No.

IN THE

SUPREME COURT OF THE UNITED STATES

ZACHERY ROWE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's decision affirming the refusal to give a buyer-seller instruction in a drug conspiracy case conflicts with this Court's holding in *Mathews v. United States,* 485 U.S. 58, 63 (1988) that a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor?

RELATED PROCEEDINGS

United States District Court

United States v. Rowe, 21-CR-557-DSF (C. D. Cal.)

Ninth Circuit Court of Appeals

United States v. Rowe, 23-1240

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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Petitioner Zachery Rowe respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on January 28, 2025. The opinion is unpublished.

OPINION BELOW

On January 28, 2025, the Court of Appeals entered its decision affirming Rowe's drug conspiracy conviction. Appendix A. The petition for rehearing was denied on March 14, 2025. Appendix B.

JURISDICTION

On January 28, 2025, the Court of Appeals affirmed Petitioner's conviction. Appendix A. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition for rehearing was denied on March 14, 2025 Appendix B. This petition is due for filing on June 12, 2025. Supreme Court Rule 13. Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Government Evidence Showed That Petitioner Bought Drugs from Caprarelli Which He Then Sold to Others on Facebook

Petitioner was indicted for a single count of a conspiracy with Darrah Caprarelli and four other people. Caprarelli's dealing with the undercover agents was the focus of the trial. Petitioner was not a target of the investigation into Caprarelli, who described herself to agent Henry Contreras as a drug dealer who liked to "go solo," and who never mentioned Petitioner, and never used the word "we." (4-ER-848.)[1]

On one occasion when Contreras met with Caprarelli, Petitioner drove the car she was riding in, but he had no contact with Petitioner. (4-ER-811-812.) Another law enforcement officer, Preston Furukawa, searched the car and found drugs under the passenger floorboard, but did not find any drugs on Petitioner. (4-ER-861-862.)

When a search warrant was served on Petitioner's residence and car, agents found money and a clear white substance in baggies consistent with packaging of drug purchased from Caprarelli. (4-ER-834-838.)

When Caprarelli's residence was searched a ledger was found that showed that "Zach" owed her $1,900. (4-ER-873.)

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[1] "ER" stands for Excerpts of Record.

When Caprarelli was arrested, Petitioner was not present. (4-ER-873.)

The government introduced numerous Facebook messages between Caprarelli and Petitioner which showed that he bought drugs from her. These messages did not show that Caprarelli had any stake in the drugs that Petitioner turned around and sold to others. (AOB at 10-12, 3-ER-376-433.)

The government also introduced numerous Facebook messages from Petitioner showing that he sold a variety of drugs to many people. None of these messages had anything to do with Caprarelli. (AOB at 12-16, 3-ER-326-459.)

Defense counsel requested a buyer-seller instruction which the government opposed and the court rejected. The proposed buyer-seller instruction was from the Ninth Circuit Manual of Model Criminal Jury Instructions, No. 12.6. (2-ER-265-266.)

The instruction read in pertinent part:

> A buyer-seller relationship between a defendant and another person, standing alone, cannot support a conviction for conspiracy. The fact that a defendant may have bought methamphetamine, heroin, or fentanyl from another person or sold methamphetamine, heroin, or fentanyl to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

> Instead, a conviction for conspiracy requires proof of an agreement to commit a crime beyond that of the mere sale.

(2-ER-265.)

The Ninth Circuit affirmed the refusal to give the buyer-seller instruction, as discussed below.

REASONS FOR GRANTING THE WRIT

THE REFUSAL OF A JURY INSTRUCTION ON THE BUYER-SELLER RULE VIOLATED THE RIGHT TO PRESENT A COMPLETE DEFENSE

A. Under the Buyer-Seller Rule Mere Sales to Others Do Not Establish a Conspiracy

Under the buyer-seller rule "mere sales to other individuals do not establish a conspiracy to distribute or possess with intent to distribute." *United States v. Moe*, 781 F.3d 1120, 1124 (9th Cir. 2015), citing *United States v. Lennick*, 18 F.3d 814, 819 n.4 (9th Cir. 1994).

> This narrow exception to conspiracy liability applies even though a drug sale is itself an agreement: a buyer and seller come together, agree on terms, and exchange money or commodities at the settled rate. Instead, a conviction for conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself.

Moe, 781 F.3d at 1124 (quotation marks, citations, omitted).

For a charge of conspiracy to possess a drug with intent to distribute, "the government must show that the buyer and seller had an agreement to further distribute the drug in question." *Moe*, 781 F.3d at 1124-1125, citing *Lennick*, 18 F.3d at 819.

"Distinguishing between a conspiracy and a buyer-seller relationship requires a fact-intensive and context-dependent inquiry that is not amenable to bright line rules." *Moe*, 781 F.3d at 1125, citing *United States v. Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008) (noting the "highly fact-specific" nature of the "inquiry into whether the circumstances surrounding a buyer-seller relationship establish an agreement to participate in a distribution conspiracy").

The Ninth Circuit has reversed several conspiracy convictions based on the buyer-seller rule. See e.g. *United States v. Loveland*, 825 F.3d 555, 560 (9th Cir. 2016); *United States v. Ramirez*, 714 F.3d 1134, 1141 (9th Cir. 2013); and *United States v. Mendoza*, 25 F.4th 730, 740 (9th Cir. 2022).

B. Refusal of an Instruction on the Defense Theory Is Per Se Reversible Error under the Sixth Amendment

A criminal defendant has a constitutional right to have the jury instructed according to his theory of the case, provided that the instruction is supported by law and has some foundation in the evidence. *United States v.*

Moe, 781 F.3d at 1127 citing *United States v. Anguiano-Morfin*, 713 F.3d 1208, 1209 (9th Cir. 2013).

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States,* 485 U.S. 58, 63 (1988) citing *Stevenson v. United States*, 162 U.S. 313 (1896) If a claim is "plausible, albeit debatable," such "cases are for the jury to decide." *United States v.* Johnson, 459 F.3d 990, 994 (9th Cir. 2006) citing United *States v. Mason,* 233 F.3d 619, 624 (D.C. Cir. 2000). See also *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (juries have "broad discretion in deciding what inferences to draw from the evidence presented at trial.")

The district court's failure to give a defendant's requested instruction that is supported by law and has some foundation in the evidence warrants *per se* reversal, unless some other instructions, in their entirety, adequately cover that defense theory. *Moe*, 781 F.3d at 1127, citing *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011). See also *United States v. Mims*, 92 F.3d 461, 464-466 (7th Ciru 1996), affirmed 101 F.3d 494 (7th Cir. 1996) (reversal required on plain error even where a buyer-seller instruction was given because the instruction was clearly erroneous and went to the heart of the theory of the defense).

The jury instructions are reviewed as a whole and the trial judge is accorded substantial latitude as long as the instructions fairly and adequately covered the issues presented. *Moe*, 781 F.3d at 1127, citing *United States v. Cortes*, 757 F.3d 850, 857 (9th Cir. 2013).

C. The Ninth Circuit Erroneously Held That the Buyer-Seller Instruction Was Not Necessary Because the Conspiracy Instruction Adequately Covered His Defense Theory

The memorandum decision did not recite the evidence, did not explain what the buyer-seller defense to conspiracy was, did not mention the Sixth Amendment right to present a defense, and did not state what the actual conspiracy instruction was. The entire ruling is as follows:

> Rowe argues that the district court erred by rejecting his proposed buyer-seller jury instruction even though it was supported by law and had some foundation in the evidence. We reject this argument. Even assuming the proposed instruct had some foundation in the evidence, the Ninth Circuit model conspiracy instruction at Rowe's trial fairly and adequately covered his defense theory. *United States v. Moe*, 781 F.3d 1120, 1127-29 (9th Cir. 2015). The district court did not abuse its discretion in rejecting Rowe's proposed buyer-seller instruction.

(Memorandum at 2.)

The conspiracy instruction given did not mention or even allude to the buyer-seller defense, adequately or otherwise. The conspiracy instruction was as follows:

For the Defendant to be found guilty of that charge, the Government must prove each of the following elements beyond a reasonable doubt.

First, beginning on or about December 29th, 2019, and ending on or about June 12th of 2022, there was an agreement between two or more persons to distribute methamphetamine, heroin, or fentanyl.

And second, the Defendant joined in the agreement knowing of its purpose and intending to help accomplish that purpose.

I instruct you that methamphetamine, heroin, and fentanyl are all controlled substances.

To distribute means to deliver or transfer possession of methamphetamine, heroin, or fentanyl to another person with or without any financial interest in that transaction,.

A conspiracy is a kind of criminal partnership, an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful. It does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, [it] is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object or purpose of the conspiracy with all of you agreeing as to the particular crime which the conspirators agreed to commit.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy even though the person does not have full knowledge of all the details of the conspiracy.

Furthermore, one who willfully joins an existing conspiracy is as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy but happens to act in a way which furthers some object or purpose of the conspiracy does not, thereby, become a conspirator.

Similarly, a person doesn't become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

A conspiracy may continue for a long period of time. It may include the performance of many transactions. It is not necessary that all members of the conspiracy join it at the same time. And one may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names, identities, or locations of all of the other members.

Even though a defendant did not directly conspire with other conspirators in the overall scheme, the Defendant has, in effect, agreed to participate in the conspiracy if the government proves each of the following beyond a reasonable doubt.

First, the Defendant directly conspired with one or more conspirators to carry out at least one of the objects of the conspiracy.

Second, the Defendant knew or had reason to know that other conspirators were involved with those with who the Defendant directly conspired.

And third, the Defendant had reason to believe that whatever benefits the Defendant might get from the conspiracy were probably dependent upon the success of the entire venture.

It is not a defense that a person's participation in a conspiracy was minor or for some short period of time.

(5-ER-1060-1063.)

The Ninth Circuit's reliance on *United States v. Moe*, 781 F.3d at 1127-29, was misplaced. Moe bought methamphetamine from a dealer named Ellifrit on at least seven occasions, which she then sold to others. She described Ellifrit as a "gold mine." *Id.* at 1125. Ellifrit, who testified against Moe, would warn her if there was a threat from law enforcement which indicated an "ongoing relationship" of "mutual trust" "beyond a simple buyer-seller transaction." *Id.* at 1126-1127. Moe's jury was instructed that it had to "find that there was a *plan* to commit at least one of the crimes charged in the indictment as an object of the conspiracy." *Id.* at 1128 (emphasis in the original).

The Ninth Circuit held that there was some evidence that warranted giving the buyer-seller instruction because a "jury could have concluded that Ellifrit was not a party to a conspiracy that encompassed downstream resales and that the relationship between Moe and Ellifritt was limited to that of a buyer and a seller." *Id.* at 1128. Nevertheless the Court held that the conspiracy instruction adequately covered Moe's defense. This is because "the only other crime charged in the indictment was Moe's alleged distribution in Montana to other purchasers downstream, not Moe's purchases from Ellifrit." *Id.* at 1128. Therefore the instructions as whole

accurately informed the jury that a conspiracy could not be found based only on the sales from Ellifrit to Moe. *Id*.

By contrast in Petitioner's case, the indictment charged no less than six other crimes and named four conspirators in addition to Caprarelli (Ian Miller, Kyle Cleveland, Robert Villa, and Patrick Van Reenen) as well other unnamed and unindicted coconspirators. The indictment also alleged 49 overt acts. (2-ER-272-281.) Cleveland and Villa exchanged Facebook messages with Petitioner but no witness otherwise testified about these two people. (See e.g. 3-ER-353 and 357.) Miller and Van Reenen were not mentioned at the trial at all.

The thrust of the government's case against Petitioner was that he conspired with Caprarelli. The jury could not possibly have considered a buyer-seller defense based on the conspiracy instruction and the indictment. The *Moe* case is simply not comparable.

D. Certioriari Should Be Granted to Clarify That the Denial of a Defense Instruction Based on the Evidence Violates the Sixth Amendment Right to Present a Complete Defense

It is well settled that a criminal defendant has the constitutional right to present a complete defense. *Holmes v. South Carolina,* 547 U.S. 319, 324-325 (2006); *Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986). There was

ample evidence to support Petitioner's defense but because the district court refused to give the buyer-seller instruction, defense counsel could not even argue his defense. Whether the buyer-seller instruction would have succeeded was up to the jury to determine, not the court. *Mathews v. United States,* 485 U.S. at 63; *Coleman v. Johnson*, 566 U.S. at 655.

This case presents the opportunity to provide much needed guidance to the lower courts.

CONCLUSION

For the reasons expressed above, Petitioner Zachery Rowe respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: June 6, 2025 Respectfully submitted,

VERNA WEFALD

Counsel of Record