DATE OF DECISION

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No. 08-2817

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per Order

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

COREY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division

Case No. 07 – CR – 10044

Hon. Judge Joe B. McDade, Presiding Judge.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, furnish the following list in compliance with Fed. R. App. R. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Corey Larrell Johnson.

2. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O'Rourke Schrup (attorney of record), Michael Gomez (senior law student), and Long Truong (senior law student) of the Bluhm Legal Clinic at the Northwestern University School of Law.

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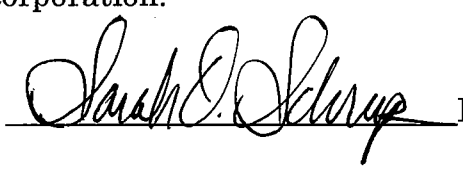
Attorney's Signature:  Date: July 10, 2009

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes X No**

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FEDERAL RULE OF APPELLATE PROCEDURE 35 STATEMENT REGARDING REASONS FOR REHEARING

Contrary to this Court's prior precedent, the panel erroneously found that Johnson failed to preserve his jury-instruction issue on appeal and thus erroneously applied plain-error review in this case. The panel further failed to apply this Court's test to determine whether the district court erred in failing to give a buyer-seller instruction and instead applied inapposite authority to the inquiry. For these reasons, Petitioner respectfully requests rehearing or rehearing *en banc* so that this Court may ensure that its jury-instruction test is being applied consistently and correctly and to determine under that test whether Johnson was entitled to a buyer-seller instruction.

DISCUSSION

Petitioner Corey Johnson petitions for rehearing for two reasons. First, contrary to well-established law in this circuit, the panel erred by finding that Johnson failed to preserve his objection to the district court's refusal to instruct the jury on a buyer-seller theory of defense. Second, also, contrary to this Court's well-established precedent, the panel erred by failing to apply the proper jury instruction test in its holding that Johnson would not have been entitled to a buyer-seller instruction under either a *de novo* or a plain error standard of review. In addition, the panel erred by incorrectly relying on two inapposite cases, *United States v. Colon* and *United States v. Johnson*, as the basis for its decision. For these reasons, Petitioner respectfully requests that this Court grant a rehearing or rehearing *en banc*.

I. The panel erred in holding that Johnson did not preserve his objection to the district court's refusal to offer a buyer-seller instruction.

The panel erroneously held that Johnson did not properly preserve his objection to the district court's rejection of his proposed buyer-seller jury instruction. The panel's opinion, which states that Johnson "proposed the instruction, but did not clearly state his reasons for objecting to the court's refusal to give it," *United States v. Johnson*, No. 08-2817, 2009 WL 1484598, at *4 (7th Cir. May 28, 2009)misconstrues the record. Far from being a passive participant who merely tendered a proposed instruction, Johnson's counsel mounted a spirited defense that set forth reasons for including the instruction and effectively informed the district court of the grounds of his objection.

During the jury instruction conference, Johnson proposed a pattern buyer-seller instruction for submission to the jury. (Trial Tr. 745.) The government objected, arguing that the buyer-seller instruction should not be given where the defendant enters a general denial. (Trial Tr. 745:8–15.) Defense counsel countered the government's objection by arguing that Johnson had effectively admitted that he was a buyer of cocaine and crack, not a seller. (Trial Tr. 745:16–19.) Counsel then pointed the Court to specific testimony that supported giving the instruction, specifically the testimony of his girlfriend, Shuntisha Carpenter. (Trial Tr. 745:24–25.) Only after counsel had put the district court on notice that Johnson believed the evidence supported the instruction did the district court rule on the instruction, saying that it did not "think that is evidence in the record to support a buyer/seller relationship," and refusing to give the instruction. (Trial Tr. 746:1–4.)

As Johnson argued on appeal and as this Court has stated many times, the purpose of an objection is to apprise the district court of the grounds of an objection, and "a litigant is not required to adhere to 'formalities of language and style.'" (Appellant's Reply Br. 8); *United States v. Martinez*, 988 F.2d 685, 698 (7th Cir. 1993). Here, Johnson had already apprised the district court that he believed the evidence supported giving the buyer-seller instruction and even pointed the district court to testimony as specific evidence. (Trial Tr. 745.)

The record supports the presence of the reasoned discourse that the objection requirement in Rule 30 was meant to facilitate. Both sides had made their positions known and presented evidence and argument for their positions. Having

apprised the district court of the grounds of the objection, it would have been superfluous for Johnson to restate his reasoning after the ruling with the accompanying phrase of "objection." Indeed, this Court has held that "the rules do not require a litigant to complain about a judicial choice after it has been made." *See United States v. Bartlett*, 567 F.3d 901, 910 (7th Cir. 2009). The panel, in holding that Johnson did not preserve his objection, essentially required him to make an "exception" to the district court's ruling. *Id.* However, Rule 51 explicitly states that exceptions are unnecessary. Fed. R. Crim. P. 51(a). Because the panel erred in holding that Johnson's failure to raise an exception did not preserve the issue for review, this Court should review the district court's failure to give the buyer-seller instruction *de novo*.

II. The panel further erred by failing to apply the appropriate test to determine if Johnson was entitled to a buyer-seller jury instruction.

The panel did not apply this Court's test to determine whether Johnson was entitled to a buyer-seller jury instruction and, as a result, erroneously relied on two inapposite cases, which led the panel to incorrectly conclude that Johnson was not entitled to a buyer-seller jury instruction. By performing the correct jury instruction analysis, this Court should conclude that Johnson was entitled to a buyer-seller jury instruction and that the failure to give one deprived him of a fair trial.

A. Contrary to clearly established precedent, the panel did not conduct this Court's jury instruction analysis to determine whether Johnson was entitled to a buyer-seller jury instruction.

The panel did not apply this Court's jury instruction test to determine whether Johnson was entitled to a buyer-seller jury instruction. It is clearly established law that a defendant is entitled to a jury instruction on a theory of defense where: (1) the defendant proposes a correct statement of the law; (2) there is some foundation in the evidence in support of the theory of defense; (3) the theory of defense does not already form a part of the jury charge; and (4) the defendant would be denied a fair trial if the district court failed to give the instruction. *United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998). Although the court should consider whether the defendant has advanced a certain theory of defense, the jury instruction test focuses the court on the *evidence* at trial, and not the theory of defense. *See United States v. Askew*, 403 F.3d 496, 504 (7th Cir. 2005) (requiring the Court to review government's and defendant's evidence at trial in determining whether defendant was entitled to a buyer-seller instruction, even where defendant did not advance a buyer-seller theory of defense at all). Specifically, the Court must look at the evidence and determine whether there was merely some foundation in the evidence to support a buyer-seller theory of defense, regardless of whether the defendant actually advanced such a defense.

In this case, neither the government nor the panel disputes that Johnson proposed a correct statement of the law or that the buyer-seller theory of defense did not form a part of the jury charge. Thus, this case turns on whether there was

some foundation in the evidence to support the giving of the instruction. The panel, however, virtually ignored this prong of the test. And its only passing reference to the evidence actually supports the giving of the instruction given the low "some-evidence" threshold. *Johnson*, 2009 WL 1484598, at *5 (stating that there were "some [alleged co-conspirators] who could be characterized as buyers only"). Indeed, the government itself even admitted at oral argument that five of the six alleged co-conspirators were mere buyer-sellers. (Audio Recording of Oral Argument, *Johnson*, 2009 WL 1484698 (No. 08-2817), *available at* http://www.ca7.uscourts.gov/tmp/P11FFUV8.mp3) [hereinafter Oral Argument]. This admission amply met the threshold of "some evidence" required for giving the instruction. Despite the government's concession, the panel summarily discounted the evidence of buyer-seller relationships, focusing instead on the irrelevant issue of the sufficiency of evidence to establish a conspiracy between Johnson and Ty.

Rather than follow this Court's precedent and apply its four-prong jury instruction test, the panel relied on two inapposite cases to reach the incorrect conclusion that Johnson was not entitled to a buyer-seller instruction. First, the panel erroneously relied on *United States v. Colon*, 549 F.3d 565 (7th Cir. 2008). As an initial matter, *Colon* is not a jury-instruction case and thus does not provide the relevant framework to analyze this issue in Johnson's case. Instead, the defendant in *Colon* claimed that the evidence at trial was insufficient to convict him of conspiracy and aiding and abetting. *Id.* at 570. The *Colon* Court, in reviewing Colon's insufficiency claim, simply stated that the some of the words in the district

court's buyer-seller instruction could have confused the jury because the evidence at trial did not support them. *Id.* at 570-71. Applying *Colon's* evidence-sufficiency analysis, the panel here stated that "[c]ourts must look at the context of the case to determine what the facts show and whether the instruction would be appropriate." *Johnson*, 2009 WL 1484598, at *5 (citing generally *United States v. Colon*, 549 F.3d 565). As a result, the panel's reliance on *Colon* caused it to apply the incorrect test and to focus on the wrong evidence—namely, evidence tending to prove Johnson's guilt of conspiracy rather than on whether there was "some evidence" showing that some transactions were mere buyer-seller transactions, thus entitling Johnson to the instruction. *Meyer*, 157 F.3d at 1074; *United States v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987)

Indeed, even if the panel were correct in concluding that there was sufficient evidence to find a conspiracy, this would not have necessarily precluded a buyer-seller instruction since a district court must give a buyer-seller jury instruction if there is some foundation in the evidence for it, even if there is also evidence supporting a conspiracy. *United States v. Thomas*, 284 F.3d 748, 756 (7th Cir. 2002); *United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000); *see, e.g., United States v. Mims*, 92 F.3d 461, 466 (7th Cir. 1996) (reversing defendant's conviction for conspiracy even where "a properly instructed jury might, nonetheless, have determined that there was a conspiratorial agreement").

Finally, even if the Court should properly consider under *Colon* the "overall context" of the trial in determining whether a defendant was entitled to a buyer-

seller jury instruction, the panel mischaracterized the prosecution's theory and evidence at trial. The panel stated that "the overriding context of this trial was that [Johnson] and Ty worked together to obtain drugs for distribution." *Johnson*, 2009 WL 1484598, at *5. Actually, the prosecution argued that Ty merely was one of Johnson's six alleged co-conspirators. (Trial Tr. 765:1-771:2.) Moreover, Ty's testimony consisted of only fifty-five pages in the 527 pages of the government's case-in-chief and the 590 pages of the entire presentation of evidence. (Trial Tr. 152:5-214:16.) Therefore, it was not the "overriding context" of Johnson's trial that Johnson and Ty conspired to distribute drugs. Rather, it was only *on appeal* that the government attempted to hang its hat entirely on the alleged conspiratorial relationship between Johnson and Ty, (*see* Gov't Br. 27-31; Appellant's Reply Br. 14), while simultaneously conceding that the other alleged co-conspirators were mere buyer-sellers, (Oral Argument). Thus, even if this Court were required to look at the context of the trial in determining whether Johnson was entitled to a buyer-seller instruction, the panel wrongfully construed the context of Johnson's trial.

The panel likewise erred in relying on *United States v. Johnson*, 437 F.3d 665 (7th Cir. 2006), because that case is significantly and materially distinguishable from this case. Unlike this case, the defendant in *Johnson* never advanced a buyer-seller theory of defense nor tendered a proposed buyer-seller instruction. *Id.* at 677. Thus, the issue facing the court in *Johnson* was whether the district court plainly erred in failing to *sua sponte* give a buyer-seller instruction. *Id.* To that end, the presence or absence of a "coherent buyer-seller defense" was relevant to

determining whether the district court should have been on notice that an instruction was warranted.

In this case, however, the question was never whether the district court should have *sua sponte* divined from the evidence the need for a particular instruction; the defendant offered the instruction, (R. at 168), and an arguable theory of defense, (*see* Appellant's Br. 24-25; Appellant's Reply Br. 3-7), and the district court explicitly rejected it. Thus, the panel erred in relying on *Johnson* and finding fatal to Corey Johnson's claim the "lack of a coherent buyer-seller defense." *Johnson,* 2009 WL 1484598, at *5. Instead, the panel should have applied this Court's four-prong jury instruction test, *Douglas,* 818 F.2d at 1320-21, and, as discussed below, in doing so the panel should have found that a buyer-seller instruction was warranted because there was some foundation in the evidence for the instruction.

B. Applying the appropriate jury instruction test would lead to the inevitable conclusion, either under *de novo* or plain error review, that Johnson was entitled to a buyer-seller jury instruction. Moreover, the government waived any argument that the district court's error was harmless.

Irrespective of whether this Court reviewed Johnson's claim *de novo* or for plain error, if the Court were to apply the appropriate jury-instruction test, it would conclude that Johnson was entitled to a buyer-seller jury instruction. There was ample foundation in the evidence that Johnson engaged in buyer-seller relationships with his alleged co-conspirators. (*See* Appellant's Br. 24-25; Appellant's Reply Br. 3-7.) The government conceded at oral argument that five of

the six alleged co-conspirators were merely buyer-seller relationships, and the panel agreed that there were "some people who could be characterized as buyers only . . . ." *Johnson*, 2009 WL 1484598, at *5. In short, there was consensus among Johnson, the government, and the panel that there was a foundation in the evidence to support a buyer-seller defense.

Because the focus of this particular inquiry is on the evidence, the panel's alternative reason for rejecting Johnson's claim under *de novo* review—that his defense was a general denial and that he had nothing to do with selling drugs, *id.*—is unavailing. To the extent that Johnson denied anything, it was the prosecution's theory and not his involvement with drugs generally. *Cf. Askew*, 403 F.3d at 503-04 (noting defendant's denial that he had "any involvement whatsoever with illegal drugs" cut against a finding of error). But even if Johnson had entered such a general denial, he would still be entitled to the buyer-seller instruction because the evidence necessitates it. Certainly one can imagine a defendant who does not put on a defense at all but nevertheless is entitled to a buyer-seller instruction where there is some foundation in the evidence for it.

Moreover, because the point of the buyer-seller instruction is to prevent the jury from conflating the mere distribution of drugs with conspiracy to distribute, *United States v. Thomas*, 150 F.3d 743, 745 (7th Cir. 1998), this Court has admonished district courts to err on the side of giving the instruction if there is any evidence in the record supporting the instruction, *Meyer*, 157 F.3d at 1076. But in this case, the jury was not able to find these buyer-seller relationships because the

district court refused to give a buyer-seller instruction. Instead, the jury conflated mere buyer-seller relationships with conspiratorial ones. It is clear the jury did so because it checked "more than 50 grams of cocaine" on the special verdict form, a drug amount that it could not have calculated without including one or more of the conceded buyer-seller relationships. (R. at 56.)

Additionally, because the jury could not distinguish these buyer-seller relationships from conspiratorial ones, it is impossible to know the cumulative effect that the evidence of these relationships had on the jury's findings and whether the jury found Johnson guilty of *conspiracy* beyond a reasonable doubt. Thus, this error was not harmless. (*See also* Appellant's Br. 28-31; Appellant's Reply Br. 7-8.) In any event, the panel correctly pointed out at oral argument, and the government acknowledged, that the government had waived any argument that the district court's error was harmless. (Oral Argument.)

For these reasons, the district court's failure to give the jury a buyer-seller instruction abrogated Johnson's right to a fair trial and cannot be deemed harmless. Accordingly, this Court should reverse Johnson's conviction and remand for a new trial.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing *en banc* in this case and remand for a new trial on the grounds presented here.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) and 40 and SEVENTH CIRCUIT RULES 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b) and Circuit Rule 40 because:

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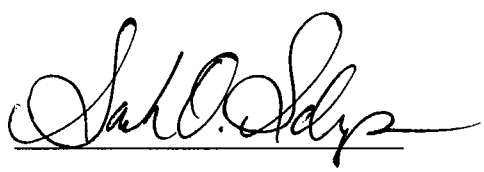

SARAH O. SCHRUP

Dated: July 10, 2009.

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CIRCUIT RULE 31(e) CERTIFICATION

I, the undersigned, counsel for the Defendant-Appellant, Corey Johnson, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), versions of this petition in non-scanned PDF format.

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CERTIFICATE OF SERVICE

I certify that I served two paper copies and one digital copy of this petition for rehearing by placing copies in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 357 East Chicago Ave., Chicago, Illinois on July, 10, 2009.

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