No. _____

In The
Supreme Court of the United States

FRANKLIN BROWN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the evidence in a drug distribution conspiracy case shows a buyer-seller relationship, what additional factors must the government prove to establish an agreement beyond the agreement inherent in the sales arrangement?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Franklin Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's order denying rehearing with suggestion for rehearing en banc, Pet. App. 41, is unreported. The Seventh Circuit's opinion affirming petitioner's conviction, Pet. App. 1-29, is reported at 726 F.3d 993. The district court's judgment, Pet. App. 31-40, is unreported.

JURISDICTION

The court of appeals entered judgment on August 12, 2013. Pet. App. 30. The court of appeals denied petitioner's petition for rehearing with suggestion for rehearing en banc on September 9, 2013. *Id*. at 41. On November 14, 2013, Justice Kagan extended the time in which to file a petition for a writ of certiorari until January 9, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 21, United States Code, § 846 provides, in pertinent part: "Any person who . . . 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 . . . conspiracy."

Title 21, United States Code, § 841 provides: "(a) 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."

STATEMENT OF THE CASE

The question presented is of exceptional importance because federal drug cases frequently involve conspiracy charges that spawn defense objections on buyer-seller grounds. The Seventh Circuit's decision in this case – affirming a buyer-seller jury instruction (which the court of appeals described as presenting an "immense challenge," Pet. App. 18, and finding the evidence sufficient – readily acknowledges that the Seventh Circuit's buyer-seller law is riddled with "many dissonant voices." *Id*. at 6. But not only are the Seventh Circuit decisions inconsistent, the circuit courts of appeals, while each recognizing the buyer-seller doctrine, are also badly fractured over the doctrine's contours. Review by this

Court is necessary to harmonize this recurring conspiracy law issue.

1. The facts relevant to this petition are uncontested. See Pet. App. 2. Petitioner Franklin Brown went to trial on a single count of conspiracy to distribute unlawful controlled substances. See 21 U.S.C. § 846. Evidence adduced at trial disclosed the following: Between approximately 2003 and late 2008, Pedro and Margarito Flores, twin brothers (sometimes known as "the Twins"), ran a substantial drug trafficking operation in and around Chicago, Illinois. Pet. App. 2. The Twins employed a few individuals to deliver cocaine, collect money and/or deal with customers, who numbered no more than 15, and included Brown as one of the "best." Tr. 721. While the Twins each cooperated with the government, neither was called as a witness at Brown's trial. Nor were their statements otherwise introduced (through tape-recordings or historical recount). As the Seventh Circuit in this case observed: "This omission [was] particularly notable due to the Floreses' rigid business practices. The Twins used couriers to handle physical transactions but reserved all power to negotiate for themselves." Pet. App. 3.

Two couriers, who testified as government witnesses in exchange for leniency, provided historical accounts about multiple, intermittent alleged large-scale cocaine deliveries to Brown between 2002 and

2008.[1] Tr. 579-80, 731, 741-42. A third courier recalled picking up large amounts of cash from Brown during a three-month period in 2008. Tr. 987-88. None of the couriers had any substantive conversations with Brown, who essentially remained mute during the transactions. See Tr. 601, 635, 708. Law enforcement did not intercept any of the transactions with Brown.

Two of the couriers testified that, at the Twins' direction, they delivered prepaid telephones to Brown. Tr. 742-53, 807-08, 986-87. One of the couriers also recalled delivering a Chevrolet HHR vehicle, outfitted with a secret compartment, to Brown on the Twins' behalf, although this witness offered no details about the terms of the transaction, Tr. 742-53, 781-87, 807-08, and the government did not produce any evidence that Brown had ever used the HHR to facilitate drug distribution conspiracy. Pet. App. 4, 28. A trash-pull at Brown's home in July 2009 uncovered vehicle documents for a Jeep that contained a secret compartment and once had been used by a member of the Flores group. Tr. 1090-99, 1190-97, 1132-35.

2. At the time of Brown's trial, the Committee on Federal Jury Instructions of the Seventh Circuit had proposed a pattern buyer-seller jury instruction, which substantially revamped the prior buyer-seller

[1] The witnesses testified that they dealt with a person known to them only as "Skinny." The three couriers identified photographs of Brown as depicting "Skinny." Tr. 620, 722-23, 853-54, 859, 980-81, 1033-35, 1058-59, 1067-68, 1118-21, 1141-43.

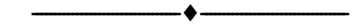
pattern instruction and avoided listing factors. See *Seventh Circuit, Federal Jury Instructions Criminal*, Instruction, 5.10(A), pp. 73-74 (2012); Pet. App. 42. Brown offered this instruction in the district court. See Deft's 7th Cir. Br., App. 16-48. The government countered with a non-pattern instruction, which listed a number of factors, i.e., mutual dependence, cooperation or assistance; credit sales; and an ongoing relationship. See *id*. The district court combined the two instructions, 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 evidence showing mutual cooperation and an ongoing arrangement between the defendant and the seller.

Deft's 7th Cir. Br., App. 13, 47-48.

3. On appeal, Brown contested the buyer-seller instruction, as well as the sufficiency of the evidence on grounds it only showed a buyer-seller arrangement and not a criminal conspiracy. Although the court of appeals, conducting de novo review, observed that the jury instruction issue presented significant challenges, it upheld the instruction. Pet. App. 6-24. The court found the instruction's listing of factors of credit sales, an ongoing arrangement, and mutual cooperation had grounding in the circuit's case law. The court also found that the evidence supported the instruction's reference to credit sales.

On the sufficiency of the evidence point, the court of appeals agreed that the government had failed to "introduce any evidence of what Brown did with the drugs after he purchased them from the Floreses." *Id*. at 25. Although the government did not introduce any evidence about the substantive terms of the arrangements between Brown and the Twins (i.e., whether the sales were on credit), and the court granted that Brown's version could have been true, the court ruled "a rational jury could have concluded that Brown purchased drugs on credit." *Id*. at 26. The court also relied on Brown's connection to vehicles. *Id*. at 28-29.



REASONS FOR GRANTING THE PETITION

Sixty-five years ago, Justice Jackson, concurring in *Krulewitch v. United States*, 336 U.S. 440, 445-46

(1949), criticized prosecutorial reliance on conspiracy charges:

> This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle to expand itself to the limit of its logic." The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

The passage of time, however, has not demoted conspiracy charges from their status as the "darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) (Hand, J.). See *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990) ("prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge"). So, too, in this case in which the government opted not to prosecute Petitioner Franklin Brown for any substantive offenses and pursued a lone conspiracy count. Far too many unresolved questions arise when the buyer-seller doctrine arises in conspiracy cases. Guidance from this Court is greatly needed.

I. This Court Should Resolve The Marked Judicial Division Over The Buyer-Seller Doctrine In Conspiracy Law.

A. The doctrine.

A combination of early-1940s cases from this Court, *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), *United States v. Falcone*, 311 U.S. 205 (1940), gave rise to the proposition that a conspiracy is not established by a relationship between a buyer and seller. See *United States v. Blankenship*, 970 F.2d 283, 285-89 (7th Cir. 1992). To establish a criminal conspiracy, the circuit courts of appeals have held that the government must prove something more than a "mere agreement of one person to buy what another agrees to sell." *United States v. Mancillas*, 580 F.2d 1301, 1307 (7th Cir. 1978). As stated in *United States v. Ford*, 324 F.2d 950, 952 (7th Cir. 1963):

> The relationship of buyer and seller absent any prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy. . . . In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective.

Although the doctrine might be easily stated, its application has proven difficult. Over the years, the buyer-seller doctrine has engendered a host of divergent judicial viewpoints. As will be seen, the cases are hopelessly inconsistent.

B. Seventh Circuit's treatment.

i. The Seventh Circuit has been prolific, but not united, in the buyer-seller area. Early cases made "clear that merely purchasing drugs or other property from a conspiracy, standing alone can never establish membership in a conspiracy." *United States v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987). Over 25 years ago, the Seventh Circuit rejected the notion that the buyer-seller rule is limited to single-sale/two participant situations in which the buyer was a minor player.[2] *Id*. at 1321 n. 3. In *United States v. Baker*, 905 F.2d 1100, 1106 (7th Cir. 1990), the court expressly refused to equate proof of a large-scale purchase with conspiracy: "Even a large purchase does not demonstrate [a conspiracy] . . . any more than a purchase of 100 tons of steel to build a skyscraper shows that the buyer has "joined" the corporate enterprise of the manufacturer." See also *United States v. Lamon*, 930 F.2d 1183, 1192 (7th Cir. 1991) ("possession of a significant quantity of illegal drugs does not, standing alone, necessarily support the conclusion that the defendant's activity is conspiratorial in nature"). The *Baker* court also rejected the idea that a conspiracy conviction could be sustained on the basis of credit sales in the absence of evidence

[2] To be sure, in the late 1980s/early 1990s, the Seventh Circuit reversed conspiracy convictions because the government failed to prove that the defendant purchased drugs for resale, as opposed to personal consumption. See, e.g., *United States v. Kimmons*, 917 F.2d 1011, 1016-17 (7th Cir. 1990); *United States v. Mancari*, 875 F.2d 103, 105 (7th Cir. 1989).

of repeat purchases or some other arrangement implying an agreement made with requisite knowledge of the conspiracy's scope. 905 F.2d at 1106.

Following *Baker* and *Lamon*, the Seventh Circuit, sitting en banc, attempted to resolve tension over whether a conspiracy could be established from the sale of non-personal use quantities of drugs. See *United States v. Lechuga*, 994 F.2d 346, 347 (7th Cir. 1993) (en banc). The lead opinion, authored by Judge Posner, was a three-judge plurality. Four concurring opinions were filed. In addition, one judge, joined by two others in full and third in part, wrote a partially concurring/dissenting opinion.

The lead *Lechuga* opinion stated that it had resolved the conflict in Seventh Circuit's cases by "holding that 'large quantities of controlled substances, without more, cannot sustain a conspiracy conviction' . . . . What is necessary and sufficient is proof of an agreement to commit a crime other than the crime that consists of the sale itself." *Id*. (quotation marks omitted). The lead *Lechuga* opinion did not limit the buyer-seller doctrine to one-time sales, finding the number of sales "significant only insofar as it cast light on the existence of a continuing relation, implying an agreement with an objective beyond a simple purchase and sale." *Id*. at 349-50. The plurality continued: "Prolonged cooperation is neither the meaning of conspiracy nor an essential element, but it is one type of evidence of an agreement that goes

beyond what is implicit in any consensual undertaking, such as a spot sale."[3] *Id*.

Judge Cudahy's partial concurrence/dissent in *Lechuga* addressed the role of credit sales, perceiving a significant distinction between sales on credit and consignment sales: "[A] credit transaction standing alone in no way changes the adversarial relationship between buyer and seller." *Id*. at 363. On the other hand, Judge Cudahy assumed a consignment relationship would be conspiratorial in nature since such a transaction links the seller's economic benefit to the distributor's success. *Id*.

In *United States v. Colon*, 549 F.3d 565, 567-68 (7th Cir. 2008), the court reversed a drug distribution conspiracy conviction on evidentiary insufficiency grounds because there was "no evidence of a relationship other than a conventional sales relationship between the defendant and the conspiracy from which he bought drugs." *Id*. at 570. The *Colon* court acknowledged that prior cases had applied a factor approach in determining whether a relationship was conspiratorial, but cautioned that "in every case such factors have to be placed in context before an inference of participation in a conspiracy can be

[3] The partial dissent agreed with the plurality that prolonged cooperation is not the meaning of conspiracy, but rather a type of evidence of an agreement beyond that implicit in a spot sale. *Lechuga*, 994 F.2d at 363 n. 8 (Cudahy, J., concurring and dissenting in part).

drawn."[4] In *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010), the court observed that confusion inures in the factor approach because "[c]ertain characteristics inherent in any ongoing buyer-seller relationship will also generally suggest the existence of a conspiracy." The *Johnson* court explained:

> If the prosecution rests its case only on evidence that a buyer and seller traded in large quantities of drugs, used standardized transactions, and had a prolonged relationship, then the jury would have to choose between two equally plausible inferences. On one hand, the jury could infer that the purchaser and the supplier conspired to distribute drugs. On the other hand, the jury could infer that the purchaser was just a repeat wholesale customer of the supplier and that the two had not entered into an agreement to distribute drugs to others. In this situation, the evidence is essentially in equipoise; the plausibility of each inference is about the same, so the jury necessarily would have to entertain a reasonable doubt on the conspiracy charge . . . . Absent some other evidence of a conspiratorial agreement to tip the scales, the jury must acquit. Otherwise, the

[4] The factor approach derived, *inter alia*, from the Seventh Circuit's pattern jury instruction. See *Seventh Circuit, Federal Jury Instructions Criminal*, 6.12 (1999); Pet. App. 44.

> law would make any "wholesale customer of a conspiracy . . . a co-conspirator per se."

Id. at 755 (citations omitted).

The *Colon* court also repudiated the government's argument that every wholesale customer is a per se conspirator. 549 F.3d at 568. As the *Johnson* court put it: "The government . . . had to prove that Johnson and someone else entered into an agreement to distribute drugs, and this required evidence that is distinct from the agreement to complete the underlying wholesale drug transaction." 592 F.3d at 752; see also *United States v. Kincannon*, 567 F.3d 893, 897 (7th Cir. 2009).

Although the government in *Colon* had relied on "standardized" transactions as a reason to uphold the conspiracy conviction, the court of appeals stressed that the relationship was "'standardized' only in the sense that because seller and buyer dealt regularly with each other, the sales formed a regular pattern, as one would expect in any repeat purchase, legal or illegal." 549 F.3d at 567. Noting that repeat transactions are not a synonym for conspiracy, the court questioned: "How 'regular' purchases on 'standard' terms can transform a customer into a co-conspirator mystifies us." *Id*.; see also *Kincannon*, 567 F.3d at 897. Addressing the government's reliance on "mutual trust," the *Colon* court stated that it is already a factor in conventional conspiracy analysis and thus "an act that is merely evidence of mutual trust cannot

be a separate factor." 549 F.3d at 568. The court expounded:

> Anyway repeat transactions need not imply greater mutual trust than is required in any buyer-seller relationship. If you buy from Wal-Mart your transactions will be highly regular and utterly standardized, but there will be no mutual trust suggestive of a relationship other than that of buyer and seller.

549 F.3d at 568.

Although the *Colon* defendant (the buyer) had no stake in his seller's income and did not stimulate, instigate or encourage the seller's business, the government relied on the sellers' stake in the defendant's distribution system. The Seventh Circuit, however, aptly noted that every seller has a stake in a distributor's activities. *Id*. The court nevertheless envisioned conduct that could establish something more than a buyer-seller relationship, e.g., the buyer agrees to find other customers for the seller and receives a corresponding sales commission; the buyer advises sellers about their business; or the buyer agrees to warn sellers of business threats (i.e., competitors or law enforcement). *Id*. at 570. Such instances could render the buyer and seller as having the same joint criminal objective, according to the court. *Id*.

The *Colon* court also emphasized that the jury instructions "mirrored" the "muddle" in the government's theory. *Id*. at 570; see also *Johnson*, 592 F.3d

at 757-58. The court discerned error in the instruction's listing of factors, explaining:

> Only the question about credit or consignment was germane, for reasons that we've indicated, and that question could only have confused the jury, since all the transactions with the defendant were cash transactions. And the judge made no effort to relate the factors that she told the jury to consider to the difference between a customer and a conspirator. It is no surprise that the jury convicted; given the warped instructions, the conviction does nothing to advance the government's argument that the evidence of conspiracy was sufficient for a reasonable jury to convict.

Id. at 570-71.

Reversing a conspiracy conviction in *Colon*'s wake, the Seventh Circuit in *Johnson* addressed the confusion resulting from the fact that "[c]ertain characteristics inherent in any ongoing buyer-seller relationship will also generally suggest the existence of a conspiracy." *Id*. at 754-55. The *Johnson* court stated:

> If the prosecution rests its case only on evidence that a buyer and seller traded in large quantities of drugs, used standardized transactions, and had a prolonged relationship, then the jury would have to choose between two equally plausible inferences. On one hand, the jury could infer that the purchaser and the supplier conspired to distribute

> drugs. On the other hand, the jury could infer that the purchaser was just a repeat wholesale customer of the supplier and that the two had not entered into an agreement to distribute drugs to others. In this situation, the evidence is essentially in equipoise; the plausibility of each inference is about the same, so the jury necessarily would have to entertain a reasonable doubt on the conspiracy charge . . . Absent some other evidence of a conspiratorial agreement to tip the scales, the jury must acquit. Otherwise, the law would make any "wholesale customer of a conspiracy . . . a co-conspirator per se."

Id. (citations omitted).

In *Johnson*, the Seventh Circuit returned to the distinction between credit and consignment sales:

> A consignment sale that permits the middleman to return the unused drugs is quintessential evidence of a conspiracy because it shows that the supplier will not get paid until the middleman resells the drugs. . . . Indeed, a consignment sale demonstrates a codependent joint enterprise because neither party profits until the middleman distributes the drugs to others. From this, a jury could easily infer an agreement to distribute. Credit sales are different; not all credit sales can support an inference that there was an agreement to distribute. For example, a supplier extending credit to an individual buying a small quantity of drugs for personal consumption does not create a conspiracy. . . .

> However, when a credit sale is coupled with certain characteristics inherent in an ongoing wholesale buyer-seller relationship – i.e., large quantities of drugs, "repeat purchases or some other enduring arrangement" – the credit sale becomes sufficient evidence to distinguish a conspiracy from a nonconspiratorial buyer-seller relationship. . . . In this situation, the credit arrangement could easily "support an inference that [the buyer] became a co-venturer" because he will not got paid until the drugs are resold.

592 F.3d at 754 n. 5 (citations omitted).

More recently, and as exemplified by the court of appeals' opinion below, the Seventh Circuit has seemingly retreated from applying the buyer-seller doctrine to wholesale transactions. For example, in *United States v. Rea*, 621 F.3d 595, 608 (7th Cir. 2010), the court articulated that a conspiracy could be proven by sales of large amounts, prolonged cooperation, a level of mutual trust, standardized dealings and sales on consignment or a "fronted" basis. See also *United States v. Villasenor*, 664 F.3d 673 (7th Cir. 2011) (fronting of large quantities of drugs, combined with evidence of repeated transactions and a prolonged relationship supports the inference of an agreement to distribute cocaine distinct from the underlying buy-sell relationship). Although the *Rea* court acknowledged that some of these factors could also create an inference of a buyer-seller relationship, it looked to *Johnson* as clarifying that the following examples "weigh more heavily in favor of finding a

conspiracy": sales on credit or consignment; an agreement to scout for other customers; commission payments; advice on conduct of business; and promises to warn of future threats from competitors or law enforcement.

In *United States v. Nunez*, 673 F.3d 661 (7th Cir. 2012), the Seventh Circuit again acknowledged that it has struggled to distinguish buyer-seller agreements from criminal conspiracies. The court of appeals discussed the role of credit in the buyer-seller analysis, stating "Sales on credit and returns for refunds are normal incidents of buyer-seller relationships, spot or otherwise." *Id*. at 665. Although the government in *Nunez* pointed to "mutual trust," as the thumbing the scale in its favor, the Seventh Circuit stressed that "mutual trust is just an implication of illegal sales on credit." *Id*. The *Nunez* court found "unanswered the question why willingness to sell illegal drugs on credit is evidence of conspiracy, when it is such a common feature of legal selling." *Id*.

Without endorsing an approach, the *Nunez* court suggested looking to contract law, i.e., distinguishing between non-conspiratorial spot contracts, and "relational contracts," which could give rise to a conspiratorial agreement. The court further wrote that the "plus" factor analysis (consisting of factors that "seem mostly makeweights") in buyer-seller cases could be cast aside in favor of a simplified rule making "the wholesaling of illegal drugs on credit" an automatic inference of conspiracy. Cf. *United States v. Moreland*, 703 F.3d 976, 985 (7th Cir. 2012) ("[t]his approach,

which infers conspiracy from wholesale sales on credit, can be found in numerous cases in this and other circuits (though usually it's presented as an instance in which two factors of a multifactor test for inferring a drug conspiracy – wholesales and credit – are present and suffice to satisfy the test)"); *United States v. Vallar*, 635 F.3d 271, 286-87 (7th Cir. 2011) (extension of credit to cover purchases of small quantities of drugs for personal consumption insufficient to show a conspiracy, but credit sales coupled with certain characteristics inherent in an ongoing buyer-seller relationship could demonstrate a conspiratorial agreement).

ii. The decision below represents the Seventh Circuit's latest foray into the buyer-seller arena. The court of appeals expressly acknowledged that assessment of whether the buyer-seller jury instruction accurately stated the law was a "difficult proposition," since the distinction between a non-criminal buyer-seller relationship and a criminal conspiracy "may seem difficult to grasp at first." Pet. App. 7. The court emphasized that the distinction "stems, however, from an important tenet of criminal law: conspiracy is a separate offense from the underlying crime." *Id*. Delving further, the court noted that "[d]rug sales complicate the situation," because the substantive trafficking offense encompasses an agreement that cannot be the same agreement necessary to establish a conspiracy. *Id*. at 8. What is necessary to prove a conspiracy, according to the court of appeals, is proof that the co-conspirator "has 'a stake in the venture'

and therefore exhibits 'informed and interested cooperation.'" *Id*. at 8-9 (quoting *Direct Sales Co. v. United States*, 319 F.3d 703, 713 (1943)). This task "is easier said than done," the court declared. Pet. App. 9.

The Seventh Circuit here pointed out that the factor-based approach, as illustrated by the 1999 pattern buyer-seller instruction, see Pet. App. 44, had recently triggered concern because "most of the factors did not actually distinguish conspiracies from buyer-seller relationships." *Id*. at 10. The court pronounced that some of the factors listed in the pattern instruction did not permit the inference of a conspiracy, or were "equally consistent with a buyer-seller relationship." *Id*. Citing *Colon* and *Johnson*, the court articulated that the 1999 factors had been replaced with "a new, nonexhaustive list of characteristics that more precisely pinpoint the distinction." *Id*.

The court of appeals also articulated that the credit/consignment distinction deserved additional discussion. Although the court recognized that both types of transactions could demonstrate "informed and interested cooperation," it perceived differences, since consignment sales are "quintessential evidence of a conspiracy," while "[c]redit sales . . . do not necessarily permit an inference of conspiracy." *Id*. at 11-12 (citation omitted). As an example of a non-conspiratorial credit transaction, the court identified the purchase of a quantity of drugs consistent with personal use. Returning to the difficulty with the buyer-seller precept, the court of appeals agreed that

"[t]here is disagreement in our case law . . . over what other evidence, when combined with a credit arrangement, is sufficient to infer conspiracy." *Id*. at 13. The court observed that the cases seemed to agree that frequent purchases of large quantities of drugs on credit permitted the inference of conspiracy, and dismissed as dicta the comment in *Nunez* that these features "just reveal a commonplace wholesale relationship." *Id*. at 13 n. 1. The court deemed "less clear . . . what combinations of those three characteristics – a credit arrangement, a large quantity, and frequent sales – are sufficient." *Id*. at 13. The court admitted that "much of the confusion" with prior factor approaches "stems from our own imprecision." *Id*. at 15. The court added a "totality of the circumstances" approach to the new, three-factor approach. "Either approach has merit, but a clearer statement of our methodology would significantly aid both litigants and district judges," so wrote the court. *Id*. at 16.

C. Treatment in the remaining circuits.

Each circuit court of appeal has adopted the buyer-seller doctrine in some form. The circuits, however, are divided on the circumstances when the doctrine is applicable.

First Circuit The First Circuit accepts the buyer-seller doctrine in limited circumstances, i.e., when the defendant was a "mere purchaser of drugs for personal use and not an active participant in the conspiracy." *United States v. Mitchell*, 596 F.3d 18 (1st

Cir. 2010); see also *United States v. Moran*, 984 F.3d 1299, 1304 (1st Cir. 1993) (a "classic" buyer-seller transaction is a spontaneous, single sale of a personal use quantity of drugs).

Second Circuit The Second Circuit views the buyer-seller doctrine as a "narrow exception to the general conspiracy rule," since "[a]s a literal matter" a buyer-seller relationship encompasses an agreement "to achieve the unlawful transfer of drugs." *United States v. Rojas*, 617 F.3d 669, 674 (2d Cir. 2010). Although the Second Circuit avoids listing factors to guide the inquiry into whether a relationship is conspiratorial or simply buyer-seller, it has "noted the 'relevance' of certain factors identified by other circuit courts of appeal." *Id*. at 675. The *Rojas* court explained:

> A non-exclusive list of considerations relevant to a jury's determination of whether a defendant was a member of a charged conspiracy, or merely a buyer and user of drugs, would include: Did the buyer seek to advance the conspiracy's interests? Was there mutual trust between buyer and seller? Were the drugs provided on credit? Did the buyer have a longstanding relationship with the seller? Did the buyer perform other duties on behalf of the conspiracy? Were the drugs purchased for a re-distribution that was part of the conspiratorial enterprise? Did the quantity of drugs purchased indicate an intent to re-distribute? Were the buyer's profits shared with the members of the conspiracy? Did the

> buyer/re-distributor have the protection of the conspiracy (physically, financially, or otherwise)? Was his point of sale assigned or protected by members of the conspiracy? Did the buyer use other members of the conspiracy in the redistribution? The jury may consider these, and any other relevant matters, in deciding whether a buyer of drugs is a member of the distribution conspiracy.

617 F.3d at 675.

Emphasizing the importance of sales on credit in distinguishing between a conspiracy and a buyer-seller relationship, *id*., the *Rojas* court affirmed the defendant's conspiracy conviction, stating:

> The jury could reasonably have relied on evidence presented at trial that demonstrated a lengthy affiliation between Colon and Rojas, evidence that demonstrated mutual trust between the defendant and Colon, the presence of sales "on credit," the quantity of drugs involved, and the fact that Colon bailed Rojas out of jail on multiple occasions, to conclude that Colon and Rojas were co-conspirators and that their relationship was not that of a mere buyer and a seller.

Id. at 676.

Third Circuit The Third Circuit agrees with the proposition that a simple buyer-seller relationship, without any contemporaneous understanding beyond the sales agreement, itself is insufficient to establish a conspiracy. See *United States v. Perez*, 280 F.3d 318,

343 (3d Cir. 2002). Under the Third Circuit's cases, an occasional buyer or supplier is dubbed a conspirator upon proof of "knowledge that she or he was part of a larger operation." *Id*. at 333. "[T]o determine a defendant's knowledge of the conspiracy," the Third Circuit looks to factors such as: "(1) the length of affiliation between the defendant and the conspiracy; (2) whether there is an established method of payment; (3) the extent to which transactions are standardized; and (4) whether there is a demonstrated level of mutual trust." *Id*. Although these factors are not dispositive, their presence suggests that the defendant has knowledge of, and a stake in, a conspiracy. *Id*. (citing *United States v. Gibbs*, 190 F.3d 188, 199 (3d Cir. 1999)).

Fourth Circuit The Fourth Circuit deems a buyer-seller relationship probative "of whether a conspiratorial relationship exists." *United States v. Yearwood*, 518 F.3d 220, 226 (4th Cir. 2008) (citing *United States v. Mills*, 995 F.2d 480, 485 n. 1 (4th Cir. 1993)). Evidence of a buyer-seller relationship, coupled with evidence of a "substantial quantity of drugs," suffices to show a conspiracy in the Fourth Circuit. *Id*.; see also *United States v. Young*, 609 F.3d 348, 355 (4th Cir. 2010).

Fifth Circuit The Fifth Circuit acknowledges that a "buyer-seller relationship, without more, will not prove a conspiracy." *United States v. Thomas*, 690 F.3d 358, 366 (5th Cir. 2012) (quoting *United States v. Maserratti*, 1 F.3d 330, 336 (5th Cir. 1993)). "The buyer-seller exception prevents a single buy-sell

agreement, which is necessarily reached in every commercial drug transaction, from automatically becoming a conspiracy to distribute drugs." *United States v. Delgado*, 672 F.3d 320, 333 (5th Cir. 2012) (en banc). The purpose of the buyer-seller exception, per the Fifth Circuit, is to shield "mere acquirers and street-level users" from severe penalties reserved for drug distributors. *Thomas*, 690 F.3d at 366. A defendant's knowing participation "in a plan to distribute drugs, whether by buying, selling or otherwise," is all that is necessary to prove membership in a conspiracy. *Delgado*, 672 F.3d at 333 (quoting *Maserratti*, 1 F.3d at 336). The Fifth Circuit finds the receipt of drugs without payment " 'strong evidence' of membership in a conspiracy because it indicates a strong level of trust and an ongoing, mutually dependent relationship." *Thomas*, 690 F.3d at 366. In *Delgado*, the Fifth Circuit, sitting en banc, rejected the defendant's argument that return policies are indicative of a buyer-seller relationship since they "are a common feature of many types of retail transaction[s]." 672 F.3d at 333-34. The *Delgado* court reasoned that a wholesaler is interested in his customer's resale business when he or she offers return policies. *Id*. To establish a conspiracy, the *Delgado* court looked to the presence of an ongoing relationship and a large quantity of drugs, which justifies "the inference that more than one person must be involved in moving [the large quantity] toward its ultimate dispersal." *Id*. at 334 (quoting *United States v. Barnard*, 553 F.2d 389, 393 (5th Cir. 1977)).

Sixth Circuit In *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009), the court summarized the buyer-seller doctrine in the Sixth Circuit as follows:

> "Generally, a buyer-seller relationship alone is insufficient to tie a buyer to a conspiracy because 'mere sales do not prove the existence of the agreement that must exist for there to be a conspiracy.'" . . . "Nonetheless, [we] have often upheld conspiracy convictions where there was additional evidence, beyond the mere purchase or sale, from which the knowledge of the conspiracy could be inferred." . . . We have cited with approval the Seventh Circuit's construct, which considers a list of factors to determine whether a drug sale is part of a larger drug conspiracy . . . . These factors include: (1) the length of the relationship; (2) the established method of payment; (3) the extent to which transactions are standardized; and (4) the level of mutual trust between the buyer and the seller.

Id. at 680-81 (citations omitted).

Eighth Circuit The Eighth Circuit gives narrow application to the buyer-seller concept. In *United States v. Johnson*, 719 F.3d 660 (8th Cir. 2013), the court of appeals held that a buyer-seller jury instruction is "'not appropriate when there is evidence of multiple drug transactions, as opposed to a single, isolated sale.'" *Id*. at 671 (quoting *United States v. Hester*, 140 F.3d 753, 757 (8th Cir. 1998) (quoting *United States v. Wiggins*, 104 F.3d 174, 177 (8th Cir. 1997))).

Ninth Circuit Reversing a conspiracy conviction, the court of appeals in *United States v. Lennick*, 18 F.3d 814, 819 n. 4 (9th Cir. 1994), held that "mere sales to other individuals do not establish a conspiracy to distribute or possesses with intent to distribute; rather the government must show that the buyer and seller had an agreement to further distribute the drug in question." Citing the Seventh Circuit's *Lechuga* decision, the *Lennick* court stated that conspiracy requires proof of "an agreement to commit a crime other than the crime that consists of the sale itself . . . . Were the rule otherwise, every narcotics sale would constitute a conspiracy." *Id*. In *United States v. Buxton*, 150 F.3d 983 (9th Cir. 1998), the court cited a factor approach in pointing out that "certain conduct 'may be sufficient to indicate the existence of more than a buyer-seller relationship . . . including: arranging contacts and meetings . . . and transaction in large quantities with regularity.'" *Id*. at 1002 (quoting *United States v. Delgado*, 4 F.3d 780, 791 (9th Cir. 1993)).

Tenth Circuit The Tenth Circuit phrases the buyer-seller doctrine as "the retail buyer rule" and holds that it applies only to buyers in drug transactions. See *United States v. Sells*, 477 F.3d 1226, 1236 n. 12 (10th Cir. 2007) ("Anthony's confusion about whether a buyer-seller relationship establishes a conspiracy stems from a misunderstanding of the retail buyer rule. Our circuit has previously held that a *buyer* in a retail drug transaction is not considered part of the larger conspiracy to manufacture and

distribute a drug.") (Emphasis original). The Tenth Circuit has explained this rule as follows:

> "[T]he purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." . . . Flores was not a streetlevel retail drug *purchaser*, he was a wholesale *seller* who knowingly helped supply large quantities of methamphetamine to a distribution organization, an organization that in turn relied in great part upon Flores' efforts for its success.

United States v. Flores, 149 F.3d 1272, 1277 (10th Cir. 1998) (emphasis original; citation omitted).

Eleventh Circuit The Eleventh Circuit reversed a conspiracy conviction on buyer-seller grounds in *United States v. Dekle*, 165 F.3d 826 (11th Cir. 1999); see also *United States v. Hardy*, 895 F.3d 1331, 1334 (11th Cir. 1990) (isolated purchases of small quantities of illegal drugs for personal consumption insufficient to establish membership in a drug distribution conspiracy); *United States v. Brown*, 872 F.2d 385 (11th Cir. 1989) (same). The *Dekle* court explained the buyer-seller doctrine as follows:

> What distinguishes a conspiracy from its substantive predicate offense is not just the presence of any agreement, but an agreement with the same joint criminal objective – here the joint objective of distributing drugs.

> This joint objective is missing where the conspiracy is based simply on an agreement between a buyer and a seller for the sale of drugs. Although the parties to the sales agreement may both agree to commit a crime, they do not have the joint criminal objective of distributing drugs.

165 F.3d at 829. (The *Dekle* court supported its decision with discussion of Judge Posner's plurality opinion in *Lechuga*. *Id*.)

D.C. Circuit In *United States v. Thomas*, 114 F.3d 228, 241 (D.C. Cir. 1997), the court of appeals acknowledged: "While a mere buyer-seller relationship is insufficient to show conspiratorial activity, where the evidence shows that a buyer procured drugs with knowledge of the overall existence of the conspiracy, he may be found to have entered into the conspiratorial agreement." In *United States v. White*, 116 F.3d 903, 928 n. 11 (D.C. Cir. 1997), the government conceded "that a buyer-seller relationship does not constitute a conspiracy." In *White*, the appellants challenged (as imbalanced) a buyer-seller jury instruction that listed factors. The D.C. Circuit found no error in the instruction's reference to multiple sales and sales on credit since they were supported by the evidence and could combine with a buyer-seller relationship to establish a conspiracy. 116 F.3d at 927-28.

D. The divergent views need to be harmonized.

As the foregoing discussion indicates, the circuit courts of appeals, while each recognizing the buyer-seller doctrine in some form, are all over the lot in terms of its content. The cases from the various circuits cannot be harmonized. A host of questions fester. Does the doctrine apply only to single-sale transactions? May a seller rely on the buyer-seller defense? Should the doctrine be applied only when personal use quantities of drugs are involved, or is it appropriate to use the doctrine when large or wholesale quantities are at issue? Does the presence of credit transactions doom successful reliance on the buyer-seller concept? Should assessment of the buyer-seller doctrine be predicated on a factor approach? If so, what are the relevant factors and how are they applied? These types of questions regularly arise across the nation both in instructing juries and review of evidentiary sufficiency claims. The circuits simply have not spoken in a consistent voice. Accordingly, this Court should resolve the controversies and provide clear guidance on this important, recurring issue in conspiracy law.

E. This case presents an appropriate vehicle for certiorari.

As the court of appeals in this case emphasized, courts and litigants are sorely in need of guidance on issues surrounding the buyer-seller doctrine. Pet App. 16. This case presents a suitable vehicle for certiorari,

namely because "no one contests . . . facts" important to the analysis. *Id*. at 2. In addition, waiver or forfeiture issues pose no impediment to merits review. The court of appeals here reviewed the jury instruction de novo, and rejected the government's argument that Brown had waived his sufficiency challenge. See *id* at 25.

Furthermore, the issues have had sufficient time to percolate in the lower courts. As noted, every circuit has embraced the buyer-seller doctrine in some form. The circuits, however, are hopelessly divided over the circumstances in which the doctrine is applicable. Given the nature of the divisions, self-unification of the jurisprudence does not realistically portend absent this Court's review.

F. Brown can show prejudice.

On the subject of whether the government proved the secondary agreement essential for a conspiracy between a seller and a purchaser, the Seventh Circuit here determined that "Brown rightly notes [that] the government did not introduce any evidence of what Brown did with the drugs after he purchased them from the Floreses." Pet. App. 25. Although the government's witnesses expressly described Brown as a "customer," they could not answer the dispositive legal issue of "whether Brown was more than a 'customer'" because they did not talk to, or negotiate terms with, Brown, and had no substantive knowledge of Brown's arrangements with the Twins,

including whether Brown purchased on credit. See *id* at 2-3. For "unknown reasons" the government did not call the Twins, who could have answered whether Brown was merely a customer, or a co-conspirator. See *id*. at 3.

Despite the evidentiary void, the district court gave a jury instruction that permitted the jury to find proof of the necessary secondary agreement on the basis of "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 evidence showing mutual cooperation and an ongoing arrangement between the defendant and the seller." See, *supra*, p. 5. Listing factors in an instruction, however, should be avoided, and be left for argument. See *Seventh Circuit, Federal Jury Instructions Criminal*, Instruction 5.10(A), Committee Comment, pp. 73-74 (2012); Pet. App. 42; see also *Johnson*, 592 F.3d at 757-58; *Colon*, 549 F.3d at 570. Moreover, each of the factors set forth in the instruction here has been the subject of doubt in the Seventh Circuit's buyer-seller cases. The listing of the factors had the effect of nudging what was supposed to be a theory of defense instruction in the government's favor. "The instruction could likely have misled the jury into finding a conspiracy when the government did not supply facts to support the elements of that crime." *United States v. Rivera*, 273 F.3d 751, 757 (7th Cir. 2001).

Another fundamental problem with the instruction is that the evidence did not support the existence

of a credit arrangement between Brown and the Twins. The court of appeals conceded that "Brown's account *could* have been true," Pet. App. 26 (emphasis original). That being the case, the evidence was in equipoise, as in *Johnson*, 592 F.3d at 755, meaning that Brown was entitled to acquittal on the conspiracy count.[5]

The Seventh Circuit also relied on evidence of Brown's connection to two vehicles. See Pet. App. 27-29. But just as couriers did not testify about the actual terms of Brown's drug-purchase arrangement with the Twins, they did not shed any light on the terms of the vehicle transactions. We do not know, based on this record, whether Brown obtained the vehicles in arm's length transactions, or otherwise. The government also failed to adduce any evidence that Brown ever used the vehicles in narcotics transactions, or to perpetuate a conspiracy. See *id*. at 4, 28.

In sum, proof that Brown entered into a conspiracy with the Twins rested on conjecture. As this Court has recognized, that is an insufficient foundation on which to sustain a conspiracy conviction. See *Anderson*

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[5] Assuming that Brown's district court theory (that he prepaid for the cocaine) could have been true, the Seventh Circuit here deemed that position unhelpful to Brown on grounds that prepayments amount to a reversal of roles in the credit analysis with Brown's interest still intermeshed with the Twins. See Pet. App. 26-27. That statement renders this case in conflict with the Seventh Circuit's prior decision in *Rivera*, which stated: "[M]any a buyer in an ordinary commercial sale pays first and receives delivery later." 273 F.3d at 756.

v. United States, 417 U.S. 211, 224 (1974) ("we scrutinize the record for evidence of such intent with special care in a conspiracy case for, as we have indicated in a related context, 'charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes'") (quoting *Direct Sales*, 319 U.S. at 711).

CONCLUSION

WHEREFORE, based on the foregoing, Petitioner Franklin Brown respectfully moves this Honorable Court to grant certiorari.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 12-2743

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANKLIN BROWN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 09-cr-671 – **James B. Zagel**, *Judge*.

ARGUED FEBRUARY 28, 2013 –
DECIDED AUGUST 12, 2013

Before MANION, KANNE, and TINDER, *Circuit Judges*.

KANNE, *Circuit Judge*. For five years, Franklin Brown led a lucrative life in Chicago's cocaine trade. Eventually, however, fate caught up with him. Federal authorities arrested Brown and charged him with conspiracy to distribute cocaine. The jury convicted, and the district court sentenced Brown to nearly twenty-five years in prison. Now, Brown challenges that result. He claims that he was only a customer to

his suppliers, as opposed to a co-conspirator. If true, that fact would have prevented a jury from convicting him. Brown also makes a second, related argument: he claims the district court's instructions to the jury provided incorrect guidance on how to distinguish a buyer-seller relationship from a conspiracy. Ultimately, we find both arguments unpersuasive and affirm Brown's conviction.

I. BACKGROUND

This case traces the relationship between three protagonists: Franklin Brown, Pedro Flores, and Margarito Flores. The Flores brothers (sometimes called "the Twins") ran a massive drug trafficking operation in the Chicagoland area. Yet the Floreses did business with only a select few customers – no more than fifteen, in fact. (R. 190 at 38.) Brown (also known as "Skinny") counted among them. Indeed, Brown was one of the Floreses' "best customers." (*Id.* at 49.) Between 2003 and 2008, Brown bought millions of dollars worth of cocaine from the Twins. No one contests these facts.

The dispute is whether Brown was more than a "customer." Federal authorities did not charge Brown with a substantive drug trafficking crime; rather, they charged Brown with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846. (R. 1); (R. 105). For this reason, a jury could convict Brown only if they found him a co-conspirator in the Floreses' trafficking

operation – a status that requires more involvement than a mere customer.

Thus, characterizing Brown's relationship with the Twins sparked intense debate at Brown's trial. For unknown reasons, those with the clearest information on Brown's involvement – the Floreses – did not testify. This omission is particularly notable due to the Floreses' rigid business practices. The Twins used couriers to handle physical transactions but reserved *all* power to negotiate for themselves. (R. 195 at 89-90); (R. 190 at 36). Consequently, without the Floreses' own accounts, the government had to rely on second-hand information from couriers to show Brown's role in the organization.

The couriers provided useful testimony, however. By piecing together their accounts, the jury could, for example, grasp the massive extent of Brown's purchases from the Floreses. One courier, Jorge Llamas, stated that, over a two-year period, he met Brown on approximately forty occasions, each time to deliver between twenty and one hundred kilograms of cocaine. (R. 190 at 69.) Another courier, Cesar Perez, testified to making between thirty and forty deliveries, each at least ten kilograms, during a separate three-year period. (R. 195 at 33-34.) At least two other couriers were also responsible for delivering cocaine to Brown. (R. 190 at 59-60.)

According to the couriers, Brown rarely provided full cash payment at the time of delivery. For instance, Brown once provided Perez with only $26,000

for around 57 kilograms of cocaine. (R. 195 at 54-56.) Throughout Brown's entire relationship with the Twins, the price of a kilogram of cocaine in Chicago never dropped below about $16,000. (R. 192 at 111.) Thus, even at that lowest price, 57 kilograms was worth at least $912,000 – far more than the $26,000 Brown provided at delivery. Conversely, Llamas testified to several meetings at which Brown dropped off five-to seven-figure payments but did not receive any drugs. (R. 190 at 69.) A third courier, Hector Simental, similarly testified to receiving several payments ranging from $250,000 to $1.3 million from Brown, all without a corresponding delivery of drugs. (R. 191 at 141-43.) Simental also spoke about an accounting ledger in which Brown's financial status with the Twins was tracked. (*Id.* at 152-62.)

Yet Brown's involvement with the Floreses did not end there. Brown received far more than drugs from the Twins. The Floreses frequently had couriers provide prepaid cell phones to their business associates to facilitate communication with the Twins. (*Id.* at 110-11.) Llamas delivered such phones to Brown. (R. 190 at 71.) The Twins also had Llamas give Brown a Chevrolet HHR specially outfitted with a secret compartment for concealing drugs or money. (*Id.* at 72-74.) The government never presented evidence that Brown used the HHR for subsequent drug trafficking, but it did introduce records showing that Brown had taken out insurance on the vehicle. (R. 192 at 41-42.) Finally, an investigator recovered title documents for a Jeep Grand Cherokee with a similar

secret compartment from Brown's garbage. (*Id.* at 34-38); (R. 190 at 86). Another courier for the Twins – although not one who delivered cocaine to Brown – was known to drive this Jeep. (R. 190 at 59-60, 85-88.)

When Brown's trial came to a close, the district court instructed the jury on the difference between a conspiracy and a buyer-seller relationship. Earlier in the proceedings, the wording of this instruction had raised significant disagreement between Brown and the government. When the district court instructed the jury, it decided to combine the two proposed approaches (more details on the specific wording later).

After deliberating, the jury found Brown guilty of conspiracy. (R. 114.) Brown moved for a judgment of acquittal and argued that the government failed to provide sufficient evidence. (R. 117.) Brown also moved for a new trial based upon several other errors purportedly made by the district court. (R. 130.) The district court denied both motions, (R. 138), and sentenced Brown to 292 months in prison, followed by 120 months of supervised release, (R. 152). Brown subsequently appealed. (R. at 153.)

II. ANALYSIS

Brown presents two arguments on appeal. First, he claims that the government did not present sufficient evidence to convict him of conspiracy. Second, he argues that the district court's buyer-seller jury

instruction misstated the law and misled the jury. We address each argument below but in reverse order. To determine whether the jury instruction was appropriate, we must discuss the case law on conspiracy. Having that discussion first will later make it easier to determine whether the evidence in this case was sufficient.

A. Buyer-Seller Jury Instruction

Brown and the government cite seemingly disparate cases for the standard of review that governs challenges to jury instructions. Yet neither makes clear that we review instructions in two steps. First, we review *de novo* whether a particular jury instruction "accurately summarize[s] the law." *United States v. Dickerson,* 705 F.3d 683, 688 (7th Cir. 2013). If so, then we "examine the district court's particular phrasing of the instruction for abuse of discretion." *Id.* Under the second step, we reverse "only if it appears both that the jury was misled and that the instructions prejudiced the defendant." *Id.*

1. Accuracy of law

We begin by assessing whether the district court's buyer-seller instruction accurately summarized the law – a difficult proposition. Our case law on buyer-seller relationships has many dissonant voices. To determine the accuracy of the district court's work, however, we will attempt to harmonize those voices into a well-blended choir.

a. Case law on buyer-seller relationships

In October 2012, our circuit released a revised set of pattern jury instructions for use in criminal cases. Committee on Federal Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Jury Instructions of the Seventh Circuit* (2012), *available at* http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf. One notable revision was to Instruction 5.10(A), which distinguishes buyer-seller relationships from conspiracies. *Id.* at 73-74. This distinction may seem difficult to grasp at first. It stems, however, from an important tenet of criminal law: conspiracy is a separate offense from the underlying crime. *See, e.g.,* 21 U.S.C. § 846; 18 U.S.C. § 43(a); 18 U.S.C. § 32(a)(8).

Conspiracy is the extra act of *agreeing* to commit a crime. *United States v. Jimenez Recio,* 537 U.S. 270, 274, (2003); *Smith v. United States,* 133 S. Ct. 714, 719 (2013). "That agreement is a 'distinct evil,'" *Jimenez Recio,* 537 U.S. at 274, because a group of criminals often pose a greater danger than an individual, *United States v. Townsend,* 924 F.2d 1385, 1394 (7th Cir. 1991). By working together, criminals capitalize on economies of scale, which facilitate planning and executing crimes – thus making it more likely that a group will complete its unlawful aim. *Id.; see also Jimenez Recio,* 537 U.S. at 275. For this reason, we punish conspiracies separately from the underlying offense, whether or not that crime comes to fruition. *Jimenez Recio,* 537 U.S. at 274.

Drug sales complicate the situation. 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. *United States v. Rock,* 370 F.3d 712, 714 (7th Cir. 2004). But, although the substantive trafficking crime is an agreement, it cannot also count as the agreement needed to find conspiracy. *United States v. Avila,* 557 F.3d 809, 815 (7th Cir. 2009); *United States v. Lechuga,* 994 F.2d 346, 349 (7th Cir. 1993) (en banc) (lead opinion). Rather, conspiracy to traffic drugs requires an agreement to advance *further* distribution. *United States v. Villasenor,* 664 F.3d 673, 679-80 (7th Cir. 2011). For example, the buyer could agree to resell the drugs at the retail level. *United States v. Nunez,* 673 F.3d 661, 665-66 (7th Cir. 2012).

Often, the government will have only circumstantial evidence of a further agreement, which requires the jury to make an inference to convict. Defendants readily challenge the sufficiency of such evidence, which has led to an array of cases in our court that parse out when the inference was permissible. Answering some of those questions proved easy. Mere knowledge of further illegal use, for example, may make the seller an aider and abettor to further drug crimes committed by the buyer but not a co-conspirator. *United States v. Moreland,* 703 F.3d 976, 984 (7th Cir. 2012). Being a co-conspirator requires more. As the Supreme Court aptly put it: a co-conspirator has "a stake in the venture" and therefore exhibits "informed and interested cooperation." *Direct*

Sales Co. v. United States, 319 U.S. 703, 713 (1943) (internal quotation marks omitted). For short-hand, we have referred to arrangements without this substantive relationship as "buyer-seller relationships," which contrast with conspiracies.

Determining whether someone has "a stake in the venture" is easier said than done – especially with circumstantial evidence. To assist juries, the previous version of our pattern instruction on buyer-seller relationships provided a list of factors to consider. Committee on Federal Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* 93 (1998), *available at* http://www.ca7.uscourts.gov/pjury.pdf. The list included: "[w]hether the transaction involved large quantities," "[w]hether the parties had a standardized way of doing business over time," "[w]hether the sales were on credit or on consignment," "[w]hether the parties had a continuing relationship," "[w]hether the seller had a financial stake in a resale by the buyer," and "[w]hether the parties had an understanding that the [goods] would be resold." *Id.* In our cases, we used a similarly worded list but often added "the level of mutual trust between the buyer and seller." *United States v. Contreras,* 249 F.3d 595, 599 (7th Cir. 2001); *accord United States v. Nubuor,* 274 F.3d 435, 440 (7th Cir. 2001). We explained that none of the factors were dispositive but provided no further guidance on weighing the various considerations. *See, e.g., United States v. Melendez,* 401 F.3d 851, 854 (7th

Cir. 2005); *United States v. Rivera,* 273 F.3d 751, 755 (7th Cir. 2001).

Recently, we became concerned with that approach. We recognized that most of the factors did not actually distinguish conspiracies from buyer-seller relationships. Consider an example using Wal-Mart. *See United States v. Colon,* 549 F.3d 565, 568-69 (7th Cir. 2008). Most private citizens do not have a "stake" in Wal-Mart. They are merely casual buyers. Yet many of those same people regularly conduct standardized transactions with the discount retailer (two factors from the old pattern instruction). For example, a man can buy two sticks of deodorant for $3.49 each, every other Friday. These transactions, despite exhibiting frequency, regularity, and standardization, do not evince the substantial relationship entailed in a conspiracy. *See id.; see also Nunez,* 673 F.3d at 665. Thus, although circumstantial evidence can prove conspiracy, *United States v. Carrillo,* 435 F.3d 767, 776 (7th Cir. 2006), several factors in the old pattern instruction did not permit that inference beyond a reasonable doubt, *United States v. Johnson,* 592 F.3d 749, 754-55 (7th Cir. 2010). Rather, those factors were equally consistent with a buyer-seller relationship. *Id.*

In response, we identified a new, nonexhaustive list of characteristics that more precisely pinpoint the distinction. These considerations include:

> 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 stemming from competitors or law-enforcement authorities.

Id. at 755-56 (internal footnote omitted); *accord Colon,* 549 F.3d at 568-70. Two considerations warrant further discussion here: sales on consignment and sales on credit. In the former, the seller permits the buyer to return unsold drugs. *Johnson,* 549 F.3d at 755 n.5. The latter is more familiar – the buyer "fronts" the drugs but expects payment for the entire shipment at a later date. *Id.* at 756 n.5. In both, the seller has affirmatively chosen terms favorable to the buyer, which demonstrates the "informed and interested cooperation" discussed earlier. *Direct Sales,* 319 U.S. at 713.

Important differences, however, distinguish consignment and credit sales. In *United States v. Johnson,* we described consignment sales as "quintessential evidence of a conspiracy." 592 F.3d at 755 n.5. "[A] jury could easily infer an agreement to distribute" from that arrangement because "the supplier will not get paid until the middleman resells the drugs." *Id.* at 755-56 n.5. In other words, the buyer and seller have enmeshed their interests. To that commentary, we add that a consignment arrangement also exhibits another key attribute we have stressed in identifying conspiracies: an "actively pursued course of sales." *United States v. Suggs,* 374 F.3d 508,

518 (7th Cir. 2004); *accord Direct Sales,* 319 U.S. at 712 n.8 (discussing "stimulation or active incitement to purchase" as indicative of a conspiracy). The seller's favorable terms encourage the buyer to accept more drugs to sell at the retail level, and, in the long-term, encourage the buyer to continue the business relationship.

Credit sales, in contrast, do not necessarily permit an inference of conspiracy. *Johnson,* 592 F.3d at 756 n.5. Unlike consignment sales, credit sales are not always premised on further distribution. For example, a buyer could purchase a quantity consistent with personal consumption. If the buyer indeed uses the drugs himself, the seller has not actively incited and agreed to further distribution. In addition, the buyer and seller's interests would not be enmeshed in the same way, since the buyer would not be reselling the product to pay back the debt. Therefore, to prove conspiracy, more evidence is required than a single sale, on credit, in a quantity consistent with personal consumption. That additional proof can come in a variety of forms – including factors from the old pattern jury instruction, such as frequency and quantity. In other words, once the government has shown some evidence that can distinguish a conspiracy from a buyer-seller relationship (i.e. something akin to those examples found in our new list), then other circumstantial evidence can bolster that argument, including evidence that would not, by itself, distinguish a conspiracy. *Id.; United States v. Vallar,* 635 F.3d 271, 287 (7th Cir. 2011).

There is disagreement in our case law, however, over what other evidence, when combined with a credit arrangement, is sufficient to infer conspiracy. One proposition seems generally uncontroversial: 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. *See, e.g., Johnson,* 592 F.3d at 756 n.5; *United States v. Zaragoza,* 543 F.3d 943, 948-49 (7th Cir. 2008); *United States v. Bender,* 539 F.3d 449, 453-54 (7th Cir. 2008); *United States v. Bustamante,* 493 F.3d 879, 885 (7th Cir. 2007); *United States v. Medina,* 430 F.3d 869, 881-82 (7th Cir. 2005).[1]

Less clear is what combinations of those three characteristics – a credit arrangement, a large quantity, and frequent sales – are sufficient. *Johnson,* for example, implies all three are necessary. In that case, we said that evidence "*becomes* sufficient" when there is an "ongoing wholesale buyer-seller relationship" on credit, which the opinion defines as "repeat purchases" of "large quantities" on credit. *Johnson,* 592 F.3d at 756 n.5 (emphasis added); *accord Vallar,* 635 F.3d

[1] In *United States v. Nunez,* we suggested that perhaps these three characteristics "just reveal a commonplace wholesale relationship." 673 F.3d at 665. Yet, only a few paragraphs later, the opinion suggests that "wholesaling of illegal drugs on credit" might "give rise to an *automatic* inference of conspiracy." *Id.* (emphasis added). The conflicting statements are both *dicta,* however. The court declined to decide the issue and instead relied on other grounds to affirm the conspiracy conviction. *See id.* at 666.

at 287. If evidence only *becomes* sufficient when all three characteristics are present, it would seem all three are required for a permissible inference.

Other cases debate the sufficiency of lesser combinations. For example, does a *single* transaction, in a wholesale quantity, on credit, permissibly support an inference of conspiracy? We have cases that answer both ways, each supporting its conclusion with other case-specific considerations. *See United States v. Smith,* 393 F.3d 717, 719-20 (7th Cir. 2004) (single large transaction on credit sufficient when middleman referred to defendant-supplier and his colleagues as "my boys," and offered to get a larger quantity from defendant-supplier when amount sold to informant came up short); *United States v. Dortch,* 5 F.3d 1056, 1065 (7th Cir. 1993) (single large credit transaction sufficient when parties had a history of several other cash purchases); *United States v. Fort,* 998 F.2d 542, 546 (7th Cir. 1993) (single large credit transaction sufficient when buyer promised to make further purchases in the future); *United States v. Baker,* 905 F.2d 1100, 1106-07 (7th Cir. 1990) (single large transaction on credit insufficient when buyer "unilaterally changed the deal from cash to credit"). Yet another series of cases disagree over whether a credit arrangement *alone* is sufficient to infer conspiracy. *Compare United States v. Dean,* 574 F.3d 836, 843 (7th Cir. 2009) ("the evidence of fronting alone may be sufficient to support [the defendant's] conviction"), *with Johnson,* 592 F.3d at 756 n.5, *and United States v. Kozinski,* 16 F.3d 795, 809 (7th Cir. 1994)

("standing alone, the credit transactions are insufficient evidence of an agreement for [the defendant] to be a distributor"). Reflecting this tension, the Committee charged with drafting the new pattern jury instruction diplomatically noted "that particular factors do not always point in the same direction." Committee Comment, *Pattern Criminal Jury Instructions of the Seventh Circuit* (2012), *supra,* at 73-74.

Admittedly, much of the confusion stems from our own imprecision. For example, in *United States v. Moreland,* we discussed the significant support for an approach that "infers conspiracy from wholesale sales on credit." 703 F.3d at 985. According to the opinion, "wholesale sales on credit" represents "two factors" from our old list (a large quantity and a credit arrangement), although the plural use of "s" in "sales" could also be read to imply that multiple purchases are required for that inference. *Id.* Similarly, in *United States v. Vallar,* we noted the presence of wholesale quantities early in the opinion, 635 F.3d at 277, but, when describing why we upheld the conviction, we referred only to the fact that there were repeated purchases on credit, *id.* at 287.

Even though many of our cases do not state the legal standard in precisely the same way, however, most of them would have reached the same outcome under each other's jurisprudence. In *Vallar,* for example, the defendant engaged in repeated sales, in wholesale quantities, on credit. *Id.* at 277, 287. These three characteristics would satisfy even the restrictive test set out in *Johnson,* despite the fact that the

opinion did not explicitly mention all three when explaining its reasoning. The same is true for many other cases. *See, e.g., Dean,* 574 F.3d at 843; *United States v. Frazier,* 213 F.3d 409, 415 (7th Cir. 2000); *United States v. Ferguson,* 35 F.3d 327, 331 (7th Cir. 1994); *United States v. Cabello,* 16 F.3d 179, 182 (7th Cir. 1994).

That latent consistency suggests we are informally using a "totality of the circumstances" approach. Indeed, the new pattern jury instruction further buttresses that conclusion. The instruction deliberately uses open-ended phrasing ("the government must prove that the buyer and seller had [a] joint criminal objective"), which encourages case-specific analysis. *Pattern Criminal Jury Instructions of the Seventh Circuit* (2012), *supra,* at 73. Yet our case law makes it sound otherwise – as if we are trying to outline a bright-line approach based on specifically dictated considerations. These two approaches raise the classic dichotomy between judicial flexibility and doctrinal clarity. *See* Pierre Schlag, *Rules and Standards,* 33 *UCLA L.Rev.* 379, 383-89 (1985). Either approach has merit, but a clearer statement of our methodology would significantly aid both litigants and district judges.

We will thus make such a statement. The underlying question beneath all buyer-seller cases is whether there was a conspiracy. We discuss buyer-seller relationships at such length because they do *not* qualify as conspiracies. People in a buyer-seller relationship have not agreed to advance further

distribution of drugs; people in conspiracies have. That agreement is the key. Agreements come in infinite varieties, however. Consider an analogy using contracts – another form of agreement. Every year, businesses form countless individualized contracts. This variation does not change the fact that each is still an agreement.

Our approach to conspiracies must – and does – account for the similar diversity in criminal agreements. For this reason, we consider the totality of the circumstances. We take into account all the evidence surrounding the alleged conspiracy and make a holistic assessment of whether the jury reached a reasonable verdict. True, repeated consideration of similar circumstances seems to have identified a few *per se* rules. As discussed earlier, either a consignment arrangement, or a relationship exhibiting all three *Johnson* factors – multiple, large-quantity purchases, on credit – are widely accepted as sufficient proof of a trafficking conspiracy. Indeed, when either of those conditions are satisfied, a reasonable jury can make that inference. Notice, though, that we develop *per se* rules by watching similar situations repeat themselves – and thus seeing that the totality of the circumstances leads to the same conclusion.

Admittedly, our list of example considerations may make it sound as if we are checking off boxes and only looking for specified indicia. That is not the case. The fact that so many of our cases reach consistent outcomes, despite inconsistent, or even contradictory, statements of the weight various

considerations hold, demonstrates that the list is merely a starting point for our analysis. If we were to give that list talismanic power, we would be liable to fixate on particular kinds of facts at the expense of other informative evidence. Thus, "[r]ather than needlessly adopt[ing] an absolute standard that cannot be applied intelligibly," we allow the circumstances of each case to speak for themselves. *Lechuga,* 994 F.2d at 357 (Kanne, J., concurring). And in so doing, our specifically focused analyses do not lose sight of the larger picture – deciding whether the jury reasonably discerned an agreement to further trafficking of drugs.

b. The district court's instruction

The preceding discussion illustrates the immense challenge of trying to craft a jury instruction that captures our case law on buyer-seller relationships. The district judge had two paragraphs to summarize what has taken several pages here. Furthermore, Brown's case arose at a particularly difficult time. The new pattern instruction, although proposed, had not yet been adopted. The government had also informed the court that the proposed instruction confused another jury in a different case. (R. 192 at 211-12.) Alternatively, the old instruction was still available but had received sharp criticism from our court. *See generally Colon,* 549 F.3d 565.

Despite the district court's unenviable task, we must still review the accuracy of the court's instruction *de novo. Dickerson,* 705 F.3d at 688. We begin by comparing Brown's proposed instruction with the one selected by the district court. Brown's instruction tracked the new (at the time, proposed) pattern instruction verbatim. Brown's proposed instruction read:

> 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.

(R. 119.) In response, the government proposed a different instruction. The district court decided to combine the language of the two proposed instructions. The instruction issued by the court read 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 re-sold.
>
> 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 evidence showing mutual cooperation and an ongoing arrangement between the defendant and the seller.

(R. 115 at 23.)

The key differences between the two instructions come in the last two sentences. First, the version used by the court added the phrase, "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." (*Id.*) This sentence accurately states the law. *See Nunez,* 673 F.3d at 664 (describing a conspiracy as "a cooperative relationship" and a "relationship of mutual assistance"); *Townsend,* 924 F.2d at 1392 (describing members of a conspiracy as either "mutually dependent on one another" or "render[ing] mutual

support"); *see also Suggs,* 374 F.3d at 518 (describing a conspiracy as a "shared stake in the illegal venture," along with "a prolonged and actively pursued course of sales"); *accord United States v. Fuller,* 532 F.3d 656, 662 (7th Cir. 2008).

The district court's other major modification to Brown's proposed instruction is similarly grounded in our case law. In the last sentence of the instruction, the district court said, "[s]uch an agreement may be proved by evidence showing sales on credit, . . . coupled with other evidence showing mutual cooperation and an ongoing arrangement between the defendant and the seller." (R. 115 at 23.) This sentence charts a tripartite avenue to conviction: (1) sales on credit; (2) "an ongoing arrangement"; and (3) "mutual cooperation." (*Id.*)

That guidance accurately summarizes the law. Several cases have found two of those characteristics – repeated transactions ("an ongoing arrangement") on credit – as sufficient to affirm a conspiracy conviction. *See, e.g., Vallar,* 635 F.3d at 287; *Ferguson,* 35 F.3d at 331. Thus, requiring repeated sales on credit, plus "mutual cooperation," exceeds what those cases require. Furthermore, the added characteristic ("mutual cooperation") speaks to the spirit of what we are looking for – a "shared stake in the illegal venture," along with an "actively pursued course of sales." *Suggs,* 374 F.3d at 518. The phrase allows for case-specific analysis, thereby enabling the jury to consider relevant indicia beyond the specific kinds of facts previously articulated in our cases.

Importantly, in the district court's instruction, repeated transactions and "mutual cooperation" are used to bolster an inference of conspiracy only after credit sales have been shown. (R. 115 at 23.) Thus, despite what Brown argues, it does not matter that repeated sales and "mutual cooperation" might not, on their own, distinguish conspiracies from buyer-seller relationships. As our earlier discussion made clear, once some evidence that distinguishes conspiracies from buyer-seller relationships is shown (here, credit sales), the jury can use other non-distinguishing circumstantial evidence to buttress that inference. *Johnson,* 592 F.3d at 756 n.5. The district court's instruction gave the jury precisely that guidance.

For these reasons, we find the district court's instruction accurately summarized the law on buyer-seller relationships.

2. Specific phrasing

Under the second step of our analysis, we must also decide whether the district court's phrasing of the instruction constituted an abuse of discretion. *Dickerson,* 705 F.3d at 688. It was not. The case law on this issue is muddled, and the district court tried to use phrases that the jury would find meaningful. We do not feel those choices misled or confused the jury in a way that warrants reversal.

Brown first argues that the court's instruction did not specifically state that the jury must acquit if

it found only that the seller knew the buyer would resell the drugs. Although true, that omission would not have confused the jury. The first sentence of the instruction explicitly stated, "[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." (R. 115 at 23.) Thus, the instruction makes clear that mere knowledge of further sales is not a conspiracy. Furthermore, the jury also received an instruction that, if it did not find the existence of a conspiracy beyond a reasonable doubt, then it must acquit. (*Id.* at 20.) Therefore, when considered in tandem, these two instructions provide the guidance Brown claims was lacking.

Brown also argues that the instruction invoked an impermissible multi-factor approach. This argument misconstrues our precedent. Some of our opinions on buyer-seller instructions indeed criticize a multi-factor approach to this issue. *See, e.g., Nunez,* 673 F.3d at 664-66; *Colon,* 549 F.3d at 567-70. This criticism, however, was primarily aimed toward the old pattern instruction. *See Nunez,* 673 F.3d at 664-66 (criticizing several factors in the old instruction); *Colon,* 549 F.3d at 567-70. As discussed earlier, that instruction not only provided no guidance on how to weigh its various factors, but it also included several factors that did not actually distinguish conspiracies from buyer-seller relationships. Our cases do not prohibit a multi-factor approach *per se.* Rather, district courts must be careful to avoid the maladies

that plagued our old pattern instruction. The court in this case certainly did so.

Finally, Brown alleges that the district court abused its discretion by even offering an instruction that discussed credit sales, because, according to Brown, the government did not show any evidence of credit sales. This argument serves as an apt transition into the second section of this opinion, which discusses sufficiency of the evidence. More details can be found in the section below, but, for now, we simply state that there was sufficient evidence for the court to include credit sales in the instruction.

Thus, for the reasons listed above, we find the wording of the district court's buyer-seller instruction was not an abuse of discretion.

B. Sufficiency of the Evidence

Brown also challenges the sufficiency of the evidence against him. We accord "great deference" to jury verdicts. *United States v. Love,* 706 F.3d 832, 837 (7th Cir. 2013). Consequently, "we review the evidence in the light most favorable to the government" and will reverse only if no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* Here, the government needed to prove (1) that Brown agreed with another person to commit an unlawful act; and (2) that Brown knowingly and intentionally joined the agreement. *See Avila,* 557 F.3d at 814.

As Brown rightly notes, the government did not introduce any evidence of what Brown did with the drugs after he purchased them from the Floreses. Therefore, any further distribution (and any agreement to that distribution) had to be inferred. For that proposition, the government relied on credit sales, along with several other bits of circumstantial evidence. Brown claims that these pieces did not allow a reasonable jury to convict beyond a reasonable doubt. We disagree.

Brown begins by arguing that a reasonable jury could not have concluded that he bought his drugs on credit from the Twins. The government responds that Brown waived this argument. For support, the government cites Brown's motion for a new trial, which stated that "the evidence adduced at trial established illegal drug sales on credit." (R. 130 at 5.)

We cannot accept the government's argument on this close issue. Brown vigorously argued throughout the trial, as well as in his motion for a judgment of acquittal, that the evidence did *not* show sales on credit. As the government acknowledges, Brown's new trial motion incorporated by reference all objections and positions taken during trial, which would therefore include those previous protestations. (*Id.* at 1.) Given that waiver principles are liberally construed in the defendant's favor, *United States v. Anderson,* 604 F.3d 997, 1002 (7th Cir. 2010), we are not convinced that Brown knowingly and intentionally waived this argument, *see United States v. Olano,* 507 U.S. 725, 733 (1993).

Considering Brown's argument, however, does not mean we are persuaded by it. Rather, we find a rational jury could have concluded that Brown purchased drugs on credit. For example, Perez testified that he once delivered approximately 57 kilograms of cocaine to Brown and received only $26,000 in return. (R. 195 at 54-56.) Yet that shipment was worth at least $912,000. (R. 192 at 111.) As another example, Simental testified that he received money from Brown but never delivered drugs to him. (R. 191 at 141-43.) These payments were usually more than $250,000 and were sometimes as much as $1.3 million. (*Id.*) Simental also testified to the contents of a ledger in which Brown's financial status with the Twins was tracked. (*Id.* at 152-62.)

Brown raises several concerns about this evidence. First, he argues that these transactions could have represented prepayments for future shipments rather than post-payments for shipments received on credit. Brown also contests the contents of the ledger. The entries are all abbreviated, including the ambiguous "Sky," which Simental testified referred to Brown's nickname, "Skinny." (*Id.* at 205-208.)

As to Brown's first argument about prepayments, we do not see how it would help his case. Even if Brown had prepaid for the drugs, his interests would still be enmeshed with the Floreses' in the same way as with a credit arrangement, only with the roles reversed. As to the other argument (and to the first, if it could help Brown), we note that Brown's account *could* have been true. But a reasonable jury could

have also found, beyond a reasonable doubt, the government's version of the story. And because a reasonable jury could make that conclusion, there was sufficient evidence that Brown purchased drugs on credit. This is not speculation, as Brown claims, but a legitimate inference grounded in evidence.

Furthermore, the government's evidence of conspiracy encompassed far more than just a credit arrangement. First, the couriers testified to repeated transactions in large quantities. Perez said that he made deliveries to Brown about thirty to forty times and that each shipment was more than ten kilograms. (R. 195 at 33-34.) Similarly, Llamas testified that he also (and independently) met with Brown thirty to forty times over the course of two years, either to deliver drugs or receive cash payments. (R. 190 at 69.) Finally, Simental testified to ten transactions in three months, in which he received payments from Brown between $250,000 and $1.3 million. (R. 191 at 141-43.) When considered together, this evidence falls into one of our *per se* rules, which permits an inference of conspiracy after demonstrating repeated transactions, in wholesale quantities, on credit.

Even beyond the standard considerations discussed in our case law, situation-specific circumstances further show just how integral a part Brown played in the Floreses' venture. Llamas, for example, testified that he delivered prepaid cell phones to Brown so that Brown could use them to contact the Twins. (R. 190 at 71.) Llamas also testified that the

Twins provided Brown with a specially outfitted Chevrolet HHR that had a "trap" to conceal drugs. (*Id.* at 73.) Brown contests this evidence. He claims, for instance, that the government provided no evidence that Brown actually *used* the HHR to distribute drugs. He also notes that the government failed to provide evidence that Brown had not paid the Floreses for the HHR through an arms-length transaction.

Again, although the jury could have believed Brown's version, it also could have believed the government's version beyond a reasonable doubt. Evidence showing that Brown took out insurance on the HHR strongly implies that Brown used it. (R. 192 at 41-42.) And given that the vehicle had a special compartment for hiding drugs, if Brown used the HHR, it would be reasonable to infer that he used it to distribute drugs. Also, the millions of dollars worth of business Brown was providing the Twins could lead a reasonable jury to conclude that the Twins gave Brown the vehicle as a gift to aid in further distribution. After all, the more Brown sold, the more money the Floreses would make. In this way, the Floreses had a "shared stake in the illegal venture," along with an "actively pursued course of sales." *Suggs,* 374 F.3d at 518; *accord Fuller,* 532 F.3d at 662. As we have demonstrated, a rational jury could have come to this conclusion. Therefore, the evidence against Brown was sufficient for conviction.

As a final note, we mention the Jeep Grand Cherokee. In May 2007, another courier in the Flores

drug conspiracy was pulled over while driving a Jeep Grand Cherokee with a hidden trap for concealing drugs. (R. 190 at 85-88); (R. 192 at 27). An investigator later found the title documents for this vehicle in Brown's trash. (R. 192 at 34-38.) The fact that Brown possessed these documents shows substantial involvement in the Floreses' organization, especially given that the courier known to drive the Jeep was one who did not even make deliveries to Brown. (R. 190 at 59-60, 85-88.) This detail is but one more piece of support for the jury's verdict.

Given the above, a jury could rationally conclude, beyond a reasonable doubt, that Brown conspired with the Floreses.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Brown's conviction.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722-219
S. Dearborn Street
Chicago, Illinois 60604

[LOGO]

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FINAL JUDGMENT

August 12, 2013

Before: DANIEL A. MANION, *Circuit Judge*
MICHAEL S. KANNE, *Circuit Judge*
JOHN DANIEL TINDER, *Circuit Judge*

No.: 12-2743	UNITED STATES OF AMERICA, Plaintiff-Appellee v. FRANKLIN BROWN, also known as SKINNY, Defendant-Appellant
Originating Case Information:	
District Court No: 1:09-cr-00671-1 Northern District of Illinois, Eastern Division District Judge James B. Zagel	

The judgment of the District Court is **AFFIRMED**, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
Northern District of Illinois

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
v.	)	Case Number: 09 CR 671
FRANKLIN BROWN	)	USM Number: 40612-424
	)	Michael Clancy Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21:846	Conspiracy to possess with intent to distribute cocaine	11/30/2008	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in economic circumstances.

7/18/2012
Date of Imposition of Judgment

/s/ James B. Zagel
Signature of Judge

JAMES B. ZAGEL U.S. District Judge
Name of Judge Title of Judge

7/18/2012
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

two hundred ninety-two (292) months.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

one hundred twenty (120) months.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, or is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall participate in a drug aftercare program approved by the probation officer, which may include residential program for treatment of a narcotic addiction or drug or alcohol dependency and/or testing for detection of substance use or abuse.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 10,000.00	$

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine or more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

☑ the interest requirement is waived for the
☑ fine ☐ restitution.

☐ the interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☑ Lump sum payment of $ 10,100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an

assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Codefendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 9, 2013

Before

DANIEL A. MANION, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 12-2743

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANKLIN BROWN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 09-cr-671 James B. Zagel, *Judge.*

ORDER

On consideration of the petition for rehearing and rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc and the judges on the panel have voted to deny rehearing. It is, therefore, **ORDERED** that rehearing and rehearing en banc are **DENIED**.

COMMITTEE ON FEDERAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, *SEVENTH CIRCUIT, FEDERAL JURY INSTRUCTIONS CRIMINAL*, INSTRUCTION, 5.10(A) (2012)

5.10(A) BUYER/SELLER RELATIONSHIP

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].

To establish that a [buyer; seller] knowingly became a member of a conspiracy with a [seller; buyer] to [distribute [name of drug]; possess [name of drug] with intent to distribute], the government must prove that the buyer and seller had the joint criminal objective of distributing [name of drug] to others.

Committee Comment

This instruction should be used only in cases in which a jury reasonably could find that there was only a buyer-seller relationship rather than a conspiracy.

A routine buyer-seller relationship, without more, does not equate to conspiracy. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008). This issue may arise in drug conspiracy cases. In *Colon*, the Seventh Circuit reversed the conspiracy conviction of

a purchaser of cocaine because there was no evidence that the buyer and seller had engaged in a joint criminal objective to distribute drugs. *Id.* at 569-70, citing *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (distinguishing between conspiracy and a mere buyer-seller relationship); see also *United States v. Kincannon,* 593 F.3d 893, 897 (7th Cir. 2009) (regular and repeated purchases of narcotics on standardized terms, even in distribution quantities, does not make a buyer and seller into conspirators); *United States v. Lechuga*, 994 F.2d 346, 47 (7th Cir. 1993) (*en banc*) (drug conspiracy conviction cannot be sustained by evidence of only large quantities of controlled substances being bought or sold).

In *Colon*, the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction so that it provides a definition, leaving to argument of counsel the weight to be given to factors shown or not shown by the evidence.

Some cases have suggested that particular combinations of factors permit an inference of conspiracy. See, *e.g.*, *United States v. Vallar,* 635 F.3d. 271 (7th Cir. 2011) (repeated purchases on credit, combined with standardized way of doing business and evidence that purchaser paid seller only after reselling the drugs); *United States v. Kincannon*, 567 F.3d 893 (7th Cir. 2009). But the cases appear to reflect that particular factors do not always point in the same direction. See *United States v. Nunez*, 673 F.3d 661, 665 and 666 (7th Cir. 2012) ("Sales on credit and returns for refunds are normal incidents of buyer-seller

relationships," but they can in some situations be "'plus' factors" indicative of conspiracy). The 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 JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, *SEVENTH CIRCUIT, FEDERAL JURY INSTRUCTIONS CRIMINAL*, 6.12 (1999)

6.12 BUYER-SELLER RELATIONSHIP

The existence of a simple buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a conspiracy, even where the buyer intends to resell [name the goods.] The fact that a defendant may have bought [name of goods] from another person or sold [name of goods] to another person is not sufficient without more to establish that the defendant was a member of the charged conspiracy.

In considering whether a conspiracy or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:

(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.

No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer-seller relationship.

COMMENT

The buyer-seller instruction is a theory of defense instruction and should be given where requested if there is evidence to support it. United States v. Paters, 16 F.3d 188 (7th Cir. 1994). The Seventh Circuit has discussed the importance and meaning of the instruction many times. See, e.g., United States v. Berry, 133 F.3d 1020 (7th Cir. 1998); United States v. Lindsey, 123 F.3d 978 (7th Cir. 1997); United States v. Turner, 93 F.3d 276 (7th Cir. 1996); United States v. Mims, 92 F.3d 461 (7th Cir. 1996); United States v. Herrera, 54 F.3d 348 (7th Cir. 1995); United States v. Lechuga, 994 F.2d 346 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 482 (1993).

Although the Committee has listed six possible factors the jury may consider in determining whether a buyer-seller relationship existed, the list is not intended to be exhaustive. In a particular case, some

or even none of the factors may be relevant and the instruction should be tailored to fit the facts of the case. See United States v. Blankenship, 970 F.2d 283, 286 (7th Cir. 1992).

The buyer-seller issue arises primarily in drug cases. However, as the examples in United States v. Blankenship, supra, illustrate, it is not limited to drug cases and may arise in a variety of conspiracy or aiding and abetting cases.

This instruction should be given immediately following the conspiracy elements instruction.