Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 77 | Issue 2 Article 9

Spring 2002

The Koon Trap: Why Imperfect Entrapment Fails to Justify Departure from the Federal Sentencing Guidelines

Joseph M. Meadows
Indiana University School of Law

The *Koon* Trap: Why Imperfect Entrapment Fails to Justify Departure from the Federal Sentencing Guidelines

JOSEPH M. MEADOWS*

I. INTRODUCTION

Imperfect entrapment theory postulates that a convicted defendant should spend less time in prison than a defendant convicted of a similar crime because a government agent talked the former into committing a crime that he was predisposed to commit.[1] Although such a concept appears nowhere in the Federal Sentencing Guidelines ("Guidelines"),[2] the Ninth Circuit Court of Appeals recognizes the theory as a basis for a judge to depart downward[3] from the sentencing range mandated for such a criminal.[4] Citing Ninth Circuit cases as persuasive authority, convicted defendants in other circuits often allege that the government imperfectly entrapped them and move the sentencing court to depart downward from the recommended range in the Guidelines.[5] One defendant even challenged the constitutionality of his conviction based on a claim of ineffective assistance of counsel because his lawyer did not move for downward departure based on imperfect entrapment theory.[6]

Beyond offering a broad description of when it occurs,[7] courts departing on such

---

* J.D. Candidate, 2002, Indiana University School of Law—Bloomington; M.S., 1995, Purdue University; B.S., 1986, United States Military Academy—West Point. I give thanks to and for my wife, Tracy, whose devotion to our young family inspires me to grow. I wish to thank my parents for their enthusiastic support of all my endeavors. I would also like to thank Assistant United States Attorney Terry Cushing of the Western District of Kentucky for giving me the opportunity to work on the case that introduced me to this topic and Assistant United States Attorney Kent Wicker for allowing me to work with him on that case. Lastly, I thank Professor Craig Bradley and Assistant United States Attorney Cushing for reviewing and commenting upon earlier drafts of this Note.

1. *See* United States v. Takai, 941 F.2d 738, 744 (9th Cir. 1991). Imperfect entrapment theory is to be distinguished from the full affirmative defense of entrapment, which applies when government agents induce a non-predisposed subject to commit a crime. *See infra* text accompanying notes 43-59.

2. U.S. SENTENCING GUIDELINES MANUAL (2000) [hereinafter GUIDELINES].

3. To depart downward or upward from the Guidelines is a term of art referring to the act of a court passing a sentence that varies from the range dictated in the Guidelines because of mitigating or aggravating circumstances impacting on the culpability of the defendant. *See infra* text accompanying notes 21-36.

4. *See, e.g.*, United States v. McClelland, 72 F.3d 717, 726 (9th Cir. 1995) (holding that imperfect entrapment is a legitimate legal basis for downward departure from the prescribed sentencing range).

5. *See, e.g.*, United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996); United States v. Lacey, 86 F.3d 956 (10th Cir. 1996).

6. Chan v. United States, 182 F.3d 898 (2d Cir. 1999) (unpublished table decision) (affirming sentence on the grounds that Chan failed to demonstrate ineffective assistance of counsel).

7. *See supra* text accompanying note 1.

grounds provide government investigators with little guidance as to what conduct constitutes imperfect entrapment. These courts define no minimum threshold of government conduct that triggers the defense. In fact, one court departing from the Guidelines based on the theory specifically absolved the police by reiterating that they did nothing "unlawful or inappropriate."[8] Such contradictory sentencing behavior could leave investigators bewildered as to how to avoid similar rulings in the future.

This Note directly challenges the merits of imperfect entrapment theory as grounds for departure from the Guidelines. After establishing the contextual background and explaining the nature of imperfect entrapment in Part II, Part III of this Note analyzes imperfect entrapment theory according to Supreme Court entrapment doctrine and according to the approach to sentencing departures mandated in *Koon v. United States*.[9] Part III concludes that sentencing courts departing from the Guidelines on the theory of imperfect entrapment abuse their discretion because they misapply federal entrapment law and because the theory does not justify departure according to the *Koon* analysis. Part IV of this Note calls on the United States Sentencing Commission ("Commission") to amend the Guidelines to state explicitly that courts should not depart from the Guidelines based on any such theory, and explains why the Commission is the appropriate authority to take such action.

II. BACKGROUND

The premise of this Note relies heavily upon the very fundamentals of criminal law, the basic theory of the Guidelines, and a comparison between competing theories of federal entrapment doctrine in the history of the Supreme Court. The Note uses these concepts to analyze the validity of imperfect entrapment theory. Accordingly, Subpart A of this Part reviews the key requirements of criminal prosecution and the nature of affirmative defenses, describes the underlying theory of the Guidelines, describes undercover police tactics, and presents the development of federal entrapment doctrine. Subpart B presents the development of imperfect entrapment and its status in the law today.

A. Fundamental Theories, Tactics, and Doctrinal Developments

1. The Fundamentals of Criminal Law

The Supreme Court first articulated the fundamental principle of American criminal law in *In re Winship*:[10] "[T]he Due Process Clause [of the United States Constitution] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged."[11] The American judicial system presumes a defendant is innocent unless the prosecution meets this exacting standard.[12]

---

8. United States v. Garza-Juarez, 992 F.2d 896, 910 (9th Cir. 1993).
9. 518 U.S. 81 (1996).
10. 397 U.S. 358 (1970).
11. *Id.* at 364.
12. *See* MODEL PENAL CODE § 1.12(1) (Official Draft 1985), *reprinted in* GEORGE E. DIX

Regarding substantive criminal liability, the specific elements of the crime and the requirement that the prosecution prove them beyond a reasonable doubt generally define who should be subjected to criminal prosecution.[13] In some cases, however, defendants assert an affirmative defense,[14] such as duress.[15] An affirmative defense is "not logically and directly related to the elements of the crime charged."[16] If such a defendant is persuasive, the jury could acquit him, even though the prosecution proved every element of the crime under the constitutional standard.[17]

If the defendant fails to establish the objective reasonableness of his actions, some jurisdictions will consider the subjective nature of his predicament as an "imperfect defense."[18] Imperfect defenses can reduce the severity of the offense charged. A defendant in a murder trial, for example, who pleads self-defense but fails to satisfy the jury that he reasonably believed the victim threatened his life, might have his murder conviction reduced to manslaughter if he establishes that he truly, but unreasonably, believed such a threat existed.[19] Alternatively, the sentencing court can consider the defendant's subjective circumstances when imposing punishment.[20] Hence, the defendant may get a lighter sentence because the nature of his situation, as he perceived it, might convince the judge that this particular defendant is not as culpable as one who committed a similar crime and who acted for more sinister reasons.

2. The Theory of the Guidelines

Prior to the Sentencing Reform Act of 1984 ("SRA"),[21] federal judges had broad discretion in sentencing criminals convicted of federal crimes.[22] The earlier system lacked "uniformity, predictability, and a degree of detachment. . . ."[23] With the SRA, Congress attempted to bring consistency to the sentencing process across the federal judiciary.[24]

As part of its plan, Congress established the Commission[25] and charged it with promulgating sentencing guidelines that "further the basic purposes of criminal

---

& M. MICHAEL SHARLOT, CRIMINAL LAW 57 (4th ed. 1996).

13. DIX & SHARLOT, *supra* note 12, at 735.

14. *See* MODEL PENAL CODE § 1.12(3) (Official Draft 1985), *reprinted in* DIX & SHARLOT, *supra* note 12, at 58.

15. *Id.* § 2.09, *reprinted in* DIX & SHARLOT, *supra* note 12, at 757.

16. DIX & SHARLOT, *supra* note 12, at 735.

17. Martin v. Ohio, 480 U.S. 228, 234 (1987) (reasoning that "if [reasonable] doubt is not raised in the jury's mind . . ., the [crime] will still be excused if the elements of the defense are satisfactorily established").

18. *See* DIX & SHARLOT, *supra* note 12, at 737.

19. *Id.*

20. GUIDELINES, *supra* note 2, § 5K2.12.

21. Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18 U.S.C.).

22. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW 684 (3d ed. 2000).

23. Koon v. United States, 518 U.S. 81, 113 (1996).

24. *See* ABRAMS & BEALE, *supra* note 22, at 684.

25. *See* 28 U.S.C. § 994(a) (1994).

punishment . . . ."[26] The Guidelines require federal sentencing courts to fit the crime they seek to punish into an "offense behavior category"[27] and to fit the criminal who committed the crime into an "offender characteristic category."[28] An offense behavior category takes into account the sort of crime committed, such as whether or not the defendant used a dangerous weapon, the amount of money stolen, and the quantity of drugs sold.[29] The offender characteristic category takes into account the guilty party's prior criminal history.[30] From these categories, the sentencing court determines an offense level and a criminal history category.[31] The court then coordinates the offense level and the criminal history category on a chart to determine an appropriate sentencing range for the class of criminal involved.[32]

The sentencing court must impose a sentence that is within the specified range unless the court deems "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the . . . Commission in formulating the [G]uidelines that should result in a sentence different from that described."[33] Such circumstances authorize the court to depart from the required sentencing range in the Guidelines. Section 5K of the Guidelines addresses departures, and the Supreme Court prescribed the manner in which sentencing courts are to approach them in *Koon*.[34] Generally, before a sentencing court may depart, it must find that "certain aspects of the case [are] unusual enough for it to fall outside the heartland of cases in the Guidelines."[35]

With the Guidelines' format of restricting a judge's sentencing range but allowing departures therefrom, the Commission strikes a balance between statutorily imposed sentences and the traditional discretion afforded the judicial branch. Theoretically, therefore, two criminals convicted of similar crimes and who have similar criminal records should get comparable sentences regardless of their respective sentencing judges, unless one of the criminals faced mitigating or aggravating circumstances that only a sentencing court is in the position to judge and the Commission in no way could have anticipated.

3. Undercover Police Tactics

Arguably, one such mitigating or aggravating circumstance is the behavior of undercover agents of the government. For some crimes, a great amount of police work is not required to detect when they have been committed. Most bank robberies are obvious to the tellers and the bank customers unfortunate enough to conduct their business at the same time the robber decided to do his. Some criminal activities,

---

26. GUIDELINES, *supra* note 2, ch. 1, pt. A, 2.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. GUIDELINES, *supra* note 2, § 1B1.1.
32. GUIDELINES, *supra* note 2, ch. 5, pt. A, cmt. n.1.
33. GUIDELINES, *supra* note 2, § 5K2.0, policy statement (quoting 18 U.S.C. § 3553(b) (2000)).
34. Koon v. United States, 518 U.S. 81, 95-96 (1996).
35. *Id.* at 98.

however, are inherently more difficult to detect than others.[36] Drug dealers, corrupt businessmen, and corrupt public officials, for example, normally do not engage in their brand of crime in the presence of uniformed police officers.

To combat these subtle forms of crime, law enforcement personnel sometimes appear to involve themselves in the very forms of crime they hope to stop.[37] When doing so, they often adopt a fictitious criminal identity,[38] and in some cases, afford actual criminals the opportunity to commit the crime.[39] To achieve realism in these operations, government agents sometimes actually encourage the commission of crimes.[40] Law enforcement personnel often use informants to penetrate and interact with the criminal community.[41] Informants often are actual or former criminals, with reputations among the criminal community, who cooperate with the government to gather evidence against fellow criminals, sometimes in return for the prosecutor's recommendation to the judge for a lighter sentence or some other form of leniency.[42] Problems arise, however, when government agents persuade those who are not prone to engage in a crime to do so.

4. Competing Theories of Federal Entrapment Doctrine

Defendants arrested for such activity can plead the affirmative defense of entrapment.[43] The term *entrapment* refers to when "[a] law-enforcement officer[] or government agent[] induce[s] . . . a person to commit a crime . . . to . . . bring criminal prosecution against that person" later.[44] As such, a jury can acquit a defendant who successfully persuades them that the government entrapped the defendant, even though the prosecution proved beyond a reasonable doubt all elements of the crime necessary to convict.[45]

Entrapment doctrine exists in two forms, each standing on one of two competing theories. The Model Penal Code and many states adopt the objective theory of entrapment.[46] Under this approach, a government agent entraps a defendant if "he induces or encourages another person to engage in conduct constituting [an] offense

---

36. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 5.1(a) (2d ed. 1992).

37. JAMES N. GILBERT, CRIMINAL INVESTIGATION 371 (Charles E. Merrill Publishing Co. 1986) (1980).

38. *Id.*

39. LAFAVE & ISRAEL, *supra* note 36, § 5.1(a).

40. *Id.*

41. GILBERT, *supra* note 37, at 372.

42. *Id.* at 137.

43. *See* Mathews v. United States, 485 U.S. 58, 59 (1988) (reversing lower court's refusal to instruct the jury on defense of entrapment because the defendant refused to admit every element of the crime charged).

44. BLACK'S LAW DICTIONARY 553 (7th ed. 1999).

45. *See supra* text accompanying notes 14-17.

46. LAFAVE & ISRAEL, *supra* note 36, § 5.2(b); *see also* MODEL PENAL CODE § 2.13 (Official Draft 1985), *reprinted in* DIX & SHARLOT, *supra* note 12, at 821; 18 PA. CONS. STAT. ANN. § 313 (West 2001) (demonstrating Pennsylvania's adoption of the objective approach to entrapment); UTAH CODE ANN. § 76-2-303 (2001) (demonstrating Utah's adoption of the objective approach to entrapment).

by . . . employing methods of persuasion or inducement [that] create a substantial risk that [the] offense will be committed by persons other than those who are ready to commit it."[47] Consistent with the objective theory, the Model Penal Code requires that the court, in the absence of the jury, acquit a defendant if he proves by a preponderance of the evidence that the government entrapped him.[48]

The objective theory is based on public policy considerations and focuses on the behavior of the government during the investigation rather than on the culpability of the defendant.[49] Barring convictions under this approach allows courts to exercise "supervisory jurisdiction over the administration of criminal justice."[50] Under the objective approach, a court may acquit a fully culpable defendant if that defendant convinced the judge that the government's activities created a substantial risk that persons other than those ready to commit the crime could have been persuaded or induced to do so. Apologists for the objective approach believe courts should refuse to convict entrapped defendants whose guilt has been established because "methods employed on behalf of the government to bring about conviction 'cannot be countenanced.'"[51]

The second theory of entrapment, adopted by the Supreme Court and a majority of the states, is known as the "subjective approach."[52] The subjective approach asks the jury to focus on the behavior and disposition of the person charged with the crime.[53] The jury's subjective approach analysis consists of a two-part inquiry. The first inquiry examines whether a government agent induced the defendant to commit the offense conduct.[54] The second inquiry asks whether the defendant was predisposed to commit the sort of crime charged.[55] If the jury decides that a defendant was predisposed to commit the crime when the opportunity afforded itself, whether or not the government's conduct might have persuaded a person not ready to commit the crime does not matter; the defense of entrapment is not available to that defendant.[56] Critics charge that this approach does nothing to discourage unscrupulous tactics on the part of investigators trying to make arrests.[57] Proponents of this approach, however, argue that the defendant predisposed to commit the crime is the very person

---

47. MODEL PENAL CODE § 2.13 (Official Draft 1985), *reprinted in* DIX & SHARLOT, *supra* note 12, at 821.

48. *Id.*

49. *See* LAFAVE & ISRAEL, *supra* note 36, § 5.2(b).

50. Sherman v. United States, 356 U.S. 369, 381 (1958) (Frankfurter, J., concurring).

51. LAFAVE & ISRAEL, *supra* note 36, § 5.2(b) (quoting *Sherman*, 356 U.S. at 380).

52. *Id.* § 5.2(a).

53. *See* Hampton v. United States, 425 U.S. 484, 496 (1976) (Brennan, J., dissenting) (summarizing the "'subjective' approach to the defense of entrapment").

54. *See Sherman*, 356 U.S. at 373 (allowing that, under allegations of entrapment, "at trial the accused may examine the conduct of the government agent").

55. *See id.* (continuing that "on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predispositions' as bearing on his claim of innocence" (quoting Sorrells v. United States, 287 U.S. 435, 451 (1932))).

56. *See Hampton*, 425 U.S. at 490 (holding that "predisposition rendered [an entrapment] defense unavailable to [the defendant]").

57. *See* LAFAVE & ISRAEL, *supra* note 36, § 5.2(c).

for whom authorities wrote the law criminalizing the behavior[58] and the very person for whom law enforcement officials designed the undercover investigation to catch.[59]

B. Imperfect Entrapment

Prior to the SRA, a federal sentencing judge sympathetic to the objective approach to entrapment, uncomfortable with particular police conduct, but who recognized the predisposition[60] of the defendant could find solace in traditional sentencing discretion by giving the defendant a punishment the judge considered just.[61] Today, however, the SRA would restrict a judge in this situation. The Guidelines would require the judge to sentence the defendant according to the applicable offense behavior category and offender characteristic category, without considering the behavior of government agents.[62] Notwithstanding, some sentencing courts depart from the Guidelines because of alleged police misconduct on the theory of "imperfect" entrapment.[63] This Subpart examines imperfect entrapment theory, first, by presenting the historical development of the theory. This Subpart then presents the status of imperfect entrapment theory as it exists today.

1. The Development of Imperfect Entrapment Theory

United States v. Giles[64] is an early case in which entrapment-like conduct did not amount to a complete defense but provided partial grounds for departure from the Guidelines. Giles was a British businessman convicted of money laundering.[65] He flew from England to New York to accept $100,000 cash from an acquaintance, a government informant, to take back to Europe and invest.[66] The informant and an FBI undercover agent told Giles that the money came from the sale of cocaine, and the three discussed ways of getting the money out of the country.[67] Giles ultimately

---

58. *See id.* § 5.2(c).

59. *See id.* § 5.2(d).

60. If the evidence was insufficient to support the predisposition of the defendant, such a judge could find for the defendant notwithstanding the verdict. *See* LAFAVE & ISRAEL, *supra* note 36, § 25.3(a), (e).

61. *See* ABRAMS & BEALE, *supra* note 22, at 684.

62. *See supra* text accompanying notes 27-35.

63. This Note distinguishes the theory of imperfect entrapment, as developed primarily in the Ninth Circuit, from the theory of sentencing entrapment, in which a government agent intentionally increases the amount of illegal substance a defendant purchases or possesses, whether or not the defendant knew of the increase, for the sole purpose of increasing the potential sentence. Arguably, section 2D1.1, Application Note 15 of the Guidelines addresses the issue of sentencing entrapment and focuses on the subjective culpability of the defendant in a manner consistent with the theory of the Guidelines. On the other hand, one can argue that section 2D1.1, Application Note 15 only authorizes a court to correct a sentencing factor artificially enhanced by the police. *See infra* text accompanying notes 177-79.

64. 768 F. Supp. 101 (S.D.N.Y. 1991).

65. *Id.* at 102.

66. *Id.*

67. *Id.*

agreed to take the money in a briefcase on his return flight.[68] Authorities arrested Giles when he arrived at the airport.[69]

Giles asserted in his defense that he was entrapped and that the government engaged in outrageous conduct because it exploited the informant's knowledge of Giles's severe financial circumstances.[70] He also claimed that he never intended to take the money on the plane, but "was merely waiting until he got into the airport where he would be able to turn the money over to Customs Officers and explain the situation."[71] A jury rejected these defenses and convicted Giles.[72] The sentencing court departed downward from the Guidelines after considering Giles's lack of a criminal history of money laundering, his personal financial difficulties, and the fact that the government permitted an informant "to use his prior personal relationship and knowledge of Giles' difficulties to involve a previously innocent individual in a criminal scheme."[73] The court considered these circumstances to be "mitigating factors 'not adequately taken into consideration by the Sentencing Commission in formulating the [G]uidelines.'"[74]

One year prior to *Giles*, the Eighth Circuit decided *United States v. Streeter*.[75] In *Streeter*, the defendant asserted district court error for not considering governmental misconduct as a mitigating factor warranting downward departure.[76] The defendant argued that the informant in the case "us[ed] sex to induce him to sell [the informant] drugs and badger[ed] others to sell drugs after they had initially refused to do so."[77] The court held this conduct did not bar a conviction and that governmental or prosecutorial misconduct should not "mitigate the sentence of an admittedly guilty defendant."[78]

In *United States v. Dickey*,[79] a defendant in the Ninth Circuit made a similar argument to the one made in *Streeter*. Convicted under a guilty plea, the defendant asserted that the district court abused its discretion by not departing downward from the sentencing guidelines because a "government informant 'talked him into' printing ... counterfeit money."[80] The *Dickey* majority agreed with the *Streeter* court and held that "no warrant [exists] for the argument that governmental ... misconduct should mitigate the sentence of an admittedly guilty defendant."[81] In a separate opinion, concurring in part and dissenting in part, Judge Reinhardt disagreed with the majority's conclusion that "such a defense, as a matter of law, can never serve as a

---

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 103.
74. *Id.* at 104 (quoting 18 U.S.C. § 3553(b) (1988)).
75. 907 F.2d 781 (8th Cir. 1990), *overruled in part by* United States v. Richmond, 37 F.3d 418 (8th Cir. 1994).
76. *Id.* at 786.
77. *Id.*
78. *Id.* at 787.
79. 924 F.2d 836 (9th Cir. 1991).
80. *Id.* at 839.
81. *Id.* (citing *Streeter*, 907 F.2d at 787).

basis for a downward departure."[82] In his view, "the defense of imperfect entrapment is a 'mitigating circumstance of a kind . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.'"[83] Judge Reinhardt stated that the defendant in the case at hand may not necessarily have been imperfectly entrapped.[84] However, he insisted that "[n]o policy or provision of the Guidelines justifies the majority's decision to foreclose completely the possibility that imperfect entrapment may on occasion justify a downward departure."[85]

Judge Reinhardt's dissent provided footing for lower courts in the Ninth Circuit to depart from the Guidelines when defendants allege questionable government conduct. In *United States v. Takai*,[86] the defendants pled guilty to bribery and conspiracy to bribe an official of the Immigration and Naturalization Service.[87] In affirming the lower court's downward departure, the Ninth Circuit Court of Appeals distinguished *Dickey*, in part, because "the person who solicited the acts was a government official whom the defendants had every reason to believe was aware of the law; he was not an undercover agent or other informant whose government status was not visible to the defendants."[88] In addition to other factors,[89] the court justified departure on "evidence at the sentencing hearing that [the government agent's] conduct influenced the defendants' decision to continue playing a pivotal role," even though there was no allegation of entrapment at trial.[90]

In *United States v. Garza-Juarez*,[91] a jury convicted the defendants of selling firearms and possession of unregistered suppressors (devices that reduce the noise associated with gunfire).[92] In that case, government undercover investigators initiated contact with one of the defendants at a "swap meet" after reports that illegal sales had occurred there.[93] The investigators had no indication that this particular defendant took part in any illegal activities.[94] However, they approached this defendant because he had "[ten] to [fifteen] firearms, including assault weapons, displayed for sale."[95] This defendant claimed that he was selling his personal collection because he needed the money.[96] The agent, however, "concluded that there were many factors showing that [the defendant] was selling other than a personal collection."[97] The investigators engaged in several communications with the defendants over a four month period,

---

82. *Id.* at 840.
83. *Id.* (quoting 8 U.S.C. § 3553(b) (1988) (omission in original)).
84. *Id.* at 841.
85. *Id.*
86. 941 F.2d 738 (9th Cir. 1991).
87. *Id.* at 740.
88. *Id.* at 744.
89. *See id.* at 741. The other factors included "the defendants' attempt to play a more limited role[] and the absence of pecuniary gain by defendants." *Id.*
90. *Id.*
91. 992 F.2d 896 (9th Cir. 1993).
92. *Id.* at 899.
93. *Id.*
94. *Id.*
95. *Id.* at 900.
96. *Id.*
97. *Id.*

asking the defendants if they could make some modifications to the guns and suppressors or sell the items without "paperwork."[98] After illegally delivering some suppressors to the agents, the defendants were arrested. A search revealed that they also possessed unregistered firearms at the time.[99] The sentencing court based a downward departure for one of the defendants partially on a medical condition.[100] The court justified both defendants' downward departures because "the conduct of this investigation, although not amounting to entrapment, was sufficiently coercive in nature as to warrant a downward departure under Guideline 5K2.12."[101]

On appeal, the Ninth Circuit affirmed the sentence.[102] Citing *Takai* and Judge Reinhardt's dissent in *Dickey*, the Ninth Circuit held that the district court had the authority to depart based on governmental conduct, "even though the agent's conduct 'did not constitute entrapment in a legal sense.'"[103] The court also found that neither the district court's factual findings were erroneous nor that the extent of the departure was unreasonable,[104] even though the district court explicitly noted that the agents did nothing "unlawful or inappropriate."[105]

The dissenting view in *Dickey*, holding that imperfect entrapment could serve as an independent grounds for departure, finally prevailed in the Ninth Circuit in *United States v. McClelland*.[106] In *McClelland*, Judge Reinhardt, writing for the majority, affirmed a downward departure based solely on imperfect entrapment.[107] A jury convicted the defendant, McClelland, of using interstate commerce facilities to commit murder-for-hire.[108] In February 1994, McClelland had contacted another individual, Russell, about killing his estranged wife.[109] The two discussed various plans for the scheme and agreed on a price of $10,000.[110] On March 13, 1994, Russell contacted the FBI and told them of the conversations he had been having with McClelland.[111] Russell accepted a tape recorder from the FBI and agreed to verify the murder plot with tape recordings.[112] On March 24, Russell and McClelland again discussed numerous ways to execute their plan.[113] At some points during that conversation, McClelland showed signs of reluctance to follow through with the

---

98. *Id.*

99. *Id.*

100. *Id.* at 902 (citing GUIDELINES, *supra* note 2, §§ 5H1.3, 5K2.0 and 18 U.S.C. § 3553(b) (1988) as grounds for departure for medical conditions "of a kind not adequately taken into consideration by the Sentencing Commission in formulating its guidelines").

101. *Id.* (internal quotation omitted). Section 5K2.12 of the Guidelines allows for departure based on coercion or duress not amounting to a complete defense. *See infra* text accompanying note 162.

102. *Garza-Juarez*, 992 F.2d at 899.

103. *Id.* at 912 (quoting United States v. Takai, 941 F.2d 738, 744 (9th Cir. 1991)).

104. *Id.* at 913.

105. *Id.* at 910.

106. 72 F.3d 717 (9th Cir. 1995).

107. *Id.* at 719.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 719-20.

113. *Id.* at 720.

plan.[114] Though the jury rejected an entrapment defense and convicted the defendant,[115] the district court found sufficient evidence of inducement to justify a downward departure based on imperfect entrapment because a government informant allegedly "prod[ded] and encourage[d]" the defendant.[116]

2. The Status of Imperfect Entrapment Theory Today

The circuits are split over the validity of the theory of imperfect entrapment as grounds justifying departure from the Sentencing Guidelines. As demonstrated in *McClelland*,[117] the Ninth Circuit fully embraces the theory. It, however, is the only circuit to have clearly done so. The Second Circuit affirmed the downward departure in *Giles*.[118] However, that sentencing court based the sentence on the highly unusual circumstances of the case and not explicitly on a formal theory of imperfect entrapment.[119] Some claim that *Giles* represents the Second Circuit's recognition of the theory of imperfect entrapment,[120] but recent case law from that circuit casts doubt on this assertion.[121] The Eighth Circuit has never affirmed a sentencing departure grounded on the theory. Hence, that circuit's only implication of its imperfect entrapment doctrine is the holding in *Streeter*.[122] The Eleventh Circuit clearly has rejected the notion as grounds for departure. In *United States v. Miller*,[123] the Eleventh Circuit reversed a district court's departure based on "partial entrapment."[124] No circuit other than the Ninth has affirmed a departure based on imperfect entrapment; yet no circuit other than the Eleventh has so explicitly rejected it.

In *Koon v. United States*,[125] the Supreme Court addressed the federal judiciary's general approach to departures from the Guidelines. *Koon* specifically articulated "that a federal court's examination of whether a factor can ever be an appropriate

---

114. *Id.*

115. *Id.* at 722-23.

116. *Id.* at 726 n.6.

117. *Id.* at 719; *see also supra* text accompanying notes 106-14.

118. United States v. Giles, 953 F.2d 636 (2d Cir. 1991) (unpublished table decision).

119. United States v. Giles, 768 F. Supp. 101, 103 (S.D.N.Y. 1991).

120. *See, e.g.*, Suzanne Mitchell, *Clarifying the United States Sentencing Guidelines' Focus on Government Conduct in Reverse Sting Sentencing: Imperfect Entrapment as a Logical Incomplete Defense that Warrants Departure*, 64 GEO. WASH. L. REV. 746, 767 (1996).

121. United States v. Bala, 236 F.3d 87, 92 (2d Cir. 2000) (stating that the Second Circuit has not yet decided if imperfect entrapment is proscribed by the Guidelines as grounds for departure).

122. 907 F.2d 781, 787 (8th Cir. 1990) (holding that governmental or prosecutorial misconduct should not "mitigate the sentence of an admittedly guilty defendant"); *see also supra* text accompanying notes 75-78.

123. 71 F.3d 813 (11th Cir. 1996).

124. *Id.* at 818. Though it is debatable whether or not the issue in *Miller* was imperfect entrapment as envisioned by the Ninth Circuit or sentencing entrapment, in which the government agent substitutes the planned type or amount of controlled substance to enhance the sentence, the Eleventh Circuit's strong language denouncing any theory of entrapment less than a complete defense makes it seem likely that it would reverse any departure based on the Ninth Circuit concept of imperfect entrapment as well.

125. 518 U.S. 81 (1996).

basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor."[126] If not, "the . . . court must determine whether the factor, . . . in the particular circumstances, takes the case outside of the heartland of the applicable Guideline."[127] This holding might indicate that circuit court denunciations of entire theories for departure, such as the holding in *Miller*, are not consistent with *Koon*. However, nothing in *Koon* seems to prevent a circuit court from consistently reversing departures based on imperfect entrapment as abuses of discretion. In fact, the Guidelines suggest that the Commission expects courts of appeals "to find departures 'unreasonable' where they fall outside suggested levels."[128]

III. ANALYSIS

Koon's holding that a court cannot refuse to consider any factor categorically as grounds for departure might seem to indicate that, because the Commission did not specifically preclude imperfect entrapment, the theory is worthy of consideration. However, no theory could justify departure if, under any circumstances, such a departure would constitute an abuse of discretion. In this Part, this Note argues that, in any circumstances, downward departure from the Guidelines based solely on the theory of imperfect entrapment constitutes abuse of discretion by the sentencing court because the theory is contrary to Supreme Court entrapment doctrine and because it fails the *Koon* analysis of the sufficiency of grounds for departure. Supporting this conclusion, Subpart A analyzes imperfect entrapment according to federal entrapment doctrine, and Subpart B applies the departure analysis set forth by the Supreme Court in *Koon*.

A. Imperfect Entrapment Theory Violates Federal Entrapment Doctrine

1. Argument Asserting Abuse of Discretion

By departing downward from the Guidelines based solely on imperfect entrapment theory, a sentencing court abuses its discretion because it misapplies federal entrapment doctrine. It misapplies federal entrapment doctrine because it examines entrapment allegations using the objective theory rather than the subjective theory.

The Supreme Court adopts the subjective approach to entrapment defenses[129] and consistently requires that the jury decide such questions according to the culpability of the defendant.[130] In *Sorrells v. United States*,[131] Chief Justice Hughes wrote for the Court:

---

126. *Id.* at 109.
127. *Id.*
128. GUIDELINES, *supra* note 2, ch. 1, pt. A, § 4(b).
129. LAFAVE & ISRAEL, *supra* note 36, § 5.2 (a).
130. *Id.* § 5.3(b).
131. 287 U.S. 435 (1932).

> It is well settled that the fact that officers or employees of the [g]overnment merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. . . . A different question is presented when the criminal design originates with the officials of the [g]overnment, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.[132]

In *United States v. Russell*,[133] the Court asserted that predisposition is "the principal element in the defense of entrapment."[134] Consistent with the subjective approach, the Court held in *Sherman v. United States*[135] that the question of entrapment "is for the jury as part of its function of determining the guilt or innocence of the accused."[136]

Courts departing from the Guidelines on imperfect entrapment theory adopt the objective perspective of entrapment because imperfect entrapment theory focuses on the behavior of law enforcement officials during undercover investigations. By the theory's very definition,[137] sentencing courts departing on imperfect entrapment grounds take remedial action according to the actions of the police, whether or not the defendant was predisposed. This inquiry and the resulting departure directly affront the holding in *Russell* that activities of government agents that do not "implant[] the criminal design in the mind of the defendant" do not defeat a prosecution.[138] As a posttrial sentencing issue, allegations of imperfect entrapment become factual issues for the court to decide,[139] encroaching upon a question left solely to the jury by the *Sherman* Court.[140] Hence, by focusing the inquiry on governmental conduct and sentencing accordingly, regardless of the defendant's predisposition, sentencing courts departing from the Guidelines on imperfect entrapment theory adopt the objective approach to allegations of entrapment. This approach directly violates the Supreme Court's federal entrapment doctrine.

2. Examples of Misapplications of Federal Entrapment Law

Cases departing downward based on imperfect entrapment provide clear examples of misapplications of federal entrapment doctrine. In *Giles*, the sentencing court focused on the government conduct, rather than the culpability of the defendant, when it referred to the "vice" in permitting the informant to use his past personal relationship and his knowledge of the defendant's difficulties.[141] The *Giles* court departed downward on these grounds in spite of its own admission that "[t]he jury's verdict convicting Giles despite his entrapment defense reflects a finding that Giles

---

132. *Id.* at 441-42.
133. 411 U.S. 423 (1973).
134. *Id.* at 433.
135. 356 U.S. 369 (1958).
136. *Id.* at 377.
137. *See supra* text accompanying note 1.
138. *Russell*, 411 U.S. at 436.
139. *See supra* Part II.B.1.
140. *Sherman*, 356 U.S. at 377.
141. United States v. Giles, 768 F. Supp. 101, 103 (S.D.N.Y. 1991), *aff'd*, 953 F.2d 636 (2d Cir. 1991).

was predisposed to commit the crime . . ., thus entrapment cannot be used to justify departure in the sentencing."[142] In *McClelland*, the appellate court cited "abundant evidence that . . . an agent of the government . . . induced [the defendant] to commit a crime"[143] in spite of the jury having found him "already predisposed to commit the crime."[144] Seemingly, only the adoption of the objective approach to entrapment could explain these courts' emphasis on governmental conduct rather than leaving entrapment issues "for the jury as part of its function of determining the guilt or innocence of the accused."[145]

3. Possible Counterarguments

The *Russell* Court conceded in dicta that, in some situations, "the conduct of law enforcement agents [may be] so outrageous [as to violate due process principles]."[146] Accordingly, one might argue that departures based on imperfect entrapment theory are consistent with the Supreme Court's due process concerns. However, these concerns arise when that government conduct violates "fundamental fairness, shocking to the universal sense of justice."[147] Supreme Court doctrine consistently views such circumstances as barring conviction.[148] Thus, if the circumstances were so *shocking* as to violate constitutional standards, the defendant should be acquitted and not face sentencing at all. If the circumstances were not so fundamentally unfair as to trigger constitutional due process protections, Supreme Court entrapment doctrine requires the federal courts to apply the subjective approach, focusing on the culpability of the defendant.

Another argument that imperfect entrapment departures are consistent with Supreme Court entrapment doctrine might be that such departures are a reasonable exercise of the court's supervisory power over police conduct. However, in *Hampton v. United States*,[149] the Court noted that "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch . . ., subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations."[150] Even Justice Powell's concurring opinion in *Hampton* pointed out that a court "should be extremely reluctant to invoke the supervisory power."[151] Once again, therefore, if the governmental conduct did not trigger "*judicially fashioned rules*" to invoke "*the applicable constitutional . . . limitations*" so as to justify dropping the indictment, Supreme Court entrapment doctrine requires the sentencing court to focus on the subjective culpability of the defendant according to

142. *Id.*
143. United States v. McClelland, 72 F.3d 717, 726 n.6 (9th Cir. 1995).
144. *Id.* at 725.
145. *Sherman*, 356 U.S. at 377.
146. United States v. Russell, 411 U.S. 423, 431-32 (1973).
147. *Id.* at 432 (quoting Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960)).
148. *Id.* at 431-32.
149. 425 U.S. 484 (1976).
150. *Id.* at 490 (quoting United States v. Russell, 411 U.S. 423, 435 (1976)).
151. *Id.* at 494 (Powell, J., concurring).

the Guidelines.[152]

To summarize, Supreme Court rulings on issues of federal law bind lower federal courts.[153] Accordingly, lower federal courts must follow the Supreme Court's subjective approach to entrapment. Because imperfect entrapment incorporates the objective theory, sentencing courts departing on those grounds fail to adhere to federal entrapment doctrine and abuse their discretion in so doing.

B. Applying Koon *to Imperfect Entrapment*

Besides failing to follow Supreme Court entrapment doctrine, courts departing from the Guidelines based on imperfect entrapment theory abuse their discretion by failing to adhere to the full requirements of the analysis mandated in *Koon v. United States*.[154]

Koon held that a sentencing court cannot use as a basis for departure any factor that is forbidden by the Guidelines.[155] Some factors are encouraged by the Commission as bases to depart, and the sentencing court is authorized to do so as long as the factor is not taken into account and applied to the case on grounds elsewhere in the Guidelines.[156] If the factor is taken into account elsewhere in the Guidelines, or if the factor is a forbidden factor, the sentencing court should depart from the Guidelines "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present."[157] Finally, if the Guidelines do not mention a particular factor, the Supreme Court directs sentencing courts to decide whether the factor suffices to take the case out of the "heartland" of the Guidelines "after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole.'"[158] Courts wishing to depart from the Guidelines based on imperfect entrapment must apply this last test because the Guidelines make no mention of police conduct that inappropriately induces criminal behavior.

1. Consideration of Relevant Individual Guidelines

Imperfect entrapment theory is insufficient to justify departure from the Guidelines after considering the structure and theory of section 5K2.12,[159] the guideline relevant to this inquiry.[160] Indeed, courts departing from the Guidelines based on imperfect

---

152. *Id.* at 490 (emphasis added).

153. *See* Helseth v. Burch, 258 F.3d 867, 870 (8th Cir. 2001).

154. 518 U.S. 81 (1996).

155. *Id.* at 95-96.

156. *Id.* at 96.

157. *Id.*

158. *Id.* (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir. 1993)).

159. GUIDELINES, *supra* note 2, § 5K2.12.

160. At first inspection, it would seem that section 5K2.0 is a relevant individual guideline. However, this guideline consists of a policy statement regarding departures in general. Thus, this Note addresses the applicability of section 5K2.0 when examining the structure and theory of the Guidelines as a whole.

entrapment often cite section 5K2.12,[161] which addresses imperfect defenses and reads as follows:

> *Coercion and Duress* (Policy Statement)
> If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business do not warrant a decrease in the sentence.[162]

This language explicitly indicates that the Commission intends that a sentencing court focus on the defendant's subjective frame of mind. The second sentence specifically directs courts to consider "the reasonableness of the defendant's actions and . . . the extent to which the conduct would have been *less harmful under the circumstances as the defendant believed them to be.*"[163] Looking at any imperfect entrapment case from this perspective demands the conclusion that imperfect entrapment, as an independent theory, is not sufficient to justify departure.

All defendants pleading imperfect entrapment, by definition, are doing so because the actual circumstances under which they were arrested were less harmful than they believed them to be. Such defendants did not know that they were dealing with government informants. They thought their cohorts were like-minded criminals willing to perpetrate crimes. Had the circumstances been as the defendant believed them to be in *McClelland*, the hired assassin would have attempted to kill the defendant's estranged wife.[164] In *Giles*, the defendant would have laundered $100,000 worth of illegal cocaine sale proceeds.[165] In *Garza-Juarez*, the defendants would have been successful at selling illegal weapons.[166] The conduct of these defendants would have been just as harmful, and arguably more harmful, had the circumstances been as they perceived them. Thus, departing on the grounds of imperfect entrapment is an abuse of discretion according to the structure and theory of section 5K2.12.

One might argue that, in cases justifying departure on section 5K2.12, the sentencing courts focused on the coercive aspects of the governmental conduct combined with the notion that the Commission invites courts to consider factors

---

161. *E.g.*, United States v. McClelland, 72 F.3d 717, 725 (9th Cir. 1995); United States v. Garza-Juarez, 992 F.2d 896, 910 (9th Cir. 1993).

162. GUIDELINES, *supra* note 2, § 5K2.12.

163. *Id.* (emphasis added).

164. *See supra* text accompanying notes 106-16.

165. *See supra* text accompanying notes 64-74.

166. *See supra* text accompanying notes 91-105.

relating to these grounds because the Commission did not consider them adequately.[167] However, this argument lacks logical support. The departing courts themselves cite the governmental conduct as their bases,[168] and one would have a difficult time justifying these departures solely on grounds of coercion or duress had the catalysts been fellow criminals rather than government informants. Had the coercion or duress been such to justify departure independently, the departing courts could rely solely on the language of section 5K2.12 and would not need to make any reference to the fact that the defendants dealt with government informants. No one could argue reasonably that a departure would not be justified had a government informant led a defendant to believe that his life was in danger or that he faced serious bodily injury. But if such a situation ever went to trial and resulted in a conviction, it would fit well within the language of section 5K2.12, and imperfect entrapment theory would be unnecessary. Thus, arguments that these courts focused on the defendants' culpability rather than the conduct of the government agents fail as a matter of logic.

In summary, the structure and theory of section 5K2.12 requires sentencing courts to focus on the subjective situation in which the convicted defendant found himself. Imperfect entrapment theory focuses on governmental conduct. Thus, downward departure based on imperfect entrapment is insufficient grounds for departure when considering the structure and theory of section 5K2.12.

3. Consideration of the Guidelines Taken as a Whole

The second part of the *Koon* analysis of the sufficiency of grounds for departure not mentioned in the Guidelines considers the structure and theory of the Guidelines as a whole.[169] Under this examination, imperfect entrapment theory is insufficient to justify departure from the Guidelines because the theory cannot be reconciled with the "policy statements[] and official commentary of the . . . Commission" regarding departures.[170]

a. Conflicts with Guidelines' Policy Statements About Departures

Imperfect entrapment theory departures cannot be reconciled with the general policy statements about departures in the Guidelines. The Guidelines address the general approach to departures in section 5K2.0 and Chapter 1, Part A, section 4(b). Section 5K2.0 explains the impossibility of having a specific guideline for every possible factual scenario a sentencing court might face. To remedy this situation, this guideline authorizes a sentencing court to

> impose a sentence outside the range established by the applicable guidelines[] if the court finds 'that there exists an aggravating or mitigating circumstance of a

167. GUIDELINES, *supra* note 2, § 5K2.0.
168. *See supra* text accompanying notes 73, 101, 116.
169. *Koon*, 518 U.S. at 106.
170. *Id.*

> kind, or to a degree, not adequately taken into consideration by the . . . Commission in formulating the [G]uidelines that should result in a sentence different from that described."[171]

Chapter 1, Part A, section 4(b) offers enlightenment to sentencing courts trying to decide if their factual situations justify a departure. This portion of the Guidelines reads, in relevant part, as follows:

> Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). *Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover*—unusual cases outside the range of the more typical offenses for which the guidelines were designed.[172]

Considering the Guidelines as a whole, the approach to departures set forth by the Commission in these excerpts would seem to exclude departures based on imperfect entrapment. If one argues that behavior of undercover agents and the conduct of sting operations in general is a factor "not adequately taken into consideration by the . . . Commission,"[173] one must consider whether the Commission came to the conclusion that this factor was not "empirically important in relation to the particular offense."[174] Sting operations in modern criminal law enforcement are quite common, particularly in relation to drug offenses.[175] It is highly unlikely that the Commission considered the effects of sting operations on the culpability of defendants as rare a factor as physical injury during the perpetration of fraud. It is equally unlikely that the Commission did not consider the potential effects of stings on a defendant's culpability. However, to justify an imperfect entrapment departure based on section 5K2.0 while taking the theory and structure of the Guidelines as a whole, a sentencing court would have to reach at least one of these erroneous conclusions.

There is evidence in the Guidelines that the Commission did consider the effects of sting operations on the culpability of defendants. The Commission specifically addressed aspects of sting operations it considered to impact the culpability of a defendant in section 2D1.1.[176] Application Note 15 of this guideline states:

> in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), . . . the government agent set a price . . . that was substantially below the market value . . . , thereby leading to the defendant's purchase of a significantly greater quantity . . . than his available

171. GUIDELINES, *supra* note 2, § 5K2.0.
172. *Id.* at ch. 1, pt. A, § 4(b) (emphasis added).
173. *See supra* text accompanying notes 33, 83, 167.
174. *See supra* text accompanying note 172.
175. RICHARD H. WARD, INTRODUCTION TO CRIMINAL INVESTIGATION 205 (1975).
176. GUIDELINES, *supra* note 2, § 2D1.1.

> resources would have allowed him . . . except for the artificially low price set by the government agent . . . .[177]

From this guideline, it is apparent that the Commission considered the effect of sting operations on the culpability of the defendant.

One commentator argues that section 2D1.1, Application Note 15 "suggests that a court may focus on the conduct of the government actors in an imperfect entrapment setting."[178] However, section 2D1.1, Application Note 15 alone seems only to authorize a court to correct a sentencing factor artificially enhanced by the police. It does not seem to say anything regarding the inducement of the crime itself. Furthermore, taking the Guidelines as a whole requires interpreting section 2D1.1, Application Note 15 in conjunction with section 5K2.0 and Chapter 1, Part A, section 4(b). Application Note 15 of section 2D1.1 indicates that the Commission considered the impact of sting operations on the culpability of defendants. This removes the possibility that the Commission did not consider imperfect entrapment factors empirically important in relation to the particular offense, thus barring the authorization for departure on those grounds under section 5K2.0. Therefore, the theory of imperfect entrapment cannot be reconciled with the general policy statements about departures in the Guidelines.

b. Conflicts with Policy Statements About Objectives of Guidelines

Imperfect entrapment theory is insufficient to justify departure from the Guidelines after considering the structure and theory of the Guidelines as a whole because it conflicts directly with Congress's second objective in enacting the SRA, as described in the general policy statements concerning the Guidelines' basic approach.[179] This objective focuses on the culpability of similar offenders committing similar crimes and aims to impose on these criminals relatively equal sentences. Under imperfect entrapment theory, however, similar criminals committing similar crimes would be sentenced equally unless one of the defendants dealt with a government informant. In that case, that particular defendant might get a lighter sentence.[180] Hence, imperfect

---

177. *Id.* at cmt. n.15.

178. Mitchell, *supra* note 120, at 766.

179. GUIDELINES, *supra* note 2, ch. 1, pt. A, § 3. The Guidelines explain that Congress sought three objectives when it enacted the SRA. The first objective was "to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system." *Id.* The second objective was to seek "reasonable uniformity in sentencing by narrowing wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* Congress's third objective was to achieve "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." *Id.*

180. This author concedes that federal entrapment doctrine creates a similar dichotomy; that is, a non-predisposed defendant whom a codefendant induced to commit a crime will likely be convicted while a similarly non-predisposed defendant induced by a government agent to commit a crime will likely be acquitted. However, this Note addresses the proper application of the Guidelines after conviction and after the defendant either failed to present, or the jury rejected, an entrapment defense. This Note does not attempt to explain or justify the policies

entrapment, as justification for downward departure from the Guidelines, hinders Congress's objective of giving similar sentences to similar criminals for similar crimes.

As this analysis demonstrates, under the structure and theory of the Guidelines taken as a whole, the theory of imperfect entrapment fails the second inquiry of the *Koon* analysis for the sufficiency of grounds for departure from the Guidelines—the theory cannot be reconciled with the general policy statements about departures in the Guidelines and it conflicts with one of Congress's objectives in enacting the SRA. As earlier analyses show, courts that depart from the Guidelines based on the theory of imperfect entrapment ignore Supreme Court entrapment doctrine and either ignore the *Koon* analysis for departures or fail to conduct it thoroughly. Either way, sentencing courts that depart downward from the Guidelines based on the theory of imperfect entrapment abuse their discretion.

IV. RECOMMENDED REMEDY

Having concluded that departing from the Guidelines under imperfect entrapment theory constitutes abuse of discretion, this Note now urges the Commission to remedy the situation. In so doing, Subpart A of this Part presents the appropriate measure the Commission should take to resolve inconsistent treatment of imperfect entrapment allegations in federal court. Subpart B explains why the Commission is the sole body with the authority to act. Finally, Subpart C discusses why such action is necessary.

A. The Appropriate Action

The Commission should amend the Guidelines to state clearly that, when sentencing a convicted defendant, courts should not consider actions on the part of government agents beyond the activities specified in section 2D1.1, Application Note 15 or beyond any behavior that fits into the language of section 5K2.12. Currently, only one circuit has affirmed departure based on the theory of imperfect entrapment.[181] However, because of its success in the Ninth Circuit, defendants in other circuits plead imperfect entrapment, or some variation thereof, and use these Ninth Circuit cases as persuasive authority.[182] The theory seems to attract the attention of defendants because there is virtually no minimum threshold of governmental conduct that qualifies. Thus, as long as a government agent was involved in the investigation, allegations of inducement might persuade a sympathetic judge at sentencing. Amending the Guidelines as recommended would remedy this situation.

---

behind the subjective and objective theories of entrapment or their relative fairness or unfairness.

181. *See supra* text accompanying notes 86-116.

182. *See, e.g.*, United States v. Spriggs, 102 F.3d 1245 (D.C. Cir. 1996); United States v. Lacey, 86 F.3d 956 (10th Cir. 1996).

B. The Sentencing Commission Has Sole Responsibility

The Commission should amend the Guidelines because it is solely responsible for the Guidelines' development. The SRA makes the Commission responsible for reviewing and rationalizing the federal sentencing system[183] under an "evolutionary process."[184] The *Koon* Court held that a "court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor."[185] Hence, federal appellate courts cannot declare a factor, categorically, as an inappropriate basis for departure. The appellate courts can only review a district court's departure for abuse of discretion.[186] The Commission, therefore, is the only authority capable of reducing the disparity in sentencing that results from imperfect entrapment departures.

C. Why Action Is Necessary

The Commission should amend the Guidelines as recommended to resolve a split between the Ninth and the Eleventh Circuits. *McClelland* demonstrates that the Ninth Circuit fully recognizes imperfect entrapment as grounds for departure.[187] In *McClelland*, the Ninth Circuit affirmed a departure based solely on the grounds of imperfect entrapment involving allegations of government inducement. Meanwhile, in *United States v. Miller*,[188] the Eleventh Circuit indicated that the theory might consistently be deemed insufficient to justify departure. In *Miller*, the Eleventh Circuit rejected notions of partial entrapment as justification for departure and declined the invitation to "implicitly undermine the verdict returned by the jury."[189] Though the actual defendants in *McClelland* and *Miller* were not similar criminals convicted of similar crimes, this comparison indicates the possibility that the Ninth Circuit might affirm a downward departure based on imperfect entrapment in a case with a defendant similar in all aspects of criminality to a defendant in the Eleventh Circuit for whom the court would likely reverse such a departure. Because of this potential sentencing disparity, the Commission should amend the Guidelines as recommended and restore uniformity to the federal sentencing process.

Summarizing this Part, the Commission should amend the Guidelines to prohibit courts from considering government conduct beyond the activities specified in section 2D1.1, Application Note 15 or any behavior that fits into the language of section 5K2.12 because a split exists between the Ninth and Eleventh Circuits on the theory of imperfect entrapment and the Commission has the sole authority to resolve this split. To amend the Guidelines as recommended would not seem to be a radical step for the Commission. As demonstrated earlier, departures based on imperfect

---

183. GUIDELINES, *supra* note 2, ch. 1, pt. A, § 2.
184. *Id.* § 3.
185. Koon v. United States, 518 U.S. 81, 109 (1996).
186. *Id.* at 97.
187. *See supra* text accompanying notes 105-14.
188. 71 F.3d 813 (11th Cir. 1996).
189. *Id.* at 818 (citing United States v. Costales, 5 F.3d 480, 487 (11th Cir. 1993)).

entrapment theory constitute abuse of discretion because they fail to provide sufficient grounds after considering the structure and theory of the individual relevant guidelines and the Guidelines as a whole. Thus, the amendment would only state explicitly the message the Guidelines already convey implicitly.

V. CONCLUSION

With passage of the SRA, Congress directed the Commission to implement a system of consistent sentencing in federal court. The Commission responded by designing the Guidelines. The Guidelines seem to strike a balance between statutory and discretionary sentencing by confining courts to rigid ranges of sentences, but allowing for departures if, in the sentencing court's discretion, circumstances make a case atypical. The Commission can maintain this balance and achieve consistency in federal sentencing only if sentencing courts exercise their discretion appropriately and apply the law consistently. As this Note demonstrates, courts departing based on imperfect entrapment abuse their discretion by basing departures on circumstances supposedly unanticipated by the Commission, when, actually, the only circumstance the Commission might not have anticipated is the misapplication of federal entrapment doctrine by sentencing courts.

In response, the Commission should amend the Guidelines to state that, when sentencing a convicted defendant, courts should not consider actions on the part of government agents beyond the activities specified in section 2D1.1, Application Note 15 or beyond any behavior that fits into the language of section 5K2.12. Such an amendment would articulate clearly the logical result of a proper application of federal entrapment doctrine and the *Koon* analysis to the theory of imperfect entrapment and would further Congress's goal of consistency in federal sentencing.