

Sentencing Manipulation/Sentencing Entrapment

By Katharine Tinto *

Sentencing Manipulation: A claim made by the defendant at the time of sentencing in which the defendant requests a reduced sentence based on the argument that the police took certain strategic actions, and suggested particular offense conduct, in order to effectuate a higher mandatory sentence. Broadly defined as when the government engages in improper conduct that has the effect of increasing a defendant's sentence. **See below for Circuit-specific definitions.*

Sentencing Entrapment: A related sentencing claim. Generally defined as occurring when the government pressures a suspect "predisposed for committing a lesser crime to commit a more serious offense."

Imperfect Entrapment: Currently recognized only in the Second and Ninth Circuits, a sentencing claim under § 5K2.12 (coercion, duress), in which the defendant seeks a reduction in sentence based on government conduct that "does not give rise to an entrapment defense but that is nonetheless aggressive encouragement of wrongdoing."

REMEDIES: range from downward departures and variances to acquittal of charges and avoidance of statutory mandatory minimums (*see* Part III below).

JURY INSTRUCTIONS: the Ninth Circuit has recently held that sentencing entrapment must be a question for the jury in some circumstances (*see* Part IV below).

I. Current Approach of the Circuits:

Each circuit varies in its definition of, and requirements for successfully bringing, a sentencing entrapment or sentencing manipulation claim. Also be aware that for circuits that fail to recognize a certain claim, it may be that courts have simply not yet found sufficient facts to grant a claim and/or that the circuit uses an unduly harsh definition of the claim (and therefore you may want to look to other circuits' definitions).

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First Circuit:

- Recognizes one claim of sentencing manipulation/entrapment. *See* *United States v. Jacob-Nazario*, 521 F.3d 50, 57 (1st Cir. 2008) (“We have used the terms ‘sentencing entrapment’ and ‘sentencing factor manipulation’ interchangeably.”); *United States v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995).
- District court granted a downward departure based on the claim of imperfect entrapment in a felon in possession case. *See* *United States v. Oliveira*, 798 F. Supp.2d 319, 325 (D. Mass. 2011) (citing Second and Ninth Circuit caselaw).
- District court acquitted defendant of § 924(c) charge where agents increased the magnitude of the charge itself, another form of sentencing factor manipulation. *See* *United States v. Carreiro*, 14 F. Supp.2d 196 (D. R.I. 1998).

Second Circuit:

- Has declined to recognize either sentencing doctrine due to failure to find the factual circumstances upon which the defendant would prevail on such a claim. *See* *United States v. Floyd*, 375 Fed. Appx. 88, 89 (2d Cir. 2010) (unpublished).
- Recognizes claim of “imperfect entrapment.” *United States v. Bala*, 236 F.3d 87, 92 (2d Cir. 2000)

Third Circuit: has declined to recognize either sentencing doctrine due to failure to find the factual circumstances upon which the defendant would prevail on such a claim. *See* *United States v. Sed*, 601 F.3d 224, 229 (3d Cir. 2010) (“We have neither adopted nor rejected the doctrines of sentencing entrapment and sentencing factor manipulation.”).

Fourth Circuit: has declined to recognize either sentencing doctrine due to failure to find the factual circumstances upon which the defendant would prevail on such a claim. *See* *United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994) (stating that the court has not yet accepted the legal viability of sentencing manipulation or sentencing entrapment but has never had to do so on the facts before it).

Fifth Circuit: has declined to recognize either sentencing doctrine due to failure to find the factual circumstances upon which the defendant would prevail on such a claim. *See* *United States v. Tremelling*, 43 F.3d 148, 151 (5th Cir. 1995) (stating that the Circuit has not expressly determined whether it accepts the concept of “sentencing factor manipulation”).

Sixth Circuit: has declined to recognize either sentencing doctrine due to failure to find the factual circumstances upon which the defendant would prevail on such a claim. *See* *United States v. Guest*, 564 F.3d 777, 781 (6th Cir. 2009) (stating that Sixth Circuit generally does not recognize either sentencing entrapment or sentencing manipulation).

Seventh Circuit:

- Rejects sentencing manipulation as defined as “when the government engages in improper conduct that has the effect of increasing a defendant’s sentence.” *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996); *see also* *United States v. Gagliardi*, 506 F.3d 140, 148 (2d Cir. 2007) (same).
- Recognizes claim of sentencing entrapment. *See United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009).
- District court is required to address sentencing mitigation arguments, including sentencing entrapment. *See United States v. Morris*, 775 F.3d 882 (7th Cir. 2015).

Eighth Circuit: recognizes two separate claims, sentencing manipulation and sentencing entrapment. *See United States v. Torres*, 563 F.3d 731, 734 (8th Cir. 2009); *United States v. Searcy*, 233 F.3d 1096, 1099 (8th Cir. 2000) (recognizing sentencing entrapment as a doctrine).

Ninth Circuit:

- Recognizes claim of sentencing entrapment. *United States v. Riewe*, 165 F.3d 727, 729 (9th Cir. 1999).
- Rejects claim of sentencing manipulation as defined as a claim seeking a sentence reduction based solely on the government’s decision to delay the arrest and investigate further. *See United States v. Baker*, 63 F.3d 1478, 1500 (9th Cir. 1995).
- Recognizes claim of “imperfect entrapment.” *United States v. Garza-Juarez*, 992 F.2d 896, 912 (9th Cir. 1993).

Tenth Circuit: recognizes one claim of sentencing manipulation/entrapment. *See United States v. Beltran*, 571 F.3d 1013, 1018 (10th Cir. 2009) (stating that circuit analyzes “claims of sentencing entrapment or manipulation under the rubric of ‘outrageous governmental conduct’”).

Eleventh Circuit: recognizes sentencing manipulation but not sentencing entrapment. *See United States v. Ciszowski*, 492 F.3d 1264, 1270 (11th Cir. 2007).

D.C. Circuit: Historically, the D.C. Circuit stated that it did not recognize either sentencing manipulation or sentencing entrapment. *See United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003). But recently, the D.C. Circuit in *United States v. Bigley*, 2015 WL 2330300 (D.C. Cir. May 15, 2015), held that these decisions are incompatible with *Booker*. *Id.* at *4. Now, a district court must consider non-frivolous mitigation arguments at sentence, which include the request for a variance based on sentencing manipulation. *Id.*

ALSO CONSIDER:

USSG § 5K2.12: allowing downward departure based on coercion or duress and the basis for “imperfect entrapment” sentencing claim in 2nd and 9th Circuits and one district court in the First Circuit. *See* United States v. Bala, 236 F.3d 87, 92 (2d Cir. 2000); United States v. Garza-Juarez, 992 F.2d 896, 912 (9th Cir. 1993); United States v. Oliveira, 798 F. Supp.2d 319, 325 (D. Mass. 2011).

USSG § 2D1.1, App. Note 12: if the defendant is able to establish that he did not intend to purchase, or was not “reasonably capable” of purchasing, the ultimate amount of narcotics received, that additional amount of narcotics may be excluded from the sentencing calculus.

USSG § 2D1.1, App. Note 14: a downward departure in sentence may be warranted if the government offers a price, “substantially below the market value of the controlled substance” which thereby induces the defendant to purchase more drugs than he would normally be able.

II. Successful sentencing manipulation/sentencing entrapment claims:

*Stash house cases:*¹

US v. Briggs, 397 Fed. Appx. 329 (9th Cir. 2010): affirmed downward variance based on “culpability concerns”

US v. Hardee, 1:12-CR-00734-JEI-2 (D.N.J. Jan. 8, 2015): At sentencing, Judge Irenas downward departs on offense level for “sentencing entrapment” on stash house sting; departs from the career offender guideline. Judge is also critical generally of stash house stings.

US v. Cambren, 29 F. Supp.2d 120 (E.D.N.Y. 1998): downward departure under App. Note 15 (now 14) of 2D1.1

US v. Cortes, 732 F.3d 1078 (9th Cir. 2013): Ninth Circuit clarifies that evidence of inducement in an entrapment defense cannot *solely* rely on the fruits of the crime, but evidence of inducement “can include government pressure or persuasion in whatever form it takes.” **ALSO held that sentencing entrapment must be presented to the jury through jury instructions** if the success of that claim/defense would result in a lower statutory range. Court suggests a model jury instruction for sentencing entrapment in a stash house case. Reversed and remanded for new trial based on jury instruction errors.

¹ For more caselaw and information on how to fight stash house stings in general, *see* Katharine Tinto, *Fighting the Stash House Sting* (THE CHAMPION, NACDL 2014).

US v. Yuman-Hernandez, 712 F.3d 471 (9th Cir. 2013): Court holds that a defendant need only show a lack of intent OR a lack of capability to establish sentencing entrapment in a fictional stash house operation

See also:

US v. Dunlap, No. 2:13-CR-00126; initially dismissed by district court based on outrageous government conduct, then reversed by 9th Circuit, went to trial on remand, acquittal by jury (and hung on some counts) based on burden of proof defense, prosecution did not meet the elements; D testified.

US v. Thomas Demetrious Johnson, No. 10 CR 3507-W (S.D. Cal. Sept. 27, 2011) (San Diego FPD): acquittal by jury based on entrapment defense

Expressed disapproval of tactic but did not depart or vary:

US v. Black, 733 F.3d 294, 303 (9th Cir. 2013): see both the majority opinion and the dissent.

US v. Kindle, 698 F.3d 401 (7th Cir. 2012) (Posner J., concurring and dissenting), *reheard en banc sub nom*, US v. Mayfield (7th Cir. Apr. 16, 2013): Judge Posner dissents, arguing that the defendants should have been entitled to present an entrapment instruction defense in this stash house case. Posner discusses his disapproval of the tactic, the concept of predisposition, and the inducements used by police officers, and cites Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 Cardozo Law Review 1401 (2013).

US v. McKenzie, 656 F.3d 688, 690-92 (7th Cir. 2011)

US v. Lewis, 641 F.3d 773, 777 (7th Cir. 2011)

US v. Diaz, No. CR 09-284-TUC-RCC (CRP), 2010 U.S. Dist. Lexis 134027 (D. Az. Dec. 2, 2010): great language about tactic itself, denies D's motion to dismiss weight allegation (which carries a mand min) and states that a more appropriate time to deal with this is at sentencing (seems to suggest no getting around mand min but downward departure or variance to the mand min may be warranted)

US v. Briggs, 623 F.3d 724 (9th Cir. 2010)

US v. Corson, 579 F.3d 804 (7th Cir. 2009)

US v. Caban, 173 F.3d 89 (2d Cir. 1999): invites Sentencing Commission to look at this tactic, reverse stings in general

**There are many published cases involving the stash house tactic in which a court did not find sentencing manipulation or entrapment. There is also caselaw on whether the stash house technique merits an entrapment jury instruction. Counsel should review the applicable cases of their circuit in order to differentiate material facts.*

Police place drug deal in a school zone:

Bell v. State, 881 N.E.2d 1080 (Ct. App. Ind. 2008): changed statute of D's conviction

State v. Steadman, 827 So.2d 1022 (Fla. App. Ct 2002): suggests downward departure is warranted

Graham v. State, 608 So.2d 123 (Fla. App. Ct 1992): suggests downward departure is warranted

Eldeib, Duaa & Jim Jawoski, *Carpentersville Police Sting Raises Questions of Public Safety*, The Chicago Tribune (Jan. 18, 2012): discussing undercover sting which they placed near a school zone, violence broke out between suspects and cops while school was in session

Reverse Stings/Drugs/Guns:

US v. Fontes, 415 F.3d 174 (1st Cir. 2005) (powder v. crack): dct found sentencing manipulation. Dct imposed a "non-Guidelines" sentence that was below the recommended Guidelines sentencing range. Dct stated that the police conduct was not sufficiently "outrageous" to justify equitable remedy of avoiding the mandatory minimum. Sentence affirmed by 1st Circuit.

US v. Carreiro, 14 F. Supp.2d 196 (D. R.I. 1998) (drugs/guns): dct acquitted D of § 924(c) charge due to sentencing factor manipulation by converting unlawful purchase of a firearm to use of a firearm in connection with a drug trafficking offense

US v. Oliveras, 359 Fed. Appx. 257 (2d Cir. 2010) (powder v. crack): stated dct did not have authority to go below mand min but suggested that police conduct could be the basis for a below-Guidelines sentence if properly supported by the factual record

US v. Sivils, 960 F.2d 587 (6th Cir. 1992) (drugs): expressed disapproval but didn't depart as D could not suggest that amount of drugs for the money rendered sentence "fundamentally unfair"

US v. Beigali, 2:07-cr-2-490-LPZ-RSW, Sentencing Memorandum Opinion (Document #44) (E.D. Mich. Apr. 14, 2009): downward departed from 5 kilos to 1 kilo of drugs in a reverse sting, citing App Notes 12 and 14 of § 2D1.1, based on finding that gov/CI induced the increase in quantity in part by “fronting” some of the drugs

US v. Searcy, 233 F.3d 1096 (8th Cir. 2000) (powder v. crack): recognizes claim of sentencing entrapment and remands for determination of whether a downward departure is warranted

US v. Cannon, 886 F. Supp. 705 (D. N.D. 1995) (drugs/guns): dct found sentencing manipulation and sentencing entrapment due to last minute addition of machine gun by police (as opposed to negotiated deal of drugs and hand guns). Dct avoided mand min for machine guns and sentenced on hand guns and drugs alone. Reversed by 8th Circuit on other grounds and granted D a new trial.

US v. Barth, 788 F. Supp. 1055 (D. Minn. 1992) (ratcheting up amt): grants downward variance based on sentencing entrapment BUT reversed by 8th Circuit which stated that on the factual record before it, evidence that the police increased amount of drugs over the course of several buys was insufficient to establish sentencing entrapment (fact-specific)

US v. Williams, 2012 WL 1422897 (9th Cir. Apr. 25, 2012) (drug conspiracy): affirmed district court’s finding of sentencing entrapment and avoidance of mandatory minimum

US v. Grajeda-Encinas, 2012 WL 1111423 (9th Cir. Apr. 4, 2012), US v. Martinez-Grijalva, 2012 WL 111413 (9th Cir. Apr. 4, 2012) (drugs): remanded for resentencing, dct has the authority to decide claim of sentencing entrapment and applicability of App. Note 12- noted concern of D’s ability to produce amt of drugs

US v. Riewe, 165 F.3d 727 (9th Cir. 1999) (ratcheting up amt): 9th Circuit remanded for more explicit factual findings and suggested that sentencing entrapment was an acceptable basis for avoiding the statutory mandatory min; dct has the authority to not count the “tainted” amount of drugs

US v. Villegas, 86 F.3d 1165 (9th Cir. 1996) (unpublished mem.): dct departed downward based on sentencing entrapment, 9th Circuit remanded, dct must explain departure better

US v. Naranjo, 52 F.3d 245 (9th Cir. 1995) (ratcheting up amt): 9th Circuit finds sentencing entrapment so remands for dct to explain why it disagreed and did not downward depart

US v. Stauffer, 38 F.3d 1103 (9th Cir. 1994) (drugs): recognizing sentencing entrapment as a ground for downward departure and finding it in this case

Thomas v. Haws, 2008 WL 4447086 (C.D. Cal. 2008) (habeas, drugs): CA court of appeal found due process violation based on reverse sting setting of amount

US v. Martinez-Villegas, 993 F. Supp. 766 (C.D. Cal. 1998) (drugs): dct finds sentencing entrapment and imperfect entrapment; grants downward departure of 4 levels (2 levels for each theory)

US v. Shepard, 857 F. Supp. 105 (D.C. D. Ct. 1994) (powder v. crack): dct applied Guidelines and mand min as if the D had sold powder cocaine (instead of crack); *on appeal DC Circuit held that with respect to the police request to supply crack cocaine instead of powder, that request alone is insufficient to prove sentencing manipulation/ entrapment.*

Anders v. State, 596 So.2d 463 (Fla. App. Ct. 1992) (drugs): granted motion to dismiss due to entrapment because of behavior of CI and inducement of D to participate in drug reverse sting

Other:

US v. Garza-Juarez, 992 F.2d 896 (9th Cir. 1993) (guns): aggressive encouragement by police to add suppressors to guns and change nature of guns sold; departed downward under 5K2.12

US v. McClelland, 72 F.3d 717 (9th Cir. 1995) (murder for hire): affirmed downward departure based on imperfect entrapment, use of CI and encouragement to complete the crime

US v. Cromitie, 2011 WL 2693297 (S.D.N.Y. 2011) (terrorism): dct found sentencing manipulation based on government's introduction of missile to offense but ruled that court was bound by mandatory min

III. Examples of Remedies: (see also successful claims listed by topic area above)

Departure/Variance:

- US v. Briggs, 397 Fed. Appx. 329 (9th Cir. 2010)
- US v. Beltran, 571 F.3d 1013, 1019 (10th Cir. 2009) (stating that post-*Booker*, courts could grant a downward departure or a variance under 18 U.S.C. § 3553(a) based on sentencing manipulation)
- US v. Connell, 960 F.2d 191, 196 (1st Cir. 1992) (affirming district court's denial of sentencing manipulation claim as not clearly erroneous on these facts but sentencing

court has “ample power to deal with the situation either by excluding the tainted transaction from the computation of relevant conduct or by departing from the GSR”)

- US v. Beigali, 2:07-cr-2-490-LPZ-RSW, Sentencing Memorandum Opinion (Document #44) (E.D. Mich. Apr. 14, 2009)
- US v. Martinez-Villegas, 993 F. Supp. 766 (C.D. Cal. 1998) (drug sting)
- US v. Cambrelen, 29 F. Supp.2d 120 (E.D.N.Y. 1998)

Exclusion of Tainted Facts from Guideline Calculation

- US v. Connell, 960 F.2d 191, 196 (1st Cir. 1992) (affirming district court’s denial of sentencing manipulation claim as not clearly erroneous on these facts but sentencing court has “ample power to deal with the situation either by excluding the tainted transaction from the computation of relevant conduct or by departing from the GSR”)

Acquittal of charges:

- US v. Carreiro, 14 F. Supp.2d 196 (D. R.I. 1998): dct finds appropriate remedy to be granting motion for acquittal of charge carrying mandatory minimum as agents’ conduct converted offense from unlawful purchase of a firearm to use of a firearm in connection with a drug trafficking offense, making it impossible to exclude tainted factors from an unadorned offense
- Bell v. State, 881 N.E.2d 1080 (Ct. App. Ind. 2008): granted judgment of acquittal based on entrapment as a matter of law (school zone case)

Avoidance of mandatory minimums:

- US v. Williams, 2012WL1422897 (9th Cir. Apr. 25, 2012) (drug conspiracy): affirmed district court’s finding of sentencing entrapment and avoidance of mandatory minimum
- US v. Ciszowski, 492 F.3d 1264, 1270 (11th Cir. 2007): suggested that a court can remove manipulated conduct from sentencing calculus and thereby avoid mandatory minimum
- US v. Fontes, 415 F.3d 174, 180 (1st Cir. 2005): recognized a court’s ability to impose a sentence below the statutory mandatory minimum as an equitable remedy
- US v. Riewe, 165 F.3d 727, 729 (9th Cir. 1999): stated that district court could apply the mandatory minimum for a lesser offense as remedy for sentencing manipulation
- United States v. Montoya, 62 F.3d 1, 3-4 (1st Cir. 1995) (sentence factor manipulation “applies to statutory minimums as well as to the guidelines”)
- US v. Carreiro, 14 F. Supp.2d 196 (D. R.I. 1998): dct finds appropriate remedy to be granting motion for acquittal of § 924(c) charge because that was the only way to exclude

tainted factors. “Ordinarily, the factors improperly inflating the sentence would be disregarded and the defendant would be sentenced on the basis of the unadorned offense that he committed.” (*support for avoidance of mand min short of acquittal*)

- US v. Cannon, 886 F. Supp. 705 (D. N.D. 1995) (drugs/guns): dct found sentencing manipulation and sentencing entrapment due to last minute addition of machine gun by police (as opposed to negotiated deal of drugs and hand guns). Dct avoided mand min for machine guns and sentenced on hand guns and drugs alone. Reversed by 8th Circuit on other grounds and granted D a new trial.
- *But see* US v. Winebarger, 664 F.3d 388, 389 (3d Cir. 2011) (holding that a court may only impose a sentence below a statutory mandatory minimum under 18 U.S.C. § 3553(e) based on the substantial assistance to the government); US v. Cromitie, No. 09 Cr. 558(CM), 2011 WL 2693297, at *5 (S.D.N.Y. June 29, 2011) (stating that even if the court found sentencing manipulation, court has no authority to avoid mandatory minimum).

IV. Jury Instructions

US v. Cortes, 732 F.3d 1078 (9th Cir. 2013)

Entrapment: In this stash house case, the district court gave a modified entrapment jury instruction which added the following directive, “[T]he amount of drugs or the profit that would be derived from their sale does not constitute an inducement supporting entrapment.”

The Ninth Circuit clarifies that evidence of inducement in an entrapment defense cannot *solely* rely on the fruits of the crime, but evidence of inducement “can include government pressure or persuasion in whatever form it takes.” The court suggests a model instruction and reverses and remands for a new trial.

Sentencing Entrapment: Court holds that a defendant is entitled to present the defense of sentencing entrapment to the jury if the success of that defense would result in a lower statutory sentencing range or mandatory minimum. The court suggests a model instruction on sentencing entrapment for a drug stash house robbery context.