

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSICA (JOSE) CAMARGO-ALEJO,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Following this Court's adoption of a subjective theory of entrapment in *Sorrells v. United States*, 287 U.S. 435 (1932), and progeny, may a court decline to instruct a jury on an entrapment defense because the government agents did not objectively intend to induce a crime?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jessica (Jose) Camargo-Alejo respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in Appendix A to this petition.

JURISDICTION

The court of appeals affirmed Ms. Camargo's conviction on December 21, 2018. *See* Appendix A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Appendix B contains the following pertinent statutory provision: 18 U.S.C. § 111(a)(1).

INTRODUCTION

Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, the first interposed in Paradise: "The serpent beguiled me and I did eat." That defence was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say christian ethics, it never will.

Board of Comm'rs v. Backus, 29 How. Pr. 33, 42 (N.Y. Gen. Term 1864). Sixty-eight years after it made its prognostication, this Court proved the Supreme Court of New York wrong: *Sorrells v. United States*, 287 U.S. 435 (1932), expressly recognized an entrapment defense as a way to protect against the government encouraging otherwise innocent people to commit crimes.

Beyond endorsing an entrapment defense, *Sorrells* settled a long-standing dispute within the lower courts between an objective theory of entrapment—focusing on the reasonableness of the government's conduct—and a subjective theory—focusing on the state of mind of the accused. *Sorrells* sided squarely with the latter. Over the following sixty years, this Court has repeatedly upheld the subjective theory of entrapment. See *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976); *Mathews v. United States*, 485 U.S. 58 (1988); *Jacobson v. United States*, 503 U.S. 540 (1992).

It has been twenty-seven years since this Court's most recent reaffirmation of the subjective theory in *Jacobson*. In that time, the government in Ms. Camargo's case has attempted to revitalize the objective theory, and the district court and Ninth Circuit have, in turn, accepted the government's invitation. Because the adoption of an objective theory of entrapment is decidedly inconsistent with *Sorrells* and progeny, this Court should grant Ms. Camargo's petition and reaffirm the subjective theory of entrapment. See Sup. Ct. R. 10(c).

STATEMENT OF THE CASE

I. Ms. Camargo sought protection in the United States and was charged with assault while detained at Barracks 5.

Ms. Camargo was indicted for assaulting Border Patrol Agent Monica Valdovinos, the officer in charge at Barracks 5, a short-term detention facility located at the Chula Vista, California Border Patrol station. Ms. Camargo found herself in custody at Barracks 5 because she was seeking refuge in the United States. For much of her life, Ms. Camargo experienced extreme violence in Mexico due to her gender identity.

Ms. Camargo was born biologically male but began identifying as female at a young age. She considers herself a transgender woman and undergoes hormone therapy to maintain her gender identity and stabilize her mood. During her childhood, Ms. Camargo's parents disapproved of her gender identity and were violent toward her because of it. When she was a teenager, Ms. Camargo's father abandoned her at an orphanage in Mexico. From then on, she lived on the streets of Tijuana, where she suffered repeated physical and sexual assault and gang rape. When Ms. Camargo sought help from the police in Tijuana, things only got worse: the police beat and raped her themselves and then continued to harass, surveil, and arrest her without cause.

Eventually, Ms. Camargo came to the United States-Mexico border for help. With the assistance of a pro bono immigration attorney, she received withholding of removal. *See generally* 8 U.S.C. § 1231(b)(3) (barring "remov[al] [of] an alien to a country if the Attorney General decides that the alien's life or freedom would be

threatened in that country because of the alien's race, religion, nationality, membership in a particular social group or political opinion.”). Despite receiving immigration relief in the United States, Ms. Camargo made a poor choice, due in part to the trauma and mental-health issues she suffered, and returned to Mexico.

Two years later, Ms. Camargo again feared for her safety in Tijuana and went to the San Ysidro, California Port of Entry. She expressed a fear of being harmed in Mexico due to her transgender status, explained her previous grant of withholding of removal, and asked for protection. A Customs and Border Protection officer took Ms. Camargo into custody, and she remained detained at the Port of Entry for about a week. She was then moved to Barracks 5, where the events giving rise to this case took place.

During her time at Barracks 5, Ms. Camargo and the other women detainees would spend time on an outdoor patio. One such day, while Ms. Camargo was out on the patio, Agent Valdovinos was out there too completing some paperwork. Agent Valdovinos noticed Ms. Camargo cough and knew Ms. Camargo had been previously given a face mask to prevent the spread of germs. Agent Valdovinos asked Ms. Camargo to put on the face mask. Ms. Camargo, however, refused and began to yell and swear.

Given Ms. Camargo's reaction, Agent Valdovinos decided it was safest to separate her from the other women and ordered her to stand up and head inside. Ms. Camargo complied, but as she walked, she continued to turn around and yell in Agent Valdovinos's face. Once they reached the entrance to the building, Agent

Valdovinos placed her hand on Ms. Camargo's shoulder. Ms. Camargo turned back toward Agent Valdovinos and sized her up, so Agent Valdovinos pushed Ms. Camargo forward to create more space. That is when the assault occurred: Ms. Camargo swung and made contact with Agent Valdovinos's face.

II. The district court adopted the government's position that the intent of the law enforcement agents was dispositive for an entrapment defense.

Once she was charged with assault, Ms. Camargo sought to pursue an entrapment defense—an “affirmative defense” that “presupposes the commission of a crime” but excuses that commission because the defendant was induced by the government. *Mathews v. United States*, 485 U.S. 58, 63 (1988). In other words, Ms. Camargo attempted to defend herself on the grounds that she committed the assault, but only because the agents at Barracks 5 provoked a fight with her. In support of that defense, Ms. Camargo proffered that she was induced into the assault because the agents treated her differently from the other women detainees: they held her in degrading conditions of confinement; harassed her and used slurs directed toward her transgender status; withheld medical care from her; subjected her to baseless punishment; and physically bullied her.

The government, in turn, opposed an entrapment defense, noting that it would be unprecedented in this type of case. In the government's view, Ms. Camargo's proffer was “insufficient for any reasonable juror to find the government agents induced the assault . . . [and] implant[ed] the criminal design in the mind of the defendant.” The government further argued that “[o]bviously, no government agent wanted the defendant to assault Agent Valdovinos.”

The district court ultimately agreed with the government and declined to instruct the jury on entrapment:

The Court does not believe that there's even slight evidence that at any time the officers or anyone involved in this was attempting to get Ms. Camargo to hit them to commit the crime, and so I think the two prongs that are necessary for the inducement are lacking and that there's not even slight evidence of that.

Denied an entrapment instruction, Ms. Camargo defended herself on two alternative grounds: (1) her reaction to Agent Valdovinos's push was an unintentional or involuntary response and so insufficient to meet the general intent to commit a forcible assault, and (2) the government failed to prove beyond a reasonable doubt that she made physical contact with Agent Valdovinos. The jury rejected both theories and convicted her.

III. The Ninth Circuit affirmed Ms. Camargo's conviction over her argument that the district court applied an incorrect, objective theory of entrapment.

Ms. Camargo appealed her conviction to the United States Court of Appeals for the Ninth Circuit. She argued, in part, that the government's and district court's view of inducement was legally erroneous. Both the government and district court focused on the agents' intent or purpose to cause her to commit the assault, but this focus was misplaced. Rather, Ms. Camargo maintained, consistent with the subjective theory of entrapment, the focus should have been directed toward her own mental state. The Ninth Circuit ultimately declined to address Ms. Camargo's argument and affirmed her conviction in an unpublished memorandum. See Appendix A.

REASONS FOR GRANTING THE PETITION

This Court last grappled with the entrapment defense twenty-seven years ago in *Jacobson v. United States*, 503 U.S. 540 (1992). In those intervening years, the lower courts have struggled to hew to a definition of “inducement” that is consistent with the Court’s adoption of a subjective theory of entrapment—one that focuses on the mental state of the accused. *See United States v. DePierre*, 599 F.3d 25, 28 (1st Cir. 2010) (“Courts have had difficulty tailoring a useful abstract definition of what is wrongful inducement . . .”). This Court should grant certiorari in Ms. Camargo’s case to provide guidance to the lower courts on the meaning of wrongful inducement and reaffirm the vitality of the subjective theory of entrapment. *See* Sup. Ct. R. 10(c).

I. In permitting an objective theory of entrapment, the Ninth Circuit has created a conflict with *Sorrells* and progeny.

This Court has repeatedly recognized that an entrapment defense turns on the mental state of the accused, not the conduct of law enforcement agents. The Court first recognized the validity of an entrapment defense in *Sorrells v. United States*, 287 U.S. 435 (1928). In doing so, the Court resolved a deep split of authority as to whether the focus of entrapment was objective—looking to the government’s conduct—or subjective—looking to the defendant’s conduct. The Court ultimately chose the latter, explaining that the need for an entrapment defense arises when “the criminal design originates with the officials of the Government, and they implant *in the mind of an innocent person* the disposition to commit the alleged

offense and induce its commission in order that they may prosecute.” *Sorrells*, 287 U.S. at 442 (emphasis added). The Court went on to hold that a “defendant [who] seeks acquittal by reason of entrapment [] cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.” *Id.* at 451.

Thirty years later, in *Sherman v. United States*, 356 U.S. 369 (1958), the Court took on the issue of entrapment again and rejected an invitation to resurrect an objective theory of the defense. *Sherman* reiterated that entrapment drew a “line . . . between the trap for the unwary innocent and the trap for the unwary criminal.” *Sherman*, 356 U.S. at 372.

Then again, twenty years later, this Court once again declined to construe entrapment as an objective defense:

[*Sorrells* and *Sherman*] establish that entrapment is a relatively limited defense. It is rooted, not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been ‘overzealous law enforcement,’ but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government.

United States v. Russell, 411 U.S. 423, 435 (1973); see also *Hampton v. United States*, 425 U.S. 484, 488-89 (1976) (*Russell* “ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.”).

This Court further solidified its preference for the subjective theory of entrapment in *Matthews v. United States*, 485 U.S. 58 (1988). There, the Court reiterated that a defendant’s predisposition to commit a crime is the primary element of an entrapment defense, which “focuses upon whether the defendant was an unwary innocent or, instead, an unwary criminal who readily availed himself of the opportunity to perpetrate the crime.” *Matthews*, 485 U.S. at 63 (internal quotations omitted).

Finally, this Court most recently addressed the entrapment defense in *Jacobson v. United States*, 503 U.S. at 540. *Jacobson* made clear that when an entrapment defense is at play, “the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to being first approached by Government agents.” *Id.* at 549. In other words, *Jacobson* reaffirmed that entrapment is principally concerned with the defendant’s state of mind.

II. The Ninth Circuit’s decision in Ms. Camargo’s case cannot be squared with this Court’s precedent.

As explained *supra* at Part I, in a series of cases starting with *Sorrells* and ending with *Jacobson*, this Court has rebuffed efforts to shift the focus of the entrapment defense to the reasonableness of the government’s actions. Before *Jacobson*, several Justices argued for a different formulation of the entrapment defense—one that focused on “whether the Government’s conduct in inducing the crime was beyond judicial toleration.” *Russell*, 411 U.S. at 443 (Stewart, J.,

dissenting); *see also Hampton*, 425 U.S. at 496 (Brennan, J., dissenting); *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring in the result); *Sorrells*, 287 U.S. at 453 (Roberts, J., concurring in the result). This Court rejected that approach, which would have “focus[ed] on the conduct of the governmental agents, rather than on whether the defendant was ‘predisposed’ or ‘otherwise innocent,’ ” (*Russell*, 411 U.S. at 441) (Stewart, J., dissenting)), because “the defense of entrapment . . . was not intended to give the federal judiciary a ‘chancellor’s foot’ veto over law enforcement practices of which it did not approve.” *Id.* at 435.

By 1988, Justice Brennan—the most vocal proponent of an objective theory of entrapment—conceded that “the Court has spoken definitively” in rejecting his “view that the entrapment defense should focus exclusively on the Government’s conduct.” *Mathews*, 485 U.S. at 66-67 (Brennan J., concurring). He “bow[ed] to *stare decisis*” and concurred in *Mathews*, 485 U.S. at 67, a case in which the Court affirmed that entrapment focuses on the defendant’s lack of predisposition. *Id.* at 63.

Here, by affirming Ms. Camargo’s conviction despite the district court’s improper focus on whether “the officers or anyone involved in this was attempting to get Ms. Camargo to hit them to commit the crime,” the Ninth Circuit has essentially resurrected Justice Brennan’s now-defunct view that entrapment focuses on the objective reasonableness of the government’s conduct. Such a view runs directly contrary to this Court’s precedent.

III. Ms. Camargo's case is a good vehicle for resolving an important and frequently arising question about the entrapment defense.

The Seventh Circuit recently threw up its hands and decided that “[c]larity and consistency would be served if [it] made a fresh start with a definition of inducement.” *United States v. Mayfield*, 771 F.3d 417, 434 (7th Cir. 2014). Those values would be served on a national scale if this Court resolved the confusion surrounding entrapment that has arisen since *Jacobson*.

Ms. Camargo's case is a good vehicle for providing such resolution. That is because there is no factual dispute here: both the government (“[o]bviously, no government agent wanted the defendant to assault Agent Valdovinos.”) and the district court (not “even slight evidence that at any time the officers or anyone involved in this was attempting to get Ms. Camargo to hit them to commit the crime”) undoubtedly adopted a view of inducement that focused on the conduct of law enforcement.

Moreover, the issue is not just teed up neatly; it is also incredibly important. Ms. Camargo's case involves assault, but entrapment most frequently arises in the context of the government using sting operations. And the government's practice shows no signs of abating. Since 2003, “[t]he ATF has more than quadrupled its use of such drug house operations . . . and officials say [that] it intends to conduct even more” going forward. Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA Today, June 28, 2013, available at <http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109> (In 2012, “the ATF said it arrested 208 people in drug-house

operations, compared with 41 a decade earlier”). Likewise, the FBI has ratcheted up its use of stings in a variety of other fields, including terrorism,¹ foreign corruption,² and mortgage fraud.³ Given the government’s increasing reliance on sting operations, guidance from this Court is critical. Otherwise, questions about the scope of the entrapment defense will continue to percolate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 21, 2019


HARINI P. RAGHUPATHI

¹ Human Rights Watch, *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* (July 21, 2014), available at <https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions> (“According to multiple studies, nearly 50 percent of the more than 500 federal counterterrorism convictions [since September 11, 2001] resulted from informant-based cases; almost 30 percent of those cases were sting operations in which the informant played an active role in the underlying plot.”).

² Leslie Wayne, *Bribery Case Falls Apart, and Tactics are Doubted*, The New York Times, Feb. 23, 2012, <https://www.nytimes.com/2012/02/24/business/fbi-bribery-case-falls-apart-and-raises-questions.html> (questioning undercover tactics in an FBI foreign corruption case).

³ U.S. Dep’t of Justice, Office of the Inspector General, Audit Div., *Audit of the Department of Justice’s Efforts to Address Mortgage Fraud* 11 (March 2014), <https://oig.justice.gov/reports/2014/a1412.pdf> (“According to the FBI’s Financial Institution Fraud Policy Implementation Guide, some mortgage fraud investigations can be more effective with the use of proactive undercover operations”).