No. 17-4372

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHRISTOPHER J. DEANS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH
Honorable Malcolm J. Howard
District Court No. 5:10-cr-00252-H-1

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

Appellant's jurisdictional statement is correct and complete.

STATEMENT OF ISSUES PRESENTED

1. Whether the appeal waiver in defendant's plea agreement forecloses this appeal.
2. Whether the district court acted within its discretion in denying defendant's motion to withdraw his guilty plea based on immaterial testimony in a separate proceeding more than six years after his plea.

STATEMENT OF THE CASE

On July 29, 2010, the government filed a criminal information in the Eastern District of North Carolina, charging defendant Christopher J. Deans with a single count of violating Section 1 of the Sherman Act, 15 U.S.C. § 1. JA 16-20. Defendant owned real estate investment companies, which bought real estate at foreclosure auctions that it then rented or sold for profit. JA 18. The government alleged that, at least from April 2003 to April 2005,[1] defendant was part of a conspiracy to

[1] Criminal prosecutions under the Sherman Act are subject to a five-year statute of limitations, *see* 18 USC § 3282(a), but defendant entered

suppress competition by rigging bids in real estate foreclosure auctions in the Eastern District of North Carolina. JA 16.

In the alleged scheme, defendant and his co-conspirators "agree[d] to refrain from full competitive bidding against each other," allowing them to purchase real estate at artificially low prices and depriving "financial institutions, lienholders, and/or homeowners" of "the full and competitive price" of their properties. JA 17. Specifically, the information alleged that defendant and his co-conspirators "refrain[ed] from filing upset bids against each other"[2] and "made payoffs to and received payoffs from[] each other in return for suppressing competition during the real estate foreclosure process." *Id.* They also "failed to disclose such payoffs on certain closing statements and other documents material to the foreclosure auction process." JA 17-18.

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into a series of tolling agreements with the government that extended the limitations period in his case to August 31, 2010.

[2] Under North Carolina law, bidding on properties subject to foreclosure must remain open for ten days following public auction at a state courthouse. N.C. Gen. Stat. § 45-21.27. During that time, anyone can submit an "upset bid" on the property, which must be at least 5% and $750 higher than the previous bid. *Id.* Filing an upset bid triggers a new ten-day window for subsequent upset bids, and so on. *Id.* When no further upset bids materialize and the latest ten-day window expires, the last person to bid wins the property. *Id.*

On September 10, 2010, defendant appeared in court to plead guilty to the charge. Before he did so, the court emphasized to every defendant present that day that it is "very important" to understand that "waiv[ing] the right to appeal your sentence in a plea agreement with the Government" will "severely restrict[]" the "ability to appeal whatever sentence is imposed." JA 27-28. Defendant's plea agreement included a broad appeal waiver. As part of the plea agreement, defendant "knowingly and voluntarily waive[d] the right[]" "to appeal his conviction" or "to appeal the imposition of sentence against him," except for "claims of ineffective assistance of counsel or prosecutorial misconduct." JA 55.

The court confirmed defendant's mental health, competency, and understanding of the proceedings, as did defendant's counsel. JA 31-32, 46. Defendant acknowledged that he had discussed his case and his plea with his attorneys; that he was satisfied with their representation, advice, and counsel; that he had read and understood the criminal information and plea agreement; and that he had heard and understood the court's explanation of his rights. JA 32-33, 38. Defendant

specifically acknowledged that he had discussed with defense counsel "the fact that there is an appeal waiver in this plea agreement." JA 39.

Defendant pleaded guilty to the one-count information against him, including the particulars of the conspiracy it described. JA 41-44 (arraignment), 56-58 (plea agreement). In accepting defendant's plea and plea agreement, the court found that defendant was "fully competent and capable" to plead guilty and that "his plea of guilty is knowingly and voluntarily made." JA 46.

Defendant's sentencing hearing was continued for several years, with the government's consent, due to many factors, including changes in counsel, ongoing discovery, defendant's continuing cooperation, and the trial of defendant's former business partner, Rodney Daw, in early 2017. *See* JA 4-13; *United States v. Daw*, No. 5:15-cr-92-H-1 (E.D.N.C.).

When defendant's sentencing hearing was finally set for May 10, 2017, he moved to withdraw his guilty plea under Federal Rule of Criminal Procedure 11(d). JA 68-75. Rule 11(d)(2)(B) allows a defendant to withdraw a guilty plea that a court has already accepted if "the defendant can show a fair and just reason for requesting the withdrawal" prior to sentencing. Fed. R. Crim. P. 11(d)(2)(B).

Defendant based his motion on the testimony of Todd Adams, a real estate attorney, during Daw's trial in February and March 2017. Daw was charged in March 2015 with one count of conspiracy to commit mail fraud affecting a financial institution, in violation of 18 U.S.C. § 1349.[3] Indictment, *Daw*, No. 5:15-cr-92-H-1 (ECF No. 1). Although Daw was charged under a different criminal provision than defendant was, their alleged offense conduct overlapped significantly, as they were part of the same general scheme.

Todd Adams, the real estate attorney, was a defense witness at Daw's trial. Tr. of Trial Test. (Day 3), *Daw*, No. 5:15-cr-92-H-1 (ECF No. 66). Adams testified that he was "not a criminal lawyer," that he did not "practice criminal law," that he "didn't understand why" state authorities began looking into the bid-rigging scheme, and that he never advised Daw that the scheme was wrong or illegal. *Id.* at 134-35. Daw did ask for Adams's legal opinion about the scheme—Adams "asked around" and "thought it would be okay," which he now concedes was "bad reasoning"—but not until after Daw was already participating

[3] This offense is subject to a ten-year statute of limitations. *See* 18 U.S.C. § 3293(2).

in the scheme. *Id.* at 162, 164. When asked whom else he discussed the legality of bid rigging with, Adams mentioned another person, but not defendant. *Id.* at 135. Daw was ultimately acquitted by jury verdict. Judgment of Acquittal, *Daw*, No. 5:15-cr-92-H-1 (ECF No. 71).

Adams's testimony at Daw's trial served as defendant's primary basis for moving the district court to withdraw defendant's guilty plea. JA 68-75. Defendant characterized Adams's testimony as "recently obtained exculpatory evidence under the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963)," JA 68, even though he conceded that it "was not in the Government's possession to turn over as discovery when Mr. Deans entered his plea agreement and guilty plea" and that, "[a]fter Daw's recent trial, counsel for the Government diligently produced the trial transcript containing this . . . evidence," *id.* at 70. In defendant's telling, "it is almost a certainty that Mr. Deans would have been acquitted at trial if he had called Adams as a witness." *Id*. at 73.

The government declined to respond to defendant's motion, and the district court orally denied it at the sentencing hearing six days later, on May 10, 2017. JA 79. At the sentencing hearing, defense counsel stated that the motion's "sole basis" was "the fact that Todd Adams . . .

waived his Fifth Amendment rights when he previously refused to interview with the Government, took the stand and testified that he thought that the forbearance agreements at issue in this case and Mr. Daw's case were lawful." JA 77-78. The court immediately rejected the suggestion that Daw must have been acquitted because of Adams's testimony. JA 78. "There is an absolute host of reasons why a jury comes back with a not guilty verdict in a case," the court explained. *Id.* The court was also disinclined to grant the motion because defendant and Daw "are not directly co-defendants," as they were subject to separate charges under different criminal laws. JA 78-79. Moreover, the court would not allow a plea withdrawal "just because another defendant charged for something similar was found not guilty." JA 79.

The court went on to hear the government's motion for a downward departure in sentencing defendant, due to his serving as "an early cooperator in this investigation." JA 84. Consistent with the government's request, the court imposed no term of imprisonment. JA 92. The court sentenced defendant to six months of probation, which it deemed "hereby satisfied in full" in light of defendant's release conditions the prior six years. JA 92-93 (sentencing hearing), 98

(judgment). The court concluded by advising defendant of general rights to appeal, noting that "[y]ou may have waived some of these rights in your plea agreement." JA 94. Judgment was entered on the docket two weeks later, on May 24, 2017. JA 13-14.

On June 7, 2017, defendant filed a notice of appeal "from the order denying his motion to withdraw his guilty plea . . . and the conviction and judgment." JA 101.

SUMMARY OF ARGUMENT

This appeal should be promptly dismissed because defendant's plea agreement contains a valid appeal waiver covering not just his sentence, but also his conviction. A motion to withdraw a guilty plea constitutes a challenge to the conviction, so this appeal, which arises from the denial of such a motion, is encompassed by defendant's appeal waiver. Defendant does not argue that his appeal waiver was in any way invalid or inapplicable: he does not claim it to be either unknowing or involuntary, nor the product of either prosecutorial misconduct or ineffective assistance of counsel. As a result, the Court need not reach the ultimate issue he presents; it should apply the plea agreement's appeal waiver and dismiss the appeal.

Defendant's argument that he should have been permitted to withdraw his guilty plea is unavailing in any event. He points to one witness's testimony at the trial of his former business partner more than six years after he entered the plea agreement. The testimony of that witness, a real estate attorney known to both men, would not have provided a basis for a good-faith defense for defendant and would have had little, if any, impact had defendant gone to trial. Moreover, not one of the factors that courts weigh in favor of withdrawal are present here. Defendant has offered no reason to doubt the district court's decision, much less conclude that the district court abused its discretion.

ARGUMENT

This appeal arises from defendant's unsuccessful attempt to withdraw his guilty plea more than six years after it was entered—after having fully served his sentence, and despite an appeal waiver in the plea agreement—based on immaterial testimony at the trial of defendant's former business partner in early 2017. Because the appeal waiver covers this appeal, this Court can and should dismiss it out of hand. But if the Court finds the waiver inapplicable for any reason, it

should hold that defendant's attempt to withdraw his guilty plea is groundless and was dispensed with appropriately by the district court.

I. This Appeal Is Barred by the Appeal Waiver in Defendant's Plea Agreement and Should Be Dismissed

As part of his plea agreement, defendant "knowingly and voluntarily waive[d] the right[]" "to appeal his conviction." JA 55. That waiver forecloses this Court's consideration of defendant's effort to withdraw his guilty plea and merits the dismissal of this appeal.

Whether a defendant has effectively waived the right to appeal is an issue of law that this Court reviews *de novo*. *United States v. Blick*, 408 F.3d 162, 168 (4th Cir. 2005).

This Court has repeatedly held that appeal waivers are generally enforceable. *E.g.*, *United States v. Cohen*, 459 F.3d 490, 494 (4th Cir. 2006); *United States v. Johnson*, 410 F.3d 137, 149-53 (4th Cir. 2005); *Blick*, 408 F.3d at 168 & n.4 (collecting cases); *United States v. General*, 278 F.3d 389, 400 (4th Cir. 2002); *United States v. Brown*, 232 F.3d 399, 402-03 (4th Cir. 2000); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990). This Court will enforce an appeal waiver on two conditions: "if the waiver is valid and [if] the issue sought to be appealed falls within the scope of the waiver." *Cohen*, 459 F.3d at 494.

In assessing the validity of an appeal waiver, this Court considers "'whether the defendant knowingly and intelligently agreed to waive the right to appeal,' an inquiry 'ultimately . . . evaluated by reference to the totality of the circumstances.'" *Cohen*, 459 F.3d at 494 (quoting *Blick*, 408 F.3d at 169). The record in this case establishes that defendant made a knowing and intelligent decision to waive his appellate rights. Defendant was represented by counsel at his arraignment, and he was satisfied with the legal work done on his behalf, including in relation to his plea. JA 32-33. Defendant confirmed that, before signing the plea agreement, he had "the opportunity to thoroughly read and review th[e] plea agreement with" defense counsel. JA 38. Defendant agreed that he understood "all the terms, language, words, and phrases used in th[e] plea agreement." *Id.* Defendant does not challenge the accuracy of these statements, and in any event, they are presumed to be accurate. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *United States v. Lambey*, 974 F.2d 1389, 1395 (4th Cir. 1992) (en banc) ("Statements of fact by a defendant in Rule 11 proceedings may not ordinarily be repudiated.").

The court found "as a fact" that defendant was "competent to appear, to understand the nature of these proceedings, and to ultimately enter a plea in these matters." JA 32. The court twice highlighted the serious repercussions of an appeal waiver, JA 27-28, 39, and defendant confirmed that he had discussed the waiver with defense counsel, JA 39. In concluding the arraignment, the court found that defendant's plea was "knowingly and voluntarily made" before accepting the plea and plea agreement. JA 46-47.

The totality of the circumstances establishes that defendant had a full understanding of the plea agreement, including the appeal waiver provision. In any event, he has not argued otherwise below or on appeal, so any such argument "is now properly considered waived." *United States v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012); *see* Appellant Br. 11 n.3.

Additionally, this appeal falls within the scope of the appeal waiver. Defendant agreed to waive his right "to appeal his conviction," reserving only the right to assert claims of ineffective assistance of counsel or

prosecutorial misconduct.[4] JA 55. All eight courts of appeals to have considered whether appealing the denial of a motion to withdraw a guilty plea constitutes an appeal of that conviction—including this Court—have concluded that it is. *See United States v. Alcala*, 678 F.3d 574, 578 & n.1 (7th Cir. 2012) (collecting cases from the Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits). Indeed, this Court has squarely held that a defendant "challenging the district court's denial of his motion to withdraw his guilty plea . . . is contesting his conviction," an action that falls "within the scope of the waiver" of "his right to appeal his conviction or sentence." *United States v. Garner*, 283 F. App'x 176, 177-78 (4th Cir. 2008) (per curiam) (unpublished).

The reasoning underlying that rule is simple: "if a defendant enters a guilty plea pursuant to a plea agreement, reference in the plea

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[4] The carve-out for claims of ineffective assistance of counsel and prosecutorial misconduct is not implicated here. Defendant has not cited the carve-out as a reason not to apply the appeal waiver, *see* Appellant Br. 11 n.3, nor has he raised any claims of ineffective assistance of counsel or prosecutorial misconduct. Although he refers to Adams's testimony at Daw's trial as "*Brady* evidence," *id.* at 20, defendant acknowledges that the government turned over the evidence as soon as it had it, *id.* at 7; JA 70, and admits that "there is no evidence of government or police misconduct," Appellant Br. 20.

agreement to the 'conviction' can only mean the guilty plea from which the judgment of conviction resulted." *United States v. Toth*, 668 F.3d 374, 378 (6th Cir. 2012). The rule "makes good sense as well," since enforcing appellate waivers "gives a defendant a means of gaining concessions from the government" and saves the government "the time and money involved in arguing appeals." *Id.* at 379.

Defendant provides no reason that the rule of eight circuits should not apply to him. He addresses the waiver only in a footnote, in which he claims that a waiver like his, covering appeals of "the *conviction and sentence*[,] . . . does not bar a challenge to the validity of the guilty plea." Appellant Br. 11 n.3 (emphasis added). But the cases he cites in support of that claim demonstrate why it is incorrect. *United States v. General*, *United States v. Lambey*, and *United States v. Marin* all involved appellate waivers that covered only the defendants' sentences, not their convictions. *See General*, 278 F.3d at 399 n.4; *Lambey*, 974 F.2d at 1393 n.*; *Marin*, 961 F.2d 493, 494 (4th Cir. 1992) (having nothing to do with withdrawing a guilty plea in any event). That distinction is crucial because the provision of the waiver covering the conviction is what reaches the guilty plea. *See Toth*, 668 F.3d at 378.

Defendant waived his right to appeal his conviction as well as his sentence, JA 55, so his waiver applies.

The only other case defendant cites is also no help. Defendant claims that challenging the denial of a motion to withdraw a guilty plea "implies a challenge to the validity of the appeal waiver," making dismissal unwarranted. Appellant Br. 11 n.3. But as eight circuits have held, that is not a general principle. Instead, the case defendant cites illustrates that the principle would only apply if a defendant links the two challenges together as part of a broader ineffective-assistance-of-counsel claim. *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam). Those are not the circumstances here, as defendant has made no claim of ineffective assistance of counsel at any point.

Accordingly, the Court should dismiss this appeal as barred by the appeal waiver in defendant's plea agreement.

II. There Is No Basis for Allowing Defendant To Withdraw His Guilty Plea

Even if defendant had not forfeited his right to this appeal, his argument for reversing the district court's decision is meritless. A defendant bears the burden of demonstrating to the district court that he has "a fair and just reason" to request the withdrawal of his guilty

plea. Fed. R. Crim. P. 11(d)(2)(B). If the district court denies the motion to withdraw, as it did here, then this Court reviews the denial for abuse of discretion. *United States v. Ubakanma*, 215 F.3d 421, 424 (4th Cir. 2000). In determining whether the trial court abused its discretion in denying a motion to withdraw a guilty plea, this Court considers six factors:

> (1) whether the defendant has offered credible evidence that his plea was not knowing or otherwise involuntary;
>
> (2) whether the defendant has credibly asserted his legal innocence;
>
> (3) whether there has been a delay between entry of the plea and filing of the motion;
>
> (4) whether the defendant has had close assistance of counsel;
>
> (5) whether withdrawal will cause prejudice to the government; and
>
> (6) whether withdrawal will inconvenience the court and waste judicial resources.

Id. (restating the original articulation of the factors in *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991)). The Court considers these *Moore* factors alongside the plea colloquy, and if the colloquy is adequate, the Court attaches a strong presumption that the plea is "final and binding." *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995).

A. There Is a Strong Presumption that Defendant's Plea Is Final and Binding

Defendant's plea colloquy below was more than sufficient to warrant the strong presumption that his plea is final and binding. The questioning at his Rule 11 hearing covered defendant's competency, his rights, his understanding of the proceedings, his comprehension of the plea agreement, his discussions and satisfaction with defense counsel, his awareness of the appeal waiver, his potential sentence, collateral consequences of his plea, and more. JA 30-46. It was lengthy and sound, and defendant has pointed to no deficiency in it. For that reason alone, this Court should strongly presume that the plea is final and binding and end its inquiry there. *Puckett*, 61 F.3d at 1099.

In any event, defendant does not advance an argument based on any of the six *Moore* factors—none of which weighs in his favor, and many of which weigh strongly against him. Because defendant has not challenged the validity or integrity of his plea[5] nor claimed legal

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[5] Although defendant concedes that "the plea was voluntary at the time it was made," Appellant Br. 14, he has appended a Due Process Clause argument to his brief, *id.* at 19-21, in which he claims that his plea may have been involuntary or unknowing because he did not have "the benefit of [knowing] what Adams would testify to under oath," *id.* at 21. But a defendant need not be clairvoyant in order to knowingly

innocence, *see* Appellant Br. 14 (criticizing the district court for "placing excessive focus on the defendant's failure to claim innocence"), the first two factors are inapplicable.

The other factors also cut against him. There was obviously a significant delay between the plea and the motion to withdraw: more than six years. Defendant has had professional private counsel at every stage of the proceeding, and he acknowledged that he was satisfied with his representation. JA 32-33. Withdrawing the plea would prejudice the government, not least because trying the case at this point will require witnesses to testify about conduct that commenced in April 2003, almost fifteen years ago. Reopening a settled case, with the sentence already served, would also waste judicial resources, particularly when the only reason to do so is to consider evidence as immaterial as Adams's testimony.

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enter a plea agreement; holding otherwise would undermine virtually every plea agreement on the books. Defendant has not cited any case finding a plea to be unknowing or involuntary because of evidence that did not exist at the time it was entered, much less to be a violation of the Due Process Clause.

Indeed, the collective weight of these considerations against defendant—reinforced by the strong presumption that his plea is binding—cannot be outweighed by defendant's implication that he could possibly fashion a good-faith defense out of Adams's testimony, were Adams to testify at defendant's trial. *See* Appellant Br. 17-18.

B. The Testimony Defendant Relies on Would Not Help Him

Even if Adams did testify at defendant's trial, that testimony would get defendant nowhere. First of all, neither a good-faith defense—which aims to refute proof that the defendant intended to break the law—nor a general *mens rea* defense that defendant did not know the forbearance agreements were unlawful, *see* Appellant Br. 17-18, is available for bid-rigging conspiracies like defendant's.

For a bid-rigging prosecution under the Sherman Act, "the fact that the defendant believed in good faith that what was being done was not unlawful is not a defense" because the government only needs to prove that the defendant knowingly joined a conspiracy to rig bids. ABA Section of Antitrust Law, *Model Jury Instructions in Criminal Antitrust Cases* 76 (2009) (citing jury charges used in various district courts). For criminal antitrust offenses, like a bid-rigging conspiracy, "the conduct is

illegal *per se*," and so "[t]he mere existence of a[n] agreement establishes the defendants' illegal purpose" and "further inquiry on the issue[] of intent . . . is not required." *United States v. Soc'y of Indep. Gasoline Marketers of Am.*, 624 F.2d 461, 465 (4th Cir. 1979); *see also United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 684 (5th Cir. Unit B Sept. 1981) (holding that, for a *per se* unlawful price-fixing conspiracy, an intent to fix prices "supplies the criminal intent necessary for a conviction of a criminal antitrust offense"); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979) ("[W]here the conduct is illegal *per se*, no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy."). As a result, "defendants can be convicted of participation in [antitrust] conspiracies without any demonstration of a specific criminal intent to violate the antitrust laws." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 6-7 (1st Cir. 1997).[6]

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[6] By contrast, a good-faith defense was available to Daw because he was charged with conspiracy to commit mail fraud affecting a financial institution. *See generally S. Atl. Ltd. P'ship of Tenn. v. Riese*, 284 F.3d 518, 531 (4th Cir. 2002); 2A Kevin F. O'Malley et al., *Federal Jury Practice & Instructions* § 47:16 (6th ed. updated Aug. 2017) ("The good faith of Defendant . . . is a complete defense to the charge of mail fraud . . . because good faith on his part is, simply, inconsistent with the

Because Adams's testimony is only relevant to a defense that is legally inapplicable, this Court need not assess its potential import for his case. But even if the defense were applicable, defendant would not be able to establish a good-faith defense based on his reliance on an expert's advice because the testimony would establish none of that defense's essential elements. Those elements are (1) "full disclosure of all pertinent facts to an expert" and (2) "good faith reliance on the expert's advice." *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981).

To begin with, Adams is not an expert. As a real estate attorney, Adams acknowledged that he was "not a criminal lawyer" and did not "practice criminal law." Tr. of Trial Test. (Day 3) at 134, *Daw*, No. 5:15-cr-92-H-1 (ECF No. 66). He "didn't understand why [he] was getting a notice" from the North Carolina Attorney General's Office when it began investigating the bid-rigging scheme. *Id.* at 135. And when asked whether he did "any research at all" about the legality of the

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intent to defraud . . . alleged in the charge." (some brackets and bracketed material omitted)). Daw was not charged with a *per se* illegal antitrust conspiracy.

scheme, Adams testified that "I didn't even know where to go, no." *Id.* at 162.

Moreover, there is no basis to believe that Adams possessed the necessary information about the scheme to assess its legality. Daw requested a reliance-on-counsel defense at his trial, but the district court denied it because the court was not satisfied that Daw had disclosed all pertinent facts to Adams before engaging in the offense conduct. *See* Appellant Br. 7. That is likely in part because Adams testified that Daw "was participating [in the scheme] before he asked" Adams whether it was legal. Tr. of Trial Test. (Day 3) at 162, *Daw*, No. 5:15-cr-92-H-1 (ECF No. 66).

Daw—and by extension his business partner, the defendant here—could not have relied in good faith on advice that had yet to be rendered. Defendant's potential claim of good-faith reliance is weakened even further by the fact that Adams testified that he had discussed legality with Daw, but not with defendant. *Id.* at 135.

In sum, Adams's testimony would not support a good-faith or *mens rea* defense for defendant at trial. The district court was correct, and

certainly within its discretion, to reject his motion to withdraw his guilty plea.

The fact that Adams's testimony is so immaterial to defendant's case renders inapposite the two out-of-circuit cases on which defendant relies. The new evidence at issue in *United States v. Garcia*, 401 F.3d 1008 (9th Cir. 2005), was "important" because it "raise[d] new questions about [the defendant's] involvement in the illegal activity." *Id.* at 1011. It "directly contradict[ed]" incriminating evidence and "distance[d the defendant] from the house" where contraband was seized. *Id.* In other words, the new evidence struck at the heart of the case against the defendant and threatened to topple the prosecution's theory entirely. By contrast, Adams's testimony, which arose in a separate case many years later, merely spoke to a possible defense that defendant might have raised at trial had he been charged with a different offense, and did so insufficiently for the reasons just given.

United States v. Morgan is likewise no support, even though it deals with a defense: the insanity defense. 567 F.2d 479, 493-94 (D.C. Cir. 1977). There again, new considerations arose within the proceedings of the defendant's case, as opposed to a separate and much later

proceeding, and the availability of the insanity defense had been hotly contested throughout those proceedings based on ongoing psychiatric evaluations and other procedural developments. *Id.* Here, there is no question whether the defense is available—it is not. And even if it were, defendant was entirely aware at the time of his plea the extent to which Adams could help him, not to mention the fact that Adams had a right to invoke the Fifth Amendment and also to waive it. Defendant could have endeavored to support a good-faith defense with other evidence, as well, but apparently decided he would not. Defendant had all the information he needed to enter his plea, and he has presented no persuasive reason to think otherwise.

In sum, the district court was plainly within its discretion to deny defendant's motion to withdraw his guilty plea, and so if this Court deems the appeal waiver inapplicable, it should affirm the district court's judgment.

CONCLUSION

This appeal should be dismissed as barred by the appeal waiver in defendant's plea agreement. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

/s/ Adam D. Chandler

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December 18, 2017

CERTIFICATE OF COMPLIANCE

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December 18, 2017

/s/ Adam D. Chandler
Attorney for the United States of America

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I, Adam D. Chandler, hereby certify that on December 18, 2017, I electronically filed the foregoing Brief of Appellee United States of America with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit using the CM/ECF System.

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December 18, 2017

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