No. 19-5346

IN THE SUPREME COURT OF THE UNITED STATES

JOSE MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Fifth and Sixth Amendment rights by considering conduct that it found by a preponderance of the evidence, but that the jury had not found beyond a reasonable doubt, in determining his sentence.

2. Whether the district court abused its discretion by not giving a "buyer-seller" instruction to the jury.

3. Whether the district court erred by repeatedly noting, in overruling defense counsel's objections to various testimony, that counsel would have the opportunity to cross-examine the government's witnesses.

4. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to commit drug trafficking.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D.N.Y.):

United States v. Martinez, No. 10-cr-233 (Aug. 29, 2016)

United States Court of Appeals (2d Cir.):

United States v. Martinez, No. 16-3142 (Apr. 25, 2019)

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-6) is not published in the Federal Reporter but is reprinted at 769 Fed. Appx. 12.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2019. The petition for a writ of certiorari was filed on July 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine, and to manufacture, possess with intent to distribute, and to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(B) (2006), and 21 U.S.C. 846 and 851. Judgment 1. He was sentenced to life imprisonment, to be followed by eight years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-6.

1. From 2007 to 2008, petitioner sold kilogram quantities of cocaine to Quincy Turner, who resold that cocaine to others, including Quentin Leeper. Presentence Investigation Report (PSR) ¶¶ 8, 12-13, 18-20. Turner began purchasing the cocaine from petitioner to resell to Leeper after Leeper's previous source was arrested. PSR ¶ 12. Petitioner sometimes fronted Turner the cocaine on consignment; Turner then would sell the cocaine to Leeper and use the proceeds to repay petitioner. PSR ¶¶ 18, 20. Leeper in turn would sell cocaine to various individuals, including members of his family, who themselves would resell it. PSR ¶¶ 9-10. One of Leeper's cousins testified that he purchased his cocaine from Leeper, who purchased it from Turner, who purchased it from petitioner. PSR ¶ 12. Turner, Leeper, and others involved in the drug conspiracy were arrested in early 2008. PSR ¶ 16.

Turner told police that he had purchased large quantities of cocaine from petitioner. PSR ¶¶ 18, 20.

After Turner's arrest, petitioner "thought Turner was 'snitching' on him." Pet. C.A. App. A69. Petitioner thus solicited an associate "for a contract to kill Turner." Ibid. That associate and another person eventually recruited four people to murder Turner; those four met with petitioner, "who gave them Turner's name, description, and address," along with $20,000. Ibid. The four men went to Turner's house, but did not find him there; they later again met with petitioner, who "directed them to an automotive garage where Turner worked." Ibid. This time they found Turner and shot him to death. Ibid. They then called petitioner and "told him to watch the news for confirmation that they had killed Turner as directed." Ibid.

2. Petitioner was charged with one count of conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine, and to manufacture, possess with intent to distribute, and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. (b)(1)(A) and (B) (2006), and 21 U.S.C. 846; four counts of witness-tampering related to the murder of Turner, in violation of 18 U.S.C. 1512 and 1513 (2006); and one count of possessing and discharging a firearm in furtherance of a drug trafficking crime and crimes of violence, in violation of 18 U.S.C. 924(c) (2006). Redacted Indictment 1-5.

During trial, the government moved in limine to preclude a so-called "buyer-seller" jury instruction, which would have stated "that a simple drug transaction between a buyer and seller is not sufficient, standing on its own, to support a conspiracy conviction." D. Ct. Doc. 512, at 2 (July 1, 2014). The government explained that the "rationale" behind such an instruction -- that "in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy" -- was inapplicable here. Ibid. (quoting United States v. Medina, 944 F.2d 60, 65 (2d Cir. 1991), cert. denied, 503 U.S. 949 (1992)). In particular, the government argued that a buyer-seller instruction would be inappropriate because the evidence showed "continuous transactions between [petitioner], Quincy Turner and Quentin Leeper, involving the sale and fronting of wholesale quantities of cocaine." Id. at 3-4. At the charge conference shortly before the close of evidence, the district court agreed that a buyer-seller instruction was unwarranted, explaining that it did not "fit[]" the evidence presented at trial in light of "the quantity" and the "large volume exchanges" of drugs, from which "it can be reasonably inferred that" the drugs were "going to be distributed or dispensed." 7/3/14 Tr. 5240-5242.

The jury found petitioner guilty on the drug-conspiracy count, but not guilty on the witness-tampering and firearm counts. Verdict 1-13. The Probation Office's presentence report

recommended a base offense level of 43 for the drug offense, which reflected that the offense had involved Turner's murder. PSR ¶ 34; see Sentencing Guidelines § 2A1.1 (2015). The resulting advisory guidelines range was life imprisonment. PSR ¶ 65. The district court overruled petitioner's objection to the Guidelines calculation. See Pet. C.A. App. A67-A72. The court found by a preponderance of the evidence that petitioner was "directly responsible for the death of Quincy Turner." Sent. Tr. 50. The court sentenced petitioner to life imprisonment. Judgment 2; Sent. Tr. 51.

3. The court of appeals affirmed. Pet. App. 1-6.

The court of appeals rejected petitioner's contention that the district court erred in considering petitioner's involvement in Turner's murder when determining the sentence. The court of appeals observed that this Court's decision in McMillan v. Pennsylvania, 477 U.S. 79 (1986), "dictates that use of 'the preponderance standard by a sentencing judge satisfies due process,'" Pet. App. 5 (brackets and citation omitted), and that reliance on conduct found by a preponderance does not violate the Fifth or Sixth Amendments under this Court's decisions in United States v. Watts, 519 U.S. 148 (1997) (per curiam), and United States v. Booker, 543 U.S. 220 (2005), see Pet. App. 5. The court of appeals also found no clear error in the district court's finding "that [petitioner] was 'directly responsible for the death of Quincy Turner.'" Ibid. (citation omitted).

The court of appeals also determined that the district court permissibly denied petitioner's request for a buyer-seller jury instruction because "the buyer-seller theory of defense did not have a 'basis in the record that would lead to acquittal.'" Pet. App. 3 (citation omitted). The court of appeals found "ample evidence that [petitioner] had a stake in additional transfers of drugs beyond the transfers to Turner." Ibid.

The court of appeals additionally rejected petitioner's suggestion that the district court improperly shifted the burden of proof when, in response to defense counsel's objections, it "repeatedly made comments to the effect of 'overruled, you can cross-examine if you choose to do that.'" Pet. App. 3 (citation omitted). The court of appeals explained that under Federal Rule of Evidence 103(c), "the court may make any statement about the character or form of the evidence, the objection made, and the ruling," Pet. App. 4 (brackets and citation omitted), and that "[v]iewing the 5,793-page transcript as a whole, the district court's explanatory comments regarding cross examination were not so prejudicial as to deny [petitioner] a fair trial." Ibid. The court of appeals further explained that "[a]ny prejudicial effect * * * was mitigated by the district court's repeated instructions to the jury throughout the trial that the burden of proof remained on the government at all times" and by "the district court's final instruction to the jury regarding the burden of proof and presumption of innocence." Ibid.

The court of appeals likewise rejected petitioner's claim that the government had failed to introduce sufficient evidence to establish that he knowingly joined the conspiracy. Pet. App. 2-3. The court explained that its inquiry on a sufficiency challenge was limited to determining "whether any rational trier of fact could have found beyond a reasonable doubt that [petitioner] knowingly became a member of the conspiracy." Id. at 3. The court observed that "the jury was presented with evidence that [petitioner] sold wholesale quantities, that he 'fronted' kilos of cocaine to Turner, that he had approached Turner and offered to sell him better quality cocaine than he was currently receiving at a lower price, and that he would receive cash payments from Turner in which Turner and Leeper had pooled money." Ibid. The court determined that "[t]his evidence, taken together, suffices to establish that [petitioner] was not 'genuinely indifferent to the possibility of retransfer' [of the cocaine], but rather there was a 'shared intention between the transferor and transferee that further transfers occur.'" Ibid. (citation omitted).

Judge Pooler concurred, stating her view that "using acquitted conduct to enhance a defendant's sentence" is "fundamentally unfair" and "deeply troubling." Pet. App. 5-6.

ARGUMENT

None of the questions presented in the petition warrants this Court's review.

1. Petitioner renews his contention (Pet. 13-18) that the district court's reliance on acquitted conduct at sentencing violated his Fifth Amendment right to due process and his Sixth Amendment right to a jury. But as petitioner acknowledges (Pet. 15), this Court already has upheld a district court's authority to consider acquitted conduct at sentencing. And every federal court of appeals with criminal jurisdiction has recognized sentencing courts' authority to rely on conduct that the judge finds by a preponderance of the evidence but that the jury did not find beyond a reasonable doubt. This Court has repeatedly denied writs of certiorari in cases raising the issue and should follow the same course here.

a. When selecting an appropriate sentence, a district court may, consistent with the Fifth and Sixth Amendments, consider conduct that was not intrinsic to the underlying conviction. Although the Sixth Amendment requires that, other than the fact of a prior conviction, "any fact that increase[s] the prescribed statutory maximum sentence" or the statutory "minimum sentence" for an offense "must be submitted to the jury and found beyond a reasonable doubt," Alleyne v. United States, 570 U.S. 99, 106-108 (2013) (plurality opinion), judges have broad discretion to engage in factfinding to determine an appropriate sentence within a statutorily authorized range, see, e.g., id. at 116 (majority opinion) ("[B]road sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment."); United

States v. Booker, 543 U.S. 220, 233 (2005) ("[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."); see also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

Contrary to petitioner's contention (Pet. 13-18), neither the Fifth Amendment nor the Sixth Amendment precludes sentencing courts from finding facts about relevant conduct under this framework when the defendant is acquitted of that conduct under a higher standard of proof at trial. As this Court explained in United States v. Watts, 519 U.S. 148 (1997) (per curiam), in addressing judicial factfinding under the then-mandatory federal Sentencing Guidelines, "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Id. at 157. The Court observed that under the pre-Guidelines sentencing regime, it was "well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted," and that "[t]he Guidelines did not alter this aspect of the sentencing court's discretion." Id. at 152 (citation and internal quotation marks omitted). And the

Court explained that a jury's determination that the government failed to prove a fact beyond a reasonable doubt does not have preclusive effect in contexts in which a lower standard of proof applies. Id. at 156 ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.") (citation omitted).

This Court's decision in United States v. Booker, supra, confirms that a judge may constitutionally base a defendant's sentence on conduct that was not found by the jury, so long as the sentence is at or below the statutory maximum. In discussing the type of information that a sentencing court could consider under the advisory Guidelines, Booker made no distinction between acquitted conduct and other relevant conduct. See, e.g., 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing a sentence within a statutory range," id. at 233, Booker cited Watts for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)," id. at 251 (emphasis omitted). And the majority opinion in Alleyne expressly distinguished "facts that increase either the statutory maximum or minimum" from those "used to guide judicial discretion in selecting

a punishment 'within limits fixed by law.'" 570 U.S. at 113 n.2 (citation omitted). The Court made clear that although the latter "may lead judges to select sentences that are more severe than the ones they would have selected without those facts, the Sixth Amendment does not govern that element of sentencing." Ibid.

b. The court of appeals correctly recognized that those precedents foreclose petitioner's constitutional claim. As the court observed, "[p]recedent dictates that use of 'the preponderance standard by a sentencing judge satisfies due process,' is 'consistent with the Double Jeopardy Clause,' and, under non-mandatory guidelines, does not violate[] the Sixth Amendment requirement for trial by jury." Pet. App. 5 (brackets and citations omitted). Even "[petitioner's] counsel acknowledged at oral argument" that "the law in this respect is well established." Ibid.

Petitioner's reliance (Pet. 14-15) on this Court's decisions in Cunningham v. California, 549 U.S. 270 (2007), and Ring v. Arizona, 536 U.S. 584 (2002), is misplaced. Those cases held that the Sixth Amendment requires a jury to find all facts required to expose the defendant to a higher statutory maximum sentence. See Cunningham, 549 U.S. at 293; Ring, 536 U.S. at 609. The jury's verdict of guilt here, however, was sufficient on its own to expose petitioner to a statutory maximum sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(B) (2006) and 21 U.S.C. 851; PSR ¶ 64. Accordingly, the district court's reliance on conduct found by a

preponderance of the evidence to sentence petitioner within that statutory range does not conflict with Cunningham or Ring.

Petitioner's suggestion (Pet. 18) that reliance on acquitted conduct effectively overrides a jury's verdict is unsound. A jury's verdict of acquittal under a beyond-a-reasonable-doubt standard does not mean it found the conduct "not proven," ibid., under a lesser preponderance-of-the-evidence standard. See Watts, 519 U.S. at 156; cf. 18 Charles Alan Wright et al., Federal Practice and Procedure § 4422, at 634 (3d ed. 2016) (explaining that an acquittal is not issue-preclusive in civil cases when the standard of proof is lower, and that the same rule "applies also when further criminal proceedings do not require proof beyond a reasonable doubt"). No logical conflict or inconsistency exists between the government's proving that petitioner more likely than not orchestrated the murder of Turner, on the one hand, and its failure to prove beyond a reasonable doubt that petitioner committed federal witness-tampering, on the other. Indeed, the jury's general verdict of acquittal on the witness-tampering counts does not necessarily reflect any specific finding as to whether petitioner orchestrated Turner's murder, as opposed to other elements of the witness-tampering offenses.

c. Every federal court of appeals with criminal jurisdiction has recognized, even after Booker, that a district court may consider acquitted conduct for sentencing purposes. See, e.g., United States v. Gobbi, 471 F.3d 302, 313-314 (1st Cir.

2006); United States v. Vaughn, 430 F.3d 518, 526-527 (2d Cir. 2005) (Sotomayor, J.), cert. denied, 547 U.S. 1060 (2006); United States v. Ciavarella, 716 F.3d 705, 735-736 (3d Cir. 2013), cert. denied, 571 U.S. 1239 (2014); United States v. Grubbs, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 559 U.S. 1022 (2010); United States v. Farias, 469 F.3d 393, 399-400 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); United States v. White, 551 F.3d 381, 386 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); United States v. Waltower, 643 F.3d 572, 575-578 (7th Cir.), cert. denied, 565 U.S. 1019 (2011); United States v. High Elk, 442 F.3d 622, 626 (8th Cir. 2006); United States v. Mercado, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 552 U.S. 1297 (2008); United States v. Magallanez, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); United States v. Siegelman, 786 F.3d 1322, 1332-1333 & n.12 (11th Cir. 2015), cert. denied, 136 S. Ct. 798 (2016); United States v. Settles, 530 F.3d 920, 923-924 (D.C. Cir. 2008), cert. denied, 555 U.S. 1140 (2009).

In addition, this Court has repeatedly and recently denied petitions for writs of certiorari challenging the reliance on acquitted conduct at sentencing. See, e.g., Villarreal v. United States, 139 S. Ct. 592 (2018) (No. 18-5468); Musgrove v. United States, 139 S. Ct. 591 (2018) (No. 18-5121); Thurman v. United States, 139 S. Ct. 278 (2018) (No. 18-5528); Rayyan v. United States, 139 S. Ct. 264 (2018) (No. 18-5390); Muir v. United States,

138 S. Ct. 2643 (2018) (No. 17-8893); Okechuku v. United States, 138 S. Ct. 1990 (2018) (No. 17-1130); Soto-Mendoza v. United States, 137 S. Ct. 568 (2016) (No. 16-5390); Montoya-Gaxiola v. United States, 137 S. Ct. 371 (2016) (No. 15-9323); Davidson v. United States, 137 S. Ct. 292 (2016) (No. 15-9225); Krum v. United States, 137 S. Ct. 41 (2016) (No. 15-8875); Bell v. United States, 137 S. Ct. 37 (2016) (No. 15-8606); Siegelman v. United States, 136 S. Ct. 798 (2016) (No. 15-353). The same result is warranted here.*

d. To the extent that petitioner suggests (Pet. 15-17) that a sentencing court's reliance on acquitted conduct found by a preponderance of the evidence is "unfair" or "troubling" as a policy matter, Pet. App. 5-6 (Pooler, J., concurring), that is an issue for Congress or the Sentencing Commission, which could pass a statute or promulgate guidelines to preclude such reliance, respectively. See Watts, 519 U.S. at 158 (Breyer, J., concurring); United States v. Bell, 808 F.3d 926, 928 (D.C. Cir. 2015) (per curiam) (Kavanaugh, J., concurring in the denial of rehearing en banc). Indeed, Congress currently is considering a bill to amend 18 U.S.C. 3661 to prohibit consideration of acquitted conduct at sentencing except in mitigation. See S. 2566, 116th Cong., 1st Sess. § 2(a)(1) (as introduced Sept. 26, 2019). And individual sentencing courts retain discretion to consider the extent to which

* At least one other pending petition raises the same issue. See Asaro v. United States, No. 19-107 (filed July 22, 2019).

acquitted conduct should carry weight in their assessment of a defendant's "background, character, and conduct" for purposes of imposing a sentence in a given case. 18 U.S.C. 3661; see Bell, 808 F.3d at 928 (Kavanaugh, J., concurring in the denial of rehearing en banc).

As to this case, petitioner's fact-bound argument (Pet. 17-18) that the government failed to establish his involvement in Turner's murder even under a preponderance standard does not warrant further review. Petitioner suggests that because he was not charged with conspiracy until after Turner's murder, he could not have thought that Turner was "snitching" on him, and thus would not have solicited Turner's murder. The district court based its finding that petitioner did commission Turner's killing on the extensive evidence at trial and on the express admissions contained in the guilty pleas of several of the men solicited to commit the murder describing in great detail how petitioner personally "paid for and arranged Turner's premeditated murder." Pet. C.A. App. A71; see id. at A68-A72 (describing the evidence and testimony). The court found that evidence and testimony "credible," id. at A68, as it was entitled to do. The court of appeals thus correctly determined that the district court did not commit clear error in finding petitioner "directly responsible for the death of Quincy Turner." Pet. App. 5 (citation omitted).

2. Petitioner separately contends (Pet. 18-23) that the district court abused its discretion in refusing to give a buyer-

seller instruction. Further review of that fact-bound contention is unwarranted because the decision below is correct and does not conflict with any decision of this Court or another court of appeals.

a. "[T]he essence of a conspiracy is 'an agreement to commit an unlawful act.'" United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)). In criminal prosecutions involving drug sales, the courts "have cautioned against conflating [an] underlying buy-sell agreement" with the agreement needed to find conspiracy. United States v. Johnson, 592 F.3d 749, 754 (7th Cir. 2010). A conspiracy does not arise simply because one person sells goods to another "know[ing] the buyer will use the goods illegally." Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943). Rather, the "gist of conspiracy" is that the seller not only "knows the buyer's intended illegal use" but also "show[s] that by the sale he intends to further, promote and cooperate in it." Id. at 711.

This Court has made clear, however, that although "single or casual transactions, not amounting to a course of business," may be insufficient to prove a conspiracy, a seller's attempts to "stimulate such sales" or "prolonged cooperation with a [buyer's] unlawful purpose" can be enough to establish that the seller and buyer have conspired together. Direct Sales Co., 319 U.S. at 712-713 & n.8. Additional relevant considerations include whether the

buyer or seller exhibits "informed and interested cooperation" or has a "stake in the venture." Id. at 713.

b. The court of appeals here correctly applied those principles in determining that the district court did not abuse its discretion in declining to give petitioner's requested buyer-seller instruction. Pet. App. 3. So long as a court in such a case instructs the jury that a defendant is guilty of conspiracy only if he voluntarily joined in an agreement to distribute drugs while knowing the purpose of the agreement -- as the district court did here, see 7/7/14 Tr. 5308 -- the court acts within its discretion in finding a buyer-seller instruction unnecessary and potentially confusing. "A trial judge," this Court has explained, "has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." Boyle v. United States, 556 U.S. 938, 946 (2009).

Here, as the court of appeals explained, "there was ample evidence that [petitioner] had a stake in additional transfers of drugs beyond the transfers to Turner." Pet. App. 3. And as the district court explained, given "the quantity" and the "large volume exchanges" of drugs between petitioner and Turner, "it can be reasonably inferred that" petitioner knew the drugs were "going to be distributed or dispensed." 7/3/14 Tr. 5240-5242. Even petitioner acknowledges both that the government adduced evidence showing that "there were kilos exchanged between Turner and

[petitioner]," and that "the quantity of narcotics exchanged should be a factor" in determining whether a buyer-seller instruction is warranted. Pet. 22. The undisputed evidence that petitioner "fronted" drugs to Turner for resale, Pet. App. 3, further confirms that the district court did not abuse its discretion in finding that petitioner and Turner had more than just a simple buyer-seller relationship. The court of appeals thus correctly determined that "the buyer-seller theory of defense did not have a 'basis in the record that would lead to acquittal.'" Ibid. (citation omitted).

Petitioner provides no sound reason for this Court to review his fact-bound challenge. He does not contend that he would have fared better under the precedent of any other circuit; instead, he contends (Pet. 20) only that the court of appeals did not correctly apply its own precedent. But the court correctly recognized that a requested instruction generally should be given if it "represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." Pet. App. 3 (citation omitted). It applied that rule to the facts here to determine that petitioner's buyer-seller theory "did not have a 'basis in the record that would lead to acquittal,'" ibid. (citation omitted). That fact-bound application of uncontested precedent does not create an intra-circuit conflict; and even if it did, this Court does not grant

review to resolve intra-circuit disagreements. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

In any event, even if the question presented warranted this Court's review, this case would be an unsuitable vehicle in which to address it. Any error in the absence of a buyer-seller jury instruction was harmless, because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946); see Fed. R. Crim. P. 52(a). The jury was instructed that to find petitioner guilty on the conspiracy count it had to find, among other things, that he "knowingly and willfully became a member of the conspiracy charged in Count 1," 7/7/14 Tr. 5308, which in turn alleged a large drug-trafficking operation, see Pet. C.A. App. A55-A56. By finding petitioner guilty on the conspiracy count, the jury thus necessarily found that petitioner did not merely sell cocaine to Turner without knowledge or intent that Turner would resell it to Leeper and others. Cf. Direct Sales Co., 319 U.S. at 713. In addition, the evidence at trial showed that over a period of several months, petitioner regularly supplied Turner with vast quantities of cocaine that could not possibly have been intended for personal use. See Pet. App. 2-3. In light of that overwhelming evidence and the instructions that the jury was given, a buyer-seller instruction would not have changed the outcome here.

This Court has repeatedly and recently denied petitions for writs of certiorari seeking review of a district court's refusal

to provide a buyer-seller instruction. E.g., Davis v. United States, 138 S. Ct. 1441 (2018) (No. 17-7207); Randolph v. United States, 135 S. Ct. 1491 (2015) (No. 14-6151); Brown v. United States, 134 S. Ct. 1876 (2014) (No. 13-807). The Court should follow the same course here.

3. Petitioner next contends (Pet. 23-28) that the district court impermissibly shifted the burden of proof to him by repeatedly noting, in overruling defense counsel's objections to various testimony, that counsel would have the opportunity to cross-examine the government's witnesses. See Pet. 24-25 (listing examples). That fact-bound contention likewise does not warrant further review.

As the court of appeals recognized (Pet. App. 4), Federal Rule of Evidence 103(c) authorizes a district court to "make any statement about the character or form of the evidence, the objection made, and the ruling." The district court's comments to defense counsel in its rulings on counsel's objections -- rulings that petitioner did not challenge on appeal -- were well within the parameters of Rule 103(c). Those comments did no more than state a simple fact of which the jury already would have been aware -- namely, that petitioner would have the right to cross-examine the government's witnesses after their direct testimony. That observation did not shift the burden of proof to petitioner.

Moreover, even if the district court's comments were erroneous, the errors were harmless because they did not prejudice

petitioner. As the court of appeals observed, the district court repeatedly instructed the jury "throughout the trial that the burden of proof remained on the government at all times." Pet. App. 4. And the court of appeals found, after reviewing the nearly six-thousand-page trial transcript, that "the district court's explanatory comments regarding cross examination were not so prejudicial as to deny [petitioner] a fair trial, as opposed to a perfect one." Ibid. Although this Court has the authority to review harmless-error rulings by the courts of appeals, it does so only "sparingly." E.g., Pope v. Illinois, 481 U.S. 497, 504 (1987). Petitioner provides no sound basis for departing from that general rule here.

4. Finally, petitioner contends (Pet. 28) that the government failed to adduce sufficient evidence to prove beyond a reasonable doubt "that he was a member of" the charged conspiracy. See Pet. 28-40. Further review of that fact-bound contention is unwarranted. As with the related buyer-seller issue above, this Court has repeatedly denied certiorari to consider sufficiency challenges to drug-conspiracy convictions. E.g., Brown, supra (No. 13-807); Baker v. United States, 558 U.S. 965 (2009) (No. 08-10604). Indeed, the Court ordinarily does not grant certiorari "to review evidence and discuss specific facts" in any context, United States v. Johnston, 268 U.S. 220, 227 (1925), generally leaving that sort of error-correction to the courts of appeals, see Hamling v. United States, 418 U.S. 87, 124 (1974) ("The primary

responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals.").

In any event, the government presented ample evidence that petitioner was a member of the conspiracy here. Evidence is sufficient to sustain a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Musacchio v. United States, 136 S. Ct. 709, 715 (2016) (citation omitted). Here, the government introduced evidence that petitioner regularly sold massive quantities of cocaine to Turner; fronted cocaine to Turner and accepted cash payments that Turner and Leeper pooled together; and actively solicited Turner's business by claiming he could provide higher quality cocaine at a lower price. See Pet. App. 3. As the court of appeals correctly determined, that evidence, viewed in a light most favorable to the government, was sufficient for at least one rational factfinder to conclude "that [petitioner] knowingly participated with Turner and others in a narcotics distribution conspiracy." Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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