No. 24-6740

IN THE SUPREME COURT OF THE UNITED STATES

ROYEL PAGE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record

MATTHEW R. GALEOTTI
JENNY C. ELLICKSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiring to distribute narcotics, in violation of 21 U.S.C. 846, rather than having only a buyer-seller relationship with his supplier.

2. Whether the district court plainly erred by not sua sponte instructing 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 (E.D. Wis.):

United States v. Jackson, No. 17-cr-175 (Aug. 23, 2019)

United States v. Bogan, No. 17-cr-175 (Mar. 3, 2020)

United States v. Michael Davis, No. 17-cr-175 (Mar. 5, 2020)

United States v. Williams, No. 17-cr-175 (Mar. 9, 2020)

United States v. Edwards, No. 17-cr-175 (Mar. 18, 2020)

United States v. Gray, No. 17-cr-175 (July 16, 2020)

United States v. Currie, No. 17-cr-175 (Aug. 11, 2020)

United States v. Kelly, No. 17-cr-175 (Sept. 28, 2020)

United States v. Hamlin, No. 17-cr-175 (May 11, 2021)

United States v. Joseph Davis, No. 17-cr-175 (June 30, 2021)

Page v. United States, No. 22-cv-1263 (Oct. 28, 2022)

United States v. Harris, No. 17-cr-175 (Mar. 28, 2023)

Harris v. United States, No. 24-cv-453 (filed Apr. 15, 2024)

United States Court of Appeals (7th Cir.):

United States v. Currie, No. 20-2549 (Dec. 3, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-6740

ROYEL PAGE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-92a) is reported at 123 F.4th 851. The opinion of the court of appeals panel (Pet. App. 93a-102a) is reported at 76 F.4th 583.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 18, 2024. The petition for a writ of certiorari was filed on March 6, 2025. 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 Eastern District of Wisconsin, petitioner was convicted on

one count of conspiring to possess heroin, fentanyl, and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846, and 18 U.S.C. 2; and 12 counts of attempting to distribute and possessing with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(C), and 846, and 18 U.S.C. 2. Judgment 1-2. The court sentenced petitioner to 90 months of imprisonment, to be followed by four years of supervised release. Judgment 3-4. After a panel of the court of appeals initially remanded petitioner's conspiracy conviction for a new trial, Pet. App. 93a-102a, the court granted rehearing en banc and affirmed, id. at 1a-92a.

1. For more than a year and a half, petitioner purchased distribution quantities of heroin from Terrance Hamlin multiple times a week. Pet. App. 3a; see id. at 5a. The quantity of heroin varied with each transaction, but petitioner typically bought five to 56 grams on each occasion, with the quantities steadily increasing over time. Id. at 3a. Hamlin had an established per-gram price for petitioner's purchases, and he allowed petitioner to purchase heroin partially on credit. Id. at 3a-4a. Hamlin eventually sold heroin to petitioner at a lower price per gram because petitioner distributed his supply quickly. Id. at 3a.

Petitioner and Hamlin maintained a close relationship and met in person or over the phone hundreds of times to arrange drug deals and exchange heroin. Pet. App. 3a. Hamlin also warned petitioner to keep his cousin out of the "business," and Hamlin told

petitioner his business relationship with petitioner was unique because petitioner had "earned what he was doing." Id. at 4a (brackets omitted). At one point, petitioner was agreeable to helping Hamlin expand his heroin dealing "up north," telling Hamlin "we can do this" and offering to provide Hamlin with his expertise in cutting heroin. Ibid.

Petitioner and Hamlin also jointly sought to ensure the delivery of high-quality heroin to petitioner's customers. Pet. App. 4a-5a. On one occasion, petitioner told Hamlin that the delivered supply of heroin was "no good" and asked to switch it out. Id. at 5a. Petitioner told Hamlin that the switch was for a customer who "spends good money" and whose business he could not afford to lose. Ibid. Hamlin agreed to replace the heroin. Ibid.

2. A federal grand jury in the Eastern District of Wisconsin returned a superseding indictment charging petitioner with one count of conspiring to possess 100 or more grams of heroin, fentanyl, and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(B), and 846, and 18 U.S.C. 2; and 12 counts of attempting to distribute and possessing with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(C), and 846, and 18 U.S.C. 2. Superseding Indictment 1-2, 4. Petitioner proceeded to trial, where the government presented evidence of the facts described above -- including testimony directly from Hamlin. Pet. App. 3a-5a.

Throughout trial, petitioner pressed the theory that he was not involved in the drug trade at all, and he broadly challenged the evidence connecting him to Hamlin. Pet. App. 5a. Petitioner's counsel also attempted to cast doubt on the criminality of petitioner's meetings with Hamlin, suggesting that their meetings were innocent encounters between family friends. Ibid.

At the close of evidence, the district court held a jury-instruction conference. Pet. App. 6a. The Seventh Circuit's pattern criminal jury instructions include a "buyer-seller" instruction that provides that:

> A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of [name of drug] do not enter into a conspiracy to [distribute [name of drug]; possess [name of drug] with intent to distribute] simply because the buyer resells the [name of drug] to others, even if the seller knows that the buyer intends to resell the [name of drug]. The government must prove that the buyer and seller had the joint criminal objective of further distributing [name of drug] to others.

Id. at 113a (brackets in original). Here, however, neither party requested that instruction or any other buyer-seller instruction. Id. at 6a.

At the close of the jury-instruction conference, the district court asked whether "the defense is good with the jury instructions, what's in and what's not in." Pet. App. 6a. Petitioner's counsel responded, "Yes." Ibid.

The jury found petitioner guilty on all counts, and the district court sentenced him to 90 months of imprisonment, to be

followed by four years of supervised release. Pet. App. 6a; Judgment 3-4.

3. On appeal, petitioner argued that insufficient evidence supported his conspiracy conviction, on the theory that the evidence showed that he had only a buyer-seller relationship with Hamlin. Pet. C.A. Br. 11-15. Petitioner also claimed for the first time that the district court should have given a buyer-seller instruction to the jury. Id. at 16-18. Petitioner acknowledged that by failing to request such an instruction, he had failed to adequately preserve a jury-instruction claim, and he accepted that he could not obtain relief without satisfying Federal Rule of Criminal Procedure 52(b)'s requirements for demonstrating plain error. Id. at 15-16.

A panel of the court of appeals reversed and remanded for a new trial on the conspiracy count. Pet. App. 93a-102a. The panel took the view that the government's conspiracy evidence was "comparatively thin" and that the district court accordingly committed plain error by not providing a buyer-seller instruction sua sponte. Id. at 102a. The panel then remanded for a new trial on the conspiracy count, without reaching petitioner's challenge to the sufficiency of the evidence. Ibid.

4. The en banc court of appeals sua sponte granted rehearing en banc and affirmed. Pet. App. 1a-92a.

a. The en banc court of appeals explained that this Court's decision in Direct Sales Co. v. United States, 319 U.S. 703 (1943),

establishes that "evidence of repeated, distribution-quantity transactions of illegal drugs between two parties, on its own, can sufficiently sustain a drug conspiracy conviction." Pet. App. 14a; see id. at 7a-11a. The en banc court of appeals acknowledged that some of its prior decisions had suggested otherwise, but found that those earlier cases "ha[d] stretched the buyer-seller doctrine too far and deviated from the standard set in Direct Sales." Id. at 11a. And the court overruled those decisions to the extent that they were inconsistent with its en banc decision in this case. Id. at 13a.

The en banc court of appeals then rejected petitioner's challenge to the sufficiency of the evidence underlying his conspiracy conviction. Pet. App. 14a-16a. The court stated that the trial evidence showing that petitioner "met with Hamlin hundreds of times over the course of a year (at a clip of approximately three times a week) to purchase distribution quantities of heroin" would "alone support[] a rational jury's finding that [petitioner] and Hamlin entered into an agreement, at least implicitly, to distribute drugs." Id. at 14a-15a.

But the en banc court of appeals went on to "stress that [petitioner's] conviction would stand even under [the court's] now-overruled precedent," which had "held that repeated, distribution-quantity drug sales could not alone support a conspiracy." Pet. App. 6a-7a, 15a. The court observed that the trial "evidence of conspiracy in this case consisted of much more

than just [evidence of] repeated, distribution-quantity drug transactions." Id. at 15a. The court specifically recounted the close (almost familial) relationship and trust between petitioner and Hamlin; Hamlin's advice to petitioner about petitioner's drug distribution; the pair's "especially cooperative business relationship," which included discounts reflecting the "understanding that Hamlin's short-term revenue losses would ultimately be usurped by larger profits stemming from [petitioner's] stable, high-volume drug distribution"; the consistent communication between the two "about the status of their drug supply and their clientele"; their joint contemplation of "expanding their business relationship 'up north'"; the "shared interest in delivering high-quality heroin to [petitioner's] customers"; and petitioner's purchase of heroin "partially on credit" "on at least one occasion." Id. at 15a-16a. And the court found that evidence "overwhelming and indicative of an implied agreement between [petitioner] and Hamlin to distribute heroin together." Id. at 16a.

The en banc court of appeals also rejected petitioner's contention that the district court plainly erred by not sua sponte giving a buyer-seller instruction to the jury. Pet. App. 17a-25a. The en banc court of appeals "assume[d] without deciding that [petitioner] merely forfeited his request for the buyer-seller instruction" -- as opposed to "waiv[ing] all challenges to the jury instructions" -- when his counsel "responded affirmatively"

to the district court's inquiry about whether the instructions were adequate. Id. at 17a. The en banc court of appeals observed that petitioner could be eligible for plain-error relief only if (1) there was error (2) that was plain and (3) affects substantial rights, and (4) the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings. Id. at 17a-18a. And the court explained that petitioner's challenge to his jury instructions failed at each step. See id. at 18a-25a.

For several reasons, the en banc court of appeals found that no instructional error had occurred. Pet. App. 18a-21a. First, the court observed that "a buyer-seller instruction was not appropriate" because, "even under [the court's] now-overruled precedent," the evidence in the case "supported a conspiracy rather than a buyer-seller relationship." Id. at 18a. Second, the court found that "a buyer-seller instruction would have contravened [petitioner's] theory of defense" because petitioner's trial strategy was "to show that he was not involved in the drug trade at all so that the jury would acquit him of all charges (and not just the conspiracy charge)." Ibid.; see id. at 18a-19a. Third, the court reasoned that no error, "let alone plain[]" error, occurs "when a district court does not sua sponte give an instruction on a defense theory that a defendant did not request," especially when the defendant is represented by counsel. Id. at 19a; see id. at 19a-21a.

The en banc court of appeals also determined that any error in not sua sponte instructing the jury on the buyer-seller defense would not have been plain because "the evidence of conspiracy was very strong" and petitioner did not present a buyer-seller defense. Pet. App. 22a; see id. at 21a-23a. The court accordingly found that "[n]othing about this record would have made it obvious to the district court that such an instruction was needed." Id. at 22a. With respect to the third requirement for plain-error relief, the en banc court of appeals found that petitioner did not meet, and could not have met, his burden of showing that any error affected his substantial rights. Id. at 24a. The court explained that a jury would have found petitioner guilty "even with a buyer-seller instruction in hand" because "this was not a close case" and "the evidence did not support a buyer-seller relationship." Ibid. Finally, the court stated that it would decline to exercise its discretion under the fourth prong of the plain-error standard because the absence of a buyer-seller instruction "would not affect the fairness, integrity, or reputation of our judicial system." Id. at 25a; see id. at 24a-25a.

b. Judge Easterbrook joined the court of appeals' en banc decision and filed a concurring opinion. Pet. App. 26a-29a. Judge Easterbrook observed that "[a] buyer-seller argument poses risks to any defendant charged with both conspiracy and substantive crimes," explaining that if petitioner argued that he had a buyer-seller relationship with Hamlin, that could have helped petitioner

on the conspiracy charge but could have increased his chance of conviction on the substantive charges. Id. at 27a. Judge Easterbrook reasoned that while "[a]n accused is free to take that risk," the "choice is one for the defense rather than the judge." Ibid. And Judge Easterbrook noted that this Court "has never held that a district judge must, should, or even may raise a contention such as a buyer-seller argument * * * when the accused does not request an instruction on that subject." Ibid.; see id. at 28a.

c. Judge Jackson-Akiwumi, joined by Judges Rovner and Lee, dissented. Pet. App. 30a-92a. Judge Jackson-Akiwumi disagreed with the en banc court of appeals' sufficiency analysis, id. at 31a-68a, and would have deemed the absence of an unrequested buyer-seller instruction to be plain error, id. at 69a-88a.

ARGUMENT

Petitioner renews his contention (Pet. 6-9) that the evidence was insufficient to show that he conspired to distribute drugs, as opposed to having only a buyer-seller relationship with his supplier. Petitioner also contends (Pet. 10-14) that the district court plainly erred by not sua sponte giving a buyer-seller instruction. The en banc court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Furthermore, this case would be an unsuitable vehicle for addressing either question presented because petitioner would not be entitled to relief even if this Court were to adopt his view of the relevant law. This

Court has repeatedly denied certiorari on such issues.[1] It should follow the same course here.

1. The court of appeals correctly determined that sufficient evidence supported the jury's determination that petitioner conspired with Hamlin to distribute drugs.

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)). 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 co[o]perate 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 "prolonged co[o]peration with a [buyer's] unlawful purpose" can be enough to

---

[1] E.g., Seigler v. United States, 142 S. Ct. 336 (2021) (No. 20-8231); St. Fleur v. United States, 141 S. Ct. 1695 (2021) (No. 20-6367); 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, 584 U.S. 918 (2018) (No. 17-7207); Kelly v. United States, 581 U.S. 919 (2017) (No. 16-6388); Randolph v. United States, 574 U.S. 1192 (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).

establish that the seller and buyer have conspired together. Direct Sales Co., 319 U.S. at 712-713 & n.8. Additional relevant considerations recognized by this Court include whether the buyer or seller exhibits "informed and interested co[o]peration" or has a "'stake in the venture.'" Id. at 713.

Here, the court of appeals correctly found that sufficient evidence supported the jury's finding that petitioner conspired with Hamlin to distribute illegal drugs. See United States v. Powell, 469 U.S. 57, 67 (1984) ("Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt."). The record contains ample evidence from which jurors could draw that inference.

To start, the government presented substantial evidence of the type of "prolonged co[o]peration" that supports an inference of conspiracy. Direct Sales Co., 319 U.S. at 713. The evidence showed that petitioner purchased distribution quantities of heroin from Hamlin hundreds of times over the course of more than a year, at a rate of approximately three times a week. Pet. App. 14a-15a. In addition, petitioner and Hamlin "maintained a relationship akin to that of an uncle and a nephew," "had a general trust in one another," and "consistently notified each other about the status of their drug supply and their clientele." Id. at 15a-16a.

Jurors could also infer that Hamlin took steps to "further, promote and co[o]perate in," Direct Sales Co., 319 U.S. at 711,

petitioner's distribution of heroin. For example, Hamlin advised petitioner on his drug distribution, including by recommending that petitioner not work with specific people, and Hamlin understood that he and petitioner had an especially close business relationship. Pet. App. 16a.

In addition, because petitioner distributed heroin at such a fast pace, Hamlin gave him a lower per-gram price for the drugs, which reflected petitioner and Hamlin's "understanding that Hamlin's short term revenue losses would ultimately be usurped by larger profits stemming from [petitioner's] stable, high-volume drug distribution." Pet. App. 16a. Petitioner and Hamlin also "contemplated expanding their business relationship 'up north,'" with petitioner "enthusiastically support[ing] the idea," at least at first. Ibid. And petitioner and Hamlin "exhibited a shared interest in delivering high-quality heroin to [petitioner's] customers, with Hamlin allowing [petitioner] to swap out a bad batch of heroin intended for a valuable, high-paying customer." Ibid. Finally, petitioner purchased heroin from Hamlin partially on credit on at least one occasion. Ibid.

b. Petitioner asserts (Pet. 6-9) that the court of appeals ran afoul of this Court's decision in Direct Sales Co. by stating that "evidence of repeated, distribution-quantity transactions of illegal drugs between two parties, on its own, can sufficiently sustain a drug conspiracy conviction." Pet. App. 14a. But contrary to petitioner's contention (Pet. 8-9), the decision below

did not adopt a blanket rule that evidence of repeat distribution-quantity transactions, without more, will "necessarily" or "automatically" be sufficient to support a conspiracy conviction. Rather, the court simply recognized that such evidence "can sufficiently sustain a drug conspiracy conviction," Pet. App. 14a (emphasis added), and overruled prior circuit cases applying a categorical rule "that repeated, distribution-quantity transactions alone could not support a conspiracy conviction and instead required the presence of additional evidence," id. at 11a-12a; see id. at 13a-14a. The court's refusal to adopt a categorical rule precluding the sufficiency of such evidence is consistent with Direct Sales Co., which recognizes that "quantity sales" can show knowledge and that "knowledge is the foundation of intent" -- and therefore a basis from which intent can be inferred. 319 U.S. at 711-712.

c. Petitioner also asserts (Pet. 6) that the decision below conflicts with Ninth Circuit decisions concerning the scope of the buyer-seller doctrine. But there is no sound basis for concluding that the Ninth Circuit would have found the evidence in petitioner's case to be insufficient. The Ninth Circuit has recognized that a variety of factors can constitute circumstantial evidence of a conspiracy, including

> whether the drugs were sold on credit or on consignment; the frequency of sales; the quantity of drugs involved; the level of trust demonstrated between buyer and seller, including the use of codes; the length of time during which sales were ongoing; whether the transactions were standardized; whether

> the parties advised each other on the conduct of the other's business; whether the buyer assisted the seller by looking for other customers; and whether the parties agreed to warn each other of potential threats from competitors or law enforcement.

United States v. Moe, 781 F.3d 1120, 1125-1126 (footnotes omitted), cert. denied, 577 U.S. 932 (2015). This case presents many of those factors, including: Hamlin's sale of drugs to petitioner on partial credit, the frequency of Hamlin's sales to petitioner (approximately three times a week), the distribution quantities of drugs that petitioner purchased, the general trust between petitioner and Hamlin, the length of time during which sales were ongoing (more than a year), and Hamlin's advice to petitioner on the conduct of his business. See Pet. App. 14a-16a.

Petitioner's assertion of a circuit split principally rests (Pet. 2, 6) on United States v. Loveland, 825 F.3d 555 (2016), in which the Ninth Circuit reversed the conspiracy conviction of a defendant who purchased two-ounce quantities of methamphetamine from a supplier on 12 to 20 occasions. Id. at 558. The defendant in Loveland paid cash upfront for the drugs each time, with "no discounts, no credit, and no agreement about what he would do with the drugs" -- distinguishing him from two other purchasers, who had much more cooperative arrangements. Ibid. Based on the facts of that case, the Ninth Circuit found that the evidence was insufficient to prove that the defendant and his supplier had even a tacit agreement that the defendant would resell the methamphetamine. Id. at 562-563. But the Ninth Circuit emphasized

that "there is no bright-line rule, and the decision whether the evidence would allow any reasonable juror to conclude beyond a reasonable doubt that there was an agreement for the redistribution must necessarily be context dependent and 'holistic' -- that is, a judgment about the totality of the circumstances." Id. at 562.

Loveland therefore does not establish that the Ninth Circuit would find that the totality of the circumstances in petitioner's case -- including, but not limited to, the evidence that petitioner purchased distribution quantities of heroin from Hamlin several times a week for at least a year -- was insufficient to support his conspiracy conviction. Nor does the Ninth Circuit's subsequent decision in United States v. Mendoza, 25 F.4th 730 (2022) (Pet. 6), which likewise deemed evidence insufficient in circumstances substantially different from petitioner's. Mendoza involved "no evidence of repeated, large-quantity sales," and instead "the 'entire course of dealing'" between the defendant and his drug supplier "consisted of four phone calls," "one short text conversation," and three attempted or completed drug transactions "spread across over three years' time." 25 F.4th at 738-740.

d. At all events, this case would be an unsuitable vehicle for addressing the circumstances in which evidence of repeated distribution-quantity drug transactions, without more, permits an inference that a defendant knowingly joined a drug-distribution conspiracy. As the decision below observed, "[t]he evidence of

conspiracy in this case consisted of much more than just repeated, distribution-quantity drug transactions." Pet. App. 15a; see pp. 6-7, supra. In light of that evidence, the court of appeals stated that it "would sustain [petitioner's] conviction even under [its] now-overruled" prior cases "h[olding] that repeated, distribution-quantity drug sales could not alone support a conspiracy." Pet. App. 15a. Accordingly, even if this Court were to take that view of the law, the court of appeals' judgment would remain the same, and "[this Court's] review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); see ibid. ("[O]ur power is to correct wrong judgments, not to revise opinions.").

2. The court of appeals also correctly determined that the district court did not plainly err by not sua sponte giving a buyer-seller instruction.

a. Consistent with the principles described above, see pp. 11-16, supra, the courts of appeals apply a fact-specific inquiry, which considers all of the relevant 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").[2] "[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"; "whether the buyer's transactions involved large amounts of drugs"; and "[w]hether the buyer purchased his drugs on credit." United States v. Gibbs, 190 F.3d 188, 199 (3d Cir. 1999), cert. denied, 528 U.S. 1131, and 529 U.S. 1030 (2000).[3]

---

[2] 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); United States v. Ramirez, 350 F.3d 780, 784-785 (8th Cir. 2003); Moe, 781 F.3d at 1125-1126; 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, 171-174 (D.C. Cir.), cert. denied, 549 U.S. 966 (2006).

[3] See, e.g., Mitchell, 596 F.3d at 25 (finding that the 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"); 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); see also, e.g., 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

The court of appeals correctly determined that in the particular circumstances here the district court did not err, much less plainly err, in declining sua sponte to give the jury a buyer-seller instruction that petitioner himself did not request. Pet. App. 18a-23a. Petitioner "conceded that he did not present a buyer-seller defense during trial," and he did not request a buyer-seller instruction. Id. at 21a. Indeed, such an instruction "would have contravened [petitioner's] theory of defense" at trial because his trial strategy rested on the theory that petitioner "was not involved in the drug trade at all" and that Hamlin was lying when he testified otherwise. Id. at 18a. And the district court correctly instructed the jury that petitioner would be guilty of conspiracy only if he knowingly joined in an agreement to distribute drugs while knowing the purpose of the agreement. See D. Ct. Doc. 568, at 22, 26 (July 30, 2021).

b. In finding that the district court did not err in not giving a buyer-seller instruction, the court of appeals explained that the evidence did not support the instruction and that such an instruction would have contravened petitioner's theory of defense. Pet. App. 18a-19a. Petitioner rightly does not contend that either of those fact-bound determinations warrants this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do

---

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 & n.6 (D.C. Cir.) (similar), cert. denied, 522 U.S. 1033 (1997).

not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). But petitioner nevertheless contends that this Court should grant review to consider the court of appeals' additional observation that no error occurs "when a district court does not sua sponte give an instruction on a defense theory that a defendant did not request." Pet. App. 19a. That language in the en banc opinion does not warrant review.

The court of appeals did in fact review petitioner's instructional claim "for plain error under Federal Rule of Criminal Procedure 52(b)." Pet. App. 17a; see id. at 17a-25a (addressing all four requirements of the plain-error standard). Accordingly, the decision below does not conflict with the decisions that petitioner cites from the First, Sixth, and Ninth Circuits, which similarly applied plain-error review to claims that the defendant failed to raise in district court. See United States v. Cheveres-Morales, 83 F.4th 34, 42-44 (1st Cir. 2023); United States v. McReynolds, 964 F.3d 555, 569-570 (6th Cir. 2020); United States v. Turchin, 21 F.4th 1192, 1199-1202 (9th Cir. 2022). In addition, two of those cases involved sentencing claims, not instructional claims. See Cheveres-Morales, 83 F.4th at 41-44; McReynolds, 964 F.3d at 562-570. And the instructional error in the third case was a legally erroneous description of an offense element, see

Turchin, 21 F.4th at 1198 -- not the absence of a theory-of-defense instruction, which undisputedly is not necessary in every case, and may sometimes actually work against the defendant.

To the extent that petitioner faults the court of appeals for stating that a district court does not err or plainly err in not sua sponte giving a buyer-seller instruction that the defendant did not request, that statement aligns with the decisions of other courts of appeals, including the First and Ninth Circuits. See, e.g., United States v. Clough, 978 F.3d 810, 823 (1st Cir. 2020) ("We have been clear time and again that, 'where a defendant does not offer a particular instruction and does not rely on the theory of defense embodied in that instruction at trial, the district court's failure to offer an instruction on that theory sua sponte is not plain error.'") (brackets and citation omitted); United States v. Delgado, 672 F.3d 320, 343 (5th Cir.) (en banc) (similar), cert. denied, 568 U.S. 978 (2012); United States v. Montgomery, 150 F.3d 983, 996 (9th Cir.) (similar), cert. denied, 525 U.S. 917, and 525 U.S. 989 (1998); cf. 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 & n.6 (D.C. Cir.) (similar), cert. denied, 522 U.S. 1033 (1997).

c. In any event, this case would be a poor vehicle for reviewing the second question presented. As a threshold matter, the court of appeals assumed, without deciding, that the instructional issue was reviewable notwithstanding petitioner's affirmative assurance to the district court that its jury instructions were adequate. Pet. App. 17a. But the court of appeals recognized that petitioner might have "waived" the issue in a manner "precluding * * * appellate review." Ibid. That procedural feature of the case creates the possibility of a similar result on different grounds in either the court of appeals or in this Court.

Furthermore, even putting that aside the court of appeals has already determined that, even if petitioner could show an error that is plain (the first two requirements of plain-error review), he still cannot show an entitlement to relief. To begin with, he cannot satisfy the third element of the plain-error standard because any instructional error in his case did not affect his substantial rights. See Pet. App. 24a. As the court explained, "nothing in this record suggests that the outcome of the trial would have differed" with a buyer-seller instruction because "the evidence did not support a buyer-seller relationship"; the district court instructed the jury "on when a defendant qualifies -- and does not qualify -- as a member of a conspiracy"; and "this was not a close case." Ibid. And even if petitioner could show that the lack of a buyer-seller instruction affected his

substantial rights, the court of appeals "would decline to exercise [its] discretion" under the fourth element of the plain-error test because the alleged error here "would not affect the fairness, integrity, or reputation of our judicial system." Id. at 25a. Further review in this Court therefore would not change the result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

MATTHEW R. GALEOTTI
JENNY C. ELLICKSON
Attorneys

MAY 2025