CRIMINAL LAW — CONSPIRACY — SEVENTH CIRCUIT APPLIES BUYER-SELLER EXCEPTION TO GUILTY PLEAS BY DRUG DEALERS. — *United States v. Goliday*, 41 F.4th 778 (7th Cir. 2022).

The federal drug-conspiracy statute, 21 U.S.C. § 846, punishes an individual who merely *agrees* to commit a drug crime as if she committed the underlying crime.[1] In the case of a drug transaction, a strictly textual reading of § 846 could punish a buyer as if she were a seller, since she agreed to distribute the seller's drugs — to herself.[2] To shield people who use drugs from § 846 conspiracy liability, courts created the buyer-seller exception, known more generally as the *Gebardi*[3] rule.[4] The exception holds people who buy drugs for personal use liable only for possessing the drugs they bought, not for agreeing to distribute their dealers' drugs.[5] However, the circuits are divided on whether that exception also protects drug dealers who buy from large-scale suppliers.[6] Recently, in *United States v. Goliday*,[7] the Seventh Circuit held that a trial court committed plain error when it allowed a drug dealer to plead guilty to conspiracy to distribute controlled substances based on transactions with his supplier without meeting two requirements.[8] First, the record must show some additional factor indicating agreement beyond repeated, large-scale transactions.[9] Second, the defendant must understand the conspiracy charge.[10] By requiring an additional factor to accept a dealer-supplier conspiracy plea, *Goliday* reduces prosecutors' leverage against those accused of participating in the drug trade. But the extent of *Goliday*'s effect depends on its implementation by prosecutors, judges, and defense attorneys.

On September 27, 2018, Indianapolis police officers and federal Drug Enforcement Agency agents searched Thomas Lee Goliday's residence, where they found a handgun and drugs.[11] Goliday arrived during the

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[1] 21 U.S.C. § 846 ("Any person who . . . conspires to commit any offense [listed in 18 U.S.C. §§ 801–904] . . . shall be subject to the same penalties as those prescribed for the offense . . . .").

[2] *See* State v. Allan, 83 A.3d 326, 334–35, 334 n.6 (Conn. 2014).

[3] Gebardi v. United States, 287 U.S. 112 (1932).

[4] *See* Shu-en Wee, Note, *The* Gebardi *"Principles,"* 117 COLUM. L. REV. 115, 123–24 (2017).

[5] *See Allan*, 83 A.3d at 335–36.

[6] Keegan Murphy, Comment, *Buying Into Criminal Liability: Resolving the Circuit Split over the Buyer-Seller Rule in Federal Drug Conspiracy Jurisprudence*, 97 OR. L. REV. 183, 194–95 (2018). Additional-factor circuits, including the Seventh, hold that transactions alone do not constitute an agreement to distribute drugs, so to find drug-conspiracy liability, these circuits require additional evidence of an agreement. *Id.* Other circuits hold that transactions alone do constitute an agreement to distribute drugs and treat the buyer-seller rule as a narrow carveout to protect people who use drugs, but not drug dealers. *See id.* at 201–02; *Allan*, 83 A.3d at 335.

[7] 41 F.4th 778 (7th Cir. 2022).

[8] *Id.* at 785–86.

[9] *Id.* at 785.

[10] *Id.*

[11] *Id.* at 780.

search.[12] After "waiv[ing] his *Miranda* rights," he confessed that the drugs in his house were his.[13] "Apparently . . . in hopes of obtaining more lenient treatment," he further volunteered that he received two ounces of heroin each week from a supplier.[14] Based on this statement, Goliday was ultimately charged — among other drug-related charges — with conspiracy to possess with intent to distribute at least 1000 grams of heroin under § 846.[15]

In February 2021, Goliday pleaded guilty to the indictment at a hearing before the U.S. District Court for the Southern District of Indiana.[16] During the plea colloquy, Judge Hanlon asked the prosecutor to read the government's factual basis into the record and asked Goliday if the recited facts were true.[17] Goliday objected to the claim that he "had been receiving . . . in excess of 1,000 grams of heroin, which heroin he then re-sold to others."[18] In response, Judge Hanlon asked whether the prosecutor "would be able to prove those facts . . . beyond a reasonable doubt" if the case went to trial.[19] "I didn't have that much drugs," Goliday replied.[20] "I made a statement to the agents telling them that they can go bust this guy . . . [.] [T]hey turned around and used that to boost my quantity up and put me in a conspiracy . . . [.] [W]hen I first got locked up it wasn't a conspiracy at all."[21] Judge Hanlon elaborated: "[T]here is no allegation that you had 1,000 grams or more of . . . heroin. [The government] alleges that there was a conspiracy to possess with intent to distribute and to distribute heroin and that the conspiracy involved 1,000 grams or more."[22] Goliday accepted this as true.[23] On that basis, the district court found that Goliday understood the charges against him and that there was a sufficient factual basis for the plea.[24] Goliday subsequently appealed, asserting that the district court had committed a plain error.[25]

The Seventh Circuit vacated and remanded.[26] Writing for a unanimous panel, Judge Scudder[27] first held that the record did not show that

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[12] *Id.*

[13] *Id.* at 780–81.

[14] *Id.* at 781.

[15] *Id.*

[16] *Id.*; Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday app. at 22, *Goliday* (No. 21-1326).

[17] Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday, *supra* note 16, app. at 17–18.

[18] *Id.* app. at 18.

[19] *Id.*

[20] *Id.*

[21] *Id.* app. at 19.

[22] *Id.*

[23] *Id.*

[24] *Id.* app. at 19, 22–23.

[25] *Goliday*, 41 F.4th at 782.

[26] *Id.* at 787.

[27] Judge Scudder was joined by Chief Judge Sykes and Judge Brennan.

Goliday understood the conspiracy charge.[28] To accept a conspiracy plea under § 846, Judge Scudder explained, a judge must be satisfied that the defendant knows she cannot be convicted on the basis of a buyer-seller relationship alone.[29] Relying on the transcript of the plea colloquy,[30] Judge Scudder noted Goliday's confusion.[31] He warned that "[d]efendants may be particularly susceptible to misunderstanding the elements of a drug conspiracy" due to the "fine but crucial distinction" between repeated large-scale drug transactions, which would not constitute conspiracy under Seventh Circuit law, and some further agreement to engage in the drug trade together, which would.[32] Instead of showing Goliday's understanding, the record of the plea colloquy "reveal[ed] 'general confusion.'"[33] In particular, the record did not show that Goliday understood either that the conspiracy charge meant that he was accused of engaging in a wide-reaching partnership or that a conspiracy conviction would make him liable for the entire amount of heroin distributed by the alleged partnership.[34] Judge Scudder cautioned that courts reviewing dealer-supplier conspiracy pleas should "proceed[] a shade slower"[35] to ensure that the plea is "truly voluntary."[36]

Next, Judge Scudder concluded that even if Goliday had understood the charge, the record did not contain a sufficient factual basis to accept his guilty plea.[37] In *United States v. Johnson*,[38] the Seventh Circuit held that a pattern of repeated transactions on a scale that suggests the buyer is reselling the drugs does not, by itself, constitute conspiracy.[39] In such a case, "the evidence is essentially in equipoise," requiring some additional factor to break the deadlock.[40] While circumstantial evidence, including the extension of credit from seller to buyer, can support an inference of a conspiracy, "purchases alone will not suffice."[41] Judge Scudder extended the same additional-factor requirement to the pleading context, holding that a judge must find more than mere repeated, large-scale transactions to accept a guilty plea.[42]

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[28] *Goliday*, 41 F.4th at 784–85.

[29] *Id.* at 783.

[30] The plea colloquy is a constitutionally required "conversation regarding the consequences of the plea . . . meant to ensure that the plea is knowing and voluntary." Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012).

[31] *See Goliday*, 41 F.4th at 783.

[32] *Id.*

[33] *Id.* at 784 (quoting United States v. Schaul, 962 F.3d 917, 922 (7th Cir. 2020)).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 785 (quoting McCarthy v. United States, 394 U.S. 459, 465 (1969)).

[37] *Id.* at 786.

[38] 592 F.3d 749 (7th Cir. 2010).

[39] *Id.* at 755.

[40] *Id.*

[41] *Goliday*, 41 F.4th at 785; *see Johnson*, 592 F.3d at 755–56.

[42] *Goliday*, 41 F.4th at 785.

Finally, Judge Scudder determined that while not all improperly accepted pleas constitute plain error,[43] the acceptance of Goliday's plea did.[44] Plain errors must prejudice the defendant's substantial rights and "seriously affect[] the fairness, integrity, or public reputation" of the proceedings.[45] Goliday's substantial rights were affected because understanding the weakness of the government's conspiracy case against him could have led him to reconsider his bargaining position.[46] Judge Scudder further held that the district court's error was grave enough to affect the "fairness, integrity, or public reputation of the judicial proceedings,"[47] thus justifying the Seventh Circuit's intervention. Because the district court's error "may have allowed Goliday to plead guilty to an offense of which he is actually innocent," the panel vacated Goliday's conviction and remanded the case for further proceedings.[48]

Goliday has the potential to provide a meaningful constraint on prosecutorial power in the plea-bargaining context. Conspiracy liability empowers prosecutors by permitting criminal liability to attach to inchoate agreements and by permitting defendants to be held liable for the acts of their co-conspirators.[49] In particular, § 846 drug-distribution liability grants prosecutors a powerful bargaining chip in plea bargaining because transactional agreements are a necessary feature of the drug trade,[50] and in some jurisdictions, including the Seventh Circuit, defendants can be held liable for the quantity dispensed by the entire conspiracy.[51] There exist several reasons to doubt the merit of such expansive prosecutorial power against defendants.[52] *Goliday*'s express extension of the additional-factor requirement to the pleading context represents a restraint on such power over criminal defendants who do not go to trial — the vast majority of all defendants.[53] But whether *Goliday*'s heightened plea-acceptance standard has a lasting impact will depend on how it is implemented by prosecutors, judges, and defense attorneys.

The facts of *Goliday* exemplify the expansionary power of conspiracy liability, particularly as it relates to plea bargaining. The doctrine of

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[43] *See id.* at 782–83.

[44] *Id.* at 783.

[45] *Id.* (quoting United States v. Triggs, 963 F.3d 710, 714 (7th Cir. 2020)).

[46] *See id.* at 786.

[47] *Id.* (quoting *Triggs*, 963 F.3d at 714).

[48] *Id.* at 786–87.

[49] *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1309–10, 1340 (2003).

[50] *See, e.g.*, United States v. Long, 748 F.3d 322, 325 (7th Cir. 2014) ("[E]very drug deal involves an unlawful agreement to exchange drugs . . . .").

[51] Elizabeth McKinley, Note, *The Importance of Drug Quantity in Federal Sentencing: How Circuit Courts Should Determine the Mandatory Minimum Sentence for Conspiracy to Distribute Controlled Substances in Light of* United States v. Stoddard, 87 U. CIN. L. REV. 1145, 1147 (2019).

[52] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 569 (2001); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 581 (1977).

[53] *See* Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205 n.2 (2021).

conspiracy empowers prosecutors in three related ways: it permits criminal liability to attach to actions that indicate only inchoate agreement, it expands defendants' sentencing exposure by holding them liable for the entire conspiracy's actions, and it creates exceptions to conventional evidentiary protections.[54] Under § 846, prosecutors argued that Goliday's purchase of two ounces of heroin per week established an agreement to join his supplier's drug-distribution enterprise.[55] The charge increased his minimum sentence from ten to fifteen years.[56] Because he intended to redistribute the heroin he bought, Goliday would have been guilty on these facts in a jurisdiction without an additional-factor requirement.[57] While Goliday ultimately did not receive a plea deal,[58] conspiracy liability facilitates two related strategies used by prosecutors to gain power in plea bargaining, which Professor Andrew Manuel Crespo terms "piling on" (filing additional charges) and "overreaching" (filing more severe versions of specific charges).[59] Together, these tactics create unique leverage from which prosecutors "slid[e] down" to a more realistic charge, to which the defendant faces enormous pressure to plead guilty.[60]

Drug-distribution conspiracy liability is particularly capable of creating prosecutorial leverage. The drug trade depends on transactions, each of which involves "an unlawful agreement to exchange drugs."[61] Thus, simply dealing drugs exposes an individual to potential conspiracy liability depending on how her jurisdiction applies the buyer-seller rule. Further, some jurisdictions, including the Seventh Circuit,[62] hold defendants liable for the quantity that the entire conspiracy sought to distribute.[63] Goliday was charged with conspiracy to possess with intent to distribute over 1000 grams of heroin,[64] despite receiving no more than two ounces (fifty-seven grams) at any one time[65] and possessing no more than eighty grams when he was arrested.[66]

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[54] *See* Katyal, *supra* note 49, at 1340; Pinkerton v. United States, 328 U.S. 640, 646–47 (1946); FED. R. EVID. 801(d)(2)(E) (providing that statements "made by the party's coconspirator during and in furtherance of the conspiracy" are not hearsay).

[55] *Goliday*, 41 F.4th at 781.

[56] *Id.*

[57] *Cf.* United States v. Ivy, 83 F.3d 1266, 1285–86 (10th Cir. 1996).

[58] Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday, *supra* note 16, at 5.

[59] Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1316, 1338 (2018); *see also* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2304 (2006) ("[P]rosecutors can extract a guilty plea in almost any case, regardless of the real culpability of the defendant. . . . [M]any innocent defendants are willing to accept minor punishment in return for avoiding the risk of a much harsher trial result.").

[60] Crespo, *supra* note 59, at 1314 (emphasis omitted).

[61] *See, e.g.*, United States v. Long, 748 F.3d 322, 325 (7th Cir. 2014).

[62] *Id.*

[63] McKinley, *supra* note 51, at 1147.

[64] For the statutory basis of the charges, see 21 U.S.C. § 846.

[65] *See Goliday*, 41 F.4th at 781.

[66] *Id.* at 782.

The enormous power wielded by prosecutors in the drug-conspiracy pleading process is normatively undesirable. It shifts the authority to determine criminal outcomes from judges and juries to prosecutors, who secure guilty pleas — and thus determine an individual's culpability and sentence — in the vast majority of cases.[67] There is a growing consensus that this power and discretion is "quite possibly the most pressing challenge in American criminal justice."[68] Prosecutors seem increasingly comfortable engaging in pretextual prosecutions based not on an individual's specific wrongdoing, but on a judgment about her nature.[69] They may have a "punitive ideology"[70] or respond to political pressures to seek excessive punishment.[71] Finally, unlike trial judgments, prosecutors' plea agreements operate with virtually no oversight.[72]

While the Seventh Circuit had already adopted an additional-factor requirement for dealer-supplier conspiracies,[73] its extension of that requirement to the plea-bargaining context in *Goliday* represents an important restriction on prosecutorial power. The protection of an additional-factor requirement at trial is entirely bypassed if a prosecutor secures a guilty plea.[74] In the many cases in which a defendant pleads guilty instead of going to trial,[75] the additional-factor requirement means nothing unless somebody — the defendant herself, her attorney, or the judge — intervenes to assert the proper view of the law. Where, as in *Goliday*, the defendant and her attorney do not object, the judge is the "only . . . neutral actor[]" remaining, and her discretion must substitute for the jury's in protecting the defendant from improper liability.[76]

The Seventh Circuit's key intervention in *Goliday* is requiring trial judges to engage in heightened factual screening of pleas.[77] In holding that a judge commits a plain error when she accepts a conspiracy plea on the basis of repeated transactions without any additional factor, *Goliday* provides a second level of protection against spurious conspiracy charges. This protection is best understood in comparison to *United*

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[67] *See* Alschuler, *supra* note 53, at 205 n.2.

[68] David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 452 (2018); *see also* Crespo, *supra* note 59, at 1304–05.

[69] Sklansky, *supra* note 68, at 454.

[70] *Id.* at 458.

[71] *See* Stuntz, *supra* note 52, at 534.

[72] *See* Sklansky, *supra* note 68, at 459; Crespo, *supra* note 59, at 1304–05.

[73] *Goliday*, 41 F.4th at 785 (citing United States v. Johnson, 592 F.3d 749, 755 (7th Cir. 2010); United States v. Colon, 549 F.3d 565, 569 (7th Cir. 2008)).

[74] *See* Crespo, *supra* note 59, at 1339.

[75] *See* LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING 1 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/SN9K-FU9G].

[76] Crespo, *supra* note 59, at 1340.

[77] *See id.* ("[A]ny procedural check on factual overreaching must come . . . from . . . judges, exercising some form of pretrial judicial review.").

States v. Neal,[78] an earlier case in which the Seventh Circuit found that contested evidence of the seller-defendant engaging in regular transactions of "resale quantities" on credit was a sufficient factual basis to accept a guilty plea.[79] *Neal* left open the question of which facts would be insufficient to accept a conspiracy plea arising from a dealer-supplier relationship.[80] By stating that repeated, large-scale transactions alone are insufficient,[81] *Goliday* sets a factual standard that must be met by judges reviewing pleas.

Goliday's impact on prosecutorial power will depend on its implementation by prosecutors, judges, and defense attorneys. Prosecutors may apply two related tactics in response to a heightened additional-factor standard at pretrial review: fact bargaining[82] and charge bargaining.[83] In a fact-bargaining strategy, prosecutors offer some benefit to the defendant in return for the defendant's acceptance of contestable assertions in the factual basis statement.[84] Such manipulation would limit *Goliday*'s protections by enabling prosecutors to spin a half-truth into an additional factor that would permit a judge to accept a guilty plea. In a charge-bargaining strategy, prosecutors could knowingly file high-sentence conspiracy charges that would fail *Goliday*'s requirements, then trade them away for some other concession by the defendant.[85] Neither tactic is unique to drug-conspiracy liability, but advocates should be particularly concerned about charge bargaining because it threatens to wholly circumvent *Goliday* by enabling prosecutors to gain the pleading leverage of conspiracy without being subject to judicial review.[86]

The primary protection against such improper leverage is the defense attorney, who should discern, during bargaining or at least by the time a defendant pleads guilty, that the conspiracy charge against her client is spurious. There is no indication in the record that Goliday's lawyer raised the issue of the lack of an additional factor during Goliday's plea colloquy,[87] but if she had, Goliday likely would not have been able to plead guilty.[88] There is reason not to treat this error as an outlier: while

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[78] 907 F.3d 511 (7th Cir. 2018).

[79] *Id.* at 516.

[80] *See id.* at 516–17.

[81] *Goliday*, 41 F.4th at 785.

[82] *See generally* Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673 (2022); William T. Pizzi, *Fact-Bargaining: An American Phenomenon*, 8 FED. SENT'G REP. 336 (1996).

[83] *See* Crespo, *supra* note 59, at 1353.

[84] *See* sources cited *supra* note 82.

[85] *See* Crespo, *supra* note 59, at 1353.

[86] *See id.* The charge would be dropped before pleading, avoiding factual screening.

[87] *See* Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday, *supra* note 16, at 5–7.

[88] *See Goliday*, 41 F.4th at 786.

Goliday was represented in pleading by a private lawyer,[89] as many as eighty percent of criminal defendants are represented by public defenders.[90] Across the United States, indigent defense is "grossly inadequate."[91] Professor Eve Brensike Primus attributes this failing to resource constraints and excessive caseloads, oversight by the legislature and the judiciary that impacts public defenders' independence, and a lack of training or supervision.[92] Together, these factors suggest that the kind of oversight that occurred in *Goliday* may, regrettably, happen frequently enough to caution against relying on defense attorneys alone.

Goliday's holding relies on judges to provide an additional protection for defendants. The Seventh Circuit now requires judges to go through a similar analysis as a defense attorney would: setting the facts against the relevant law to determine whether the plea is supported. This means that trial judges must actually screen for the additional-factor requirement in pleading for the law to have effect. In addition to the tactics that prosecutors might use to frustrate such screening, trial judges themselves might simply fail to follow *Goliday* in future pleading contexts. However, one encouraging fact is that following the Seventh and Ninth Circuits' adoption of additional-factor rules, courts have required a greater showing than mere transaction at trials,[93] suggesting that trial courts are responsive to such reframings of the law. Additionally, there exists evidence of trial judges being sensitive to the factual-basis requirement in pleading generally,[94] so there is reason to be confident in *Goliday* meaningfully shifting judges' orientations.

As Thomas Lee Goliday said, his relationship to his supplier "wasn't a conspiracy at all."[95] What *Goliday* offers is an additional safeguard for individuals who, on the sole basis of transactions with their suppliers, face conspiracy charges that could not be proven at trial. If judges and defense attorneys react properly after *Goliday*, defendants will be less susceptible to the power that § 846 grants prosecutors. This would represent a meaningful step toward fairer pleading and sentencing.

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[89] *See* Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday, *supra* note 16, at ii, app. at 1.

[90] Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121 (Erik Luna ed., 2017).

[91] *Id.*

[92] *Id.* at 123–24, 126–27.

[93] *See, e.g.*, United States v. Chavez-Macias, No. 16-CR-67, 2017 WL 5349538, at *1 (D. Idaho Nov. 13, 2017); United States v. Moreno, No. 13-CR-576, 2016 WL 1555581, at *5 (N.D. Ill. Apr. 18, 2016).

[94] *See, e.g.*, United States v. Hernandez-Rivas, 513 F.3d 753, 757–58 (7th Cir. 2008).

[95] Brief & Required Short Appendix of Defendant-Appellant, Thomas L. Goliday, *supra* note 16, at 7.