Nos. 19-6236 and 19-6942

IN THE SUPREME COURT OF THE UNITED STATES

CHRISTINA MARIE EICHLER, PETITIONER

v.

UNITED STATES OF AMERICA

SAVON GERMAIN CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in declining to give petitioners' requested instruction to the jury that a buyer-seller relationship is insufficient on its own to prove a drug-distribution conspiracy.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Wyoming):

United States v. Carter, No. 17-cr-167-1 (Feb. 15, 2018)

United States v. Eichler, No. 17-cr-167-2 (Feb. 13, 2018)

United States Court of Appeals (10th Cir.):

United States v. Carter, No. 18-8014 (July 11, 2019)

United States v. Eichler, No. 18-8015 (July 11, 2019)

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OPINION BELOW

The opinion of the court of appeals (Eichler Pet. App. 4-27; Carter Pet. App. 1-24) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 707.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2019. The petition for a writ of certiorari in No. 19-6236 was filed on October 7, 2019. On October 8, 2019, Justice Sotomayor

extended the time within which to file a petition for a writ of certiorari in No. 19-6942 to and including December 9, 2019, and the petition was filed on that date. 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 District of Wyoming, petitioners were convicted of conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846 (2012). Eichler Judgment 1; Carter Judgment 1. The district court sentenced petitioner Christina Marie Eichler to 121 months of imprisonment, to be followed by five years of supervised release, and petitioner Savon Germain Carter to 135 months of imprisonment, to be followed by five years of supervised release. Eichler Judgment 2-3; Carter Judgment 2-3. The court of appeals affirmed. Eichler Pet. App. 4-27 (Pet. App.).

1. Between approximately September 2016 and May 2017, petitioners distributed methamphetamine and marijuana in northern Utah and Wyoming. See Pet. App. 5, 9. Eichler had lived in Wyoming earlier in 2016 and, after moving in with her boyfriend Carter in a suburb of Salt Lake City, regularly returned to Wyoming to visit family and sell methamphetamine there. Id. at 5. Eichler's customers in Wyoming included Darrell Gilson. Ibid. On one occasion in September 2016, Eichler was stopped for speeding while traveling to Wyoming to sell methamphetamine and marijuana

to Gilson. Ibid. She was arrested after the trooper smelled marijuana and a subsequent search of Eichler's car and purse revealed approximately an ounce of methamphetamine and an ounce of marijuana. Ibid.

While in jail, Eichler called Carter on the jail's recorded line. Pet. App. 5. Petitioners discussed asking their associates in Wyoming -- including Gilson and George Maestas -- to help pay for Eichler's bond. Id. at 5-6. Eichler also asked Carter to tell Gilson that he (Carter) could "handle" the drug supply that Eichler was supposed to have "handled for [Gilson]" before her arrest. Id. at 5. Maestas eventually helped to pay for Eichler's bond, id. at 6, but Gilson -- fearing that it might be a law enforcement sting -- did not, see Trial Tr. 287.

After her release from jail, Eichler continued to travel to Wyoming, where she sold methamphetamine to Maestas at his home. Pet. App. 6-7. Eichler also obtained a car from Gilson in exchange for three ounces of methamphetamine, a quarter pound of marijuana, and cash. Id. at 7. Gilson, in the meantime, began traveling from Wyoming to the home that Eichler and Carter shared in Utah to buy methamphetamine from them. Gilson eventually started buying the drugs directly from Carter, although Eichler was present at the house for the transactions. Ibid.

Petitioners also sold drugs to and through another man, Michael Flores. Pet. App. 7-8. Like Gilson, Flores had initially purchased methamphetamine from Eichler but later began buying it

from Carter, with Eichler sometimes present at the house for the transactions. Id. at 8. On one occasion, Carter fronted 21 grams of methamphetamine to Flores with the expectation that he would pay Carter later. See Trial Tr. 474-475.

After Flores was arrested in May 2017, he agreed to arrange a controlled purchase of drugs from petitioners. Pet. App. 8. In a recorded call, Flores told Carter to meet him at a Wyoming motel. Id. at 8-9. Carter agreed and later told Flores that Eichler was on her way to meet him there. Ibid. Officers arrested Eichler when she arrived at Flores's room. Id. at 9. Meanwhile, Carter was exchanging text messages with Flores's phone (which was being operated by law enforcement personnel) to negotiate a purchase price for methamphetamine and marijuana. Id. at 9, 12.

2. A grand jury in the District of Wyoming charged petitioners and Flores with conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A), and 846 (2012). Indictment 1-2. Flores pleaded guilty to the conspiracy charge and testified at the joint trial of petitioners. See Pet. App. 10-12. At an in-chambers conference held at the close of the government's case, Carter proposed that the district court instruct the jury on a "buyer-seller" defense. See id. at 13; Trial Tr. 659. The two proposed instructions, which petitioners asserted were based on decisions of the Seventh Circuit, provided in pertinent part that "[m]ere proof of the existence of a buyer-seller relationship is not sufficient to prove

that the defendant is a co-conspirator in [a] drug conspiracy"; that "[a] buyer or seller of a product does not automatically become a member of the charged conspiracy"; and that "[t]he prosecution must establish by proof beyond a reasonable doubt that the defendant knew the existence and scope of the conspiracy and sought to promote its success." Pet. App. 28-29.

The district court declined to give the requested instructions. Pet. App. 14; Trial Tr. 659, 661. Adhering to the Tenth Circuit's pattern instructions, the court instructed the jury that it had to find beyond a reasonable doubt that each petitioner "agreed with at least one other person to distribute" methamphetamine; that each "knew the essential objective of the conspiracy"; that each "knowingly and voluntarily involved [themselves] in the conspiracy"; and that "interdependence [existed] among the members of the conspiracy." Pet. App. 30. The court further instructed the jury that to find petitioners guilty, it also would have to find that the objective of the charged conspiracy was "to distribute methamphetamine"; that "the members of the alleged conspiracy came to a mutual understanding to try to accomplish a common and unlawful purpose"; and that "the defendant knowingly joined the conspiracy with the intent to advance its purposes." Trial Tr. 687-688. As to the "interdependence" element, the court instructed the jury that the members of the conspiracy must have "intended to act for their

shared mutual benefit" and "relied on each other in achieving a common illicit goal." Id. at 688.

The jury found petitioners guilty of the charged conspiracy. Pet. App. 14. In answers to a special interrogatory, the jury further determined that each conspirator was responsible for more than 500 grams of methamphetamine. Ibid. The district court sentenced Eichler to 121 months of imprisonment and Carter to 135 months of imprisonment, both to be followed by five years of supervised release. Eichler Judgment 2-3; Carter Judgment 2-3; see Pet. App. 15.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 4-27. As relevant here, petitioners argued that "the district court erred by refusing to give" a buyer-seller instruction, id. at 16, which petitioners understood to require, at least in the Seventh Circuit, that the government prove not only that they worked together to distribute drugs, but that those who bought drugs from them "in turn sold those drugs to others and then returned some of the profits to Carter and Eichler," id. at 18.

The court of appeals rejected that argument. Pet. App. 17-18. The court explained that it had previously "rejected the Seventh Circuit's interpretation of the buyer-seller rule," and had construed the rule to serve the limited "purpose" of "separat[ing] customers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who

do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." Id. at 18 (quoting United States v. Ivy, 83 F.3d 1266, 1285-1286, cert. denied, 519 U.S. 901 (1996)). The court observed that here, petitioners' conspiracy conviction rested on the theory "that Carter, Eichler, and Flores were each distributors -- not consumers -- who agreed among each other to sell to consumers." Id. at 18 n.12. And the court determined that "the district court did not err by refusing to" give the buyer-seller instruction. Id. at 18.

ARGUMENT

Petitioners renew their contention (Eichler Pet. 4-13; Carter Pet. 3-5) that the district court erred in declining to give their requested buyer-seller instruction. The court of appeals correctly rejected that contention, and its factbound determination does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be an unsuitable vehicle for addressing the circumstances in which a buyer-seller instruction is appropriate because any error in declining to give that instruction here was harmless. This Court has recently and repeatedly denied certiorari on the instructional issue and the related question of what evidence suffices to distinguish a drug-distribution conspiracy from a buyer-seller relationship. See, e.g., Davis v. United States, 138 S. Ct. 1441 (2018) (No. 17-7207); Kelly v. United States, 137 S. Ct. 1577 (2017) (No. 16-6388); Randolph v. United States, 135 S. Ct. 1491

(2015) (No. 14-6151); Brown v. United States, 572 U.S. 1060 (2014) (No. 13-807); Baker v. United States, 558 U.S. 965 (2009) (No. 08-10604).* It should follow the same course here.

1. The court of appeals correctly determined (Pet. App. 16-18) that the district court permissibly declined to give petitioners' proposed buyer-seller instruction.

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" in such a circumstance would be 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 coöperate 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

* The pending petition for a writ of certiorari in Martinez v. United States, No. 19-5346 (filed July 20, 2019), raises a similar issue.

"stimulate such sales" or "prolonged coöperation 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 coöperation" or has a "stake in the venture." Id. at 713.

b. Under those principles, the court of appeals correctly affirmed the denial of petitioners' proffered buyer-seller instruction. So long as a court instructs the jury that a defendant is guilty of conspiracy only if he or she voluntarily joined in an agreement to distribute drugs while knowing the purpose of the agreement -- as the district court did here, see Trial Tr. 685-688; Pet. App. 30 -- the court may properly determine that a buyer-seller instruction is 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, the evidence at trial established that petitioners -- who lived together as boyfriend and girlfriend -- were co-conspirators who repeatedly engaged in distribution-quantity sales of methamphetamine to customers in or from Wyoming. Three of those purchasers (Maestas, Gilson, and Flores) testified that they resold the drugs, and on one occasion Carter fronted methamphetamine to Flores with the expectation that Flores would

repay him after selling the drugs in Wyoming. See Pet. App. 5-8; Trial Tr. 282, 405-406, 474-475. The district court thus correctly agreed with the government's argument "that the existing instructions accurately set forth the law related to conspiracies," id. at 659, and that no further instruction on conspiracy was necessary, see id. at 659-660.

Indeed, a buyer-seller instruction would have been especially inappropriate here because the government did not predicate the conspiracy charge solely on the relationship between petitioners and their purchasers. Rather, as the court of appeals observed, the government alleged and proved that petitioners and Flores "agreed among each other to sell to consumers." Pet. App. 18 n.12. For example, in recorded jailhouse calls, Eichler and Carter agreed that Carter would "handle" the sale of drugs to Gilson that Eichler had been on the way to conduct when she was arrested. Pet. App. 5 (citation omitted). As the court of appeals correctly recognized, "a rational jury could conclude that Eichler and Carter were working in tandem to sell methamphetamine." Id. at 19. As the Seventh Circuit has recognized, that is sufficient on its own to establish a conspiracy to distribute drugs irrespective of whether petitioners also conspired with their purchasers. See United States v. Love, 706 F.3d 832, 839 (2013).

2. Contrary to petitioners' contention (Eichler Pet. 2-4, 13), this Court's review is not warranted to resolve disagreement among the courts of appeals on when a buyer-seller instruction is

appropriate. The courts of appeals broadly agree on the principles governing drug-conspiracy cases that involve buyer-seller relationships. To the extent that tension can be found in the language of courts of appeals' opinions, it is not implicated here.

a. The courts of appeals are in general agreement that the mere existence of a buyer-seller relationship by itself does not establish a conspiracy to distribute narcotics. Instead, they apply a fact-specific inquiry considering all of the circumstances to determine whether a conspiracy is established and, relatedly, whether a buyer-seller instruction is appropriate. See United States v. Hawkins, 547 F.3d 66, 74 (2d Cir. 2008) (describing courts' approaches to the "highly fact-specific inquiry into whether the circumstances surrounding a buyer-seller relationship establish an agreement to participate in a distribution conspiracy"); see also, e.g., United States v. Mitchell, 596 F.3d 18, 24-25 (1st Cir. 2010); United States v. Gibbs, 190 F.3d 188, 197-200 (3d Cir. 1999), cert. denied, 528 U.S. 1131, and 529 U.S. 1030 (2000); United States v. Reid, 523 F.3d 310, 317 (4th Cir.), cert. denied, 555 U.S. 1061 (2008); United States v. Delgado, 672 F.3d 320, 333-334, 341 (5th Cir.) (en banc), cert. denied, 568 U.S. 978 (2012); United States v. Deitz, 577 F.3d 672, 680-682 (6th Cir. 2009), cert. denied, 559 U.S. 984 (2010); Johnson, 592 F.3d at 754-756; United States v. Ramirez, 350 F.3d 780, 784-785 (8th Cir. 2003); United States v. Moe, 781 F.3d 1120, 1125-1126 (9th Cir.), cert. denied, 136 S. Ct. 342 (2015); United States v.

Small, 423 F.3d 1164, 1182-1183 (10th Cir. 2005), cert. denied, 546 U.S. 1155, 546 U.S. 1190, and 547 U.S. 1141 (2006); United States v. Brown, 587 F.3d 1082, 1089-1090 (11th Cir. 2009); United States v. Baugham, 449 F.3d 167, 171-172 (D.C. Cir.), cert. denied, 549 U.S. 966 (2006).

"[I]n making that evaluation," courts have considered a variety of factors, such as "the length of affiliation"; "whether there is an established method of payment"; "the extent to which transactions are standardized"; "whether there is a demonstrated level of mutual trust"; and "whether the buyer's transactions involved large amounts of drugs." Gibbs, 190 F.3d at 199. The presence of such factors "suggests that a defendant has full knowledge of, if not a stake in, a conspiracy." Ibid.

Courts have likewise considered those and other similar factors in determining whether a buyer-seller instruction is appropriate. See, e.g., United States v. Medina, 944 F.2d 60, 65 (2d Cir. 1991) (finding that "the district court did not err in refusing to give the * * * 'buyer-seller' instruction" because there was "advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use"), cert. denied, 503 U.S. 949 (1992), abrogated on other grounds by Bailey v. United States, 516 U.S. 137, 142-150 (1995); Mitchell, 596 F.3d at 25 (finding that district court did not err in "failing to give a buyer-seller instruction" because the evidence showed (among other things) that the defendant "was

involved in multiple transactions, for large, kilogram-quantities of cocaine, for large sums of money," and "made pre-arranged purchases from other conspiracy members"); see also United States v. Mata, 491 F.3d 237, 241-242 (5th Cir. 2007) (holding that failure to give a buyer-seller instruction is not error where the court gives an "adequate instruction on the law of conspiracy"), cert. denied, 552 U.S. 1189 (2008); Moe, 781 F.3d at 1128-1129 (similar); United States v. Thomas, 114 F.3d 228, 245-246 (D.C. Cir.) (similar), cert. denied, 522 U.S. 1033 (1997).

b. Petitioners contend (Eichler Pet. 2-3; Carter Pet. 3-4) that this Court's review is warranted because the Seventh Circuit's interpretation of the role of the buyer-seller rule differs from that of the court below. But they err in reading Seventh Circuit precedent to require a buyer-seller instruction in a case like this.

Petitioners assert, for example, that in conspiracy cases in the Seventh Circuit involving drug sales, "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." Eichler Pet. 2. But petitioners identify no support for an absolute requirement of that nature in Seventh Circuit case law. The Seventh Circuit pattern instructions (cited by the court of appeals here, see Pet. App. 13-14) do not contain a return-of-profits requirement. Instead, they provide only that when a conspiracy is predicated on a purchaser's resale of drugs, "[t]he

government must prove that the buyer and seller had the joint criminal objective of further distributing the drug to others." Id. at 14 (brackets and citation omitted); cf. United States v. Brown, 726 F.3d 993, 1002 (7th Cir. 2013) (explaining that the Seventh Circuit "consider[s] the totality of the circumstances," not a finite list of factors, in distinguishing a buyer-seller relationship from a conspiracy), cert. denied, 572 U.S. 1060 (2014).

In upholding the jury instructions in this case, the court of appeals here cited its decision in United States v. Gallegos, 784 F.3d 1356 (10th Cir. 2015), for the proposition that it had "rejected the Seventh Circuit's interpretation of the buyer-seller rule." Pet. App. 18. As Gallegos explained, the Tenth Circuit has held that the "buyer-seller rule applies only to end users," not to those who sell drugs as part of a conspiracy. 784 F.3d at 1360. But as Gallegos recognized, even the Seventh Circuit would find a buyer-seller instruction unwarranted if presented with "evidence of fronting coupled with evidence of repeat drug purchases." Ibid. (citing Johnson, supra). And as explained above, the evidence here showed that Carter fronted drugs to Flores on at least one occasion and that petitioners repeatedly sold drugs to Flores, Gilson, and Maestas.

Moreover, as explained above, the Seventh Circuit has repeatedly recognized that courts should not give a buyer-seller instruction when conspiracy liability rests on the defendant's

cooperation with individuals "on the same side of the" transaction. United States v. Payton, 328 F.3d 910, 912, cert. denied, 540 U.S. 881 (2003); see Love, 706 F.3d at 839; United States v. Baskin-Bey, 45 F.3d 200, 205 & n.2, cert. denied, 514 U.S. 1089, and 514 U.S. 1121 (1995). This is such a case. Petitioners agreed with and worked "in tandem" with each other and at least one other person (Flores) on the distribution side of the transaction "to sell [methamphetamine] to consumers." Pet. App. 18 n.12, 19. Accordingly, petitioners cannot show that they would have been entitled to a buyer-seller instruction in the Seventh Circuit.

c. The remaining decisions cited by petitioners (see Eichler Pet. 7, 12) likewise do not establish a circuit conflict that warrants this Court's review in this case. Instead, each represents a factbound application of the general principles set forth above. For example, the Ninth Circuit's decision in Moe, supra, found that the government had presented sufficient evidence to prove a drug conspiracy -- not merely a buyer-seller relationship -- and that the district court was not required to give a specific buyer-seller instruction on the facts of that case. 781 F.3d at 1125-1129. And the Eleventh Circuit's decision in United States v. Dekle, 165 F.3d 826 (1999), involved only a challenge to the sufficiency of the evidence, not the circumstances under which a buyer-seller instruction is appropriate. Indeed, that case involved a conspiracy conviction predicated on a physician's agreement to prescribe controlled substances in

exchange for sexual favors -- a scenario that bears little resemblance to the methamphetamine distribution conspiracy here. See id. at 830.

3. Even if the question petitioners raise otherwise warranted this Court's review, this case would be an unsuitable vehicle in which to address it, because the absence of a buyer-seller instruction 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). The jury was adequately informed by the district court's instructions that a buyer-seller relationship would not suffice to establish a conspiracy.

The district court instructed the jury that it had to find beyond a reasonable doubt that each petitioner "agreed with at least one other person to distribute" methamphetamine, that each "knew the essential objective of the conspiracy," that each "knowingly and voluntarily involved himself or herself in the conspiracy," and that "interdependence [existed] among the members of the conspiracy." Pet. App. 30. The court further instructed the jury that proof that a defendant "knew about the existence" of a methamphetamine-distribution "conspiracy or was associated with members of the conspiracy" was not sufficient, and that the evidence instead "must show that the defendant knowingly joined the conspiracy with the intent to advance its purposes." Trial Tr. 687-688. And the "interdependence" element -- which is "unique" to the Tenth Circuit, see 10th Cir. Crim. Pattern Jury

Instr. No. 2.19 cmt. -- additionally required the jury to find that the members of the conspiracy "intended to act for their shared mutual benefit" and "relied on each other in achieving a common illicit goal." Trial Tr. 688.

Taken together, those instructions made clear to the jury that it had to find that petitioners each shared an "unlawful purpose" and intent to mutually benefit with at least one other person before it could find that petitioners voluntarily agreed to distribute methamphetamine. Direct Sales Co., 319 U.S. at 713. The absence of a further specification that a buyer and a seller do not necessarily share such a purpose in every instance could not have played a substantial role in determining the jury's verdict. See, e.g., Moe, 781 F.3d at 1128-1129; Mata, 491 F.3d at 241-242. To the contrary, and as explained above, the evidence at trial established that petitioners "work[ed] in tandem" in distributing methamphetamine. Pet. App. 19; see id. at 18 n.12. In addition to proof that Eichler sold drugs to customers herself, the evidence included recorded calls and text messages showing that she told Carter to "continue selling to Gilson" the methamphetamine that she previously "had been selling" to Gilson. Id. at 19; see id. at 5-8. Likewise, recorded calls and text messages showed that Carter agreed to sell drugs to Flores and sent Eichler to carry out the transaction. See id. at 8-9. In light of that evidence showing that petitioners agreed with each

other to distribute drugs, petitioners suffered no prejudice from the absence of a buyer-seller instruction.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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