NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

MAYCOL MENDEZ-MARADIAGA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an entrapment case where the defendant has met his burden on the threshold element of inducement, may the government establish predisposition merely by showing that the defendant had some remote prior experience with drug activity, or must the government show that the defendant was an eager and willing participant at the time the government's course of inducement began?

2. Whether *United States v. Powell*, 469 U.S. 57 (1984) — which insulated criminal convictions from review on the ground that the jury had returned irreconcilably inconsistent verdicts — should be overruled.

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Mendez Maradiaga submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

1. *United States v. Mendez Maradiaga*, No. 1:19-cr-20224-UU (S.D. Fl. Nov. 27, 2019).

2. *United States v. Mendez Maradiaga*, 860 F. App'x 650 (11th Cir. June 23, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-14938, on June 23, 2021. *United States v. Mendez Maradiaga*, 860 F. App'x 650 (11th Cir. June 23, 2021).

OPINION BELOW

The Eleventh Circuit's decision under review, *United States v. Mendez Maradiaga*, 860 F. App'x 650 (11th Cir. June 23, 2021), is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The Eleventh Circuit's decision was entered on June 23, 2021. This petition is timely filed pursuant to SUP. CT. R. 13.1 and the Court's March 19, 2020 Order, temporarily extending the time to file petitions for certiorari to 150 days from the judgment of the lower court. The Eleventh Circuit had jurisdiction over this case pursuant to 28 U.S.C. §§ 1291, 2253, and 2255(d).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. V

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 offence 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.

U.S. CONST. amend. VI

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

1. ***The set-up.***

Maycol Mendez Maradiaga was born in Honduras, and was brought to Miami when he was 10 years old. (DE 90:3-4). Prior to the events in this case, Mendez Maradiaga was a lawful permanent resident of the United States. He was married, had two daughters, and was lawfully working to support his family. (DE 90:9-11).

In high school, Mr. Mendez Maradiaga dated a girl named Nancy, who had a younger brother named Marvin Reyes. Years later, in 2010, Reyes was caught illegally reentering the United States after being deported. He made a deal with Homeland Security Investigations ("HSI"), that if Reyes provided information regarding "[a]ny violations of narcotics or firearms related offenses," HSI would help him stay in the country. (DE 89:129). Reyes thereafter began working as a confidential informant ("CI"), and set his sights on Mendez Maradiaga.

Reyes told Mr. Mendez Maradiaga that he had gotten into trouble with some drug dealers and needed help. The plan was to "purchase some narcotics from the defendant and then in the end basically introduce an undercover agent" (DE 89:117). Introducing Mendez Maradiaga to the undercover agent ("UC") was the main goal. (DE 89:117). Before that occurred, however, HSI agents had Mendez Maradiaga engage in a series of four transactions at Reyes' behest. These transactions, which occurred between December 2014 and August 2105, were surreptitiously recorded by law enforcement introduced as evidence at trial. (*See* DE 90:74).

2. *The Offense Conduct*

On October 2, 2015, HSI agents instructed the Reyes to place a three-way call to Mr. Mendez Maradiaga, along with Retried Special Agent Lemuel Lampkins, an undercover officer who assumed the identity of a drug dealer named "Big Mike." (DE 89:118). Agent Lampkins testified that the purpose of the call was to "[t]o verify" that Mendez Maradiaga – who did not maintain a steady supply of drugs or keep any in his home – "could obtain the narcotics." (DE 89:136) (emphasis added).

Lampkins and Reyes concocted a story about Big Mike having been robbed twice before. On the phone, Big Mike told Mr. Mendez Maradiaga: "look, I can't take no more hits. I got hit twice already." (DE 42-1:4). Mendez Maradiaga responded that Reyes had told him about it, but he had "to order" the drugs: "They don't bring me that [expletive] until they don't see the bread." (DE 42-1:5). Big Mike said, "I can't take another hit for this, you know, [expletive] up here? I can't do no more." (DE 42-1:6). Mendez Maradiaga agreed to bring him eight ounces of cocaine, for $1,200 each. (DE 42-1:6). He then said: "let me call my people so they do business, because I call Marvin right now." (DE 42-1:65). Big Mike put Reyes back on the phone, who told Mendez Maradiaga: "There, dude, all right then, . . . now you know dude, I'm finally, finally free of that." (DE 42-1:8).

The deal took place on October 5, 2015, in the parking lot behind Reyes' apartment building. Around the same time that Mr. Mendez Maradiaga arrived, a black Infiniti parked in the lot. (DE 89:120-121). Mendez Maradiaga entered the UC's

car and counted out $8,400 dollars. He had only obtained seven ounces of cocaine, even though the UC had ordered eight. (DE 89:143). Mendez Maradiaga took the $8,400, walked over and entered the black Infiniti, and returned with seven ounces of cocaine. (*See* DE 89:119).

On November 3, 2015, Big Mike reached out again to Mendez Maradiaga. They ended up negotiating another deal for Big Mike to purchase another eight ounces of cocaine for $9600. (DE 89:122). The deal took place the following day, in the parking lot behind Reyes' apartment complex. (DE 89:122). This time, however, Mendez Maradiaga brought the drugs himself because the supplier – who had been followed by the agents after the last transaction – refused to return to the parking lot. (*See* DE 89:142). Mendez Maradiaga explained that he was only making $25-30 dollars an ounce for the deal. (DE 42-1:31). He said, "Yes, but I'm going to do it because, you know, eight, that's like $300." (DE 42-1:31).

During this transaction, Lampkins tried "to build the case and to purchase more narcotics, see what else he has out there that he can sell or get his hands on." (DE 89:154). Mr. Mendez Maradiaga said: "like I told you, I'm getting back in the game of [expletive] right now. Feel me. I got my pinky in-out right now with you all. ... But once I get my full hand out there, is a different story." (DE 42-1:40).

There were no further transactions between Lampkins and Mr. Mendez Maradiaga. (DE 89:175). Nor, despite a lengthy investigation, did the government discover any evidence of Mendez Maradiaga selling drugs to anyone without the

instigation of the CI. (DE 89:130). At some point, the agents realized that they would be unable to "move up the ladder," and – nearly 3-and-a-half years later – the case was indicted. (DE 93:3).

3. *The charges*

On April 24, 2019, Mr. Mendez Maradiaga was named in a three-count indictment returned in the Southern District of Florida. Count 1 alleged that from "at least as early as October 5, 2015 through on or about November 4, 2015," Mr. Mendez Maradiaga conspired with others to possess with intent to distribute "a mixture and substance containing a detectable amount" (hereafter a "detectable quantity") of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(c) and 846. (DE 1:1-2). Count 2 charged that on or about October 5, 2015, Mendez Maradiaga possessed with intent to distribute a detectable quantity of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). Count 3 charged that Mendez Maradiaga possessed with intent to distribute a detectable quantity of cocaine on November 4, 2015.

4. *The trial*

The only witnesses during the government's case-in-chief were retired Special Agent Lampkins and Special Agent Alejandro Diaz, Reyes' handler at HSI. (*See* DE 89:130-132). Marvin Reyes had been arrested on unrelated drug charges and deported from the United States before the trial.

During the defense case, Mr. Mendez Maradiaga testified that the Reyes asked for his help to get cocaine, because he was in trouble. (DE 90:24). "He came from

Honduras because he had a problem with his family that were murdered." (DE 90:24). Reyes told Mendez Maradiaga that "he had bought something for somebody else and sold it to somebody and that it was no good coke and he got in problems with it, the person, and they were looking for him." (DE 90:25). "And he had to flee the country due to that situation." (DE 90:25).

Mr. Mendez Maradiaga testified that Reyes first contacted him over Facebook. They met a couple of times and spoke over the phone, and Reyes was asking "can you get this for me, can you get this for me. Like he was really desperate for it." (DE 90:26). Maradiaga testified that he "[p]retty much ignore[d] him at first." (DE 90:26). "But it was so – like he explained everything to me that was going on and that's what got me to get the drugs for him.' (DE 90:26). Mr. Mendez Maradiaga believed that Reyes' life was in danger. (DE 90:26-27, DE 90:59). He obtained the drugs by contacting somebody he had gone to school with. (DE 90:27).

Mr. Mendez Maradiaga testified that a day or two before the conversation with the UC, Reyes had told him "to make him look good and to agree to whatever the person was asking ... for." (DE 90:27). Mendez Maradiaga believed that Big Mike was "the guy that Marvin had got the bad drugs for." (DE 90:30). Reyes had told him that the Big Mike had been robbed twice before, and when Big Mike said "I can't take another hit for this ... [expletive] up here," Maradiaga believed that he was telling him "that he had got basically robbed, the same story that Marvin told me. That's why he was in some problems." (DE 90:31).

After the November 2015 transaction, Reyes continued to contact Mendez Maradiaga and try to "get [him] to do something," but Maradiaga Mendez stopped participating. (DE 90:34). There were no further transactions. Nor, between 2015 and 2019, did the government find any evidence of Mr. Mendez Maradiaga engaging in any drug activity that did not involve Reyes. (DE 90:59-60).

The government was permitted to cross-examine Mr. Mendez Maradiaga with respect to the fact that he had "sold drugs four times to the CI prior to selling it to the undercover." (DE 90:35). Mr. Mendez Maradiaga testified that he didn't consider his actions to be selling drugs. He only considered himself the "middleman." (DE 90:52-53).

The prosecutor also asked whether Mr. Mendez Maradiaga's statements and actions during the two charged drug sales were not proof that he was an experienced drug dealer. Maradiaga answered that he was just repeating the terminology that his supplier had used, and that he had grown up in bad neighborhood, where he saw that sort of thing, and knew people who were involved in drug dealing. He denied that he had "been involved with drugs outside" of the deals he had done with Reyes. (DE 90:53). The government was permitted to cross-examine Mr. Mendez Maradiaga about the fact that he had been arrested in 2012 and alleged to be in possession of "molly." The charges, however, had been dropped, and the government offered no evidence of the alleged offense, other than questioning Mendez-Maradiaga, over defense objection, about the arrest. (*See* DE 90:54-55).

After Mr. Mendez Maradiaga's testimony, his stepfather testified as to the long hours that he had been working at the time of the offense. (DE 90:64-65).

After the close of evidence, Mr. Mendez Maradiaga renewed a motion for judgment of acquittal based on entrapment. (DE 90:97). Defense counsel argued that he had made a prima facie showing of entrapment, requiring the government to prove that Mendez Maradiaga was "ready to commit the crime." (DE 90:90). Counsel argued that the government had not produced any evidence of that. "There were no communications whatsoever;" there was no evidence of "any time of stash house or trap house or anything like that where Mendez Maradiaga was getting drugs from." Instead, in each transaction Mendez Maradiaga had to "call[]someone else to bring the narcotics." (DE 90:98). The court denied the motion, finding that there was "plenty of evidence in the record that the jury could find that Mr. Mendez-Maradiaga was ready, willing and able to do these transactions just based on the transcripts." (DE 90:99). During the charge conference, the court *sua sponte* added an aiding and abetting instruction to the jury instructions, stating: "I think it's pretty important, since the defendant seems to think that being a middleman is not being a drug dealer." (DE 90:100).

The jury returned a split verdict. It acquitted Mr. Mendez Maradiaga of the conspiracy and the October 5, 2015 transaction (Counts 1 and 2), but convicting him of the November 4 2015 transaction (Count 3). (DE 91:8). Mendez Maradiaga filed written motions for judgment of acquittal and for a new trial, both of which were

denied. (DE 50, 58, 63, 71). In the order denying Mendez Maradiaga's motion for judgment of acquittal, the district court wrote that: "Defendant argues that because he testified that he initially refused Reyes's requests, he did not readily commit the crime. ... However, when push came to shove and Defendant was presented with money in exchange for cocaine, Defendant readily engaged in the transaction." (DE 63:4-5). The court also found — despite the acquittals Counts 1 and 2 — that "[t]he jury rejected any notion of Defendant's purported reluctance." (DE 63:5).

On November 27, 2019, the district court sentenced Mendez Maradiaga to 41 months' imprisonment, to be followed by 3 years of supervised release. In explaining why a low-end sentence was appropriate, the court stated: "I think there is an element here where he just exercised extremely poor judgment." (DE 92:27).

5. The appeal

Mr. Mendez Maradiaga appealed his conviction to the United States Court of Appeals for the Eleventh Circuit, arguing *inter alia*, that the government had failed to offer sufficient proof that he was predisposed to commit the offense. Because Mr. Mendez Maradiaga provided evidence of inducement, the government bore the burden of proving that he was predisposed to commit the offense before the government's intervention. But there was no evidence from which any jury could reach that conclusion. The court could not find that Mendez Maradiaga readily availed himself of the opportunity to commit the crime, because the government offered no evidence of his initial contacts with the CI, or his reaction to the CI's initial

inducements. Nor was there any evidence – despite the government's lengthy investigation – that Mendez Maradiaga had any involvement with drugs outside the reverse-sting investigation.

Mr. Mendez Maradiaga argued that the acquittals in Counts 1 and 2 proved that the jury accepted his entrapment defense with respect to those counts. He argued that there was no rational basis to find that Mr. Maradiaga was entrapped on Counts 1 and 2, but not on Count 3.

THE OPINION BELOW

On June 23, 2021, the Eleventh Circuit issued an unpublished opinion affirming Mr. Mendez Maradiaga's conviction. The court concluded that the government had met its burden of proof on the element of predisposition based on Mendez Maradiaga's statements and conduct during the October 5 and November 4, 2015 transactions, which "showed that he possessed expertise" in drug dealing, suggested that he had previously been "in the game" and admitted that he associated with people who dealt drugs. *See United States v. Mendez Maradiaga*, 860 F. App'x 650, 656–57 (11th Cir. June 23, 2021). The court rejected Mr. Mendez Maradiaga's argument that the acquittal in counts 1 and 2 showed that no reasonable jury could have found he was predisposed to commit the later offense, because "inconsistent jury verdicts are generally insulated from review," and sufficient evidence supported the guilty verdict in Count 3. *See id.* (citations omitted).

This petition follows.

REASONS FOR GRANTING THE PETITION

1. This case presents an important question of federal law, over which the circuits have divided, regarding the government's burden of proof in an entrapment case. Following this Court's guidance in *Sherman v. United States,* 356 U.S. 369, 372 (1958), the Seventh and Eight Circuits have held that a defendant's prior involvement with criminal activity, by itself, is insufficient to meet the government's burden of proof on the element of predisposition. *See United States v. Mayfield,* 771 F.3d 417, 441 (7th Cir. 2014) ("a defendant with a criminal record can be entrapped"); *United States v. Brooks*, 215 F.3d 842, 846 (8th Cir. 2000) (the defendant's "prior conviction, standing alone, does not establish that he was predisposed"). Instead, in those circuits, the government must show that the defendant was predisposed to commit the offense at the time of the inducement. *See id*. The Eleventh Circuit, however, eschews any such requirement. Despite overwhelming evidence that Mr. Mendez Maradiaga was ***not*** actively involved in criminal activity when he was approached by the CI, the Eleventh Circuit held that the government satisfied its burden of proving Mendez Maradiaga's predisposition to sell drugs based on his statements and actions suggesting some remote prior experience with drug activity. This case thus raises an important question of federal law regarding the when the government must show that the defendant was predisposed to engage in criminal activity.

2. The jury's verdict reflects that it was just as confused about the meaning "predisposition" as the circuit courts. The jury accepted Mr. Mendez Maradiaga's

entrapment defense – and thus necessarily found that he was ***not*** predisposed to sell drugs – with respect to the conspiracy charge and the October 5, 2015 transaction. But the jury convicted Mr. Mendez Maradiaga of a transaction that occurred a month later, on November 4, 2015.

The jury's findings in Counts 1 and 2 that Mr. Mendez Maradiaga was not predisposed to sell drugs on October 5, 2015 necessarily means that the jury found, twice, that he was not predisposed to sell drugs on November 4, 2015. At a minimum, it shows that a juror or jurors had a reasonable doubt about whether Mr. Mendez Maradiaga was predisposed to commit the later offense. The Eleventh Circuit rejected this argument, however, invoking *United States v. Powell*, 469 U.S. 57, 68-69 (1984), for the maxim that "inconsistent jury verdicts are generally insulated from review." *Mendez Maradiaga*, 860 F. App'x at 657 (citations omitted).

This Court's opinion in *Powell* rests on the theory that, when an inconsistent verdict has been returned, "it is unclear whose ox has been gored." *See Powell*, 465 U.S. at 65. The Court reasoned that, because a split verdict might be the result of lenity, and because the government is not permitted to appeal an acquittal, the benefit of the doubt should not go to the defense. *See Powell*, 465 U.S. at 65. But times have changed dramatically since 1984, and the assumptions about the relative balance of power in the federal criminal legal system that underlie *Powell* no longer justify the result.

I.

THE COURT SHOULD RECONCILE THE SPLIT OF AUTHORITY AMONG THE CIRCUITS AND CLARIFY THE LAW REGARDING WHEN A DEFENDANT'S PREDISPOSITION MUST BE SHOWN TO EXIST.

A. THE LAW OF ENTRAPMENT

The defense of entrapment rests on the theory that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." *Sherman v. United States*, 356 U.S. 369, 372 (1958). "When the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992). Therefore, "[w]here the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, 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." *Id.* at 548-49.

Appeals to friendship and sympathy, such as those employed here, are the quintessential forms of inducement giving rise to an entrapment defense. *See Sorrells v. United States*, 287 U.S. 435 (1932) (holding that entrapment defense should have been allowed where veteran twice refused prohibition agent's requests for liquor, but relented upon a third request posed after the conversation turned to war experiences); *Sherman*, 356 U.S. at 372, 375-76 (1958) (finding entrapment as a matter of law

where informer persuaded petitioner, who was undergoing treatment for narcotics addition, to obtain narcotics through resorts to sympathy).

Sorrels and *Sherman* make clear that Mr. Mendez Maradiaga's testimony was sufficient to give rise to an entrapment defense. Mendez Maradiaga was a close friend of Reyes' family, and had known Marvin Reyes since he was a child. They lived in a close-knit Honduran community within Miami. Mendez Maradiaga knew that Reyes' family members had been murdered in Honduras, and Reyes led him to believe that his life was in danger as the result of a bad drug deal. Agent Lampkins' story about having been robbed, and statement that he could not "take another hit" for Reyes, corroborated Reyes' tale of woe. (DE 42-1:6; DE 90:31). This was more than enough to meet the defendant's initial burden of production for an entrapment defense.

The government was therefore required to prove beyond a reasonable doubt that Mr. Mendez Maradiaga was predisposed to commit the offense prior to the inducement — and that he would have been a ready and willing participant in the crime even without the government's intervention. *See United States v. Mayfield,* 771 F.3d 417, 441 (7th Cir. 2014) (Predisposition "refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means."). There was no such evidence in this case.

B. THE GOVERNMENT OFFERED NO EVIDENCE THAT MR. MENDEZ MARADIAGA WAS PREDISPOSED TO SELL DRUGS AT THE TIME OF THE INDUCEMENT.

The government offered no evidence of when CI first approached Mr. Mendez Maradiaga, but we know it was at least some time prior to the first recorded transaction in December 2014. There is nothing in the record to contradict Mr. Mendez Maradiaga's testimony that he attempted to ignore the CI's initial pleas to help him obtain and sell drugs.

What the evidence did show, however, was that Mr. Mendez Maradiaga was not actively involved in drug activity when the lengthy and emotionally manipulative course of inducement began. The undisputed evidence showed that Mr. Maradiaga had been working long hours, including nights and weekends, at a lawful job. (DE 90:64-65). He was raising his daughters, and attempting to obtain lawful immigration status for his wife. (DE 90:9, 45). He kept no drugs in his home, and had to contact someone every time the CI asked him for drugs. Significantly, he had to pay for the drugs in advance – and did not have the ability to obtain the drugs up front, which might have indicated the existence of an established business relationship with the supplier. (*See* DE 42-1:5). He was not even able to obtain the full eight ounces of cocaine requested for the October 5, 2015 deal. (DE 89:143).

The government continued investigating Mendez Maradiaga after the November 4, 2015 transaction, and did not indict the case for nearly three and a half

years. Yet the government failed to unearth even a single instance of Mr. Mendez Maradiaga selling drugs to *anyone* without the instigation of the CI.

In in denying Mr.Mendez Maradiaga's motion for a judgment of acquittal, the district court wrote that "Defendant's predisposition was demonstrated by his ready commission of the crime." (DE 63:4). But the government offered no evidence of Mendez Maradiaga's initial responses to the CI, let alone any "ready commission" of the offense. Tellingly, the government did attempt to defend this proposition on appeal.

Instead, the government's relied on Mr. Mendez Maradiaga's conduct and statements during his meetings with the UC and CI – some of which occurred nearly a year after the course of inducement commenced. Even setting that aside, however, Mendez Maradiaga's statements supported at most the inference that he had some experience with drug dealing, at some point in the past. But those very same statements confirmed that he was ***not*** involved in drug activity when the inducement began. Indeed, Mendez Maradiaga's statement, in November 2015, that he was just "getting back in the game," confirms that he was not actually "in the game" when he was approached nearly a year earlier, by the CI.

All of the available evidence showed that Mr. Maradiaga was living a law-abiding life, and was not engaged in criminal activity, when the CI approached him with his life-and-death pleas for help. Agent Lampkins knew this. He testified that

he was trying to see that Mendez Maradiaga "has out there that he can sell ***or get his hands on***." (DE 89:154) (emphasis added).

None of this mattered to the Eleventh Circuit. Evidence that Mr. Mendez Maradiaga had any past experience with drug dealing was sufficient, in that court's view, to establish predisposition. This reasoning conflicts with published decisions of the Seventh and Eight Circuits, which have expressly held that "a defendant with a criminal record can be entrapped." *See Mayfield,* 771 F.3d at 438. *See also United States v. Brooks*, 215 F.3d 842, 846 (8th Cir. 2000).

C. The Seventh And Eighth Circuits Would Have Required Evidence Of Predisposition At The Time Of The Inducement.

In *Sherman*, this Court held that the petitioner's nine-year old conviction for selling narcotics and a five-year old conviction for possessing them were "insufficient to prove petitioner had a readiness to sell narcotics at the time [the CI] approached him, particularly when we must assume from the record that he was trying to overcome the habit at the time." 356 U.S. 372, 375-76 (1958). In *Mayfield*, the Seventh Circuit looked to this passage to hold that "predisposition is not an immutable characteristic or a one-way ratchet." 771 F.3d 417, 428 (7th Cir. 2014). Instead, the defendant's predisposition must be "measured at the time the government first proposed the crime." *Id*. "Past convictions for similar conduct may show predisposition, but only if reasonably close in time to the charged conduct, and even then only in combination with other evidence tending to show predisposition."

Id. "A prior conviction for a similar offense is relevant but not conclusive evidence of predisposition; a defendant with a criminal record can be entrapped." *Id*.

Similarly, in *Brooks*, the Eighth Circuit found entrapment as a matter of law, notwithstanding the fact that the defendant had a prior drug conviction. Brooks was a heroin addict who testified that Walker was his only source of supply. After Walker began working as a paid confidential informant, he developed a ruse where he would sell heroin to Brooks, and then demand that Brooks return a portion of it, so it could be sold to other customers. When Brooks initially refused Walker's demands, Walker threatened to cut off his supply. Walker then arranged for Brooks to be present when the heroin was sold to the undercover agent.

The Eighth Circuit vacated the conviction, finding that Brooks had been entrapped as a matter of law. The government argued "even if Walker did improperly induce the heroin sale," this did not constitute entrapment because "other circumstances" suggested that Brooks was "predisposed to this criminal enterprise." *Id*. at 846. First, the government pointed to Brooks' continued dealings with Walker and the undercover agent after the initial sale, along with "evidence that Brooks gave Walker twenty dollars following one sale." *Id*. at 846. The court held that this argument "misse[d] the mark," because both of these events took place *after* Walker's initial inducement. "In examining a defendant's alleged predisposition to commit an offense, we examine whether the defendant 'possessed the requisite predisposition prior to the Government's investigation and [whether] it existed independent of the

Government's many and varied approaches to [the defendant]." *Brooks*, 215 F.3d at 846.

The court also held that Brooks' 4-year old prior conviction for possession of cocaine with intent to distribute was insufficient to establish predisposition. Again relying on *Sherman*, the Eighth Circuit wrote:

> While perhaps probative, this evidence standing alone is insufficient to establish predisposition. The defendant in *Sherman* had been convicted of two prior drug offenses, one sale-related and one for possession. . . . Still, the Court found that this evidence alone was insufficient to establish that the defendant was predisposed to sell illegal drugs, particularly in light of the other evidence of governmental coercion. . . . We adopt the same analysis and reach the same result.

Brooks, 215 F.3d at 846-847 (citing *Sherman*, 456 U.S. at 376-76).

D. THE DECISION BELOW IS WRONG.

Based on the reasoning of *Mayfield* and *Brooks*, it is clear that Mr. Mendez Maradiaga's conviction would have been vacated in the Seventh or Eighth Circuits. The government offered no evidence of Mendez Maradiaga's initial conversations with Reyes, how many times Reyes contacted him, or what Reyes said during those conversations. Thus, the government could not establish predisposition by evidence of Mendez Maradiaga's immediate acceptance or willingness to commit the crime, because no such evidence existed.

Instead, the government attempted to show predisposition by pointing to Mr. Mendez Maradiaga's actions and statements during the October 5, and November 4, 2015 transactions, which suggested that he had some prior experience with drug

dealing. But there was no specific evidence about when these past experiences took place, or what they entailed. *See Mayfield,* 771 F.3d at 428. Mr. Mendez Maradiaga's statements about remote past experience do not establish that he was predisposed to sell drugs "at the time the government first proposed the crime." *See id.* And there was no such evidence in this case.

E. THE QUESTION PRESENTED WARRANTS REVIEW.

The question before the Court could not have greater significance. So-called "proactive" undercover operations — in which federal agents create opportunities to lure would-be criminals into government-invented crimes —have rightfully been met with skepticism from the Courts. *See, e.g., Sherman*, 356 U.S. at 826 (Frankfurter, J., concurring) ("The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.") *United States v. Lewis,* 641 F.3d 774, 777 (7th Cir. 2011) ("We have seen versions of this sting, which appears a bit tawdry, several times ... We use the word 'tawdry' because the tired sting operation seems to be directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them."); *United States v. Sanchez*, 138 F.3d 1410, 1413 (11th Cir. 1998) ("A common and more troublesome issue presented by all defendants this appeal is the fact that the crime was, in effect, created by the government."). They have nonetheless become ubiquitous in the federal criminal legal system.

What makes these practices particularly troublesome is that – just as happened in this case – federal agents routinely delegate the task of selecting their targets to self-interested confidential informants, and provide no oversight or monitoring of the CI's initial interactions with their marks. In this situation, the ***only*** safeguard to distinguish between the "unwary criminal" and the "unwary innocent" is the government's burden of proving, beyond a reasonable doubt, that the defendant was "predisposed" to commit the offense. *See Sherman*, 356 U.S. at 372.

Yet the circuits disagree about what it means for an individual to be predisposed. This Court recognized in *Sherman* that even someone with a criminal past should not be lured back into a life of crime at the government's behest, once he has made the effort to 'go straight.' *See Sherman*, 78 F.3d 356 U.S. at 376 (considering the defendant's efforts "to overcome the narcotics habit" at the time of the inducement). The Seventh and Eight Circuits, but not the Eleventh, agree.

F. THIS IS AN IDEAL VEHICLE TO RESOLVE THE SPLIT.

This case presents an ideal vehicle to resolve the split because the government offered no evidence which can even arguably suffice to show predisposition, other than Mr. Mendez Maradiaga's statements suggesting some unspecified past involvement with drug activity. In affirming the conviction, the Eleventh Circuit relied on two pieces of evidence beyond Mr. Mendez Maradiaga's purported "expertise" in drug dealing, to sustain the conviction. First, "Mendez Maradiaga admitted that he had engaged in four prior drug deals with Reyes before the offense

charged in his indictment." *Mendez Maradiaga*, 860 F. App'x at 657. But these do not show predisposition, because they, too, were part of the reverse-sting operation, and occurred *after* the initial inducement from Reyes. "It makes [n]o difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." *Sherman*, 356 U.S. at 374. *See also Brooks*, 215 F.3d at 846 ("Brooks' actions ***after*** his first sale to Brugman are irrelevant to the issue of his predisposition as it existed ***before*** this initial sale") (emphasis in original).

Additionally, the court wrote that: "because Mendez Maradiaga testified in his own defense, the jury was free to disbelieve his assertion that he had never sold drugs before and was entitled to conclude the opposite." *id.* at 657 (citing *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995)). *See also id.* at 653 (citing *Brown* for the proposition that "when a defendant testifies in his own defense, the jury may disbelieve his testimony, conclude that the opposite of his testimony is true, and consider it as substantive evidence of his guilt."). But even the Eleventh Circuit has acknowledged that a jury's "purported disbelief" of a defendant's testimony is not, by itself, sufficient to meet the government's burden of proof. *See United States v. McCarick*, 2294 F.3d 1286, 1291, 1293 (11th Cir. 2002) ("Our cases since *Brown* have reiterated the government's fundamental obligation to establish guilt in its case-in-chief."). And, in any event, the jury in this case did not conclude the opposite of Mr.

Mendez Maradiaga's testimony. If it had, it would not have returned verdicts of ***not guilty*** in Counts 1 and 2.

The government's evidence of predisposition in this case thus rested squarely on the permissible inference that Mr. Mendez Maradiaga had some remote experience with drug dealing. Thus, a ruling that evidence of a defendant's remote involvement with criminal activity is insufficient, by itself, to establish predisposition at a later point in time, would require that Mendez Maradiaga's conviction be set aside.

II.

UNITED STATES V. POWELL, 469 U.S. 57 (1984), SHOULD BE OVERRULED.

The jury's verdicts in this case were irreconcilably inconsistent. The acquittals in Counts 1 and 2 mean that the jury necessarily found – twice – that Mr. Mendez Maradiaga was not predisposed to sell cocaine on October 5, 2015. Thus, the jury necessarily found – twice – that he was not predisposed to sell cocaine a month later, on November 4, 2015. At a minimum, it shows that a juror or jurors had a reasonable doubt about whether Mr. Mendez Maradiaga was predisposed to commit the offense charged in Count 3.

The Eleventh Circuit held that Mr. Mendez Maradiaga's reliance on the inconsistency was "inapposite," however, based on the longstanding rule that "that "inconsistent jury verdicts are generally insulated from review." *Mendez-Maradiaga*, 860 F. App'x at 657 (citing, e.g., *Powell*, 469 U.S. at 68-69). In *Powell,* the Court

reasoned that, "where truly inconsistent verdicts have been reached, '[t]he most that can be said ... is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Powell*, 469 U.S. at 64 (citing *Dunn v. United States*, 284 U.S. 390, 393 (1932)). "The rule that the defendant may not upset such a verdict" is based on the theory that inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense." *Id.* at 65. It is equally possible, the Court reasoned, that the jury reached the proper conclusion in rendering a guilty verdict, but then "through mistake, compromise, or lenity, arrived at an inconsistent conclusion" on the separate offense. *See id.* "But in such situations, the Government has no recourse if it wishes to appeal the jury's error." *See id.* "Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored." *Id.* "The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review," led the Court to conclude that inconsistent verdicts should not be reviewable. *Id.* at 66.

Whatever the merits of this rule in 1984, it works no justice today. It simply cannot be presumed that an inconsistent verdict returned today is just as likely the result of lenity, as it is a failure of the government's proof. Since the time *Powell* was decided in 1984, the United States has seen a sharp decline in criminal trials. According to data compiled by the Administrative Office of the U.S. Courts, in Fiscal

Year 2018, only two (2) percent of federal criminal defendants stood trial, and they were convicted at an overwhelming rate of **83%.**[1] All in all, in FY 2018, ***fewer than one percent*** of federal criminal defendants were acquitted after a trial.

We know whose ox has been gored. Federal juries are not in the habit of returning acquittals – and there is certainly no evidence that they do so based on irrationality, lenity or caprice. If a jury has returned a verdict of not guilty, it is because the government has failed to meet its burden of proof. And if the jury has returned a set of irreconcilably inconsistent verdicts, the Court can rest assured that one or more jurors harbored a reasonable doubt about one or more elements of the offense for which the guilty verdict was returned.

The *Powell* Court took comfort in the fact that criminal defendants are "afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Powell*, 469 U.S. at 67. But this vastly overstates the scope of available review. Under the *Jackson v. Virginia* standard, a reviewing court is required to consider the evidence "in the light most favorable to the prosecution," and determine whether "***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citation omitted) (emphasis in

[1] *See* John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, Pew Research Center (June 11, 2019), *available at* https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (accessed Nov. 21, 2021).

original). Under this standard, whatever factual findings led the jury to return acquittals in certain counts are wholly erased from the equation. And here, too, the statistics put the lie to *Powell*'s assumption that criminal defendants have adequate recourse by the availability of appellate review. During the 12-month period ending June 30, 2019, less than 7% of all federal criminal appeals resulted in reversal.[2] The government's success rate on appeal (93%), is even higher than in the trial court.

In *Powell*, the Court made a policy choice, that where a jury has returned an irreconcilable inconsistent verdict, it was more appropriate to give the government the benefit of the doubt. The realities of today's criminal legal system however, put the lie to this rationale. The Court should grant certiorari, and reconsider a policy decision that has long outlived its utility to the federal justice system.

[2] *See* Table B-5—U.S. Courts of Appeals Statistical Tables For The Federal Judiciary (June 30, 2019) | United States Courts (uscourts.gov) (accessed November 11, 2021).

CONCLUSION

Based upon the foregoing, the petition should be granted.

Respectfully submitted,

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