NO. _____

# In The Supreme Court of the United States

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## KEVIN THOMAS SEIGLER,

*Petitioner*,

**v.**

## UNITED STATES OF AMERICA,

*Respondent.*

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

The Court has said many times: The essence of conspiracy is agreement. This agreement among bad actors to break the law is the "essential evil" at which the crime of conspiracy is directed. Conspiracy is distinct from, and poses a threat beyond, the relevant substantive crime.

In accordance with these principles, the Seventh Circuit and others hold that the mere sale of illegal drugs is insufficient to prove conspiracy to distribute drugs. Proof of an agreement that the buyer will distribute the drug to others is lacking.

Yet the Fourth Circuit here rejected the Seventh Circuit's holdings. It held that a single buy-sell transaction is indeed sufficient to prove conspiracy to distribute drugs. It accordingly rejected Mr. Seigler's challenge to his conviction for conspiracy.

The questions presented are:

1. Is evidence of a single sale of illegal drugs, from one seller to one buyer, sufficient to support a conviction for conspiracy to distribute illegal drugs?

2. Did the Fourth Circuit, in reliance on its affirmative answer to the question presented above, err in declining to rule on the remainder of Mr. Seigler's appeal challenging conviction as to a second object of that same alleged conspiracy?

## PARTIES TO THE PROCEEDING

The Petitioner, Kevin Thomas Seigler, is a United States citizen currently incarcerated by virtue of a prison sentence imposed by the United States District Court for the Western District of Virginia. The Respondent is the United States of America.

## STATEMENT OF RELATED CASES

None.

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## CITATIONS OF THE OFFICIAL AND UNOFFICIAL OPINIONS AND ORDERS BELOW

Following a trial, the United States District Court for the Western District of Virginia entered a judgment of conviction on June 20, 2019, sentencing Mr. Seigler to 262 months of imprisonment. That judgment is not available in the Federal Supplement but was filed as docket number 1204 in the District Court. A panel of the Fourth Circuit affirmed the District Court's decision by published opinion dated March 3, 2021. *United States v. Seigler*, 990 F.3d 331 (4th Cir. 2021). The Fourth Circuit denied Mr. Seigler's petition for *en banc* review by order dated March 31, 2021, as docket number 57 in the Fourth Circuit.

## JURISDICTION

The District Court entered its final judgment of conviction and sentence on June 20, 2019, for conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 841, and for conspiracy to use a communication facility to facilitate a felony drug offense, in violation of 21 U.S.C. § 843(b). The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Fourth Circuit affirmed the District Court by opinion dated March 3, 2021. It denied Mr. Seigler's petition for *en banc* review on March 31, 2021. This Petition for Writ of Certiorari is filed within 90 days of the Fourth Circuit's ruling. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

## STATUTES INVOLVED IN THE CASE

21 U.S.C. § 846 provides, "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."

21 U.S.C. § 841 provides in relevant part, "[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance . . . ."

21 U.S.C. § 843(b) provides in relevant part, "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter . . . . For purposes of this subsection, the term 'communication facility' . . . includes . . . telephone . . . ."

## STATEMENT OF THE CASE

This case involved 21 people selling illegal drugs to customers in southwest Virginia from 2012 to 2016. Of those, 20 lived in the area. They knew each other. Mostly, they were relatives, neighbors, and friends. They got their drugs from the 21st person, Stephen Cino. Mr. Cino, a resident of Las Vegas, sent packages of drugs from Nevada to Virginia via Federal Express. The Government obtained convictions of all 21 of them in the Western District of Virginia for conspiring to distribute methamphetamine and other drugs.

If that were all there was to the story, we would not be here before the Court. But the Government decided to tack one more person, a 22nd person, onto this case. That person was lifelong Nevada resident Kevin Seigler.

The Government charged Mr. Seigler with conspiracy. It alleged two objects of the conspiracy: (1) conspiracy to distribute illegal drugs, and (2) conspiracy to use a communication facility in furtherance of a felony drug offense.

Regarding conspiracy to distribute drugs, as the Fourth Circuit observed below, the "principal evidence" against Mr. Seigler was a single drug deal on a single day, March 9, 2016. On that day, Mr. Seigler allegedly sold two pounds of methamphetamine to Mr. Cino in Nevada.

Regarding conspiracy to use a communication facility in furtherance of a felony drug offense, the Government alleged that Mr. Cino had called Mr. Seigler on the telephone to ask to buy those two pounds of methamphetamine.

The District Court conducted a jury trial,[1] at which the jury found Mr. Seigler guilty. The District Court then entered a judgment of conviction and sentence.

On appeal to the Fourth Circuit, Mr. Seigler argued insufficiency of the evidence of conspiracy to distribute illegal drugs. He argued there was insufficient evidence of agreement to distribute the drugs to others. He pointed to the Court's critical holdings on the crime of conspiracy:

- The essence of conspiracy is agreement. *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).
- This agreement among bad actors to break the law is the "essential evil" at which the crime of conspiracy is directed. *Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975).
- Conspiracy is distinct from, and poses a threat to the public beyond, the relevant substantive crime. *Jimenez Recio*, 537 U.S. at 275.

[1] The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231.

Mr. Seigler then relied upon a long line of cases from the Seventh Circuit and several other circuits holding that the mere sale of illegal drugs from a buyer to a seller is insufficient evidence to prove conspiracy to distribute illegal drugs. In reliance on the principles this Court set forth in *Iannelli* and *Jimenez Recio*, these circuits observe that proof of an agreement (that the buyer will distribute the drug to others) is lacking, and therefore the charge of conspiracy fails. Mr. Seigler urged the Fourth Circuit to adopt that view and accordingly vacate his conviction.

But the Fourth Circuit rejected the Seventh Circuit's holdings. The Fourth Circuit held that evidence of a single buy-sell transaction is indeed sufficient to prove conspiracy to distribute those drugs. It accordingly rejected Mr. Seigler's challenge to his conviction for conspiracy to distribute drugs.

Mr. Seigler also challenged before the Fourth Circuit his conviction for conspiracy to use a communication facility. He pointed out that the District Court incorrectly instructed the jury that the underlying statute criminalized use of a communication facility in furtherance of *any* drug offense, as opposed to only a *felony* drug offense. See *Abuelhawa v. United States*, 556 U.S. 816, 822 (2009) (holding that "the scope of the communications provision [covers] only those who facilitate a drug felony.") He also noted that the Government had not charged him with using the phone in furtherance of a felony drug crime; it charged him with *conspiring* to do so. So, he again argued there was insufficient evidence of conspiracy, of agreement, to use a communication facility in furtherance of a felony drug offense. But the Fourth Circuit declined to address substantively these arguments as to this object of the

alleged conspiracy, apparently on the basis that it was affirming as to the other object of the conspiracy. See *Seigler*, 2021 U.S. App. LEXIS 6199, at *22 ("because the conspiracy conviction can stand based on the first object of the conspiracy (drug distribution), we need not consider Seigler's challenge to . . . the second object of the conspiracy (use of a communication facility).")[2]

The Fourth Circuit affirmed the District Court's judgment of conviction and sentence of Mr. Seigler.

## REASONS FOR GRANTING THE PETITION

### I. There is a Sharp Conflict Among the Federal Courts of Appeals about One of the Most Commonly Charged Criminal Offenses in the Federal System: Conspiracy to Distribute Drugs

The federal courts of appeals are divided on whether evidence of a drug deal between one buyer and one seller is sufficient to support a conviction for conspiring to distribute illegal drugs. The Seventh Circuit, as well as the Second Circuit and

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[2] The Fourth Circuit panel majority also commented in passing, in a footnote, that Mr. Seigler had not raised sufficiency of the evidence as to conspiracy to use a communication facility. See *United States v. Seigler*, 990 F.3d at ____, n.7, 2021 U.S. App. LEXIS 6199, *7, n.7. But the panel was mistaken. Mr. Seigler in fact did argue at length about sufficiency of the evidence as to this second object:

> The Government's second allegation was conspiracy to use a communication facility to commit a felony controlled-substance offense in violation of 21 U.S.C. § 843(b). Yet again, the Government did not put on sufficient evidence that Mr. Seigler conspired to commit this crime. There was no evidence of agreement by Mr. Seigler with one or more persons to use a communication facility to commit a felony controlled-substance offense. At most,the Government argued that he used the phone to communicate about the sale of methamphetamine to Mr. Cino on March 9, 2016. To communicate, Mr. Seigler had to have another person with whom to communicate. That is all the Government argued that he did. No conspiracy; just an act, with the minimum two people communicating to commit the offense, at most.")

Seigler Brief at 27; see also Seigler Reply Brief at 11-12.

Ninth Circuit, say it is not. The Fourth Circuit says it is. Only this Court can resolve the disagreement on this critical issue.

The Seventh Circuit has explained why a drug sale alone does not prove a conspiracy to distribute illegal drugs:

> Although every drug deal involves an unlawful agreement to exchange drugs, . . . a buyer-seller arrangement can't by itself be the basis of a conspiracy conviction because there is no common purpose: The buyer's purpose is to buy; the seller's purpose is to sell. So there must be an agreement, in addition to the underlying purchase agreement, to commit a common crime; in cases like this, it's usually an agreement that the buyer will resell drugs to others. The government may use circumstantial evidence to prove a resale agreement, but it may not rely solely on purchases and sales, which after all are present in both buyer-seller and conspiracy arrangements. If the evidence is equally consistent with either a buyer-seller relationship or a conspiratorial relationship, the jury would be left with two equally plausible inferences and could not conclude beyond a reasonable doubt that there was a conspiracy.
>
> . . . Standing alone, neither large-quantity sales, nor sales on credit, can sufficiently distinguish a conspiracy from an ordinary buyer-seller relationship.

*United States v. Long*, 748 F.3d 322, 325-326 (7th Cir. 2014) (cleaned up). This is a view the Seventh Circuit has repeatedly reaffirmed. It has impacted many appeals of drug conspiracies in that circuit:

> [W]e will also overturn a conviction when the plausibility of a mere buyer-seller arrangement is the same as the plausibility of a drug-distribution conspiracy. In this situation, the evidence is in equipoise . . . so the jury necessarily would have to entertain a reasonable doubt on the conspiracy charge.
>
> This standard is a function of the government's burden of proof. For it must prove an agreement to distribute drugs that is *distinct from* evidence of the agreement to complete the underlying drug deals. Evidence of an agreement to advance further distribution—beyond the initial transaction—is therefore required. Notably, this requirement has upset many convictions in this circuit.

*United States v. Pulgar*, 789 F.3d 807, 812-813 (7th Cir. 2015) (cleaned up) (emphasis in original).

The Second Circuit agrees with the Seventh Circuit. The "mere purchase and sale of drugs does not, without more, amount to a conspiracy to distribute narcotics." *United States v. Brock*, 789 F.3d 60, 63 (2d Cir. 2015). "[T]he buyer's agreement to buy from the seller and the seller's agreement to sell to the buyer cannot be the conspiracy to distribute, for it has no separate criminal object." *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009). Even "[e]vidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy." *United States v. Hawkin*s, 547 F.3d 66, 74 (2d Cir. 2008). This is so even "if the seller is aware of the buyer's intent to resell" because "more is required than mere knowledge of the purpose of a conspiracy." *Id*.

The Ninth Circuit agrees as well. See, *e.g.*, *United States v. Lennick*, 18 F.3d 814, 818-819 (9th Cir. 1994) ("As most circuits have held, proof that a defendant sold drugs to other individuals does not prove the existence of a conspiracy. Rather, conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself. Were the rule otherwise, every narcotics sale would constitute a conspiracy").

These cases from the Second, Seventh, and Ninth Circuits are faithful to this Court's teachings about conspiracy. This Court has focused on the importance of agreement (agreement among criminal minds to break the law) as the key to the

crime of conspiracy, which is entirely distinct from the intended substantive offense. "Conspiracy poses distinct dangers quite apart from those of the substantive offense," and therefore conspiracy is "an evil in itself." *Iannelli v. United States*, 420 U.S. 770, 778-779 (1975). Conspiracy is distinct from and poses a threat to the public beyond the intended substantive crime. *United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003). The "difference between the conspiracy and its end has led this Court consistently to attribute to Congress a tacit purpose . . . to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated." *Ianelli.* 420 U.S. at 779.

Yet in Mr. Seigler's case, the Fourth Circuit expressly rejected the Seventh Circuit's line of cases. The panel majority wrote:

> And in this case the principal evidence against Seigler is the March 9, 2016 sale of two pounds of methamphet-amine to Cino. We have repeatedly recognized that evidence of a single buy-sell transaction involving a 'substantial quantity of drugs' can support a 'reasonable inference' of knowing participation in a distribution conspiracy. Evidence of a buy-sell transaction, when coupled with a substantial quantity of drugs, would support a reasonable inference that the parties were co-conspirators. In so holding, we expressly rejected the position adopted by the Seventh Circuit that Seigler relies on to contend that such circumstances can serve only as evidence of a buy-sell transaction.

*United States v. Seigler*, 990 F.3d 331, _____, 2021 U.S. App. LEXIS 6199, *10-11 (4th Cir. 2021) (cleaned up).

This conflict is stark. If the Seventh Circuit (or Second Circuit or Ninth Circuit) instead of the Fourth Circuit had heard Mr. Seigler's appeal, his conviction may have been vacated.

Indeed, one can find appeals like Mr. Seigler's appeal here in those circuits, in which convictions for conspiracy have been overturned. *Pulgar* is a prime example in the Seventh Circuit:

> Pulgar, no doubt, sold large quantities of cocaine to Schmidt at wholesale prices for a period of eleven years. . . . But repeat sales, without more, simply do not place the participants' actions into the realm of conspiracy.
>
> . . . .
>
> Pulgar and Schmidt enjoyed an eleven-year relationship . . . . It is not surprising that a friendship blossomed over the course of the same period. . . . Without evidence of repeated fronting, sales on consignment, provisioning of tools or supplies, warnings of threats to the business, or some other signal that the two enjoyed a heightened level of trust indicative of a drug-distribution conspiracy, we cannot infer anything nefarious from this friendship.
>
> In sum, the record of trial does not support the conspiracy conviction. Employing the most charitable view of the evidence, it is just as plausible that a mere buyer-seller arrangement existed as it is that a conspiracy to distribute drugs existed. Consequently, any rational jury examining this case would harbor a reasonable doubt . . . .

*Pulgar*, 789 F.3d at 813-16 (cleaned up).

An example from the Ninth Circuit is *United States v. Ramirez*, 714 F.3d 1134 (9th Cir. 2013):

> To prove conspiracy, the government had to show more than that Ramirez sold drugs to someone else knowing that the buyer would later sell to others. It had to show that Ramirez had an agreement with a buyer pursuant to which the buyer would further distribute the drugs.
>
> . . . .
>
> [T]he government presented ample proof that the defendant possessed and sold drugs [to Bejaran]. . . . However, the sale of large quantities of controlled substances, without more, cannot sustain a conspiracy

> conviction. And the government presented no evidence indicating that Ramirez had any kind of involvement in Bejaran's drug sales.

*Ramirez*, 714 F.3d at 1140 (cleaned up).

Again, the conflict among the circuits is stark. On the same evidence, federal courts of appeals in Chicago, San Francisco, and New York will vacate a conviction for conspiracy, but not in Richmond.

This irreconcilable view of the law has a massive impact on the lives of defendants and their families. The difference between the two approaches is potentially worth *decades* in prison. The Court should not leave this conflict to fester.

## II. This Issue Has Already Percolated Extensively in the Courts of Appeals

There is no need to let this issue percolate longer. Most of the other courts of appeals have weighed in on this issue. For example, like the Second Circuit and Ninth Circuit, the Eleventh Circuit also leans in the direction of the Seventh Circuit:

> What distinguishes a conspiracy from its substantive predicate offense is not just the presence of any agreement, but an agreement with the same joint criminal objective--here the joint objective of distributing drugs. This joint objective is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs. Although the parties to the sales agreement may both agree to commit a crime, they do not have the joint criminal objective of distributing drugs.

*United States v. Dekle*, 165 F.3d 826, 829 (11th Cir. 1999).

The First Circuit also favors the Seventh Circuit's approach, albeit with some qualification. In *United States v. Bedini*, 861 F.3d 10, 15 (1st Cir. 2017), the First Circuit cited with approval Seventh Circuit precedent that "buyer-seller relationships do not qualify as conspiracies, because people in a buyer-seller relationship have not

agreed to advance further distribution of drugs, whereas people in conspiracies have." *Id.* at 15 (cleaned up). But the court also held that "more than a mere buyer-seller relationship existed when a party sold wholesale quantities of cocaine and was even willing to front cocaine, on the understanding that the buyer would pay in the course of a subsequent transaction." *Id.* (cleaned up).

The Third Circuit appears torn. It has said "a simple buyer-seller relationship, without any prior or contemporaneous understanding beyond the sales agreement itself, is insufficient to establish that the buyer was a member of the seller's conspiracy," but "even an occasional supplier can be shown to be a member of the conspiracy by evidence, direct or inferential, of knowledge that she or he was part of a larger operation." *United States v. Kelly*, 629 Fed. Appx. 258, 260 (3d Cir. 2016). Four judges in that circuit dissented from the denial of a petition for *en banc* review in *Kelly*, having unsuccessfully urged their colleagues to fully adopt the view of the Seventh Circuit. *United States v. Kelly*, 650 Fed. Appx. 136, 140 (3d Cir. 2016) (Smith, C.J., Dissenting Sur Denial of Petition for Rehearing En Banc) ("[I]t is past the time that we should have adopted something analogous to the Seventh Circuit's buyer-seller relationship inquiry, also adopted by the Second Circuit . . . .")

The Sixth Circuit's views seem to be in the general vicinity of the views of the Third Circuit majority. See *United States v. Brown*, 332 F.3d 363, 373 (6th Cir. 2003) ("A mere buyer-seller relationship alone is insufficient to establish a conspiracy. However, evidence of repeat purchases provides evidence of more than a mere buyer-seller relationship. . . . The evidence at trial established that the conspirators had a

regular arrangement with Brown to purchase very large quantities of powder cocaine. This goes beyond a mere buyer-seller relationship and provides sufficient evidence to support the jury's verdict") (cleaned up).

The Eighth Circuit, while not going as far as the Fourth Circuit, has taken a substantial step in that direction:

> The mere agreement of one person to buy what another agrees to sell, standing alone, does not support a conspiracy conviction. [However, while] proof of a conspiracy requires evidence of more than simply a buyer-seller relationship, we have limited buyer-seller relationship cases to those involving only evidence of a single transient sales agreement and small amounts of drugs consistent with personal use. As we have noted, evidence of multiple sales of resale quantities of drugs is sufficient in and of itself to make a submissible case of a conspiracy to distribute.

*United States v. Trotter*, 837 F.3d 864, 867-868 (8th Cir. 2016) (cleaned up).

The Fourth Circuit, with its view that a single buy-sell transaction is sufficient to support a conviction for conspiracy to distribute, has reached the polar-opposite view of the Seventh Circuit.

The circuits have been wrestling with this issue for some years. The Court should resolve the issue now.

## III. This Case is a Good Vehicle to Answer the Question Presented, Because the Fourth Circuit Presented the Issue Cleanly

The Fourth Circuit told us that the "principal evidence" against Mr. Seigler of conspiracy to distribute illegal drugs was this one sale to Mr. Cino on March 9, 2016. That cleanly presents the question here: Is that sale enough to prove conspiracy to distribute drugs?

To be sure, that issue will never be completely isolated and presented in pristine condition. Prosecutors, when trying to defend a conspiracy conviction based heavily on just the sale of drugs from a buyer to a seller, understandably try to sidestep the issue. They search the trial record for some other circumstances or inferences beyond just a single sale of drugs, then argue that this other evidence is momentous. Accordingly, courts of appeals often are asked to dive deeply into a record, looking at pieces of evidence, circumstances, and inferences, then hear lawyers argue about the import of them. And indeed, there will always be something more than just a sale alone to argue. Prosecutors might point to an apparent friendship between buyer and seller, or a turn of a phrase, or a delay in receipt of money, to avoid direct confrontation with the question presented here. Prosecutors attempted to do so in the Seventh Circuit in *Pulgar* and the Ninth Circuit in *Ramirez*, and they did so here before the Fourth Circuit as well.

But the Court will not be burdened by that sort of fact fight in this case. By telling us that the "principal evidence" against Mr. Seigler of conspiracy to distribute drugs was this one sale on March 9, 2016, the Fourth Circuit presented the legal issue (whether sale is sufficient to prove conspiracy) as cleanly as it ever will be presented. This accordingly is a good case in which to resolve the circuit split and decide the question presented. Once this Court gives its answer, all of the courts of appeals (including the Fourth Circuit here if the Court elects to remand) can review the remainder of the trial records in their pending appeals regarding sufficiency of the

evidence with the correct rule in place. Indeed, they may remand to their district courts to decide in the first instance.

This is the right case in which to decide the question presented and resolve the circuit split.

## IV. The Issue is Critical and Worthy of the Court's Attention Now

The conspiracy charge is a powerful one. It gives the Government major advantages.

For example, although the Confrontation Clause normally requires live testimony and the opportunity to cross-examine at trial, the Government can have a co-conspirator's out-of-court statement against a defendant admitted into evidence. See *Bourjaily v. United States*, 483 U.S. 171, 181-182 (1987); see also Fed. R. Evid. 801(d)(2)(E) (mostly removing co-conspirators' out-of-court statements from the definition of hearsay).

Likewise, although Article III and the Sixth Amendment provide that those accused of a federal crime should be tried in the state in which the crime occurred, the venue rules for conspiracy allow the Government to choose to its own advantage any venue in which it alleges an overt act in furtherance of the conspiracy occurred. See *Hyde v. United States*, 225 U.S. 347, 360-66 (1912); *United States v. Camara*, 908 F.3d 41, 48 (4th Cir. 2018).[3]

[3] Indeed, the Government used this very advantage at the outset of its prosecution of Mr. Seigler. After all, if the Government thought he made a sale of illegal drugs on March 9, 2016 in Las Vegas, it could have charged him in a Nevada court with exactly that – selling illegal drugs on March 9, 2016 in Las Vegas. But it charged him with conspiracy instead. Then it used conspiracy's permissive venue rules to haul him across the country to face the charge in Virginia.

Another example of the power of a conspiracy charge is that a defendant can be held accountable not just for the drug weight with which he was directly involved, but all reasonably foreseeable quantities of drugs within the scope of the alleged conspiracy. See, *e.g.*, *United States v. Bell*, 667 F.3d 431, 441 (4th Cir. 2016); U.S. Sentencing Guidelines Manual § 1B1.3.

Courts should not allow the powerful charge of conspiracy to grow so large that it swallows the rest of the criminal code. Limits should be defended. This is particularly so for prosecutions of alleged conspiracies to distribute drugs, because such a conviction typically results in a crushing prison sentence.

Concern about unrestrained conspiracy law has been around the Court for a long time. Justice Jackson, joined by Justice Frankfurter and Justice Murphy, said it well:

> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principle to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.
>
> . . . .
>
> And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

*Krulewitch v. United States*, 336 U.S. 440, 445-46, 457 (Jackson, J., *concurring*) (1949) (cleaned up).

V. The Fourth Circuit Should Have Ruled on Mr. Seigler's Arguments About the Second Object of the Alleged Conspiracy

The Government did not charge Mr. Seigler with the substantive offense of using a communication facility in furtherance of a felony drug offense. It charged him with *conspiring* to do so.

Unless every phone call is going to amount to a *conspiracy* to use the phone, the Government presented insufficient evidence to convict Mr. Seigler of this second object of the alleged conspiracy. Yet again, proof of agreement was missing. Mr. Seigler urged this point on appeal before the Fourth Circuit. He also argued that contrary to *Abuelhawa*, the District Court mistakenly instructed the jury that 21 U.S.C. § 843(b) prohibits use of a communication facility in furtherance of any drug offense, not just a felony drug offense. Yet the Fourth Circuit declined to rule substantively on Mr. Seigler's arguments. The Fourth Circuit apparently felt that because it was affirming the conviction of conspiracy as to the first object (conspiracy to distribute drugs), it need not address Mr. Seigler's appeal as to this second object (conspiracy to use a communication facility).

This second question presented is inextricably intertwined with the first. If the conviction as to the first object collapses, then the reason why the Fourth Circuit declined to address errors as to the second object evaporates. Moreover, even if the Fourth Circuit had been correct that conviction for the first object could stand, it still should have examined the appeal as to the second object. *C.f. Black v. United States*, 561 U.S. 465, 470 (2010) (holding that a verdict may be set aside when the verdict is supportable on one ground, but not on another.) Conviction of the second object may

well have made a difference to the District Court at sentencing. After all, the Government thought the alleged misdeed was important enough to charge it, and Congress thought it was important enough to criminalize it. It is unfair to Mr. Seigler to assume that the sentencing judge would have given him the exact same sentence regardless of whether the jury acquitted him or found him guilty of this second object.

Here, Mr. Seigler asks for a review that will resolve a circuit split and could result in the reversal of the Fourth Circuit's affirming of his conviction for conspiracy to distribute illegal drugs. The Fourth Circuit's errors as to this second object of the alleged conspiracy should not be allowed to persist. Mr. Seigler accordingly asks the Court to grant a writ of certiorari for the additional purpose of addressing and correcting the District Court's errors here as to this second object itself, or of remanding and directing the Fourth Circuit to address it.

That is the reason for the second question presented, and this section addressing it.

## CONCLUSION

Mr. Seigler respectfully requests that the Court grant this petition for a writ of certiorari and review the Fourth Circuit's decision.

Respectfully submitted,

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Petitioner

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