

No. \_\_\_\_\_

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

*Respondent,*

v.

CHRISTINA MARIE EICHLER,

*Petitioner,*

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

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**PETITION FOR WRIT OF CERTIORARI**

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Jason B. Wesoky  
Member of the Tenth Circuit's CJA Appellate Panel  
Appointed pursuant to 18 U.S.C. § 3006A  
DARLING MILLIGAN PC  
1331 17<sup>th</sup> Street, Suite 800  
Denver, Colorado 80202  
(303) 623-9133

**ATTORNEY FOR PETITIONER**

## QUESTIONS PRESENTED FOR REVIEW

1. Is evidence of drug sales admissible to prove a conspiracy to distribute when the person charged with the conspiracy only sold drugs to end users and the end users did not further sell the drugs purchased?
2. Should a district court give a jury instruction on the defense theory that the evidence only showed a series of buy-sell agreements and not a conspiracy?

## **PARTIES TO THE PROCEEDINGS**

The petitioner in this case is Christina Eichler. The respondent is the United States of America.

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Christina Eichler respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

### **OPINIONS BELOW**

The opinion of the Court of Appeals is reported at *United States v. Savon Germain Carter and Christina Marie Eichler*, 2019 U.S. App. LEXIS 20559, 2019 WL 3034736, \_\_\_ Fed. Appx. \_\_\_, No. 18-8014 and 8015 (10th Cir. July 11, 2019) and reprinted in the Appendix at pp. 4-27. The District Court's refusal of tendered jury instructions and the relevant instructions provided are reprinted in the Appendix at pp. 28-32.

### **JURISDICTION**

The Court of Appeals entered its judgment on July 11, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over the case pursuant to 28 U.S.C. § 3231.

### **STATUTORY PROVISIONS INVOLVED**

21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846.

## I. STATEMENT OF THE CASE

This case seeks to resolve a split in the Federal Courts of Appeal regarding the “buyer-seller” rule. The “buyer-seller” rule, in some circuits, requires the Government to prove that a person on trial charged with conspiracy to distribute drugs: 1) sold drugs; 2) to people who then re-sold the drugs; and 3) a portion of the resulting resale profit was received by the defendant.

In some circuits, such as the Seventh Circuit, when the defendant on trial for conspiracy to distribute drugs claims that the sales were merely to end users, and not to other persons who sold the drugs for profit which profit was funneled up the chain of conspirators, the jury is instructed that the Government must prove that the buyers sold the drugs they purchased to others and returned profits to the conspirators on trial. Other circuits, such as the Tenth Circuit, do not recognize this version of the “buyer-seller” rule and interpret the “buyer-seller” rule to only require proof that the conspirators on trial sold drugs to others and profited from those sales.

In this case, Ms. Eichler asserted the “buyer-seller” defense because none of the people to whom she sold drugs re-sold the drugs



and gave profits to her. Appx. at 6-8, 11-13. But the trial court refused to instruct the jury that any such sales should not be counted as part of the conspiracy. *Id.* at 13-14, 28-32. The Tenth Circuit affirmed, identifying that the law in the Tenth Circuit was different from the law in the Seventh Circuit. *See id.* at 16-18.

The Tenth Circuit's opinion makes clear the split between at least two of the circuits as to the meaning of the "buyer-seller" rule and how juries are to be instructed (or not instructed) when a person alleged to have conspired to distribute drugs invokes the "buyer-seller" rule. *Id.*

This Court should grant certiorari and reverse by finding the "buyer-seller" rule requires courts to instruct juries that the Government must not only prove the person on trial sold drugs for profit, but also that the persons to whom the drugs were sold re-sold the drugs for profit and provided some of that profit to the person on trial. This will bring consistency to the law and prevent people from being charged with a conspiracy to sell drugs for profit when no conspiracy or profit is involved.

## II. ARGUMENT

“The Circuit Courts of Appeals uniformly acknowledge that evidence of a mere buyer-seller relationship, without more, does not constitute a conspiracy to distribute drugs.” *State v. Allan*, 83 A.3d 326, 335 (Conn. 2014) (collecting cases). But from this conclusion, two distinct lines of cases have emerged. The first group of cases, most clearly set forth by the Seventh and Ninth Circuits, preclude a conspiracy from being proven merely from a seller selling drugs to a buyer. See Murphy, Keegan, *Comments Buying into Criminal Liability: Resolving the Circuit Split over the Buyer-Seller Rule in Federal Drug Conspiracy Jurisprudence*, 97 Or. L. Rev. 183, 191-201 (2018) (hereinafter, Murphy, *Resolving the Circuit Split*, 97 Or. L. Rev. at \_\_\_\_).

The second group of cases, most clearly set forth by the Tenth Circuit, allows a conspiracy conviction of the seller to stand even when the evidence only consists of sales to a drug user. *Id.* at 201-206.

This Court should grant certiorari and adopt the Seventh Circuit’s interpretation of the buyer-seller rule. *Id.* at 206-213.

**A. *Circuits Where the Buyer-Seller Rule is Insufficient to Prove Conspiracy.***

One line of cases holds that “in a buyer-seller relationship, there is no singularity of purpose and thus no meeting of the minds.” *Allan*, 83 A.3d at 335. When “the buyer’s purpose is to buy; [and] the seller’s purpose is to sell ... [the] relationship lacks an essential element necessary to form a conspiracy.” *Id.* (internal citations and quotations omitted). Thus, under this line of cases, someone who merely sells drugs to a buyer/user, neither the seller nor the buyer can be part of a conspiracy because, “to prove a conspiracy, the government must offer evidence establishing an agreement to distribute drugs that is distinct from evidence of the agreement to complete the underlying drug deals.” *United States v. Johnson*, 592 F.3d 749, 754-55 (7th Cir. 2010). In other words, “[m]ere proof of a buyer-seller agreement without any prior or contemporaneous understanding does not support a conspiracy conviction because there is no common illegal purpose: In such circumstances, the buyer’s purpose is to buy; the seller’s purpose is to sell.” *United States v. Donnell*, *supra*, 596 F.3d 913, 924-25 (8th Cir. 2010) (internal quotation marks omitted.) *See also United States v. Pizano*, 421 F.3d 707, 719 (8th Cir. 2005) (same); Murphy, *Resolving the*

*Circuit Split*, 97 Or. L. Rev. at 207-208 (Seventh Circuit focuses on whether there is agreement to commit offense beyond sale itself).

The reasoning behind this line of cases is sound. A drug-distribution conspiracy under 21 U.S.C. § 846 requires proof that the defendant knowingly agreed with someone else to distribute drugs. *See* Murphy, *Resolving the Circuit Split*, 97 Or. L. Rev. at 191-192. When the alleged coconspirators are in a buyer-seller relationship, however, there is nothing agreed upon between the buyer and seller other than for the seller to sell and the buyer to buy. *Id.* at 208. There is no “agreement to commit a crime other than the crime that consists of the sale itself.” *United States v. Lechuga*, 994 F.2d 346, 347 (7th Cir. 1993).

“This rule is based on a fundamental principle of criminal law: the requirement that the government prove the defendant guilty beyond a reasonable doubt.” *Johnson*, 592 F.3d at 755. When there is merely a buyer-seller relationship, the jury “has to choose between two equally plausible inferences.” *Id.* “On one hand, the jury could infer that the purchaser and the supplier conspired to distribute drugs. On the other hand, the jury could infer that the purchaser was just a repeat wholesale customer of the supplier and that the two had not entered

into an agreement to distribute drugs to others.” *Id.* Both inferences are equally reasonable, thus “the jury necessarily would have to entertain a reasonable doubt on the conspiracy charge.” *Id.*

In *United States v. Dekle*, 165 F.3d 826, 830 (11th Cir. 1999), for example, the Eleventh Circuit found evidence of conspiracy was insufficient when the seller, Delke, gave drugs to female patients in exchange for sexual favors. The court found the evidence was merely that the patients purchased drugs for their own personal consumption, and on one or two occasions, shared the drugs with a friend or relative. *Id.* Thus, the evidence fell “short of proving a joint criminal objective between any of the patients and Dekle to distribute drugs to third parties.” *Id.*

***B. Circuits Where the Buyer-Seller Rule is Sufficient to Prove Conspiracy.***

In *United States v. Ivy*, 83 F.3d 1266, 1285-86 (10th Cir. 1996), the Tenth Circuit limited the buyer-seller rule to only personal consumption and only excludes the buyer from a conspiracy charge, so long as the buyer did not sell any drugs. In other words, the buyer-seller rule applies **only** to drug users who buy for personal consumption.

But this argument and view misunderstands the core element of a conspiracy to distribute drugs: that the defendant agreed with someone else to distribute drugs. See *United States v. Horn*, 946 F.2d 738, 740 (10th Cir. 1991).

The Court in *Ivy* looked to *United States v. Evans*, 970 F.2d 663, 674 (10th Cir. 1992) in interpreting the buyer-seller rule. *Ivy*, 83 F.3d at 1285. In *Evans*, the Tenth Circuit said a defendant's role in the conspiracy must be analyzed based on what agreement or understanding that defendant had. *Evans*, 970 F.2d at 673. To figure that out, a court uses "common sense and ... the facts of th[e] case." *Id.* at 674. Thus, in order for a seller-defendant to have the requisite knowledge (implicit or explicit), she must understand that the person to whom she is selling the drugs intended to sell the drugs as well. Otherwise, it is just an agreement to buy and sell drugs among a seller and buyer.

"The Tenth Circuit's approach to the buyer-seller rule ... seems much more interested in punishing the sale of the drugs than it is in punishing the agreement to distribute them." Murphy, *Resolving the Circuit Split*, 97 Or. L. Rev. at 208. "Protecting end users has little to do

with punishing those who would plot and agree to distribute drugs.” *Id.* “In fact, the end-user-only interpretation borders on redundant as the end users that it purports to protect are already virtually impossible to prosecute for conspiring to distribute a controlled substance.” *Id.*

***C. The Circuit Split Should Be Resolved So That a Mere Buyer-Seller Transaction is Insufficient to Prove Conspiracy.***

This Court has been very clear that the focus of the law making an agreement to distribute drugs illegal is on preventing the agreement. *See Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Conspiracies are harmful and need to be prevented because of plotting and scheming that go into them, which can give rise to additional dangers such as the use of weapons, large quantities of illegal substances, and scores of participants. *See Callanan v. United States*, 364 U.S. 587, 593 (1961) (discussing danger of conspiracy).

The Tenth Circuit’s approach to the buyer-seller rule, however, does not focus on the conspiracy or agreement. Instead, it focuses on the transaction – the sale of drugs – because only the end-user is exempt from conspiracy in a buyer-seller transaction. But in a situation where the seller merely sells to an end user, there cannot be an agreement

between those two people to distribute drugs because the end user has not agreed to distribute – he has only agreed to use. *See* Murphy, *Resolving the Circuit Split*, 97 Or. L. Rev. at 202. Thus, the Tenth Circuit punishes someone for conspiracy when there may be no evidence of an agreement, *i.e.*, a conspiracy.

In contrast, the Seventh Circuit’s approach to the buyer-seller rule keeps the focus of a conspiracy case on the conspiracy by punishing only those who enter into an agreement to distribute drugs. “Courts in these jurisdictions consistently take extra care to ensure that the conspiracy statute is applied only to those defendants whose conduct could hardly occur absent some sort of scheme.” *Id.* at 207. The factors set forth by the Seventh Circuit to determine whether there is evidence of a conspiracy tend to demonstrate there is “a conspiratorial agreement.” *Id.*

The disparity between the application of the buyer-seller rule between circuits must be resolved. “One defendant losing twelve years of her life while the other walks away scot-free despite engaging in substantially the same conduct is simply too significant of a disparity to ignore.” *Id.* at 213. The better rule is the one articulated by the Seventh



Circuit because it punishes the crime charged – conspiracy. This Court should grant this petition to resolve this circuit split.

***D. Simply by Being in the Tenth Circuit, Petitioner Was Deprived of Her Opportunity to Apply the Buyer-Seller Rule and Convicted of Conspiracy.***

Here, the facts are that Ms. Eichler did not enter into an agreement with any of the Government's witnesses to distribute drugs – she agreed to sell them drugs, they agreed to buy them. *See* Appx. at 5-8, 11-13, 16-18. The drugs were not resold for profit to Ms. Eichler. *Id.* Thus, applying common sense to the facts should result in finding the buyer-seller defense should have, at least, been presented to the jury for consideration. The jury could have rejected the defense, but it never had the opportunity, which means the court substituted its common sense for the juries to determine an issue of fact. The failure to allow the buyer-seller defense to be presented to the jury was thus reversible error.

A criminal defendant is entitled to have her defense theory presented to the jury through jury instructions. *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir. 1995). Petitioner argued that various buy-sell transactions were insufficient to prove a conspiracy.

Appx. at 13-14, 16-18. The testimony at trial from persons who allegedly purchased drugs from Ms. Eichler all stated they only made purchases – no one testified that they thereafter re-sold the drugs or that any profit was paid to Ms. Eichler. The court refused instructions propounded by the defendants that would have allowed the jury to consider the defense theory that this was not a vast conspiracy, but rather several buy-sell transactions. *See* Appx. at 13-14, 16-18, 28-32.

“Distinguishing between a conspiracy and a buyer-seller relationship requires a fact-intensive and context-dependent inquiry that is not amenable to bright-line rules.” *United States v. Moe*, 781 F.3d 1120, 1125 (9th Cir. 2015). “Among the factors that courts have considered relevant in making this determination are the following: whether the drugs were sold on credit or on consignment; the frequency of sales; the quantity of drugs involved; the level of trust demonstrated between buyer and seller, including the use of codes; the length of time during which sales were ongoing; whether the transactions were standardized; whether the parties advised each other on the conduct of the other's business; whether the buyer assisted the seller by looking for

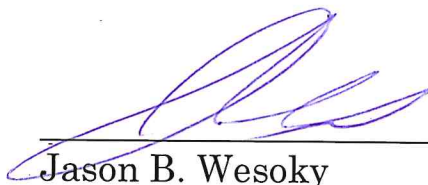
other customers; and whether the parties agreed to warn each other of potential threats from competitors or law enforcement.” *Id.* at 1125-26.

The Tenth Circuit, however, precluded Ms. Eichler from asserting the buyer-seller defense. Ms. Eichler’s conviction resulted from sales of drugs in Utah and Wyoming. Had Ms. Eichler sold drugs one state over in either direction, *e.g.*, Nebraska or Nevada, she would have been in the Seventh or Ninth Circuit and been able to assert the buyer-seller rule as a defense. The punishment for a violating a federal law should not vary based on the whim of where a crime takes place. Thus, the Court should grant this Petition.

### III. CONCLUSION

A critical and consequential circuit split exists regarding the application and meaning of the buyer-seller rule. The Tenth Circuit’s narrow and incorrect application of the rule should be corrected so that it conforms with the Seventh Circuit’s interpretation. Petitioner respectfully requests the Court grant her Petition for Writ of Certiorari.

Respectfully submitted this 4<sup>th</sup> day of October 2019.



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Jason B. Wesoky  
Darling Milligan PC  
1331 17<sup>th</sup> Street, Suite 800  
Denver, CO 80202  
(303) 623-9133  
*Attorney to Petitioner*