

IN THE SUPREME COURT OF THE UNITED STATES

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LEON PAUL KAVIS,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

=====

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

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 12 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
LEON PAUL KAVIS, Jr.,
Defendant - Appellant.

No. 24-888

D.C. Nos. 9:20-cr-00053-DLC-1
9:22-cv-00063-DLC

District of Montana,
Missoula

ORDER

Before: CALLAHAN and M. SMITH, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

LEON PAUL KAVIS, JR.,

Defendant/Movant.

Cause No. CR 20-53-M-DLC
CV 22-63-M-DLC

ORDER DENYING § 2255 MOTION
AND DENYING CERTIFICATE
OF APPEALABILITY

This case comes before the Court on Defendant/Movant Leon Paul Kavis's motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. Kavis is a federal prisoner proceeding with appointed counsel.

The Court held a hearing on January 30, 2024. The motion will be denied.

I. Background

Kavis pled guilty to Count I, conspiracy to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846, and Count III, possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). On July 20, 2021, he was sentenced to serve 180 months on Count I, followed by 60 months on Count III, terms to run consecutively, for a total custodial term of 240 months, and five years' supervised release on both counts, to run concurrently. (Doc. 52.) Kavis did not appeal.

On December 8, 2021, Kavis wrote a letter to the Court asking who the attorney in charge of his appeal was. (Doc. 58.) The Court construed his letter as a possible § 2255 motion and directed him to file a form motion, if that is what he intended to do. (Doc. 59.) He filed his first motion on March 21, 2022. (Doc. 62.) The Court subsequently appointed Stephen Hormel as counsel for Kavis, who filed an Amended Motion on March 30, 2023. (Doc. 79.) The United States answered the motion on July 17, 2023. (Doc. 85.)

Kavis's amended motion proposes five grounds for relief related to ineffective assistance of his trial counsel. (Doc. 79-1.) Ground One is ineffective assistance of counsel for failing to advise Kavis of a defense to the conspiracy charge before he agreed to plead guilty. (Doc. 79-1 at 2 – 3.) Ground Two alleges ineffective assistance of counsel for failing to advise Kavis of the correct elements of Count III of the Indictment, prior to signing his plea agreement. (Doc. 79-1 at 4 – 6.) Ground Three asserts that trial counsel coerced Kavis into signing the plea agreement by providing him incorrect information regarding the consequences of his plea, or alternatively, of going to trial. (Doc. 79-1 at 7 – 9.) Ground Four alleges that trial counsel did not provide the plea agreement until the last day possible and provided misleading information to Kavis, thus causing him to accept the agreement against his interest. (Doc. 79-1 at 9 – 11.) Finally, Ground Five asserts that trial counsel was ineffective for failing to file an appeal, after having

been directed to do so by Kavis. (Doc. 79-1 at 11 – 12.) Kavis asks the Court to vacate his guilty pleas and convictions, and/or grant him an out-of-time appeal.

The Court held an evidentiary hearing on January 30, 2024. Kavis was present and testified, as did trial counsel Ryan Heuwinkel. Prior to the hearing, Kavis waived Grounds One, Three, and Four of his motion. Several exhibits were admitted, as noted below.

II. Findings and Conclusions

In filing this motion, Kavis claims “the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States,” and moves “the court which imposed the sentence to vacate, set aside, or correct the sentence.” 28 U.S.C. § 2255. The burden of proving the claim rests on Kavis. *Parke v. Raley*, 506 U.S. 20, 31 (1992).

The overarching contention of Kavis’s motion is that Ryan Heuwinkel provided ineffective assistance of counsel in various ways. These claims are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Kavis must prove facts sufficient to support an inference (1) that counsel’s performance fell outside the wide range of reasonable professional assistance, *id.* at 687-88, and (2) that there is a reasonable probability that, but for counsel’s unprofessional performance, the result of the proceeding would have been different, *id.* at 694. See also *Premo v. Moore*, 562 U.S. 115, 121 (2011). In the context of a guilty plea, “in

order to satisfy the “prejudice” requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). “[T]here is no reason . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Strickland*, at 697.

A. Whether Heuwinkel was ineffective because he failed to advise Kavis of the proper elements of the 18 U.S.C. § 924(c) charge.

A guilty plea “is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. Where a defendant pleads guilty to a crime without having been informed of the crime’s elements, this standard is not met and the plea is invalid.” *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (internal citations and quotations omitted). The Court finds that Kavis’s plea agreement was knowing and voluntary, despite the incorrect description of the elements. Kavis was well-informed about his charges, the penalties he faced, and the evidence stacked against him. No rational defendant in his position would have gone to trial.

Kavis asserts he could not have knowingly pled guilty to Count III of the Indictment because he was not properly informed of the elements of the crime. (Doc. 80 at 9.) The Plea Agreement and the Government’s Offer of Proof both included the following incorrect recitation of the elements:

First, the *defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine*;

Second, the defendant knowingly possessed firearms;

Third, the *defendant possessed the firearm in furtherance of possession with intent to distribute*.

(Doc. 79-4 at 4); (Doc. 25 at 3) (emphasis added). (Count III was also improperly numbered as II.) These were also the elements recited at Kavis's change of plea hearing. (Doc. 79-5 at 4; Tr., Doc. 78-6 at 46 – 47.) In this recital, elements one and three assert different crimes, making it an improper statement of the law. Heuwinkel thus provided ineffective assistance, Kavis asserts, because he failed to advise Kavis that the recitation in the plea agreement was incorrect, and he agreed, at the time of the change of plea hearing, that those elements were correct. (Doc. 80 at 11; Tr., 78-6 at 47.)

At the evidentiary hearing, Heuwinkel testified that he did not recall discussing the mistaken elements with Kavis, and that he may not have noticed it. He did, however, recall that the discovery was sufficient to convict Kavis of the 924(c) charge, and thus, he had encouraged Kavis to plead guilty to it. The elements of each count were properly described in the Indictment. (Doc. 9.)

Kavis's counsel argued that Kavis could not have made a knowing, intelligent, and voluntary plea, given that he was pleading guilty to elements that were not correct for the crime, relying on *Bradshaw v. Stumpf*, at 182-183. In

Bradshaw, the U.S. Supreme Court considered whether a defendant had made a knowing plea because he was not aware of an element of the charge and may have factually disputed it. The Supreme Court concluded that the defendant's plea was, in fact, knowing and voluntary.

Kavis's counsel at hearing emphasized the possibility that one could participate in a conspiracy without participating in a substantive act in furtherance of it; therefore, in theory, Kavis could have possessed a firearm in conspiring, but not in possessing with intent. Thus, theoretically, the mistaken elements could have led him to plead guilty to a charge that he was not, in fact, guilty of. As a factual matter, however, that was not true.

Sworn statements in open court are presumed to be truthful. The Court may summarily dismiss "conclusory allegations unsupported by specifics" or "contentions that in the face of the record are wholly incredible." *Blackledge*, 431 U.S. at 74; *see also United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008) ("Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea.").

The Court concludes that Kavis was aware of the elements of the crimes he was charged with. Kavis stated under oath at his change of plea hearing that he had read and understood his Indictment and that it had been fully discussed by him with his counsel. (Doc. 71, COP Tr. 12:14-17.) He also affirmed during his change

of plea and again at the evidentiary hearing that his counsel had thoroughly explained the evidence against him. Kavis stated that he understood the maximum and minimum penalties that applied to him. (Doc. 71, COP Tr. 14:1-15:1.) The Court finds that Kavis was sufficiently aware of the elements required to convict him of Count III, such that his plea to that Count was knowing, voluntary, and intelligent.

Furthermore, the admitted facts demonstrate that he was, in fact, guilty of the correct elements of Count III. At his change of plea hearing, Kavis stated:

I had contacted some individuals in California and purchased methamphetamine there and brought it back to Montana and distributed it to people in the Flathead Valley and Missoula area.

... And I had other people that were involved with me in the distribution of meth.

(Tr., 79-6 at 50).

Kavis admitted under oath at his change of plea that he did possess a firearm "at all times while I was distributing meth." (Doc. 71, COP Tr. 50:18-20.) He reiterated this fact at the hearing when he stated that he always had a gun with him, no matter what he was doing, whether distributing methamphetamine or conspiring to do so.

Further, viewing these facts through the lens of ineffective assistance, Kavis must establish that the mistake in elements prejudiced him, and that he would have proceeded to trial had the mistake not occurred. Kavis does not carry that burden.

Kavis fails to show that a rational defendant primarily concerned with reducing his penalty risk would have chosen to go to trial. *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (defendant “must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.”). The hearing illuminated an issue that was previously unknown to the Court: the discovery provided to Kavis during his prosecution inaccurately portrayed his criminal history. One charge was identified as simple possession of dangerous drugs, when in fact, it was possession with intent to distribute. As such, considering his accurate criminal history, Kavis likely would have been subject to the career criminal enhancement in the sentencing guidelines, and his criminal history category would have gone from IV to VI. However, Kavis’s counsel successfully bargained with the U.S. to an agreement not to seek that enhancement. This bargain saved Kavis many years on his sentence, potentially a doubling of his sentence. The Court concludes that no rational defendant would forgo the advantage of that bargain, in light of his admission that he knew the Government had sufficient evidence to prove his guilt, and his knowledge of his true criminal history. Heuwinkel’s failure to notify Kavis about the mistaken recitation of the elements of Count III was not constitutionally ineffective assistance of counsel.

B. Whether Heuwinkel was ineffective because he failed to file a notice of appeal.

The terms of Kavis’s plea agreement required him to waive his right to

appeal. (Doc. 25 at 7 - 8.) At his change of plea hearing, Kavis acknowledged that he was waiving his right to appeal. (Doc. 71, COP TR. 29:20-30:1.) However, Kavis asserts that he informed Heuwinkel at his sentencing hearing that he wanted to appeal after all. Relying on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), Kavis asserts that Heuwinkel's failure to file a notice of appeal was ineffective assistance of counsel.

At the point of appeal, counsel has two constitutional duties: a conditional duty to consult with the client about appeal, and an unconditional duty to file a notice of appeal if instructed to do so, even if the defendant waived appeal, and even if counsel believes an appeal is frivolous. *See Garza v. Idaho*, 586 U.S. __, 139 S. Ct. 738, 747 (2019); *Roe v. Flores-Ortega*, 528 U.S. 470, 477–80 (2000).

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable... (“[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal without showing that his appeal would likely have had merit”).

Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (internal citations omitted).

Failure to consult, however, may not be *per se* ineffective. “We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient.” *Flores-Ortega*, 528 U.S. at 479 (emphasis in original). The Supreme Court held that counsel has a constitutional duty to consult with the defendant if there is

reason to think a defendant would want to appeal, or if the defendant showed an interest in appealing. In this regard it is necessary to consider the information that counsel “knew or should have known.” *Flores-Ortega*, 528 U.S. at 480.

There is no doubt that Heuwinkel and Kavis consulted about a possible appeal prior to his sentencing. They discussed his right to appeal in the context of his plea agreement, because he waived that right there. At the hearing, Heuwinkel testified that he had had many discussions with Kavis about the waiver of his appeal prior to sentencing, including while he was deciding whether to take the plea agreement. Heuwinkel did not speak with Kavis about the appeal after the sentencing because he had previously discussed it repeatedly, and Heuwinkel had had no further indication that Kavis wanted to appeal.

The question, then, is did Kavis convey to Heuwinkel that, despite these previous discussions, he wanted to appeal? Kavis has provided three versions of what he contends was his demonstration of his intent to appeal. In his first declaration in support of his motion, he stated “After the sentencing hearing, Mr. Heuwinkel and I discussed an appeal. I instructed Mr. Heuwinkel that I wanted to file an appeal. He informed me that he would not handle an appeal for me. He also stated that he was no longer taking federal criminal cases, and that he was leaving town for a vacation. I believed that an appeal was filed.” (Doc. 77-2 at 3 – 4.)

Kavis's second declaration states "It is my belief that I directed Mr. Heuwinkel to appeal the sentence. Before the Marshals escorted me out of court, I expressed my dissatisfaction with the length of my sentence with Mr. Heuwinkel, stating "we're going to appeal, right?" I intended this question to convey to Mr. Heuwinkel that I wanted to appeal my sentence." (Doc. 92-1 at 1.)

At the hearing, Kavis's story changed once again. He claimed that at the sentencing hearing, after the Court pronounced the sentence on Count I, he was so rocked by the initial term that he immediately leaned over to Heuwinkel and said something to him about appealing. He said that, before he had even finished his sentence, Heuwinkel put up a finger in a sort of shushing motion. At the end of the sentencing hearing, Heuwinkel shook his hand and wished him luck, but they did not otherwise speak. They did not speak of appeal again.

Heuwinkel denies Kavis told him he wanted to appeal. Heuwinkel had no reason to think that further consultation was necessary, because he had discussed with Kavis on multiple occasions the fact that Kavis was waiving his right to appeal, and that there was no basis upon which to appeal. (Decl. Heuwinkel at ¶ 18.)

At the evidentiary hearing, counsel for Kavis questioned Heuwinkel about a closing letter he sent the day after sentencing, discussing various matters, including why an appeal would not be advantageous. (Govt. Exh. 1 (Decl. Heuwinkel at ¶

1); Exh. 2 (Letter, Doc. 86-1.)) In the letter, Heuwinkel explained to Kavis that he would have 14 days to file a notice of appeal, and Heuwinkel offered to consult if Kavis desired to speak to him about it. (Decl. Heuwinkel at ¶ 18; 7/21/21 Letter.)

Rather than accepting this letter proves Heuwinkel did not know Kavis wanted to appeal, Kavis contends that it is, in fact, proof that he did want to, and that Heuwinkel knew it. (Doc. 92 at 1 – 6.) Kavis emphasizes how much it discusses appeal and posits that it does so to dissuade Kavis from a request he had already made. Heuwinkel’s explanation at the hearing was merely that the letter included all of the advice that Heuwinkel had previously given Kavis regarding an appeal. The Court does not find the letter’s content to support an inference that Kavis had told Heuwinkel at the sentencing hearing that he wanted to appeal.

The letter itself is a bit of a red herring. The testimony at the hearing was equivocal about the letter. The parties stipulated that Kavis remained at Missoula County Detention Facility, the address to which the letter was sent, until July 26, 2021. The letter is dated the day after Kavis’s sentencing, July 21, 2021, which was a Wednesday. In the ordinary course of mail in Missoula, Montana, the letter likely would have arrived at the detention facility within a day or two, sufficient time for it to reach Kavis. However, Kavis did not recall receiving the letter. Heuwinkel testified that he did not recall his office receiving the letter back as undeliverable. Thus, the Court determines it is likely that Kavis received the letter,

but whether he did is not material to the Court's conclusions. The Court concludes that Kavis did not clearly express his desire to appeal, nor did Heuwinkel have reason to believe that Kavis would want to appeal. Heuwinkel did not violate his unconditional duty to file a notice of appeal when instructed to do so by the client. Kavis's claim is denied.

III. Certificate of Appealability

“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rule 11(a), Rules Governing § 2255 Proceedings. A COA should issue as to those claims on which the petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The standard is satisfied if “jurists of reason could disagree with the district court’s resolution of [the] constitutional claims” or “conclude the issues presented are adequate to deserve encouragement to proceed further.” *Gonzalez v. Thaler*, 565 U.S. 134, 140 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)); *see also Buck v. Davis*, 580 U.S. 100, 115 - 116 (2017).

Kavis’s claims do not meet the relatively low threshold required to issue a COA. The record of the case, along with the additional evidence and testimony introduced on the issue, provide no factual support for his claim that he instructed counsel to file a notice of appeal or that counsel failed or refused to do so, nor that a scrivener’s error in the plea agreement induced him to plead when he would not

have otherwise.

The Court does not believe reasonable jurists would find room to debate these issues. There is no reason to encourage further proceedings. A COA is not warranted.

Accordingly, IT IS ORDERED:

1. Kavis's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255 (Doc. 79) is DENIED.
2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Kavis files a Notice of Appeal.
3. The Clerk of Court shall ensure that all pending motions in this case and in CV 22-63-M-DLC are terminated and shall close the civil file by entering judgment in favor of the United States and against Kavis.

DATED this 2nd day of February, 2024.



Dana L. Christensen
Dana L. Christensen, District Judge
United States District Court

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FILED

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Clerk, U.S. District Court
District of Montana
Bozeman, MT

ATTORNEY FOR PLAINTIFF
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEON PAUL KAVIS, JR.,

Defendant.

CR 20- 53 -M- DLC

INDICTMENT

**CONSPIRACY TO POSSESS WITH THE
INTENT TO DISTRIBUTE
METHAMPHETAMINE**
Title 21 U.S.C. § 846
(Count I)
(Penalty: Mandatory minimum ten years to
life imprisonment, \$10,000,000 fine, and at
least five years supervised release)

**POSSESSION WITH INTENT TO
DISTRIBUTE METHAMPHETAMINE**
Title 21 U.S.C. § 841(a)(1)
(Count II)
(Penalty: Mandatory minimum ten years to
life imprisonment, \$10,000,000 fine, and at
least five years supervised release)

	<p>POSSESSION OF A FIREARM IN FURTHERANCE OF A DRUG TRAFFICKING CRIME Title 18 U.S.C. § 924(c)(1)(A)(i) (Count III) (Penalty: Mandatory minimum five years to life imprisonment, consecutive to any other sentence, \$250,000 fine, and five years supervised release)</p> <p>FORFEITURE Title 21 U.S.C. §§ 853(a)(1) and (2) and 881 Title 18 U.S.C. § 924(d) Title 21 U.S.C. § 853(p)</p> <p>TITLE 21 PENALTIES MAY BE ENHANCED FOR PRIOR DRUG-RELATED FELONY CONVICTIONS</p>
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THE GRAND JURY CHARGES:

COUNT I

Beginning in November 2019 and continuing until November 2020, in Flathead County, Missoula County, and elsewhere in the State and District of Montana, and elsewhere, the defendant, LEON PAUL KAVIS, JR., knowingly and unlawfully conspired with others, both known and unknown to the Grand Jury, to possess with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), 500 grams or more of a substance containing a detectable amount of methamphetamine, a Scheduled II controlled substance, in violation of 21 U.S.C. § 846.

COUNT II

Beginning in November 2019 and continuing until November 2020, in Flathead County, Missoula County, and elsewhere, in the State and District of Montana, the defendant, LEON PAUL KAVIS, JR., knowingly and unlawfully possessed with the intent to distribute, 500 grams or more of a substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1).

COUNT III

That in or about November 2019 and continuing until November 2020, in Flathead County, Missoula County, and elsewhere, in the State and District of Montana, the defendant, LEON PAUL KAVIS, JR., did knowingly possess a firearm in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, namely conspiracy to possess with the intent to distribute controlled substances and possession with intent to distribute controlled substances, as alleged in Counts I and II above, in violation of 18 U.S.C. § 924(c)(1)(A)(i).

FORFEITURE ALLEGATION

Upon conviction of either of the offenses set forth in counts I and II of this indictment, the defendant, LEON PAUL KAVIS, JR., shall forfeit, pursuant to 21 U.S.C. § 853(a)(1) and (2), and 21 U.S.C. § 881(a)(11): (1) any property

constituting and derived from any proceeds obtained, directly and indirectly, as a result of the commission of said offense; (2) any property used and intended to be used, in any manner and part, to commit, and facilitate the commission of, said offense; and (3) any firearm used and intended to be used to facilitate the transportation, sale, receipt, possession, and concealment of controlled substances and any proceeds traceable to such property.

The United States of America shall be entitled to forfeiture of substitute assets, pursuant to 21 U.S.C. § 853(p), if any of the property that constitutes and is derived from the proceeds traceable to the offenses set forth in Counts I and II:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty.

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Upon conviction of the offense set forth in count III of this indictment, the defendant, LEON PAUL KAVIS, JR., shall forfeit, pursuant to 18 U.S.C. § 924(d), any firearms and ammunition involved in any knowing violation of said offense.

A TRUE BILL.

Foreperson Signature Redacted



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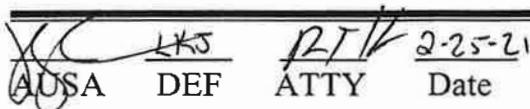
ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

UNITED STATES OF AMERICA, Plaintiff, vs. LEON PAUL KAVIS, JR., Defendant.	CR-20-53-M-DLC PLEA AGREEMENT
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Pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the United States of America, represented by Jennifer S. Clark, Assistant United States Attorney for the District of Montana, and the defendant, Leon Paul Kavis, Jr., and the defendant's attorney, Ryan Heuwinkel, have agreed upon the following:

1. **Scope:** This plea agreement is between the United States Attorney's Office for the District of Montana and the defendant. It does not bind any other

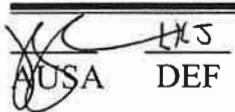

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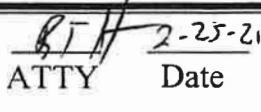
federal, state, or local prosecuting, administrative, or regulatory authority, or the United States Probation Office.

2. Charges: The defendant agrees to plead guilty to Count I of the indictment, which charges the crime of Conspiracy to Possess with the Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 846, and Count III of the indictment, which charges the crime of Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). Count I carries a mandatory minimum punishment of ten years up to life imprisonment, a \$10,000,000 fine, five years of supervised release, and a \$100 special assessment. Count III carries a mandatory minimum punishment of five years up to life imprisonment, consecutive to any other sentence, a \$250,000 fine, five years supervised release, and a \$100 special assessment.

At the time of sentencing, if the Court accepts this plea agreement, the United States will move to dismiss Count II of the indictment. The defendant will deny the forfeiture allegation, which is further addressed in paragraph 7 of this agreement.

3. Nature of the Agreement: The parties agree that this plea agreement will be governed by Rule 11(c)(1)(A) and Rule 11(c)(1)(B), *Federal Rules of Criminal Procedure*. The defendant acknowledges that the agreement will be fulfilled provided the United States moves to dismiss, and the Court agrees to

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USA DEF

 BJH 2-25-21
ATTY Date

dismiss, Count II of the indictment. The defendant understands that if the agreement is accepted by the Court there will not be an automatic right to withdraw the plea.

4. Admission of Guilt: The defendant will plead guilty because the defendant is guilty of the charge contained in Counts I and III of the indictment. In pleading guilty, the defendant acknowledges that:

COUNT I:

First, there was an agreement between two or more people to possess with the intent to distribute methamphetamine;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it;

Third, at least 500 grams or more of a substance containing a detectable amount of methamphetamine was involved in the conspiracy.

COUNT II:

First, the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine;

Second, the defendant knowingly possessed firearms;

Third, the defendant possessed the firearm in furtherance of possession with intent to distribute.

5. Waiver of Rights by Plea:

 LSJ
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ATTY Date

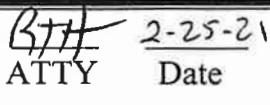
(a) The government has a right to use against the defendant, in a prosecution for perjury or false statement, any statement given under oath during the plea colloquy.

(b) The defendant has the right to plead not guilty or to persist in a plea of not guilty.

(c) The defendant has the right to a jury trial unless, by written waiver, the defendant consents to a non-jury trial. The United States must also consent, and the Court must approve a non-jury trial.

(d) The defendant has the right to be represented by counsel and, if necessary, have the Court appoint counsel at trial and at every other stage of these proceedings.

(e) If the trial is a jury trial, the jury would be composed of 12 laypersons selected at random. The defendant and the defendant's attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that the defendant is presumed innocent, and that it could not convict unless, after hearing all the evidence, it was persuaded of the defendant's guilt beyond a reasonable doubt.

 
AUSA DEF ATTY Date 2-25-21

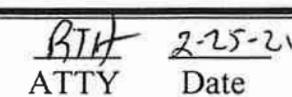
(f) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not the judge was persuaded of the defendant's guilt beyond a reasonable doubt.

(g) At a trial, whether by a jury or a judge, the United States would be required to present its witnesses and other evidence against the defendant. The defendant would be able to confront those government witnesses and the defendant's attorney would be able to cross-examine them. In turn, the defendant could present witnesses and other evidence. If the witnesses for the defendant would not appear voluntarily, their appearance could be mandated through the subpoena power of the Court.

(h) At a trial, there is a privilege against self-incrimination so that the defendant could decline to testify, and no inference of guilt could be drawn from the refusal to testify. Or the defendant could exercise the choice to testify.

(i) If convicted, and within 14 days of the entry of the Judgment and Commitment, the defendant would have the right to appeal the conviction to the Ninth Circuit Court of Appeals for review to determine if any errors were made that would entitle the defendant to reversal of the conviction.

(j) The defendant has a right to have the district court conduct the change of plea hearing required by Rule 11, Federal Rules of Criminal Procedure. By execution of this agreement, the defendant waives that right and agrees to hold

 
AUSA DEF ATTY Date

that hearing before and allow the Rule 11 colloquy to be conducted by, the U.S. Magistrate Judge, if necessary.

(k) If convicted in this matter, a defendant who is not a citizen of the United States may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The defendant understands that by pleading guilty pursuant to this agreement, the defendant is waiving all of the rights set forth in this paragraph. The defendant's attorney has explained those rights and the consequences of waiving those rights.

6. Recommendations: The United States will recommend the defendant's offense level be decreased by two levels for acceptance of responsibility, pursuant to USSG §3E1.1(a), unless the defendant is found to have obstructed justice prior to sentencing, pursuant to USSG §3C1.1, or acted in any way inconsistent with acceptance of responsibility. The United States will move for an additional one-level reduction, pursuant to USSG §3E1.1(b), if appropriate under the Guidelines. The parties reserve the right to make any other arguments at the time of sentencing. The defendant understands that the Court is not bound by this recommendation. The United States will not argue that any factors increase the base-offense level other than ones established by the probation officer in the PSR. The United States does not oppose defendant's request that USSG

 LVS BTK 2.25.21
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§ 4B1.1(a) does not apply based on the criminal history disclosed in discovery.

The United States further agrees not to file a notice to seek enhanced penalties under 21 U.S.C. § 851.

7. Forfeiture Proceeding Prior to Sentencing: The defendant will deny the forfeiture allegation at the change of plea hearing. The parties agree to pursue forfeiture proceedings under Fed. R. Crim. P. 32.2(b)(1) at any time convenient for the Court prior to sentencing. The parties waive their rights to a jury trial on the issue of forfeiture, Fed. R. Crim. P. 32.2(b)(5), and both parties agree to proceed either before the district court or magistrate court for forfeiture proceedings under Fed. R. Crim. P. 32.2(b)(1)(A) and (B). These proceedings are necessary to address, at least in part, \$13,920 in U.S. currency that was recovered during the investigation.

8. Sentencing Guidelines: Although advisory, the parties agree that the U.S. Sentencing Guidelines must be applied, and a calculation determined, as part of the protocol of sentencing to determine what sentence will be reasonable.

9. Waiver of Appeal of the Sentence – Conditional: The defendant understands the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. The prosecution has a comparable right of appeal. 18 U.S.C. § 3742(b). By this agreement the defendant waives the right to appeal or collaterally attack any aspect

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AOUSA DEF ATTY Date

of the sentence, including conditions of probation or supervised release, if the sentence imposed is within or below the Guideline range calculated by the Court, regardless of whether the defendant agrees with that range. This waiver includes challenges to the constitutionality of any statute of conviction and arguments the admitted conduct does not fall within any statute of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel. The United States waives its right to appeal any aspect of the sentence if the sentence imposed is within or above the Guideline range calculated by the Court.

10. Voluntary Plea: The defendant and the defendant's attorney acknowledge that no threats, promises, or representations have been made to induce the defendant to plead guilty, and that this agreement is freely and voluntarily endorsed by the parties.

11. Loss of Federal Benefits: The defendant acknowledges that, based on the plea of guilty to a federal controlled substances crime, the defendant is no longer eligible for assistance under any state program funded under Part A of Title IV of the Social Security Act or benefits under the Food Stamp Act. 21 U.S.C. § 862a. The Court may also deny the defendant eligibility to participate in any federal grant, contract, loan, professional license, or commercial license. 21 U.S.C. § 862.

 JKS
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 RJF
ATTY

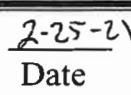
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12. Detention/Release After Plea:

Pursuant to 18 U.S.C. § 3143(a)(2), the defendant acknowledges that the defendant will be detained upon conviction unless (A)(i) the Court finds there is a substantial likelihood that a motion for acquittal or new trial will be granted or (ii) this agreement provides that the United States will recommend that no sentence of imprisonment be imposed and (B) the Court finds, by clear and convincing evidence, that the defendant is not likely to flee or pose a danger to any other person or the community. Then, if exceptional circumstances exist, the defendant may be released upon conditions.

13. Breach: If the defendant breaches the terms of this agreement or commits any new criminal offenses between signing this agreement and sentencing, the U.S. Attorney's Office is relieved of its obligations under this agreement, but the defendant may not withdraw the guilty plea.

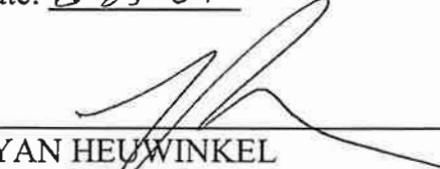
14. Entire Agreement: Any statements or representations made by the United States, the defendant, or defense counsel prior to the full execution of this plea agreement are superseded by this plea agreement. No promises or representations have been made by the United States except as set forth in writing in this plea agreement. This plea agreement constitutes the entire agreement between the parties. Any term or condition which is not expressly stated as part of this plea agreement is not to be considered part of the agreement.

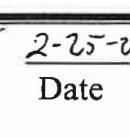
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AUSA

LEIF M. JOHNSON
Acting United States Attorney


JENNIFER S. CLARK
Assistant U. S. Attorney
Date: 2-25-21


LEON PAUL KAVIS, JR.
Defendant
Date: 2-25-21


RYAN HEUWINKEL
Defense Counsel
Date: 2-25-21

 AUSA  DEF  ATTY  Date

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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LEON PAUL KAVIS, Defendant.	CR 20-53-M-DLC OFFER OF PROOF IN SUPPORT OF GUILTY PLEA
---	--

The United States of America, represented by Assistant United States Attorney Jennifer S. Clark, files its offer of proof in anticipation of the change of plea hearing set for March 9, 2021.

THE CHARGES

The defendant, Leon Paul Kavis, is charged by indictment in Count I with Conspiracy to Possess with Intent to Distribute Methamphetamine, in violation of

21 U.S.C. § 846, Count II with Possession with Intent to Distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and Count III with Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i). There also is a forfeiture allegation contained in the indictment.

PLEA AGREEMENT

There is a plea agreement in this case. The defendant will enter a voluntary plea of guilty to Count I and Count II of the indictment. The United States will move to dismiss Count III. The parties have agreed to hold a contested hearing/bench trial on the forfeiture allegation. The United States presented all formal plea offers to the defendant in writing. In the government's view, the plea agreement entered into by the parties and filed with the Court represents the most favorable offer extended to the defendant. *See, e.g., Missouri v. Frye*, 132 S. Ct. 1399 (2012).

ELEMENTS

In order to prove the charge contained in the indictment against the defendant at trial, the United States would have to prove the following elements beyond a reasonable doubt.

COUNT I:

First, there was an agreement between two or more people to possess with the intent to distribute methamphetamine;

Second, the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it;

Third, at least 500 grams or more of a substance containing a detectable amount of methamphetamine was involved in the conspiracy.

COUNT II:

First, the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine;

Second, the defendant knowingly possessed a firearm;

Third, the defendant possessed the firearm in furtherance of possession with intent to distribute.

PENALTY

Count I of the indictment charges the crime of Conspiracy to Possess with the Intent to Distribute Methamphetamine. This offense carries a mandatory minimum ten years imprisonment, a \$10,000,000 fine, at least five years of supervised release, and a \$100.00 special assessment. Count II of the indictment charges the crime of Possession of a Firearm in Furtherance of a Drug Trafficking Crime. This offense carries a mandatory minimum five years imprisonment, consecutive to any other sentence, \$250,000 fine, and five years of supervised release, and a \$100.00 special assessment.

ANTICIPATED EVIDENCE

If called upon to prove this case at trial, and to provide a factual basis for the defendant's plea, the United States would present, by way of testimony of law

enforcement officers, lay and expert witnesses and physical evidence the following:

Leon Kavis was identified to law enforcement as a source of methamphetamine in the Flathead valley. Law enforcement began investigating his activities and identified several individuals in Montana that he worked with to distribute methamphetamine. While the investigation was proceeding in Montana, California authorities also identified Kavis as working with individuals in California to bring methamphetamine to Montana for distribution.

Witnesses will testify that Kavis sold them methamphetamine ranging from ounce quantities to multiple ounces in a single transaction. Witnesses will testify they observed Kavis with pounds of methamphetamine including on one occasion he was observed with up to 15 pounds of methamphetamine. Witnesses will testify that Kavis always carried a firearm on his person as he deals large amounts of methamphetamine and that he used the firearm as protection. Witnesses will testify that Kavis often had large sums of cash with him ranging from \$30,000 to \$50,000.

Part of the investigation involved packages being sent to Kavis' shop at 501 Montana Avenue in East Missoula. Law enforcement will testify about several packages sent to the shop from California. Law enforcement obtained a search warrant on one of the packages and located approximately five pounds of

suspected drugs, individually wrapped in five separate quart size containers. The package was addressed to Kavis's shop and had Kavis' number listed. The suspected drugs were submitted to the DEA lab for further testing. The substance tested positive for methamphetamine, with a net weight of 2,079.5 grams (+/- 0.2 grams) with a 99% (+/-6%) purity for a pure amount of methamphetamine of 2,058.7 grams (+/- 125.6 grams).

The government submits that the aforementioned evidence would prove beyond a reasonable doubt all the elements of the crime charged in the indictment.

Respectfully submitted this 3rd day of March, 2021.

LEIF M. JOHNSON
Acting United States Attorney

/s/ Jennifer S. Clark
Assistant U.S. Attorney
Attorney for Plaintiff

1 JoAnn Jett Corson
2 Registered Diplomate Reporter
3 Certified Realtime Reporter
4 P. O. Box 8006
5 Missoula, Montana 59807-8006
6 406/829-7123 office
7 joann_corson@mtd.uscourts.gov

8 United States Court Reporter

9

10

11

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF MONTANA
14 MISSOULA DIVISION
15
16 UNITED STATES OF AMERICA,)
17 Plaintiff,) No. CR 20-53-M-DLC
18 vs.)
19 Defendant.)
20)
21)
22)
23)
24)
25

16 BEFORE THE HONORABLE KATHLEEN L. DeSOTO
17 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
18 FOR THE DISTRICT OF MONTANA

19 Russell Smith United States Courthouse
20 201 East Broadway
21 Missoula, Montana 59802
22 Tuesday, March 9, 2021
23 2:04 to 3:29 p.m.

24
25 Proceedings recorded by digital audio recording
 Transcript produced by computer-assisted transcription

APPEARANCES

2 For the Plaintiff: MR. RYAN G. WELDON
3 Assistant U.S. Attorney
P.O. Box 8329
Missoula, Montana 59807

5 For the Defendant: MR. RYAN T. HEUWINKEL
6 Attorney at Law
P.O. Box 7729
Missoula, Montana 59807

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TRANSCRIBER'S NOTE: "Uh-huh" and "Um-hmm" indicate affirmative responses. "Huh-uh" and "Hm-umm" indicate negative responses.

1 THE COURT: And have you had sufficient time to talk
2 about the guidelines and all of the variables that go into
3 that with Mr. Heuwinkel?

4 THE DEFENDANT: Yes, Your Honor.

5 THE COURT: All right.

6 Well, Mr. Weldon, would you please explain the legal
7 elements of the offense beginning with Count 1?

8 MR. WELDON: Yes, Your Honor.

9 With Count 1, there are three elements:

10 First, there was an agreement between two or more
11 people to possess with the intent to distribute
12 methamphetamine;

13 Second, the defendant became a member of the
14 conspiracy knowing at least one of its objects and intending
15 to help accomplish it; and

16 Third, at least 500 grams or more of a substance
17 containing a detectable amount of methamphetamine was involved
18 in the conspiracy.

19 THE COURT: All right.

20 MR. WELDON: And, Your Honor, in this case, also, it
21 would be Count 3, I noticed that the Court referenced that
22 there was the typo in there. It's actually Count 3, and there
23 are three elements with that as well, Your Honor:

24 First, the defendant committed the crime of
25 conspiracy to possess with the intent to distribute

1 methamphetamine;

2 Second, the defendant knowingly possessed a firearm;
3 and

4 Third, the defendant possessed the firearm in
5 furtherance of possession with the intent to distribute.

6 THE COURT: All right.

7 Mr. Heuwinkel, as to Count 1, do you agree that
8 those are -- that's the correct statement of the legal
9 elements?

10 MR. HEUWINKEL: Yes, Your Honor.

11 THE COURT: And same question as to Count 3.

12 MR. HEUWINKEL: Yes, Your Honor.

13 THE COURT: All right.

14 So, Mr. Kavis, there's been an offer of proof filed
15 in this case, and an offer of proof is simply a document that
16 the United States files. It contains the legal elements of
17 the offenses, and then it also contains the evidence the
18 United States believes it could prove if it had to go to trial
19 in this matter.

20 Have you had a chance to review that document with
21 your attorney?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: All right.

24 Mr. Weldon, would you please describe for the Court
25 the evidence the United States believes it could prove if it

1 was required to go to trial?

2 MR. WELDON: Yes, Your Honor.

3 If this case proceeded to trial, the United States
4 would prove that the defendant, Leon Kavis, was identified to
5 law enforcement as a source of methamphetamine in the Flathead
6 Valley.

7 Law enforcement began investigating his activities
8 and identified several individuals in Montana that he worked
9 with to distribute methamphetamine. While the investigation
10 was proceeding in Montana, California authorities also
11 identified Mr. Kavis as working with individuals in California
12 to bring methamphetamine to Montana for distribution.

13 Witnesses will testify that Mr. Kavis sold them
14 methamphetamine ranging from ounce quantities to
15 multiple ounces in a single transaction. Witnesses will
16 testify they observed Mr. Kavis with pounds of
17 methamphetamine, including on one occasion he was observed
18 with up to 15 pounds of methamphetamine.

19 Witnesses will testify that Mr. Kavis always carried
20 a firearm on his person as he deals large amounts of
21 methamphetamine and that he used the firearm for protection.

22 Witnesses will testify that Mr. Kavis often had
23 large sums of cash with him ranging from \$30,000 to \$50,000.

24 Part of the investigation involved packages
25 being sent to Mr. Kavis's shop at 501 Montana Avenue in

1 East Missoula. Law enforcement will testify about several
2 packages sent to the shop from California. Law enforcement
3 obtained a search warrant on one of the packages and located
4 approximately five pounds of suspected drugs, individually
5 wrapped in five separate quart-sized containers. The package
6 was addressed to Mr. Kavis's shop and had Mr. Kavis's number
7 listed.

8 The suspected drugs were submitted to the DEA lab
9 for further testing. The substance tested positive for
10 methamphetamine with a net weight of 2,079.5 grams with a
11 99 percent purity for a pure amount of methamphetamine of
12 2,058.7 grams.

13 If this case had proceeded to trial, Your Honor,
14 that would be the evidence the United States would offer.

15 THE COURT: All right.

16 Mr. Kavis, were you able to hear all of that?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: And do you understand what the
19 government says it could prove if it went to trial?

20 THE DEFENDANT: I do.

21 THE COURT: And so let me ask you first,

22 Mr. Heuwinkel: Is there anything that you disagree with that
23 Mr. Weldon just said out loud?

24 MR. HEUWINKEL: Yes, Your Honor.

25 First of all, we don't disagree that the government

1 could prove the case, but we do dispute that Mr. Kavis was
2 ever observed with 15 pounds of methamphetamine. We also
3 dispute that it was -- you know, that he often had large sums
4 of cash with him in those amounts. We don't think that that's
5 what the evidence would actually establish.

6 But, you know, again, we don't dispute that the
7 government could prove the elements of the crime, and those
8 are the contentions that we have with this.

9 THE COURT: All right.

10 Were you able to hear that, Mr. Kavis?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: Okay. So let me ask you: Do you
13 disagree with anything that Mr. Weldon just said about what
14 the government could prove?

15 THE DEFENDANT: Uh, uh --

16 THE COURT: Actually, let me ask you this way:
17 Subject to the comments from your attorney regarding the
18 15 pounds and the frequency with which you had a firearm on
19 you and the frequency with which you had pounds of
20 methamphetamine, subject to those qualifications, do you agree
21 generally with what the United States said it could prove if
22 it went to trial?

23 THE DEFENDANT: Your Honor, I do generally agree
24 with that. I don't believe that Mr. Heuwinkel said anything
25 about the firearm. I'm, I'm not sure we could contest that at

1 all. Just the 15 pounds and then me being seen often with
2 30 to \$50,000.

3 THE COURT: Okay. So your, so your issue is with
4 the 15-pound amount of methamphetamine and the amount of
5 currency that you had, but, other than that, you generally
6 agree with what the United States said they could prove if it
7 went to trial?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: So, so what I'd like you to do now,
10 then, Mr. Kavis, is just tell me in your own words why you're
11 pleading guilty to Counts 1 and 3 of this indictment. So tell
12 me what you did.

13 THE DEFENDANT: I had contacted some individuals in
14 California and purchased methamphetamine there and brought it
15 back to Montana and distributed it to people in the Flathead
16 Valley and Missoula area.

17 I, also, I -- as soon as I was off probation a
18 couple years ago, I went and bought a gun -- multiples because
19 it's a hobby -- and I had one with me at all times while I was
20 distributing meth. And I had other people that were involved
21 with me in the distribution of meth.

22 THE COURT: Okay. And, Mr. Kavis, in terms of the
23 amount of methamphetamine that you were distributing, is it
24 accurate that it was 500 grams or more of a substance that
25 contained a detectable amount of methamphetamine?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: All right.

3 Well, Mr. Kavis, based on our discussions here
4 today, I am going to grant your motion to withdraw your
5 previously entered not guilty pleas to Counts 1 and 3 of the
6 indictment, and let me ask you first how you plead to Count 1
7 of the indictment.

8 THE DEFENDANT: Guilty, Your Honor.

9 THE COURT: And how do you plead to Count 3 of the
10 indictment?

11 THE DEFENDANT: Guilty, Your Honor.

12 THE COURT: Okay. And then, for the record, the
13 Court will maintain the denial of the forfeiture, and then
14 that issue will be handled later at the hearing with Judge
15 Christensen.

16 All right. Mr. Kavis, I find that you are fully
17 competent and capable of entering an informed and voluntary
18 plea, that you are aware of the nature of the charges to which
19 you have pled guilty, that you understand the consequences of
20 your guilty plea as well as the maximum penalties that can be
21 imposed upon you by pleading guilty here today.

22 I find that you fully understand your constitutional
23 rights and the extent to which you are waiving those rights by
24 pleading guilty here today. I find that you have had adequate
25 time to review the plea agreement, that you understand the

Honorable Judge Christensen

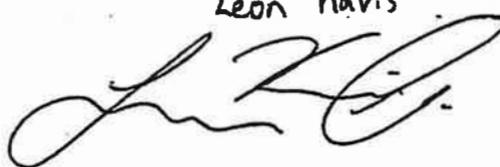
12/20/21

On July 20th, 2021 I was sentenced in your court to 240 months. I was somewhat represented by an insurance attorney that had been appointed to me. His name is Ryan Heuwinkel. Immediately after sentencing, the decision was made to appeal the sentence (Mr. Heuwinkel informed me that he would not be the attorney that handled my appeal). He also informed me that he was leaving on vacation, would no longer be my attorney, and was also no longer going to have anything to do with federal cases.

The reason I am writing the court, is because I am trying to find out who my attorney is that handles the appeal of my sentence. I was told it takes a while for them to contact me, but there are two people here that were sentenced in September and have already heard from their new attorney. If the court could contact whoever runs that office of law, or get me the contact information I need, it would be greatly appreciated.

Thank you for your time on this matter.

Leon Karis



DEC 20 2021

Clerk, U.S. Courts
District of Montana
Missoula Division

USDC Case# 20-53-m-DLC

Date Case# 9:20-cr-00053-DLC-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Cause No. CR 20-53-M-DLC

Plaintiff,

vs.

ORDER

LEON PAUL KAVIS, JR.,

Defendant.

On December 20, 2021, the Court received a letter from Defendant Kavis asking for the name of the attorney appointed to represent him on appeal. Kavis was sentenced on July 20, 2021. *See* Minutes (Doc. 51). No notice of appeal was filed, and no appeal is pending.

Liberally construed, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Rishor v. Ferguson*, 822 F.3d 482, 495 (9th Cir. 2016), Kavis's letter alleges facts that, if proved true, state a claim on which relief may be granted under 28 U.S.C. § 2255.

Kavis may decide whether he wants the Court to consider his letter as a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. In other words, Kavis's letter would become his motion under § 2255.

If Kavis does not want the Court to recharacterize his letter and address it under § 2255, he need not respond to this Order. No further action will be taken.

If Kavis agrees to recharacterization, he may add any more claims for relief he wants the Court to consider under § 2255. This is important, because, in general, federal prisoners have only one opportunity to file a motion under 28 U.S.C. § 2255. *See 28 U.S.C. § 2255(h); Castro v. United States, 540 U.S. 375, 377 (2003).*

Kavis is also advised that a one-year limitations period applies to § 2255 motions. *See 28 U.S.C. § 2255(f).*

Accordingly, IT IS ORDERED:

1. If Kavis wishes to proceed with a motion under 28 U.S.C. § 2255, he must say so on or before **January 24, 2022.**
2. If Kavis does not timely respond to this Order, no further action will be taken on his letter.
3. If Kavis wants the Court to consider any claims for relief that are not included in his letter, he must complete the Court's standard form for motions under 28 U.S.C. § 2255 and file it on or before **January 24, 2022.**

4. The clerk will include a form motion under 28 U.S.C. § 2255 with
Kavis's service copy of this Order.

DATED this 22nd day of December, 2021.



Dana L. Christensen
Dana L. Christensen, District Judge
United States District Court

1 Stephen R. Hormel
2 Hormel Law Office, L.L.C.
3 17722 East Sprague Avenue
4 Spokane Valley, WA 99016
Telephone: (509) 926-5177
Facsimile: (509) 926-4318

5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF MONTANA
8 Missoula Division

9
10 UNITED STATES OF AMERICA,)
11 Plaintiff/Respondent,) No. CR-20-53-M-DLC
12 vs.)
13 LEON PAUL KAVIS, Jr.,) MOVANT'S CLAIMS AND
14) SUPPORTING FACTS FOR
15) AMENDED § 2255 MOTION
Defendant/Movant) **(Grounds One through Five)**
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)

LEON PAUL KAVIS, Jr., through counsel Stephen R. Hormel for Hormel
Law Office, LLC, submits the following claims and supporting facts for the
Amended Motion to Vacate, Set Aside or Correct Sentencing pursuant to 28
U.S.C. § 2255:

I. Exhibits Relevant to Amended § 2255 Claims:

Exhibit 1: Movant's declaration in support of § 2255 Motion.

Exhibit 2: Order (Doc. 21 at 1-2) (establishing plea agreement deadline).

Exhibit 3: Plea Agreement (Doc. 25).

1 Exhibit 4: Offer of Proof in Support of Guilty Plea (Doc. 27).

2 Exhibit 5: Transcript on Hearing on Motion to Change Plea.

3 Exhibit 6: Movant's 12/08/21 letter re: counsel on appeal (Doc. 58).

4 Exhibit 7: Court Order Re: 2255 Motion in response to letter.

5 II. Grounds for Relief, No. 5, on Amended § 2255 Motion.

6 5. State each ground on which you claim that you are being held
7 unlawfully (e.g., Ground One: Confrontation Clause violation). Briefly
8 summarize the facts supporting each ground and answer the questions following:

9 A. **Ground One**: Movant was denied effective assistance of
10 counsel as guaranteed by the Sixth Amendment to the United States
11 Constitution based on trial counsel's failure to advise Movant of the buyer-
12 seller defense to the conspiracy charged in Count I of the Indictment before
13 Movant executed a plea agreement that included a provision that he enter a
14 plea of guilty to the conspiracy count. Had counsel advised Movant of the
15 buyer-seller defense, Movant would not have pleaded guilty to the
16 conspiracy, and would have elected to proceed to trial.

17 (i) Supporting Facts:

18 The Court established a change of plea deadline for February 25, 2021.
19 Exhibit 2 at 1 (Doc. 21 at 1). Trial counsel did not present the government's
20 proposed written plea agreement until the day of the deadline. Exhibit 1 at 2, ¶ 2;

1 Exhibit 3 at 1-10; (Doc 25 1-10). Trial counsel, explained to Movant the options
2 of going to trial or accepting the terms of the plea agreement. Exhibit 5 at 16.
3
4 Counsel did not explain to Movant that he could defend the conspiracy charged in
5 Count I of the indictment by maintaining that the government's evidence did not
6 establish a conspiracy, but rather, the evidence established that Movant had
7 nothing more than a buyer-seller relationship with his source of
8 methamphetamine, and nothing more than a buyer-seller relationship with those he
9 distributed methamphetamine to and who later distributed some of that
10 methamphetamine. Exhibit 1 at 2, ¶ 6. Had Movant been advised of the buyer-
11 seller defense, Movant would not have pleaded guilty and would have proceeded
12 to trial. Exhibit 1 at 2, ¶ 7.

15 Trial counsel's performance fell below objective standards of
16 reasonableness and constitutes ineffective assistance of counsel. Such deficient
17 performance prejudiced the criminal proceedings against Movant.

19 Movant is entitled to an evidentiary hearing based on these allegations. The
20 allegations establish that Movant is entitled to relief. Should the Court grant
21 relief, the convictions on both Count I and Count III should be vacated. The first
22 element of Count III is premised on Movant's commission of the crime of
23 conspiracy to possess with intent to distribute methamphetamine. Exhibit 3 at 3, ¶
24 4; (Doc 25 at 3, ¶ 4).

(ii): Ground One was not raised on direct appeal. *See*, Ground 5. In addition, this claim requires development of facts not developed in the current trial record.

5 B. Ground 2: Movant did not receive effective assistance of
6 counsel as guaranteed under the Sixth Amendment to the United States
7 Constitution based on trial counsel's failure to advise Movant of the proper
8 elements of the 18 U.S.C. § 924(c)(1) offense charged in Count III at the
9
10 time the written plea agreement was presented to, and executed by, Movant.

(i) Supporting Facts:

13 Trial counsel did not present to Movant the written plea agreement offer to
14 until the day of the February 25, 2021, plea agreement deadline. Exhibit 3 at 1-10;
15 (Doc. 25 at 1-10) (initialled, signed and dated "2-5-2021"). The plea agreement
16 sets out the elements for "Count II[I]" as follows:

First, the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine:

Second, the defendant knowingly possessed firearms:

Third, the defendant possessed the firearm in furtherance of possession with intent to distribute.

23 Exhibit 3 at 3, ¶ 4 (Doc. 25 at 3, ¶ 4) (emphasis added). The Offer of Proof in
24 Support of the Guilty Plea sets out the same elements. Exhibit 4 at 3; (Doc. 27 at
25 3).
26

1 Count III of the indictment charged Movant with possessing a firearm in
2 furtherance of either a conspiracy to possess with intent to distribute
3 methamphetamine, *and* in furtherance of possession with intent to distribute
4 methamphetamine, two distinct offenses. (Doc. 9 at 3) (emphasis added). The
5 elements contained in both the plea agreement and in the offer of proof set out
6 different offenses in the first and third element. Exhibit 3 at 3, ¶ 4 (Doc. 25 at 3);
7 and Exhibit 4 at 3; (Doc. 27 at 3).

8 The first element required a finding that Movant committed the inchoate
9 crime of conspiracy with intent to distribute methamphetamine. *Id.* The third
10 element required a finding that the firearm was possessed in furtherance of
11 possession with intent to distribute. *Id.*

12 At the change of plea hearing, the prosecutor set out the same erroneous
13 elements as follows: “in this case, also, it would be Count 3, I noticed that the
14 Court referenced that there was the typo in there. It's actually Count 3, and there
15 are three elements with that as well, Your Honor.”

16 First, the defendant committed the crime of
17 conspiracy to possess with the intent to distribute
18 methamphetamine;

19 Second, the defendant knowingly possessed a
20 firearm; and

21 Third, the defendant possessed the firearm in
22 furtherance of possession with the intent to distribute.

1 THE COURT: All right.

2 Mr. Heuwinkel, as to Count 1, do you agree that those
3 are -- that's the correct statement of the legal elements?

4 MR. HEUWINKEL: Yes, Your Honor.

5 THE COURT: And same question as to Count 3.

6 MR. HEUWINKEL: Yes, Your Honor.

7 Exhibit 5 at 45-46.

8
9 Counsel advised Movant to accept the plea agreement and permitted
10
11 Movant to enter a guilty plea to Count III pursuant to offense elements that were
12 legally insufficient to establish the 924(c)(1) offense that was charged in the
13 indictment. Therefore, Movant did not enter a guilty plea knowingly, voluntarily
14 or intelligently, with an understanding of the elements required to find him guilty
15 of that offense as charged in Count III. Thus, the guilty plea was entered without
16 due process of law. For this reason, the guilty plea to Count III must be vacated.

17
18 Additionally, trial counsel's performance fell below objective standards of
19 reasonableness and constitutes ineffective assistance of counsel. Such deficient
20 performance prejudiced the criminal proceedings against Movant.

21
22 Movant is entitled to an evidentiary hearing based on these allegations. The
23 allegations establish that Movant is entitled to relief. Should the Court grant
24 relief, the conviction on Count III should be vacated.

25
26
27

(ii): Ground Two was not raised on direct appeal. *See*, Ground 5. In addition, this claim requires development of facts not developed in the current trial record.

5 C. **Ground 3:** Trial counsel coerced or induced Movant to accept
6 the plea agreement. Trial counsel advised Movant that he would qualify for
7 the enhanced penalty under the Armed Career Criminal Act, 18 U.S.C. §
8 924(e)(1), on a conviction unlawful possession of a firearm by a convicted
9 felon, 18 U.S.C. § 922(g)(1), if Movant did not accept the terms of the plea
10 agreement. Exhibit 1 at 2, ¶ 12. Movant did not qualify as a Armed Career
11 Criminal. Trial counsel advised Movant that he would qualify for time-
12 reduction credits under the First Step Act if he pleaded guilty under the
13 terms of the plea agreement. *Id.* Movant would have rejected the plea
14 agreement and proceeded to trial had he received the correct advice on the
15 Armed Career Criminal Act and the correct advice that he did not qualify
16 for time-reduction benefits under the First Step Act. *Id* at 3, ¶ 13.
17 Therefore, Movant did not receive effective assistance of counsel as
18 guaranteed by the Sixth Amendment to the United States Constitution and
19 his convictions should be vacated.
20
21
22
23

(ii) Supporting Facts:

The 15-year mandatory minimum sentence under the Armed Career

1 Criminal Act applies if, upon a conviction under 18 U.S.C. § 922(g)(1), a person
2 has at least 3 prior convictions for violent felonies, three prior convictions for
3 “serious drug offense(s),” or both. 18 U.S.C. § 924(e)(1). Movant does not have
4 three qualifying convictions of either violent felonies nor serious drug offenses.
5 PSR at 17-22, ¶¶ 69-75. Trial counsel’s advice to Movant to accept the plea
6 agreement to avoid a potential Armed Career Criminal prosecution, as an
7 inducement to enter the plea agreement, was based on a gross misapplication or
8 understanding of the Armed Career Criminal. Had Movant understood the Armed
9 Career Criminal Act penalties could not apply to his case, he would not have
10 pleaded guilty under the terms of the plea agreement and would have elected to
11 proceed to a trial. Exhibit 1 at 2, ¶ 12-13.

15 Likewise, 18 U.S.C. § 3632(d)(4)(D) of the First Step Act, states: “A
16 prisoner is ineligible to receive time credits under this paragraph to serving a
17 sentence for a conviction under any of the following provisions of law: ... (xxii)
18 Section 924(c), relating to unlawful possession or use of a firearm during and in
19 relation to any crime of violence or drug trafficking crime.” Trial counsel’s advice
20 to Movant that he would qualify for time-reduction benefits under the First Step
21 Act, as an inducement to enter the plea agreement, was based on a gross
22 misapplication or misunderstanding of the provisions of the First Step Act. Had
23 Movant understood he would not receive time-reduction credits under the First
24
25
26
27

1 Step Act based on his § 924(c)(1) conviction, he would not have pleaded guilty
2 and would have elected to proceed to a trial. Exhibit 1 at 2, ¶ 12-13.
3

4 Trial counsel's performance fell below objective standards of
5 reasonableness and constitutes ineffective assistance of counsel. Such deficient
6 performance prejudiced the criminal proceedings against Movant.
7

8 Movant is entitled to an evidentiary hearing based on these allegations. The
9 allegations establish that Movant is entitled to relief. Should the Court grant
10 relief, Movant's conviction on Count III should be vacated.
11

12 (ii): Ground Three was not raised on direct appeal. *See*, Ground 5. In
13 addition, this claim requires development of facts not developed in the current trial
14 record.
15

16 D. **Ground 4:** Movant did not receive effective assistance of
17 counsel as guaranteed by the Sixth Amendment to the United States
18 Constitution. Trial counsel coerced Movant into accepting the plea
19 agreement and to plead guilty to conspiracy to distribute 500 grams or
20 more of a substance containing a detectable amount of
21 methamphetamine as charged in Count I, and to plead guilty to
22 possession of a firearm in furtherance of a drug trafficking crime.
23

24 (i) Supporting Facts:
25

26 Counsel did not present Movant the written plea agreement until the day of
27

1 the deadline for plea agreements enter by the Court, February 25, 2021. Exhibit 1
2 at 1, ¶3; Exhibit 2 at 1 (Doc. 21 at 1); and Exhibit 2 at 1-10, (Doc. 25 at 1-10)
3 (Initialed and signed, "2-25-21"). Counsel did not discuss with Movant the buyer-
4 seller defense to the conspiracy charged in Count I. Exhibit 1 at 2, ¶ 6-7. Counsel
5 did not review the proper elements to the § 924(c) charged in Count III. *Id.* at 8-
6
7 11.

8
9 Additionally, counsel misadvised Movant as to the applicability of the
10 Armed Career Criminal Act. *Id.* at 2, ¶ 12. Trial counsel misadvised Movant as to
11 the applicability of the First Step Act time-reduction credit program. *Id.*
12

13 Having been presented the plea agreement offer on the last day of the
14 deadline, Movant believed he had no choice but the accept the plea agreement.
15 Exhibit 1 at 2, ¶ 4. Thus, the manner and timing at which trial counsel presented
16 the plea agreement, in combination with legally incorrect advice, forced/coerced
17 Movant into accepting the plea agreement in violation of his right to effective
18 assistance of counsel. Under the totality of circumstances now known to Movant,
19 he would have rejected the plea agreement and elect to proceed to a trial. Exhibit 1
20 at 3, ¶¶ 17-19.
21

22 Trial counsel's performance fell below objective standards of
23 reasonableness and constitutes ineffective assistance of counsel. Such deficient
24 performance prejudiced the criminal proceedings against Movant.
25
26

1 Movant is entitled to an evidentiary hearing based on these allegations. The
2 allegations establish Movant is entitled to relief. Should the Court grant relief,
3 both convictions to Count I and Count III should be vacated.
4

5 (ii): Ground Four was not raised on direct appeal. *See*, Ground 5. In
6 addition, this claim requires development of facts not developed in the current trial
7 record.
8

9 E. **Ground 5:** Movant did not receive effective assistance of counsel as
10 guaranteed by the Sixth Amendment to the United States Constitution for trial
11 counsel's failure to file an appeal, after the Court's imposition of sentence, and
12 after Movant had directed trial counsel to file an appeal.
13

14 (i) Supporting Facts:

15 After the sentencing hearing, Movant discussed with trial counsel his desire
16 to appeal. Exhibit 1 at 2, ¶ 15. Movant informed trial counsel that he wanted to
17 file an appeal. *Id.* Trial counsel informed Movant that trial counsel would not
18 handle an appeal. *Id.* Trial counsel also stated he was no longer taking federal
19 criminal cases, and that he was leaving town for a vacation. *Id.* Movant believed
20 that an appeal was filed. *Id* at 2-3, ¶ 15.
21

22 On December 20, 2021, the court received a letter authored by me dated
23 December 8, 2021. Exhibit 6 (Doc. 58). In that letter, Movant requested
24 information on the attorney appointed to represent him on appeal. *Id.*
25
26

1 The Court responded with an order instructing Movant that an appeal had
2 not been filed. Exhibit 7 (Doc. 59). The order allowed Movant to raise the issue
3 of ineffective assistance of counsel for failing to file an appeal in a 2255 motion,
4 and file any other claims in a 2255 motion. *Id.* at 2.

6 Trial counsel's performance fell below objective standards of
7 reasonableness and constitutes ineffective assistance of counsel for failing to file a
8 notice of appeal. Such deficient performance prejudiced the criminal proceedings
9 against Movant.

11 Movant is entitled to an evidentiary hearing based on these allegations. The
12 allegations establish Movant is entitled to relief. Should the Court grant relief,
13 Movant should be entitled to file a notice of appeal to the Ninth Circuit.

15 (ii): Ground Two was not raised on direct appeal. Movant's claims the trial
16 counsel failed to file an appeal after Movant instructed counsel to file an appeal.
17 In addition, this claim requires development of facts not developed in the current
18 trial record.

20 Prayer for Relief

22 Wherefore, Movant prays that the Court grant the request for an evidentiary
23 hearing. After such hearing, it is requested that the Court vacate the guilty pleas
24 and convictions on Count I and/or Count III; and/or grant Movant an appeal for
25 trial counsel's failure file a notice of appeal as directed by Movant.

Dated this 30th day of March, 2023.

Respectfully Submitted,

s/ Stephen R. Hormel

MT Bar # 3059

Hormel Law Office, L.L.C.

17722 East Sprague Avenue

Spokane Valley, WA 99016

Telephone: (509) 926-5177

Facsimile: (509) 926-4313

Email: steve@hormellaw.com

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Jennifer Clark, United States Attorney's Office, District of Montana.

s/ Stephen R. Hormel

Counsel for Movant

Steve Hormel

From: KAVIS LEON PAUL JR (09194046)
Sent Date: Monday, March 27, 2023 2:06 PM
To: steve@hormellaw.com
Subject: RE: Revised Declaration Email 2 - Response ASAP

I have reviewed the declaration and declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

March 27th, 2023, at Sheridan, Oregon

s/Leon Paul Kavis, Movant
----Hormel, Steve on 3/27/2023 10:06 AM wrote:

>

Mr. Kavis: below is the revised declaration I prepared from our conversations relating to the amended 2255 motion and memorandum. I believe you have the following claims: (1) ineffective assistance of counsel for failing to counsel you on the buyer-seller defense for the conspiracy count; (2) if successful on that issue, then Count III would be vacated also because the first element relied on the conspiracy; (3) ineffective assistance of counsel for failing to advise you on the proper elements of the 924(c)(1) offense where the first and third elements require a finding of different crimes; (4) ineffective assistance of counsel for misadvising on the Armed Career Criminal implications; (5) ineffective assistance of counsel for in accurate advice on the First Step Act benefits; (6) Ineffective assistance of counsel on all claims based on coercion to enter the plea agreement; and (7) ineffective assistance of counsel for failure to file an appeal after you direct him to file an appeal.

Review the declaration below: If it is truthful and accurate, then reply to this email by stating: I have reviewed the declaration and declare under the penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Dated: March ___, 2023, at Sheridan, Oregon. You must sign in following format - s/Leon Paul Kavis, Movant. Make Sure you put the "s/" before your name.

I, LEON PAUL KAVIS, the movant in the above-entitled matter declares under the penalty of perjury as follows:

1. The government charged me in a three-count indictment with conspiracy to possess with intent to distribute 500 or more grams of a substance containing a detectable amount of methamphetamine in Count I, possession with intent to distribute 500 or more grams of a substance containing a detectable amount of methamphetamine in Count II, and possession of a firearm in furtherance of a drug trafficking offense in Count III.
2. On February 25, 2021, I signed a plea agreement. The terms of the plea agreement required me to plead guilty to Count I, the conspiracy, and Count III, possession of a firearm in furtherance of a drug trafficking crime. The government agreed to dismiss Count II at the time of sentencing.
3. The court's scheduling order set a plea agreement deadline of February 25, 2021. My appointed lawyer, Ryan Heuwinkel, did not provide me with the government's written plea agreement until the day of the deadline, February 25, 2021. At that time, I was housed pending trial in Shelby, Montana.
4. I alleged in my memorandum supporting my 2255 motion that I "receive[ed] numerous completely erroneous pieces of legal advice from" Mr. Heuwinkel. (Doc. 63 at 6). As I indicated in my 2255 motion, I was coerced into accepting the plea agreement since Heuwinkel did not present the written agreement to me until the last day of the deadline. Id. Because of the court's plea agreement deadline, I believed I had no choice but to sign the agreement on that day.
5. At the change of plea hearing, I informed Magistrate DeSoto that Mr. Heuwinkel "did a thorough job making sure I knew all my options" and that he "investigate[d] the case to [my] satisfaction." I indicated I was satisfied with his representation. Change of Plea Transcript (COP) at 16-17. I also indicated to Magistrate

Steve Hormel

DeSoto that Mr. Heuwinkel discussed defenses I might have to the charges. COP at 16. I have since learned that this statement was not an accurate assessment of Mr. Heuwinkel's representation of me.

6.. Mr. Heuwinkel did not advise me that the law does not consider a buyer-seller relationship as a conspiracy. In other words, I was not told that I could proceed to trial defending the conspiracy count by challenging the government's evidence as insufficient to establish that I was a member of a conspiracy with those who sold drugs to me and with those who bought drugs from me. I was not fully informed nor was I advised of my ability to defend against the conspiracy based on the fact that my relationship between my source of supply in California was nothing more than a buyer-seller relationship, and not a conspiracy. Likewise, I was not informed that I could defend the conspiracy charge based on the fact that I had nothing more than a buyer-seller relationship with those who I sold methamphetamine to, and who later resold that methamphetamine.

7. Had I been aware of the buyer-seller defense, I would not have pleaded guilty and would have proceeded to trial on the conspiracy charge based on the information from the discovery I had reviewed with Mr. Heuwinkel relating to the government's witnesses.

8. In relation to Count III, I maintain that Mr. Heuwinkel did not adequately advise me of the government's burden of proof to convict someone for violating 18 U.S.C. 924(c)(1). (Doc. 63 at 8). The indictment charged me with possessing a firearm in furtherance of a conspiracy to possess with intent to distribute, and in furtherance of possession with intent to distribute methamphetamine.

9. The factual basis of the plea agreement stated the elements for Count III as follows:

First, the defendant committed the crime of conspiracy to possess with intent to distribute methamphetamine;

Second, the defendant knowingly possessed a firearm;

Third, the defendant possessed the firearm in furtherance of possession with intent to distribute.

Mr. Heuwinkel did not advise me that the elements for the firearm charge in Count III were incomplete and insufficient to support my guilty plea.

10. The first element in the factual basis states that I committed the crime of "conspiracy to possess with intent to distribute methamphetamine." The third element states that I "possessed the firearm in furtherance of [the crime of] possession with intent to distribute."

11. It is now my understanding that the first and third element of the crime of possession of a firearm in furtherance of a crime must match in relation to the same specific crime that I am alleged to have furthered while in possession of a firearm. The first and third elements contained in the plea agreement, and in the offer of proof supporting the guilty plea, set out two different specific crimes. Therefore, I did not understand at the time of my guilty plea that I was pleading guilty to elements of the 924(c)(1) that were insufficient to support my guilty plea. Mr. Heuwinkel did not discover, or know of, or alert me to this problem before I pleaded guilty. I did not know at the time that I entered my guilty plea to the 924(c)(1) offense that the elements did not legally support the charge as set out in Count III.

12. Mr. Heuwinkel also advised me that if I did not accept the plea offer, I would be subjected to the Armed Career Criminal enhancement if I went to trial. He also mistakenly told me that I would be entitled to all benefits for time reduction in the First Step Act if I pleaded guilty. This information also induced me to accept the government offer. I have since learned that I did not qualify under the Armed Career Criminal Act, nor can I benefit for any time-reductions under the First Step Act.

13. For the above reasons, I did not enter a guilty plea on Count III knowingly, intelligently and voluntarily. Had I been given the correct information, I would have not pleaded guilty and would have proceeded to trial.

14.. On July 20, 2021, the district court imposed a combined 20 year sentence on both counts. I am currently serving time in the custody of the Bureau of Prisons, Sheridan, Oregon.

15. After the sentencing hearing. Mr. Heuwinkel and I discussed an appeal. I instructed Mr. Heuwinkel that I wanted to file an appeal. He informed me that he would not handle an appeal for me. He also stated he was no longer taking federal criminal cases, and that he was leaving town for a vacation. I believed that an appeal was

Steve Hormel

filed.

16. On December 20, 2021, the court received a letter authored by me dated December 8, 2021. In that letter, I requested information on the attorney appointed to represent me for my appeal. The court responded with an order instructing me that there was no pending appeal in my case. The order allowed me to raise the issue of ineffective assistance of counsel for failing to file an appeal in a 2255 motion and indicated that I could file any other claims I may have in a 2255 motion. I did not receive effective assistance of counsel for Mr. Heuwinkel's failure to file an appeal on my behalf.

17. I do not believe I received effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. I do not believe I was effectively counseled on the buyer-seller aspects of the federal conspiracy prosecution. I do not believe that my guilty plea was made knowingly, intelligently and voluntarily due to my counsel's failure to advise me on the significant legal aspects of the conspiracy charge. Had I understood that the buyer-seller rule I would not have pleaded guilty and would have proceeded to trial on Count I.

18. I do not believe that I was effectively counseled on the proper elements of the charge of possession of a firearm in furtherance of a drug trafficking crime. The elements set out in the offer of proof supporting the guilty plea includes different crimes in the first and third elements. I did not enter the guilty plea that alleged a violation of 18 U.S.C. 924(c)(1) with complete knowledge of the elements.

19. I do not believe I received effective assistance of counsel before entering my guilty plea to Count III of the indictment. Had I known of the proper elements and the necessary facts required to support the offense, I would not have pleaded guilty and would have proceeded to trial on Count III. I also would not have pleaded guilty and would have gone to trial on Count III had I known that the Armed Career Criminal enhancement did not apply in my case, and that I could not receive time-reduction benefits from the First Step Act. I would have proceeded to trial on Count III.

I declare under the penalty of perjury under the laws for the United States of America, the foregoing is true and correct.

Dated: ___ day of March, 2023, at Sheridan, Oregon.

Leon Paul Kavis, Movant

Steve Hormel

From: KAVIS LEON PAUL JR (09194046)
Sent Date: Monday, October 23, 2023 10:20 PM
To: steve@hormellaw.com
Subject: RE: Declaration for Reply Brief

I declare under the penalty of perjury under the laws of the United States of America that the contents of the declaration set out in the email below are true and correct.

Dated: October 23, 2023.

s/Leon Paul Kavis Jr.

-----Hormel, Steve on 10/23/2023 12:21 PM wrote:

>

I, Leon Paul Kavis, Jr., declares as follows:

I have reviewed the United States' answer to my amended motion to vacate, set aside or correct the sentence. I have also reviewed Mr. Heuwinkel's declaration in response to my amended motion. I now make the following clarifications:

1. As Mr. Heuwinkel stated, I was very upset about the length of the 20-year sentence. It is my belief that I directed Mr. Heuwinkel to appeal the sentence. Before the Marshals escorted me out of court, I expressed my dissatisfaction with the length of my sentence with Mr. Heuwinkel, stating "we're going to appeal, right?" I intended this question to convey to Mr. Heuwinkel that I wanted to appeal my sentence.
- 2.. I do not recall receiving the closing letter from Mr. Heuwinkel. I was transported from the Missoula County jail to the Cascade County jail within three days after my sentencing hearing. I was housed in the Cascade County jail for about four days and then transported to Pahrump, Nevada. From Pahrump, I was transported to BOP in Sheridan, Oregon. I remember reaching the facility in Sheridan in about ten days after the date I was sentenced.
3. It is possible that I received the closing letter. I just don't have a recollection of that. Again, I believed that my question to Mr. Heuwinkel about filing an appeal immediately after the sentencing hearing conveyed to him my desire to have him file an appeal of my sentence. The letter would not have changed my mind about appealing my sentence.
4. I would not have known how to file an appeal with the clerk's office in the District of Montana.

If the declaration is accurate, reply to this email by writing the following exactly:

"I declare under the penalty of perjury under the laws of the United States of America that the contents of the declaration set out in the email below are true and correct. Dated: October 23, 2023. s/Leon Paul Kavis, Jr."

Ryan Heuwinkel
BOHYER, ERICKSON, BEAUDETTE & TRANL, P.C.
283 West Front, Suite 201
Post Office Box 7729
Missoula, Montana 59807-7729
Telephone: (406) 532-7800
Facsimile: (406) 549-2253
Email: mail@bebtlaw.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,)	Case No. 20-53-M-DLC
)	
Plaintiff,)	
)	DECLARATION OF
-vs-)	RYAN HEUWINKEL RE:
)	KAVIS'S § 2255 MOTION
)	
LEON PAUL KAVIS, JR.)	
)	
Defendant.)	
)	

Ryan Heuwinkel provides the following declaration:

1. I am an attorney admitted to the practice of law in the State of Montana and in this Court with personal knowledge of the facts stated herein.
2. Upon graduation from law school, I was a law clerk in the Billings Division of this Court from August 2005 through October 2013. In November 2013, I entered private practice at Bohyer, Erickson, Beaudette & Tranl, P.C. where I am an employee attorney and shareholder. From approximately early 2014 through 2021, I

was a member of the CJA Panel for the District of Montana. During my time on the CJA Panel, I represented Defendant Leon Kavis (“Kavis”) in this matter upon appointment of the Court on November 19, 2020. Doc. 5. During the course of my representation, Kavis pleaded guilty pursuant to a plea agreement that I negotiated with the Assistant United States Attorney Jennifer Clark. Kavis was sentenced to 240 months in prison on July 20, 2021. *See* Docs. 25-32 and 51-52.

3. On March 21, 2022, Kavis filed a motion to vacate his conviction in this case under 18 U.S.C. § 2255 on the grounds that I provided him ineffective assistance of counsel. The Court has since appointed counsel for Kavis, who filed an amended § 2255 motion on his behalf. *See* Docs. 62-63, 77-80.

4. Because of Kavis’ § 2255 Motion and the Court’s Order (Doc. 81), counsel for Kavis and counsel for the United States emailed me a list of questions to answer regarding my representation of Kavis. Those letters are attached hereto as **Exhibits A** (Counsel for Kavis) and **B** (Counsel for the United States). It is my intent that those letters be incorporated into this Declaration.

5. The remainder of this affidavit contains my answers to the questions contained in Exhibits A and B. I wish to protect Kavis and maintain my legal and ethical duties to him, but am answering counsel’s questions through this affidavit because it is more efficient than sitting for a deposition, which the Court has authorized, and in reliance on the Court’s Order (Doc. 81, ¶¶ 2-3) stating that my

“duty of confidentiality to Kavis is waived for the sole purpose of formal proceedings in this case.”

6. I did not discuss the buyer-seller defense with Kavis because the evidence produced by the United States in discovery did not support that Kavis was merely a buyer and seller of methamphetamine. In fact, the discovery provided by the United States included evidence that Kavis had purchased and sold large quantities of methamphetamine via “fronting”, among other evidence, that I believed was more than sufficient to establish the elements of a conspiracy to distribute methamphetamine. Moreover, because Kavis had 2 prior drug felony convictions for Criminal Possession of Dangerous Drugs With Intent to Distribute under Montana law, PSR ¶¶ 71, 74, I was concerned, that if Kavis was convicted of any charge carrying a 10-year mandatory minimum, that Kavis would be subjected to a mandatory minimum of 25 years imprisonment pursuant to 21 U.S.C. §§ 841(b)(1)(A)(viii) and 851. And notwithstanding a potential increase of the mandatory minimum from 15 to 30 years (including the § 924(c) charge) pursuant to § 851, given Kavis’s criminal history and the evidence produced by the United States, I was concerned Kavis was exposed to a very long prison sentence should he refuse to accept responsibility and take the case to trial. Finally, the events of September 10, 2020 also impacted the defense strategy as I was concerned that taking an aggressive position, rather than accepting responsibility, could result in additional, very serious

charges against Kavis. All of this was relayed to Kavis. Accordingly, the strategy from near the outset of the case was to negotiate a plea agreement with the United States to limit Kavis's sentencing exposure and ensure that he would have some time to live his life after his prison sentence. Everything I did after that time was to limit Kavis's sentencing exposure. As a result of this strategy, Kavis was subject to a mandatory minimum 15-year sentence, rather than a mandatory minimum 30-year sentence and he was not charged with any additional crimes. Unfortunately, we were not able to convince the Court that a 15-year sentence was sufficient.

7. I reviewed the Offer of Proof (Doc. 27) with Kavis prior to his guilty plea. On March 3, 2021 at 8:50 am MST, I received the Offer of Proof via CM/ECF. At 9:45 am, I emailed Kavis via the Edovo system with a summary of the information in the Offer of Proof. I told Kavis in the email regarding the Offer of Proof that based on my review of the discovery, "None of this is surprising to me or problematic" and asked that he call me to discuss. I was not able to attach documents to the Edovo email, but my office also mailed the Offer of Proof to him at Crossroads Correctional Facility ("CCF") where he was incarcerated pending trial. I do not recall the specifics of the conversation, but my records reflect a phone call of .3 hours, meaning it was between 12.5 and 18.5 minutes per my usual practice, and that we discussed "offer of proof, extraordinary circumstances argument for release, and case status." I do not

specifically recall it more than 2 years later, but I am certain that I read the Offer of Proof to Kavis on this call. And while I do not recall the substance of these communications, my records reflect the following phone subsequent conversations with Kavis prior to sentencing:

- 0.20h 03/04/2021 Phone call with client re: COP hearing prep, discussion of release arguments, and his wife's presence at COP hearing.
- 0.10h 03/05/2021 Phone call with client re: [redacted]; draft email to AUSA and FBI re: the same.
- 0.70h 03/08/2021 Phone call with client re: additional info re: [redacted], preparation for COP hearing,
- 0.70h 03/09/2021 Phone call with client re: preparation for COP hearing (additional prep necessary since he will be appearing remotely).
- 0.20h 03/09/2021 Phone call with client re: reasons the court denied release after COP hearing, next steps, and his request that I advise USMS he does not want to be moved despite potential safety issues.
- 0.20h 03/15/2021 Phone call with client re: preparation for telephone interview with USPO P. Tescher re: PSR interview.
- 0.20h 03/19/2021 Phone call with client re: advice for sentencing letters and issues with Crossroads.
- 0.20h 03/22/2021 Phone call with client re: concerns posed by [redacted]; draft email to USMS re: the same.
- 0.20h 03/22/2021 Phone call with client re: [redacted] and information re: client therein.
- 0.70h 03/22/2021 Phone call with client re: initial review of new discovery provided by USA.

- 0.10h 03/23/2021 Phone call with client re: his wife's concerns about threats and contact from [redacted].
- 0.30h 03/24/2021 Phone call with client re: questions from USPO Tescher and draft email to USPO Tescher re: the same.
- 0.50h 03/29/2021 Phone call with client re: review of new discovery, status of shooting investigation, and confirming he authorizes me to advise AUSA that we do not contest forfeiture allegations.
- 0.10h 04/22/2021 Phone call with client re: case status and anticipated movement from Shelby to Cascade County.
- 0.20h 04/26/2021 Phone call with client re: status of alleged co-conspirator cases, Shelby staying open 60 more days; prep for sentencing.
- 0.10h 05/04/2021 Phone call with client re: case status.
- 0.30h 05/14/2021 Phone call with client re: [redacted] sentencing and differences in the two cases.
- 0.20h 05/20/2021 Phone call with client re: status of [alleged co-conspirator's] cases and sentencing strategy.
- 0.20h 05/21/2021 Phone call with client re: [relative's] indictment on federal meth charges.
- 0.60h 06/07/2021 Phone call with client re: draft PSR.
- 0.50h 06/10/2021 Phone calls (x2) with client re: his review of draft PSR' acceptance of responsibility letter.
- 3.60h 06/17/2021 Meet with client at MCDF to review new discovery, PSR, draft objections thereto, and draft acceptance letter.
- 0.50h 06/18/2021 Phone calls (x2) with client re: yesterday's calls with AUSA re: their refusal to budge on drug amounts because of purity levels of seized

drugs, thus incredibility of [witness], but AUSA's consideration of increased departure and [redacted].

- 0.30h 06/23/2021 Phone call with client re: USPO's decision re: career offender designation in PSR, USA's response to the same; need for sentencing letters, and preparation for sentencing hearing.
- 0.40h 06/28/2021 Phone calls (x2) with client re: whether he wants his wife to testify at sentencing, whether to maintain objections to level 38 and premises enhancement ; other sentencing issues; and discussions with AUSA Clark.
- 0.20h 06/29/2021 Phone call with client re: facts for sentencing memo.
- 0.20h 06/29/2021 Phone call with client re: withdrawing objections to drug quantities and premises enhancement; life history; and sentencing strategy.
- 0.30h 06/30/2021 Phone call with client re: facts of life for sentencing memo, his wife's testimony, and his agreement to not contest drug amounts or premises enhancement.
- 1.20h 07/01/2021 Phone call with client re: review of Sentencing Memorandum and overall sentencing strategy.
- 0.50h 07/02/2021 Phone call with client re: final revisions to sentencing memo
- 0.20h 07/06/2021 Phone call with client re: USA's sentencing memo, potential arguments against meth guidelines.
- 0.10h 07/15/2021 Phone call with client re: [redacted] motion and my response to the same.
- 0.60h 07/15/2021 Phone calls with client re: response to [redacted]; and preparation for sentencing.
- 0.10h 07/16/2021 Phone call with client re: [redacted] in preparation for responding to inquiries from AUSA.

- 1.60h 07/19/2021 Meet with Client at Missoula County Jail in preparation for sentencing; travel to and from office.
- 0.20h 07/20/2021 Phone call with client re: preparation for sentencing.

8. Beyond the above, I do not recall the details of my discussions with Kavis regarding the Offer of Proof, but I know that my professional opinion was that the United States could prove the facts stated in the Offer of Proof, among numerous other relevant facts, and convict Kavis of the charges in the Indictment, including those to which he pleaded guilty, and that I advised Kavis of the same on multiple occasions.

9. Beyond the above, I do not recall my discussions with Kavis regarding the elements of Count III, possession of a firearm in furtherance of a drug trafficking crime, but I know I told him, based on my experience with federal drug prosecutions since 2005 and my review of the discovery, that the United States could admit evidence at trial sufficient to convict him of that crime.

10. I engaged in extensive plea discussions with Jen Clark, the Assistant United States attorney assigned to Kavis's case, to secure the best possible sentence for Kavis and keep him from being charged with other crimes. My goal was to convince her to allow Kavis to plead guilty to only Count II of the Indictment. According to my records, I commenced plea negotiations with AUSA Clark on December 2, 2020 in hopes that she would allow Kavis to be released pending

sentencing so that Kavis could spend time with his wife and children and get his life in order before his expected lengthy prison sentence, but she would not agree and, after a detention hearing, the Court ordered that Kavis be detained pending trial. My records reflect that Kavis and I discussed the proposed plea agreement on January 7, 2021 and that I receive the document the next day, on January 8, 2021 from AUSA Clark via email and mailed it to Kavis that day. Ms. Clark flatly rejected a guilty plea to Count II only, so I tried to convince her to allow Leon to plead guilty to Count I only, insisting the § 924(c) conviction was unnecessary because Kavis would receive a 2-level enhancement for possession of a firearm and that the drug amounts, coupled with Kavis criminal history would result in a high guideline range. I also argued that a lengthy term of supervised release could be substituted for additional prison time beyond the mandatory minimum because Kavis had a history of performing well under supervision. My records reflect that, as early as January 19, 2021, I had advised Kavis he should prepare himself to plead guilty to charges carrying a mandatory minimum of 15 years, including 10 years for conspiracy to PWITD and 5 years for § 924(c) because the United States was not likely to agree to anything less based on the evidence it had compiled. I was attempting to convince AUSA Clark to drop her insistence that Kavis plead guilty to the § 924(c) charge up until the day before the plea agreement deadline. Because of my efforts to convince AUSA Clark to drop the § 924(c) charge, we did not finalize the Plea Agreement until the day before the plea

agreement deadline and I was thus required to drive from my location in Missoula to CCF in Shelby, MT to go through the Plea Agreement with Kavis, secure his signature on the Plea Agreement, and then deliver it to AUSA for filing before the close of business on the February 25, 2021 deadline.

11. I do not recall the specifics of my discussions with Kavis about the Armed Career Criminal Act 18 U.S.C. § 924(e), but I know we discussed it given that he had two prior drug felony convictions and a prior felony criminal endangerment that perhaps could have qualified as a violent felony given the conduct described. While the Armed Career Criminal Act enhancement was a concern, I was far more concerned about § 851 enhancements and the possibility that Kavis would be deemed a “Career Offender” under U.S.S.G. § 4B1.1, which would increase his criminal history category from IV to VI because of his two prior state felony drug convictions. I sent Kavis a letter dated February 2, 2021 containing my analysis of the sentencing issues and it discussed § 4B1.1 and § 851 extensively, but not the Armed Career Criminal Act. Regardless, it is likely that in discussions with Kavis that I mistakenly used the term “Armed Career Criminal” when I meant the “Career Criminal” enhancement under U.S.S.G. § 4B1.1 because they are named similarly. Fortunately, we were able to negotiate with the United States to forego a § 851 enhancement and, because the criminal history disclosed in discovery incorrectly stated that one of those prior felony drug convictions was for “criminal possession of dangerous drugs” even

though the pleadings in the underlying case made clear the conviction was for “possession of dangerous drugs with intent to distribute”, the United States agreed in the Plea Agreement that “USSG § 4B1.1(a) does not apply based on the criminal history in discovery.” Doc. 25, ¶ 6. Thus, even though the PSR stated that Kavis was “a career offender; therefore, the criminal history category is VI. U.S.S.G. § 4B1.1(b)”, the Court ultimately honored the Plea Agreement and sentenced Kavis at criminal history category IV.

12. With regard to credits for reduction of his sentence (“good time”) under the First Step Act, 18 U.S.C. § 3632(d)(4)(D), I recall that we discussed that the First Step Act and that I advised Kavis that the First Step Act made it easier to earn good time than before. I also recall that we discussed my understanding was that the Bureau of Prisons had the sole discretion to calculate “good time”, not the Court, and that many federal prisoners had issues getting the BOP to properly calculate good time. I do not recall being aware that a § 924(c) conviction was a disqualifying offense for earning good time, even under the First Step Act, until I read Doc. 80 in this case and researched the issue, so it is likely I did not advise Kavis of this specific issue. These discussions likely would have taken place during the calls and visits noted above in ¶ 5.

13. The Armed Career Criminal Act and the good time credits under the First Step Act did not factor, at all, into my advice to Kavis to accept the Plea Agreement. I

advised Kavis to accept the Plea Agreement because, through extensive negotiations with the AUSA, I had exhausted all options to secure a better deal for Kavis and I knew that the United States had sufficient evidence to convict Kavis of all charges in the Indictment and that if he did not plead guilty, the United States could file a § 851 Information and increase the mandatory minimum on Counts I-II from 10 years to 25 years. Adding in the consecutive 5-year mandatory minimum on Count III, his mandatory minimum could be 30 years. Although my experience was that the U.S. Attorney's Office in Montana did not use § 851 as often in 2021 as in prior years, this case had certain aggravating factors, so I could not rule out that a § 851 would be filed if Kavis did not plead guilty. Moreover, regardless of the increased mandatory minimum, if Kavis did not plead guilty, he would not get acceptance of responsibility, among other benefits. I also believed the United States had sufficient evidence to argue for a "role in the offense" enhancement and, as noted, Kavis qualified as a "Career Offender" under USSG § 4B1.1(a) and United States could have argued for its application. And again, the events of September 10, 2020, and the potential for additional charges arising from those events, were always in the background and impacted our strategy accordingly. Simply put, my professional opinion was that if Kavis did not plead guilty per the most favorable Plea Agreement that I could negotiate his sentence would have been significantly longer than 20 years. I also believed there was a reasonable chance the Court would impose the mandatory

minimum sentence of 15 years, followed by a lengthy period of supervised release because Kavis had a good record of complying with the terms of supervision. That was the argument I made to the Court, but the Court rejected it.

14. At this time, I cannot describe all discussions I had relating to the Plea Agreement. My records reflect that as early as December 2, 2020, I commenced plea negotiations with AUSA Clark. My time records note the following discussions related to plea negotiations. I found these by searching for the word “plea” in my time recording software, but there were likely others because not all time gets recorded and not all entries contained the word “plea.”

- 0.30h 12/02/2020 Phone call with AUSA J. Clark re: plea negotiations and re whether she will agree to pretrial release.
- 0.30h 12/21/2020 Phone call with client re: appealing detention order, strategy for plea negotiations, discussion with AUSA re: the same, agreement to get investigator to review discovery, then discuss plea.
- 0.30h 12/30/2020 Phone call with client re: status of discovery review, no apparent evidentiary motions, and even if there were, there is no point in filing them given the weight of the evidence, and plea negotiation and sentencing strategy.
- 0.30h 01/07/2021 Phone call with client re: proposed plea agreement, negotiation strategy, and his agreement that no motions to suppress are available and would not be worthwhile even if they were given how easy it would be to prove indictment from co-conspirator statements without warrant evidence
- 0.10h 01/11/2021 Draft/exchange emails with AUSA Clark re: proposed plea agreement.

- 0.30h 01/12/2021 Phone call with client re: case status, medical issues, forfeiture, and awaiting word from AUSA on [redacted] before further plea negotiations.
- 0.40h 01/14/2021 Phone call with client re: forfeiture allegations and authority for plea negotiations.
- 0.10h 01/25/2021 Phone call with client re: case status his agreement that since we have until 2/25 for plea agreements, we hold off further negotiation pending guidance from new AG.
- 0.20h 01/28/2021 Phone call with client re: case status, agree to continue to wait for further plea negotiations pending guidance from AG Garland.
- 0.20h 02/02/2021 Phone call with client re: my forthcoming written analysis of sentencing issues and how trial will drastically increase his sentencing exposure, agreement to discuss my memo upon receipt and then engage in plea negotiations.
- 0.40h 02/10/2021 Phone call with client re: his agreement to proceed with me as his attorney, after I explain the unlikelihood the court will get him a new attorney; why his two prior convictions are counted separately because of intervening arrest; impossibility of release pending sentencing, and statutes to look at on that subject; and agreement to proceed with plea negotiations and topics thereof.
- 0.60h 02/11/2021 Phone call with AUSA Clark re: plea negotiations.
- 0.50h 02/12/2021 Phone call with client re: status of plea negotiations, explaining that while USA will likely agree to drop count three, we need to be prepared that the sentence will not be below the mandatory minimum 10 years, that released pending sentencing is highly unlikely and his understanding of the same.
- 0.10h 02/18/2021 Review emails from AUSA Clark re: plea negotiations.
- 0.30h 02/19/2021 Phone calls (x2) with client re: plea negotiation status, USA's refusal to dismiss 924c but file [redacted] and request [redacted], agreement that we cannot go to trial or risk losing [redacted], that I will tell

USA we will not stipulate to witnesses, but will not be trying this case, clients request that I continue to negotiate forfeiture and release pending sentencing.

- 0.20h 02/19/2021 Phone call with J. Clark re: plea negotiations, she confirms she still thinks 10-12 is reasonable sentence plus supervised release, but how do we get there; her calculation offense level 33 and CH 4; discussion of request for forfeiture and release pending sentencing.
- 0.30h 02/19/2021 Phone call with client re: contact with AUSA Clark re: plea negotiations.
- 0.90h 02/19/2021 Phone call with AUSA J. Clark re: plea negotiations no career offender because 1st was possession; [redacted] and 30% reduction.
- 0.50h 02/22/2021 Phone call with client re: plea negotiations, forfeiture, gun charge, contact with AUSA.
- 0.30h 02/22/2021 Phone call with client re: plea negotiations and strategy.
- 0.60h 02/23/2021 Phone calls (x2) with client re: plea negotiations, defenses to forfeiture, and his agreement that he will take the plea if we cannot do any better.
- 0.20h 02/23/2021 Phone call with client re: status of plea negotiations, his confirmation that he will still sign the plea agreement if there are no further concessions.
- 0.10h 02/23/2021 Draft/exchange emails with AUSA re: plea negotiations.
- 0.10h 02/24/2021 Draft/exchange emails with client re: status of plea negotiations.
- 0.10h 02/24/2021 Draft/exchange emails with AUSA re: plea negotiations.
- 0.20h 02/24/2021 Phone call with client re: USA will not budge any further on plea agreement, except that it will not file 851 and we can contest forfeiture, but my advice is that we do not request bench trial on that issue, and his understanding that this is the best we can do, and we will discuss tomorrow.
- 0.20h 02/24/2021 Phone call with client re: final revision to plea agreement.

- 0.10h 02/24/2021 Draft email to client re: filing of the plea agreement and motion to change plea and list of tasks for him to complete in preparation for sentencing.
- 8.90h 02/25/2021 Round trip drive from Missoula, MT to Crossroads Correctional Facility (7.2) to meet with client to review, discuss, and sign plea agreement (reached yesterday and today was the deadline), and prepare for COP hearing (1.6 hours); deliver signed plea agreement to US Attorney's office for filing (.1). (note I brought all discovery, but client did not want to review).

15. Kavis could not have had a copy of the final Plea Agreement *prior to* February 25, 2021 because it was not finalized until the day before and I could not email him attachments while he was incarcerated at CCF. But as the preceding paragraph shows, we discussed the Plea Agreement on multiple occasions before that date. My records reflect that I mailed the first proposed plea agreement to Kavis at CCF on the day we received it, January 8, 2021. The only other draft of the Plea Agreement was the final version, which AUSA Clark emailed to me on February 24, 2021. It was that copy that I took with me when I met with Kavis at CCF on February 25, 2021. While I cannot say so definitively, I am pretty sure I brought an extra copy of the final Plea Agreement with me to CCF on February 25 to leave with him. During our meeting on February 25, 2021, we went through the Plea Agreement line by line before he signed it.

16. My records reflect that I met with Kavis for 1.6 hours at CCF on 2/25/2021. During that meeting, Kavis was, understandably, somewhat reluctant to

sign the Plea Agreement because it meant he would be pleading guilty to serious charges subject to a mandatory minimum sentence of 15 years, but, as the records quoted above reflect, he had already agreed to do so before our February 25 meeting. In my experience, most criminal defendants are at least a little reluctant to sign plea agreements because they always hope for a better deal. Kavis was no different and he wanted all along to avoid the § 924(c) conviction, as I did, but I was unable to convince AUSA Clark to drop it and I believed, based on the discovery provided and my experience with federal drug prosecutions in the District of Montana since 2005, that the United States would convict Kavis of that charge had he went to trial. Perhaps most importantly, contesting the § 924(c) charge at trial would almost certainly render relevant and admissible at trial the events of September 10, 2020, among others.

17. I only met with Kavis in person at Crossroads Correctional Facility one time, on February 25, 2022, to discuss and secure his signature on the Plea Agreement, but Kavis also had access to a phone and email and we had numerous phone calls. We also met for 3.6 hours at Missoula County Detention Facility on June 17, 2021 to “review new discovery, PSR, draft objections thereto, and draft acceptance letter” and for more than an hour on July 19, 2021 to prepare for sentencing.

18. From the very first draft plea agreement, all proposed plea agreements required Kavis to waive his right to appeal and collaterally attack his sentence, except

a collateral challenge alleging ineffective assistance of counsel. I told Kavis on multiple occasions that by pleading guilty, he would waive any right to appeal and that the only post-conviction relief available to him was if I provided ineffective assistance of counsel. We discussed this during our meeting at CCF on February 25, 2021 when we went through the plea agreement line by line. My advice to Kavis was that he did not have any basis to appeal his sentence because he had waived his right to appeal and even if he did succeed on appeal, he could be retried and subject to a more severe sentence. Along these lines, the day after sentencing, I sent Kavis a closing letter that states, among other things:

Critically, and as we discussed extensively, because the Court imposed a sentence that is less than the sentence recommended by the Sentencing Guidelines, you have waived any right to appeal the sentence per ¶ 9 of the Plea Agreement, which provides:

9. Waiver of Appeal of the Sentence - Conditional: The defendant understands the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a); 28 U.S.C. §§ 2241, 2255. The prosecution has a comparable right of appeal. 18 U.S.C. § 3742(b). By this agreement the defendant waives the right to appeal or collaterally attack any aspect of the sentence, including conditions of probation or supervised release, if the sentence imposed is within or below the Guideline range calculated by the Court, regardless of whether the defendant agrees with that range. This waiver includes challenges to the constitutionality of any statute of conviction and arguments the admitted conduct does not fall within any statute

of conviction. This waiver does not prohibit the right to pursue a collateral challenge alleging ineffective assistance of counsel. The United States waives its right to appeal any aspect of the sentence if the sentence imposed is within or above the Guideline range calculated by the Court.

Here, only Count 1 was subject to the advisory sentencing guidelines; the other count of conviction, Count 3, carried a mandatory 5-years, consecutive to Count 1. And because the Court imposed a sentence of 180 months on Count 1, which was far below the initial guideline of 360 months, and also below the final guideline range of 188-235 Months (offense level 33, criminal history category IV), "the sentence imposed is within or below the Guideline range calculated by the Court regardless of whether the defendant agrees with that range." As such, you do not have a right to appeal or collaterally attack the sentence. The Government, however, retains its right to appeal the sentence because it was less than the advisory guideline range. An appeal by the government, however, is very unlikely, but they have 30 days from the date of Judgment, July 20, 2021, to do so.

With that said, you may still choose to file an appeal, but I will not be able to represent you on such appeal because, for the reasons stated above, my opinion is that there is no legal basis to do so. I further believe that an appeal would be pointless because, for all the reasons we have discussed throughout this case and as noted above, there is virtually no chance of receiving a better result after an appeal than the current sentence. In fact, an appeal could result in a more severe sentence. Nonetheless, if you choose to appeal, you must do so within fourteen days of July 20, 2021, the date the written and oral judgment was entered. This means if you choose to file an appeal, you must file a Notice of Appeal with the U.S. District Court for the District of Montana by Tuesday August 3, 2021 at the latest. Please contact me immediately if you have any questions about this, or anything else.

But while you did waive your right to appeal or collaterally attack the sentence imposed, you did not waive your right to file a collateral challenge (via motion per 28 U.S.C. § 2255) to the sentence alleging that I provided ineffective assistance of counsel. For all the reasons herein, and as we have discussed, I am not aware of any legal or factual basis for such a claim, but if you choose to file a § 2255 motion alleging ineffective assistance of counsel there is a time-limit on such motions:

- (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
 - (1) the date on which the judgment of conviction becomes final;
 - (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United

States is removed, if the movant was prevented from making a motion by such governmental action;

- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f). Also know that you have only one § 2255 motion. That is, if you were to file a § 2255 motion now alleging that I provided ineffective assistance of counsel, and it was later revealed that you had a different basis to allege ineffective assistance based on something you did not know now, you would likely be precluded from filing the second motion.

In the end, while I am sorry we did not achieve a better result, I also know that I presented the best arguments available. I also very much enjoyed our meetings and phone calls and wish you the best of luck going forward. Please do not hesitate to contact me if you have any questions regarding this letter or anything to do with your case.

19. Kavis was not happy with the sentence imposed in this case, nor was I. We had hoped that the Court would sentence him to the mandatory minimum of 15 years with a longer term of supervised release. I do not believe I spoke with Kavis after the U.S. Marshals took him away following the imposition of sentence, but I sent him the above-referenced letter the next day, July 21, 2021. I also recall speaking with his wife and exchanging correspondence with her after sentencing. I don't know if Kavis received my letter of July 21, 2022, but the letter was not returned to my office as undeliverable and I did not hear from Kavis again until he contacted me at some time in October of 2021, requesting documents, which I sent him via letter dated November 1, 2021. He asked for more documents in August of 2022, which I sent him

via letter dated August 29, 2022. I also received an email from him on December 26, 2021 wishing me a Merry Christmas.

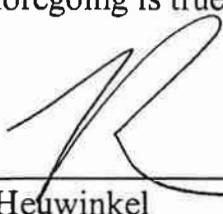
20. I do not recall Kavis asking me to file an appeal at any time. If he would have asked me to file an appeal, I would have filed the notice of appeal and then sought leave to withdraw as his counsel for the reasons stated in my letter of July 21, 2021, specifically that he had waived his right to appeal, there was no legal or factual basis for an appeal, and even if an appeal were successful, it could result in a more severe sentence because the United States had sufficient evidence to convict him of the charges in the Indictment and there were aggravating factors that could result in a harsher sentence, not the least of which is loss of the 3-point reduction for acceptance of responsibility.

21. During my time as a CJA panel attorney, and prior to my representation of Kavis, I handled one appeal, *United States v. Pimentel-Lopez*, 743 F. App'x 127 (9th Cir. 2018), and one § 2255 Motion, *United States v. Walsh*, No. CR 17-23-BU-DLC, 2020 U.S. Dist. LEXIS 102626, 2020 WL 3104579 (D. Mont. June 11, 2020).

22. I took a vacation shortly after Kavis's sentencing hearing. I left my home in Missoula, Montana on either July 30 or 31, 2021 and returned to Missoula on August 7, 2021.

I declare under penalty of perjury under the laws of the State of Montana and the United States of America that the foregoing is true and correct.

Executed on June 26, 2023.



Ryan Heuwinkel
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8

11 UNITED STATES OF AMERICA,)
12 vs. Plaintiff/Respondent,) No. CR 20-53-M-DLC
13 LEON PAUL KAVIS, JR.,) **TRANSCRIPT OF**
14 Defendant/Movant.) **EVIDENTIARY HEARING**

16 BEFORE THE HONORABLE DANA L. CHRISTENSEN
17 UNITED STATES DISTRICT COURT JUDGE
18 FOR THE DISTRICT OF MONTANA

24 Proceedings recorded by machine shorthand
25 Transcript produced by computer-assisted transcription

APPEARANCES

2 For the Plaintiff/
3 Respondent: MS. JENNIFER S. CLARK
4
5 For the Defendant/
6 Movant: Assistant U.S. Attorney
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24 REPORTER'S NOTE: "Uh-huh" and "Um-hmm" indicate
affirmative responses. "Huh-uh" and "Hm-umm" indicate
25 negative responses.

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1 PROCEEDINGS

2 (Open court.)

3 (Defendant present.)

4 THE COURT: Please be seated.

5 Amanda, would you please call the matter on the
6 Court's calendar?

7 THE CLERK: This is the time set for an evidentiary
8 hearing in Case No. CR 20-53-M-DLC, *United States of America*
9 *v. Leon Paul Kavis.*

10 THE COURT: Ms. Clark, Mr. Hormel, Mr. Kavis, good
11 afternoon.

12 I have read everything that's been filed in
13 connection with the motion: the 2255 motion, the briefs,
14 attachments, as well as Mr. Heuwinkel's affidavit, so I think
15 I'm up to speed.

16 So, Mr. Hormel, it's your client's motion. I'm
17 going to turn this over to you.

18 MR. HORMEL: Your Honor, before we begin any
19 testimony, we are waiving Issue No. 1.

20 THE COURT: Okay. Let me look. So I've got
21 Grounds --

22 MR. HORMEL: Ground 1.

23 THE COURT: -- 1 through 5. So you're waiving
24 No. 1, which was --

25 MR. HORMEL: The buyer/seller issue.

1 THE COURT: -- the buyer/seller issue. All right.

2 MR. HORMEL: We're waiving Grounds 3 and 4, which
3 are kind of interrelating, relating to pressure or coercion to
4 enter the guilty plea -- or enter the plea agreement.

5 THE COURT: Okay.

6 MR. HORMEL: And we are going solely on Ground 2 and
7 Ground 5. Ground 2 is the missing elements in -- for the
8 924(c), and Ground 5 is the failure to consult regarding the
9 appeal.

10 THE COURT: Okay. The appeal issue.

11 MR. HORMEL: Yes.

12 THE COURT: All right. Thank you, Mr. Hormel.

13 MR. HORMEL: You're welcome.

14 And I don't know; I believe Mr. Heuwinkel is
15 present.

16 THE COURT: He is.

17 MR. HORMEL: And we would call him as a witness.

18 THE COURT: Do you wish to call him now as an
19 adverse witness at this time?

20 MR. HORMEL: Either that or I can follow with cross.
21 I would prefer to follow with cross if Ms. Clark is ready for
22 direct.

23 THE COURT: Okay. Are you going to call Mr. Kavis?

24 MR. HORMEL: Probably for some limited testimony,
25 yes.

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 THE COURT: Okay. Well, you've got the burden of
2 proof, so I tell you what we're gonna do. I'm gonna let you
3 call your witnesses. If you wish to call Mr. Heuwinkel as an
4 adverse witness, you can do so, but --

5 MR. HORMEL: I'll do that.

6 THE COURT: Okay.

7 MR. HORMEL: I'll do it in that fashion, Your Honor.

8 THE COURT: Okay.

9 MR. HORMEL: I'll call Ryan Heuwinkel to the stand,
10 Your Honor.

11 (Oath administered to the witness.)

12 WHEREUPON,

13 MR. RYAN HEUWINKEL,
14 called for examination by counsel for defendant/movant, after
15 having been first duly sworn to testify the truth, the whole
16 truth, and nothing but the truth, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. HORMEL:

19 Q Mr. Heuwinkel, would you state your name? And I think
20 spell your first and last. Or last name? I'm not sure how
21 you do it in this court.

22 A My name is Ryan Heuwinkel. The last name is spelled
23 H-e-u-w-i-n-k-e-l. "Heuwinkel" is acceptable as well.

24 Q Is it "Heuwinkel"?

25 A We say "Heuwinkel," but I think if we were in Germany, we

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 probably would say "Heuwinkel."

2 Q Thank you. Okay.

3 All right. So you heard that we've waived three of the
4 five issues, and so I'm just gonna --

5 A Yes.

6 Q -- direct your attention, first of all, to the elements
7 of 924(c) that are in the -- that was recited in the offer of
8 proof supporting the guilty plea and also recited in the
9 sentencing -- the change of plea hearing transcript.

10 And just want to get a little bit of background. As I
11 understand, the guilty plea deadline or plea agreement
12 deadline was February 25 of 2021; is that correct?

13 A That sounds right based upon my recollection, yes.

14 Q Okay. Now have you reviewed your declaration in
15 preparation for this hearing?

16 A Yes, sir.

17 Q Do you have a copy of it?

18 A I do. I don't have one with me, but I had a copy at my
19 office.

20 Q Okay. Would you like to have a copy just in case you
21 need to refresh your recollection?

22 A I mean, if you want me to have one -- I have one. I'm
23 prepared to answer your questions.

24 Q Okay. So it's my understanding that you visited
25 Mr. Kavis at Shelby, the Shelby correction center in Shelby,

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 Montana, the day of the deadline, correct?

2 A That's right.

3 Q And I know that, in your declaration, you outlined
4 several phone calls between the first part of January up to
5 February 25 relating to the plea agreement with Mr. Kavis,
6 correct?

7 A Yes.

8 Q And in your discussions about the plea agreement, did you
9 discuss with Mr. Kavis the elements of the offense 924(c) in
10 Count III?

11 A I'm sure that we did, yes.

12 Q Okay. And do you recall reading the elements that were
13 contained within that plea agreement, that proposed plea
14 agreement, to Mr. Kavis?

15 A I know that we went through the plea agreement line by
16 line at the meeting at the -- at Crossroads, and I'm sure we
17 went over them in -- on the phone at other times.

18 Q Are you familiar with the fact that the elements that are
19 set out in the plea agreement for the 924(c), Count III,
20 Mr. Kavis is actually pleading to a -- or one of the
21 elements -- the first element relates to a conspiracy to
22 distribute controlled substances, correct?

23 A Yes.

24 Q And the third element refers to the substantive offense
25 of distribution of a controlled substance, correct?

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A I'd have to take your word for it.

2 MR. HORMEL: Your Honor, if I may approach and use
3 the filed plea agreement to refresh his recollection, would
4 that be okay?

5 THE COURT: Yeah.

6 Amanda, do you have the overhead on?

7 THE CLERK: I do.

8 MR. HORMEL: Oh.

9 THE COURT: Why don't you hand that, Mr. Hormel, to
10 Amanda, and then she can publish it and we can all see it.

11 MR. HORMEL: Okay. Thank you.

12 THE COURT: Can you see that there, Ryan?

13 THE WITNESS: Um-hmm.

14 (Discussion off the record between Mr. Hormel and the
15 courtroom deputy clerk.)

16 BY MR. HORMEL:

17 Q Showing you what's been filed as Document 25, and it's
18 Document, I believe, 74-4 --

19 THE CLERK: 79-4.

20 BY MR. HORMEL:

21 Q -- 79-4 for the 2255 proceeding, this is page 3 of the
22 plea agreement.

23 Do you see where it says "Count II"?

24 A Yes.

25 Q And it's actually supposed to be Count III; is that

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 correct?

2 A I think that's, I think that's right, yes.

3 Q And do you recall the magistrate correcting that at the
4 time of the change of plea hearing?

5 A I don't specifically recall that today, but I know that
6 Leon pleaded guilty to Counts I and III of the indictment.

7 Q Okay. So do you see the first element of Count III?

8 A Yes.

9 Q And that relates to a conspiracy to distribute
10 controlled -- or methamphetamine, correct?

11 A Yes.

12 Q Okay. And your understanding of conspiracy law is that a
13 conspiracy targets the agreement to commit an offense, not
14 necessarily the commission of the underlying offense, correct?

15 A Yes.

16 Q And then Count III, you'll see that it refers to, "Third,
17 the defendant possessed the firearm in furtherance of
18 possession with intent to distribute." That does not
19 reference a conspiracy, correct?

20 A It's correct that the words "conspiracy to possess" are
21 not in that. It says "possession with intent to distribute."

22 Q And is it your understanding that possession with intent
23 to distribute methamphetamine is a substantive offense
24 underlying a conspiracy to possess with intent to distribute a
25 controlled substance?

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A Yes.

2 Q So I take it, when you went through the plea agreement,
3 reviewed it yourself, you didn't catch that error, correct?

4 A I can't remember at this time, but, yeah, that could be
5 true. I don't remember discussions.

6 What I do recall is that I believe that the government
7 had evidence to convict him of possession with intent to
8 distribute -- or with the 924(c) conviction. That's why I
9 argued -- you know, I urged him to accept the plea agreement.

10 Q I understand that, but --

11 A Yeah, I, I may have missed this particular issue.

12 Q Okay. And the same goes true with the proffer -- the
13 offer of proof underlying Mr. Kavis's guilty plea that was
14 filed as Document 27, for the underlying case before the
15 guilty plea, and Document 79-5.

16 Do you -- it's got the date of March 3. Do you recall,
17 in your declaration, that you indicated March 3 was the first
18 date that you had seen this document?

19 A Are we talking about the offer of proof?

20 Q Yes.

21 A I would stand by my declaration.

22 Q Okay. So, so March 3 would be the day. If that's the
23 date, you would stand by that?

24 A Absolutely.

25 Q Thank you.

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 If I may approach, Your Honor?

2 THE COURT: You may.

3 MR. HORMEL: (Handing.)

4 (Discussion off the record between Mr. Hormel and the
5 courtroom deputy clerk.)

6 BY MR. HORMEL:

7 Q So this is Document 79-5 in the materials submitted for
8 the 2255 motion, amended motion, and this would be at page 3,
9 also.

10 It indicates "Count II," but, again, we're talking
11 specifically about Count III, correct?

12 A Yes. What should be Count III but which is labeled as
13 Count II on this.

14 Q Yes, in the document. Thank you.

15 Again, the same error has occurred in the elements in the
16 offer of proof in support of the guilty plea, also, correct?

17 A That's right. It does not say "in furtherance of
18 conspiracy to possess with intent to distribute."

19 Q Okay. And --

20 A It just says "possession with intent to distribute."

21 Q And consistent with your testimony about the guilty plea,
22 again, this appears to be an error on your part that you
23 didn't catch, correct?

24 A If there's an error in -- yeah, I didn't know that the --
25 I mean, I don't recall recognizing that. And so, yeah, I

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 would admit that I probably did not see that the third element
2 does not say "conspiracy to possess with intent to distribute
3 methamphetamine." It just says "possession with intent to
4 distribute methamphetamine." So, yes.

5 Q So -- and in your disc- -- and again, in your
6 discussion -- since you got this document, the offer of proof,
7 on March 3, 2021, and knowing that the -- we know that the
8 sentencing date -- or the change of plea date was March 9,
9 2021, so six days -- you got the offer of proof six days prior
10 to the change of plea hearing, did you have a chance to have a
11 face-to-face visit with Mr. Kavis relating to the offer of
12 proof?

13 A I don't recall. I think I covered that in my
14 declaration. Because in drafting the declaration, I went
15 through my detailed time records and noted all the times that
16 I had spoken with him. So as we sit here today, I don't know.
17 I can't remember if we did that. We probably at least -- I
18 think Leon appeared at the -- by video for his change of plea,
19 as I recall.

20 THE DEFENDANT/MOVANT: That's true.

21 MR. HORMEL: All right.

22 THE WITNESS: I know -- so --

23 BY MR. HORMEL:

24 Q So -- okay. If he did appear by video, and I think we'll
25 clean -- clear that up with Mr. Kavis on his testimony --

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A Um-hmm.

2 Q -- if he did appear by video, then is it unlikely that
3 you had a face-to-face visit with him with the offer of proof
4 for him to review?

5 A I don't recall. I would have detailed all of my
6 interactions with Leon in my declaration.

7 Q Okay. And, again, any discussions that you had with
8 Mr. Kavis relating to the elements of the 924(c) charge would
9 have been designed or tailored around the offer of proof after
10 you received the offer of proof on March 3, 2021, correct?

11 A We went through the offer of proof line by line at least
12 over the phone.

13 MR. HORMEL: Okay. And if I may have a moment,
14 Your Honor?

15 THE COURT: You may.

16 (Discussion off the record at counsel table.)

17 BY MR. HORMEL:

18 Q From reading your declaration, I do, I do note that you
19 had a fairly good amount of telephone contact with Mr. Kavis
20 in relation to the plea agreement -- or the potential plea
21 agreement or plea offer.

22 A I would agree. Leon and I talked a lot.

23 Q So my understanding is that one of his biggest hang-ups
24 in settling the case was the 924(c) count, correct?

25 A Absolutely. We talked --

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 Q And --

2 A Yeah. That was a big focus of our defense, absolutely,
3 was trying to, trying to get rid of that one. As it is in all
4 of these types of cases.

5 Q Sure. Understood.

6 But with him, that was his primary focus?

7 A Sure. It's an extra five years consecutive.

8 Q Right. So let's fast-forward to the sentencing hearing.
9 And the sentencing hearing, it sounds like, from your
10 declaration, didn't go as Mr. Kavis hoped for, and it sounds
11 like it didn't go as you were hoping for.

12 A We hoped for a 15-year sentence followed by a lengthy
13 term of supervised release --

14 Q Right.

15 A -- or even a longer term of supervised release.

16 Q So immediately after imposition of the sentence, it
17 sounds to me like Mr. Kavis at least vocalized to you his
18 disagreement or his displeasure with the sentence, correct?

19 A He vocalized displeasure with the sentence. I don't know
20 if it was directed at me or not, but I observed it.

21 Q Do you recall him speaking to you about potentially an
22 appeal?

23 A No.

24 Q Do you recall him saying anything to the effect that,
25 "We're gonna appeal, right?" a question to you?

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A No.

2 Q You just don't have a recollection, correct?

3 A I don't recall that.

4 Q Okay.

5 A I, I mean --

6 Q What you did do, though, is that -- the sentencing date
7 was July 20, 2022, as I recall.

8 A I'll take your word for it.

9 Q And -- oh, excuse me, 2020. July 20, 2022.

10 You wrote him a letter on July 21, 2022, correct?

11 A I thought this was in 2021 that we had the sentencing.

12 THE DEFENDANT/MOVANT: It was '21.

13 MR. HORMEL: Is it '21?

14 THE DEFENDANT/MOVANT: (Nodded head affirmatively.)

15 MR. HORMEL: Oh, excuse me. Okay.

16 BY MR. HORMEL:

17 Q So back up. That's right. Okay.

18 So on July 20, 2021 was the sentencing hearing, right?

19 A I'll take your word for it, but I believe that to be
20 true.

21 Q Excuse me. Okay. July 20, 2021 was the sentencing
22 hearing. The next day, you wrote a letter. A closing letter
23 is what you called it.

24 A I did.

25 Q And it was a rather detailed letter.

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A That's -- you know, it was a detailed -- you know, that's
2 for you to decide, but I did write a record, and I think -- or
3 a letter, and I think I provided that to you.

4 Q Yes. And in that letter, there's much discussion about
5 your opinion as to the advisability of him taking an appeal or
6 not taking an appeal, correct?

7 A That's true.

8 Q And your opinion was, with him, that he should not take
9 an appeal.

10 A Absolutely.

11 Q And you indicated in that letter, which would be
12 Exhibit 2-1 of 86-1 as submitted by the government in response
13 to the 2255 amended motion, you indicated to him that if he
14 wanted to file an appeal, he had to file an appeal with the
15 United States District Court in Montana by Tuesday, August 3,
16 2021, correct?

17 A Yes.

18 Q Now between July 21, 2021 and July 26, 2021, did you have
19 any occasion to have a visit and consult with Mr. Kavis face
20 to face about whether or not he wanted to appeal?

21 A We, we did not -- I did not see Leon -- I haven't seen
22 Leon until today after the sentencing hearing.

23 Q So between the sentencing date of July 20, 2021 to
24 August 3, the appeal deadline, of 2021, you did not have a
25 face-to-face consultation with Mr. Kavis about an appeal?

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 A That's true. Not, not during that time. We had
2 discussed an appeal previously, but not after, not after the
3 end of the sentencing hearing.

4 Q Yes. You -- let's correct that for the record.

5 So you had a lot of discussions about his waiver of
6 appeal prior to the sentencing hearing.

7 A Absolutely, yes.

8 Q And during the time in which he was deciding whether to
9 take the plea offer, correct --

10 A Yes, that's true.

11 Q -- the plea agreement.

12 But after he was sentenced, you had no occasion to
13 consult with him after the sentencing hearing prior to the
14 deadline of August 3, 2021 about whether or not he wanted to
15 file an appeal?

16 A I mean, I could -- the way you're phrasing it, I had
17 occasion to. I mean, I could have gone down to the jail to
18 see him, but I didn't know that he wanted to file an appeal,
19 and we had previously discussed it repeatedly, numerous times,
20 and there was no indication that he wanted to file an appeal.

21 So I, I didn't talk to him further about it.

22 Q But let's clear this up. Your closing letter has
23 fairly -- and I won't -- lengthy discussion or detail about
24 your opinion whether or not he should file an appeal, correct?

25 A My closing letter recounted all of the advice I had

HEUWINKEL DIRECT EXAMINATION BY HORMEL

1 previously given him on the appeal.

2 Q And that was a primary focus of your letter.

3 A I think we also talked about the sentence, too, but,
4 yeah. It was, it was one of the main topics that I discussed
5 in that letter, is his right to appeal; that he had waived it
6 and that I didn't think he should appeal. Yeah.

7 Q And if he wanted to appeal, he had to file it with the
8 Clerk of the Montana United States District Court?

9 A I know you focus on that "you" language in the -- you
10 know, in your briefing, but I would say when I say, you know,
11 "You need to do this," it's -- of course, you know, usually
12 the lawyer files documents, not the, not the defendant, so.

13 Q Okay. So the bottom line is you didn't go to either the
14 Missoula County jail or the jail -- I can't remember where he
15 went after that -- at any time prior to the deadline to see if
16 he wanted to appeal, correct?

17 A No, because we had discussed it extensively and I had no
18 indication that he wanted to appeal.

19 MR. HORMEL: If I may have a moment, Your Honor?

20 THE COURT: You may.

21 (Discussion off the record at counsel table.)

22 MR. HORMEL: Your Honor, Ms. Clark and I and
23 Mr. Kavis have entered into an agreement to stipulate to the
24 fact that Mr. Kavis was in the Missoula County jail from
25 June 11, 2021 through 7/26/2021.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 And with that stipulation, I'll pass the witness to
2 the government.

3 THE COURT: And that second date was July 26?

4 MR. HORMEL: Yes.

5 THE COURT: And then so you've stipulated to that,
6 and so that means he was at the Missoula County detention
7 center during that time period of June 11 through July 26 of
8 2021?

9 MR. HORMEL: Yes, Your Honor.

10 THE COURT: Where did he go after July 26?

11 THE DEFENDANT/MOVANT: Cascade County.

12 MS. CLARK: Cascade County.

13 MR. HORMEL: Oh. Oh, Cascade County, Your Honor,
14 and I was gonna bring that out in his direct examination.

15 THE COURT: Okay.

16 Any further questioning of Mr. Heuwinkel,

17 Mr. Hormel?

18 MR. HORMEL: No. I pass the witness, Your Honor.

19 THE COURT: Okay. Ms. Clark.

20 (Discussion off the record re: display.)

22 BY MS. CLARK:

23 Q All right. Mr. Heuwinkel, I am showing you, on the
24 screen, a document, and I'm gonna ask if you can identify that
25 document. Let me scroll down here.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 A Yes.

2 Q Is that the indictment that charged Mr. Kavis in this
3 case?

4 A I believe so, yes.

5 Q I'm going to direct your attention to Count III on this
6 indictment. And Count III is the charge of possessing a
7 firearm in furtherance of drug trafficking; is that correct?

8 A That's what Count III is, yes.

9 Q Looking at this document, the allegations contained in
10 the indictment state that he "possess[ed] a firearm in
11 furtherance of a drug trafficking crime, namely conspiracy to
12 possess with the intent to distribute controlled substances
13 and possession with intent to distribute controlled
14 substances," correct?

15 A That's what it says, yes.

16 Q And this is a stand-alone charge, correct?

17 A Count III would be, yes.

18 Q Okay. When Mr. Kavis changed his plea, did he admit that
19 he had possessed a firearm at all times while distributing
20 methamphetamine?

21 A I'm sure that he did, yes. I don't remember the words he
22 used at the hearing.

23 Q And if I can show you a document that is a transcript
24 from the change of plea hearing, if you could review that to
25 yourself and let me know if that refreshes your memory?

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 (Pause.)

2 THE WITNESS: This, this shows that it says he "had
3 one with me at all times while I was distributing meth," and I
4 believe "one" refers to a gun.

5 BY MS. CLARK:

6 Q When you met with Mr. Kavis, you discussed the elements
7 of the charge for a 924(c), correct?

8 A Yes.

9 Q And you explained to him that, under either theory, he
10 would be found guilty?

11 A My opinion was that the discovery showed there was plenty
12 of evidence to convict him of a 924(c) conviction based upon
13 my experience with these cases.

14 Q And based on your review of the evidence, did the
15 evidence show that he was engaged in a conspiracy to
16 distribute methamphetamine?

17 A My advice was that the government could convict him of
18 conspiracy to possess with intent to distribute
19 methamphetamine based upon the discovery that I reviewed.

20 Q And part of that review showed that he was fronting or
21 providing methamphetamine to others to distribute in
22 anticipation of receiving payment later?

23 A That's what the discovery showed, yes.

24 Q Did the discovery also show that he was, himself,
25 distributing methamphetamine?

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 A Yes.

2 Q In reviewing the elements as set out in the plea
3 agreement and in the offer of proof, is it fair to say that
4 that could be read as a whole and that the third element would
5 refer back to the first element regarding the conspiracy to
6 possess with intent to distribute?

7 A I'm not sure I understand the question.

8 Q Well, Mr. Hormel asked you about the fact that the first
9 line said "conspiracy to distribute."

10 A Yes.

11 Q And the third element just said "possession with intent
12 to distribute."

13 A That's correct.

14 Q Is it fair to say that those two are related?

15 A Yes, I would say that "possession with intent to
16 distribute" is kind of incorporated within the conspiracy.

17 Q If the Court was to find that these elements were
18 incorrect, was there any prejudice to him in your advice to
19 plead guilty pursuant to the plea agreement that was offered
20 in this case?

21 A I don't think I'm qualified to answer that. I don't
22 know.

23 Q Okay. Was one of the things that you discussed with him
24 the disadvantage of proceeding to trial in this case?

25 A Absolutely.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q And that he could be found to be a career offender?

2 A Absolutely.

3 Q And if he was found to be a career offender, his minimum
4 sentence, the mandatory minimum that the Court would have to
5 work with, was 30 years, correct?

6 A Would that be under the guideline range?

7 Q Correct.

8 A Yeah. My concern was that a career offender guideline
9 would have started out significantly higher.

10 Q And the plea agreement that was negotiated with the
11 government placed him at a 15-year mandatory minimum?

12 A Yep. Yes.

13 Q And that allowed the Court to sentence him significantly
14 lower than what would have otherwise happened, correct?

15 A I don't know what would have happened, but I know it's
16 better to start out with a mandatory 15 than a mandatory 30.

17 Q You met with him several times to discuss the discovery
18 in the case?

19 A That's true.

20 Q You had multiple phone calls with him?

21 A Yes.

22 Q You discussed possible defenses with him?

23 A Many times.

24 Q And in your review of the discovery, you determined
25 that -- well, strike that.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Regarding the appeals, you discussed a direct appeal with
2 Kavis, correct?

3 A Yes.

4 Q And you discussed that from the beginning of your
5 representation through sentencing?

6 A I don't know about the beginning of representation, but
7 we definitely talked about it as soon as we started talking
8 about plea agreements, yes. And we talked about it through to
9 sentencing, yes.

10 Q Okay. How many times did you discuss that with him?

11 A I wouldn't know.

12 Q Okay. You detailed that, all of your discussions with
13 Mr. Kavis, in your declaration?

14 A I think so. I tried -- like I said, when I drafted the
15 declaration, I went through my time records and tried to
16 recreate what had happened because, you know, it's been some
17 time since, since, you know, I was at work in this case.

18 Q Did you discuss the advantages and disadvantages of
19 filing an appeal with him?

20 A Yes.

21 Q When you had these conversations with Mr. Kavis, did you
22 try to understand what his concerns were and address those?

23 A Of course.

24 Q Did you ever tell Mr. Kavis that you refused to file a
25 notice of appeal?

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 A No.

2 Q Through sentencing, did you think Mr. Kavis had any
3 nonfrivolous claims to appeal?

4 A No.

5 Wait. I did not think he had any viable basis for
6 appeal, no.

7 Q Looking at the sentence that he received, did he receive
8 a sentence that he bargained for?

9 A (No response.)

10 Q I'm differentiating that from one that he had hoped to
11 get, which was the 15 years.

12 A The sentence was within the statutory minimum and maximum
13 that we bargained for.

14 Q So was part of the plea agreement that the sentencing
15 guidelines would be applied to or considered when the Court
16 determined the appropriate sentence?

17 A Yes.

18 Q In your opinion, was the sentence he received favorable?

19 A We always hope, we always hope for better, but my opinion
20 was that it could have been much worse.

21 Q Did you tell him that he could still appeal although he
22 waived his right in the plea agreement?

23 A I'm sure I told him that he waived the right but you
24 could still file a notice of appeal because, you know, because
25 waiver is a fact issue, and sometimes you can get around that.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q Okay. You advised him that if he was successful on
2 appeal, he could be facing a lengthier sentence?

3 A Absolutely.

4 Q You also advised him that he could file a petition for
5 ineffective assistance of counsel?

6 A I did.

7 Q And after sentencing, you sent him the letter that
8 Mr. Hormel described as a closing letter?

9 A That's right.

10 Q And that letter advised him about his right to appeal?

11 A It did.

12 Q And it detailed his options?

13 A I think so, yeah.

14 Q In that letter -- I'm sorry.

15 A Yeah. I mean, the letter was a recap of what we had,
16 what we had already discussed. There wasn't anything new in
17 that letter.

18 Q Okay.

19 A To the best of my, to the best of my memory, I don't
20 think there was anything in that letter that we had not
21 already discussed.

22 Q You offered to discuss appeal with him in that letter,
23 correct?

24 A I did.

25 Q You never heard from Mr. Kavis about a request to file an

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 appeal, did you?

2 A No.

3 Q He knew how to reach you, correct?

4 A I believe so, yeah. I mean, we had -- he was -- we had
5 good contact throughout.

6 Q Was he able to phone you?

7 A Yes.

8 Q And he was able to email you?

9 A At certain times, he was, yes. I think it kind of -- he
10 would lose access to the tablet from time to time, as I
11 recall, but this was during the time when Leon had better
12 access to me than other -- than prior incarcerated clients --

13 Q Okay.

14 A -- in my experience.

15 Q He was able to write you letters?

16 A I believe so, yes.

17 Q Okay.

18 A I don't know that he ever wrote me a letter. No, you
19 know, he did afterwards, but I don't know that he wrote
20 letters (indicating air quotes).

21 Q He was able; if he wanted to, he presumably could have
22 written you a letter?

23 A I think so, yeah.

24 Q Okay. And he never asked you to file an appeal?

25 A No.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q Did he ask you to file an appeal during the hearing, the
2 sentencing hearing?

3 A No.

4 Q We talked a little bit about him being upset about the
5 sentence he received and that you were upset as well because
6 you were hoping to convince the Court to give him the
7 mandatory minimum 15 years, right?

8 A Yeah. Yes, that was, that was my, my goal.

9 Q Okay. And as we discussed before, the sentence that the
10 defendant received was within the parameters of the plea
11 agreement?

12 A Yes.

13 Q And you had many discussions prior to the sentencing and
14 during the plea negotiations with -- and discussions with
15 Mr. Kavis about the waiver or the right to appeal?

16 A Yes.

17 Q And after the sentencing, was the only thing left to
18 potentially change his mind about an appeal the length of the
19 sentence he received?

20 A (No response.)

21 Q As far as things that you could have discussed further
22 with him after sentencing?

23 A Yeah. Prior to the sentencing hearing, we didn't know
24 what the sentence would be, yeah, so I suppose that's true,
25 yes, when you phrase it that way.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q And prior to the sentencing hearing, you discussed with
2 him that the plea agreement called for a mandatory minimum of
3 15 years?

4 A Yes.

5 Q And you also discussed with him that the potential under
6 the guidelines could be more.

7 A Yes.

8 Q And you received the presentence report in this case
9 prior to sentencing?

10 A Yes.

11 Q And you discussed with him what the probation office had
12 calculated his guidelines as?

13 A Yes.

14 Q And you told him at that point that that also could be a
15 sentence he received?

16 A Yes.

17 Q And that was more than the 15 years that was the
18 mandatory minimum, correct?

19 A Yes.

20 Q Did you hear about him, about other things after the
21 sentencing hearing?

22 A I think I heard from his wife, and he sent me a couple
23 letters asking for documents after sentencing, yes.

24 Q Did he send you an email wishing you a merry Christmas?

25 A Yeah. I think that was a form email he sent to probably

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 a bunch of people on his list.

2 Q Okay.

3 A I don't think that was specifically directed at me.

4 Q In any of these communications after sentencing, did he
5 ever mention an appeal?

6 A No.

7 Q Did he ever inquire about his appeal?

8 A No.

9 Q Based on your professional opinion and in your
10 experience, do you think a rational defendant would want to
11 appeal the sentence that he received under these
12 circumstances?

13 MR. HORMEL: Objection. Relevance.

14 THE COURT: Yeah, I'm not sure that's either
15 relevant or -- you'd have to establish some foundation for
16 Mr. Heuwinkel offering that opinion. I mean, I'm not saying
17 you can't; I'm just saying you need to.

18 BY MS. CLARK:

19 Q Mr. Heuwinkel, are you familiar with case law regarding
20 ineffective assistance of counsel?

21 A Somewhat familiar, yes.

22 Q Have you read the *Roe v. Flores-Ortega* case from the
23 Supreme Court decided in 2000?

24 A I can't recall if I've read that.

25 Q Just to go back about the plea agreement, the plea

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 agreement establishes the mandatory minimum as 15 years,
2 correct?

3 A Yes.

4 Q And that was the most favorable offer that was made to
5 Mr. Kavis in writing?

6 A Yes.

7 Q And you attempted to convince the government on numerous
8 occasions to dismiss the 924(c) count, correct?

9 A I did.

10 Q Your efforts were not successful?

11 A No.

12 Q You also discussed with the government on numerous
13 occasions your concerns about him being designated a career
14 offender, correct?

15 A Yes.

16 Q And you were able to get a concession in the plea
17 agreement that the government would rely upon the criminal
18 history that was provided in discovery rather than the actual
19 court documents, correct?

20 A Yes. I recall there was an error on the criminal history
21 sheet, and I argued that it wasn't fair to -- that he should
22 be bound by that representation.

23 Q Okay. And that error on the criminal history was that he
24 was convicted of a simple possession of dangerous drugs in
25 state court, correct?

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 A Yes.

2 Q And, in fact, looking at the actual judgment from the
3 Flathead County District Court, he had been convicted of
4 possession with intent to distribute dangerous drugs?

5 A Yes.

6 Q And, in fact, he had two of those convictions in Flathead
7 County?

8 A Yes, separated by an intervening arrest.

9 Q So if the government had not agreed in the plea agreement
10 to make that concession, Mr. Kavis could have been subjected
11 to a potential 30 years mandatory minimum under the career
12 offender?

13 A I didn't think that was a mandatory minimum. I thought
14 that was a guideline thing. But I don't, I don't know. I
15 mean, I know that the career -- if he was a career offender,
16 he would have been Criminal History Category VI as compared to
17 IV, and when you're up in that higher section of the
18 guideline, two categories of criminal history is very
19 significant.

20 Q And you are correct; I shouldn't say mandatory minimum of
21 360 months or 30 years, but that would be the base level for
22 the Court to consider during guide- -- or in the guidelines?

23 A Yeah. I mean, you'd start with that guideline
24 calculation, and I'd have to convince the Court that that was
25 unreasonable.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q And as we stated before, if Mr. Kavis had requested you
2 to file a notice of appeal, you would have filed it?

3 A Yes.

4 Q I just want to touch a little bit about the plea
5 agreement. Mr. Kavis had alleged in his filings that he only
6 discussed the plea agreement with you on February 25 of 2021.
7 Do you recall that?

8 A That's what he says? I don't recall what he says about
9 that.

10 Q Okay. Did you have phone conversations with him about
11 the plea agreement prior to that date?

12 A My recollection is that we were discussing pleas for at
13 least a month and that I had numerous conversations with you
14 and with him. I would speak with you, try to get you to move,
15 and then I'd talk to Leon about whether I had been successful
16 or not.

17 Q Okay. Do you know when he received a copy of the plea
18 agreement?

19 A The final one?

20 Q Correct, the written offer.

21 A I don't think that he would have received that until I
22 met him at Crossroads on the plea agreement deadline, because
23 I don't think I got it until the day before, and -- because we
24 were negotiating right up until that deadline, and I couldn't
25 email him documents.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q Okay.

2 A I couldn't give him attachments, basically.

3 Q All right. So if, in your declaration, you talked about
4 receiving an offer from the government on January 8, 2021 and
5 sending it to Mr. Kavis the next day, do you recall which plea
6 offer that was?

7 A January 8 would have been the first plea agreement that
8 you sent me.

9 Q Okay. Did that plea agreement, if you recall, contain a
10 provision for him to plead guilty to the 924(c)?

11 A Yes.

12 Q And did the plea agreement also contain a recitation of
13 the elements for that offense?

14 A I'm sure that it did.

15 Q And he signed the plea agreement on February 25, 2021?

16 A Leon did, yes.

17 Q And you waited to have him sign it on that date, hoping
18 to get a better offer; is that correct?

19 A That's right. As I testified, I think you and I were
20 talking right up until the end of the day on February 24.

21 Q And then as we heard, his change of plea date was March 9
22 of 2021?

23 A I -- whatever the record shows.

24 Q You prepared an affidavit, as we discussed, correct?

25 A Yes.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 Q And is that a true and accurate document as to what you
2 recall happened in this case during your representation of
3 Mr. Kavis?

4 A Yes, to the best of my recollection.

5 Q And does that declaration have specifics about your dates
6 and your contacts with Mr. Kavis as well as the content of
7 your discussions?

8 A It did, because I reviewed -- prepared that based upon my
9 detailed time records.

10 MS. CLARK: Judge, I would move for admission into
11 the record what I've marked as Government's Exhibit 1, which
12 is also attached to our brief, just to make sure that that is
13 in the record.

14 THE COURT: Any objection, Mr. Hormel?

15 MR. HORMEL: No, Your Honor.

16 THE COURT: It is admitted as Government's
17 Exhibit 1. It's also Exhibit 1-10 to Document 85-1.

18 (Exhibit 1 was received in evidence.)

19 BY MS. CLARK:

20 Q And, Mr. Heuvelinkel -- oh, sorry.

21 THE COURT: It's Exhibit 1 to Document 85 -- it is
22 Document 85-1, is what I mean to say.

23 MS. CLARK: Thank you.

24 THE COURT: So it's in the record.

25 MS. CLARK: All right. Thank you.

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 BY MS. CLARK:

2 Q Mr. Heuwinkel, you also provided the closing letter dated
3 July 21, 2021 to Mr. Kavis?

4 A I think I provided that to you and Steve.

5 Q Okay. Did you mail that letter to Mr. Kavis?

6 A My office did.

7 Q Would that have been mailed, to the best of your
8 knowledge, at the time that you had prepared the letter?

9 A Yes.

10 Q Would that have been mailed to him at the Missoula County
11 Detention Facility?

12 A Yes. I believe that's the address listed on the letter.

13 MS. CLARK: Judge, I would move for admission of
14 Government's Exhibit 2, which is the -- well, I guess I should
15 show to it Mr. Heuwinkel first.

16 THE COURT: Yeah.

17 MS. CLARK: May I approach --

18 THE COURT: You may.

19 MS. CLARK: -- to save time?

20 Do you want me to approach Amanda or the witness?

21 THE COURT: Why don't you go ahead and give it to
22 Amanda, and we'll publish it that way.

23 MS. CLARK: (Complied with request.)

24 THE CLERK: (Complied with request.)

25 ///

HEUWINKEL CROSS-EXAMINATION BY CLARK

1 BY MS. CLARK:

2 Q Mr. Heuwinkel, do you recognize this document?

3 A I do.

4 Q What is it?

5 A This is my letter that I wrote to Leon the day after the
6 sentencing.

7 Q Does this appear to be a true and accurate copy of the
8 letter that you sent to Mr. Kavis?

9 A Yes.

10 Q And would you like to see the following pages to confirm?

11 A Sure.

12 THE CLERK: (Complied with request.)

13 THE WITNESS: Okay. Are there attachments?

14 THE CLERK: (Complied with request.)

15 BY MS. CLARK:

16 Q Is this a true and accurate copy of what you sent to
17 Mr. Kavis after the sentencing?

18 A It appears to be, yes.

19 MS. CLARK: Your Honor, I'd move for admission of
20 Government's Exhibit 2.

21 THE COURT: Any objection, Mr. Hormel?

22 MR. HORMEL: No, Your Honor.

23 THE COURT: Government's Exhibit 2 is admitted.

24 (Exhibit 2 was received in evidence.)

25 MS. CLARK: Thank you. No further questions.

HEUWINKEL REDIRECT EXAMINATION BY HORMEL

1 THE COURT: Amanda, may I see it?

2 THE CLERK: Yes. (Handing.)

3 THE COURT: Any redirect, Mr. Hormel?

4 MR. HORMEL: Yes, Your Honor. Thank you.

5 (Discussion off the record at counsel table.)

6 REDIRECT EXAMINATION

7 BY MR. HORMEL:

8 Q Mr. Heuwinkel, on direct you were asked to look at the
9 indictment that was filed in this case, which is Document 9
10 filed with the Court, and to particularly look at the
11 allegations in Count III. Do you recall that?

12 A Yes.

13 Q And in the allegations alleged in Count III, the
14 indictment does allege that a firearm was possessed in
15 furtherance of a conspiracy to possess with intent to
16 distribute methamphetamine or possession with intent to
17 distribute methamphetamine, correct?

18 A It was either "or" or "and." I can't recall. But, yes.

19 MR. HORMEL: May I approach Amanda, Your Honor?

20 THE COURT: You may.

21 MR. HORMEL: (Handing.)

22 (Discussion off the record between Mr. Hormel and the
23 courtroom deputy clerk.)

24 BY MR. HORMEL:

25 Q Count III is on the monitor. Do you see that?

HEUWINKEL REDIRECT EXAMINATION BY HORMEL

1 A I do.

2 Q And it is in the conjunctive, correct, "or"?

3 A It says -- yeah.

4 Q And are you familiar with the law that "or" in an
5 indictment can also mean "and"?

6 A That sounds familiar, yes.

7 Q Okay. So that's kind of what you were referring to,
8 correct?

9 A I just couldn't recall which it said --

10 Q Okay.

11 A -- and you said -- and I wanted to make sure.

12 Q So you -- and in your testimony, you indicated, yes,
13 "possession with intent to distribute" is related to
14 "conspiracy to possess with intent to distribute." Do you
15 recall that testimony and your answer?

16 A Yes.

17 Q You are familiar with the case law that an overt act is
18 not required under 21 U.S.C. 846 conspiracies under the
19 Controlled Substances Act, correct?

20 A Yes, that sounds familiar, now that you mention it.

21 Q Okay. So it's your understanding that there doesn't have
22 to be an underlying substantive completed crime in order to
23 charge someone with an agreement to commit that underlying
24 substantive crime; is that correct?

25 A I think that sounds right as opposed to, what is it, a

HEUWINKEL REDIRECT EXAMINATION BY HORMEL

1 371 conspiracy that does require that?

2 Q Yes. Is that your recollection?

3 A Yes.

4 Q Okay.

5 A Yes.

6 (Discussion off the record at counsel table.)

7 MR. HORMEL: Your Honor, that concludes my questions
8 to Mr. Heuwinkel.

9 THE COURT: All right. May Mr. Heuwinkel be excused
10 at this time, Mr. Hormel?

11 MR. HORMEL: From my perspective, yes, Your Honor.

12 THE COURT: And, Ms. Clark, do you intend to call
13 Mr. Heuwinkel again in your case in chief?

14 MS. CLARK: Judge, I would ask that he remain.

15 THE COURT: All right.

16 You're excused for the time being, sir.

17 THE WITNESS: Thank you.

18 THE COURT: Can I ask you a question, a couple of
19 questions?

20 THE WITNESS: Sure.

21 THE COURT: Looking at Government's Exhibit 2 -- and
22 I don't know how this works, but I'm hoping maybe you do.
23 When you send mail to somebody that's in custody at the
24 Missoula County Detention Facility, is it placed in a separate
25 kind of envelope, or how does -- do you know mechanically how

1 the mail gets there and then how much time it takes for that
2 mail to get distributed to folks that are in custody there?
3 Do you have any knowledge of that?

4 THE WITNESS: I don't know. I know that we never
5 put staples in it --

6 THE COURT: Okay.

7 THE WITNESS: -- just kind of just -- because for
8 some reason we heard that that speeds it up if we don't. And
9 we just throw the looseleaf paper in and mail it like we would
10 any other document.

11 THE COURT: Any other document.

12 And would it have on the envelope "Privileged and
13 Confidential Attorney/Client Communications"?

14 THE WITNESS: Absolutely, yes.

15 THE COURT: So do you have any experience, when mail
16 is sent to an inmate, if that inmate has been transferred to
17 another facility, do you know what happens then to the mail
18 that you sent to them? Does it get forwarded, does it get
19 returned to you, or do they shred it? I mean, do you know?

20 THE WITNESS: I think both things have happened,
21 Judge. I have personally experienced mail coming back to my
22 office that says, you know, "Inmate is no longer here," or
23 whatever, and it comes back.

24 THE COURT: Okay. All right. And do you have any
25 personal experience with mail that you may have sent there

1 that then would be transferred up to the Cascade County
2 detention facility?

3 THE WITNESS: I think that's happened, Judge, but I
4 can't give you any specific examples.

5 THE COURT: Okay. All right.

6 THE WITNESS: And I don't know whether -- I don't
7 know what happened in this case.

8 THE COURT: Okay.

9 You discussed a lot of things with Mr. Kavis in this
10 letter of July 21. And in one of the paragraphs at page 3,
11 where you go through and talk about appeals and things of that
12 sort, you said, "With that said, you may still choose to file
13 an appeal, but I will not be able to represent you on such
14 appeal because, for the reasons stated above, my opinion is
15 that there is no legal basis to do so." And then you go on to
16 explain why you think an appeal would be pointless.

17 So you're indicating you wouldn't be able to
18 represent him, but if he had called you and said, "Let's file
19 the appeal," would you have filed it and then -- go ahead.

20 THE WITNESS: Judge, I would have filed a notice of
21 appeal and then tried to withdraw from the case.

22 THE COURT: Understood. Okay. That clarifies what
23 I needed to ask.

24 Ms. Clark, does that cause any additional questions
25 on your part?

HEUWINKEL RECROSS-EXAMINATION BY CLARK

1 MS. CLARK: Just one, Your Honor.

2 THE COURT: Yep. Go ahead.

3 RECROSS-EXAMINATION

4 BY MS. CLARK:

5 Q Was the letter that you sent to Mr. Kavis at the Missoula
6 County Detention Center returned to your office?

7 A Not to my knowledge.

8 MS. CLARK: That's all.

9 THE COURT: Mr. Hormel?

10 MR. HORMEL: I don't believe that has sparked any
11 additional questions.

12 THE COURT: All right.

13 Mr. Heuwinkel, you may stand down, subject to
14 recall.

15 Your next witness.

16 MR. HORMEL: Yes. Your Honor, just for some
17 housekeeping matters, I would ask, and with Ms. Clark's
18 agreement, the Court to admit the exhibits that were attached
19 to my amended motion.

20 THE COURT: All right. And those exhibits were --
21 why don't you state them for the record.

22 MR. HORMEL: Yes. Exhibit 1, which would have been
23 on Document 79 --

24 THE COURT: Okay.

25 MR. HORMEL: -- is Mr. Kavis's initial declaration.

3 THE COURT: Okay.

4 MR. HORMEL: Exhibit 3 is the actual plea agreement
5 that was filed.

6 And then Exhibit 4 is the offer of proof in support
7 of guilty plea, which is filed.

8 And then in the reply to the United States' answer
9 to motion for 2255, which would be Document 92, Mr. Kavis's
10 second declaration clarifying his first declaration was
11 attached as Document No. 92-1.

12 So I ask that all those be admitted just for the
13 record for this hearing.

14 THE COURT: All right.

15 Any objection, Ms. Clark?

16 MS. CLARK: No, Judge.

17 I would also ask that Exhibits 5 and 6 from the
18 Document 79-8 be admitted, which is the transcript of the
19 motion --

20 MR. HORMEL: Oh.

21 MS. CLARK: -- change of plea hearing.

22 MR. HORMEL: Yes. Sorry, Your Honor. I missed that
23 one. The transcript of the change of plea hearing, which is
24 Exhibit 6 -- or, excuse me --

25 MS. CLARK: Exhibit 5.

1 MR. HORMEL: -- Exhibit 5.

2 THE COURT: And then Ms. Clark is also moving
3 admission of Exhibit 6 from Document 79-8. Any objection to
4 that?

5 MS. CLARK: And I should say -- let me back up,
6 because that says 79 --

7 MR. HORMEL: I don't have an objection, but I'm
8 looking to see what that was.

9 MS. CLARK: That's the letter.

10 MR. HORMEL: Oh. Go ahead.

11 MS. CLARK: The December 8, 2021 letter to Judge
12 Christensen from Mr. Kavis.

13 MR. HORMEL: Yes, yes. Okay. That, for some
14 reason, didn't get into my nifty little notebook. Yes, no
15 objection.

16 THE CLERK: Are we calling those Defense Exhibits 1
17 through 6?

18 THE COURT: Well -- oh. All right. Let me just see
19 here.

20 (Discussion off the record between the courtroom deputy
21 clerk and the court reporter.)

22 MR. HORMEL: So, Your Honor, these are documents
23 that were filed --

24 THE COURT: Yes.

25 MR. HORMEL: -- under 79-1, -2, -3, -4, -5, -6, and

KAVIS DIRECT EXAMINATION BY HORMEL

1 -7, and those are the documents that were previously filed as
2 exhibits on the amended motion, and I'd ask the Court to
3 incorporate those as the exhibits for this hearing.

4 THE COURT: All right. So 79-1, -2, -3, -4, -5, -6,
5 and -7 are admitted for purposes of this hearing without
6 objection.

7 (Exhibits 79-1 through 79-7 were received in evidence.)

8 THE COURT: Does that cover everything?

9 MS. CLARK: Did you do the second declaration?

10 MR. HORMEL: And the second declaration, 92-1.

11 THE COURT: And 92-1 is made a part of the record of
12 this hearing as well --

13 MR. HORMEL: Thank you.

14 THE COURT: -- and admitted for that purpose without
15 objection.

16 (Exhibit 92-1 was received in evidence.)

17 MR. HORMEL: Your Honor, I call Mr. Kavis.

18 THE COURT: All right.

19 Mr. Kavis, if you would come forward, please, and
20 the clerk will administer an oath.

21 (Oath administered to the defendant/movant.)

22 WHEREUPON,

23 MR. LEON PAUL KAVIS, JR.,
24 called for examination by counsel for defendant/movant, after
25 having been first duly sworn to testify the truth, the whole

KAVIS DIRECT EXAMINATION BY HORMEL

1 truth, and nothing but the truth, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. HORMEL:

4 Q Mr. Kavis, would you state your name and spell your last
5 name for the record, please?

6 A Yes, sir. It's Leon Paul Kavis, Jr., K-a-v-i-s.

7 Q So I just want to just briefly go through sort of the
8 sequence of events relating to the plea agreement, the offer
9 of proof, and then get into the sentencing hearing and the
10 appeal issue later. Okay?

11 A Yes, sir.

12 Q Now you recall that you and Mr. Heuwinkel had
13 conversations in January and February relating to trying to
14 settle the case, correct?

15 A Yes, sir.

16 Q When was the first time you saw the final plea agreement
17 that was submitted in this case and filed?

18 A I believe it was the 25th.

19 Q Of?

20 A Of February. I don't believe he had -- and he had
21 explained that he had gotten it just shortly before. I mean,
22 there was just the one amendment in the plea agreement, but
23 everything else had been the same.

24 Q Do you remember what the amendment was?

25 A Man. I couldn't point it out.

KAVIS DIRECT EXAMINATION BY HORMEL

1 Q Okay.

2 A Maybe if I read it again, but I don't know for sure.

3 Q For the record, will you tell the Court what year that
4 was?

5 A 2021.

6 Q Okay. Do you recall -- do you have any recollection of
7 your conversations relating to Mr. Heuwinkel on the elements
8 of the 924(c) offense?

9 A Not specifically.

10 Q And do you recall any conversations specifically relating
11 to the terms of the written plea agreement that you had
12 received?

13 A He was correct in saying we went over -- he made sure I
14 read it line by line and asked me if I had questions.

15 Q Okay. In relation to the offer of proof, did you ever
16 get a physical copy of the offer of proof before you entered a
17 plea, a guilty plea?

18 A I, I do not know.

19 Q You have no recollection?

20 A I don't recall receiving anything other than my PSR, I
21 believe, while I was at -- while I was in Missoula from June
22 to sentencing, but I don't -- I can't specifically recall the
23 order [sic] of proof.

24 Q And if you would clear it up for the record, did you
25 appear for your guilty plea hearing by videoconference?

KAVIS DIRECT EXAMINATION BY HORMEL

1 A Yes, sir.

2 Q So you weren't face to face with Mr. Heuwinkel discussing
3 your guilty plea prior to the hearing?

4 A No, sir.

5 Q And do you remember if you ever -- I may have asked you
6 this, but remind me what your answer is. Did you ever -- you
7 don't recall physically getting a copy of the offer of proof
8 in support of your guilty plea, do you?

9 A Before pleading guilty?

10 Q Yes.

11 A I don't recall that at all.

12 Q And do you recall any discussions relating to that with
13 Mr. Heuwinkel?

14 A No.

15 Q So let's fast-forward to, let's fast-forward to your
16 sentencing hearing. And it's my understanding -- how did the
17 sentencing hearing come out, in your mind? And it's okay;
18 we're all --

19 A No offense there, but it went a little bit higher than
20 what I was expecting.

21 Q Okay. And do you -- was it -- what was it in relation to
22 what Mr. -- you thought Mr. Heuwinkel was expecting or hoping
23 for?

24 A You know, we were -- because of certain actions before
25 plea agreement, I thought there was a chance that I could get

KAVIS DIRECT EXAMINATION BY HORMEL

1 around ten, looking at having gone 12 years without getting in
2 trouble, things like that. And -- but Mr. Heuwinkel, right
3 before sentencing, made sure that I knew it wasn't possible to
4 get under 15. And he felt, he felt good about being able to
5 express to the Court why I should get no more than 15.

6 Q So after the imposition of the 20-year sentence, what was
7 your reaction?

8 A Well, so I -- my reaction started before I realized. So
9 what happened is he was reading Count I, and --

10 Q Who is "he"?

11 A Sorry. Your Honor was reading. I thought he was
12 sentencing me, and he sentenced me to 180 months, and I was a
13 little bummed. But then he continued and said, "And as for
14 Count III," and then I -- I mean, my heart sank. And that's
15 when I realized I had been given the 15 years for just the
16 first, first charge.

17 And so as I recall it, I can't remember if it was right
18 (indicating) or what, but I had said, when I realized it was
19 15 for that and I was gonna get another five, he had --
20 Your Honor hadn't even stopped speaking and I leaned over to
21 say, "Well, we can appeal that, right?" And Mr. --

22 Q Do you recall if Mr. Heuwinkel responded to that?

23 A So I hadn't even gotten the full sentence out and he was
24 kind of giving me the one-minute signal (indicating) because
25 the judge wasn't done talking yet, and that's -- and then it

KAVIS DIRECT EXAMINATION BY HORMEL

1 was -- I didn't -- then it was for a total of two hundred and
2 -- when I tuned back in, it was for a total of 240 months.
3 And then I remember nothing after that except for, you know,
4 standing up, Mr. Heuwinkel offering me his hand, telling me
5 good luck, and then being led out of the court.

6 Q Okay. So it was, your mention of wanting -- or thinking
7 about appealing was prior to the judge finishing the
8 announcing of your sentence?

9 A Yes.

10 Q And Mr. Heuwinkel gestured at you?

11 A He just held up his (indicating) finger.

12 Q So kind of like "Hang on"?

13 A Yeah.

14 Q Did, did Mr. Heuwinkel have an occasion to come visit you
15 at the Missoula County jail or detention center at any time
16 after your sentencing prior to your transport from that
17 facility?

18 A He did not. I know that I left pretty quickly.

19 Q And you heard the date, right? July 26?

20 A The 26th? Yes.

21 Q Yeah, the stipulation.

22 Where did you go after that?

23 A Cascade County, which is in Great Falls.

24 Q Great Falls.

25 A I was there for three days, and then I got shipped to

KAVIS DIRECT EXAMINATION BY HORMEL

1 Pahrump, Nevada. Was there for two days and got shipped to
2 Sheridan, Oregon.

3 Q And you've heard testimony about a letter that was
4 written to you from Mr. Heuwinkel that was admitted as
5 Government's Exhibit 2 for the purposes of this hearing.

6 A Yes.

7 Q Do you recall whether you received that letter?

8 A So when I looked at that letter, the only thing that
9 looked familiar to me --

10 Q When you looked at it, when did you look at it?

11 A Oh, sorry. When I looked at the copy that you had sent
12 me for -- during -- for this process, when you sent me a copy
13 of the letter that he had filed with this motion as his
14 response and his declaration, the only thing that looked
15 familiar to me was the judgment and commitment, because I --
16 he had sent that to me maybe a month after I got to Sheridan.
17 I had gotten the judgment and commitment, and I remember
18 needing that at that point.

19 Q Is there a specific reason you needed it?

20 A That would be prison politics.

21 Q Okay. I just wanted to clear that up.

22 So you asked him for a copy of it after you made it to
23 Sheridan?

24 A Yes, sir.

25 Q Okay. Of the judgment?

KAVIS DIRECT EXAMINATION BY HORMEL

1 A The J and C, yes.

2 Q Do you recall receiving that letter before leaving the
3 Missoula County jail on the 26th of July, 2021?

4 A I don't recall that letter, no.

5 Q Do you recall receiving that letter at any time in the
6 Cascade County jail before you left for Pahrump, Nevada?

7 A I received no mail in Cascade County --

8 Q Did you receive --

9 A -- or Pahrump.

10 Q -- mail in Pahrump?

11 A No, sir.

12 Q So the next mail you received is after you arrived at
13 Sheridan --

14 A Yes, sir.

15 Q -- as you recall?

16 A Yes, sir.

17 Q You, you read the contents of the letter where it
18 references that you would -- if you wanted to appeal, you
19 would have to file it with the United States District Court by
20 August 3. Do you recall that part of the letter?

21 A Yes, sir.

22 Q Had you read the letter, would you have had any idea how
23 to file a notice of appeal?

24 A No, sir.

25 Q This may be asked of you on cross, so I'll ask you now:

KAVIS DIRECT EXAMINATION BY HORMEL

1 Did you have access to a phone in Missoula County Detention
2 Center?

3 A Yes, sir.

4 Q And how does that work? Explain to the Court how phone
5 access works.

6 A It's available all day as long as you're not on -- as
7 long as we're not locked down, we can go to the phone, type in
8 your attorney's number; your attorney's number, they file it
9 and so that it's a free call.

10 Q So when you had phone conversations with Mr. Heuwinkel,
11 were they normally calls by you collect to his office, or were
12 they direct and prepaid?

13 A They were -- I believe they were collect to his office.
14 I think, I think that's part of whatever he gets paid for. I
15 don't know.

16 Q And --

17 A I never had to pay for phone calls to speak with him.

18 Q Okay. Was he pretty good at taking your calls?

19 A Yes --

20 Q Okay.

21 A -- if he wasn't in the courtroom and he was in his
22 office, he'd take my call. At least I think.

23 Q So were you under the impression that an appeal had been
24 filed?

25 A I believed -- I had thought that that would be filed, and

KAVIS DIRECT EXAMINATION BY HORMEL

1 I didn't know, because of that letter that you had showed
2 me -- like when I got to prison, I had no idea who -- like
3 what to do, and so I just -- I was talking to other people.
4 They told me, "Oh, you'll have an appellate attorney get a
5 hold of you while you're here."

6 And so I waited some time because it was during COVID,
7 and so then I -- they just -- somebody told me, "So write your
8 judge and find out who your attorney is, because he'll have
9 that," and so that's when I wrote Judge Christensen and asked
10 who my appellate attorney would be.

11 Q Okay. So you were under the belief that there was an
12 appeal filed.

13 A Yes, sir.

14 Q And then let's talk about receiving mail at the Missoula
15 County jail or detention center. What's the process there, if
16 you know? Did you ever receive mail?

17 A I received mail there. And I know I had received --
18 that's where I received my PSR from Mr. Heuwinkel. But I
19 don't really recall the process. I mean, I'm there now, but I
20 just got there yesterday so I haven't even seen what the
21 process is like for mail. I can't remember. I know it's all
22 different now. I think it's all on -- like on a kiosk or
23 something unless it's, unless it's from your attorney.

24 Q What about the Cascade County jail, do you know? Did you
25 receive any mail there?

KAVIS CROSS-EXAMINATION BY CLARK

1 A I did not receive any mail there, so I don't know.

2 Q And Pahrump?

3 A I think they just come in and they holler out. I just
4 seen that. I was just there this last Friday, and they just
5 kind of call out names.

6 If I remember right, now, I think it was the same thing
7 in Missoula. They'd come to the door and yell through a
8 little hatch if you had mail.

9 MR. HORMEL: All right. I believe that's all the
10 questions I have. Thank you.

11 THE COURT: Thank you, Mr. Hormel.

12 Ms. Clark, you may cross-examine.

13 CROSS-EXAMINATION

14 BY MS. CLARK:

15 Q Good afternoon, Mr. Kavis.

16 A Good afternoon.

17 Q You distributed methamphetamine in Missoula County,
18 correct?

19 A Yes, ma'am.

20 Q And you fronted methamphetamine to others to distribute
21 on your behalf, correct?

22 A Yes, ma'am.

23 Q And you expected them to provide payment to you once they
24 had sold that methamphetamine to pay you back for it, correct?

25 MR. HORMEL: Excuse me, Your Honor. I believe that

KAVIS CROSS-EXAMINATION BY CLARK

1 goes to the buyer/seller issue that has been waived.

2 THE COURT: It does. It's also a little context, I
3 assume, but --

4 MS. CLARK: Judge, it goes to the elements of the
5 924(c).

6 THE COURT: Right, and then the 924(c).

7 MR. HORMEL: Okay.

8 THE COURT: Overruled.

9 BY MS. CLARK:

10 Q So you expected payment in return from those individuals
11 that sold the meth?

12 A Yes.

13 Q And you possessed a firearm at all times when you were
14 distributing methamphetamine?

15 A I possessed a firearm at all times, period.

16 Q Okay. So that would include while you were distributing
17 methamphetamine?

18 A Yes.

19 Q And that would also include when you were giving drugs to
20 other people to sell on your behalf?

21 A Yes.

22 Q And when you were then again expecting money for the
23 drugs that you fronted to them to sell on your behalf?

24 A Yes.

25 Q Okay. So -- and in your words, you always had a firearm

KAVIS CROSS-EXAMINATION BY CLARK

1 with you?

2 A I was a Montanan who had just gotten his rights given
3 back to him. I absolutely did.

4 Q Okay. And when you did the change of plea with
5 Judge DeSoto, you didn't object to the fact that you possessed
6 firearms for protection while you were dealing
7 methamphetamine, correct?

8 A I believe there was something in there that I was not
9 happy with about the gun charge. I don't recall saying that I
10 used it for protection for dealing drugs.

11 Q Did you -- you received a copy of the transcript from the
12 change of plea hearing?

13 A Yes.

14 MS. CLARK: Amanda, may I please have our table?

15 THE CLERK: Yes. (Complied with request.)

16 BY MS. CLARK:

17 Q I'm gonna show you what is page 47, lines 19 through 21,
18 and this is from the offer of proof that the government
19 provided to the Court. Do you see that it says, "Witnesses
20 will testify that Mr. Kavis always carried a firearm on his
21 person as he deals large amounts of methamphetamine and that
22 he used the firearm for protection"?

23 A I did see that.

24 Q And then looking to the next couple pages, the Court
25 asked you if there was anything that you disagreed with. And

KAVIS CROSS-EXAMINATION BY CLARK

1 what Mr. Heuwinkel had said -- we're on pages 48 and 49.
2 Mr. Heuwinkel said that you disputed that you had 15 pounds of
3 methamphetamine and that you had large amounts of cash,
4 correct?

5 A Yes.

6 Q On page 49 of that transcript, you corrected the Court
7 and said, "I don't believe that Mr. Heuwinkel said anything
8 about the firearm," and, "I'm not sure we could consent" --

9 THE COURT: "Contest that."

10 BY MS. CLARK:

11 Q Or, excuse me, "contest that at all. Just the 15 pounds
12 and me being seen with 30 to \$50,000." That's what you said,
13 correct?

14 A Yes.

15 Q So you didn't dispute that you had possessed the firearm
16 while distributing meth for -- possessed the firearm for
17 protection while distributing meth?

18 A I didn't dispute that the government couldn't have
19 witnesses testify to that --

20 Q Okay.

21 A -- which I felt is different than disputing the fact that
22 I did use it for protection.

23 Q Okay. But you did have that with you, a firearm with you
24 when you were distributing meth?

25 A Not for protection.

KAVIS CROSS-EXAMINATION BY CLARK

1 Q But you did have that --

2 A Yes, ma'am.

3 Q -- in your possession?

4 A Yes, ma'am.

5 Q And when you were conspiring with others to distribute
6 meth?

7 A (Nodded head affirmatively.) That would fall under "all
8 of the time."

9 Q Okay. Are you now saying that your admitted conduct does
10 not fall within the scope of 924(c)?

11 MR. HORMEL: Your Honor, I'm gonna object to this.
12 That's getting into a legal issue that this Court has to
13 decide.

14 THE COURT: Sustained.

15 MS. CLARK: Okay.

16 BY MS. CLARK:

17 Q When you appeared before Judge DeSoto for the change of
18 plea, she thoroughly discussed your rights with you?

19 A Yes, ma'am.

20 Q And she went over the terms of the plea agreement again?

21 A Yes, ma'am.

22 Q And you had gone over that with Mr. Heuwinkel as well?

23 A Yes, ma'am.

24 Q Mr. Heuwinkel had sent you a previous version of the plea
25 agreement prior to the one that you signed, correct?

KAVIS CROSS-EXAMINATION BY CLARK

1 A Yes, ma'am.

2 Q You talked about a change that was made in the one that
3 you signed. Was that regarding the criminal history
4 calculation?

5 A I can't remember what the amendment was. I just remember
6 there being an amendment at the very end that got switched.

7 Q You do remember having conversations with Mr. Heuwinkel
8 about your criminal history?

9 A Yes, ma'am.

10 Q And having the discussions that you had, in fact, been
11 convicted of two separate counts of possession with intent to
12 distribute dangerous drugs in Flathead County?

13 A Yes, ma'am.

14 Q And that's true; is that correct?

15 A Yes, ma'am.

16 Q Okay. When Judge DeSoto asked you if Mr. Heuwinkel did a
17 thorough job making sure you understood all your options, you
18 said that he did?

19 A Yes, ma'am.

20 Q And you told Judge DeSoto that you never were coerced?

21 A Yes, ma'am.

22 Q Never told her that you were rushed?

23 A I don't believe I told her that.

24 Q Never told her that you were coerced?

25 A No.

KAVIS CROSS-EXAMINATION BY CLARK

1 Q Confused?

2 A No.

3 Q Dissatisfied with the plea agreement that you were
4 entering into?

5 A That's, that's something I wasn't allowed to bring up. I
6 was definitely dissatisfied with the plea agreement, but in
7 the discussion that Mr. Heuwinkel and I had, he had made it
8 clear what would happen if I didn't take the plea agreement
9 and what would happen if I announced displeasure of the plea
10 agreement during the change of plea process. Because as we
11 had talked, it basically would sound a lot like the judge is
12 trying to talk me out of it, but she's just making sure I know
13 my rights, and so I did not voice the displeasure in the
14 change of plea.

15 Q And when you say that you were displeased with the plea
16 offer, that was because you wanted to have the 924(c) count
17 dismissed, right?

18 A Yes, ma'am.

19 Q Okay. And you're aware that Mr. Heuwinkel contacted the
20 government multiple times in an attempt to do that?

21 A Yes, ma'am.

22 Q And the government just didn't do it, so your options
23 were either to proceed to trial or accept this plea agreement?

24 A Yes, ma'am.

25 Q And in reading that plea agreement, you understood that

KAVIS CROSS-EXAMINATION BY CLARK

1 the mandatory minimum that the Court could impose was a
2 15-year sentence?

3 A Yes, ma'am.

4 Q And Mr. Heuwinkel had discussed with you if you went to
5 trial that you would lose points -- or a reduction in points
6 or your offense level for acceptance of responsibility?

7 A Yes, ma'am.

8 Q And that that would increase your guideline sentence?

9 A Yes, ma'am.

10 Q Did he also talk to you about the fact that your criminal
11 history would subject you to a career offender designation?

12 A Well, we didn't feel that was the case, because for -- up
13 until the second PSR, we didn't think that that would be the
14 case at all, because it was the second PSR that came back with
15 possession with intent to distribute. And at that point, he
16 had said, "Well, we're really lucky that we can get the no
17 career criminal," but -- so that wasn't really something that
18 we talked a lot about.

19 Q You didn't have discussions with him that you had two
20 prior convictions for possession with intent to distribute?

21 A No. One of them had showed up as possession with -- or
22 just simple possession.

23 MS. CLARK: May I approach the clerk, Your Honor?

24 THE COURT: You may.

25 (Discussion off the record at counsel table.)

KAVIS CROSS-EXAMINATION BY CLARK

1 MS. CLARK: (Handing.)

2 BY MS. CLARK:

3 Q I'll show you what's been marked as Government's
4 Exhibit 3 or Proposed Exhibit 3. Do you recognize this?

5 A I do.

6 Q This is a copy of the judgment that you received in
7 Flathead County for Cause No. DC-04-013(B) and DC-05-106(B),
8 correct?

9 A Yes, ma'am.

10 MR. HORMEL: Your Honor, I'm gonna object. I don't
11 know what the relevance of this line of questioning is.

12 THE COURT: Overruled.

13 BY MS. CLARK:

14 Q Mr. Kavis, this document shows that you were, in fact,
15 convicted of two counts of possession with intent to
16 distribute?

17 A Yes, ma'am.

18 Q And you heard Mr. Heuwinkel testify here today that that
19 was a major concern in his discussions with you.

20 A That's what I heard him testify, yes.

21 Q And you're here to testify that that never came up during
22 your discussions?

23 A I don't remember it coming up until after the second PSR.
24 Like him and I had had conversations about it, and when I had
25 wanted to -- I had asked him to speak with the government

KAVIS CROSS-EXAMINATION BY CLARK

1 about changing the 924(c) to a 922(g), and he had said
2 something about if that were to happen, then they could come
3 at me with armed career criminal, and I thought that's what he
4 had said, and so I just kind of left it be at that.

5 But as far as his conversations with you, you had never
6 mentioned the career criminal, and so that was just something
7 that had been tabled until the second PSR came back, as far as
8 I can recall.

9 Q You did not discuss with Mr. Heuwinkel, on page 7 of your
10 plea agreement, that, "The United States does not oppose
11 defendant's request that [Sentencing Guideline] 4B1.1(a) does
12 not apply based on the criminal history disclosed in
13 discovery"?

14 A We went over every line of the plea agreement.

15 Q Did he explain that provision to you?

16 A I read it, and he asked if I had any questions, and I
17 don't think I had a lot of questions.

18 Q Because you understood that that meant that you were not
19 going to be a career offender, correct?

20 A Correct. So that . . .

21 Q You told Judge DeSoto, in your conversations with
22 Mr. Heuwinkel and his representation, that you pushed him to
23 his limit and even beyond.

24 A I believe he was frustrated on a regular basis, not
25 specifically with me but with the ability to get any movement

KAVIS CROSS-EXAMINATION BY CLARK

1 from the government.

2 Q Let me talk to you about the appeal. You had stated that
3 immediately after sentencing, the decision was made to appeal
4 the sentence. Do you recall that in your documents?

5 A I just testified as to what -- whether it was immediately
6 after. It was really after, immediately after 15 years for
7 Charge 1, Count I.

8 MS. CLARK: Amanda, may I please have my table?

9 THE CLERK: (Complied with request.)

10 BY MS. CLARK:

11 Q I'm going to show you an email that purports to be from
12 you to Mr. Hormel on March 27, 2023. Do you recognize that?

13 A Yes, ma'am.

14 Q Was that an email that he had sent to you regarding a
15 declaration in support of your motion today?

16 A Yes, ma'am.

17 Q You wrote back to Mr. Hormel, and you affirmed that this
18 was correct?

19 A Yes.

20 Q At paragraph 15, you stated in this declaration that
21 after the sentencing hearing, Mr. Heuwinkel and you discussed
22 an appeal and that you instructed Mr. Heuwinkel that you
23 wanted to file an appeal.

24 A That's correct.

25 Q Okay. And that's different from what you testified about

KAVIS CROSS-EXAMINATION BY CLARK

1 today?

2 A Is this the first declaration or the second?

3 Q The first declaration.

4 A Okay. Yeah, it's, it's different than what I testified
5 to today.

6 Q Okay. When you wrote this affidavit or agreed to this
7 declaration, what was the decision to appeal? What were you
8 going to appeal?

9 A There were -- on the sentencing? The direct appeal after
10 the sentencing?

11 Q Correct.

12 A There was multiple things. The 924(c) was one of them.
13 Not objecting to certain things that were in the PSR. I can't
14 remember what else it was.

15 Q What about the 924(c) did you want to appeal?

16 A Well, I still felt that it was a charge that I should not
17 have been made to plead guilty to.

18 Q You signed a plea agreement?

19 A Yes.

20 Q And you pled guilty to that charge?

21 A Yes.

22 Q When was this conversation?

23 A Which conversation?

24 Q The one that you said you made a decision to appeal the
25 sentence in the 924(c) and the no objection to certain things

KAVIS CROSS-EXAMINATION BY CLARK

1 in the PSR?

2 A That was a conversation I had with myself about that.
3 Mr. Heuwinkel and I had discussed, previous to sentencing,
4 what things we should argue and what he would argue, and we,
5 we kind of dumbed it down. And his reasoning, his reasoning
6 was basically that the more we make the judge do his job, the
7 harsher the sentence is gonna be.

8 THE COURT: That's not true, Mr. Kavis.

9 MS. CLARK: That is not true.

10 THE DEFENDANT/MOVANT: Didn't seem like it at the
11 end to me, either.

12 BY MS. CLARK:

13 Q You say it didn't seem like that at the end, either.
14 What do you mean by that?

15 A I just mean it felt like we didn't make the judge work
16 too hard, but I still kind of got some, got some time.

17 Q So this was a conversation you had with yourself about
18 wanting to appeal the 924(c) and the no objections to certain
19 things in the PSR?

20 A Yes.

21 Q Okay. I'm gonna refer you, for reference, to an email
22 from you to Mr. Hormel on October 23, 2023, and I would term
23 this as your second declaration. Would you agree with that?

24 A Yes, ma'am.

25 Q In this declaration, did you state that it was your

KAVIS CROSS-EXAMINATION BY CLARK

1 belief that you directed Mr. Heuwinkel to appeal the sentence?

2 A Yes, ma'am.

3 Q And you stated here that at the end of your hearing,
4 before the marshals escorted you out, you expressed your
5 dissatisfaction with the length of the sentence and stated,
6 "We're going to appeal, right?"

7 A Yes, ma'am.

8 Q And you said you intended for that question to convey to
9 Mr. Heuwinkel that you wanted to appeal your sentence.

10 A Yes, ma'am.

11 Q Today your testimony was that this conversation actually
12 occurred after Judge Christensen announced the sentence for
13 Count I.

14 A Yeah. I wouldn't say much of a conversation. It was
15 more just a (indicating), "We're gonna appeal, right?" and he
16 just (indicating).

17 Q And he gave you the, "Hold on. I'm listening"?

18 A Yes, ma'am --

19 Q All right.

20 A -- to quit. Basically telling me not to be
21 disrespectful, which is probably good advice.

22 Q So you actually didn't get that request conveyed to
23 Mr. Heuwinkel?

24 A If he didn't hear at all, I guess I did not get it
25 conveyed.

KAVIS CROSS-EXAMINATION BY CLARK

1 Q You didn't reach out to him after the hearing to follow
2 up on that conversation?

3 A I can't even explain to you the depression that came
4 immediately after. I didn't reach out to anybody.

5 Q Okay. You sent him other letters requesting documents?

6 A I, so when I got to Sheridan, FCI Sheridan, I asked for
7 the basic paperwork, yes.

8 Q Did you send letters to Mr. Heuwinkel requesting those
9 documents?

10 A Emails, yes.

11 Q Emails. Okay.

12 And he responded with the documents you requested?

13 A Yes, ma'am.

14 Q During -- or in those emails, you did not inquire about
15 an appeal?

16 A No, ma'am.

17 Q You didn't ask to check on the status of the appeal?

18 A No, ma'am. The direction that I had from the people that
19 were around me there just said that I wouldn't have the same
20 attorney. And during the, during the plea agreement process
21 and presentencing, he had explained to me that, you know, if I
22 wanted to file an appeal, that he wouldn't be my attorney.

23 Q But he was a contact for you.

24 A Yes.

25 Q And you worked well with him?

KAVIS CROSS-EXAMINATION BY CLARK

1 A I mean, he might not say that, but I -- yes.

2 Q I think he would say that. I think he was frustrated
3 with the government.

4 You didn't attempt to contact the Court, either, until
5 the letter of December 8, 2021, correct?

6 A Correct. Everybody just kind of told me to wait. I'd
7 get a letter, I'd get a letter, because of COVID, so.

8 Q And the people that were telling you that, is that what
9 we sometimes call the jailhouse lawyers?

10 A Yes, ma'am.

11 Q Can you tell the Court how you were prejudiced by this
12 plea agreement?

13 A I don't know what you expect me -- I don't know how to
14 answer that.

15 MR. HORMEL: Your Honor, I also think that's a legal
16 issue that the Court is gonna have to decide based on the
17 evidence in the matters.

18 THE COURT: Well, I think it's, I think it's
19 relevant if Mr. Kavis is able to tell me why he thinks he was
20 prejudiced. And he's answered that, that he doesn't, doesn't
21 know how to answer that question, so I'm not sure there's much
22 progress we can make there.

23 MS. CLARK: Correct.

24 THE DEFENDANT/MOVANT: Are you asking if I thought
25 you were picking on me?

KAVIS CROSS-EXAMINATION BY CLARK

1 MS. CLARK: No.

2 THE DEFENDANT/MOVANT: Because I don't --

3 THE COURT: No, the question was how you were
4 prejudiced by not having an appeal filed in the matter, I
5 believe.

6 No, the question was, "Can you tell" -- me -- "the
7 Court how you were prejudiced by this plea agreement?" That,
8 that was the question. If you feel there's something about
9 the plea agreement that you were -- that damaged you in some
10 respect, I think that was the gist of Ms. Clark's question.

11 THE DEFENDANT/MOVANT: Yeah, I don't, I don't know
12 how to really answer that. I didn't, I mean, I didn't like
13 the plea agreement.

14 BY MS. CLARK:

15 Q Okay.

16 A So -- but other than that.

17 Q Aside from not liking the plea agreement, you were aware
18 that the plea agreement gave you a benefit regarding your
19 criminal history calculation?

20 A The criminal history calculation? I think. I don't, I
21 don't recall feeling, I don't recall feeling like there was
22 any benefit to the, to the plea agreement.

23 Q Mr. Heuwinkel discussed with you the potential outcomes
24 if you proceeded to trial?

25 A Yes, yes.

KAVIS CROSS-EXAMINATION BY CLARK

1 Q And he discussed with you that the sentence -- or the
2 guidelines that the judge would apply would be much higher
3 than what they would be calculated as under the plea
4 agreement?

5 A Could apply, yes.

6 Q And while you were dissatisfied or not pleased with the
7 plea agreement because it did request a mandatory minimum
8 sentence for 15 years, you understood, in entering that plea
9 agreement, that if you did not, you could face a potentially
10 higher sentence?

11 A Yes, ma'am.

12 Q And you were hoping the Court would sentence you to the
13 15 years?

14 A Or less. Yes, ma'am.

15 Q Okay. And you understood, in the plea agreement, that
16 the Court was required to calculate the guidelines and
17 consider them in imposing an appropriate sentence?

18 A Yes, ma'am.

19 Q And you understand here today that if the Court was to
20 undo the plea agreement, you could face a potentially higher
21 sentence?

22 A Yes, ma'am.

23 MS. CLARK: Thank you. I have nothing further.

24 THE COURT: Any redirect, Mr. Hormel?

25 MR. HORMEL: No, Your Honor.

1 THE COURT: Mr. Kavis, you may return to counsel
2 table. Thank you, sir.

3 Mr. Hormel.

4 MR. HORMEL: I believe that rests Mr. Kavis's --

5 THE COURT: Presentation of evidence?

6 MR. HORMEL: -- presentation. Yes.

7 THE COURT: All right.

8 Well, I've read all the briefs, and I'm well aware
9 of the arguments that we've got as it relates to the remaining
10 two grounds supporting this petition, but if either of you
11 would like to sum up based on what we've heard here this
12 afternoon, you're more than welcome to do so.

13 Mr. Hormel, I'll let you go first since it's your
14 motion.

15 MS. CLARK: Judge, at this time I think we could let
16 Mr. Heuwinkel be excused.

17 THE COURT: Mr. Heuwinkel, you are excused.

18 MR. HEUWINKEL: Thank you.

19 MR. HORMEL: Your Honor, each issue actually boils
20 down to very few cases. The appeal issue is the *Flores-Ortega*
21 case from the Supreme Court which we're all pretty familiar
22 with by now.

23 And so the only section that I want to highlight
24 would be at 528 U.S. 470, page 480, where the general
25 principle of law is that the Supreme Court held that "counsel

1 has a constitutionally imposed duty to consult with the
2 defendant about an appeal when there is reason to think either
3 (1) that a rational defendant would want to appeal (for
4 example, because there are nonfrivolous grounds for appeal)."

5 The nonfrivolous ground for appeal in this case
6 would be a direct appeal based on the voluntariness of his
7 guilty plea, whether he entered a knowing, intelligent, and
8 voluntary plea in relation to the elements of the offense.

9 Which brings us to the Supreme Court case in
10 *Bradshaw v. Stumpf*, 545 U.S. 175 at 182-183. "Where a
11 defendant pleads guilty to a crime without having been
12 informed of the crime's elements, this standard is not met" --
13 the knowing, intelligent, and voluntary standard is not met --
14 "and the plea is invalid."

15 In this case, we have Count III both in the plea --
16 well, in the plea agreement, in the offer of proof for the
17 plea agreement, and at the change of plea hearing where the
18 elements of Count III are inadequate, legally inadequate,
19 because Mr. Kavis is not -- did not enter a plea to one
20 specific set or one specific offense and with a mixed and
21 matched sort of elements.

22 And I know that was probably -- might have been a
23 scrivener error. Might not have been a scrivener error. But
24 those elements are legally inadequate for a guilty plea
25 because the first element relates to a conspiracy to

1 distribute with intent to -- a conspiracy to distribute -- or
2 to possess with intent to distribute and a possession with
3 intent to distribute in Count -- or in the third element. So
4 contrary to -- or the plea was entered contrary to the -- his
5 knowledge of the full elements of the offense.

6 The second part of *Flores-Ortega* is "that this
7 particular defendant reasonably demonstrated to counsel that
8 he was interested in appealing. In making this determination,
9 courts must take into account all the information counsel knew
10 or should have known." And this is in relation to the duty to
11 consult.

12 It's our position that a letter drafted to a
13 defendant after sentencing without a face-to-face consultation
14 with the defendant, who is expressing dissatisfaction with the
15 sentence -- and, also, it sounds to me like there was a lot of
16 discussion relating to appeal even up until the time of the
17 change of plea. And Mr. Kavis's statement that he mentioned
18 the appeal or questioned whether or not they were gonna appeal
19 after you imposed the sentence on Count I is a reasonable
20 indication that an appeal -- the appeal topic was brought up.

21 The other indication that an appeal topic was
22 brought up was the fact that this letter, this closing letter,
23 is a rather detailed letter focusing on all the reasons why
24 Mr. Heuwinkel would advise him not to appeal and indicating,
25 "If you still want to appeal, here is how you do it." Or he

1 didn't say "still." "If you want to appeal, here is how you
2 do it."

3 I think the record indicates that there is a reason
4 for Mr. Heuwinkel to have believed that Mr. Kavis may want to
5 appeal, and, in that circumstance, the Supreme Court says
6 there's a duty to consult.

7 It's our position that a letter does not fulfill
8 that duty and that it really does require either a direct
9 communication -- consultation is direct communication -- with
10 the person. And there's only a 14-day period in which to
11 appeal, so it's really important for a defense attorney to, if
12 there's any issues relating to that, to meet with the client
13 and discuss whether or not the client wants to file an appeal,
14 whether or not there is any meritorious grounds.

15 So I would ask the Court to grant relief on both.
16 Mr. Heuwinkel was honest with the Court and indicated that he
17 may have made a mistake in not catching the error in the
18 elements of Count III, and, in that regard, Mr. Kavis then was
19 prejudiced by entering a guilty plea that was not knowing,
20 intelligent, and voluntary.

21 Thank you.

22 THE COURT: All right. Thank you, Mr. Hormel.

23 I'm assuming I advised Mr. Kavis of his right of
24 appeal at the end of the sentencing. Does anybody have a copy
25 of that transcript, that part of the sentencing transcript?

1 MS. CLARK: I don't, and I did mean to ask that
2 question.

3 THE COURT: All right. Well, I always do, so I'm
4 sure I did.

5 MS. CLARK: I'm sure you did, too, Your Honor.

6 Regarding the first -- well, what I'll call the
7 first but the second grounds regarding the elements of 924(c),
8 the defendant absolutely did enter a voluntary plea.

9 Mr. Heuwinkel and Mr. Kavis had many discussions about the
10 evidence that the government had. Mr. Kavis admitted on the
11 stand today that he always had a firearm with him, that that
12 was both when he was distributing methamphetamine and when he
13 was conspiring with others to distribute methamphetamine.

14 And while the indictment alleges both a conspiracy
15 and a possession with intent to distribute, to satisfy that
16 count, the offer of proof and the plea agreement were not as
17 clear as they could have been. However, the discussion that
18 they had was about the evidence. And both of those elements
19 and all of the elements, and under Mr. Kavis's statement
20 today, he was guilty under either theory.

21 In order to be successful, he has to show that
22 Mr. Heuwinkel was ineffective, that his representation fell
23 below a standard that is expected from attorneys, and that he
24 was prejudiced.

25 We heard that he was aware that he could have

1 received a greater sentence had he not entered this plea
2 agreement, and therefore no prejudice ensued to Mr. Kavis by
3 pleading guilty to the 924(c) count.

4 Regarding the request to appeal, Mr. Hormel relies
5 on *Flores-Ortega*, and the facts in that case are starkly
6 different from the facts in this case. In that case, there
7 was a clear request from the defendant to appeal the sentence.
8 There was a note in the defense attorney's file that said to
9 file an appeal, and the attorney did not do so.

10 Here, there is no clear conveyance to Mr. Heuwinkel
11 that Mr. Kavis wanted to appeal the sentence. There were many
12 discussions, as we heard from them, about whether or not to
13 appeal. Mr. Heuwinkel's declaration talks about it, too, the
14 advantages and the disadvantages to Mr. Kavis if he was to
15 appeal and the fact that he was waiving his right to appeal by
16 entering this plea agreement.

17 They consulted about the appeal numerous times, and
18 the fact that it didn't happen after the sentencing hearing is
19 not fatal to this case.

20 As Mr. Hormel pointed out, "Counsel has a
21 constitutionally imposed duty to consult, however, only when
22 there is reason to think . . . that a rational defendant would
23 want to appeal or . . . that this particular defendant
24 reasonably demonstrated to counsel that he was interested in
25 appealing."

1 The government submits that no rational defendant
2 would want to appeal this sentence. He received the benefit
3 of an incorrect criminal history that enabled him to avoid a
4 designation as a career offender, which would have made his
5 criminal history score a VI and would have made his guidelines
6 360 months to life.

7 We've heard three different versions from Mr. Kavis
8 regarding his request to Mr. Heuwinkel about an appeal. His
9 first declaration said he immediately discussed it after the
10 sentencing hearing, but then he admitted on the stand that was
11 in his mind. He said he wanted to appeal the 924(c) and some
12 of the items that Mr. Heuwinkel didn't object to in the PSR.

13 In the second declaration, again, he said he thought
14 that he had made that request or he believed that he made that
15 request. Again, Mr. Heuwinkel can't be expected to know what
16 Mr. Kavis is thinking, and, in fact, all of the conversations
17 leading up to this would lead him to have an opposite belief.

18 Then, third, today we heard that that request was
19 made while the Court was imposing the sentence, that Mr. Kavis
20 tried to express to Mr. Heuwinkel that he wanted to appeal
21 after the Court had announced the sentence for Count I, and at
22 that time Mr. Heuwinkel (indicating) gave him the "Shhh, pay
23 attention" sign and continued to listen to the Court. It's
24 not reasonable to expect that Mr. Heuwinkel heard what
25 Mr. Kavis was saying or that his wishes were clearly conveyed

1 to Mr. Heuwinkel.

2 And then he never reached out to Mr. Heuwinkel. He
3 told the Court on the stand that he just went into a deep
4 depression and he never reached out. He listened to the
5 jailhouse lawyers, but he also had made communication with
6 Mr. Heuwinkel, never requested an appeal, never inquired about
7 how his appeal was going.

8 I submit that that evidence shows the Court that he
9 never intended to appeal his sentence and that all of the
10 conversations that he had with Mr. Heuwinkel about not
11 appealing were heeded.

12 So based on the evidence before the Court today, we
13 would ask the Court to deny his motion on both grounds.

14 THE COURT: All right.

15 THE CLERK: (Handing.)

16 THE COURT: Okay. Anything further, Counsel?

17 MS. CLARK: I need to provide the clerk with
18 Exhibit 1.

19 THE COURT: Yes. Please do so.

20 Mr. Hormel, anything further?

21 MR. HORMEL: Just because the Court brought it up,
22 page 38 of the sentencing transcript, there was a notice of
23 appeal --

24 THE COURT: (Indicating.)

25 MR. HORMEL: Oh, you have it. Okay.

1 THE COURT: That was provided to me by Amanda, which
2 I assume JoAnn or somebody found this. We'll go ahead and
3 make this part of the record as well, which is page 38 of the
4 sentencing transcript where I expressly discussed with
5 Mr. Kavis his right of appeal, and he acknowledged verbally
6 that he understood his right of appeal.

7 All right. Anything further?

8 MR. HORMEL: Other than I believe the facts in this
9 case are almost -- not -- I won't say or use the word
10 "identical" but very similar to Ortega because the attorney in
11 that case -- or the defendant in that case said basically the
12 same thing. It was his understanding that Ms. Kops was going
13 to file a notice of appeal after a conversation they had and
14 that the lawyer didn't have any recollection of that
15 conversation. So I just wanted to make that clear for the
16 record.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 We'll be in recess.

20 (Proceedings were concluded at 15:29:19.)

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REPORTER'S CERTIFICATE

2 I, JoAnn Jett Corson, a Registered Diplomate
3 Reporter and Certified Realtime Reporter, certify that the
4 foregoing transcript is a true and correct record of the
5 proceedings given at the time and place hereinbefore
6 mentioned; that the proceedings were reported by me in machine
7 shorthand and thereafter reduced to typewriting using
8 computer-assisted transcription; that after being reduced to
9 typewriting, a certified copy of this transcript will be filed
10 electronically with the Court.

11 I further certify that I am not attorney for, nor
12 employed by, nor related to any of the parties or attorneys to
13 this action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at Missoula,
15 Montana this 8th day of March, 2024.

17 /s/ JoAnn Jett Corson

JoAnn Jett Corson
United States Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	USCA No. 24-888
)	
Plaintiff-Appellee,)	USDC No. 9:20-CR-053-DLC
vs.)	
)	
LEON PAUL KAVIS, Jr.,)	
)	
Defendant-Appellant.)	
)	

I. Introduction.

Leon Paul Kavis, Jr. (hereinafter Kavis) requests that this Court pursuant to Cir. Rule 22-1(d) issue a certificate of appealability on the district court's denial of his motion to vacate, set aside or correct his sentence timely filed pursuant to 28 U.S.C. § 2255, and the district court full denial of a certificate of appealability, attached in the Appendix (App.) at 1-14.

Kavis requests that this Court grant a certificate of appealability on the following issues.

1. Whether trial counsel's letter sent to the defendant after the sentencing hearing about the defendant's option to file an appeal satisfies the duty to consult with the defendant about an appeal as set out in *Roe v. Flores-Ortega*. 528 U.S. 470, 480 (2000)?

2. Whether a guilty plea for possessing a firearm in furtherance of a drug trafficking crime pursuant to 18 U.S.C. § 924(c)(1), based on a conspiracy to distribute methamphetamine, was involuntarily, where the elements of the offense in the plea agreement, the elements in the offer of proof, and the elements set out during the Rule 11 guilty plea colloquy failed to set out the correct the elements of the crime underlying the § 924(c)(1) offense.

II. Proceedings before the District Court.

On December 12, 2020, the government obtained a three-count indictment charging Kavis with conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846 in Count I, and possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) in Count II. Count III charged Kavis with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). App. 99-101.

On March 3, 2021, Kavis pleaded guilty to Counts I and III pursuant to a plea agreement. App. 136-37, 153-62. On July 20, 2021, the district court sentenced Kavis to a term of 15 years in prison on Count I and to a consecutive 5 years in prison on Count III. (Doc. 52, DC No. 9:20-cr-53-DLC). A direct appeal was not filed on behalf of Kavis by trial counsel.