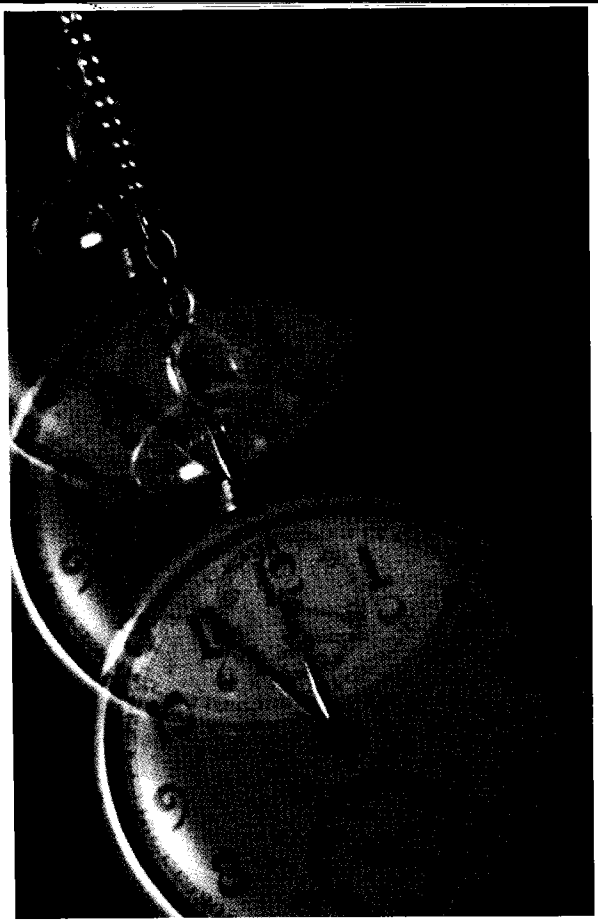

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BY MARK P. RANKIN AND RACHEL MAY ZYSK

Let The Seller Beware: Sentencing Entrapment And Manipulation in Federal Court

Attorneys who practice long enough in federal court notice a pattern in narcotics cases — small-time dealers who are seemingly overnight promoted to the big leagues of drug distribution, then arrested and charged with selling large quantities of drugs. They will also frequently see a defendant who has never before been an armed trafficker bring a firearm to a deal. How and why are these peons of narcotics trafficking so quickly working their way up in the world? How do defendants with no history of firearms end up selling a gun along with the drugs? This happens most often because the government itself has asked them to do so. The result? A lengthy prison sentence fit for a true drug kingpin is imposed upon a low-level street dealer.

It is called sentencing entrapment or sentencing factor manipulation.[1] This article describes the messy state of the law regarding these related arguments. It also suggests how defense counsel in any jurisdiction can combat government action aimed to artificially increase criminal penalties for low-level street dealers.

Sentencing Entrapment vs. Sentencing Factor Manipulation

As one court has said, sentencing entrapment and manipulation are "kissing cousins."[2] Although some courts use the terms interchangeably, it is important to note the difference between sentencing entrapment and sentencing factor manipulation. Each argument has its own nuances and, as explained more fully below, is treated differently by some courts. A defense attorney's understanding of the differences and how the attorney's jurisdiction recognizes (or does not recognize) each is the key starting point to assessing the viability of these arguments.

Sentencing entrapment, at least in the context of a narcotics case,[3] "occurs when official conduct leads an individual otherwise indisposed to dealing in a larger quantity or different type of controlled substance to do so, and the result is a higher sentence."[4] In most instances, in order to establish sentencing entrapment, a defendant bears the burden of proving by a preponderance of the evidence that the government induced the actions at issue and that he was not predisposed to do what the government induced.[5] In the Ninth Circuit, the sentencing court is required "to make express factual findings as to whether the defendant met this burden."[6] Put in more general terms, "the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense."[7] One court has required that the defendant prove that his "will was overcome by unrelenting government persistence" that was "extraordinary."[8] In these ways, sentencing entrapment is similar to the traditional substantive entrapment defense in that the primary focus is on whether the defendant was predisposed to perform the acts allegedly induced by law enforcement.

Sentencing factor manipulation, again in the narcotics setting, is "a violation of the Due Process Clause [that] occurs when the government unfairly exaggerates the defendant's sentencing range by engaging in a longer-than-needed investigation and, thus, increasing the drug quantities for which the defendant is responsible."[9] Another court has described it as "when the government engages in improper conduct that has the effect of increasing a defendant's sentence."[10] In order to establish sentencing factor manipulation, a defendant generally bears the burden of proving by a preponderance of the evidence that the government engaged in outrageous conduct that violated the Due Process Clause — for example, by prolonging the investigation solely to subject the defendant to increased penalties.[11] Contrary to the entrapment defense, the focus here is on the government's actions, not the defendant's.[12] Unfortunately, federal courts have set an impossibly high bar for showing such outrageous behavior, finding that steadily increasing drug quantities is permitted so long as it is done in an effort to "establish a person's guilt ... probe the depth and extent of a criminal enterprise ... [or] determine what quantity of drugs a defendant will deal."[13] If mere curiosity regarding just how much a defendant will sell is enough to warrant continued and escalating transactions, almost anything will pass muster.

Adding some confusion, some courts have combined the two concepts, making for a muddled state of the law. For example, in *United States v. Jaca-Nazario*[14] and *United States v. Barbour*,[15] the First Circuit lumped both concepts under the heading of sentencing entrapment, finding that entrapment required "law enforcement agents to venture outside the scope of legitimate investigation and engage in extraordinary misconduct that improperly enlarges the scope of sentencing" and finding that the defendant was not predisposed. The Tenth Circuit has done the same.[16] Those courts have thereby seemingly imposed the tougher due process standard upon the entrapment defense. Similarly, the Ninth Circuit has melded the two defenses, but seemed to impose the standard for entrapment without requiring that it rise to the level of a due process violation.[17]

Circuits Split on Viability of Defenses

The federal circuits are more than just split on whether sentencing entrapment and sentencing factor manipulation are viable defenses at sentencing — they are all over the map. Some circuits recognize both defenses, while others reject them or issue a split decision on the two arguments. Other circuits have simply avoided deciding the issues. Below is a summary of where each circuit stands.

Circuits Recognizing Entrapment and Manipulation

The good news is that the First, Eighth, Ninth, and Tenth Circuits have recognized both sentencing entrapment and sentencing manipulation as viable defenses at sentencing.[18] The bad news is that not one of these circuits has ruled in favor of a defendant.

Circuits Recognizing One Defense, but Not the Other

The Seventh and Eleventh Circuits recognize one doctrine but not the other. The Seventh Circuit has recognized sentencing entrapment as a valid sentencing mitigation argument, but expressly rejected the concept of sentencing factor manipulation. In *United States v. Turner*,[19] the court addressed both doctrines. There, the defendant first argued sentencing manipulation, claiming that the government arranged a second controlled drug buy simply for the purposes of increasing his sentence.[20] The Seventh Circuit rejected the argument on its face, stating, "[t]here is no constitutional right to be arrested at the exact moment that the police acquire probable cause."[21] Rather, the court pointed out that law enforcement may have valid reasons for extending the length of an investigation, including "to ensure that there is sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature of the criminal enterprise, and to ensnare co-conspirators.[22]

Conversely, however, the Seventh Circuit entertained the defendant's claim of sentencing entrapment as "a doctrine that our court *does* recognize."[23] The court described the claim, factually, as being "based on [the defendant's] self-proclaimed status as a small-time, 'dime-bag' dealer who was not predisposed to sell the quantity of drugs requested by the informant" and who "was 'surprised' to receive such as large order."[24] The court deemed this showing sorely insufficient to meet the "high bar" of demonstrating, first, that the defendant "lacked a predisposition to commit the crime, and [second], that his will was overcome by unrelenting government persistence."[25] Rather, the court pointed out that the defendant did not lack predisposition, as he was admittedly a crack dealer, and that the government had not engaged in "extraordinary inducement or unrelenting pressure."[26]

The Eleventh Circuit has gone the other way, accepting sentencing factor manipulation, but barring any argument of sentencing entrapment. In *United States v. Ciszkowski*,[27] the government became concerned that the defendant had threatened one of its confidential informants.[28] As a result, it arranged for a second confidential informant to approach the defendant with a proposition — the defendant would kill the first confidential informant in return for the second confidential informant supplying him with ecstasy pills, a pistol, and cash.[29] The defendant agreed.[30] The following day, the defendant obtained from the second confidential informant a duffel bag containing the drugs, money, and gun.[31] Unbeknownst to the defendant, however, the government had provided him with a pistol that contained an internal silencer.[32] Despite the defendant's lack of knowledge, that silencer raised the defendant's mandatory minimum under 18 U.S.C. § 924(c) from five years to 30 years.[33]

The Eleventh Circuit defined sentencing factor manipulation as "occur[ing] when the government's manipulation of a sting operation, even if insufficient to support a due process claim, requires that the manipulation be filtered out of the sentencing calculus."[34] The court declined to find that the government had engaged in sentencing factor manipulation under the facts before it, rather finding that it was reasonable for the government to provide a pistol with a silencer for the commission of a contract killing.[35] The court mused, however, that "if the government provided a undetectably silenced weapon in a circumstance where the firearm or the silencer was completely unrelated to the accompanying criminal act, we might be inclined to find improper sentencing manipulation in such a case."[36] Thus, there is at least a slim crack in that door in the Eleventh Circuit.

Sixth and D.C. Circuits Reject Entrapment and Manipulation

In *United States v. Hinds*,[37] the District of Columbia Circuit squarely rejected both sentencing entrapment and sentencing factor manipulation. In *Hinds*, the defendant sold powder cocaine to an undercover officer.[38] Thereafter, the officer asked the defendant to make subsequent sales, but to also help him "rock up" the powder cocaine into crack cocaine.[39] The defendant found someone (unbeknownst to him, a government informant) to assist in turning the powder cocaine into crack and sold two quantities of crack cocaine to the officer.[40] At sentencing, based upon a calculation that included the crack cocaine, the defendant's Guidelines range was 70 to 87 months; had he sold the officer powder cocaine his range would have been only 12 to 18 months.[41]

The defendant in *Hinds* argued that the crack cocaine quantities should have been excluded from his Guidelines calculation because he only converted the powder cocaine to crack at the request of the undercover officer.[42] Although the defendant argued that he was not capable of delivering the crack requested by the officer without the help of the informant, the D.C. Circuit treated his argument as "just the kind of sentencing entrapment or sentencing factor manipulation argument consistently rejected by this circuit."[43] With respect to sentencing entrapment, the *Hinds* court noted numerous D.C. Circuit cases rejecting such claims.[44]

Addressing the separate issue of whether the informant's actions constituted "egregious government misconduct" that violated due process and warranted exclusion of the crack from the sentencing calculation, the court found two problems with the defendant's argument. First, "such a claim would go to the validity of the defendant's conviction, rather than his sentence," such that if the government's actions are so outrageous as to offend due process, the conviction itself is invalid, leaving no room for a middle ground regarding sentencing.[45] Second, in order to raise such a claim, "the defendant must establish that the government had committed coercion, violence, or brutality to the person."[46] The *Hinds* court, focusing on the informant's assistance in cooking the powder cocaine into crack, found that such actions "amounted to nothing more than acceding to Hinds' request for help."[47] The court similarly rejected the defendant's claim that he would not have sold crack but-for the officer's request, finding that the defendant "showed no hesitation" to convert the powder cocaine to crack.[48]

Perhaps most important is the *Hinds* court's rejection of sentencing manipulation because it found that any outrageous government conduct rising to the level of a due process violation would necessitate

dismissal of the entire case.[49] As another D.C. Circuit decision put it: "If the government's actions were not so outrageous that judicial processes to obtain a conviction were barred — if, in other words, there were no violations of the Due Process Clause — it follows that those actions cannot serve as a basis for a court's disregarding sentencing provisions."[50] The Fourth Circuit, in *dicta*, similarly doubted whether the government could ever act outrageously such that dismissal was not warranted but a downward departure was justified.[51] Making the sentencing manipulation argument co-existent to the Due Process Clause, at least in the D.C. Circuit, thereby bars the former argument altogether.

In *United States v. Guest*,[52] the Sixth Circuit also made clear that neither sentencing entrapment nor sentencing factor manipulation is a viable defense in that jurisdiction. In *Guest*, an undercover FBI agent posed online as a mother willing to provide her two minor daughters for sexual activity.[53] The defendant traveled to meet the fictitious mother and daughters and was arrested, charged, and eventually pleaded guilty to travel with intent to engage in illicit sexual conduct.[54]

At sentencing, the defendant in *Guest* argued that the Guidelines range was excessive because it included a two-level enhancement for an offense involving more than one "child," and another enhancement for the "child" being under the age of 13, both scenarios created by the undercover agent, not himself.[55] The district court essentially declined to consider that argument and the appeals court affirmed, noting that, even after *Gall*, it had "reaffirmed that the Sixth Circuit does not recognize either [the sentencing entrapment or sentencing manipulation] defense."[56] In a footnote, the *Guest* panel opined that, even if the Sixth Circuit did recognize either defense, the facts in *Guest* would not support such claims.[57] As to both defenses, the court found that the defendant did not demonstrate "outrageous government conduct" or entrapment in part because the government did not specifically target Guest with its fictitious online profile.[58]

Circuits Still in Punt Formation

The Second, Third, Fourth, and Fifth Circuits have avoided making a decision about whether sentencing entrapment and sentencing factor manipulation may be successful in those jurisdictions.[59] However, in deciding nothing, these courts have nevertheless given some clues about their negative thoughts on both concepts. For instance, in *United States v. Jones*, the Fourth Circuit, in *dicta*, stated: "We decline to impose a rule that would require the government to come forward with a purpose or motivation [for an extended investigation]."[60] And in *United States v. Tremelling*, where the defendant complained that the government manipulated the sentence by, without the defendant's knowledge, bringing additional marijuana to a reverse sting, the Fifth Circuit expressed similar skepticism: "We are not disposed to find that the government's suspicious conduct by itself would constitute sentencing manipulation."[61] Most telling, the Third Circuit, while declining to make a decision on either argument, has held that "it is not a violation of due process for the police to intentionally delay a sting operation in an effort to subject a suspect to a greater penalty."[62] In light of such negative (though non-binding) comments, the future of these defenses does not look bright in these circuits.

Although it has failed to recognize sentencing entrapment or manipulation as a viable defense, the Second Circuit has left some room for defendants to argue each. In *United States v. Oliveras*,[63] the Second Circuit explained: "Although [we have] never formally recognized the validity of either of these doctrines, various panels have suggested that a departure based on manipulation or entrapment might lie where the government engages in 'outrageous' conduct." The *Oliveras* court remanded to the district court for a determination of whether there was evidence that law enforcement engaged in "sufficiently aggressive encouragement of wrongdoing ... to justify a below-Guidelines sentence."[64] Thus, in the Second Circuit, although the court has yet to rule on their validity and both arguments are seemingly open to defendants, defense counsel must convince the sentencing court that law enforcement aggressively induced the defendant's actions.

Practice Pointers

Where to Watch for Sentencing Entrapment and Manipulation

Although drug quantity is the most obvious (and probably common) sentencing issue that is driven by entrapment or manipulation, there are myriad Guidelines provisions that may be ripe for challenge. It is often the Guidelines provisions with numerous fact-based enhancements that are most susceptible to government entrapment or manipulation. For example, drug cases may also involve an uncharged firearm that results in a two-level enhancement. That firearm is often introduced into the case at the government's request. Similarly, a defendant's decision to sell crack rather than powder cocaine may have been the government's idea, not the defendant's.[65]

Child pornography and enticement cases are rife with potential for sentencing entrapment or manipulation by the government. In child pornography cases, the undercover agent requesting that the defendant send materials via e-mail or Internet often seeks images of a certain type or number that trigger significant Guideline enhancements. For example, in *United States v. Snow*,[66] the Fifth Circuit rejected the defendant's claim that the sentencing court should disregard the distribution enhancement because he only transmitted the child pornography at the request of the undercover agent. Similarly, in cases in which the defendant entices an undercover agent "child" to meet for sex, it is the agent who determines the age and number of children at issue, again manipulating the Guidelines.[67]

Finally, counsel should pay particular attention in gun cases to potential sentencing entrapment and manipulation. Guideline § 2K1.1 and the sentencing provisions of 18 U.S.C. § 924 contain numerous sentencing enhancements that are susceptible to government hijinks, including the quantity of firearms, the type of firearm, and whether it has a silencer. As demonstrated in the Eleventh Circuit's *Ciszkowski* decision, an aggressive government agent can do some devastating damage to a defendant through entrapment or manipulation in a firearms case.

Remedies for Government Entrapment and Manipulation

Even though courts do not necessarily agree about the substance of sentencing entrapment or manipulation, they generally agree on the appropriate remedies if a defendant demonstrates the defenses. Perhaps the most encouraging aspect of various courts' dicta is that, if proven, sentencing entrapment or manipulation could result in a sentence below a statutory mandatory minimum.[68]

For example, in *Ciszkowski*, where statutory minimums resulted in a 25-year increase in the defendant's prison term, the Eleventh Circuit instructed that if a defendant was able to meet his burden of demonstrating sentencing manipulation, the mandatory minimum for the greater offense simply would not apply.[69] The court explained that the court should "filter[] the manipulation

out of the sentencing calculus before applying a sentencing provision, [and thus] no mandatory minimum would arise in the first place."[70]

Similarly, the First and Ninth circuits have agreed that the sentencing court should focus on crafting a sentence based on the conduct that the defendant actually intended rather than that caused by the government's improper actions. In *United States v. Montoya*,[71] the First Circuit found that "where government agents have improperly enlarged the scope or scale of the crime," the district court could simply exclude the "tainted" transactions in determining an appropriate sentence.[72] Specifically, the district court could (1) exclude the transaction from the Guidelines calculus, (2) exclude the transaction from the statutory minimums calculus, or (3) downward depart from the higher Guidelines range.[73]

Likewise, in *Riewe*, the Ninth Circuit directed that first, the district court should decline to sentence the defendant based upon the "greater offense that the defendant was induced to commit, and instead apply the penalty provision for the lesser offense that the defendant was predisposed to commit."[74] When mandatory minimums are in play, the court should apply the mandatory minimum of the lesser offense.[75] Second, and alternatively, the district court could "grant a downward departure from the sentencing range for the greater offense that the defendant was induced to commit."[76]

Tying Arguments to the § 3553(a) Factors

Most cases regarding sentencing entrapment and manipulation address the question of whether either argument can support a downward departure. After *Booker*, there is no doubt that the Guidelines still matter (and in some courtrooms are still the whole ball game). Nevertheless, sentencing courts are now free to consider that the criminal activity driving the recommended sentence is based upon government-induced behavior. The key is to tie those arguments to the factors arrayed at 18 U.S.C. § 3553(a).

For example, 18 U.S.C. § 3553(a)(1) directs the court to consider "the nature and circumstances of the offense." Where the *government* turned a relatively minor offense into a very serious one, the court should take that into account in evaluating the true seriousness of the crime. Section 3553(a)(1) also directs the sentencing judge to consider "the history and characteristics of the defendant." Attorneys often rightfully focus on the defendant's lack of criminal record, drug addiction, difficult background, etc. But this factor also dovetails well with arguments of sentencing entrapment and manipulation, for counsel can often contrast the defendant's mitigating background with the aggravating factor of a higher drug quantity or firearm that was strategically manufactured by the government.

Finally, 18 U.S.C. § 3553(a)(2)(A) requires the court to consider "the need for the sentence imposed ... to reflect the seriousness of the offense. ..." If the government ratcheted up the seriousness of the crime, a harsh sentence is not necessary to address the seriousness of the offense. Counsel should ask that the court punish the defendant based upon the seriousness of the crime he would have committed without government enticement. To that end, the defense attorney must give the court examples of sentences that it and other courts have imposed in cases where the defendant was convicted of the offense with which the client *should* have been charged.

Notes

1. For the sake of brevity, this article will sometimes refer to the two concepts as "sentencing entrapment and manipulation."

2. *United States v. Gibbens*, 25 F.3d 28, 30 (1st Cir. 1994).

3. Although courts most often address — and define — these terms in the narcotics context, the defenses apply to a variety of sentencing contexts.

4. *United States v. Martin*, 583 F.3d 1068, 1073 (8th Cir. 2009).

5. *Martin*, 583 F.3d at 1073.

6. *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1998).

7. *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009).

8. *Id.* at 641-42.

9. *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009).

10. *Turner*, 569 F.3d at 641 (quoting *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996)); *see also United States v. Beltran*, 571 F.3d 1013, 1019-20 (10th Cir. 2009).

11. *See, e.g., United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009).

12. *United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

13. *Id.*

14. 521 F.3d 50, 57-58 (1st Cir. 2008).

15. 393 F.3d 82, 86 (1st Cir. 2004).

16. *United States v. Beltran*, 571 F.3d 1013, 1018 (10th Cir. 2009).

17. *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1998).

18. *See, e.g., United States v. Beltran*, 571 F.3d 1013, 1019-20 (10th Cir. 2009); *United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009); *United States v. Jaca-Nazario*, 521 F.3d 50, 57-58 (1st Cir. 2008); *United States v. Riewe*, 165 F.3d 727 (9th Cir. 1998).

19. 569 F.3d 637 (7th Cir. 2009).

20. *Id.* at 641.

21. *Id.*

22. *Id.* (citing *United States v. Garcia*, 79 F.3d 74, 76 (7th Cir. 1996)) (internal citation omitted).

23. *Id.* (emphasis added).

24. *Id.* at 641, 642.

25. *Id.* at 641 (citing *United States v. Gutierrez-Herrera*, 293 F.3d 373, 377 (7th Cir. 2002) (internal quotation omitted).

26. *Id.* at 642.

27. 492 F.3d 1264 (11th Cir. 2007).

28. *Id.* at 1266-1267.

29. *Id.* at 1267.

30. *Id.*

31. *Id.*

32. *Id.* The law enforcement agent that testified at trial "admitted that a layperson looking at the firearm's exterior would be unable to tell that a silencer was mounted within the gun's barrel." *Id.*

33. *Id.* at 1267, 1267 n.1.

34. *Id.* at 1270.

35. *Id.* at 1271.

36. *Id.* Interestingly, in a concurring opinion, Judge Carnes pointed out that though the Eleventh Circuit "recognized" the doctrine of sentencing manipulation, it had never actually vacated a sentence as a result. *Id.* at 1272 (Carnes, J., concurring). Judge Carnes noted, "Unless and until we actually see ... sentencing manipulation egregious enough to lead to a vacated sentence, [the] defense[] cannot be found in the law of this circuit. In our speculative dicta yes, but in our law no. Not yet anyway." *Id.*

37. 329 F.3d 184 (D.C. Cir. 2003).

38. *Id.* at 185.

39. *Id.*

40. *Id.*

41. *Id.* at 185-86.

42. *Id.* at 186-87.

43. *Id.* at 188 (internal quotation and citation omitted).

44. *Id.*

45. *Id.* at 190.

46. *Id.* (quoting *United States v. Walls*, 70 F.3d 1323, 1329-30 (D.C. Cir. 1995)).

47. *Id.*

48. *Id.* at 189.

49. *Id.* at 190.

50. *United States v. Walls*, 70 F.3d 1323, 1229-30 (D.C. Cir. 1995).

51. *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994)

52. 564 F.3d 777 (6th Cir. 2009).

53. *Id.* at 778.

54. *Id.*

55. *Id.* at 778, 781, n.4.

56. *Id.* at 781.

57. *Id.* at 781, n.4.

58. *Id.*

59. *See United States v. Sed*, 601 F.3d 224 (3rd Cir. 2010); *United States v. Snow*, 309 F.3d 294 (5th Cir. 2002); *United States v. Tremelling*, 43 F.3d 148 (5th Cir. 1995); *United States v. Jones*, 18 F.3d 1145 (4th Cir. 1994).

60. *Jones*, 18 F.3d at 1155.

61. *Tremelling*, 43 F.3d at 151.

62. *Sed*, 2010 WL 1292152, at *6 (citing *United States v. Tykarsky*, 446 F.3d 458, 476 n.13 (3d Cir. 2006) (internal quotes omitted).

63. *United States v. Oliveras*, 2010 WL 46872, at **3-4 (2d Cir., Jan. 8, 2010).

64. *Id.* at **4.

65. *See, e.g., United States v. Hinds*, 329 F.3d 184 (D.C. Cir. 2003). As stated *supra*, in *Hinds*, the defendant first sold powder cocaine to an undercover police officer. *Id.* at 185. At the officer's request, the defendant sold him crack cocaine. *Id.* Because the defendant did not know how to convert powder cocaine to crack cocaine, he elicited the help of a friend who happened to be working as confidential informant for the government. *Id.* In other words, the defendant was unable to sell crack cocaine to the government without the government's assistance. *Id.* at 187-188. The D.C. Circuit rejected the defendant's argument that the crack cocaine should be excluded from his sentencing calculation, finding that the defendant "showed no hesitation when the undercover agent asked him to provide the drugs in crack form." *Id.* at 189.

66. *United States v. Snow*, 309 F.3d 294, 295 (5th Cir. 2002).

67. *See, e.g., United States v. Guest*, 564 F.3d 777 (6th Cir. 2009). As stated *supra*, in *Guest*, the defendant pled guilty to crossing state lines with the intent to engage in sexually illicit conduct after agreeing online to meet a mother and her two children under the age of 12. *Id.* at 778. The mother was actually an undercover agent and the children were fictional. *Id.* The defendant argued that it was "the government's choice to create two fictitious children and to make their ages under 12." *Id.* at 781 n.4. The Sixth Circuit declined, again, to recognize the doctrines of sentence entrapment or sentence manipulation. *Id.* at 781. The court further noted that "[e]ven if we were to recognize sentencing entrapment or sentence manipulation as a defense, both would be inapplicable here." *Id.* at 781 n.4.

68. *See Ciszkowski*, 492 F.3d at 1270 ("There are only two circumstances in which a court can depart from a statutory authorized mandatory minimum sentence. Either the government must file a motion to recognize the defendants substantial assistance or the defendants must fall within the provisions of the safety valve embodied in 18 U.S.C. § 3553(f)." (internal quotations omitted)).

69. *Id.* (citing *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999) (per curiam)).

70. *Id.*

71. 62 F.3d 1 (1st Cir. 1995).

72. *Id.* at 3.

73. *Id.*

74. *Riewe*, 165 F.3d at 729. As discussed *supra*, the Ninth Circuit combines the two doctrines. *Id.*

75. *Id.*

76. *Id.*

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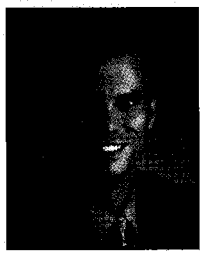

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