NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DONNIE JOE PHILLIPS, Petitioner,

VS.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the"government inducement" element of the entrapment defense can be met through the actions of an unwitting government agent.

LIST OF PARTIES

All parties to this proceeding appear in the caption of the case on the cover page.

The following additional individuals were defendants in the district court proceeding:

1. Gordon Owen Miller

2. Phyllis Mosher

Mr. Miller also appealed to the United States Court of Appeals for the Ninth Circuit (Case No. 18-10198).

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Petitioner Donnie Joe Phillips ("Petitioner" or "Phillips") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in Case No. 18-10268.

OPINION BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment on appeal is attached as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 25, 2021. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution:

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

STATEMENT OF THE CASE

A. General Procedural Background

On April 16, 2015, a federal grand jury returned an indictment against Donnie Joe Phillips, Gordon Miller ("Miller"), and Phyliss Mosher ("Mosher"), charging conspiracy to distribute at least 500 grams of methamphetamine during the period between June 5, 2014 and April 8, 2015 (21 U.S.C. §§ 846 and 841(a)(1)). ER345. The indictment also charged each defendant with numerous substantive counts of distribution of at least 50 grams of methamphetamine in violation of 21 U.S.C. section 841(a)(1). ER347, 349, 351, 353-54, 356, 359-60, 362, 364.

On May 9, 2017, Mosher pleaded guilty to the conspiracy charge. CR 45. On January 23, 2018, and pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), Mosher was sentenced to 180 months imprisonment. ER320.

Phillips and Miller pleaded not guilty. The case against Phillips and Miller was tried to a jury beginning on January 29, 2018.

On February 7, 2018, the jury returned guilty verdicts against Phillips on all ten counts charged against him. ER301-05. The jury also returned guilty verdicts against Miller on five counts, including the conspiracy charge. ER305-07.

On May 15, 2018, the district court imposed the statutory minimum

sentence of 240 months imprisonment against Miller. ER071-72.

At a sentencing hearing on July 10, 2018, the district court imposed a sentence of 300 months imprisonment against Phillips. ER016.

B. Background Related to Third-Party Entrapment Defense

Agent Brian Nehring had worked as an undercover agent for the DEA hundreds of times over two decades. ER117. According to the affidavit filed in support of the criminal complaint and search warrants, Agent Nehring began receiving information about Phillips' involvement with methamphetamine in 2001. ER373. Agent Nehring was aware of Phillips' criminal history, which included prior methamphetamine convictions. ER373.

In 2014, Agent Nehring was told by an unnamed confidential informant ("CS#2") that "Mosher had been very close with Donnie Phillips for many years and that she had sold [the informant] small amounts of methamphetamine for several years which she claimed she obtained from Phillips." ER374. The informant told Agent Nehring that Phillips' son "was incarcerated on then-pending state homicide charges." ER374.

In May 2014, CS#2 told Mosher that he or she "had a friend from out of town who wished to purchase a quarter pound of methamphetamine in the near future." ER375. Mosher agreed to meet the "friend," who was Agent Nehring. ER375.

On June 5, 2014, Agent Nehring monitored and recorded CS#2's telephone call with Mosher. ER375. "During the call, CS#2 told MOSHER that a friend had arrived from out of town and wanted to purchase two ounces of methamphetamine to examine the quality." ER375. Mosher met with Agent Nehring in the parking lot of My Office Bar on that same date, leading to the first methamphetamine transaction between the two.

From the outset, Agent Nehring used the cover story with Mosher that he had a wealthy sister in Alaska and that he would be sending the drugs there to obtain a better price. ER180. Agent Nehring testified that he used the "whole the-drugs-are-going-out-of-state thing because everybody loves that. I love it because people's greed kind of takes over." ER181. Agent Nehring never met or spoke with Phillips or Miller during the events in question; he only dealt with Mosher. ER183.

According to Agent Nehring, Mosher was a meth user who "talked a mile a minute all the time" and "drove like a maniac." ER185. Mosher had "a very strong personality." ER185. Mosher was also a meth dealer, who had multiple sources for methamphetamine. ER185-86. Agent Nehring acknowledged that Mosher was not generally a reliable person, and testified that it was "very possible that [Mosher] was lying about stuff." ER186.

There was no dispute at trial that, for all but one transaction, Mosher

obtained the methamphetamine that she sold to Agent Nehring from Phillips. The government alleged that Phillips, in turn, received the methamphetamine from Miller. The relevant transactions took place on June 5, 2014 (four ounces), June 19, 2014 (four ounces), July 31, 2014 (eight ounces), September 11, 2014 (thirteen ounces), and February 4, 2015 (two pounds). There was also a "buy-bust" operation on April 7, 2015, during which Mosher was arrested during a three-pound sale to Agent Nehring. ER309. Mosher and Agent Nehring had planned to do another three-pound transaction on the same date. ER167, 169-70. Phillips was arrested later on April 7, 2015, with nearly six pounds of methamphetamine in his car. ER090-93.

During a post-arrest interview on April 7, 2015, "Mosher indicated she felt bad because she had known Phillips for several years. Mosher stated Phillips had been kind to her, and now Phillips was in trouble because of her." PSR, ¶ 21.

Before trial, the defense proposed a jury instruction related to third-party entrapment, on the theory that Phillips "was entrapped by the government through an unwitting 3rd party[,]" namely Mosher. ER321. In support of the proposed instruction, the defense relied on out-of-circuit cases, including *United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007), *United States v. Washington*, 106 F.3d 983 (D.C. Cir. 1997), and *United States v. Valencia*, 645

F.2d 1158 (2d Cir. 1980).[1]

The defense also proffered the signed statements of four witnesses, including Ratterman, Phillips' girlfriend. Ratterman stated the following:

> I have been [Phillips'] girlfriend since 2010 or 2011. . . .
>
> [Phillips] never used or sold drugs while with me. He was approached by several people in my presence to do so. He told them, "no, I'm not going to touch it."
>
> [Mosher], his long-term friend, approached him repeatedly – I was present some times – and she kept telling him he could make a lot of money if he would get drugs for her.
>
> He definitely did not want to do it. His son, Coby, had a death penalty murder case at that time. Coby needed money to get a Mr. Horowitz to represent him. His son was desperate; he needed a good lawyer. [Phillips] kept telling me that he did not want to get involved with [Mosher], but he also felt worried and ashamed that he could not contribute to his son's defense lawyer.
>
> [Mosher] assured him that after he got money to pay for the lawyer, they would end it. She talked him into it.
>
> He did it for his son. His family is the most important thing in the world to him.

ER329.

Two of the other proffered defense statements were from friends of

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[1] The proffered defense was third-party entrapment based upon Mosher's use of improper inducements at Agent Nehring's behest. Petitioner did *not* claim that he was entitled to raise "vicarious entrapment" based on the theory that Mosher herself was entrapped by Nehring.

Phillips, who reported recent instances when Phillips refused to use or get involved with drugs. ER330, 332. One additional statement corroborated that Phillips was trying to raise a substantial amount of money for his son's defense. ER331.

Relying chiefly on the Ninth Circuit's decisions in *United States v. Thickstun*, 110 F.3d 1394 (9th Cir. 1997), and *United States v. Emmert*, 829 F.2d 805 (9th Cir. 1987), the government opposed the proposed jury instruction. CR 87.

Before trial, the district court denied the requested defense instruction on the basis that "the Ninth Circuit cases cited by the government seem to make it absolutely clear that a derivative entrapment defense is not permitted in this district court." ER029. Noting that there were "divided circuits," the defense requested "leave to put on evidence" on the entrapment defense, and stated that the district court should wait "until the end of the case to decide what instruction [the defense is] going to get." ER030. The defense specifically objected to not being permitted to "at least to put on our defense and then decide whether or not you're going to give the instruction." ER031. Defense counsel stated that "I proffer to the Court that we did interview Phyliss . . . Mosher, and she will be corroborating that she participated in persuading my client to do it." ER030-31. Relying on *Thickstun*, *Emmert* and

Brandon,[2] the district court denied the request and entirely precluded the entrapment defense. ER031-32.

In his opening statement, defense counsel laid out the facts that had been proffered on the entrapment issue, stating that they were relevant to motive. ER073-80.

With respect to most of the witnesses at trial, counsel for Phillips did not undertake any cross-examination. ER084, 109, 115-16, 195, 218-20, 231, 236, 238, 242-43, 250, 254, 261, 263, 265, 270, 272, 275, 285, 292. The defense also presented no case-in-chief. ER295.

During trial, the government moved to bar the defense from arguing motive or encouraging jurors to engage in jury nullification. CR 104. The defense argued that Phillips' motive – obtaining funds to hire an attorney for his son – was relevant to his intent. CR 106-107. The district court denied the defense request for a motive instruction. ER021-25. In so doing, the district court explained again why it had denied the third-party entrapment defense:

> [T]he Court at the beginning of the trial granted the government's objection and did not permit the defense, Mr. Phillips, to argue derivative entrapment for a number of reasons, primarily because the Ninth Circuit doesn't allow it at this point. But also so the record's complete, the Court found that request to be problematic given the facts of this case, underlying facts of the case, including the lack of any evidence in this case that Ms. Mosher actually at any point in time worked for or became

[2] *United States v. Brandon*, 633 F.2d 773 (9th Cir. 1980).

> an agent of the government, that in most entrapment cases it does involve a lack of predisposition on the part of the defendant, and the Court obviously is aware of the fact that Mr. Phillips has a prior criminal history involving involvement with methamphetamine. And again, given the significant number of separate transactions in this case, it was problematic in terms of an entrapment defense. So for all those reasons, the Court did not permit the derivative entrapment defense.

ER 021-22.

In closing argument, defense counsel apologized for not presenting the witnesses promised in the opening statement. Counsel stated that "the law on occasion constricts, and the law constrains; and I'm operating sadly under that premise." ER296; *see also* ER299. Defense counsel's arguments based upon what Phillips wanted to do with the money were barred by the district court. ER297-98.

At sentencing, Phillips stated that he had made a major mistake by agreeing to work with Mosher to obtain money for his son's criminal defense. ER012-13.

C. Ninth Circuit Memorandum Opinion

In its memorandum opinion of March 25, 2021, the Ninth Circuit held in relevant part as follows:

> The district court properly rejected Phillips's requested third-party entrapment defense, which was premised on alleged entrapment by Mosher as an "unwitting middleman." We have "consistently held that the entrapment defense is available only to defendants who were *directly* induced by government

> agents." *United States v. North*, 746 F.2d 627, 630 (9th Cir. 1984) (emphasis added). Targeting a defendant through an "unwitting agent" does not constitute forbidden inducement if the agent was not then cooperating with the government. *See United States v. Emmert*, 829 F.2d 805, 809 (9th Cir. 1987).

Ninth Circuit Mem. Op., at A5.

REASONS FOR GRANTING THE WRIT

"This case involves a difficult question in the field of entrapment law, and one on which courts around the country have reached vastly different conclusions: to what extent is a derivative entrapment instruction merited in cases where the government acts through an unwitting agent." *United States v. Washington*, 106 F.3d 983, 994 (D.C. Cir. 1997).

The defense of entrapment requires both government inducement of the crime and lack of predisposition by the defendant. *Mathews v. United States*, 485 U.S. 58, 63 (1988). This Court's entrapment precedent has focused on the predisposition element. *See*, *e.g.*, *Jacobson v. United States*, 503 U.S. 540 (1992). Absent guidance from the Court, circuit law related to the government inducement element has fallen into significant disuniformity. In particular, as recognized by the D.C. Circuit in *Washington*, circuit courts have long split on whether improper inducement conveyed by an unwitting government agent can give rise to the defense of entrapment. The First, Fifth and D.C. Circuits hold that third-party entrapment involving an unwitting government agent can give

rise to a valid defense. *United States v. Luisi*, 482 F.3d 43, 51-58 (1st Cir. 2007); *United States v. Washington*, 106 F.3d 983, 992-96 (D.C. Cir. 1997); *United States v. Anderton*, 629 F.2d 1044, 1045, 1047 (5th Cir. 1980). The Fourth, Ninth and Tenth Circuits strongly disagree. *United States v. Squillacote*, 221 F.3d 542, 574 (4th Cir. 2000); *Thickstun*, 110 F.3d at 1398; *United States v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992). The result is that a fundamental element of a key defense in federal criminal law is interpreted inconsistently throughout the United States.

The case at bar presents an ideal opportunity to fix this persistent problem. Despite the defense's proffer of facts sustaining the third-party entrapment theory before trial, the district court completely precluded the defense under Ninth Circuit precedent, thereby leaving Petitioner without any possible defense at trial. Petitioner thereafter fully preserved the claim both in the district court and on appeal. This Court should grant certiorari to resolve a conflict that has long plagued federal criminal law.

I. Certiorari Should be Granted to Resolve the Recognized and Persistent Circuit Split with Respect to Whether the "Government Inducement" Element of the Entrapment Defense Can Be Based Upon the Actions of an Unwitting Government Agent

To address a recognized and persistent circuit split with regard to the viability of the third-party entrapment defense, this Court should grant the

petition.

"The law . . . forbids convictions that rest upon entrapment." *United States v. Jimenez Recio*, 537 U.S. 270, 276 (2003). A "valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews*, 485 U.S. at 63. "The question of entrapment is generally one for the jury, rather than for the court." *Id.*

This Court's opinions in entrapment cases concentrate on the predisposition element, with little discussion of the "government inducement" requirement for entrapment. *See*, *e.g.*, *Jacobson*, 503 U.S. at 549 n.2 ("Inducement is not at issue in this case."); *Sherman v. United States*, 356 U.S. 369, 372 (1958), *quoting Sorrells v. United States*, 287 U.S. 435, 451 (1932) (stating that "[e]ntrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials"). Without further guidance from the Court, circuit courts have developed a deep and enduring split with respect to whether the government inducement element can be met through the conduct of unwitting government agents. *See Washington*, 106 F.3d at 994 (stating that different circuits have reached "vastly different conclusions" about the issue).

Some circuits, like the Ninth Circuit, reject third-party entrapment

based upon the conduct of individuals unwittingly acting on the government's behalf. *See Thickstun*, 110 F.3d at 1398 ("We now hold explicitly that a principal wrongdoer, not knowingly working for the government, cannot entrap his co-conspirator."); *Emmert*, 829 F.2d at 808-09; *United States v. Squillacote*, 221 F.3d 542, 574 (4th Cir. 2000) ("[I]n the Fourth Circuit, a defendant cannot claim an entrapment defense based upon the purported inducement of a third party who is not a government agent if the third party is not aware that he is dealing with a government agent."); *United States v. Martinez*, 979 F.2d 1424, 1432 (10th Cir. 1992) (holding that "without direct government communication with the defendant, there is no basis for the entrapment defense").

By contrast, in other circuits, an entrapment defense can be based upon inducement conveyed by an unwitting government agent. *See United States v. Luisi*, 482 F.3d 43, 51-58 (1st Cir. 2007) (discussing cases and holding that inducement by an unwitting government agent is sufficient for entrapment under certain circumstances); *United States v. Washington*, 106 F.3d 983, 992-96 (D.C. Cir. 1997) (concluding "that a limited form of the 'derivative entrapment' theory is recognized in this circuit, and extends to cases in which unwitting intermediaries—at the government's direction—deliver the government's inducement to a specified third party"); *United States v.*

Anderton, 629 F.2d 1044, 1045, 1047 (5th Cir. 1980) (permitting the entrapment defense where law enforcement officers specifically targeted the defendant and then put unspecified "pressure" on the unwitting middleman to bring the defendant into a pre-designed criminal scheme). As formulated by the First Circuit in *Luisi*, a defendant is entitled to an entrapment instruction in a case involving a unwitting middleman when there is evidence that:

> (1) a government agent specifically targeted the defendant in order to induce him to commit illegal conduct; (2) the agent acted through the middleman after other government attempts at inducing the defendant had failed; (3) the government agent requested, encouraged, or instructed the middleman to employ a specified inducement, which could be found improper, against the targeted defendant; (4) the agent's actions led the middleman to do what the government sought, even if the government did not use improper means to influence the middleman; and (5) as a result of the middleman's inducement, the targeted defendant in fact engaged in the illegal conduct.

Luisi, 482 F.3d at 55 (footnote omitted).[3]

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[3] There is also a circuit split with respect to vicarious entrapment – where a defendant asserts the defense based upon the entrapment of his or her co-defendant – but the instant case does not involve this distinct issue. *See United States v. Valencia*, 645 F.2d 1158, 1168 (2d Cir. 1980) ("If a person is brought into a criminal scheme after being informed indirectly of conduct or statements by a government agent which could amount to inducement, then that person should be able to avail himself of the defense of entrapment just as may the person who receives the inducement directly."); *but see United States v. Poulsen*, 655 F.3d 492, 502 (6th Cir. 2011) ("We have explicitly chosen not to adopt the doctrine of indirect entrapment"); *United States v. Mers*, 701 F.2d 1321, 1340 (11th Cir. 1983) ("A defendant cannot avail himself of an entrapment defense unless the initiator of *his* criminal activity is acting as an agent of the government.") (emphasis in original).

An examination of the policy justifications identified on both sides of the circuit split shows that the First, Fifth and D.C. Circuits have the better approach. For instance, the Ninth Circuit relies on this Court's statement in *United States v. Russell* that "'Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government.'" *Thickstun*, 110 F.3d at 1398, *quoting United States v. Russell*, 411 U.S. 423, 435 (1973). According to the Ninth Circuit, this "does not apply when one criminal simply convinces another to join him in criminal enterprise." *Id.* at 1399. But the Ninth Circuit's reasoning ignores the government's central role in cases involving unwitting agents. "[I]n a case where the government agent specifically targets the defendant, and then causes the middleman to take a specifically contemplated action (that is arguably improper pressure) with the goal of ensnaring the defendant, the government's role is hardly attenuated." *Luisi*, 482 F.3d at 56. As explained by the D.C. Circuit:

> [T]he purpose behind allowing such a defense is to prevent the government from circumventing rules against entrapment merely by deploying intermediaries, only one degree removed from the officials themselves, who carry out the government's explicit instructions to persuade a particular individual to commit a particular crime using a particular type of inducement. This purpose could too easily be defeated by allowing the government to target specific individuals through unwitting go-betweens.

Washington, 106 F.3d at 994.

In rejecting the entrapment defense, the Ninth Circuit also relied on the justification that "[w]ere we to recognize a private entrapment defense, the evidence necessary for the government to prove predisposition would involve purely private transactions and conversations between co-conspirators." *Thickstun*, 110 F.3d at 1399. But that is simply not the case. Most of the relevant evidence would relate to the *government's* actions, including the specific targeting of the defendant, the government agent's actions through a middleman after other government attempts at inducement had failed, and the agent's request or instruction to the middleman to employ a specific inducement. *Luisi*, 482 F.3d at 55. If all of this is established, the fact that the middleman's actual use of the inducement would likely involve a private interaction with the defendant is not a reason to disallow the defense, especially since that outcome would have been the result of the government's own actions in the first place.

Finally, the Ninth Circuit reasoned in *Thickstun* that third-party entrapment should be disallowed as a defense to avoid creating "a troubling inconsistency in the law, because we have rejected the related defense of 'derivative entrapment.'" *Thickstun*, 110 F.3d at 1399. According to the court, "[t]here is no reason to distinguish between a defendant induced to commit

crime by a self-motivated private person and one induced by an entrapped private person." *Id.* Once again, the Ninth Circuit was far off the mark. With vicarious entrapment – where one is induced by an entrapped person – there is no government conduct specifically targeting the defendant at issue. That is decidedly not the case with third-party entrapment. *Luisi*, 482 F.3d at 55.

In short, there is a recognized and enduring circuit split with regard to the defense of third-party entrapment that requires this Court's intervention to create uniformity as to an important issue of federal criminal law.

II. This Case Presents an Excellent Vehicle for the Court to Resolve the Circuit Split

The case at bar presents an excellent opportunity for the Court to resolve the circuit split regarding third-party entrapment.

First, this case involves the *complete* deprivation of the third-party entrapment defense. The district court shut down the defense before trial, and Petitioner was not afforded the opportunity to present evidence relevant to the defense to the jury. The pretrial preclusion of the entrapment defense under Ninth Circuit law meant that Phillips had no defense, as shown by defense counsel's opening statement, his failure to cross-examine most witnesses, his failure to present a case-in-chief, and his closing argument. In other words, this is a case where the denial of the entrapment defense resulted in a prejudicial denial of Petitioner's Fifth and Sixth Amendment rights, rendering

it an appropriate vehicle for the Court's review. *See*, *e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense"); U.S. Const., 5th and 6th Amends.

Second, even without the opportunity to develop a record, the available evidence demonstrated that the circumstances set forth in *Luisi* were present in this case. By the time of the DEA's sting operation in 2014, Agent Nehring had already had his sights set on Phillips for 13 years. ER373. In 2014, Nehring was aware that Phillips' son "was incarcerated on then-pending state homicide charges." ER374. Nehring set up a methamphetamine transaction with Mosher, believing that Mosher would obtain the drugs from Phillips. ER375. There was extensive evidence that Nehring played on Mosher's greed during the sting operation. The confidential informant who first spoke with Mosher echoed Agent Nehring's "whole the-drugs-are-going-out-of-state thing[,]" which Agent Nehring "love[d] because people's greed kind of takes over." ER 181, RT 503; *see also* ER 375, CR 1 at 6 (CS#2 telling Mosher "that a friend had arrived from out of town and wanted to purchase two ounces of methamphetamine to examine the quality"). There is evidence that Agent Nehring used Mosher to convey at least one inducement to Phillips during the sting. *See* ER 315, Gov't Exhibit 85A at 4 ("Well talk to your guy."); ER 316,

Gov't Exhibit 85A at 5 ("I'm telling you, we could run numbers down but definitely-I think you would like it a lot better.").

Through Catherine Ratterman, Phillips' girlfriend, the defense proffered that Mosher induced Phillips to sell her the methamphetamine by approaching him "repeatedly" and "telling him he could make a lot of money if he would get drugs for her." ER329. Ratterman explained that Phillips "did not want to do it" but that he was "desperate" because his son needed money to get a good lawyer for his death penalty case. ER329. According to Ratterman, "[Mosher] assured [Phillips] that after he got money to pay for the lawyer, they would end it. She talked him into it." ER329.[4]

In short, there was evidence supporting the type of third-party entrapment set forth in *Luisi*. This evidence was at least enough to allow the defense to develop additional facts at trial. *See United States v. Mayfield*, 771 F.3d 417, 440 (7th Cir. 2014) ("In ruling on a pretrial motion to preclude the entrapment defense, the court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it."). Given the evidence indicating the government's inducement via an unwitting third party,

[4] The district court referred to "the lack of any evidence . . . that Ms. Mosher actually at any point in time worked for or became an agent of the government" (ER 022, RT 929), but any insufficiency of such evidence in the record was foreordained once the district court completely *barred* all evidence related to entrapment at trial.

this case presents an excellent vehicle for the Court to resolve the circuit split.

Third, there was also evidence that Petitioner was not predisposed to commit the offenses. During pretrial proceedings, Phillips presented the statements of four witnesses relating to his lack of predisposition and the inducement by Mosher. ER329-32. The statements showed that Phillips had turned the corner on his involvement with drugs, including methamphetamine, and that Mosher induced him to participate in the transactions by playing on their friendship and on Phillips' desperate need for money for his son's legal defense. ER329-32. Even if this showing was deemed "weak, insufficient, inconsistent, or of doubtful credibility," it was sufficient to place the issue before the jury. *United States v. Mayweather*, 991 F.3d 1163, 1181 (11th Cir. 2021); *see also Luisi*, 482 F.3d at 58 (finding sufficient evidence of lack of predisposition, even when the defendant had previously been a cocaine dealer and continued to receive profits from his associate's small drug deals).

The district court expressed doubt about Petitioner's lack of predisposition, noting Phillips' prior convictions and the number of transactions in the case. ER022. However, even if the district court harbored doubts about the credibility of Petitioner's proffered evidence related to predisposition, that was an issue for the *jury* to resolve, not the judge. *See Mathews*, 485 U.S. at 63 (holding that entrapment is generally a question "for

the jury"); *see also Kansas v. Ventris*, 556 U.S. 586, 594, n. * (2009) ("Our legal system ... is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses."); *Mayfield*, 771 F.3d at 440 (stating that a court should accept the defense's proffered evidence as true and "not weigh the government's evidence against it").

Moreover, assuming the government's counter-evidence *were* weighed, Phillips' prior drug convictions would have in fact been essential for a *Luisi*-type entrapment defense, since they explained why Agent Nehring had targeted Phillips since 2001. The prior convictions were also remote in time – the last ones being from 2005 (PSR ¶¶ 54-55) – and therefore would have been fully consistent with the defense's contention that Phillips had changed and no longer wanted to deal drugs in 2014, when he was over 60 years old. *See Luisi*, 482 F.3d at 58 (finding sufficient evidence of lack of predisposition in case involving prior cocaine dealer, where the defendant claimed that he had "resolved to stop dealing drugs"). In addition, the fact that the sting operation ultimately involved multiple transactions did nothing to preclude an entrapment defense, since the key issue was whether the government entrapped Phillips with respect to *the original transaction*. *See Jacobson*, 503 U.S. at 549 (stating that "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act *prior to first being*

approached by Government agents") (emphasis added) (citation omitted).

Finally, the entrapment issue was fully preserved at all stages, both in the district court and on appeal. As a result, there is no waiver or forfeiture issue that would counsel against the grant of certiorari.

For all of these reasons, this case is an excellent vehicle for the Court to resolve the persistent and deep circuit split regarding whether a defendant is entitled to raise an entrapment defense where the inducement was conveyed through an unwitting government agent.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: June 7, 2021

Respectfully submitted,

ALEXIS HALLER
Attorney for Petitioner,
Donnie Joe Phillips