United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 24, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-1543

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTWAN JONES,
Defendant-Appellant.

Appeal from the
United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 12 CR 697-1

Virginia M. Kendall,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

APPENDIX-A
(1-page)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-1543

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTWAN JONES, Pro Se,
Defendant-Appellent.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 12 CR 697-1

Virginia M. Kendall, Judge.

MOTION FOR REHEARING AND REHEARING EN BANC

The Defendant-Appellant Antwan Jones pro se respectfully submits this motion pursuant to Rules 35 and 40 Federal Rules of Appellante Procedure for panel rehearing and rehearing en banc consideration by each and every active seated judge in the Seventh Circuit Court of Appeals.

GROUNDS FOR REHEARING

The Seventh Circuit's decision in this case entered November 30, 2018, is in conflict with the United States Supreme Court's decision in Hambling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590 (1974) and United States v. Russell, 369 U.S. 749, 8 L.Ed. 2d 240, 82 S.Ct. 1038 (1961). The Seventh Circuit's decision also conflicts with prior Seventh Circuit decisions that control the issue presented that have not been overruled by subsequent panels of the Seventh Circuit in United States v. Airdo, 380 F.2d 103 (7th Cir. 1967). and United States v. Wabaunsee, 528 F.2d 1 (7th Cir. 1975).

APPENDIX-B
(8-pages)

Seventh Circuit's Decision Conflicts With Hamblin v. United States, 418 U.S. 87, (1974) and United States v. Russell, 369 U.S. 749 (1961).

The Supreme Court in Hamblin v. United States, and United States v. Russell, addressed the charging of statutory elements in the indictment and established the requirements to be followed by the lower courts when determining the sufficiency of the charging language of the offense to be charged. Both the Hamblin and Russell courts held the following:

> Hamblin, Headnote 25. "An indictment is sufficient if it (1) contains the lements of the offense charged and fairly informes the defendant of the charge against which he must defend, and (2) enables him to plead an acquittal or conviction in bar of future prosedutions for the same offense".
>
> Hamblin, Headnote 26. "It is generally sufficient that an indictment set forth an offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressely, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished".
>
> Russell, Headnote 12. "Although the language of the statute may be used in the genreral discription of an offense in an indictment upon the statute, it is not sufficient to set forth the offense in the words of the

statute unless those words themselves fully, directly, and expressely, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished".

Russell, Headnote 13. "Where the statutory language does not appraise the defendant with reasonable certainty of the nature of the accusation against him, it must be accompanied with such a statement of facts and circumstances as will inform him of the specific offense, comming under the general discription with which he is charged".

Drug Conspiracy Charged In Count One Fails To Charge Essential Element That Jones "knowingly" Conspired.

In his Appeal Brief Jones raised the issue that the drug conspiracy charged in Count One under 21 U.S.C. §846, fails to charge the essential element that he "knowingly" conspired, and therefor failed to inform him of the charge he must defend against at trial.

In denying Jones challange to Count One's failure to charge "knowingly" the Seventh Circuit Panel relied on an "unpublished" panel opinion in United States v. Barrios-Ramos, F. Appx. 457, 460 (7th Cir. 2018) where the panel concluded that the words "did conspire" suffice to allege a "knowing and intentional" agreement. (Footnote 1, page 3). The panel held that the requirements

for charging the conspiracy under 21 U.S.C. §846 were satisfied because "The indictment alleged that Jones "did conspire" to knowingly and intentionally possess with intent to distribute". This interpretation of the essential element of "knowingly" under §846 is flawed and in conflict with the Supreme Courts holdings in Hamblin and Russell.

The charging language "did conspire" fails to "fully, directly, and expressely without any uncertainty or ambiguity", set forth the necessary essential element that Jones "knowingly" conspired, and fails to place Jones on notice that he must defend against the allegations that he "knowingly" conspired with others. Additionally the drug conspiracy charged in Count One has no accompaning statement of facts and circumstances that inform Jones that he is being accused of "knowingly conspiring with others to join the conspiracy".

The language "did conspire" does not even appear in the statute 21 U.S.C. §846. Section 846 provides the following language:

> §846. Attempt and Conspiracy
>
> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Seventh Circuit panel in the unpublished opinion in United States v. Barrios-Ramos, 732 F. App'x 457, 460 (7th Cir. 2018), impermissiabley amendded the scope of 21 U.S.C. §846 by adding the charging wording "did conspire". The words "did conspire" amounts

to an impermissable amendment of 21 U.S.C. §846 Attempt and Conspiracy by the Seventh Circuit panel and is so uncertain and ambibuious as to have denied Jones his constitutional Fifth Amendment rights to due process of law. When Jones decided to stand trial he had no idea or understood that he had to defend himself against uncharged, unidentified elements that he "knowingly" conspired with others. Only after the close of all evidence being submitted and the close of the trial did the trial judge through jury instructions disclose that "in order to convict Jones of the conspiracy charged in Count One the government had to prove beyond a reasonable doubt that Jones knowingly joined the conspiracy". By the time the jury instructions were given, the trial was over and it was to late for Jones to present any evidence that he did not "knowingly" conspire with others. Jones was "sandbagged" by the government not charging that Jones "knowingly" conspired with others. The foundation of due process is notice and the oppertunity to respond, and in the instant case Jones was clearly denied his constitutional fifth amendment rights to notice and the opportunity to respond and as a results was denied a fair trial in violation of his sixth amendment constitutional rights to a fair trial.

"The remedy for any dissatifaction with the results in particular cases lies with Congress and not the court. Congress may amend the statute; the court may not. Until it does so, however, the court must apply the statute as written. When a statute expresses its purpose in short, clear trems, the only

duty of the court is to apply the statute as written". Archuleta v. Hopper, 786 F.3d 1340 (D.C. Cir. 2015). A reading of 21 U.S.C. §846 readily reveals the statute expresses its purpose in short, clear terms and must be applied as written. The Seventh Circuit clearly holds that "conspiracy is a specific intent crime. See United States v. Harris, 536 F.3d 798 (7th Cir. 2008) "Conspiracy is a specific intent crime". Id. Headnote. Also see United States v. Brown, 726 F.3d 993 (7th Cir. 2013) (same). "Government must prove that a conspiracy existed and that defendant "knowingly" agreed to join it". United States v. Ferguson, 35 F.3d 327 (7th Cir. 1994).

Here the Seventh Circuit panel's decision is in conflict with the law of the Seventh Circuit. In united States v. Wabaunsee, 528 F.2d 1, 3 (7th Cir. 1975) the Seventh Circuit addressed the issue of "knowledge" not being "spelled out" in an indictment. Citing United States v. Airdo, 380 F.2d 103 (7th Cir. 1967) the court stated "in Airdo we held that while "knowledge" need not be "spelled out" in an indictment, other words of similar import must be present to "[supply] the required element of knowledge" when the indictment is read in its total context. Id at 105. It is clear from the decision in Airdo that "knowledge" is an essential element of conspiracy under 21 U.S.C. §846 that must be set forth in the charging language of the statute itself or spelled out in other words of similar import to supply the required element of knowledge when the indictment is read in its total context.

Because the panel decision in this case conflicts with Supreme Court authority and law of the Seventh Circuit, the panel should rehear this appeal and grant Jones the relief he is entitled to by vacating his conviction on Count One and dismissing Count One of the indictment.

CONCLUSION

Wherefore Appellant Antwan Jones's motion for Panel Rehearing should be granted. In the vent panel rehearing is denied then Jones requests his motion be distributed to all active seated Judges in the SEventh Circuit for En Banc consideration.

Respectfully submitted

Date 12/19/2018

Antwan Jones
Appellant, Pro Se

Certificate Of Service

I, Antwan Jones, swear under penalty of perjury that I have mailed a copy of Appellant's Motion For Rehearing And Rehearing En Banc, to counsel for the United States, Mereen Merin, Assistant United Attorney, 219 South Dearborn Street, Chicago, Illinois. 60604, this 19 day of December. 2018. (28 U.S.C. §1746).

Antwan Jones

Certificate Of Mailing

I, Antwan Jones, swear under penalty of perjury that I have mailed the original and three copies of Appellant's Motion For Rehearing And Rehearing En Banc to the Office Of The Clerk , United States Court of Appeals, 219 South Dearborn Street, Chicago, Illinois. 60604, by placing said motion in a legal envelope with sufficient first-class postage attached and deposited same in the Prisoner's Mail Box at the Federal Correctional Institution at Milan, Michigan, this 19 day of December, 2018. (28 U.S.C. §1746).

Antwan Jones
#40833-424
Federal Correctional Institution
P.O.Box 1000
Milan, Michigan. 48160

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 21, 2018*
Decided November 30, 2018

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 17-1543

UNITED STATES OF AMERICA *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	No. 12 CR 697-1
ANTWAN JONES, *Defendant-Appellant.*	Virginia M. Kendall, *Judge.*

ORDER

A grand jury returned a multicount superseding indictment charging Antwan Jones and his two codefendants with various drug-related offenses. Among other crimes, Jones was charged with conspiracy to possess with intent to distribute over five kilograms of cocaine, 21 U.S.C. § 846; attempt to possess with intent to distribute over five kilograms of cocaine, *id.* § 841(a)(1); and possession of a firearm in furtherance of a

* We agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

APPENDIX-C
(6-pages)

drug-trafficking crime, 18 U.S.C. § 924(c)(1)(A). A jury convicted Jones on all nine counts against him. Jones then asked the district court to allow him to represent himself. The judge accepted the waiver of counsel and allowed Jones to proceed pro se, as he continues to do on appeal. Jones principally challenges the validity of his indictment for conspiracy and the sufficiency of the evidence presented at trial.

At trial the government presented evidence that a drug conspiracy existed between Antwan Jones, James Jones, and Calvin Nelson. Nelson testified that the three bought, stored, and sold drugs out of a multiunit apartment building that Jones leased and in which James Jones and Nelson lived. Nelson elaborated that he stored cocaine, crack, and heroin in his apartment for Jones, and he observed Jones receive, in a variety of transactions, a total of 22.5 kilograms of cocaine at Nelson's apartment. As corroborating evidence the government also introduced scores of Jones's phone conversations related to drug dealing and the testimony of law-enforcement agents about their surveillance of Jones and his associates.

The government also presented evidence of Jones's attempt to buy 500 grams or more of cocaine on one occasion. Recorded phone calls show that Jones arranged with Edgar Delgado to purchase a large quantity from Delgado's friend. In a call on April 11, 2012, Jones verified the price of a kilogram and told Delgado that he "may have to do that." He also asked whether the supplier would lower the price if he "went all the way," which according to agents' testimony, referred to purchasing the entire kilogram of cocaine. In a recorded call the morning of April 15, Delgado told Jones that the supplier was almost at Delgado's house (the arranged delivery spot), and Jones responded that he was "leaving out." A police officer surveilling the house testified that he witnessed the putative supplier arrive at Delgado's house. In a recorded call about 40 minutes later, Delgado told Jones that the supplier left because "he didn't feel right." The same officer later pulled over the supplier and found 1.25 kilograms of cocaine in his car.

The prosecution also presented evidence that Jones used a firearm in furtherance of a drug conspiracy. On the same day Jones was arrested, June 6, 2012, officers recovered a handgun from his car, which was in a garage located a few feet from the apartment building. The gun was found in a hidden compartment and next to approximately $18,000 in cash. Nelson testified that in a call on January 17, 2012, Jones told him he had heroin in the same car. The indictment charged that "on or about June 6, 2012," Jones possessed the gun in furtherance of a drug conspiracy.

On appeal Jones first challenges his conviction for conspiracy. First, he argues that the indictment was defective for failing to include specific intent as an element. Jones asserts that because every essential element must be alleged in an indictment, *United States v. Miller*, 883 F.3d 998, 1002 (7th Cir. 2018), and specific intent is an element of § 846, *see United States v. Ross*, 510 F.3d 702, 713 (7th Cir. 2007), the government's failure to allege specifically that he "knowingly and intentionally" conspired is grounds for dismissing this charge. Because Jones challenges his indictment for the first time on appeal, "it is immune from attack unless it is so obviously defective as not to charge the offense by any reasonable construction." *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003).

The indictment here was not "obviously defective." *Id.* "[A]n indictment under 21 U.S.C. § 846 is sufficient if it alleges a conspiracy to distribute drugs, the time during which the conspiracy was operative and the statute allegedly violated ... ." *United States v. Sweeney*, 688 F.2d 1131, 1140 (7th Cir. 1982) (quoting *United States v. Bermudez*, 526 F.2d 89, 94 (2d Cir. 1975)). These requirements were satisfied: The indictment alleged that Jones "did conspire" to "knowingly and intentionally possess with intent to distribute" cocaine and other narcotics, beginning in February 2010, in violation of 21 U.S.C. § 846. True, the indictment did not explicitly accuse Jones of "knowingly and intentionally" conspiring. The verb "conspire," however, necessarily entails an intent to act. *See United States v. Cox*, 536 F.3d 723, 727–28 (7th Cir. 2008) (explaining that the indictment for § 846 did not need to define the term "conspire" to be sufficient). To "conspire," like to "induce" or "entice," *United States v. Smith*, 223 F.3d 554 (7th Cir. 2000), involves intent.[1] And "[i]t is not necessary to spell out each element" of an offense in an indictment so long as "each element [is] present in context." *Id.* at 571; *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 107–08 (2007) (explaining that the indictment need not specifically allege each element if it is stated implicitly).

Jones next challenges the sufficiency of the evidence to support the finding that the conspiracy trafficked in at least five kilograms of cocaine. He acknowledges that at times he bought cocaine by himself and contends that those transactions were not in furtherance of any conspiracy with James Jones and Nelson. Because Nelson testified to only two transactions in which he acted on Jones's behalf involving less than five

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[1] In an unpublished decision, a panel of this court concluded that the words "did conspire" suffice to allege a knowing and intentional agreement. *United States v. Barrios-Ramos*, 732 F. App'x 457, 460 (7th Cir. 2018).

kilograms of cocaine total, Jones contends that the government failed to prove the five-kilogram quantity.

Jones's argument rests upon a view that because only Nelson and James Jones were listed as coconspirators in the indictment, they had to be directly involved in every transaction, and if they were not, Jones's transactions were unrelated "buyer-seller" deals. But the quantity of drugs implicated in the conspiracy is not limited to those that the named coconspirators sold together. Each conspirator is liable "for amounts involved in transactions by co-conspirators that were reasonably foreseeable to him." *United States v. Jones*, 900 F.3d 440, 446 (7th Cir. 2018). Nelson testified that Jones used Nelson's apartment for many drug deals, amounting to him receiving over 20 kilograms of cocaine. Although Jones insists that these deals were separate from the conspiracy, the jury was entitled to conclude otherwise. Jones conducted business out of Nelson's apartment, in a building Jones leased, and Nelson observed the deals and watched Jones count the money. A reasonable jury, having concluded that a conspiracy existed among Jones, Nelson, and James Jones, could conclude the cocaine in these transactions was part of the conspiracy. *See United States v. Moon*, 512 F.3d 359, 364 (7th Cir. 2008) (concluding that the jury could infer from the evidence that the parties were working together).

Jones also challenges the sufficiency of the evidence of his attempted possession of cocaine stemming from the unconsummated April 15 purchase. To sustain a conviction for attempt, the government had to show that Jones had the intent to commit the offense and took a substantial step toward completing it. *See United States v. Carrillo*, 435 F.3d 767, 777 (7th Cir. 2006). Jones argues that the government did not prove that he took a "substantial step" because no one saw him arrive at Delgado's house or confirmed that he had the money to complete the purchase. He compares his case to *United States v. Cea*, 914 F.2d 881 (7th Cir. 1990). There, we concluded that there was insufficient evidence of a substantial step to support a conviction for attempt to possess cocaine. *Id.* at 888. Cea agreed over the telephone to "be over shortly" to buy the drugs and was arrested upon leaving his home shortly thereafter. *Id.* But there was no evidence where the deal was to take place or where Cea was going when he left his home, leaving this court to conclude that "[s]upposition will not suffice" to show that Cea was going to complete a drug transaction. *Id.* By comparison, here Jones said he was headed to Delgado's home, an officer surveilling the property testified that the supplier had arrived, and the supplier was later stopped with the cocaine in his possession.

Jones appears to counter that his recorded calls with Delgado were improperly presented to the jury because the statements made in them are hearsay. He argues that because Delgado was not charged as a coconspirator, anything that Delgado said on the intercepted calls is inadmissible. We note first that just because Delgado was not charged with conspiracy in the same indictment as Jones (indeed, Delgado later pleaded guilty to conspiracy to possess and distribute drugs and the indictment detailed the April 15 sale) does not mean that he is not a coconspirator for the purposes of Rule 801(d)(2)(E) of the Federal Rules of Evidence. *See United States v. Rea*, 621 F.3d 595, 604–05 (7th Cir. 2010); *Moon*, 512 F.3d at 363. Moreover, if Delgado's statements concerning the price of cocaine and the supplier's arrival time were presented to show that Jones intended to purchase drugs, they would not be hearsay because they were not presented for the truth of the matter asserted. *See* FED. R. EVID. 801(c)(2). And Jones's own statements, of course, were admissible as admissions of a party opponent pursuant to Rule 801(d)(2)(A), without reference to the coconspirator rule. *See United States v. Maholias*, 985 F.2d 869, 877 (7th Cir. 1993).

Finally, Jones argues that at trial the government and district court constructively amended the count of the indictment charging use of a firearm in furtherance of a drug crime. A constructive amendment to an indictment is more than a variation in proof; it occurs when the court or the government broadens the possible bases for conviction beyond those presented to the grand jury. *See United States v. Turner*, 836 F.3d 849, 863 (7th Cir. 2016). Jones argues that because the indictment alleges that he possessed the firearm on June 6, 2012, the government had to prove that he used it in furtherance of the drug-trafficking conspiracy that day. But Jones was convicted of a conspiracy that ran from February 2010 through June 6, 2012. And conspiracy is the crime he was accused of using the firearm to further.

Moreover, the government was not required to prove a specific drug transaction or other act in furtherance of the alleged conspiracy during which Jones used the gun. To show that he possessed the gun "in furtherance of" the conspiracy, the government was required to "present a viable theory as to how the gun furthered" the drug conspiracy and "present specific, non-theoretical evidence to tie that gun and the drug crime together under that theory." *United States v. Castillo*, 406 F.3d 806, 815 (7th Cir. 2005). To establish the nexus, the court uses common sense and consults the nonexhaustive list of factors set forth in *United States v. Seymour*, 519 F.3d 700 (7th Cir. 2008). *See United States v. Eller*, 670 F.3d 762, 766 (7th Cir. 2012).

Jones does not dispute the jury's finding that he possessed the gun, which was found inside his car that was parked in a garage Jones controlled. And the government established a nexus between the firearm and the drug conspiracy: Jones ran a drug-trafficking conspiracy out of a building located feet from the garage, Jones stored heroin in the car, and the gun was found next to thousands of dollars in presumed buy money or proceeds. *See United States v. Morris*, 576 F.3d 661, 670–72 (7th Cir. 2009). A gun's proximity to drugs or drug profits supports the "in furtherance" element. *Seymour*, 519 F.3d at 715. The jury was entitled to conclude that the gun was "not used for ordinary personal protection but rather to thwart those who might try to relieve [the defendant] of his inventory and profits." *See United States v. Fouse*, 578 F.3d 643, 651 (7th Cir. 2009). And it is "unanimously accepted" that a gun can further a drug-trafficking offense "by providing the dealer, his stash[,] or his territory with protection." *United States v. Duran*, 407 F.3d 828, 840 (7th Cir. 2005).

We have considered Jones's other arguments and none has merit.

AFFIRMED

Argument 1

1. Count 1 Conspiracy Indictment is insufficient on its face because it omitted essential element(s) that the Government needed to prove.

1a. Standard of Review

"In order to constitute plain error, the error must be clear under the current law and must affect substantial rights. In order to reverse a conviction for plain error, the court of appeals must determine, in its discretion, that the error seriously affects the fairness, integrity or public reputation of judicial proceedings." Quoting LEXIS Nexis Headnotes of U.S. v. Mims, 92 F.3d 461 (7th Cir. 1996).

1b. Argument with Material Facts

The defendant's Count 1 Indictment reads:

> "...defendants herein, did conspire with each other, and with others known and unknown to the Grand Jury, to knowingly and intentionally possess with intent to distribute a controlled substance, namely, 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine, a Schedule II Controlled Substance; 280 grams or more of a mixture and substance containing a detectable amount of cocaine base, a Schedule II Controlled Substance; and a quantity of a mixture and substance containing a detectable amount of heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1): All, in violation of Title 21, United States Code, Section 846."

According to LEXIS Nexus Headnotes for U.S. v. Harris, 536 F.3d 798 (7th Cir. 2008), "Conspiracy is a specific intent crime," but also "The crime of possession of cocaine with the intent to distribute, in violation of 21 U.S.C.S. § 841(a)(1), is a specific intent crime making the defendant's state of mind an element of the crime which is determined by the finder of fact." The insufficiency of the indictment lies in the "did conspire with each other" language related to "Title 21, United States Code, Section 846." The error in the above cite(s) is that because the "conspiracy is a specific intent crime" identical to the specific intent of Section 841(a)(1), the state of mind of defendant is an essential element needed to be proven beyond a

reasonable doubt, that defendant(s) "knowingly and intentionally" "did conspire with each other." The required state of mind is missing from the charged conspiracy. In other words, the "indictments did not sufficiently allege violations of the statute..." See U.S. v. Gimbel, 830 F.2d 621 (7th Cir. 1987). According to the Gimbel Court:

> "In order to be valid, an indictment must allege that the defendant performed acts, which, if proven, constituted a violation of the law that he or she is charged with violating. If the acts alleged in the indictment did not constitute a violation of the law that the defendant has been charged with violating, the court must reverse any subsequent conviction based on that indictment."

However, these are indictments that are sufficient "having contained the elements of the offense charged, having fairly informed the defendants to plead an acquittal or conviction in bar of future prosecutions of the same offense..." (pg. 577 of 62 L.Ed. 2d 575, 444 U.S. 394, United States v. Bailey), but in the present case the defendant's indictment of Count One charge of conspiracy is not sufficiently charged. The controlling law in this matter is Russell v. United States, 8 L.Ed. 2d 240, 369 U.S. 749, which states:

> "[8] The sufficiency of an indictment is measured by two criteria: (1) whether the indictment contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet; and (2) in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

The defendant went to trial on an indictment that presumed that he and codefendants "did conspire with each other." Therefore, the matter was settled long before trial of whether defendant and codefendants "knowingly and intentionally" did conspirre with each other, which means either the government decided to omit this essential element from the indictment or the grand jury did not know that U.S.C.S. Section 846 was a separate charge from 841(a)(1) and was also a specific intent crime whose essential elements are equivalent to the specific intent essential element of "knowingly and intentionally" prerequisite that was fully expressed in U.S.C.S. Section 841(a)(1) charge portion

of the indictment.

The defendant's indictment does not sufficiently apprise "the defendant of what he must be prepared to meet." There is no defense that the defendant can put on to challenge the charge of conspiracy where if the defendant committed the essential elements of that crime has already been decided before trial. Russell, 369 U.S. 765 states:

> "An indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him... is defective, although it may follow language of the statute." United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819, 820. In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly without any uncertainty or ambiguity set forth all the elements necessary to constitute the offense intended to be punished:... "United States v. Carll, 105 U.S. 611, 612, 26 L.Ed. 1135."

Similar to Russell, the defendant is charged with "a cryptic form of indictment" that "requires the defendant to go to trial with the chief issue undefined" [369 U.S. 766]. Section 846 is the defendant's chief issue and without stating the essential elements of conspiracy in the same fully, directly and expressed manner that Section 841(a)(1) was spelled out, then the indictment fails to provide the defendant with proper "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or Federal." Cole v. Arkansas, 333 U.S. 201.

Russell, 369 U.S. 770 further states:

> "A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was."

Either the jury did not know that the charge of conspriacy under Section 846 had prerequisite elements that must be fully expressed in the indictment as equally as the elements of the crime were fully expressed in Section 841 (a)(1), or ultimately, it was the government that decided and presumed that it was a fact that the defendant and codefendants "did conspire with each other."

If the conspiracy charge of Section 846 was already decided by the prosecutor in the grand jury indictment, then the only charge that apprises the defendant of what he must be prepared to meet is the drug amount under Section 841(a)(1). "To allow the prosecutor, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment <* pg. 255> would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." (369 U.S. 770). Therefore, defendant's Count One indictment of conspiracy charged under Section 846 is insufficient on its face and deficient of essential elements. Conviction should be vacated. Title 21 §846 is unconstitutionally vague as applied to my case.

possessing a firearm in furtherance of the drug conspiracy, 18 U.S.C. § 924(c), including because it proved defendant's motive for the crime.

Finally, the district court did not constructively amend the indictment by instructing the jury that it must find, as an element of 18 U.S.C. § 924(c) (possession of a firearm in furtherance of the drug conspiracy), that defendant participated in a conspiracy to distribute narcotics.

ARGUMENT

I. The Indictment Properly Alleged that Defendant Participated in a Conspiracy to Distribute and Possess with Intent to Distribute Narcotics

A. Standard of Review

Generally, this Court reviews a defendant's challenge to the sufficiency of an indictment *de novo*. However, a defendant is required to raise this type of challenge to an indictment, in the form of a motion to dismiss, prior to trial. *See* Fed. R. Crim. P. 12(b)(3). Defendant did not file a motion to dismiss Count One at any point prior to trial; in fact, he made no argument in the district court regarding the sufficiency of Count One. His failure to make a timely motion before trial constitutes waiver, absent good cause. Fed. R. Crim. P. 12(c)(3); *see also United States v. Petitjean*, 883 F.2d 1341, 1344 (7th Cir. 1989). Defendant has made no attempt to show good cause.

Alternatively, if this Court finds no waiver, its review should be for plain error only, construing the indictment "liberally in favor of validity." *United*

States v. Harvey, 484 F.3d 453, 455 (7th Cir. 2007) (quoting *United States v. Smith*, 230 F.3d 300, 306 n. 3 (7th Cir. 2000).

B. Analysis

Defendant argues, for the first time on appeal, that Count One of the indictment, which charged him with having conspired to possess with intent to distribute and distribute cocaine, cocaine base, and heroin, in violation of 21 U.S.C. § 846, was fatally flawed in that it did not allege that defendant knowingly and intentionally conspired with others. Even if this Court were to reach the merits of defendant's argument, it has no merit.

An indictment must (1) state the elements of the charged offense; (2) "fairly inform" a defendant of the nature of the charge so that he may prepare a defense; and (3) enable the defendant to "plead an acquittal or conviction as a bar against future prosecutions for the same offense. *United States v. Miller*, 883 F.3d 998, 1002 (7th Cir. 2008). In order to "successfully challenge the sufficiency of an indictment, a defendant must demonstrate that the indictment did not satisfy one or more of the required elements and that [he] suffered prejudice from the alleged deficiency." *United States v. Vaughn*, 722 F.3d 918, 925 (7th Cir. 2013). In reviewing the sufficiency of an indictment, the Court views the contents of the indictment "on a practical basis and in [its] entirety, rather than in a hypertechnical manner." *United States v. McLeczynsky*, 296 F.3d 634, 636 (7th Cir. 2002).

In turn, an indictment alleging a violation of 21 U.S.C. § 846 is sufficient if it alleges (1) the existence of a conspiracy to distribute narcotics; (2) the time period of the conspiracy; and (3) the statute violated. *United States v. Barrios-Ramos*, 2018 WL 2095486, at *3 (7th Cir. May 7, 2018); *United States v. Cox*, 536 F.3d 723, 727–28 (7th Cir. 2008); *United States v. Sweeney*, 688 F.2d 1131, 1140 (7th Cir. 1982). Construing the indictment liberally in favor of validity, as this Court is required to do, Count One did exactly that. It alleged that defendant "did conspire with others . . . to knowingly and intentionally possess with intent to distribute and distribute a controlled substance." R. 1 at 1. This allegation tracked the language of 21 U.S.C. § 846, using the phrase, "did conspire."

Defendant is incorrect that the indictment needed to inlude the specific terms, "knowingly" and "intentionally," before the words "did conspire." This Court rejected precisely the same argument earlier this year. The defendant in *Barrios-Ramos*, like defendant here, argued that the conspiracy count omitted an essential element of the conspiracy offense because it did not allege that he "knowingly" conspired to possess drugs for sale. This Court disagreed:

> The verb "conspire," like the verbs "induce" or "entice" in *Smith*, and unlike "transport" in *Wabaunsee*, entails an intent to act. . . . [A] person cannot conspire—*i.e.*, agree—without intending to do so. It is difficult to imagine how someone could involuntarily or accidentally come to an agreement.
>
> . . .

> In this case, the intent element of the conspiracy offense was implicitly stated in the indictment's allegation that Barrios-Ramos "did conspire" knowingly to possess drugs for sale. Section 846 punishes those who "attempt[ ] or conspire[ ]" to commit controlled-substance crimes. The term "conspire" . . . encompasses both the overt act element and the intent element of the inchoate crime.

2018 WL 2095486, at *2–3 (internal citations omitted); *see also Cox*, 536 F.3d at 727–28 (indictment charging that defendant and others "did conspire" to commit an offense under § 841(a) was legally sufficient).

In any event, defendant has alleged no defect in the instructions given to the jury at his trial, which directed the jury that, in order to find him guilty of Count One, the government had to prove, not only the existence of the conspiracy, but also that defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy. R.136 at 27. This was sufficient to ensure that the jury found the intent element of the conspiracy offense. Accordingly, there was no error, much less plain error.

II. The District Court Properly Refused to Give a Buyer Seller Instruction

A. Standard of Review

A district court's refusal to give a buyer-seller instruction at trial is reviewed *de novo*. *United States v. Lomax*, 816 F.3d 468 (7th Cir. 2016). Reversal is proper only if the instructions as a whole are insufficient to inform

the jury correctly of the applicable law and the jury is thereby misled. *United States v. DiSantis*, 565 F.3d 354, 359 (7th Cir. 2009).

B. Background

At the end of trial, defense counsel requested a buyer-seller instruction, consistent with Seventh Circuit Pattern Criminal Jury Instruction 5.10(A). R.125 at 4, Tr. 893. That instruction would have read as follows:

> A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of cocaine, cocaine base and heroin do not enter into a conspiracy to possess cocaine, cocaine base and heroin with intent to distribute simply because the buyer resells the cocaine, cocaine base and heroin to others, even if the seller knows that the buyer intends to resell the cocaine, cocaine base and heroin
>
> To establish that a buyer knowingly became a member of a conspiracy with a seller to possess cocaine, cocaine base and heroin with intent to distribute, the government must prove that the buyer and seller had the joint criminal objective of distributing cocaine, cocaine base and heroin to others.

R.125 at 4.

Defense counsel argued that this instruction was appropriate because Parker testified that neither he nor Givens fronted narcotics to defendant; defendant instead paid cash. Tr. 893-94. The government objected to the instruction because neither Parker nor Givens were alleged co-conspirators. Tr. 894-5. Defendant was charged in Count One with conspiring to distribute and possess with intent to distribute narcotics with Nelson and James. R.65.