No. 25-5249

IN THE SUPREME COURT OF THE UNITED STATES

BARRY GORDON CROFT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard for harmless error and correctly determined that any error in the district court's limitation on the admission of statements by government informants under Federal Rule of Evidence 801(d)(2)(D) was harmless under the standard for nonconstitutional error set out in Kotteakos v. United States, 328 U.S. 750 (1946).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-44) is reported at 134 F.4th 348. The opinion and order of the district court is available at 2022 WL 1025938. The orders of the district court denying petitioner's motions in limine (Pet. App. 45-71, 72-74) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 2025 (Pet. App. 1). On June 15, 2025, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including July 30, 2025, and the petition was filed on July

29, 2025. 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 Western District of Michigan, petitioner was convicted on one count of conspiring to commit kidnapping, in violation of 18 U.S.C. 1201(c); one count of conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a)(2)(A), 2332a(a)(2)(C), and 921(a)(4); and one count of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d), 5871, and 5841. Pet. App. 75. The court sentenced petitioner to 235 months of imprisonment, to be followed by five years of supervised release. Id. at 76-77. The court of appeals affirmed. Id. at 3.

1. As discussed in the factual discussion in the Sixth Circuit's opinion, Pet. App. 3-21, petitioner was convicted of participating in an alleged scheme to kidnap Michigan Governor Gretchen Whitmer during the COVID-19 pandemic. The participation of significant numbers of FBI informants -- including one Dan Chappel, who testified at trial -- and undercover FBI agents in the development of the scheme led petitioner and codefendants to assert entrapment defenses.

2. In April 2021, a federal grand jury in the Western District of Michigan returned a superseding indictment charging petitioner and other members of the group. Pet. App. 11.

Petitioner was charged with conspiring to commit kidnapping, in violation of 18 U.S.C. 1201(c); conspiring to use a weapon of mass destruction, in violation of 18 U.S.C. 2332a(a)(2) and 921(a)(4); and possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d), 5871, and 5841. Ibid. Two codefendants pleaded guilty in exchange for cooperative testimony, but petitioner and others proceeded to trial. Gov't C.A. Br. 41.

Before trial, petitioner and his codefendants filed a motion in limine -- anticipating an affirmative defense of entrapment by law enforcement -- seeking the admission of more than 200 recorded statements (identified in a chart) made by FBI agents, government informants, and defendants themselves. D. Ct. Docs. 383, 383-1 (Dec. 29, 2021). They contended that the kidnapping scheme had been originated and incubated by government agents and informants. They argued that many of the statements by government agents and informants were relevant to the entrapment defense that they sought to prove at trial and that those statements qualified as nonhearsay admissions of a party opponent under Federal Rule of Evidence 801(d)(2)(D). D. Ct. Doc. 383, at 3, 6. Under Rule 801(d)(2)(D), a statement offered against an opposing party is not hearsay if it "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D). The government asserted that all of the identified statements were either hearsay, irrelevant, or both. See Pet. App. 34, 45.

The district court granted the motion in part and denied it in part. Pet. App. 70-71. The court found that the out-of-court statements of FBI agents qualified as nonhearsay party admissions under Rule 801(d)(2)(D). Id. at 46. But the court held that out-of-court statements by informants qualified as nonhearsay only "where an informant's words and actions are directly and expressly authorized by a government agent." Id. at 62. The court observed that "[o]nly the Sixth Circuit has permitted" informant statements to be admitted as party admissions under Rule 801(d)(2)(D). Id. at 61 (citation omitted). But it identified "reasons to be cautious in the application (and any expansion)" of that outlier approach. Id. at 61-62. Citing evidence treatises, the court explained that informants "more closely resemble independent contractors" than true agents of the government, because they are "expected to deal in and report rumor, speculation, suspicion, and opinion, and often they themselves are implicated in criminal ventures and labor under a mix of motives that is hard to unravel." Ibid. (citation omitted).

b. A trial held in spring 2022 resulted in a hung jury for petitioner and one codefendant and acquittals for two other codefendants. Pet. App. 12. Petitioner and his codefendant were retried, and the district court reapplied its evidentiary ruling about the statements by government informants. Id. at 72. On retrial, a jury found petitioner and his codefendant guilty of all charges against them. Id. at 12.

3. The court of appeals affirmed. Pet. App. 2-43.

The court of appeals first rejected petitioner's challenge to the sufficiency of the evidence, including as to petitioner's entrapment defense. Pet. App. 22-26. The court explained that an entrapment defense "requires proof of two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity." Id. at 23 (citation omitted). The court determined that petitioner's evidence of government inducement was "weak," and failed to "detract from the strong evidence of predisposition" -- which included evidence of petitioner's long association with antigovernment movements; his statements and postings going back to December 2019 about kidnapping and executing state governors; his "level of involvement"; and "the fact that [petitioner] was one of the progenitors of the kidnapping plan coupled with his lack of reluctance in seeing it through." Id. at 16; see id. at 24-26.

The court of appeals next addressed petitioner's challenge to the district court's evidentiary ruling limiting the admission of informant statements under Rule 801(d)(2)(D). Pet. App. 33. The court of appeals acknowledged that the majority of circuits do not treat informant statements as party admissions under Rule 801(d)(2)(D), but it looked to its prior decision in United States v. Branham, 97 F.3d 835 (6th Cir. 1996), to apply an approach under which informant statements are admissible under Rule 801(d)(2)(D)

when the statements fall within the scope of the agency relationship and are in furtherance of the government's investigative goal. Pet. App. 36 & n.10. And the court of appeals concluded that the district court had erred under that approach in limiting the admission of informant statements under Rule 801(d)(2)(D) to "only those situations where an informant's words and actions are directly and expressly authorized by a government agent." Id. at 36-37 (citation and emphasis omitted).

The court of appeals determined, however, that the district court's exclusion of the informant statements was harmless. Pet. App. 44; see id. at 37-44. The court of appeals rejected petitioner's argument that harmlessness should be evaluated under the "exacting" standard for constitutional errors announced in Chapman v. California, 386 U.S. 18 (1967), which "requires proof of harmlessness 'beyond a reasonable doubt.'" Pet. App. 37 (quoting 386 U.S. at 24). The court explained that "evidentiary rulings rarely constitute" a constitutional violation of the defendant's right to present a defense, and do not cause constitutional injury when other "avenues are available to the defendant to present his defense, including his own testimony." Ibid. (brackets and citations omitted). And here, the court observed that petitioner could have presented his entrapment defense through other means -- including "cross examination of the confidential informants," as well as by testifying himself. Id. at 38. The court thus evaluated harmlessness under the standard

for nonconstitutional errors set out in Kotteakos v. United States, 328 U.S. 750, 765 (1946), explaining that the court would not grant a new trial where it had a "'fair assurance' that the verdict was not 'substantially swayed' by the error." Pet. App. 38 (citation omitted).

Applying the Kotteakos standard, the court of appeals found that admitting the proffered informant statements "would not have had a material effect on the jury's verdict." Pet. App. 39. The court observed that petitioner "focus[ed]" his arguments about the effects of the evidentiary ruling on the "inducement" prong of the entrapment defense, but that "many of the statements at issue were never communicated" to petitioner and thus could not have induced him. Ibid. The court also found that other statements by informants that were communicated to petitioner did not qualify as the sort of "excessive pressure" necessary to establish inducement. Id. at 40-42. The court stated that "the jury heard the substance of most of these statements," and that others could have been brought out during the cross-examination of the informant Chappel, who made the majority of the statements at issue and testified at trial. Id. at 37, 40. The court additionally reasoned that "even if the proffered statements would have helped [petitioner] prove some inducement, we do not see how they would have swayed the jury's predisposition finding," identifying "powerful evidence" that petitioner was "predisposed to commit the crimes charged." Id. at 43.

ARGUMENT

Petitioner contends (Pet. 23-37) that the court of appeals should have evaluated harmlessness under the more stringent standard for constitutional error adopted in Chapman v. California, 386 U.S. 18, 24 (1967), rather than the standard for nonconstitutional error adopted in Kotteakos v. United States, 328 U.S. 750, 765 (1946), on the theory that the district court's evidentiary ruling deprived him of his constitutional right to present a complete defense. The court of appeals, however, correctly determined that any error in the district court's evidentiary ruling was not of constitutional dimension, and thus correctly applied the Kotteakos standard for harmlessness rather than the Chapman standard. That fact-bound determination does not conflict with any decision of this Court or any other court of appeals. Moreover, this case would be a poor vehicle to address the Sixth Circuit's choice of harmlessness standards, because the Sixth Circuit's outlier view that informant statements are admissible as statements of party opponents is subject to serious dispute. No further review is warranted.

1. The court of appeals correctly applied the Kotteakos standard to evaluate the harmlessness of the district court's evidentiary ruling, and correctly found the error to be harmless under that standard.

Under Rule 52(a) of the Federal Rules of Criminal Procedure, "[a]ny error, defect, irregularity, or variance that does not

affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a); see 28 U.S.C. 2111. Harmless-error doctrine "focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Outside the narrow category of "structural" errors, see Neder v. United States, 527 U.S. 1, 7-8 (1999) (citation omitted), the court of appeals must conduct an "analysis of the district court record * * * to determine whether the error was prejudicial," i.e., whether it "affected the outcome of the district court proceedings." United States v. Olano, 507 U.S. 725, 734 (1993). Where the error at issue is of constitutional dimension, the reviewing court may find it harmless only if the government demonstrates "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. But where the error is nonconstitutional, it is evaluated under the less demanding standard articulated in Kotteakos, and is harmless unless it had a "substantial and injurious effect or influence in determining the jury's verdict," 328 U.S. at 776; see Brecht v. Abrahamson, 507 U.S. 619, 631-632 & n.7, 637-638 (1993) (explaining that "claims of nonconstitutional error" are judged under the Kotteakos standard).

The Kotteakos standard is generally appropriate for evaluating evidentiary errors, because "'[e]rroneous evidentiary rulings rarely constitute a violation of a defendant's right to

present a defense.'" Pet. App. 37 (citation omitted); see United States v. Lathern, 488 F.3d 1043, 1046 (D.C. Cir. 2007) (Kavanaugh, J.) (noting that "such cases are rare"); Washington v. Schriver, 255 F.3d 45, 56 (2d Cir. 2001). Although the Fifth and Sixth Amendments protect a criminal defendant's "meaningful opportunity to present a complete defense," Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citation omitted), they do not give the accused "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Taylor v. Illinois, 484 U.S. 400, 410 (1988). Accordingly, "rules excluding evidence from criminal trials * * * do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998) (citation omitted). And where a defendant retains "a sufficient opportunity to present his defense" at trial through other means, an erroneous ruling excluding certain evidence does not cause constitutional harm. Lathern, 488 F.3d at 1046; see Pet. App. 37.

The court of appeals correctly applied those principles in evaluating which harmlessness standard should apply to the district court's limitation on the admission of informant statements under Federal Rule of Evidence 801(d)(2)(D). The court observed that petitioner had "other avenues" for presenting the defense at trial. See Pet. App. 37-38. For example, petitioner

himself could have "testified in support of the[] * * * defense," and other statements "could have been explored through cross examination of the confidential informants" such as Chappel, who testified at trial. Id. at 37-38 & n.11. The court thus correctly determined that any error in the exclusion of certain informant statements did not burden petitioner's constitutional right to present his entrapment defense, and that harmlessness thus should be assessed under the Kotteakos standard for nonconstitutional errors. Id. at 38; see Lathern, 488 F.3d at 1046. Applying that standard, the court found any error to be harmless. Pet. App. 44. Petitioner does not dispute that under the Kotteakos standard, any errors were harmless.

Instead, petitioner argues (Pet. 23-37) that the court of appeals should have applied the Chapman standard for constitutional errors. His primary contention (Pet. 25-28) is that the district court's ruling was so "arbitrary" as to constitute constitutional injury, on the theory that it conflicted with the "plain meaning" of Rule 801(d)(2)(D). By that logic, however, every erroneous interpretation of the Rules of Evidence could be characterized as having a constitutional dimension -- a view that the courts of appeals have uniformly rejected. See pp. 9-10, supra. And classifying only an amorphous subset of misinterpretations as "arbitrary" would be indeterminate and inadministrable. To the extent that petitioner suggests that there was something particularly egregious about the asserted error in

this case, that is difficult to square with the fact that most courts would not have found any error, as the Sixth Circuit is the only circuit that has permitted the admission of informant statements under Rule 801(d)(2)(D). See Pet. App. 36 n.10, 61.

Petitioner also contends (Pet. 28) that the district court's evidentiary ruling arbitrarily precluded him from using Rule 801(d)(2)(D) "at all." But the court expressly allowed the admission under Rule 801(d)(2)(D) of both the statements of FBI agents and statements of informants that were directly and expressly authorized by a government agent. Pet. App. 59, 62. Petitioner further contends that the court's ruling prevented him from "examin[ing] the conduct of the government agent[s]" to mount his entrapment defense. Pet. 30 (quoting Sherman v. United States, 356 U.S. 369, 373 (1958)) (second set of brackets in original). But, as the Sixth Circuit recognized, petitioner had other means of eliciting similar evidence, including by cross-examining informant witnesses like Chappel or through direct testimony. See Pet. App. 37-38.

Petitioner contends (Pet. 38-40) that, by considering petitioner's decision not to testify in deeming the district court's asserted error nonconstitutional, the court of appeals put petitioner to an "unconstitutional choice" between invoking his Fifth Amendment privilege against self-incrimination and his Fifth and Sixth Amendment right to present a defense. But the court of appeals did not force petitioner to choose between constitutional

rights; it merely considered petitioner's ability to testify in determining which harmlessness standard to apply when evaluating an evidentiary error. See Pet. 37-38. Petitioner has not identified any authority for the proposition that if he chooses not to testify, he is nonetheless constitutionally entitled to present evidence that substitutes for what he would say, irrespective of any rules of evidence to the contrary. See Taylor, 484 U.S. at 410. Moreover, the court also considered other ways in which petitioner could have proved entrapment without waiving his Fifth Amendment privilege, such as "cross examination of the confidential informants." Pet. App. 38.

2. Petitioner does not assert that the Sixth Circuit's assessment of harmless error conflicts with any decision of another court of appeals. Indeed, other courts of appeals likely would not have considered the district court's evidentiary ruling to be error in the first place, because "'[o]nly the Sixth Circuit has permitted'" informant "statements 'to constitute a party admission under Rule 801(d)(2)(D).'" Pet. App. 36 n.10 (citation omitted); see United States v. Yildiz, 355 F.3d 80, 82 (2d Cir. 2004) (per curiam) (holding that "the out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D)"); Lippay v. Christos, 996 F.2d 1490, 1499 (3d Cir. 1993) (explaining that "[w]e do not believe that the authors of Rule 801(d)(2)(D) intended statements by informers as a general matter to fall under the rule," but declining to adopt a "per se

rule"). Petitioner's arguments thus boil down to a case-specific request for error correction as to which harmlessness standard should have applied in his case. Such factbound contentions do not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

3. In all events, this case would be a poor vehicle for reviewing the question presented because the Sixth Circuit's view that informant statements may be admitted against the government as admissions of a party opponent reflects an outlier view among the courts of appeals. See United States v. New York Tel. Co., 434 U.S. 159, 166 n.8 (1977) (recognizing a "prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted").

Rule 801(d)(2)(D) provides that statements by an opposing "party's agent or employee on a matter within the scope of that relationship and while it existed" do not qualify as hearsay when offered against the opposing party. Fed. R. Evid. 801(d)(2)(D). As commentators have explained, "[u]sually statements by informants should not be viewed as admissions by the government" because "informants are expected to deal in and report rumor, speculation, suspicion, and opinion, and often they themselves are implicated in criminal ventures and labor under a mix of motives that is hard to unravel." Christopher B. Mueller & Laird C. Kirkpatrick, 4 Federal Evidence § 8:56 (4th ed. July 2025 update).

The approach of the majority of circuits that have addressed the issue is likely the correct one: as a general matter, "out-of-court statements of a government informant are not admissible in a criminal trial pursuant to Rule 801(d)(2)(D) as admissions by the agent of a party opponent." Yildiz, 355 F.3d at 82; see Lippay, 996 F.2d at 1498. For that reason as well, the petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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