No. 22-5150

IN THE SUPREME COURT OF THE UNITED STATES

JULIO CESAR GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in allowing the government to introduce predisposition evidence during its case-in-chief where, as the court of appeals observed (Pet. App. 36), petitioner "stated unequivocally" before trial that he would be raising an entrapment defense and "confirm[ed]" that "prior indication" by "obtaining * * * testimony to support" that theory.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Gomez, No. 16-cr-401 (Sept. 20, 2019)

United States Court of Appeals (9th Cir.):

United States v. Gomez, No. 19-50313 (July 28, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31-45) is reported at 6 F.4th 992. An accompanying memorandum disposition is not published in the Federal Reporter but is available at 2021 WL 3204461.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2021. A petition for rehearing was denied on February 17, 2022 (Pet. App. 46). On April 25, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 17, 2022. The petition for a writ of certiorari

was filed on July 15, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of conspiring to possess with intent to distribute and to distribute methamphetamine, in violation of 21 U.S.C. 846; two counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); and one count of unlawfully possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 34; Judgment 1. The district court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised released. Ibid. The court of appeals affirmed. Pet. App. 31-45.

1. On January 7, 2016, petitioner and co-defendant Angel Carmona met with two confidential informants, CI-5 and CI-489, in Cathedral City, California. Pet. App. 32. During the meeting, the informants wore concealed recording devices and recorded petitioner and Carmona agreeing to sell them methamphetamine the following week. Ibid. Petitioner added that his co-defendant Steven Gonzalez might be able to sell a firearm to CI-489. Ibid.

A week later, petitioner, Carmona, and Gonzalez sold the informants a quarter pound of methamphetamine, and Carmona sold CI-5 a firearm. Pet. App. 32. The informants again secretly

recorded this meeting, and law enforcement tracked the participants' location using a GPS device installed in the informants' vehicle. Ibid.

After the second meeting, petitioner and CI-489 exchanged text messages about future firearm and drug transactions. Pet. App. 32. On February 17, 2016, petitioner met with CI-489 and, after negotiating the quantity and pricing, sold him a Smith & Wesson rifle and 222.9 grams of methamphetamine. Ibid. CI-489 secretly recorded this transaction. Ibid.

On June 16, 2016, law enforcement officers arrested petitioner at his girlfriend's home, where they found a loaded Smith & Wesson pistol, a box of ammunition, and 3.23 grams of methamphetamine in the bedroom. Pet. App. 32.

2. A grand jury in the Central District of California returned a superseding indictment charging petitioner with one count of conspiring to possess methamphetamine with intent to distribute and distributing methamphetamine, in violation of 21 U.S.C. 846; two counts of distributing methamphetamine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(viii); one count of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); two counts of unlawfully possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and one count of unlawfully possessing a firearm in furtherance of a drug trafficking crime,

in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Superseding Indictment 1-9.

Petitioner moved to dismiss the superseding indictment asserting outrageous government misconduct and entrapment on the theory that CI-5 had coerced and encouraged petitioner to sell firearms and methamphetamine to the other informant, CI-489. Pet. App. 32-33; see D. Ct. Doc. 162, at 4-5 (Apr. 3, 2018). In support of his motion, petitioner submitted a declaration by Carmona claiming that CI-5 gave petitioner the methamphetamine that petitioner later sold to CI-489 on January 14, 2016. Pet. App. 32-33.

At a hearing on petitioner's motion to dismiss, petitioner explained how the evidence would "play into the entrapment defense at trial." C.A. E.R. 57. Petitioner told the district court that he would highlight CI-5's informant agreement with the government, which he characterized as a "coercive incentive" for CI-5 to supply the drugs that petitioner would then sell to CI-489. Ibid. Petitioner also explained that he would highlight how lack of law enforcement monitoring had enabled CI-5 to "seduce" petitioner, "influenc[e] him, and intimidate him to engage in this conduct." Ibid. Finally, petitioner claimed that he would "prove * * * at trial" that CI-5 was a Mexican Mafia affiliate. Ibid.

The district court denied petitioner's motion to dismiss. Pet. App. 33; C.A. E.R. 65. After the court announced its ruling,

counsel for petitioner responded, "I just want to make sure I'm able to present my entrapment defense at trial," and maintained, "I have enough to go to trial on it," including through the testimony of the government's witnesses. C.A. E.R. 62, 67. Petitioner also proposed three voir dire questions regarding entrapment, id. at 87-88, and a jury instruction on entrapment, id. at 94.

Before trial, the government filed a notice that it intended to call petitioner's parole officer to testify in the government's case-in-chief about the location-monitoring equipment used by petitioner as a condition of his parole, among other topics. Pet. App. 33; D. Ct. Doc. 158, at 11-12 (Mar. 26, 2018). Over petitioner's objection, the district court ruled that the officer's testimony was admissible. Pet. App. 33. The government also notified petitioner that it intended to present expert testimony about drug trafficking and gangs. D. Ct. Doc. 161-1, at 2 (Apr. 2, 2018). Petitioner filed a motion in limine to preclude the government from introducing gang-affiliation evidence. Pet. App. 33; D. Ct. Doc. 161 (Apr. 2, 2018); D. Ct. Doc. 171 (Apr. 4, 2018). In response, the government explained that the testimony would be evidence of predisposition that would rebut petitioner's anticipated entrapment defense. Pet. App. 33.

The day before trial, the district court heard arguments on petitioner's motion in limine. Pet. App. 33. The court indicated

it would likely exclude expert testimony on drugs and gangs if petitioner was not going to pursue an entrapment defense. Ibid. Counsel for petitioner said that he was "leaving open" whether to pursue an entrapment defense based on the theory that CI-5 facilitated petitioner's drug sale to CI-489. Ibid. Counsel for petitioner told the court that the theory could come through petitioner's testimony or from "some other evidence that may come out during the government's case in chief." Ibid. The court reserved ruling on petitioner's evidentiary motion until the next morning, by which time it required petitioner to "declare * * * whether [he] intended to raise an entrapment defense." Ibid.

The next morning, the district court asked petitioner whether he intended to pursue an entrapment defense. Pet. App. 33. Petitioner's counsel informed the court: "We will be pursuing an entrapment defense." C.A. E.R. 160-161; Pet. App. 33. Based on that representation, the court denied petitioner's motion in limine. Pet. App. 33.

At trial, petitioner did not give an opening statement. Pet. App. 33. During the government's case-in-chief, petitioner elicited testimony from government witnesses on topics consistent with the entrapment theory that he had described before the trial. During his cross-examination of the government's first witness, petitioner asked about the coercive nature of CI-5's informant contract, law enforcement's lack of monitoring of CI-5, CI-5's

association with the Mexican Mafia, and whether CI-5 supplied the drugs petitioner sold to CI-489 in January 2016. See C.A. Gov't E.R. 341-344, 351-359, 373, 379-380. Petitioner also asked questions suggesting that the amount of drugs petitioner sold to CI-489 was not petitioner's idea and that petitioner exhibited reluctance at various points during the transaction. Id. at 458, 463, 475, 512-514. In the middle of trial, after the district court observed that petitioner's "[e]ntrapment defense got blown up a long time ago," counsel for petitioner responded, "We're working on reviving it just so the Court is clear." Id. at 540-541.

Petitioner's only defense witness was his co-defendant Gonzalez. Pet. App. 34; C.A. Gov't E.R. 589-606. Gonzalez testified that on January 13, 2016, he met with petitioner, Carmona, and CI-5. Pet. App. 34; C.A. Gov't E.R. 594. According to Gonzalez, CI-5 brought a bag filled with brown paper baggies and had a separate meeting with petitioner and Carmona. Pet. App. 34; C.A. Gov't E.R. 596. Gonzalez testified that the next day, petitioner had asked Gonzalez to hold a brown paper bag filled with methamphetamine, which he later retrieved and sold to CI-489. See Pet. App. 34; C.A. Gov't E.R. 598-605. Gonzalez further testified that "[t]o [his] knowledge," the methamphetamine petitioner sold to CI-489 "came from" CI-5, C.A. Gov't E.R. 600; see id. at 598-600, although he was not sure, id. at 601.

After Gonzalez testified, petitioner renewed his request for an entrapment instruction. C.A. Gov't E.R. 606. The district court declined to give the requested instruction, ibid., and neither party referenced entrapment or predisposition during their closing arguments, Pet. App. 34. The jury returned guilty verdicts on the conspiracy count, two counts of distributing methamphetamine, and the Section 922(g)(1) offense. Ibid.; Judgment 1. The court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Ibid.

3. The court of appeals affirmed. Pet. App. 31-45.[1]

The court of appeals found that the district court did not abuse its discretion in permitting predisposition evidence during the government's case-in-chief because petitioner "clearly indicated that he would present an entrapment defense." Pet. App. 36. The court observed that circuit precedent allows a defendant to argue that he was entrapped, and receive an entrapment instruction, based solely on evidence adduced in the government's case-in-chief. Ibid. And it explained that it therefore had no "per se rule precluding the government from rebutting an anticipated entrapment defense in its case in chief," which "would

[1] In addition to the published opinion included in the Petition Appendix, the court of appeals also entered an unpublished memorandum disposition addressing issues relating to voir dire and the jury instructions. See 2021 WL 3204461. The petition for a writ of certiorari does not seek review of the court's disposition of those issues.

allow a defendant to invoke the defense without the government having had an opportunity to rebut it." Ibid.

The court of appeals emphasized, however, that the government may introduce predisposition evidence only in "limited circumstances * * * 'where it is clear . . . that the [entrapment] defense will be invoked.'" Pet. App. 36 (quoting United States v. Sherman, 240 F.2d 949, 952-953 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 369 (1958)) (brackets in original).

The court of appeals explained that a "defendant clearly indicates that he will invoke an entrapment defense" when he "raise[s] the defense * * * during his opening statement," the "defense materializes 'through a defendant's presentation of [his] own witnesses or through cross-examination of the government's witnesses,'" or "the defendant requests an entrapment instruction or tells the trial judge that he intends to invoke an entrapment defense." Pet. App. 36 (quoting United States v. Parkin, 917 F.2d 313, 316 (7th Cir. 1990); and United States v. Goodapple, 958 F.2d 1402, 1407 (7th Cir. 1992); citing Sherman, 240 F.2d at 953) (first set of brackets in original).

"Applying these principles," the court of appeals determined that the district court "permissibly allowed the government to present predisposition evidence in its case in chief, because it was sufficiently clear that [petitioner] would invoke an entrapment defense." Pet. App. 36. The court of appeals observed

that "[e]ven before the hearing on the motion in limine, [petitioner] requested an entrapment instruction"; that in response to the district court's request "to make his intention clear," his counsel had "stated unequivocally that [he] would be pursuing an entrapment defense"; and that the entrapment-relevant evidence that he adduced at trial "confirm[ed] defense counsel's prior indication that [he] would be pursuing an entrapment defense." Ibid. (internal quotation marks omitted).

The court of appeals also rejected petitioner's argument that the district court had erred in permitting testimony by petitioner's parole officer. See Pet. App. 38-39. "[A]ssuming without deciding that the district court erred" by allowing the testimony, the court held that any such error was harmless here in light of the "overwhelming" evidence of petitioner's guilt. Ibid. The court explained that "[t]he jury heard" recordings of "[a]ll of the relevant transactions and meetings between [petitioner]" and the confidential informants. Id. at 39. The government also presented other evidence from its "surveillance of the meetings and transactions"; "text messages" and "recordings of conversations * * * between" petitioner and CI-489; testimony by CI-489; and testimony from petitioner's co-defendant, Gonzalez, "that he watched [petitioner] sell [CI-489] methamphetamine and a firearm." Ibid. The court found that, "[b]ased on this evidence, 'the harmlessness of any error is clear beyond serious debate and

further proceedings are certain to replicate the original result.'" Ibid. (citation omitted).

Judge Steele, sitting by designation, dissented. Pet. App. 41-43. He agreed that "there are limited circumstances which allow the government to introduce [predisposition] evidence in its case-in-chief," but disagreed "with the finding that this case falls within such limited circumstances," and would have found prejudicial error. Id. at 42.

ARGUMENT

Petitioner contends (Pet. 11-22) that the government should have been precluded from introducing limited predisposition evidence to rebut petitioner's anticipated entrapment defense. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. This Court has "firmly recognized the defense of entrapment in the federal courts." Sherman v. United States, 356 U.S. 369, 372 (1958). "Entrapment occurs only when the criminal conduct was the product of the creative activity of law-enforcement officials." Ibid. (emphasis and internal quotation marks omitted). "[T]he fact that government agents merely afford opportunities or facilities for the commission of that offense does not constitute entrapment." Ibid. (internal quotation marks omitted).

The affirmative defense of entrapment thus has two related elements: "government inducement of the crime, and a lack of predisposition on the part of the defendant." Mathews v. United States, 485 U.S. 58, 62-63 (1988). When a defendant alleges entrapment and the first element is satisfied, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." Jacobson v. United States, 503 U.S. 540, 548-549 (1992). "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, 485 U.S. at 64-65 (citation omitted). And this Court has found entrapment based solely on "the undisputed testimony of the prosecution's witnesses." Sherman, 356 U.S. at 373.

Accordingly, in circumstances where a defendant makes clear that he will be raising an entrapment defense, evidence of the defendant's predisposition to commit a criminal act "is admissible" because it is "[r]elevant," Fed. R. Evid. 402, or even "essential" to an "element of a * * * defense," Fed. R. Evid. 405(b). And that legitimate use of the evidence cannot be deemed to be invariably "outweighed by the danger of * * * unfair prejudice," Fed. R. Evid. 403, so as to support a blanket rule requiring exclusion of such evidence.

Instead, as courts of appeals have recognized, district courts have discretion, based on their assessment of all the

relevant circumstances, to admit predisposition evidence during the government's case-in-chief where a defendant has made clear his intention to pursue an entrapment defense. See United States v. Sherman, 240 F.2d 949, 952-953 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 369 (1958) (permitting such evidence "where it is clear * * * that the defense will be invoked"); United States v. Goodapple, 958 F.2d 1402, 1407 (7th Cir. 1992) (permitting such evidence when entrapment defense is "clearly raised" in the defendant's opening statement and obviously implicated through the defendant's efforts at trial); cf. United States v. Hicks, 635 F.3d 1063, 1072 (7th Cir. 2011) (suggesting that such evidence would be permitted where defendant "clearly communicated his intention to present an entrapment defense" before the government introduced predisposition evidence, even if he was equivocal before trial).

The court of appeals properly applied that rule to the facts of this case. See Pet. App. 35-36. As the court of appeals observed, petitioner made it "sufficiently clear" to the district court that he would present an entrapment defense through his pretrial request for an entrapment instruction, his pretrial statement that he would "be pursuing an entrapment defense," and his attempts to support his defense at trial. Id. at 36. In those circumstances, the district court did not abuse its discretion by allowing the government to present predisposition evidence in its case-in-chief in order to rebut petitioner's entrapment defense.

Ibid. Nothing in the Constitution, federal statutes, or any federal rule foreclosed the district court from exercising its inherent trial-management authority to admit the government's predisposition evidence at that time. See Dietz v. Bouldin, 579 U.S. 40, 45-46 (2016).

2. Contrary to petitioner's contention (Pet. 11-20), the decision below does not implicate a conflict among the circuits warranting this Court's review.

a. The decision below, which emphasized that the defendant must "clearly" demonstrate his intent to invoke the entrapment defense before the government can introduce predisposition evidence in its case-in-chief, Pet. App. 36, expressly relies on the Second Circuit's decision in Sherman, which explained that predisposition evidence is admissible in the government's case-in-chief when "it is clear * * * that the [entrapment] defense will be invoked," 240 F.2d at 953; see Pet. App. 36. Like the court of appeals here, see Pet. App. 36, the Second Circuit explained that to "mak[e] the admissibility of such evidence always depend upon whether the defendant had introduced evidence" would "work grave prejudice to the government in cases where [the] defendant" attempts to make out a defense of entrapment based on "proofs adduced by the prosecution in its case in chief." Sherman, 240 F.2d at 952.

The court of appeals' decision is likewise consistent with the circumstances in which other circuits have permitted the

introduction of predisposition evidence during the government's case-in-chief. In Goodapple, for example, the Seventh Circuit upheld the admission of predisposition evidence during the government's case-in-chief after the defendant's lawyer "made more than a passing reference to the affirmative defense of entrapment in his opening statement." 958 F.2d at 1407. Similarly, in United States v. Salisbury, 662 F.2d 738 (1981), cert. denied, 457 U.S. 1107 (1982), the Eleventh Circuit upheld the admission of predisposition evidence during the government's case-in-chief where the defendant had "raised the issue of entrapment at trial and received jury instructions" on the issue. Id. at 741.

b. Petitioner cites (Pet. 12-18) three decisions in which a court of appeals concluded that a district court had erred in allowing the introduction of predisposition evidence. None of those decisions conflicts with the decision below in a manner warranting this Court's review.

The D.C. Circuit's decision in Hansford v. United States, 303 F.2d 219 (1962), did not involve the introduction of predisposition evidence in the government's case-in-chief.[2] The D.C. Circuit instead determined that the government's rebuttal evidence, which it offered after the district court determined that the defendant

[2] The Eleventh Circuit's decision in United States v. Brannan, 562 F.3d 1300 (2009), on which petitioner also relies (Pet. 17), is similarly inapposite. In that case, the Eleventh Circuit found no error in the district court's admission of predisposition evidence on rebuttal, after the defendant testified during the defense case that he had been entrapped. 562 F.3d at 1307-1308.

had offered enough evidence to warrant a jury instruction on entrapment, was so prejudicial and unreliable in the circumstances of that case as to require exclusion under Federal Rule of Evidence 403. Id. at 226. The court of appeals performed a similar analysis under Rule 403 here, see Pet. App. 37-38, and simply "reject[ed] [petitioner's] argument that the gang-affiliation evidence was unfairly prejudicial" in the circumstances of this case, id. at 38.

The Seventh Circuit's decision in Hicks likewise did not adopt a categorical rule precluding the use of predisposition evidence in the government's case-in-chief. The Seventh Circuit found that on the facts there, it was improper to admit predisposition evidence before an entrapment defense had "materialize[d]." Hicks, 635 F.3d at 1072. Consistent with the court of appeal's decision here, however, the Seventh Circuit indicated that it might have reached a different result "[h]ad Hicks clearly communicated his intention to present an entrapment defense" before the predisposition evidence was admitted. Ibid.

Finally, the Eighth Circuit's decision in United States v. McGuire, 808 F.2d 694 (1987) (per curiam), involved different circumstances and resulted in affirmance of the challenged conviction. There, the defendant had suggested an entrapment defense during voir dire and mentioned it during the opening statement, but ultimately "presented no evidence" to support an entrapment defense. Id. at 695-696. In that context, the Eighth

Circuit stated -- in a single sentence, without further analysis -- that it "agree[d] 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." Id. at 696. The court determined that "the error was harmless," however, and that it would be inappropriate to grant relief for "an error caused by confusion" stemming from the defendant's assertion that he would be raising an entrapment defense. Ibid. The court accordingly affirmed the conviction. Ibid.

The indications that petitioner would be asserting an entrapment defense were substantially stronger in this case, and petitioner did in fact pursue evidence to support such a defense. Petitioner moved to dismiss the indictment based on his entrapment theory, D. Ct. Doc. 162, at 4-5; previewed his entrapment defense during a motion hearing, C.A. E.R. 57; proposed voir dire questions and a jury instruction on entrapment, id. at 87-88, 94; confirmed for the court at the beginning of trial that "[w]e will be pursuing an entrapment defense," id. at 160-161; and pursued the entrapment defense through cross-examination of the government's witnesses and direct examination of his own witness, see C.A. Gov't E.R. 341-344, 351-359, 373, 379-380, 458, 463, 475, 512-514, 596-600. Faced with similar facts, the Eighth Circuit might well conclude that the entrapment defense had "actually materialized" in the relevant sense, McGuire, 808 F.2d at 696, and that the district

court accordingly did not abuse its discretion in admitting predisposition evidence during the government's case-in-chief.

The precedential effect of the Eighth Circuit's per curiam decision in McGuire is also uncertain. Although the decision is published in the Federal Reporter, the court appears to have issued it under a circuit rule, no longer in effect, that permitted abbreviated decisions in cases where "the court determine[d] that an opinion would have no precedential value." 8th Cir. R. 14 (1981); see McGuire, 808 F.2d at 696 (citing 8th Cir. R. 14); see also William L. Reynolds & William M. Richman, The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167, 1173-1174 & n.37 (1978) (discussing, inter alia, the Eighth Circuit's Rule 14). Especially given the absence of any meaningful analysis explaining the court's conclusion that it had been error to admit predisposition evidence in that case during the government's case-in-chief, and that the conclusion was not necessary to the judgment in light of the court's harmlessness determination, it is far from clear that the Eighth Circuit would treat the decision as binding precedent that would require setting aside a conviction in circumstances like petitioner's.

All told, therefore, petitioner identifies only a single decision in which a court of appeals has ever overturned a conviction because of predisposition evidence introduced during the government's case-in-chief -- and there, the court

specifically noted that it might reach a different outcome if, as the court of appeals found in this case, the defendant had "clearly communicated his intention to present an entrapment defense" before the predisposition evidence was admitted. Hicks, 635 F.3d at 1072. And to the extent that petitioner disputes (Pet. 16) whether he did in fact give such a clear indication, he did not preserve any challenge to the district court's directive that he make his intention clear before trial so that it could decide his motion challenging the relevant evidence, see Pet. App. 36 n.12, and any factbound claims about what was clear at trial do not warrant this Court's review.

3. Even if the question presented warranted review in an appropriate case, the petition for a writ of certiorari provides a poor vehicle for resolving the question.

First, the question presented addresses the admission of predisposition evidence when "an entrapment defense * * * does not materialize during trial." Pet. i. In this case, however, petitioner elicited evidence -- albeit unsuccessfully -- to support his entrapment theory. From the government's first witness, petitioner's cross examination focused on entrapment. Petitioner asked the first witness about CI-5's "coercive" contract, C.A. Gov't E.R. 354-357; asked questions suggesting that CI-5 was inadequately monitored by law enforcement, id. at 359, 373; and elicited testimony that CI-5 pressured petitioner to engage in criminal activity, including to sell methamphetamine to

CI-489, id. at 379-380, 456. During the defense case, in an apparent attempt to "revive" his entrapment defense, id. at 540-541, petitioner called his co-defendant Gonzalez to provide testimony indicating that the methamphetamine that petitioner sold to CI-489 came from CI-5. Id. at 600. And petitioner renewed his request for an entrapment instruction after Gonzalez's testimony. Id. at 606. Petitioner's case accordingly would not provide an opportunity to address circumstances in which a defendant truly "presented no evidence" in support of a previously suggested entrapment defense. McGuire, 808 F.2d at 695.

Second, resolution of the question presented would not affect the outcome in this case because any error in admitting predisposition evidence would have been harmless beyond a reasonable doubt. See Fed. R. Crim. P. 52(a). As the court of appeals explained in rejecting petitioner's claim concerning testimony by his probation officer, the evidence of petitioner's guilt was "overwhelming," including recordings of "[a]ll of the relevant transactions and meetings," "text messages" and "recordings of conversations" between petitioner and CI-489, and testimony from petitioner's co-defendant "that he watched [petitioner] sell [CI-489] methamphetamine and a firearm." Pet. App. 39. "Based on this evidence, 'the harmlessness of any error is clear beyond serious debate and further proceedings are certain to replicate the original result.'" Ibid. (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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