No. 22-5150

IN THE SUPREME COURT OF THE UNITED STATES

═══════════════

JULIO CESAR GOMEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════════

PETITIONER JULIO GOMEZ'S REPLY TO RESPONDENT UNITED STATES'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

═══════════════

TODD W. BURNS
Burns & Cohan, Attorneys at Law
501 West Broadway, Suite 1510
San Diego, California 92101
619-236-0244
todd@burnsandcohan.com

Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

INTRODUCTION

In its brief in opposition, the government pretends that Julio Gomez advocates for a blanket rule that prosecutors may never introduce predisposition evidence in their case-in-chief to rebut an entrapment defense. That is not Gomez's argument. His argument is that prosecutors may not introduce otherwise inadmissible predisposition evidence to rebut an entrapment defense until that defense materializes during trial, which could be during the government's case-in-chief. The Ninth Circuit's contrary rule conflicts with every other circuit court that has addressed the issue, and short-circuits the trial process in the manner rejected in *United States v. Ohler*, 529 U.S. 753 (2000).

Another overarching point bears making at the outset. The government's brief repeatedly mentions that Gomez's counsel unsuccessfully attempted to support an entrapment defense during trial. *See, e.g.*, BIO at 6-7, 9-10. But that was after (1) the district court permitted the government to preemptively "rebut" the entrapment defense, and (2) the government capitalized on that ruling by introducing incredibly inflammatory evidence through the direct-examination of its first witness. After that, defense counsel was merely trying, unsuccessfully, to play the bad hand he'd been erroneously dealt by the court.

Gomez now turns to addressing the government's treatment of the conflicting circuit case law.

CIRCUIT CONFLICT

I. Eighth Circuit

United States v. McGuire, 808 F.2d 694, 695-96 (8th Cir. 1987), held the government may not introduce otherwise inadmissible evidence to rebut an entrapment defense until that defense materializes in evidence, which may occur during the government's case-in-chief. The Eighth Circuit therefore concluded that even though defense counsel mentioned the entrapment defense

during *voir dire* and opening statement, the district court erred when it permitted the government to introduce predisposition evidence because the defense did not materialize during the evidentiary phase of the trial. *See id.*

The government tries to distinguish *McGuire* by claiming "[t]he indications that petitioner would be asserting an entrapment defense were substantially stronger in this case." BIO at 16. That's inaccurate, and ignores that right before trial Gomez's counsel said he wanted to keep his options open as to whether he would raise an entrapment defense, and he only said he'd be pursuing such a defense when the district court required him to "elect." *See* App'x at 17, 26-27; *United States v. Gomez*, 6 F.4th 992, 998 (9th Cir. 2021). More important, the key question is whether entrapment was raised in front of the jury. In McGuire's trial it was, in Gomez's trial it wasn't.

Faced with this, the government resorts to questioning *McGuire's* precedential effect. But it is published in the Federal Reporter, has been cited as precedential by the Eighth Circuit and its district courts, *see, e.g., United States v. Abumayyaleh*, 530 F.3d 641, 646 (8th Cir. 2008), and was cited as persuasive in *United States v. Hicks*, 635 F.3d 1063, 1072 (7th Cir. 2011), and *United States v. Goodapple*, 958 F.2d 1402 (7th Cir. 1992). It was also cited approvingly by the dissent in Gomez's appeal, and distinguished unconvincingly by the panel majority. *See Gomez*, 6 F.4th at 1003 n.11; *id.* at 1012 (Steele, J., dissenting); Pet. at 13.

II. Seventh Circuit

United States v. Hicks, 635 F.3d 1063, 1072 (7th Cir. 2011), held the government may not introduce otherwise inadmissible evidence to rebut an entrapment defense until the "entrapment defense materialize[s during trial], either during cross-examination or during its rebuttal case." The court rejected the government's argument that defense counsel's statements *before trial* may open the door for preemptive rebuttal, even though Hicks's counsel voluntarily stated before trial that he

intended to proceed with an entrapment defense. *See id.* The government attempts to distinguish *Hicks* by saying it "did not adopt a categorical rule precluding the use of predisposition evidence in the government's case-in-chief." BIO at 16. But Gomez is not arguing for such a rule.

Furthermore, in *United States v. Goodapple*, 958 F.2d 1402 (7th Cir. 1992), the Seventh Circuit stated that to put entrapment into "controversy," and thus open the door to government rebuttal evidence, it is not sufficient for a defendant to mention the defense in opening. Instead, the defense must "materialize[during trial] through a defendant's presentation of its own witnesses or through cross-examination of the government's witnesses . . . ." *Id.* at 1407. The government implies that in *Goodapple* the court approved of the admission of otherwise inadmissible predisposition evidence based solely on defense counsel mentioning entrapment during opening. *See* BIO at 15. That is wrong – in *Goodapple* the entrapment defense "materialized" during trial, and the jury was instructed on it. 958 F.2d at 1407. Regardless, whether defense counsel's mentioning entrapment during opening is sufficient to put the matter into controversy, and thus allow for immediate rebuttal in the government's case-in-chief, is something this Court may consider if it grants Gomez's petition. Resolution of that point is, however, irrelevant to the outcome in Gomez's case because his counsel waived opening.

III. Eleventh Circuit

United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981), held that "the government may not normally introduce evidence of a defendant's predisposition to engage in criminal activity in its case-in-chief," but it "may do so once a defendant *submits some evidence* which raises the possibility that he was induced to commit the crime." *Id.* (emphasis added). Because the defendant "raised the issue of entrapment" during the government's case-in-chief, the government subsequently was allowed to introduce predisposition rebuttal evidence during its case-in-chief. *Id.* at 739, 741.

The government agrees with Gomez's statement of the controlling law in the Eleventh Circuit, *see* BIO at 15, but fails to appreciate that, unlike in *Salisbury*, the prosecution in Gomez's trial introduced its "rebuttal" evidence during the direct-examination of its first witness, before Gomez's counsel asked a single question. That cannot be squared with the rule set out in *Salisbury*.

IV. D.C. Circuit

Hansford v. United States, 303 F.2d 219, 225 (D.C. Cir. 1962) (*en banc*), held that only "when there is sufficient evidence of entrapment to go to the jury" may "the prosecution answer the claim of entrapment by" adducing otherwise inadmissible evidence to "show[] that the defendant was predisposed to commit the crime" charged.

The government responds that *Hansford* "did not involve the introduction of predisposition evidence in the government's case-in-chief," it involved "the government's rebuttal evidence." BIO at 15-16. But the timing of the introduction of the entrapment evidence is irrelevant to *Hansford's* holding – the point is that the government may not introduce otherwise inadmissible predisposition evidence unless the defendant first introduces sufficient evidence (of improper inducement) for the defense to be submitted to the jury. And there obviously wasn't sufficient evidence to submit the entrapment defense to the jury in Gomez's case.

V. Second Circuit

In *United States v. Sherman*, 240 F.2d 949, 953 (2d Cir. 1957), the defendant "devoted his entire opening statement to a denunciation of [the informant], telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment." The Second Circuit held that the government could introduce evidence of the defendant's prior convictions during its case-in-chief, to rebut the entrapment defense the defendant *had already raised*. Gomez, on the other hand, had not given an opening statement or asked a

witness a single question before the government preemptively introduced its "predisposition" evidence.

The government says that in *Sherman* the court allowed the government to introduce evidence in its case-in-chief to rebut an entrapment defense. *See* BIO at 14-15. Sure, but only because, at that point, the defendant had already raised the entrapment defense. That, of course, is not what happened in Gomez's case.

VI. Conclusion

The holdings discussed above are founded on recognition of the risk of unfairness to the defendant if the prosecution is allowed to preemptively "rebut" an entrapment defense that never materializes, as well as the practical difficulty of a district court ruling on rebuttal evidence "preemptively," before the defense actually materializes. Those holdings are also based on an appreciation of the trial process, and the recognition that adopting the Ninth Circuit's approach short-circuits that process, contrary to *Ohler*, which Gomez discusses next.

UNITED STATES v. OHLER AND SHORT-CIRCUITING THE TRIAL PROCESS

Before discussing *Ohler*, it is useful to highlight key facts in Gomez's case.

First, long before trial, the district court made clear that it did not think the facts that defense counsel proffered in support of the entrapment defense established improper inducement. *See* App'x 9, 12-13; Pet. at 3-4. And lacking evidence of improper inducement, the government would not have the burden of rebutting the entrapment defense with evidence of Gomez's predisposition, and the defense would not be submitted to the jury. *See Jacobson v. United States*, 503 U.S. 540, 548-549 (1992); *Mathews v. United States*, 485 U.S. 58, 62-63 (1988); *see also* BIO at 12.

Second, the district court refused to order the U.S. Marshals to bring Angel Carmona to the trial from prison, because the court concluded the entrapment defense was not viable. *See* App'x at 11-13. Carmona was *the* necessary witness for defense counsel to present the entrapment defense he envisioned. *See* Pet. at 6; *Gomez*, 6 F.4th at 998.

On the eve of trial, "Gomez's counsel said that he was 'leaving open' whether to pursue an entrapment defense, depending on the evidence." *Id.*; App'x at 17. The next day, the district court took that option way, telling defense counsel he had to make "an election" whether he would pursue an entrapment defense. *See* App'x at 26-27; *Gomez*, 6 F.4th at 1003 n.12. Having been ordered to make that decision, defense counsel responded that he would present an entrapment defense, but he also said he would continue to reevaluate the defense strategy during trial and the defense could change. *See* App'x at 26-29. That is what the Ninth Circuit panel majority describes as Gomez making "sufficiently clear" that he would proceed with an entrapment defense. *Gomez*, 6 F.4th at 1003.

Based on this "election," the district court green-lighted the government's preemptive "rebuttal" of the entrapment defense, and the government wasted no time presenting highly inflammatory evidence. *See* App'x at 27. Its first witness testified *on direct-examination* that 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." *Gomez*, 6 F.4th at 999. He explained that his unit focused "on the worst of the worst," and he said Gomez was a member of the North Side Indio gang and the Mexican Mafia. The investigator also said Gomez was on parole and his parole officer supervised "high risk" and "higher-level" gang members, and he added that 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." *Id.* Finally, the

investigator testified that both the North Side Indio gang and Mexican Mafia are involved in drug trafficking and firearms. *See id.*; *see also id.* at 1011 (Steele, J., dissenting). Three subsequent witnesses confirmed in small part, but did not add to, this testimony. *See* Pet. at 7. Therefore, the predisposition evidence came in before defense counsel asked a single question.

Turning to *Ohler*, the district court in that case granted the government's motion *in limine* to allow it to impeach the defendant with a prior conviction if she testified during trial. 529 U.S. at 754. The defendant testified and during her direct-examination she admitted her prior conviction. *See id.* This Court held that because Ohler adduced evidence of the conviction first, she waived her right to appeal the district court's *in limine* ruling.

Ohler "argued[] that it would be unfair to apply such a waiver rule in this situation because it compels a defendant to forgo the tactical advantage of preemptively introducing the conviction in order to appeal the *in limine* ruling. She argue[d] that if a defendant is forced to wait for evidence of the conviction to be introduced on cross-examination, the jury will believe that the defendant is less credible because she was trying to conceal the conviction." *Ohler*, 529 U.S. at 757. The Court responded that during a trial the parties are required to make choices, which in *Ohler* included (1) the defendant's decision whether to testify and risk impeachment with the prior felony, and (2) the government's decision whether to impeach the defendant with the prior conviction and risk reversal on appeal. *See id.* at 758. The Court noted that those decisions are influenced by the parties' ongoing assessment of how the trial is going, and rejected Ohler's position because it would "short circuit that decisional process by" depriving the government of "the right to decide, after [Ohler] testifies, whether or not to use her prior conviction against her." *Id.* Furthermore, "*in limine* rulings are not binding on the trial judge," and "Ohler's position . . . would deprive the trial court of the opportunity to change its mind after hearing all of the defendant's testimony." *Id.* at 758 n.3.

This sort of short-circuiting of the trial process is exactly what the Ninth Circuit's holding in *Gomez* allows. To reiterate, Gomez's counsel stated just before trial that he was not sure if he wanted to present the entrapment defense, but he wanted to keep his options open. *See* App'x at 17; *Gomez*, 6 F.4th at 998. The district court nevertheless forced defense counsel to make an "election," which effectively precluded (1) him from deciding how to proceed as trial progressed, and (2) the court from changing its *in limine* ruling based on the evidence actually adduced during trial. The government capitalized on that short-circuiting by preemptively "rebutting" the never-to-materialize entrapment defense during its direct-examination of its first witness.

The Ninth Circuit panel majority's reason for allowing the trial process to be short-circuited in this manner was a professed concern about defense sand-bagging. As explained in the petition, that concern is baseless generally, and certainly was not implicated in this case. *See* Pet. at 20-22. The government does not claim otherwise.

THIS CASE IS A GOOD VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The government gives two reasons why it believes this case is not a good vehicle for resolving the question presented.

First, the government says defense counsel attempted, "albeit unsuccessfully," "to support his entrapment theory" during trial. BIO at 19. However, Gomez did that after (1) the district court short-circuited the trial process with its erroneous ruling, and (2) the government introduced its preemptive "rebuttal" evidence during its direct-examination of its first witness. Gomez's unsuccessful efforts to counter this error after the fact is irrelevant to resolving the question presented.

Second, the government claims that "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." BIO at 20. This claim cannot be taken seriously, given the highly inflammatory nature, and quantity, of the "predisposition" evidence. *See Kennedy v. Lockyer*, 379 F.3d 1041, 1055 (9th Cir. 2004) (stating that inadmissible "evidence relating to gang involvement will almost always be prejudicial and will constitute reversible error"). It is presumably for that reason that the government waived any harmless error claim with respect to this issue by failing to raise it in the Ninth Circuit.

Furthermore, a harmless error claim is usually addressed by the court of appeals in the first instance. The dissenting judge in this case made his view clear: "[g]iven the overwhelmingly prejudicial nature of that evidence, the harmless error doctrine cannot save the government's convictions." *Gomez*, 6 F.4th at 1010 (Steele, J., dissenting). The two judges in the majority did not address the issue. But they did address Gomez's claim that the district court went overboard with respect to the predisposition evidence it admitted, and in that context they: (1) analyzed the issue as if the entrapment defense had actually materialized; (2) said the district court was entitled to "great deference" with respect to what evidence was relevant, and more probative than prejudicial, to "rebut" the entrapment defense; and (3) held that they could not conclude the district court abused its discretion. *See id.* at 1006. Which draws the spotlight back to the district court judge, who said, in no uncertain terms, that the "predisposition" evidence was incredibly prejudicial and, "[b]ut for the fact that prior counsel had indicated his intention to pursue a defense of entrapment," the decision to exclude the evidence "wouldn't be a difficult call at all." App'x at 17; *see also* App'x at 23-24, 27. In short, even if the government could get past its waiver of the harmless error claim, it is evident it would not succeed on that claim.

CONCLUSION

Gomez requests that the Court grant the petition.

Respectfully submitted,

/s/ Todd W. Burns

Date: November 4, 2022

TODD W. BURNS
Burns & Cohan, Attorneys at Law
501 West Broadway, Suite 1510
San Diego, California 92101-5008
(619) 236-0244
todd@burnsandcohan.com

Counsel of Record