No. 17-

IN THE

Supreme Court of the United States

WENDELL RIVERA-RUPERTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

H. MANUEL HERNÁNDEZ *
H. MANUEL HERNÁNDEZ, P.A.
620 East Club Circle
Longwood, FL 32779
(407) 682-5553
manny@hmh4law.com

Counsel for Petitioner

July 27, 2018

* Counsel of Record

QUESTIONS PRESENTED

Whether the Eighth Amendment forbids the creation of a de-facto mandatory life without parole sentence through stacking 18 U.S.C. § 924(c) charges for sting operations in which the government exercised control over the predicates for sentencing enhancements.

Whether the Due Process Clause is violated when a sentencing court refuses to consider, as a mitigating factor, whether the government has engaged in a scheme to manipulate minimum mandatory sentencing statutes to intentionally enhance the severity of the offense.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Wendell Rivera-Ruperto, defendant-appellant below. Respondent is the United States, plaintiff-appellee below. Petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	3
STATEMENT OF THE CASE	4
I. FACTUAL BACKGROUND	4
II. PROCEEDINGS BELOW	5
A. Prosecution And Sentencing	5
B. Appellate Review	6
1. First Circuit Panel	6
2. En Banc Proceedings	7
REASONS FOR GRANTING THE PETITION	8
I. THE ENTIRETY OF THE FIRST CIRCUIT HAS ASKED THE COURT TO RECONCILE THE CONFLICTING HOLDINGS OF *SOLEM* AND *HARMELIN*	8
A. The Stakes Of Clarifying Eighth Amendment Precedent Are Highest In § 924(c) Cases Like Mr. Rivera-Ruperto's	9

TABLE OF CONTENTS—continued

Page

B. The First Circuit Panel Incorrectly Applied *Harmelin* 12

II. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER SENTENCE MANIPULATION IS A VALID MITIGATING FACTOR 16

A. Six Circuit Courts Recognize Sentence Factor Manipulation As A Mitigating Factor.. 16

B. The Sixth And Seventh Circuits Do Not Recognize Sentence Factor Manipulation As A Mitigating Factor 18

C. Four Circuits Have Not Made Decisions Regarding The Viability Of Sentence Factor Manipulation As A Mitigating Factor.. 19

D. These Divisions Are Unlikely To Be Remedied Without The Court's Review ... 20

III. THIS CASE IS A STRONG VEHICLE TO CONSIDER THE QUESTION PRESENTED 22

A. Mr. Rivera-Ruperto's Sentence Was Grossly Disproportionate.......................... 22

B. The Facts Indicate That The Motive For The Additional Transactions Was To Manipulate Mr. Rivera-Ruperto's Sentence... 22

C. The Issues Have Been Well Preserved And The Record Is Well Reflected And Modest In Length..................................... 24

TABLE OF CONTENTS—continued

Page

CONCLUSION 27

APPENDICES

APPENDIX A: Denial of Rehearing or Rehearing En Banc, *United States* v. *Wendell Rivera-Ruperto*, Nos. 12-2364, 12-2367, 13-2017 (1st Cir. Feb. 27, 2018) 1a

APPENDIX B: Opinion, *United States* v. *Wendell Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Jan. 13, 2017) 26a

APPENDIX C: Opinion, *United States* v. *Wendell Rivera-Ruperto*, Nos. 13-2017, 13-2047, 13-2072 (1st Cir. Jan. 13, 2017) 97a

APPENDIX D: Judgment, *United States* v. *Wendell Rivera-Ruperto*, No. 10-342 (D.P.R. July 30, 2013)... 139a

APPENDIX E: Judgment, *United States* v. *Wendell Rivera-Ruperto*, Nos. 10-344, 10-356 (D.P.R. Oct. 31, 2012) 145a

APPENDIX F: Excerpts from Transcript of Sentencing Hearing, *United States* v. *Wendell Rivera-Ruperto*, No. 10-342 (D.P.R. July 30, 2013)... 150a

APPENDIX G: Excerpts from Transcript of Sentencing Hearing, *United States* v. *Wendell Rivera-Ruperto*, Nos. 10-344, 10-356 (D.P.R. Oct. 16, 2012) 157a

APPENDIX H: Table of Charges and Indictments with Drug Quantities 167a

TABLE OF AUTHORITIES

CASES Page

Harmelin v. *Michigan*, 501 U.S. 957 (1991) .... *passim*

In re Hernandez, 857 F.3d 1162 (11th Cir. 2017) 10, 11

Rummel v. *Estelle*, 445 U.S. 263 (1980) 15

Solem v. *Helm*, 463 U.S. 277 (1983) 3, 8

United States v. *Baber*, 161 F.3d 531 (8th Cir. 1998) 21

United States v. *Barbour*, 393 F.3d 82 (1st Cir. 2004) 16, 17

United States v. *Beltran*, 571 F.3d 1013 (10th Cir. 2009) 16, 17, 20

United States v. *Bigley*, 786 F.3d 11 (D.C. Cir. 2015) (per curiam) 16, 17

United States v. *Ciszkowski*, 492 F.3d 1264 (11th Cir. 2007) 16, 17

United States v. *DePierre*, 599 F.3d 25 (1st Cir. 2010) 16

United States v. *Fontes*, 415 F.3d 174 (1st Cir. 2005) 17

United States v. *Gagliardi*, 506 F.3d 140 (2d Cir. 2007) 19

United States v. *Gardner*, 488 F.3d 700 (6th Cir. 2007) 18

United States v. *Gibbens*, 25 F.3d 28 (1st Cir. 1994) 21

United States v. *Guest*, 564 F.3d 777 (6th Cir. 2009) 18

United States v. *Jaca-Nazario*, 521 F.3d 50 (1st Cir. 2008) 16

United States v. *Jones*, 18 F.3d 1145 (4th Cir. 1994) 19, 20

TABLE OF AUTHORITIES—continued

Page

United States v. *Jones*, 102 F.3d 804 (6th Cir. 1996) 18
United States v. *Kenney*, 756 F.3d 36 (1st Cir. 2014) 16
United States v. *Lacey*, 86 F.3d 956 (10th Cir. 1996) 18
United States v. *Montoya*, 62 F.3d 1 (1st Cir. 1995) 17
United States v. *Mosley*, 965 F.2d 906 (10th Cir. 1992) 21
United States v. *Riewe*, 165 F.3d 727 (9th Cir. 1999) (per curiam) 16, 17
United States v. *Sed*, 601 F.3d 224 (3d Cir. 2010) 19, 20
United States v. *Torres*, 563 F.3d 731 (8th Cir. 2009) 16, 17
United States v. *Tremelling*, 43 F.3d 148 (5th Cir. 1995) 19
United States v. *Turner*, 569 F.3d 637 (7th Cir. 2009) 18, 19
United States v. *Veazey*, 491 F.3d 700 (7th Cir. 2007) 18
United States v. *White*, 519 F.3d 342 (7th Cir. 2008) 18
West v. *United States*, 631 F.3d 563 (1st Cir. 2011) 16, 17

STATUTES

18 U.S.C. § 924(c) 2
21 U.S.C. § 841(b)(1) 23

TABLE OF AUTHORITIES—continued

Page

OTHER AUTHORITIES

Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 24 (2009) 10
U.S. Const. amend. V 2
U.S. Const. amend. VIII 1, 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mr. Wendell Rivera-Ruperto, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the First Circuit denying rehearing en banc and the related concurrence is reproduced in the appendix to this petition at 1a and is reported at 884 F.3d 25 (1st Cir. 2018) ("Pet. App."). The related opinions of the First Circuit are reported at 846 F.3d 417 (1st Cir. 2017) (Rivera-Ruperto I) and 852 F.3d 1 (1st Cir. 2017) (Rivera-Ruperto II) and are reproduced in the appendix to this petition at Pet. App. 26a-138a. The judgments of the United States District Court for the District of Puerto Rico are reprinted in the petition appendix at Pet. App. 139a-149a.

JURISDICTION

The First Circuit entered judgment and issued related opinions in both appeals on January 13, 2017, Pet. App. 26a, 97a, and denied Mr. Rivera-Ruperto's petition for rehearing en banc on February 27, 2018. Pet. App. at 1a. On May 3, 2018, Justice Breyer extended the time within which to file this petition to and including July 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the U.S. Constitution provides, in relevant part, that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cru-

el and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fifth Amendment of the U.S. Constitution provides, in relevant part, that "[n]o person shall … be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V.

18 U.S.C. § 924(c) provides, in relevant part, that:

> (1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years; …
>
> (1)(C) In the case of a second or subsequent conviction under this subsection, the person shall--
>
> > (i) be sentenced to a term of imprisonment of not less than 25 years; …

INTRODUCTION

A unanimous First Circuit has recently entreated the Court to reconcile the conflict between two contrasting precedents that both address federal judges' ability to assess the meaning of "grossly disproportionate" sentences as applied to the Eighth Amendment's prohibition against "cruel and unusual" punishments. The two conflicting cases, *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) and *Solem* v. *Helm*, 463 U.S. 277 (1983) set forth opposing tests for determining proportionality.

Under *Solem*, "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria." *Solem*, 463 U.S. at 292. In contrast, under the binding three-justice concurrence in *Harmelin*, courts are limited to making a "threshold comparison of the crime committed and the sentence imposed." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Notably, four dissenting justices in *Harmelin* opined that under this form of analysis, courts would have "no basis for [a] determination that a sentence was … – or was not – disproportionate, other than the 'subjective views of individual [judges],' which is the very sort of analysis our Eighth Amendment jurisprudence has shunned." Pet. App. at 15a (quoting *Harmelin*, 501 U.S. at 1020) (alterations in original).

Mr. Rivera-Ruperto joins all of the judges on the First Circuit in recognizing that Eighth Amendment implications arise when federal judges are permitted to engage in subjective analysis of proportionality and, further, that statutes such as 18 U.S.C. § 924(c) are particularly vulnerable to Eighth Amendment violations and prosecutorial manipulation. As the First Circuit urged, the Court should "revisit the logic of

the *Harmelin* concurrence, at least insofar as it applies to mandatory greater-than-life-without-parole sentences under § 924(c) in cases involving predicate drug offenses." Pet. App. at 17a.

Mr. Rivera-Ruperto's case also squarely presents an important question on whether the government's construction of sting operations designed solely to enhance the severity of a defendant's sentence can be considered as a mitigating factor at sentencing. Six circuits have adopted the sentence manipulation doctrine, but two circuits expressly deny that it is a viable mitigating factor. The lack of guidance from the Court regarding the viability of this doctrine has created a circuit split wherein due process rights vary from circuit to circuit.

Both questions presented were persistently raised and preserved for appeal throughout Mr. Rivera-Ruperto's prosecution. Mr. Rivera-Ruperto's case "is so rare that it is distinguishable from the cases in which the Supreme Court rejected Eighth Amendment challenges to sentences for a term of years…and it is also distinguishable from cases the Government cited in which other circuits rejected Eighth Amendment challenges to sentences under § 924(c)." Pet. App. at 96a (Torruella, J., dissenting).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case originates from a large-scale FBI sting operation in which undercover agents orchestrated a series of staged drug deals to ensnare corrupt sworn officers of the Police of Puerto Rico. All of the deals followed the same pattern: undercover agents recruited police officers to act as armed security while the agents posed as *both* sellers and buyers of fake

cocaine at FBI-monitored apartments. Pet. App. at 28a, 100a.

Each bogus transaction involved exceedingly large quantities (8-, 12- and 15- kilograms) of fake cocaine and different groups of Puerto Rican police officers. See *id.* at 167a-169a. Having structured the sting operation in this way, Mr. Rivera-Ruperto was charged with six separate counts of conspiracy and attempted possession corresponding to the six different dates in which he participated. *Id.* at 9a, 28a.

Mr. Rivera-Ruperto was not a police officer. He was a first-time offender who was only there because he misinformed an FBI informant that he was a prisons corrections officer. *Id.* at 28a. He provided armed security during six of these sham transactions. *Id*. An FBI agent also ensured that "in every transaction" Mr. Rivera-Ruperto "held the sham cocaine in his hands" by "hand[ing] him the bag that held the sham cocaine for him to weigh." *Id.* at 10a (alterations in original omitted) (citation omitted).

II. PROCEEDINGS BELOW

A. Prosecution And Sentencing.

Mr. Rivera-Ruperto was charged with six counts of possession of a firearm in violation of 18 U.S.C. § 924(c), six counts of conspiracy to possess with intent to distribute a controlled substance, six counts of attempted possession with intent to distribute a controlled substance and one count of possession of a firearm with an obliterated serial number. Pet. App. at 2a.

For reasons not apparent in the record, the district court bifurcated Mr. Rivera-Ruperto's charges. *Id.* at 30a. Mr. Rivera-Ruperto's first trial, which involved five of the transactions, resulted in a 126-year and

10-month sentence. *Id.* at 27a. At his second trial, another district judge sentenced Mr. Rivera-Ruperto to a consecutive 35-year term of imprisonment. *Id.* at 101a. As opposed to a single five-year sentence that would have accompanied a single drug conspiracy, each subsequent conviction under § 924(c) carried a mandatory 25-year sentence to be served consecutively, resulting in 130-years imprisonment for the firearms convictions alone. *Id.* at 3a. Defense counsel vehemently objected to sentencing manipulation. See *id.* at 154a-155a, 159a-161a. Mr. Rivera-Ruperto is now serving a sentence totaling 161-years and 10-months for a non-violent crime that "involved staged drug deals, sham drugs, and fake dealers," and fake buyers. *Id.* at 30a-31a.

B. Appellate Review.

1. First Circuit Panel.

Mr. Rivera-Ruperto challenged his sentences both on Eighth Amendment and manipulation grounds. In addition, he argued that the government manipulated his sentence by using unnecessarily high quantities of fake drugs and continuing to engage him in a "seemingly endless number of deals." Pet. App. at 54a, 114a. He also argued that his cumulative mandatory sentence was grossly disproportionate and violated the Eighth Amendment. *Id.* at 114a-115a.

The same First Circuit panel addressed these arguments in "related," "companion" opinions. *Id.* at 31a, 102a. The panel affirmed. They reasoned that his 161-year sentence was not "hen's-teeth rare," in light of the 25-year to life and 40-year sentences allowed in *Ewing* v. *California*, 538 U.S. 11 (2003) and *Hutto* v. *Davis*, 454 U.S. 370 (1982) (per curiam). Pet. App. at 57a-59a. The panel dismissed dissenting Judge Torruella's distinguishing factor of recidivism

in those cases by noting that Mr. Rivera-Ruperto's crime involved "drugs and guns." *Id.* at 59a. Cribbing from *Muscarello* v. *United States*, 524 U.S. 125 (1998) (expanding the definition of "carrying firearm" in § 924(c)), the panel quoted the chief legislative sponsor of § 924(c) as saying: "the provision seeks to persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Id.*

The First Circuit panel further held that the plain language of § 924(c) overcame any Eighth Amendment concerns under *Harmelin*, 501 U.S. at 1006 (Kennedy, J., concurring). Pet. App. at 60a ("[C]ourts … must step softly and cede a wide berth to the Legislative Branch's authority to match the type of punishment with the type of crime") (citation omitted).

2. En Banc Proceedings.

The First Circuit denied Mr. Rivera-Ruperto's petition for rehearing or rehearing en banc; however, every judge on the First Circuit, including those who served on the original First Circuit panel, concurred with Judge Barron "urg[ing]" this Court to "revisit" the *Harmelin* precedent in order to "determine whether [Mr.] Rivera's sentence is grossly disproportionate under the Eighth Amendment." Pet. App. at 3a, 24a-25a.

REASONS FOR GRANTING THE PETITION

I. THE ENTIRETY OF THE FIRST CIRCUIT HAS ASKED THE COURT TO RECONCILE THE CONFLICTING HOLDINGS OF *SOLEM* AND *HARMELIN*

The *Solem* Court found "[w]hen sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized." *Solem,* 463 U.S. at 290. Those criteria were "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

In *Harmelin*, the last word on proportionality, the concurring Justices appeared to alter the objective test under the *Solem* test without acknowledging that they were doing so. The concurrence opined that judges could forego the second and third factors of the *Solem* test if those judges determined the first factor did not raise an inference of "gross disproportionality." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). On this basis, the *Harmelin* Court upheld a mandatory sentence of life without parole for possession of more than 650 grams of cocaine. *Id.* at 1008-1009 (Kennedy, J., concurring).

Although the concurrence in *Harmelin* purported to align with "the requirement that proportionality review be guided by objective factors," *id.* at 1001, an equal number of dissenting justices found S*olem* "directly to the contrary." *Id.* at 1019 (White, J., dissenting). They noted that "the Court [has] made clear that 'no one factor will be dispositive in a given case,' and 'no single criterion can identify when a sen-

tence is so grossly disproportionate that it violates the Eighth Amendment.'" *Id.* Rather, "a combination of objective factors can make such analysis possible." *Id.* They found the concurrence an "abandonment of the second and third factors" that "makes any attempt at an objective proportionality analysis futile." *Id.* at 1020.

Here, the First Circuit panel reluctantly resolved Mr. Rivera-Ruperto's appeal "at the threshold of the *Solem* inquiry." Pet. App. at 16a. The First Circuit argued that *Harmelin* required it to conclude that a first-time offender's sentence of more than 161 years for possessing a firearm during government drug stings did not raise an inference of "gross disproportionality." *Id.* (quoting *Harmelin*, 501 U.S. at 1005). It analogized to *Harmelin*, and offered weakly that "Congress could … have had a rational basis for concluding that such a sentence was warranted." *Id.*

The First Circuit therefore unsurprisingly asked this Court to review the "abstract and highly deferential threshold inquiry" required by the *Harmelin* analysis. Specifically, the First Circuit questioned the use of the *Harmelin* concurrence to ratify a minimum mandatory life without parole sentence under § 924(c). See *Id.* at 21a.

A. The Stakes Of Clarifying Eighth Amendment Precedent Are Highest In § 924(c) Cases Like Mr. Rivera-Ruperto's.

The First Circuit's concern regarding § 924(c) is rooted in the severity of § 924(c)'s minimum mandatory sentencing stacking provisions. See Pet. App. at 3a ("Other federal judges have expressed their dismay that our legal system could countenance extreme mandatory sentences under §924(c).").

The severity of § 924(c)'s stacking provisions is well documented. In *In re Hernandez*, a case much like *Rivera*, the majority of an Eleventh Circuit panel concurred in the court's decision to uphold a 775-month sentence (64.5 years), 300 months (25 years) of which were mandated by §924(c), but expressed unease. *In re Hernandez*, 857 F.3d 1162, 1168 (11th Cir. 2017). The Eleventh Circuit noted that while § 924(c) "may have been intended to punish repeat offenders … Prosecutors can charge multiple 924(c) counts to dramatically increase a defendant's minimum sentence for a series of crimes committed close in time." *Id.*

Both the Judicial Conference of the United States and the United States Sentencing Commission have also scrutinized the severity of minimum mandatory sentencing stacking under § 924(c).[1] In *In re Hernandez*, the court noted, "the Judicial Conference has urged Congress on at least two occasions to amend the 'draconian' penalties established at section 924(c) by making it a 'true recidivist statute, if not rescinding it all together.'" *Id.* at 1168-69. Further, the Court noted that, "The Sentencing Commission joined the

---

[1] *Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 24-25 (2009) (prepared statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States):

> [W]e hope that the Congress will attempt to identify expeditiously and address those most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results in the cases sentenced under their provisions. The Conference, at the recommendation of the Criminal Law Committee, has identified one such provision—the stacking aspect of § 924(c) penalties—and has explicitly endorsed seeking legislation that would unstack § 924(c) penalties.

Judicial Conference of the United States in concluding that the practice of 'stacking' of § 924(c) sentences is so unjust that Congress should eliminate it." *Id.* at 1169.

The Eleventh Circuit found the sentencing disparity created by § 924(c) most "worrisome." *Id.* "The Sentencing Commission also reported to Congress that the practice of 'stacking' § 924(c) charges happens in very few districts" and that "data showed 'no evidence that those offenses occur more frequently in those districts than in others.'" *Id.* The Commission concluded "this geographic concentration is attributable to inconsistencies in the *charging* of multiple violations of § 924(c)." *Id.* (emphasis added). In this respect, *Harmelin*'s legacy in §924(c) cases has been prosecutorial, rather than legislative, deference.

Like the Eleventh Circuit, the First Circuit expresses its concern that § 924(c) could be used to allow a first-time offender such as Mr. Rivera-Ruperto to be sentenced to a mandatory-life-without-parole sentence. See Pet. App. at 7a (observing that "Rivera … was sentenced to a prison term of more than 100 years for the § 924(c) convictions that he received at a single trial … *despite the fact that he had no prior criminal history*.") (emphasis added).

Mr. Rivera-Ruperto joins the First Circuit in asking the Court to reconsider the *Harmelin* concurrence in circumstances such as the one at hand, where statutory minimums preclude federal judges from analyzing discretionary factors. See Pet. App. at 2a. ("[T]his case is replete with factors that – under a discretionary sentencing regime – would surely have been relevant to a judge's individualized rather than arithmetical assessment of whether what Rivera did should not only be punished severely but also deprive him … of any hope of ever enjoying freedom again.").

B. The First Circuit Panel Incorrectly Applied *Harmelin*.

The concurring Justices in *Harmelin* anchored their reasoning in "common principles" they distilled from the Court's decisions. *Harmelin*, 501 U.S. at 998. Justices argued these principles gave "content to the uses and limits of proportionality review." *Id*. The five principles were, first, "fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Id.* (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 275-76 (1980)). Second, "the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 999. Third, "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Id.* Fourth, "proportionality review by federal courts should be informed by 'objective factors to the maximum possible extent.'" *Id.* at 1000 (quoting *Rummel*, 445 U.S. at 274-275). Fifth, "the Eighth Amendment does not require strict proportionality," but "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001.

As noted by the First Circuit, these factors did not apply with force in *Rivera*. In contrast to the "carefully calibrated and graduated penalty scheme" in *Harmelin* "in which the Michigan legislature specially singled out only a subset of precisely defined large-quantity drug possession crimes for … harsh punishment," Pet. App. at 18a, the statute at issue in *Rivera* (18 U.S.C. §924(c)) "criminalizes much conduct that – given that statute's famously ambiguous scope – is in its nature not similarly precisely knowable to legislatures." *Id*. Under § 924(c) "life-without-parole

sentences may be required … for an astoundingly wide array of possible offense combinations, including mixes potentially of both state and federal offenses and various combinations of predicate drug offenses, whether or not paired with 'crime[s] of violence.'" *Id.* at 19a (alteration in original). Further, no mention was made in floor debates of the language which triggered the stacking of sentences in *Rivera* or of the "draconian" sentences that would result. *Id.* It is therefore unlikely that the provisions triggering the life-without-parole sentence in *Rivera* were based, as in *Harmelin*, on a "substantive penological judgment" or "penological theory" regarding the results in cases like Mr. Rivera-Ruperto's. *Harmelin*, 501 U.S. at 998, 999 (Kennedy, J., concurring).

Instead, *Rivera* is different because prosecutors, rather than a legislature, created the grossly disproportionate sentence. Under §924(c), Mr. Rivera-Ruperto received a 5-year enhancement for the first of his counts, and pursuant to § 924(c)(1)(C), he received 25-year sentences for his "second or subsequent" five remaining sentences. This outcome was not required. Mr. Rivera-Ruperto's conduct was part of a single drug conspiracy involving the same FBI agent. Because prosecutors could not use the FBI agent as the only basis to allege a conspiracy under First Circuit law, prosecutors charged each of their operations with Mr. Rivera-Ruperto as separate conspiracies. This is even though the First Circuit has found on Double Jeopardy grounds that "a single conspiracy conviction may not serve as the predicate for multiple § 924(c) convictions … no matter how large or extended that predicate conspiracy happens to be." Pet. App. at 10a.

Given that Mr. Rivera-Ruperto was a relatively peripheral figure in operations staged by the govern-

ment, the stacking in this case was more a product of the government's actions than Mr. Rivera-Ruperto's. Government agents posed as buyers and sellers, they provided sham drugs and determined their weight, and they determined the number of transactions conducted by the (FBI agent) seller, and of course, the government created the requirement that a firearm be present at all of the sham drug deals. As such, prosecutors created the predicate to stack 162 years just as easily as they could have 1,600 years. As the First Circuit observed, even if the transactions had been real ones, prosecutors determined which of these transactions to charge and how to charge them. They noted:

> Notably, though, if Rivera had participated in the same type of extended conspiracy with a real drug trafficker standing in the stead of the FBI agent who was present for each of the six transactions, and if Rivera had then been charged with participating in a single, extended conspiracy for his course of conduct, he could have been sentenced under § 924(c) to a prison term of only five years for possessing a firearm in furtherance of that conspiracy.

Pet. App. at 9a-10a.

Rivera is distinguishable from *Harmelin* because *Rivera* is a federal prosecution. Respect for states' "differing attitudes and perceptions of local conditions" is therefore not at issue here. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring). See also Pet. App. at 18a (noting that setting aside mandatory minimums under § 924(c) would not "require rejection … [of] the collective wisdom of the Legislature and, as a consequence, the citizenry") (quoting *Harmelin*, 501 U.S. at 1006) (alterations in original omitted).

The necessity of being guided by "objective factors" also does not apply in *Rivera* as it did in *Harmelin*. Justices opined in *Harmelin* that the "type of punishment imposed" is the "most prominent objective factor" for invalidating a sentence as cruel and unusual, and that "the penalty of death differs from all other forms of criminal punishment." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring). In contrast, Justices found courts lack "clear objective standards to distinguish between sentences for different terms of years." *Id.* at 1001 (Kennedy, J., concurring). For this reason, they argued, successful proportionality challenges to non-capital cases are "exceedingly rare." *Id*. But prosecutorial misuse of charging statutes to create life without parole sentences provides another such objective basis. This concept of "cruel and unusual" is rooted in the history of the Eighth Amendment. See *id.* at 966-976 (tracing the meaning of the "cruel and unusual punishments" provision of the English Declaration of Rights, the precursor to such language in the Eighth Amendment, to the "arbitrary" and "illegal" sentences imposed by "Lord Chief Justice Jeffreys of the King's Bench during the Stuart reign of James II.").

Additionally, *Rivera* did not involve recidivism as in *Rummel* and *Solem*. The 162-year sentence does not therefore reflect "the interest … in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society." *Rummel*, 445 U.S. at 276.

In light of these crucial differences, granting cert would not require overruling *Harmelin*, but clarifying the proportionality standard for the Eighth Amendment when the *Harmelin* principles do not apply. The *Harmelin* holding lauds the divergences between

state sentencing regimes as a benefit of the federal court system. *Harmelin*, 501 U.S. at 999-1000 (Kennedy, J., concurring). As *Harmelin* relies upon such federalism principles, however, lower courts, including the panel here, should not consider it persuasive authority for Eighth Amendment challenges to federal sentences.

II. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER SENTENCE MANIPULATION IS A VALID MITIGATING FACTOR

A. Six Circuit Courts Recognize Sentence Factor Manipulation As A Mitigating Factor.

The First, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits recognize sentence factor manipulation as a viable mitigating factor. See*, e.g.*, *United States* v. *Jaca-Nazario*, 521 F.3d 50, 57-58 (1st Cir. 2008); *United States* v. *Torres*, 563 F.3d 731, 734 (8th Cir. 2009); *United States* v. *Riewe*, 165 F.3d 727, 729 (9th Cir. 1999) (per curiam); *United States* v. *Beltran*, 571 F.3d 1013, 1019-20 (10th Cir. 2009); *United States* v. *Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007); *United States* v. *Bigley*, 786 F.3d 11, 14-15 (D.C. Cir. 2015) (per curiam).

The First Circuit defines sentence manipulation as government misconduct that prolongs or extends the scope of an investigation for the sole reason of exacerbating the defendant's sentence. See *United States* v. *Kenney*, 756 F.3d 36, 51 (1st Cir. 2014); see*, e.g.*, *West* v. *United States*, 631 F.3d 563, 570 (1st Cir. 2011); *United States* v. *DePierre*, 599 F.3d 25, 28-29 (1st Cir. 2010). The threshold for misconduct is high; sentence manipulation is found only when the government engages in "extraordinary misconduct." *United States* v. *Barbour*, 393 F.3d 82, 86 (1st Cir.

2004). Sentence modification is appropriate when the defendant proves by a preponderance of evidence that the government's conduct was both extraordinary and illegitimately motivated. See *West*, 631 F.3d at 570; *United States* v. *Fontes*, 415 F.3d 174, 180 (1st Cir. 2005); *United States* v. *Montoya*, 62 F.3d 1, 4 (1st Cir. 1995).

Similarly, the Eleventh, Ninth, and D.C. Circuits recognize sentence modification as an appropriate remedy when the government's misconduct is "outrageous" or "reprehensible." See *Ciszkowski*, 492 F.3d at 1270; *Riewe*, 165 F.3d at 729; *Bigley*, 786 F.3d. Notably, in the Eleventh Circuit the remedy for sentence factor manipulation is not an outright sentence modification, but a "filtering" of the manipulation from the sentencing calculus. Defendants in the Eleventh Circuit that make successful sentence manipulation challenges are sentenced based solely on the offenses that the defendant would have committed absent the government's manipulation. See *Ciszkowski*, 492 F.3d at 1270 ("Sentencing factor manipulation … requires that the manipulation be filtered out of the sentencing calculus … [A]n adjustment for sentencing factor manipulation is not a departure. When a court filters the manipulation out of the sentencing calculus before applying a sentencing provision, no mandatory minimum would arise in the first place.").

The Tenth and Eighth Circuits provide the most expansive interpretation of the sentence manipulation doctrine, recognizing that sentence manipulation is a violation of a defendant's Fifth Amendment right to due process. See *Beltran*, 571 F.3d at 1019; *Torres*, 563 F.3d at 734 ("[S]entencing manipulation, if present, is a violation of the Due Process Clause"). Specifically, the Tenth Circuit has noted that sentence manipulation is a due process principle allowing a

court to modify a sentence if "the government's conduct is so shocking, outrageous and intolerable that it offends the universal sense of justice." See *United States* v. *Lacey*, 86 F.3d 956, 964 (10th Cir. 1996) (citation omitted). The Tenth Circuit further opines that while the threshold for government misconduct is high, and while courts should avoid inhibiting government investigations, "there is a point at which excessive government zeal may warrant judicial intervention." See *id*.

B. The Sixth And Seventh Circuits Do Not Recognize Sentence Factor Manipulation As A Mitigating Factor.

The Sixth and Seventh Circuits have consistently held that sentence manipulation is not a recognized ground for sentence modification. See *United States* v. *Guest*, 564 F.3d 777, 781 (6th Cir. 2009) ("The Sixth Circuit has already addressed sentencing entrapment and sentence manipulation … and reaffirmed that the Sixth Circuit does not recognize either defense."); *United States* v. *Gardner*, 488 F.3d 700, 716-717 (6th Cir. 2007); *United States* v. *Jones*, 102 F.3d 804, 809 (6th Cir. 1996); *United States* v. *Turner*, 569 F.3d 637, 641 (7th Cir. 2009) ("As the district judge acknowledged, our circuit does not recognize the sentencing manipulation doctrine."); *United States* v. *White*, 519 F.3d 342, 346 (7th Cir. 2008) ("[T]his circuit clearly and consistently has refused to recognize any defense based on … 'sentencing manipulation.'"); *United States* v. *Veazey*, 491 F.3d 700, 710 (7th Cir. 2007).

While neither circuit gives an in-depth reasoning as to its denial of this doctrine, the Seventh Circuit suggests that the denial stems from the court's unwillingness to intervene in government investigations. Specifically, the Seventh Circuit recommends that

courts "defer to the discretion of law enforcement to conduct its investigations as it deems necessary for any number of reasons." *Turner*, 569 F.3d at 641.

C. Four Circuits Have Not Made Decisions Regarding The Viability Of Sentence Factor Manipulation As A Mitigating Factor.

The Second, Third, Fourth, and Fifth Circuits have addressed sentencing manipulation claims but avoided taking a position one way or another.[2] See *United States* v. *Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) ("[T]his Court has not yet recognized the doctrine of sentencing manipulation"); *United States* v. *Sed*, 601 F.3d 224, 229 (3d Cir. 2010) ("We have neither adopted nor rejected the doctrines of sentencing entrapment and sentencing factor manipulation."); *United States* v. *Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) ("[W]e conclude that … we need not decide whether the theory of sentencing manipulation has any basis in law."); *United States* v. *Tremelling*, 43 F.3d 148, 151 (5th Cir. 1995) ("[T]his Court … has not expressly determined whether we have accepted the concept of 'sentencing factor manipulation.'").

The Third Circuit, for example, recognizes that sentence manipulation may be a "violation of the Due

---

[2] In each Circuit, the courts have refrained from assessing the merits of the sentence manipulation argument because in each case, the defendant did not offer sufficient evidence for the court to consider the claim. *See United States* v. *Gagliardi*, 506 F.3d 140, 148 ("Even if we were to assume that sentencing manipulation [were] … valid …, [the defendant] has not made the requisite showing in this case."); *United States* v. *Sed*, 601 F.3d 224, 230 (3d Cir. 2010) ("Once again, we need not rule on the legal merits of [sentence manipulation] because [the defendant] cannot establish the requisite factual predicates for … sentencing factor manipulation.").

Process Clause." *Sed*, 601 F.3d at 231 (quoting *Torres*, 563 F.3d at 734). Moreover, the Third Circuit's threshold for government misconduct is lower than those set by other circuits, with the Third Circuit suggesting that defendants only need to prove that the government engaged in an "unfair … exaggerat[ion of] the defendant's sentencing range." *Id.*

Conversely, the Fourth Circuit is "skeptical" that sentence factor manipulation could ever be used as a viable ground for sentence modification. Like the Seventh Circuit, the Fourth Circuit suggests that courts should pay substantial deference to the discretion of law enforcement, and states that the formal adoption of sentence manipulation "would require district courts to speculate as to the motives of, or to ascribe motives to, law enforcement authorities." *Jones*, 18 F.3d at 1155. Further, even if the Fourth Circuit were to adopt sentence manipulation as a viable mitigating factor, it would not accept the theory that government misconduct amounts to a violation of due process. *Id.* ("Due process requires no such rumination.").

D. These Divisions Are Unlikely To Be Remedied Without The Court's Review.

This deeply entrenched split is compounded by the Court's silence regarding sentence manipulation. See *Sed*, 601 F.3d at 229-230 ("Almost all of our sister courts of appeals have opined about [sentence manipulation] … reaching varied conclusions."); *Beltran*, 571 F.3d at 1019-20 n.1 ("Other federal circuit courts of appeal have adopted varying approaches to claims of sentencing manipulation as an objection to a sentence."); *Jones*, 18 F.3d at 1154 ("With respect to 'sentencing manipulation' theory, the Supreme Court has never decided whether outrageous government conduct can serve as a valid defense to a crime, let alone

as a justification for a downward departure for sentencing purposes.").

As a result of this division, defendants in those circuits recognizing sentence factor manipulation are granted greater due process considerations than those sentenced in circuits denying sentence factor manipulation. Accordingly, defendants sentenced in separate circuits have fundamentally different constitutional protections.

For example, the outcome of Mr. Rivera-Ruperto's case would have differed had he been sentenced in either the Eighth or the Tenth Circuit. Though Mr. Rivera-Ruperto was sentenced in a circuit that recognizes the sentence manipulation doctrine, the First Circuit refrains from providing any guidance on when misconduct rises to the level of "extraordinary." See *United States* v. *Gibbens*, 25 F.3d 28, 31 (1st Cir. 1994) ("We can plot no bright line to separate the government's ordinary conduct in a conventional sting operation from extraordinary misconduct of a sort that might constitute sentencing factor manipulation.").

In contrast, both the Eighth and Tenth Circuits offer more definitive guidelines on when government misconduct constitutes sentence manipulation. See *United States* v. *Mosley*, 965 F.2d 906, 911 (10th Cir. 1992) ("The cases on outrageous conduct suggest two factors that form the underpinnings for most cases where the outrageous conduct defense has been upheld: government creation of the crime and substantial coercion."). See also *United States* v. *Baber*, 161 F.3d 531, 532 (8th Cir. 1998) (holding that sentence manipulation may be proven when the government "engaged in the … drug transactions solely to enhance [the] potential sentence.").

Had Mr. Rivera-Ruperto's case been heard in either the Eighth or the Tenth Circuit, his defense of sentence manipulation would have fared far better.

III. THIS CASE IS A STRONG VEHICLE TO CONSIDER THE QUESTION PRESENTED

A. Mr. Rivera-Ruperto's Sentence Was Grossly Disproportionate.

Mr. Rivera-Ruperto's case is an appropriate vehicle through which to view the gross disproportionality of stacking under §924(c). The First Circuit determined that "Rivera faces the longest and most unforgiving possible prison sentence for conduct that, though serious, is not of the most serious kind." Pet. App. at 25a. Moreover, the First Circuit also lamented that "[n]ever before has a first-time offender who has not dedicated his life to crime been condemned to spend his entire life in prison for a transgression such as Rivera-Ruperto's, not even in cases in which the transgression was real—and Rivera-Ruperto's transgression is fictitious." *Id.* at 96a (Torruella, J., dissenting). Mr. Rivera-Ruperto's case thus presents the Court with a strong lens through which to examine the Eighth Amendment violations arising out of §924(c).

B. The Facts Indicate That The Motive For The Additional Transactions Was To Manipulate Mr. Rivera-Ruperto's Sentence.

Mr. Rivera-Ruperto's case additionally presents the Court with an excellent vehicle to examine sentence manipulation because his case shows outrageous government misconduct[3]. The choice to use greater than

[3] As Mr. Rivera-Ruperto argued below, the "government's arbitrary decision on the amount of fake cocaine used for each

five kilograms of narcotics in every transaction was intended to expose Mr. Rivera-Ruperto to unnecessarily lengthy sentences. Under 21 U.S.C. § 841(b)(1)(A)(ii)(II), offenses involving five or more kilograms of narcotics are met with a mandatory minimum sentence of ten years. In contrast, under 21 U.S.C. § 841 (b)(1)(B)(ii)(II), had the government decided to deal in transactions of less than five kilograms of sham cocaine, Mr. Rivera-Ruperto would have only faced a five-year mandatory minimum for each charge and a significantly reduced total sentence. Moreover, the Government has expressly admitted that each transaction was intended to trigger the statutory minimum.[4] See Consolidated Br. for Appellee at 31, *United States* v. *Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Mar. 3, 2015) ("While the government did vary the drug amount throughout … it was *always* an amount that was sufficiently large enough to trigger the ten (10) years statutory minimum.") (emphasis added).

Further, the government's decision to continue the operation past the first offense caused Mr. Rivera-Ruperto to be charged through the "stacking" provi-

---

transaction … ratcheted up Mr. Rivera-Ruperto's sentencing exposure." *See* Appellant's Corrected Initial Brief and Addendum at 39-40, *United States* v. *Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Oct. 30, 2014) ("Rivera-Ruperto Initial Br.").

[4] Mr. Rivera-Ruperto specifically argued below that "[i]n the context of a sentencing manipulation claim, this is a stunning admission by the government. If the government's story is to be swallowed, it was just a serendipitous coincidence that, under the guise of purportedly making the fake drug transactions look realistic, the 'manipulated' fake drug amounts always resulted in Mr. Rivera-Ruperto facing multiple 10-year minimum mandatory sentences." *See* Appellant's Reply Brief at 14-15, *United States* v. *Rivera-Ruperto*, Nos. 12-2364, 12-2367 (1st Cir. Aug. 5, 2015) (citations omitted).

sions of §924(c). Had the operation been stopped after one offense, Mr. Rivera-Ruperto would have been charged with just one §924(c) violation for carrying a firearm during a drug trafficking crime, exposing him to a mandatory minimum of just five years. Instead, the choice to pursue additional transactions triggered § 924(c)(1)(C)(i), which imposed a twenty-five-year sentence for each of Mr. Rivera-Ruperto's subsequent convictions, increasing Mr. Rivera-Ruperto's sentence by 125 years.[5]

C. The Issues Have Been Well Preserved And The Record Is Well Reflected And Modest In Length.

Both issues of gross disproportionality and sentence factor manipulation have been well preserved and were raised at every stage in Mr. Rivera-Ruperto's prosecution.

The First Circuit recognized that Mr. Rivera-Ruperto's disproportionality challenge was properly preserved during his previous trials. See Pet. App. at 57a n.18 ("On our read of the record … Rivera-Ruperto probably did enough to preserve an Eighth Amendment challenge.").

The First Circuit further recognized that the sentence factor manipulation issue was raised during the sentencing hearing of Mr. Rivera-Ruperto's first trial, as well as within both of Mr. Rivera-Ruperto's appellate briefs. See Pet. App. at 48a-49a, 111a-114a. The First Circuit acknowledged that though the district court failed to make an express ruling regarding Mr.

---

[5] *See* Rivera-Ruperto's Initial Brief at 42 ("[T]he firearms charges under 18 U.S.C. 924(c)(1) … ultimately add[ed] 125-years to Mr. Rivera-Ruperto's sentence based on the number of times he was allowed to participate in the FBI's fantasy drug-less drug deals.").

Rivera-Ruperto's claim[6], "the judge effectively denied the sentencing manipulation objection when he chose not to deviate from the statutory minimums in sentencing Rivera-Ruperto for his crimes." *Id.* at 52a. In the absence of the district court's analysis, the First Circuit held that Mr. Rivera-Ruperto's claim would likely have failed under the Circuit's current interpretation of the sentence manipulation doctrine. Mr. Rivera-Ruperto's case thus presents an excellent vehicle to examine sentence manipulation because the issue has been examined by both the district court and the First Circuit.

Given the concerns of the First Circuit regarding §924(c), *Harmelin*, and the imposition of life-without-parole sentences, the matter of gross disproportionality is ripe for the Court's review. See *id.* at 24a (urging the Court to review the *Harmelin* concurrence "in light of the concerns that the Court has recently expressed about the imposition of life-without-parole sentences.").

Further, given the deep split between the circuits on the matter of sentence factor manipulation, and the unlikelihood that the matter will be resolved without the Court's guidance, the sentence manipulation doctrine is ripe for the Court's review.

There are no unresolved factual issues that would prevent the Court from addressing the questions presented. Review is warranted to resolve the confusion among the Circuit Courts. Mr. Rivera-Ruperto's sen-

---

[6] Mr. Rivera-Ruperto argued below that "the District Court never addressed the sentencing manipulation argument, at least in Mr. Rivera-Ruperto's case. Given the ultimate sentence imposed, it is clear that sentencing manipulation was not considered." *See* Rivera-Ruperto Initial Brief at 34 (citation omitted).

tence should be vacated and the case remanded to the First Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEFFREY T. GREEN
SARAH O'ROURKE SCHRUP
NORTHWESTERN SUPREME COURT PRACTICUM
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0063

H. MANUEL HERNÁNDEZ *
H. MANUEL HERNÁNDEZ, P.A.
620 East Club Circle
Longwood, FL 32779
(407) 682-5553
manny@hmh4law.com

Counsel for Petitioner

July 27, 2018

* Counsel of Record