No. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

Fnu Sadiqullah,
Petitioner,

vs.

United States of America,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a defendant requests a jury instruction on the affirmative defense of entrapment, what must be proven by the defendant to be entitled to such instruction. Specifically:

1. Whether the defendant must prove inducement to commit the crime, or both inducement and predisposition to commit the crime to be entitled to an instruction on the affirmative defense of entrapment.

2. The burden which must be met by the defendant to establish a prima facie case of entrapment.

3. In determining whether the defendant has met the initial threshold, warranting an instruction on entrapment, with what weight a trial court must review the proffered evidence.

4. What proof the defendant is required to produce to support a finding of inducement.

5. What factors, if any, are to be considered in determining the defendant's predisposition to commit the criminal conduct proposed by the government agent.

6. In determining the defendant's predisposition to commit the crime, should a trial court consider the actions and/or statements of the defendant prior to introduction to the government agent solely or, should all actions and/or statements of the defendant before, during, and after introduction of the government agent be considered?

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Fnu Sadiqullah ("Mr. Sadiqullah"), an inmate currently incarcerated at the Federal Medical Center in Lexington, Kentucky, by and through Whitney True Lawson, counsel appointed pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, respectfully petitions this Court for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Opinions Below

The decision by the Sixth Circuit Court of Appeals denying Mr. Sadiqullah's direct appeal is unreported and is attached hereto as Appx. A. The order of the Sixth Circuit Court of Appeals denying Mr. Sadiqullah's Petition for Rehearing is unreported and attached hereto as Appx. B.

Jurisdiction

The Sixth Circuit Court of Appeals upheld the conviction of Mr. Sadiqullah by opinion entered on July 20, 2021. A timely Petition for Rehearing was denied by the Sixth Circuit Court of Appeals on August 19, 2021. Mr. Sadiqullah invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for writ of certiorari within ninety days of the denial of the requested rehearing.

Constitutional Provisions Involved

United States Constitution, Amendment 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.

Statement of the Case

The affirmative defense of entrapment was adopted by this Court in *United States v. Sorrells*, 287 U.S. 435, 441 (1932), wherein the "severest condemnation" was considered for circumstances in which law enforcement had abused the "authority given for the purpose of detecting and punishing crime," instead, using such power to lure lawful individuals into criminal activity. While *Sorrells* created a blueprint of entrapment, the defense was not further developed until *Sherman v. United States*, 356 U.S. 369 (1958), when this Court identified factors for consideration in determining the applicability of an entrapment defense, *to wit*:

> To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an appropriate and searching inquiry into his own conduct and predisposition as bearing on his claim of innocence.

Id. at 372-73. Accordingly, *Sherman* established entrapment as a matter for jury consideration upon the showing of "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 v. United States*, 485 U.S. 58, 63 (1988) (citing *Sherman*, 356 U.S. at 376-378)).

Subsequent cases further explored the application of the entrapment defense, with *Mathews* confirming a defendant's right to this defense, even if the defendant

denies wrongdoing: "We hold that even if the defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." 485 U.S. at 62.

In the most recent review of entrapment, this Court considered the concept of predisposition, providing further guidance on what constitutes predisposition, or more accurately, what *does not* constitute predisposition. In *Jacobson v. United States*, 503 U.S. 540 (1992), the notion that predisposition could be proven by a defendant's behavior alone was disavowed: "[E]vidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." *Id.* at 1541. Instead, proof of predisposition must be grounded in a defendant's readiness and willingness to act in a criminal manner after proposal of the illicit conduct by a government agent. *See id.* at 550.

The "conflicting signals about the substance of the defense, the procedure for raising and presenting it, and the quantum of evidence necessary to get the issue before the jury" has been recognized by the Seventh Circuit as an issue within its own precedent. *United States v. Mayfield*, 771 F.3d 417, 424 (7th Cir. 2014). This reality, however, is not confined to the Seventh Circuit. Since this Court's rendering of the *Jacobson* opinion, federal appellate courts have been left to review, expand, and further detail concepts related to entrapment, creating vast inconsistency in the manner and degree in which the defense may be invoked. As a result, defendants face disparate treatment in the prosecution of a federal offense, with the strong

probability that a defendant could be entitled to an entrapment instruction under the precedent of one circuit, while being denied such instruction in another.

The conviction of Mr. Sadiqullah highlights this very concern, having been denied a jury instruction on the affirmative defense of entrapment within the Sixth Circuit – a circuit limited in interpretation of the entrapment factors and, when reviewed, often adopting heightened limitations on the ability to pursue the defense. The persistent pressure and continued suggestion of criminal activity by the government informant in this matter was firmly established and supported by ample evidence. Moreover, the record was void of evidence supporting Mr. Sadiqullah's predisposition to commit the crimes of which he was convicted: conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c); and conspiring to use facilities of interstate commerce to commit murder-for-hire, in violation of 18 U.S.C. § 1958. Despite evidence supporting both entrapment factors, the Sixth Circuit upheld the denial of this instruction, confirming the improper removal of a factual determination from the jury.

In denying an instruction on entrapment, Mr. Sadiqullah was substantially prejudiced, as best evidenced by the acquittal of his co-defendant, Hadi. The Sixth Circuit responded to this error, invoking an inadequate consideration of the facts, with scant discussion of the entrapment analysis, creating a textbook example of why review of this matter is necessary. Absent reconsideration, improper convictions resulting from the unlawful and impermissible conduct of law enforcement, such as what occurred with Mr. Sadiqullah, will endure. If permitted, the fundamental

fairness guaranteed to a defendant and mandated by due process will continue to erode, creating substantial inequality amongst those prosecuted. In light of the expansive and recent review of the entrapment concept within federal circuits, the need for clarity and cohesiveness of legal standards related to this affirmative defense is readily apparent. Accordingly, this issue is ripe for review.

1. Mr. Sadiqullah was entrapped by the government informant.

Mr. Sadiqullah was indicted on the above-stated offenses with co-defendants Mahmoud Shalash ("Shalash") and Abdul Hadi ("Hadi"). Such charges stemmed from an investigation which, at its inception, focused solely on Shalash for suspicion of money laundering. As the investigation progressed, however, the government agent's focus shifted from money laundering conspiracy to inducing Mr. Sadiqullah and the other defendants to engage in criminal conduct to recover money from which they were defrauded.

While the government informant spoke with Shalash on prior occasions, it was not until April 30, 2019 that the coercion and persistence of the government informant climaxed. The meeting began with discussion between the government informant and Shalash solely. The two discussed an individual by the name of Ashraf Yousef, who owed a debt to Shalash. While the government informant had suggested criminal, but non-violent means of recovering the debt on prior occasions, the government informant turned to suggesting far more aggressive and egregious conduct on this date: kidnapping, physical assault, and cutting off the debtor's left-hand, a tactic allegedly used in Middle Eastern culture when a debt is not repaid.

After initially rebuffing such suggestions, Shalash eventually relented, instructing the government informant to use whatever means necessary to recover the debt.

Mr. Sadiqullah joined this meeting, at the request of Shalash, approximately one hour and five minutes after the informant's arrival. Upon introduction, Mr. Sadiqullah began speaking of money owed to him by Lahoucine Elkholi ("Elkohli"). This individual had defrauded him and four other Afghan men of approximately $200,000, and was left with no form of legal recourse. With this information, the government informant, again, began his campaign of illegal, violent tactics to recover the money stolen: intimidation, kidnapping Elkohli, kidnapping of a family member, physical assault, and alluding to killing Elkholi. When Mr. Sadiqullah questioned the use of violence, his concern was quickly dismissed by the government informant, with assurances that he knew the laws of the United States and, therefore, knowledgeable in how to subvert them. Accordingly, there was no cause to worry.

The next contact between the government informant and Mr. Sadiqullah occurred on May 2, 2019 via telephone. In an unrecorded phone call – the only unrecorded interaction in the investigation – Mr. Sadiqullah told the government that he and the others were meeting with Elkohli in Lexington, Kentucky. Mr. Sadiqullah then, allegedly, requested the government informant's assistance in recovering the money owed, suggesting that he desired the utilization of force as previously discussed.

In subsequent recorded conversations on this date, initiated by the government informant, Mr. Sadiqullah was instructed by the government informant as to what

actions should be taken to recover the money by force, in compliance with their "agreement." Mr. Sadiqullah, dismissed these instructions, telling the government informant that Elkholi had made promises of repayment and had left the area.

As a result of these events, Mr. Sadiqullah, Shalash and Hadi were arrested on May 8, 2019 and charged with conspiracy to commit kidnapping, in violation of 18 U.S.C. § 1201(c); and conspiring to use facilities of interstate commerce to commit murder-for-hire, in violation of 18 U.S.C. § 1958. Mr. Sadiqullah was convicted of the charged offenses, with Hadi being acquitted on all charges.

2. Mr. Sadiqullah was denied a jury instruction on the affirmative defense of entrapment.

In the proposed jury instructions and as argued at the charge conference, Mr. Sadiqullah requested the inclusion of an entrapment instruction. This request was denied based on its inconsistency with Mr. Sadiqullah's defense – denying culpability: "[T]o say they were entrapped *almost means you have to admit the agreement.*" Appx. C at 34a (emphasis added). Furthermore, the trial court determined that, during the April 30 meeting, Mr. Sadiqullah did not "require[] a lot of convincing or arm twisting or like that was anything out of the realm of imagination." Appx. C at 33a.

On review, the Sixth Circuit of Appeals upheld the denial, finding that Mr. Sadiqullah "failed to present sufficient evidence" of the government's "excessive pressure upon the defendant" or that the government took "advantage of the defendant's alternative, non-criminal motive." Appx. A at 11. A petition for rehearing was denied on August 19, 2021. *See* Appx. B.

REASONS FOR GRANTING THE WRIT

As established in *Sorrell*, an instruction on the affirmative defense of entrapment is only warranted if evidence shows "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. While this standard is universally recognized within the federal circuits, the interpretation and application of these factors differ drastically. Such differences give rise to the question: under what circumstances is a defendant entitled to an instruction of entrapment?

As recognized by the Seventh Circuit, "entrapment-like *activity* is new" as "law enforcement [has] professionalized and developed techniques of artifice and deception in pursuit of criminals." *Mayfield*, 771 F.3d at 424 (emphasis added). With this advancement in investigative techniques, the question of entrapment continues to surface in criminal prosecutions, resulting in repeated – and very recent – examinations of the applicability of the affirmative defense. As a natural consequence, the legal landscape of entrapment is comprised of a multitude of conflicting interpretations of the required proof for submission of entrapment to the jury. In having such a wide range of legal opinions, the application of the entrapment defense is now wrought with unwelcome diversity, resulting in the unfair, disparate treatment of defendants amongst the circuits. Undoubtedly, this issue is ripe for review to cure discord amongst the circuits.

A. Federal appellate courts are divided as to a defendant's burden in proving a prima facie case of entrapment.

As reiterated in *Mathews*, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." 485 U.S. at 63 (citing *Stevenson v. United States,* 162 U.S. 313, 316 (1896)). The affirmative defense of entrapment is no exception to this requirement – evidence supporting such defense must be shown. However, there remains dissent amongst the federal circuits as to the required burden of the defendant, specifically, what constitutes a prima facie showing of entrapment.

i. Factors of Entrapment Requiring Proof by Defendant

The first issue requiring clarification relates to the established factors of entrapment. As stated above, the federal circuits universally acknowledge that "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. Within the federal circuits, however, there is inconsistency as to whether a defendant is required to prove one or both of these recognized factors to be entitled to the entrapment instruction.

In the First, Third, Fifth, Sixth, Seventh and Tenth Circuits, to receive an entrapment instruction, a defendant must first submit or identify evidence of *both* inducement and predisposition: "If a defendant makes a prima facie showing of both elements, the burden shifts to the government to disprove the entire defense by

disproving one of the elements of the defense beyond a reasonable doubt."[1] *United States v. Davis*, 985 F.3d 298, 307 (3d Cir. 2021); *see also United States v. Stephens*, 717 F.3d 440, 444 (5th Cir. 2013), *cert. denied*, 571 U.S. 967 (2013) ("To be entitled to an entrapment instruction, a defendant must 'make a prima facie showing of (1) his lack of predisposition to commit the offense and (2) some governmental involvement and inducement[.]'") (citing *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009)). *See United States v. Perez-Rodriguez*, 13 F.4th 1, 18 (1st Cir. 2021) ("A defendant is entitled to a jury instruction on entrapment if he meets a modest burden of production on the two prongs of the defense."); *United States v. Khalil*, 279 F.3d 358, 364 (6th Cir. 2002) (requiring proof of both elements); *Mayfield*, 771 F.3d at 440 (requiring proof of both elements); *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998) (requiring sufficient evidence "to put the affirmative defense of entrapment at issue.").

In contrast, the remaining circuits require proof of only one factor: government inducement. As held in the Second Circuit, "when a defendant has presented credible evidence of inducement by a government agent, the government has the burden of proving beyond a reasonable doubt that the defendant was predisposed to commit the crime." *United States v. Cabrera*, 13 F.4th 140, 146 (2d Cir. 2021) (citing *United*

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[1] In addition to the issues addressed herein, there exists dissent amongst the federal circuits regarding the burden of the government, upon a showing of entrapment by the defendant. While all circuits require the government to prove lack of entrapment beyond a reasonable doubt, some circuits require this proof in regards to only one element, while others require this level of proof on both elements. However, as the issue before this Court focuses on a defendant's entitlement to a jury instruction, the government's required proof will not be addressed.

States v. Flores, 945 F.3d 687, 717 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 375 (2020)); *see also United States v. Cromitie*, 727 F.3d 194, 204 (2d Cir. 2013) ("The defendant has the burden of showing inducement . . . and, if inducement is shown, the prosecution has the burden of proving predisposition beyond a reasonable doubt.") (internal citations omitted). The Fourth, Eighth, and Eleventh Circuits follow suit, requiring proof solely on the element of inducement: "[T]o be entitled to an entrapment instruction, a defendant must produce 'more than a scintilla' of evidence of 'inducement[.]'" *United States v. Hsu*, 364 F.3d 192, 200 (4th Cir. 2004); *see also United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998) ("Entrapment is an affirmative defense, and the defendant has the initial burden to 'produce more than a scintilla of evidence that the government induced him to commit the charged offense[.]'") (citing *United States v. Daniel*, 3 F.3d 775, 778 (4th Cir. 1993)) (internal citations omitted). *See also United States v. Young*, 613 F.3d 735, 746-47 (8th Cir. 2010), *cert. denied*, 562 U.S. 1159 (2011) ("[T]o warrant an entrapment instruction, a defendant must first present evidence that the government induced the criminal conduct."); *United States v. Mayweather*, 991 F.3d 1163, 1176 (11th Cir. 2021) ("First, the trial court must determine if the defendant has met his initial burden of producing sufficient evidence of government inducement.").

ii. Defendant's Required Burden of Production

The second area of inconsistency is the required level of proof which must be submitted by the defendant for submission of the entrapment defense to the jury, regardless of whether such proof must be submitted in regards to one or both of the

factors. Federal circuits vacillate between requiring proof of "some" evidence of inducement or entrapment, to requiring "sufficient" evidence of inducement or entrapment. In *Cabrera*, the Second Circuit explicitly recognized the inconsistency inherent within its case law, ultimately adopting the burden employed by the Seventh Circuit, requiring a defendant to provide "some" evidence, *to wit*:

> We have long held that the jury instruction on inducement should not specify a burden of proof; it should require only "some" or "credible" evidence the government initiated the crime.
>
> At the same time, we have previously characterized the defendant's burden to establish inducement as a burden of proof by a preponderance. We now recognize that this "preponderance" burden is inconsistent with the jury instruction we have endorsed. As our sister circuits recognize, a "some evidence" instruction on inducement communicates a burden of production, not one of persuasion. And in this Circuit, "some evidence" describes a burden of production in the context of burden shifting. "Some evidence" is evidence that is detected or recognized – without being weighed, as would be needed to find a thing by a preponderance.

13 F.4th at 146-47 (internal citations omitted); *see also Mayfield*, 771 F.3d at 440 ("An entrapment instruction is warranted if the defendant proffers some evidence that the government induced him to commit the crime and he was not predisposed to commit it.") (internal citations omitted).

Other circuits, with the exception of the Fifth Circuit, have adopted a requirement of sufficient proof before an entrapment defense is warranted. *See Hsu*, 364 F.3d at 198-99 ("[A] defendant is only entitled to an entrapment instruction [when] there is sufficient evidence from which a reasonable jury could find entrapment.") (internal citations omitted); *Khalil*, 279 F.3d at 364 (permitting an entrapment instruction "whenever there is sufficient evidence from which a

reasonable jury could find entrapment.") (citing *Mathews*, 485 U.S. at 62); *United States v. Tobar*, 985 F.3d 591, 592 (8th Cir. 2021) (holding a defendant is entitled to an entrapment defense "only if there is sufficient evidence from which a reasonable jury could find entrapment.") (internal citations omitted). *See also United States v. Ortiz*, 804 F.2d 1161, 1163-64 (10th Cir. 1986) (finding a defendant is entitled to an entrapment defense when "[e]vidence is sufficient to put a theory of defense before a jury" as such defense "creates a genuine factual dispute" for the jury's consideration); *Mayweather*, 991 F.3d at 1176 (noting that while "the initial burden of production to show inducement is not onerous," there must be "sufficient evidence produced to raise the issue of government inducement."); *United States v. Fedroff*, 874 F.2d 178, 189 (3d Cir. 1989) (finding that the defendant produced insufficient evidence to warrant an instruction on entrapment).

The Fifth Circuit, reflective of the circuits as a whole, presents confusion as the burden adopted and to be applied in permitting an entrapment instruction. In *United States v. Gilmore*, 590 Fed. Appx. 390, 395 (5th Cir. 2014), *cert. denied*, 576 U.S. 1006 (2015), an entrapment defense is deemed permitted when there "is 'evidence sufficient to support a reasonable jury's finding of entrapment[.]'" (citing *Theagene*, 565 F.3d at 919). Yet, in the next immediate paragraph, the court notes the necessity of "some showing" of both elements to be entitled to the defense instruction. *Id.* Accordingly, there exists confusion, not only with other circuits on this issue, but *within* the Fifth Circuit as well.

iii. Weight Given to Proffered Evidence

The determination of whether a defendant has met the initial burden of entrapment lies with the trial court. However, the weight or manner in which a trial court must consider the proffered evidence, within some circuits, is left completely unanswered. Such is the case within the Third, Sixth, Eighth and Nineth Circuits. While the Fourth Circuit establishes the trial court's "duty of determining whether or not the defendant has met" the initial burden of production, there is no discussion of how such evidence should be viewed or construed in making such determination. *United States v. Osborne*, 935 F.2d 32, 38 (4th Cir. 1991).

The harm in failing to specify the burden is evident in the conviction of Mr. Sadiqullah. Absent guidance, a trial court's discretion is wide ranging, increasing the probability that an entrapment instruction would be denied, based solely on factual determinations improperly made by the trial court. *See contra United States v. McGill* 754 F.3d 452, 460 (7th Cir. 2014) ("The question is not whether the government's take strikes us as logical or even probable, but simply whether 'there exists evidence sufficient for a reasonable jury to find' in the defendant's favor.") (citing *Mathews*, 485 U.S. at 63). Mr. Sadiqullah was victim of such unbridled discretion, being denied the instruction based on a review of evidence, taken in a light more favorable to the government than Mr. Sadiqullah – despite the light burden of production required.

Requiring review of the evidence in a light most favorable to the defendant, as has been adopted in the remaining circuits, is proper and in keeping with the

defendant's light burden of production. In invoking this level of review, a trial court is restricted to "examin[ing] the evidence of record" and drawing "the inferences reasonably to be drawn therefrom to see if the proof, taken most hospitably to the accused, can plausibly support the theory of defense." *United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988). This, in turn, limits the discretion of the trial court, decreasing the risk that a matter of fact will be improperly removed from consideration by the jury. *See Gilmore*, 590 Fed. Appx. at 395 (Because "the defendant is entitled to an entrapment instruction if he presents evidence sufficient to support a reasonable jury's finding of entrapment . . . we construe the evidence and make inferences in the light most favorable to the defendant."). *See also Ortiz*, 804 F.2d at 1164 ("To meet the evidentiary threshold to submit an entrapment defense to the jury, there must be a foundation in the evidence in the light viewed most favorably to the accused."); *United States v. Humphrey*, 670 F.2d 153, 156 (11th Cir. 1982) ("In determining whether [a defendant] met his initial burden of production, we must accept the testimony most favorable to him."); *United States v. Blitch*, 773 F.3d 837, 844 (7th Cir. 2014), *cert. denied*, 575 U.S. 1034 (2015).

("In this posture, courts must *accept the defendant's proffered evidence as true and not weigh the government's evidence against it.*") (internal citations omitted) (emphasis added); *United States v. Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980) (reviewing the denial of an entrapment instruction, "accepting the testimony most favorable to the defendant" as required); *United States v. Burkley*, 591 F.2d 903, 914

(D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979) (requiring review of the defendant's proffered evidence in the light most favorable to the defendant).

Credibility was critical in the government's prosecution of Mr. Sadiqullah – with the testimony of a paid government informant and a cooperating co-defendant served as the principal evidence of the conspiracy offenses. As held in *United States v. Mayo*, 705 F.2d 62, 68 (2d Cir. 1983), not only must a trial court "examine the record of the case 'in the light most favorable to the defendant,'" such is a requirement when the "credibility as between the agent and the defendant" is at issue, as the determination of veracity "is peculiarly within the jury's province." Had the trial court been held to this standard, the issue of entrapment would have been properly submitted for the jury's consideration, resulting in the likely acquittal of Mr. Sadiqullah.

B. There is dissent among the federal circuits as to what constitutes inducement.

In order to prove inducement, the majority of circuits require not only proof of the opportunity, but an additional, overzealous act by the government agent. As specified in *Perez-Rodriguez*, 13 F.4th at 17,

> An "inducement" consists of an "opportunity" plus something else typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive." "Plus" factors that may tip a government operation from a permissible sting operation to improper inducement include, for example, intimidation and threats, "dogged insistence," playing on the defendant's sympathies, and "repeated suggestions."

(citing *United States v. Poehlman*, 217 F.3d 692, 710 (9th Cir. 2000)) (internal citations omitted) (emphasis original). With implementation of this "opportunity-plus" doctrine, the Seventh Circuit has identified "other conduct" as

> repeated attempts at persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward beyond that inherent in the customary execution of the crime, pleas based on need, sympathy, or friendship, or any other conduct by government agents that risk that a person who otherwise would not commit the crime if left alone will do so in response to the government's efforts.

Mayfield, 771 F.3d at 434-35. Similarly, in *United States v. Dennis*, 826 F.3d 683, 690 (3d Cir. 2016), the Third Circuit held that "'mere solicitation' or request by the government to participate in a criminal activity, without more, is not inducement." Proof that a government agent

> merely open[ed] an opportunity for a crime is insufficient. . . Rather, the defendant must show that law enforcement engaged in conduct that takes the form of "persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship."

(citing *United States v. Wright*, 921 F.2d 42, 45 (3d Cir. 1990), *cert. denied*, 501 U.S. 1207 (1991)). *See also Mayweather*, 991 F.3d at 1177 (holding that a defendant must show proof of "an opportunity *plus* some added government behavior that aims to pressure, manipulate, or coerce the defendant into criminal activity[.]") (emphasis original); *Ortiz*, 804 F.2d at 1165 (holding that "[e]vidence that a government agent solicited, requested or approached the defendant to engage in criminal conduct, standing alone, is insufficient to constitute inducement[,]" with inducement taking "the form of persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.")

(internal citations omitted); *United States v. Sutton*, 769 Fed. Appx. 289, 297 (6th Cir. 2019) ("Government inducement "requires 'an opportunity *plus* something else – typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive.") (citing *United States v. Wilson*, 653 Fed. Appx. 433, 439 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 696 (2017)).

Other circuits have declined adopting, explicitly, the opportunity plus analysis, suggesting the implementation of a broader, more fact intensive review of the respective facts. Within in the Fourth and Fifth Circuit, the courts have simply identified actions that, when taken in the specific factual context, constitutes inducement, *i.e.*, "where the government has taken either threatening or harassing conduct or actions designed specifically to take advantage of the defendant's weaknesses... includ[ing] [p]ersuasion or mild coercion and pleas based on need, sympathy, or friendship." *United States v. Gilmore*, 590 Fed. Appx. 390 (5th Cir. 2014), *cert. denied*, 576 U.S. 1006 (2015); *see Osborne*, 935 F.2d at 39 ("To place the burden onto the government, the defendant must also produce some evidence of unreadiness on his part, or of actual persuasion by the government.").

Least burdensome on the defendant is the standard implemented by the Second Circuit, confirming that solicitation by a government agent, alone, could rise to the level of inducement depending on the factual circumstances: "The first element – inducement – is relatively straightforward. It happens when the government has initiated the crime. More broadly, inducement covers soliciting, proposing, initiating,

broaching or suggesting the commission of the offence charged." *Cabrera*, 13 F.4th at 146 (internal citations omitted). The Ninth Circuit, as well, has explicitly acknowledged its broad definition of inducement, defining inducement as "any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship." *United States v. Gomez*, 6 F.4th 992, 1001 (4th Cir. 2021) (citing *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003), *cert. denied*, 540 U.S. 995 (2003)). However, the broadest of definitions has been implemented, by far within the Eighth Circuit, simply identifying inducement as occurring "when the government 'implanted the criminal design' in the defendant's mind." *Young*, 613 F.3d at 745 (citing *United States v. Eldeeb*, 20 F.3d 841,843 (8th Cir. 1994), *cert. denied*, 513 U.S. 905 (1994)). As such, the Eighth Circuit seemingly requires a fact-specific review of the matter, with little defined boundaries as to what government actions should be deemed "inducing."

C. Circuits differ in defining predisposition, including at what point in a criminal scheme a defendant's predisposition must be determined.

i. Review of Predisposition

To be entitled to an instruction on the defense of entrapment, there must not only be proof of inducement by the government agent, but evidence that the defendant was not predisposed, or likely to have committed the offense absent government inducement. While varying to some degree, the majority of circuits have adopted factors, which are to be considered in the circumstance of possible entrapment. In

recognizing that "predisposition requires more than a mere desire, urge, or inclination to engage in the criminal misconduct," the Seventh Circuit delineated a "nonexclusive list of five factors to determine whether the defendant was predisposed to commit the charged offense," including

> the defendant's character and reputation . . . whether the government initially suggested the criminal activity . . . whether the defendant engaged in the criminal activity for profit . . . whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and . . . the nature of the inducement or persuasion by the government.

See Mayfield, 771 F.3d at 435. Of this list, "[n]o one factor controls," however, "the 'most significant is whether the defendant was reluctant to commit the offense." *Id.* (citing *United States v. Pillado*, 656 F.3d 754, 766 (7th Cir. 2011)). Similarly, the Ninth Circuit has employed factors for consideration in the purview of predisposition, but emphasized "the character and reputation of the defendant," as well as, the reluctance of the defendant to commit the offense, as the "most important" of the factors to be considered. *Gomez*, 6 F.4th at 1004 (citing *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994), *cert. denied*, 516 U.S. 971 (1995)).

The Tenth Circuit, in *Nguyen*, confirmed applicable considerations, serving as guidance as to this factor, *to wit*: "Predisposition to commit a criminal act may be shown by evidence of similar prior illegal acts or it may be 'inferred from defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity.'" 413 F.3d 1170, 1178 (10th Cir. 2005) (citing *Duran*, 133 F.3d at 1335) (internal citations omitted), *cert. denied*, 546 US. 1125 (2006). *See Perez-*

Rodriguez, 13 F.4th at 18 (reiterating the factors to be applied by a trial court in determining if a defendant was predisposed to commit the offense).

With notable contrast, the Sixth Circuit has explicitly emphasized the preeminence of the predisposition factor in considering the applicability of the entrapment defense, *to wit*: "Predisposition, the *principal element in the defense of entrapment*, focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Wilson*, 653 Fed. Appx. at 438 (citing *Mathews*, 485 U.S. at 63)) (emphasis added). This explicit ascendency of predisposition is only further cemented by the adoption of a standard, specifying when the entrapment denial may be denied, *to wit*: "Where the evidence 'clearly and unequivocally establishes that [the defendant] was predisposed,' the district court is justified in denying an entrapment instruction." *Khalil*, 279 F.3d at 365 (citing *United States v. Nelson*, 922 F.2d 311, 317 (6th Cir. 1990), *cert. denied*, 499 U.S. 981 (1991)); *see also Sutton*, 769 Fed. Appx. at 297 ("Where the evidence clearly and unequivocally establishes that [the defendant] was predisposed, the district court is justified in denying an entrapment instruction.")[2] Not only does the Sixth Circuit stand alone in the creation and adoption of this standard, no other circuit seems to contemplate such a standard.

Similar to other circuits, however, in conjunction with this standard, the Sixth Circuit has adopted factors for consideration "in determining predisposition":

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[2] While the predominance of this element of this element is emphasized in the Sixth Circuit, the requested entrapment instruction was, interestingly, denied in the immediate matter, with the Sixth Circuit reviewing only the issue of inducement.

[1] the character or reputation of the defendant, including any prior criminal record;

[2] whether the suggestion of the criminal activity was initially made by the Government;

[3] whether the defendant was engaged in the criminal activity for profit;

[4] whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and

[5] the nature of the inducement or persuasion supplied by the government.

Id. at 365 (citing *United States v. Barger*, 931 F.2d 359, 366 (6th Cir. 1991)).

The Second Circuit follows a similar standard to that of the Sixth Circuit, deeming "[p]redisposition – not inducement – [as] the 'principal element' of entrapment," though rejecting the adoption of explicit factors to be contemplated. *Cabrera*, 13 F.4th at 147 (citing *Mathews*, 485 U.S. at 63). Instead, the Second Circuit has specified three manners in which the government can prove predisposition, as established by Judge Learned Hand in *Sorrell*: "an existing course of similar criminal conduct; the accused's already formed *design* to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance." *Cromitie*, 727 F.3d at 205 (citing *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933)) (emphasis original); *see also United States v. Kopstein*, 759 F.3d 168, 173 (2d Cir. 2014).

Not only does the Second Circuit recognize its diversion from other circuits on this factor, it recognizes the ensuing confusion created as a result of the departure. While the consideration of prior similar criminal conduct and ready compliance

present "little controversy," what constitutes "pre-existing design is more problematic." *Id.* (internal citations omitted). While the court held that "'design' must take its meaning from the context of the type of criminal activity comprising the specific offenses a defendant has committed," a factfinder is left with broad discretion as to what constitutes a pre-existing design, as some conduct may require a narrow view, while other conduct may require only a "generalized idea or intent to inflict harm on such interests."

The Eleventh Circuit, in stark contrast, has decidedly rejected the employment of "fixed, enumerated factors," instead holding that a determination of predisposition "is necessarily fact-intensive" requiring "subjective inquiry into a defendant's state of mind." *United States v. Isnadin*, 742 F.3d 1278, 1298 (11th Cir. 2014), *cert. denied, Cius v. United States*, 574 U.S. 862 (2014) and *Gustama v. United States*, 574 U.S. 894 (2014). As such, the Eleventh Circuit invokes a standard which makes it, seemingly, impossible to remove consideration of entrapment from the purview of the jury: "[T]he fact-intensive nature of the entrapment defense often makes *jury consideration* of demeanor and credibility evidence a pivotal factor." *Id.*

The differing means employed by the circuits to determine the issue of predisposition serves as a clear illustration of the disparity faced by defendants prosecuted across the federal circuits. While the Eleventh Circuit continues to reinforce the factual nature of entrapment and its consideration into the province of the jury, the Sixth Circuit, in alarming contrast, works to further remove entrapment from the jury's consideration, investing determination of entrapment, principally,

with the trial court. The obvious prejudice to Mr. Sadiqullah is evident in contemplating this reality. In this matter, his fundamental fairness was violated, as an entrapment defense was more likely to be given in the Eleventh Circuit than the circuit in which he was prosecuted. This fundamental unfairness will remain, should this Court refuse to review and elucidate these divergent standards.

ii. The Time for Predisposition Analysis

An additional matter related to predisposition is that of timing – is a factfinder required to consider the statements and actions of a defendant before government involvement, upon solicitation of the government agent, or after government involvement in determining the defendant's predisposition. Many of the circuits have deemed "[t]he 'critical time' for the predisposition analysis" as the "time 'in advance of the government's initial intervention[,]'" a stance predominantly based on the word itself. *Perez-Rodriguez*, 13 F.4th at 18 (citing *United States v. Gifford*, 17 F.3d 462, 469 (1st Cir. 1994)). As reasoned in *Poehlman*, "[q]uite obviously, by the time a defendant actually commits the crime, he will have become disposed to do so. However, the relevant time frame for assessing a defendant's disposition comes before he has any contact with government agents, which is doubtless why it's called predisposition." 217 F.3d at 703 (9th Cir. 2000). *See also United States v. Reed*, 459 Fed. Appx. 644, 646 (9th Cir. 2011) (holding that to prove predisposition, the government must prove the defendant's willingness to commit the crime prior to "being approached by the agents."); *United States v. Scull*, 321 F.3d 1270, 1276 (10th Cir. 2003), *cert. denied*, *Bono v. United States*, 540 U.S. 864 (2003) (defining

predisposition as "a defendant's inclination to engage in the illegal activity for which he has been charged . . . [and] focuses on the defendant's state of mind before government agents suggest that he commit a crime."); *see also United States v. Kaminski*, 703 F.2d 1004, 1008 (7th Cir. 1983) ("We start with the observation that predisposition is, by definition, the defendant's state of mind and inclinations *before his initial exposure to government agents.*") (internal citations omitted) (emphasis original); *United States v. Gambino*, 788 F.2d 938, 945 (3d Cir. 1986), *cert. denied*, 479 U.S. 825 (1986) (holding that predisposition is focused on the defendant's state of mind prior to the initial interaction with a government agent); *Osborne*, 935 F.2d at 37 (finding that predisposition refers to the defendant's state of mind "before government agents make any suggestion that he shall commit a crime."); *Gilmore*, 590 Fed. Appx. at 395 ("The first factor, predisposition, focuses on whether the defendant intended, was predisposed, or was willing to commit the offense *before first being approached by government agents.*") (internal citations omitted) (emphasis original).

While the Seventh Circuit confirmed that predisposition should be "measured *prior* to the government's attempts to persuade the defendant to commit the crime," the court clarified that actions taken after the initial encounter should not be deemed wholly irrelevant. *Mayfield*, 771 F.3d at 436 (emphasis original). To the contrary, statements made or actions taken in "response to the government's offer may be important evidence of his predisposition." *Id.* This logic has been contemplated by the Sixth and Tenth Circuits as well. *See United States v. Mitchell*, 67 F.3d 1248,

1253 (6th Cir. 1995), *cert. denied*, 516 U.S. 1139 (1996); *Nguyen*, 413 F.3d at 1178 ("The defendant's predisposition is viewed at the time the government agent first approaches the defendant, but inferences about that predisposition may be drawn from events occurring after the two parties came into contact.").

The Eighth Circuit, however, has seemingly resisted defining the period of time in which the defendant's predisposition should be assessed, simply maintaining that such analysis is invoked solely to determine "whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who 'readily availed himself of the opportunity to perpetrate the crime." *Young*, 613 F.3d at 747; *see also United States v. Kendrick*, 423 F.3d 803, 808 (8th Cir. 2005) (held that defendant was predisposed to the crime of drug trafficking, as defendant sold narcotics prior to introduction to government agent, it was defendant's idea to distribute narcotics, he was familiar with the business of selling narcotics, and continued to sell narcotics after introduction to government agent).

Stemming from its rejection of "fixed, enumerated factors" to determine the issue of predisposition, the Eleventh Circuit has adopted the broadest approach of determining predisposition. As held in *United States v. Isnadin*, 742 F.3d 1278, 1298 (11th Cir. 2014), "[t]he Government need not produce evidence of predisposition prior to its investigation[,]" including the "[e]xistence of prior related offenses." While such prior offenses may be "relevant," it is "not dispositive" of the issue of predisposition. *Id.* Instead, "[p]redisposition may be demonstrated simply by a defendant's ready commission of the charged crime" or a finding of predisposition may "also supported

by evidence that the defendant was given opportunities to back out of illegal transactions but failed to do so." In addition, "[p]ost-crime statements" may "support a jury's rejection of an entrapment defense." *United States v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995), *cert. denied*, 516 U.S. 917 (1995). However, with certainty, "[e]vidence of legal activity combined with evidence of certain non-criminal tendencies, standing alone, cannot support a conviction." *United States v. Rutgerson*, 822 F.3d 1223, 1235 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 2158 (2017).

In reviewing the conviction of Mr. Sadiqullah, the logic of the Eighth and Eleventh Circuits prove sound. While circuits have found that actions taken by the defendant after the initial government introduction may prove predisposition, such actions may also prove *lack* of predisposition. In a matter, such as Mr. Sadiqullah's, where the evidence of the charged offense is scant, limiting the time of predisposition consideration could prove detrimental, removing pertinent and relevant conduct from the purview of the factfinder.

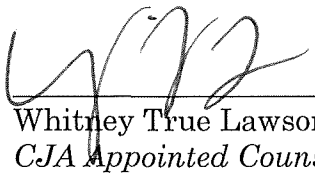
CONCLUSION

For the foregoing reasons, Mr. Sadiqullah respectfully request that this Court issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

DATED this the 17th day of November, 2021.

Respectfully submitted,

TRUE GUARNIERI AYER, LLP

By: 

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