

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).

103. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998)).

104. *Id.*

105. *See* FED R. CRIM. P. 12(b)(3)(B).

106. *See United States v. Freed*, 688 F.2d 24, 25 (6th Cir. 1982); *cf. Augustine V. Cheng, Appellate Review of Double Jeopardy Claims in the Guilty Plea Context*, 56 FORDHAM L. REV. 983, 989 (1988) (“[A] voluntary and intelligent

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*,¹⁰⁷ the Court held that the defendant's guilty plea did not waive a due process challenge of prosecutorial vindictiveness.¹⁰⁸ 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.¹⁰⁹ 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."¹¹⁰ The Court emphasized the importance of this right and concluded that the defendant's guilty plea did not bar a challenge to his conviction.¹¹¹

Moreover, in *Menna*,¹¹² the Supreme Court allowed the defendant to challenge his guilty plea on Fifth Amendment grounds of double jeopardy.¹¹³ The Court expressly stated that its earlier decisions did not stand for the proposition that "guilty pleas inevitably 'waive' all antecedent constitutional violations."¹¹⁴ 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."¹¹⁵

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,¹¹⁶ yet permits review of certain nonjurisdictional de-

plea of guilty is a conclusive admission of factual guilt that renders 'irrelevant' those constitutional violations that relate to the establishment of factual guilt.")).

107. 417 U.S. 21 (1974).

108. *Id.* at 28–29.

109. *See* Tollett v. Henderson, 411 U.S. 258, 266 (1973).

110. *Blackledge*, 417 U.S. at 30.

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 ra-

dictional defects. *See, e.g.*, *United States v. Freed*, 688 F.2d 24, 25 (6th Cir. 1982) ("Like a plea of guilty, a plea of *nolo contendere* constitutes a waiver of all so-called 'non-jurisdictional defects' or, more accurately, any claims not logically inconsistent with the issue of factual guilt . . .").

117. Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 19 (1975).

118. *See Guilty Pleas*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 403, 431 (2009) (noting that a guilty plea "does not waive every nonjurisdictional error").

119. 535 U.S. 625 (2002).

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).

122. *Cotton*, 535 U.S. at 631.

123. *Id.*

tionales of *Blackledge* and *Menna* do not apply because an error in the factual basis does not represent a constitutional violation.¹²⁴ Moreover, these proponents may cite the Court's explanation in *Menna* and argue that a factual basis defect is one that is "not logically inconsistent with the valid establishment 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 adequacy 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 error 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 Supreme 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 standard 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 violated 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.").

129. See *United States v. Olano*, 507 U.S. 725, 732-35 (1993). The Supreme Court has recently reaffirmed this test for plain error review. See *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010).

130. 535 U.S. 55 (2002).

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.*

136. 507 U.S. 725 (1993).

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.").

141. FED. R. CRIM. P. 11(b)(3).

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.”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.”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,”¹⁴⁴ the Court has explained that “the error must have been prejudicial: It must have affected the outcome of the district court proceedings.”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.”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.”¹⁴⁷ A court convicting an innocent defendant destroys the public’s faith in the judicial system.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.”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.

142. *United States v. Olano*, 507 U.S. 725, 732–33 (1993).

143. *Id.* at 734.

144. *Id.* (quoting FED. R. CRIM. P. 52(b)).

145. *Id.*

146. *Id.* at 736.

147. *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1938)).

148. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1386–88 (2003) (discussing how convicting innocent defendants harms the public perception that the criminal justice system is fair and accurate).

149. *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004).

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

150. See, e.g., *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997) (citing the policy rationales presented in *McCarthy* and the Federal Rules of Criminal Procedure's 1966 advisory committee's note).

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))).

152. See Stephanos Bibas, *Exacerbating Injustice*, 157 U. PA. L. REV. PENUMBRA 53, 55 (2008), <http://www.pennumbra.com/responses/11-2008/Bibas.pdf> ("Blatantly unjust pleas can only sap public faith in and compliance with the law.").

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.”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,”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.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,¹⁵⁶ mostly to avoid harsher punishments.¹⁵⁷ Specifically, these scholars claim that most innocent defendants are recidivists charged with petty crimes.¹⁵⁸ 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.¹⁵⁹

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

153. *In re Winship*, 397 U.S. 358, 364 (1970).

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

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).

156. See Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293, 309–10 (1975) (estimating that one-third of defendants who plead guilty could ultimately escape conviction).

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).

158. See Bowers, *supra* note 155, at 1125 (“[The] recidivist majority is over-represented among the population of wrongfully accused.”).

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.”).

crime.¹⁶⁰ 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.”).

161. *In re Winship*, 397 U.S. 358, 375 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 435 (1895)).

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 . . .”).

163. See Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127, 1138–43 (2001) (noting how trial judges do not apply the factual basis requirement with consistency and at times fail to protect the rights of criminal defendants in the interests of efficiency).

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 (high-

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-

highlighting a "great deal of discretion" for judges and characterizing it as "troubling").

166. Penrod, *supra* note 163, at 1142.

167. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 256 (2006) (analyzing survey results from plea bargaining systems in Germany, Florida, and Connecticut).

168. Alschuler, *supra* note 35.

169. Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 930 n.164 (1980).

170. See, e.g., F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel and the Judge*, 16 BYU J. PUB. L. 189, 191–93 (2002) (describing prosecutors' incentives in plea bargaining).

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.")

172. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 32 (1998) ("Prosecutors often make decisions that discriminate against African American victims and defendants.").

ceive a harsher charge and sentence than white defendants.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.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.

173. See *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1520–30 (1988) (summarizing studies on the racial impacts of prosecutors' charging decisions); *id.* at 1603–41 (summarizing studies of racial differences at sentencing).

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,¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ This multistep process first involves discussion and public debate of the proposed amendment by the Federal Rules of Criminal Procedure Advisory Committee.¹⁷⁸ 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,¹⁷⁹ for further approval.¹⁸⁰ After granting approval, the Judicial Conference transmits the proposed amendment to the Supreme Court, who in turn submits the rule to Congress for review.¹⁸¹ If Congress does not take any action on the proposed rule, it becomes effective.¹⁸²

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).

177. Rules Enabling Act, Pub. L. No. 100-702, § 401(a), 102 Stat. 4648, 4648 (codified as amended at 28 U.S.C. § 2072(a) (2006)).

178. See 28 U.S.C. § 2073(b)-(d) (specifying the role of the standing committees to the Judicial Conference).

179. See *id.* § 331 (2006) (describing the composition, purpose, and duties of the Judicial Conference of the United States).

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."¹⁸³ 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.¹⁸⁴

One could argue that the "rigorous standard"¹⁸⁵ of plain error review creates too difficult a requirement for the defendant and destroys the purpose of even allowing a defendant to ap-

2010), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx>.

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").

184. See, e.g., *United States v. Garcia*, 587 F.3d 509, 519–21 (2d Cir. 2009) (reviewing a factual basis appeal under a plain error standard).

185. *United States v. Lawton*, 995 F.2d 290, 294 (D.C. Cir. 1993).

peal.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ 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,¹⁹⁰ 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.¹⁹¹ 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.”¹⁹² The plain error standard strikes the proper balance of protecting the rights of the defendant and maintaining the integrity of the system.

186. See Amy E. Sloan, *Appellate Fruit Salad and Other Concepts: A Short Course in Appellate Process*, 35 U. BALT. L. REV. 43, 61 (2006) (“[A]ppellate courts are rarely persuaded to reverse for plain error . . .”).

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).

189. See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 444–48 (2004) (detailing the principal reasons appellate courts should not engage in fact-finding).

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 . . .”).

192. *United States v. Vonn*, 535 U.S. 55, 73 (2002).

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.¹⁹³ 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*¹⁹⁴ 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 statute¹⁹⁵ 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.’”¹⁹⁶ 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

193. See Advisory Comm. on Criminal Rules, *Criminal Rules Docket (Historical)*, U.S. COURTS (Sep. 19, 2008), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010-CRDocket.pdf>.

194. 129 S. Ct. 1886 (2009).

195. See 18 U.S.C. § 1028(a)(1) (2006).

196. *Flores-Figueroa*, 129 S. Ct. at 1888 (quoting 18 U.S.C. § 1028A(a)(1)).

has waived his right to appeal.¹⁹⁷ 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.¹⁹⁸ Third, the Court has ruled explicitly that a defendant can challenge the factual basis of his guilty plea via collateral attack.¹⁹⁹ 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,²⁰⁰ 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

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.

200. See 28 U.S.C. § 2255 (2006).

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.