No. 24-

In The

# Supreme Court of the United States

HUMBERTO FALCON SAN-MARTIN
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the conduct of government agents or officials can constitute sentencing entrapment, as that constitutional theory is recognized outside of sentencing.

Whether the Court should resolve the conflict among the Circuits on whether to apply the doctrine of entrapment to sentencing decisions.

## PARTIES TO THE PROCEEDINGS

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. San-Martin submits that although there are parties to an associated proceeding in 22-20252-Cr-BB, there are no parties to this proceeding other than those named in the caption of the case.

## RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

*United States v. San-Martin,* 2024 WL 2182101 (11th Cir. May 15, 2024) (Decision below)

*United States v. San-Martin*, No. 22-Cr-20335 (S.D. Fla. July 29, 2022) (Criminal Case)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the Eleventh Circuit affirming petitioners' conviction, dated May 15, 2024, is unreported, and is reprinted as Appendix ("App.") A. That opinion was entered as the court's judgment pursuant to a Mandate entered on June 13, 2024.

The judgment of the United States District Court for the Southern District of Florida is dated July 31, 2023 (Doc. 53).

## JURISDICTION

On August 14, 2023, Petitioner appealed his conviction and sentence from the United States District Court for the Southern District of Florida to the Eleventh Circuit, arguing that undercover agents and an informant, acting on behalf of the government, manipulated and entrapped appellant and impermissibly augmented his sentence by inducing actions he otherwise would not have undertaken (Doc. 16). On May 15, 2024, the Eleventh Circuit issued its opinion affirming Petitioners' conviction and sentence. App. 1a. The Eleventh Circuit issued a mandate on June 13, 2024, as the judgement in the case.

This Court has jurisdiction to review the Eleventh Circuit's judgment under 28 U.S.C. §1254(1), and the Fifth and Sixth Amendment to the United States Constitution. U.S. Const. amend. V, U.S. Const. amend. VI. The Petition is timely filed. The Eleventh issued its opinion on May 15, 2024. On August 8, 2024, this Court granted an extension to file a petition for writ of certiorari until September 12, 2024.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following Constitutional and other provisions:

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, … nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

## INTRODUCTION

Petitioner Humberto Falcon San-Martin respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. In affirming the sentence, the Eleventh Circuit allowed the government to continue its practice of "sentencing entrapment." The defense of entrapment protects defendants from being unduly punished for crimes instigated or exacerbated by government conduct. The Circuits are split on whether the defense of entrapment can be raised at sentencing. The Eleventh Circuit does not recognize the defense; other Circuits do.

## STATEMENT OF THE CASE

### I. The Charges Against Petitioner

Petitioner Humberto Falcon San-Martin was charged in a four-count indictment. (Doc. 8). Count 1 charged Falcon San-Martin with knowingly and intentionally distributing a controlled substance on December 27, 2021, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. This count alleged that this violation involved five hundred (500) grams or more of a mixture and substance containing a detectable amount of methamphetamine, and a mixture and substance containing a detectable amount of cocaine, Schedule II controlled substances. Counts 2 and 3 charged Appellant with knowingly and intentionally distributing a controlled substance (on January 5, 2022, and March 8, 2022, respectively), involving a mixture and substance containing a detectable amount of cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. Count 4 charged Appellant with knowingly and willfully combining, conspiring, confederating, and agreeing with other persons known and unknown to the Grand Jury, to possess with intent to distribute a controlled substance in violation of Title 21, United States Code, Section 846.

### II. Facts Giving Rise To The Charges

Upon San-Martin's conviction, the District Court sentenced him to 240 months in prison and imposed a compelled forfeiture of assets, without a corresponding jury verdict that the proceeds subject to forfeiture were actual proceeds the defendant

received from criminal offenses. On appeal, the Eleventh Circuit affirmed San-Martin's conviction in an unpublished opinion.

Appellant Falcon San-Martin came into possession of a bulk amount of cocaine left in his care by an individual known as "Danger." (Doc. 68:8). Initially, Appellant took some of the cocaine for his own use but when "Danger" did not come back, Appellant attempted to sell the cocaine. (Doc. 68:9).

Appellant made contact with an individual who was, unbeknownst to him, a government informant. (Doc. 63:17-18; Doc. 68:9). The informant urged Appellant to incorporate crystal methamphetamine into the transaction. (Doc. 68:9-10). There is no evidence that Appellant had originally intended to sell methamphetamine. But influenced by the government informant's suggestions, he became involved in transactions with both substances. (*Id*.) Appellant Falcon San-Martin procured the initial kilogram of crystal methamphetamine from the informant himself. As Appellant's counsel argued at sentencing, although Appellant had not intended to sell anything, the cocaine left by "Danger" was sold on the insistence of the government informant that the cocaine would sell more easily if it were sold together with methamphetamine.

Appellant thereafter carried out an initial transaction involving both cocaine and crystal methamphetamine:

> But my point is that at the time that he first approached the informant, he was trying to get rid of this cocaine. The informant, according to what he's informed not only the – well, he's informed me, but he also informed agents during the safety valve debrief, and I had

> reached out to Mr. Calderon to let him know, is that according to Mr. Falcon, his only intention was to try to sell cocaine. He was never really in the market for crystal meth. He was never trying to get rid of crystal meth. The informant was the one that was telling him, Listen, you know, we can get rid of this a little bit better if you include this crystal, and if you got some crystal meth, we could make this move a little faster.

(Doc. 68:9-10) (Sentencing Hearing, Appellant's counsel). Also, according to counsel's proffer, Falcon San-Martin received the crystal methamphetamine, which he did not originally intend to sell, from the government informant. (Doc. 68:10).

The government neither confirmed nor disputed that contention. The Government did respond that the Appellant told probation he had used crystal methamphetamine as well as cocaine in 2020. The Government did not argue that he had sold either before. (Doc. 68:15). Two subsequent drug sales involved cocaine and did not include crystal methamphetamine. As Appellant's counsel proffered:

> After that, he did engage in two other transactions, one – sorry – the first one was in December – excuse me. The next one occurs in January and another one two months later, in March. And those two transactions never included crystal meth. Those were simply more of the original bulk of cocaine that Danger had left in Mr. Falcon's possession.

(Doc. 68:10).

Appellant sold one kilogram of crystal methamphetamine and two ounces of cocaine on December 27, 2021, four ounces of cocaine on January 5, 2022, and ten ounces of cocaine on March 8, 2022. (Doc. 63:6, 17-18). Subsequent to that, after several conversations with the informant, Appellant procured additional crystal meth, additional cocaine, and "did the final transaction." (Doc. 68:10).

## REASONS FOR GRANTING THE PETITION

Certiorari is warranted in this case to address the important issue of sentencing entrapment: whether the conduct of the government can be so outrageous as to constitute a violation of Petitioner's due process rights under the Fifth and Sixth Amendments, as in this case, when Petitioner was sentenced based on the narcotics provided by the government agents; and whether the Supreme Court should address the constitutional issue of sentencing entrapment to resolve a split in the Circuits.

*The Defense of Entrapment*

This Court has recognized the defense of entrapment for almost a century. *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct 210, 77 L. Ed. 413 (1932). Two competing theories of entrapment have jostled for supremacy over the years: the first and prevailing theory holds that a defendant's predisposition toward a crime determines whether or not he may invoke the defense of entrapment. *Sorrells*, 287 U.S. at 448 ("a Defendant may invoke entrapment as a defense if state agents instigate criminal acts in those people who are "otherwise innocent in order to lure them and punish them"); see also: *Sherman v. United States*, 356 U.S. 369 (1958); a second theory, one featured in numerous Supreme Court dissents over the years, propounds that the correct test for entrapment does not involve an analysis of a defendant's criminal disposition, but instead a consideration of the government's complicity in the crime. *Sorrells*, 287 U.S. at 459, 53 S. Ct. at 219. ("The courts must be closed to the trial of a crime instigated by the government's own agents").

Though dissenting voices from this Court have persisted throughout the 20th century – including those of Justice Frankfurter in Sherman and Justice Roberts in *Sorrells* – the majority on the Court has consistently decided in favor of a theory of entrapment that considers primarily a defendant's disposition toward wrongdoing.

Neither of the aforementioned competing grounds for the defense of entrapment is a constitutional defense. The first defense, which considers a defendant's alleged criminal disposition, rests on the premise that the legislature did not intend to hold entrapped defendants accountable. *Sherman*, 356 U.S. at 372 ("Congress could not have intended that its statutes would be enforced by tempting innocent persons into violations"). The second defense, the minority view up to now, reasons that it is the judiciary's prerogative not to grant an imprimatur on excessive government complicity and crime. *Sherman*, 356 U.S. at 385 ("…police conduct to ensnare [a defendant] into further crime is not to be tolerated by an advanced society").

This Court has recognized still a third ground for invoking the defense of entrapment. In *United States v. Russell*, this Court stated that the government's actions could be so egregious that a court must bar a defendant's prosecution on due process grounds: "we may someday 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. 423, 431, 93 S. Ct. 1637, 1643 (1973).

*Petitioner Asks This Court To Recognize That Sentencing Entrapment Violates the Constitution's Due Process Clause*

The controversy here, and the cause of this Petition, issues from a disagreement among the Federal Circuits concerning a species of the entrapment defense: sentencing entrapment. The concept of sentencing entrapment naturally aligns with the foundational principles that justify the defense of entrapment. The defense of entrapment protects defendants from being unduly punished for crimes instigated or exacerbated by government conduct. The defense of sentencing entrapment simply extends the same logic. Whereas the defense of entrapment *ratione generis* protects defendants who have been induced into criminal activity by the government, that of sentencing entrapment protects those who have committed a crime, but who were induced by government action to a more serious crime in order that the defendant's sentence be augmented beyond what he would have faced had he been left to his own.

The defense of sentencing entrapment is consistent with every major theory this Court has advanced as grounds for the broader defense of entrapment. Under the current predominating theory of entrapment, the focus falls on the defendant's initial inclination to commit a crime. Sentencing entrapment is consistent with that theory, and simply applies to that subset of scenarios in which government actions elevate the severity of an already existing crime in order to enhance a defendant's sentence. The same analysis that this Court propounded to establish the defense of entrapment can be used to recognize a defense of sentencing entrapment.

A defense of sentencing entrapment is also consistent with the minority view of the Court – namely, a theory of entrapment in which a court should scrutinize not

a defendant's criminal alleged criminal propensity, but rather the propriety of the government's involvement in instigating crime. Just as it is intolerable for the nation's courts to extend their imprimatur to a government agent's egregious behavior in his pursuit of a conviction, it is equally intolerable for the courts to extend their imprimatur to an agent's egregious behavior in pursuit of a heightened sentence. This Court, by recognizing sentencing entrapment as a defense, would not change the theory of entrapment; rather, it would extend the logic of the defense of entrapment in such a way as to prevent disproportionate punishment resulting from government manipulation.

Similarly, to the extent that a criminal court may invoke the constitutional protections of process in order to protect a defendant from the government's efforts to entrap him, that same court should be free to invoke a defendant's due process protections in order to exclude elements of a conviction that resulted from a government agent's unconstitutional efforts to enhance a defendant's sentence through sentencing entrapment.

*The Federal Circuits Are Split In their Interpretation of Sentencing Enhancement And Petitioner Asks This Court To Settle This Important Issue*

The defense of sentencing entrapment is consistent with every major theory that justifies the broader defense of entrapment. Yet the federal circuits are not consistent in recognizing this fact.

The Eighth Circuit was perhaps one of the first to recognize hold that sentence entrapment should be a defense when wrongful conduct on the part of the government overcomes a defendant's predisposition, inducing him to engage in a greater crime

than he first was disposes to commit. *United States v. Lenfesty*, 923 F.2d 1293 (8th Cir. 1991).

The Ninth Circuit followed, and upheld a downward departure on the basis of the defense of sentence entrapment, holding that:

> Government abuse can be discouraged and corrected only if courts also are able to ensure that the government has some reason to believe that defendants are predisposed to engage in a drug deal of the magnitude for which they are prosecuted. Furthermore, courts can ensure that the sentences imposed reflect the defendants' degree of culpability only if they are able to reduce the sentences of defendants who are not predisposed to engage in deals as large as those induced by the government.

*United States v. Staufer*, 38 F.3d 1103 (9th Cir. 1994).

The Ninth Circuit has maintained the defense of sentence entrapment over decades, holding in *United States v. Cortes* that a defendant may be entitled to a jury instruction upon it:

> if there is some foundation in the evidence that he would be subject to a lesser statutory minimum or maximum sentence if his sentencing entrapment defense were to succeed, then he is entitled to a jury instruction on that defense. 757 F.3d 850 (9th Cir. 2014).

State courts have likewise recognized the need for, and justice behind, a defense of sentence entrapment:

> If the defendant had no previous intent to commit the greater crime or did not become ready and willing to commit a greater crime during the course of the transaction, even though predisposed to commit the lesser crime, then a finding that law enforcement agents committed sentencing entrapment would require that the defendant be found not guilty of the greater crime, and guilty of the lesser offense.

*Leech v. State*, 66 P.3d 987, 990 (2003 OK CR 4).

The Third Circuit likewise holds sentencing entrapment to occur when a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. *United States v. Sumler*, 294 F.3d 579, 582, n.1. (3d Cir. 2002).

This Court, considering the generic defense of entrapment, held: "when the government's quest for convictions leads to the apprehension of an otherwise law–abiding citizen who, if left to his own devices, likely would have never run afoul of the law, this Court should intervene." *Jacobson v. United States*, 112 S. Ct. 1535, 1543 (1992). That is, if an agent acting on behalf of the government behaves in such a way as to implant the disposition to commit a crime, and then induce its commission, then the defendant is protected by the defense of entrapment. See: *Hampton v. United States,* 425 U.S. 484, 490 (1976).

The circuits recognizing the defense of sentencing entrapment are simply acting consistently with this Court's precedent concerning the broader defense of entrapment, as this Court's reasoning on entrapment holds even when the alleged offense is one offense in a constellation of other offenses. That is, the promulgation of the defense of entrapment – namely, that a defendant is excused from misbehavior when such behavior was induced by the government persuasion – cannot logically be said to hold only in such circumstances in which the government induced the primary crime; if a government agent may not persuade a man to sell cocaine, the same principle should restrain the government agent who tries to augment the same defendant's sentence by persuading that man to bring a gun, or to sell a different

drug than he had intended. See e.g., *United States v. Gibson*, 135 F.3d 1124 (6th Cir. 1998); *United States v. Barth*, 990 F.2d 422 (8th Cir. 1993). See esp., the law of Florida, under which a trial court may impose a downward departure in a sentence "when law enforcement allows a defendant to continue criminal activities for no reason other than to enhance his or her sentence." *State v. Steadman*, 827 So.2d 1022, 1025 (Fla. 3d DCA 2002).

Not every federal circuit, however, is consistent with this Court's precedent. Although the Eleventh Circuit has correctly understood the defense of sentencing entrapment to involve "the claim that a defendant, although predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment." *United States v. Cannon*, 987 F.3d 924, 944 (11th Cir. 2021), that Circuit departs from the logic of this Court's precedent, however, when it refuses to recognize that defense in sentencing. *Cannon*, 987 F.3d at 944. The Eleventh Circuit bars the defense of sentencing entrapment, and departs from her sister circuits in doing so. Petitioner brings this present Petition in an effort to resolve the inconsistent application of law among the federal circuits.

## CONCLUSION

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

Respectfully submitted,

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