No. 20-6367

IN THE SUPREME COURT OF THE UNITED STATES

KISSINGER ST. FLEUR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in declining to give petitioner's 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 (M.D. Fla.):

United States v. Gilles, No. 17-cr-131 (June 29, 2018)

United States Court of Appeals (11th Cir.):

United States v. Fernetus, No. 18-12811 (Apr. 15, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is not published in the Federal Reporter, but is reprinted at 810 Fed. Appx. 712.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2020. A petition for rehearing was denied on June 10, 2020. Pet. App. 33. The petition for a writ of certiorari was filed on November 9, 2020. 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 Middle District of Florida, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846, and one count of aiding and abetting possession with intent to distribute a detectable amount of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 18 U.S.C. 2. Judgment 1; Pet. App. 27. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3; Pet App. 28-29. The court of appeals affirmed. Pet. App. 1-26.

1. Petitioner was part of a cocaine-trafficking organization that operated out of two houses in Orlando, Florida. Pet. App. 3. The leader of the organization was Eric Jean Gilles, who became a cooperating witness. Ibid. Police officers placed a wiretap on conspirators' cell phones and used pole cameras to track vehicles and people visiting the drug houses. Id. at 3-5; D. Ct. Doc. 332, at 225, 301-302 (Feb. 12, 2018); D. Ct. Doc. 336, at 8-9, 12-14 (Feb. 14, 2018).

Investigators identified one of petitioner's co-defendants, Gerardson Norgaisse, on the wiretap, and linked his calls to his visits to the houses. Pet. App. 6; D. Ct. Doc. 336, at 17, 41–42; D. Ct. Doc. 338, at 106–108 (Feb. 15, 2018). Gilles testified

that Norgaisse came to the houses to deal drugs and would purchase between an ounce and two-and-a-half ounces of cocaine at a time -- amounts typically bought by dealers, rather than users. Pet. App. 6; D. Ct. Doc. 338, at 116; D. Ct. Doc. 340, at 119-120 (Feb. 16, 2018). Norgaisse made frequent visits to the drug houses, usually for fewer than five minutes, and on occasion visited multiple times in one day. Pet. App. 6; D. Ct. Doc. 336, at 26-28.

Gilles testified that petitioner was frequently with Norgaisse. Pet. App. 6; D. Ct. Doc. 338, at 116. Investigators saw petitioner's car at the drug houses at least a dozen times, and at least once he was specifically identified as the driver. Pet. App. 6; D. Ct. Doc. 336, at 37-44, 242-244; D. Ct. Doc. 340, at 123. On multiple occasions, petitioner's car arrived after Norgaisse made a phone call to a wiretapped line. D. Ct. Doc. 336, at 17. And on at least one occasion, investigators heard Norgaisse say he would send his "boy[] * * * again," and petitioner's car then arrived. D. Ct. Doc. 336, at 17, 67; Pet. App. 6; D. Ct. Doc. 338, at 227 (Gilles testifying that Norgaisse called petitioner his "boy").

On April 11, 2017, investigators stopped Norgaisse for a traffic violation after his car was seen at one of the drug houses. Pet. App. 6. Petitioner was in the passenger seat. Ibid. Petitioner consented to a search, and the officers found 73 grams

(two-and-one-half ounces) of cocaine in his underwear. Ibid.; see D. Ct. Doc. 334, at 214 (Feb. 13, 2018) (28 grams equivalent to roughly one ounce); D. Ct. Doc. 336, at 252-254; D. Ct. Doc. 340, at 120.

2. A federal grand jury in the Middle District of Florida charged petitioner with one count of conspiring to distribute and possess with intent to distribute five kilograms or more of cocaine and 280 grams or more of cocaine base, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846, and one count of aiding and abetting others in possessing cocaine or cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), and 18 U.S.C. 2. Indictment 1-3, 11. Petitioner and several co-defendants were tried in a seven-day jury trial. Pet. App. 8.

At the close of the government's case, petitioner requested a jury instruction that read:

> A buyer-seller relationship between a defendant and another person, standing alone, cannot support a conviction for conspiracy.
>
> The fact that a defendant may have bought [c]ocaine from another person is not sufficient without more to establish that a defendant was a member of the charged conspiracy.
>
> Instead, a conviction for conspiracy requires proof of an agreement to commit a crime beyond that of the mere sale.

Pet. App. 8, 18; D. Ct. Doc. 247 (Feb. 16, 2018); D. Ct. Doc. 340, at 216-217. The district court denied his request. Pet App. 8; D. Ct. Doc. 342, at 5 (Feb. 20, 2018).

Instead, the district court instructed the jury that the defendants had been charged with a conspiracy "to knowingly possess with the intent to distribute cocaine or cocaine base." D. Ct. Doc. 342, at 16. The court explained that a conspiracy is "an agreement by two or more persons to commit an unlawful act," and that the government had to prove that "the defendant knew of the unlawful purpose of the plan and willfully joined in it." Id. at 16-17. The court further instructed the jury that "simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests does not establish proof of a conspiracy" and that a "person who does not know about a conspiracy but happens to act in a way that advances some purpose of one does not automatically become a conspirator." Id. at 17-18.

The jury found petitioner guilty on both charged counts. Verdict 1-2. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Pet App. 28-29.

3. The court of appeals affirmed. Pet. App. 1-26. As relevant here, petitioner argued that the district court erred in refusing to give his requested buyer-seller instruction. Id. at

18-19. The court of appeals rejected that argument. Id. at 19-20. The court stated that "'a simple buyer-seller controlled substance transaction does not, by itself, form a conspiracy,'" and that "the better course here would have been to give the buyer-seller instruction," because the proposed instruction was "legally correct" and the evidence, viewed in the light most favorable to petitioner, "could have been interpreted as showing only a buyer-seller relationship." Ibid. (citation omitted). The court explained, however, that a "district court's refusal to give a requested instruction" does not warrant reversal unless "'the requested instruction was correct, the charge actually given did not substantially address it, and the failure to give the instruction seriously impaired the defendant's ability to present an effective defense.'" Id. at 19 (quoting United States v. Farias, 836 F.3d 1315, 1328 (11th Cir. 2016), cert. denied, 138 S. Ct. 68 (2017)). And relying on its prior precedent, the court explained that a general conspiracy instruction like the one given in this case "is sufficient to address the substance of a requested buyer-seller instruction." Id. at 20 (citing United States v. Lively, 803 F.2d 1124, 1129 (11th Cir. 1986)). Accordingly, the court determined that the district court had not "abused its discretion in refusing to give the buyer-seller instruction." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 4-8) that the district court erred in declining to give his 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. 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., Carter v. United States, 140 S. Ct. 2521 (2020) (No. 19-6942); Eichler v. United States, 140 S. Ct. 2517 (2020) (No. 19-6236); Martinez v. United States, 140 S. Ct. 1128 (2020) (No. 19-5346); 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). The same result is warranted here.

1. The court of appeals correctly determined (Pet. App. 19-20) that the district court permissibly declined to give petitioner's 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 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 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 "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.

Consistent with that understanding, the courts of appeals 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, 577 U.S. 932 (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 accordingly relied on those and other similar factors to determine whether a buyer-seller instruction was not required in the circumstances of a particular case. 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) (stating 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. Under those principles, the court of appeals correctly determined that the district court did not abuse its discretion in declining to give petitioner's requested buyer-seller instruction. Pet. App. 19-20. "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). The district court here could thus permissibly find petitioner's requested instruction unnecessary or confusing in light of its instruction to 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. See D. Ct. Doc. 342, at 16-18; Pet. App. 20.

The evidence at trial established that petitioner was a co-conspirator in the drug-distribution conspiracy rather than a mere buyer. Testimony and other evidence demonstrated that petitioner served as a courier for Norgaisse, who regularly purchased dealer quantities of cocaine, sometimes making multiple visits to a drug house in a single day. D. Ct. Doc. 336, at 28, 253-254; D. Ct. Doc. 338, at 26-28; D. Ct. Doc. 340, at 120. After Norgaisse placed an order, petitioner often arrived in Norgaisse's stead; in one case, he did so after Norgaisse was heard on the wiretap saying

he was sending his "boy" to the drug house. D. Ct. Doc. 336, at 17, 67. And when police followed Norgaisse and petitioner from one of the drug houses and stopped them, they found two-and-one-half ounces of cocaine -- an amount Norgaisse routinely purchased and far more than one person would use -- in petitioner's underwear. D. Ct. Doc. 334, at 214; D. Ct. Doc. 336, at 20-21, 207, 252-254. Under the circumstances, the district court thus did not abuse its discretion in determining that the conspiracy instructions accurately reflected the law and that no further instruction was necessary.

2. Contrary to petitioner's contention (Pet. 4-8), this Court's review is not warranted to resolve a purported disagreement among the courts of appeals on the application of harmless-error review, which was not the basis for the decision below.

A constitutional error is harmless if the government "prove[s] beyond a reasonable doubt that [it] did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). In Neder v. United States, 527 U.S. 1 (1999), this Court held that Chapman's harmlessness standard for constitutional errors applies to "improper instructions" that "preclude[d] the jury from making a finding on the actual element[s] of the offense." Id. at 9-10 (emphasis omitted). Every court of appeals follows that standard, including the court below. See, e.g., United States v. Takhalov, 827 F.3d 1307, 1320-1321 (11th Cir.

2016). In this particular case, however, the court did not even need to reach the issue of harmlessness, because it found that the district court did not err in the first place.

The Eleventh Circuit has explained that, "[f]or the denial of a requested jury instruction to be reversible error, a defendant must show that the instruction (1) was a correct statement of the law; (2) was not adequately covered in the instructions given to the jury; (3) concerned an issue so substantive that its omission impaired the accused's ability to present a defense; and (4) dealt with an issue properly before the jury." United States v. Brazel, 102 F.3d 1120, 1139 (1997), cert. denied, 522 U.S. 822 (1997), and 522 U.S. 1060 (1998) (citation and internal quotation marks omitted); see Pet. App. 19 (same). In the decision below, the court of appeals acknowledged that petitioner's "requested instruction was legally correct" but determined, in light of precedent, that the rest of the district court's conspiracy instruction was "sufficient to address the substance of [the] requested buyer-seller instruction." Pet. App. 19-20. The court of appeals therefore determined that the district court did not "abuse[] its discretion in refusing to give" the precise instruction petitioner had requested. Id. at 20.

The court of appeals' determination that the jury instructions as a whole accurately described the elements of the charged conspiracy offense is a finding that no error occurred,

not that the district court committed an error that was harmless. See Takhalov, 827 F.3d at 1320 (explaining that harmlessness inquiry applies only if court improperly denied an instruction that "was not substantially covered by other instructions"). The court did not address harmlessness, much less adopt a harmless-error standard different from the one used in other circuits.

3. Nor can petitioner demonstrate that he would have been entitled to a buyer-seller instruction in any other circuit. The Seventh Circuit, for example, 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 a" transaction. United States v. Cruse, 805 F.3d 795, 816 (2015), cert. denied, 136 S. Ct. 1699 (2016) ("Because a middleman and his principal are on the same side of a transaction, they cannot have a buyer-seller relationship."); see also United States v. Payton, 328 F.3d 910, 912 (7th Cir.), cert. denied, 540 U.S. 881 (2003) (finding a conspiracy, rather than a buyer-seller relationship, where defendant's father testified that he served as a "runner"); ibid. ("The 'buyer-seller' argument is irrelevant" where "the conspirators are on the same side of the sale"). This is such a case. The evidence shows that petitioner served as a courier, assisting Norgaisse in procuring dealer quantities of cocaine. See Pet. App. 6; D. Ct. Doc. 334, at 214; D. Ct. Doc. 340, at 120. Petitioner's co-conspiratorial

relationship with Norgaisse himself, which is alone sufficient to support the verdict, was not a buyer-seller relationship at all; and his co-conspiratorial relationship with Gilles was in furtherance of his and Norgaisse's drug distribution.

Petitioner relies (Pet. 7) on the Seventh Circuit's decision in United States v. Gee, 226 F.3d 885 (2000), but that decision stated only that, "in appropriate situations," district courts should instruct juries on the distinction "between a conspiracy and a mere buyer-seller relationship." Id. at 895. The Seventh Circuit determined that Gee was "one of those situations" because the evidence of a conspiracy was "weak" and "as consistent with a buyer-seller relationship as it was with a conspiracy." Ibid. Indeed, during trial, the district court had "ruled that the government could not admit coconspirator statements under Fed. R. Evid. 801(d)(2)(E)" because it "found that the government had not shown, by a preponderance of the evidence, that a conspiracy existed between the defendants." Id. at 895 n.8. In addition, although the court of appeals did not quote the district court's jury instructions, the court of appeals stated that "[t]he instructions allowed the jury to make a guilty finding without determining whether the government had proved the existence of a conspiracy." Id. at 895.

The remaining decisions cited by petitioner (see Pet. 8) likewise do not establish a circuit conflict that warrants this

Court's review. The Ninth Circuit's decision in Moe, 781 F.3d 1120, is a factbound application of the general principles set forth above; like the court of appeals here, the court in Moe found that notwithstanding some evidentiary support for a buyer-seller instruction, the district court did not commit error in failing to give one because the other instructions -- specifically those that informed the jury of "the general elements of conspiracy" -- sufficiently conveyed "the distinction between a buyer-seller relationship and a co-conspiracy relationship." Id. at 1128; see id. at 1125-1129. And the First Circuit's decision in United States v. Boidi, 568 F.3d 24 (2009), did not concern a buyer-seller instruction at all, but instead an instruction for the lesser-included offense of conspiring to possess a controlled substance where the defendant was charged with conspiring to possess a controlled substance with the intent to distribute it. Id. at 27-30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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