

No. ____ - ____

IN THE SUPREME COURT OF THE UNITED STATES

DAVIEL SALINAS ACEVEDO,
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 WRIT OF CERTIORARI

Ignacio Fernández de Lahongrais
Court Appointed Attorney for Appellant
Capital Center Sur, Suite 202
Avenida Arterial Hostos #239
San Juan, Puerto Rico 00918-1475
Tel. 787-923-5789
ignacio@bufetefernandezalcaraz.com

(Appointed under 18 U.S.C. § 3006A)

QUESTION PRESENTED

In Jacobson v. United States, 503 U.S. 540, 112 S. Ct. 1535 (1993) this Court ruled that predisposition to commit a crime is the principal element in the defense of entrapment. It further held that a prosecutor must demonstrate beyond a reasonable doubt that a defendant was predisposed to commit the crime before being approached by law enforcement.

The question presented is:

1. Does the First Circuit's requirement that a defendant must prove an entrapment defense twice: once to the court prior to trial, and then once more to the jury run afoul of *Jacobson* and the Sixth Amendment to the Constitution of the United States?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Daviel Salinas Acevedo ("Daviel Salinas"), through his court appointed attorney, prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the First Circuit issued on January 17, 2017.

OPINIONS BELOW

On January 13, 2017 the United States Court of Appeals for the First Circuit entered its judgment and opinion affirming Petitioner's conviction. United States v. Salinas Acevedo, 863 F.3d 13 (2017). A copy of that Opinion is attached as Addendum 3. Denial of petition for reconsideration and rehearing en banc in the United States Court of Appeals for the First Circuit was entered July 11, 2017. A copy of that Judgment and Opinion is attached as Addendums 1 and 2 respectively.

JURISDICTION

Denial of petition for rehearing in the United States Court of Appeals for the First Circuit was entered July 11, 2017. Thus, the original deadline to file a petition for a writ of certiorari was October 9, 2017.

On October 2, 2017 this honorable Court entered *Order* extending the "deadline to file a petition for certiorari in a case arising from the state or federal courts of Puerto Rico ... to November 20, 2017." 583 U.S. _____. This case arises from the United States District Court for the District of Puerto Rico.

On November 13, 2017 Petitioner Filed an *Application for Extension of Time to File Petition for Writ*. Said application was granted and extended the time to file the petition until December 8, 2017.

A Petition for Writ of Certiorari was then filed on that date, December 8, 2017. The Petition was returned by the Clerk of the Court on December 18, 2017 with instruction that it be re-submitted within 60 days. Thus the Petition must be filed on or before February 16, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

BASIS FOR JURISDICTION IN THE DISTRICT COURT

The District Court had jurisdiction pursuant to 18 U.S.C. §3231.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States

provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, 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.

STATEMENT OF THE CASE

Introduction

This Court has not addressed the defense of entrapment since 1992. See: Jacobson v. United States, 503 U.S.540, 112 S. Ct. 1535 (1992).

The entrapment doctrine forbids punishment of an "otherwise innocent" person whose "alleged offense" is "the product of the creative activity of government officials. Sorrels v. United States, 287 U.S. 435, 451 (1932).

When the Government's quest for conviction 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, the courts should intervene. Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992).

In *Jacobson* this Court ruled that the predisposition to

commit a crime was the principal element in the defense of entrapment.

The First Circuit has departed far from this norm. As it relates to the entrapment defense, it has usurped the role of the jury and requires defendants to prove their defense twice: once to the Court before trial and then once more to the jury. See: Torruella, C.J. *dissenting*, Appendix p. 7.

The First Circuit's departure from this Court's definition of the entrapment defense calls for an exercise of this Court's supervisory power. Furthermore, the First Circuit's decision stands in sharp contrast with *Jacobson* and violates the Sixth Amendment to the Constitution of the United States.

Petitioner's conviction.

Mr. Daviel Salinas was charged with 3 counts related to providing armed security for one FBI sham drug transaction in March 24, 2010. (Appendix p.30.)

Mr. Salinas exercised his right to trial by jury. The trial ended with the return of guilty verdicts on January 10, 2013 on counts 11 and 14. The jury could not reach a verdict on count 12. (D.E. 499 & 501.)

Mr. Salinas Acevedo was then sentenced to a term of imprisonment of 121 months for count 11 and a consecutive term of imprisonment of 60 months for count 14; for a total term of imprisonment of 181 months. (Appendix p. 30.)

The Government decides to target Salinas because he was facing financial difficulties, not because he was suspected of any wrongdoing

Petitioner Salinas-Acevedo was never in the government's radar. Nothing in the record suggests that he was anything but an upstanding and law abiding citizen and police officer.

Salinas-Acevedo first came into the government's cross hairs one fateful day when he asked FBI informant Alwin Camacho ("Camacho") for a job as a security guard in CompUsa. Mr. Salinas-Acevedo did not know Camacho was a FBI informant. Had Salinas-Acevedo never asked for a part time job, he would still be a member of the Puerto Rico Police and the law abiding citizen he had been up to that fateful day.

At that time Camacho was moonlighting as CompUsa's head of security. When Salinas-Acevedo found out that his wife was expecting another child, he decided to seek a second job. He

then approached Camacho and asked his help in getting a part time security job at CompUsa. Salinas told Camacho about his dire economic situation and his need to get a second job to take care of his pregnant wife. Camacho told Salinas that at the moment there were no openings at CompUsa but would get in touch with him later if there was an opening. (D.E. 371.)

Once Camacho learned of his money troubles, he used two corrupt police officers already targeted by the FBI: Israel Rullán Santiago (Rullán-Santiago) and Carlos Méndez-Perez (Méndez-Perez") to induce Salinas-Acevedo to provide security for an FBI led sham drug transaction. Appendix p. 31. There was no reason to go after Salinas-Acevedo other than he was "desperate" and "broke." Appendix p. 32.

That alone, is improper government conduct and this Court should exercise its supervisory powers and intervene.

Unlike Salinas-Acevedo, Camacho targeted Rullan-Santiago because he would hear him boast at the police station that he knew drug traffickers, had access to money and that he "was basically a delinquent using up the uniform." Appendix p. 31.

Both Camacho and Rullán-Santiago knew that Salinas-Acevedo had a daughter, was expecting a another child and that he was in a difficult financial situation. *Id.*

The entrapment begins.

The first recorded telephone conversation between Camacho and Rullan-Santiago (related to Salinas) takes place on March 9, 2010. Appendix p. 31. In it, Rullan-Santiago calls Camacho to let him know that "that one" (referring to Salinas) had given him an excuse not to participate in the drug transaction planned for the next day.

This exchange makes clear that Camacho had already singled out Salinas as a target for Rullan to recruit. Both of them knew who "that one" was and were purposely avoiding using his name over the telephone.

According to Rullan-Santiago, Salinas told him "[s]orry, it's gonna be difficult for me because on the little girl and the like." Rullan-Santiago did not believe that there was anything wrong with Salinas' girl and told Camacho "[y]ou know that's an excuse." Appendix p. 31.

In light of Salinas' refusal to participate, Camacho postponed the drug transaction. *Id.*

But Camacho persisted.

Shortly thereafter Camacho approached Méndez-Pérez seeking his help to recruit Salinas. Appendix p. 32.

Camacho brings up the subject of Salinas to the

conversation. Camacho asked Méndez-Pérez what he thought of Salinas (meaning, would Salinas be willing to participate in a drug transaction). (*"And since you're buddies with Salinas, what do you think about Salinas?"*) Camacho then tells Méndez-Pérez that Rullan-Santiago had already approached Salinas without success. (*"Because, um, Rullán approached him and later he gave me excuses that his daughter, that..."*) (D.E. 414, Exh. 1, p.7.) (Appendix p. 32.)

Although at some point Camacho tells Méndez-Pérez that he had told Rullan-Santiago not to "bring up the topic with [Salinas] anymore," he later sweet-talks Méndez-Pérez into talking to Salinas by telling him that Salinas is "willing to do anything and he's broke." *id.*

Camacho then asks Méndez-Pérez to talk to Salinas-Acevedo and have him "come by" to see him. Méndez-Pérez instead tells Camacho that he will stop by Salinas's house. *Id.*

At this point Camacho is aware that Salinas is resisting and does not seem willing to participate. He tells Méndez-Pérez: "Yes, if he gives you a lot of crap ... This isn't compulsory, this is for those who want to and know what it is." *Id.*

We pause to note that the district court and the Court of

Appeals interpreted Camacho's statement as proof that there was no overreaching or pressuring by the government informant.

However, we respectfully submit that this passage reinforces Salinas' entrapment defense. It shows that Camacho is aware of Salinas' hesitance but still wants one more crack at him. That is why he wants Méndez-Pérez to try one more time. But Camacho is cautious: he tells Méndez-Pérez to "drop it" if Salinas "...gives you a lot of crap..." Camacho knows that Méndez-Pérez might get a "lot of crap" if Salinas is approached again.

In any event, this instruction was given only to Mendez-Perez, not Rullán-Santiago who was the one who eventually recruited Salinas-Acevedo.

Camacho ploughs on.

On March 19, 2010 Camacho once more tries to get to Salinas through Rullan-Santiago. Appendix p. 32.

Camacho asks Rullan-Santiago over the telephone to "get that guy that you tried to find last time." (Referring to Salinas.) Rullan-Santiago is unsure if he can get Salinas involved ("*...let me see if, if that dog is around here*"). But, Camacho insists. ("*Well, but let me know for sure, don't do the same shitty thing to me like you did last week.*") *id.*

Camacho is pressuring Rullan-Santiago to make sure that Salinas agrees so that the transaction does not get postponed once more. Camacho is adamant: "But you have to reassure me that you are going to do your part on Wednesday's gig." *Id.*

Three days later (3/22/10), Camacho calls Rullan-Santiago-Santiago to "double check" for "Wednesday." (Meaning Wednesday, March 24, 2010.) Camacho asks Rullan-Santiago if Salinas is on board. ("*Salinas is - we are clear with Salinas, right?*") Appendix p. 33.

Camacho is clearly worried about Salinas' reaction when he finds out that the transaction is drugs. ("*You told Salinas what it was, right, the devices?*") (Appendix p. 33.)

The conversation is a bit confusing. While Rullan-Santiago tells Camacho "yes" when he is asked whether or not he told Salinas about the "devices", Rullan-Santiago later laughs and tells Camacho that Salinas will indeed "jump off the balcony when he sees (the drugs)." *Id.* (*Suggesting that Salinas does not know that he is going to provide security for a drug transaction.*)

The deal went on as planned and Salinas-Acevedo participated in the sham drug transaction. *Id.*

The entrapment in this case is simple and

straightforward. To target an otherwise law abiding police officer because he is going through financial difficulties and periods of anxiety is *per se* an *improper tactic* by the government.

There is no noble purpose behind preying on the weak.

In this case Camacho knew that Rullan-Santiago was a corrupt police officer (through his own boasting at the police station) and recruited him to provide security in undercover drug transactions. (D.E. 253.) In contrast to Rullan-Santiago, there is nothing in the record to suggest that Salinas would have committed any illegal act but for the fact that Camacho singled him out and pressured Rullan-Santiago to recruit him.

REASONS FOR GRANTING THE WRIT

In Jacobson v. United States, 503 U.S.540, 542 (1992) this Court reversed a conviction because "the Government overstepped the line between setting a trap for the 'unwary innocent' and the unwary criminal' ... and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested..."

In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then

induce commission of the crime so that the Government may prosecute. *Sorrells*, supra, 287 U.S., at 442, 53 S.Ct., at 212; *Sherman*, supra, 356 U.S., at 372, 78 S.Ct., at 820. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. *Jacobson*, 503 U.S. at 548-49.

In *Jacobson*, this Court noted that the government could "not prove that his predisposition to commit the crime was independent and not the product of the attention that the Government had directed at [him]." *id.*

The defense of entrapment has two elements: (1) the government must have induced a defendant to commit a crime that (2) the defendant was not otherwise willing to commit. See: *United States v. Russell*, 411 U.S. 423, 428-30 (1973) and *Hampton v. United States*, 425 U.S. 484, 488. The Supreme Court has stressed that the defense centers on the latter element, a person's predisposition to commit a crime, and not on the government's conduct. *United States v. Whoie*, 925 F.2d 1481, 1483 (D.C. Cir. 1991).

The entrapment defense focuses on both the predisposition and inducement elements (that is, the conduct of law enforcement and whether such conduct represented an improper use of government power. *Sorrells*, 287 U.S. at 453 (Roberts,

J. Concurring). However, predisposition remains "the principal element in the defense of entrapment." Mathews v. United States, 485 U.S. 58, 63 (1988).

The First Circuit has turned on its head the entrapment defense as established by this Court. Their main focus is no longer the defendant's predisposition, but whether law enforcement used "improper inducements." United States v. Luisi, 482 F.3d 43, 55 (1st Cir. 2007); Appendix p. 37.

It also placed the burden on the defendant to present evidence of such improper inducement *before* he or she is allowed to present the entrapment defense to the jury. That is, without the benefit of cross examination of government witnesses or even *Jencks* materials. 18 U.S.C. §3500.

Although the First Circuit had no trouble finding that petitioner lacked the required predisposition to commit the crime (Appendix p. 37), it still refused to allow petitioner to present an entrapment defense because, in its view, the evidence proffered was insufficient to prove improper inducement by the government.

In the First Circuit "predisposition" is no longer the principal element of an entrapment defense as required by *Jacobson*. It is, instead, whether there was an "improper

inducement" by the government in order to overcome the defendant's initial reluctance to commit the crime. The First Circuit identified the key issue in this case as follows:

The key issue here is whether a specified improper inducement by Rullán-Santiago (or Méndez-Pérez) can be attributed to the government itself. The government would be responsible for any improper inducement by either middleman if its agent (Camacho) had "told" or "instructed" the middleman (Rullán-Santiago or Méndez-Pérez) to apply the inducement later deemed improper. United States v. Salinas Acevedo, 846 F.3d 417, 430 (1st Cir. 2017). (Appendix pp. 38 - 39.)

The First Circuit found that there was no improper inducement in this case. ("...there is no evidence that [Camacho] urged (Rullán-Santiago or Méndez-Pérez) to apply improper pressure to join the enterprise.) *Id.* This is contrary to this Court's decision in *Jacobson*.

Petitioner Salinas-Acevedo was not targeted because of any suspicion that he was a corrupt policeman. He was targeted because he asked Camacho for a part time security job at CompUsa and needed the job because his wife was pregnant and was in financial troubles.

To target an otherwise law abiding police officer because

he is going through financial difficulties and periods of anxiety is *per se* an *improper tactic* by the government. There is no noble purpose behind preying on the weak.

In this case Camacho knew that Rullán-Santiago was a corrupt police officer (through his own boasting at the police station) and recruited him to provide security in undercover drug transactions. In contrast to Rullán-Santiago, there is nothing in the record to suggest that Salinas Acevedo would have committed any illegal act but for the fact that Camacho singled him out.

Other Circuits have only required “minimally sufficient” evidence to support an entrapment defense.¹ (See: United States v. McGill, 754 F.3d 452 (7th Cir. 2014); (*Assessing an entrapment defense involves subjective inquiry, and defendant is entitled to argue that he was particularly susceptible to inducement.*)).

Salinas proffers were neither thoroughly implausible nor constructed entirely out of generalities. To the contrary,

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More precisely, the issue before this court is the properness of the *derivative* entrapment defense. The derivative entrapment doctrine allows criminal defendants to assert they were entrapped when “a government agent [Camacho] ‘uses [an] unsuspecting middleman [Rullán] as a means of passing on an inducement’ to the defendant.” United States v. Luisi, 482 F.3d 43, 53 (1st Cir.2007).

Salinas' account is interlaced with considerable detail and corroboration in the record.

Under *Jacobson* the principal element of the entrapment defense is whether or not a defendant was predisposed to commit the crime before induced to do so by the government. The law in the First Circuit has inverted the hierarchy of these elements. Predisposition is now secondary to a judicial determination of whether the government's inducements were "improper." And, as this case illustrates, repeated requests cannot give rise to an entrapment defense unless there is some sort of "improper" behavior by the government. In other words, the government is free to target law abiding citizens and induce them to commit crimes (as long as such inducement is not "improper").

As this case showed; this is hardly a technical debate. It threatens the very protections of the Sixth Amendment to the Constitution. The new standard "entails whether we recognize the legitimate role of the jury, or whether we will engage in an usurpation of that role." Appendix p. 7. Torruella, C.J., dissenting.

In the First Circuit a defendant is "not allowed to argue to a jury that he was entrapped" unless he can "prove his

defense twice: once to the court, and then once more to the jury." *Id.*

This case presents the exact situation that the *Jacobson* Court sought to protect us from:

When the Government's quest for conviction 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, the courts should intervene. Jacobson, 503 U.S. at 543.

Salinas-Acevedo had no criminal record, nor whatsoever the slightest indication that he was involved in police corruption. Rather, the government first laid eyes on him when he sought a part time job from Camacho to support his family. Salinas-Acevedo never sought to participate in any crime.

CONCLUSION

WHEREFORE, for the foregoing reasons it is most respectfully requested from this Honorable Court to grant certiorari and reverse the judgment of the First Circuit.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico February 16, 2018.

Ignacio Fernández de Lahongrais
Capital Center Sur, Suite 202
Avenida Arterial Hostos #239
San Juan, Puerto Rico 00918-1475
Tel. 787-923-5789
ignacio@bufetefernandezalcaraz.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Supreme Court Rule 33 because this petition contains 16 pages, exclusive of the items listed in Rule 33(d).

This brief complies with the typeface requirements because it was prepared using 13 point, mono-spaced typeface (13 Courier New). Software used: WordPerfect X8.

I understand that a material misrepresentation can result in this Court striking this brief or imposing sanction. If the Court so directs, I will provide a copy of the word or line print-out.

I declare under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico February 16, 2018.

Ignacio Fernández de Lahongrais
Capital Center Sur, Suite 202
Avenida Arterial Hostos #239
Hato Rey, Puerto Rico 00918-1475
Tel. 787-923-5789
ignacio@bufetefernandezalcaraz.com

Attorney for the Appellant

CERTIFICATE OF SERVICE

I, Ignacio Fernández de Lahongrais, do swear that on this 16th day of February, 2018, as required by Supreme Court Rule 29, I have served the enclosed Petition for a Writ of Certiorari on each party to the above proceeding or that third party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly Addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

1. Solicitor General of the United States
U.S. Department of Justice, Room 5614
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 514-2217
2. AUSA Mariana Bauza
Torre Chardón, Suite 1202
350 Carlos Chardón Avenue
San Juan, Puerto Rico 00918
(787) 766-5656
3. Daviel Salinas Acevedo
Reg. 35980-069
FCI Manchenster
Federal Correctional Institute
PO Box 4000
Manchester, Kentucky 40962

I declare under penalty of perjury that the foregoing is true and correct.

Executed in San Juan, Puerto Rico on February 16, 2018.

Ignacio Fernández de Lahongrais
Court Appointed Attorney
Capital Center Sur, Suite 202
Avenida Arterial Hostos #239
San Juan, Puerto Rico 00918-1475
Tel. 787-923-5789
ignacio@bufetefernandezalcaraz.com