No. 24-5580 ORIGINAL

IN THE

Supreme Court of the United States

OCTAVIUS ARTIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Octavius Artis
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QUESTION(S) PRESENTED

I. Whether the district court erred in sentencing Artis as a career offender where he did not have two prior controlled substance offenses required for a career offender designation?

II. Appellant Artis contends that the District Court clearly erred under Rule 11 of the Federal Rules of Criminal Procedure by failing to ensure that the plea was voluntary and determining a factual basis for the plea without satisfying the necessary essential elements that constitute the crime of conspiracy.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

1. United States v. Octavius Artis, No. 5:21-CR-302-JCD, U.S. District Court for the Eastern District of North Carolina, Western Division.

2. United States v. Octavius Artis, No. 22-4374, U.S. Court of Appeals for the Fourth Circuit. Judgment entered 6.6.2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Octavius Artis, respectfully prays that a writ of certiorari issues to review the unpublished per curiam opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 22-4374, submitted 4.22.2024 and decided 6.6.2024.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on 6.6.2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USSG. § 4B1.1 provides that a defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Under USSG. § 4B1.2(b), a "controlled substance offense" is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance[...]or the possession of a controlled substance[...]with intent to manufacture, import, export, distribute, or dispense."

North Carolina Gen. Stat. § 90-95(a)(1) provides: "[I]t is unlawful for any person...[t]o manufacture, sell or deliver, a contolled substance...". "Deliver" or "delivery" is then defined as "the actual constructive, or attempted transfer from one person to another of a controlled substance." Id. § 90-87(7). In Campbell, we explained that the text of USSG § 4B1.2(b) does not define "controlled substance offense" to include attempt offenses.

21 U.S.C.S. § 846 violation, the government has to prove (1) that a defendant entered into an agreement with one or more persons to engage in illegal misconduct; (2) that the defendant had knowledge of that conspiracy; and (3) that the defendant knowingly and voluntary participated in the conspiracy.

STATEMENT OF THE CASE

On 7.28.2021, a federal grand jury in the Eastern District of North Carolina indicted Artis, on four charges: (1) conspiracy to distribute and possession with intent to distribute quantities of heroin, marijuana, and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; (2) possession with intent to distribute quantities of heroin and marijuana, in violation of 21 U.S.C. § 841(a)(1); (3) possession with intent to distribute quantities of heroin and marijuana "at a time separate and apart from the events described in count two," in violation of 21 U.S.C. § 841(a)(1); and (4) possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A)(i). JA009-012. Artis pled guilty to counts 1 and 2 pursuant to a plea agreement on 3.23.2022. JA022-049, JA098-106. At sentencing on 6.22.2022, the district court imposed a sentence of "180 months on Counts 1 and 2 to run concurrently." JA065. The district court also ordered concurrent terms of 3 years of supervised release. JA065. The district court dismissed counts 3 and 4 pursuant to the plea agreement. JA065. The court entered judgment on 6.30.2022. JA006, JA070-077. Artis timely appealed on 6.30.2022. JA078-079. On 7.1.2022, the Office of the Federal Public Defender was appointed to represent Artis in his appeal. Dkt. No. 2. On 12.6.2022, counsel filed a joint appendix and brief on Artis' behalf. Dkt. No. 19, 20. On 2.16.2023, Artis filed a pro se brief. Dkt. No. 37. On 2.21.2023, Artis filed a pro se motion to substitute counsel. Dkt. No. 38. On 3.3.2023, this Court allowed the motion to substitute counsel and appointed undersigned counsel, Sharon L. Smith, to represent Artis. Dkt. No. 39. By order dated 7.10.2023, the Court allowed Artis' motion to file a supplemental opening brief. Dkt. No. 49. In this brief, Artis incorporates and adopts the arguments made in his pro se brief at Dkt. No. 37. He also adopts the joint appendix filed on 12.6.2022 at Dkt. Nos. 20, 22.

REASONS FOR GRANTING THE PETITION

The district court erred in calculating Artis' Guideline sentencing range because Artis does not have two prior felony convictions that qualify as controlled substance offenses required for a career offender designation. The two predicate convictions cited in the presentence report were based on violations of N.C.G.S. § 90-95(a). Convictions under § 90-95(a) do not qualify as controlled substance offenses and cannot support a career offender designation because the statute criminalizes attempt offenses. United States v. Campbell, 22 F.4th Cir. 2022: United States v. Locklear, No 19-4443, 2022 U.S. App. LEXIS 19588 (4th Cir. 2022); United States v. Sprinkle, 617 F.Supp.3d (S.D.W.Va. 2022). And should have vacated his sentence. The case should be remanded for a new sentencing hearing and the Guideline range recalculated without the career offender designation.

In the instant case, the district court failed to ensure that the plea of guilty for Count I was voluntary and failed to make a factual determination based upon the evidence provided that the essential elements of the crime conspiracy were proven. In short, the crime conspiracy as alleged in Count I of the indictment is nonexistent. For the foregoing reasons, Appellant Artis humbly prays that this Court vacate the judgment in Count I of the indictment. This petition follows, asking for relief from the opinions of the Fourth Circuit.

Attempt offenses do not qualify as predicate controlled substance offenses under the Career Offender Guideline.

USSG. § 4B1.1 provides that a defendant is a career offender if (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. Under USSG./§ 4B1.2(b), a "contolled substance offense" is "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance [...] or the possession of a controlled substance [...] with intent to manufacture, import, export, distribute, or dispense."

An application note to USSG § 4B1.2(b) states that the definition "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." USSG. § 4B1.2 app. note 1. However, in Campbell, 22 F. 4th 438, 441 (4th Cir. 2022), held that the application note is inconsistent with the plain text of § 4B1.2(b), and the definition of controlled substance offense does not include attempt offense.

Defendant Artis was sentenced as a "career offender" pursuant to the USSG § 4B1.1 as a result of two prior North Carolina General Statute § 90-95(a)(1) convictions. In Campbell, we considered "whether [USSG] § 4B1.2(b)'s definition of 'controlled substance offense' includes an attempt to deliver a controlled substance," 22 F.4th at 442, and held that it does not, Id. at 449. We explained that the text of USSG § 4B1.2(b) does not define "controlled substance offense" to include attempt offenses. Id. at 442, 444. We held that the commentary's expanded definition is plainly inconsistent with the Guidelines' plain text and not entitled to deference under Stinson v. United States, 508 U.S. 36, 43 (1993). 22 F.4th at 443-49. We conluded that the defendant's attempt conviction could not qualify as a controlled substance offense and, therefore, vacated and remanded for resentencing.

Campbell was applied to NCGS § 90-95(a)(1) in United States v. Sprinkle, 617 F.Supp.3d 439 (S.D. W. Va. 2022). The Sprinkle court explained that Section 90-95(a)(1) makes it "unlawful for any person" to "possess with intent to manufacture, sell or deliver, a controlled substance." NCGS § 90-87(7) defines "delivery" as "the actual constuctive, or attempted transfer from one person to another of a controlled substance." Id. at 443. "Applying the categorical approach," the Sprinkle court held that "the North Carolina convictions were produced by a statute that criminalizes attempted transfers. The are thus not, under Campbell, qualifying, predicate controlled substance offenses under the Career Offender Guideline." Id. at 444.

In 2008, Mr. Sprinkle was convicted of the felony manufacture of methamphetamine under North Carolina General Statute § 90-95(a)(1). In 2015, Mr. Sprinkle was convicted under the same statute for felony possession with the intent to deliver marijuana. After Sprinkle's guilty plea, the Court directed the United States Probation Office to prepare the Report. The Probation Office considered recommending, but ultimately rejected, a career offender sentencing enhancement. Two separate grounds supported the decision. [PSR ¶ 33]. First, considering United States v. Campbell, 22 F.4th 438 (4th Cir. 2022), the Report conluded Sprinkle's previous felony convictions in North Carolina are not predicate controlled substance offenses under U.S.S.G. § 4B1.2.(b). [PSR ¶ 33]. Second, the probation officer stated the underlying violation of 21 U.S.C. § 841(a) is likewise not a controlled substance offense. [PSR Ad. at 25].

In Campbell, the Fourth Circuit Court of Appeals held that , the North Carolina Drug Statute pursuant to § 90-95(a)(1) is indivisible. Simply put, the statute is indivisible. The North Carolina statute does not define multiple offenses; rather, its subcategories provide different ways of committing the same offense. The North Carolina statute was drafted so the manufacturing,

selling, and delivering are all violations of the same subsection. Moreover, the same penalties apply to all violations of § 90-95(a)(1), regardless of whether the controlled substance was manufactured, sold, or delivered or possessed with the intent to do so.

Applying the categorical approach, the North Carolina convictions were produced by a statute that criminalizes attempted transfers. They are thus not, under Campbell, qualifying, predicate controlled substance offenses under the Career Offender Guideline. United States v. Campbell, 22 F.4th 438 (4th Cir. 2022); United States v. Sprinkle, 617 F.Supp. 3d 439 (S.D. W. Va. 2022); United States v. Locklear, No. 19-4443, 2022 U.S. App. LEXIS 19588 (4th Cir. 7.15.2022) (unpublished opinion).

The Fouth Circuit Court of Appeals employed the categorical approach outlined in United States v. Ward, 972 F.3d 364, 368 (4th Cir. 2020), where if the "least culpable" conduct criminalized by the predicate offense statute does not qualify as a "controlled substance offense," the prior conviction cannot support a career offender enhancement. United States v. King, 673 F.3d 274, 278 (4th Cir. 2012). After a detailed analysis, the Court held that the plain text of Section 4B1.2(b) excludes attempt offenses from its definition of "controlled substance offense." Id. at 445.

This Court found Campbell's reasoning "readily applicable" where the government failed to distinguish the operative statutory language in Campbell from NCGS §§ 90-87(7) and 90-95(a)(1). Locklear, 2022 U.S. App. LEXIS 19588, at *5. The Court cited decisions in State v. Moore, 327 N.C. 378 (1990) ("[E]ach single transaction involving transfer of a controlled substance [is] one criminal offense, which is committed by either or both of two acts-sale or delivery."); State v. Beam, 201 N.C. App. 643 (2010) (acknowledging that "delivery" under § 90-87(7) is satisfied by attempted tranfer, which requires proof of elements of attempt);

and United States v. Middleton, 883 F.3d 485, 487 (4th Cir. 2018) (observing that court applying categorical approach "is bound by the interpretation of the offense articulated by that state's courts" (cleaned up)). Id. The Court concluded the district court erred in applying the career offender enhancement under USSG § 4B1.1(a)(3) because Locklear's 2003 conviction did not qualify as a controlled substance offense. Id. at *6.

It is well settled that a panel of the appellate court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of the court. Only the United States Supreme Court or the appellate court sitting en banc can do that.

Applying this Court's established precedent, Artis' two predicate convictions: 1) a conviction in 02CRS60088 for possession with intent to sell and distribute cocaine, offense class H, prior points I, under NCGS § 90-95; and 2) a conviction in 10CRS53217 for possession with intent to sell and distribute cocaine, offense class H, prior points 04, under NCGS § 90-95 do not qualify as controlled substance offenses and cannot be used to support a career offender enhancement. Therefore, the district court erred in sentencing Artis as a career offender.

More specifically, Artis was sentenced as a career offender under the Guidelines to a sentence more than two times the amount of what he would have received had he not been considered a career offender as a result of his prior North Carolina drug convictions under § 90-95(a)(1), which now the Fourth Circuit Court of Appeals say cannot be used for the purpose of career offender Guidelines under § 4B1.1. Therefore, the district court rendered Artis a sentence procedurally unreasonable in light of Campbell, Sprinkle, and Locklear, and Fourth Circuit Court of Appeals should not have hesitated to vacate and remand for resentencing.

The Guidelines provide "the starting point" and "lodestar" for sentencing. United States v. Cannady, 63 F.4th 259, 269 (4th Cir. 2023) (citations omitted). "[W]hen a defendant is sentenced under an incorrect Guidelines range, the error itself can, and most often will, be sufficient to show a reasonable probability that his sentence would have been different had the district court used the correct framework for sentencing." Id. (citing United States v. Green, 996 F.3d 176, 186 (4th Cir. 2021) and quoting Molina-Martinez v. United States, 578 U.S. 189, 198 (2016)). Whether the district court would have imposed the same sentence even if Artis had not qualified as a career offender is "mere speculation." Id.

Where Artis does not have two predicate offenses that qualify as controlled substance offenses necessary to invoke career offender status, this Court should find that the district court erred in sentencing him as a career offender. The case should be remanded for a new sentencing hearing and the Guideline range should be recalcuted without the career offender designation before the court imposes sentence.

In the United States v. Winstead, 890 F.3d 1082, (5.25.2018), the Defendant claimed that he was not effectively represented in plea negotiations. The record is quite sketchy regarding plea discussions, so in accordance with our normal practice when we cannot definitely reject an ineffective assistance of counsel, Sixth Amendment claim, United States v. Rashad, 331 F.3d 908, 912, 356 U.S. App. D.C. 323 (D.C. Cir. 2003) we will remand the trial issues to the district judge. But by far the damaging error the counsel made, according to the Defendant, was not to raise the textual argument referred to above; that his previous crimes which were counted to make him a career criminal-"attempted distribution of, and attempted possession" with intent to distribute, drugs are listed in the commentary to the guidelines but not the guidelines themselves. Winstead argued that this commentary cannot be squared with the guideline.

The Winstead court concluded that "there is no question that...the commentary (to U.S.S.G. § 4B1.2(b)) adds a crime, attempted distribution, that is not included in the guideline." Id. at 1090. Because U.S.S.G. § 4B1.2(b) presented a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. The D.C. Circuit held that the Commentary's inclusion of such offense had "no ground in the guidelines themselves," and thus U.S.S.G. § 4B1.2(b) and its Commentary were inconsistent. Id. at 1091-92.

The Sixth Circuit followed the next year, overturning circuit precedent to the contary in an en banc decision. See United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam) to make attempt crimes a part of § 4B1.2 (b) the Commission did not interpret a term in the guideline itself-no term in § 4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guidelines. Havis objected because the Tennessee statute at issue criminalizes both the "sale and delivery" of cocaine, and his charging documents did not specify whether his conviction was for sale, delivery, or both. See Tenn. Code Ann. § 39-17-417(a)(2)-(3). Havis therefore argued that his Tennessee conviction was not a controlled substance offense because it encompassed the mere attempt to sell cocaine, and the Guidelines' definition of "controlled substance offense" does not include attempt crimes. See USSG § 4B1.2(b).

Artis further submits that his direct appeal claim for resentencing under this Court's decision in Campbell does not fall squarely within the scope of the appeal waiver as the Government summarily avers in its motion to dismiss. The Campbell opinion was issued on 1.2.2022, several months prior to Artis' plea hearing, but was not applied to prior convictions under North Carolina law until the Court's opinion in Locklear on 7.15.2022, several weeks after Artis' sentencing hearing. The Campbell holding, although questioned, remains in effect.

ARGUMENT II

APPELLANT ARTIS CONTENDS THAT THE DISTRICT COURT CLEARLY ERRED UNDER RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE BY FAILING TO ENSURE THAT THE PLEA WAS VOLUNTARY AND DETERMINIG A FACTUAL BASIS FOR THE PLEA WITHOUT SATISFYING THE NECESSARY ESSENTIAL ELEMENTS THAT CONSTITUTE THE CRIME CONSPIRACY.

Rule 11(b)(1)(G) reads that before a court can accept a guilty plea...the court must inform the defendant of the (character) of each charge to which the defendant is pleading; Rule 11(b)(2) reads that before accepting a plea of guilty..., the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement); and Rule 11(b)(3) reads that before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea. See Fed.R.Crim.P. 11(b).

STANDARD OF REVIEW

As a general rule, there is no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights in the plea agreement context. The "chief virtues" of a plea agreement are speed, economy, and finality. Those virtues are promoted by waivers of collateral appeal rights as much as by waivers of direct appeal rights. Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government.

However, such waivers are not absolute. For example, defendant cannot waive their rights to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement. See United States v. Michelsen, 141 F.3d 867, 872 (8th Cir.), cert. denied, 525 U.S. 942, 119 S.Ct. 363, 142 L. Ed.2d 299 (1998). In addition, the decision to be bound by the provisions of the plea agreement, including the waiver provisions, must be knowing and voluntary. Appellant Artis contends that his plea and waiver to Count 1 of the

indictment was not knowing and voluntary as a result of a Sixth Amendment violation ineffective assistance of counsel.

Artis' pro se briefs raise several claims that fall outside the appeal waiver's scope, including his challenge to the factual basis for his plea and his ineffective assistance of counsel claims. See United States v. McCoy, 895 F.3d 358, 364 (4th Cir. 2018).

The Sixth Amendment right to effective assistance of counsel includes representation during the plea bargaining process. Missouri v. Frye, 566 U.S. 134, 143-47 (2012). "[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 599 U.S. 356, 373 (2010). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." Lafler v. Cooper, 566 U.S. 156, 168 (2012). Effective assistance requires the provision of reasonably informed advice on material issues. "An attorney's ignorance of a point of law that is fundamental to his case combined with his/her failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland v. Washington, 466 U.S. 668 (1984)." Hinton v. Alabama, 571 U.S. 263, 274 (2014) (per curiam). In Garmon v. Lockhart, 938 F.2d 120, 121 (8th Cir. 1991), upheld a finding that counsel was not professionally reasonable in advising a client to plead guilty based on a mistaken understanding about parole, wher "[m]inamal research would have alerted counsel to the correct parole eligibility date." See Mayfield v. United States, 955 F.3d 707 (8th Cir. 2019).

In this case United States v. Campbell, Locklear, and Sprinkle and the now pending in The Eastern District of North Carolina 3582 motion for reduction is sentence in the light of the Fourth Circuit ruling in United States v. Norman,

A substantive crime and conspiracy to commit that crime are separate offenses because an agreement to do an act is distinct from the act itself. The graveman of the crime is an agreement to effectuate a criminal act. In a conspiracy, the criminal agreement itself is the actus reus. A defendant's knowlege and intent are elements the government must establish to prove a conspiracy to violate 21 U.S.C.S. S. § 841(a)(1). Furthermore, "any agreement made in addition to or beyond the bare buy-sell transaction may be taken to infer a joint enterprise between parties beyond the simple distribution transaction and thereby support a finding of conspiracy." United States v. Edmonds, 679 F.3d 169, 174 (4th Cir.), vacated on other grounds, 568 U.S. 803, 133 S.Ct. 376, 184 L.Ed.2d 4 (2012).

The evidence shows one is merely a buyer or seller in a drug transaction and takes the view that such evidence, standing by itself, is insufficient to make out a conspiracy. A sale, by definition, requires two parties; their combination for that limited purpose does not increase the likelihood that the sale will take place, so conspiracy liability would be inappropriate.

Because § 846 looks to an underlying offense, the mens rea of § 846 is derived from that of the underlying offense, in this case § 841(a). See United States v. Deffenbaugh, 709 F.3d 266, 272 (4th Cir. 2013). The mens rea of § 841 (a) is articulated explicitly in the statute. Section 841(a) makes it unlawful for a person "knowingly or intentionally to...distribute...a controlled substance" or "knowingly or intentionally to...possess with intent to...distribute...a controlled substance." 21 U.S.C. § 841(a)(1).

Artis, importantly, does assert that, had the court been more exacting in ensuring factual support for the plea, he would have chosen not to plead guilty and would have insisted on proceeding to trial. Artis' adamant denial of participation in a conspiracy, these facts may indeed be inadequate to establish an independant factual basis for the plea. "The evidence need only establish a

a slight connection between a defendant and the conspiracy to support conviction," United States v. Green, 599 F.3d 360, 367 (4th Cir. 2010). We question whether the evidence proffered by the Government was sufficient to prove the requisite nexus between Artis and the charged conspiracy. Neither/nor the individuals who purportedly provided drugs to Artis, were identified as co-conspirators. The Government provided no indication of the quantity, frequency, or type of transactions in which Artis allegedly engaged, as evidence of a tacit agreement to distribute further.

The Government presented no evidenc that Artis and other co-defendants sold drugs to the same buyer or seller on multiple occasions. Thus, the evidence is insufficient to enable a fact finder to fing the "slight connection between the defendant and the conspiracy [that is needed] to support conviction." Therefore, appeals court did err in denying Artis's motion with regard to Count 1.

It should be concluded that Artis did not admit the necessary mens rea before entering his plea and the record contained no factual basis to support... the elements of the offense. On appeal, Artis contended that "there was insufficient factual basis in the record to support [his] guilty plea," claiming that there was "no evidence in the recore that [he] knew he was participating in an illegal conspiracy.

On appeal, Artis, contended that the district court erred by accepting his guilty plea to the conspiracy count, and that counsel was ineffective with respect to his plea. Mr. Artis contends that his guilty plea to the conspiracy charge was not knowing and voluntary and was not supported by an adequate factual basis. He asserts that he was not informed of the elements of the offense and that the factual basis was insufficient to support his plea to the conspiracy offense. Thus, the court erred in failing to find that Artis's guilty plea was supported by an independent basis in fact containing each of the

elements of the offense.

The record shows that the trial court's inadequate Rule 11 colloquy prevented Artis from making a knowing and intelligent pleading guilty. Where a defendant's Fed.R.Crim.P. 11 plea proceeding is deficient, the court must also determine what relief, if any, the defendant is entitled to receive. Several alternatives are possible, such as either vacating the acceptance of his guilty plea or vacating his judgement of conviction on the count. Where the sole defect in the Fed.R.Crim. P. 11 recore is the lack of a sufficient factual basis for the judgement of conviction, however, the proper remedy is to vacate the conviction and remand.

In the United States v. Mallory, 40 F.th 166 (4th Cir. 2022), "conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." United States v. Shabani, 513 U.S. 10, 16 (1994). Accordingly, the crime conspiracy "may exist and be punished whether or not the substantive crime ensues." United States v. Jimenez Recio, 537 U.S. 270, 274 (2003). To convict a defendant of conspiracy, the government must prove that (1) two or more people agreed to commit an unlawful act, and (2) the defendant knowingly and intentionally joined in the agreement. A drug-distribution conspiracy under 21 U.S.C. § 846 requires proof that the defendant knowingly agreed-either implicitly or explicitly-with someone else to distribute drugs. Courts have cautioned against conflating the underlying buy-sell agreement with the drug-distribution agreement that is alleged to form the basis of the charged conspiracy. To ensure that "'distribution' [of a controlled substance] under [21 U.S.C. § 841] and 'conspiracy' [to distribute a controlled substance] under § 846 [remain] distinct crimes," we have recognized that "a conspiracy to commit the distribution offense must involve an agreement separate from the immediate distribution conduct that is the object of the conspiracy." United States v. Edmonds, 679 F.3d 169, 174 (4th Cir. 2012). In short, the mere evidence of a simple buy-sell transaction is sufficient to prove

a distribution violation under § 841, but not conspiracy under § 846, because the buy-sell agreement, while illegal in itself, is not an agreement to commit an offense; it is the offense of distribution itself." Id. Thus, a conspiracy to commit a crime is distinct from the commission of the crime.

A conviction for conspiracy to distribute drugs cannot be sustained solely on circumstantial evidence if the evidence contains no basis for the jury to distinguish the alleged conspiracy from the underlying buyer-seller relationship. Thus, to prove a conspiracy, the government must offer evidence establishing an agreement to distribute drugs that is distinct from evidence of the agreement to complete the underlying drug deal. See United States v. Johnson, 592 F.3d 749 (7th Cir. 2010). This rule is based on a fundamental principle of criminal law: the requirement that the government prove the defendant guilty beyond a reasonable doubt. If the prosecution rests its case only on evidence that a buyer and seller traded in large quantities of drugs, used standardized transactions, and had a prolonged relationship, then the jury would have to choose between two equally plausible inferences. On one hand, the jury could infer that the purchaser and the supplier conspired to distribute drugs. On the other hand, the jury could infer that the purchaser was just a repeat wholesale customer of the supplier and that the two had not entered into an agreement to distribute drugs to other. In this situation, the evidence is essentially in equipose; the plausibility of each inference is about the same, to the jury necessarily would have to entertain a reasonable doubt on the conspiracy charge. United States v. Hawkins, 547 F.3d 66, 71 (2d Cir. 2008); United States v. Caseer, 399 F.3d 828, 840 (6th Cir. 2005); O'Laughlin v. O'Brien, 568 F.3d 287, 301 (1st Cir. 2009); United States v. Lovern, Nos. 08-3141 & 08-3149, 590 F.3d 1095, 2009 U.S. App. LEXIS 20775, 2009 WL 2871538, at *9 (10th Cir. 2009). Absent some other evidence of a conspiratorial agree-

ment to tip the scales, the jury must acquit. Otherwise, the law would make any "wholesale customer of a conspiracy...a co-conspirator per se." United States v. Colon, 549 F.3d 565, 569 (7th Cir. 2008).

A person who sells a gun knowing that the buyer intends to murder someone may or may not be an aider or abettor of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone. Most private citizens do not have a "stake" in Wal-Mart. They are merely casual buyers. Yet many of those same people regularly conduct standardized transaction with the discount retailer. For example, a man can buy two sticks of deodorant for $3.49 each, every other week. These transactions, despite exhibiting frequency, regularity, and standardization, do not evinc the substantial relationship entailed in a conspiracy. Rather, those factors were equally consistent with a buyer-seller relationship.

In the instant case, the charged conspiracy is nonexistent. The district court failed to ensure that the plea of guilty for Count 1 was voluntary and failed to make a factual determination based upon the evidence provided that the essential elements of the crime conspiracy were proven. Moreover, the crime conspiracy requires at least two or more people agreeing to commit an unlawful crime other than a buyer-sellers agreement, which is not present. And there exist no independent evidence in the discovery or record that indicates that defendant Artis conspired with anyone known or unknown other than freely admitting to the purchases and sales of drugs from 2016 through 1.12.2021 (to which he said he never stated).

Additionally, there is nothing in the record or in the discovery that comes close to proving or even suggesting that Appellant Artis was under any form of investigation, by himself or with anyone else. The law specifically forbids him being thrown into a conspiratorial web of deceit based on a iso-

lated incident which consist of a $40.00 heroin sale and nothing more. More specifically, Artis showed up at a legitimate business to make a $40.00 heroin sale not knowing that the business itself as under investigation for "methamphetamine" illegal drug trafficking. There is absolutely nothing in the discovery or the record that even remotely prove or suggest that Artis "knowingly and intentionally" joined into an agreement with any person or persons to distribute drugs to other people. There is absolutely no conspiratorial agreement with Artis and the individuals involved in the methamphetamine investigation, and neither is there any conspiratorial agreement with the unknown suppliers in North Carolina and outside of North Carolina, including New York, other than what Appellant Artis told the arresting officers. He never told them that he was involved in a conspiracy to sale illegal drugs with anyone. He never gave the names of any of his suppliers. He simply told them that his relationship with his suppliers was a buyer-seller agreement. He never admitted to being "beholden" to anyone's drug venture and neither did he exhibit informed and interested cooperation. There is no agreement of any kind other than what Artis himself told the arresting officers about the $40.00 heroin sale...who then fabricated and manufactured the crime of conspiracy which now stands uncorroborated. The conspiracy crime is nothing more than smoking mirrors which now stands uncorroborated and unverified. See Wong Sun v. United States, 371 U.S. 471 (1963) ("One uncorroborated admission by the accused does not, standing alone, corroborate an unverified confession"). There must be sufficient evidence of an agreement between two or more people to commit a crime other than the crime that consist of solely the $40.00 heroin sale itself...and Artis simply tellinig the arresting officers he knew multiple drug dealers and suppliers where he purchases his drugs form is not proof of a conspiracy, rather it indicates nothing more than a "buyer and sellers" agreement.

Please See Colloquy..

Would the Government please provide the factual basis for the entry of the guilty plea.

When Mr Artis was taken into custody, he did waive his Miranda protections and he gave a summary of his recent drug trafficking activities (which he denies). Specifically, that when he was released from custody in 2016, he began to receive fairly significant sources of heroin, cocaine and marijuana from multiple sources, both inside and outside of North Carolina. Courts have been admonished on using the word multiple. And what does fairly significant mean? When he would leave North Carolina, he would usually go to New York. He would return where he (alone) would distribute the drugs. Mr. Artis also gave consent to search his home (under false pretenses) where officers went with Mr. Artis. There were multiple ounces of heroin that were packaged for distribution that were recovered. (But to rebut that point, a search of the residence revealed only 46 grams of heroin). Small baggies of rock cocaine were recovered. Quantites? of marijuana were recovered. And a 44 Magnum revolver was recovered stuffed into the cushion of the couch. Mr.Artis did claim the firearm, said that he had purchased it from the street, but he was unaware of where it came from prior to his acquisition of it.

In Ruan and Kahn v. United States, Nos. 20-1410 and 21-5261, decided 6. 27.2022, the Supreme Court now holds that 21 U.S.C. §§ 841(a)(1) and 846 "knowingly and intentionally" mens rea applies... First, as a general matter, our criminal law seeks to punish the "vicious will." Morissette v. United States, 342 U.S. 246, 251 (1952). With few exceptions, "wrongdoing must be conscious to be criminal." Elonis v. United States, 575 U.S. 723, 734 (2015). Indeed, we have said that consciousness of wrongdoing is a principle "as universal and persistent in mature systems of [criminal] las as belief in free-

dom of the human will and consequent ability and duty of the normal individual to choose between righteousness and evil." Id. at 250.

Consequently, when we interpret criminal statutes, we squarely "start from a longstanding presumption, traceable to the secular law, that Congress intends intends to require a defendant to possess a culpable mental state." Rehaif v. United States, 588 U.S. , _____ (2019) (slip op., at 3). We have referred to this culpable mental state as "scienter," which means the degree of knowledge necessary to make a person criminally responsible for his or her acts." Morissette, 342 U.S. at 250-52.

The Government has never disclosed who Appellant Artis purportedly entered into an agreement with to commit a crime other than the $40.00 heroin sale at the business; and the suppliers with whom he simply had a buyer-seller agreement? The Government neither disclosed who Appellant Artis "knowingly and intentionally" joined into an agreement with to sale other people illegal drugs? The crime conspiracy here is "nonexistent" and the district court clearly erred in making a factual finding/determination that a conspiracy was committed absent proof that all of the essential elements of the crime were met conclusively, other than Appellant Artis' admitting to a crime at his appointed attorney's behest...who never took the time or effort to explain to him what actually constituted the crime conspiracy, and that he could not conspire alone because the crime requires at least the sound of two lawbreaker's had clapping. Ms. Lauren Harrell Brenan nor Andrew DeSimone, who are both colleagues' from the Federal Public Defender's Office for the Eastern District of North Caroling, never informed Artis that a conspiracy is not merely an agreement, but rather an agreement with a particular kind of object-an agreement to commit a crime. Neither attorney informed him that when the sale of some commodity, such as illegal drugs, is the substantive crime, and that the

failure to perform basic research on those points are quintessential examples of unreasonable performance under Strickland v. Washingtion, 466 U.S. 688 (1984). Thus, counsel was professionally unreasonable.

Appellant Artis did not object to the district court's failure to ensure that the plea was voluntary and neither did he object to the district court making a factual basis for the plea without first satisfying the necessary essential elements that constituted the crime. However, when a defendant has not objected to that classification before the district court, we review such a question for plain error. See Fed.R.Crim.P. 52(b); United States v. Olano, 507 U.S. 725, 731-32 (1993); United States v. Carthorne, 726 F.3d 503 (4th Cir. 2013).

Federal Rules of Criminal Procedure 11(b)(3) as explained: The rule is intended to ensure that the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime. The requirement to find a factual basis is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the character of the charge but without realizing that his conduct does not actually fall within the charge. United States v. Mastrapa, 509 F.3d 652, 659-60 (4th Cir. 2007). In Mastrapa the defendant pleaded guilty to conspiracy to distribute methamphetamine, in violation of 21 U.S.C.S §§ 846 and 841(a)(1), conviction was vacated because defendant did not admit necessary mens rea and record contained no factual basis to support the element of the offense.

To establish a 21 U.S.C.S. § 846 violation, the government has to prove (1) that a defendant entered into an agreement with one or more persons to engage in illegal conduct; (2) that the defendant had knowledge of that conspiracy; and (3) that the defendant knowingly and voluntarily participated in the conspiracy.

sale agreement itself cannot be the conspiracy, for it has no separate criminal object. Additionally, Artis was not informed that what is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself. Therefore, Appellant Artis respectfully suggest that he cannot ever waive his right to appeal a "nonexistent" crime.

CONCLUSION

For the foregoing reasons, Appellant Artis humbly prays that this Court should vacate the judgement in Count 1 of the indictment and remand Appellant Artis' case to the district court for resentencing in light of United States v. Campbell, 22 F.4th 438 (4th Cir. 2022).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this foregoing instrument has been maile, postage prepaid, on this 8/14/24 addressed to the following:

Executed under penalty of perjury pursuant to 28 U.S.C. § 1746, on this 8/14/24.

Octavius Artis #59165-509
Hebrew Name: Shematyah Yahash Hawkins

Octavius Artis #59165-509
Hebrew Name: Shematyah Yahash Hawkins