Sentencing Entrapment: An Overview and Analysis

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I. INTRODUCTION

Two Spanish-speaking defendants agree to exchange methamphetamine for guns with a government agent who does not speak Spanish. It is not clear whether the defendants negotiated for any particular type of gun because the government refuses to release the identity of the informant who arranged the transactions. At the meeting, the agent gives the defendants a closed bag containing two machine guns. The defendants do not realize the bag contains machine guns. The defendants are then arrested. The defendants are charged and convicted with the crime of "use of a firearm in drug trafficking." Because the firearms are machine guns, the defendants are given a mandatory minimum sentence of thirty years to run consecutively with their other sentences. If the weapons had been handguns instead of machine guns, the defendants would have faced a mandatory sentence of only five years.

A defendant agrees to sell cocaine to an undercover drug enforcement agent, but first the agent insists that the defendant "cook" the cocaine into cocaine-base (crack). The agent waits in his car for a few minutes while the defendant goes inside and cooks the cocaine into

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1. United States v. Ramirez-Rangel, 103 F.3d 1501, 1503 (9th Cir. 1997).
2. Id. at 1505.
3. Id. at 1503.
4. Id. at 1504.
5. Id.
6. Id.
7. Id. at 1505.
8. Id. at 1507.
9. United States v. Shepherd, 857 F. Supp. 105, 108 (D.D.C. 1994), vacated by 102 F.3d 553 (D.C. Cir. 1996). According to footnote (D) of the drug quantity table, "[c]ocaine base," for the purposes of this guideline, means 'crack.' 'Crack' is the street name for a form of cocaine base... usually appearing in a lumpy, rocklike form." U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2001) (for brevity, the United States Sentencing Guidelines will be abbreviated within this Comment as "USSG").
crack—placing it in a microwave for a few minutes. If the defendant had sold the agent cocaine in its powder form, she would have received a sentence of sixty months, but because she cooked the cocaine into crack, she faced a sentence of 120–135 months. This agent "insisted on the conversion of cocaine to crack because he was aware of the heavier sentences." In fact, it was office policy to request the conversion of cocaine to crack in order to increase defendants' sentences.

Over the course of five weeks, a defendant sells crack seven times to an undercover officer. At the sentencing hearing, it is determined that the defendant sold 50.4 grams of crack to the officer. An offense involving over fifty grams of crack carries a mandatory minimum penalty of ten years. There is evidence that the officer continued to do business until over fifty grams of crack were involved because the officer knew that the sale of over fifty grams of crack would double the defendant's sentence.

These three examples illustrate the Federal Sentencing Guidelines "terrifying capacity for escalation of a defendant's sentence based on [an] investigating officer's determination." Each of these fact patterns demonstrates the difficult scenario in which a defendant has undoubtedly committed a crime, but law enforcement has arguably acted to increase the defendant's penalty. Fact situations like these have engendered the doctrine of sentencing entrapment, also known as sentencing factor manipulation.

This Comment will examine the way federal courts define and apply this doctrine. Part II provides a brief overview of the Federal Sentencing Guidelines and the grounds for departure from those

11. Id. at 106. For a discussion of the disparity between crack and cocaine sentences and the federal courts' reluctance to depart based on that disparity despite the sentencing commission's suggestion that the disparity is too great, see THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 368–70 (2001).
13. Id.
15. Id.
16. Id.
18. Id.
19. For the purposes of this Comment, the terms "sentencing factor manipulation" and "sentencing entrapment" will be used interchangeably. However, some circuits do distinguish between the two terms. See infra Part II.D.
Guidelines. Part II also defines sentencing entrapment and sentencing factor manipulation. Part III surveys the varying approaches the federal courts have taken to this doctrine: a subjective approach, an objective approach, a rejection of the doctrine altogether, and avoidance of the decision regarding the doctrine's validity. Part IV examines the policies for and against applying an approach that scrutinizes the defendant's intent (a subjective approach) and one that scrutinizes law enforcement's actions (an objective approach). Part IV also considers which approach is most consistent with the Federal Sentencing Guidelines and briefly considers other possible solutions.

II. A BACKGROUND AND HISTORY OF THE SENTENCING GUIDELINES—THE NEED FOR THE DOCTRINE

To understand sentencing entrapment, it is helpful first to examine the basic structure of the Federal Sentencing Guidelines (Guidelines) and the practice of "downward departures" from the Guidelines. Part A provides a brief synopsis of the Guidelines, while Part B examines the grounds for departure from the Guidelines. Additionally, to understand sentencing entrapment, it is helpful to examine the definition of the traditional form of entrapment and how sentencing entrapment and sentencing factor manipulation are similarly derived. Part C explores the definition of the traditional form of entrapment while Part D provides definitions of sentencing entrapment and sentencing factor manipulation.

A. A Brief History of the Federal Sentencing Guidelines

Before enactment of the Guidelines, federal judges had almost completely unfettered discretion in imposing sentences, the exercise of which was generally not reviewable on appeal. This in turn led to great disparity in sentences. By the 1970s, scholars and practitioners became concerned with these disparities. They were particularly concerned

21. Id. at 26.
22. Id. Many feel that the Guidelines have not eliminated disparities in sentences. See, e.g., United States v. Shepherd, 857 F. Supp. 105, 111 (D.D.C. 1994), vacated by 102 F.3d 553 (D.C. Cir. 1996). In Shepherd, Judge Greene argues that instead of reducing disparities, the Guidelines have shifted the "ability to achieve disparity . . . from judges [] who are generally experienced men and women . . . to Assistant U.S. Attorneys—who, whatever their individual intelligence and achievements, have been by and large but a brief period out of law school."
with the lack of predictability and the possibility that factors such as race
and gender accounted for these disparities. To address this issue,
Congress passed the Sentencing Reform Act of 1984. The purpose of
the Act was to establish uniform guidelines, while in certain
circumstances allowing for departures above and below the guidelines.

B. Downward Departures

The Sentencing Commission views downward departures "as a
dangerous necessity whose scope and significance need[s] to be
narrowly conceived and greatly confined." The Guidelines only permit
district courts to depart downward "in cases that feature... mitigating
circumstances of a kind or degree not adequately taken into
consideration by the [Sentencing] Commission." Today, downward
departures are relatively rare, although the number of downward
departures varies greatly by circuit.

The statutory basis which provides for departure from the
Guidelines is 18 U.S.C. § 3553(b). It states:

The court shall impose a sentence of the kind, and within the
range, referred to in subsection (a)(4) unless the court finds that
there exists an aggravating or mitigating circumstance of a kind, or
to a degree, not adequately taken into consideration by the
Sentencing Commission in formulating the guidelines that should

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24. Id. at 37. For a detailed explanation of the legislative history of federal sentencing
reform, see Kate Stith & Steve Y. Koh, The Politics of Sentencing Reform: The Legislative
sentencing reform legislation has a long and tortured history from its introduction by Senator
Edward Kennedy in 1975 to its passage nine years later. See id. at 223.
25. See Berman, supra note 20, at 36–41. For an overview of how sentences are
calculated under the Guidelines, see WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §
26.3(e) (3d ed. 2000).
26. The Sentencing Commission is an independent agency within the judicial branch
comprised "of seven voting and two non-voting, ex officio members. Its principal purpose is
to establish sentencing policies and practices for the federal criminal justice system that will
assure the ends of justice by promulgating detailed guidelines prescribing the appropriate
27. Berman, supra note 20, at 45 (footnote omitted).
29. Berman, supra note 20, at 82–83. Departure rates in the Fourth, Sixth, Seventh, and
Eleventh Circuits ranged from 3.6% to 5.2% in 1998, while the Second and Ninth Circuits had
departure rates over 20%. Id.
result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.\textsuperscript{30}

Section 3553(b) clearly implies that a court cannot consider extrinsic factors in departing from the Guidelines.\textsuperscript{31} Section 5K2.0 of the Guidelines further describes what a court may consider in departing from the Guidelines.\textsuperscript{32} The policy statement to Section 5K2.0 suggests three situations in which a court may depart from the Guidelines.\textsuperscript{33} First, a court may depart if there is a factor that has not been adequately considered by the Sentencing Commission.\textsuperscript{34} Second, a court may depart even if the factor is considered by the Commission, "if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive."\textsuperscript{35} However, that factor must be "present to a degree substantially in excess of that which is ordinarily involved in the offense."\textsuperscript{36} Finally, a third situation in which a court may depart is if there is "an offender characteristic or other circumstance that is . . . 'not ordinarily relevant'" but is "present to an unusual degree and distinguishes the case from the 'heartland' [of] cases covered by the guidelines."\textsuperscript{37} This type of departure is also termed an "outside the heartland" departure.\textsuperscript{38} Regardless of the grounds for departure, a departure must have a basis in either the Guidelines themselves or in the official statements of the Sentencing Commission.\textsuperscript{39}

\textsuperscript{31} See id.
\textsuperscript{32} See USSG § 5K2.0, p.s. (2001).
\textsuperscript{33} See id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Koon v. United States, 518 U.S. 81, 98 (1996); see also infra Part IV.C for a discussion of using an outside-the-heartland departure in the sentencing entrapment context.
\textsuperscript{39} 18 U.S.C. § 3553(b) (2000). Factors that may be considered in departing upward or downward from the Guidelines include: death, physical injury, extreme psychological injury, abduction or unlawful restraint, property damage, weapons, disruption of government function, extreme conduct, criminal purpose, victim's conduct, lesser harms, coercion and duress, and diminished capacity, public welfare, voluntary disclosure of offense, gang membership, aberrant behavior, and dismissed and uncharged conduct. USSG §§ 5k.2.1 to
Sentencing entrapment and manipulation are not common grounds for downward departures. However, some courts have used the application notes in Section 2D1.1 of the Guidelines as a statutory basis for a downward departure based on sentencing entrapment or manipulation in drug cases. Application Note Fourteen (Note Fourteen) states:

If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant's purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

Application Note Twelve (Note Twelve) states that generally in a reverse sting operation a defendant should be held responsible for the drugs he agreed to sell to law enforcement. However, if the defendant shows that he "did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance," then the court must exclude that amount "from the offense level determination." One distinction between Notes Twelve and Fourteen is that the language of Note Twelve indicates the judge "shall exclude" the weight of the drugs, while Note Fourteen suggests that in a reverse

5K2.18, 5K2.20 to 5K2.21. But see Koon, 518 U.S. at 96 (factors that are not mentioned in the Guidelines may be contemplated if the court considers "the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.").

40. USSG § 2D1.1, cmt. nn.12, 14. In the 2001 edition of the Sentencing Guidelines, Note Fourteen was renumbered. Before 2001, Note Fourteen was Note Fifteen. The text was not altered. See USSG § 2D1.1, cmt. n.15 (2000). Notes Twelve and Fourteen serve as a statutory basis for entrapment in cases involving drugs because § 2D1.1 of the Guidelines only applies to drug offenses. See USSG § 2D1.1 (2001).

41. See, e.g., United States v. Searcy, 233 F.3d 1096, 1099 (8th Cir. 2000).

42. USSG § 2D1.1, cmt. n.14. In a reverse sting "the government agent provides the agreed-upon quantity of controlled substances to a buyer for a prearranged price" instead of the norm, which is where the "government agent... buys... an agreed-upon quantity of a controlled substance." United States v. Gomez, 103 F.3d 249, 252 n.1 (2d Cir. 1997).

43. See USSG § 2D1.1, cmt. n.12.

44. Id.

45. Id. (emphasis added).
sting "a downward departure may be warranted." Therefore, Note Twelve mandates a downward departure, while a departure is merely discretionary under Note Fourteen. One possible explanation for this discrepancy is that Note Twelve applies to agreements to sell drugs—the drugs never need to be sold to law enforcement—while Note Fourteen is applicable to completed transactions—the defendant buys drugs, albeit for a very low price.

C. Entrapment Generally

Sentencing entrapment may be characterized as an outgrowth of the affirmative defense of entrapment. The salient distinction between sentencing entrapment and entrapment is that entrapment is a defense to a crime, while sentencing entrapment merely lowers a defendant's sentence. Many of the same policies support both concepts. The federal system applies a subjective approach to entrapment: "[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in this criminal conduct." However, the focus is on whether the defendant had the requisite intent to commit the crime. Entrapment is "a relatively limited defense" predicated on "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government." Thus, "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."

The relevant distinction between entrapment and sentencing entrapment lies within the degree of intent. For example, a defendant who raises the defense of entrapment is arguing that he did not have the requisite intent to commit that crime at all; in contrast, a defendant who

46. Id. at n.14 (emphasis added).
47. See id. at nn.12, 14.
49. For a discussion of the underlying policies of sentencing entrapment and its analogies to traditional entrapment, see infra Parts IV.A-B.
50. LAFAVE, supra note 25, § 5.2(a). However, a growing number of jurisdictions are focusing on the government's conduct and adopting an objective approach to entrapment. See id. § 5.2(b).
51. Matthews, 485 U.S. at 62 (citations omitted).
53. Id. at 435.
54. Id. at 429 (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)).
argues sentencing entrapment is asserting only that he did not have the intent to commit that serious of a crime. As such, entrapment is a complete defense to a crime, while a finding of sentencing entrapment only warrants a lower sentence. This may explain why it is exceedingly difficult for a defendant to prevail on a sentencing entrapment claim.

D. Sentencing Entrapment

A definition for sentencing entrapment is difficult to synthesize because there is much variance among the courts. Black's Law Dictionary defines sentencing entrapment as "[e]ntrapment of a defendant who is predisposed to commit a lesser offense but who is unlawfully induced to commit a more serious offense that carries a more severe sentence." Within the context of drug crimes, the basic premise of sentencing entrapment is that the Guideline's practice of correlating the sentence to the weight of the drugs involved encourages federal agents to induce defendants to buy or sell large amounts of drugs merely to increase sentences.

Some courts recognize sentencing factor manipulation as a doctrine distinct from sentencing entrapment: "Sentencing manipulation occurs when the government engages in improper conduct that has the effect of increasing the defendant's sentence." In these circuits, sentencing factor manipulation is distinct from sentencing entrapment, which focuses on a defendant's predisposition. Circuits that recognize

55. See BLACK'S LAW DICTIONARY 554 (7th ed. 1999).
57. See discussion infra Parts III.A-B.
58. See BLACK'S LAW DICTIONARY 554 (7th ed. 1999).
59. See BLACK'S LAW DICTIONARY 554 (7th ed. 1999).
60. See, e.g., United States v. Rizzo, 121 F.3d 794, 801 (1st Cir. 1997); United States v. Lacey, 86 F.3d 956, 964 (10th Cir. 1996). Black's does not recognize this distinction and notes that sentencing entrapment can also be termed "sentencing factor manipulation." See BLACK'S LAW DICTIONARY 554 (7th ed. 1999).
61. United States v. Garcia, 79 F.3d 74, 75 (7th Cir. 1996) (emphasis added). Garcia holds that sentencing manipulation is not a valid defense. Id. at 76.
62. See id. at 75; United States v. Jones, 18 F.3d 1145, 1153 (4th Cir. 1994); United States
sentencing factor manipulation as a distinct doctrine or those that apply an objective standard to sentencing entrapment generally analyze the government's conduct under the rubric of "outrageous [government] conduct." As noted earlier, this Comment will use the terms "sentencing entrapment" and "sentencing factor manipulation" interchangeably.

III. APPROACHES TO SENTENCING ENTRAPMENT

Courts have taken four general approaches to determinations of sentencing entrapment. One approach is to apply a subjective test, two circuits apply an objective test, while still other circuits either do not recognize the doctrine or have not yet decided the issue. Some circuits have also changed their approaches over time, applied multiple approaches, or recognized either sentencing entrapment or manipulation, but not both. This section provides an overview of these four approaches and demonstrates the varying applications of sentencing entrapment by circuit and sometimes within a circuit.

A. Subjective Determination

The D.C. Circuit, Eighth Circuit, and Ninth Circuit embrace a subjective approach to sentencing entrapment. Under a subjective approach, a court must determine whether the defendant had the subjective intent to commit the more serious crime. In other words, a court asks whether the defendant had the intent to commit the more serious crime or merely the intent to commit some lesser crime.

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63. See, e.g., Lacey, 86 F.3d at 963-64. The idea of outrageous government conduct was first introduced in United States v. Russell, in which the Court envisioned the possibility of 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, 431-32 (1973). However, Russell aside, outrageous government conduct to date has been used in a limited fashion. In fact, the Seventh Circuit held that outrageous government conduct "does not exist in this circuit." United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995).

64. See supra note 19.

65. See United States v. Searcy, 233 F.3d 1096, 1101 (8th Cir. 2000); United States v. Parrilla, 114 F.3d 124, 127 (9th Cir. 1997); United States v. Walls, 70 F.3d 1323, 1329 (D.C. Cir. 1995).

66. See, e.g., Searcy, 233 F.3d at 1101; Parrilla, 114 F.3d at 127; Walls, 70 F.3d at 1329.
The D.C. Circuit has generally endorsed a subjective approach to sentencing entrapment because the key element in any entrapment claim is a defendant's predisposition. The D.C. Circuit is wary of using sentencing entrapment as a means to influence law enforcement activities because "we [can] conceive of no basis for allowing [outrageous government conduct] or some variant of it, to reduce a defendant's sentence."

The Ninth Circuit also generally focuses on a defendant's intent—the defendant must "demonstrate a lack of predisposition" to succeed on a sentencing entrapment claim. However, when a defendant received machine guns in exchange for drugs and it was not clear that the defendant realized that the weapons in the bag were machines guns (which carry a much greater mandatory minimum sentence than other firearms), the Ninth Circuit was willing to consider the government's conduct in addition to the defendant's predisposition. The Ninth Circuit also requires a judge to make an express factual finding stating the reasons for rejecting sentencing entrapment claims.

The Eighth Circuit's "sentencing entrapment analysis [also] focuses on the defendant's predisposition." Outrageous government conduct is not a consideration. Rather, "the government's conduct is relevant in a sentencing entrapment analysis, but only insofar as it provides the inducement." The defendant bears the burden of "establish[ing] by a preponderance of the evidence a lack of predisposition to commit the crime." However, other circuits disagree with the subjective approach and consider the government's conduct.

**B. Objective Determination**

The First and Tenth Circuits take a different approach and focus on

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68. Walls, 70 F.3d at 1329.
69. Id. at 1330.
70. Parrilla, 114 F.3d at 127 (explaining United States v. Naranjo, 52 F.3d 245, 250 (9th Cir. 1995)).
71. United States v. Ramirez-Rangel, 103 F.3d 1501, 1506–08 (9th Cir. 1997).
72. Naranjo, 52 F.3d at 251.
73. United States v. Searcy, 233 F.3d 1096, 1101 (8th Cir. 2000).
74. Id.
75. Id.
76. United States v. Searcy, 284 F.3d 938, 942 (8th Cir. 2002).
the government's conduct. The objective approach scrutinizes the government's conduct to determine if the government acted in a manner that was so inappropriate as to warrant a downward departure.

The Tenth Circuit has stated that sentencing factor manipulation "should be analyzed under [an] established outrageous [government] conduct standard." In the Tenth Circuit, outrageous government conduct is a narrow doctrine that has never been applied "due in primary part to the reluctance of the judiciary to second-guess the motives and tactics of law enforcement officials.

To prove sentencing factor manipulation in the First Circuit, the defendant has the burden of showing the government acted in bad faith. The government's actions must amount to "extraordinary misconduct." The First Circuit's standard to prevail on sentencing factor manipulation is "high because we are talking about a reduction at sentencing, in the teeth of a statute or guideline approved by Congress. . . . The standard is general because it is designed for a vast range of circumstances and of incommensurable variables." The most important variable is the government's conduct, "including the reasons why its agents enlarged or prolonged the criminal conduct in question." The defendant's predisposition to commit the crime is marginally relevant in this analysis, but the defendant must show more than just a lack of intent to commit a certain number of transactions.

As previously discussed, the D.C. Circuit generally applies a subjective test. However, a D.C. District judge found that a law enforcement agent's insistence that cocaine be cooked into crack, solely

77. See United States v. Rizzo, 121 F.3d 794, 801 (1st Cir. 1997); United States v. Lacey, 86 F.3d 956, 964 (10th Cir. 1996); United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995). Additionally, despite the D.C. Circuit's general endorsement of the subjective approach, a D.C. district judge applied an objective approach to sentencing entrapment but was overturned on appeal for not applying a subjective approach. See United States v. Shepherd, 857 F. Supp. 105, 111 (D.D.C. 1994), vacated by 102 F.3d 558 (D.C. Cir. 1996).

78. See, e.g., Rizzo, 121 F.3d at 801; Lacey, 86 F.3d at 964; Montoya, 62 F.3d at 4.

79. Lacey, 86 F.3d at 963.

80. Id. at 964.

81. Rizzo, 121 F.3d at 801.

82. Montoya, 62 F.3d at 4 (quoting United States v. Gibbens, 25 F.3d 28, 31 (1st Cir. 1994)); see also United States v. Terry, 240 F.3d 65, 71 (1st Cir. 2001); United States v. Woods, 210 F.3d 70, 75-76 (1st Cir. 2000).

83. Montoya, 62 F.3d at 4.

84. Id.

85. Id.

86. See supra Part III.A for a discussion of the D.C. Circuit's subjective approach.
to increase the defendant's punishment, amounted to outrageous conduct and constituted either sentencing entrapment or manipulation. The court opined that the government's conduct was relevant because the "practical effect" of the drug sentencing guidelines "is to vest the power of sentencing in the police officer on the street—even further removed from the judicial arena where it has traditionally reposed." The D.C. Circuit overruled the district judge, suggesting that generally in entrapment or manipulation cases the defendant's intent should be the focus. To consider government conduct, the conduct would need to be so outrageous as to constitute a due process violation, and selling a government agent crack instead of cocaine does not rise to that level.

C. Courts That Have Rejected the Doctrine Altogether

While it is quite difficult to prove sentencing entrapment under both the subjective and objective approaches, some jurisdictions have ruled there is not a place for the doctrine of sentencing entrapment at all. These circuits opine that it is not the place of the federal courts to adjust a sentence in a sentencing entrapment scenario.

The Eleventh Circuit has rejected sentencing entrapment as a matter of law because, in its analysis, the Guidelines do not authorize such a departure. The Eleventh Circuit labels sentencing entrapment a "defunct doctrine" and opines that an entrapment argument is only relevant when it serves as a complete defense to the crime. However, the Eleventh Circuit has indicated that if sentencing entrapment were a valid doctrine it would apply the same test it applies to a traditional entrapment defense. Namely, the defendant would have to show "1) government inducement of the crime, and 2) [a] lack of

88. Id. at 112.
90. Id.
91. United States v. Miller, 71 F.3d 813, 817–18 (11th Cir. 1996). The Eleventh Circuit considers sentencing manipulation and sentencing entrapment as distinct doctrines. It has left open the possibility that sentencing manipulation may be a valid defense. See United States v. Govan, 293 F.3d 1248, 1251 (11th Cir. 2002).
92. Miller, 71 F.3d at 817–18; see also United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992).
93. United States v. Ryan, 289 F.3d 1339, 1343 (11th Cir. 2002).
The Seventh Circuit has similarly rejected sentencing manipulation because a defendant has no right to be arrested as soon as there is probable cause.\(^9\) It is permissible for a government agent to wait to arrest someone until after there is probable cause even if the person continues to commit an act that increases his exposure at sentencing.\(^6\) The Seventh Circuit is reluctant to take away law enforcement's discretion in deciding when to arrest someone because the police may need additional time to understand the scope of the criminal activity, catch others who are involved, or simply "allow the suspect enough 'rope to hang himself.'"\(^7\) The Seventh Circuit's approach suggests that sentencing manipulation might be a viable claim if the timing of arrest were not at issue.\(^8\) However, the Seventh Circuit, like several of its sister circuits, has not clearly addressed this issue.\(^9\)

### D. Courts That Have Not Decided

Several circuits have considered the issue of sentencing entrapment but have declined to decide if it is a valid basis for a downward departure.\(^10\) The Fifth Circuit refuses to consider sentencing entrapment cases on appeal because it believes it lacks jurisdiction to review sentencing entrapment claims.\(^11\) The Fifth Circuit will "review a defendant's challenge to a sentence only if it was imposed in violation of law; was imposed as a result of a misapplication of the sentencing guidelines... or was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."\(^12\) As alluded to

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94. Id. (citing United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995)).
95. United States v. Garcia, 79 F.3d 74, 76 (7th Cir. 1996); accord United States v. Baker, 63 F.3d 1478, 1500 (9th Cir. 1995).
96. Garcia, 79 F.3d at 76.
97. Id.
98. See id. In United States v. Gutierrez-Herrera, 293 F.3d 373, 377 (7th Cir. 2002), the Seventh Circuit hinted that sentencing entrapment is a viable defense as it set out a subjective standard for proving sentencing entrapment. However, it did not find that sentencing entrapment had occurred because the defendant failed to show a lack of predisposition to commit the crime. Id.
99. See United States v. Estrada, 256 F.3d 466, 477 (7th Cir. 2001).
100. See, e.g., United States v. Duverge Perez, 295 F.3d 249, 256 (2d Cir. 2002); United States v. Bala, 236 F.3d 87, 93 (2d Cir. 2000); United States v. Washington, 44 F.3d 1271, 1280 (5th Cir. 1995); United States v. Raven, 39 F.3d 428, 438 (3d Cir. 1994); United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994).
101. See United States v. Ogbonna, 184 F.3d 447, 451 (5th Cir. 1999).
102. Id. (quoting United States v. DiMarco, 46 F.3d 476, 477 (5th Cir. 1995)); accord
above, the Seventh Circuit has declined to decide whether Notes Twelve and Fourteen address sentencing entrapment.\textsuperscript{103}

There are several possible reasons why some circuits have declined to decide whether to allow sentencing entrapment claims. One may be that these circuits do not want a flood of claims. These circuits may also want to retain the option to use the doctrine in a limited fashion if there is ever a situation where the government's conduct is truly outrageous. Perhaps the right case has yet to come before these courts.

Furthermore, because the sentencing decisions of district judges are reviewed under an abuse of discretion standard,\textsuperscript{104} it is difficult for an appeals court to find sentencing entrapment unless the trial court finds sentencing entrapment. Therefore, if trial courts in certain circuits are not receptive to sentencing entrapment claims, the issue will not come before the court of appeals in those circuits.

The disparate approaches taken by federal courts to claims of sentencing entrapment demonstrates the contentious nature of the issue, as well as the range of policy considerations that influence each court that faces this difficult issue.

IV. THE POLICIES UNDERLYING THE SUBJECTIVE AND OBJECTIVE APPROACHES

This section examines the policy considerations that underlie courts' application of sentencing entrapment claims. Specifically, this section examines the subjective and objective approaches in detail, focusing on the policy considerations for and against applying both approaches. This section also briefly examines using an "outside the heartland" departure\textsuperscript{105} in the sentencing entrapment context.

A. The Subjective Approach

In addition to statutory support, there are several valid policy reasons for considering a defendant's intent under the subjective approach to sentencing entrapment. However, criticisms of the subjective approach include that it subverts the intent of the Guidelines

\textsuperscript{103} Estrada, 256 F.3d at 477.

\textsuperscript{104} Koon, 518 U.S. at 100.

\textsuperscript{105} See USSG § 5K2.0 (2001); see also supra notes 37–38 and accompanying text.
and that the quantity of criminal intent is not a relevant consideration for a departure.

The statutory support for the subjective approach in drug cases is found in Notes Twelve and Fourteen.\(^{106}\) Note Twelve states that if "the defendant establishes that he or she did not intend to provide . . . the agreed-upon quantity of the controlled substance, the court shall exclude [that amount] from the offense level determination."\(^{107}\) The text of Note Twelve focuses on the defendant's intent, and the government's conduct is not a relevant element.\(^{108}\) Note Fourteen authorizes a departure when the government sets an artificially low price for a drug, which thereby allows a defendant to purchase a "significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase."\(^{109}\) Note Fourteen does not expressly mention intent;\(^{110}\) however, the focus is on the defendant's resources, not the government's conduct.\(^{111}\) Because of this support in the Application Notes, the Ninth Circuit has held that "[t]he sentencing entrapment analysis focuses on the defendant's predisposition. . . . [T]he government's conduct is relevant in a sentencing entrapment analysis, but only insofar as it provides the inducement."\(^{112}\)

The most germane policy argument for considering a defendant's culpability is that the concept of punishing only those who are culpable and have some level of scienter is a fundamental principle in American criminal law.\(^{113}\) One reason some circuits believe it is appropriate to consider a defendant's culpability is that, before the Guidelines, "courts

\(^{106}\) See USSG § 2D1.1, cmt. nn.12, 14; United States v. Searcy, 233 F.3d 1096, 1099 (8th Cir. 2000).

\(^{107}\) USSG § 2D1.1, cmt. n.12 (emphasis added).

\(^{108}\) See id.; Searcy, 233 F.3d at 1101.

\(^{109}\) USSG § 2D1.1, cmt. n.14.

\(^{110}\) See id.


\(^{112}\) Searcy, 233 F.3d at 1101.

\(^{113}\) See Morissette v. United States, 342 U.S. 246, 250–60 (1952) (exploring the roots of the scienter requirement in English common law and American jurisprudence).

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. *Id.* at 250. "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil." *Id.* at 251–52.
were able to ensure that defendants' prison terms did not exceed their culpability.\textsuperscript{114} Because judges could adjust a sentence to reflect a defendant's culpability level, sentencing entrapment was not an issue.\textsuperscript{115}

Under the current system, where drug sentences are based on weight, a judge's discretion is limited. Further, "the entrapment doctrine [which was] designed for the previous system no longer adequately protects against government abuse nor ensures that defendants will be sentenced on the basis of the extent of their culpability."\textsuperscript{116} Because judges no longer have discretion to adjust a sentence based on the defendant's intent, the doctrine of sentencing entrapment is necessary to deter government abuse and 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."\textsuperscript{117} Downward departures for sentencing entrapment can help curb inappropriate government conduct and "ensure that sentences imposed reflect the defendants' degree of culpability."\textsuperscript{118}

As discussed above, the statutory support for departing based on intent is found in Note Fourteen,\textsuperscript{119} which "recognizes that law enforcement agents should not be allowed to structure sting operations in such a way as to maximize sentences imposed on defendants, . . . and that courts may" consider a defendant's intent.\textsuperscript{120} However, the Ninth Circuit has extended the application of Note Fourteen\textsuperscript{121} beyond reverse sting operations to situations where law enforcement exercises "unwarranted pressure on a defendant in order to increase his or her sentence without regard for his predisposition, his capacity to commit the crime on his own, and the extent of his culpability."\textsuperscript{122} If a departure based on the defendant's intent were not permitted, the power to determine a sentence would essentially reside with individual law enforcement agents.\textsuperscript{123} The difficulty with the Ninth Circuit's approach

\textsuperscript{114} United States v. Staufer, 38 F.3d 1103, 1106 (9th Cir. 1994); accord United States v. Parrilla, 114 F.3d 124, 127 (9th Cir. 1997).
\textsuperscript{115} Staufer, 38 F.3d at 1106.
\textsuperscript{116} Id. at 1107.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} USSG § 2D1.1, cmt. n.14 (2001).
\textsuperscript{120} Staufer, 38 F.3d at 1107.
\textsuperscript{121} See USSG § 2D1.1, cmt. n.14.
\textsuperscript{122} Staufer, 38 F.3d at 1107.
\textsuperscript{123} Id.
is that it overreaches the statutory authority to depart found in Notes Twelve and Fourteen.

In United States v. Ramirez-Rangel, the Ninth Circuit addressed a situation that provided compelling reasons to consider the defendant's knowledge of the facts. Ramirez-Rangel presented a situation where the defendants were exposed to twenty-five additional years in prison because they received machine guns from the ATF. However, it was not clear whether the defendants had bargained for machine guns or in fact knew they had received them. The court opined that the defendants should not face an enlarged sentence when it was possible that they "neither agreed nor knew that machine guns were involved." In this situation, even proving that "the defendants were predisposed to deal in machine guns would not justify the larger sentence" because "[t]he government ought not to be able to commit an entire act for a defendant without the defendant's knowledge, in order to increase a penalty by 25 years." This holding is unique in that it implies that the defendant's intent is not the only material factor; rather, his knowledge of the surrounding circumstances (the machine guns) must be considered as well.

There are, however, several compelling policy reasons not to consider a defendant's intent. The first of these is the argument that the judiciary is subverting the intent of the Guidelines when it departs based on a defendant's lack of intent. The Seventh Circuit subscribes to the belief that a judge does not have "an equitable power to sentence a defendant as if the defendant had committed the crime he preferred to commit, rather than the crime he actually committed. 'As-if' sentencing is not authorized by federal law." A second criticism of the subjective approach is that comparing sentencing entrapment to traditional entrapment is not a valid analogy. The First Circuit has succinctly stated this objection to the subjective approach:

124. United States v. Ramirez-Rangel, 103 F.3d 1501 (9th Cir. 1997). For a discussion of the facts of this case, see supra notes 1–8 and accompanying text.
125. 103 F.3d at 1503–07.
126. Id.
127. Id. at 1507.
128. Id.
129. See id.
130. United States v. Wilson, 129 F.3d 949, 951 (7th Cir. 1997).
The analogy at sentencing to ordinary entrapment is not often going to help a defendant who is arguing only about the number or size of the transactions. Having crossed the reasonably bright line between guilt and innocence, such a defendant's criminal inclination has already been established, and the extent of the crime is more likely to be a matter of opportunity than of scruple.\textsuperscript{131}

The alternative approach is to consider the government's conduct, but this approach raises serious concerns as well.

\textit{B. The Objective Approach}

Considering the government's conduct when granting downward departures raises important systematic questions. This section examines the policy reasons against considering the government's conduct, reasons to consider the government's conduct, and the particular issues the outrageous government conduct standard raises.

The first criticism of examining the government's conduct is the argument that as long as the government acts within the bounds of the law, its conduct should not be relevant. For example, proponents of this theory might argue that it does not matter whether a defendant converts cocaine into crack at a government agent's insistence. The defendant is still guilty of distributing drugs and should not be given a lesser sentence because of his own stupidity. The Seventh Circuit has succinctly stated the policy reasons why the judiciary should not scrutinize law enforcement conduct at sentencing:

Our inclination, however, is not to subject isolated government conduct to a special brand of scrutiny when its effect is felt in sentence, as opposed to offense, determination. If we are willing to accept the assumption apparently approved by Congress that dealing in greater quantities of drugs is a greater evil, it is not clear to us what the precise legal objection to governmental behavior based on cognizance of relative penal consequences in this area could be.\textsuperscript{132}

In the context of a traditional entrapment defense, the Supreme Court has stated that law enforcement's conduct should not be a basis

\textsuperscript{131} United States v. Montoya, 62 F.3d 1, 4 (1st Cir. 1995).
\textsuperscript{132} United States v. Cotts, 14 F.3d 300, 306 n.2 (7th Cir. 1994).
for entrapment because the judiciary should not have a "veto over law enforcement practices which it [does] not approve." It is somewhat puzzling that some circuits have adopted a standard that focuses on the government's action for sentencing entrapment when that standard is inappropriate in a traditional entrapment scenario. Conversely, there are those who argue that the government needs to play "fairly" and that government misconduct is relevant to sentencing. The argument is that the Guidelines create an opportunity for mischief because the "incremental sentencing ranges create the potential for sentencing abuse by [the] government," and the structure of the Guidelines does not "adequately consider the terrifying capacity for escalation of a defendant's sentence." The Guidelines create a potential for abuse when an officer convinces a defendant to cook cocaine into crack, gives a defendant a machine gun instead of a handgun, or continues drug transactions until a certain weight of drugs are seized.

The reasons for considering the government's conduct in the sentencing entrapment context are similar to the reasons for considering the government's conduct in an entrapment defense. Justice Frankfurter eloquently espoused the policy for considering the government's conduct in his concurrence in Sherman v. United States. He stated:

Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them.... Public confidence in the fair and honorable administration of

133. United States v. Russell, 411 U.S. 423, 435 (1973). However, in Russell the Court did reserve the possibility that outrageous government conduct could exist. Id. at 431–32.
134. *But see* LAFAVE ET AL., supra note 25, § 5.2(b) (discussing the burgeoning support for the objective approach to entrapment, noting that it is preferred by most commentators, and that it is the approach taken in the Model Penal Code).
135. United States v. Stavig, 80 F.3d 1241, 1245 (8th Cir. 1996).
138. *See* United States v. Ramirez-Rangel, 163 F.3d 1501, 1502–05 (9th Cir. 1997).
justice, upon which ultimately depends the rule of law, is the transcending value at stake.\textsuperscript{141}

The principal articulated by Justice Frankfurter that courts need to prevent law enforcement from using unjust means to attain their end is relevant to sentencing entrapment. It is particularly relevant in the context of crack, where the Guidelines have created great potential for abuse because the sentence by weight for crack is much greater than the sentence by weight for cocaine.\textsuperscript{142} This "distinction presents an unparalleled opportunity for law enforcement to increase the sentence of a defendant with relatively little effort."\textsuperscript{143} When law enforcement acts to increase a defendant's sentence based on the crack/cocaine discrepancy, this behavior "strikes at the very heart of our system of justice."\textsuperscript{144} In this situation, the judiciary must "stand as a bulwark against overreaching by law enforcement . . . to achieve justice under [the] law."\textsuperscript{145}

If one accepts that law enforcement's manipulation of sentences in this manner is contrary to our systemic notion of justice, then perhaps an objective approach is necessary to preserve the integrity of the system. Inducing a defendant to convert cocaine into crack merely to increase his sentence "undermin[es] the defendant's due process rights . . . [and] must be viewed as outrageous."\textsuperscript{146} However, the converse of that argument is that a government agent insisting on receiving crack cocaine instead of powder cocaine is not particularly outrageous conduct because it was the defendant's choice to convert the powder cocaine into crack.\textsuperscript{147}

The outrageous government conduct standard that some circuits apply as part of the objective approach poses a problem because of the extreme nature the conduct must meet to satisfy that standard. The Tenth Circuit analyzes sentencing factor manipulation using an outrageous government conduct standard.\textsuperscript{148} The standard is not clearly

\begin{itemize}
\item \textsuperscript{141} Id. at 380.
\item \textsuperscript{142} See Shepherd, 857 F. Supp. at 109.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 112.
\item \textsuperscript{146} Id. at 111.
\item \textsuperscript{147} See United States v. Shepherd, 102 F.3d 558, 566-67 (D.C. Cir. 1996).
\item \textsuperscript{148} See United States v. Lacey, 86 F.3d 956, 963 (10th Cir. 1996).
\end{itemize}
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defined, but it is exceedingly high.\textsuperscript{149} For a finding of outrageous government conduct, the government's actions must be "so shocking, outrageous and intolerable that it offends 'the universal sense of justice.'"\textsuperscript{150} The reason for having such a strict standard "is due in primary part to the reluctance of the judiciary to second guess the motives and tactics of law enforcement officials."\textsuperscript{151} However, it is clear from the widely varying approaches taken by different circuits on this issue that some courts are more willing to second-guess law enforcement than others. Outrageous government conduct has become a mechanism that allows a court to reserve the possibility that sentencing entrapment may exist without ever finding sentencing entrapment.\textsuperscript{152}

Outrageous government conduct is, in many ways, a stillborn principle that has a limited, if any, application under the federal courts' current standards.\textsuperscript{153} This is partially why the Seventh Circuit has rejected the doctrine altogether.\textsuperscript{154} In the Seventh Circuit, government misconduct "is relevant only insofar as it may shed light on the materiality of the infringement of the defendants' rights."\textsuperscript{155} What is clear is that in jurisdictions that apply an objective standard and require outrageous government conduct as a prerequisite to a finding of sentencing entrapment, the defendant has almost no chance of success. Another flaw with the objective approach is that the Guidelines do not seem to support such an approach.\textsuperscript{156}

The objective approach is attractive because it addresses the policy of ensuring that courts do not condone law enforcement conduct that does not comport with "rationally vindicated standards of justice."\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{149} Id. at 964. The Lacey court notes that the Tenth Circuit has never found outrageous government conduct, but that "does not suggest that the defense is unavailable, but merely bears testament to its narrow scope." Id. (citations omitted).
\item \textsuperscript{150} Id. (quoting United States v. Mosley, 965 F.2d 906, 910 (10th Cir. 1992) (quoting United States v. Russell, 411 U.S. 423, 432 (1973)).
\item \textsuperscript{151} Id.
\item \textsuperscript{152} See, e.g., United States v. Barth, 990 F.2d 422, 425 (8th Cir. 1993) (finding government conduct was not outrageous but reserving the possibility that such a case may someday arise); United States v. Connell, 960 F.2d 191, 196 (1st Cir. 1992).
\item \textsuperscript{153} United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995).
\item \textsuperscript{154} See id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} See supra notes 106-11 and accompanying text.
\item \textsuperscript{157} Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring).
\end{itemize}
C. Other Approaches

As discussed above, there are policy considerations that both support and undermine applying the subjective and objective approaches. At least one judge was unsatisfied with these approaches and suggested applying a third approach. That approach is to depart downward because the government's conduct in manipulating the sentence takes the case "'outside the heartland' encompassed by the provisions of the sentencing guidelines because the Sentencing Commission simply did not contemplate, nor would it countenance, maximal sentencing as a law enforcement objective." Thus, the defendant's sentence should be adjusted downward "to a level which fairly reflects [the defendant's] culpability." An outside the heartland departure has a different statutory basis than Notes Twelve and Fourteen. The difficulty with using an outside the heartland departure in the sentencing entrapment or manipulation context is that this type of departure may only be applied in situations "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." Because Notes Twelve and Fourteen address sentencing entrapment in the drug context, it seems an outside the heartland departure is only appropriate if conduct at issue does not involve drugs or otherwise falls outside the scope of Notes Twelve and Fourteen.

V. CONCLUSION

Sentencing entrapment is an unfortunate byproduct of the Guidelines. When the Guidelines shifted discretion from judges to prosecutors and law enforcement, it created an enormous opportunity for abuse. It should be apparent from this Comment's discussion of the objective and subjective approaches that these approaches as currently applied are inadequate to deal with this complex problem. Perhaps, a tenable solution is to shift some discretion back to district judges, as they seem to be best equipped to conduct the type of factual analysis required to determine if sentencing entrapment has occurred. While it may be unclear whether giving judges increased discretion is an ideal

158. See United States v. Berg, 178 F.3d 976, 986 (8th Cir. 1999) (Bright, J., dissenting).
159. Id.
160. Id.
162. USSG § 5K2.0.
163. See id. at §§ 5K2.0 and 2D1.1, cmt. nn.12, 14.
approach to dealing with sentencing entrapment, it is clear that the current approaches are inadequate, and perhaps the time has come to at least consider shifting some discretion back to the judiciary.

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