APPENDIX

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JULIO CESAR GOMEZ, aka "Spanky," STEVEN ANDREW GONZALEZ aka "Cubs," Defendants.	CR No. 16-401(A)-ODW GOVERNMENT'S OPPOSITION TO DEFENDANT STEVEN ANDREW GONZALEZ'S MOTION IN LIMINE TO EXCLUDE GANG EXPERT TESTIMONY Hearing Date: 4/30/2018 Hearing Time: 10 a.m. Location: Courtroom of the Hon. Otis D. Wright

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Sean D. Peterson and Sonah Lee, hereby submits its Opposition to defendant Steven Andrew Gonzalez's Motion in limine to exclude gang expert testimony.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Julio Cesar Gomez ("GOMEZ") and Steven Andrew Gonzalez ("GONZALEZ") are charged in a seven-count First Superseding Indictment with conspiracy to possess with intent to distribute and distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii) (Count One); distribution of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii) (Counts Two and Three); Felon in Possession of Firearms and Ammunition, in violation of 18 U.S.C. § 922(g)(1) (Counts Three and Six); Possession with Intent to Distribute Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C); and Possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count Seven). On April 2, 2018, defendant GONZALEZ filed a motion in limine to exclude gang expert testimony. (Dkt. No. 161.) On April 4, 2018, defendant GOMEZ joined in the motion in limine. (Dkt. No. 171.) The Court should deny the motion in limine as moot as the government does not intend to introduce gang expert testimony at trial.

II. ARGUMENT

A. Motion Is Moot

The Court should deny defendant GONZALEZ's motion in limine as moot as the government does not intend on introducing any gang expert testimony in its case-in-chief at trial, thus, defendant GONZALEZ's motion is moot.

However, should it become necessary during the course of the trial, the government reserves the right to elicit testimony about the nature of the relationship between defendants GOMEZ and GONZALEZ

and confidential informant CI 005, during rebuttal. This potential testimony would necessarily reveal defendants' gang membership and/or affiliation. The government would elicit such testimony during rebuttal only if defendants were to raise a defense, such as entrapment, and the government needs to rebut defendants' potential claim that defendants are not predisposed to commit the offenses alleged in the indictment. If the need for such testimony arose, the government may seek to introduce testimony to rebut defendants' claim, including their membership in, and affiliation with, a criminal gang.

In summary, the government does not intend on introducing any gang expert testimony in its case-in-chief, and the Court should deny defendant GONZALEZ's motion in limine as moot.

III. CONCLUSION

For these foregoing reasons, the government respectfully requests that this Court deny defendants' motion in limine as moot.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JULIO CESAR GOMEZ, aka "Spanky," Defendant.	CR No. 16-401(A)-ODW-1 PLAINTIFF'S OPPOSITION TO DEFENDANT JULIO CESAR GOMEZ'S MOTION *IN LIMINE* TO EXCLUDE PROPOSED EXPERT TESTIMONY CONCERNING GANGS AND DRUG TRAFFICKING [261]

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Sonah Lee and Sean Peterson, hereby submits its Opposition to defendant Julio Cesar Gomez's Motion *in limine* to exclude proposed expert testimony concerning gangs and drug trafficking.

testimony has become highly relevant in this case because defendant appears to be pursuing an entrapment defense based in part on testimony from co-defendant and fellow Mexican Mafia associate CARMONA. By asserting that he was entrapped, defendant has put his character squarely at issue, in particular his character for engaging in the conduct underlying the charges in this case: conspiring to traffic in drugs, possess drugs for distribution, distribute drugs, and possess firearms. Defendant's participation in a local gang, North Side Indio, and his affiliation with a prison gang, the Mexican Mafia, is directly relevant to his predisposition to engage in the conduct at issue in this case, as both entities and its members are involved in distributing drugs. Moreover, as part of his entrapment defense, defendant appears to intend to elicit testimony from co-defendant (and co-conspirator) CARMONA, a fellow Mexican Mafia associate. It is important that plaintiff be able to cross-examine witness CARMONA regarding his shared affiliation with the Mexican Mafia, which provides a basis for impeaching his testimony. Testimony from Investigator Cervello would educate the jury on gang associates' willingness to lie for one another, even in court. The jury should be allowed to consider this testimony when evaluating CARMONA's credibility as a witness. In sum, so long as defendant asserts an entrapment defense or calls co-defendant CARMONA as a witness, plaintiff will seek to elicit expert testimony from Investigator Cervello regarding *modus operandi* of gang members, and indicia of gang membership.

A. CERVELLO IS QUALIFIED TO TESTIFY AS AN EXPERT

The admission of expert opinion testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides:

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE OTIS D. WRIGHT II, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. CR 16-401-ODW

JULIO CESAR GOMEZ, STEVEN ANDREW GONZALEZ,

Defendant.
_____/

REPORTER'S TRANSCRIPT OF
MOTIONS IN LIMINE
WEDNESDAY, MAY 30, 2018
1:30 P.M.
LOS ANGELES, CALIFORNIA

_____

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THE COURT: Okay. Mr. Gomez wasn't induced to do anything. He was not under coercion, he didn't have a contract, he had nothing.

You are saying he wasn't predisposed to take this quantity of drugs and go sell it.

Is that what you are saying?

MR. MCLANE: Yes, Your Honor.

THE COURT: This other crook somehow convinced him that is what he should do?

MR. MCLANE: Yes, Your Honor.

THE COURT: Well, that is the other crook entrapping him then.

MR. MCLANE: He's an agent of the government.

THE COURT: Not in connection with that transaction.

MR. MCLANE: Well, Your Honor, I could present authority. I don't think the government can dispute it if an agent of the government, a confidential informant, entraps or solicits or improperly induces another person to commit a crime, that entrapment is attributed to the government even if he's a confidential informant.

I think that is pretty basic standard law that a confidential informant can't entrap a defendant because he's an agent of the government.

THE COURT: So the crime then that 05 encouraged Mr. Gomez to commit was accepting receipt and possession with

the intent to distribute or sale?

MR. MCLANE: Right, on the next day.

THE COURT: Day minus one, the prior day.

MR. MCLANE: Yes, Your Honor.

THE COURT: All right. And Mr. Gomez, taking possession of these drugs with the intent to make a further distribution is a crime right there. It's done, right?

MR. MCLANE: Well, Your Honor, it's a crime unless he's entrapped. If he's entrapped, it's not a crime.

THE COURT: But that isn't what the government -- that isn't what the government was actually trying to set up. They were trying to set up a buy from CI-489.

MR. MCLANE: Basically what happened here, Your Honor, at least from my perspective and Mr. Gomez's perspective is that CI-5 sold the drugs to CI-489. That is basically how it happened, and he entrapped my client to being the conduit to give him the drugs. This way CI-005, it worked out great for him.

Not only does my client owe him money, which he says, don't pay me now, pay me later, because he doesn't want CI-489 or Senior Officer Monis to understand that is what is really going on, he gets money for the drugs he's going to supply, and he gets credit against his informant contract.

THE COURT: Well, he had to pay for the drugs himself, so it's not --

MR. MCLANE: He's selling them for more, so he's making money off of it.

THE COURT: Capitalism at work. I'm not seeing this entrapment thing, but okay.

To the extent that you are now moving to dismiss this case on the basis of entrapment, that motion is denied.

MR. MCLANE: Your Honor, I want to make sure I'm not precluded -- your denying it without having an evidentiary hearing. I just want to make sure I'm able to present my entrapment defense at trial.

THE COURT: Okay. If we were to have a hearing, what I would be hearing?

MR. MCLANE: You would be hearing about how officer -- Senior Investigator Monis set up this contract on behalf of the District Attorney, the District Attorney was involved.

THE COURT: See, I'm taking you at your word about this contract.

I don't believe for a moment that that contract was written that way.

I don't believe that that contract did not contain a clause that indicated that the prosecution would be making a recommendation only but the ultimate sentence would be in the sole discretion of the sentencing judge.

MR. MCLANE: It is in the sole discretion, except to the extent they filed strikes, and the Court knows that they

time.

In our last conference before trial, we're going to talk about trial estimate. We're going to talk about certainly the government's witnesses and any witnesses that the defense wishes to share with the Court so we can give the jury panel a reasonably good estimate as to how long the trial is going to last. That is all I care about.

MR. SOLIS: I discussed this with the government today and they estimated a 3- to 4-day trial.

THE COURT: Okay.

MR. PETERSON: I think that where largely goes back and forth, Your Honor, it has to do with the entrapment defense and how much additional evidence we might put in or the defense might put in.

THE COURT: This is one of the reasons we're talking about this now.

When we start talking about bringing people out of prison, you know, in order to testify, I need that testimony to be relevant at least to the case, not just for a trip to LA or not to find themselves in the lockup with someone they would like to tune up. There needs to be a reason for this person to be here.

And to simply say, that I'm the one who supplied Gomez with the drugs, and yes, I have also been working with the police in an undercover capacity, yeah, and?

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CRIMINAL MINUTES - GENERAL

Case No. 2:16-CR-00401(A)-ODW-1 **Date: March 28, 2019**

Title: USA vs. JULIO CESAR GOMEZ, et al

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Present: The Honorable OTIS D. WRIGHT, II, United States District Judge

Deputy Clerk	Court Reporter
Sheila English	Not Reported N/A

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) ORDER RE: GOVERNMENT'S MOTION IN LIMINE TO PRECLUDE TESTIMONY OF CI-005 AND FRANCISCO FIGUEROA [202]

On March 25, 2019 Defendant Gomez sought and obtained orders for the production of five currently incarcerated individuals as witnesses in his trial set to begin April 2, 2019. Gomez was immediately informed by the U.S. Marshal's Service that one week was not sufficient time for, presumably the Bureau of Prisons, to arrange the production of these individuals for trial. Gomez again seeks a continuance of the trial because he waited too late to order the production of witnesses in custody. It is noted that orders to produce two of these witnesses for trial were initially issued in April 2018, see DE- 166 & 169 when trial was scheduled for May 1, 2018. No explanation is offered as to why Writs of Habeas Corpus Ad Testficandum were not requested for these known witnesses until a week before trial.

In any event, Gomez's hastily prepared ex parte application to continue the trial [DE-299] filed March 26, 2019 was denied the same day because Gomez had failed to show good cause for yet a further continuance or why each of the five persons to be ordered out for trial were necessary for his defense. [D.E. 299]. In response, Gomez filed a request for reconsideration stating that the Court had failed to consider material information "already presented". Apparently by way of pointing the Court to the specific information which he considered material, the Court was instructed that "the necessity of the witnesses has been presented to the Court on several prior occasions, including the defense opposition to the government's motion to exclude two of these witnesses, which motion is still pending ruling.," (Ex Parte App at p.2.) This opposition was filed May 18, 2018 [DE-210]. So it would seem Gomez was well aware of his need to have these persons attend the trial well in advance of him taking any action to make it so. The Court was not directed to any information regarding the other three individuals. Perhaps it is Gomez's believe that it is the court's responsibility to scour the record in search of those elusive kernels of information that he could have just as easily pointed out. The Court is of a different view, but in any event, the Court did examine the "defense opposition to the government's motion to exclude" two witnesses: Riverside District

Attorney CI-005 and Francisco Remigio Figueroa. The docket does not reflect that the Court ever ruled on the motion in limine. That ruling might affect, at least in part, the issue now before the Court. The Court therefore rules on the motion in limine at this time.

It appears that Figueroa had no involvement in this relatively straightforward hand to hand drug and firearm transaction, but had apparently had other experiences with CI-005. As for CI-005, who is not identified, at all relevant times was acting with ATF CI-489. In fact, CI-489 was involved in both transactions which form the basis for the First Superseding Indictment [DE-98], whereas CI-005 was not. CI-489 is capable of offering testimony on matters material to the guilt or innocence of Gomez on the counts charged.

In reviewing the First Superseding Indictment as well as the ATF Reports of Investigation, Form 3120, the following facts are reported. On January 6, 2016 members of the ATF and the Riverside Doistrict Attorney's Office surveilled a Mexican Mafia meeting in Cathedral City. With the law enforcement officers were DA CI-005 and ATF CI-489. During the meeting CI-005 arranged for Gomez and Carmona to sell meth and firearms to CI-489.

On January 14, 2016 an ATF Special Agent and investigators met with CI-489, CI-005 and CI-006 at a predetermined location to brief the operation. Each of the CI's were searched for contraband, as was their vehicle. CI-489 was given $2,500 in government funds to purchase the meth and any guns available for sale. CI-005 was given electronic surveillance equipment to record the transation.

The CI's drove to the location where they were to meet Gomez. While waiting for Gomez and Carmona to arrive, they observed Gonzalez in front of the residence openly selling what appeared to be methamphetamine. When Gomez and Carmona arrived, the CI's were instructed to follow them to another location. Upon arrival, all but CI-006 entered the residence. CI-006 remained in the vehicle. Once inside, Gonzalez led CI-489, CI-005, Gomez and Carmona to a bedroom after which Gonzalez left the room. Carmona then pulled out .357 caliber revolver and handed it to CI-489 in exchange for $500. Shortly thereafter Gonzalez reentered the bedroom and handed Gomez a bandana containing multiple plastic bags ultimately determined to be a quarter pound of methamphetamine, CI-489 handed Gomez $900. The CI's, Gomez, Carmona and Gonzalez left the location.

It is the defense theory, and apparent justification for producing Carmona and Gonzalez for trial, that Gomez was purportedly entrapped into committing the crimes with which he is charged. Gomez is expected to claim CI-005 provided the meth to him the previous day so that he could then sell the drugs to CI-489. Considering that the agreement to engage in the drug and gun sales was made by Gomez it would appear that Gomez was predisposed to engage in the transactions at least a week prior to CI-005 allegedly giving him the drugs to complete the transaction. Given the fact that all but one person in a chain of distribution of illegal drugs receives those drugs from someone else, it is unclear how, even if true, Gomez's source of the meth exonerates him. It was he who negotiated the transaction, handed the drugs to the buyer and received cash in exchange. All the while being monitored by law enforcement.

The Court finds the defense version of events implausible. Especially in light of the subsequent and very similar transaction on February 17, 2016. After an exchange of text messages between CI-489

and Gomez regarding a purchase of one-half pound of meth and any firearms Gomez had for sale, it was agreed they would meet the following day to consummate the purchases. On this occassion, CI-489 met Gomez alone. CI-489 was equipped with electronic surveillance equipment. Gomez was accompanied by a female. Gomez produced a .22 caliber rifle with a sawed-off barrel and obliterated serial number and a half-pound of methamphetamine in exchange for $2,100.

Gomez's Ex Parte Application for Reconsideration makes no mention of Vertucci or Lopez and only passing reference to Figueroa. As for the latter, it appears that Figueroa is expected to testify that on a prior occasion CI-005 also provided him with drugs which Figueroa then sold. As mentioned above, this does not establish entrapment. The Court must agree wiht the government that Gomez appears to plan calling CI-005 for the sole purpose of having him impeached by Figueroa. Figueroa will testify as to specific instances of bad conduct on the part of CI-005. The jury will not be tasked with the determination of CI-005's criminal conduct, if any. Nor will the court permit the trial to be side-tracked on a tangential issue unrelated to Gomez. Moreover, because he was not at the planning meeting on January 7, 2016, nor the buy on January 14 or Feburary 17, 2016, he has nothing of relevance to offer on the issue of the guilt or innocence of Gomez on the charges of distribution of methamphetamine or the possession and sale of firearms by a felon. Therefore, Figueroa would not be a relevant witness in this case. Gomez offers no argument as to the necessity of either Vertucci nor Lopez therefore failure to secure their attendance at trial on April 2, 2019 would not warrant a trial continuance.

As for CI-005, his testimony, if any, would be cumulative to that of CI-489 as to the January 14, 2016 transaction. The only one at which he attended. Of special concern is the fact that he has been cooperating with the government in investigstaions and prosecutions of the North Side Indio street gang. Based on information provided by the government, both Gomez and CI-005 are affiliated with the Mexican Mafia. The Court is concerned that Gomez has no legitimate defense interest in having CI-005 produced for trial, but others in either North Side Indio or the Mexican Mafia might use the occassion of him being removed from custody to facilitate access to him by those who might wish to do him harm.

It is therefore ordered that the Government's Motion in Limine to preclude the testimony of CS-005 and Figueroa is GRANTED. As for Gomez's motion to again continue the trial to such a time when the other in-custody individuals he would like to call for trial can be arranged, that request is DENIED. Trial will commence as scheduled.

IT IS SO ORDERED

DATED: March 28, 2019

Otis D. Wright, II
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE OTIS D. WRIGHT II, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. CR 16-401-ODW

JULIO CESAR GOMEZ,

Defendant.
_____/

REPORTER'S TRANSCRIPT OF
PRETRIAL CONFERENCE HEARING
MONDAY, APRIL 1, 2019
11:00 A.M.
LOS ANGELES, CALIFORNIA

_____

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LOS ANGELES, CALIFORNIA; MONDAY, APRIL 1, 2019

11:00 A.M.

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11:52AM THE COURTROOM DEPUTY: Calling Item No. 4, *CR 16-401, United States of America versus Julio Cesar Gomez.*

Counsel, may I have your appearance, please?

MR. PETERSON: Good morning, Your Honor, Sean Peterson on behalf of the United States.

11:52AM THE COURT: Good morning, Mr. Peterson.

MR. KALOYANIDES: Good morning, David Kaloyanides with Mr. Gomez, who is present for the Court and in custody.

THE COURT: Mr. Kaloyanides, good morning. Mr. Gomez, good morning, sir.

11:52AM THE DEFENDANT: Good morning.

THE COURT: All right. One of the things that we're going to deal with this morning is a motion in limine that has been pending for sometime.

But since the filing of the motion in limine there has 11:52AM been a change of -- I'm going to say it -- there has been an upgrade of defense counsel, and I'm not certain how vigorous an argument we're going to have on these motions in limine.

But let me say this: For your benefit, Ms. English, we're talking about Docket Entry 261, defendant's motion in limine to 11:53AM exclude proposed expert testimony concerning gangs and drug

trafficking.

And let me say this: But for the fact that prior counsel had indicated his intention to pursue a defense of entrapment this wouldn't be a difficult call at all.

11:53AM But if that is indeed what the defense intends to do, then I can understand how the prosecution feels it's necessary to paint a fuller picture of Mr. Gomez and what his intentions were and his predisposition was.

But if the defense isn't going to pursue this entrapment

11:54AM theory, then I think it becomes really quite an easy call that none of this would be terribly relevant, that indeed we're talking about a very simple transaction, a simple hand-to-hand transaction.

So, Mr. Kaloyanides, I am loathed to have either side make

11:54AM a commitment with respect to what they intend to do, but because this is going to directly impact my decision on this motion in limine, I am going to go out on a limb and ask you whether or not these experts that the government intends to call, whether or not, you know, they are responsive to your

11:55AM stated defense?

MR. KALOYANIDES: Your Honor, I can say it this way, we are leaving open pursuing an entrapment and a sentencing entrapment defense, if the evidence, of course, metes out to justify requesting those instructions.

11:55AM And I think I can address at least my perspective on

former counsel's motion in limine.

I have spoken with the government and it's my understanding that Investigator Monas will not be testifying as an expert, but that it will be only Cervello, and I think that while I understand the government's argument as to the relevance of some of the gang information, I think the simple answer is the -- any expert opinion regarding affiliation with the Mexican Mafia has nothing to do with that.

I'm sorry, Your Honor, you waved?

11:56AM THE COURT: I did. I'm not going to get into this. Like I said, this is really easy.

I see you are leaving yourself the option, and I think that is the prudent thing to do, because I'm trying to read between the lines here, because but for entrapment, all of this other stuff is irrelevant. I wouldn't let it in anyway.

MR. KALOYANIDES: I agree.

THE COURT: It's not that hard.

You are making it hard. If we're going to talk about something then maybe that is what we ought to talk about, the basis for entrapment, the fact that one of the CIs allegedly provided the drugs.

My question becomes, so what. Someone always supplies the drugs, but the supplier is only concerned with getting paid.

The supplier doesn't care what the buyer does with the drugs.

You can flush them, but if it's going to be the defense's position that somehow by supplying the drugs to -- I guess you are going to say it is Mr. Gonzales or directly to Mr. Gomez -- which?

11:57AM MR. KALOYANIDES: It was supplied for Mr. Gomez to supply to the other CI.

THE COURT: Okay, right.

All right. Anyway, if -- how does that amount to entrapment?

11:58AM MR. KALOYANIDES: Well, it presents --

THE COURT: There was a sale. Remember, there was a sale by Mr. Gomez. So how was he induced to sell?

MR. KALOYANIDES: Well, that would be part of the inducement with the way I would anticipate the evidence coming

11:58AM in. CI-5 was directed to pursue some deals by his handler with Mr. Gomez. CI-5 surreptitiously provides that evidence, the drugs, to Mr. Gomez to sell to another CI --

THE COURT: Uh-huh.

MR. KALOYANIDES: -- as part of CI-5's side dealings

11:58AM where Mr. Gomez had no other prior inclination to be involved in drug trafficking.

THE COURT: Uh-huh.

MR. KALOYANIDES: So, as a government agent, CI-5 can be the source of the entrapment.

11:59AM Now, this is distinct from Mr. McClane's prior motion to

dismiss for government misconduct, that has resolved, we're not talking about that.

But when we have the individual who is supposed to be the end -- the end recipient being on both sides of the transaction, when an individual has no other indication, prior history, or inclination to be involved in that criminal activity, that is sufficient evidence for the entrapment.

THE COURT: Of course, this is all coming from where?

11:59AM MR. KALOYANIDES: Well, again, it's going to depend upon how the evidence comes out.

I know the Court has already ruled to exclude or preclude us from -- the defense from calling CI-5.

THE COURT: Right.

12:00PM MR. KALOYANIDES: It could come through Mr. Gomez's own testimony, if he so decides to testify.

THE COURT: Okay.

MR. KALOYANIDES: I think there might be some other evidence that may come out during the government's case in

12:00PM chief.

THE COURT: That would corroborate this?

MR. KALOYANIDES: That would corroborate it.

THE COURT: Okay.

MR. KALOYANIDES: To be fair, Your Honor, I am

12:00PM predicting how the evidence is going to come out, of course, we

will have to see how it does.

THE COURT: All right. Well, I guess we're all going to have to wait and see.

All right. Then I won't be able to rule on the motion in limine then.

We will just leave all options on the table if that is what is going to happen.

MR. PETERSON: Your Honor, may I address one or two points?

THE COURT: Sure.

MR. PETERSON: So just for framework, the motion involving Chuck Cervello, I would break that down into two parts.

I would say one part has to do with modus operandi of drug traffickers and indicia of drug trafficking. I would say the other part has to do with modus operandi of gang members and indicia of membership.

THE COURT: Let's talk about the gangs.

MR. PETERSON: I feel like really the discussion so far this morning has been about the gangs, and that is what I have understood the Court and Mr. Kaloyanides to be going back and forth on.

With regards to the first part -- Your Honor, I did hear you say let's talk about the gangs, but regards to the first part, the drug trafficking, I feel like what the government

would be looking to call Mr. Cervello to testify in an expert capacity is consistent with what the government had previously noticed Ryan Monis to testify on in an expert capacity, and of course, the Court already ruled in the government's favor on some motions in limine that were filed by previous defense counsel with regards to whether or not Mr. Monas could testify in an expert capacity relating to the drug trafficking.

12:02PM

THE COURT: But is there really any need to get into any expert testimony regarding gangs now, as things have changed, do you think?

12:02PM

MR. PETERSON: Frankly, Your Honor, I'm not sure. I'm not sure what the defense case is going to be.

THE COURT: Okay.

MR. PETERSON: So -- I hope we have made this clear in our filings that if we're just talking about a non-entrapment defense, we are not looking to get into expert gang testimony.

12:02PM

THE COURT: I wouldn't think so.

MR. PETERSON: But if the entrapment defense does go forward, and in particular, if certain witnesses are called by the defense that the government thinks has reason to be biased and/or have a motive to lie, and the government believes that evidence of gang membership and trafficking is relevant to that, then I think it would be a very front and center issue as to whether or not government should be able to use expert

12:02PM

12:03PM

testimony relating to modus operandi of gang members and membership.

THE COURT: Understood.

MR. PETERSON: If I may say so, Your Honor, forgive me if this is out of sequence for what we're doing so far, my understanding of the case law regarding entrapment is that before trial would start, the Court would need to make a very preliminary threshold determination that it could come in at all -- any kind of evidence on that point could go forward.

12:03PM It's my understanding that the bar for that is low, relatively speaking.

But it is my understanding that that is the case.

And while I think it's possible that the prosecution could reserve a lot of its evidence that would go to combatting an

12:04PM entrapment defense for rebuttal, it's also my understanding that the case law says that that doesn't have to happen, that if entrapment is on the table and the defense basically needs to -- I think declare itself by tomorrow morning, is my understanding, then the government is at liberty to go into

12:04PM essentially character evidence and some of these things that otherwise wouldn't go into in the absence of entrapment.

THE COURT: I can understand your desire to want to keep your options open, but it's going to unnecessarily complicate the case and the kinds of evidence that comes in.

12:05PM I was hoping to be able to avoid having all of this --

this gang evidence come in, for one, because it certainly is prejudicial.

But if this is something that you really think you would like to pursue, then the case is going to get more complicated.

12:05PM I'm not sure that the candle is really worth the game here, unless there is some fairly solid evidence to support this entrapment theory, other than Mr. Gomez's version, then Mr. Gomez is opening himself up to an awful lot of negative evidence that could be avoided where we would just be dealing

12:06PM with a hand-to-hand drug deal.

All right. Those doors are going to open at 7:00 a.m. tomorrow, and I guess I'm going to have to ask you to fish or cut bait because what you decide to do, if you decide to pursue this particular defense, then that is going to open up -- if

12:07PM you decide to do it, then that is going to open up the possibility of the government talking about the street gang as well as the connection to that notorious prison gang and taxes and all of the rest of this, which Lord knows I was hoping that we would avoid.

12:07PM But you are entitled to try your case the way you want to try your case, so we will wait until tomorrow morning to see what the defense is going to do.

Do we have any issues with respect to evidence that still has not been produced to the defense?

12:07PM MR. PETERSON: No, Your Honor.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE OTIS D. WRIGHT, II, U.S. DISTRICT JUDGE

UNITED STATES OF AMERICA, Plaintiff, vs. JULIO GOMEZ, Defendant.	16-CR-401-ODW

PARTIAL TRANSCRIPT - JURY TRIAL

Los Angeles, California

Tuesday April 2, 2019

AMY DIAZ, RPR, CRR, FCRR
Federal Official Reporter
350 West 1st Street, #4455
Los Angeles, CA 90012

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comes in as admissible and relevant, then I think a practical solution would be if somebody, perhaps defense investigator, has him or herself gone to Google and has entered in the relevant latitude and longitude coordinates, both, you know, generated -- have Google generate them based on certain addresses, and then the opposite, actually put in the coordinates that the defense has independently acquired from other sources and then showed up, I don't see --

THE COURT: I like that. That is good. That's good, with no preparation.

MR. PETERSON: Thank you, Your Honor.

THE COURT: This workable, sir?

MR. KALOYANIDES: Yes, that would certainly meet the need.

THE COURT: Okay.

MR. KALOYANIDES: And --

THE COURT: Stop talking. You are going to mess it up.

MR. KALOYANIDES: I was going to say, I'm going to confer with the government as to a suggestion I have as to which witness might be appropriate for that.

THE COURT: Gotcha. All right.

MR. KALOYANIDES: Thank you, Your Honor.

THE COURT: Now, have you made an election?

MR. KALOYANIDES: Yes, Your Honor. We will be

pursuing an entrapment defense.

THE COURT: You know, I was going to place a caution on the record, but I don't guess that is my place. This is just so dangerous, but if this is what you choose to do, okay.

MR. KALOYANIDES: Thank you, Your Honor.

THE COURT: Then, the defense requests to preclude testimony regarding various drug trafficking practices and procedures. That motion is denied. Likewise with respect to the defense request to preclude any introduction regarding gangs, etcetera. That is denied. Oh, boy.

MR. KALOYANIDES: And I understand the Court's concerns and I appreciate that, Your Honor.

I do have one question or point I would like to emphasize. While I understand the Court's ruling regarding the government's ability to present evidence to counter the elements for entrapment, predisposition, etcetera, that evidence relating to how gangs work, generally I understand where the Court's coming from. My concern at this point, or my objection at this point, is that it does not -- that should not open the door for added evidence regarding the prison gang the Mexican Mafia, its hierarchy and its dealings.

I think that evidence on how a specific gang that Mr. Gomez may be affiliated with would be proper under the

Court's ruling; how gangs generally that traffic in narcotics or other drugs might be relevant, as well, but beyond that, to bring in the specifics of an entity that has nothing to do with this case is where I have a problem.

THE COURT: All right. I don't know what you mean with respect to entities that have nothing to do with this case. That could be problematic, but --

MR. KALOYANIDES: And I'm referring specifically to evidence regarding the activities, structure, members of the Mexican Mafia.

THE COURT: Oh, no, that is going to come in. Their control over certainly predominantly Mexican gangs is something I can take judicial notice of. The taxing structure, etcetera, and the fact that the revenue-generating activities of these criminal street gangs is derived from trafficking in drugs and weapons -- this is why I did not want to do this, because all of this information is going to come out before this gentleman makes an election whether or not he's going to take the stand. And after the jury has heard all of this, then he gets on the stand and he's going to try to sell this entrapment story, this is -- dude, I hate this. And I just kind of hope that during jury selection there will be reconsideration of this; but again, I'm entreating in your territory.

Bring them out. Are they out there now?

THE CLERK: I will go talk to them.

THE COURT: Yes, thank you.

I hear what you are saying, I absolutely do. And as we get into the trial and as we get into the testimony, if I feel that a witness is going too far afield, then I'll have to rein them in, we'll have to stop that. I want to make sure that the testimony remains relevant, but if we are talking about the need for local gangs to generate revenue because they owe taxes to the Mexican Mafia, how do we not bring in the Mexican Mafia? I don't like doing it, but it's a fact of life. And I would love to stay away from this. I'll give you a dollar if you will agree to stay away from this.

MR. KALOYANIDES: Well, I appreciate that, Your Honor.

I mean, I will continue to consult with Mr. Gomez. It's his decision ultimately. And if he decides to change his position, obviously we'll let the Court know.

THE COURT: I'm going to look at you. Guess who I'm talking to.

MR. KALOYANIDES: I understand, Your Honor.

THE COURT: I'm going to be really, really plain, oh, God, when you are in front of the jury wearing a billboard proclaiming yourself to be a gang member, and then you have invited the government to offer all of this

testimony about these dangerous gangs, including that extremely dangerous prison gang, and we are going to hear all this information about how they generate revenue, primarily through trafficking in narcotics. And then sometime later this person wearing this billboard proclaiming himself to be a gang member takes the stand and swears to tell the truth, and then spins this fanciful tale about how in actuality, I'm an alter boy, but I was induced to engage in this drug trafficking offense, and then you expect that to fly.

My job in a criminal case is to ensure that the defendant gets a fair trial. Civil cases, I'm barely in the room. My obligation is to make sure a criminal defendant gets a fair trial. And if I see a defendant getting ready to drive off of a cliff, I've got to say something. I feel I do. And though I hesitate to intrude upon counsel's prerogatives in trial strategies, for crying out loud, I remember being in your position, and have a judge tell me, don't go there, but it worked, all right? So I understand. I could be wrong and you all could be right. And I appreciate that. So let me shut up. It's up to you, okay?

MR. KALOYANIDES: And just to be clear, Your Honor, unless I think that there is an overstepping on certain issues, I would just like a continuing objection --

THE COURT: Yes.

MR. KALOYANIDES -- to the gang evidence, just for

6 F.4th 992
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Julio Cesar GOMEZ, Defendant-Appellant.

No. 19-50313
|
Argued and Submitted April 16, 2021 Pasadena, California
|
Filed July 28, 2021

Synopsis

Background: Defendant was convicted in the United States District Court for the Central District of California, Otis D. Wright, II, J., of conspiracy with intent to distribute at least 50 grams of methamphetamine, distribution of methamphetamine, and being felon in possession of firearm. Defendant appealed.

Holdings: The Court of Appeals, Ikuta, Circuit Judge, held that:

on issue of first impression, predisposition evidence rebutting anticipated entrapment defense was admissible as part of prosecution's case-in-chief only where it was clear that entrapment defense would be invoked;

district court did not abuse its discretion by giving government leeway to present evidence preemptively rebutting defendant's anticipated entrapment defense in its case-in-chief;

probative value of gang-affiliation evidence was not unfairly prejudicial;

any error was harmless in admitting statement that defendant had been convicted of carjacking offense; and

two-level sentencing enhancement for possession of dangerous weapon applied to defendant's sentence.

Affirmed.

John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation, filed dissenting opinion.

***996** Appeal from the United States District Court for the Central District of California, Otis D. Wright II, District Judge, Presiding, D.C. No. 2:16-cr-00401-ODW-1

Attorneys and Law Firms

Todd W. Burns (argued), Burns & Cohan, San Diego, California, for Defendant-Appellant.

Julius J. Nam (argued), Sonah Lee, and Sean D. Peterson, Assistant United States Attorneys; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Riverside, California; for Plaintiff-Appellee.

Before: Milan D. Smith, Jr. and Sandra S. Ikuta, Circuit Judges, and John E. Steele,[*] District Judge.

Dissent by Judge Steele

OPINION

IKUTA, Circuit Judge:

Julio Cesar Gomez appeals his convictions and subsequent sentence for conspiracy with intent to distribute at least 50 grams of methamphetamine, distribution of methamphetamine, and being a felon in possession of a firearm. We hold that the district court did not err by allowing the government to rebut Gomez's entrapment defense in its case in chief, or by allowing the government to introduce evidence of Gomez's affiliation with gangs to rebut that defense. Any error in allowing Gomez's parole officer to testify was harmless. Finally, the district court did not err by applying a two-level sentence enhancement

for possession of a firearm during a drug-trafficking offense. We therefore affirm Gomez's conviction and sentence.

I

A

Gomez was indicted for various offenses relating to the sale of methamphetamine and firearms, and possessing firearms after being convicted of a felony. According to the evidence adduced at trial, on January 7, 2016, Gomez and his co-conspirator, ***997** Angel Carmona, met with two confidential informants, Lopez (CI-5) and Gabe (CI-489), in Cathedral City, California. The informants wore concealed recording devices during the meeting, and they recorded Gomez and Carmona agreeing to sell them methamphetamine the following week. At the meeting, Gomez stated that Steven Andrew Gonzalez, a co-defendant, might also be able to sell a firearm to Gabe.

A week later, on January 14, 2016, Gomez, Carmona, and Gonzalez met Lopez and Gabe at a residence in Indio, California. Law enforcement tracked the participants in the meeting using a GPS device installed in the informants' vehicle, and the informants again secretly recorded the meeting. During the meeting, Lopez and Gabe purchased a quarter-pound of methamphetamine from Gomez, Carmona, and Gonzales. Lopez also purchased a firearm from Carmona.

After the January 14 meeting, Gomez and Gabe communicated through text messages to negotiate the sale of an additional half-pound of methamphetamine and firearms to Gabe. Gomez asked Gabe if he wanted a pound of methamphetamine rather than the half-pound they had previously discussed, but Gabe said that he did not have the money for the additional half-pound.

On February 17, 2016, Gomez met Gabe at a rest stop near Palm Springs, California. Gabe secretly recorded this meeting, and it was observed by law enforcement. Gomez and Gabe negotiated the quantity and price of the methamphetamine, as well as the price of the firearm. Gomez then sold Gabe a Smith & Wesson rifle and 222.9 grams (approximately a half-pound) of methamphetamine. In response to Gabe's question about how much a pound would cost, Gomez told him "three flat," meaning $3,000.

On June 16, 2016, officers from multiple law-enforcement agencies executed a search warrant at the residence of Gomez's girlfriend. The officers found Gomez in a bedroom and arrested him. The officers also found a loaded Smith & Wesson pistol, a box with 38 rounds of ammunition, and 3.23 grams of methamphetamine in the bedroom.

B

A federal grand jury indicted Gomez on seven criminal counts.[1] Count 1 alleged a conspiracy among Gomez, Gonzalez, and Carmona, among others, with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C. § 846. This count identified overt acts occurring at the January 7 meeting between Gomez, Carmona, and the informants, and the January 14 sale of a firearm and methamphetamine. Count 2 alleged distribution of at least 108.1 grams of methamphetamine at the January 14 sale, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii), and 18 U.S.C. § 2(a). Count 3 alleged distribution of 219.3 grams of methamphetamine on February 17, 2016 in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(viii). Count 4 alleged that on or about February 17, 2016, Gomez knowingly possessed specified firearms and ammunition, after being convicted of one or more felonies (specifically, carjacking and possession of drugs where prisoners are kept) in violation of 18 U.S.C. § 922(g)(1).[2]

***998** Carmona and Gonzalez entered guilty pleas and admitted to meeting with Gomez and the informants, and to selling methamphetamine and a firearm on January 14.

Gomez moved to dismiss the indictment on the ground of outrageous government conduct. In support, he submitted a declaration by his co-conspirator, Carmona, which alleged that Lopez gave Gomez the methamphetamine that Gomez later sold to Gabe on January 14th. In other words, Carmona alleged that one confidential informant gave Gomez the drugs that

Gomez subsequently sold to the other confidential informant. The court denied this motion.

Before trial, the government filed a notice that it intended to call Manuel Ortiz, Gomez's parole officer, to testify in the government's case in chief, and it provided a list of topics on which Ortiz would likely testify. Over Gomez's objection, the district court ruled that Ortiz's testimony was admissible.

In August 2018, Gomez filed a motion in limine seeking to preclude the government from offering expert testimony from Chuck Cervello, an investigator from the Riverside County District Attorney's gang unit, regarding drug trafficking and gangs. In opposition to Gomez's motion, the government stated that it would seek to introduce this expert testimony so long as Gomez pursued an entrapment defense or called Carmona as a witness.[3]

The day before trial, in April 2019, the district court heard arguments on Gomez's motion in limine. The district court indicated that it would likely preclude expert testimony on gangs if Gomez was not going to raise an entrapment defense. Gomez's counsel said that he was "leaving open" whether to pursue an entrapment defense, depending on the evidence.[4] The theory underlying Gomez's entrapment defense was similar to the theory underlying his motion to dismiss based on outrageous government conduct. According to Gomez, even though he had no prior inclination to be involved in drug trafficking, Lopez (the government's informant) facilitated Gomez's drug sale to Gabe (another government informant). Gomez's counsel further told the court that evidence supporting this theory could come in through Gomez's testimony, as well as from "some other evidence that may come out during the government's case in chief."

In response, the government argued that if Gomez intended to raise an entrapment defense, the government should have the opportunity to introduce evidence that would rebut such a defense in its case in chief. The court implicitly agreed, and the government asked Gomez's counsel to "declare itself by tomorrow morning," immediately before the trial began, whether Gomez intended to raise an entrapment defense. The district judge warned Gomez that invoking an entrapment defense would open him up "to an awful lot of negative evidence that could be avoided," including "the possibility of the government talking about the street gang as well as the connection to" the Mexican Mafia.

***999** The next morning, Gomez's counsel informed the court that Gomez would "be pursuing an entrapment defense." After warning Gomez that this was a risky decision because it would allow the government to introduce predisposition evidence, including evidence of Gomez's gang affiliations, the court denied Gomez's motion in limine to prevent the government from introducing gang-affiliation evidence. Gomez did not give an opening statement before the government's case in chief.

C

At trial, Ryan Monis testified that he was a senior investigator assigned to the major organized crime division within the Riverside County District Attorney's office, and that he participated in a multi-agency task force investigating organized crime within Riverside County. Monis first described the nature and purpose of his task force, explaining that, "we investigate major organized crime," meaning "we focus on the worst of the worst" and the "individuals that we believe [are] the most dangerous." Monis also explained that "[g]angs and drugs kind of interact with each other," and "as a gang investigator" he was aware of "how the gang members on the streets and within the prison system operate in distributing and making profit from narcotics." Monis stated that he first learned about Gomez from Gomez's parole officer, Ortiz, who said that he was supervising "a high-level risk individual by the name of Julio Gomez." Monis then testified about the surveillance of the meetings on January 7, January 14, and February 17, 2016, as well as text messages between Gomez and the confidential informants. After describing his participation in the investigation of Gomez and his co-defendants, Monis stated that based on his information, "not only was [Gomez] a member of the North Side Indio [gang], but he was making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley." Monis stated that both the North Side Indio gang and the Mexican Mafia were involved in drug trafficking and handling firearms.

One of the government's confidential informants, Gabe, testified about his meetings with Gomez and other co-conspirators. The jury heard the secret recordings and saw the text messages. Gabe testified that Gomez was "apparently" going to take over Lopez's prior role collecting "taxes" for the Mexican Mafia.[5]

Paul Day, a special agent with the Bureau of Alcohol, Tobacco, and Firearms testified regarding the search of the residence on June 16, 2016. According to Day's testimony, the search uncovered two rounds of ammunition, a firearm, 4.1 grams of methamphetamine, and "sheets of paper with very, very small writing on them," which he said were commonly known as "kites," often used in prison.

Ortiz identified himself as Gomez's parole officer and stated that Gomez was placed on his caseload after his release from state prison in November 2015 for carjacking with the use of a firearm. Ortiz testified that Gomez was a documented member of North Side Indio based on his tattoos and his own admission. Ortiz stated that he discussed the parole conditions (including requirements for drug testing and GPS monitoring, and prohibitions on possession of firearms) with Gomez. Ortiz testified that Gomez's GPS monitoring device was at the location of the sale transaction ***1000** that occurred on February 17, and at the residence where he was arrested on June 16. Ortiz also testified about his participation in Gomez's arrest on June 16, and his observation of the bedroom where Gomez was sleeping, where a firearm and ammunition were found. After Ortiz testified, the government stated that Gomez had stipulated that he had previously been convicted of a felony, an element of Count 4 (charging Gomez with knowingly possessing specified firearms and ammunition after being convicted of one or more felonies).

Finally, Charles Cervello, a supervising investigator with the Riverside County District Attorney's office, testified that he supervised a team tasked with investigating gang narcotic and other violent crimes. Cervello stated that he had expertise on "how gang members interact with narcotics." Cervello testified about the drugs and loaded Smith & Wesson pistol found in the June 16 search of the residence of Gomez's girlfriend. Cervello inferred that the pistol belonged to Gomez based on his "past history, the involvement in prior narcotics sales," and Cervello's opinion that the drugs found in the residence were in a "distribution amount" and possessed for sale. He explained that

> gang members will often arm themselves for various reasons, one of which is to protect from being robbed, because that happens within the criminal community. Another one is to collect debts, meaning if I sold some narcotics and you didn't pay me, I could use the gun to get the money back. And then in some cases also to use to assault law enforcement.

The defense then called Gomez's co-conspirator, Gonzalez, to support Gomez's entrapment defense. Gonzalez testified that on January 13, he met with Gomez, Lopez, and Carmona. Lopez brought a bag filled with brown paper bags to the meeting, and then had a separate meeting with Gomez and Carmona. On January 14, Gomez handed Gonzalez a brown paper bag filled with methamphetamine. Gonzalez testified that he did not know "where Gomez got the meth from." Later that day, Gonzalez gave the bag to Gomez, who sold it to Gabe.

Neither the prosecution nor defense counsel discussed a defense based on entrapment in closing arguments, and the court did not give any instruction on that theory. The court informed the jury that "as of February 17th, 2016, and June 16th, of 2016, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year." The court also instructed the jury that it "may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial," and provided general limiting instructions regarding expert and opinion testimony.

The jury returned guilty verdicts as to Counts 1 through 4. After applying a two-level sentence enhancement under § 2D1.1(b)(1) of the United States Sentencing Guidelines for possession of a firearm during a drug-trafficking offense, the district judge sentenced Gomez to 210 months in prison. Gomez appealed.

The district court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II

On appeal, Gomez argues that the district court erred by allowing the government to offer evidence regarding Gomez's gang affiliation in its case in chief in anticipation of Gomez's entrapment defense, that the district court abused its discretion by allowing Ortiz, Gomez's parole officer, to testify at trial, and that the district ***1001** court erred by applying a two-level enhancement when calculating Gomez's sentence.[6] We consider each of these issues in turn.

A

We first consider whether the government may present evidence in its case in chief to rebut an anticipated entrapment defense.

The Supreme Court has "firmly recognized the defense of entrapment in the federal courts." *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). "Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials," in other words, "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Id.* (internal quotation marks omitted) (quoting *Sorrells v. United States*, 287 U.S. 435, 442, 451, 53 S.Ct. 210, 77 L.Ed. 413 (1932)). By contrast, "the fact that government agents merely afford opportunities or facilities for the commission of that offense does not constitute entrapment." *Id.* (citation and internal quotation marks omitted).

In determining where to draw the line "between the trap for the unwary innocent and the trap for the unwary criminal," *id.*, we have held that the affirmative defense of entrapment has two elements: "[1] government inducement of the crime and [2] absence of predisposition on the part of the defendant" to engage in the criminal conduct, *United States v. Gurolla*, 333 F.3d 944, 951 (9th Cir. 2003). We have defined "inducement" broadly 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." *Id.* at 954 (citation omitted). In examining predisposition, we consider the following five factors: "(1) the character or reputation of the defendant; (2) whether the government made the initial suggestion of criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement." *Id.* at 955. The government has the "burden of proving beyond reasonable doubt that [the defendant] was predisposed to break the law and hence was not entrapped." *Jacobson v. United States*, 503 U.S. 540, 542, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992); *see also United States v. Thickstun*, 110 F.3d 1394, 1396 (9th Cir. 1997).

A defendant need not inform the court of his intent to invoke an entrapment defense. "A simple plea of not guilty puts the prosecution to its proof as to all elements of the crime charged, and raises the defense of entrapment." *Mathews v. United States*, 485 U.S. 58, 64–65, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) (cleaned up).[7] Nor does the defendant have to present ***1002** evidence to support the entrapment defense; rather, the defendant may rely on evidence presented by the government. In *Sherman v. United States*, for instance, the Supreme Court held that "entrapment was established as a matter of law" based solely on "the undisputed testimony of the prosecution's witnesses." 356 U.S. at 373, 78 S.Ct. 819. Similarly, we have explained that "[t]he evidence supporting the entrapment defense need not be presented by the defendant," and that "[e]ven when a defendant presents no evidence of entrapment, it may nonetheless become an issue at his trial if (1) the Government's case-in-chief suggests that the defendant who was not predisposed was induced to commit the crime charged, or (2) a defense or a government witness gives evidence suggesting entrapment." *United States v. Spentz*, 653 F.3d 815, 818 n.2 (9th Cir. 2011) (cleaned up); *see also Gurolla*, 333 F.3d at 956–57 (indicating that even when a criminal defendant did not introduce "affirmative evidence of entrapment," the defendant "may nevertheless be entitled to a jury instruction on that defense should the government's evidence justify such an instruction").

Because in our circuit a defendant can argue that he was entrapped, and may be entitled to an entrapment instruction, based solely on evidence introduced by the government, we do not have a per se rule precluding the government from rebutting an anticipated entrapment defense in its case in chief, because such a rule would be unfair. Said otherwise, a blanket rule "that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant" would "work grave prejudice to the government," because it would allow a defendant to invoke the defense without the government having had an opportunity to rebut it.[8] *United States v. Sherman*, 240 F.2d 949, 952–53 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. at 377–78, 78 S.Ct. 819; *see also United States v. Hicks*, 635 F.3d 1063, 1072 (7th Cir. 2011) (indicating that the government may preemptively rebut an entrapment defense in its case in chief when the defendant "clearly communicate[s] his intention to present an entrapment defense").[9]

***1003** Nevertheless, the government can introduce such evidence in only limited circumstances. We agree with the Second Circuit that evidence rebutting an anticipated entrapment defense "is admissible as part of the prosecution's case in chief" only "where it is clear ... that the [entrapment] defense will be invoked."[10] *Sherman*, 240 F.2d at 952–53. A defendant clearly indicates that he will invoke an entrapment defense when defense counsel "raise[s] the defense of entrapment during his opening statement," *U.S. v. Parkin*, 917 F.2d 313, 316 (7th Cir. 1990), when the entrapment defense materializes "through a defendant's presentation of its own witnesses or through cross-examination of the government's witnesses," *United States v. Goodapple*, 958 F.2d 1402, 1407 (7th Cir. 1992), or when the defendant requests an entrapment instruction or tells the trial judge that he intends to invoke an entrapment defense, *Sherman*, 240 F.2d at 953.[11]

Applying these principles here, we conclude that the district court permissibly allowed the government to present predisposition evidence in its case in chief, because it was sufficiently clear that Gomez would invoke an entrapment defense. Even before the hearing on the motion in limine, Gomez requested an entrapment instruction. At the subsequent hearing, despite the district judge's warnings that doing so would open the door to the government's predisposition evidence, including gang-affiliation evidence, counsel for Gomez stated that he was reserving the right to pursue an entrapment defense. He then sketched out his theory of that defense, based on evidence that Lopez induced Gomez to sell methamphetamine to Gabe. When asked by the court to make his intention clear, Gomez's counsel stated unequivocally that Gomez would "be pursuing an entrapment defense."[12] Unlike in *Hicks*, where the defendant's "counsel discussed the *possibility* of raising an entrapment defense prior to trial," but did not definitively inform the court that he would ***1004** be raising an entrapment defense until after the government rested, 635 F.3d at 1072 (emphasis added), the statement from Gomez's counsel was definitive: Gomez intended to argue that he was entrapped. The government thus proceeded with its case in chief on the belief that Gomez would present an entrapment defense. Finally, during the government's case, Gomez obtained Gonzalez's testimony to support his theory that Lopez had induced Gomez to commit a crime, thus confirming defense counsel's prior indication that Gomez would be pursuing an entrapment defense. This is more than sufficient to make clear that Gomez intended to invoke an entrapment defense.[13]

Because Gomez clearly indicated that he would present an entrapment defense at trial, the district court did not err by allowing the government to preemptively rebut that defense.

B

Even though the district court did not abuse its discretion by giving the government leeway to present evidence rebutting Gomez's anticipated entrapment defense in its case in chief, we must still consider whether the gang-affiliation evidence that the government introduced was admissible.

Predisposition is a material issue in an entrapment case, because "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." *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002) (internal quotation marks omitted). Of the five factors for proving predisposition, *see supra* Section II.A, the most important are "the character and reputation of the defendant," and "whether the defendant showed any reluctance." *United States v. Davis*, 36 F.3d 1424, 1430 (9th Cir. 1994); *see also United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998). We have reasoned that "the well-settled rule that character must be considered is tantamount to a holding that it is an 'essential element' of the defense" of entrapment. *Thomas*, 134 F.3d at 980; *see also Mendoza-Prado*, 314 F.3d at 1103 ("The character of the defendant is one of the elements—indeed, it is an essential element—to be considered in determining predisposition."). Therefore, when a defendant raises an entrapment defense, character, reputation, and lack of reluctance constitute "essential elements" of the entrapment defense.

Under the Federal Rules of Evidence, when evidence of a person's character is admissible, it may be proven "by testimony about the person's reputation or by testimony in the form of an opinion." Fed. R. Evid. 405(a). When character "is an essential element of a charge, claim, or defense," it may be proven by "relevant specific instances of that person's conduct." Fed. R. Evid. 405(b). Because character evidence is both admissible and an essential element of an entrapment defense, it may be proved under Rule 405 of the Federal Rules of Evidence by reputation or opinion testimony, as well as by specific instances of conduct.

The government may meet its burden of proof "through inquiry into the defendant's record of conduct and reputation that he was predisposed to commit the crime and was not an otherwise innocent person who would not have committed the ***1005** crime but for the inducement." *Pulido v. United States*, 425 F.2d 1391, 1393 (9th Cir. 1970). Reputation evidence may include evidence of the defendant's "past and current reputation in the community for involvement in the narcotics trade," including testimony from government agents and confidential informants. *Id.* By the same token, it may also include evidence of the defendant's reputation in the community for involvement in gang activity. "Both the Supreme Court and this court have ruled that evidence of gang affiliation is admissible when it is relevant to a material issue in the case," *United States v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995), and either the Supreme Court or our court has previously admitted gang affiliation evidence when relevant to identity, *id.*; bias, *see United States v. Abel*, 469 U.S. 45, 49, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); coercion, *see United States v. Hankey*, 203 F.3d 1160, 1172–73 (9th Cir. 2000); and motive, *see United States v. Santiago*, 46 F.3d 885, 889 (9th Cir. 1995).[14] Although the government may also present evidence of specific instances of a person's conduct, "[e]vidence of prior acts, whether offered under Rule 404(b) or 405(b) by the prosecution or by the defense, must be sufficiently related and proximate in time to the crime charged to be relevant under Rule 403." *United States v. Barry*, 814 F.2d 1400, 1404 (9th Cir. 1987); *see also Mendoza-Prado*, 314 F.3d at 1103 (holding that "evidence of prior bad acts is not relevant to prove predisposition unless the prior bad acts are similar to the charged crime").

The gang-affiliation evidence that Gomez challenges on appeal focused on two issues.[15] First, the government's witnesses presented evidence that Gomez had a significant role in the North Side Indio gang and the Mexican Mafia, including making a "power play" for control of the streets and taking over a role of collecting taxes. Evidence related to gang paraphernalia at the residence where Gomez was arrested was relevant to showing this affiliation. Second, the witnesses testified that gangs were generally engaged in trafficking in drugs and used firearms in their enterprises, for purposes including protecting themselves, paying debts, and assaulting law enforcement.

This evidence is all relevant to Gomez's character, *see Pulido*, 425 F.2d at 1393, in that it shows Gomez's predisposition to commit drug offenses and to possess and use firearms. It also shows a lack of reluctance to engage in criminal activities related to drug trafficking. In other words, evidence that Gomez had the reputation of having a leadership position in gangs that are heavily involved in drug trafficking, and regularly use guns to facilitate such trafficking, is relevant to rebut Gomez's theory that he had no prior inclination to ***1006** be involved in drug trafficking and to possess a firearm until the government's confidential informants induced him to do so.

The government did not introduce any evidence regarding Gomez's involvement in specific prior gang-related activity. *See Santiago*, 46 F.3d at 889 (holding that general evidence that a defendant was a gang member does not constitute evidence of prior bad acts, subject to Rule 404(b) of the Federal Rules of Evidence). Therefore, we reject Gomez's argument that under our decision in *Mendoza-Prado*, the government's gang-affiliation evidence was inadmissible because it was not sufficiently related to the charged crimes. In *Mendoza-Prado*, we held that the district court erred by admitting the transcript of a videotape in which the defendant bragged about several uncharged crimes that he had committed (namely, theft, extortion, and aiding a prison escape), when the crimes bore "little relationship to the drug-trafficking crimes with which [the] [d]efendant was charged." 314 F.3d at 1104. We held that when a defendant raises an entrapment defense, the government can introduce evidence of specific instances of prior conduct under Rule 405(b) of the Federal Rules of Evidence, but only when the prior bad acts are similar to the charged crimes. *Id.* *Mendoza-Prado*'s ruling does not apply here, because the government's gang-affiliation witnesses did not identify any specific prior crimes or bad acts of Gomez to show that Gomez had a propensity to commit similar bad acts. Rather than rely on Rule 405(b), the government's testimony was permissible under Rule 405(a), as evidence about Gomez's reputation and character.

We also reject Gomez's argument that the gang-affiliation evidence was unfairly prejudicial. We give great deference to district courts when considering the admissibility of gang-affiliation evidence. "Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact." *Abel*, 469 U.S. at 54, 105 S.Ct. 465. If a defendant invokes an entrapment defense, "he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells*, 287 U.S. at 451, 53 S.Ct. 210. If, as a consequence of the defendant's decision to invoke the defense, "he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense." *Id.* at 452, 53 S.Ct. 210; *see also United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987) (emphasizing that it is "disingenuous and inconsistent" for a defendant to indicate that he will pursue an entrapment defense and then fault the government for rebutting that defense). Here, the gang-affiliation evidence was not admitted for an improper purpose, such as "to prove a substantive element of a crime," *Hankey*, 203 F.3d at 1172, or to prove "intent or culpability," *Kennedy v. Lockyer*, 379 F.3d 1041, 1055 (9th Cir. 2004). Nor was it introduced to prove "guilt by association," because it was not offered to prove that Gomez was guilty of the charged crimes. *See id.* at 1056 (internal quotation marks omitted); *see also Santiago*, 46 F.3d at 889 (holding that where gang-affiliation evidence was not "the entire theme of the trial," it did not "infect the trial with the threat of guilt by association") (cleaned up). Giving "considerable deference" to the district court's decision to allow the government to present gang-affiliation evidence, we hold that the district court did not abuse its discretion in admitting the evidence. *United States v. Cordoba*, 194 F.3d 1053, 1063 (9th Cir. 1999) (citation omitted).

***1007** III

We next consider whether, assuming without deciding that the district court erred by allowing Gomez's parole officer to testify at trial, any such error is grounds for reversing Gomez's conviction.

Gomez argues that the admission of Ortiz's testimony was irrelevant and unfairly prejudicial. As with Gomez's challenge to the admission of the gang-affiliation evidence, the district court's determination as to the admissibility of this evidence under Rule 403 of the Federal Rules of Evidence is reviewed for an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1267 (9th Cir. 2009).

We weigh the probative value of a parole officer's testimony against its prejudicial effect on a case-by-case basis. *See United States v. Bagley*, 641 F.2d 1235, 1240 (9th Cir. 1981) (holding that under the circumstances of that case, the probation officer's testimony was not prejudicial); *United States v. Butcher*, 557 F.2d 666, 669–70 (9th Cir. 1977)

(balancing the probative value against the potential prejudice of police and parole-officer testimony, and ultimately determining that the testimony was admissible).[16]

Applying Rule 403, we have recognized that allowing a parole or probation officer to testify may have a prejudicial effect because it raises the inference that the defendant had a prior criminal conviction. *See United States v. Pavon*, 561 F.2d 799, 802 (9th Cir. 1977) (holding that "the jury could readily infer that [the defendant] had a prior criminal conviction" from the fact that the defendant's probation officer testified). Just as "[d]irect evidence of a defendant's past crimes is not admissible" absent an exception, *Pavon* reasoned that "evidence pointing strongly to an inference to the same effect should also be excluded." *Id.* Because we could not identify any applicable past-crimes exception and because the prosecution "could have presented the same evidence without calling the parole officer as a witness," *Pavon* held that the probative value of the parole officer's testimony was substantially outweighed by its prejudicial effect, and therefore that the testimony should have been excluded. *See id.* As suggested by *Pavon*, however, a district court may allow a probation officer to testify if the inference raised by such testimony (i.e., that the defendant has a prior conviction) is permissible, such as when a defendant's past crimes or character is at issue in the trial. *See, e.g.*, *Bagley*, 641 F.2d at 1240.

Here, even assuming the district court erred in admitting Ortiz's statement that Gomez had been convicted of a carjacking offense, any such error was harmless. *See Pavon*, 561 F.2d at 803. We may raise harmless error sua sponte in consideration of "(1) the length and complexity of the record, (2) whether the harmlessness of an error is certain or debatable, and (3) the futility and costliness of reversal and further litigation." *United States v. Rodriguez*, 880 F.3d 1151, 1164 (9th Cir. 2018) (cleaned up). The certainty of the harmlessness is the most important factor. *Id.*

The evidence against Gomez was overwhelming. All of the relevant transactions and meetings between Gomez and one or more of the government's informants were secretly recorded. The jury heard those ***1008** recordings. The government also conducted surveillance of the meetings and transactions. Further, Gabe, who was present for the transactions and involved in the sales of methamphetamine and firearms, testified against Gomez. The jury also heard recordings of conversations and saw text messages between Gomez and Gabe. Finally, co-defendant Gonzalez testified that he watched Gomez sell Gabe methamphetamine and a firearm. Based on this evidence, "the harmlessness of any error is clear beyond serious debate and further proceedings are certain to replicate the original result." *United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005). Further, the record of Gomez's two-day trial is not especially long or complex, and reversal would be both costly and futile. Therefore, we conclude that any error related to Ortiz's testimony was harmless.

IV

Finally, we consider whether the district court erred by applying a two-level sentence enhancement under § 2D1.1(b)(1) of the United States Sentencing Guidelines.

Section 2D1.1 applies to Gomez's drug-trafficking offenses, and § 2D1.1(b) provides the specific offense characteristics for such offenses. Under the guidelines, specific offense characteristics are determined on the basis of all relevant conduct, broadly defined, that occurred in relation to the offense of conviction. *See* U.S.S.G. § 1B1.3(a).[17]

Under § 2D1.1(b)(1), "[i]f a dangerous weapon (including a firearm) was possessed," a two-level enhancement is applicable. *Id.* § 2D1.1(b)(1). We have interpreted the § 2D1.1(b)(1) enhancement broadly. We have held that possession of the firearm may be actual or constructive, *United States v. Lopez-Sandoval*, 146 F.3d 712, 714–15 (9th Cir. 1998), and that the firearms and drugs need not "be found in proximity to each other," *United States v. Willard*, 919 F.2d 606, 610 (9th Cir. 1990). Even when defendants were arrested miles away from the firearms stored at their homes or places of business, we held that the defendants possessed weapons during the commission of the drug-trafficking offenses for purposes of this sentencing enhancement. *Lopez-Sandoval*, 146 F.3d at

715; *see also United States v. Stewart*, 926 F.2d 899, 901–02 (9th Cir. 1991).

Application Note 11 to § 2D1.1(b)(1) provides that "[t]he enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1) comment n.11(A). "For example, the enhancement would not be applied if the defendant, arrested at the defendant's residence, had an unloaded hunting rifle in the closet." *Id.* The application note ***1009** also states that this enhancement "reflects the increased danger of violence when drug traffickers possess weapons." *Id.* We have also interpreted this application note broadly. In determining whether the weapon "was connected with the offense," *id.*, we have concluded that the "offense" in this context refers to "the entire course of criminal conduct," not just the crime of conviction, *Willard*, 919 F.2d at 609–10. This is consistent with the broad language of § 1B1.3, which provides that specific offense characteristics such as § 2D1.1(b)(1) take into account all acts and omissions that occurred "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(1)(B). We have also held that the fact that a firearm was unloaded does not make it "clearly improbable that the weapon was connected to" the drug offense. *Lopez-Sandoval*, 146 F.3d at 716 (cleaned up).

Here, the probation office's Presentence Investigation Report (PSR) recommended a sentence enhancement under § 2D1.1(b)(1) for two reasons. First, on January 14, 2016, Carmona provided Gabe with a firearm "just minutes before Gomez, Gonzalez, and Carmona sold [Gabe] methamphetamine." Second, on February 17, 2016, Gomez sold Gabe the firearm and the methamphetamine at the same time. In his objections to the PSR, Gomez argued that the two-level enhancement was improper because there was no evidence that he had been involved in Carmona's sale of a firearm to Gabe at the January 14 transaction. Gomez did not mention the sale of the firearm during the February 17 transaction. The district court adopted the PSR's recommendation and applied the enhancement at sentencing.

On appeal, Gomez argues that it was "clearly improbable that the weapon was connected with the offense," U.S.S.G. § 2D1.1(b)(1) comment n.11(A), and therefore that the enhancement was inappropriate. He reasons that if he were using the firearms for the purpose of protecting or facilitating the drug transaction, they would not be unloaded and would not be sold to the drug buyer. In making this argument, he relies on *United States v. Lagasse*, a First Circuit opinion holding that a defendant's use of a knife to rob other members of the conspiracy did not facilitate the offense conduct, and so could not be the basis for a sentencing enhancement. *See* 87 F.3d 18, 23 (1st Cir. 1996). Gomez also argues that he could not be responsible for the January 14 incident, because Carmona, not Gomez, sold the firearm to Gabe.

We review the district court's finding that the defendant possessed a firearm during the commission of a drug offense for clear error. *See United States v. Garcia*, 909 F.2d 1346, 1349 (9th Cir. 1990).[18] We conclude that the district court's § 2D1.1(b)(1) enhancement was not clearly erroneous here. Because an enhancement under § 2D1.1(b)(1) can be appropriate "based on all of the offense conduct, not just the crime of conviction," *United States v. Boykin*, 785 F.3d 1352, 1364 (9th Cir. 2015), we may determine whether any of Gomez's underlying offense conduct was sufficient to justify the enhancement.[19]

***1010** During the February 17 transaction, Gomez possessed a firearm to sell to Gabe, and the weapon was present during the drug-trafficking offense. Therefore, the enhancement was applicable "unless it is clearly improbable that the weapon was connected with the offense." U.S.S.G. § 2D1.1(b)(1) comment n.11(A). Unlike the example of a hunting rifle locked in a closet, *id.*, the firearm here was connected to the offense, because the sale of the firearm and methamphetamine were bundled together. Under our case law, the government does not have to establish that the defendant possessed the firearm for the purpose of protecting or facilitating the drug transaction. Indeed, the firearms need not be "involved in the crime of conviction." *Willard*, 919 F.2d at 609; *cf. Smith v. United States*, 508 U.S. 223, 235, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) (holding that a person who sells a firearm "uses" it within the meaning of 18 U.S.C. § 924(d)(1) "even though those actions do

not involve using the firearm as a weapon"). Nor is it relevant that the firearms were unloaded. *Lopez-Sandoval*, 146 F.3d at 714–15. *Lagasse* is not to the contrary; rather, it held that possession of a firearm that was adverse to the offense of conviction was not connected to that offense. 87 F.3d at 23. Therefore, the district court did not err in applying the two-level § 2D1.1(b) enhancement to Gomez's sentence.

AFFIRMED.

STEELE, District Judge, dissenting:

In my view, the trial court committed reversible error by allowing the government to present evidence to the jury in its case-in-chief to "rebut" an anticipated entrapment defense which was never presented by the defendant. Given the overwhelmingly prejudicial nature of that evidence, the harmless error doctrine cannot save the government's convictions. Accordingly, I would reverse the convictions in this case, remand for a new trial, and not reach the other issues raised by appellant.

I.

This case presents a relatively common fact-pattern involving illegal drugs and guns. Law enforcement officers utilized the services of two informants to negotiate for and ultimately purchase quantities of methamphetamine and firearms from three persons. Law enforcement officers surveilled the transactions and made recordings of the transactions. Three participants were indicted on various federal charges, two of whom resolved their case with guilty pleas.

In April 2018 appellant Gomez adopted a co-defendant's *in limine* motion to preclude the government from offering the testimony of a gang expert. The government responded that it did not intend to introduce such testimony at trial, but reserved the right to introduce evidence of gang membership or affiliation on rebuttal should it become necessary. Specifically, the government asserted that it "would elicit such testimony during rebuttal only if defendants were to raise a defense, such as entrapment ...." The co-defendant ultimately plead guilty and the motion was never decided by the trial court.

In August 2018 Gomez filed his own motion *in limine* to preclude the government from introducing evidence about the *modus operandi* of gang members and indicia of gang membership. The government ***1011** opposed the motion, in part because it appeared Gomez was pursuing an entrapment defense and such evidence was relevant to that defense.

On April 1, 2019, the day before trial, the trial judge heard oral arguments on Gomez's motion *in limine*. The court asked new defense counsel whether an entrapment defense was being pursued, and counsel stated he was leaving that option open. The trial court gave defense counsel until the morning of trial to decide whether an entrapment defense would be pursued. On the morning of trial, defense counsel stated Gomez would be pursuing an entrapment defense. The trial court then denied Gomez's motion *in limine*, indicated that the gang-related evidence would be admitted in its entirety in the government's case-in-chief, and granted Gomez a standing objection to the gang-related evidence.

Defense counsel did not give an opening statement prior to the beginning of the government's evidence, and therefore did not assert an entrapment defense to the jury. The government wasted no time, however, in "rebutting" the anticipated entrapment defense. The government's first witness testified he worked for the district attorney's office and investigated major organized crime, which he described as "gang members within the prison and the street-level-type of environment." The investigator testified his unit focused "on the worst of the worst," and identified Gomez as a member of the North Side Indio gang and the Mexican Mafia. The investigator also testified that Gomez was on parole and his parole officer supervised "high risk gang members" and "higher-level gang members in the community." The investigator also testified he had received information that Gomez was "making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley." Finally, the investigator testified that both the North Side Indio and the Mexican Mafia are involved in drug trafficking and handling firearms.

The government's next witnesses continued the testimony about gangs and Gomez's membership in

gangs. One of the confidential informants testified that Gomez was apparently going to take over collecting taxes for the Mexican Mafia. Gomez's parole officer testified his caseload was "strictly with documented street gang members" and that Gomez was a documented member of the North Side Indio gang, a gang known for "criminal activities." The parole officer also testified that Gomez had been released from state prison after a carjacking conviction. A supervising investigator for the district attorney's office, who was qualified as an expert in drug trafficking, testified about the "close correlation between gangs and narcotics." The investigator also testified about the relationship between firearms and gangs and the various reasons why gang members arm themselves, which included "to use to assault law enforcement."

Gomez was unable to support an entrapment defense through cross examination of the government's witnesses. As it turned out, the witness called by Gomez also did not support an entrapment defense. In a determination which is unchallenged by Gomez, the trial court held there was insufficient evidence to allow an entrapment defense to be decided by the jury, and declined to give any jury instruction concerning entrapment. Gomez was convicted of all counts submitted to the jury.

II.

It is clear that gang-related evidence may be admissible in some situations. "Both the Supreme Court and this court have ruled that evidence of gang affiliation is admissible when it is relevant to a material ***1012** issue in the case." *U.S. v. Easter*, 66 F.3d 1018, 1021 (9th Cir. 1995). Rebutting an entrapment defense may be one such situation.

The majority correctly discusses the general principles relating to entrapment, including that a defendant may rely upon the government's evidence in its case-in-chief to establish an entrapment defense and that there are limited circumstances which allow the government to introduce entrapment rebuttal evidence in its case-in-chief. My disagreement is with the finding that this case falls within such limited circumstances. While defense counsel told the trial court and the government that entrapment would be a defense and submitted a proposed jury instruction before trial, this alone is insufficient to allow introduction of rebuttal evidence in the government's case-in-chief. I am not persuaded by the only decision cited by the majority which supports the admission of such evidence. *United States v. Sherman*, 240 F.2d 949, 952–53 (2d Cir. 1957), *rev'd on other grounds*, *Sherman v. United States*, 356 U.S. 369, 377–78, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The difficulty here is that the trial court admitted the totality of the government's anti-entrapment evidence before Gomez had uttered a single word to the jury suggesting entrapment or introduced any evidence suggesting entrapment. *See United States v. Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981) ("Although the government normally may not introduce evidence of a defendant's predisposition to engage in criminal activity in its case in chief, it may do so once a defendant submits some evidence which raises the possibility that he was induced to commit the crime." (marks and citation omitted)); *see also United States v. Cohen*, 489 F.2d 945, 950 (2d Cir. 1973) (holding government was entitled to anticipate entrapment defense and prove predisposition and propensity when defense counsel raised the issue of entrapment in his opening statement); *United States v. Brown*, 453 F.2d 101, 108 (8th Cir. 1971) ("The defense of entrapment may be raised by cross-examination of the Government's witnesses."). And in the end, no evidence of entrapment was ever presented to the jury. *See United States v. Hicks*, 635 F.3d 1063, 1071–72 (7th Cir. 2011) (holding evidence of prior convictions was inadmissible in government's case-in-chief because although defense counsel discussed the possibility of raising an entrapment defense prior to trial, "the entrapment defense did not materialize until the defense presented its case"); *United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987) ("We agree that it was error for the district court to allow the government to introduce rebuttal evidence in its case-in-chief in anticipation of an entrapment defense that was proposed, but that never actually materialized.").

In this case, defense counsel did not inform the jury of entrapment in an opening statement (counsel did not give one prior to the government's evidence). The evidence presented by the government did not support an entrapment defense. Gomez's witness did not support an entrapment defense. The lack of

entrapment evidence caused the trial court to properly decline to give a requested entrapment jury instruction. While Gomez may have been sufficiently clear that he intended to invoke an entrapment defense, he did not actually do so. Thus, in this case the government rebutted an issue which was not presented to the jury with highly inflammatory and prejudicial evidence which cannot be said to have been harmless.

While the majority is concerned with the possibility of sandbagging by a defendant, that did not occur in this case. Additionally, a trial court has the ability to control ***1013** the proceedings and certainly can allow the government to re-open its case under proper circumstances. *See Dietz v. Bouldin*, —— U.S. ——, 136 S.Ct. 1885, 1891, 195 L.Ed.2d 161 (2016) ("[A] district court possesses inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)). Further, it is well-established that rulings on motions *in limine* can be changed as a case proceeds. *See Luce v. United States*, 469 U.S. 38, 41–42, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984) ("The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.").

I would reverse the convictions in this case, remand for a new trial, and not reach the other issues raised by appellant.

All Citations

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Footnotes

* The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

1 The first indictment charged Gomez, Carmona, and Gonzalez with five criminal counts. The operative first superseding indictment charged only Gomez and Gonzalez, and included seven criminal counts.

2 At the close of trial, the district court dismissed Counts 5, 6, and 7 due to insufficient evidence.

3 The government argued to the district court in its March 2019 trial memorandum, that, "if the [district court did] not preclude an entrapment defense pre-trial, then the government must be permitted to present evidence regarding ... the defendant's predisposition ... in its case in chief," giving notice to the district court and Gomez. Therefore, it is irrelevant that a year before Gomez's trial the government responded to Gomez's *co-defendant's* motion in limine by stating it intended to offer gang expert testimony during rebuttal only if the co-defendant were to raise an entrapment defense. *See* Dissent at 1012-13.

4 Indeed, a few days before trial, the parties submitted joint proposed jury instructions that included an entrapment instruction.

5 In this context, the fees paid by retail drug sellers for the privilege of selling drugs in an area controlled by the Mexican Mafia are called "taxes," and the person who collects the fees is called a "tax collector."

6 We address and reject Gomez's remaining challenges in a memorandum disposition filed concurrently with this opinion. —— Fed. App'x ——.

7 When a defendant notifies the court of his intent to invoke an entrapment defense, "[a] district court may require a defendant to submit a pretrial offer of proof on an entrapment defense." *Gurolla*, 333 F.3d at 951 n.8. If the defendant's offer of proof is "insufficient to establish all the elements of the defense," *United States v. Arellano-Rivera*, 244 F.3d 1119, 1125 (9th Cir. 2001), the "district court may preclude him from presenting

the defense at trial," *Gurolla*, 333 F.3d at 951 n.8. Nevertheless, at the close of trial, a defendant may raise the entrapment defense if the evidence raised at trial supports it. *Id.* at 956–57.

8 The potential that a district court could address prejudice to the government in a different way, by allowing the government to re-open its case if the defendant raised the entrapment defense in closing argument, *see* Dissent at 1012-13, does not have a direct bearing on our conclusion that a per se rule precluding the government from introducing rebuttal evidence in its case in chief would be unfair.

9 *Hicks* does not support the dissent's argument that the government may not introduce predisposition evidence to rebut an anticipated entrapment defense in its case in chief. Dissent at 1012-13. In *Hicks*, the Seventh Circuit held that the district court erred in permitting the government to introduce evidence of the defendant's prior drug convictions. 635 F.3d at 1073. The court rejected the government's argument that the evidence was admissible to rebut an entrapment defense, because the defendant had not placed the issue of entrapment into controversy. *Id.* at 1071–72. Although the defendant "discussed the possibility of raising an entrapment defense prior to trial," he "did not refer to his entrapment defense during an opening statement, which he waived, nor during the government's case-in-chief," and "it was not until after the convictions came in at the close of the government's case-in-chief," that the defendant "definitively informed the court that he would be raising an entrapment defense." *Id.* at 1072. The Seventh Circuit concluded that had the defendant "clearly communicated his intention to present an entrapment defense before the convictions were allowed into evidence, the government's contention that the convictions were admissible to show predisposition would have more force," but the defendant "did not do so." *Id.*

10 The Seventh Circuit has similarly suggested that the government may preemptively rebut an entrapment defense in its case in chief when the defendant "clearly communicate[s] his intention to present an entrapment defense." *Hicks*, 635 F.3d at 1072.

11 Contrary to this authority, the Eighth Circuit has held that it is "error to permit the government in its case-in-chief to introduce evidence of predisposition, which is properly admissible only as rebuttal of the entrapment defense." *See United States v. McGuire*, 808 F.2d 694, 696 (8th Cir. 1987). But in the Eighth Circuit, such a rule does not raise the risk, present in our circuit, that a defendant will sandbag the government by electing not to introduce any evidence of entrapment and then raising the defense in closing argument based on the government's evidence. That is because in the Eighth Circuit, "[t]he defendant carries the initial burden of presenting some evidence that he or she was induced by government agents to commit the offense." *United States v. Abumayyaleh*, 530 F.3d 641, 646 (8th Cir. 2008) (citation omitted). Consistent with *Mathews*, we take a different approach to the defendant's burden of raising an entrapment defense, and thus we decline to follow the Eighth Circuit's per se rule precluding the government's rebuttal of an anticipated entrapment defense.

12 On appeal, Gomez states, in a cursory footnote, that the district court cannot require a defendant to elect before trial whether it will present an entrapment defense. Because we review only issues that are argued specifically and distinctly in a party's opening brief, *see Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986), we decline to address this issue here. Moreover, Gomez failed to raise this issue to the district court, and because there is no binding authority holding that a district court cannot require a defendant to make such an election, the district court did not plainly err in requiring Gomez to inform the court of his intent. *See United States v. Depue*, 912 F.3d 1227, 1234 (9th Cir. 2019).

13 There is no support for the dissent's suggestion that the defendant must inform the jury—not just the district court—that the defendant intends to raise an entrapment defense, Dissent at 1012-13, before the court may allow the government to introduce rebuttal evidence in its case-in-chief. *Cf. Hicks*, 635 F.3d at 1072.

14 Several of these cases dealt explicitly with impeachment evidence. *See, e.g.*, *Abel*, 469 U.S. at 49, 105 S.Ct. 465; *Hankey*, 203 F.3d at 1172–73.

15 Gomez challenged five items of gang-affiliation evidence: (1) Gomez was a member of the Mexican Mafia and North Side Indio gangs; (2) Gomez "was making a power play under the umbrella of the Mexican Mafia

for control of the streets within the Coachella Valley," and he was going to take over "collect[ing] taxes for the Mexican Mafia" from Lopez; (3) Gomez was a "high risk individual"; (4) gang members like Gomez arm themselves with guns to, among other things, "assault law enforcement"; and (5) in his bedroom, Gomez had photographs of men making gang signs, "kites" with surreptitious prison communications, and a police report related to two Mexican Mafia associates. Gomez also challenges Ortiz's testimony about Gomez's prior conviction for carjacking with a firearm, but this testimony does not relate to gang affiliation. As discussed below, we conclude that any error in admitting that testimony was harmless.

16 Several of our sister circuits take a similar approach. *See* *United States v. Contreras*, 536 F.3d 1167, 1171–72 (10th Cir. 2008) (rejecting a per se rule); *United States v. Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993) (same); *United States v. Garrison*, 849 F.2d 103, 107 (4th Cir. 1988) (same); *United States v. Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984) (same).

17 Section 1B1.3(a)(1) provides that "specific offense characteristics ... shall be determined on the basis of the following":

> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity;
>
> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

18 Because Gomez did not mention the February 17 transaction in his objections to the PSR, the government argues that we should review the district court's application of the § 2D1.1(b)(1) enhancement for plain error. Because we conclude that there is no error at all, let alone plain error, we do not reach this issue.

19 Therefore, we do not need to reach the question whether the enhancement was appropriately tied to the January 14 transaction. Even if we reached this issue, however, we would conclude that it would also be appropriate to impose a sentencing enhancement on Gomez for the sale of the firearm during the January 14 transaction, due to Gomez's involvement in a jointly undertaken criminal activity. *See* U.S.S.G. § 1B1.3.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIO CESAR GOMEZ, Defendant-Appellant.	No. 19-50313 D.C. No. 2:16-cr-00401-ODW-1 Central District of California, Los Angeles ORDER

Before: M. SMITH and IKUTA, Circuit Judges, and STEELE,* District Judge.

Judge M. Smith and Judge Ikuta voted to deny the petition for rehearing. Judge Steele voted to grant the petition for rehearing. Judge M. Smith and Judge Ikuta voted to deny the petition for rehearing en banc, and Judge Steele recommended granting the petition for rehearing en banc.

The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.