

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

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024

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**ARMANDO DANIEL CALDERON, Petitioner**

vs.

**UNITED STATES OF AMERICA, Respondent**

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

1. Does an officer interfere with a driver's property rights, in violation of the Fourth Amendment, by continuing to seize a vehicle after the driver is in other officers' custody, without independent reasonable suspicion involving the vehicle or the person designated by the driver to take custody of it?
2. In order to establish a drug-distribution conspiracy between a government agent's middleman and a putative seller of drugs, must there be evidence of their prolonged course of sales and shared stake therein?
3. Is a buyer and seller's agreement to commit a further crime, beyond their single transaction, an essential element of a drug-distribution conspiracy between that buyer and seller, which must be provided to a jury *sua sponte* if a buyer-seller relationship is supported by substantial evidence?

## **RELATED PROCEEDINGS**

The following proceedings are directly related to the instant case:

- *United States v. Armando Daniel Calderon* No. 3:18-cr-00290-WHA-7, United States District Court for the Northern District of California, Judgment entered June 21, 2019.
- *United States v. Armando Daniel Calderon*, No. 22-10024, United States Court of Appeals for the Ninth Circuit, unpublished Memorandum Disposition filed on March 22, 2024, and Petition for Panel Rehearing and Rehearing En Banc denied on June 24, 2024.

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**ARMANDO DANIEL CALDERON, Petitioner**

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioner Armando Daniel Calderon respectfully prays that a Writ of Certiorari issue to review the unpublished decision of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Northern District of California, convicting Petitioner of conspiracy to distribute and possession with intent to distribute methamphetamine, under 21 U.S.C. §§ 841(a)(1)&(b)(1)(A)(viii) & 846; and carrying a firearm during, in relation to, and in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c)(1). As set forth in his accompanying motion, Petitioner requests leave to proceed *in forma pauperis*, as he is indigent and has been represented by appointed counsel in all proceedings.

## **OPINION BELOW**

The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit affirming the judgment appears with its Order Denying Panel Rehearing and Rehearing en Banc as Appendix A and B.

## **JURISDICTION**

The Ninth Circuit filed its Memorandum affirming Mr. Calderon's convictions on March 22, 2024, and denied his Petition for Rehearing and Rehearing en Banc on June 24, 2024. App. A & B.<sup>1</sup> The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely pursuant to Supreme Court Rule 13.

## **CONSTITUTIONAL PROVISIONS AND STATUTES**

**THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION** provides in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

**THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION** provides in pertinent part: “No person shall be ... deprived of life, liberty, or property, without due process of law.”

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<sup>1</sup> “App.” refers to the Appendix to the instant petition, “AOB” refers to Appellant’s Opening Brief, “ARB” refers to Appellant’s Reply Brief, and “PFR” refers to Appellant’s Petition for Rehearing and for Rehearing en Banc. “ER” refers to the Excerpts of Record filed on appeal.

**21 U.S.C. § 841(a)(1)** provides:

**(a) Unlawful acts:** Except as authorized by this subchapter, it shall be

unlawful for any person knowingly or intentionally—

**(1)** to manufacture, distribute, or dispense, or possess with intent to  
manufacture, distribute, or dispense, a controlled substance;

**21 U.S.C. § 846** provides: Any person who attempts or conspires to commit  
any offense defined in this subchapter shall be subject to the same  
penalties as those prescribed for the offense, the commission of which  
was the object of the attempt or conspiracy.

### **STATEMENT OF THE CASE**

#### **I. THE PROCEEDINGS IN THE DISTRICT COURT.**

##### **A. Trial Proceedings Related to the Issues Raised on Appeal.**

On October 11, 2018, Calderon was charged in a superseding indictment with conspiracy to distribute and possess with intent to distribute 500 or more grams of methamphetamine for Count 8, possession with intent to distribute 50 or more grams of methamphetamine for Count 10, and possession with intent to distribute 500 or more grams of methamphetamine for Count 13, , all under 21 U.S.C. §§ 841(a)(1)&(b)(1)(A)(viii); and carrying a firearm during, in relation to, and in furtherance of a drug trafficking crime, under 18 U.S.C. § 924(c)(1), for Count 14. 6-ER-4-5. Six co-defendants were charged with various drug-related crimes. 6-ER-1398-1405.

On January 15, 2019, Calderon filed a motion to suppress the evidence in support of Counts 13 and 14, as obtained during an unlawful search of his truck on August 20, 2018. Dkt. #78.<sup>2</sup> An evidentiary hearing on the motion was held on May 1 and 2, 2019. 1ER-64-69. The court denied the motion on May 16, 2019, finding the evidence would have been inevitably discovered. 1-ER-56. On June 25, 2019, Calderon filed a second motion to suppress evidence from a different vehicle driven by him on September 11, 2018. Dkt. #173. The court denied that motion on August 9, 2019, Dkt. #201.

Following several continuances and substitution of counsel, a jury trial began on Calderon's four counts on June 14, 2021, without his co-defendants. Dkt. #399. He was convicted on all counts on June 23, 2021. 1-ER-11-15.

On January 25, 2022, Calderon was sentenced to 198 months imprisonment, with 138-month terms for each of Counts 8, 10, and 13, to be served concurrently, and 60 months consecutive for Count 14. 1-ER-10. The judgment and his timely notice of appeal were filed on January 26, 2022. 1-ER-2; 6-ER-1406.

**B. Evidence Presented at the Hearing on the Motion to Suppress the Evidence Used to Support Counts 13 and 14.**

At around 4:00 a.m. on August 20, 2018, San Jose State University Police Corporal Christopher Zonsius ran Calderon's license plate after observing his truck stop in a bicycle lane and pull back out again. 2-ER-98-99,

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<sup>2</sup> "Dkt." refers to the docket of the Northern District of California, No. 3:18-cr-00290-WHA-7.

143. The registration came back suspended, and he activated his patrol lights. 2-ER-99-101. Calderon stopped the truck in the down-sloped driveway of an apartment building's garage. 2-ER-101-02.

Zonzius checked Calderon's driver's license, which returned with a felony warrant for violating a domestic-violence protective order. 2-ER-111, 115-16. Zonzius removed Calderon from the truck and handcuffed him, putting his phone on the driver's seat. 2-ER-119; Ex. 1, Zonzius Bodycam Video, 11:05:30-50.<sup>3</sup> Calderon asked if his cousin, Cesar, could take the truck, and Zonzius responded, "yes, your cousin can take the truck." Ex. 1, 11:06:02; 2-ER-119. Calderon said Cesar was on his way, and Zonzius said "that's fine, I don't have a problem with your cousin taking the car." Ex. 1, 11:06:11-45.

Officer Edward Carboni took Calderon's keys and placed them on the truck's driver-side door panel. Ex. 2, Carboni Bodycam Video, 11:6:05-08. Carboni stated, "I'll take care of this," and began searching the truck. Ex. 1 & 2, 11:06:40-56. Calderon said he wanted "to see everything you guys, you know," and Zonzius reassured him, "we're not taking anything out of your vehicle" and walked Calderon up to the squad car. Ex. 1 & 3, Krapivkin Bodycam Video, 11:6:45-49. Meanwhile, Carboni lifted up a seat cushion, opened the console, picked up some cell phones and turned them on, opened Calderon's wallet, and pulled a backpack from the backseat area. Ex. 2,

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<sup>3</sup> Calderon cites to the universal time clock in the videos' upper-right corner, which is 7 hours ahead of the local time.

11:06:40-7:52.

Cesar arrived near the squad car, where Zonzius was preparing to search Calderon incident to his arrest. Ex. 3, 11:07:30. Calderon stated Cesar had a valid license, and Zonzius told Cesar, “you can take possession of the vehicle, he has given you permission to do that.” Ex. 1 & 3, 11:07:36-44. Cesar looked towards the truck and asked Carboni, “why are you going through his truck?” Ex. 1 & 3, 11:07:50. Carboni approached and responded:

Because he’s under arrest, okay? If you would like to take possession of the truck, you can wait over by the tree, okay? But what you’re not going to do is just come in here and start asking questions, okay? So after we are done with the truck you can take possession of it.

Ex. 2 & 3, 11:07:55-8:07. Carboni resumed searching the truck, and Zonsius began searching Calderon with assistance from Officer Krapivkin. Ex. 1 & 2, 11:08:10-20.

While Caboni was telling Cesar to wait, Calderon asked Zonzius if Cesar could “grab his money and everything.” Ex. 1, 3, 11:8:04. Zonzius responded, “yes he can,” and Calderon said “hey Cesar,” but Zonzius stopped him and said, “just hold up for a second, we got to deal with this for a second, and we’ll get to that in a second.” Ex. 1 & 3, 11:08:04-12. Caldron asked if Cesar could take “all my things,” and Krapivkin said Calderon could leave whatever he wanted with Cesar, but “we just got to get through this whole thing first.” Ex. 1 & 3, 11:08:12-33.

Back at the truck, Carboni unzipped the backpack and pulled out a bag containing suspected methamphetamine.<sup>4</sup> Ex. 2, 11:08:30; 2-ER-197. He walked up to where Zonzius was searching Calderon and stated, “[y]ou’re going to have some on-view charges as well.” Ex. 2, 11:08:34-45. Carboni told Calderon, “the truck is no longer going with your brother (sic).” Ex. 2, 11:8:45. Carboni told Cesar he “could go back inside; we’re not giving the truck back to you.” Ex. 2, 11:9:10-13. Carboni resumed searching the truck. Ex. 2, 11:09:40.

By 4:09:30 a.m., Zonsius had found a large amount of cash and six bullets in Calderon’s pockets. Ex. 1 & 3. 11:08:15-09:30; 2-ER-124-26. He placed Calderon in his squad car and spoke with Carboni at the truck, telling him to “just stop.” Ex. 1 & 2, 11:10:00-19. Carboni showed Zonzius the methamphetamine, saying “you’ve at least got him for sales.” Ex. 1 & 2, 11:10:20-36. Zonzius checked his computer again, and in response to another officer, stated “no, he’s gone … keep him gone.” Ex. 1, 11:11:02-11:14. Zonzius returned to the truck saying, “there’s going to be a gun in here too, I found bullets.” Ex. 1, 11:11:20-11:25. While Zonsius and Carboni searched the truck, Zonsius said: “OK, we’re towing the car because we’re placing him under arrest at this time for the felony. OK. So, we’re doing the inventory search. Let’s just double check everything,” and Carboni misstated: “Well, in addition to having the felony warrant that’s why I’m searching where he has access to … [w]hich

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<sup>4</sup> At trial, the parties stipulated it contained 706 grams of methamphetamine. 5-ER-930.

is what led me to this [methamphetamine], which was sitting on the top.”

1-ER-58; Ex. 1 & 2, 11:11:46-12:07.

Carboni found a gun wedged in the driver’s side of the truck, while Zonsius found an ammunition magazine in a bag on the front passenger’s seat. Ex. 1 & 2, 11:12:22. A few minutes later, Carboni found a second bag containing additional methamphetamine. Ex.1 & 2, 11:11:02-11:25; 2-ER-210. The keys remained in the truck on the inside of the door during the search until Carboni moved them to the driver seat before leaving with evidence. Ex. 2, 11:6:05-08, 11:17:40; 2-ER-213.

### **C. Evidence Presented at Trial in Support of Counts 13 and 14.**

From the above searches of Calderon and his truck, the Government presented 832.4 grams of methamphetamine, \$5,363.50 cash, four cell phones, a scale, a gun, and ammunition. 2-ER-444-445, 478-79, 485-86, 493-94.

### **D. Evidence Offered at Trial in Support of Counts 8 and 10, from September 2018.**

In 2018, the federal Drug Enforcement Administration (“D.E.A.”) investigated a methamphetamine distributor, Eric Jimenez, through the use of a confidential informant. 3ER-516-17, 522. The informant had made some small controlled buys of methamphetamine from Jimenez. 3-ER-522-23, 594.<sup>5</sup>

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<sup>5</sup> Jimenez was charged in Count 8 with Calderon, and in Count 1 with a conspiracy between December 19, 2017, and April 17, 2018, with other co-defendants, but not Calderon. 3-ER-1398-1402.

On August 27, 2018, the informant called Jimenez to arrange to buy a pound of methamphetamine. 3-ER-527-28; 4-ER-715-16; 6-ER-1270-72. On August 28, in the Denny's parking lot in Redwood City, Jimenez removed a white bag from the trunk of his Scion and took it to the informant's Camaro. 3-ER-638-39; 4-ER-669. The informant asked if the product was clean, and Jimenez responded, “[it] should be. That is how it arrived.” 6-ER-1275. The informant asked for the price and was told \$2750. 4-ER-726; 6-ER-1275. The informant then mentioned a planned trip to Washington to re-sell between 10 and 15 kilos, and asked if Jimenez's people “could make a trip” and give him that amount at a good price. 4ER-726-28; 6-ER-1277-81. Jimenez said, “I have another one over here that has cheaper ones and they're also good, ... it's just a matter of asking.” 6-ER-1279. Jimenez indicated he would call and “see if he wants to.” 4-ER-729; 6-ER-1283.

On September 4, Jimenez sent the informant a text: “A friend will give them to you at 4,700 if you get five or more.” 3-ER-532.

On September 11, the informant and Jimenez met again at the Denny's parking lot. 3-ER-599-600. Jimenez told him, “[w]ell right now ... what I have ... is garbage. ¶ I don't think you want that, but I had told you that I have a cousin that ... has that. ¶ Well, something good.” 6-ER-1287-88. “[W]e can see what he has right now .... I don't know what ... exactly he has.” 6-ER-1303. Jimenez additionally explained he has “grab[bed] some from them and it's okay.... It's good, yes.” 6-ER-1290; *see also* 6-ER-1304 (“they have some decent,

pretty good. I get it from them there, too.”)

A man identified as Calderon arrived in a Jeep and joined the informant in his Camaro, sitting in the seat Jimenez had vacated for him. 3-ER-600-05; 4-ER-679-81. Jimenez talked to them through the window, and he and Calderon referred to each other as cousins. 3-ER-600-01; 6-ER-1305. The informant told Calderon he wanted to know he had something good, not trash, and Calderon guaranteed that if he did not like something he gave him, he would exchange it, so they could continue working. 4-ER-772; 6-ER-1306-07. The informant explained he had a trip in two weeks, “[w]hat price can you guys give me? ... You guys talk the price over, so you can give it to me afterwards – him to me. I don’t want to go over anyone’s head.” 6-ER-1308.

The informant asked Jimenez if he wanted “to explain it to him,” and Jimenez told the informant to talk. 6-ER-1308. The informant responded, “[n]o, no, but I don’t [U/I], in front of you, I don’t want [U/I] anything;” and Jimenez said, “[i]t’s okay, it’s me and you.” 6-ER-1308. The informant then told Calderon more about his plans for consecutive trips, every two to three weeks, and for Calderon to set the price and discuss it, apparently, with Jimenez, with whom the informant would be in touch. 6-ER-1308-12.

After Calderon left in his Jeep and Jimenez left in his Scion, agents surveilled Calderon while he drove around Redwood City. 3-ER-602-05; 4-ER-682. At one point aerial footage shows the Jeep and the informant’s Camaro pull aside each other, with the drivers interacting. 4-ER-682-83. Calderon was

stopped for vehicle violations in the driveway of an apartment building and fled. 3-ER-601-02; 4-ER-832-33, 852. Deputies searched the area and the Jeep, finding Calderon's ID card and a bag with a gun. 4-ER-833-47.

On September 18 or 19, Jimenez sent the informant a text, stating: "I gave my cousin your number. Everything is good with him." 3-ER-538. Calderon called the informant on September 19. 3-ER-540; 6-ER-1322-23. He confirmed he was Jimenez's cousin and agreed to meet the informant the following Friday. 6-ER-1323-34. The informant told Jimenez that Calderon had called him and said, "[i]f I'm going to meet with him, I'd like you to come with him also, so the three of us can talk....[¶] Please, because I'm telling you, I trust you, the same way that you trust me." 6-ER-1328-30.

The next meeting between the three occurred at the Home Depot parking lot in East Palo Alto on September 21, 2018. 3-ER-543-44, 606-07. Jimenez arrived first and waited with the informant, who asked Jimenez about his prior experiences with Calderon:

C/I: Now the quality, it must be good quality.

Jimenez: They're good, they're good.

C/I: Because you've always told me now, and I really appreciate that, you've always worked professionally ... It's not that good. You have told me up front....

Jimenez: No, no, they've been having a good product. Like I was telling you, is going to be good.

C/I: Have you been working with him, how have you done it with him?

Jimenez: I get work from him as well.

C/I: And he gives it to you like that?

Jimenez: Yeah.

C/I: I'm telling you; I'm going to say it in front of him when he comes also. I'd like to do it only with you. At least the first time.

...

Jimenez: Okay, do you want to talk to him? My phone is there so that you can call him....

C/I: Or he comes, and we talk. It's better so that he can see me. I feel comfortable with you always, and for him to see me face to face.

Jimenez: Well, that's fine. He's going to be in good terms with me, better.

C/I: And of course, of course, I know how important is to be cordial. And for him not to feel that he's being cut off the deal. But I mean, he can give it to you, we can do it at least for the first time, I'd see that everything went fine, and that he's involved. I have complete trust on you.... If you come, I'm going to feel much better. It's going to be done in a jiffy, and then two weeks later –

Jimenez: But look, this is the thing. If you're going to work, it's good for you to meet him.

C/I: Oh, yes, that is why I want you to come.

6-ER-1341-43; 4-ER-786-87,791.

Calderon then arrived and told the informant, “[i]f something comes bad, I'll be in charge of changing them for you.” 4-ER-790. When the informant asked if they were “on the same price,” Calderon said “47. Are you going to need 10?” And the informant responded he was bringing “for 15.” 4-ER-790.

On September 24, Calderon called the informant to see if he could go to him to talk that night or the next morning. 6-ER-1355. The informant said he could not meet then, but he was ready with the cash. 6-ER-1355-56. Calderon

confirmed the quality was good and he would exchange anything the informant did not like. 6-ER-1356-57; 4-ER-794-95. D.E.A. Agent Wolf opined sellers sometimes guarantee their products to build loyalty. 5-ER-1032.

D.E.A. agents lowered the agreed amount to 12 kilograms and planned the buy/bust operation for September 25. 3-ER-545-48; 4-ER-827-28. In a pre-operation briefing report, Sergeant Sabel wrote that the agents had been advised there was a “very strong possibility of a money rip.” 3-ER-580-81.

Jimenez met the informant in the parking lot at 812 Willow in Menlo Park around 11:35 a.m. on September 25. 3-ER-644-45; 5-ER-947. An undercover agent performed a money flash from an SUV, over Jimenez’s protests that he did not need to see the money and recommendations that the Informant just talk with Calderon. 5-ER-948; 6-ER-1294-97. Calderon arrived at noon, and the three spoke together outside of the informant’s Camaro. 3-ER-645-46. According to Agent Li, Calderon said he would need to go get the drugs and left. 3-ER-550.

Later that afternoon, Jimenez called the informant:

C/I: Okay, have you talked to him or not yet?

Jimenez: I just talked to him right now, he said they were coming over here, right?...

C/I: Okay, ... he said that---that he is bringing it, do you think it’s true or a lie?”

Jimenez: Well, if they say he is bringing it, well, I say he is bringing it, right? ...

C/I: I don’t know, you know him better, not me.

Jimenez: Well, yes, ... why would they lie?

C/I: Okay, do me a favor. ... I'm thinking, if you can bring me one of the ones you have, so I can take it and test it good? ....  
[B]ecause maybe I can ... buy the rest from you in a few days....

Jimenez: Okay.

6-ER-1361-62.

Arial surveillance followed Jimenez, who eventually pulled up to 223 Daphne Way in East Palo Alto. 5-ER-954. He walked up to the house carrying something white in each hand. Ex. 97-1, 12:18.<sup>6</sup> He then left the house and was hidden from aerial view for about 30 seconds before walking to his car with something larger in his right hand. Ex. 97-1, 12:20:17-12:21:20. He then stopped at a McDonald's, where a man identified as Jimenez's source, Farias, got into his car for several minutes. 3-ER-588; 5-ER-991-92; Ex. 97-1, 12:26-34.<sup>7</sup> Jimenez returned to the parking lot at 812 Willow and met with the informant for about 25 minutes, before returning to 223 Daphne. 5-ER-957-60; Ex. 97-1, 12:42-1:08-1:18.

The agent who was aerially surveilling Jimenez began surveilling Calderon's BMW at 2:23 p.m. 5-ER-962. At 2:41 p.m., Calderon stopped at a gas station and left with two people. 5-ER-986. A man exited at a homeless encampment before being picked back back up. 5-ER-987. This repeated at a mobile home park. 5-ER-987. The BMW also stopped at Jack in the Box. 5-ER-

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<sup>6</sup>Citations are to the clock in the upper-left corner of the video.

<sup>7</sup> Farias was charged in a separate earlier conspiracy in Count 1 with Jimenez, but not Calderon. 6-ER-1398-99.

987-88. After that, the man exited at another encampment, and a woman exited at an apartment complex, carrying several bags. 5-ER-964, 988.

At 4:21 p.m., the BMW parked near 223 Daphne. 5-ER-965. Jimenez's Scion is not there. Ex. 97-2, 16:21:44-47. The video stops and the next disc starts 42 seconds later, showing Calderon walking along the side of 223 Daphne near some parked cars, including a red Mustang in non-working condition. 3-ER-422; 5-ER-965-66; Ex. 97-3, 16:22:32. Agent Brown interpreted the video as showing Calderon approaching the Mustang, opening the driver door, and placing a white object he was carrying inside it, closing the door, and then walking back toward the driveway. 5-ER-967-98. However, given trees and shadowing, it is hard to see any details except Calderon's approaching a trash can, holding something white, and briefly pausing next to the Mustang, before walking back down the driveway without anything in his hands. Ex. 97-3, 16:22:32-55. When Calderon next appears in view of the orbiting plane's camera 30 seconds later, he is walking towards the front of the house empty-handed, and then turns around and walks to the backyard where he is hidden by the bushes and trees for 90 seconds, before walking back down the driveway and returning to his car while slightly adjusting his pants. 5-ER-968-69; Ex. 97-3, 16:23:31-16:25:55. Calderon then drove around for a half-hour before returning to 812 Willow and having a brief unrecorded meeting with Jimenez and the informant. 5-ER-974-75; Ex. 97-3, 16:25:55-16:54:30.

Calderon then drove around again before picking up a passenger who

had exited a white car stopped at the same light. 5-ER-976-77; Ex. 97-3, 17:15:20-17:15:30. The white car followed Calderon back to 812 Willow and immediately parked near Jimenez and the informant's cars. 5-ER-978; Ex. 97-3, 17:21:20-17:22:14. Calderon drove around the side and parked closer to where Jimenez and the informant were standing. 3-ER-649-50; 5-ER-978; Ex. 97-3, 17:22:14-17:22:40. The passenger exited Calderon's car and greeted them, followed by Calderon. 4-ER-658, 5-ER-979; Ex. 97-3, 17:22:42-17:23:23. While they were talking, the white car pulled up behind them. 5-ER-979; Ex. 97-3, 17:23:23. Agents suddenly arrived, the white car drove away, and Calderon fled and was arrested nearby. 3-ER-599; 5-ER-980.

Agent Tush searched Jimenez's Scion and found a kilo of methamphetamine inside a cardboard box. 4-ER-902-03; 5-ER-934. The only items found in Calderon's BMW were an iPhone, a scale with residue, unused sandwich bags, clothes, and toiletries. 4-ER-906-07.

At 223 Daphne Way, agents found 7,101 grams of methamphetamine and bundles of money. 4-ER-861-72, 882-83; 5-ER-931-33. A white plastic bag containing 335 net grams of pure methamphetamine was found in the Mustang parked in the driveway. 5-ER-933. DEA agents also found ID cards and DMV mail for Jimenez, and one court-related notice for Calderon. 5-ER-887-88; 6-ER-1397. There were also registration, insurance, and title documents showing Jimenez owned the Mustang. 4-ER-890-93.

## II. THE APPEAL AND DECISIONS IN THE NINTH CIRCUIT

Calderon raised four issues on appeal, two of which were multi-faceted.

The first issue explained that the contraband found pursuant to an illegal search of Mr. Calderon's truck, used to support Counts 13 and 14, would not have been inevitably discovered by lawful means, as the district court had found, because Officer Carboni had unlawfully prolonged the truck's seizure beyond the mission of effecting Calderon's arrest warrant when he prevented Calderon's cousin from taking the truck without reasonable suspicion. *See* AOB 38-40; Reply 6-7 (citing, *e.g.*, *Rodriguez v. United States*, 575 U.S. 348, 356-58 (2015); *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005)).

The Ninth Circuit's rejection of this argument in its Memorandum was limited to noting that only two minutes had passed between the cousin's arrival and discovery of probable cause (pursuant to Calderon's custodial search), and erroneously stating Calderon did not "cite any precedent holding that two minutes constitutes unlawful prolonging of a traffic stop." App. A at 5-6.<sup>8</sup> However, Calderon had cited this Court's analysis specifically rejecting a temporal *de minimis* exception for unlawfully prolonging a traffic stop beyond its mission, in holding that "law enforcement may not extend a traffic stop with tasks unrelated to the traffic mission, absent independent reasonable suspicion." *Rodriguez*, 575 U.S. at 356-58.

Issue II explained that Count 8 must be dismissed, because there was

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<sup>8</sup> Cited pages in the Appendix are those in the lower right corner.

insufficient evidence of Calderon’s conspiratorial agreement with the middleman used by a government agent to locate a seller. See AOB 46-49 (citing e.g., *United States v. Bey*, 725 F.3d 643, 649 (7th Cir. 2013); *United States v. Ramirez*, 714 F.3d 1134 (9th Cir. 2013) (requiring “evidence of a prolonged and actively pursued course of sales coupled with the seller’s knowledge of and a shared stake in the buyer’s illegal venture); Reply 12-16.

The Ninth Circuit ignored this authority, and its cited evidence failed to show any prolonged sales or shared stake to demonstrate the requisite agreement between Calderon and Jimenez to distribute drugs to the informant, as opposed to their prior existing buyer-seller relationship and Jimenez’s new role as the Informant’s middleman. *See* App. A at 6.

Issue III presented three instructional errors for plain-error review. The first explained that the instructions omitted a drug conspiracy’s essential element that there must be an agreement between a buyer and seller to commit a further crime than a single transaction. The Ninth Circuit found the error was not plain by erroneously finding the instructions sufficiently similar to those in *United States v. Moe*, 781 F.3d 1120, 1128-29 (9th Cir. 2015), and because Calderon had not relied on a buyer-seller *defense*. App. A at 7. This was error, because unlike in *Moe*, nothing in Calderon’s instructions informed the jury they had to find the conspirators’ agreement to commit further sales, and under Ninth Circuit precedent, this is an essential element for drug conspiracies alleged between buyers and sellers. In applying the prejudice

prongs of plain-error review of an omitted element, courts must consider what the argument and evidence could be in a proceeding *with* the element, including on retrial, rather than the arguments defendants relied on at the original trial. *See* PFR 13-17 (citing, e.g., *Greer v. United States*, 593 U.S. 503, 508 (2021); *United States v. Johnson*, 979 F.3d 632, 637-38 (9th Cir. 2020)).

The second issue explained that the omission of the standard instruction that jurors must unanimously agree as to the particular crime the conspirators agreed to commit was prejudicial because there was a genuine possibility of confusion regarding both the particular crime Calderon was argued to have committed and the co-conspirators. *See* AOB 68-73. The Ninth Circuit erroneously found no plain error by distinguishing the facts of a prior decision, in which the indictment had not specifically identified the co-conspirators, and by not addressing the potential confusion here regarding particular criminal acts, in addition to co-conspirators. *See* App. A at 7-8; PFR 20-22.

The third instructional error highlighted the erroneous insertion of “conspired” in the verdict forms for the possession counts, such that the jury was charged with identifying the amounts Calderon was alleged to have conspired to possess, rather than actually possessed. *See* AOB 73-77. The Ninth Circuit found no prejudice, based on the amounts alleged. App. A. at 8.

Finally, Calderon argued his trial counsel provided constitutionally-ineffective assistance by failing to argue the evidence did not establish his agreement with Jimenez to distribute drugs; failing to object to the omission of

the buyer-seller instruction and the specific-unanimity requirement; failing to object to the erroneous verdict forms; making an erroneous and harmful concession that evidence of a lesser quantity of methamphetamine found on Jimenez's property could support the charged conspiracy to possess with intent to distribute, if the jury found Calderon had placed it there; and failing to object to the provision of a timeline highlighting material facts, for the jury to keep in their notebooks. *See AOB 77-92.* The Ninth Circuit declined to review these issues, finding the record insufficiently developed. App. A at 8.

Calderon's Petition for Rehearing and for Rehearing En Banc was denied on June 24, 2024. App. B at 10.

### **REASONS FOR GRANTING THE PETITION**

**CERTIORARI IS NEEDED TO RESOLVE CIRCUIT SPLITS AND TO ADDRESS IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT YET BEEN SETTLED BY THIS COURT OR WERE HANDLED IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT.**

- A. The Ninth Circuit Erroneously Applied a *de Minimus* Exception for Prolonging a Vehicle's Seizure Beyond a Traffic Stop's Mission and Left Unaddressed the Important Legal Question of whether an Officer Violates the Fourth Amendment by Preventing an Authorized Person from Taking Custody of a Vehicle once the Driver Is Securely Arrested.**

As presented in detail in Part I.B of the case statement, *supra*, Mr. Calderon was lawfully stopped and placed into custody pursuant to an arrest warrant for violating a domestic-violence protective order. While he was in handcuffs and being searched by two officers away from his truck, another officer was illegally searching it. *See Arizona v. Gant*, 556 U.S. 332, 343 (2009);

Ex. 1 & 2, 11:05:30-11:08. Calderon asked if his cousin, Cesar, could take the truck, and Corporal Zonsius said he could. Ex. 1, 11:06:02. Zonzius reaffirmed this when his cousin arrived, but Cesar was prevented from taking the truck by Officer Carboni, who told him he was searching it “[b]ecause [Calderon]’s under arrest,” and “after we are done with the truck you can take possession of it.” *See* Ex. 1, 2, & 3, 11:07:50-8:07.

Carboni then went back to the truck, unzipped a backpack, and found a large bag of methamphetamine. Ex. 2, 11:08:10-30. A little more than two minutes after the cousin’s arrival, Corporal Zonsius found bullets on Calderon. *See* Ex. 1 & 3 11:08:15-09:30. Another officer took Calderon away, and Zonsius returned to the truck to search for weapons with Carboni, indicating they were doing an inventory search, while Carboni made other false statements. Ex. 1 & 2, 11:10-11:12:07. They soon found a gun and a magazine with bullets. Ex. 1 & 2, 11:12:22. The keys remained in the truck during the search. Ex. 2, 11:6:05-08, 11:17:40.

Calderon moved to suppress this evidence, as obtained pursuant to an illegal search and seizure of his truck and its containers in violation of the Fourth Amendment. Dkt. #78. The Government conceded the initial search of the truck by Officer Carboni was illegal, but argued the evidence inevitably would have been discovered pursuant to a lawful search once Zonzius found bullets on Calderon’s person and had probable cause to search the truck for a gun, because domestic-violence restraining orders typically prohibit possession

of guns or ammunition. 1-ER-59; 2-ER-116-17; Dkt. #97 at 10, 13-14. Following an evidentiary hearing, the district court agreed the officers inevitably would have searched the truck, and it denied the motion. 1-ER-63.

On appeal, Mr. Calderon explained that Carboni unlawfully prolonged his truck's seizure beyond the stop's mission to effect his arrest warrant by prohibiting his cousin from taking his truck while Carboni was illegally searching it. *See* AOB 38-40; Reply 6-7 (citing, *e.g.*, *Rodriguez v. United States*, 575 U.S. 348, 356-58 (2015); *United States v. Place*, 462 U.S. 696, 700-02 (1983); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983); *United States v. Landeros*, 913 F.3d 862, 866-67 (9th Cir. 2019); *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005).) In holding that "law enforcement may not extend a traffic stop with tasks unrelated to the traffic mission, absent independent reasonable suspicion," this Court expressly rejected the Eighth Circuit's rule permitting a *de minimis* unjustified delay. *Rodriguez*, 575 U.S. at 356-58. Yet, that is essentially what the Ninth Circuit adopted here, when its sole explanation for affirmance was its erroneous statement that Calderon did not "cite any precedent holding that two minutes constitutes unlawful prolonging of a traffic stop." App. A at 6 (citing *United States v. Taylor*, 60 F.4th 1233, 1241 (9th Cir. 2023) (observing that an officer did not "improperly prolong the stop when he spent a few minutes consulting computerized databases").

In so doing, the Ninth Circuit dodged the important question of law raised by Calderon: does an officer unconstitutionally interfere with a driver's property rights by continuing to seize a vehicle after the driver is in other officers' secure custody, without independent reasonable suspicion involving the vehicle or the person designated by the driver to take custody of it? And, its ruling directly conflicts with this Court's precedent, cited by Calderon, as well as its own. *See Rodriguez*, 575 U.S. at 356-58; *Landeros*, 913 F.3d at 867.

Unlike in *Taylor*, Carboni was not prolonging Calderon's arrest to engage in lawful activity related to it. He was illegally searching Calderon's truck before allowing Cesar to take possession, without reasonable suspicion regarding the truck or Cesar.

Though there are many decisions delineating the constitutional limits of searching and seizing people pursuant to traffic stops, impounding vehicles for inventory searches, and other searches and seizures of suspects' property, which Calderon cited in framing his arguments on appeal, this Court has never squarely delineated the constitutional parameters for seizing a *vehicle* pursuant to a completed traffic stop, as distinct from the people who were in the vehicle when it was stopped. This Court should grant certiorari to address this important question of law, involving the intersection of multiple Fourth Amendment doctrines.

**B. The Memorandum Erodes the Limited Agreement within the Circuits as to What Constitutes Sufficient Evidence of a Drug-Distribution Conspiracy between a Seller and a Confidential Informant’s Middleman, an Important Question of Law this Court Should Address on Certiorari.**

The Government has a habit of using confidential informants to enlist unsuspecting middlemen to find willing sellers of drugs and then charging the middlemen and sellers with conspiracy. Both the Seventh and Ninth Circuits have recognized that such a conspiracy would require substantial evidence “that the middleman had an agreement with the seller to distribute drugs in addition to the agreement to help the informant buy drugs.” *See AOB 46-49* (citing, e.g., *United States v. Bey*, 725 F.3d 643, 649 (7th Cir. 2013); *United States v. Ramirez*, 714 F.3d 1134, 1140 (9th Cir. 2013)). And to find that agreement, courts look for “evidence of a prolonged and actively pursued course of sales coupled with the seller’s knowledge of and a shared stake in the buyer’s illegal venture.” *Ramirez*, 714 F.3d at 1140 (comparing *United States v. Webster*, 623 F.3d 901, 907 (9th Cir. 2010) (seller received kickback and helped middleman deliver drugs); *Bey*, 725 F.3d at 650 (evidence of payment provided basis to infer middleman’s separate agreement with seller); *United States v. Contreras*, 249 F.3d 595, 599-600 (7th Cir. 2001) (finding middleman “aided and abetted” sale, but absent evidence of “prolonged cooperation with Contreras, nor any stake in the success of Contreras’ trafficking,” middleman’s “assistance on this one occasion does not permit the inference that he conspired with Contreras”); *United States v. Tyler*, 758 F.2d 66, 69 (2d Cir.

1985) (helping willing buyer find willing seller is insufficient to establish conspiratorial agreement between facilitator and seller); *see also Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (while indicating “stake in the venture” is not “essential” to conviction, it marks “shadowy border between lawful co-operation and criminal association”).

As presented in more detail in Part I.C, of the case statement, *supra*, a government informant used a middleman, Jimenez, to find someone willing to sell him a large quantity of drugs. 4ER-726-29; 6-ER-1277-83. Jimenez reached out to his cousin, Calderon, from whom he'd bought before, and gave him the informant's number. 3-ER-532, 538. They organized meetings, which the informant made sure Jimenez also attended, and eventually set up a deal date, to which which Calderon arrived empty-handed, and Jimenez brought a lesser quantity of his own drugs at the informant's request, because the informant was concerned Calderon would not come through. *See, e.g.*, 6-ER-1330, 1341-43, 1361-62; 4-ER-902-03, 906-07.

Calderon argued on appeal that, at most, Jimenez was acting as a buyer's agent for the informant, and there was insufficient evidence of the kind of prolonged course of sales and shared stake that was found to be required in the middleman buyer-seller cases cited above. *See AOB 45-56*. However, the Ninth Circuit ignored its precedent by permitting a conspiracy to be inferred between Calderon and Jimenez, without citing any evidence of their prolonged sales to the Informant and shared stake therein. *See App. A at 6.*

Certiroari is required to address this important question of law and assure uniformity of decision regarding the kind of evidence required to sustain a drug conspiracy between an informant’s middleman and a seller.

**C. The Ninth Circuit’s Erroneous Analysis in Finding No Plain Error in the Failure to Provide a Buyer-Seller Instruction Conflicts with Precedent and Creates Inner-Circuit Splits within Circuit Splits on When the Instruction Is Required and Whether It Provides an Essential Element.**

The Ninth Circuit’s conclusion that the district court did not plainly err in omitting a buyer-seller instruction, which would have provided the established element of a buyer and seller’s agreement to commit a further crime, because “Calderon neither relied on a buyer-seller theory of defense nor specifically requested such an instruction at trial,” misapprehends the requisite inquiry here. App. A at 7 (citing *United States v. Montgomery*, 150 F.3d 983, 996 (9th Cir. 1998)).

Under Ninth Circuit precedent, an agreement “to commit a crime beyond that of the mere sale” is an essential *element* of a drug conspiracy between a buyer and seller, which must be provided to the jury when there is substantial evidence of a buyer-seller relationship with a charged co-conspirator. *See* Ninth Cir. Mod. Instr. 12.6, Comment, *available at* <https://www.ce9.uscourts.gov/jury-instructions/node/963> (last visited July 30, 2024) (quoting *United States v. Loveland*, 825 F.3d 555, 562 (9th Cir. 2016) (“A relationship of mere seller and buyer, with the seller having no stake in what the buyer does with the goods, shows the absence of a conspiracy, because it is

missing the element of an agreement for redistribution.”)). The omission of an element that a jury might have found to be unsupported is plain error that affects a defendant’s constitutional right to have every element proven beyond a reasonable doubt, thus satisfying the first three prongs of plain-error review.

*See Greer v. United States*, 593 U.S. 503, 508 (2021) (omission of element affects substantial rights if defendant shows “there is a ‘reasonable probability’ that he would have been acquitted,” had it been provided); *United States v. Alferahin*, 433 F.3d 1148, 1157-58 (9th Cir. 2006) (holding “a district court’s error is plain” and “affects substantial rights” “when its jury instructions fail to incorporate an element of the crime that has been clearly established by Ninth Circuit precedent,” and evidence was not overwhelming). To satisfy the fourth prong, *i.e.*, the error seriously affected the proceedings’ fairness and integrity, reflecting a miscarriage of justice requiring retrial, “a defendant must offer a plausible basis for concluding that an error-free retrial might end more favorably.” *United States v. Johnson*, 979 F.3d 632, 637-38 (9th Cir. 2020) (discussing *Johnson v. United States*, 520 U.S. 461, 470 (1997); *United States v. Cotton*, 535 U.S. 625, 627-28, 632-34 (2002)).

The Ninth Circuit’s Memorandum in the instant case conflicts with this authority by failing to recognize that Calderon’s instructions omitted an essential *element* that the jury could have found unsupported, had it been provided to them originally or on retrial, and that these facts satisfy all four prongs of plain-error review, while mistreating Calderon’s presumably-

unknowing forfeiture of this element as waiver of a known right. *See United States v. Perez*, 116 F.3d 840, 845-46 (9th Cir. 1997) (en banc).

The Memorandum's errors in applying the first prong create an inner-circuit split within a circuit split on whether a specific buyer-seller instruction highlighting this element is required if supported by the evidence. While the Fifth and Sixth Circuits have found such an instruction is never required if the jury is instructed on the basic elements of conspiracy; *see, e.g.*, *Riggs v. United States*, 209 F.3d 828, 832-33 (6th Cir. 2000); *United States v. Asibor*, 109 F.3d 1023, 1035 (5th Cir. 1997); other circuits recognize such an instruction may be required if supported by the evidence; *see, e.g.*, *United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000) (finding plain error); *United States v. Prieskorn*, 658 F.2d 631, 636 (8th Cir. 1981); *cf. United States v. Lyle*, 919 F.3d 716, 737 (2d Cir. 2019) (no plain error where repeatedly purchased large quantities). The Ninth Circuit has a handful of decisions recognizing such an instruction may be required and accordingly provides an applicable model instruction, but it had not yet addressed this precise situation, where a buyer-seller instruction was supported by substantial evidence but never requested by the defendant. *See Montgomery*, 150 F.3d at 1002; *Moe*, 781 F.3d at 1128 & fn.11; *cf. United States v. Mendoza*, 25 F.4th 730, 742, fn.12 (9th Cir. 2022) (not addressing sua sponte failure to provide buyer-seller instruction because it was reversing for insufficient evidence).

In *Moe*, the Ninth Circuit found a requested buyer-seller instruction was

supported by law and evidence, but because *Moe*'s conspiracy instructions had provided that the agreement must include "a plan to commit at least one of the crimes charged in the indictment as an object of the conspiracy," and the indictment's only other charges happened to be for downstream sales, it found *Moe*'s jury necessarily had to find an agreement for redistribution, rather than just a simple transaction between buyer and seller. 781 F.3d at 1128. By contrast, Calderon's instructions did *not* limit the potential object of the conspiracy to crimes charged in the indictment (which were simple possessions), but rather encompassed *any* agreement to distribute methamphetamine, regardless of planned redistribution. *See* 1-ER-23-24. This is precisely the kind of situation that *Moe* noted may require a buyer-seller instruction in addition to the general conspiracy instruction, leading to the Ninth Circuit's Model Instruction 12.6. *See* 781 F.3d at 1128 & n. 11.

Thus, the Memorandum's conclusion that Calderon's instructions were sufficiently similar to *Moe*'s is erroneous, because unlike *Moe*'s, Calderon's instructions did not effectively require the jury to find that buyer-seller co-conspirators had agreed to further downstream sales. *Compare* App. A at 7; *with Moe*, 781 F.3d at 1128 & n. 11. If applied to the actual instructions Calderon's jury received, the Memorandum's analysis creates a split within the Ninth Circuit on when a specific buyer-seller instruction is required, aligning itself with the Fifth and Sixth Circuit in finding the basic conspiracy elements sufficient to convey the buyer-seller rule.

This Court may remedy this split and resolve the plain-error prejudice prongs by addressing a closely-related circuit split on whether a buyer-seller instruction provides an essential element of a drug-distribution conspiracy. The Memorandum misapplied the third and fourth prongs in finding no plain error because Calderon had not relied on a buyer-seller “defense,” while citing an inapposite passage from *Montgomery*, 150 F.3d at 996, apparently based on the Government’s oral argument. *See* App. A at 7; Oral Arg. at 19:35-21:05.

*Montgomery* had found instructions sufficient that indicated the “existence of a buyer-seller relationship does not prove the existence of a conspiracy ....,” and in its brief, the Government had attempted to distinguish *Montgomery*’s facts as more-clearly showing a buyer-seller relationship than those here. *See* GAB 35 (citing 150 F.3d at 1002); AOB 63 (same). For the first time at argument, the Government quoted an inapposite passage, which had found no plain error in the failure to provide a *Sears*<sup>9</sup> instruction where *Montgomery* did not rely on a *Sears* theory (and there was overwhelming evidence), which it misrepresented as foreclosing Calderon’s argument by holding it cannot be plain error to not provide a buyer-seller instruction *sua sponte* when the defense relies on a different theory. *See* 150 F.3d at 996; Oral Arg. at 19:35-21:05.

While some cases have treated the buyer-seller instruction as

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<sup>9</sup> *Sears v. United States*, 343 F.2d 139, 142 (5th Cir.1965) held “there can be no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy.” Calderon’s jury was instructed the charged conspiracy could not be with the informant.

highlighting a defense theory, others have recognized that the buyer-seller rule identifies an additional essential *element* of a conspiracy between a buyer and seller of drugs. *Compare Prieskorn*, 658 F.2d at 636; *Moe*, 781 F.3d at 1127-28; *with Loveland*, 825 F.3d at 562; *United States v. Mims*, 92 F.3d 461, 465-66 (7th Cir. 1996). This understanding is reflected in the many decisions reversing conspiracy convictions for failure to prove an agreement beyond a single transaction, even if they do not expressly identify an agreement for further distribution as an essential element. *See, e.g., Mendoza*, 25 F.4th at 736-40; *Ramirez*, 714 F.3d at 1140; *Contreras*, 249 F.3d at 599-601. In describing this as an element in *Loveland*, the Ninth Circuit cited the “particularly thoughtful” analysis of the Connecticut Supreme Court, which had examined the two camps of federal circuit law treating the buyer-seller rule as either highlighting an essential element or as an exception to the general conspiracy rule, and agreed with the element analysis. *Loveland*, 825 F.3d at 562 (citing *State v. Allan*, 83 A.3d 326, 335 (Conn. 2014).)

*Allan* explained that some circuits recognized that in a buyer-seller transaction, the buyer’s goal is to buy and the seller’s goal is to sell, and thus, without more, there is an absence of proof of their *shared* intent to *distribute*. 83 A.3d at 335. These decisions recognize that drug-distribution conspiracies between a buyer and seller necessarily have an essential element of agreeing to *further* distribution. *See, e.g., Loveland*, 825 F.3d at 562; *United States v. Brown*, 726 F.3d 993, 998 (7th Cir. 2013); *United States v. Donnell*, 596 F.3d

913, 924-25 (8th Cir. 2010); *United States v. Boidi*, 568 F.3d 24, 30 (1st Cir. 2009). By contrast, other circuit find the shared intent to transfer drugs can be a conspiratorial object, but out of policy concerns, they craft a conspiracy exception for single transactions, so as not to subject addicts to the harsh penal consequences of being linked to the greater drug distribution conspiracy. *See Allan*, 83 A.3d at 335-36 (citing *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012); *United States v. Parker*, 554 F.3d 230, 234-35 (2d Cir. 2009)).

The essential-element reasoning is correct and should be adopted by this Court. *See Allan*, 83 A.3d at 336-40. And, under both the Ninth Circuit precedent already establishing it as an essential element, and other precedent governing the prejudice prongs, the failure to instruct on this essential element satisfies all four prongs of plain-error review here. First, the omission of an established essential element is an error that is plain, establishing the first two prongs. *See Greer*, 593 U.S. at 508; *Mims*, 92 F.3d at 465-66. Second, plain-error review under the third and fourth prongs is not limited to the evidence and argument presented at the proceeding without the element. *See Greer*, 593 U.S. at 508-11; *Johnson*, 979 F.3d at 637-38. The Memorandum's requiring defendants to have *relied* on a buyer-seller *defense* conflicts with this precedent and conflates forfeiture with waiver.

In finding the substantial-rights third prong permits reviewing courts to look at the entire appellate record to determine whether there is a reasonable probability of a different outcome with the omitted element, this Court found it

*unrealistic* to assume that parties would maintain the same arguments and evidence in a trial with the element that they had presented without that element. *See Greer*, 593 U.S. at 509-11. It is similarly unrealistic to assume that had the district court provided the instruction, Calderon would not have argued the identified element was unsatisfied or that jurors would not have reached that conclusion on their own. Thus, under the substantial-rights prong, courts consider what could have happened if the instruction was given, including what the parties may have argued, based on what is apparent from the appellate record. *See id.*

Similarly, a defendant satisfies the fairness/integrity fourth prong by offering *on appeal*, “a plausible basis for concluding that an error-free *retrial* might end more favorably.” *Johnson*, 979 F.3d at 637-38 (emphasis added). *Johnson* reached this conclusion by applying Rule 52’s goal of avoiding “wasteful retrials” and this Court’s emphasis on the absence of a plausible argument in petitioner’s *appellate* briefs that an omitted element could not have been satisfied by the overwhelming evidence presented. *Id.* (discussing *Johnson*, 520 U.S. at 470; *Cotton*, 535 U.S. at 626-27, 632-34). Thus, the correct focus for the fourth prong, much like the third, is not limited to what *trial* counsel argued (or did not argue) to the jury, but on what *appellate* counsel argued to this Court to plausibly show what a properly instructed jury might find in a new trial, with potentially new evidence and argument tailored to the newly-provided element.

In this appeal, Calderon has pointed to substantial evidence supporting a buyer-seller relationship, like those found in other middleman cases, and the *absence* of substantial evidence supporting the omitted element of a buyer and seller's agreement for redistribution. *See Part B, supra*, (citing, e.g., *Ramirez*, 714 F.3d at 1140; *Contreras*, 249 F.3d at 599-600). Thus, he has provided a plausible argument showing how a properly instructed jury could find this element unproven on retrial if properly instructed, satisfying the fourth prong.

The Panel may not have wished to hold the district court responsible for *sua sponte* providing an instruction on a “theory” that defense counsel did not recognize or wish to pursue; however, while courts are not expected to anticipate unraised defense theories, fundamental due process requires that essential *elements* be provided *sua sponte*. *See United States v. Fuchs*, 218 F.3d 957, 968-69, 973 (Graber, J., dissenting) (citing, *Perez*, 116 F.3d at 846-47; *United States v. Jerome*, 942 F.2d 1328, 1331 (9th Cir.1991)); U.S. Const. amend. V. A forfeited right to have an element provided to the jury, which is subject to plain-error review, is distinct from waiver of a known right, which is unreviewable invited error. *Perez*, 116 F.3d at 845-46 (citing *United States v. Olano*, 507 U.S. 705, 733 (1993); *Johnson*, 520 U.S. at 465-66) (finding no evidence defendants affirmatively relinquished a known right to the element they had not requested and reviewing for plain error). Likewise here, there is nothing in the record indicating Calderon affirmatively relinquished a known right to have an essential element provided through a buyer-seller instruction.

The Memorandum's conclusion that there was no plain error, because Calderon did not request it or argue it as a defense *theory*, erroneously treats his forfeited error as unreviewable invited error and conflicts with the above precedent's direction to consider what the argument, evidence, and outcome would be at a different proceeding with the element. *See, e.g., Greer*, 593 U.S. at 508-11; *Johnson*, 979 F.3d at 637-38; *Perez*, 116 F.3d at 845-47.

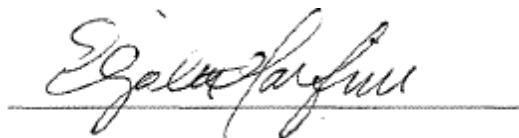
A grant of certiorari is thus needed to settle this important issue of law and remedy circuit splits regarding whether the buyer-seller instruction supplies an essential element of a drug-distribution conspiracy between a buyer and seller and when its omission is plain error.

## **CONCLUSION**

For the foregoing reasons, a writ of certiorari to the Ninth Circuit should be granted to address the questions presented.

Dated: August 10, 2024

Respectfully submitted,



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