No. 23-6797

IN THE SUPREME COURT OF THE UNITED STATES

MARK STEVEN DOMINGO, 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 sufficient evidence supported the jury's finding that petitioner was not entrapped.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 2023 WL 8166774.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2023. A petition for panel rehearing was denied on December 8, 2023. The petition for a writ of certiorari was filed on February 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on one count of providing material support to terrorists, in violation of 18 U.S.C. 2339A, and one count of attempting to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a). Judgment 1. The district court sentenced petitioner to 25 years of imprisonment, to be followed by a 20-year term of supervised release. Ibid. The court of appeals affirmed. Pet. App. 4a.

1. While serving in the U.S. army in Afghanistan, petitioner threatened to kill Afghan civilians, allied troops, and his fellow American soldiers. C.A. E.R. 79-81, 354. He would point out unarmed people in the distance and "talk about killing them." Id. at 80. He wrote the names of his platoonmates on bullets stored in his kit, as well as on 40-millimeter grenades stored in a guard tower. Id. at 80, 82. And, as documented in military records, petitioner also threatened to stab one of his platoonmates and to suffocate another. Id. at 354.

Once home, petitioner turned to radical Islam, aspiring to "martyrdom." C.A. E.R. 1432. He amassed a collection of images, videos, and audio recordings celebrating violent jihad, including photos of severed heads and decapitations; images of ISIS soldiers with flags and guns; and an image of an attack in London, captioned "Do your Jihad. Even while you are in Europe." Id. at 61-70; C.A. S.E.R. 45 (capitalization altered).

Petitioner also joined an invitation-only group on Discord, an online chat application, populated by approximately 50 users who supported radical Islam. C.A. E.R. 97-98, 178. Petitioner's Discord messages asked whether he could "get rewards" by stabbing "a kaffir" (a non-believing infidel); stated that "America needs another Vegas event" (an apparent reference to the mass shooter who killed more than 50 people at a Las Vegas music festival in 2017); and promoted "weakening America" by "giving them a taste of the terror they gladly spread all over the world." Id. at 99-102, 282, 721, 1304, 1537 (emphases omitted).

In early March 2019, an FBI employee who had been investigating another individual in the Discord group read petitioner's posts and alerted the FBI, which opened an investigation into petitioner. C.A. E.R. 102-103, 191-192. Soon after -- but before anyone from law enforcement had made contact with petitioner -- a terrorist murdered worshippers at mosques in Christchurch, New Zealand. Id. at 251, 1308. Petitioner posted: "[I] feel like [I] should make a christian[']s life miserable tomorrow for our fallen bros [and] sis in new zealand," or "maybe a jew[']s life." Id. at 1310-1311. "They shed our blood," and a "message needs to be sent"; "there must[] be retribution." Id. at 1308-1311.

In light of "the potential for mass murder the next day," and the FBI's fear that petitioner "was going to go out and murder multiple people," the FBI began "24-hours-a-day, seven-days-a-week

surveillance." C.A. E.R. 193, 199. In addition, the FBI employee who had first seen petitioner's Discord posts messaged petitioner directly for the first time, and a FBI confidential source also messaged petitioner and began a correspondence. Id. at 106-107, 194-196, 239, 467.

Petitioner repeatedly proposed criminal activity to the FBI contacts. C.A. E.R. 146, 156. He devised various plans to commit jihad: gunning down "a bunch of Jews" in "black hats" as they walked to their synagogue, ambushing police officers as they drove home "sleepy" from a nightshift or when they had "their windows rolled down because their windows are bulletproof," or deploying a bomb "on the freeway" to injure "hundreds and maybe thousands of U.S. citizens." Id. at 104, 110, 545, 774, 881, 900, 937. Petitioner also proposed starting "small" by murdering his neighbor, to test police response time before moving on to larger plots. Id. at 866; see id. at 461, 486.

Petitioner told the FBI contacts he wanted to kill as many people as possible, particularly non-believers, starting with the extermination of Jews: "Just kill them all: man, woman and child," "[l]ike bugs" -- "[d]on't even let one live." C.A. E.R. 959-960; see id. at 946-947. He sought to recruit other militants (id. at 252, 944), and he began a dialogue with a Discord user in the Philippines who posted about using improvised explosive devices (IEDs). Petitioner said that he wanted to "follow [the Philippine user's] example" and that "an IED here" "would do so much damage."

Id. at 149, 154 (emphases omitted). Petitioner's proposal to the FBI contacts that they set off an IED on the freeway in California expressed a desire to "make 'em bleed." Id. at 881.

On April 19, petitioner visited the apartment of the FBI confidential source who had previously established contact with him, bringing an assault rifle that he was eager to use to kill people that night. C.A. E.R. 208-209, 282-283, 549. The FBI had not anticipated that petitioner would take action that night, so the source attempted to slow petitioner down by suggesting that he needed a plan first. Id. at 211, 990-993. Petitioner identified a target: a rally in Long Beach, California, scheduled for April 28. Id. at 208. Petitioner anticipated that both right-wing supporters and counter-protestor "communists"/"liberals" would attend the rally, and that attacking both sides -- as well as the police -- "if we do it right" would provoke "civil war." Id. at 999-1000, 1002.

The source gave petitioner an out, saying "you know that you don't have to do this, right?" C.A. E.R. 1022. But petitioner continued making plans for the attack, including proposing precautions to take to avoid detection by law enforcement. Id. at 1026-2027, 1049. Although petitioner had initially proposed a mass shooting at the rally, he was also supportive about the possibility of setting off a bomb. Id. at 1002, 1005. When the source said he "might know someone" who could make a bomb, petitioner said: "If you know someone, that's perfect." Id. at

1005. Petitioner said that the "IED route" was a "better idea" than "just going spraying and praying." Id. 1048, 1051. He observed that "IEDs would [do] more damage and would be better to transport," id. at 1031, and that they "c[ould] detonate [the bomb] in the crowd," where "even a small IED would do damage," id. at 1046-1047 -- "[b]ig boom, people are dead," id. at 1049. He also expressed the view that using a bomb would "help sow as much division and hatred into America" as possible. Id. at 1051-1053.

Petitioner instructed the source on what to say to the bombmaker, including by scripting the source's lines. C.A. E.R. 211-212. Petitioner also immediately took steps to implement the attack, purchasing nails to use as shrapnel in the bombs. Id. at 1062, 1555-1557; C.A. S.E.R. 13. He selected three-and-a-half-inch nails, because "[y]ou only need three inches to kill a person," C.A. E.R. 1081, and he was "banking" that "three inches will penetrate some people's intestines," given the "speed at which they're gonna fly" and the anticipated "blast radius," id. at 1082. Petitioner wanted to be the one to detonate the bomb, so he practiced arming and disarming (inert) bombs that the FBI had brought to the source's apartment. Id. at 219, 227, 1158.

Petitioner emphasized the importance of finding "the right position" at the rally, so as to "cause fear and terror" among nonbelievers and help spark the "civil war" that was "brewing." C.A. E.R. 1198-1199. He also proposed additional targets, such as the Santa Monica pier, where they could put a bomb in a "backpack,"

set it "on the pier," and "detonate it from far away," killing "[l]ocals, foreign nationals," and "kids" out of school. Id. at 1072-1075.

Two days before the rally designated as the target, petitioner drove the FBI contacts to the rally site for reconnaissance and led the group on a walk to identify places where they could plant the bombs to inflict maximum casualties. C.A. E.R. 228-229, 389-391. At that point, the confidential source, following FBI instructions, set in motion the arrest sequence. Id. at 48-49, 394. The source said that he had received a phone call from his uncle, who was going to stop by the apartment. Id. at 394. The source proposed hiding the bombs in a car so his uncle would not see them. Ibid. Petitioner picked up one of the bombs and carried it out of the apartment and into an alley. A SWAT team arrested petitioner with the bomb in his hands. Id. at 48-51, 394, 553-555.

2. A grand jury indicted petitioner on one count of providing material support to terrorists, in violation of 18 U.S.C. 2339A, and one count of attempting to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a). Indictment 1-3.

Petitioner asserted an entrapment defense, claiming that the government induced him to commit a crime -- use of a weapon of mass destruction -- for which he lacked any predisposition. C.A. E.R. 574, 609. The district court allowed the entrapment defense to go to the jury, meaning that, under circuit law, it became the

government's burden to prove beyond a reasonable doubt "that defendant was not entrapped." Id. at 574. The jury was instructed that the government must "prove either: One, defendant was predisposed to commit the crime before being contacted by government agents; or two, the defendant was * * * not induced by the government agents to commit the crime." Ibid.

The jury ultimately rejected the defense and found petitioner guilty on both counts. C.A. E.R. 652. The district court denied petitioner's post-trial motion for a judgment of acquittal. Id. at 4, 10. The court sentenced petitioner to 25 years of imprisonment, to be followed by a 20-year term of supervised release. Judgment 1.

3. In an unpublished memorandum decision, the court of appeals affirmed, agreeing with the district court that the record evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that petitioner was not entrapped. Pet. App. 4a.

The court of appeals found "sufficient evidence for a rational jury to conclude that [petitioner] was not induced into committing his crimes." Pet. App. 4a. The court observed that "there was no need for 'repeated and persistent solicitation' or 'persuasion' by the government because [petitioner] spoke of terrorism unprompted and eagerly planned the attack. Ibid. (quoting United States v. Simas, 937 F.2d 459, 462 (9th Cir. 1991)). And it noted that

petitioner testified at trial that he "wanted to commit mass murder with a bomb." Ibid.

The court of appeals also found "sufficient evidence from which the jury could find [petitioner's] predisposition to commit his crimes." Pet. App. 4a. The court noted several factors are relevant to determining predisposition: (1) the defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the inducement by the government. Id. at 2a (citing United States v. Gomez, 6 F.4th 992, 1001 (9th Cir. 2021), cert. denied, 143 S. Ct. 493 (2022)). The court found that each factor favored the government, emphasizing (among other things) that petitioner "initiated and led the effort to commit a terrorist attack," was motivated to commit the attack by "martyrdom," and "'expressed great enthusiasm in seeing it through.'" Id. at 3a-4a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 8-21) that the court of appeals erred in rejecting his entrapment defense. The court correctly found the trial evidence sufficient to permit the jury to determine that petitioner was not entrapped, and the decision below does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The court of appeals correctly recognized that "a rational jury could have found that [petitioner] was not entrapped." Pet. App. 4a.

The defense of entrapment involves two related elements: "government inducement of the crime, and a lack of predisposition on the part of the defendant." See 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). The predisposition element "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." Mathews, 485 U.S. at 63 (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)). And here, the court of appeals correctly determined that "[a] rational jury could have found beyond a reasonable doubt that [petitioner] was not entrapped." Pet. App. 2a.

To begin with, as the court of appeals explained, "there was sufficient evidence for a rational jury to conclude that [petitioner] was not induced into committing his crimes." Pet. App. 4a. Among other things, "there was no need for 'repeated and persistent solicitation' or 'persuasion' by the government because [petitioner] spoke of terrorism unprompted and eagerly planned the

attack," including testifying at trial that he "'wanted to commit mass murder with a bomb.'" Ibid. (citation omitted). Indeed, petitioner repeatedly proposed criminal activity to the government agents, rather than the other way around: petitioner proposed gunning down "a bunch of Jews," ambushing police officers, and setting off an IED on a California highway to kill many U.S. citizens at once. See pp. 4-7, supra. Petitioner likewise took many acts on his own, without influence or pressure from government agents, including messaging another Discord user about use of IEDs; showing up at the FBI contact's apartment with an assault rifle, hoping to kill people that night; scripting the request for the bombmaker; purchasing nails to be used as shrapnel in the bomb; and scouting the target location. See pp. 5-7, supra.

The court of appeals also correctly determined that "even assuming inducement," a reasonable jury could have found, based on the extensive trial evidence, that petitioner was predisposed to provide material support to ISIS. Pet. App. 4a. As the court explained, petitioner's "'character' and 'reputation' suggested an inclination toward violence that predated his contact with government agents, as shown by the testimony of his former platoonmate and therapist." Id. at 3a (citation omitted). Petitioner's own testimony was even more "damaging": he "admitted on the stand that the government agent with whom he planned the terrorist attack was 'someone who [he] could be [himself] with, uncensored, unfiltered, [he] didn't have to put on a mask or

disguise with this individual.'" Ibid. (brackets in original). Petitioner also "initiated and led the effort to commit a terrorist attack; for example, * * * [petitioner] identified potential target locations after the government's initial contact with him but before the suggestion of criminal activity." Ibid. (citation omitted). And petitioner's "ultimate decision" to "give the go-ahead to proceed with the attack" showed he had no "'reluctance in going through with a horrific attack that would have killed and maimed countless people'"; "[r]ather, his cumulative actions 'expressed great enthusiasm in seeing it through.'" Id. at 4a (citation omitted).

2. Petitioner errs in suggesting (Pet. 8-21) that the decision below conflicts with the decisions of other circuits.

a. Petitioner contends that the courts of appeals are divided as to whether the government must show that the defendant was predisposed to commit "the particular crimes charged," or whether the government can "meet its predisposition burden" by showing that the defendant was predisposed to commit "similar" crimes. Pet. 18 (emphases omitted); see Pet. 9-18. But no such conflict exists.

This Court's decisions focus on a "predisposition on the part of the defendant to engage in the criminal conduct" with which he is charged. Mathews, 485 U.S. at 63; see, e.g., Jacobson, 503 U.S. at 542 (holding that the government failed to show that the defendant "was independently predisposed to commit the crime for

which he was arrested"). But prior similar acts and attempts to commit prior similar acts can be relevant evidence to show predisposition to commit the charged offense. See, e.g., United States v. Williams, 547 F.3d 1187, 1198 (9th Cir. 2008) (finding that prior "criminal schemes [that] are not identical" were relevant to finding predisposition to commit the charged crime).

Petitioner errs in arguing that the Ninth Circuit in the decision below, and the Second Circuit, reject an approach to predisposition that requires proof that the defendant was "predisposed to commit the particular crimes charged." Pet. 18 (emphasis omitted). In the Second Circuit decision on which he relies, United States v. Cromitie, 727 F.3d 194 (2013), cert. denied, 574 U.S. 829 (2014)), the court explained that evidence showing that a defendant has "a state of mind that inclines them to inflict harm on the United States, be willing to die like a martyr, be receptive to a recruiter's presentation, whether over the course of a week or several months, of the specifics on an operational plan, and welcome an invitation to participate" can permit the jury to find that the defendant had the requisite "design" to commit specific terrorist attacks, including a particular bombing. Id. at 207-208; see id. at 215. But the court framed the overall inquiry as one into whether the defendant was "ready and willing to commit the offense." Id. at 206-207 (citation omitted; emphasis added).

And even assuming that the Second Circuit were out of step with other courts, that would not suggest the need for further review of the Ninth Circuit's nonprecedential decision in this case. On petitioner's own telling (Pet. 13), the Ninth Circuit has accepted that the relevant question is whether the defendant was "predisposed to commit the charged offense[]." United States v. Mohamud, 843 F.3d 420, 432 (2016), cert. denied, 583 U.S. 1060 (2018); see United States v. Poehlman, 217 F.3d 692, 697-698 (2000). And the decision below is consistent with that approach. See, e.g., Pet. App. 2a ("The record contained ample evidence" showing that petitioner "'was predisposed to commit the crime before being contacted by government agents.'") (emphasis added); id. at 4a (finding that there "was sufficient evidence from which the jury could find [petitioner's] predisposition to commit his crimes") (emphasis added).

Petitioner errs in asserting that the government's brief in the Ninth Circuit took the position that the government need not prove that the defendant was predisposed to commit the "'precise crime for which he was convicted.'" Pet. 13-14 (quoting Gov't C.A. Br. 75). Read in context, that discussion simply explained that the entrapment defense does not "protect criminals merely because they propose to commit their crimes using a different weapon; predisposition turns on the intended harm, not the means by which the harm is accomplished." Gov't C.A. Br. 75-76. As the brief elsewhere makes clear, the government's evidence showed that

petitioner "was predisposed to commit his crimes." Id. at 56; id. at 58-59 (accepting that the government must prove that "the defendant was predisposed to commit the crime before being contacted by government agents") (emphasis added).

In any event, as petitioner acknowledges (Pet. 13-14 & n.3), the district court instructed the jury, consistent with petitioner's proposed language, that "[t]he government must prove * * * defendant was predisposed to commit the crime before being contacted by government agents." C.A. E.R. 574 (emphasis added). And as just explained, the decision below is consistent with that instruction.

Factually, moreover, petitioner's argument rests on the premise that, absent government intervention, he was predisposed to use his AK-47 assault rifle to go on a shooting spree, killing Jews, police, and other Americans -- but not to set off a bomb. Pet. 5; see, e.g., Pet. 19 (arguing that government agents engaged in "deliberate efforts to divert [petitioner] from gun crimes to bomb crimes"). But petitioner testified at trial that he "wanted to commit mass murder with a bomb." Pet. App. 4a. And the trial evidence showed that petitioner had independently contacted likeminded individuals about using IEDs, and that petitioner actively developed the plan to bomb the rally, including by scripting the request for the bombmaker, purchasing nails to be used as shrapnel in the bomb, and leading the group in scouting the rally site to identify places where bombs could be planted to

inflict maximum damage. See pp. 5-7, supra. The fact that petitioner devised multiple plots for killing people, some of which involved a bomb and some of which involved his AK-47, does not establish that the government "implant[ed] in an innocent person's mind the disposition to commit a criminal act," Jacobson, 503 U.S. at 548, or otherwise require overturning the jury's finding that he was not entrapped into his crimes.

b. Petitioner separately asserts (Pet. 18-19) that the decision below conflicts with Seventh Circuit precedent requiring a showing that the defendant was in a position to commit the crime prior to the government's involvement. See Pet. 14, 18-19 (citing United States v. Mayfield, 771 F.3d 417, 436 (7th Cir. 2014) (en banc)). But the Seventh Circuit has made clear that a "predisposed person is not one who 'on his own might, under some conceivable set of circumstances, commit the crime.' Rather, a predisposed person is one who 'is presently ready and willing to commit the crime.'" Mayfield, 771 F.3d at 436 (citation omitted).

That requirement was satisfied here. Petitioner was well connected within the pro-ISIS community, and he posted messages and communicated with likeminded individuals about committing terrorist attacks on U.S. soil before any FBI contact. See pp. 2-5, supra. As to the use of a bomb in particular, petitioner had been trained on use of explosives and IEDs in the military, engaged in an extended dialogue with a Discord user about using IEDs, scripted the bomb request for the bombmaker, purchased nails for

the bombs on his own, selected the target, and took the lead on planning the details of the attack. See pp. 5-7, supra. It is thus far from clear that the Seventh Circuit would reach a different result from the decision below on the facts of this case.

This Court has recently and repeatedly denied certiorari in cases seeking review of the standard for determining predisposition. See, e.g., Young v. United States, 140 S. Ct. 113 (2019)(No. 18-1443); Rutgerson v. United States, 581 U.S. 992 (2017) (No. 16-759); McLaurin v. United States, 575 U.S. 962 (2015) (No. 14-798); Lowery v. United States, 575 U.S. 962 (2015) (No. 14-7954); Cromitie v. United States, 574 U.S. 829 (2014) (No. 13-9679); Dang v. United States, 552 U.S. 1210 (2008) (No. 07-8404); Weiner v. United States, 547 U.S. 1162 (2006) (No. 05-884); Price v. United States, 518 U.S. 1017 (1996) (No. 95-1579); Zaia v. United States, 513 U.S. 1190 (1995) (No. 94-1002). It should follow the same course here.*

3. At all events, this case would be a poor vehicle in which to consider the standard for determining predisposition because petitioner has not challenged the court of appeals' determination that "there was sufficient evidence for a rational jury to conclude that [petitioner] was not induced into committing his crimes." Pet. App. 4a. To meet its burden of proving that the defendant

* A similar question is presented in Jones v. United States, petition for cert. pending, No. 23-6480 (filed Jan. 8, 2024).

was not entrapped, the government must establish beyond a reasonable doubt "either that there was no inducement or that the defendant was predisposed to commit the crime." United States v. Hoyt, 879 F.2d 505, 509 (citing United States v. Barry, 814 F.2d 1400, 1402 (9th Cir. 1987)) (emphasis added), amended, 888 F.2d 1257 (9th Cir. 1989). Resolution of the alleged conflicts -- which pertain only to the predisposition element -- would thus be unlikely to afford petitioner practical relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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