No. 13-807

In the Supreme Court of the United States

FRANKLIN BROWN, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the jury instructions and evidence properly permitted petitioner's conviction for a drug-distribution conspiracy, notwithstanding his theory of defense that he had only a buyer-seller relationship with his suppliers.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 13-807

FRANKLIN BROWN, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 726 F.3d 993.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2013. A petition for rehearing was denied on September 9, 2013 (Pet. App. 41). On November 14, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 9, 2014. The petition for a writ of certiorari was filed on January 6, 2014. 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 Northern District of Illinois, petitioner

was convicted of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846. Pet. App. 1-2. The district court sentenced petitioner to 292 months of imprisonment, to be followed by 120 months of supervised release. *Id.* at 5. The court of appeals affirmed. *Id.* at 2.

1. From approximately 2001 to 2008, Pedro and Margarito Flores ran a massive drug-trafficking operation in the Chicago area. Gov't C.A. Br. 2. The Flores brothers used couriers to deliver the drugs to their customers, who never numbered more than 15, but the brothers had the exclusive authority to negotiate the purchases. Pet. App. 2-3. Petitioner was one of the Floreses' "best customers"; between 2003 and 2008, he purchased millions of dollars' worth of cocaine. *Id.* at 2. In 2003 and 2004, one courier delivered between 20 and 100 kilograms of cocaine to petitioner on approximately 40 different occasions. *Id.* at 3; Gov't C.A. Br. 2. And between 2005 and 2008, another courier made between 30 and 40 deliveries, each involving at least ten kilograms of cocaine. Pet. App. 3; Gov't C.A. Br. 3. At least two of the brothers' other couriers also delivered cocaine to petitioner. Pet. App. 3.

Petitioner rarely paid the couriers in full at the time of delivery. Pet. App. 3. On one occasion, petitioner gave a courier $26,000 for 57 kilograms of cocaine, a quantity that should have been worth at least $912,000. *Id.* at 3-4. On several other occasions, petitioner gave a second courier cash payments of five to seven figures without receiving any cocaine. *Id.* at 4. Similarly, petitioner gave a third courier several payments ranging from $250,000 to $1.3 million without receiving any cocaine. *Ibid.*

In addition to selling petitioner cocaine, the Flores brothers provided him with prepaid cellular phones and a Chevrolet HHR that contained a secret compartment for carrying drugs or cash. Pet. App. 4. Petitioner took out insurance on the HHR. *Ibid.* Investigators also found title documents for a Jeep Grand Cherokee in petitioner's trash. *Id.* at 4-5. One of the Floreses' couriers who never delivered cocaine to petitioner was known to drive the Jeep, which also contained a secret compartment. *Id.* at 5.

2. A grand jury in the United States District Court for the Northern District of Illinois indicted petitioner for conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), 846. Pet. App. 2. The indictment did not allege a substantive drug offense. *Ibid.* At trial, the government called three of the Floreses' couriers who had delivered cocaine to petitioner or received cash from him to describe the workings of the Floreses' operation. *Id.* at 3-4. The government introduced evidence about the Chevrolet HHR and the Jeep Grand Cherokee. Gov't C.A. Br. 6. The government also presented evidence that petitioner had returned several kilograms of cocaine to a courier because they were of poor quality, that petitioner's fingerprints had been found on several bags of cocaine discovered at one of the Floreses' stash houses, and that petitioner was mentioned in sticky notes and ledgers at a stash house. *Ibid.*

At the end of the evidence, petitioner proposed the following "buyer-seller" jury instruction:

> A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of cocaine do not enter into a conspiracy to possess cocaine

> with intent to distribute simply because the buyer resells cocaine to others, even if the seller knows that the buyer intends to resell the cocaine.
>
> To establish that a buyer knowingly became a member of a conspiracy with a seller to possess cocaine with intent to distribute, the government must prove that the buyer and seller had the joint criminal objective of distributing cocaine to others.

Pet. App. 19. That instruction was based on a pattern jury instruction that had been proposed, but not yet adopted, by the Committee on Federal Jury Instructions for the Seventh Circuit. *Id.* at 19, 42.

In response, the government proposed its own instruction. Pet. App. 19. The district court combined the language of the two proposals, and instructed the jury as follows:

> A conspiracy to distribute drugs or possess drugs with intent to distribute requires more than simply an agreement to exchange money for drugs which the seller knows will be resold.
>
> In order to establish that a defendant knowingly conspired to distribute drugs or possess drugs with intent to distribute with a person from whom the defendant bought drugs, the government must prove that, in addition to agreeing to buy drugs, the defendant further agreed to participate with the seller in an arrangement involving mutual dependence, cooperation or assistance in distributing drugs. Such an agreement may be proved by evidence showing sales on credit, in which the buyer is permitted to pay for all or part of the drugs after the drugs have been re-sold, coupled with other ev-

> idence showing mutual cooperation and an ongoing arrangement between the defendant and the seller.

Id. at 19-20.

Thus instructed, the jury found petitioner guilty. Pet. App. 5. The district court denied petitioner's motions for a judgment of acquittal and a new trial, and sentenced him to 292 months of imprisonment, to be followed by 120 months of supervised release. *Ibid.*

3. The court of appeals affirmed, rejecting petitioner's argument that the buyer-seller jury instruction misstated the law and misled the jury. Pet. App. 6, 29. The court conceded that its "case law on buyer-seller relationships ha[d] many dissonant voices." *Id.* at 6. Yet the court identified a "latent consistency" in its precedents that allowed even its seemingly inconsistent decisions to be "harmonize[d]." *Id.* at 6, 16. The court explained that its prior pattern jury instruction had listed a number of non-dispositive factors the jury could consider to help determine whether a defendant had entered into a conspiracy to distribute drugs, as opposed to a simple buyer-seller arrangement.[1] *Id.* at 9. The court, however, explained

---

[1] Those factors included:

> (1) Whether the transaction involved large quantities of [name of goods];
>
> (2) Whether the parties had a standardized way of doing business over time;
>
> (3) Whether the sales were on credit or on consignment;
>
> (4) Whether the parties had a continuing relationship;
>
> (5) Whether the seller had a financial stake in a resale by the buyer;
>
> (6) Whether the parties had an understanding that the [name of goods] would be resold.

that it had recently disavowed some of the factors in the pattern instruction because they did not actually distinguish conspiracies from buyer-seller relationships. *Id.* at 10 (citing *United States* v. *Colon*, 549 F.3d 565, 570-571 (7th Cir. 2008), and *United States* v. *Johnson*, 592 F.3d 749, 758 (7th Cir. 2010)). The court noted that it had "identified a new, non-exhaustive list of characteristics that more precisely pinpoint the distinction," including "sales on credit or consignment, an agreement to look for other customers, a payment of commission on sales, an indication that one party advised the other on the conduct of the other's business, or an agreement to warn of future threats to each other's business * * * ." *Id.* at 10-11 (quoting *Johnson*, 592 F.3d at 755-756).

The court of appeals explained that credit sales, although relevant evidence of a conspiracy, are, by themselves, not necessarily sufficient to support a conspiracy conviction. Pet. App. 12-14. The circuit's law was clear, the court noted, that "if a person buys drugs in large quantities (too great for personal consumption), on a frequent basis, on credit, then an inference of conspiracy legitimately follows." *Id.* at 13. What was "[l]ess clear" was "what combinations of those three characteristics—a credit arrangement, a large quantity, and frequent sales—are sufficient." *Ibid.* The court concluded that this lack of clarity resulted from the court's "informally using a 'totality of the circumstances' approach" while simultaneously using language suggesting that it was "trying to out-

---

Committee on Federal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* 6.12 (1998), http://www.ca7.uscourts.gov/pjury.pdf (alterations in original).

line a bright-line approach based on specifically dictated considerations." *Id.* at 16. The court clarified that, although certain combinations of factors could be generally accepted as establishing a conspiracy, the proper approach was to consider "the totality of the circumstances" without giving any particular combination of factors "talismanic power." *Id.* at 17-18.

Given that interpretation of its precedent, the court of appeals concluded that the district court's jury instruction was not erroneous. Pet. App. 20-21. The court reviewed the instruction in two steps, first considering *de novo* whether the instruction accurately stated the law and then examining the district court's particular phrasing for an abuse of discretion. *Id.* at 6. Under the first step, the court concluded that the three factors listed—"sales on credit, * * * mutual cooperation and an ongoing arrangement"—were appropriate under the court's precedents. *Id.* at 21. The court of appeals noted that several of its cases had found a combination of only two of these factors—an ongoing arrangement and sales on credit—to be "sufficient to affirm a conspiracy conviction." *Ibid.* (citing *United States* v. *Vallar*, 635 F.3d 271, 287 (7th Cir. 2011), and *United States* v. *Ferguson*, 35 F.3d 327, 331 (7th Cir. 1994), cert. denied, 514 U.S. 1100 (1995)). Thus, by requiring those two factors, "plus mutual cooperation," the court held, the district court's instruction "exceed[ed] what those cases require." *Ibid.* (internal quotation marks omitted).

The court of appeals also concluded that the district court's specific phrasing of the instruction did not constitute an abuse of discretion. Pet. App. 22. It rejected petitioner's argument that the instruction "invoked an impermissible multi-factor approach." *Id.*

at 23. The court explained that its "cases do not prohibit a multi-factor approach *per se*." *Ibid.* Rather, the court interpreted its cases as holding that jury instructions should not include irrelevant or misleading factors that do "not actually distinguish conspiracies from buyer-seller relationships." *Ibid.*

Finally, the court of appeals rejected petitioner's argument that there was insufficient evidence of credit sales to support an instruction on that factor, Pet. App. 24, 26-27, and his challenge to the sufficiency of the evidence supporting his conviction, *id.* at 24-29.

ARGUMENT

Petitioner contends that the buyer-seller instruction "could likely have misled the jury," that it prejudiced him, and that this Court should resolve the "divergent views" of the courts of appeals on the application of the buyer-seller doctrine. Pet. 30-32 (quoting *United States* v. *Rivera*, 273 F.3d 751, 757 (7th Cir. 2001)). This Court's review is unwarranted because the court of appeals' holding was correct and because the courts of appeals are in agreement as to the general applicability of the buyer-seller doctrine. Any variations among the circuits about the doctrine are insignificant and are not implicated by the facts of this case. Furthermore, any potential error in the district court's instruction was harmless.

1. "[T]he essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States* v. *Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)). In criminal prosecutions involving drug sales, the courts "have cautioned against conflating [an] underlying buy-sell agreement" with the agreement needed to find conspiracy. *United States* v. *Johnson*, 592 F.3d 749, 754

(7th Cir. 2010). A conspiracy does not arise simply because one person sells goods to another "know[ing] the buyer will use the goods illegally." *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709 (1943). Rather, the "gist of conspiracy" is that the seller not only "knows the buyer's intended illegal use" but also "show[s] that by the sale he intends to further, promote and cooperate in it." *Id.* at 711.

Nevertheless, although "single or casual transactions, not amounting to a course of business," may not be sufficient to prove a conspiracy, a seller's attempts to "stimulate such sales" or "prolonged cooperation with a [buyer's] unlawful purpose" can be enough. *Direct Sales Co.*, 319 U.S. at 712-713 & n.8. Additional relevant considerations include whether the buyer or seller exhibits "informed and interested cooperation" or has a "stake in the venture." *Id.* at 713.

2. Petitioner asserts two errors in the buyer-seller instruction that the district court gave in this case. First, he argues that "[l]isting factors in an instruction * * * should be avoided." Pet. 32. Second, he argues that "each of the factors set forth in the instruction here has been the subject of doubt in the Seventh Circuit's buyer-seller cases." *Ibid.* Neither of these arguments has merit.

In support of his assertion that the instruction should not have listed factors, petitioner cites the commentary to the court of appeals' new pattern jury instructions and the court's decisions in *United States* v. *Colon*, 549 F.3d 565, 570 (7th Cir. 2008), and *Johnson*, 592 F.3d at 757–758. Pet. 32. The commentary to the court of appeals' 2012 pattern buyer-seller instruction notes that "[t]he Committee considered and rejected the possibility of drafting an instruction that

would zero in on particular factors, out of concern that this would run afoul of *Colon* and due to the risk that the instruction might be viewed by jurors as effectively directing a verdict." Committee on Federal Criminal Jury Instructions of the Seventh Circuit, *Pattern Criminal Jury Instructions of the Seventh Circuit* 5.10(A) cmt. (2012), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf. *Colon*, however, did not hold that listing factors in an instruction was inappropriate. In fact, *Colon* did not even involve a challenge to jury instructions, but rather a challenge to the sufficiency of the evidence. 549 F.3d at 567. *Colon* disapproved of the prior pattern jury instruction not because it listed factors, but because many of the factors were not "germane" to the question of whether a conspiracy, as opposed to a conventional buyer-seller relationship, existed. *Id.* at 570. And in *Johnson*, the court of appeals concluded that a jury *could* "rely on" the factors in the old pattern jury instruction "to buttress an inference that there was an agreement to distribute drugs" as long as the government also "offered some evidence from which the jury can distinguish a conspiracy from a mere buyer-seller relationship." 592 F.3d at 758. Thus, the court of appeals has never held that listing factors in a buyer-seller jury instruction is inappropriate. The commentary to the model instruction is, of course, not authoritative. Nor is the commentary's concern about the instruction's "directing a verdict" implicated here. The district court instructed the jury that an agreement "*may* be proved" by a combination of the three listed factors (Pet. App. 20 (emphasis added)), not that the presence of such factors required the jury to find a conspiracy. In any event, any tension between the

court of appeals' decision and its prior decisions or pattern jury instructions does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner asserts that "[t]he listing of the factors had the effect of nudging what was supposed to be a theory of defense instruction in the government's favor." Pet. 32. He quotes *Rivera*, a case in which the court of appeals held that the instruction at issue "could likely have misled the jury into finding a conspiracy when the government did not supply facts to support the elements of that crime." 273 F.3d at 757. *Rivera*, however, involved a jury instruction that allowed a jury to infer a conspiracy based on either credit sales or multiple sales alone, without any additional evidence. *Id.* at 756-757. That instruction was misleading because it directly conflicted with the court of appeals' precedent. *Id.* at 757. Petitioner has not explained how the legally correct instruction given in this case could have misled the jury. The instruction simply informed the jury of specific facts that it could consider in deciding whether a conspiratorial agreement existed.

Petitioner also argues that the court of appeals has called into doubt the factors listed in the jury instruction. Pet. 32. He is incorrect. The instruction mentioned only three factors: "sales on credit, * * * coupled with * * * mutual cooperation and an ongoing arrangement." Pet. App. 20. As the court of appeals noted (*id.* at 21), the instruction listed these factors conjunctively, meaning they could support a conviction only if all three were present. The Seventh

Circuit has specifically observed that "a credit sale" combined with "repeat purchases" can support a conviction. *Johnson*, 592 F.3d at 755 n.5; see also *United States* v. *Fagan*, 35 F.3d 1203, 1206 (1994) ("Evidence of frequent and repeated transactions, especially when credit arrangements are made, can support a conspiracy conviction."). The court has also noted the relevance of "prolonged cooperation" and "mutual trust." *United States* v. *Medina*, 430 F.3d 869, 881 (7th Cir. 2005). Thus, far from listing factors that have been "the subject of doubt in the Seventh Circuit's buyer-seller cases" (Pet. 32), the instruction included a combination of factors that the court of appeals has specifically endorsed. Moreover, any intracircuit conflict would not merit review. See *Wisniewski*, 353 U.S. at 902.

3. Petitioner next argues that the courts of appeals "are divided on the circumstances when the [buyer-seller] doctrine is applicable" and that this Court should "resolve the controversies and provide clear guidance." Pet. 21, 30. None of the alleged variations among the courts of appeals that petitioner identifies, however, is implicated in this case.

Petitioner points out (Pet. 24) that in the Fourth Circuit, "evidence of a buy-sell transaction, when coupled with a substantial quantity of drugs," is sufficient to support a conspiracy conviction. *United States* v. *Mills*, 995 F.2d 480, 485 n.1, cert. denied, 510 U.S. 904 (1993). In the Seventh Circuit, by contrast, "[t]he mere purchase or sale of drugs (even in large quantities)" is not sufficient. *United States* v. *Townsend*, 924 F.2d 1385, 1394 (1991). Petitioner observes (Pet. 26) that in the Eighth Circuit, a buyer-seller theory-of-defense jury instruction is inappropriate

"when there is evidence of multiple drug transactions, as opposed to a single, isolated sale." *United States* v. *Johnson*, 719 F.3d 660, 671 (quoting *United States* v. *Hester*, 140 F.3d 753, 757 (8th Cir. 1998)), cert. denied, 134 S. Ct. 705 (2013). That rule, petitioner suggests, is in tension with the Seventh Circuit's statement in *Colon* that "'regular' purchases on 'standard' terms" cannot "transform a customer into a co-conspirator." 549 F.3d at 567. Finally, petitioner points out (Pet. 27) that some Tenth Circuit decisions imply that the buyer-seller doctrine protects only the *buyer* in a drug transaction, *United States* v. *Sells*, 477 F.3d 1226, 1236 n.12 (2007), whereas the Seventh Circuit applies the doctrine to sellers as well, *United States* v. *Lechuga*, 994 F.2d 346, 347 (en banc), cert. denied, 510 U.S. 982 (1993). This case is not an appropriate vehicle to review these minor discrepancies between the circuits' application of the buyer-seller doctrine because none of these discrepancies is implicated in this case.

The circuits are not divided on the relevance of any of the three factors included in the jury instruction the district court gave in this case. Every circuit has indicated that sales on credit can distinguish a conspiracy from a buyer-seller transaction. *United States* v. *Santiago*, 83 F.3d 20, 24 (1st Cir. 1996); *United States* v. *Rojas*, 617 F.3d 669, 675 (2d Cir. 2010); *United States* v. *Gibbs*, 190 F.3d 188, 199-200 (3d Cir. 1999), cert. denied, 528 U.S. 1131, and 529 U.S. 1030 (2000); *United States* v. *Edmonds*, 679 F.3d 169, 174 (4th Cir.), vacated on other grounds by 133 S. Ct. 376 (2012); *United States* v. *Hughes*, 817 F.2d 268, 273 (5th Cir.), cert. denied, 484 U.S. 857, 484 U.S. 858, and 484 U.S. 966 (1987); *United States* v. *Wettstain*, 618 F.3d 577, 585 (6th Cir. 2010), cert. denied, 131 S. Ct.

1551, and 131 S. Ct. 1582 (2011); *United States* v. *Detweiler*, 454 F.3d 775, 777 (8th Cir. 2006); *United States* v. *Mincoff*, 574 F.3d 1186, 1193 (9th Cir. 2009), cert. denied, 558 U.S. 1116 (2010); *United States* v. *Patterson*, 713 F.3d 1237, 1246 (10th Cir. 2013); *United States* v. *Burroughs*, 830 F.2d 1574, 1580-1581 (11th Cir. 1987), cert. denied, 485 U.S. 969 (1988); *United States* v. *Baugham*, 449 F.3d 167, 171-172, 173 (D.C. Cir.), cert. denied, 549 U.S. 966 (2006).

Similarly, every circuit has indicated that an "ongoing arrangement" (Pet. App. 20) or its equivalent is a relevant factor. *United States* v. *Mitchell*, 596 F.3d 18, 25 (1st Cir. 2010) ("multiple transactions"); *United States* v. *Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008) ("prolonged cooperation" and "standardized dealings") (quoting *United States* v. *Hicks*, 368 F.3d 801, 805 (7th Cir. 2004)); *Gibbs*, 190 F.3d at 199 ("length of affiliation"); *United States* v. *Reid*, 523 F.3d 310, 317 (4th Cir.) ("continuing relationships and repeated transactions"), cert. denied, 555 U.S. 1061 (2008); *United States* v. *Mitchell*, 777 F.2d 248, 261 (5th Cir. 1985) ("continuing relationship"), cert. denied, 475 U.S. 1096, and 476 U.S. 1184 (1986); *United States* v. *Layne*, 192 F.3d 556, 568 (6th Cir. 1999) ("repeat purchases or some enduring arrangement"), cert. denied, 529 U.S. 1029 (2000); *United States* v. *Moya*, 690 F.3d 944, 949 (8th Cir. 2012) ("an ongoing relationship"); *United States* v. *Houser*, 929 F.2d 1369, 1372 (9th Cir. 1990) ("more than an isolated transaction"), abrogated on other grounds by *Buford* v. *United States*, 532 U.S. 59 (2001); *United States* v. *Small*, 423 F.3d 1164, 1183 (10th Cir. 2005) (drug purchases "on multiple occasions"), 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 (11th Cir. 2009) ("repeated transactions"); *Baugham*, 449 F.3d at 172 ("the duration and regularity of the dealings").

Finally, although other circuits have not used the specific term "mutual cooperation" when discussing the buyer-seller doctrine, that phrase is rooted in this Court's decision in *Direct Sales Co.*, 319 U.S. at 713 ("informed and interested cooperation"). And some circuits have used similar wording. See *United States* v. *Slagg*, 651 F.3d 832, 846 (8th Cir. 2011) ("knowing involvement and cooperation") (quoting *United States* v. *Cabrera*, 116 F.3d 1243, 1244 (8th Cir. 1997)); *Hawkins*, 547 F.3d at 74 ("prolonged cooperation" and "mutual trust") (quoting *Hicks*, 386 F.3d at 805); *United States* v. *Lopez-Medina*, 461 F.3d 724, 748 (6th Cir. 2006) ("trust and cooperation"); *Gibbs*, 190 F.3d at 199 ("mutual trust").

Thus, no split of authority exists among the circuits on the factors that petitioner argues were improperly included in the buyer-seller instruction.

4. Even if the question presented merited review, this case would be a poor vehicle to consider the question because any potential error in the jury instruction was harmless. The instructional error that petitioner alleges is not one of constitutional dimension, and therefore the alleged error is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). It did not. The instruction correctly stated that the government had to "prove that, in addition to agreeing to buy drugs, the defendant further agreed to participate with the seller in an arrangement involving mutual dependence, cooperation or assistance in distributing drugs." Pet.

App. 20. The evidence was sufficient to support such a finding, regardless of whether the jury was specifically instructed to consider the combined effect of credit transactions, an ongoing arrangement, and mutual cooperation. The evidence showed that petitioner received dozens of shipments of large quantities of cocaine from the Flores brothers. *Id.* at 27. Petitioner did not fully pay for the cocaine upon delivery, meaning that the Flores brothers likely were fronting him the cocaine. *Id.* at 26. The Floreses provided petitioner with prepaid cellular phones and a specially-equipped Chevrolet HHR for transporting drugs. *Id.* at 28. Finally, petitioner possessed the title documents for a Jeep Grand Cherokee used by one of the Floreses' drug couriers who did not deliver drugs to petitioner. *Id.* at 28-29. In light of this evidence, the jury would have convicted petitioner even if the court had given a slightly different jury instruction.

5. Petitioner argues that the buyer-seller instruction prejudiced him because "the evidence did not support" an instruction about credit sales and because the remaining evidence of conspiracy "rested on conjecture." Pet. 32-33. These arguments are un-availing. The evidence showed that petitioner often received cocaine without paying for it in full—once paying $26,000 for a quantity of cocaine that was worth at least $912,000—and that he sometimes made payments without receiving any drugs. Pet. App. 3-4, 26. The court of appeals correctly held that that was "sufficient evidence for the [district] court to include credit sales in the instruction." *Id.* at 24. And the evidence against petitioner did not rest on conjecture. Rather, as discussed above, the government produced sufficient circumstantial evidence from which a jury

could infer that petitioner conspired with the Flores brothers to distribute cocaine. See *Direct Sales Co.*, 319 U.S. at 714.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

MARCH 2014