No. 20-8306

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

PETITIONER'S REPLY BRIEF

ALEXIS HALLER
Counsel of Record
LAW OFFICE OF ALEXIS HALLER
7960B Soquel Drive, #130
Aptos, California 95003
(831) 685-4730
ahaller@ahlawoffice.com

Counsel of Record for Petitioner,
DONNIE JOE PHILLIPS

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INTRODUCTION

While conceding that there exists a deep and enduring circuit conflict regarding whether the "inducement" element of the entrapment defense can be based upon the actions of an unwitting government agent, the government recommends that this Court deny certiorari and permit the disuniformity to persist for an untold number of years. Four decades is enough. Contrary to the government's position, this case provides an excellent opportunity to finally resolve the issue, and the Court is highly unlikely to encounter a better occasion to do so any time soon. The petition should be granted.

I. The Government Concedes that There is a Deep and Enduring Circuit Conflict with Respect to Whether the "Inducement" Element of the Entrapment Defense Can Be Based Upon the Actions of an Unwitting Government Agent

The government agrees that there is a deep, long-running circuit split regarding whether the "inducement" element of the entrapment defense can be based upon the actions of an unwitting government agent. Brief for the United States in Opposition ("U.S. Opp.") 7-8. In fact, according to the government, the conflict is as clear as could be, with six circuits on each side. *Id.*[1] The

[1] The government cites the Eleventh Circuit's decision in *United States v. Mers*, 701 F.2d 1321 (11th Cir. 1983), but that case technically involved vicarious entrapment – where a defendant asserts the defense based upon the entrapment of his or her co-defendant – which is not at issue here. *See id.* at 1324, 1328, 1340; *see also* Petition for Writ of Certiorari ("Pet.") 15 n.3.

government also concedes that the conflict began nearly forty years ago and has only become more entrenched over time. *Id.*

Nonetheless, citing the denial of certiorari in *Dong v. United States*, 573 U.S. 918 (2014) (No. 13-8801), the government argues that the Court should also deny review in the case at bar. U.S. Opp. 6. Yet the fact that the circuit conflict continues seven years after the denial of review in *Dong* is a reason to *grant* review here. Under the government's own analysis, a critical element of a major defense in federal criminal law has for decades been treated inconsistently in the Nation's twelve regional circuits. The government's position – that the Court should allow this profound disuniformity to persist in the hope that the ideal case will one day come along – ignores the well-worn maxim that "the perfect is the enemy of the good." Voltaire, *Dictionnaire Philosophique* (1764).

This maxim is particularly apt given the unlikelihood that the Court will ever see a "perfect" case to resolve the issue. In the circuits in which the derivative entrapment defense is allowed, there is no reason to believe that the government will seek review to resolve the conflict – perhaps because the government is aware that barring such a defense is difficult to justify. *Compare* Pet. 16-18 (explaining the problems with the Ninth Circuit's derivative entrapment analysis) *with* U.S. Opp., *passim* (no attempt to justify

the complete preclusion of the defense). For instance, the government never petitioned for certiorari in *United States v. Luisi*, 482 F.3d 43 (1st Cir. 2007), despite the fact that the First Circuit's decision was the most significant published opinion on the issue in over a decade.

In circuits where the derivative entrapment defense is not permitted, the Court will get cases – such as the one here – where there are gaps in the record, for the simple reason that the government moves to preclude the defense before trial and the defendant is not permitted to develop the defense at trial. *See* Pet. 18-19. In such cases, the government will argue – again, as it does here (U.S. Opp. 11) – that the incomplete record counsels against this Court's review.

Under these circumstances, the Court will never get the ideal opportunity to resolve the deep and entrenched circuit conflict regarding derivative entrapment. For the reasons stated in the petition and below, this case provides an excellent opportunity to fix the problem now. Pet. 18-23; *infra* at 4-9. The Court should grant review to resolve the conflict once and for all.

II. The Government's Arguments Against Certiorari are Without Merit

The government argues that "at least three distinct obstacles would have prevented petitioner from prevailing" with a derivative entrapment defense.

U.S. Opp. 8. As shown below, none of the government's three arguments holds water.

But even the government's *framing* of its arguments fails *ab initio*. The question is not whether Petitioner would have "prevailed" at trial with the derivative entrapment defense. A court's complete denial of the opportunity to present a legitimate defense theory is structural error that requires reversal. *Herring v. New York*, 422 U.S. 853 (1975); *see also*, *e.g.*, *United States v. Miguel*, 338 F.3d 995, 1003 (9th Cir. 2003) (the preclusion of a valid defense theory "is structural and requires reversal"). Moreover, even if subject to harmless error analysis, it would be the *government's* burden to prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

In any event, the government's arguments fail on the facts and the law.

A. The Government's Contentions Regarding Predisposition are Unavailing

The government incorrectly contends that Petitioner could not have shown a lack of predisposition.

First, the government's argument relies on a mischaracterization of the facts. The government emphasizes that a search of "petitioner's properties uncovered firearms, methamphetamine, and a marijuana-growing operation." U.S. Opp. 3; *see also id.* at 9. In fact, a search of a mobile home belonging to

Petitioner – which was located on a larger property in Richmond, California – yielded a single unloaded Glock 22 pistol, a box of ammunition, and approximately 43.2 grams of methamphetamine. PSR, ¶ 22. No other firearms were found in the mobile home, and additional firearms found on the larger property were deemed to belong to other individuals. CR 120-1, at 2. The government presented no evidence linking Petitioner to the other firearms or to the marijuana grow, and Petitioner was not held accountable for either at sentencing. In addition, there was no evidence that Petitioner used the Glock 22 pistol during any drug transaction.[2]

Second, the government highlights Petitioner's prior drug convictions. U.S. Opp. 9. However, the government disregards that the prior convictions were critical for a *Luisi*-type entrapment defense, because they were necessary to explain why Petitioner had been targeted by the DEA since 2001. Pet. 22; *Luisi*, 482 F.3d at 58. The government also ignores the remoteness of the prior convictions and the fact that they would have been consistent with the defense's contention that Petitioner, then over 60 years old, no longer wanted involvement with drugs when he was first approached in 2014 by Mosher (the unwitting government agent). Pet. 22.

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[2] The evidence notably shows that the pistol remained in the mobile home, unloaded, at the time of the final and largest transaction in the sting operation in April 2015. PSR, ¶¶ 17-18, 22.

Third, the government relies on methamphetamine found in Phillips' car in April 2015, after completion of the DEA's 10-month sting operation. U.S. Opp. 9. But the key issue was whether the government entrapped Phillips with respect to the original transactions *a year earlier*. The government's heavy reliance on evidence at the tail-end of the sting operation ignores this Court's holding 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.*" *Jacobson v. United States*, 503 U.S. 540, 549 (1992) (emphasis added); Pet. 22-23.

Finally, the government disregards evidence proffered by the defense regarding lack of predisposition. Pet. 7-8. Given that proffer, the predisposition issue was for the jury to resolve during deliberations – and not for the district court to resolve before trial. *See United States v. Mayweather*, 991 F.3d 1163, 1181 (11th Cir. 2021) (stating that even a showing on predisposition deemed "weak, insufficient, inconsistent, or of doubtful credibility" was sufficient to place the issue before the jury); *see also Mathews v. United States*, 485 U.S. 58, 62 (1988) ("The question of entrapment is generally one for the jury, rather than for the court.").

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B. Contrary to the Government's Argument, the State of the Record Related to Inducement Does Not Counsel Against the Grant of Review

The government argues that the derivative entrapment defense would not have prevailed because "[t]he record . . . contains no evidence that the undercover agent targeted petitioner. . . ." U.S. Opp. 10. However, any gap in the evidence was the direct result of the government's own actions, since – at the government's request – Petitioner's entrapment defense was completely shut down before trial. ER29-32; CR 87. In fact, defense counsel specifically requested "leave to put on evidence" regarding entrapment, but the district judge precluded admission of any evidence related to derivative entrapment based upon Ninth Circuit precedent. ER030-32. Because the district court foreclosed the derivative entrapment defense before trial, Petitioner never had the opportunity to develop the relevant facts that were in the government's possession, including with respect to the DEA agent's specific interactions with Mosher.

The government argues that the district court properly denied the entrapment defense because Petitioner failed to proffer before trial proof "to establish all the elements of the defense." U.S. Opp. 11-12 (citation and quotations omitted). But the defense *did* proffer evidence as to both predisposition and inducement, which are the only two elements of an

entrapment defense. Pet. 7-8, 19-23; *Mathews*, 485 U.S. at 63. The government ignores much of this evidence, including the fact that the affidavit filed in support of the criminal complaint indicated that the DEA began targeting Phillips thirteen years before the sting operation. ER 373. Contrary to the government's characterization (U.S. Opp. 10), the affidavit did not discuss any confidential informant claiming personal knowledge of ongoing drug trafficking activity by Petitioner.[3]

In short, any gaps in the record related to inducement do not counsel against this Court's review, especially since the Court is unlikely to encounter a case without similar gaps given the government's strategy of seeking the complete preclusion of the derivative entrapment defense before trial. *See supra* at 3.

C. The Derivative Entrapment Theory Does Not Require that the Government Itself Applied Improper Pressure on the Defendant

Finally, the government argues that the entrapment defense would have failed because there was no evidence that the government itself had engaged

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[3] The confidential informant, "an associate" of Mosher who had "an extensive criminal history for firearms and narcotics offenses" and who provided information "in hopes of receiving consideration in a then pending state narcotics case," stated only that he had heard from Mosher and other unnamed "individuals" that Phillips continued to deal in methamphetamine. ER 373-74. Although the government relies on this multiple hearsay here, it obviously would have been inadmissible at any trial. Fed. R. Evid. 802.

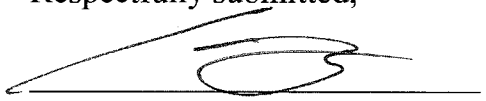
in "'improper' pressure to induce the defendant's criminal behavior." U.S. Opp. 10-11; *see also id.* at 11 ("even if such pressure were improper, Mosher's use of it would not suggest that *the government* had engaged in inducements that rose to the level of entrapment") (emphasis added). The government's contention misapprehends the nature of the derivative entrapment defense. As the First Circuit made clear in *Luisi*, the defense applies if the *middleman* used improper pressure, "even if the government did not use improper means to influence the middleman." *Luisi*, 482 F.3d at 55. The defense proffered evidence here that Mosher had used improper pressure by playing on her friendship with Petitioner and on Petitioner's desperate need for money for his son's legal defense. ER 329-32. Notwithstanding the government's argument, the derivative entrapment defense does not require any showing that the government itself applied the pressure directly.

CONCLUSION

To resolve a deep and enduring conflict regarding a key defense in federal criminal law, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: September 23, 2021

Respectfully submitted,



ALEXIS HALLER
Attorney for Petitioner,
Donnie Joe Phillips