

Nos. 17-8370, 17-9219, 17-8411, and 17-8418

IN THE SUPREME COURT OF THE UNITED STATES

KENNETH FLOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

KALI ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

TERRANCE CHAPPELL, PETITIONER

v.

UNITED STATES OF AMERICA

JUSTIN MAXWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in declining to dismiss the indictment based on asserted "outrageous government conduct" in conducting a sting operation.

2. Whether the district court erred in declining to sentence petitioners below the statutory minimum term of imprisonment based on their claims that the government engaged in "sentencing entrapment" or "sentencing manipulation" in its sting operation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-32a)¹ is not published in the Federal Reporter but is reprinted at 712 Fed. Appx. 492. The opinion of the district court denying petitioners' relevant pretrial motions is not published in the Federal Supplement but is available at 2015 WL 1523910.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2017. A petition for rehearing filed by petitioner Kenneth Flowers was denied on December 28, 2017 (Flowers Pet App. B1). Petitions for rehearing filed by the other petitioners were denied on January 3, 2018 (Pet. App. 34a). Petitioner Flowers filed a petition for a writ of certiorari on March 28, 2018. Petitioners Terrance Chappell and Justin Maxwell filed petitions for writs of certiorari on April 3, 2018. Petitioner Kali Alexander filed a petition for a writ of certiorari on June 1, 2018.² 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 Northern District of Ohio, petitioners were each convicted on one count of conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C.

¹ Unless otherwise noted, petition appendix citations refer to the appendix in Alexander v. United States, No. 17-9219.

² On March 23, 2018, Justice Kagan granted petitioner Alexander's motion to extend the time within which to file a petition for a writ of certiorari to and including June 2, 2018.

841(a)(1), (b)(1)(A), and 846, and one count of using or carrying a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 4a-5a. Petitioners Alexander, Chappell, and Maxwell were each also convicted on one count of unlawful possession of a firearm and/or ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 4a-5a. And petitioner Alexander was convicted on one count of distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 4a-5a. The district court sentenced petitioner Flowers to 180 months of imprisonment, petitioner Alexander to 211 months of imprisonment, petitioner Chappell to 181 months of imprisonment, and petitioner Maxwell to 181 months of imprisonment, each to be followed by a term of supervised release. Pet. App. 6a. The court of appeals affirmed. Id. at 2a-32a.

1. In response to a nationwide increase in robberies of “drug stash houses” in residential neighborhoods, the Bureau of Alcohol, Firearms, and Tobacco (ATF) has carried out a series of “undercover sting operations developed to find and arrest crews engaging in violent robberies.” United States v. Black, 733 F.3d 294, 298 (9th Cir. 2013), cert. denied, 135 S. Ct. 105, 135 S. Ct. 266, 135 S. Ct. 267, and 135 S. Ct. 275 (2014). In particular, in order to “prevent actual stash-house robberies,” which are “‘largely unreported crimes that pose a great risk of violence in residential communities,’” the ATF’s efforts have frequently relied on “sting operation[s] involving a fake stash-house

robbery.” United States v. Combs, 827 F.3d 790, 795 (8th Cir. 2016) (citation omitted).

In a stash-house sting operation, “an undercover agent recruits individuals to steal a large quantity of drugs from a house protected by an armed guard.” Pet. App. 2a. “The house, the drugs, and the guards, however, are all fictional.” Ibid. After the individuals take “the opportunity to plan and carry out an armed robbery of the stash house,” Black, 733 F.3d at 298, they “are arrested before they reach the invented location,” Pet. App. 2a. Such sting operations are “a safer technique” than the “alternative [of] planting fake drugs in a stash house and confronting the armed robbers once they [break] into the house.” Black, 733 F.3d at 298.

2. In August 2014, an ATF agent directed two confidential informants in Cleveland, Ohio, “to go into the community and return with general information.” Pet. App. 3a. One of the informants approached petitioner Alexander, who “agreed to sell the informant ten grams of heroin.” Ibid.

The agent accompanied the informant to the drug sale, where the agent “proposed the idea of robbing a cocaine stash house” by “presenting himself as a disgruntled drug courier who felt he was being treated unfairly.” Pet. App. 3a. The agent “specified that the house would have eight to nine kilograms of cocaine and be guarded by two men, one armed with a gun.” Ibid. He also “discussed splitting the cocaine 50/50 with Alexander and whoever

else assisted with the robbery.” Ibid. The agent later testified that “the fictional amount of cocaine originated in a conversation with” local law enforcement and “was intended to mimic the average quantity in a Cleveland stash house.” Id. at 5a.

Over the next two weeks, Alexander brought Rasheam Nichols and petitioner Maxwell into the robbery plan. Pet. App. 3a-4a. The agent gave all three men an opportunity to withdraw from the plan, but they declined. Gov’t C.A. Br. 10.

On the day of the planned robbery, Alexander, Nichols, and Maxwell -- joined by petitioners Flowers and Chappell -- met the informant on the east side of Cleveland. Pet. App. 4a. The informant drove the men across town to meet the agent. Ibid. Both Flowers and Nichols carried firearms on the trip. Ibid. When the men arrived, the agent entered the car, described the robbery plan, and reiterated that the stash house “contained eight to nine kilograms of cocaine and was guarded by two men, one with a gun.” Ibid. The agent later testified that petitioners “spoke about the plan, asked him questions, and were attentive.” Ibid. The agent again offered an opportunity to withdraw, but none of the petitioners did so. See Gov’t C.A. Br. 11.

After the discussion of the plan, the informant drove the men to a warehouse parking lot, where law enforcement officers were waiting to arrest them. Pet. App. 4a. All petitioners except Chappell were arrested with firearms, but an agent testified that he “saw a firearm drop from Chappell’s person while he was

running," and Chappell later admitted that he had carried a pistol that day. Ibid.; see Gov't C.A. Br. 14.

3. The grand jury indicted each petitioner on one count of conspiracy to possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846. Pet. App. 4a. The grand jury also indicted each petitioner on one count of using or carrying a firearm during and in relation to a drug conspiracy, in violation of 18 U.S.C. 924(c)(1)(A)(i). Pet. App. 4a. Petitioners Alexander, Chappell, and Maxwell were each indicted on one count of unlawful possession of a firearm and/or ammunition by a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 4a-5a. Petitioner Alexander was indicted on one count of distribution of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 4a.

Before trial, petitioners filed a motion to dismiss the indictment for "outrageous government conduct." Pet. App. 6a. They asserted that the government's conduct "created and encouraged [their] commission of the offense by luring" them "with the promise of a large payoff, making repeated requests for meetings over a short period of time, making repeated demands for their commitment to the conspiracy," and otherwise facilitating the conspiracy. Ibid. The district court denied the motion, citing Sixth Circuit precedent foreclosing a defense of "outrageous government conduct," including where "government conduct * * * induces a defendant to commit a crime." Mem. Op.

& Order 7 (Apr. 3, 2015) (Mem. Op.) (quoting United States v. Warwick, 167 F.3d 965, 974 (6th Cir. 1999)).

Petitioners also filed a joint pretrial motion seeking to preclude the district court from imposing the statutory minimum sentence of ten years applicable to the drug-conspiracy count. Pet. App. 5a, 19a; see 21 U.S.C. 841(b)(1)(A)(ii), 846. They contended that the government had manipulated the drug quantity involved in the sting to trigger the ten-year statutory minimum sentence for an offense involving "5 kilograms or more" of cocaine. 21 U.S.C. 841(b)(1)(A)(ii). The court denied the motion but explained that petitioners' claims "would be more appropriately raised at sentencing." Pet. App. 5a.; see Mem. Op. 8.

After a joint trial, the jury found petitioners guilty on all charged counts, indicating through a special verdict form its particular finding that the drug conspiracy involved "more than five kilograms" of cocaine. Pet. App. 5a.

4. At sentencing, petitioners Flowers, Alexander, and Maxwell renewed their objection to the imposition of statutory minimum sentences on the drug-conspiracy counts, on the theory that the government had improperly manipulated the quantity of drugs involved in the conspiracy. See Pet. App. 6a. Petitioner Chappell did not renew that objection. See D. Ct. Doc. 105 (Sept. 1, 2015). The district court overruled the objections and sentenced petitioner Flowers to 180 months of imprisonment, petitioner Alexander to 211 months of imprisonment, petitioner

Chappell to 181 months of imprisonment, and petitioner Maxwell to 181 months of imprisonment. Pet. App. 6a.

5. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 2a-32a.

The court of appeals rejected petitioners' contention that the district court had been required to dismiss the indictment for "outrageous government conduct." Pet. App. 6a. The court explained that "there is no authority in this circuit which holds that the government's conduct in inducing the commission of a crime, if 'outrageous' enough, can bar prosecution of an otherwise predisposed defendant under the Due Process Clause of the Fifth Amendment." Id. at 7a (quoting United States v. Tucker, 28 F.3d 1420, 1424 (6th Cir. 1994), cert. denied, 514 U.S. 1049 (1995)).

The court of appeals also rejected petitioners' claims of sentencing manipulation and sentencing entrapment. Pet. App. 19a-20a. The court explained that it had "not yet recognized either sentence manipulation or sentence entrapment" as a defense to a statutory minimum sentence. Ibid. The court cited its decision in United States v. Hammadi, 737 F.3d 1043 (6th Cir. 2013), which had found that the court "'need not decide whether to adopt or reject these doctrines'" under "the facts of the case." Pet. App. 20a (quoting 737 F.3d at 1048). The court again "decline[d] to resolve that question" and "le[ft] it for another day." Ibid.

Judge Stranch filed a concurring opinion that took no issue with the court of appeals' position as a legal matter, but

"express[ed] [her] discomfort with the governmental operation known as a 'stash house sting.'" Pet. App. 28a.

ARGUMENT

Petitioner Chappell contends that the lower courts erred in rejecting his "outrageous government conduct" defense (Chappell Pet. 15-19), and all petitioners contend that that the district court erred by sentencing them based on drug-quantity findings that were the result of improper "sentencing entrapment" or "sentencing manipulation" (Flowers Pet. 9-16; Alexander Pet. 10-16; Chappell Pet. 11-15; Maxwell Pet. 7-14). Those contentions lack merit. This Court has never recognized the "outrageous government conduct" defense that Chappell proposes, and the court of appeals did not err in declining to do so here. The courts below likewise appropriately declined to determine whether claims of sentencing entrapment and sentencing manipulation may be cognizable, because petitioners adduced no evidence to support any such claim. The court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. The petitions for writs of certiorari should be denied.

1. Petitioner Chappell does not contest that he committed the charged crimes or that he was predisposed to do so. He instead argues (Pet. 18-19) that the courts below should have dismissed the prosecution based on the government's alleged "inducement" of him to commit the crimes, which he characterizes as "outrageous government conduct" in violation of the Due Process Clause. This

Court has never recognized such a defense, however, and petitioner Chappell ultimately acknowledges (Pet. 16) that no court of appeals has applied the defense to a criminal defendant in his position. This Court's intervention is accordingly unwarranted.

a. This Court has never held that a defendant who was predisposed to commit a crime can avoid conviction by claiming that the government induced him to commit the offense through "outrageous" conduct. To the contrary, the Court in United States v. Russell, 411 U.S. 423 (1973), reversed a court of appeals decision that had recognized a purported "defense to a criminal charge * * * founded upon an intolerable degree of governmental participation in the criminal enterprise." Id. at 424 (citation omitted). This Court explained that allowing such a defense would require it to "reconsider the theory of the entrapment defense," which the Court has long "held to focus on the intent or predisposition of the defendant to commit the crime." Id. at 424, 429; see Sherman v. United States, 356 U.S. 369, 372 (1958); Sorrells v. United States, 287 U.S. 435, 451 (1932). The Court observed that allowing courts to "bar prosecutions" of admittedly predisposed defendants merely because of concerns about "'overzealous law enforcement'" would give courts an impermissible "'chancellor's foot' veto over law enforcement practices of which [they] did not approve." Russell, 411 U.S. at 435.

Russell left open the possibility that the Court "may some day be presented with a situation in which the conduct of law

enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." 411 U.S. at 431-432. The Court indicated, however, that such conduct would have to violate "fundamental fairness" and be "shocking to the universal sense of justice." Id. at 432 (citation omitted). And the Court included a "cf." citation to Rochin v. California, 342 U.S. 165 (1952), in which the Court reversed a conviction that had relied on evidence that the police had obtained by forcibly pumping the defendant's stomach "against his will" -- a "brutal" application of "force" that was "offensive to human dignity." Id. at 166, 174.

In Hampton v. United States, 425 U.S. 484 (1976), a plurality of the Court stepped back from the possibility left open in Russell, explaining that "[t]he remedy of the criminal defendant with respect to the acts of Government agents" not "resisted" by the defendant "lies solely in the defense of entrapment." Id. at 490. Justices Powell and Blackmun concurred in the judgment, explaining that they would leave open the possibility of a due process defense that reaches beyond entrapment, but that any such case would be "rare" and would have to involve "a demonstrable level of outrageousness." Id. at 495 n.7.

Petitioner Chappell has never contended that he was entrapped -- i.e., induced by the government to commit a crime notwithstanding a lack of predisposition to do so. See Mathews v. United States, 485 U.S. 58, 62-63 (1988); D. Ct. Doc. 145, at 715

(Sept. 22, 2015) (Chappell's counsel declining to seek an entrapment instruction). And he does not meaningfully contend that the government's involvement in the crime approaches the level of "shocking to the universal sense of justice." Russell, 411 U.S. at 432 (citation omitted). The court of appeals' rejection of petitioner's asserted "due process defense of inducement" thus follows from the decisions of this Court. Pet. App. 7a.

b. Petitioner Chappell errs in suggesting (Pet. 15-19) that the decision below conflicts with the decisions of other courts of appeals. Although some circuits have recognized the conceptual possibility of an outrageous government conduct defense, petitioner Chappell acknowledges that those courts "impose[] such a high burden on defendants that the defense rarely results in dismissal of charges." Chappell Pet. 16; see, e.g., United States v. Jayyousi, 657 F.3d 1085, 1111 (11th Cir. 2011) ("We have never applied the outrageous government conduct defense and have discussed it only in dicta."), cert. denied, 567 U.S. 946 (2012); United States v. Capelton, 350 F.3d 231, 243 n.5 (1st Cir. 2003) (referring to the defense as "moribund") (citation omitted); United States v. Jones, 13 F.3d 100, 104 (4th Cir. 1993) ("[I]n practice, courts have rejected [the defense's] application with almost monotonous regularity.") (citation omitted). Indeed, petitioner Chappell appears to disagree with many of the decisions that he cites as evidence of a purported circuit conflict, stating

that the "high burden" imposed by other courts of appeals is "not just in cases such as this one." Chappell Pet. 16.

Petitioner Chappell identifies (Pet. 16) only one case in which a court of appeals ordered dismissal of criminal charges on the grounds of outrageous government conduct -- United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). But the Third Circuit has not relied on Twigg since it was decided four decades ago. Three circuit judges have expressly called for the decision to be overruled, see United States v. Jannotti, 673 F.2d 578, 610 n.17 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982), and others have expressed doubt whether it was correctly decided, see United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983) (per curiam); see also United States v. Fattah, 858 F.3d 801, 813 (3d Cir. 2017) ("Since Twigg was decided, this Court has repeatedly distinguished, and even questioned, its holding.") (footnote omitted); United States v. Nolan-Cooper, 155 F.3d 221, 230 (3d Cir. 1998) (describing the outrageous government conduct defense as "hanging by a thread").

Moreover, the government conduct in Twigg differed markedly from the government conduct at issue here. In Twigg, a divided panel reversed convictions where government agents were "completely in charge of" a methamphetamine-production operation, supplying the defendant with the necessary chemicals, laboratory equipment, and expertise while the defendant himself "often ran errands for groceries or coffee." 588 F.2d at 376. As other

courts have observed, the agents in Twigg quite literally “manufactured the crime.” United States v. Bogart, 783 F.2d 1428, 1436 (9th Cir. 1986). The same is not true here, where the ATF agent suggested the possibility of a stash-house robbery to Alexander, who then recruited petitioner Chappell and the other co-conspirators and with them planned how the robbery would occur, which weapons they would use, and how they would subdue the guards. See Pet. App. 3a-4a; Gov’t C.A. Br. 9-12.

Petitioner Chappell does not contend that any circuit would find the government’s conduct here sufficiently “outrageous” to require dismissal of the prosecution. To the contrary, courts that have considered assertions of the outrageous government conduct defense in stash-house sting cases have repeatedly rejected the defense, and this Court has repeatedly declined to review the issue. See, e.g., United States v. Washington, 869 F.3d 193, 209-210 (3d Cir. 2017), cert. denied, 138 S. Ct. 713 (2018); United States v. Combs, 827 F.3d 790, 795 (8th Cir. 2016); United States v. Dennis, 826 F.3d 683, 695 (3d Cir. 2016); United States v. Hare, 820 F.3d 93, 103-104 (4th Cir.), cert. denied, 137 S. Ct. 224 (2016); United States v. Pedrin, 797 F.3d 792, 797 (9th Cir. 2015); United States v. Black, 733 F.3d 294, 307 (9th Cir. 2013), cert. denied, 135 S. Ct. 105, 135 S. Ct. 266, 135 S. Ct. 267, and 135 S. Ct. 275 (2014). The unpublished decision below is consistent with those decisions and likewise does not warrant this Court’s review.

2. This Court's review is also unwarranted with respect to petitioners' contention that the court of appeals erred in rejecting their claims that the sting operation's inclusion of a purported type and quantity of drug (eight or nine kilograms of cocaine) that would trigger a ten-year minimum sentence constituted impermissible governmental "sentencing entrapment" or "sentencing manipulation." See Flowers Pet. 9-16; Alexander Pet. 10-16; Chappell Pet. 11-15; Maxwell Pet. 7-14.³ This Court has consistently denied petitions for writs of certiorari seeking review of sentencing entrapment or manipulation claims and should follow the same course here. See, e.g., Whitfield v. United States, 137 S. Ct. 1063 (2017) (No. 16-5769); Macedo-Flores v. United States, 136 S. Ct. 1156 (2016) (No. 15-5947); Daniels v. United States, 562 U.S. 1079 (2010) (No. 09-9754); Docampo v. United States, 559 U.S. 1050 (2010) (No. 09-7833); Jimenez v. United States, 552 U.S. 828 (2007) (No. 06-10315).

a. Courts of appeals have disagreed about whether claims of "sentencing entrapment" and "sentencing manipulation" are potentially available defenses to an otherwise lawful -- or, in

³ Petitioner Flowers (Pet. 1, 9-11) references only "sentencing manipulation," not "sentencing entrapment," and has therefore abandoned his sentencing entrapment claim. Petitioner Chappell failed to renew his claims of sentencing entrapment and manipulation at sentencing, see D. Ct. Doc. 190, at 2-8 (Oct. 21, 2015), so those claims are forfeited and may be reviewed only for plain error, see Fed. R. Crim. P. 52(b). Even if petitioners Flowers and Chappell had properly preserved sentencing entrapment and manipulation claims, however, those claims would fail for the same reasons as the claims raised by the other petitioners.

this case, mandatory -- federal sentence. See United States v. Sed, 601 F.3d 224, 230 (3d Cir.) (noting varying approaches and declining to "rule on the legal merits of either doctrine"), cert. denied, 562 U.S. 899 (2010). Of the courts that acknowledge the defenses, some treat them as "interchangeabl[e]," United States v. Jaca-Nazario, 521 F.3d 50, 57 (1st Cir. 2008), while others treat them as distinct, see United States v. Boykin, 785 F.3d 1352, 1360 (9th Cir.), cert. denied, 136 S. Ct. 272 (2015). The Ninth Circuit, for example, has stated that "sentencing entrapment" occurs when the government entraps a defendant into committing a crime with greater sentencing exposure than the offense he was disposed to commit, while "sentencing manipulation" occurs when the government induces a defendant to commit multiple offenses "solely to enhance his potential sentence." Ibid. (citation omitted); see Pet. App. 19a (noting that sentencing entrapment "focuses on the defendant's lack of predisposition to commit the greater offense," while sentencing manipulation "focuses on the government's conduct") (brackets and citation omitted).

Even courts that recognize the theoretical possibility of sentencing entrapment or manipulation claims, however, have explained that the doctrines could apply only in "extreme and unusual case[s] involving outrageous governmental conduct." Boykin, 785 F.3d at 1360 (citation and internal quotation marks omitted); see, e.g., United States v. Beltran, 571 F.3d 1013, 1018 (10th Cir. 2009) ("[T]he government's conduct [must be] so

shocking, outrageous and intolerable that it offends the universal sense of justice.”) (citation and internal quotation marks omitted); United States v. Fontes, 415 F.3d 174, 180 (1st Cir.) (defense may only apply in an “extreme and unusual case”) (citation omitted), cert. denied, 546 U.S. 1050 (2005). Petitioners identify no case in which a court of appeals has in fact granted relief on such a claim of sentencing entrapment or manipulation.

b. Petitioners’ claims here fall far short of satisfying any plausible standard for sentencing entrapment or manipulation.

On the question of sentencing entrapment, petitioners adduced (and the record includes) no facts suggesting that they were predisposed to commit only a crime with lower sentencing exposure. See Boykin, 785 F.3d at 1360; Pet. App. 19a; cf. United States v. Hammadi, 737 F.3d 1043, 1048 (6th Cir. 2013) (“[T]he defendant bears the burden of proof as to his lack of predisposition.”). Specifically, petitioners point to nothing suggesting that they were predisposed to commit an armed robbery of a stash house containing fewer than five kilograms of cocaine, which would not have subjected them to a ten-year statutory minimum sentence, but were not predisposed to commit the more profitable armed robbery of a stash house containing eight or nine kilograms of cocaine as described by the ATF agent.

Indeed, the record undermines any assertion that petitioners lacked predisposition to commit the charged offense. All of the petitioners “readily and actively acted as willing participants

with a professed ability to carry out a dangerous armed robbery.” Black, 733 F.3d at 302. As the ATF agent testified, petitioners “spoke about the plan, asked him questions, and were attentive,” Pet. App. 4a, and they expressly declined to withdraw from the plan, see Gov’t C.A. Br. 10-11. Moreover, only one of the petitioners, Alexander, was actually recruited into the conspiracy by a government agent; the others were recruited by Alexander and the other co-conspirators. Pet. App. 3a-4a; see Black, 733 F.3d at 307 (noting that concerns about the government operation are “mitigated” in part because “the defendants before [the court] in this appeal were recruited by other defendants, not by” government agents). As for petitioner Alexander, he repeatedly confirmed his predisposition to commit the planned robbery through his words and actions. See, e.g., Alexander Presentence Investigation Report ¶ 13 (“I know what I’m doing, I’m about to holler at my big brother, then we going to orchestrate it from there.”). Moreover, Alexander expressly declined to seek an entrapment instruction at trial, undercutting his effort to invoke this doctrine as a sentencing claim. See D. Ct. Doc. 145, at 715. In short, petitioners could not make out a claim of sentencing entrapment, even if the court of appeals recognized that doctrine.

Petitioners likewise cannot make out a claim of sentencing manipulation. Petitioners adduced no proof that the ATF agent informed the participants that the stash house contained eight or nine kilograms of cocaine “solely,” or even primarily, “to enhance

[their] potential sentence[s].” Boykin, 785 F.3d at 1360 (citation omitted). To the contrary, the trial testimony indicated that the ATF agent selected that purported drug quantity for operational credibility reasons -- namely, that a typical stash house in Cleveland would store that amount of cocaine. See Pet. App. 5a (explaining that “the fictional amount of cocaine originated in a conversation with” local law enforcement and “was intended to mimic the average quantity in a Cleveland stash house”). Courts of appeals have rejected arguments similar to petitioners’ in other stash-house sting cases, including some involving even higher purported cocaine quantities. See, e.g., Washington, 869 F.3d at 212 & n.71 (rejecting sentencing manipulation argument based on ten-kilogram quantity and collecting similar authorities); Hare, 820 F.3d at 103 (rejecting sentencing manipulation argument based on quantity of 15 to 20 kilograms).

c. Finally, some petitioners (Alexander Pet. 13; Chappell Pet. 11; Maxwell Pet. 12-14) object to the court of appeals’ limited explanation for its rejection of their sentencing entrapment and manipulation claims, suggesting that the court failed to resolve an issue on which they had a right to appeal. That case-specific objection lacks merit and does not warrant this Court’s review.

The court of appeals declined to decide whether sentencing entrapment or sentencing manipulation constitute valid defenses, “leav[ing]” those questions “for another day.” Pet. App. 19a-20a.

Read in context, the court's decision makes clear that it did address -- and reject -- the merits of petitioners' claims. The court cited its prior decision in Hammadi for the proposition that "under the facts of the case, it 'need not decide whether to adopt or reject these doctrines'" of sentencing entrapment or manipulation. Id. at 20a (quoting 737 F.3d at 1048). That discussion indicates that the court determined that petitioners would not be entitled to relief, even if the court were to recognize the existence of those doctrines. See Sed, 601 F.3d at 230 (taking a similar approach); cf. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 386 (2008) (reviewing court should not lightly presume error by lower court). In any event, any explanatory deficiencies in the particular unpublished opinion in this case would not provide a sound basis for certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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